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MEMORANDUM

To: Joyce Kent, City Clerk

Through: Interim City Attorney, Skip Fowler

From: Marsha Segal-George, Assistant Interim City Attorney

Date: March 12th, 2010

RE: Whether Mayoral Candidate Robert Desmond's Petitions that he collected prior to filing his oath to comply with the City's Code are valid and must be accepted by the City?

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Yes

The facts in this case are simple but the law is not. Mayoral candidate Robert Desmond downloaded petition forms from the Volusia County election website and began obtaining signatures starting in August 2009. In August of 2009, Mr. Desmond spoke with Janet Day, in the Deltona Clerk's office, when Mr. Desmond had come in to file paperwork appointing his Treasurer. At that time he asked for updated information to begin his campaign. Ms. Day told him that he would need to familiarize himself with the City's election rules and that there would not be updated information or candidate information booklets or petitions available prior to the end of January 2010. It appears that Mr. Desmond then downloaded petitions from the Volusia County Election web-site and began circulating his petitions. He currently has about 70 signed petitions out of the 150 necessary signatures.

The following three sections of the Deltona Code of Ordinances are pertinent to the question at hand.

Section 30-32. Oath and petition forms. Candidates for city elective office may file an oath and received the petitions forms from the city clerk at any time after the first Tuesday after the first Monday in January of the year in which the first primary is held, put prior to the 21st day preceding the first day of the qualifying period for the office sought.

Section 30.33. Filing of petitions. Candidates for city elective office must submit to the clerk each petition collected prior to noon of the 21st day preceding the first day of the qualifying period for the office sought.

Section 30-34. Filing of other items. A candidate who has submitted the necessary petitions by the requested deadline and who is notified by the city clerk that the required number of signatures

has been obtained shall be entitled to subscribe to the candidate's oath and file the qualifying papers during the time prescribed for qualifying for office. Any person other than a write-in candidate who qualified within the time prescribed in this section shall be entitled to have his name printed on the ballot.

I have reviewed, Florida Statutes, Volusia County election provisions and relevant case law. My review has shown that the deadline for submittal of petitions and signature verification is of great interest with significant case law precedent. However, there is little guidance as to when a potential candidate may begin their petition process. Deltona's Section 30-32 makes it clear when a candidate is supposed to begin their candidacy with regard to the oath, receiving election process information and petitions. It does not address what to do with petitions that a candidate has collected in advance of the City opening its election shop in January 2010 for the November 2010 election.

I have spoken with Eric Hartwell at Florida League of Cities, Ann McFall, Volusia County Supervisor of Elections and Miguel Hernandez with the Florida Election Commission. All have graciously offered information on this issue. Mr. Hartwell has never heard of this particular issue before but believes that a reasonable standard should be applied allowing for the petitions secured prior to January 2010 to be accepted and then have the signatures verified. Ms. McFall shared that Volusia County only requires that a treasurer be appointed and a bank account be opened by the candidate prior to circulating petitions and there is no time requirement as to when a candidate can start circulating petitions. I then spoke with Mr. Hernandez who directed me to take another look at Fla. Statutes Section 99.095, which states;

99.095 (2) (a) Except as provided in paragraph (b), a candidate must obtain the number of signatures of voters in the geographical area represented by the office sought equal to at least 1 percent of the total number of registered voters of that geographical area, as shown by the compilation by the department for the immediately preceding general election. Signatures may not be obtained until the candidate has filed the appointment of campaign treasurer and designation of campaign depository pursuant to s. 106.021 and are valid only for the qualifying period immediately following such filings. (emphasis added)

Section 99.095 (2) (a) offers a guide as to reasonableness. After a qualifying period passes, a candidate may, after appointment of campaign treasurer and establishment of a bank account, begin circulating a petition for signatures for the next qualifying period.

Ms. McFall told me that in her experience, great discretion is offered to the supervisor of elections, who in this case is the City Clerk. The City Clerk qualifies the candidates for election. Ms. McFall also told me that she has been a party to a number of different election and petition challenges, none relevant to our question, but in each case the Court spoke of reasonableness and a desire to give petition signatures as much deference as the law allows. "Restrictions on First Amendment rights must be supported by compelling government interest and must be narrowly drawn to insure that there is no more infringement than is necessary", U.S.C.A. Const. Amend 1; Firestone v. News-Press Publishing Company, Inc., 538 So. 2d 457 (Fla. 1987). She did tell me that if the City Clerk accepts these petitions then she will also.

The available case law with regard to election petitions focuses on verification that the signatures on

a petition come from qualified electors from within the district for which election is sought. The verifying of signatures and the timely filing of one's petitions with regard to the qualifying period are also the subject of current cases. Carroll v. Mack, Fla., 766 So. 2d 1216, (4th DCA 2000). There is also a strong public policy imperative; "Fundamental to our system of government is the principle that the right to be a candidate for public office is a valuable one and no one should be denied this right unless the Constitution or an applicable valid law expressly declares him to be ineligible." Florida Constitution, Article 5, Section 8; Levey V. Dijols, , 990 So. 2d 688 (Fla. 4th DCA 2008).

There is no Deltona code provision that states that Mr. Desmond's previously collected petitions are invalid. It is my opinion that petitions collected subsequent to the end of the prior qualifying period for the same office and subsequent to the appointment of a treasurer and creation of a campaign bank account, even though that predates issuance of the City's informational books and petition forms in January 2010, should be accepted. The City of Deltona should accept Mr. Desmond's previously collected petitions, verify the signatures and if they are good signatures then they count.

The City may either wish to conform their petition process to Volusia County's petition process since the Supervisor of Elections informed me that in the near future the State will require conformance on petitions and petition format or the City may wish to adopt more limiting language that clearly addresses this issue. The Deltona City Clerk acts as the Supervisor of Elections with regards to qualifying candidates for City elections and as such, more limiting language may be warranted. There are other cities in Volusia County that provide more limiting language in their codes such as South Daytona which does not allow for the circulation of petitions until the qualifying period has begun.

cc: Ms. Faith Miller, City Manager
Mr. Robert Desmond (*desmondformayor@cfl.rr.com*)