

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Brian Schwalb
Attorney General

December 7, 2023

ADVISORY OPINION OF THE ATTORNEY GENERAL

Re: Proposed Initiative, “Humane Environment “Back up Plan” “S.W.A.P. O.U.T.” for Movement & Minds for “THE BAD for THE GOOD” Amendment Act, 2024”

Ms. Christine Pembroke
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Board of Elections
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Dear Ms. Pembroke:

This memorandum responds to your November 16, 2023 request, on behalf of the Board of Elections (“Board”), that the Office of the Attorney General (the “Office”) provide an advisory opinion on whether the proposed initiative, “Humane Environment “Back up Plan” “S.W.A.P. O.U.T.” for Movement & Minds for “THE BAD for THE GOOD” Amendment Act, 2024” (“Proposed Initiative”), is a proper subject of initiative in the District of Columbia, pursuant to D.C. Official Code § 1-1001.16(b)(1A)(B)(i). For the reasons set forth in this letter, the Proposed Initiative is not a proper subject of initiative.¹

STATUTORY BACKGROUND

The District Charter (“Charter”) establishes the right of initiative, which is the ability of District electors to “propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval.”² In accordance with the Charter, the Council has adopted an implementing statute detailing the initiative process.³ Under this statute, any registered qualified elector may begin the initiative process by filing the full text of the proposed measure, a summary statement of not more than 100 words, and a short title with the Board.⁴ After receiving a proposed initiative, the Board must refuse to accept it if the Board determines that it is not a “proper subject” of initiative.⁵

¹ If the Board accepts the Proposed Initiative, in accordance with D.C. Official Code § 1-1001.16(c)(3), this Office may provide recommendations for ensuring that it is prepared in the proper legislative form.

² D.C. Official Code § 1-204.101(a).

³ *Id.* § 1-204.107.

⁴ *Id.* § 1-1001.16(a)(1).

⁵ *Id.* § 1-1001.16(b)(1).

A measure is not a proper subject for initiative if it is not in the proper form, or if it would:

- Appropriate funds;
- Violate or seek to amend the Home Rule Act;
- Violate the U.S. Constitution;
- Authorize or have the effect of authorizing discrimination prohibited under the Human Rights Act of 1977; or
- Negate or limit an act of the Council enacted pursuant to section 446 of the Home Rule Act.⁶

If the Board determines that a proposed initiative is a proper subject of initiative, it must accept the measure and, within 20 calendar days, prepare and adopt a true and impartial summary statement, prepare a short title, prepare the proposed initiative in the proper legislative form, and request a fiscal impact statement from the Office of the Chief Financial Officer (“OCFO”).⁷ The Board must then adopt the summary statement, short title, and legislative form at a public meeting.⁸ Within 24 hours after adoption, the Board must publish its formulation and the fiscal impact statement.⁹ If no registered qualified elector objects to the Board’s formulation by seeking review in Superior Court within 10 days after publication in the *District of Columbia Register*, the Board must certify the measure and provide the proposer with a petition form for use in securing the required signatures to place the proposed initiative on the ballot at an election.¹⁰

FACTUAL BACKGROUND

The Proposed Initiative is a 24-page document that opens by stating that it consists of six “Back up Plans.” According to the Proposed Initiative, the “Back up Plan” “applies the theories and methods for Break thru therapy for inhumane environments to the analysis of behavior and actions,” and “can also revolutionize the study of decision-making processes that have not been made or solved in the best interest of citizens public trust.”¹¹ The Proposed Initiative follows with several paragraphs purporting to discuss the theory, rationale, and objectives underlying the “Back up Plan.”

Next, the Proposed Initiative includes six enumerated sections. Each section consists of extensive commentary as well as statements regarding one or more policy concepts. Section 1 references “virtual court attendance and appointment” and lists various court officers and proceedings.¹² Section 2 states that “one way or several ways to address crime rates is to offer citizens in the system rehabilitative exchanges of services from all levels low, medium, and high.”¹³ It also states that “[t]he program[] should include expanded visitor privileges [sic], home furloughs, and family and employment counseling,” and “should

⁶ *Id.* §§ 1-204.101(a); 1-1001.16(b)(1); 3 DCMR § 1000.5.

⁷ D.C. Official Code § 1-1001.16(c). Because the statute gives the Board 20 days to prepare the legislative form, and the OCFO 15 business days to respond to the Board’s request, the Board effectively must request a fiscal impact statement immediately upon accepting an initiative, so that the Board has the fiscal impact statement when it later adopts the legislative form. *See id.* This is necessary so that the Board can comply with its obligation to publish both the adopted legislative form and the fiscal impact statement in the *D.C. Register* after adoption, which triggers the 10-day judicial challenge period. *Id.* § 1-1001.16(d)(2), (e)(1)(A).

⁸ *Id.* § 1-1001.16(d)(1).

⁹ *Id.* § 1-1001.16(d)(2).

¹⁰ *Id.* § 1-1001.16(e)–(i); *see also id.* § 1-204.102(a) (requiring, under the District Charter, an initiative petition to be signed by 5 percent of the registered electors in the District, including 5 percent of registered electors in each of five or more wards).

¹¹ Proposed Initiative at 2. Citations refer to pages of the PDF of the handwritten Proposed Initiative as received by the Board.

¹² *Id.* at 10.

¹³ *Id.* at 11.

arrange for prisoners to have driver’s licenses and social security cards before leaving prison.”¹⁴ Section 3 states that “[t]his ballot initiative proposed that citizens have the right to be aware of non-licensed firearm carriers and license carriers,” “that firearms be know it’s locked by safety while in public spaces and environments around citizens,” and “that all Gun owners and sellers exchange their bullets for GPS traceable bullets or ink explodable bullets traceable.”¹⁵ Section 4 states that “[i]f the government agrees to collect Gun and ammo to reduce crime rates such robberies, murders, carjacks and assaults while arm in exchange or swap out for sentences suspended reductions starting with the end probation or parole.”¹⁶ Section 5 “urges Mayor Muriel E. Bowser (D) to declare or define drug addiction as disease of the brain and treat it under a new NIH research for sphycological dependency.”¹⁷ It further “propose[s] that addicts with opioid, fentanyl, and molly substance use disorder be treated as an disease, and given medication prescription injections of the same substance use disorder in taking if it was the [illegible].”¹⁸ Finally, section 6 proposes a “[n]ew mobile body Guard security for citizens Globally” that “the government can fund this ballot initiative if it choose[s].”¹⁹

ANALYSIS

The right of initiative “is a power of direct legislation by the electorate.”²⁰ Accordingly, a threshold requirement for any initiative is that it must “propose [a] law[.]”²¹ This right must be construed “liberally,” and “only those limitations expressed in the law or clear[ly] and compelling[ly] implied” may be imposed on that right.²² Because we conclude that the Proposed Initiative does not meet the threshold requirement to propose a law, it is not a proper subject and the Board must refuse to accept it.

As the District of Columbia Court of Appeals has explained, because “the power of the electorate to act by initiative is coextensive with the legislative power[,] an initiative cannot extend to administrative matters.”²³ In distinguishing legislative acts from administrative regulations, the Court noted that legislative power “includes an action which adopts a policy affecting the public generally and sets in motion the effectuation of that policy.”²⁴ A legislative act “is the declaration and adoption of a policy and program by which affairs of general public concern are to be controlled.”²⁵

Applying this rule to the Proposed Initiative, it is not legislative in nature. It does not propose “to make new law.”²⁶ The Proposed Initiative consists primarily of commentary on policy problems, theory, and the need for solutions. It does not cite any law that it seeks to amend or add. Even construing the initiative right liberally,²⁷ the Proposed Initiative does not propose a law.

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 17.

¹⁶ *Id.* at 19.

¹⁷ *Id.* at 21.

¹⁸ *Id.*

¹⁹ *Id.* at 24.

²⁰ *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 897 (D.C. 1981) (internal citations and quotations omitted).

²¹ D.C. Official Code § 1-204.101(a).

²² *Convention Ctr. Referendum Comm.*, 441 A.2d at 913 (internal citations and quotations omitted).

²³ *Hessey v. Burden*, 615 A.2d 562, 578 (D.C. 1992).

²⁴ *Id.* (quoting *Woods v. Babcock*, 185 F.2d 508, 510 (D.C. Cir. 1950)).

²⁵ *Woods*, 185 F.2d at 510.

²⁶ *Convention Ctr. Referendum Comm.*, 441 A.2d at 908.

²⁷ *See id.* at 913.

As an initial matter, the vast majority of the Proposed Initiative is composed of commentary that does not propose a law. It is incumbent on the proposer to begin the initiative process by submitting “the full text of the measure” in the form of an initiative, meaning a proposed law.²⁸ As a practical matter, it would be virtually impossible for the Board to identify all the intended policy concepts, develop these concepts into policies, and craft these policies into the form of legislation. This would also require the Board to act outside its statutory role in the initiative process. For the Board to parse the entire submission to recraft the Proposed Initiative into a proposed law, it would have to make policy determinations that belong to the proposer and go well beyond its limited authority to prepare the “proper legislative form.”²⁹

Further, to the extent the Proposed Initiative does reference policies, it presents them as declarations, statements, and concepts. By its own terms, even if enacted, it would not result in the establishment of any policy “by which affairs of general public concern are to be controlled,” but simply would announce various aspirational statements regarding potential policies.³⁰ Section 1 references virtual court appearances, but does not specify what requirements, if any, would apply. Sections 2 and 4 discuss the benefits of “rehabilitative” and firearm and ammunition “exchanges” and what they “should” include, but even if enacted, would not “control” anything.³¹ Section 5 “urge[s]” the Mayor to make a “declaration,” without establishing any policy by its own terms.³² Finally, Section 6 states that “[n]ew mobile body Guard security for citizens Globally . . . will be provided.”³³ However, this provision does not state who will provide this security or what this security would entail.

Construing the Proposed Initiative favorably to the proposer, the firearm-related policy concepts discussed in section 3 are the most concrete. However, even this language is too vague to “set[] in motion the effectuation of that policy” if approved by the electorate.³⁴ For example, it proposes that “citizens have the right to be aware of non-license[d] firearm carriers and license carriers like the same notices are given out for sex offenders” that live near residents.³⁵ But this “right” to be aware of firearm carriers, without more, is an aspirational policy statement. Unlike statutory notice requirements for sex offenders,³⁶ the Proposed Initiative does not state which agency would be responsible for notifying community members, who must be notified, or when notification must occur. Such a bare statutory right would have no legal effect. Further, what does it mean for firearms to be “know[n]” to be locked by safety, and what are “public spaces and environments around citizens?”³⁷ Finally, it is not clear whether the traceable bullet exchange is mandatory or permissive, or who would be providing the traceable bullets. These are all critical details for a law to be effective that the proposer must make for the overarching policy concepts to be legislative.

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We underscore that the Proposed Initiative’s fundamental deficiency has nothing to do with its apparent substance; it is deficient because it merely announces public policies without any mechanism for the policies

²⁸ See D.C. Official Code § 1-1001.16(a)(1).

²⁹ See *id.* § 1-1001.16(c)(3).

³⁰ See *Woods*, 185 F.2d at 510.

³¹ See Proposed Initiative at 11–15, 19–20.

³² See *id.* at 21.

³³ See *id.* at 24.

³⁴ See *Woods*, 185 F.2d at 510.

³⁵ Proposed Initiative at 17.

³⁶ *E.g.*, D.C. Official Code § 22-4011.

³⁷ See Proposed Initiative at 17.

to be carried out.³⁸ The absence of detail and lack of clarity preclude the Proposed Initiative from “set[ting] in motion the effectuation of” any policy, which is fatal to it being legislative in nature.³⁹

We also note that aspirational policy declarations are regularly adopted by the Council by resolution. The District Charter permits the Council to adopt resolutions “to express simple determinations, decisions, or directions of the Council of a special or temporary character.”⁴⁰ Resolutions, however, are not laws. The Council must use “acts for all *legislative* purposes,”⁴¹ and the initiative power “is coextensive with the power of the [Council] to adopt *legislative* measures.”⁴² The pronouncement of policy aspirations is a simple determination of a special character appropriate for a Council resolution, but it is not a proper subject for a voter-proposed initiative.

Finally, we recognize that a proponent’s failure to submit a proposed initiative in the technical form of an act of the Council does not by itself render the measure not a proper subject. The responsibility to prepare an initiative in the “proper legislative form” of a Council act lies with the Board, after it has determined that the measure is a proper subject.⁴³ The Proposed Initiative, however, is vague and unclear as to the law its passage would effectuate. Recasting the Proposed Initiative’s policy aspirations as legislation would require extensive substantive changes, which can only be made by the proposer and are beyond the Board’s limited authority to make technical drafting revisions. The Proposed Initiative, even if enacted, would not “set[] in motion the effectuation” of any policy, nor would it result in any policy “by which affairs of general public concern are to be controlled.”⁴⁴ Accordingly, the measure is not legislative and therefore not a proper subject of initiative.

CONCLUSION

It is the opinion of this Office that the *Humane Environment “Back up Plan” “S.W.A.P. O.U.T.” for Movement & Minds for “THE BAD for THE GOOD” Amendment Act, 2024* is not a proper subject of initiative. An initiative, by definition, must propose a law. To be legislative in nature, a measure must include “the declaration *and adoption* of a policy or program *by which affairs of general public concern are to be controlled.*”⁴⁵ Although the language is not clear, the Proposed Initiative, at most, only declares or states aspirational policies and does not propose the adoption of any specific, controlling policy. Accordingly, the Proposed Initiative is not a proper subject.

Sincerely,



Brian L. Schwalb
Attorney General for the District of Columbia

³⁸ See *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1176 (Alaska 1985) (noting that initiative’s provisions “establish a public policy and they make it the chief executive’s duty to carry that policy out,” and that “[t]hey are a solemn expression of legislative will, and that is what law is all about”).

³⁹ See *Woods*, 185 F.2d at 510.

⁴⁰ D.C. Official Code § 1-204.12(a).

⁴¹ *Id.* (emphasis added).

⁴² *Convention Ctr. Referendum Comm.*, 441 A.2d at 897 (emphasis added).

⁴³ D.C. Official Code § 1-1001.16(c)(3).

⁴⁴ See *Woods*, 185 F.2d at 510.

⁴⁵ *Id.* (emphasis added).