

**DISTRICT OF COLUMBIA
BOARD OF ELECTIONS**

In Re:

“D.C. Bike Life Access and
Use of Non-Traditional
Vehicles Act of 2018.”

Administrative Hearing
No. 18-009

Re: Acceptance of Proposed
Initiative Measure

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the Board of Elections (“the Board”) on Wednesday, April 4, 2018, pursuant to D.C. Official Code § 1-1001.16(b)(1) (2016 Repl.). It involves a finding by the Board that the proposed measure, “D.C. Bike Life Access and Use of Non-Traditional Vehicles Act of 2018,” (“the BLA Act” or “the Measure”), is a proper subject of initiative pursuant to D.C. Official Code § 1-1001.16(b)(1). The proposer of the Measure, Mr. Eric S. Butler, appeared before the Board *pro se*. Chairman D. Michael Bennett and Board Members Dionna Lewis and Michael Gill presided over the hearing. Executive Director, Alice Miller, Senior Staff Attorney, Rudolph McGann, and Director of the Office of Campaign Finance, Cecily Collier-Montgomery were also present. This Memorandum Opinion constitutes the Board’s findings of fact and conclusions of law.

Statement of the Facts

On January 16, 2018, Eric Butler filed the BLA Act as an initiative measure pursuant to D.C. Official Code § 1-1001.16(a). In summary, the BLA Act “will ask District of Columbia voters if they would like to expand legal access to and use of All-Terrain Vehicles, Dirt Bikes and Multipurpose Off-Highway Utility Vehicles (UTV/MOHUVs) (altogether referred to hereinafter as “alternative vehicles”) for limited use on public roads without the right to public street parking.”¹

Section One of the Measure seeks to amend the Traffic Act of 1925, codified at D.C. Official Code § 50-2201.04(b) *et seq.*, to allow persons with driver’s licenses to operate alternative vehicles on public roads in the District with posted speed limits of 45 mph and lower. Additionally, the Measure provides for operation of alternative vehicles on the shoulder lane of highways in the District. The Measure would limit parking of alternative vehicles to private parking and public parking garages. The Measure also stipulates that persons operating alternative vehicles at speeds lower than 45 mph shall not be required to possess an “M” endorsement on their Driving Permit.²

Section Two of the Measure concerns registration requirements and delineates penalties for violations of Section One. The Measure requires all persons operating alternative vehicles to register them with the District of Columbia Department of Motor Vehicles. Violations of the established speed limit on public roads and operating alternative vehicles on highways can, upon conviction, be fined no more than the amount set forth in D.C. Official Code § 22-3571.01, or incarcerated for no more than 30 days, or both.

¹ See Summary Statement “DC Bike Life Access and Use of Non-Traditional Vehicles Act 2018.”

² Pursuant to D.C. Official Code § 50-1401.01(d), individuals operating a motorcycle in the District of Columbia must obtain a motorcycle endorsement, which §1(c) of the BLA refers to when obviating the need to possess an “M” endorsement on their Driving Permit.

On January 19, 2018, the Board’s General Counsel requested that the Office of Documents and Administrative Issuances publish in the *D.C. Register* a “Notice of a Public Hearing: Receipt and Intent to Review” (“the Notice”) with respect to the Measure. The Notice was published in the *D.C. Register* on February 23, 2018. 65 DCR 1848. On January 19, 2018, the General Counsel also sent the Notice to the Attorney General for the District of Columbia (“the Attorney General”), the Office of the Mayor’s Legal Counsel, and the General Counsel for the Council of the District of Columbia (“the Council”) inviting them to comment on the issue of whether the Measure presented a proper subject.

On March 29, 2018, the Attorney General submitted comments to the Board asserting that the Measure was an improper subject for three reasons: (1) the Measure’s penalty provisions violate the Due Process clause of the Fifth Amendment because they are unconstitutionally vague; (2) the Measure is an impermissible “law appropriating funds” because it would impose new responsibilities on the District government that could not be carried out without additional funding; and (3) to the extent the measure would reduce penalties, the Measure removes a source of revenue, which would intrude upon the Council’s appropriation authority and could negate or limit a Budget Request Act.³

During the Proper Subject Hearing convened on April 4, 2018, there were no witnesses in opposition to the Measure. The Board’s Office of the General Counsel provided a summary of the Attorney General’s opinion that the Measure is not a proper subject for initiative. Staff Attorney Rudolph McGann provided testimony on behalf of the Board’s General Counsel concurring with the Attorney General’s position. The proponent, Mr. Butler, spoke in favor of the Measure as drafted. Specifically addressing the concerns of the Attorney General that the

³ Racine Opinion Letter (Mar. 29, 2018) pp. 4-6.

Measure removes a source of revenue (thereby impacting the appropriations authority), Mr. Butler argued that no such legal concerns were raised by the Attorney General or the Board during the proper subject matter review of Initiative #71, a measure which removed a source of revenue through the decriminalization of the possession of marijuana.

Analysis

The right of initiative is to be construed liberally, and “only those limitations expressed in the law or clear[ly] and compelling[ly] implied” are to be imposed upon that right.⁴ “Absent expressed or implied limitation, the power of the electorate to act by initiative is coextensive with the power of the [Council] to adopt legislative measures.”⁵

In the District of Columbia, the people’s direct legislative right expressly excludes laws which appropriate funds. D.C. Official Code § 1-1001.02(10) (“[t]he term ‘initiative’ means the process by which the electors of the District of Columbia may 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.”) In addition to the express exclusion of proposed measures which appropriate funds, pursuant to D.C. Official Code § 1-1001.16 (b)(1), the Board is also obligated to refuse to accept an initiative measure if it finds that it violates Title IV of the District of Columbia Home Rule Act; authorizes or would have the effect of authorizing discrimination prohibited by the District of Columbia Human Rights Act (codified at D.C. Official Code § 2-1401 *et seq.*); or negates or limits a budget act of the Council.⁶

⁴ *Convention Center Referendum Committee v. DCBOEE*, 441 A.2d 889, 913 (D.C. 1981)(“*Convention Center II*”).

⁵ *Convention Center II* at 897.

⁶ D.C. Official Code § 1-1001.16 (b)(1) creates an obligation on the Board to reject proposed ballot measures when they concern the prohibited subjects listed, as well as when the proponent of the measure fails to meet

Although the Attorney General expressed several concerns with the Measure as submitted, the Board, for the reasons discussed below, has determined that the Measure is a proper subject, and accordingly must accept it.

A. The legislative drafting defects of the Measure do not compel the Board to reject it.

In addition to the express limitations on the power of initiative codified in law, the Attorney General properly argues that there is an implied limitation on the power of initiative that the subject of the measure be consistent with the Constitution. Here, the Attorney General has noted that the Measure's penalty provisions have several ambiguous internal references which make it unclear what is being penalized. Accordingly, the Attorney General argues that the Board is compelled to reject the Measure as unconstitutionally vague because under the Due Process clause, "[p]enal statutes are subject to the requirement of definiteness and must be sufficiently specific to inform persons affected by its requirements of the elements of the criminal offense involved."⁷

The Board takes notice that the Measure does not conform to the legislative drafting format with respect to numbering of sections internally, and that the Measure is somewhat confusing since the proponent does not delineate precisely which provisions of the existing traffic laws he wishes to leave unamended. The Attorney General's comments on the penalty provisions and the internal references are noted and will be taken into consideration when the Board drafts the proper legislative format pursuant to D.C. Code § 1-1001.16(c)(3).⁸ Insofar as

certain filing requirements. The filing requirements are for "5 printed or typewritten copies of the full text of the measure, a summary statement of not more than 100 words, and a short title," as well as the proper filing of a statement of organization and report of receipts and expenditures with the Office of Campaign Finance. 1-1001.16 (b)(1)(A) and (B).

⁷ Racine Opinion Letter at 4 (citing *Mitchel v. D.C.*, 741 A.2d 1049, 1054 (D.C. 1999)).

⁸ D.C. Official Code § 1-1001.16(c)(3) states:

the constitutional concerns of this Measure appear to be isolated to merely legislative drafting and internal references to codified District law that can be remedied by the Board's task of preparing the Measure in legislative format, the defect identified by the Attorney General is not fatal to the Measure in this particular instance.

B. There is no evidence in the record that permits the Board to find that the DMV could not comply with the mandatory provisions of the Measure in the absence of funding.

The Court of Appeals has addressed and interpreted the appropriations prohibition on the right of initiative in a total of seven cases. In broadly examining the legislative history of the Dixon Amendment to the Initiative Procedures Act, which incorporated the appropriation prohibition into the right of initiative, the Court found:

[D]uring lengthy discussion of the "laws appropriating funds" amendment, Council members worried that an unqualified initiative right would enable the electorate to interfere with the fiscal affairs of the District. In particular, members expressed their concern that the initiative right would permit citizens to establish a program for which the Council then could be required to seek funding, regardless of the fiscal impact. *Proponents of the amendment responded by distinguishing sharply between the power to authorize a substantive program, which the initiative right would confer on citizens, and the power to authorize expenditures, which the amendment explicitly reserved to the Council and Congress.*⁹

The language chosen in the Dixon Amendment reflected the concern to maintain the precise and unique financial relationship between the Congress and the Council that was agreed to in the Charter, thereby balancing the right of initiative with the Charter's provisions for sound financial management by the District's elected officials. *See Hessey v. District of Columbia Board of*

Within 20 calendar days, of the date on which the Board accepts an initiative or referendum measure, the Board shall: Prepare, in the proper legislative form, the proposed initiative or referendum measure, where applicable, which shall conform to the legislative drafting format of acts of the Council of the District of Columbia. The Board may consult experts in the field of legislative drafting, including, but not limited to, Corporation Counsel of the District of Columbia and officers of the Council of the District of Columbia for the purpose of preparing the measure in its proper legislative form.

⁹ *Convention Center II* at 912 (emphasis added).

Elections and Ethics, 601 A.2d 3, 18-19 (D.C. 1991)(“*Hessey II*”). Over the course of its various analyses, the Court has concluded that the “laws appropriating funds” prohibition equates with “acts allocating funds.” *Hessey II* at 19. The Court has ultimately held that “a measure which would intrude upon the discretion of the Council to allocate District government revenues in the budget process is not a proper subject for initiative. This is true whether or not the initiatives would raise new revenues.” *Id.* According to the Court, this interpretation is “the most consistent with the District government’s unique fiscal status” and “the Council’s role in the budget process and its financial responsibilities under the Charter.” *Id.*

Applying the various holdings from the Court of Appeals, in order for an initiative measure to pass muster with respect to the prohibition on laws appropriating funds, the measure must not do any of the following:

- (1) Block the expenditure of funds requested or appropriated (*Convention Center II* at 913-14);
- (2) Directly appropriate funds (*District of Columbia Board of Elections v. Jones*, 481 A.2d 456, 460 (D.C. 1984));
- (3) Require the allocation of revenues to new or existing purposes (*Hessey II* at 19-20);
- (4) Compel the allocation of funds to carry out the mandatory provisions of the measure upon enactment (*District of Columbia Board of Elections and Ethics and District of Columbia Campaign for Treatment v. District of Columbia*, 866 A.2d 788, 794 (D.C. 2005)).;
- (5) Establish a special fund (*Hessey II* at 19-20);
- (6) Create an entitlement enforceable by private right of action (*Id.* at 20 n.34); or
- (7) Directly address and eliminate any revenue source (*Dorsey v. District of Columbia*, 648 A.2d 675, 677 (D.C. 1994)).

In the present case, the Attorney General’s opinion is that the Measure would compel the allocation of funds to carry out the mandatory provisions of the Measure upon enactment,

contrary to what the Court of Appeals discussed as a limitation in *D.C. Board of Elections & Ethics v. District of Columbia*, 866 A.2d 788 (D.C. 2005) (hereinafter *DCBOEE v. D.C.*).¹⁰ In *DCBOEE v. D.C.*, the Court of Appeals concluded that the “Treatment Instead of Jail Initiative” would “impose numerous mandatorily-phrased obligations upon trial courts to effectuate its goals” which “the courts would be unable to comply with...in the absence of funding” and failed to “condition the court’s compliance with its dictates upon funding by the Council.”¹¹ Here, the Attorney General’s position is that the Measure would require the Council to allocate *additional* revenues so that the DMV could comply with the mandatory provision of registration of alternative vehicles.

Although the Board agrees with Attorney General’s iteration of the holding in *DCBOEE v. DC*, the Board finds that the law proposed in the Measure here is distinguishable from the “Treatment Instead of Jail Initiative.” The “Treatment Instead of Jail Initiative” proposed a law which would have created several new obligations on District courts including, *inter alia*, ordering assessment of eligible offenders, reviewing treatment plans, and designating treatment providers, that the courts could simply not do so without the Council’s allocation of additional funds. Here, while the Measure does create mandatory obligations on the Department of Motor Vehicles, these obligations are within a program the DMV is already conducting – namely the registration of vehicles. In his letter, the Attorney General has stated that “funds would be needed to modify the registration database, to process the applications, and to amend current regulations[.]”¹² No statement from the Department of Motor Vehicles was received concerning whether the DMV could comply absent additional funding. In the record before the Board, there

¹⁰ Racine Opinion Letter at 5.

¹¹ Racine Opinion Letter at 5.

¹² Racine Opinion Letter at 5-6.

is no evidence that the DMV would require the allocation of additional funds to comply with the Measure upon enactment. In light of the DMV's existing vehicle registration program, the Board is not persuaded by the evidence in the record that the DMV would be "unable to comply in the absence of funding" if the Measure were approved by the electorate. Accordingly, the Board finds that the Measure does not run afoul of the express prohibition on laws appropriating funds.

C. **There is no evidence in the record that the District receives any revenue from fines from the illegal operation of alternative vehicles on public roads.**

Finally, the Attorney General argues that the decriminalization provision of the Measure eliminates revenues. He then explains that because the Measure eliminates revenue, the Measure intrudes upon the Council's appropriation authority, thereby violating the prohibition on laws appropriating funds, as well as violating the specific requirement that an initiative not negate or limit a Budget Request Act.¹³ Accordingly, the Attorney General argues that the Board is obligated to reject the Measure as an improper subject.

While the Measure does propose to eliminate an act that could be fined by the District, there is not convincing evidence in the record that the Measure would eliminate actual revenue. In *Dorsey v. District of Columbia Board of Elections and Ethics*, the Court concluded that the proposed initiative which prohibited booting and impounding of cars to collect traffic fines and requiring periodic amnesty of traffic fines was an impermissible intrusion on the Council's allocation authority. In that particular case, two Council members provided evidence to the Board that the Council actually relied on the revenue from booting and impounding of vehicles and the collection of traffic fines in developing the District's budget. *Id* at 676. In contrast, the administrative record before the Board shows no evidence specific and convincing enough to

¹³ Racine Opinion Letter at 6, citing *Dorsey v. District of Columbia Board of Elections and Ethics*, 648 A.2d 675 (D.C. 1994).

persuade the Board that the Measure would eliminate actual revenue or that the Council relies on this particular fine as a revenue source when developing the District's budget. The Attorney General, in his opinion letter at footnote 39, references the revenue projections from fines and forfeitures in the FY 2019 Proposed Budget and Financial Plan, specifically stating that the Metropolitan Police Department collected \$248,000 for non-traffic violations ("Fines and Forfeitures – Other"). The Board is unable to find any further detailed explanation in the FY 2019 Budget which would show that the type of fine proposed to be eliminated by the Measure is an actual source of revenue in this category or that it was contemplated by the District's elected officials in their preparation of the Budget. Accordingly, with no evidence in the record that any revenue would be eliminated by the Measure, the Board is obligated to accept the Measure as a proper subject.

Conclusion

The right of initiative is to be construed liberally, and "only those limitations expressed in the law or clear[ly] and compelling[ly] implied" are to be imposed upon that right.¹⁴ The Board cannot reject a ballot measure when it simply is not in proper legislative format. The Board is prepared to adhere to the advice of the Office of the Attorney General in drafting the Measure in proper legislative format as required by law. While the Measure authorizes a *de minimis* extension of an existing program, there is no evidence in the record that it would necessarily (1) compel additional appropriations to carry out the mandatory provisions of the Measure, or (2) eliminate revenues. Further, there is no evidence in the record that the Council relies on projected revenue from this particular source when it develops the District's budget.

For the foregoing reasons, it is hereby:

¹⁴ *Convention Center II* at 913.

ORDERED that the Measure, the “D.C. Bike Life Access and Use of Non-Traditional Vehicles Act of 2018,” is **ACCEPTED** pursuant to D.C. Code § 1-1001.16(b)(1).

Date: May 18, 2018



D. Michael Bennett
Chairman,
Board of Elections