

**DISTRICT OF COLUMBIA
BOARD OF ELECTIONS**

In Re:

“Legalization of Retail
Cannabis in the District
of Columbia 2018.”

Administrative Hearing
No. 18-002

Re: Rejection of Proposed
Initiative Measure

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the Board of Elections (“the Board”) on Wednesday, March 7, 2018, pursuant to D.C. Official Code § 1-1001.16(b)(1). It involves a finding by the Board that the proposed initiative, “Legalization of Retail Cannabis in the District of Columbia 2018,” (“the LRC Initiative” or “the Initiative”), is not a proper subject of initiative pursuant to D.C. Official Code § 1-1001.16(b)(1). Chairman Michael Bennett and Board Members Dionna Lewis and Michael Gill presided over the hearing. The proposer of the Initiative, Mr. Asar Mustafa, appeared before the Board *pro se*. An array of witnesses provided testimony in support of the LRC Initiative. Executive Director, Alice Miller, General Counsel, Kenneth McGhie, and Director of the Office of Campaign Finance, Cecily Collier-Montgomery were also present.

Statement of the Facts

On December 18, 2017, Asar Mustafa filed the LRC Initiative pursuant to D.C. Official Code § 1-1001.16(a).¹ In summary, the LRC Initiative “advocate[es] for the total legalization of retail cannabis in the District of Columbia [] that will use 39.9% of the Legalized Retail

¹ Mr. Mustafa withdrew his original measure on December 22, 2017, and he resubmitted his proposed measure with revisions on the same date.

Cannabis tax dollars to provide Black Citizens with an opportunity for ownership, education/training, employment, with special assistance to Black Farmers in the Cannabis industry.”² The proposed measure contemplates the establishment of consortiums set up in specified locations that provide services to the retail cannabis business owners to mitigate concerns arising during business operations and to ensure the owners are current with their taxes and fees.

On January 4, 2018, the Board’s General Counsel requested that the Office of Documents and Administrative Issuances (“ODAI”) publish in the D.C. Register a “Notice of a Public Hearing: Receipt and Intent to Review” (“the Notice”) with respect to the Initiative. The Notice was published in the D.C. Register on January 19, 2018. *See* 65 D.C. Reg. at 378. On January 4, 2018, the General Counsel’s office 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 LRC Initiative presented a proper subject.

On March 6, 2018, the Attorney General submitted comments to the Board asserting that the LRC Initiative was an improper subject for at least three reasons: (1) the Initiative would violate federal law, specifically section 809(b) of the District of Columbia Appropriations Act of 2017 (Pub. L. 115-31; 131 Stat. 392); (2) the Initiative is an impermissible law appropriating funds because it would control how District tax revenues must be allocated; and (3) the Initiative authorizes, or would have the effect of authorizing, discrimination prohibited under the Human Rights Act of 1977.³

² *See* Proposed Summary Statement “An Initiative for the Legalization of Retail Cannabis in the District of Columbia 2018.”

³ *See generally* Racine Opinion Letter. pp. 2-4.

During the hearing convened on March 7, 2018, the Board’s General Counsel provided a summation of the Attorney General’s opinion that the LRC Initiative is not a proper subject for initiative. Staff Attorney Rudolph McGann provided testimony on behalf of the Board’s Office of the General Counsel concurring with the Attorney General’s position. Numerous witnesses spoke in support of the proposed measure.⁴ None of the witnesses’ testimony addressed the Attorney General’s conclusion that the LRC Initiative is an improper subject for an initiative. The proponent of the Initiative, Mr. Mustafa, spoke at length regarding the tax benefits the District would realize if his measure was approved and passed by the electorate. He emphasized the educational component as a means of job creation in the District for those who have scarce employment opportunities. Moreover, Mr. Mustafa asserted that he had spoken with the Office of Congressman Andy Harris, the author of §809(b) of the District of Columbia Appropriations Act of 2017, in the hopes that he would refrain from inserting the rider in the District’s next appropriation bill. Mr. Mustafa concluded his remarks by acknowledging the appropriation rider was a hurdle that appeared insurmountable absent a change in position by Congressman Harris.

Analysis

Pursuant to 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.” The Board may not accept an initiative measure if it finds that it is not a proper subject of initiative under the terms of Title IV of the District of Columbia Home Rule Act or upon any of the following grounds:

- (A) The verified statement of contributions has not been filed pursuant to §§ 1-

⁴ The witnesses that provided testimony are as follows: Antoine Nailon, Lisa Scott, Danielle Sherman of the Cannabis Consumer’s Coalition, Justin Asifo, Scott Williams, Arslan Khan, Corey Williams, Tim Catron, Daniel David Wallace, Marvin Plunket, Raven Woods, and Hani Ahmed.

- 1163.07 and 1-1163.09;⁵
- (B) The petition is not in the proper form established in subsection (a) of this section;⁶
 - (C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2;⁷ or
 - (D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.⁸

D.C. Official Code § 1-1001.16 (b)(1). Additionally, the Board must not accept an initiative if it finds that the measure is inconsistent with the United States Constitution or any nationally applicable federal law.⁹

A. The LRC Initiative is inconsistent with federal law.

The United States Constitution grants Congress the right to legislate over the District of Columbia, which is the seat of the federal government. Pursuant to the United States Constitution, Article I section 8,

The Congress shall have Power to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings. . .

This constitutional provision means that Congress has plenary power to legislate for the District

⁵ The verified statement of contributions consists of the statement of organization required by D.C. Official Code § 1-1163.07 and the report of receipts and expenditures required by D.C. Official Code § 1-1163.09.

⁶ Subsection (a) of D.C. Official Code § 1-1001.16 provides that initiative measure proposers must file with the Board “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 of the measure to be proposed in an initiative[.]”

⁷ Chapter 14 of Title 2 of the D.C. Official Code contains the District of Columbia Human Rights Act, the intent of which is to secure an end in the District of Columbia to discrimination for any reason other than individual merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, matriculation, political affiliation, disability, source of income, and place of residence or business.

D.C. Official Code § 2-1401.

⁸ D.C. Official Code § 1-204.46 deals with budgetary acts of the D.C. Council.

⁹ *See Hessey v. Board of Elections and Ethics*, 601 A.2d 3, 14.

of Columbia. Although Congress has ceded some legislative authority to the District by way of the Home Rule Act, Congress reserved the right to legislate on behalf of the District.

Notwithstanding any other provision of this chapter, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this chapter, including legislation to amend or repeal any law in force in the District prior to or after enactment of this chapter and any act passed by the Council.¹⁰

Moreover, even when the D.C. Council is authorized to legislate for the District, Congress has the option to weigh in prior to enactment during a 30-day review period.¹¹ This legislative scheme allows Congress to retain its plenary power over the District while granting the local citizenry the power to legislate on local affairs. In the event Congress takes issue with an act passed by the Council in the District, the congressional review period allows Congress to enact a joint resolution disapproving of such act within the 30-day review period. “In any case in which any such joint resolution disapproving such an act has, within such 30-day period, passed both Houses of Congress and has been transmitted to the President, such resolution, upon becoming law . . . shall be deemed to have repealed such act . . .”¹²

The Attorney General duly noted in his opinion letter that the LRC would violate section 809(b) of the District of Columbia Appropriations Act, 2017. This provision of the Consolidated Appropriations Act 2017 was a concerted effort on behalf of Congress to impose a categorical restriction on all funds available for obligation or expenditure for establishing a retail recreational cannabis market. Federal legislation preempts local legislation when Congress passes Acts that are not limited in application to District of Columbia. *See Brizill v. D.C. Brd. Of*

¹⁰ D.C. Official Code § 1-206.01.

¹¹ *See* D.C. Official Code § 1-206.02(c)(1).

¹² *Id.*

Elections & Ethics, 911 A.2d 1212 (D.C. 2006) (an initiative seeking to introduce gambling machines was preempted by a federal statute that prohibited the transportation of gambling devices across state lines).

B. The LRC Initiative is an improper subject because it would appropriate funds.

The District of Columbia Court of Appeals has determined 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 initiative would raise new revenues.” *Hessey v. District of Columbia Board of Elections and Ethics, et al.*, 601 A.2d 3 at 19 (D.C. 1991) (“*Hessey*”). In order for an initiative measure to pass muster with respect to the prohibition on laws appropriating funds, the measure must not: block the expenditure of funds requested or appropriated; directly appropriate funds; require the allocation of revenues to new or existing purposes; establish a special fund; create an entitlement enforceable by private right of action; or directly address and eliminate any revenue source. Finally, the mandatory provisions of the initiative may not be precluded by any lack of funding. *See 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) (“*Campaign Treatment*”).

By stipulating “39% of the taxable Legalize Retail Cannabis dollars will go to Black Citizens in the District of Columbia, for Ownership, Education/Training & Employment,” the LRC ostensibly intrudes upon the discretion of the Council to allocate District government revenues in the budget process. Notwithstanding the proposed measure will arguably generate new taxable revenues, initiatives cannot dictate how those new revenues will be allocated. It runs afoul of the appropriation prohibition because it directs the Council to allocate a specific percentage to a particular purpose. By requiring the Council to adhere to a percentage of taxable

revenue devoted to a new purpose, the LRC Initiative is an impermissible appropriation of funds.

The use of a specific percentage of tax revenues from retail recreational cannabis is problematic because it amounts to an appropriation for a new purpose;

C. The LRC Initiative would discriminate based on race.

As aforementioned, an initiative measure may not authorize, or have the effect of authorizing, discrimination prohibited under the D.C. Human Rights Act (HRA). The HRA makes discrimination illegal based on 20 protected traits for people that live, visit or work in the District of Columbia. Race is the primary listed trait under the HRA. The LRC Initiative would bestow benefits to black farmers and business owners to the exclusion of all people similarly situated of different races. Race cannot be taken into account when bestowing benefits because such action clearly amounts to racial discrimination.

Conclusion

In conclusion, not only does the measure conflict with a federal appropriation statute (the Harris rider) that imposes a categorical restriction on all funds to purchase recreational cannabis, but the LCR presents an improper subject for initiative because it violates the prohibition on laws appropriating funds by stipulating “39% of the taxable Legalize Retail Cannabis dollars will go to Black Citizens in the District of Columbia, for Ownership, Education/Training & Employment.” The LRC Initiative also discriminates on the basis of race by dictating that the benefits accrue to only black citizens. The measure cannot function as intended without forcing the Council to appropriate a specific percentage of tax revenues for a racially discriminatory purpose.

For the foregoing reasons, it is hereby:

ORDERED that the proposed initiative, the “Legalization of Retail Cannabis in the District of Columbia 2018,” is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C.

Code § 1-1001.16(b)(2)

A handwritten signature in blue ink, appearing to read "D. Michael Bennett". The signature is stylized with a large initial "D" and a long horizontal flourish extending to the right.

Date March 27, 2018

D. Michael Bennett, Esq.
Chairman