DISTRICT OF COLUMBIA
BOARD OF ELECTIONS AND ETHICS

In Re: "District of Columbia Citizen Legislation Initiative Act of 2008"	Administrative Hearing No. 08-07 Re: Rejection of Proposed Initiative Measure

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the Board of Elections and Ethics (hereinafter "The Board") on Wednesday, August 6, 2008, pursuant to D.C. CODE § 1-1001.16(b)(1). It involves a finding by the Board that the proposed initiative, "District of Columbia Citizen Legislation Initiative Act of 2008," (hereinafter "DCCLIA") could not be accepted because it is not a proper subject of initiative under the terms of title IV of the District of Columbia Home Rule Act. The proposer of the initiative, Robert Brannum appeared *pro se* before the Board. Chairman Errol Arthur and Board members Lenora Cole and Charles R. Lowery, Jr. presided over the hearing.

Statement of the Facts

On June 18, 2008, Mr. Brannum filed DCCLIA pursuant to D.C. CODE § 1-1001.16(a). On June 24, 2008, the Board's Office of the General Counsel requested the Office of Documents and Administrative Issuances to publish in the D.C. Register a "Notice of a Public Hearing to Review Initiative Measure." Additionally, on June 24, 2008, the General Counsel's Office sent the Notice of a Public Hearing to the Attorney General for the District of Columbia and the General Counsel for the Council of the District of Columbia inviting them to address the issue of whether DCCLIA presents a proper subject for initiative. The "Notice of Public Hearing Receipt and Intent to Review

Initiative Measure" was published in the D.C. Register on July 4, 2008. D.C. Reg. Vol. 55 – No. 27 pp 7280-81. On June 20, 2008, Mr. Brannum filed a Statement of Organization and a Verified Statement of Contributions with the D.C. Office of Campaign Finance pursuant to D.C. CODE §§ 1-1102.04 and 1-1102.06 respectively.

On August 1, 2008, the Attorney General characterized DCCLIA as an improper subject for initiative because it is contrary to the terms of the District of Columbia Charter. Specifically, the Attorney General found that the proposed initiative unlawfully intrudes upon the Council's authority to enact legislation, and it also circumvents the process by which citizens can propose legislation under the Charter. On August 4, 2008, the General Counsel for the Council of the District of Columbia concurred in the assessment of the Attorney General and opined that the proposed initiative was not a proper subject of an initiative on essentially the same grounds. Moreover, the General Counsel also noted that forcing Council Members to introduce legislation potentially infringes upon the Council Members' First Amendment rights, and the costs associated with forced Council hearings incurs incidental appropriations as well. During the hearing, Mr. Brannum requested and was granted leave until August 12, 2008 to file a response to the opinions of the Attorney General and the General Counsel of the Council. The relevant provisions of law; the opinion letters; the testimony gathered during the hearing; and Mr. Brannum's response to those opinion letters form the basis of the Board's decision in this matter.

Analysis

Pursuant to D.C. 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." (emphasis added). In making a "proper subject determination," the Board analyzes whether the measure would unlawfully appropriate funds, negate or limit a budget request act, and/or violate the provisions of either the D.C. Home Rule Act or the D.C. Human Rights Act.[1] The Board first determines whether the proposer properly filed the verified statement of contributions pursuant to D.C. CODE § 1-1001.16(b)(1)(A). Each proposer must file with the Director of the Office of Campaign Finance a verified statement of contributions within ten (10) days after its organization pursuant to D.C. CODE §§ 1-1101.01(5),[2] 1-1102.04(a),[3] 1-

[1] D.C. CODE § 1-1001.16(b)(1) states:

> Upon receipt of each proposed initiative or referendum measure, the Board shall refuse to accept the measure if the Board finds that it is not a proper subject of initiative or referendum, whichever is applicable, under the terms of title IV of the District of Columbia Home Rule Act, or upon any of the following grounds:
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> (A) The verified statement of contributions has not been filed pursuant to §§ 1-1102.04 and 1-1102.06;
> (B) The petition is not in the proper form established in subsection (a) of this section;
> (C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2; or
> (D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.

[2] D.C. CODE § 1-1101.01(5) states:

> The term "political committee" means any proposer, individual, committee (including a principal campaign committee), club, association, organization, or other group of individuals organized for the purpose of, or engaged in: promoting or opposing a political party, promoting or opposing the nomination or election of an individual to office, or promoting or opposing any initiative, referendum, or recall.

[3] D.C. CODE § 1102.04(a) states in relevant part: "Each political committee shall file with the Director a statement of organization within 10 days after its organization."

1102.06(d),[4] and 3 DCMR § 1001.6.[5] In the instant case, the proposer filed his petition with the Board on June 18, 2008, and he filed his verified statement of contributions on June 20, 2008. Although Mr. Brannum complied with the procedural requisites for filing an initiative petition, the legislative text of DCCLIA runs afoul of the limitations on the initiative right codified at D.C. CODE § 1-1001.16(b)(1).

DCCLIA BY ITS TERMS VIOLATES TITLE IV OF THE D.C. HOME RULE ACT.

As required by D.C. CODE § 1-1001.16(a)(1), the DCCLIA contains a Summary Statement that reads:

> This initiative directs the Chair of the D.C. City Council to introduce legislation in the D.C. City Council in response to a citizen initiative and requires a committee of the D.C. City Council to hold a public hearing or roundtable on its merits for any further legislative action by the D.C. City Council. Nothing in this initiative shall direct the D.C. City Council to approve any citizen initiative introduced under this provision or the obligation of funds.

Essentially, DCCLIA enacts a new legislative process by which any citizen with the support of 250 qualified electors—or an Advisory Neighborhood Commission on its own initiative—can introduce legislation through the Chair of the D.C. City Council. Mr. Brannum asserted during the hearing that the measure does not require Council Members to pass the introduced legislation; rather, it

[4] D.C. CODE § 1102.06(d) states:

> In the case of reports filed by a committee or committees on behalf of initiative, referendum, or recall measures under this section, such reports shall be filed on such dates as the Board may by rule prescribe, but in no event, shall more than 4 separate reports be required during the consideration of a particular initiative, referendum, or recall measure by any political committee or committees collecting signatures, or supporting or opposing such measures.

[5] 3 DCMR § 1001.6 states in relevant part: "For the purposes of this chapter, the phrase "verified statement of contribution," in accordance with D.C. Code §1-1001.16 (b)(1)(A) shall consist of the following: (a) The statement of organization, under D.C. Code §1-1102.04; and (b) The report(s) of receipts and expenditures, under D.C. Code §1-1102.06

merely puts citizens on par with the Mayor by granting them the same ability to propose legislation.[6] Mr. Brannum's characterization illustrates his initiative measure's glaring inconsistency with the D.C. Charter. The Charter provides that "[s]ubject to the limitations specified in §§ 1-206.01 to 1-206.04, the legislative power granted to the District by this chapter is vested in and shall be exercised by the Council in accordance with this chapter. . ." D.C. CODE § 1-204.04(a). By attempting to grant a minimum of 250 qualified electors and Advisory Neighborhood Commissions the right to propose legislation in this manner, DCCLIA necessarily conflicts with the Charter's grant of legislative power to the D.C. Council.

The introduction of new legislation is part and parcel of the legislative process, and is within the province of the D.C. Council. As Mr. Brannum alluded to during the hearing, the Mayor does have the power to "submit drafts of acts to the Council" pursuant to D.C. CODE § 1-204.22(5); however, that power is a specific grant under the Charter. *See note 5 supra*. Consequently, DCCLIA's new legislative scheme usurps the Council and the Mayor's authority to introduce legislation notwithstanding section 5 of DCCLIA's command that "[n]othing in this Act shall require the approval or passage of any proposed legislation. . ." By the terms of the initiative right, the Board must refuse to accept a measure if the Board finds that it is not a proper subject of initiative under the terms of title IV of the District of Columbia Home Rule Act.

The initiative right does not give the electorate the authority to change any provision contained in Title IV of the Home Rule Act, D.C. CODE § 1-1001.16(b)(1). *Hessey v. District of Columbia Board of Elections and Ethics*, 601 A.2d 3 (D.C. 1991) offers guidance with respect to the limitations of the right to initiative in this respect:

[6] In accordance with its authority to adopt and publish rules of procedures pursuant to D.C. CODE § 1-204.04(c), the Council has adopted procedures for introducing legislation. Rule 401 provides that only Council Members may

> [T]he language of [§ 1-1001.16(b)(1)] suggests that the Council may have intended more than simply placing a restriction on direct amendments of the Charter. The language chosen by the Council is "under the terms of title IV." While the phrase is not precise, its meaning can only arise from the substantive provisions of title IV. Adopted to implement the Charter Amendments Act, the phrase could reasonably be interpreted to mean that an initiative is also prohibited if it would interfere with the responsibilities assigned to the Council by the Charter, such as the Council's revenue allocation role and control of special funds. Accordingly, by referring to title IV, the Council, accepting that the initiative right was no more extensive than its own powers, excluded from the initiative right matters that would purport to change the structure of government and the procedures and responsibilities assigned by the Charter. . . In other words, under [§ 1-1001.16(b)(1)], an initiative, like an act of the Council, could not directly amend the Charter, and an initiative also could not interfere with the ability of the Council to carry out its responsibilities under the Charter.

Hessey at 14. *Hessey* illustrates the difficulty of reconciling DCCLIA's requirement that the Chairman of the Council introduce legislation submitted by 250 citizens or Advisory Neighborhood Commissions, because the Council realistically would have no control over the legislative process. DCCLIA provides no safeguards against frivolous proposals, which would necessarily be scheduled for hearings; moreover, there is no limit to the amount of legislation submitted. One can realistically envision a scenario where the Council's hands are tied where the mandatory hearings scheduled for proposed legislation submitted by the citizenry interrupt the normal course of legislative business.

DCCLIA ATTEMPTS TO USURP THE INITIATIVE PROCESS OF PROPOSING LAWS.

Currently, the only method for electors of the District of Columbia to propose laws is through the right of Initiative. As aforementioned, the legislative power in the District of Columbia is established by the Charter and vested in the D.C. Council; consequently, the right of initiative was granted by the first charter amendment referendum entitled "Initiative, Referendum, and Recall Charter Amendments Act of 1977." The charter amendment granted the electorate of the District of

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introduce legislation for consideration by the Council, and that the Chairman of the Council shall introduce legislation at the request of the Mayor (a right of the Mayor under section 422(5) of the Charter, D.C. Code § 1-204.22(5)).

Columbia the authority to propose laws and delineated a process for doing so. Under the existing process, a proponent is required to obtain the signatures of five percent of the registered electors of the District of Columbia including five percent of the registered electors in five of the eight wards. D.C. CODE § 1-1001.16(i). DCCLIA would lower that threshold dramatically to at most 250 qualified electors—with no geographical distribution—and as little as two Advisory Neighborhood Commissioners.[7] Clearly this new scheme conflicts with the existing Initiative right that is enshrined in the District Charter by way of charter amendment. Consequently, the only way to change the initiative process of citizens proposing laws is to amend the Charter as the General Counsel for the D.C. Council asserted in his opinion letter.[8]

Mr. Brannum also asserts that the Office of the Attorney General and the General Counsel for the D.C. Council have opined on this subject previously and held that the *Public Education Reform Amendment Act of 2007*, which amended the Charter, did not require referendum approval. Mr. Brannum is correct that the legislation aimed at vesting major aspects of school governance in the Office of the Mayor changed the Charter, but that effort was initiated by the Mayor under his power to propose laws to Congress under D.C. CODE § 1-204.22(8). The legislation was a formal request for the United States Congress to act. The present scenario is inapposite because the initiative process cannot be used to amend the Charter; however, Congress has plenary power over the District and can amend the Charter at any time—including when the Mayor of the District makes

[7] Advisory Neighborhood Commission 2D consist of two single member districts.

[8] Mr. Brannum asserts in his response statement that the statement provided by the General Counsel, Council of the District of Columbia must be rejected because the copy of the statement he received from the Board's General Counsel was undated and unsigned. Mr. Brannum has raised no statutory requirement as the basis of his contention, and the original statement was in fact signed and dated August 6, 2008. The Board's General Counsel gave Mr. Brannum a printed email courtesy copy of the original statement in an effort to accommodate Mr. Brannum as expeditiously as possible.

a formal request to do so. DCCLIA therefore cannot be a proper subject for initiative under the terms of title IV of the Home Rule Act.

DCCLIA IMPERMISSIBLY APPROPRIATES FUNDS.

The General Counsel of the D.C. Council has raised the specter that DCCLIA requires an appropriation of funds if passed. The General Counsel reasoned that Council hearings have costs associated with them, including personnel, utilities and security, and if the Council is forced to hold hearing proposed by the public, those associated costs would necessarily have to be accounted for. Mr. Brannum counters that the opinion of the General Counsel[9] "cannot be construed as a requirement to spend funds, as the proposed initiative expressly states there is not a requirement to spend funds." Mr. Brannum's analysis fails to take into account the comprehensive appropriation prohibition on the initiative right.

Appropriation of funds is the hurdle where most proposed initiatives run afoul. The District of Columbia Court of Appeals has addressed whether an initiative, either passed or proposed, runs afoul of the law's prohibition on initiatives "appropriating funds" on seven previous occasions—most recently in *District of Columbia Board of Elections and Ethics and District of Columbia Campaign for Treatment v. District of Columbia*, 866 A.2d 788 (D.C. 2005) (hereinafter "*Campaign Treatment*"). A measure can 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; directly address and eliminate any revenue source; and the mandatory provisions of an initiative can not be precluded by any lack of funding. See *Campaign Treatment* at 794. The DCCLIA clearly violates two of the prohibitions

[9] Mr. Brannum referred to the opinion of the Attorney General, when actually the General Counsel for D.C. Council raised this concern in his opinion.

proscribed in *Campaign Treatment*. Specifically, the proposed initiative requires the allocation of revenues to new or existing purposes and the mandatory provisions of DCCLIA would necessarily be precluded if the Council decides not to fund the mandatory hearings.

The DCCLIA requires the Council to hold hearings at the request of the citizenry or an Advisory Neighborhood Commission. While the summary statement clearly states: "[n]othing in this initiative shall direct the D.C. City Council to approve any citizen initiative introduced under this provision or the obligation of funds[,]" the mandatory provision would necessarily be precluded if the Council decided that it was not going to fund these citizen-initiated hearings. Moreover, any additional spending to accommodate such hearings in the way of utilities, personnel, and security would amount to allocating revenues to an existing purpose. Consequently, Mr. Brannum's argument that the Council holds hearings all the time and already appropriates funds for this purpose is of no moment.

DCCLIA IMPINGES UPON COUNCIL MEMBERS' FIRST AMENDMENT RIGHTS.

The laws proposed by way of initiative in the District of Columbia, must conform with the United States Constitution as is the case with any attempt to pass legislation within the United States. Accordingly, if an initiative measure is in violation of the U.S. Constitution, then it must be rejected as an improper subject. In the case of DCCLIA, the General Counsel for the D.C. Council raised concerns about the constitutionality of the proposed measure. The General Counsel reasoned that it impinges on legislative immunity guaranteed by the Speech and Debate Clause of the United States Constitution, U.S. Const. art. I, § 6, cl. 1; moreover, DCCLIA infringes on the Council Members' First Amendment Rights. Mr. Brannum counters that DCCLIA contains nothing that directs the Council to approve or to speak in support of citizen-proposed legislation. As aforementioned, the introduction of new legislation is part and parcel of the legislative process, and

the General Counsel for the D.C. Council cites *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) in support of this proposition. Accordingly, by forcing the Council to introduce legislation, their immunity is diminished because they are no longer free to conduct legislative affairs as they see fit. The General Counsel also cited *Clarke v. United States*, 280 U.S. App. 387 (D.C. Cir. 1989) as an example where the D.C. Circuit upheld a finding that a Congressional mandate that the Council Members adopt a specific act violated their First Amendment rights by coercing them to speak against their wills. Although Mr. Brannum correctly posits that the DCCLIA does not require passage of the proposed legislation, the forced proposal of legislation is akin to forcing the Council to enact it because that is an inextricable part of the legislative process.

LETTERS IN SUPPORT OF DCCLIA CAN NOT BE CONSIDERED.

During the hearing, Mr. Brannum requested the Board accord great weight to the statements of support from Advisory Neighborhood Commission 5C and the D.C. Federation of Civic Associations, Inc. Ms. Albrette Ransom, a member of the public, also spoke in support of the DCCLIA during the hearing. While it is commendable that Mr. Brannum garnered such an outpouring of support, the Board unfortunately is not authorized to consider such support where it has made a finding that the measure is not a proper subject for initiative. Mr. Brannum suggested that statements from ANC's must be accorded great weight, and that the affected ANC's must have an opportunity to respond.

Mr. Brannum is undoubtedly referencing D.C. CODE § 1-309.10(a), which states in relevant part: "[e]ach Advisory Neighborhood Commission ("Commission") may advise the Council of the District of Columbia, the Mayor and each executive agency, and all independent agencies, boards and commissions of the government of the District of Columbia with respect to all proposed matters of District government policy. . ." First, the initiative is not a proposed matter of District

government policy because the measure was submitted by a District resident. Second, D.C. CODE § 1-309.10(a) goes on to illustrate the types of proposed matters subject to ANC advice: "For the purposes of this part, proposed actions of District government policy shall be the same as those for which prior notice of proposed rulemaking is required pursuant to § 2-505(a) or as pertains to the Council of the District of Columbia." Although the Board publishes initiative measures in their submitted form for publication in the D.C. Register, the only requirement is to publish the adopted summary statement, short title, and legislative form after the subject determination has been made pursuant to D.C. CODE § 1-1001.16(d). Accordingly, the ANC advice provision is inapplicable in the instant scenario where the Board has yet to even make a proper subject determination.

Finally, Mr. Brannum raised the Supreme Court case of *Wesberry v. Sanders*, 376 U.S. 1 (1964) to support his proposition that the citizenry should be involved in the legislative process. *Wesberry* held that unequal apportionment of congressional districts violated the constitutional requirement that representatives be chosen by people of the several states. The case dealt with a Georgia congressional district that held twice as many voters as any other district, and the scheme was found to violate equal protection guarantees. Mr. Brannum omitted key words in the dicta that he cited in support of his claim. The actual quote reads: "[n]o right is more precious in a free country than that of having a voice in the election of ***those who make the*** laws under which, as good citizens, we must live." *Wesberry* at 17 (emphasis added). Mr. Brannum's cited dicta relates to the right to elect congressional leaders on an equally apportioned basis—not a protected right for citizens to have a say in legislation that the legislative body contemplates.

Accordingly, the Board refuses to accept the measure DCCLIA finding that it is not the proper subject of an initiative because it attempts to circumvent the initiative process for proposing laws—thereby conflicting with the Charter; it appropriates funds; and potentially violates the First

Amendment right of legislators by compelling the Chair to introduce legislation.

For the foregoing reasons, it is hereby:

ORDERED that the proposed initiative, "District of Columbia Citizen Legislation Introduction Initiative Act of 2008," is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C. CODE § 1-1001.16(b)(2).

October 6, 2008
Date

Errol R. Arthur
Chairman, Board of Elections and Ethics

Dr. Lenora Cole
Member, Board of Elections and Ethics

Charles R. Lowery, Jr.
Member, Board of Elections and Ethics

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing order was hand-delivered this 6th day of October, 2008 to Robert V. Brannum, 158 Adams Street, N.W. Washington D.C. 20007.

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