**DISTRICT OF COLUMBIA**
**BOARD OF ELECTIONS**

In Re:
"Humane Environment" "Back up Plan" S.W.A.P. O.U.T. for M.O.V.E.M.E.N.T. & M.I.N.D.S. for 'The Bad for the Good' Amendment Act of 2024"

Administrative Hearing
No. 24-002

## MEMORANDUM OPINION AND ORDER

This matter came before the Board of Elections ("the Board") on Wednesday, January 10, 2024. It involves a finding by the Board that the "Humane Environment" "Back up Plan" S.W.A.P. O.U.T. for M.O.V.E.M.E.N.T. & M.I.N.D.S. for 'The Bad for the Good' Amendment Act of 2024" is not a proper subject of initiative pursuant to D.C. Official Code § 1-1001.16(b)(1) because it is not supported by a verified statement of contributions, fails to meet initiative filing and form requirements, does not qualify as a law and, to the extent it might be deemed legislative, constitutes an impermissible law appropriating funds. Board Chairman Gary Thompson and Board members Karyn Greenfield and J.C. Boggs presided over the January 10, 2024 hearing. This Memorandum Opinion constitutes the Board's findings of fact and conclusions of law.

### Statement of Facts

On November 15, 2023, a hand-written 24-page document was received through U.S. Postal Service mail at the D.C. Board of Elections' offices. The following language appeared across the top of the first page: "BALLOT INITIATIVE 2024 filing 11-9-2023". The first page also indicated that the document concerned the "Humane Environment" "Back up Plan" S.W.A.P. O.U.T. for M.O.V.E.M.E.N.T. & M.I.N.D.S. for 'The Bad for the Good' Amendment Act of 2024" ("the Measure") and that it was submitted by Demanne Cutchin, Sr. (the "Proposer"), an

inmate at the D.C. Jail. The second and third pages of the Measure list six items under the heading "Summary". These items appear to be the topics that the Proposer intended the Measure to address.

D.C. law allows voters to propose laws that can be voted on during an election by registered voters provided that the proposal meets certain criteria. Notably, the elections laws provide that the Board shall refuse to accept the measure if the Board finds that it is not a proper subject of initiative or because the proposer has not filed a verified statement of contributions with the Office of Campaign Finance and the proposal is not in the form required by such laws.[1] The form requirements include that the proposer submit five printed or typewritten copies of the measure and an affidavit that he or she is a registered qualified elector of the District of Columbia.[2]

Although the Measure here failed to comply with some ministerial filing requirements and was self-evidently defective (*see* discussion *infra*), the elections laws do not authorize the Board to reject summarily a purported proposal for the reason that it is facially defective. Accordingly, the Board's General Counsel concluded that the submission should, out of an excess of caution, be processed in accordance with statutorily-mandated procedures for initiative proposals. Toward that end, on November 16, 2023, the Office of General Counsel requested advisory opinions from

[1] D.C. Code § 1–1001.16(a)-(b). *See also* 3 DCMR § 1000.5.

[2] *Id.* The proposal must also contain a summary statement of not more than 100 words and a short title of the measure.

the Attorney General for the District of Columbia ("AG") and of the D.C. Council's General Counsel ("CGC") for on whether the Proposed Initiative met certain proper subject requirements as required by law.[3] In addition and fundamentally, initiatives that are not legislative in character may be rejected as failing to constitute a proper subject.[4]

On December 6, 2023, the CGC provided an advisory opinion on the Measure. That opinion concluded that the Measure was not a proper subject of initiative.[5] In support of her conclusion, the CGC noted: "The Proposed Initiative contains lengthy and confusing narrative discussions, but nothing that could be construed as legislative text that could be adopted or implemented." She noted that an initiative must propose a law, but that the Measure "contains no text that could be construed as a legislative proposal."

On December 7, 2023, the AG provided his advisory opinion to the Board. That opinion stated:

> 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.
>
> . . .
>
> [I]t [i.e., the Measure] is not legislative in nature. It does not propose "to make new law." … 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, … the Proposed

[3] D.C. Code § 1-1001.16(b)(1A)(A).

[4] *See* discussion *infra*.

[5] The CGC also pointed that the Proposer had not filed a verified statement of contributions and that the Measure did not comply with the form requirements.

Initiative does not propose law.

On December 8, 2023, a notice appeared in the D.C. Register that announced that the Board would hold a proper subject hearing on the Measure on January 3, 2024. Subsequently, the Board's January meeting was rescheduled to January 10, 2024. Accordingly, on December 19, 2023, the Board's Office of General Counsel submitted a notice to the D.C. Register that indicated that the hearing would be rescheduled for January 10, 2024.[6]

On December 22, 2023, the notice rescheduling the proper subject hearing to January 10, 2024 appeared in the D.C. Register (*see* 70 D.C. Reg. 51 at p 16,111). With publication of the notice confirmed, the Board's staff reached out to the D.C. Jail for guidance on mailing the Proposer a copy of the notice. At that time, staff learned that the Proposer had been released from the D.C. Jail into "self custody" on December 20, 2023. The Proposer did not update his D.C. Jail address in the Board's voter records or otherwise inform the Board of his whereabouts so as to enable the Board to contact him regarding his Measure. Nevertheless, the Board's staff attempted to ascertain his whereabouts and on December 26, 2023, sent notices of the rescheduled proper subject meeting to other possible mail addresses for him.

At the January 10, 2024 hearing, the Board's General Counsel entered into the record the

[6] 3 DCMR § 1000.4 requires that, within one business day of the submission of an initiative, notice of a hearing on a proposed measure be published in the District of Columbia Register. As that submission date is not based in the statute, the Board has authority to waive it, particularly where, as here, the Board was considering whether it should meet at its usual time (*i.e.*, the first Wednesday of the month or January 3, 2024) given that that date fell immediately after the New Year holiday. At the end of the day, the initial delay in submitting the notice of the proper subject matter hearing was of no consequence because that hearing was rescheduled. *See* discussion *infra*.

advisory opinions. She also noted that the Measure failed to comply with other filing regulatory provisions that require that a proposal be filed in-person at the Board's office and include in the sworn affidavit the proposer's name, telephone number, and residence address.[7] The General Counsel agreed with the conclusion of the advisory opinions that the Measure did not constitute a law. Based on the filing defects and the fact that the Measure was not a law, the General Counsel recommended that the Board refuse to accept the Measure.

The Proposer failed to appear at the hearing. No member of the public sought to address the Measure.[8]

After allowing for comment on the proposal, the Board Chair moved that the Board vote on whether the Board should refuse to accept the Measure. The motion was duly seconded. Thereafter, the Board voted unanimously to refuse to accept the Measure.

**Analysis**

Pursuant to amendments to the Home Rule Act, the electors of the District of Columbia may propose *laws*,[9] and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval.[10] This right of initiative, however, is subject to several limitations. To begin with, the law, as noted above, sets forth certain filing requirements including that the initiative filing contain five printed copies, that the proposer swear

[7] 3 DCMR §1000.3.

[8] One attendee at the meeting did comment on the difficulty that the initiative filing requirements presented to voters at the D.C. Jail and he encouraged the Board to arrange outreach to the DC. Jail to inform inmates of initiative opportunities. The Board Chair responded by noting that, in this case, the proposal was not, however, summarily rejected for failing to meet ministerial filing requirements and was instead reviewed on the merits.

[9] Under D.C. Official Code §§ 1-204.101 and 1-1001.02(10), '[t]he term 'initiative' means the process by which the electors of the District of Columbia may propose laws[.]).

[10] D.C. Official Code § 1-1001.02(10) (codifying the Initiative, Referendum, and Recall Charter Amendments Act of 1977).

in an affidavit that he or she is a registered qualified elector of the District of Columbia; and that the proposer submit a copy of the verified statement of contributions that the proposer has filed with the Director of the Office of Campaign Finance ("OCF"). We address each of these initiative requirements in turn.

*The requirement that five printed copies be filed.* As noted, the statute requires that five printed or typewritten copies be filed. While the Proposer here submitted a hand-printed proposal, the statutory requirement was simply not satisfied by that one printed version. Because the Proposer failed to comply with this basic filing requirements, we cannot accept his proposed Measure.

*The requirement that initiatives be filed with a sworn affidavit.* As noted, only registered qualified electors have the right of initiative. Compliance with that requirement is maintained through the filing requirement of an affidavit from the proposer attesting to his or her status as a registered qualified elector. Further, to enable the processing of an initiative proposal, the proposer must attest to accurate contact information including a telephone number. Self-evidently, if the proposer's contact information changes, the proposer should provide an amended affidavit setting forth his or her current contact information.

The instant Measure did not include the required affidavit. Importantly, the Proposer did not even provide a telephone number, much less attest to the accuracy of his contact information. Nor did he update his contact information when he was released from the D.C. Jail. Because the Proposer failed to comply with this additional basic filing requirements, we cannot accept his proposed Measure.

*The requirement that initiatives be supported by a verified statement of contributions filed with OCF*. Just as candidates seeking ballot access must register with the OCF and disclose their

campaign funding and spending, those seeking ballot access for an initiative measure must comply with campaign finance requirements. Specifically, as indicated above, initiatives are subject to a financial disclosure requirement that is reflected in the verified statement of contributions. The Proposer has failed to comply with this requirement. We cannot, therefore, accept the Measure.[11]

*The requirement that initiatives be legislative*. Self-evidently, a proposed initiative must be legislative in nature.[12] In this case, however, in addition to not proposing a law, the proposed Measure is not organized in the form of a bill or other legislation, contains none of the usual standard legislative provisions such as an enacting clause and an effective date clause, and fails to set forth any particularized mechanism for implementing its objectives. Accordingly, we must reject the Measure as failing to meet legislative text requirements.[13]

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[11] *In re: District of Columbia Drug Price Relief Act of 2018*, BOE Case No. 18-001 (1/3/2018) (where the proponent failed to file the statement required by DC Code 1-1001.16(b)(1), the Board could not accept the initiative); *In Re: "District of Columbia Public Education Reform Amendment Act of 2007,"* Case No. 07-004 (6/12/2007) (same); *In re: "Council Members Must Pay Their Parking Tickets Initiative of 2004,*" Case No. 04-017 (6/14/2004) (same); *In Re: "GSA Bill HR 429 International Home Rule Charter Amendment #23.*," Case No. 04-018 (6/14/2004) (same).

[12] *In re: Americans Vote 2002 God Father Son Jesus Holy Spirit back Representing America Christianity Legal Religion*, BOE Case No. 07-006 (12/12/2007) (initiative rejected where it did not contain required enacting and effective date clauses); *In Re: DC/Citizens to Elect the Next Chief of Police*, BOE Case No. 04-024 (9/27/2004) (same). While the Board could recommend limited revisions to help the Proposer comply with the requirement that the Measure be formatted along the lines of legislative text, it would be counterproductive to engage in that exercise where, as here, the Measure's objectives and the means by which its objectives might be met appear to present insurmountable substantive proper subject issues (*see* discussion of apparent appropriation defects below).

[13] In addition, we note that an initiative cannot appropriate funds. While the Measure is not a model of clarity, it does appear to propose "expanded visitation priviledges (sic), home furloughs, and family and employment counseling" and other undertakings aimed at facilitating the transition of formerly incarcerated persons into the community. *See* unnumbered page 14. It also appears to propose that the identity of gun owners be made public through a program modeled after the sex offender registry program and tracking devices for guns and a program for sentence reductions where family members turn in weapons. *See* unnumbered pages 17-19. Finally, it seems that the Measure contemplates a new program of offering prescription medication to persons addicted to certain drugs. *See* unnumbered page 21. The programs suggested in the Measure cannot be implemented without increasing spending and/or altering the Council's budget. The Board cannot accept an initiative such as the instant Measure that interferes with the Council's discretion over funding. Accordingly, the Board finds that the Measure, to the extent it might be deemed legislative in nature, amounts to an impermissible law appropriating funds and is not the proper subject for an initiative.

## Conclusion

In sum, the Board determines that the "Humane Environment" "Back up Plan" S.W.A.P. O.U.T. for M.O.V.E.M.E.N.T. & M.I.N.D.S. for 'The Bad for the Good' Amendment Act of 2024" does not present a proper subject of initiative and fails to satisfy filing requirements. Accordingly, it is hereby:

**ORDERED** that the "Humane Environment" "Back up Plan" S.W.A.P. O.U.T. for M.O.V.E.M.E.N.T. & M.I.N.D.S. for 'The Bad for the Good' Amendment Act of 2024" is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C. Code § 1-1001.16(b)(2). The Board issues this written order today, which is consistent with its oral ruling rendered on January 10, 2024.

Dated: January 11, 2024

Gary Thompson
Chair