DISTRICT OF COLUMBIA
BOARD OF ELECTIONS

In Re: "Limited Gaming Initiative Act of 2016."	Administrative Hearing No. 16-003 Re: Rejection of Proposed Initiative Measure

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the Board of Elections ("the Board") on Wednesday, May 4, 2016, pursuant to D.C. Official Code § 1-1001.16(b)(1). It involves a finding by the Board that the proposed initiative, "Limited Gaming Initiative Act of 2016" ("the Gaming Act"), is not a proper subject of initiative pursuant to D.C. Official Code § 1-1001.16(b)(1). The proposer of the initiative, Mr. Barry E. Jerrels, appeared before the Board represented by Jeffrey D. Robinson, Esq. Chairman D. Michael Bennett and Board Members Dionna M. Lewis and Michael D. Gill presided over the hearing. Also present were acting Executive Director, Terri Stroud, General Counsel, Kenneth McGhie, and Director of the Office of Campaign Finance, Cecily Collier-Montgomery.

Statement of the Facts

On March 15, 2016, Barry Jerrels filed the Gaming Act initiative pursuant to D.C. Official Code § 1-1001.16(a). In summary, the Gaming Act seeks to amend D.C. Code title 22 chapter 17[1] by adding new sections authorizing the licensing of Limited Gaming. The measure recommends revenue accruing to the District from the operation of Limited Gaming is

[1] The proponent amends the criminal statute to give effect to his proposed measure as opposed to the enabling statute for the District of Columbia Lottery and Charitable Games Board codified at D.C. Code §3-1301 et seq.

distributed equally to a District of Columbia Public Schools Fund, the District of Columbia Housing Production Trust Fund, and the General Fund of the District of Columbia.

On March 21, 2016, 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 April 1, 2016, *see* 63 D.C. Reg. 15 (2016). On March 21, 2016, 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 Initiative presented a proper subject.

On April 27, 2016, the Attorney General submitted comments to the Board stating that the Initiative was an improper subject. "We conclude that [the Gaming Act] is not [a proper subject], because it would violate the Home Rule Act. In addition, the measure would raise a significant Fifth Amendment concern."[2]

During the Proper Subject Hearing convened on May 4, 2016, several opponents of the proposed measure testified before the Board including the following: Dorothy Brizill of DCWatch; concerned residents, Mary Buckley, Marie Drissel, Anthony Muhammad, and Norman Smith; and Advisory Neighborhood Commissioner, Single Member District 8B02 Paul Trantham. Collectively, the opponents contended that the Gaming Act is an improper subject for initiative because it violates the Home Rule Act, it impermissibly appropriates funds, it would authorize or have the effect of authorizing discrimination, and it is not in the proper legislative form. The Board's Office of the General Counsel Staff Attorney Rudolph McGann testified that

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[2] Opinion of District of Columbia Attorney General, Karl A. Racine, Esq. (Apr. 27, 2016) p. 1.

the Gaming Act is not a permissible subject for initiative because the District of Columbia Lottery and Charitable Games Control Board ("Gaming Board") would be unable to comply with the mandatory duties set out in the Gaming Act in the absence of funding to establish and operate the Limited Gaming Licensing and Monitoring scheme.

In response, Jeffrey Robinson asserted that the initiative merely authorized a new program subject to Council funding as found to be a proper use of the Initiative in the case of *Convention Center Referendum Committee v. District of Columbia Bd. of Elections & Ethics*, 441 A.2d 889. Moreover, Robinson presaged an evisceration of the voters' right to initiative if the Board accepted the opponents' contentions. He elaborated by noting that any prospective initiative involving government action would necessarily be deemed invalid because any requisite funding would preclude a proper subject finding. Robinson went on to request an opportunity to respond fully in writing to the opposition's contentions.

The Board agreed to keep the record in the proceeding open to accept submissions from the public for one business week culminating at the close of business (4:45 p.m.) on Wednesday, May 11, 2016. The Board received written submissions from the following respondents: Brizill representing DCWatch; Robinson on behalf of the proposer Mr. Jerrels; a disapproval resolution from Advisory Neighborhood Commission 8A; an Anacostia resident named Morgann Reeves; Graylin Presbury, President of the Fairlawn Citizen's Association; and Norman Smith.

Analysis

Pursuant to D.C. Official Code § 1-1001.02(10) (2012 Repl.), "[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 §§ 1-1163.07 and 1-1163.09;[3]
(B) The petition is not in the proper form established in subsection (a) of this section;[4]
(C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2;[5] or
(D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.[6]

D.C. Official Code § 1-1001.16 (b)(1) (2012 Repl.).

Title IV of the District of Columbia Home Rule Act delineates the separation of powers within the District of Columbia government. Those provisions are codified in Chapter 2, Subpart IV of the D.C. Official Code. Of particular note, the Code establishes the Council, (D.C. Code § 1-204.01 *et seq.*); the Office of the Mayor, (D.C. Code § 1-204.21 *et seq.*); the Office of the Chief Financial Officer, (D.C. Code § 1-204.24a et seq.); the Lottery and Charitable Games Control Board, established by Chapter 13 of Title 3, (D.C. Code §1-204.24a(6)); and the Zoning Commission, (D.C. Code § 1-204.92).[7] The Board of Elections may not accept initiatives that "conflict with powers granted to the Council in the Home Rule Act."[8]

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[3] 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 § 1-1102.06.

[4] 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[.]"

[5] 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.

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

[7] Although 1-204.92 has been omitted in the current iteration of the Code, it is still relevant law and was omitted because the Home Rule Act amended Title 6 of the D.C. Code.

[8] *See marijuana Policy Project v. United States*, 304 F3d. 82 at 84.

The Gaming Act exceeds the powers granted to the Council to the extent that it dictates a specific use (limited gaming), for a specific parcel of land (initial designated gaming site), that has not been designated by the Zoning Commission for that particular use. Such an automatic designation would interfere with the execution of existing law ensconced in the Home Rule Act, which neither the Council nor the electorate may change by way of initiative. To the extent that the initial designated limited gaming site is not currently zoned for the proposed activity of limited gaming, a hearing would have to be held by the Zoning Commission prior to a zoning change or a grant of variance. The Gaming Act does mention that "[a]ny facility at which Gaming Operations are conducted pursuant to the License shall be in compliance with all laws, rules, and regulations of the District of Columbia, including, but not limited to, zoning regulations."[9] However, compliance with zoning regulations dictates that the Board of Zoning Adjustment ("BZA") is the sole adjudicator of zoning matters; moreover, that designation cannot be changed by simple legislation as those powers emanate from the Charter.

Brizill in her written submission notes: "[the Gaming Act] seeks to issue a license by an initiative or legislation, and the issuing of such a license falls within the regulatory executive authority of the Mayor."[10] Again, the measure appears to usurp the ability of the Gaming Board to administer the licensing of limited gaming by mandating a specific person as the initial licensee. The provision mandating the issuance of the initial license based upon a controlling ownership of a specific parcel of land does not grant the administrative agency the ability to carry out its administrative function. As noted by Ms. Brizill:

While establishing a scheme of licensing is a proper legislative measure that could

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9 *See* §22-1726(5).

10 Written submission by Dorothy Brizill on behalf of DCWatch in opposition to the Gaming Act (May 11, 2016) p. 1.

> also be accomplished by an initiative measure, the actual granting of a license, or mandating the granting of a license to a particular individual (however that individual is specified, whether by name or by location) is not a proper subject for legislation, whether by the council or by initiative." [11]

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*"). However, Initiatives can "contain a 'non- binding policy statement' that revenues should be allocated for specific purposes."[12]

In her written submission, Brizill saliently notes that the District of Columbia Lottery and Charitable Games Control Board, a vestige of the District of Columbia Financial Control Board era, has been subsumed into the Office of the Chief Financial Officer, and the Gaming

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[11] Written submission by Dorothy Brizill on behalf of DCWatch in opposition to the Gaming Act (May 11, 2016) p. 2.

[12] *See Campaign Treatment* at 795. Opponents of the measure have asserted that the strong recommendations for the taxation rate of Limited Gaming revenues and what to do with said collected tax revenues is an improper appropriation; however, the Courts have long maintained that non-binding policy statements are appropriate for initiatives.

Board is comprised of an Executive Director and support staff.

> The District of Columbia Lottery Board is a small District agency (with a budget of $212 million and 65 employees) that is within the Office of the Chief Financial Officer (CFO) of the District of Columbia, and operates under the direction of the CFO . . . The duties mandated, required, and imposed by this initiative to establish a gambling regulatory regime in the District of Columbia could clearly not be accomplished by the current Lottery Board with its present staff, expertise, equipment, and resources. Thus, the initiative imposes costs and expenses on the District of Columbia and the Lottery Board, and would require an appropriation of funds.[13]

The Gaming Act requires the Gaming Board to promulgate new regulations setting forth a procedure for application of licenses, (§§22-1724(a), 22-1725(c), 22-1726); acceptance of new license applications, (§22-1725(d)); awarding the licenses, (§§22-1723(c), 22-1725(a)(e)); renewal of licenses (§22-1727(a)); and the right of compliance inspections of Designated Gaming Facilities by the Gaming Board, (§22-1726(4)) the measure vests the Gaming Board with new duties and responsibilities that necessarily require funding to give effect to the measure. In the instant case, there is an unfunded mandate that would thwart the purpose of the measure as in *Campaign Treatment* because the measure has no mechanism to pay for these mandatory duties of the newly reconstituted Gaming Board.

In *Campaign Treatment*, the proposed initiative, titled "the Treatment Instead of Jail for Certain Non-Violent Drug Offenders Initiative of 2002," provided for substance abuse treatment as an alternative to incarceration for certain drug offenses. The Court reasoned that if the Council sought to not fund the program, then the right to treatment would be thwarted for a lack of funds.

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[13] Written submission by Dorothy Brizill on behalf of DCWatch in opposition to the Gaming Act (May 11, 2016) p. 3.

> This mandatory language means, once in effect, the Superior Court would be obliged to comply with the initiative's provisions. . . Courts are bound by. [] legislation, and must enforce [statutes] while they exist. [] Plainly, however, the courts would be unable to comply with these mandatory duties in the absence of funding to establish and operate the treatment programs contemplated by, and indeed at the very heart of, the initiative.[14]

By vesting the Gaming Board with an entirely new administrative function including but not limited to the mandatory issuance of an initial temporary license, the Gaming Act implicates an allocation of funds to new and/or existing purposes in contravention to the holding in *Campaign Treatment*. The measure specifically provides in pertinent part:

> (c) The Board ***shall*** grant the Temporary Initial License to the Person who, on the earliest date following the effective date of the "Limited Gaming Initiative Act of 2016," meets the following criteria: (1) the Person submits an application that is deemed complete pursuant to subsection (b) of this section, and (2) the Person has demonstrated that the Person either owns, leases or has the contractual right to own or lease, and has the right to possess and occupy, more than 50% of any real property that is eligible to become the Initial Designated Limited Gaming Site.[15]

This provision limits licensing of the first limited gaming site to the person who has more than 50% interest in the property designated by the definition of the "*Initial Designated Limited Gaming Site.*"[16] While the proponent in his written submission maintains that the Gaming Act authorizes a new program to be run by the Lottery Board, that program mandates the issuance of an initial license, which would require some level of funding.

The proponent acknowledges that the proposed initiative would require the Gaming Board to incur administrative expenses. However, in support of his supposition that an initiative

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14 *Campaign Treatment* at 796. (internal citations omitted).

15 Gaming Act §22-1723(c) (emphasis added).

16 §22-1719(6) provides:

> "Initial Designated Limited Gaming Site" shall mean an approximately 9,000 square foot area consisting of lots 5, 812, and 813 in square 5770 of Ward Eight that is targeted for redevelopment by the Anacostia Economic Development Corporation, and/or any parcels brought under common control with any Licensee under the Temporary Initial License or Initial License issued by the Board pursuant to the "Limited Gaming Initiative Act of 2016".

can create an unfunded program subject to Council appropriation, he advances an opinion from a former Attorney General regarding the 2006 iteration of this measure entitled "Video Lottery Terminal Initiative of 2006" ("VLT" Initiative). At that time, the Attorney General reasoned that "the [VLT Initiative does] not appear to require the Council to make an affirmative effort to appropriate or allocate District funds. . ."[17] However, that opinion never reconciled the holding in *Campaign Treatment*, which was decided a little more than a year earlier. As aforementioned, *Campaign Treatment* found an initiative creating an unfunded right to treatment that could necessarily be thwarted by a lack of Council appropriations was an improper subject.

Conclusion

In conclusion, the Gaming Act presents an improper subject for initiative because it violates the Home Rule Act, and it violates the prohibition on laws appropriating funds by establishing an unfunded program that cannot function as intended without forcing the Council to appropriate funds for an unknown expense.

For the foregoing reasons, it is hereby:

ORDERED that the proposed initiative, the "Limited Gaming Initiative Act of 2016" is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C. Code § 1-1001.16(b)(2)

Date May 23, 2016

D. Michael Bennett, Esq.
Chairman

[17] Opinion of District of Columbia Attorney General, Robert J. Spagnoletti, Esq. (Mar. 30, 2006) p. 3.