DISTRICT OF COLUMBIA
BOARD OF ELECTIONS

In Re: "District of Columbia Right to Housing Act of 2014"	Administrative Hearing No. 14-03 Re: Rejection of Proposed Initiative Measure

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the Board of Elections ("the Board") on Wednesday, January 8, 2014, pursuant to D.C. Official Code §1-1001.16(b)(1) (2012 Repl.). It involves a finding by the Board that the proposed initiative, the "District of Columbia Right to Housing Act of 2014" ("the DCRHA") cannot be accepted because it is not a proper subject of initiative pursuant to D.C. Official Code §1-1001.16(b)(1) (2012 Repl.). Reginald E. Black, Jr., the proposer of the initiative, appeared *pro se* before the Board. Chairman Deborah K. Nichols and Board Members Devarieste Curry and Stephen I. Danzansky presided over the hearing.

Statement of the Facts

On November 18, 2013, Mr. Black filed the DCRHA pursuant to D.C. Official Code § 1-1001.16(a) (2012 Repl.). The DCRHA, in brief, would require the District to provide housing to all homeless citizens and those earning up to $40,000 per year or below the poverty level. The initiative uses an ambiguous quarter-ratio funding provision that allocates the costs of this guaranteed housing among four sources: local revenue, federal allocation, rental reduction, and individual income. Finally, the proposed initiative creates an enforceable right to housing whereby an aggrieved person may sue the District for relief in any court of competent

jurisdiction in the event the District of Columbia fails to provide housing. While this initiative does contain a severability clause, the mandatory provisions of the initiative compel the allocation of funding if the initiative is deemed to be in effect.

On November 26, 2013, the Board's General Counsel requested that the Office of Documents and Administrative Issuances ("ODAI") publish a "Notice of a Public Hearing: Receipt and Intent to Review" ("the Notice") with respect to the DCRHA in the D.C. Register. The Notice was published in the D.C. Register on November 29, 2013. *See* 60 D.C. Reg. 51 (2013). On November 22, 2013, the General Counsel's Office sent the Notice to the Attorney General for the District of Columbia ("the Attorney General") and the General Counsel for the Council of the District of Columbia ("the Council") inviting them to comment on the issue of whether the DCRHA presented a proper subject for initiative. On December 2, 2013, Mr. Black submitted his verified statement of contributions to the D.C. Office of Campaign Finance ("OCF") pursuant to D.C. Official Code § 1-1001.16(b)(1)(A) (2012 Repl.). On January 8, 2014, Mr. Black supplemented his verified statement of contributions with the name and address of the bank designated by the committee as the committee's depository pursuant to D.C. Official Code § 1-1.1163.07(1)(D) (2012 Repl.).

On December 31, 2013, the Attorney General submitted comments to the Board stating that the DCRHA was not a proper subject for initiative for three independent legal reasons: "First, it would violate the Due Process Clause of the Constitution.[1] Second, it would violate federal appropriation law. And third, because it is a law appropriating funds, the District's

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[1] While the Board appreciates the Attorney General's opinion regarding the constitutionality of the DCRHA, the Board will refrain from engaging in a constitutional review of the proposed initiative in light of *Hessey v. Burden*, 615 A.2d 562, 574 (D.C. 1992): "We do not agree that the statute requires either the Superior Court or the Board to entertain and rule on constitutional challenges before an election. . . We agree with the majority of courts which hold that such review is imprudent."

Charter bars it from being a subject of initiative."[2] For the following reasons, the Board concurs with the opinion of the Attorney General in his assessment that the DCRHA is not a proper subject of initiative.

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.).

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2 Opinion of the District of Columbia Attorney General, Irvin B. Nathan, Esq. (Dec. 31, 2013) p. 1.

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 § 2-1401.01 (2012 Repl.).

6 D.C. Official Code § 1-204.46 (2012 Repl.) deals with budgetary acts of the D.C. Council.

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*").

In the instant case, the proposer attempts to establish a judicially enforceable right to housing with mandated allocations of funds. Such a policy would constitute an impermissible appropriation of funds, as the effect of the initiative would be to delay or condition the Council's allocation authority, forcing the Council to use funds in accordance with the initiative rather than in accordance with the discretion of the Council as it seeks to meet District government needs. Such was the case in *Hessey*. In that case, the proposers brought action to require the Board to place initiatives on the ballot that guaranteed a right to housing funded by contributions from commercial developers. The collected funds would either be deposited in a trust fund created by the initiative and used exclusively for the construction of low income housing, or alternatively deposited in the Housing Production Trust Fund—an existing special fund established by the

Council. The Court concluded that:

> [a]ny restriction on the Council's power to allocate revenues interferes with responsible financial management and runs afoul of the 'laws appropriating funds' limitation. An initiative which attempts to impose, by the terms of the initiated law, a legal constraint (either by mandate or by prohibition) on the Council's authority to allocate revenues among competing programs or other uses in the normal budget process, or which attempts itself to exercise that authority, is prohibited.

Hessey at 6.

The DCRHA goes above and beyond the scope of the proposed initiatives at issue in *Hessey* by establishing a judicially enforceable right to housing. In formulating the allocation interpretation of the "laws appropriating funds" limitation, the Court reasoned that the Council must remain unfettered in its allocation discretion. The DCRHA would frustrate that discretion by mandating housing for a segment of the population funded in part by District resources.[7] Moreover, the interference with the Council's allocation power also results from the fact that if an individual entitled to housing pursuant to the measure was denied housing and sued the District, that individual could obtain a money judgment against the District, which would force the Council to allocate funds to pay the judgment. *See Hessey* at 20 fn. 34.

The proposer also attempts to require a yearly Mayoral housing assessment, but the measure is silent as to how this assessment would be funded. As in *Campaign for Treatment*, the program at the heart of the measure is unfunded and accordingly an improper subject. In *Campaign for Treatment*, the District of Columbia brought a post-election challenge against the Board and the initiative sponsor challenging a passed initiative providing for substance abuse treatment as an alternative to incarceration, alleging that initiative was an impermissible law appropriating funds. The Court "conclude[d] that the Treatment Instead of Jail Initiative, fairly

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[7] *See* Initiative, §5: "The District of Columbia ***adopts ¼ ruling*** to provide best affordability for persons at or below poverty level up to, and not exceeding 40,000 dollars a year of income." (emphasis added).

read, would, if to be effective in accordance with its terms, compel the allocation of funds and is therefore a law appropriating funds and an impermissible subject for an initiative. . ." *Campaign for Treatment* at 795.

By requiring the District of Columbia Government to provide housing and to fund at least one quarter of the cost to do so, the measure initiates a program that is mandatory yet lacks funding, as was the case in *Campaign for Treatment.* The measure obligates the Council to allocate funds to this program at the risk of exposing the District to judicial monetary sanctions. Accordingly, the measure runs afoul of the appropriation prohibition in the same manner as the measures at issue in *Hessey* and *Campaign Treatment.* Moreover, the DCRHA raises the specter of federal funding in its quarter-ratio funding scheme. The provisions mandating that one fourth of the funding come from federal revenues could ostensibly run afoul of the federal Anti-Deficiency Act. As noted by the Attorney General:

> Section 1 of the Federal Anti-Deficiency Act prohibits District officers and employees from "mak[ing] or authoriz[ing] an expenditure or obligation exceeding an amount available in an appropriation or fund," 31 U.S.C. § 1341(a), or involving the District or federal government "in a contract or obligation for the payment of money," without legal authorization and before an appropriation is made. *Id.* §1341(b). Furthermore, funds appropriated by Congress "shall be applied only to the objects for which the appropriations were made except as otherwise provided by law," 31 U.S.C. § 1301(a), which means that "public funds may be used only for the purpose or purposes for which they were appropriated."[8]

Accordingly, the DCRHA requirement that the District utilize federal funds as a source to finance housing would necessarily run afoul of the Anti-Deficiency prohibition where Congress did not appropriate funds for that specific purpose.

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[8] *See* Opinion of the District of Columbia Attorney General Irvin B. Nathan, Esq. (Dec. 31, 2013) p. 7 (quoting Government Accountability Office, Principles of Appropriations Law at 4-6 (Third Ed. Vol. I)

Conclusion

The Board is quite sympathetic to the cause of the proposer, but is also cognizant of its duty under the law to refuse to accept a measure if it finds that it is not a proper subject of initiative pursuant to D.C. Official Code § 1-1001.16 et seq. Homelessness is an intractable societal ill that urgently needs to be addressed, especially in the District of Columbia where the rate of homelessness is high. However, the right of initiative is an unfortunately ill-suited vehicle to address this issue in the manner the proposer seeks. The Board must reject this initiative because it impermissibly appropriates funds by establishing a judicially enforceable right to housing, seeks to establish a fund to provide housing to a segment of the community, and allocates both federal and local revenues to provide housing. While the Board certainly appreciates this civic attempt to address a real problem, it is required to follow the law. The Board does not render this decision lightly, but it is constrained to administer the law faithfully.

Accordingly, the Board refuses to accept the DCRHA, as it is not a proper subject for initiative because it appropriates funds in contravention of Title IV of the Home Rule Act, pursuant to D.C. CODE § 1-1001.16(b)(1)(D) (2012 Repl.).

For the foregoing reasons, it is hereby:

ORDERED that the proposed initiative, the "District of Columbia Right to Housing Act of 2014," is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C. CODE § 1-1001.16(b)(2) (2006 Repl.).

2/21/14
Date

Deborah K. Nichols
Chairman, Board of Elections