DISTRICT OF COLUMBIA
BOARD OF ELECTIONS

In Re:	)	Administrative Hearing
Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014	)	No. 14-004

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

This matter came before the District of Columbia Board of Elections (hereinafter "the Board") during a special hearing on Tuesday, February 25, 2014, concerning a proposed initiative measure, titled the "Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014" ("the Initiative"). Based upon its Summary Statement, the Initiative, if passed, would

> make it lawful for a person 21 years of age or older to[:] possess up to two ounces of marijuana for personal use; . . . grow no more than three mature cannabis plants within the person's principal residence; . . . transfer without payment (but not sell) up to one ounce of marijuana to another person 21 years of age or older; and . . . use or sell drug paraphernalia for use, growing or processing of marijuana or cannabis that is made legal by the Initiative.[1]

The purpose of the special hearing was to determine whether the Initiative presents a proper subject matter for initiative in the District of Columbia. The proposer of the Initiative, Adam Eidinger ("the Proposer"), Chair of the DC Cannabis Campaign, appeared before the Board, and was also represented at the hearing by Amanda S. LaForge, Esquire of Sandler, Reiff, Young & Lamb, P.C. Chairman Deborah K. Nichols presided over the hearing, and Board members Devarieste Curry and Stephen Danzansky participated.

[1] Summary Statement, Initiative.

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

On January 10, 2014, the Proposer filed the Initiative with the Board. On February 5, 2014, the proposer filed a Statement of Organization with the D.C. Office of Campaign Finance ("OCF"), and on February 7, 2014, the proposer filed a Verified Statement of Contributions Report and Initial Report of Receipts & Expenditures with OCF.[2] On January 13, 2014, the Board's Office of the General Counsel ("OGC") transmitted a Notice of Public Hearing and Intent to Review the Initiative ("the Notice") to the Office of Documents and Administrative Issuances for publication in the D.C. Register.[3] The Notice was published in the D.C. Register on January 17, 2014. Also on January 13, 2014, OGC sent the Notice to Mayor Vincent C. Gray, Phil Mendelson, Chairman of the Council of the District of Columbia ("the Council"), Irvin B. Nathan, Esquire, the District's Attorney General, V. David Zvenyach, Esquire, General Counsel for the Council, and Brian K. Flowers, Esquire, General Counsel for the Executive Office of the Mayor, and invited each of them to comment on the propriety of the Initiative.

The Board held the proper subject hearing on Tuesday, February 25, 2014.[4] During the hearing, the Board heard oral testimony from the Proposer, Ms. LaForge, and several other individuals and organizations. While the hearing record was officially closed at the conclusion of the hearing, on February 26, 2014, the Board extended the comment period through March 3, 2014. In all, the Board received and considered oral and written comments from five individuals

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[2] *See* D.C. Official Code § 1-1001.16(b)(1)(A) (2001). Although the Statement of Organization and the Verified Statement of Contributions Report and Initial Report of Receipts & Expenditures were due on January 27, 2014, the Proposer requested, and was granted a ten (10) day extension of time within which to file the Statements, which meant that that he had to file the documents on or before February 10, 2014. The proposer filed the Statement of Organization on February 5, 2014, and the Verified Statement of Contributions Report and Initial Report of Receipts & Expenditures on February 7, 2014.

[3] *See* D.C. Mun. Regs. tit. 3 § 1001.2.

[4] *See* D.C. Mun. Regs. tit. 3 § 1001.3.

and/or organizations, including the Attorney General, counsel for the Proposer, and Ken Slaughter, Esquire, Interim General Counsel for the District of Columbia Housing Authority ("DCHA").[5]

A. Comments Regarding the Propriety of the Initiative

1. The Attorney General

On February 19, 2014, and after the hearing on February 25, 2014, the Attorney General submitted comments to the Board in which he expressed his opinion that the Initiative does not present a proper subject for initiative because it contravenes the federal Anti-Drug Abuse Act of 1988,[6] and thus conflicts with the District Charter.

The Anti-Drug Abuse Act requires that public housing agencies, including the DCHA, utilize leases that

> [p]rovide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.[7]

The Anti-Drug Abuse Act defines "drug-related criminal activity" as "the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as such term is defined in section 802 of [the Controlled Substances Act][8])."[9] Because marijuana is a controlled substance under the Controlled

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[5] The other individuals to whom the OGC sent the Notice on January 13, 2014 did not submit comments regarding the propriety of the Initiative.

[6] Approved November 18, 1988 (102 Stat. 4181; 42 U.S.C. § 1501 *et seq.*)(as amended)("Anti-Drug Abuse Act").

[7] 42 U.S.C. § 1437d(l)(6).

[8] Approved October 27, 1970 (84 Stat. 1236; 21 U.S.C.§ 801 *et seq.)*(as amended)("Controlled Substances Act")

[9] 42 U.S.C. § 1437a(b)(9).

Substances Act,[10] its "manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use," whether "on or off [the public housing grounds], engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy."

The Attorney General asserts that, because the Initiative would, among other things, legalize the possession of marijuana weighing two ounces or less for personal use by individuals 21 years of age and older, it would legalize conduct that, under federal law, constitutes drug-related criminal activity and is, therefore, a basis for eviction from public housing. The Attorney General further asserts that, while the Anti-Drug Abuse Act requires lease terms that vest public housing authorities with the discretion to evict tenants for drug-related criminal activity, the Initiative would prohibit the DCHA not only from using public housing leases which "state that any 'drug-related criminal activity' is a basis for eviction,"[11] but also from evicting tenants on the basis of that activity, provided it occurs off of public housing grounds.[12] This is so, according to the Attorney General, because public housing is a benefit provided by the DCHA, and section (1)(b)(3) of the Initiative precludes District government agencies, including the DCHA, from denying benefits on the basis of the conduct legalized pursuant to the Initiative.

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[10] *See* 21 U.S.C. § 812(c).

[11] Letter from the Attorney General to the OGC regarding the Initiative (February 19, 2014) at 6.

[12] The Attorney General acknowledges that the Initiative would not prohibit the DCHA from denying public housing on the basis of conduct that occurs on public housing premises.

2. The Proposer[13]

In response to the Attorney General's concerns regarding the propriety of the Initiative, Joseph Sandler, Esq. of Sandler, Reiff, Young & Lamb, P.C, counsel for the Proposer, asserts that section (1)(b)(3) of the Initiative does not conflict with federal law, because if the DCHA exercised its discretion to "terminate [a tenant's] lease based on the drug-related activity of [the tenant or other covered persons], [s]uch termination would not be denial of a benefit based on possession of marijuana or other conduct, but based on violation of the terms of a lease to which the tenant had voluntarily agreed." Thus, he concluded,

> under the Proposed Initiative, the District would be free to use the lease required by federal law and evict tenants who violate the terms of the lease, as well as regulate conduct made lawful by the Initiative on property that it owns. For that reason, there is absolutely no conflict between federal law and the Proposed Initiative[.]

During the hearing, the Proposer testified that the Initiative would not, and was not intended to, prohibit the DCHA from including the federally-required lease provision at issue, and that it would not preclude the DCHA from evicting tenants based upon conduct made legal by the Initiative.

3. The DCHA[14]

In its comments to the Board, the DCHA noted that the Attorney General's analysis regarding the validity of the Initiative "do not necessarily control the legal position our agency will take on how DCHA interprets the Initiative." It indicated that the DCHA, in establishing its "final policy on marijuana," would "be challenged to reconcile its Federal mandates with any

[13] Counsel for the Proposer submitted initial comments on February 21, 2014 and supplemental comments on February 28, 2014.

[14] The DCHA submitted comments on March 4, 2014.

changed District laws, whether they are changed by initiative or as proposed in the Council of the District of Columbia."

In addition, the DCHA outlined its federally-mandated obligation to include terms in its leases that address the impact of drug-related activity, including marijuana use and possession, on both admission into and eviction from public housing:

> [T]he Quality Housing and Work Responsibility Act ("QHWRA") of 19982 (sic) requires that [public housing agencies ("PHA's")] administering HUD's rental assistance programs establish standards and lease provisions that prohibit admission into the Public Housing and Housing Choice Voucher programs based on the illegal use of controlled substances, including state legalized medical marijuana. Specifically, Section 576(b) of QHWRA addresses admissions standards related to current illegal drug use by all public housing and other federally assisted housing. It states that the public housing agency must establish standards or lease provisions that allow the agency or owner to terminate the tenancy or assistance for any household with a member who is illegally using a controlled substance or the use interferes with the health, safety or right to peaceful enjoyment of the property. It is important to emphasize that, while expressly extending the prohibition on marijuana use and requirement of lease enforcement by PHA's, QHWRA also provides PHA's, including DCHA, have discretion on whether to pursue eviction of current residents who are illegal drug users.[15]

III. ANALYSIS

A. The Right of Initiative

With the passage of the Initiative, Referendum, and Recall Charter Amendments Act in 1978 ("Charter Amendments Act"),[16] electors in the District of Columbia were granted the right to "propose laws (except laws appropriating funds) to the registered qualified electors of the District of Columbia for their approval or disapproval."[17] The creation of this right established

[15] Letter from the DCHA to the OGC regarding the Initiative (March 4, 2014) at 2.

[16] D.C. Law 2-46, 24 D.C. Reg. 199 (1978) (codified as amended at D.C. CODE ANN. § 1-204.101 *et seq.*).

[17] D.C. Official Code § 1-204.101(a) (2001).

in the District a "power of direct legislation by the electorate[,]"[18] putting the District's electorate on a par with the Council, enabling it to wield the legislative powers enjoyed by the Council, albeit to a limited extent. "Absent express or implied limitation, the power of the electorate to act by initiative is coextensive with the power of the [Council] legislature to adopt legislative measures."[19] The right of initiative is to be construed liberally, and "only those limitations expressed in the law or 'clear[ly] and compelling[ly] implied" are to be imposed upon that right."[20]

District of Columbia Official Code § 1-1001.16(b)(1) provides that the Board, which serves as "the gatekeeper for the initiative process,"[21] 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:
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> (A) The verified statement of contributions has not been filed pursuant to §§ 1-1163.07 and 1-1163.09;[22]
> (B) The petition is not in the proper form established in subsection (a) of this section;[23]
> (C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2;[24] or
> (D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.[25] [26]

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[18] *Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002)("*Marijuana Policy Project*").

[19] *Convention Center,* 441 A.2d. at 897.

[20] *Convention Center Referendum Committee v. District of Columbia Bd. of Elections and Ethics,* 441 A.2d 889, 913 (D.C. 1981)("*Convention Center*").

[21] *Marijuana Policy Project,* 304 F.3d. at 84.

[22] 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.

[23] D.C. Official Code § 1-1001.16 (a) 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."

[24] Chapter 14 of Title 2 of the District of Columbia Code contains the District of Columbia Human Rights Act. *See* D.C. Official Code § 2-1401.01 *et seq.* (2001).

The Board finds that the Initiative is a proper subject of initiative under Title IV, and that it meets each of the other criteria prescribed in District of Columbia Official Code § 1-1001.16(b)(1).

B. The Initiative

By its terms, the Initiative, if enacted, would establish that

> it shall be lawful, and shall not be an offense under District of Columbia law, for any person twenty-one (21) years of age or older to :
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> (A) Possess, use, purchase or transport marijuana weighing two ounces or less;
> (B) Transfer to another person twenty-one years of age or older, without remuneration, marijuana weighing one ounce or less;
> (C) Possess, grow, harvest or process, within the interior of a house or rental unit that constitutes such person's principal residence, no more than six cannabis plants, with three or fewer being mature, flowering plants, provided that all persons residing within a single house or single rental unit may not possess, grow, harvest or process, in the aggregate, more than twelve cannabis plants, with six or fewer being mature, flowering plants;
> (D) possess within such house or rental unit the marijuana produced by such plants[.][27]

The Initiative would also amend Chapter 9 of Title 48 of the District of Columbia Code to remove from the District's definition of "controlled substance(s),"

> (A) Marijuana that is or was in the personal possession of a person twenty-one years of age or older at any specific time if the total amount of marijuana that is or was in the possession of that person at that time weighs or weighed two ounces or less;
> (B) Cannabis plants that are or were grown, possessed, harvested, or processed by a person twenty one years of age or older within the interior of a house or rental unit that constitutes or at the time constituted, such person's principal residence, if such person at that time was growing no more than six cannabis plants with three or fewer being mature flowering plants and

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

[26] D.C. Official Code § 1-1001.16 (b)(1)(2001).

[27] Section 1(a), Initiative.

> if all persons residing within that single house or single rental unit at that time did not possess, grow, harvest or process, in the aggregate, more than twelve cannabis plants, with six or fewer being mature, flowering plants; or
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> (C) The marijuana produced by the plants which were grown, possessed, harvested or processed by a person who was, pursuant to subparagraph (B) of this paragraph, permitted to grow, possess, harvest and process such plants, if such marijuana is or was in the personal possession of that person who is growing or grew such plants, within the house or rental unit in which the plants are or were grown.[28]

Moreover, the Initiative provides that "no district government agency or office shall limit or refuse to provide any facility[,] service, program[,] or benefit to any person based upon or by reason of conduct that is made lawful by this subsection[,]"[29] and that:

> [n]othing in this subsection shall be construed to prohibit any person, business, corporation, organization or other entity, or district government agency or office, who or which occupies, owns or controls any real property, from prohibiting or regulating the possession, consumption, use, display, transfer, distribution, sale, transportation or growing of marijuana on or in that property.[30]

C. The Initiative Would Not Conflict With, Amend, or Repeal a Federal Law

As noted above, "the power of the electorate to act by initiative is coextensive with the power of the [Council] legislature to adopt legislative measures."[31] Pursuant to Title IV of the District of Columbia Home Rule Act ("the District Charter"), the Council's legislative power is circumscribed by limitations specified in D.C. Official Code § 1-206.02. Consistent with this provision, the Council may not, among other things, "[e]nact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or

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[28] Section 1(b), Initiative.

[29] Section 1(b)(3), Initiative.

[30] Section 1(b)(6), Initiative.

[31] *See* note 20 *supra*.

which is not restricted in its application exclusively in or to the District[.][32] Since the Council cannot enact a law that would amend or repeal a federal law that applies nationally, the electorate also cannot use the initiative process to enact such a law, and any proposed measure that would do so would not be a "proper subject of initiative ... under the terms of [the District Charter],"[33] and must be rejected by the Board.[34]

An initiative that would impose by its terms a legal constraint, either by mandate or by prohibition, on DCHA's authority to include the "drug-related criminal activity" provision mandated by the Anti-Drug Abuse Act in its leases, would certainly be prohibited, as it would amount to an impermissible attempt to repeal federal law. There is, however, no provision in the Initiative that prohibits the DCHA from including the federally-mandated language in its leases. Thus, if the Initiative were enacted, the DCHA would remain free to comply with the lease provisions of the Anti-Drug Abuse Act, and would, therefore, continue to be "vest[ed] ... with the discretion to evict tenants for [their] drug-related activity [and that of their] household members and guests"[35] based upon a violation of lease terms.

Notwithstanding the Attorney General's characterization of section (1)(b)(3) of the Initiative, that provision cannot be read to supplant basic tenets of landlord/tenant and contract law, and supersede the contractual liability of a tenant which results when that individual voluntarily enters into and executes a public housing lease. As the proposer has noted, a

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[32] D.C. Official Code § 1-206.02(a)(3) (2001).

[33] D.C. Official Code §1-1001.16(b)(1)(2001).

[34] *See, for e.g., Brizill v. District of Columbia Bd. of Elections and Ethics,* 911 A.2d 1212 (D.C. 1981)("*Brizill*")(providing that a District law conflicts with federal law when it would essentially amount to an amendment or repeal of a federal law that applies nationally).

[35] *United States v. Rucker*, 535 U.S. 125, 130 (2002).

prospective tenant, by signing a public housing lease, is "enter[ing] a contract . . . voluntarily, [and agreeing] that the lease may be terminated if that tenant or certain others engage[] in future drug-related activity."[36] If that tenant (or other covered persons) engages in drug-related activity and is evicted, such eviction is due to a breach of lease provisions caused by engaging in behavior the tenant contractually agreed not to engage in.

The Board's position is bolstered by language used by the U.S. Department of Housing and Urban Development ("HUD") in its summary of the law governing tenant liability for the conduct of family members:

> As in a conventional tenancy, a public housing tenant holds tenure of the unit *subject to the requirements of the lease*[.] *By signing the lease, a tenant agrees to comply with leasehold requirements*[.] The ability of a PHA or other landlord to *enforce covenants relating to acts of unit residents* (e.g., damage to a unit, disturbance of other residents) is a normal and ordinary incident of tenancy, and is important for management of the housing. The power of a landlord to evict for the tenant's *breach of lease requirements* concerning behavior of any member of the household gives the tenant and other occupants a strong motive to avoid behavior which can lead to eviction.[37]

Finally, the Board credits the Proposer's testimony during the hearing that the Initiative would not, and was not intended to, prohibit the DCHA from including the federally-required lease provision at issue, that it would not preclude the DCHA from evicting tenants based upon conduct made legal by the Initiative, and that it could not serve as a defense for the tenant in an eviction proceeding.

In sum, the Board does not read section (1)(b)(3) to force the DCHA to choose between complying with the Initiative and complying with the Anti-Drug Abuse Act. Accordingly, we do not find that the Initiative impermissibly conflicts with federal law.

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[36] Letter from Mr. Sandler, Counsel for the Proposer, to the OGC regarding the Initiative (February 21, 2014) at 2.

[37] HUD Public Housing Lease and Grievance Procedures, 56 Fed.Reg. 51,560, 51,566–67 (Oct. 11, 1991)(emphasis added).

IV. CONCLUSION

Based upon the Board's extensive research and analysis of relevant documentary evidence and review of the Initiative, we find that it meets each proper subject requirement, and may therefore be presented to the electorate for its approval or disapproval. Accordingly, it is hereby

ORDERED that the Initiative is **ACCEPTED** pursuant to D.C. CODE § 1-1001.16(b)(2).

March 10, 2014
Date

Deborah K. Nichols, Esq.
Chairman
Board of Elections

Member Danzansky, dissenting:

I agree with the Attorney General's conclusion, as expressed in his opinion letter of February 19, 2014, and rebuttal of February 25, 2014, that one of the core provisions of the Initiative contravenes federal law and thus is contrary to the terms of the Home Rule Act and not a proper subject for initiative.

Federal law commands that public housing leases state that any drug-related criminal activity, is a basis for eviction, and defines that activity via the Anti-Drug Abuse Act as any violation of the federal Controlled Substances Act. That includes drug-related activity on or off public housing premises.

The Initiative proposes to narrow, redefine, or delimit that full panoply of drug-related offenses by instructing District government agencies and offices that they cannot limit or refuse to provide any "facility, service, program or benefit to any person" who possesses minimal amounts of marijuana, as defined in the Initiative.

I agree with the Attorney General's conclusion that both providing a public housing lease and maintaining or assuring a tenancy under that lease, without termination for cause, is indeed a "facility, service, program or benefit," and thus disagree with the proposer's interpretation of the Supreme Court's decision in *United States v. Rucker.*[38]

Nor do the exceptions defined by the Initiative ameliorate the breach, because they fail to cover drug-related activities off of public housing premises.

Nothing cited in the letter submitted by the Deputy General Counsel of the DCHA changes my view. Whether the Board of the local housing authority chooses to terminate leases for "minimal" marijuana use, or whether the Department of Housing and Urban Development or the U.S. Department of Justice chooses to prosecute such offenses, is a matter of enforcement rather than law, and under the District Charter, initiatives must comport with law rather than the choice or discretion of administrators to enforce that law. Similarly not a matter of law is the discretion afforded a public housing landlord to terminate or not terminate a lease for violation of the federally-mandated lease provision.

To that point, I do not read the DCHA's letter as asserting that it is not a "District of Columbia agency or office" under the Initiative, despite its designation as an independent agency. It does, however, assert that in the face of recent DC marijuana legalization initiatives or legislation, it will make its own judgments with regard to enforcement or assertion of rights and responsibilities. That assertion, correct or not, does not alter the law, and it is conformity vs. contravention of federal law that determines whether a proposal is a proper subject for initiative.

[38] *See* note 36 *supra.*