GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

Brian Schwalb
Attorney General

June 6, 2024

ADVISORY OPINION OF THE ATTORNEY GENERAL

Re: Proposed Initiative, the "DC Cash Payment Reparations Act"

Ms. Christine Pembroke
Senior Attorney Advisor
D.C. Board of Elections
1015 Half Street, S.E.
Washington, D.C. 20003
cpembroke@dcboe.org

Dear Ms. Pembroke:

This memorandum responds to your May 15, 2024 request, on behalf of the Board of Elections ("Board"), that the Office of the Attorney General (the "Office") provide an advisory opinion on whether the proposed initiative, the "DC Cash Payment Reparations Act" ("Proposed Initiative"), is a proper subject of initiative in the District of Columbia, pursuant to D.C. Official Code § 1-1001.16(b)(1A)(B)(i). For the reasons set forth in this letter, the Proposed Initiative is a proper subject of initiative. Because the Proposed Initiative is a proper subject, as you requested, we have attached recommended technical changes to ensure that it is in the proper legislative form.[1]

STATUTORY BACKGROUND

The District Charter ("Charter") establishes the right of initiative, which allows District electors to "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."[2] The Charter requires that the Board submit an initiative to the voters "without alteration."[3] Pursuant to the Charter, the Council has adopted an implementing statute detailing the initiative process.[4] Under this statute, any registered qualified elector may begin the initiative process by filing the full text of the proposed measure, a summary statement of not

[1] If the Board accepts the Proposed Initiative, in accordance with D.C. Official Code § 1-1001.16(c)(3), this Office may provide further recommendations for ensuring that it is prepared in the proper legislative form.
[2] D.C. Official Code § 1-204.101(a).
[3] *Id.* § 1-204.103.
[4] *Id.* § 1-204.107.

more than 100 words, and a short title with the Board.[5] After receiving a proposed initiative, the Board must refuse to accept it if the Board determines that it is not a "proper subject" of initiative.[6]

A measure is not a proper subject for initiative if it does not propose a law, if it is not in the proper form, or if it would:

- Appropriate funds;
- Violate or seek to amend the Home Rule Act;
- Violate the U.S. Constitution;
- Authorize or have the effect of authorizing discrimination prohibited under the Human Rights Act of 1977 ("Human Rights Act"); or
- Negate or limit an act of the Council enacted pursuant to section 446 of the Home Rule Act.[7]

If the Board determines that a proposed initiative is a proper subject of initiative, it must accept the measure and, within 20 calendar days, prepare and adopt a true and impartial summary statement, prepare a short title, prepare the proposed initiative in the proper legislative form, and request a fiscal impact statement from the Office of the Chief Financial Officer ("OCFO").[8] The Board must then adopt the summary statement, short title, and legislative form at a public meeting.[9] Within 24 hours after adoption, the Board must publish its formulation and the fiscal impact statement.[10] If no registered qualified elector objects to the Board's formulation by seeking review in Superior Court within 10 days after publication in the *District of Columbia Register*, the Board must certify the measure and provide the proposer with a petition form for use in securing the required signatures to place the proposed initiative on the ballot at an election.[11] The Board must then submit the initiative "without alteration" at the next primary, general, or city-wide special election held at least 90 days after it certifies the measure.[12]

FACTUAL BACKGROUND

The Proposed Initiative includes headings labeled "Short Title," "Summary Statement," and "Legislative Text." The Summary Statement states that the Proposed Initiative would do two things if enacted. First, it would "[e]nsure that DC Council puts out a study showing how a one-time payment of 300,000 dollars to every Black household in DC, over the next 15 years would benefit the Black DC residents."[13] Second, it would "[e]nsure that DC Council holds a public hearing regarding the study, in which the public could testify."[14]

Under the Legislative Text heading, the Proposed Initiative quotes Dr. Martin Luther King, Jr. and states that it "seeks to continue [his] dream of a radical distribution of economic power."[15] It goes on to reference

---

[5] *Id.* § 1-1001.16(a)(1).
[6] *Id.* § 1-1001.16(b)(1).
[7] *Id.* §§ 1-204.101(a); 1-1001.16(b)(1); 3 DCMR § 1000.5.
[8] D.C. Official Code § 1-1001.16(c).
[9] *Id.* § 1-1001.16(d)(1).
[10] *Id.* § 1-1001.16(d)(2).
[11] *Id.* § 1-1001.16(e)–(i); *see also id.* § 1-204.102(a) (requiring, under the District Charter, an initiative petition to be signed by 5 percent of the registered electors in the District, including 5 percent of registered electors in each of five or more wards).
[12] *Id.* §§ 1-204.103, 1-1001.16(p)(1).
[13] Proposed Initiative at 1.
[14] *Id.*
[15] *Id.*

figures regarding economic disparities between Black and White households in the District.[16] The Proposed Initiative states that the median net worth of White households in the District is $300,000 more than the median net worth of Black households."[17] It then states that "[i]f we know that white people have more wealth due to the racial oppression of Black people, then Black people should be given wealth to close the gap."[18] Finally, the Legislative Text states:

> [t]his legislation would not appropriate funds, it is simply a study and a public hearing regarding the specific number of [$]300,000 one-time cash payments being distributed to every Black household over the next 15 years. For the purpose of this legislation, "Black people" refers to descendants of Black people who were enslaved on USA's soil and survived Jim Crow.[19]

ANALYSIS

The Proposed Initiative is a proper subject because it is legislative in nature, it does not authorize or have the effect of authorizing discrimination prohibited under the Human Rights Act or the U.S. Constitution, and it does not contravene the prohibition on measures that appropriate funds.

1. The Proposed Initiative is legislative.

The right of initiative "is a power of direct legislation by the electorate."[20] Accordingly, a threshold requirement for any initiative is that it must "propose [a] law[]."[21] This right must be construed "liberally," and "only those limitations expressed in the law or clear[ly] and compelling[ly] implied" may be imposed on that right.[22]

As the District of Columbia Court of Appeals has explained, because "the power of the electorate to act by initiative is coextensive with the legislative power[,] an initiative cannot extend to administrative matters."[23] In distinguishing legislative acts from administrative regulations, the Court noted that legislative power "includes an action which adopts a policy affecting the public generally and sets in motion the effectuation of that policy."[24] A legislative act "is the declaration and adoption of a policy and program by which affairs of general public concern are to be controlled."[25]

Construing the right of initiative "liberally," as we must, the Proposed Initiative meets the threshold requirement of proposing a law. The Legislative Text specifies two actions that would be required: a study and a public hearing. It also states general parameters for that study and hearing: they must concern the "specific number" of one-time $300,000 cash payments that would be necessary to distribute such a payment to each Black household in the District over the next 15 years. The Legislative Text also defines the term "Black people" as "descendants of Black people who were enslaved on [United States] soil and

---

[16] *Id.* at 1–2.
[17] *Id.* at 2.
[18] *Id.* at 2.
[19] *Id.*
[20] *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 897 (D.C. 1981) (internal citations and quotations omitted).
[21] D.C. Official Code § 1-204.101(a).
[22] *Convention Ctr. Referendum Comm.*, 441 A.2d at 913 (internal citations and quotations omitted).
[23] *Hessey v. Burden*, 615 A.2d 562, 578 (D.C. 1992).
[24] *Id.* (quoting *Woods v. Babcock*, 185 F.2d 508, 510 (D.C. Cir. 1950)).
[25] *Woods*, 185 F.2d at 510.

survived Jim Crow." Although this term is not used elsewhere in the legislative language of the Proposed Initiative, it appears to refer to the "Black households" who would be eligible for payments for purposes of the study and hearing. The Short Summary further develops the details of this policy.[26] It charges the Council of the District of Columbia with conducting both the study and the hearing, and additionally provides that the study and hearing must concern how the cash payments would benefit Black District residents.

The Proposed Initiative does not indicate any date by which the Council must conduct the study and public hearing. However, it prescribes the essential elements of who must conduct the study and hearing, and what the study must entail. Even if no deadline is imposed, requiring the Council to conduct a study within defined bounds is sufficient to establish a policy and "set[] in motion the effectuation of that policy."[27] Indeed, the Council regularly adopts legislation directing District government entities to conduct studies, within frameworks of varying degrees of specificity, with and without deadlines.[28]

Further, although "[i]t is well established that 'one legislature may not bind a future legislature,'" the Proposed Initiative does not purport to do so, nor could it.[29] It simply requires the Council to take a particular action, similar to various other existing laws imposing requirements on the Council, including to hold public hearings.[30] The Proposed Initiative, if enacted into law, would be subject to amendment or repeal by the Council at any time.[31]

Finally, we note that the first 12 sentences of the Legislative Text are not independently legislative in nature because they discuss a rationale for a policy, rather than identify or prescribe a policy. Commentary and observations alone, even if enacted, would not "adopt[] a policy affecting the public generally."[32] Here, however, the non-operative language articulates the basis for the proposed requirement for a study and hearing. It is akin to a statement of purposes. Such statements are "strongly discouraged" in legislative

---

[26] *See Zukerberg v. D.C. Bd. of Elections & Ethics*, 97 A.3d 1064, 1078–79 (concluding that the summary statement reflects the electorate's intent in ratifying a Charter amendment).

[27] *Hessey*, 615 A.2d at 578 (quoting *Woods*, 185 F.2d at 510); *see also Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1176 (Alaska 1985) (noting that initiative's provisions "establish a public policy and they make it the chief executive's duty to carry that policy out," and that "[t]hey are a solemn expression of legislative will, and that is what law is all about").

[28] *See, e.g.*, D.C. Official Code § 4-204.08 (requiring the Department of Human Services to conduct a study to determine the size of the eligible population for Interim Disability Assistance); *id.* § 48-411 (requiring the Office of Planning to conduct a study of the state of the local food economy without specifying a deadline); *id.* § 50-921.04(a)(1)(I) (requiring the Project Delivery Administration of the Department of Transportation to "[c]onduct studies," without specifying a subject matter or deadline); *id.* § 50-921.21(c); (requiring the Department of Transportation to update a congestion management study); Secure DC Omnibus Amendment Act of 2024, § 2(b), enacted on March 11, 2024 (D.C. Act 25-411; 71 DCR 2732) (to be codified at D.C. Official Code § 1-301.193(h)) (requiring the Deputy Mayor for Public Safety and Justice to initiate a study on the prevalence of violence and crime that occurs in public spaces and identify and evaluate strategies for reducing crime in those locations); Central Food Processing Facility Siting and Feasibility Study Act of 2022, effective September 21, 2022 (D.C. Law 24-167; 69 DCR 9236) (requiring the Office of Planning to oversee the execution of a siting and feasibility study for a central food processing facility in the District).

[29] *Washington, D.C. Ass'n of Realtors, Inc. v. District of Columbia*, 44 A.3d 299, 306 (D.C. 2012) (quoting *A.B.A.T.E. of Ill. v. Quinn*, 957 N.E.2d 876, 884 (Ill. 2011)).

[30] *See, e.g.*, D.C. Official Code § 9-202.04 (requiring a Council hearing on an application to close all or part of a street or alley); *id.* § 34-1263.03(d) (requiring a Council hearing prior to revocation or termination of a cable operator franchise); For example, it is required to hold a public hearing to revoke); *id.* § 38-2803(a)(2) (requiring a Council hearing on the proposed 10-year Master Facilities Plan for public education facilities).

[31] *See Washington, D.C. Ass'n of Realtors*, 44 A.3d at 306 ("[E]ven if the Licensure Act were construed to" prohibit the Council from transferring funds, it would not prevent the Council from transferring funds by legislation, since "[t]he Licensure Act was enacted by the Council, and the Council was free to repeal, amend, or override it.").

[32] *Hessey*, 615 A.2d at 578 (quoting *Woods*, 185 F.2d at 510).

drafting,[33] but are nonetheless found in initiatives and Council legislation.[34] And here, the non-operative language is easily distinguishable from the language proposing a law, given that the latter is prefaced by the statement that "[t]his legislation . . . is simply a study and a public hearing."[35] Thus, if the Board determines that the Proposed Initiative is a proper subject, it must include the non-operative language in the Legislative Text as part of its preparation of the "proper legislative form"[36] without substantially altering the measure.[37] We have suggested placing this language in a distinct "statement of purposes" section in our attached recommended Legislative Text.

2. The Proposed Initiative is otherwise a proper subject.

The Proposed Initiative arguably implicates the prohibitions against (1) authorizing discrimination or having the effect of authorizing discrimination prohibited by the Human Rights Act and/or the U.S. Constitution and (2) appropriating funds. As discussed below, though, it does not violate these limitations.

First, the Proposed Initiative would not authorize or have the effect of authorizing discrimination prohibited by the Human Rights Act or the U.S. Constitution.[38] The Human Rights Act is intended to end "discrimination for any reason other than that of individual merit, including, but not limited to, discrimination by reason of" any protected trait, including race, color, and national origin.[39] Among other things, the law prohibits the District government from "limit[ing] or refus[ing] to provide any facility, service, program, or benefit to any individual" on the basis of an individual's actual or perceived" race, color, national origin, or other specified protected trait.[40] Additionally, the U.S. Constitution's Equal Protection Clause, through the Due Process Clause of the Fifth Amendment, prohibits the District from "deny[ing] to any person . . . the equal protection of the laws."[41] The Proposed Initiative does not authorize or have the effect of authorizing discrimination prohibited under the Human Rights Act or the U.S. Constitution because, among other reasons, it would not require, or have the effect of requiring, the District government to provide or deny any "tangible benefits" to anyone on the basis of a protected trait.[42]

Second, the Proposed Initiative would not necessarily violate the prohibition against proposing a law appropriating funds. Whether the measure's mandate for the Council creates unbudgeted costs is a factual

[33] Council of the Dist. of Columbia, *Legislative Drafting Manual* 68 (2019 ed.), https://dccouncil.gov/wp-content/uploads/2019/02/Legislative-Drafting-Manual-2019-Edition-FINAL.pdf.

[34] *See, e.g.*, Law to Legalize Lotteries, Daily Numbers Games, and Bingo and Raffles for Charitable Purposes in the District of Columbia, § 3, effective March 10, 1981 (D.C. Law 3-172; D.C. Official Code § 22-1716); Entheogenic Plant and Fungus Policy Act of 2020, § 2, effective March 16, 2021 (D.C. Law 23-268; D.C. Official Code § 48-921.51) (Initiative No. 81); Minimum Wage Act Revision Act of 1992, § 2, effective March 25, 1993 (D.C. Law 9-248; D.C. Official Code § 32-1001).

[35] Proposed Initiative at 2.

[36] D.C. Official Code § 1-1001.16(c)(3).

[37] *Id.* § 1-204.103 (requiring the Board to submit an initiative to the electorate "without alteration"); *see also Convention Ctr. Referendum Comm.*, 441 A.2d at 900 (observing that D.C. Official Code § 1-1001.16(c)(3) "interprets this [Charter] provision to make technical, but not substantive, changes before circulation to assure 'proper legislative form.'").

[38] Effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code § 2-1401.01 *et seq.*).

[39] D.C. Official Code § 2-1401.01.

[40] *Id.* § 2-1402.73; *see also Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89, 118 n.54 (D.C. 2010) ("Offices and agencies of the District government are covered by the prohibitions of the Human Rights Act." (internal citation omitted)).

[41] U.S. Const. amend. XIV, § 1; *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (recognizing that although "[t]he Fifth Amendment, which is applicable to the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states[,] . . . the concepts of equal protection and due process[] . . . are not mutually exclusive").

[42] *See Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 26, 30 (D.C. 1987) (en banc) (holding that educational institution's denial of "tangible benefits" attendant to the institution's endorsement, but not the denial of the endorsement itself, violated the Human Rights Act).

question that may be determined conclusively only by the OCFO. That office has previously opined that requiring the District government to conduct a study would have a fiscal impact.[43] However, any mandatory provisions requiring funds would necessarily be subject to appropriations under section 4a(b) of the General Legislative Procedures Act (D.C. Official Code§ 1-301.47a(b)).[44] This could be reflected in the Proposed Initiative through a clause indicating that the measure's effectiveness is subject to appropriations.[45] Accordingly, in our attached drafting recommendations, we have included a subject-to-appropriations section for use in the event of a negative fiscal impact.[46]

CONCLUSION

It is the opinion of this Office that the *DC Cash Payment Reparations Act* is a proper subject of initiative. The Proposed Initiative is legislative in nature. Further, the measure would not authorize or have the effect of authorizing discrimination prohibited by the D.C. Human Rights Act or the U.S. Constitution, nor would it require the appropriation of funds. Any unbudgeted costs would make the measure's effectiveness subject to appropriations under D.C. Official Code § 1-301.47a(b), which may be reflected through a subject-to-appropriations clause in the Proposed Initiative.

Sincerely,

Brian L. Schwalb
Attorney General for the District of Columbia

---

[43] *See, e.g.*, Memorandum from Jeffrey S. DeWitt, Chief Fin. Officer, to Chairman Phil Mendelson, Fiscal Impact Statement – Study of Long-Term Care Facilities and Long-Term Care Services Act of 2018 (Oct. 3, 2018) (concluding that funds are not sufficient to implement a bill requiring the Department of Health to conduct a study to evaluate the availability of affordable long-term care facilities and long-term care services in the District).

[44] Effective October 16, 2006 (120 Stat. 2038; D.C. Official Code § 1-301.47a(b) ("Permanent and emergency acts which are accompanied by fiscal impact statements which reflect unbudgeted costs, shall be subject to appropriations."); *see also* Letter from Brian Schwalb, Att'y Gen., to Terri Stroud, Gen. Counsel, D.C. Bd. of Elections, Advisory Opinion of the Attorney General on Proposed Initiative, "The Make All Votes Count Act of 2024," at 7–9 (June 9, 2023).

[45] *See District of Columbia Board of Elections & Ethics v. District of Columbia,* 866 A.2d 788, 797 (D.C. 2005) (opining that initiative would be a proper subject if it "condition[ed] . . . compliance with its dictates upon funding by the Council" by being subject to appropriations).

[46] *See Convention Ctr. Referendum Comm.*, 441 A.2d at 900-901 (opining that the Board's responsibility to prepare the "proper legislative form" under D.C. Official Code § 1-1001.16(c)(3) "may encourage the Board to give proposers some substantive guidance before circulation, at the time the Board approves the summary statement").

SHORT TITLE

"DC Cash Payment Reparations Act"

SUMMARY STATEMENT

If enacted, the Initiative would:

(a) Require the D.C. Council to study regarding a $300,000 one-time cash payment over the next 15 years to each Black household in the District, meaning a household comprising descendants of Black people who were enslaved on United States soil and survived Jim Crow; and

(b) Require the D.C. Council to hold a public hearing regarding the study at which the public may testify.

This Initiative will not be implemented if it requires unbudgeted costs unless the D.C. Council separately chooses to appropriate funds for the costs.

LEGISLATIVE TEXT

BE IT ENACTED BY THE ELECTORS OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "DC Cash Payment Reparations Act".

Sec. 2. Statement of purposes.

(a) In 1967, Dr. Martin Luther King, Jr. said, "We must recognize that we can't solve our problem now until there is a radical redistribution of power." This initiative seeks to continue Dr. Martin Luther King, Jr.'s dream of a radical redistribution of economic power.

(b) According to a study done by an organization called "Prosperity Now and the Institute for Policy Studies", the median Black wealth is expected to fall to zero by the year 2053. This is a crisis. In the District of Columbia, White households have 88 times the wealth of Black households. The District of Columbia has the worst economic equality by race in America. The District of Columbia has the biggest racial wealth gap in America. The District of Columbia has the largest unemployment gap between Black and White households.

(c) If we know that White people have more wealth due to the racial oppression of Black people, then Black people should be given wealth to close the gap. The amount of $300,000 was chosen because, according to the most recent data, the median net worth of White households in the District of Columbia was $300,000 more than Black households. White households on average had a net worth of $284,000, and Black households a median net worth of $284,000.

Sec. 3. Cash payment study and hearing.

(a) The Council of the District of Columbia shall conduct a study regarding:

(1) How a $300,000 one-time cash payment to each Black household in the District over the next 15 years would benefit black District of Columbia residents; and

(2) The specific number of $300,000 one-time cash payments that would be provided.

(b) The Council shall hold a public hearing regarding the study at which the public may testify.

(c) For purposes of this section, the term “Black household” means a household comprising descendants of Black people who were enslaved on United States soil and survived Jim Crow.

Sec. 4. Applicability.

(a) This act shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan.

(b) The Chief Financial Officer shall certify the date of the inclusion of the fiscal effect in an approved budget and financial plan, and provide notice to the Budget Director of the Council of the certification.

(c)(1) The Budget Director shall cause the notice of the certification to the published in the District of Columbia Register.

(2) The date of publication of the notice of the certification shall not affect the applicability of this act.

Sec 5. Effective date.

This act shall take effect after a 30-day period of congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code§ l-206.02(c)(1)), and publication in the District of Columbia Register.