DISTRICT OF COLUMBIA
BOARD OF ELECTIONS

In Re:
"DC Cash Payment Reparations Act" — Administrative Hearing No. 24-014

MEMORANDUM OPINION AND ORDER

This matter came before the Board of Elections ("the Board") at a hearing convened on Wednesday, July 3, 2024. It concerns the Board's review of a new initiative proposal entitled the "DC Cash Payment Reparations Act."[1] As required by law, the Board considered at the hearing and ruled on whether the proposal complies with proper subject requirements. Board Chairman Gary Thompson and Board Member J.C. Boggs presided over the hearing. The Board's General Counsel, Terri Stroud, and the initiative proposer, Addison Sarter ("Proposer"), were also present.

Statement of Facts

On May 14, 2024, the Proposer, a D.C. registered voter, filed an initiative entitled "DC Cash Payment Reparations Act" ("Measure") and related documents at the Board's offices. The initiative proposal portion of the filing begins with the name of the Measure and then sets forth the following "Summary Statement":

> If enacted, the "DC Cash Payment Reparations" would:
>
> a. Ensure 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.
> b. Ensure that DC Council holds a public hearing regarding the study, in which the public could testify.

[1] The initiative proposal process is a means whereby D.C. voters can enact legislation if, after following various procedures and having the proposal appear on an election ballot, more voters opt in favor of the proposal than those that who opt against it.

After the above-quoted Summary Statement, the proposal, under the heading "Legislative Text," contains a narrative that is generally a policy discussion of the racial wealth gap in America and in the District. Interjected into that narrative is language asserting that the proposal "would not appropriate funds [because] it is simply [requiring] a study and a public hearing regarding the specific number of 300,000 one-time cash payments being distributed to every Black household in DC over the next 15 years." At the end of this policy discussion, there is an effective date clause along the lines of clauses typically included in D.C. legislation regarding the 30-day Congressional review period that applies to D.C. laws.

On May 15, 2024, the Board's Office of General Counsel notified the D.C. Council's General Counsel ("CGC") and the Attorney General for the District of Columbia ("OAG") of the filing of the Measure and requested that these offices provide advisory opinions regarding the Measure as required by law.[2]

Also on May 15, 2024, the OGC requested that the Office of Documents and Administrative Issuances publish in the D.C. Register a "Notice of a Public Hearing: Receipt and Intent to Review" ("the Notice") with respect to the Measure. The Notice, published on May 31, 2024, advised that there would be a public hearing on July 3, 2024 to determine whether the Measure is a proper subject matter for initiative.[3] The Proposer was notified on May 22, 2024

[2] *See* D.C. Official Code § 1-1001.16(b)(1A)(B)(i) (requiring the OAG and CGC to provide advisory opinions regarding the propriety of proposed initiative measures.)
[3] *See* 71 DCR 006486-6488 (May 31, 2024).

that a proper subject hearing on the Measure would take place before the Board on July 3, 2024.

On June 6, 2024, the CGC and the OAG provided their advisory opinions on the Measure. While recognizing that a study would have a fiscal impact, the OAG's advisory opinion notes that "the Proposed Initiative would not necessarily violate the prohibition against proposing a law appropriating funds."[4] In that regard, the OAG expressed that a clause indicating that the Measure's effectiveness is subject to appropriations could be added in the event it has a negative fiscal impact. Based, *inter alia*, on its view that the Board could address appropriations concerns by reading or adding subject-to-appropriations language into the Measure, the OAG concluded that it satisfies proper subject requirements.[5] The CGC stated in her advisory opinion that she "believe[s] that initiatives that would have a cost to implement, such as the Proposed Initiative, are impermissible laws appropriating funds."[6] She concluded, however, that, based on recent Board decisions, the Measure would meet proper subject matter requirements "if it contained a subject-to-appropriations clause."[7] She then concluded that the Measure meets proper subject requirements. The advisory opinions were forwarded to the Proposer.

[4] *See* 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, "DC Cash Payment Reparations Act" at 5 (June 6, 2024) ("OAG Advisory Opinion").

[5] In addition, the OAG included with his advisory opinion a modification to the summary statement and a re-write of the Measure's legislative text. *See* Addendum to OAG Advisory Opinion.

[6] Letter from Nicole Streeter, Gen. Counsel, D.C. Council, to Terri Stroud, Gen. Counsel, D.C. Bd. of Elections, Advisory Opinion of the D.C. Council General Counsel on Proposed Initiative, "DC Cash Payment Reparations Act" at 2 (June 6, 2024) ("CGC Advisory Opinion").

[7] *Id.* at 2-3.

At the July 3, 2024 hearing, the Board's General Counsel summarized and entered the advisory opinions into the record. The Board Chair asked the Proposer whether he wished to be heard with respect to the advisory opinions. Proposer Sarter reiterated that the Measure would not appropriate funds because it merely required a study.

After hearing the summary of the advisory opinions and from the Proposer, the Board Chair requested that the General Counsel provide her opinion as to whether the Measure met the proper subject requirements. The General Counsel recommended that the Board find that it does not for the reason that it would constitute a law appropriating funds. She further advised that it would be contrary to legal authority for the Board to read into the Measure subject-to-appropriations language and that the Board should, therefore, reject the Measure.

The Board Chair agreed that, while the Proposer could resubmit the Measure with a subject-to-appropriations clause, it could not be accepted as written. He then made a motion that the Board reject the Measure. The motion was duly seconded and unanimously passed.

Analysis

Pursuant to amendments to the Home Rule Act (also known as the District's Charter), District of Columbia voters may propose laws,[8] and present such proposed laws through an election ballot for approval or disapproval by the voting residents of D.C.[9] This right of initiative, however, has several limitations including that the proposed law or measure meet certain "proper subject matter" and filing requirements. As stated in the Board's regulations:

> A measure does not present a proper subject for initiative or referendum, and must be refused by the Board, if:

[8] 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[.]).

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

(a) The measure presented would violate the Home Rule Act;

(b) The measure presented seeks to amend the Home Rule Act;

(c) *The measure presented would appropriate funds;*

(d) The measure presented would violate the U.S. Constitution;

(e) The statement of organization and the report(s) of receipts and expenditures have not been filed with the Office of Campaign Finance;

(f) The form of the measure does not include legislative text, a short title, or a summary statement containing no more than one hundred (100) words;

(g) The measure authorizes or would have the effect of authorizing discrimination prohibited under the Human Rights Act of 1977 or any subsequent amendments; or

(h) The measure would negate or limit an act of the Council enacted pursuant to § 446 of the Home Rule Act ["Enactment of local budget by Council"].[10]

3 DCMR §1000.5 (emphasis added). As explained below, the instant Measure does not satisfy one of these requirements.

The Charter for the District of Columbia granted to D.C. voters the ability to propose laws "except laws appropriating funds."[11] A measure is deemed to appropriate funds if it "would intrude upon the discretion of the Council to allocate District government revenues in the budget process[.]"[12] To remedy the problem that an initiative will not meet proper subject requirements

[10] D.C. Official Code §§ 1-204.101(a) and 1-1001.02(10) and D.C. Official Code § 1-1001.16(b)(1)(D) require that a measure not negate or limit a budgetary measure of the Council enacted under D.C. Official Code § 1-204.46. Our findings and conclusions here with respect to appropriated funds or appropriations apply equally to the prohibition against measures that negate or limit a budget act.

[11] This Charter provision is now codified at D.C. Official Code §1-204.101.

[12] *Hessey v. D.C. Board of Elections and Ethics, et al.*, 601 A.2d 3, 19 (D.C. 1991).

because it will require the expenditure of appropriated funds, one proposer of a recent initiative included a provision explicitly making the measure subject to appropriations.[13]

Here, the Measure is intended to enact a law that would require the Council to convene a public hearing and issue a study. The Board, however, previously rejected a proposal that directed the Council to hold a public hearing or roundtable because that requirement ran afoul of the prohibition on initiatives that appropriate funds even though the legislative text provided "[n]othing in this initiative shall direct … the obligation of funds."[14] The order in that prior case notes that "hearings have costs associated with them, including personnel, utilities and security, and if the Council is forced to hold [a] hearing . . . those associated costs would necessarily have to be accounted for."[15] The order rejected the proposer's position that the measure avoided an appropriations defect because the Council holds hearings all the time and already appropriates funds for this purpose and the proposal, by its own terms, prevented the obligation of funds.[16] As the order explains, the proposal's mandate of hearings could not be complied with if the Council declined to fund such hearings.

The instant Measure would similarly require a hearing. It would also mandate a study. The Chief Financial Officer ("CFO") has indicated with respect to other legislation that appropriated funds are needed to support a study.[17] The fact that the Measure claims that no funds

[13] *In re: Make All Votes Count Act of 2024*, BOE Case No. 23-007 (7/25/2023).

[14] *In Re: "District of Columbia Citizen Legislation Initiative Act of 2008",* BOE Case No. 08-07 (10/06/2008).

[15] *Id*. at 8.

[16] *Id.* at 9.

[17] *See* OAG Advisory Opinion at p. 6, n. 43. While the OAG claims that whether the Measure creates unbudgeted costs is a factual question that should be decided by the Chief Financial Officer ("CFO"), he then acknowledges that the CFO has found in at least one past Fiscal Impact Statement that appropriated funds would be needed to conduct a study.

would be appropriated because it contemplates only a hearing and study does not negate the reality that hearings and studies cost money. To the extent that the Measure was intended to impose additional hearing and/or study requirements, it interferes with the Council's authority over the budget. Therefore, it would violate the prohibition on initiatives that intrude on the Council's appropriation and budgeting authority. In other words, it would constitute a law appropriating funds.

We agree with the CGC that the Measure would meet proper subject requirements "*if* it contained a subject-to-appropriations clause."[18] As the Measure, as currently written, does not contain such a clause, it does not meet proper subject requirements. In its advisory opinion, the OAG asserts that it was not necessary for the Proposer to include a subject-to-appropriations clause in the Measure in order for it to meet proper subject requirements. If the proposed measure – or any measure – is determined to, by its terms, create unbudgeted costs, advises the OAG, such measure "would necessarily be subject to appropriations under section 4a(b) of the General Legislative Procedures Act (D.C. Official Code § 1-301.47a(b)),"[19] which provides that "[p]ermanent and emergency acts which are accompanied by fiscal impact statements which reflect unbudgeted costs, shall be subject to appropriations." The OAG further suggests that the import of Section 4a(b) "could be reflected [through the addition] of a clause indicating that the measure's effectiveness is subject to appropriations[,]"[20] and that the addition of such clause at this juncture is appropriate pursuant to the Board's authority to prepare initiative measures in the "proper legislative form" in accordance with D.C. Official Code §1-1001.16(c)(3).

[18] CGC Advisory Opinion at 2-3 (emphasis added).

[19] OAG Advisory Opinion at 6.

[20] *Id*.

We decline to read the law in the manner suggested by the OAG as we do not agree that Section 4a(b) necessarily applies to measures proposed by voters. While Section 4a(b) is a provision of a Congressional act, the 2005 District of Columbia Omnibus Authorization Act, October 16, 2005 (Public Law 109-356, 120 Stat. 2019)), it amends an act of the Council, the General Legislative Procedures Act of 1975 ("the GLPA").[21] The GPLA was intended "[t]o define certain terms for all acts and resolutions of the *Council*[.]" It is necessarily silent with respect to initiative measures, as it was enacted prior to the passage of the Initiative, Referendum, and Recall Charter Amendment Act of 1977 ("the CAA"), which provided the right of initiative. In light of this, the Congressional amendment to language defining terms applicable to Council legislation should not be read as limiting the voters' right of initiative.

Moreover, contrary to the OAG's assertion, we cannot, at this juncture, cure the appropriations-related defect by adding subject-to-appropriations language. To do so would be contrary to the statutory scheme that provides for the Board to make legislative drafting changes to a measure only *after* the Board has made a decision to accept a measure in the form that it was submitted.[22]

[21] D.C. Law No. 1-17 (Sept. 23, 1975) (emphasis added).

[22] The statute sets forth a step-by-step process for processing initiatives. First, a proposer must file the full text of the measure, a summary statement of not more than 100 words, and a short title for the measure. D.C. Official Code § 1–1001.16(a). If the Board finds that the measure complies with proper subject and filing requirements, then the Board must prepare the measure in "proper legislative form . . . which shall conform to the legislative drafting style of acts of the Council, and consult experts in legislative drafting, including the Attorney General and the General Counsel of the Council." D.C. Official Code § 1–1001.16(c). The law "permit[s] the Board to make technical, but not substantive, changes . . . to assure "proper legislative form." *Convention Center Referendum Committee v. D.C. Bd. of Elections and Ethics*, 441 A.2d 889, 900 (D.C. 1981). With respect to non-substantive changes, we note that Chapter 4 ("Form of Bills and Resolutions") of the legislative drafting manual for D.C. laws covers formatting legislation. For example, that Chapter instructs that the lines of a bill should be double-spaced and have line numbers and it provides the standard order of arrangement of provisions, including the order of arrangement of any administrative and procedural provisions.

As the statute requires that we reject an initiative that does not meet proper subject requirements, the mechanism for resolving a potential curable subject matter defect is for the Board to reject the measure and for the proposer, should that person agree with the changes needed to a measure to make it viable, to re-file. The Proposer here is welcome to add, should he wish to, subject-to-appropriations language to the Measure and re-submit it.[23]

Conclusion

In sum, the Board determines that the proposed initiative "DC Cash Payment Reparations Act" does not present a proper subject for an initiative.[24] Accordingly, it is hereby:

ORDERED that the "DC Cash Payment Reparations Act" 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 July 3, 2024.

Dated: July 11, 2024

Gary Thompson
Chair

[23] The OAG's opinion states that, "[i]f the Board determines that Section 4a(b) does not apply and that the initiative would result in unbudgeted costs, it must reject the Proposed Initiative, and the proposers may simply submit a new proposed initiative with a subject-to-appropriations clause." Having determined that Section 4a(b) does not apply, and that the Measure would result in unbudgeted costs, we do reject the Measure, and acknowledge that the Proposer is free to re-submit the Measure with a subject-to-appropriations clause.

[24] We find that the Measure does not violate the Home Rule Act, the Constitution, or the Human Rights Act, and the OCF filing requirements have been satisfied.