DISTRICT OF COLUMBIA
BOARD OF ELECTIONS

In Re: "The Minimum Wage Act of 2016"	Administrative Hearing No. 15-003 Re: Approval of Proposed Initiative Measure

MEMORANDUM OPINION AND ORDER

Introduction

This matter came before the Board of Elections ("the Board") on Wednesday, July 1, 2015, pursuant to D.C. Official Code § 1-1001.16(b)(1). It involves a finding by the Board that the proposed initiative, "The Minimum Wage Act of 2016" ("the Initiative"), is a proper subject of initiative pursuant to D.C. Official Code § 1-1001.16(b)(1). Joseph Sandler, Esq. of Sandler Reiff appeared before the Board as counsel for the proposer of the initiative. Chairman Deborah K. Nichols and Board Member Stephen I. Danzansky presided over the hearing. Also present were Executive Director, Clifford Tatum, General Counsel, Kenneth McGhie, and Director of the Office of Campaign Finance, Cecily Collier-Montgomery.

Statement of the Facts

On May 15, 2015, Matthew Hanson filed the Initiative pursuant to D.C. Official Code § 1-1001.16(a). The Initiative incrementally increases the minimum wage codified at D.C. Official Code § 32-1003(a) from $12.50 per hour in July 2017 to $15 per hour in July 2020. The Initiative thereafter provides for prospective yearly adjustments comporting with changes in the local Consumer Price Index beginning in the year 2020. The Initiative also increases the minimum wage for tipped employees provided that the employee receives gratuities in an amount at least equal to the difference between the cash wage paid and the minimum wage established in the

initiative. Beginning in 2025, the minimum wage for tipped employees would be the same as the regular minimum wage.

On May 18, 2015, 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 May 22, 2015. *See* 62 D.C. Reg. 21 (2015). On May 18, 2015, 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 Initiative presented a proper subject.

On June 22, 2015, the Attorney General submitted comments to the Board stating that the Initiative was a proper subject. "We conclude that the Proposed Initiative would not increase the amount that the District must pay to District government employees or District contractor employees and therefore does not violate the prohibition against initiatives that require the allocation of revenues."[1]

During the Proper Subject Hearing convened on July 1, 2015, four opponents of the Initiative offered testimony characterizing the measure as addressing an improper subject of an initiative. Mr. Harry Wingo, President and CEO of the D.C. Chamber of Commerce testified that, "[d]ue to the impact increasing labor costs will have on all employers[], the result will have a bearing on the District's revenue forecasts, expenditures, and appropriations."[2] Mr. Wingo went on to assert that the D.C. Council recently passed legislation raising the minimum wage,

[1] Opinion of District of Columbia Attorney General, Karl A. Racine, Esq. (Jun. 22, 2015) p. 3.

[2] Written testimony of Harry Wingo, President and CEO, D.C. Chamber of Commerce on the "Fair Wage Act of 2016." (Jul. 1, 2015) p. 1

and "[s]ince the initiative proposed would interfere with that legislation, any changes should remain within the purview of the legislative process." [3] Ms. Ellen Valentino of the Association of Convenience Stores and Energy Distributors testified that by exempting employees of the D.C. Government and D.C. contractors from the purview of the measure, that particular class of workers is being discriminated against solely on the basis of their source of income in violation of the Human Rights Act codified at D.C. Official Code § 2-1401.01 *et seq.* Mr. Eric Jones, representing Associated Builders and Contractors, Inc., Washington Metro Chapter, raised the specter of renegotiating D.C. government contracts in light of heightened wage requirements for contractors on projects already underway—thereby requiring the allocation of new appropriated funds to existing projects. Mr. Kirk McCauley, representing Washington D.C., Maryland, and Delaware Service Stations, testified that raising the minimum wage in the District to the levels sought by the Initiative will amount to an unbearable economic hardship for a number of local small businesses causing them to shutter their doors permanently.

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;[4]

[3] Harry Wingo's written testimony at 1.

[4] 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.

(B) The petition is not in the proper form established in subsection (a) of this section;[5]

(C) The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2;[6] or

(D) The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46.[7]

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

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 proposed measure does not appropriate any funds. The Initiative

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[5] 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[.]"

[6] 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.

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

leaves unchanged the current exemption from the local minimum wage law for the District government. It also does not lead to increased amounts for services provided to District government by contractors. Notwithstanding Mr. Jones' concern regarding renegotiating existing contracts to reflect a change in the minimum wage, this category of workers is specifically exempted from the minimum wage increases in the Proposed Initiative. The Proposed Initiative specifically provides that the new minimum wage requirements "shall not apply to employees of the District of Columbia, *or to employees employed to perform services provided under contracts with the District of Columbia"* (Propsed Initiative section 1(d), adding new D.C. Official Code section 32-1003(i)(emphasis added).

Ms. Valentino's assertion that the proposed initiative violates the Human Rights Act prohibition against "source of income" discrimination is equally without merit. In the instant case, the Proponent of the measure evinces no discriminatory intent; rather, the exclusion of the particular class (employees of D.C. Government and D.C. contractors) is essential to avoid an appropriation prohibition. In fact, without the exemption, the initiative would necessarily present scenarios envisioned by Mr. Jones where the Council is compelled to appropriate additional funds to existing projects due to increased wages.

While the Board recognizes and can appreciate the concerns of small business owners who bemoan the prospects of increased operating costs, the Board is not authorized to reject initiatives dues to financial hardships on private business owners. Speculative fiscal and economic impacts of a higher minimum wage also cannot be used as a justification to reject an initiative. As noted by the proponent, by and through his counsel, the District of Columbia Court of Appeals has never equated speculative fiscal impact with an appropriation of funds or negating a Budget Request Act.

[S]uch indirect impacts are far too speculative and subject to debate among

> economists to be an appropriate consideration in assessing whether a proposed initiative should be deemed to implicate [D]istrict appropriations or revenue. The Court of Appeals has never evaluated an initiative's impact on revenue by considering such far removed and indirect data points. Rather, where the Court of Appeals has rejected initiatives for "negat[ing] or limit[ing]" a Budget Request Act, it has only been in circumstances where the proposed initiative would have directly impacted District revenue by explicitly limiting or eliminating a source of District funds.[8]

Accordingly, the Board is precluded from rejecting a proposed measure on the basis of pure speculation that the measure will result in increasing labor costs that will have a bearing on the District's revenue forecasts, expenditures, and appropriations notwithstanding Mr. Wingo's objections. "In construing the [initiative right], we must weigh two major public interest concerns of the Council reflected in the Charter Amendments—the electors' right of initiative and responsible fiscal management—with a view to enhancing the value of each without undue intrusion on the other." *See Convention Center Referendum Committee v. D.C. Board of Elections*, 441 A.2d 871, 912 (D.C. 1980).

As aforementioned, the right of initiative is 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. "Moreover, what [the Court] said [] was that "*absent express or implied limitation*, the power of the electorate to act by **initiative** is **coextensive** with the power of the legislature to adopt legislative measures," *Jackson v. D.C. Bd. of Elections & Ethics*, 999 A.2d 89 at 99 (D.C. 2010) (emphasis in original) (citations omitted). No such express or implied limitation exists in the instant case; accordingly, the Board must accept the initiative as a proper subject.

[8] Correspondence of Joe Sandler, Esq. & Dara Lindenbaum, Esq. of Sandler Reiff, representing the Proponent of the Initiative. (Jun. 29, 2015) p.3.

Conclusion

The proposed measure avoids the appropriation of funds prohibition because the District government is excluded from its intended purview as an "employer". The Board sees no reason to reject the measure as it does not conflict with any of the prohibitions codified in the Initiative Procedures Act and applicable case law. The contention that the measure discriminates is false as evidenced by the context of the exemption that is necessary for the Initiative to pass muster. Notwithstanding the speculative financial hardships that small businesses may come to bear as a result of increased operating costs, the Board may not reject a proposed initiative on that basis.

Accordingly, the Minimum Wage Act of 2016 is a proper subject for initiative pursuant to the Initiative Procedures Act.

For the foregoing reasons, it is hereby:

ORDERED that the proposed initiative, the "Minimum Wage Act of 2016," is **ACCEPTED** pursuant to D.C. Code § 1-1001.16(b)(2) (2012 Repl.).

7/21/2015
Date

Deborah K. Nichols
Chairman, Board of Elections