

MEMORANDUM

2009 JUN -9 P 12:19

TO: District of Columbia Board of
Elections & Ethics

DATE: June 9, 2009

FROM: Aaron M. Flynn, Esq.

The Proposed Measure
“A Referendum Concerning the Jury and Marriage Amendment Act of 2009”
Is Improper Subject Matter For a Referendum

On June 5, 2009, the District of Columbia Board of Elections and Ethics (“Board”) published a notice of public hearing (“Notice”) regarding the Board’s receipt and intent to review a proposed referendum measure. This measure would seek to invalidate in part the Jury and Marriage Amendment Act of 2009 (the “Act”), Act No. A18-0070, passed by the D.C. Council and signed by the Mayor on May 6, 2009 and currently pending review by the United States Congress. The Act was transmitted to Congress on May 11, 2009, and the review period is projected to close on July 6, 2009.¹

The referendum process in the District of Columbia (“D.C.” or the “District”) is governed by the Initiative, Referendum, and Recall Charter Amendments Act of 1977² and the Initiative, Referendum, and Recall Procedures Act.³ See generally *Price v. District of Columbia Bd. of Elections & Ethics*, 645 A.2d 594, 600 (D.C. 1994). These statutes are further supplemented by regulations promulgated by the Board.⁴ As described below, these statutes and regulations, as interpreted by the courts of the District, require the Board to reject to proposed referendum on the basis that it seeks to address improper subject matter under District law.

¹ See Council of the District of Columbia, LIMS, available at <http://www.dccouncil.washington.dc.us/lims/legislation.aspx?LegNo=B18-0010&Description=JURY-AND-MARRIAGE-AMENDMENT-ACT-OF-2009.---&ID=21817>.

² D.C.Law 2-46, § 2, 24 D.C.Reg. 199 (1978), as amended by Pub.L. No. 95-526, § 1(3), 92 Stat. 2023 (1978) (codified as amended in D.C.Code §§ 1-281 to -287 and §§ 1-291 to -295 (1992)).

³ D.C.Law 3-1, § 2(c), 25 D.C.Reg. 9454 (1979) (codified as amended in D.C.Code §§ 1-1320 to -1326 (1992)).

⁴ D.C. MUN. REGS. tit. 3, §§ 1000-1015.

I. The Subject Matter of the Proposal Is Improperly Addressed Through a Referendum Under D.C. Law.

District law prohibits the use of the referendum process in a number of circumstances that are enumerated in relevant statutes. This memorandum addresses only two of the several bases that compel the Board to refuse to accept the proposed referendum, as described below. It should be noted, however, that other bases not addressed here are likely to also require rejection of the proposed referendum. The Board must carefully consider all potential bases for rejecting the proposal.

District law compels the Board to refuse to accept a proposed referendum when:

- (1) "[T]he Board Finds that it is not a proper subject ... under the terms of title IV of the District of Columbia Home Rule Act;"
- (2) "The verified statement of contributions has not been filed pursuant to §§ 1-1102.04 and 1-1102.06;"⁵
- (3) "The petition is not in the proper form established in subsection (a) of [D.C. Code § 1-1001.16];"
- (4) "The measure authorizes, or would have the effect of authorizing, discrimination prohibited under Chapter 14 of Title 2;" or
- (5) "The measure presented would negate or limit an act of the Council of the District of Columbia pursuant to § 1-204.46." ⁶

⁵ D.C. MUN. REGS. tit. 3, § 1000.5 further specifies that the proposer(s) of a referendum measure or any political committee organized in support of a measure must file a verified statement of contributions with the Office of Campaign Finance on or before the submission of the measure for filing. D.C. MUN. REGS. tit. 3, § 1000.6 further indicates that the phrase "verified statement of contribution," consists of the following:

- a. The statement of organization, pursuant to DC Code §11414 (1981); and
- b. The report(s) of receipts and expenditures, pursuant to DC Code §11416 (1981).

Id.

⁶ D.C. Code § 1-1001.16(b); *See also* D.C. MUN. REGS. tit. 3, § 1001.3, which states:

(continued...)

In addition, D.C. Code § 1-204.101(b) imposes a separate limitation on the proper subject matter of a referendum, stating:

The term "referendum" means the process by which the registered qualified electors of the District of Columbia may suspend acts of the Council of the District of Columbia (*except emergency acts, acts levying taxes, or acts appropriating funds for the general operation budget*) until such acts have been presented to the registered qualified electors of the District of Columbia for their approval or rejection.⁷

While the operative phrases "acts levying taxes, or acts appropriating funds" appear similar to the provision, cited above, prohibiting referenda and initiatives from negating or limiting an act of the Council enacted pursuant to § 466 of the District of

Following publication of the "Notice of Public Hearing: Receipt and Intent to Review" in the DC Register, the Board, at a public hearing, shall determine whether to approve the measure as proper subject matter for an initiative or referendum measure, or to reject it based on the following reasons:

- a. The measure presented is not a proper subject for an initiative or referendum under Title IV of the Self Government Act;
- b. The statement of organization and the report(s) of receipts and expenditures have not been filed with the Office of Campaign Finance;
- c. The form of the measure does not comply with the requirements set forth in §1001.1;
- d. The measure authorizes or would have the effect of authorizing discrimination prohibited under the Human Rights Act of 1977; or
- e. The measure would negate or limit an act of the Council enacted pursuant to §446 of the District of Columbia Self Government and Governmental Reorganization Act.

⁷ D.C. MUN. REGS. tit. 3, § 1-204.101(b) (emphasis added). It is also important to note that initiatives are also subject to the prohibition against acts appropriating funds for the general operation budget. Accordingly cases addressing initiatives subject to this prohibition are equally relevant to referenda.

Columbia Self Government and Governmental Reorganization Act, *see* D.C. MUN. REGS. tit. 3, § 1001.3(e), the courts of the District of Columbia have interpreted the prohibitions in D.C. Code § 1-204.101 broadly and have consistently held that they prohibit initiatives and referenda such as the one currently pending before the Board. Specifically, the District of Columbia Court of Appeals has interpreted the “laws appropriating funds” limitation “very broadly, holding that it ‘extend[s] ... to the full measure of the Council’s role in the District’s budget process” *Dorsey v. District of Columbia Bd. of Elections & Ethics*, 648 A.2d 675, 677 (D.C. 1994) (quoting *Hessey v. District of Columbia Bd. of Elections & Ethics*, 601 A.2d 3, 20 (D.C. 1991)).

In *Dorsey*, the District of Columbia Court of Appeals determined that an initiative seeking to prohibit the D.C. government from “booting” vehicles and from collecting various motor vehicle impoundment fines violated the statutory prohibition against using the referendum and initiative process to propose (or invalidate) “laws appropriating funds.” The *Dorsey* court explained the District’s budgetary process thusly:

As part of the annual budgetary process, for example, the Mayor must submit to the Council “a report on all available revenues,” and the Mayor and Council in turn must “identify expenses and revenues, and ... propose a balanced budget for Congressional approval....” Through the “laws appropriating funds” limitation, Congress and the Council ensured that these “matters relating to the local budget process would remain within the control of the Mayor and Council, and that initiatives [would] not create deficits or interfere with the locally elected officials’ decisions about how District government revenues should be spent.”

Id. at 677 (internal citations omitted). Accordingly, *all* matters relating to the budget process, including the identification of *both* expenses and revenues, cannot be subject to either the initiative or referendum process. Further, the court stated:

That these funds are only a tiny part of the District’s annual revenue projections is beside the point; the electorate may no more eliminate them by initiative than it could abolish or lower the sales tax or local income tax—matters integral to the “power of the purse” which Congress and the Council reserved exclusively to the elected government.

Id. (internal citations omitted). Thus, the amount of the revenues or expenses at issue is not relevant. Any act that would have even a marginal effect on revenues or expenses “relates to” the budgetary process and cannot be properly addressed through the referendum or initiative process.

The D.C. Superior Court further elucidated the proper approach to reviewing initiatives and referenda against the “laws appropriating funds” standard. In *Restaurant Ass’n of Metropolitan Washington v. District of Columbia Bd. of Elections & Ethics*, 2004 WL 2102203 (D.C. Super. 2004), the Superior Court of the District of Columbia reviewed

the validity of a proposed ballot initiative seeking to prohibit smoking in all public places. The court determined that this initiative violated the subject matter limitation on laws appropriating funds. The court stated “[t]he word ‘appropriations’ when used in connection with the functions of the Mayor and the Council in the District’s budget process refers to the discretionary process by which *revenues* are identified and allocated among competing programs and activities.” *Id.* at 3 (emphasis added). The court determined that it was irrelevant that the initiative appeared “neutral on its face” as a revenue measure and instead examined the ultimate effect that the initiative would have on the Council’s ability “to identify tax revenues ... when preparing the Budget Request Act.” *Id.* at 4. Because the initiative, if approved, would have affected tax revenues raised from restaurants, the resulting fiscal impact in the District was found to impermissibly interfere with the Council’s ability to rely upon its tax revenue projections. *Id.* at 4. Moreover, the Court noted in particular that it was irrelevant if the initiative was likely to result in increased or decreased tax revenues and that, regardless, “the initiative would still be considered a ‘law appropriating funds’ according to *Hessey*.” *Id.* at 4.

Accordingly, the relevant case law makes a number of significant points relevant to the matter now before the Board. First, it is well-established that “laws appropriating funds” cannot properly be enacted via referendum, and the prohibition must be read broadly. Second, a proposed referendum will qualify as a “law appropriating funds” if it *relates to revenues or expenses* of the District government. Third, it is irrelevant if such a matter appears on its face to be revenue neutral; courts and the Board must look to the practical effect of such a law. Finally, the amount of the revenues involved and whether revenues will increase or decrease under the proposal is irrelevant; initiatives and referenda cannot escape operation of the “laws appropriating funds” prohibition based on these outcomes.

The proposed referendum violates the “laws appropriating funds” prohibition because the Jury and Marriage Amendment Act of 2009, which it seeks to overturn, is an act that relates to the local budgetary process. Therefore, it is reserved to the D.C. Council and the Mayor of the District to address policies related to marriage recognition. Indeed, numerous scholarly articles explain the significant tax revenue implications of recognizing same-sex marriages. *See, e.g.,* Christopher Ramos; M.V. Lee Badgett; Brad Sears, *The Economic Impact of Extending Marriage to Same-Sex Couples in the District of Columbia*, THE WILLIAMS INSTITUTE (2009); M. V. Lee Badgett, Ph.D., R. Bradley Sears, Deborah Ho, *Supporting Families, Saving Funds: An Economic Analysis of Equality for Same-Sex Couples in New Jersey*, 4 RUTGERS J. L. & PUB. POL’Y 8 (2006); William P. Kratzke, *The Defense of Marriage Act (DOMA) Is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399 (2005); Jonathan Brophy, *Death is Certain, Are Taxes? Another Argument for Equality for Same-Sex Couples Under the Code*, 34 SW. U. L. REV. 635 (2005); M.V. Lee Badgett, R. Bradley Sears, *Putting a Price on Equality? The Impact of Same-Sex Marriage on California’s Budget*, 16 STAN. L. & POL’Y REV. 197 (2005); The Association of the Bar of the City of New York, *Report on Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 70 (2004); Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995). Each of these analyses addresses different issues and circumstances relevant to various states; however, each concludes