DISTRICT OF COLUMBIA
BOARD OF ELECTIONS

In Re: "Local Budget Autonomy Emergency Amendment Act of 2012"	)	**Administrative Hearing No. 13-01 Re: Formulation of Proposed Charter Amendment Ballot Language**

BEFORE

Deborah Nichols, Chair
Devarieste Curry, Member
Stephen Danzansky, Member

Members Curry and Danzansky issue a Separate Concurring Opinion.

MEMORANDUM OPINION AND ORDER

On December 20, 2012, Phil Mendelson, Chairman of the Council of the District of Columbia ("the Council") transmitted to the Board a proposed Charter Amendment titled the "Local Budget Autonomy Emergency Act of 2012" ("the Charter Amendment").[1] On the same day, the Board submitted a "Notice of Public Hearing: Receipt and Intent to Formulate Proposed Ballot Language" ("the Notice") to the D.C. Register.[2] The Notice, which was published in the D.C. Register on December 28, 2012, indicated that the Board would meet to formulate the Charter Amendment ballot language (*i.e.*, short title and summary statement) on January 7, 2013.[3]

On December 21, 2012, the Board sent correspondence to each Councilmember, and to Mr. Irvin Nathan, Esq., the Attorney General for the District of Columbia ("the Attorney

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1 *See* D.C. MUN. REGS. tit. 3, §§ 1801.1, 1801.2.
2 *See* D.C. MUN. REGS. tit. 3, § 1801.6.
3 *See* D.C. MUN. REGS. tit. 3, § 1802.1.

General"), inviting them to participate in the hearing and to offer suggested language for the ballot language formulations. In response, the Attorney General and Mr. David Zvenyach, Esq., the General Counsel for the Council ("the General Counsel"), sent statements to the Board in which they offered suggestions as to ballot language for the Charter Amendment, and their opinions as to both the legality of the Charter Amendment and the Board's authority to assess the legality, validity, and appropriateness of the Charter Amendment.

During the public hearing on January 7, 2013, Council Chairman Phil Mendelson appeared and testified concerning the history of the Charter Amendment, and discussed testimony presented before the Council by proponents of the measure. The Attorney General and the General Counsel testified in accordance with the statements they had provided to the Board in advance of the hearing. Specifically, the General Counsel argued that:

1) the Charter Amendment is a lawful exercise of the Council's legislative powers, and is consistent with the District of Columbia Self-Government and Governmental Reorganization Act ("Home Rule Act")[4], and;

2) the Board lacks jurisdiction to evaluate whether a charter amendment is a proper subject for the ballot.

In response, the Attorney General asserted that:

1) the Charter Amendment violates Title VI of the Home Rule Act[5] by impermissibly exempting the expenditure of local funds from the federal appropriations process, depriving federal entities, including the Congress and the President, of their established roles in the District's budget process;

2) section 303(d)[6] of the Home Rule Act, which provides that the charter amending process "may not be used to enact any law or affect any law with respect to which the Council may not enact any act, resolution, or rule under the limitations specified in [Title VI of the Home Rule Act,]" precludes the Board from accepting the Charter Amendment, and;

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[4] P.L. 93-198, 87 Stat. 801.

[5] Title VI of the Home Rule Act is titled "Reservation of Congressional Authority," and it addresses the federal government's reservation of constitutional authority over the District, limitations on the Council, the budget process, limitations on borrowing and spending, and Congressional action on certain District matters.

[6] D.C. Official Code § 1-203.03(d) (2006 Repl.).

3) the Board has a duty to prevent patently illegal Charter Amendment measures from being placed on the ballot.

Based upon the testimony presented during the public hearing, and the Board's analysis of the issues raised, it is hereby

ORDERED that the Charter Amendment be accepted, and that the ballot language for the same is formulated as follows:

SHORT TITLE

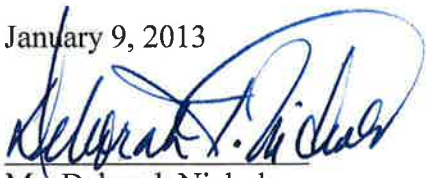
"Charter Amendment: Local Budget Autonomy"

SUMMARY STATEMENT

Currently, the Home Rule Act requires affirmative Congressional action with respect to the entire District budget (both federal and local funds).

This Charter Amendment, if ratified, enacted, and upheld, would permit the Council to adopt the annual local budget for the District of Columbia government; would permit the District to spend local funds in accordance with each Council approved budget act; and would permit the Council to establish the District's fiscal year.

January 9, 2013



Ms. Deborah Nichols
Chair, Board of Elections

Separate Concurring Opinion of Board Members Devarieste Curry and Stephen Danzansky

While we concur in the result ultimately reached in this matter, *i.e.*, the acceptance of the Charter Amendment, we write separately to express our fundamental disagreement with the General Counsel's assertion that there is no role for the Board to play in the charter amending process beyond executing the purely ministerial tasks required to ensure that charter amendment acts passed by the Council (and their accompanying ballot language formulations) are placed before the District's electorate. In this respect, we depart from a previous Board's position, set

forth in *In re School Governance Charter Amendment Act of 2000*[7], that the Board's "sole function, in the charter amendment process, is to place whatever act the Council adopts, which purportedly amends the Home Rule Act, before the voters for ratification and report those results to Congress."

We are convinced that, as the independent agency charged with insuring the integrity of the election administration process, the Board has an obligation (and the legal authority to support a decision) not to use the charter amendment process to place a patently illegal measure on the ballot. We are persuaded by, among other authority, *Mayers v. Ridley* [8], cited by the Attorney General, that the Board's role in the charter amending process is more than ministerial; that we must make independent legal judgments to insure that the process we administer is not used to facilitate the placement of patently illegal measures before the District's electorate. The General Counsel recognized as much when he stated, unprompted, that the Board could refuse to place a measure on the ballot if the Board believed there was no reasonable basis to determine that the measure was lawful.

While both parties pointed to section 303(d) of the Home Rule Act to support their respective position as to the authority of the Board's role in the charter amending process, neither side could cite case law or legislative history to illuminate its position or support its interpretation. The Board's own research into the legislative history of that section indicates that it does not refer to the Board's role in the charter amending process. Rather, section 303(d) was drafted and included to address the concern that a then-existing provision in the Home Rule Act which allowed the District's electorate to amend the Home Rule Act by initiative would be used to enable the electorate to do by initiative what the Council could not do by ordinary legislation:

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7 Board Opinion No. 00-036A, May 11, 2000.

8 465 F.2d 630 (1972).

change Title VI of the Home Rule Act. Section 303(d), then, does not require the Board to reject charter amendments it deems unlawful, but rather is actually an outdated provision rendered inapplicable by the deletion of the provision that would have allowed charter amendments via an initiative process.[9]

As for the validity of the Charter Amendment itself, the Board was divided on that question. Despite the extremely compelling arguments made by the Attorney General regarding the illegality of the Council's action, a majority of the Board did not think that the Charter Amendment is patently illegal. Indeed, the Attorney General himself recognized (at least implicitly) the nuances in the law, and the merit of some aspects of the General Counsel's arguments. Because the majority did not find the Charter Amendment to be patently illegal, we find no basis upon which to reject it.

Ms. Devarieste Curry
Member, Board of Elections

Mr. Stephen Danzansky
Member, Board of Elections

[9] The same is true of the provision in section 303(c) of the Home Rule Act, which discusses "the distribution and signing of petitions … for ratifying amendments to [the District Charter]."