GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

January 4, 2013

Via Hand Delivery and Email

Kenneth J. McGhie, Esq.
General Counsel
District of Columbia Board of Elections
441 4th Street, N.W., Suite 250
Washington, D.C. 20001

Dear Mr. McGhie:

Thank you for your letter providing the Notice of Public Hearing relating to the formulation of ballot language for the proposed Charter amendment, the "Local Budget Autonomy Emergency Amendment Act of 2012" (amendment), and inviting the Office of the Attorney General (OAG) to comment on the proposed amendment.

Since the amendment was introduced in the Council, the OAG, including experienced career lawyers, has evaluated its legal strengths and weaknesses, as well as its potential consequences. The amendment is as a matter of policy appealing in that it attempts to secure budget autonomy for the District, allowing the District government to control its expenditure of locally collected revenues, a goal that this Administration has pursued and continues to pursue in Congress, and that this office fully endorses. However, I respond to your notice not as a spokesman for the Administration, but as an independent Attorney General charged with the responsibility of attempting to ensure that the District adheres to the rule of law, including complying with the provisions of the Home Rule Act, passed by Congress, that serve as the equivalent of the District's state-level Constitution.

In that capacity, the OAG has serious reservations about the legality of the amendment, whether it would be sustained if challenged in court and, most pertinently, whether the Board has the authority to place this amendment on a ballot referendum in light of the clear prohibition under Section 303(d) of the District of Columbia Home Rule Act ("Home Rule Act"), approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Code § 1-203.03(d) (2012 Supp.). That provision of governing law provides in relevant part that "the [Charter] amending procedure … may not be used to enact any law or affect any law with respect to which the Council may not enact… under the limitations specified in §§ 1-206.01 to 1-206.03." (Emphasis added). The statute is phrased in clear, mandatory terms: a proposed amendment is precluded by law from

going on the ballot through the Charter-amending procedure of Section 303 if the proposed amendment would "enact any law or affect any law with respect to which the Council may not enact… under the limitations specified in" Sections 206.01-03. For reasons we detail below, it is precisely these limitations, reserving to Congress, among other things, the authority to change the laws governing the role played by Congress and the President in the District's budget that, in the considered judgment of this office, preclude using the charter amendment procedures, including the placement on a ballot for the electorate, for the proposed amendment. Likewise, it our view that under those express limitations, Congress or a court reviewing the merits of the legal issue would find the amendment to be outside the scope of the Charter amending process in section 303, and also contrary to other federal laws, those found in Title 31 of the U.S. Code.

I understand that the Board does not usually make such an analysis when the proposed amendment results from Council action. However, the very statutory provision that empowers the Board to participate in the Charter amending procedure, D.C. Code § 1-203.03, contains the express limits of subpart (d), and my lawyers and I think it clear that the Board has such authority under the law to engage in independent review as to whether subpart (d) permits use of the Charter-amending process.[1] For these reasons, I respectfully suggest that the Board of Elections has the legal obligation to make an independent assessment of whether it would be lawful under D.C. Code Section 203.03(d) for the Board to use the Charter-amending process for the amendment, and to act accordingly after that review to ensure compliance with Section 203.03(d).

Discussion

The amendment, if it became law, would be a seachange in the District's budget process in two key ways. First, it would authorize a separate path for the appropriation of the District's local budget -- *i.e.*, revenues raised from District taxes, fees, and fines and those received under federal grant programs applicable nationally -- from the path for the federal portion -- *i.e.*, the federal payment to the District. The federal portion would continue to follow the path currently set forth in the District's Charter -- passed by Congress through its well-established authority to regulate District affairs under Article I of the U.S. Constitution -- that requires an affirmative appropriation by Congress and Presidential approval before any of it can be lawfully spent by the District Government. However, for the local portion, the rules would change. Rather than requiring an active, congressional appropriation and Presidential signature, the local portion would take effect after being passed by District lawmakers and then laying before Congress for *passive* review during the 30 legislative day period unless Congress passes, and the President approves, a Joint Resolution disapproving the act of the Council. Second, it would provide for a change in the dates of the fiscal year for the District of Columbia Government -- from its current schedule, October 1-September 30, which currently tracks the schedule of the federal budget, to run from July 1 through June 30 on its own track independent of the established federal schedule and process.

---

[1] It may be that such review has not been necessary in the past because the Council-proposed amendments have not previously raised the clear specter of violating subsection (d).

Rather than waiting for Congress to make the requested (and in our view highly justified) relevant amendments to the Home Rule Act, the Council has attempted to rely on the Charter amendment process in section 303 in the Home Rule Act (D.C. Code § 1-203.03) to accomplish the goal of budget autonomy. Section 303(a) provides that, with important exceptions, that the Charter "may be amended by an act passed by the Council and ratified by a majority of the registered qualified electors of the District voting in the referendum held for such ratification." Such an amendment must be submitted to Congress for a 35-calendar-day period of passive review.

Although the Charter amendment process is available to make a variety of changes to the District Charter, Section 303 itself indicates that it cannot be used to exempt the expenditure of local funds from the federal appropriations process. As noted, Section 303(d), codified in D.C. Code § 1-203.03(d), specifically provides that the amendment procedure authorized under section 303(a) "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 sections 601, 602, and 603." These are the provisions codified in Sections 1-206.01 through 1-206.03.[2] Sections 602 and 603 of the Home Rule Act (D.C. Code §§ 1-206.02 and 1-206.03) contain three different, independent bases for concluding that the ratification procedure established under section 303(a) may not be used to amend sections 441 and 446 of the Home Rule Act (D.C. Code §§ 1-204.41 and 1-204.46) in the manner reflected in the amendment, and thus does not permit the amendment. Read together, these provisions demonstrate that Congress, in passing the Home Rule Act and allowing the District to make certain amendments to it, evidenced its intent that the District not be allowed to unilaterally deprive the Congress or the President of their established active roles in appropriating the funds for the District's budget.

First, Section 602(a)(3) of the Home Rule Act, codified at D.C. Code § 1-206(3), provides that the Council has no authority to "enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District." Removing the expenditure of local funds from the federal appropriations process would affect the functions of the United States by preventing Congress, with Presidential approval, from appropriating local District funds. It would also have an application beyond District matters by limiting the participation of the federal government in the District's budget process. In addition, changing the District's fiscal year would affect the functions of the United States and extend beyond the District's local affairs

---

[2] There are some sections of the Charter identified in Section 303(a) of the HRA by section number that Congress provided separate and explicit restrictions on: 401(a) (addressing the establishment of the Council), 421(a) (addressing the Mayor), and Part C (addressing the Judiciary). Some have suggested that since portions of the Charter dealing with the budget -- sections 441 and 446 -- are not listed there, Congress must not have objected to their being amended through the referendum process. This approach is not persuasive and fails to recognize that Congress created a separate and specific set of prohibitions in Section 303(d), which governs the analysis here, as discussed.

by making it difficult, if not impossible, for Congress to review the District's finances during its regular budget cycle.

Second, the amendment would violate section 603(a) of the Home Rule Act (D.C. Official Code § 1-206.03(a)). This section states that:

> Nothing in this act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government.

We think it plain that this language is a "limitation" under Section 303(d). Some have argued that Section 603(a) is merely a rule of construction and not a limitation. However, this interpretation is contrary to a common-sense reading of these provisions as limitations on the District Government's authority under the Home Rule Act. The conclusion that Congress did not intend such a strict reading of the word "limitations" is supported by Congress's explicit reference in § 303(d) to "limitations" found in § 601, D.C. Code § 1-206.01, which contains in it no express limitation on the Council. Congress would not have done so if it meant in § 303(d) to refer only to provisions that are explicitly phrased as "thou shall not." Further, the HRA's legislative history shows that Congress intended to preserve the congressional appropriation process for the District's budget. For example, the Conference Report explained that the bill "required . . . that the Council after public hearings, approve a balanced budget and submit same to the President for transmission to the Congress, leaving Congressional appropriations and reprogramming procedures as presently existing. . . . .The Conference substitute . . . adopts essentially the House provisions, preserving the Congressional appropriations provisions of existing law.. . . ." H.R. Rep. No. 93-703, 93d Cong., 1st Sess. 78 (1973). Our lawyers have looked for and have uncovered no indication in the HRA's legislative history that any member of Congress *ever* contemplated that the Charter-amending procedures could be used to affect Congress's appropriation of the total budget of the District Government. This matters because changing the approval route for over half of the District budget is something significant enough that Congress would likely have mentioned it if this was authority it intended to confer.

This limitation in Section 603(a) would be violated by the amendment. The amendment's changes to sections 441 and 446 of the Home Rule Act would change the long-standing roles and procedures of the stated federal entities with respect to the District's "total budget."[3] Upon

---

[3] The "total budget" includes amounts derived from local taxes and fees and federal grants and payments. The Home Rule Act defines "budget" to mean "the entire request for appropriations and loan or spending authority for all activities of all agencies of the District financed from all existing or proposed resources and shall include both operating and capital expenditures." Section 103(15) of the Home Rule Act (D.C. Official Code § 1-201.03(15).

enactment, rather than being subject to the federal appropriations process, the District would establish its own budget for local funds, to be appropriated according to a different fiscal year, subject only to passive Congressional review. This would constitute a major change in the District's budget process that appears to directly contradict the prohibition in section 603(a).

Third and finally, section 603(e) of the Home Rule Act (D.C. Official Code § 1-206.03(e)) also may prohibit the use of the ratification process to accomplish the amendment's objectives. Section 603(e) states that "[n]othing in this act shall be construed as affecting the applicability to the District government of the provisions of §§ 1341, 1342, and 1349 to 1351 and subchapter II of Chapter 15 of Title 31, United States Code." For reasons similar to the discussion for 603(a), we think it clear that this provision is a "limitation" for subsection (d) purposes. And, upon consideration, we conclude that these federal provisions, which comprise the relevant provisions of the federal Anti-Deficiency Act, prohibit government employees, under pain of federal criminal penalties, from, among other things, obligating or expending funds in excess or in advance of an appropriation by Congress. The federal Anti-Deficiency Act is the principal mechanism the federal government uses to ensure District and federal agency compliance with federal appropriations law. Congress' inclusion of this provision in the Home Rule Act, and in the list of subject matters that are excluded from the ratification process, reflects Congress's intent that District spending be subject to the federal budget process.

We note also that in addition to potentially violating the provisions of the Home Rule Act, as discussed above, the amendment may also be viewed as separately violating two provisions of Title 31 of the U.S. Code – (i) the anti-deficiency Act and (ii) the provisions in 31 U.S.C. § 1101, *et seq.* governing the budget approval process.

The federal Anti-Deficiency Act independently applies to the District by its own terms. *See* 31 U.S.C. § 1341. This section prohibits District government employees from obligating or expending funds that have not been congressionally appropriated.[4] Even if sections 441 and 446 of the Home Rule Act were amended to exclude local funds from the appropriations requirement, the federal Anti-Deficiency Act would still apply. Thus, a court could find that District employees are subject to federal prosecution or civil liability under the Anti-Deficiency Act for spending money in the course of their regular duties.

The amendment would also violate Subtitle II of Title 31 of the United States Code, 31 U.S.C. § 1101 *et seq*., which sets out the procedures for the approval of the budgets of all agencies, which, under 31 U.S.C. § 1101(1), includes the District government. Under 31 U.S.C. § 1108, each agency, including the District, must submit appropriations requests by the date established by the President, in order to allow these requests to be included in the President's annual budget

[4] It is not persuasive to argue that an appropriation by the Council would be sufficient to satisfy the federal Anti-Deficiency Act. Under federal law, the District is considered a federal agency for budget purposes, and federal appropriations law, including the federal appropriations process and the enforcement provisions contained in the Anti-Deficiency Act, apply to it. 31 U.S.C. § 1101(1).

submission to Congress. If the District were to fail to comply with these requirements, it is unlikely that the amendment would be found sufficient to justify these deviations from federal law.

Conclusion

For the reasons discussed, we respectfully submit that the Board should make an independent legal assessment to determine whether it is lawful to permit the proposed amendment to be placed on the ballot under D.C. Code § 1-203.03(d), and to consider the detailed analysis we have provided showing why that provision of law bars the use of the Charter-amending procedure for the amendment transmitted to the Board by the Council.

In the alternative, if the Board decides to forego an independent legal analysis or otherwise concludes that it may lawfully place the amendment on the ballot, we suggest that to convey accurately the substance and effect of the proposed amendment to the voters, the summary statement must do more than simply state that, if the voters approve the amendment and it is not rejected by Congress, it will allow the District to appropriate its local budget and change the date of its fiscal year from October 1 – September 30 to July 1 – June 30. It should also convey that, because serious legal concerns have been raised about the validity of the amendment, its passage could result in Congressional action disapproving the amendment or in extended litigation and uncertainty about the validity of the District's budget, and could jeopardize the legal status of individual employees of the District government who expend locally raised government funds in accordance with the amendment but without Congressional authorization.

I hope these comments are useful to you and the Board's Commissioners. I intend to attend and testify at the Board's open hearing on the amendment scheduled for Monday, January 7, and my staff and I would be happy to discuss this matter further with you at your convenience.

Sincerely,

Irvin B. Nathan
Attorney General for the District of Columbia

cc: All Members of the Council of the District of Columbia