On January 7, 2013, the District of Columbia Board of Elections is scheduled to hold a hearing relating to the formulation of ballot language for the proposed Charter amendment, the “Local Budget Autonomy Emergency Amendment Act of 2012.” On January 4, 2013, Irvin B. Nathan, Attorney General for the District of Columbia, sent a letter to the Board of Election’s general counsel suggesting that the Board has the legal obligation to undertake an independent assessment of the legality of the proposed Charter amendment. Alternatively, the Attorney General suggested that the Board convey in the ballot language legal concerns about the Act’s validity.

This memorandum analyzes whether the Board has the authority to undertake the type of analysis suggested by the Attorney General. As explained below, the pertinent D.C. Code sections, Board regulations, and Board precedent make clear that the Board has no authority to engage in this independent assessment. They also make clear that the Board cannot adopt the ballot language suggested by the Attorney General.

I. Background

On December 18, 2012, the Council of the District of Columbia unanimously passed Bill 19-993, the Local Budget Autonomy Act of 2012. Mayor Vincent C. Gray signed the Act into law on December 20, 2012. The Act proposes to amend the District’s Charter so that the Council could
approve the District’s budget in the same manner as it considers all other legislation: two readings and a 30-day congressional review period. No longer would the District’s budget process be subject to the congressional appropriations process.

The Act was passed pursuant to the Council’s authority under D.C. Code § 1-203.03 (Section 303 of the Home Rule Act). Section 1-203.03 authorizes the Council to propose amendments to the District Charter. Once the Council acts, the proposed amendment is then submitted to District voters who vote on it in a referendum. If ratified, the amendment takes effect after a 35-day congressional review period. Under § 1-203.03, the Board of Elections is tasked with prescribing rules “with respect to . . . the holding of elections for ratifying [proposed Charter] amendments.”

Under Section 1802.2 of the Board of Election’s prescribed rules, the Board is responsible for formulating a short title and summary statement which shall “accurately and impartially reflect the meaning and intent of the proposed Charter amendment and shall not intentionally create prejudice for or against the measure.”

On January 7, 2012, the Board is scheduled to hold a hearing regarding the formulation of a short title and summary statement for the Local Budget Autonomy Act.

As noted above, on January 4, 2012, the District’s Attorney General, Irvin Nathan, sent a letter to the Board’s general counsel advising that the proposed Charter Amendment violates the Home Rule Act and suggesting that the Board undertake an independent assessment of the legality of the proposed Charter amendment before placing it on the ballot. The Attorney General’s letter further suggests that, if the Board agrees with the Attorney General that the proposed amendment violates the Home Rule Act, the Board should “act accordingly after that review to ensure compliance with Section 203.03(d).”

II. Legal Analysis

The Board has no authority to conduct an independent legal assessment of the legality of the proposed amendment for at least three reasons. First, the Board reviewed this precise issue in 2000 and concluded it has no such authority. Second, the Board’s regulations on the Charter amendment process do not recognize any such Board authority – in fact, those regulations make clear that the Board must follow particular procedures and must put the amendment on the ballot. Third, other provisions of the D.C. Code related to voter-driven initiatives and referendums demonstrate that, while the Board has authority to reject certain voter petitions, no such authority exists for the Board to question the legitimacy of a Council-passed proposed Charter amendment.

1 D.C. Mun. Regs. Tit. 3, § 1802.2.
A. The Board’s Precedent Establishes That It Cannot Undertake an Independent Assessment of a Proposed Charter Amendment.

The Board’s own precedent establishes that it has no authority to undertake an independent legal assessment of a proposed Charter amendment. Specifically, in 2000, a District resident filed a challenge to the Board’s formulated ballot language to amend portions of the Charter related to school governance. The resident argued that the D.C. Council violated the Home Rule Act by not reading the proposed act twice in substantially the same form and that the amendment was therefore improper.

Citing Section 303(c) of the Home Rule Act – the Home Rule Act section that outlines the Board’s authority regarding Charter amendments – the Board concluded it did not have the authority to question the D.C. Council’s actions. The Board’s own words say it best:

Nothing in section 303 even remotely gives the Board the authority to look behind the Council’s actions to determine if they inappropriately exceeded their legislative authority. 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.

In Re: “The School Governance Charter Amendment Act of 2000,” Docket No. 00-036A (Board of Election and Ethics Memorandum Opinion and Order) (May 5, 2000). The Board went on to say that “unless instructed otherwise by an appropriate court—it must accept the Council’s act as valid.” Id.²

Accordingly, the Board would have to ignore or repudiate this decision to find that it has the authority to undertake an independent assessment of a proposed Charter amendment. The Attorney General’s letter does not explain why the Board should disregard its own precedent (indeed, the letter does not even mention this decision).

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² Attached to this memorandum is a copy of the Board’s opinion.

D.C. Code § 1-203.03 provides:

The Board of Elections and Ethics shall prescribe such rules as are necessary with respect to the distribution and signing of petition and holding of elections for ratifying amendments of this Act [District Charter] according to the procedures specified in subsection (a).

The regulations the Board promulgated in accordance with § 1-203.03 are detailed and specific. These regulations outline the Board’s procedures for handling the mechanics of the ballot process, such as the formulation of a short title and summary statement and setting a date for the election. Nowhere, though, do the regulations mention any authority to undertake an independent legal assessment of a Council-passed proposed Charter amendment. Instead, the regulations repeatedly use the word “shall” when describing what the Board must do after the D.C. Council passes a charter amendment—a word choice confirming the Board’s understanding that it has no discretion to question the legitimacy of a Council-passed proposed Charter amendment. For example, section 1801.3 of the Board’s regulations states that, if the D.C. Council passes an Act that proposes amending the Charter in multiple ways, each amendment “shall be identified as a proposed Charter amendment and subjected to a separate referendum.”

Except in one specified instance—which solely relates to the timing of the election—the Board’s regulations give the Board no discretion regarding the placement of a proposed Charter amendment on the ballot. Indeed, that one instance is the exception that proves the rule—that Congress did not intend the Board to have discretion to refuse to place a Council-passed proposed Charter amendment on the ballot.


Our conclusion that the Board has no authority to undertake an independent assessment of a proposed Charter amendment is reinforced by comparing D.C. Code § 1-203.03, which outlines the process for Charter amendments, with D.C. Code § 1-1001.16, which sets out the process for the submission of a voter-initiated initiative or referendum. Under the voter-driven approach, the Board has the authority to “refuse to accept the measure if the Board finds that it is not a proper

3 D.C. Mun. Regs. tit. 3, § 1801.03 (emphasis added).
subject.”

Section 1-1001.16 goes on to list various improper subjects and courts have affirmed the Board’s authority to place a voter-driven initiative or referendum on the ballot.

Applying well-established statutory interpretation principles, the inclusion of express language in the Code provisions authorizing voter-based initiatives and referenda and the absence of any comparable language in the Code provisions authorizing Charter amendments further demonstrates that the Board has no authority to question the legitimacy of a Council-passed proposed Charter amendment.

Indeed, the District of Columbia Court of Appeals relied on this distinction in a case concerning the Board’s authority to reject proposed initiatives under D.C. Code §1-1001.16. Specifically, the Court of Appeals contrasted the Board’s broad authority under D.C. Code §1-1001.16 to refuse to accept a measure if it is “not a proper subject” with the Board’s narrow authority in §1-203.03 “to enact merely procedural rules” for placing proposed Charter amendments on the ballot. The Court of Appeals’ statement that the Board’s authority under §1-203.03 is limited to enacting procedural rules further confirms that the Board has no authority to undertake an independent legal assessment of a proposed Charter amendment.

D. The Attorney General Incorrectly Asserts that D.C. Code §1-203.03(d) Authorizes the Board to Undertake an Independent Assessment of a Proposed Charter Amendment.

In his January 4th letter to the Board’s general counsel, the Attorney General asserts that D.C. Code §1-203.03(d) authorizes the Board to undertake an independent legal assessment of proposed Charter amendments. Section 1-203.03(d) provides 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.” According to the Attorney General’s letter, the proposed Charter amendment violates §1-203.03(d) and, therefore, the Board has the authority to undertake an independent review of its propriety under this subsection.

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4 D.C. Code § 1-1001.16(b)(1).

5 See e.g., Hessey v. Dist. of Columbia Bd. of Elections & Ethics, 601 A.2d 3, 14 (D.C. 1991) (citing D.C. Code § 1-1001.16(b)(1) for the proposition that the Board of Elections can refuse to accept a proposed initiative in the voter proposed initiative context if the initiative is not a proper subject).

6 See Russello v. United States, 464 U.S. 16, 23 (1983) (stating that, “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”).


8 Id. (emphasis added).
Section 1-203.03(d) does not expressly authorize the Board to review the propriety of the Board’s actions. Thus, the Attorney General is contending that § 1-203.03(d) implicitly authorizes the Board to undertake the type of analysis ordinarily reserved for a court. And if the Board concludes that the Council has violated the Charter, the Attorney General further advises the Board that it can disregard a law passed by the Council and signed by the Mayor.

The Attorney General’s position is incorrect for several reasons. First, the Attorney General bases his conclusion on an isolated review of one subsection of § 1-203.03 (subsection (d)). But § 1-203.03(d) cannot be read in isolation; instead § 1-203.03 must be read as a whole. And when read as a whole, it is clear that the Board’s role in the Charter amendment process is outlined in § 1-203.03(c), which provides that the Board’s role is to administer elections for the ratification of amendments. The fact that Congress expressly outlined the Board’s role in subsection (c), but said nothing about the Board in subsection (d) strongly suggests that Congress did not intend to give the Board the authority to independently review the propriety of the Council’s actions in the Charter amendment process. It would be unusual, to say the least, for Congress to give the Board such substantial authority over the Council’s conduct via an implicit authorization.

Not surprisingly, the Board has never interpreted § 1-203.03(d) as giving it the authority to undertake an independent assessment of a proposed Charter amendment. As described above, the Board reviewed this precise issue in 2000 and determined that “[n]othing in section 303 even remotely gives the Board the authority to look behind the Council’s actions to determine if they inappropriately exceeded their legislative authority.” And the Board’s regulations make clear that it has, to date, understood that its role in the Charter amendment process is limited to the administration of elections – not engaging in the type of independent assessment that the Attorney General suggests. The Attorney General’s letter provides no compelling reason for the Board to depart from this position and undertake an unprecedented review of a proposed Charter amendment that was passed by the Council and signed by the Mayor.10

9 See, e.g., United Savings Assn. of Texas v. Timbers of Inwood Forest Assoc., 484 U.S. 365, 371 (1988) (explaining that every section of a statute must be read in connection with every other part of section so that it produces a harmonious whole).

10 While the Attorney General’s letter advises the Board that it has the authority to undertake an independent assessment of the proposed Charter amendment, the bulk of the Attorney General’s letter actually focuses on a peripheral issue – the merits of the underlying Charter amendment. It is beyond the scope of this memorandum to respond to the Attorney General’s arguments on the merits of the proposed amendment. But the authors note that the Attorney General’s views are inconsistent with the analysis of numerous legal experts who testified at the Council’s hearing on the proposed amendment. In addition, the authors submitted a legal memorandum to the Council during consideration of the proposed Charter amendment that addresses most of the issues the Attorney General raises regarding the merits of the amendment.
The Attorney General also advises that, if the Board disagrees with his position that it has the authority to undertake an independent assessment of the proposed Charter amendment, the Board should include in the summary statement warnings about the purported risks of approving the amendment. For example, the Attorney General suggests that the summary statement advise voters that passage of the amendment “could result in Congressional action disapproving the amendment or in extended litigation and uncertainty about the validity of the District’s budget.” But the Attorney General’s suggested language would plainly violate the Board’s requirements that summary statements “shall not intentionally create prejudice for or against the measure.” And the Attorney General’s letter does not explain how the Board could include such prejudicial language without violating this regulation.

**E. The Board Cannot Adopt the Ballot Language Suggested by the Attorney General Because It Would Create Prejudice Against the Measure.**

The Attorney General suggests that in the alternative, if the Board does decide to place the amendment on the ballot, it should include the Attorney General’s various legal concerns in the ballot language. Specifically, the Attorney General suggests that language note that there are legal concerns about the amendment’s validity, that the amendment’s passage could result in congressional disapproval or extended litigation, and that it could jeopardize D.C. government employees who expend funds in accordance with the amendment but without congressional authorization.

This suggested language is not consistent with the Board’s regulations and would likely result in an elector challenge that would delay certification. The Board must formulate ballot language that “shall accurately and impartially reflect the meaning and intent of the proposed Charter amendment and shall not intentionally create prejudice for or against the measure.” D.C. Mun. Regs. tit. 3, § 1802.2.

**III. Conclusion**

Contrary to the Attorney General’s advice in his January 4, 2012 letter to the Board of Election’s general counsel, the Board does not have the authority to undertake an independent assessment of a proposed Charter amendment. As described above, the D.C. Code does not give the Board such authority; the Board’s own regulations do not give it such authority; and the Board’s own precedent demonstrates it has no such authority.

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11 D.C. Mun. Regs. tit. 3, § 1802.2