

Councilmember Jack Evans

AN AMENDMENT

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

DATE: July 10, 2013

Offered By: Councilmember Jack Evans

Title: Bill 20-134, the "Elected Attorney General Implementation and Legal Service Establishment Amendment Act of 2013"

Version: ☐ Introduced
☐ Draft Committee Print (circulated July 2, 2013)
☐ Committee Print
☒ First Reading
☐ Amended First Reading
☐ Engrossed
☐ Enrolled
☐ Unidentified

A new section xx is added to read as follows:

"Sec. xx. Section 1-301.82(a) is amended to read as follows:

"§ 1-301.82. Appointment of the Attorney General

(a) Until such time as an Attorney General is elected under § 1-204.35, which time shall not be before January 1, 2018, the Attorney General for the District of Columbia shall be appointed by the Mayor with the advice and consent of the Council pursuant to § 1-523.01."

Rationale for amendment:

In light of the extraordinary procedural process that has resulted in the Attorney General bill being considered before the Council, and in view of the fact that no candidates have even declared an interest in the position, this amendment would ensure that there is sufficient time for deliberation among the Council and the people as to the appropriate role and responsibility of the Attorney General prior to the first election. My preference would be to simply postpone the election for two years rather than four years, but the Home Rule Act provides that the election must be concurrent with the Mayoral election.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



July 9, 2013

The Honorable Jack Evans
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 200004

Re: May the Council Postpone the Election of the Attorney General Past 2014?

Dear Councilmember Evans:

Following the recent markup of Bill 20-134, the Elected Attorney General Implementation and Legal Service Establishment Amendment Act of 2013, you have asked whether the Council may, by ordinary legislation, set an election date for the Attorney General that is later than 2014. This office concludes that a fair reading of the Charter amendment and the accompanying legislation permits such action. While the Council and the Mayor have the legal authority to pass such legislation, I do not recommend this course of action. The District's voters by a substantial margin supported the Charter amendment creating an elected Attorney General and did so with the justifiable expectation of voting for one in 2014 who would take office in January 2015 concurrent with the next Mayoral term. In my view, their expectation should be respected and fulfilled.

In 2010, the Council passed the Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2010, effective May 28, 2010 (D.C. Law 18-160; D.C. Official Code § 1-204.35(e) (2011 Supp.)) ("Act"). The Act passed the Council, and since it contained amendments to the Charter, it was submitted to popular referendum in accordance with the Home Rule Act. The charter amendment was overwhelmingly ratified by the electorate in the referendum. Section 201(b) of that Act, which adds a new subsection 435(e) to the Charter ("section 435(e)"), states that:

The first election for the position of Attorney General shall be after January 1, 2014.

The charter amendment does not say that the first election for this position must be in 2014; it says only that the election shall be after January 1, 2014. It is the legal opinion of this office that this language does not prohibit the Council from postponing the first Attorney General election past 2014.

201 . . .” (emphasis added). There would be no reason for this broad language if the first Attorney General election date were fixed rather than flexible.

The provision’s clear meaning is reinforced by section 131 of the Act, which is contained in Title I, part of the ordinary legislation. In section 131, the Council provided that the new elected Attorney General will be subject to the Elections Code, just as Councilmembers, Board of Education members, and other elected officials are. *See* D.C. Official Code § 1-1001.01 (2011 Supp.). The Elections Code regulates the elections process in great detail, including the qualifications of voters, *id.* § 1-1001.07, the timing of primary elections, *id.* § 1-1001.05(b)(1) (2012 Supp.), and the protection of polling places. *Id.* § 1-1001.05. It even sets election dates for some elected officials. *Id.* § 1-1001.10 (2011 Supp.). The fact that the Act placed the Attorney General under this same regulatory umbrella strongly implies that, except to the extent that the Charter amendments specifically provide otherwise, the Council has significant regulatory authority over the timing of the Attorney General’s election. In our view, although the Attorney General’s term plainly must coincide with a Mayor’s, the Council has a reasonable amount of discretion to determine, based on applicable local conditions, in what year the first Attorney General election will take place.

The Council has, on multiple prior occasions, exercised its power to amend or even repeal a popularly-passed initiative or referendum. For instance, in 1999, the public voted for the Legalization of Marijuana Treatment Initiative of 1998, effective February 25, 2010 (D.C. Law 13-315; D.C. Official Code § 7-1671.01 *et seq.* (2011 Supp.)). Soon thereafter, the Council adopted the Legalization of Marijuana for Medical Treatment Amendment Act of 2010, effective May 21, 2010 (D.C. Law 18-210; 57 DCR 4798), which made substantial changes to the initiative. In another example, in 1994, the electorate established term limits for the Mayor, the Council, and the Board of Education, through the initiative process, by amending section 8 of the Election Code (D.C. Official Code § 1-1001.08). *See* Term Limits Initiative of 1995, effective March 23, 1995 (D.C. Law 10-254; 42 DCR 758). Subsequently, in 2001, the Council repealed the initiative. *See* Consecutive Term Limitation Amendment Act of 2001, effective October 2, 2001 (D.C. Law 14-26; 48 DCR 6344). Indeed, at least one initiative has been amended by the Council on several occasions. The District of Columbia Statehood Constitutional Convention Initiative of 1979, effective March 10, 1981 (D.C. Law 3-171; D.C. Official Code § 1-121 *et seq.*), which has been amended on numerous occasions, was recently amended again by the District of Columbia Statehood Delegation Fund Commission Establishment and Tax Check-Off Amendment Act of 2004, effective March 16, 2005 (D.C. Law 15-226; 51 DCR 10539).

B. The Plain Meaning Is Entirely Sensible

We are aware of a legal memorandum, prepared on July 2, 2013 by the Deputy General Counsel of the Council of the District of Columbia, addressing the same issue and reaching the opposite conclusion. (“Council Memorandum”). Although the Council Memorandum acknowledges that section 435(e)’s language, read literally, is unambiguous, it states that this plain reading is incompatible with the Council’s intent, and concludes that the first election for Attorney General must be in 2014. For this conclusion, it cites no specific language of the Charter and cites no precedent or case law or canon of statutory construction. The only concern it articulates is that “[r]eading section 435 as authorizing the Council, within its discretion, to schedule the year of

ballot must take place between 8 and 10 days post-election); *id.* § 1-1163.27(a) (2011 Supp.) (a transition committee terminates no later than 45 days from the beginning of the new Mayor or Council Chairman's term). *See also id.* § 1-309.06(a) (2011 Supp.) (ANC elections will take place beginning in 1984); *id.* § 7-2071.03(b)(E)(3) (2006 Repl.) (Health Care Ombudsman Program's first evaluation will take place no later than 2 years after April 12, 2005). The fact that the Council did not establish an express deadline for the first Attorney General election strongly implies that it did not mean to create one. This is especially compelling since, only one day after Councilmember Mendelson's amendment was proposed, Councilmember Wells proposed an amendment that *did* contain a specific deadline. That amendment specified that the first election for that new position would take place "in 2014." No such language appears in section 435(e).

The legislative history of the Council-proposed Act is not clearly at odds with section 435(e)'s plain meaning. It therefore provides no grounds for reading that provision to mean anything other than what its words plainly say.

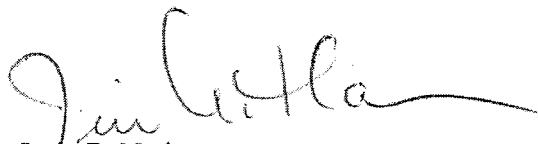
III. This Office Does Not Recommend Postponing the Election Date for the Attorney General Beyond 2014

For all of the reasons stated above, it is our legal opinion that the Council has the legal authority to set the Attorney General election after 2014 by passing legislation to this effect. We do not, however, recommend taking this action because we believe it would be inconsistent with the expressed will of the District's electorate. When the Elected Attorney General referendum was presented to the voters of the District, the Board of Elections and Ethics gave the electorate a brief summary that explained the Board's interpretation of this referendum. In this summary statement, the Board wrote that:

If voters approve of this amendment and the U.S. Congress does not reject the measure, residents of the District of Columbia would begin voting for the Attorney General in 2014.

District of Columbia Board of Elections and Ethics, *Notice of Publication for Proposed Charter Amendment IV: "The Elected Attorney General Charter Amendment."* This summary, though not compelled by the plain language of the referendum, strongly suggests that, when District citizens voted in favor of this referendum, they did so with the understanding and expectation of electing a new Attorney General in 2014. The Council should fully consider the consequences of dashing such a justifiable expectation.

Sincerely,



Irvin B. Nathan

Attorney General for the District of Columbia