



Agenda

CITY CLERK'S OFFICE

DATE 4/21/17 TIME 8:39
PREPARED BY Zach Shandler
APPROVED BY [Signature]

ETHICS & CAMPAIGN REVIEW BOARD

Monday, April 24, 2017

3:00 p.m.

City Council Chambers

1st Floor, City Hall

200 Lincoln Avenue

1. PROCEDURES

- a. Roll Call
- b. Approval of Agenda
- c. Approval of Minutes—April 19, 2017 (if available)

2. Discussion and Possible Action

- a) Case #2017-6. Complaint filed by Elaine Sullivan and Nancy Woodward Alleging Violation of City Charter Section 2.05; SFCC 1987, Section 9-1.2, 9-2.2A; “Intentionally Misleading and Misrepresenting to Voters the Details of the Proposed Soda Tax Ballot Initiative” against Better Way for Santa Fe and Pre-K.
--In Accordance with Section 6-16.4 SFCC 1987 “Determination of Legal Sufficiency; Setting a Hearing.” Consideration of Whether the Complaint Sets Forth Legally Sufficient Facts Which, if True, Show Probable Cause to Believe There Was a Violation. (The Board May Go Into Executive Session Under NMSA 1978, Section 10-15-1(H)(3) to Deliberate in Connection With an Administrative Adjudicatory Proceeding.)
 - 1) Action Regarding Whether the Complaint Sets Forth Legally Sufficient Facts Which, if True, Show Probable Cause to Believe There Was a Violation.
 - 2) Action on Any Next Steps as Permitted Under Section 6-16.
- b) Case #2017-4A/4B. Parties’ Presentations on the Merits of Complaint filed by Edward Stein Alleging Violation of SFCC 1987, Section 9-2 and 9-3; “Failure to Comply with City Ordinances Regarding Campaigning and Elections” against Rio Grande Foundation. (The Board May Go Into Executive Session Under NMSA 1978, Section 10-15-1(H)(3) to Deliberate in Connection With an Administrative Adjudicatory Proceeding.)
 - 1) Action on Determination on the Merits of Complaint.
 - 2) Action on Sanctions, if There Was a Violation, as Permitted Under Section 6-16.7 SFCC 1987.
 - 3) Action on Any Next Steps as Permitted Under Section 6-16
- c) Approval of Order. Case #2017-1A/1B. Complaint filed by Karen Heldmeyer Alleging Violation of SFCC 1987, Section 9-2.5(B); (D); “Disseminating Campaign Material Without Identifying Source” against Pre-K for Santa Fe.
- d) Tasks for Subcommittee on Issues Raised in 2017 Special Election and Preparation of 2018 Election

3. BOARD MATTERS
4. PUBLIC COMMENT
5. SCHEDULE NEXT MEETING (IF NEEDED)
6. ADJOURNMENT

PERSONS WITH DISABILITIES IN NEED OF ACCOMMODATIONS, CONTACT THE CITY CLERK'S OFFICE AT 955-6520, FIVE (5) WORKING DAYS PRIOR TO MEETING DATE.

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CITY OF SANTA FÉ
ETHICS AND CAMPAIGN REVIEW BOARD**
April 24, 2017

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**MINUTES OF THE
CITY OF SANTA FE
ETHICS AND CAMPAIGN REVIEW BOARD**

Monday, April 24, 2017

1. PROCEDURES

A. ROLL CALL

A special meeting of the City of Santa Fe Ethics and Campaign Review Board was called to order on the above date by Justin Miller, Chair, on this date at approximately 3:00 p.m. in the City Council Chambers, 1st floor, City Hall, 200 Lincoln Avenue, Santa Fe, New Mexico.

Roll call indicated the presence of a quorum as follows:

Members Present:

Justin Miller, Chair
Judith Amer
Paul Biderman
Ruth Kovnat
Tara Luján
Seth McMillan

Members Absent:

Kristina Martínez

Staff Present:

Zachary Shandler, Assistant City Attorney

Others Present:

Carl Boaz, Stenographer

B. APPROVAL OF THE AGENDA

Member Kovnat moved to approve the agenda as presented. Member McMillan seconded the motion and it passed by unanimous voice vote. Member Luján was not present for the vote.

C. APPROVAL OF MINUTES April 4, 2017

Mr. Shandler said the minutes of April 4, 2017 were not available.

Member Luján arrived at 3:08.

2. DISCUSSION AND POSSIBLE ACTION

Chair Miller explained to the audience that the Board has two complaints alleging violations of the campaign finance code. The meeting was scheduled on short notice because it was in the best interest of the public and the parties involved to resolve the issues as promptly as possible, especially in the context of an election in which voting is already taking place and election day is a little more than one week away.

He thanked the parties who were involved in the complaint for being willing to appear and providing the petition to the Board so expediently.

Chair Miller stated that in this complaint, the political action committee, *Better Way for Santa Fe and Pre-K* made inaccurate or false representations of fact in campaign communications. That complaint, as a matter of procedure, is at the first stage of the Board's addressing that complaint. And that is, for the board to determine whether the complaint is legally sufficient. The criteria for the Board's determination are four:

- 1) If the complaint, on its face alleges facts, which, if true, show probable cause to believe there was a violation;
- 2) If the complaint was filed within one year after the alleged violation was discovered or should have been discovered;
- 3) If the complaint is frivolous or intended solely to harass or intimidate; and,
- 4) If the Board lacks jurisdiction to adjudicate the complaint.

The initial determination doesn't address the merits of the complaint. It is merely to determine the legal sufficiency, and if the Board determines that the complaint is legally sufficient, the Board will schedule a hearing at a future date.

In addressing this complaint, the Board will hear from the complainant, the respondent, and any members of the public that wish to address the Board.

The second complaint, at the last meeting, the Board determined, and it is against the Rio Grande Foundation, the Board determined that complaint was legally sufficient and scheduled a hearing for today. At the hearing, the Board will hear opening statements from each party, the Complainant will then present his case. The Respondent will present its case. Each party will have the opportunity to present evidence in rebuttal. Each party will have the opportunity to present evidence in rebuttal. Each party will have the opportunity to make a closing argument. And the Board will deliberate and decide the complaint; and may enter into executive session to do so.

Then the Board will deliver its decision, including if there is a finding of a complaint and whether there is any sanction to be imposed.

One word on evidence - oral evidence may be taken. It will be under oath. Witnesses may be cross-examined. Redirect or recross will be permitted. And the evidentiary rules of civil procedure do not apply in this context. According to the Board's rules of practice and procedure, any evidence is admissible, if it is the sort of evidence on which responsible persons are accustomed to relying on in the conduct of serious affairs. That is the standard by which we will be considering evidence

Without further explanation or discussion, the Board moved to item 2a and noted that neither Ms. Sullivan nor Ms. Woodward, the complainants, were present.

a. Case #2017-6. Complaint filed by Elaine Sullivan and Nancy Woodward Alleging Violation of City Charter Section 2.05; SFCC 1987, Section 9.1.2, 9-2.2A; "Intentionally Misleading and Misrepresenting to Voters the Details of the Proposed Soda Tax Ballot Initiative" against Better Way for Santa Fe and Pre-K.

– In Accordance with Section 6-16.4 SFCC 1987 "Determination of Legal Sufficiency, Setting a Hearing." Consideration of Whether the Complaint Sets Forth Legally Sufficient Facts Which, if True, Show Probable Cause to Believe There Was a Violation. (The Board May Go into Executive Session Under NMSA 1978, Section 10-15-1(H)(3) to Deliberate in Connection With an Administrative Adjudicatory Proceeding.)

1) Action Regarding Whether the Complaint Sets Forth Legally Sufficient Fact Which, if True, Show Probable Cause to Believe There Was a Violation.

2) Action on Any Next Steps as Permitted Under Section 6-16.

The Respondent, Mr. Scott Fuqua was present. He said, "I believe you were provided with a letter, delivered today. I won't belabor the point of the letter but according to the four criteria the Chairman described earlier, this complaint fails on both the first and the fourth criteria. It is not that money was spent inappropriately nor a failure on the way it was raised or spent and there is no ethical deficiency. But it is a claim that information provided was factually inaccurate. Nothing in the code would permit this Board to sit in judgment of statements made in the course of a campaign. There is not much more to say about that point. Nothing says that political speech has to be accurate or whether a statement is true or false.

First, whether it is truthful or not, ferreting out what is true is notoriously difficult and the kind of cesspool that keeps entities from stepping into political discourse. Attack ads take a kernel of truth and build on it to make the most unflattering portrait possible. There is no arbiter to make that decision. That is the purpose of political speech. At the risk of aggrandizing that, this complaint is about political advocacy. The answer to information misleading is to combat that assertion. An article was published yesterday saying some may be misleading or objectively false. It has to do with proponents of the measure stating '1-cent tax' vs. '2 cents per ounce tax'." Even if there were some provision in the code, which there is not, the Board would still want to think carefully what its role is in the matter. It gets really murky really quickly. The complaint is not legally sufficient.

There were no questions from the Board.

Chair Miller noted the complainant cited to the Charter Section 205. He asked if Mr. Fuqua had anything to say about the claim that anything in the Charter or other provisions have anything to say to it.

Mr. Fuqua didn't see anything in any of the content of the complaint that would violate those provisions. That was his read of them.

There were no statements from the public regarding this matter and the public portion of this case was closed. The complainants were still not present.

Member Biderman agreed with Mr. Fuqua's statement across the board. He didn't see anything in the cited provisions either that would go into accuracy of any statement or falsehood and he was also equally concerned about first amendment provisions. This is political speech. "We'd never get out of here from that kind of allegation of false statements." Mr. Biderman thought the Board needed to dismiss the complaint for lack of jurisdiction.

Member Kovnat agreed it should be dismissed. Voters have the last word on this. There is robust coverage on it and the Board should not take a position to intrude on the power of the voters to make a decision.

Member McMillan and Member Amer agreed with those comments.

MOTION: Member Biderman moved to dismiss Case #2017-6. Complaint filed by Elaine Sullivan and Nancy Woodward Alleging Violation of City Charter Section 2.05; SFCC 1987, Section 9.1.2, 9-2.2A for lack of jurisdiction. Member Kovnat seconded the motion and it passed by unanimous (5-0) voice vote.

Chair Miller declared that the Case #2017-6 complaint is dismissed.

b. Case #2017-4A/4B, Complaint filed by Edward Stein Alleging Violation of SFCC 1987, Sections 9-2 and 9-3; "Failure to Comply with City Ordinances Regarding Campaigning and Elections" against the Rio Grande Foundation Smart Progress New Mexico.

– In Accordance with Section 6-16.4 SFCC 1987 "Determination of Legal Sufficiency; Setting a hearing." Consideration of Whether the Complaint Sets Forth Legally Sufficient Facts Which, if True, Show probable Cause to Believe There Was a Violation. (The Board May Go Into Executive Session Under NMSA 1978, Section 10-15-1 (H) (3) to Deliberate in Connection With an Administrative Adjudicatory Proceeding.)

Mr. Edward Stein was sworn. He stated that Mr. Fuqua had reminded him of some arguments he had in the Seventh Circuit years ago. It also reminded him of why he enjoyed the Santa Fe Playhouse 1984 a few weeks ago.

On April 19, this panel sustained his complaint regarding Rio Grande Foundation and Paul Gessing and set today for a hearing thereon. "Last week, I introduced myself for the record. Briefly, I am a retired attorney, graduated from Brooklyn Law School in 1967 and practiced law in Illinois for about 45 years. My areas of concentration were civil rights, employment discrimination and the First Amendment. I was a board member of the ACLU of Illinois for 18 years. I am a resident of Santa Fe at 3172 Plaza Blanca in Park Plaza; a home that my wife and I have owned since 1990. We raised four children and have five grandchildren. We retired in 2012 from full-time employment and moved to Santa Fe. I believe strongly in the law and dedicated my professional life to that philosophy. I believe Santa Fe and its citizens share that view.

On or about April 6, 2017, Rio Grande Foundation and Paul Gessing launched its *No Way Santa Fe* campaign against beverage taxes. The initiative claims to be a public education initiative on sugary drinks. It is not. Initiative is a propaganda campaign; not an educational one. The campaign, rather than singing praises of sugary beverages, which obviously, they are arguing, is a clear statement that the tax labels the Mayor as a tax and spend sham.

At about the same time, *No Way* launched a video on Youtube, attacking Mayor Gonzales and labeling the tax as 'regressive' and intentionally misstating Philadelphia's experience with their tax on sugary beverages. The video graphics show the Mayor in an unflattering cartoonish-like and the people nodding their heads 'no' throughout the video - a video I think you have all seen last week. And it is still up.

As of a week ago, there were 118 views and as of today, there are over 150. The ordinance in question 9-2.6A contemplates advertisement or publication that would attract a hundred views and this is way more than a hundred views.

As a footnote, we offered to make our expert, Glen Silver, who is here, whose affidavit was submitted last week, a signed and notarized one which I produced and would like to identify as Exhibit C today. As a footnote, we offered Mr. Silver available to respond but received no such request. Mr. Silver will testify in part, that the video would cost, either in cash or in-kind, at least \$3,000, if not more.

I'm not here to complain about Rio Grande Foundation, *No Way*, or Mr. Gessing's advertising content or advertising content, but I am pointing out that their work is in no way educational. In fact, after looking at or listening to their content, people will be less informed than if they didn't look at it at all. I'm here because these respondents violated city ordinances and they should be held to account for their violations. If we want clean and fair elections, then we must make sure that participants adhere to the laws and rules. These respondents, we will show, violated Campaign Code 906.6 A in two crucial parts. *Any person or entity that makes expenditures of \$250 or more, in the aggregate, during a single election to pay for any form of public communication ... that is disseminated to one hundred or more eligible voters - and that expressly advocates for the election or defeat or approval or defeat of a ballot resolution, not merely a candidate.* They took the liberty of attacking our Mayor, in addition to the tax, *advocates the election or defeat or approval or defeat of a ballot proposition within sixty days before an election*, must file with the City Clerk a report of all expenditures, etc. This they have not done.

I call, as my first witness, Mr. Gessing.

Chair Miller said, Mr. Stein, we will have an opening statement for the Rio Grande Foundation and then we will have testimony.

Mr. Stein apologized.

Mr. Carlin Hunter said, Mr. Chair, testing Mr. Chair, members of the Board my name is Carlin Hunter. I went to the University of New Mexico school of Law. Prof. Kovnat was my Civil Procedure Prof. in 2000, I think. But I am here representing the Rio Grande Foundation. And what the evidence will show, and we have the Facebook. Once the Foundation was made aware of the ordinance, they immediately stopped spending. Rio Grande Foundation did not spend one penny on the video. It did spend approximately \$201 on Facebook ads promoting the video. And when Mr. Gessing testifies, Mr. Stein, and I will do that on direct myself, is free to ask him about the origins of the video. But it's not something that Rio Grande Foundation spent a single dollar on. So, they are under the \$250 threshold that the ordinance contemplates.

I looked at the affidavit that Mr. Stein attached to his complaint but I don't think you disagreed or I don't know how much it cost. I don't think Mr. Gessing knows how much it cost to produce the video. He did not produce it, he did not pay for it. He did repost it. He did expand money for Facebook ads to promote the video. So, I think we have a factual defense. But another thing that I ask the Board to consider is the constitutionality of the City of Santa Fe's disclosure requirements and election of the First Amendment. Mr. Gessing also is one of our exhibits, which evidence will show had planned a postcard campaign. But as soon as he found out, and if he had mailed out the poster that he designed, he would easily have exceeded the threshold.

In 2010, our own Tenth Circuit Judge, Harris Hartz, whose chambers are in the Bank of Albuquerque that building, authored a unanimous opinion in *Sampson v. Bauscher* in his original capacity as Secretary of State. And in that case, the State of Colorado passed what is called the disclose act. It set a threshold four disclosure at \$200 and it applied to candidates and two ballot initiatives. What the 10th Circuit decided, which is still binding law - it's a Colorado case but it's part of this same circuit and it is good precedent -and I will quote directly from the majority opinion. It says, *Point does contend that Colorado reporting requirements unconstitutionally burden their First Amendment right to associate. We agree that Colorado law, as applied to plaintiffs, has violated their constitutional freedom of association. There should be no proper governmental interest in opposing disclosure requirements on ballot initiatives committees that raise and expand so little money. And that limited interest cannot justify the burden that those requirements impose on such a committee.*

The rational is in *Valeo* in 1964 case, the Supreme court laid out a three-pronged rationale for - first, it acknowledges that there is some infringement on the right of association with disclosure laws. But then it lays out a three-pronged rationale of why it is constitutional. He went through the three factors and why they are not furthered Dick in a ballot initiative case. He concluded that it is still in effect in ballot initiatives and does not overcome freedom of speech. But for this ordinance, the Foundation would continue to be speak and be engaged in his process but because of it and because of the correspondence it received from City Attorney office regarding the ordinance in this process, it has chosen not to.

He noted that Mr. Stein provided some detail about his background and working on First Amendment issues and practicing before the Second Circuit, Seventh Circuit. But in the Tenth Circuit, the law is clear. Disclosure reporting requirements on entities and ballot initiative cases are unconstitutional.

One other case he mentioned: *Southwest Organizing Project v Herrera* – also a 2010 case - a nonprofit out of Albuquerque sent literature about incumbent Senate Democratic candidates in advance of the election. They never mentioned the opponents by name. What Secretary of State Herrera tried to do is apply New Mexico's campaign reporting act to those nonprofits. They resisted, which would have required them to register as political committees with the State and disclose their spending. They refused. The Tenth Circuit found in favor of SWOP. It said that nonprofits, a federally recognized nonprofit – you can't force disclosure of their contributors or their spending or make them register as a political action committee. The facts aren't nearly as analogous, but encouraged the Board to look at the Colorado decision. It is about as analogous as you can get to the situation this Board confronts. The only distinguishing factor in that case is that the Colorado threshold was \$200 and the Santa Fe threshold is \$250. It is constitutional as applied to candidates. All three of the factors laid out by Judge Hartz apply to candidates, but two of them are not present in ballot initiatives. We intend to provide a factual defense but also ask the Board to keep in mind the constitutionality of the ordinance that it is considering enforcing against the Rio Grande Foundation.

Mr. Stein called Mr. Paul Gessing as his first witness.

Mr. Stein: Mr. Gessing, would you please state your name and spell your last name?

Mr. Gessing: Yes. I am Paul Gessing – G E S S I N G.

Chair Miller: Mr. Stein, if you don't mind, let's swear in the witness.

Mr. Boaz: Under penalty of perjury, do you swear or affirm that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

Mr. Gessing: I do.

Mr. Boaz: Thank you.

Mr. Stein: please state your name and spell your last name, sir.

Mr. Gessing: Paul Gessing. G E S S I N G.

Mr. Stein: What is your occupation?

Mr. Gessing: I am the President of the Rio Grande Foundation. That is a 501(c) 3, nonprofit, policy research organization, based in Albuquerque, New Mexico. I am the president and have been for a little over 11 years, now.

Mr. Stein: And do you get paid for your work?

Mr. Gessing: I do.

Mr. Stein: Are there any other staff members at the Rio Grande Foundation who also get paid?

Mr. Gessing: There is one other gentleman and he is the Research Director, named Dowd Muska.

Mr. Stein: Can you tell us what the annual budget of the Rio Grande Foundation is?

Mr. Gessing: In 2016, it was approximately \$260,000.

Mr. Stein: And did the Foundation spend all or most of that money during the course of the year?

Mr. Gessing: We spent that money during the course of 2016, correct.

Mr. Stein: Now, your counsel made an opening statement and said neither you or the Rio Grande calculation paid any money for the Youtube video that's in question here.

Mr. Gessing: That's correct.

Mr. Stein: Now, have you heard of the project of the Rio Grande Foundation called No Way, Santa Fe?

Mr. Gessing: Yes.

Mr. Stein: What is that?

Mr. Gessing: It is an educational effort to discuss the ballot measure that's going to be on the ballot in May, on May 2, taxing soda that two cents an ounce tax on it.

Mr. Stein: When did No way, Santa Fe, come into existence?

Mr. Gessing: We actually started; present out a press release on Thursday, April 6. The reporting deadline was the seventh. So, our release went out on 6 April.

Mr. Stein: Okay. And let me ask you something. My math is a little rusty. But, would the April 6 be less than 60 days to the ballot initiative of May 2?

Mr. Gessing: It would be.

Mr. Stein: Has No Way, Santa Fe filed any reports, any documents, with the City Clerk of the City of Santa Fe?

Mr. Gessing: No.

Mr. Stein: Has Rio Grande Foundation filed any reports or statements of expenditures or donations with

the City of Santa Fe?

Mr. Gessing: Not filings, per se, but City Attorney Shandler and I have had various letters going back and forth addressing these issues. I wouldn't say it is a filing. I am not - discussing versus filing is kind of a nuance term, but ...

Mr. Stein: So, in one of the letters that you sent to City Attorney Shandler, did you say that you were preparing to file something with the City of Santa Fe on April 14, 2017? If you remember.

Mr. Gessing: We ... on the 7th, we - first, and foremost, I looked got a letter very quickly about his expeditious response to our press release. I think I either got it the afternoon of the sixth or the morning of the seventh, with details of the campaign finance laws. In Santa Fe and asking me whether those were issues that would comply and whatnot. We sent a letter back, in compliance with the April 7 deadline, essentially saying, that we just launched and were not clear on where we stood. So, we wanted to look at things that we filed a letter on the 14th. I believe that the letter that said did not get the threshold.

Mr. Stein: So, that you sent a letter on the 14th, saying you didn't have to file a report because you didn't hit the threshold. -

Mr. Gessing: Right.

Mr. Stein: What time did the ... What date did the video, the Youtube video come out?

Mr. Gessing: It was for a week at that time.

Mr. Stein: So, it came out around the 11th of April.

Mr. Gessing: Yes.

Mr. Stein: Okay. And is that ... my math is a little rusty. Is that less than 60 days before the election?

Mr. Gessing: It is.

Mr. Stein: Now, did you file any letters on or about April 20th with the City?

Mr. Gessing: Again, I think it was in response to a request to appear here and what that letter entailed, whether we were going to go ahead and appear here.

Mr. Stein: But, no reports to the City Clerk. Now, as we sit here or stand here, and sit here this afternoon, is the YouTube video – the No Way Santa Fe video up and running?

Mr. Gessing: It is. Yes.

Mr. Stein: And, do you have any idea how many hits it's had since it's been up?

Mr. Gessing: I was hoping for thousands but guess 150 is what will have to settle for.

Mr. Stein: Okay. So, that, by the way, have you ever read the campaign ordinance in the City of Santa Fe?

Mr. Gessing: I've read the relevant sections as outlined by the City Attorney and maybe more.

Mr. Stein: But, were you aware that 100 hits - contemplating 100 hits of electors, voters - that's what you talking about his voters and Santa Fe, right? – the Youtube video?

Mr. Gessing: This his, broadly speaking, local?

Mr. Stein: Well, would your video have any impact on somebody in Austin Texas to vote on this initiative?

Mr. Gessing: Not unless they are considering a soda tax.

Mr. Stein: Would they have any relevance to Santa Fe?

Mr. Gessing: Probably not.

Mr. Stein: The Youtube video that you put on television on computers was directed to voters in Santa Fe, was it not?

Mr. Gessing: I couldn't say voters. I would say citizens of Santa Fe. It doesn't have to be voters.

Mr. Stein: well, my 5-year-old granddaughter, if she saw the video, what difference would it make? She can't vote.

Mr. Gessing: Well, I have a 7-year-old that might show me a video they thought was interesting. And that might be a fun way to someone. You may not be one to send it to a fund developer or something along those lines. The viral nature of the internet is not for me to ponder but it was not targeted specifically at voters.

Mr. Stein: Okay. That works. Now, I want to show you... May I approach the witness?

Chair Miller: Yes.

Mr. Stein: I went to show you a document. [inaudible – away from the microphone.] I ask you to identify it.

Mr. Gessing: It is the release dated April 6, 2017, which announced our initiative, our efforts under the auspices of No Way, Santa Fe.

Mr. Stein: Your counsel, in his opening statement, said the Rio Grande Foundation didn't spend one dollar on this video.

Mr. Gessing: Right.

Mr. Stein: Did No Way for Santa Fe, and initiated project of Rio Grande Foundation spend any money on this video?

Mr. Gessing: No. In fact, No Way it is not legally separate from the Rio Grande Foundation in any way.

Mr. Stein: Okay. So, do you have any idea who made the video?

Mr. Gessing: Rio Grande Foundation has numerous relationships with nonpartisan policy organizations all over the country. And an organization that is in philosophical alignment with the Foundation, but not based care in New Mexico made the video. And ...

Mr. Stein: And, what is their name?

Mr. Gessing: That information I'm not going to reveal unless compelled to. It's an organization that, let's just say, will come out on our statements; our 990 forms. If my counsel suggested I should bring it forth, I would be glad to do that. But here in I am not.

Mr. Stein: Let me just say this.

Mr. Gessing: It is a nonprofit 501c3, though. I will say that

Mr. Stein: And that protects it from anything. It is a political action committee. I would say that I don't know whether or not ... Does this Board have contempt powers?

Mr. Shandler: Mr. Stein, let me research that.

Chair Miller: God ahead Mr. Shandler.

Mr. Stein: I appeal to the Chair and to the Board to compel this gentleman to disclose the information that I've asked. This would otherwise be a subterfuge. Can you imagine how easy it would be to get around your own ordinances if organizations could say, 'oh we've got this donated and put it on but we didn't have anything to do with it?' So, I ask ...

Chair Miller: Mr. Stein, for purposes of this hearing, the witness has answered your question and did not provide the information you asked, so, these proceed with the questions.

Mr. Hunter: (away from the microphone) Under the ordinance, it doesn't require disclosure. It is a 501c3. [the rest of his statement was not audible.]

Mr. Stein: In my opening remarks, I alluded to Rio Grande and No Way making political statements through the video, making them a political action committee.

Chair Miller: The Board is not in a position to compel the witness to disclose it.

Mr. Stein: Okay. In my opening remarks, I alluded to Rio Grande and No Way Santa Fe, making political statements through this video. And I think that is the definition of a political action committee. But regardless, do you know how much you spent on this? On this video?

Mr. Gessing: On this production? No.

Mr. Stein: Do you know how many people worked on it?

Mr. Gessing: [gestured].

Mr. Stein: Is that a no?

Mr. Gessing: No, sir.

Mr. Stein: Do you know whether they had a director?

Mr. Gessing: I do not. I am not a film maker. I don't.

Mr. Stein: So, you would have no basis to challenge my expert witness, Mr. Silver's opinion as to how much this video would have cost?

Mr. Gessing: No. I would not.

Mr. Stein: And you don't have any witnesses here to challenge Mr. Silver's opinion regarding the cost of the video. Do you have the computer skills to produce a video like this?

Mr. Gessing: No, I do not.

Mr. Stein: Does anybody in your organization have those skills?

Mr. Gessing: No.

Mr. Stein: Do you know what ... how much time would be spent in producing this video?

Mr. Gessing: No. I do not.

Mr. Stein: Do you know how much ... how difficult or simple it is to have graphics and movement on a video?

Mr. Gessing: No, I don't.

Mr. Stein: Aside from ... You submitted some expenditures today that appear to be Facebook costs for what?

Mr. Gessing: So, the primary means of distributing the video is, has been through the use of Facebook advertising. They have a mechanism where you can pay money to make stuff – advertising, whatever - appear in people's Facebook feeds. That's what is displayed here. And I wanted to be sure to give you the correct numbers - \$198.96.

Mr. Stein: Can I assume that the video is in line with Rio Grande's opinion about the sugary beverage tax?

Mr. Gessing: Sure. At the various eleven years we've consistently been an organization that works against higher taxes; for limited government and individual person freedom across the boards. And this is right in line with everything that the Rio Grande Foundation has always stood for.

Mr. Stein: And is it also in line with No Way Santa Fe?

Mr. Gessing: Yes.

Mr. Stein: So, in other words, you have adopted the video as your own.

Mr. Gessing: I don't know how you would adopt a Youtube video.

Mr. Hunter: [objected but speaking away from a microphone].

Chair Miller: Mr. Gessing, did you testify earlier that No Way Santa Fe is a part, an arm of the Rio Grande Foundation? Did I hear you correctly?

Mr. Gessing: No Way Santa Fe is simply a name for a campaign. Yes, it's a wholly ... There is no legal documentation to separate No Way Santa Fe from the Rio Grande Foundation.

Chair Miller: So, it is not separated from Rio Grande Foundation.

Mr. Gessing: Right.

Chair Miller: I think he has testified that it ...

Mr. Stein: Yes, he has testified. So, the question is, would you say Mr. Miller, that it's argument as to whether they have adopted it or not?

Chair Miller: Well, you can continue asking the question. The reason I asked because I thought I heard

him to say that No Way Santa Fe is, I guess, the same entity – it's not even an entity – it's part of the Rio Grande Foundation. So, I was trying to get clarity on the answer. But, go ahead.

Mr. Stein: I have no further questions.

Mr. Hunter: Members of the Board, I'll be brief. I think Paul (Mr. Gessing) was pretty clear in his testimony in this cross. I guess I would make a request of the City Attorney and the Chair. I think we have some exhibits. Do I need to go through and ask Mr. Gessing to identify each one of those exhibits? Or, can I move in that that the Facebook receipts and the one postcard be admitted as exhibits?

Mr. Stein: I have no objection.

Chair Miller: Thank you. I think that's fine.

Mr. Hunter: Okay. We will move, at this point, to have respondent's – was Mr. Stein letters? We would move at this time to have respondent's 1, 2, 3, 4, 5, 6, 7, 8, which are all Facebook receipts and Respondent's 9, which is a postcard with the graphics that were produced and nothing was ever mailed, as Respondent's 9.

Chair Miller: Well, thank you. Do we need to identify each exhibit individually? Are you asking questions about them?

Mr. Hunter: I don't think so. The Board has them in front of them. I think Paul's testimony that there is \$197 approximate in there and the only other one is a post card. So, I'm not ... unless it would be the Board's preference, I wasn't intending to ask a question about each of these exhibits. I noticed that Mr. Stein did not object to their foundation or authenticity.

Chair Miller: I'm just not sure which exhibit is which number? Could we do ...?

Mr. Hunter: I could provide ...

Mr. Shandler: We will figure it out for the issue in the interest of time. The important part is the cumulative total. And I want to get this correct. I wrote down \$198.96.

Mr. Gessing: That's what I got - \$198.96, if I didn't make a mistake with my calculator. I am very confident that they are well below the threshold.

Chair Miller: Okay. To ahead. Thank you.

Mr. Hunter: Mr. Gessing, were you aware of the disclosed Santa Fe disclosure of what compliance was before PRN from the Santa Fe City Attorney?

Mr. Gessing: I was not.

Mr. Hunter: After you were made aware of the disclosure requirements, did you spend anything additional at that point?

Mr. Gessing: Well, it depends on different defining spending but there were Facebook ads already in place that were continuing to go out, that I could have stopped. However, I did not ... I made very sure that the \$250 was not something that we violated because of the law and the way that it read.

Mr. Hunter: Prior to being informed by the City Attorney about the disclosure requirements, what had... What speech had Rio Grande Foundation planned to engage in before being made aware of the ordinance?

Mr. Gessing: Well, these postcards ... well, postcards of a similar nature were supposed to be sent out. Bernie Sanders opposes the soda taxes. And, even though we are more of a conservative free-market organization, we felt that that was a message that hadn't been put out publicly. We were also contemplating radio advertising. Those were going to be the main expenditures associated with any effort. That broader distribution of radio to get that number of views into the thousands or more.

Mr. Hunter: And Mr. Gessing, I think you've made this point clear, but just to make absolutely - Rio Grande Foundation didn't spend a single penny on the production of the video at issue in Mr. Stein's complaint. Is that accurate?

Mr. Gessing: Yes.

Mr. Hunter: I don't have anything else for Mr. Gessing.

Chair Miller: Thank you. Any redirect, Mr. Stein?

Mr. Stein: Nothing except the same question. Please disclose the name of the organization that created this video, gave it to you that you are actually benefitting from, and in your testimony today.

Mr. Hunter: Well, again, we would object. I don't think reasonable people benefit from the question being asked before over and over again. [The rest was inaudible away from the microphone.]

Chair Miller: Okay. I don't see any ... the Board is not in a position to compel the witness to answer that question and you have asked it and he has responded. So, do you have any further redirect?

Mr. Stein: No.

Chair Miller: Okay. Thank you.

Mr. Stein: I would like to call Mr. Silver

Mr. Hunter: [away from the microphone] - We would prefer that we would disagree with the affidavit on its face and have no reason to doubt that the affidavit is accurate on video costs.

Chair Miller: Well, thank you. I think that is helpful. You are welcome to proceed with questions. But, to the extent that you're trying to elicit facts that are already stated in the affidavit, we have that and the respondent has stipulated to it.

Mr. Stein: Okay. Then, I don't know in this forum how this works but would Mr. Silver's expertise be accepted as our expert in this area and could it be qualified as an expert in this area - based on counsel's statement?

Mr. Hunter: Yeah. I would just clarify on procedure or process that this is qualifying him as expert. We don't disagree that he has experience to proffer an opinion as an expert statement. We don't disagree with what he offered.

Chair Miller: Well, thank you. I think the Board is in a position to qualify or not qualify someone as an expert but we will consider the evidence and the testimony.

Mr. Stein: Since counsel has not objected to the affidavit, and, in fact, said that there is no reason for Mr. Silver to go through each statement in the affidavit, which is already sworn to. But I would like to ask Mr. Silver a couple of question.

Mr. Boaz: May I swear the witness?

Mr. Silver: Oh please. Sorry.

Mr. Boaz: Please state your name and address.

Mr. Silver: My name is Glen Silver. I live at 70 Heartstone Drive, Santa Fe New Mexico.

Mr. Boaz: Under penalty of perjury, do you swear or affirm that the testimony you are about give is the truth, the whole truth, and nothing but the truth?

Mr. Silver: I do.

Mr. Stein: So, I'm going to be brief, Mr. Silver, and I appreciate your coming here today. And I know you're leaving this week. You'll be out of town. But you will be available for any question that the Board might ask. I'd like to go directly to what ... You testified that this video would cost at least \$3,000. What went into your opinion? And what are the components of that opinion, if you could, to tell the panel?

Mr. Silver: Sure. A video; a one-minute video that is constructed not of live production, but of graphics, of animation, have many components. And, first of all, someone had to write it. And this is a very professional, very slick video, in my opinion. So, you have a writer who has to spend time writing it. And it's not just that they write it one time. They write it for someone else who has commissioned him to write it. And it goes through a number of revisions. And that becomes the road map for the production, itself. Now if you typically have a writer, sometimes, the producer could also be the writer. But that's not necessarily

the case, especially with something that has this type of competence, that needs to be approved by the entity that's paying for it. So, there is likely two parties there: the writer and the producer, which you could also call the director. I would call them in TV terms, the producer.

We also know there is a very professional narrator involved, which we heard. That wasn't done by Mr. Gessing or anyone who knows. That's professional. There was music throughout and sound effects, which, while not necessarily original, even if they were coming off of a service where you pay, like when I worked at ABC News or CBS News. They pay a great amount of money to have certain I wouldn't call them public domain, but they buy music libraries. They buy them for a fee and then they can use them over the course of a year as they want. That's more money.

Now, the key element here is once you get the scripts, is the graphics and animation. And they are fairly intense. And when you see something that looks this good and this simple, and percolates along the way it does, you know someone has worked very hard to do it.

Okay, this is not ... I said \$3,000. My guess is, it is probably closer to at least twice that. The graphics have to be created. We are so used to seeing things on TV, especially on Youtube; we just think it is all for free. Every single image in that video had to be created or acquired. Okay? There is no free lunch here. I have testified that I made you know, something like 80 prime-time news magazines. And I take great pride in every image I put into those prime-time stories. And they are heavily vetted by my bosses, just the way this was vetted by whoever commissioned this.

I'm not graphics expert, per se, although I have worked on many occasions with the graphics department for example, of ABC News, while I was a 20/20 producer for ten years. And that's a conversation I have with the graphics expert. I also consulted with my own editor, who has in his possession, my final cut pro edit system to confirm my opinion that these were intensively produced images, especially the ones with emotion. There are some images that are not hard to produce, like you see the five instances where there is a quote and a newspaper and you put it up with what we call a tear. It is as if it was torn off of a piece of paper and you put a headline of where it came from. Those can be produced pretty quickly. But it still takes generally, hours. Okay? These are not done like that.

According to consulting with my editor who's got my edit system, he suggested the likelihood that the ... the tool that was used to create the motion – and there is a lot of motion in this one minute, one second video, is something known as after effects. It's a video tool.

Mr. Hunter objected: The opinions of other people should not be included, providing commentary. More specifically, when he includes the comments of the editor and other people. We would be ...

Mr. Stein: No. This would be ... I don't know how many experts counsel has interviewed or examined. But this is precisely what expert does. Once his credentials are established, he can go anywhere – books, literature, articles, others, and reaffirm his opinion, based on the whole. So, Counsel's objection is inappropriate. And, he is doing this. It would have gone a lot smoother, if he would have just sat down. And I ask the Board to overrule that objection and let Mr. Silver, who is

Chair Miller: Let me, let me... You've both made your point. I see nothing objectionable with the testimony so far, other than it is largely about the affidavit to which the opposing side has stipulated. So, in the interest of not having a whole lot of redundant testimony, just keep that in mind when you are questioning.

Mr. Silver: I am close to being done. Basically, my point is that it is, in talking about the graphics, the motion, the animation, and I could go through each instance individually, if you want me to. I looked at it again today and ticked off about eight instances of generally what I'm talking about. It's very labor intensive. This is a pro job. This is not something someone's teenager put together. And it is not something you get or free. Someone paid a lot of money for this. I estimated on the low end, \$3,000. It could easily be two or here times that amount. Thank you.

Mr. Silver: I have nothing further.

Chair Miller: Counsel?

Mr. Hunter: I'll be very brief. Are you a supporter of the soda tax?

Mr. Stein: We object.

Mr. Hunter: You know, I think that impartiality and bias of the witness, no matter what forum, is always relevant.

Chair Miller: Go ahead, Mr. Hunter.

Mr. Hunter: Are you a proponent or opponent of the proposed City of Santa Fe soda tax?

Mr. Silver: I can't. I live in the county. So, I cannot vote in this election

Mr. Hunter: Do you have an opinion on the City of Santa Fe's proposed soda tax?

Mr. Silver: I do.

Mr. Hunter: And what is that opinion?

Mr. Silver: I would be in favor of it.

Mr. Hunter: Did you and Mr. Stein discuss your opinion on the soda tax prior to you signing on as his expert or preparing that affidavit?

Mr. Silver: Not at all. I was just asked to review the production, itself.

Mr. Hunter: And I will remind you that you are under oath, even though in a Board. And it is a fine to be untruthful under oath. But you testified that you and Mr. Stein never discussed your ...

Mr. Stein: It is inappropriate to admonish a witness when he has no testimony for which to admonish. We have no evidence that he is not telling the truth. This is a topic that I have seen time and time again – by people ... I urge you to admonish Counsel to abstain from that.

Chair Miller: Okay. Objection noted. Mr. Hunter, please continue.

Mr. Hunter: I understand you are under oath testimony. You and Mr. Stein have never had a conversation between the two of you where you made your view that you supported or opposed the soda tax.

Mr. Silver: To the best of my recollection, we've only discussed the nature of the production, itself.

Mr. Hunter: I don't have anything else.

Chair Miller: Thank you. Mr. Stein, do you have any redirect?

Mr. Stein: No.

Chair Miller: Any further witnesses?

Mr. Stein: no further witnesses.

Chair Miller: Okay. Thank you. Mr. Hunter, does the Rio Grande Foundation call any witnesses?

Mr. Hunter: We do not, Mr. Chair.

Chair Miller: Very well. We will go to closing arguments, first from Mr. Stein.

Mr. Silver was excused.

Closing arguments:

Mr. Stein: I was thrown a curve ball to find they would not disclose who produced it and how much it cost. My argument is that the video that's benefitting the ideology and position of Rio Grande and No Way Santa Fe that they have adopted the video. They've advertised it; they've embraced it, they've taken it as their own. The testimony not only is crystal clear but un rebutted that the video was well over \$250 and they did not file one report or document, as required under the law.

If the Board believes this video was dropped out of the sky and landed in Rio Grande Foundation's lap as a gift and put it on as an advertisement and they are not responsible for reporting the cost of that for reporting, then that would completely vitiate all campaign laws and rules not only in Santa Fe but across the country. This is a subterfuge; this is the way dark money gets used and gets exploited. And who pays in the end? We do, for not knowing who's interests ... For instance, Rio Grande comes out here and says they

are a not for profit think tank.

Now, I didn't ask, because I know I would get an objection where would \$200,000+ of Rio Grande Foundation comes from. Was it the Koch brothers? Was it Coca-Cola? Was is some... Where was that money coming from? I don't know. And, quite frankly, I don't care right now. But what I do care about is that they did not file the proper papers. Santa Fe should not condone this type of behavior. Because it will only open the door to the next campaign whether it is a ballot initiative or a candidate.

Now, let me just say, I haven't read Buckley v. Valeo in a long time. It was a 1960's case decided ever before I was in law school. When I was in law school, you know what cases were decided? Map, Miranda, Venium. They are what drove to civil rights and civil liberties – those decisions.

Buckley deals with candidates. It doesn't deal with campaign initiatives, propositions. So, I think it is irrelevant to this proceeding. And I don't believe this panel has the jurisdiction to rule on the constitutionality of the City of Santa Fe's ordinance. I think that goes somewhere else. And only, should this panel find against Rio Grande, which I think it should, so send a message to these types, on the right or on the left, because when you are going to use dark money, you've got to disclose it. You can't use this subterfuge that you didn't pay for anything. Somebody paid for it. They should not only be sanctioned; but they should be ordered to withdraw the Youtube video from the airwaves. Because, even as we are talking, that video is going over and over again. Thank you.

Chair Miller: Thank you.

Mr. Hunter: Mr. Chair, members of the Board, I think Mr. Stein is incorrect when he says that behavior, like Rio Grande Foundation is believed to be evisceration of disclosure laws all over the country. What has led to evisceration of disclosure laws are laws like this all over the country is the first amendment of federal courts. What Rio Grande and ... I've never appeared before the Santa Fe Board of Ethics and Campaign Practices. But in dealing with Mr. Fuqua, who was once Counsel for the Secretary of State. The primary goal of Campaign boards is to enforce compliance, above anything else. In this case, Mr. Shandler, informing Mr. Gessing of what the disclosure requirements were - Mr. Fuqua testified under oath, uncontroverted, that he spent less than \$200. He is choosing not to spend and engage in political speech because of the ordinance. And he is complying because of the ordinance. So, we would ask that you take that into account when deciding what the Board will do with this complaint going forward. Nothing was presented to controvert Mr. Gessing's testimony that the Rio Grande Foundation did not spend one penny on the video. The ordinance at issue says that in-kind contributions to candidates or committees must be disclosed if they are between political action committees and candidates. I don't know what - A video was produced that Rio Grande used. I don't know if that is considered an in-kind contribution or what. But nothing in the Santa Fe election code regarding disclosure requires that type of contribution or in-kind contribution. And we would just ask that, looking at the totality of the circumstances here, that the Board not find or sanction Rio Grande Foundation. We would encourage the Board to look at - and I would add to Mr. Stein's discussion of Valeo. And he is correct about Valeo. It applied to candidates. And so, what the Tenth Circuit did in the case against the Secretary of State, is it applied it to ballot initiatives. What it said is the underpinnings of Valeo don't hold true for ballot initiatives. And that is why it's dropped, on its face, found the disclosure act in Colorado unconstitutional as applied to ballot initiatives.

So, we don't disagree that that is what Valeo said. But what the Tenth Circuit has done is applied Valeo's principles to disclosure in ballot initiative cases. Taking all of that into account, The Rio Grande Foundation, Paul Gessing, respectfully requests that the Board take no action against the Rio Grande Foundation.

Mr. Biderman asked Mr. Mr. Hunter - we looked at the video last week. I remember that it included the name of the campaign. No Way Santa Fe.

Mr. Hunter agreed that it did.

Mr. Biderman reasoned that they took responsibility for the dissemination of it. The question really is whether that makes them liable or contributes to making them liable.

Mr. Hunter said, "Yeah, it was produced at no cost for them to distribute. I mean, that would be a hint of the arrangement. They don't have the ability to do that. I have no expertise to know how you would bill that, doing that. The Rio Grande didn't produce it; didn't pay for it, but did plan to distribute it. And the only efforts taken to distribute it, I think the evidence shows this – was the Facebook ads that they've already paid for and then posting it on Youtube and sending out a press release and that's it."

Chair Miller said that concludes the presentations from both parties.

Member Kovnat asked if there would be any public comment.

Chair Miller said they could if the Board would like to.

Member Luján said okay.

Chair Miller asked for public comment and reminded them that another meeting is scheduled to start at 5:00.

Mr. Jim Harrington, Common Cause, was sworn. He said they don't take sides on these complaints and it was a very interesting factual issue. He said, "I stood up before to take issue with Judge Hartz' opinion in Samson that all disclosure in ballot cases are unconstitutional. It seemed both sides tried to inflate his opinion in such holding which he is not. It is true that Judge Hartz makes clear in that opinion that he personally believes the constitutionality is questionable but he acknowledges the repeated Supreme Court affirmations that voters have an interest in knowing who is behind ballot measures. And the disclosure requirements in ballot measure cases as well as candidate cases have been repeatedly upheld by the Supreme Court and other courts. What Samson v Vershey is about ends up being a threshold case under which you cannot impose some spending threshold, below which you cannot constitutionally impose disclosure requirements. It may be a little higher in the Tenth Circuit.

Except for the issue of the spending threshold, he didn't think there is any doubt whatsoever of the constitutionality of Santa Fe's disclosure requirements in ballot measures as well as candidate elections.

There were no others from the public.

Member McMillan asked Mr. Hunter, looking at the Facebook invoices, if he knew to whom they were submitted.

Mr. Hunter said they were submitted to the Rio Grande Foundation.

Member McMillan asked about the address in Minnesota.

Mr. Hunter did not know about that.

Member McMillan asked about an executive session.

Member Luján moved to go into executive session pursuant to NMSA 1978, Section 10-15-1(H)(3) to deliberate in connection with an administrative adjudicatory proceeding. Member Amer seconded the motion which passed by unanimous roll call vote with Members McMillan, Luján, Amer, Kovnat and Biderman voting in the affirmative and none voting against.

The Board went into closed executive session at 4:30 p.m.

The Board returned to open session at 4:56 p.m. upon motion by Member Amer, second by Member Biderman and unanimous voice vote.

Chair Miller announced to the public that during the executive session, no actions were taken and the only matters discussed were those allowed under the Open Meetings Act, NMSA 1978, Section 10-15-1(H)(3).

- 1) **Action Regarding Whether the Complaint Sets Forth Legally Sufficient Facts Which, if True, Show Probable Cause to Believe There Was a Violation.**
- 2) **Action on Any Next Steps as Permitted Under Section 6-16.**

Member Biderman moved that the Board find that the Rio Grande Foundation has violated Section 9-2.6b by creating the No Way Santa Fe as a political committee which was made independent of expenditures and contributions of anything of value in amounts greater than \$250 which it has failed to report. He further moved that the Board issue a reprimand to Rio Grande Foundation for that violation and order a report to be made forthwith to fulfill the responsibilities of the Campaign Code.

Member Amer seconded the motion and it passed by unanimous voice vote.

Mr. Shandler clarified that it applies to 2B also.

Mr. Hunter noted in the Board procedures that there is a 5-day period to request reconsideration and asked what starts that 5-day period.

Mr. Shandler didn't have an answer.

Chair Miller agreed to get an answer to Mr. Hunter on that question.

Chair Miller stated that because there was no time left for this meeting, the other matters will be taken up at the next meeting.

- c. Case #2017-1A/1B. Parties' Presentations on the Merits of Complaint filed by Karen Heldmeyer Alleging Violation of SFCC 1987, Section 9-2.5(B) (D); "Disseminating Campaign Material Without Identifying Source" against Pre-K for Santa Fe.**
(The Board May Go into Executive Session Under NMSA 1978, Section 10-15-1 (H) (3) to Deliberate in Connection with an Administrative Adjudicatory Proceeding.)

- 1) **Action on Determination on the Merits of Complaint.**
 - I. **Pre-K for Santa Fe "Waiver of Defense"**
- 2) **Action on And Next Steps as Permitted Under Section 6-16.**

This matter was not considered.

- d. Presentation, Discussion and Possible Action on Advisory Opinion on which types of Groups Need to File Campaign Reports and which Types of Groups Need to "Check the Box" under Sections 9-2.6 and 9-2.12.**

This matter was not considered.

3. UPDATE ON STATUS OF CAMPAIGN FINANCE LEGISLATION

This matter was not considered.

4. BOARD MATTERS

No Board Matters were considered.

5. PUBLIC COMMENT

No public comment was considered.

6. SCHEDULE NEXT MEETING (IF NEEDED)

No meeting schedule was considered.

7. ADJOURNMENT

Member Biderman moved to adjourn the meeting. Member McMillan seconded the motion and it passed by unanimous voice vote.


The meeting was adjourned at 5:15 p.m.

Approved by:



Justin Miller, Chair

Submitted by:



Carl Boaz for Carl G. Boaz (Inc.)