

**INDEX OF
CITY OF SANTA FÉ
ETHICS AND CAMPAIGN REVIEW BOARD**

April 27, 2015

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

Wednesday, April 27, 2015

1. PROCEDURES

A. ROLL CALL

A regular meeting of the City of Santa Fe Ethics and Campaign Review Board was called to order by Justin Miller, chair on this date at approximately 3:05 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
Ruth Kovnat
Tara Luján
Kristina Martínez
Seth McMillan

Members Absent:

Paul L. Biderman [excused]
One Vacancy

Staff Present:

Zachary Shandler, Assistant City Attorney

Others Present:

Jim Harrington, Common Cause
Karen Heldmeyer, former City Councilor
Jodi Larsen, League of Women Voters
Carl Boaz, Stenographer

Chair Miller announced the resignation of Roderick Thompson.

B. APPROVAL OF THE AGENDA

Ms. Martínez moved to approve the agenda. Ms. Kovnat seconded the motion and it passed by unanimous voice vote.

2. PUBLIC COMMENT

Chair Miller invited public comment both before and after the Board considered the possible amendments to the Campaign Code and Public Financing Code. The red-line amendments, entitled "Discussion Draft 4/10/15" are attached to these minutes as Exhibit A.]

Ms. Heldmeyer said the part where it talks about using advertising as coordination or donation needs a lot of work because there is the media exception later on for a different issue. Satirically, people use advertising and other candidates use their opponents' advertising to point out the differences between the two candidates. That needs a lot of work.

The way this is trying to deal with the "Russian dolls" is so counter-intuitive and backward where in certain cases the candidate you give money to has to disclose and in others, the contributor has to disclose. She knew it was in a mess because of the Supreme Court but if there was any way to simplify it that would be a good thing.

Finally, as the Board saw in the draft, the idea that a candidate has to have so many signatures to qualify as a candidate and get the public money, is not in the ordinance and only in the charter. So it needs to be put in the ordinance. In part it is needed because the document refers to it in the Jeff Green amendment but there are also issues coming up where it should refer to that provision where it speaks about electronic signatures. The way it is now, a candidate has to get two sets of signatures, one set to get on the ballot and the other signatures that accompany the money that they raise. At least one of those might be done electronically rather than physically. If those signatures were in the code it would be easier to play around with than just having it in the charter.

Those were her comments for today's discussion. She said she would be suggesting other proposed code amendments on issues not being discussed at this meeting.

Mr. Jim Harrington apologized for sending another long email. [A copy of his email is attached to these minutes as Exhibit B]. He agreed there is a lot of confusion on that issue of signatures and how the funding mechanism works and how one would estimate the costs under this system. The funding mechanism that is still in the Code was set up for a more expensive campaign system with more candidate spending.

He said he and Ms. Kovnat, who was also on the drafting committee with him anticipated that the fund would get run down almost completely after each mayoral election and then it would be restored with \$150,000 a year thereafter. So he had to smile when he saw there was a half million dollars in there. If someone had told him about that balance, he would have told them they were nuts.

That happened because in 2011, the New Mexico Supreme Court prohibited much of the anticipated spending that was supposed to take place under that system.

The committee actually considered what to do with the funding mechanism at that point because they anticipated that it was going to be too much. For this "stripped down" system they had been persuaded to go with it. But they left it in place for now, not knowing if the stripped down system would work and wouldn't

know until the next mayoral election. Sure enough, the stripped down system failed the test and the candidates helped us to respond. And now the Board is thinking about a system that would involve expenditures much more like the ones that were originally contemplated.

We are lucky to have in place not only the original funding mechanism but also a bonus with such a cushion built up recently in the fund.

During the second part of the analysis there were various scenarios about how many candidates there might be and different spending ratios. But that is the wrong place to look if you are trying to estimate the system because it is all unpredictable. It was for that reason we built into the ordinance a control mechanism that had two parts. One part says you can't give the candidates any more than what is in the fund and secondly, it is specified what appropriation is going into the fund in the four-year cycle. It will always be between \$600,000 and \$900,000. And if there are 20 candidates for mayor, the City is not affected. Who is affected are the candidates. So the formula is already built in and candidates' portion will be prorated. And it doesn't need to be done in advance because the formula already does it for them. He hoped that provided a better understanding of how it would work.

Ms. Helen Ferguson, with Common Cause New Mexico, thanked the Board for all of their work on this issue and to Mr. Harrington for all of his efforts in it. Common Cause wanted to speak on behalf of the funding provision and it looks like there will be enough money to do it. Las Cruces and Albuquerque are also working that direction to recommend to the Council.

There were no other speakers from the public regarding this matter.

3. DISCUSSION AND POSSIBLE ACTION

A. Consideration of the Following Amendments:

1) Coordination Between Candidates and/or Their Campaigns and Independent Expenditure Groups or Individuals

Chair Miller noted that the Board spent a lot of time last meeting on this and it was incorporated into a new discussion draft. He asked for comments from the Board starting with the sub-committee.

Ms. Kovnat said they started with section A-1 and have had substantial discussion. The sub-committee tried to incorporate some changes from the discussion and didn't make decisions on them but highlighted those areas in hopes that the Board can vote on those today.

On page 2, the salient deletion was any limiting language on coordination. There is no need for having limiting language so the recommendation is to delete all limiting language in 1, a, b, and c.

On page 3 under a, the changes are stylistic, eliminating the language of presumption. Section d is an item that the Board might want to discuss further. That is the item Ms. Heldmeyer referred to. It has to do with dissemination, distribution and republishing of an advertisement that is prepared by the candidate, political committee, representative or agent.

Chair Miller pointed out that there is no nexus between candidate and this independent spending. So it is perhaps not fair. She said when the candidate or its committee prepares this material with a purpose, that it would be republished or redistributed.

Ms. Kovnat looked at research and found a number of other places where they had the nexus without this language. The question is whether we should delete it. The subcommittee's view was that it doesn't seem to be much of a problem here but maybe others on the Board or from the public would have a different view. That is the only substantive item on this material of coordinated expenditures.

She asked Mr. Shandler if he thought that was true.

Mr. Shandler said the subcommittee did delete the presumption language in all sections except on page 5, lines 7 and 8, where the presumption was kept.

Chair Miller asked in paragraph e on page 4 whether the Board needs to keep qualifying language of professional services to be campaign related.

Ms. Kovnat said the subcommittee didn't discuss that much. She thought the meaning of professional services was clear because of the language in the second sentence - "include but not be limited to." If the Board feels more modification is needed, the subcommittee wouldn't have strong feelings about that.

Chair Miller suggested they could come back to that but the real area of discussion is probably on b.

Mr. McMillan did not think so. He asked on paragraph d what the proposed limiting language was.

Ms. Kovnat said the language discussed was if the entity or individual disseminates or distributes or republishes an advertisement that contains in whole or any part of any broadcast or any written graphic or other form of campaign material prepared by the candidate with the intention that it be republished or re-advertised.

Chair Miller added the example given from the consultant is that campaigns use stock footage or video to let people use that in promotional materials.

Mr. McMillan asked if it comes from another code somewhere else.

Ms. Kovnat said that clarification is the language of Philadelphia, Maine and Connecticut. She had not seen that additional language anywhere else.

Ms. Martínez asked if in section d there was also some question about distinguishing between the

candidate and then the groups actually doing the publishing. She recalled the discussion with the consultant how he was saying that it could apply differently, depending on what your actions were. She wasn't sure she entirely followed him but remembered that as a point

Ms. Kovnat didn't recall that and noted that the last minutes were not available.

Ms. Martínez opined that this was just an example and they were not limited to these examples so the Board was not constrained by including this.

Ms. Kovnat said the subcommittee concluded that if it is too confusing, that argued for deleting it. Those are the facts in concert with or in coordination. So the subcommittee thought they could be deleted but thought the Board should be given the opportunity to do that.

Chair Miller asked, if it was deleted, that it could still be found to be coordination.

Ms. Martínez agreed, whether we keep it or not. This is the language from Philadelphia and Maine.

Ms. Kovnat said also from Connecticut.

Chair Miller asked Ms. Heldmeyer if this was her concern.

Ms. Heldmeyer agreed. It is probably a little legally messy. There was discussion on intent - the intent to support a candidate. If that is not the intent then no one could call it part of the campaign.

Chair Miller clarified that this is when one campaign takes materials from another campaign.

Ms. Heldmeyer agreed and not just material. In this age, they take terrible faces off the Internet to run with the opponent's ad. Taking pictures or words out of context doesn't help the other candidate. We also see a lot of satirical use. It is more available to pick and choose from it if you are the other side.

Ms. Kovnat said what Ms. Heldmeyer is describing is not coordination but opposition. If an opponent picked it off to use, coordination would never be the intention.

Ms. Heldmeyer pointed out that there are two things here. The original wording doesn't talk about anything other than distribution, etc. but it can also be used with negative and with neutral intent.

She thought they would start seeing TV ads in Santa Fé but if on Facebook, perhaps a news entity might pick it up and run it as a spot. Technically, it is getting a lot more complicated. It is easier to take that stuff for their own use. There is just much more of it now. How legally one talks about intent here is important. That is what you have to focus on rather than the specifics.

Mr. Harrington proposed, before making this turn on someone's subjective intent, to research a 2007 Supreme Court decision called *FEC v. Wisconsin on Right to Life*. That case makes the enforcement of the First Amendment unpredictable as free speech. It might be best to get rid of it until deciding on what to do

about it.

Mr. Shandler commented that his budget was to send the mailers but he liked to have a fourth one so he put up a picture of him with veterans and another group went to his Facebook page, got that picture and captioned it "Zach Shandler stands with Veterans." That became his fourth mailer, essentially. The question as a judicial body is if a complaint is failed and the candidate admits it happened but when confronted, the candidate could say it wasn't what they intended and there is no proof. That might be an additional defense for a candidate.

Ms. Kovnat moved to delete that section. It is not a big enough problem in Santa Fé to have this much confusion when the fact can be captured by intention. .

Ms. Martínez seconded the motion.

Ms. Heldmeyer commented that if all that is in the law is that someone else has picked up material from another campaign and used it in some way themselves, without any discussion of intent, what you could get is the retaliatory effect that a person from the initial campaign could file a complaint and the Board would have to hear it. And it could be argued this is proof of coordination. Candidate 3 would accuse candidate 1 and 2 of being in cahoots. The Board would have to hear it and the Board hates those cases. So it would be better to forestall those than to say deal with it afterward.

The motion passed by majority, 3-1 voice vote with Ms. Luján dissenting.

Chair Miller asked about subsection e. The concern is that a campaign might engage professional services that are not campaign related and might have to defend an allegation that it was coordinated. Ms. Kovnat said the last sentence would help mitigate that circumstance.

Ms. Martínez noted that the last sentence leaves it open (not limited to). So she was in favor of adding "campaign related professional services."

Ms. Martínez moved to add to the last sentence in subsection e, "campaign related" before professional services on line 4. Ms. Kovnat seconded the motion and it passed by unanimous voice vote.

Chair Miller said he would entertain a motion to include part 1 in the Board's recommendations, assuming they could decide part by part to approve a part to recommend to Council, should we move to approve the draft as amended.

Mr. Shandler said that sounds like a good idea.

Ms. Kovnat moved to approve Part 1 as amended today. Ms. Martínez seconded the motion and it passed by unanimous voice vote.

2) Transparency and Independent Expenditures

Ms. Kovnat said the subcommittee had no changes from the draft discussed last time but agreed that in A-2, the reference to a clearly identified candidate about a proposition within 60 days would be the relevant time.

Ms. Martínez added it was the longest they could go safely. Ms. Kovnat agreed.

Ms. Kovnat said for the filing. On line 19 and 20, our guest from the Brennan Center was concerned about that language being too limited and suggested that litigation in the Holland case is in the circuit courts. He suggested that limitation was not necessary as a constitutional matter. She read the case and it turns on a point of administration law. She thought that was optimistic and was sure people have views on this. The subcommittee wanted to leave it in and identify it for discussion purposes.

The other change in Part A was eliminating an explicit waiver for communications on contributions for the purpose of newspaper editorials or reports of commentary by the news media does not need to be reported. There is a tenth circuit case that looked at it under a waiver for Citizen's United. So it was a red flag to have a media exception in the ordinance and most people with the media don't need a statutory exception. The First Amendment provides that. So they just wanted to give full disclosure.

Ms. Kovnat said Part B has a provision the subcommittee eliminated in the draft and was discussed two weeks ago. Now, the subcommittee decided to put it back in for a second layer of disclosure. And if the Board thinks it is too problematic, the subcommittee provided an alternate just as a disclaimer.

Ms. Luján said they just wanted it to be transparent.

Ms. Martínez asked if B was deleted last time.

Ms. Kovnat recalled that Ms. Vigil thought it would be too complicated. Brent Ferguson from Brennan thought the second layer was important.

Ms. Kovnat said Ms. Vigil may still feel that way so the Board needs to discuss it.

Chair Miller didn't think each portion needed its own motion but he would like to get consensus.

On line 14, to change it from 30 to 60 days, he asked for any discussion. There was none.

On line 19 - to leave in paying for such expenditures.

Ms. Kovnat clarified that an entity spending money for campaign expenditures has to report all expenditures and the contributions received for the purpose of paying such expenditures. It does not have to report all of its contributions. She explained that some organizations make contributions and not all are for campaigns.

There was general consensus to leave that language in.

Chair Miller said the next is Line 27-28, to remove the media section.

Mr. McMillan asked if there is a compelling argument for leaving it in.

Ms. Kovnat didn't think there is an argument for it and it is allowed by the First Amendment.

Mr. Harrington recalled some op-ed pieces in the last election about how wonderful the PACS were. Because the other candidates had the media on their side. He wouldn't be surprised that a complaint would be filed on it. There is no expenditure as an Op-Ed. He thought what should happen is to allot some to each of those entities or the Board could develop an editorial form to be filed with City Clerk and it would be a drill. That is how it could go down.

Ms. Kovnat reasoned that people could claim that the New Mexican would have to file what it costs to publish an Op-Ed.

Mr. Harrington concluded that there are bad things either way.

Ms. Heldmeyer agreed with Mr. Harrington. It is an enforcement issue and it all hinges on "expenditure." For the most part, the newspaper doesn't pay you to put it in but if you are paid overall for your job and just throw in the Op-Ed.

Ms. Luján thought they would get some feedback from the media and this is about their First Amendment right to communicate and how they are protected. She hoped the expenditure would be captured there when pros write.

Ms. Heldmeyer clarified she was thinking about ghost writers. She was not comfortable with that.

Ms. Martínez said the subcommittee thinking was that it was overkill and didn't need to be part of the ordinance.

Ms. Luján and Ms. Kovnat agreed. The media has a long-standing exemption.

Mr. McMillan moved to accept the deletion of the media section. Ms. Martínez seconded the motion and it passed by unanimous voice vote.

Ms. Kovnat thought it would be prudent to talk with the media about it so they would understand the Board is not attacking them.

Mr. Shandler agreed to contact them.

Chair Miller went to page 8, Section B or Alternate B.

In Section B, Ms. Kovnat said this would require a second layer of reporting of contributors to entities or people who transfer money to other entities of at least \$250 that the money would be paid to the candidate or if there is a campaign expenditure of \$250 or more and that would be captured by provisions in Section A.

Chair Miller thought the alternate wouldn't be an alternate but an addition to B - that a report would still be required even without disclosure.

Ms. Kovnat said unions are an example that would make such contributions. This provides that they have to report contributions to their funds.

Ms. Luján said they were talking about how this just ballooned out. They have political committees who gather voting information from the members and each member contributes \$5 which all together would exceed \$250 and this would require those members to be identified. So the change would exempt them from that requirement. It might infringe upon their requirements. We don't know how they would feel about that. So she wasn't sure how far the Board wants to take it.

Ms. Kovnat said the change would only affect a person who transfers more than \$250 with the knowledge that it is to support a candidate.

We thought the alternate to be in lieu of A. Mr. Harrington pointed out in the memo that the alternate is not as broad as the original so if we go with the alternate, we should look at that.

Ms. Kovnat said the subcommittee didn't put it in because the Clerk was concerned.

Mr. Harrington said he was concerned when he heard the Clerk had some issues with it. This was proposed by Senator Wirth and it is new ground. It made him nervous and he racked his brain to see what it might be. The issue with unions is a good example. He would like to hear what Ms. Vigil had to say about it. New things sometimes make us nervous and it might get struck down with some example that is unconstitutional.

Mr. Shandler explained that each reporting period has 14 reports coming in and she has to review all of them and put them on the web so this would necessitate many more people reporting including citizens who are not part of the campaign itself and not experienced in reporting like campaign treasurers. And then the Clerk has to prove that individual is actually the one who is reporting.

Mr. Harrington felt not knowing who will be reporting is already a problem under sub section A but she would know somewhat who they are by what is showing up in mail boxes. It is just an enforcement issue.

Ms. Martínez said the last sentence talks about when a report is not required. She asked if the Board could make that so the political committees would have to report those and not have as many people having to make reports nor putting the onus on individuals contributing to PACs (the receiver of the individual contribution).

Ms. Luján said that comes under the transfer.

Mr. Shandler referred to lines 7 - 11 or line 12 where it requires that each individual transferring money has to report the transfer to the City Clerk.

Ms. Martínez asked who would be making the reports that are required by this provision and that Ms. Vigil was concerned about receiving.

Ms. Kovnat said it is the contributor to the PAC that would be captured by this provision.

Ms. Martínez wondered how people would know about this obligation.

Ms. Kovnat said that was why the subcommittee took it out.

Ms. Luján said they would know if they contribute to a PAC, or the treasurer would know. That goes back to the treasurer being required to provide the information to the Clerk's office.

Mr. Shandler spelled out another scenario.

[The meeting was interrupted by the parade outside for the Boston Marathon winner.]

Ms. Kovnat agreed there is no doubt that B uncovers others who contribute who need to report.

Ms. Heldmeyer liked the alternate better because it tells the public the City is doing something about this issue. It also gives the larger Russian dolls issue. She asked if they could just make them all PACs and the answer from Mr. Shandler is no.

Ms. Heldmeyer asked if those who don't report could be issued a subpoena.

Chair Miller asked if there was a consensus.

Ms. Kovnat moved to eliminate B and adopt the alternate to B and expand it to say "any candidate, political committee or entity which has to file under Section 9-2.6 and receives contributions from another entity that does not have to disclose its contributors to the City Clerk shall place the following disclosure. Ms. Martínez seconded the motion and it passed by unanimous voice vote.

Ms. Martínez moved to approve Part 2 as amended for recommendation to City Council. Ms. Luján seconded the motion and it passed by unanimous voice vote.

3) Qualified Small Contribution System

The Board did not consider this item.

4) Alternative Compliance for Qualification

Ms. Kovnat noted this has a requirement for a \$5 contribution to qualify for public financing and the Board was asked to consider an alternative to that. So on page 20, the proposal is that in lieu of the \$5, the potentially publicly financed candidate would submit a supplemental nominating petition containing the same number of signatures from additional voters. Last time, the Board saw that the numbers were pretty small but the subcommittee stayed with the same alternative. The purpose is to make sure candidates that qualify for public money are serious candidates and have enough support to warrant the public funding.

Ms. Martínez asked if most other public financed codes have an alternate compliance or if they all have qualifying contribution provisions.

Ms. Kovnat said they all have a requirement of seriousness and usually it is small amounts of money. The subcommittee has proposed the alternate.

Ms. Martínez asked if the Board could decide to have higher numbers of signatures.

Ms. Kovnat said they talked about that but decided on just requiring doubled numbers of signatures.

Mr. McMillan asked what those numbers were and Mr. Harrington provided a document to him.

Mr. McMillan observed from the document that it would have a high of 84 to a low of 31.

Chair Miller clarified that the alternate numbers would be in addition to the required petition signatures.

Ms. Kovnat agreed.

Ms. Martínez thought it would be easier to get the signatures instead of \$600 so she thought it should be more than just double. And part of her said it should just be the money.

Ms. Kovnat moved to not adopt the alternative and require a certain number of the \$5 contributions for public financing qualification. Ms. Luján seconded the motion.

Chair Miller said the action of the Board would not include Part 4 in their recommendations and leave the ordinance as now stated.

Mr. Harrington agreed with that action. It should be hard to get public financing. He asked the Board to not forget sub section D. He thought it would also be advisable to put the prohibition of a person to make a contribution in the name of another provision in this section.

Ms. Kovnat said it was already there in 9-2.6a.

The motion passed by unanimous voice vote.

Chair Miller noted they were about out of time.

5) Matching Fund Proposal

This item was not considered because of time constraints.

B. Consideration of Other Issues Raised by the Public and Board

Chair Miller noted there were many ideas about changes that needed to be made to the ordinance. The Board has addressed the larger ones. Some of the smaller issues could be handled with more technical cleanups and will be presented at the next meeting and some issues not so pressing to be put in the ordinance for the next election like enforcement will not be addressed.

4. NEXT MEETING AND TOPICS FOR CONSIDERATION

Chair Miller announced the meeting would be on May 20th and is the meeting where the Board expects to take final action on the proposals to the Governing Body so the Board needs to spend time on small contributions and the Matching Fund proposal.

5. BOARD MATTERS

Ms. Luján asked if they would consider appointments and reappointments for next time.

Chair Miller agreed and filling the vacancy by Mr. Thompson's resignation and reappointments.

6. PUBLIC COMMENT

There were no public comments.

7. ADJOURNMENT

Ms. Kovnat moved to adjourn the meeting. Ms. Martínez seconded the motion and it passed by unanimous voice vote.

The meeting was adjourned at 4:45 p.m.

Approved by:

Justin Miller, Chair

Submitted by:


Carl Boaz for Carl G. Boaz, Inc.