

**BEFORE THE COMMISSIONER OF POLITICAL PRACTICES
STATE OF MONTANA**

In the Matter of the Complaint against Higher Ground Foundation)))	SUMMARY OF FACTS AND STATEMENT OF FINDINGS
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INTRODUCTION

On October 15, 2008, Mary Morris (Morris) filed a complaint with the Commissioner of Political Practices for the state of Montana (COPP) against Higher Ground Foundation (Higher Ground). Morris' Complaint alleges Higher Ground is not an incidental committee pursuant to ARM 44.10.327(2)(c), but instead was formed to repeal the Ravalli County Growth Policy, a specific ballot issue.

SUMMARY OF FACTS

1. Higher Ground filed with the COPP as an incidental committee on August 22, 2008. Morris alleges the activities of Higher Ground required it to file as a ballot issue committee, rather than an incidental committee and, therefore, it should have been required to disclose its financial contributors. Morris further alleges the "open connection" between Dan Cox and Higher Ground supports her conclusion. Dan Cox is a Ravalli County citizen who was actively coordinating people to oppose the growth policy.

2. The 1999 Montana Legislature revised statutes related to community development and land-use planning, known as a comprehensive plan or master plan. Montana cities and towns have been authorized to adopt master plans or comprehensive plans since 1957 and counties since 1971.

3. During the 1999 legislative session, Senate Bill (SB) 97 was introduced at the request of the Environmental Quality Council (EQC) as a result of an interim study of growth issues and planning for growth in Montana. The bill was approved by the Legislature (Chapter 582, Laws of 1999) and became law on October 1, 1999.

4. Montana's previous planning law allowed local governments to adopt master (comprehensive) plans and provided a long list of elements that could be included in the plan. The actual contents of the plan were left up to the local government. Under the revised law, master plans or comprehensive plans are now called "growth policies," and must meet certain minimum requirements that are oriented

toward the future and taking action. The rationale for setting minimum requirements for the content of the local growth policy is that if it is to be used as the basis for regulating the development or use of private property through subdivision regulations and zoning, the underlying growth policy should meet certain minimum standards. EQC also believed that the changes to the planning law would "provide a framework for implementation activities, including capital improvements planning and subdivision regulation".

5. The 2003 Montana legislature amended the 1999 growth policy law through SB 326. Importantly, the amended law:

- Authorized a governing body to revise an adopted growth policy following the procedures for adoption of the proposed growth policy;
- Authorized the governing body to repeal a growth policy by resolution; and
- Clarified that a petition for initiative or referendum to adopt, revise, or repeal a growth policy must contain the signatures of 15% of the qualified electors of the area covered by the growth policy.

SB 326 did not change provisions in the existing law that required:

- That the governing body be guided by and give consideration to the general policy and pattern of development set out in the growth policy in the adoption of zoning ordinances or resolutions and with respect to development or abandonment of public ways, public places, public structures, or public utilities (76-1-605, MCA); and
- That subdivision regulations be made in accordance with the growth policy, if a growth policy has been approved (76-1-606, MCA).¹

6. Ravalli County prepared a county growth policy in 2001 and 2002. The Ravalli County Planning Board (Planning Board), an advisory board to the County Commission, recommended adoption of the growth policy. On December 31, 2002, the County Commission adopted the growth policy. In April 2003 and August 2004, the County Commission amended the growth policy.

7. On June 3, 2008, Darby, Montana held a Ballot Issue advisory vote for the Darby School District asking voters if they wanted the County to continue to consider baseline zoning in the Darby School District.

8. On August 6, 2008, the Ravalli County Clerk and Recorder approved a petition to place a referendum on the November 4, 2008 ballot to repeal the growth policy. The effect of the referendum, if approved by voters, would be to end work on

¹ Montana Department of Commerce, Growth Policy Resource Book (2006).

projects authorized under the approved growth policy, including drafting of general zoning and streamside setback regulations.

9. Ravalli County had put out zoning information in November of 2007. Near that time, local citizens started coming together to discuss the ramifications of proposed county actions and implementations, and to discuss available options.

10. From November 2007 through May 2008, the individuals who would become Higher Ground attended public meetings and attempted to educate themselves on zoning and streamside setback issues, along with attempting to understand the Planning Department's direction. At these meetings, citizens discussed the ramifications of proposed county actions and implementations, and the available options.

11. The individuals who ultimately formed Higher Ground started meeting in late 2007. There were several informal meetings to discuss where they wanted to go as an organization, and how they wanted to present information to the public on issues they deemed important.

12. While Higher Ground was forming, Dan Cox was present at a general citizen meeting where zoning issues were discussed. Some members of Higher Ground heard what he had to say at this citizen meeting and invited him to a Higher Ground meeting. At that meeting, Dan Cox told Higher Ground members how they could delay county zoning by two years by repealing the Growth Policy.

13. Several members from Higher Ground split once a plan of action to support Dan Cox was established. The dissident group of individuals adopted the name "Citizens for Property Rights," and broke away from Higher Ground.

14. Dan Cox was listed as the registered agent of "Citizens Coalition for Repealing the Growth Policy" (CCRGP). CCRGP was incorporated and registered with the Montana Secretary of State on August 29, 2008, and dissolved in April 2009. While Cox was invited to be a presenter at one of Higher Ground's public meetings, he appeared as a representative of CCRGP, not as a representative or member of Higher Ground.

15. The first formal meeting of Higher Ground took place in May 2008. At that time, Higher Ground obtained an IRS Employer Identification Number (EIN).

16. Higher Ground's Bylaws, dated July 8, 2008, state the following purpose in Article 2 of the bylaws:

Section 1. The Corporation is a nonprofit and nonsectarian organization under the laws of the State of Montana.

Section 2. The purpose of this Corporation shall be to promote community issues and policies which are strategically designed to enhance property rights, economy, education build better and stronger communities, and preserve Montana's quality of life. The Corporation shall utilize public relations, grass roots and grass tops coordination activities to target concerned citizens from around Montana who are willing to support and advocate the inherent right of all citizens in Montana.

The Articles of Incorporation, dated July 8, 2008, provide:

The corporation shall be operated exclusively for educational, charitable, and scientific purposes within the meaning of § 501(c)(6) of the Internal Revenue Code of 1986, as now in effect or as may hereafter be amended ("the Code"). The purposes for which the Corporation are formed are:

1. to increase and diffuse knowledge to the general public about issues concerning the county in its broadest sense;
2. to educate the public in order to further their knowledge;
3. to do all and everything necessary to enhance the growth of education and the prospects for by encouraging the exploration and implementation of solutions to county issues;
4. to encourage allocation policy changes for our community;
5. to promote and facilitate the expansion, development, and growth of the county for the general public and members by any means consistent with the public interest through other activities, including, but not limited to, publications, meetings, conferences, training, educational seminars, and the issuance of grants and other financial support to educational institutions, foundations and other organizations exclusively for educational, charitable, and scientific purposes.

17. The Montana Secretary of State's records show Higher Ground recorded its Articles of Incorporation on August 12, 2008. The Secretary of State approved the Articles and sent notification to Higher Ground on August 14, 2008. Higher Ground Foundation remains an active Montana corporation in good standing with the Secretary of State's office.

18. Members of Higher Ground considered chartering the organization as a non-profit. They considered what they could and could not do with each non-profit classification, placing emphasis on being able to do the most education with the fewest restrictions. The members involved were not familiar with setting up organizations or establishing political committees. They were trying to educate themselves and get up to speed in a short time to adjust for implementation of zoning policies.

19. Higher Ground did discuss which type of entity would allow donors to remain anonymous. At the time, opposition groups were waging a campaign against the ballot referendum to repeal the growth policy. Members discussed filing as a PAC, but it was decided that would limit the group's freedom to educate.

20. Higher Ground made its first expenditures before Repeal the Growth Policy became a ballot issue. There were several individuals and loosely formed groups of people coming together in an attempt to inform the public about Ravalli County zoning issues. Higher Ground was formed to organize these individuals and to educate the community.

21. The founding members of Higher Ground had no experience in non-profit chartering or operations, and founding members did not have experience in ballot issues. Terri Daniel and other founding members of Higher Ground attended several county meetings one and a half to two years before Higher Ground was established.

22. In early to mid-May of 2008 Higher Ground began consulting with Missoula attorney William VanCanagan to discuss the goals and purposes of the would-be organization, as well as nature and requirements associated with the formation of a 501(c)(6) entity. The decision to become a 501(c)(6) entity was VanCanagan's idea, as he thought it was the best course for an educational entity. Higher Ground wanted to protect its donors' personal information because of some of the potential high profile donors contributing to the organization.

23. Terri Daniel called COPP for guidance regarding reporting requirements once the Ravalli County Clerk and Recorder approved the petition to place a referendum on the November 4, 2008 ballot to repeal the growth policy.

24. Higher Ground gathered signatures for the ballot issue, placed ads in the local newspaper, held educational forums, and launched a billboard campaign to repeal the Growth Policy.

25. Higher Ground did not endorse any candidates. Terri Daniels forwarded information (current events) via her Higher Ground email list. She put together a database that comprised contacts throughout the county. Information was not restricted to members only. The forwarded material was comprised of personal views and educational materials in relation to county and state issues. Terri Daniels stated she did not forward items she thought were inappropriate for the email list. She also stated that Higher Ground's webpage had educational links dealing with local, county, and statewide issues as covered by Higher Ground's mission statement.

26. Because of the inexperience of its members, Higher Ground found it difficult to balance between education and advocacy. Once COPP explained the differences between an incidental and political action committee to Terri Daniel, she informed COPP she should have organized a separate Political Action Committee for

the repeal of the growth policy activities. Terri Daniels further stated mistakes might have been made, though not intentionally.

27. Higher Ground remained active after the referendum election to repeal the growth policy, including sponsoring billboards in the county pertaining to the protection of private property rights.

28. Based on information provided by officers of Higher Ground, the organization initially expended approximately 16% of its time working on the ballot issue. None of the officers received a salary. Those individuals indicated they primarily spent their time educating the public on zoning issues and attending informational meetings, along with meeting with individuals from other counties to discuss zoning issues.

29. The investigation of this matter revealed that Higher Ground expended approximately 57% of its initial budget in support of the ballot issue to repeal the Growth Policy. Higher Ground's involvement in support of the referendum on the November 4, 2008, ballot to repeal the growth policy was this entity's first, and only, foray into the political arena.

30. Higher Ground continues to operate and function three years after it was formed, with no further political activity. Higher Ground has spent approximately 20% of its overall budget on political activities (i.e., the repeal of the growth policy) from 2008 through 2010.

STATEMENT OF FINDINGS

As noted in Fact 1, Higher Ground registered with COPP as an incidental political committee. The issue to be decided is whether Higher Ground was acting as a ballot issue committee and was required to register as such, rather than as an incidental committee.

The administrative rule setting forth the definition of a "ballot issue committee," is ARM 44.10.327(2)(a)(i), which states:

A ballot issue committee is specifically organized to support or oppose a ballot issue, as defined in 13-1-101, MCA.

The statutory definition of "ballot issue" in § 13-1-101(17) (a), MCA, provides:

... 'ballot issue' means a proposal submitted to the people at an election for their approval or rejection, including but not limited to initiatives, referenda, proposed constitutional amendments, recall questions, school levy questions, bond issue questions, or a ballot question.

Therefore, reading ARM 44.10.327(2)(a)(i) in conjunction with § 13-1-101(17) (a), MCA, provides the full and specific definition of a "Ballot Issue Committee." It is a committee specifically organized to support or oppose a proposal submitted to the people at an election for their approval or rejection, including but not limited to initiatives, referenda, proposed constitutional amendments, recall questions, school levy questions, bond issue questions, or a ballot question.

Here, the issue on the November 4, 2008 Ravalli County election ballot was denominated as a "referendum," which was submitted to the people at an election for their approval or rejection. Hence, the referendum for the repeal of the growth policy was a ballot issue.

Ravalli County citizens have faced divisive issues related to land use, zoning, setbacks, and growth policy for decades. The Ravalli County Growth Policy Plan was formalized in 2001 and has ever since been a frequent topic of discussion, meetings, education, and political debate.

Higher Ground's formation began in late 2007, and it received an IRS EIN number on May 28, 2008. The organization's Articles of Incorporation and Bylaws, dated July 8, 2008, were submitted to the Secretary of State on August 12, 2008 and approved by that office on August 14, 2008. The Ravalli County Clerk and Recorder approved the referendum to repeal the growth policy to be on the ballot on August 6, 2008. The fact that Cox's organization may have shared Higher Ground's growth policy concerns is not a violation of any statute or rule under the jurisdiction of COPP.

Section 13-1-101(17) (b), MCA, provides guidance regarding when an issue becomes a "ballot issue" for purposes of the matters under the jurisdiction of COPP's enforcement. That statute states:

For the purposes of chapters 35 and 37, an issue becomes a "ballot issue" upon certification by the proper official that the legal procedure necessary for its qualification and placement upon the ballot has been completed ...

The timing of the formation of Higher Ground as a legal entity in relation to the official certification of the ballot referendum, along with the fact that the organization received contributions and made expenditures to oppose the referendum, suggests that Higher Ground was specifically organized to support the referendum to repeal the growth policy. However, resolution of this issue requires an examination of all relevant evidence.

Higher Ground officer Terri Daniels contacted COPP after the organization had made a decision to advocate for the repeal of the growth policy referendum, to inquire as to the proper form of registration. Thereafter, Higher Ground registered with COPP as an incidental committee and received a letter from COPP advising its C-2 had been received and was in good order.

ARM 44.10.327 provides in pertinent part:

- (c) An incidental committee is a political committee that is not specifically organized or maintained for the primary purpose of influencing elections but that may incidentally become a political committee by making a contribution or expenditure to support or oppose a candidate and/or issue.
- (3) "Primary purpose" shall be determined based upon such criteria as allocation of budget, staff or members' activity, and the statement of purpose or goals of the individuals or person.

When determining whether Higher Ground registered correctly as an incidental committee, its primary purpose must be examined.

Initially Higher Ground's purpose was aligned with the efforts to repeal the growth policy. However, other individuals, both for and against the referendum, gathered to discuss the issues related to land use in Ravalli County on numerous occasions. Some attempted to formalize their groups by adopting names and filing for legal status, while others were more informal.

Higher Ground's Articles of Incorporation and its Bylaws make no mention of the growth policy repeal referendum, and were executed in advance of the Ravalli County Clerk and Recorder's certification of the referendum for the November 2008 general election ballot. Facially, Higher Ground memorialized its purpose prior to the growth policy repeal becoming a ballot issue.

There is no requirement that any of the committees under the jurisdiction of COPP be formalized as a corporation. Therefore, the fact that Higher Ground's Articles of Incorporation were not filed with the Secretary of State until subsequent to the Ravalli County Clerk and Recorder approving the referendum for the November 2008 general election ballot, is not, in and of itself, determinative.

However, a committee cannot memorialize its purpose in writing to indicate it is organized for a reason other than supporting or opposing a ballot issue, and then act inconsistent with that stated purpose by spending all or nearly all of its resources to support or oppose the ballot issue, in an effort to circumvent the disclosure

requirements for a ballot issue committee. The activities of the committee are ultimately determinative, with the stated purpose of the committee being one factor to be weighed in making such a determination.

Those other factors considered include that Higher Ground initially expended approximately 16% of its time and approximately 57% of its initial budget in support of the ballot issue. These expenditures totaled approximately 20% of Higher Ground's overall budget from 2008 through 2010. Due consideration was also given to the fact and that Higher Ground continues to operate and function, three years after it was formed, with no further political activity.

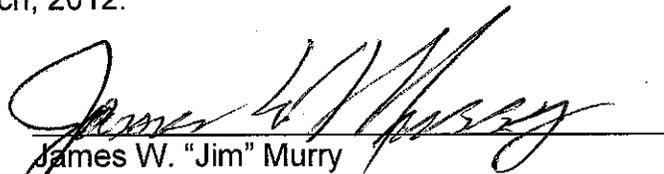
Consideration of the above referenced factors supports a conclusion that Higher Ground was not specifically organized for the primary purpose of influencing the 2008 Ravalli County referendum to repeal its growth policy.

Higher Ground became an incidental political committee when it involved itself in the referendum to repeal the Ravalli County growth policy. At that time, it properly filed with COPP as a incidental committee.

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings there is insufficient evidence to conclude that Higher Ground violated Montana campaign finance and practices laws or rules.

DATED this 5th day of March, 2012.


James W. "Jim" Murry
Commissioner of Political Practices