

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES

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In the Matter of the Complaint	)	<b>SUMMARY OF FACTS</b>
Against Eric Griffin and Lewis	)	<b>AND</b>
and Clark County	)	<b>STATEMENT OF FINDINGS</b>

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Joe R. Roberts filed a complaint against “unknown person, persons, or entity.” The complaint alleges that “political advocacy advertisements” relating to a road mill levy appeared in newspapers in Lewis and Clark County and contained no attribution, in violation of § 13-35-225, MCA. The complaint also alleges other violations, as described below.

**SUMMARY OF FACTS**

1. On November 7, 2006 Lewis and Clark County residents living outside the Helena city limits voted on a county road mill levy. The mill levy was proposed to raise \$500,000 annually for road reconstruction and improvement projects in the county. The mill levy passed by 97 votes, 6,726 to 6,629.
2. Eric Griffin is the Lewis and Clark County Public Works Director. Janet Pallister is also employed at the county’s Public Works Department.
3. The ad on the following page appeared as an insert in the November 1, 2006 edition of the Helena *Queen City News*:

# EVERY ROAD LEADS BACK TO YOU!

## **WHAT?**

- A county road mill levy to raise \$500,000 annually:
  - ◆ For road reconstruction;
  - ◆ For asphalt overlays, chip seals, and improvements to gravel roads.

## **FACTS**

- Roads constructed 30 to 40 years ago are deteriorating.
- Less than \$4.00 out of every \$100.00 in tax revenue currently goes to the County Road Fund.
- Growth continues to impact County roads.
- The condition of a road surface affects:
  - ◆ Law enforcement, fire and EMT response times;
  - ◆ Transportation of students to public schools;
  - ◆ The ability of citizens to shop, socialize, recreate, go to work or church;
  - ◆ Mail delivery.

## **HOW MUCH WILL IT COST ME?**

For a person owning a home with an assessed value of \$100,000, the additional cost will be approximately \$23 per year, or less than \$2 per month.

To learn more about the Road Mill Levy call: Eric Griffin at 447-1636 or Janet Pallister at 447-1634. You can also go to the City-County web page at <http://www.co.lewis-clark.mt.us/>

**YOUR VOTE IS YOUR VOICE!**  
**VOTE NOVEMBER 7, 2006**

4. An additional ad appeared in the November 2 and November 6, 2006 editions of the Helena *Independent Record* newspaper:

## EVERY ROAD LEADS BACK TO YOU!

*By Eric Griffin, Public Works Director  
Lewis and Clark County*

On November 7, Lewis and Clark County residents living outside the city limits of Helena and East Helena have an opportunity to vote on a County road mill levy. Here are some little known facts about the Lewis and Clark County road system, and its role in providing services for our County.

Lewis and Clark County is larger in size than the combined area of the states of Delaware and Rhode Island. The Road Department is responsible for 559.76 miles of roads in our County. These roads stretch from south of Helena to north of Augusta bordering on Flathead County. They extend east of Canyon Ferry Lake and west of Lincoln.

Many roads in our infrastructure system are worn out because they were built 30 to 40 years ago. The road mill levy is needed to raise \$500,000 annually for road reconstruction projects. The permanent levy will pay for asphalt overlays, chip seals, and gravel road improvements. The money cannot be used for maintenance or operations. The mill levy will cost approximately \$23 a year on a home with an **assessed** value of \$100,000. This is the same as buying a large pizza, movie tickets for three people, or four rolls of duct tape.

The **assessed** value of your home is different from its market value. The **assessed** value for taxing purposes may be less than the amount it sells for on the real estate market. As an example, a house that sold in the last year for \$282,500 has an **assessed** value for taxing purposes of \$95,022.

Statutorily less than \$4 out of every \$100 of property tax revenue goes to the County road fund. Over the last 20 years, funding reconstruction projects has decreased from 13.6 percent of the road budget to virtually nothing.

A quality road system is needed for law enforcement, fire and emergency medical responses. From January through October 6, 2006, the Sheriff's department, rural fire departments, Augusta and Lincoln ambulances, Lewis and Clark Search and Rescue, and the County Coroner responded to 12,896 incidents.

Did you know 978 students, living outside of Helena and East Helena, ride a bus to school every day? This does not include the 1,151 high school students who are driven or drive themselves to school.

Our County is projected to grow by 30,000 people over the next 20 years. Road improvements are needed to handle the influx of people and to ease traffic congestion. Roads provide for delivery of goods and services, farm to market transportation, recreation, and support a more mobile society.

We rarely give much thought to the importance of a quality road network in our day-to-day lives, but I'm asking you to think about how **every road leads back to you**. Please remember to vote November 7 on the Road Improvement Mill Levy.

5. The complaint alleges:

1. that the two ads contained no attribution in violation of § 13-35-225, MCA;
2. that the person or persons who sponsored the ads were required to register and report as a political committee under title 13, chapter 37, MCA and failed to do so; and,
3. that Eric Griffin and other county employees violated §13-35-226(4), MCA by soliciting support for a ballot issue while on the job or at the place of employment.

6. K. Paul Stahl, Deputy Lewis and Clark County Attorney, filed a written response to the complaint and provided copies of documents related to the process that resulted in the creation and publication of the ads. Stahl's response refers to the ad published in the *Helena Independent Record* as the "narrative ad," and the ad published in the *Queen City News* as the "block ad." The same references will be used herein. Stahl notes that in addition to its publication as an insert in the *Queen City News*, the block ad appeared as an insert in the *Independent Record* and the *Blackfoot Valley Dispatch*. According to Stahl the block ad was also enlarged and stapled to posters that were placed in various businesses with their permission. In addition, much of the information that was included in the ads was posted on the county's website prior to the election. The website included other data and information explaining the county's reasons for seeking to raise money through the mill levy.

7. Stahl's written response notes that eleven county officers and employees, with the assistance of an outside consultant, played a role in creating the two ads. Stahl admits that employees, officers, and agents of the county composed and prepared the ads while on the job and at their places of employment, and that the county paid public funds to create the ads and have them published. Stahl maintains that the ads do not constitute political advocacy. They were attempts to educate the public on the details of the road levy, he said, including the purpose of the levy and the intended use of the money that would be raised by the levy.

8. Records provided by Stahl show that in August, 2006 Lewis and Clark County contracted with the Gallatin Group, a private consulting firm, to provide consulting services to assist the county in devising a strategy for education of the public on issues pertaining to the proposed road mill levy. The contract provided for payments to the consultant of \$120 per hour, up to a maximum of \$10,000. Over the next several months, members of the Gallatin Group worked with staff of the county Public Works Department, the County Attorney's Office, and members of the Lewis and Clark County Commission to create the ads that are the subject of this complaint.

9. During that time, drafts of the ads were reviewed by the County Attorney's Office, Stahl said, to ensure that the message in the ads was educational rather than advocacy. According to an October 26, 2006 email, Stahl was asked to review the draft of an article that Eric Griffin planned to submit for publication on the opinion page of the *Independent*

*Record*. The draft of the article identified Griffin as the county's Public Works Director. Stahl recommended removal of the following sentence from the article: "It is time to invest in our road system." In the email Stahl noted: "If Eric were acting as a private citizen, I have no trouble leaving the sentence in, but he is identified as a public employee on the title, so no advocacy allowed."

10. The *Independent Record* declined to accept the article submitted by Griffin for publication on its opinion page, presumably because of the high volume of letters that it received in the days prior to Election Day, which was November 7, 2006. The county therefore decided to pay for publication of the article as an advertisement in the *Independent Record*, and it was published as the narrative ad. The county also authorized publication of the block ad as inserts in the *Queen City News*, the *Helena Independent Record*, and the *Blackfoot Valley Dispatch*. The total cost of publishing the ads and inserts exceeded \$3,000.

11. Stahl notes that in three instances language in the narrative ad, if viewed in isolation, could be interpreted as words of advocacy. Specifically, the third paragraph of the narrative ad includes the sentence "The road mill levy is needed to raise \$500,000 annually for road reconstruction projects." The sixth paragraph of the ad includes the sentence: "A quality road system is needed for law enforcement, fire and emergency medical responses." The eighth paragraph includes the sentence: "Road improvements are needed to handle the influx of people and to ease traffic congestion." Stahl states that in each of the three sentences the phrases "is needed" or "are needed" could better have been phrased as "will be used." Stahl nevertheless contends that when viewed and read in context, none of the three sentences constitute political advocacy, and that the phrases should be interpreted to mean "will be used."

## STATEMENT OF FINDINGS

### **Alleged Violation of § 13-35-225, MCA**

The complaint alleges that unknown persons or entities published "political advocacy advertisements" related to the Lewis and Clark County road mill levy, and that the advertisements contained no attribution in violation of § 13-35-225, MCA. Subsection (1) of the statute requires that:

"all communications advocating the success or defeat of a candidate, political party, or ballot issue. . . must clearly and conspicuously include the attribution 'paid for by' followed by the name and address of the person who made or financed the expenditure for the communication."

The question is whether the ads created and submitted for publication by the county violated the statute.

Although neither ad included a formal “paid for by” attribution, each ad included information strongly suggesting that the county was responsible for the ad. For example, the block ad referred the reader to the county’s website, which included the same information contained in the ads (Fact 6), and included telephone numbers for Eric Griffin and Janet Pallister, both employees of the Public Works Department (Fact 3). The top of the narrative ad stated: “Every Road Leads Back to You! By Eric Griffin, Public Works Director, Lewis and Clark County.” Even a casual reader would likely be able to discern that the ads were prepared by employees of Lewis and Clark County.

Each ad included information and data explaining the reasons the money was sought through the mill levy, the uses to which the money would be put, and how the condition of the road surface affects various users and uses of the county roads. The narrative ad urged the reader to “vote November 7 on the Road Improvement Mill Levy.” The block ad concluded with two statements: “Your vote is your voice! Vote November 7, 2006.” Although each ad explained and provided justification for the county’s request for the mill levy, neither ad expressly advocated for the passage of the mill levy.

In *Matter of the Complaint Against Jack Vallance* (November 16, 2009) (*Vallance*), I noted that in recent years federal courts have recognized the right of individuals to engage in limited anonymous campaign activities involving ballot issues, and declared statutes similar to § 13-35-225(1), MCA, unconstitutional because they applied to both ballot issue and candidate campaigns. (See, e.g., *ACLU v. Heller*, 378 F.3d 979 (9<sup>th</sup> Cir. 2004); and *Swaffler v. Cane, et al.*, 610 F. Supp. 2d 962 (E.D. Wisc. 2009).) Other courts have upheld statutes if they apply only to candidate campaigns and more than a *de minimis* campaign expenditure has been made. (See, e.g., *McConnell v. FEC*, 540 U.S. 93 (2003); and *Majors v. Abell*, 361 F.3d 349 (7<sup>th</sup> Cir. 2004).)

As Commissioner, I have no legal authority to decide the constitutionality of § 13-35-225(1), MCA. However, I do have an obligation to analyze the facts and narrowly construe § 13-35-225(1), MCA to avoid, if possible, constitutional questions. (*State v. Nye*, 283 Mont. 505, 510, 943 P.2d 96, 99 (1997); *State v. Lilburn*, 265 Mont. 258, 266, 875 P.2d 1036, 1041 (1994), *cert. denied*, 513 U.S. 1078 (1995).) To that end, in *Vallance* I listed several important factors that should be considered in determining whether there has been a violation of § 13-35-225(1), MCA.

1. Was an anonymous campaign expenditure made to support or oppose a *candidate*, rather than a *ballot issue*?
2. Did the anonymous campaign speech involve *express advocacy* (urging a vote for or against a particular candidate or ballot issue)?
3. Did the person who engaged in anonymous political speech *act alone* and use only his or her personal resources?
4. Did the person who engaged in anonymous political speech act independently and not *coordinate* the expenditure with a political committee or a campaign?
5. Did the anonymous campaign expenditure involve *more than a de minimis amount*?

(See *Vallance* at pp. 6-7.)

Generally speaking, affirmative answers to questions 1, 2, and 5 would tend to support requiring attribution on the campaign speech, while affirmative answers to questions 3 and 4 would tend to support a conclusion that the expenditure involved the type of anonymous speech that courts have held may not be subjected to regulation. The analysis requires a balancing process that focuses on the facts and circumstances of each particular case. Application of the factors to this case produces mixed results.

Regarding question 3, the county approved the hiring of a private consultant, who assisted numerous county officers and employees in the creation of the ads, using taxpayer money. This was therefore not a case of a person acting alone and using his or her personal resources. And, since thousands of dollars were spent (Facts 8 and 10), this also did not involve a *de minimis* expenditure (*see* question 5). Both of these factors would tend to support requiring attribution on the two ads. On the other hand, there is no evidence that the county coordinated its activities with a political committee or campaign organization (question 4). And, the campaign expenditure was made to support a ballot issue rather than a candidate (question 1). As noted above, some courts have declared statutes like Montana’s, which apply to both candidate and ballot issue expenditures, unconstitutional.

In this case, however, the answer to question 2 is the key factor, since it goes to the very issue presented by the language of § 13-35-225(1), MCA – whether the ads constitute “communications advocating the success” of a ballot issue.

The “express advocacy” standard was first devised by the United States Supreme Court in *Buckley v. Valeo*, (424 U.S. 1 (1976)) to avoid problems of unconstitutional vagueness in attempts to regulate political speech. The Court upheld a provision of the Federal Election Campaign Act that limited expenditures “relative to a clearly identified candidate” during a calendar year. The Court narrowly construed that phrase to “apply

only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for public office.” (*Id.* at 44.) The Court recognized that general discussions of issues and candidates are distinguishable from more pointed exhortations to vote for or against particular persons. (*Id.* at 39-45.)

Following years of debate among courts, lawyers, and scholars in the decades since *Buckley* was decided, the United States Supreme Court in more recent years sought to provide some guidance regarding the dividing line between “express advocacy” and “issue advocacy.”

In *McConnell v. FEC*, (540 U.S. 93 (2003),) the Court found that numerous claimed issue ads could be regulated because they were “the functional equivalent of express advocacy.” (*Id.* at 193-94, 206.)

In *FEC v. Wis. Right to Life*, (551 U.S. 449 (2007) (*WRTL*),) the Court considered whether ads broadcast by Wisconsin Right to Life, a corporation, violated a federal law prohibiting corporations from using corporate treasury funds for “electioneering communications” during a certain period of time preceding an election. The Court stated that “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” (*Id.* at 470.) The Court emphasized that in analyzing whether a particular ad meets the test:

1. there can be no free-ranging intent and effect test;
2. there generally should be no discovery or inquiry into the sort of ‘contextual’ factors highlighted by the FEC and intervenors;
3. discussion of issues cannot be banned merely because the issues might be relevant to an election; and
4. in a debatable case, the tie is resolved in favor of protecting speech. (*Id.* at 474, n. 7.)

Applying the *WRTL* test to the ads produced by the county, I cannot find that the ads are susceptible to no reasonable interpretation other than as an appeal to vote for the mill levy. The ads included the following information:

- The amount of money sought (\$500,000);
- What the money would be used for (asphalt overlays, chip seals, gravel road improvements);
- In the narrative ad, what the money could not be used for (maintenance and operations);
- Why a quality county road system is important (used by law enforcement, for fire and emergency medical responses, delivery of goods and services, farm to market transportation, recreation, and transportation of students);



- What it would cost a typical homeowner (\$23 a year on a home with an assessed value of \$100,000).

Although these facts may well have been set forth to convince the reader that the mill levy was a reasonable and justifiable request for money to improve the road system, a reader may just as well have believed, after reviewing the information, that the county roads were in good shape, or that the cost of the mill levy was prohibitive, or may have disagreed with the uses to which the money would be put.

Importantly, neither ad urged the reader to vote one way or another on the mill levy, but instead simply advised them to vote on Election Day.

Considering all the circumstances, I am not able to conclude that the ads were the functional equivalent of express advocacy. As a consequence, the ads did not violate § 13-35-225, MCA.

### **Registration and Reporting as a Political Committee**

The complaint states: “It appears that whoever sponsored these ads would also be required to file and report as a political committee under chapter 37 of Title 13, MCA.”

Montana law requires a political committee to file a statement of organization and file periodic reports of contributions and expenditures. (§§ 13-37-201, 13-37-225, MCA.) A “political committee” is defined in § 13-1-101(20), MCA, as:

. . . a combination of two or more individuals or a person other than an individual who makes a contribution or expenditure:

- (a) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination;
- (b) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or
- (c) as an earmarked contribution.

The county officers and employees did not become a political committee when they created and had published the ads discussed herein. It appears their objective was to educate the public by presenting various facts and data pertaining to the mill levy and the use that would be made of the revenue derived from the levy. Since the county proposed the mill levy to raise money for road reconstruction and improvement projects, it is not surprising that the county sought to explain the rationale for the request. Drafts of each ad were reviewed by the County Attorney’s Office in an effort to ensure that the content of the ads was educational rather than advocacy, and changes were made as a result of that review. (See Fact 9.)

Deputy County Attorney Stahl conceded that, in hindsight, some portions of the narrative ad could have been phrased differently to eliminate any suggestion that the ads were advocating a particular vote on the mill levy. (See Fact 11.) When read in the context of the entire ad, however, the use of the words “is needed” or “are needed” seems appropriate, given that a purpose of the ads was to explain to the public the county’s reasons for seeking the money. Moreover, the final portion of each ad simply urged the reader to “vote” on the mill levy, without specifically urging a “yes” vote.

As noted above, the county did not engage in express advocacy. The officers and employees involved in creating the ads did not become a political committee, thus no filing and reporting was required.

#### **Alleged Violation of § 13-35-226(4), MCA**

The complaint alleges that Eric Griffin and the other county officers and employees who were involved in the creation and publication of the two ads violated § 13-35-226(4), MCA, which provides:

A public employee may not solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue while on the job or at the place of employment. However, subject to 2-2-121, this section does not restrict the right of a public employee to perform activities properly incidental to another activity required or authorized by law or to express personal political views.

First, as discussed above, the activities of the county employees who worked on the two ads did not amount to advocacy for or solicitation of support for the mill levy; therefore, there is no basis to conclude that any of the county employees violated § 13-35-226(4), MCA. Moreover, the second sentence of § 13-35-226(4), MCA states that “subject to 2-2-121, this section does not restrict the right of a public employee to perform activities properly incidental to another activity required or authorized by law. . . .”

§ 2-2-121(3)(a), MCA prohibits a public officer or public employee from using public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue unless the use is:

- 1) authorized by law, or
- 2) properly incidental to another activity required or authorized by law, such as the function of an elected public officer, the officer's staff, or the legislative staff in the normal course of duties.

§ 2-2-121(3)(b)(i), MCA provides that, with respect to ballot issues, “properly incidental activities” are restricted to “the activities of a public officer, the public officer's staff, or legislative staff related to determining the impact of passage or failure of a ballot issue on state or local government operations.” The county officers and employees who helped to create the two ads that are the subject of the complaint were at least in part engaged in activities related to determining the impact of passage or failure of the road mill levy – activities that are not prohibited by §§ 2-2-121 and 13-35-226(4), MCA.

### CONCLUSION

Based on the preceding, the activities of Eric Griffin and other public officers and employees who were involved in the creation and publication of the two ads at issue did not violate Montana campaign finance and practices laws.

Dated this 19<sup>th</sup> day of November, 2009.

A handwritten signature in black ink, appearing to read "Dennis Unsworth", with a horizontal line underneath it.

Dennis Unsworth  
Commissioner of Political Practices