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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MICHAEL A. CARRIGAN, Fourth Ward
City Council Member of the City of Sparks,
Petitioner,

Case No.: CV09-02453
Dept. No.: 7

vs.

THE COMMISSION ON ETHICS OF THE
STATE OF NEVADA,
Respondent.

ORDER

The Petitioner, MICHAEL A. CARRIGAN, Fourth Ward City Council Member of the City of Sparks (hereinafter the "Petitioner"), filed a *Petition for Judicial Review* on August 13, 2009. The Petitioner filed his *Opening Brief* on October 19, 2009. The Respondent, THE COMMISSION ON ETHICS OF THE STATE OF NEVADA (hereinafter the "Commission"), filed a *Motion to Change Venue; Motion to Dismiss or in the Alternative, Motion for Summary Judgment* on November 25, 2009. The Petitioner filed a *Reply Brief*, a *Request for Hearing*, and a *Request for Submission* on December 21, 2009. The Commission filed a *Reply in Support of Motion to Change Venue; Motion to Dismiss or in the Alternative, Motion for Summary Judgment* on January 5, 2010.

Having granted the Petitioner's request for a hearing on this matter, the Court heard oral argument on January 27, 2010. After hearing arguments, the Court ordered the Commission to file a brief addressing the constitutional issues raised in the Petitioner's *Opening Brief*, and gave

1 the Petitioner an opportunity to reply to the Commission’s brief. The Commission filed an
2 *Answering Brief* on March 1, 2010. The Petitioner filed a *Reply Brief*, a *Request for Hearing*,
3 and a *Request for Submission* on March 12, 2010. Again, the Court granted the Petitioner’s
4 *Request for Hearing* and heard oral argument on May 27, 2010.

5 The Petitioner seeks an order from this Court finding NRS 281A.420(2),¹ NRS
6 281A.420(8)(d), and NRS 281A.420(8)(e)² unconstitutional and/or finding that the
7 Commission’s decision finding that the Petitioner is required to abstain from voting on any
8 issues regarding the Lazy 8 Project (hereinafter the “Project”) is not supported by substantial
9 evidence. Based on the analysis below, the Court finds that the doctrine of issue preclusion bars
10 this Court from ruling on the facial challenges to NRS 281.420(8) and the Commission’s
11 *Opinion* is supported by substantial evidence; however, the manner in which the Commission
12 applied the underlying statutory provisions violated the Petitioner’s First Amendment rights.

13 **Background**

14 This case comes before the Court on a *Petition for Judicial Review* challenging a ruling
15 from the Commission regarding the Petitioner’s need to abstain from voting on issues involving
16 the Project. The Petitioner is a member of the Sparks City Council representing the Fourth Ward
17 of the City of Sparks. After the Petitioner voted on an issue involving the Project at an August
18 23, 2006, Sparks City Council Meeting, a number of individuals filed ethics complaints with the
19 Commission against the Petitioner regarding his relationship with Mr. Carlos Vasquez
20 (hereinafter “Vasquez”). Vasquez served as the Petitioner’s campaign manager during the
21 Petitioner’s successful campaigns for Sparks City Council in 1999, 2003, and 2006. At the time,
22 Vasquez was a consultant to Red Hawk regarding the Project.

23 As a result of those complaints, the Commission conducted an investigation of charges
24 that the Petitioner (1) used of his official position to obtain an unwarranted benefit from
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27 ¹ The Court is aware that amendments to NRS 281A.420 during the 2009 Legislative Session moved the disclosure
28 and abstention requirements that are the subject of the *Petition for Judicial Review* from NRS 281A.420(2) to NRS
281A.420(3); however, for purposes of consistency between this *Order* and the briefing submitted by the parties the
Court refers to the subsection requiring disclosure and abstention as NRS 281A.420(2).

² NRS Chapter 281A is often referred to as the Nevada Nevada Ethics in Government Law. See NRS 281A.010

1 Vasquez, (2) failed to adequately disclose his relationship with Vasquez, and (3) failed to abstain
2 from voting on Red Hawk's application at the August 2006 meeting as NRS 281A.420(2)
3 requires. After holding a hearing on August 29, 2007, the Commission ultimately found that the
4 Petitioner (1) did not gain an unwarranted benefit through the use of his official position, (2)
5 adequately disclosed his relationship with Vasquez, and (3) should have abstained from voting
6 on Red Hawk's application because of his relationship with Vasquez. The Petitioner challenged
7 the finding that NRS 281A.420 required him to abstain from voting in the First Judicial District
8 Court (Case No. 07-OC-012451B). The First Judicial District Court affirmed the Commission's
9 decision from the August 2007 hearing, and the Petitioner appealed that decision to the Nevada
10 Supreme Court (Case No. 51920). The Nevada Supreme Court held oral argument in that matter
11 on March 3, 2009, and a decision in the case is pending.

12 In the interim, Red Hawk continued its efforts to develop the Project within the Tierra
13 Del Sol. On April 2, 2009, an amendment to the Master Plan (PCN09005) involving a change to
14 the land designation of a 20.5 acre parcel of land within Tierra Del Sol from General
15 Commercial to Tourist Commercial came before the Sparks Planning Commission (hereinafter
16 Planning Commission). A motion to approve this amendment failed due to a lack of a second on
17 the motion, which constitutes a denial of the amendment pursuant to NRS 278.210(3) because it
18 failed to obtain the quantity of votes required for approval of a master plan amendment.

19 On April 13, 2009, at a Sparks City Council meeting, Sparks Mayor Geno Martini and
20 Councilman Ron Schmitt requested a review of the Planning Commission's decision to deny
21 PCN09005 pursuant to Sparks Municipal Code 20.07.030(C).³ Red Hawk also filed an appeal of
22 the Planning Commission's decision on April 21, 2009, pursuant to Sparks Municipal Code
23 20.07.030(A)-(B).⁴ These two issues were consolidated in to a single item on the May 11, 2009,

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25 ³ "The mayor or any member of the city council may request review of a planning commission action or decision
26 with a written notice to the city clerk or orally at a meeting of the city council. Any such notice must be made
27 within twenty one days after such action or decision." Sparks Municipal Code 20.07.030(C).

28 ⁴ "A. Every action or decision of the planning commission or of any person engaged in the administration or
enforcement of this title, other than a recommendation or other action or decision routinely reviewed by the city
council, may be appealed to the city council.

B. Unless otherwise provided, any person aggrieved by any such action or decision, or any person engaged in
the administration or enforcement of this title affected by such action or decision, may appeal such action or

1 Sparks City Council meeting's agenda.

2 Due to the impending vote on PCN09005, the Petitioner sought an advisory opinion from
3 the Commission. The basis of the request for the advisory opinion was that Vasquez no longer
4 worked on the Project and no longer served as a campaign manager to the Petitioner. After a
5 hearing on May 7, 2009, the Commission found that the NRS 281A.420(2) required the
6 Petitioner to abstain from voting on PCN09005 despite the change in circumstances.⁵ Petitioner
7 sought to challenge this ruling by filing an Emergency Petition for Writ of Mandamus with the
8 Nevada Supreme Court; however the Supreme Court denied the Petition on May 8, 2009,
9 because the district court is the proper forum to file such a petition. The Petitioner then sought a
10 writ of mandamus from the Second Judicial District Court, which the Court denied on August
11 17, 2009. (See CV09-01999.) The Petitioner now seeks judicial review of the Commission's July
12 15, 2009 *Opinion*.

13 **Motion to Dismiss**

14 1) Arguments

15 The Commission seeks an order dismissing the *Petition* pursuant to NRCP 12(b)(5) or
16 alternatively under NRCP 56. The Commission argues that the Court should dismiss the *Petition*
17 under the doctrine of issue preclusion because the same parties already litigated the merits of
18 identical issues before the First Judicial District Court. In response, the Petitioner argues that the
19 issues are not identical, in particular the "as applied" challenge and the "substantial evidence"
20 challenge, because the change in facts is essential to litigating those issues.

21 2) Standard of Review

22 It is unclear to the Court whether Nevada's Rules of Civil Procedure are applicable to a
23 petition for judicial review in light of the appellate nature of the proceedings. But see C.R.
24 Federick, Inc. v. Nevada Tax Comm'n, 98 Nev. 387 (1982) (finding error in district court's

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26 decision to the city council, by filing a written notice of appeal with the city clerk within twenty one days after such
27 action or decision. Upon such filing, the city clerk shall set the matter for public hearing at the next available
28 regular meeting of the city council. The city council shall review the matter de novo, and may affirm, modify,
remand for further consideration or reverse the action or decision." Sparks Municipal Code 20.07.030(A) and (B)."
⁵ The Commission issued an oral decision at the hearing on May 7, 2009, and issued a written opinion on July 15,
2009.

1 refusal to grant a motion to dismiss a petition for judicial review for want of prosecution
2 pursuant to NRC 41(e)). In particular, because the Court is not involved in the fact finding
3 stage of litigation the standard of review on a motion to dismiss or a motion for summary
4 judgment is not well suited to provide the appropriate framework for disposing of such a motion.
5 However, Nevada case law establishes that dismissal by motion is an available remedy to a
6 respondent of a petition for judicial review where the petitioner is not entitled to the relief sought
7 in the *Petition*. See Kame v. Employment Sec. Dept., 105 Nev. 22 (1989) (affirming dismissal of
8 petition for lack of subject matter jurisdiction based on untimely filing of the petition).

9 3) Analysis

10 The Commission argues that the *Petition* should be dismissed, or alternatively the Court
11 should enter judgment in favor of the Commission as a matter of law, because the Petitioner's
12 challenge to the Commission's *Opinion* is barred by issue preclusion. The doctrine of issue
13 preclusion precludes parties from relitigating an issue that was actually and necessarily litigated
14 in a prior action. Five Star Capital Corporation v. Ruby, -- Nev. --, 194 P.3d 709 (2008). Five
15 Star Capital clarifies the elements of issue preclusion as being:

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17 (1) the issue decided in the prior litigation must be identical to the issue presented
18 in the current action; (2) the initial ruling must have been on the merits and have
19 become final; ... (3) the party against whom the judgment is asserted must have
20 been a party or in privity with a party to the prior litigation; and (4) the issue was
21 actually and necessarily litigated.

22 Id. at 713 (internal quotations omitted and ellipses original).

23 The Petitioner's claims regarding the application of NRS 281A.420(2) and (8) and
24 challenging the sufficiency of the evidence are not identical to the issues decided by the First
25 Judicial District Court in Case No. 07-OC-012451B because the change in factual circumstances
26 is material to the Court's determination of the issues raised by the Petitioner. Furthermore,
27 because the change in circumstances is material to the Court's analysis, the issue has not actually
28 been litigated. Accordingly, the Court finds that the doctrine of issue preclusion is inapplicable
to the "as applied" challenge and the challenge to the sufficiency of the evidence. However, to

1 the extent that the *Petition* challenges the facial validity of NRS 281A.420(8)(d) and (e), the
2 Court finds that the same parties already litigated this issue to a final decision on the merits
3 before the First Judicial District Court. Accordingly, the Court grants the *Motion to Dismiss* in
4 part, because the facial challenge to NRS 281A.420(d) and (e) is barred by issue preclusion. See
5 Robert Pennza, Inc v. City of Columbus, Ga., 196 F.Supp.2d 1273, 1278-79 (M.D. Ga. 2002)
6 (applying claim and issue preclusion to facial constitutional challenge of city ordinance).

7 **Motion for Change of Venue**

8 1) Arguments

9 The Commission also seeks a change of venue. In support of this position, the
10 Commission argues that a change of venue is proper to achieve judicial economy, avoid
11 inconsistent outcomes, and discourage forum shopping. In contrast, the Petitioner argues that
12 NRS 233B.130(2)(b) establishes this Court as a proper venue to hear this matter, and permitting
13 a change of venue would serve to prejudice the Petitioner by causing further delay to an
14 adjudication of the merits of his *Petition*.

15 2) Standard of Review

16 The Commission seeks an order transferring the case to the First Judicial District Court.
17 NRS 233B.130(2)(b) establishes three potential venues for a petition for judicial review
18 including the First Judicial District Court in Carson City, and the “district court ... in and for the
19 county in which the aggrieved party resides....” NRS 13.050(2) provides the Court with the
20 discretion to order a change of venue. Pearce v. Boberg, 87 Nev. 255, 256 (1971).⁶

21 3) Analysis

22 The Commission seeks an order transferring venue to the First Judicial District Court. In
23 support of its position the Commission cites Public Service Comm’n of Nev. v. Southwest Gas
24 Corp., 103 Nev. 307 (1987). In Southwest Gas Corp., the Nevada Supreme Court held that a
25 change of venue on a petition for judicial review filed with the Eight Judicial District Court was
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27 ⁶ The Petitioner argues that application of NRS 13.050 is improper because it references a change of venue of a trial
28 as opposed to a petition for judicial review, which is appellate in nature; however, Public Service Comm’n of Nev.
v. Southwest Gas Corp., 103 Nev. 307 (1987), indicates that a change of venue may be had on a petition for judicial
review.

1 appropriate where the First Judicial District Court held continuing jurisdiction over the matter.
2 103 Nev. at 308. In so doing, the Supreme Court relied upon a Ninth Circuit case noting that the
3 purpose of change of venue rules “is to conserve court resources, and avoid judicial collisions
4 and conflicts involving the same parties and controversies.” *Id.* (quoting Pacific Gas & Elec. Co.
5 v. Federal Power Comm’n, 253 F.2d 536, 541 (9th Cir. 1958)). The Petitioner argues that these
6 purposes are not served by changing venue. The Court agrees with the Petitioner.

7 The Commission is correct that the *Petition* before the Court raises constitutional issues
8 in common with issues raised before the First Judicial District Court in Case No. 07-OC-
9 012451B. However, unlike in Southwest Gas Corp., the First Judicial District Court does not
10 retain continuing jurisdiction over the constitutional issues because they are pending on appeal
11 with the Nevada Supreme Court in Case No. 51920. See Foster v. Dingwall, 126 Nev. Adv. Op.
12 5, 228 P.3d 453, 454-55 (2010) (noting that filing of notice of appeal divests the district court of
13 jurisdiction over matters on appeal). Furthermore, because the Court does not address the merits
14 of the facial challenge to the NRS 281A.420(8), the dispositive issues that remain are fact
15 specific to the *Petition* before the Court. Accordingly, a change of venue in this case would not
16 preserve judicial resources, and there is no danger of a “confusing or unseemly discord between
17 two courts ... concerning essentially the same controversy.” *Id.* (quoting Pacific Gas, 253 F.2d at
18 541).

19 **Petition for Judicial Review**

20 1) Arguments

21 The Petitioner argues that (1) the statutes in question are void for vagueness pursuant to
22 the Due Process Clause of the Fourteenth Amendment,⁷ (2) the statutes violate the Petitioner’s
23 First Amendment speech rights, and (3) there is not substantial evidence in the record to establish
24 that the Petitioner has a relationship with Mr. Carlos Vasquez that requires Petitioner to abstain
25 from voting on the Project. In contrast, the Commission argues that (1) the statutes in question
26 are sufficient to survive constitutional muster under the due process clause because they can
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28 ⁷ As noted above, the Court does not address the merits of the facial challenge to NRS 281A.420(8) because it is
barred by issue preclusion.

1 reasonably be interpreted as barring the Petitioner from voting on issues involving the Project,
2 (2) the statutes do not violate the Petitioner's First Amendment rights because the due process
3 rights of the citizens in having a fair impartial hearing outweigh the Petitioner's speech rights
4 and/or they survive either an intermediate or a strict scrutiny analysis, and (3) there is sufficient
5 evidence in the record to support a finding that the Petitioner and Vasquez have a relationship
6 that bars the Petitioner from voting on issues related to the Project.

7 2) Standard of Review

8 A district court may not substitute its judgment in the place of an administrative agency's
9 judgment when reviewing findings of fact and must limit their review to whether or not the
10 findings of fact are supported by substantial evidence. Clements v. Airport Authority of Washoe
11 County, 111 Nev. 717, 721 (1995). Pure questions of law are reviewed de novo; however "an
12 agency's conclusions of law that are closely related to the agency's view of the facts are entitled
13 to deference and should not be disturbed if they are supported by substantial evidence." Id. at
14 722 (citing SIIS v. Swinney, 103 Nev. 17, 20 (1987)).⁸ Substantial evidence is defined as "that
15 quantity and quality of evidence which a reasonable [person] could accept as adequate to support
16 a conclusion." Id. (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608 n.1 (1986)
17 (alteration original)).

18 3) Analysis

19 In challenging the Commission's *Opinion* requiring the Petitioner to abstain from matters
20 involving the Project, the Petitioner raises a First Amendment challenge to the Nevada Ethics in
21 Government Law, and he also challenges whether there is substantial evidence to support the
22 Commission's *Opinion*. It is a long standing axiom of judicial restraint that courts are to act
23 "with the greatest of caution" when asked to rule upon the constitutionality of a statute and are to
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25
26 ⁸ Compare Dept. of Motor Vehicles and Public Safety v. Jones-West Ford, Inc., 114 Nev. 766, (1998) ("A 'pure
27 legal question' is one 'that is not dependent upon, and must necessarily be resolved without reference to any fact in
28 the case before the court. An example ... might be a challenge to the facial validity of a statute.'" (quoting Beavers
v. Dept. of Motor Vehicles and Public Safety, 109 Nev. 435, 438 n. 1 (1993)), with State Environmental Com'n v.
John Lawrence Nevada, 108 Nev. 431, 433 (1992) ("Whether NAC 445.696 is unconstitutionally vague *as applied*
to John Lawrence is a mixed question of law and fact; thus, the findings of the Commission were entitled to
deference by the district court." (citing NRS 233B.135) (emphasis added)).

1 avoid answering constitutional questions when doing so is unnecessary. King v. Board of
2 Regents of Univ. of Nev., 65 Nev. 533, 542 (1948). Accordingly, to reach the First Amendment
3 issues the Petitioner raises, the Court must first determine whether there is sufficient evidence to
4 support the challenged findings. As is discussed below, the Court finds that the record contains
5 sufficient evidence to support the Commission's *Opinion*; however, the Commission's
6 application of the Nevada Ethics in Government Law violated the Petitioner's First Amendment
7 Rights.

8 a. *Substantial Evidence*

9 The Petitioner argues that this Court should reverse the Commission's decision because it
10 is not supported by substantial evidence. To support this point, the Petitioner argues that there is
11 no evidence to support the Commission's finding that the Petitioner is required to abstain from
12 voting on issues before the Sparks City Council involving the Project because (1) Vasquez no
13 longer served as a campaign volunteer for the Petitioner, and (2) although Vasquez continues to
14 work with Red Hawk, he is no longer involved in working on the Project. In contrast, the
15 Commission argues that (1) the initial decision in 2007 was supported by substantial evidence,
16 and (2) the relationship between the Petitioner and Vasquez has not changed in a way that would
17 eliminate the disqualifying conflict of interest because the Petitioner could neither confirm nor
18 deny that he would run for office in the future and if the Petitioner did run for re-election that
19 Vasquez would not work on the campaign.

20 Under NRS 281A.420(2), a public officer⁹ is required to abstain from voting on "a matter
21 with respect to which the independence of judgment of a reasonable person in [the public
22 officer's] situation would be materially affected by ... [h]is commitment in a private capacity to
23 the interest of another." The term "others" as used within "commitment in a private capacity to
24 the interest of others" includes a person:

- 25 (a) Who is a member of [the public officer's] household;
26 (b) Who is related to [the public officer] by blood, adoption or marriage within
27 the third degree of consanguinity or affinity;

28 _____
⁹ The term "public officer" is defined at NRS 281A.160.

- 1 (c) Who employs [the public officer] or a member of his household;
2 (d) With whom [the public officer] has a substantial and continuing business
3 relationship; or
4 (e) Any other commitment or relationship that is substantially similar to a commitment or
5 relationship described in this subsection.

6 NRS 281A.420(8).

7 In this case, the Commission found that the Petitioner and “Vasquez continue to share a
8 substantial and continuing business relationship or one that is substantially similar.” See In re
9 Carrigan, Comm’n on Ethics Opinion No. 09-28A at 4. The Commission supported this finding
10 by asserting that the relationship between the Petitioner and Vasquez was substantial because
11 “Vasquez is a close personal friend and political advisor” to the Petitioner and the relationship is
12 continuing because the Petitioner “could not say that Vasquez would not handle [the Petitioner’s]
13 campaign” if the Petitioner decided to run for re-election. Id. at 4-5. Because the Court must
14 give deference to the Commission’s findings of fact, and those conclusions of law that are
15 intertwined with the Commission’s interpretation of the facts, the Court finds that there is
16 substantial evidence to support the Commission’s finding. In particular, the Petitioner’s own
17 testimony during the May, 2, 2009, hearing supports the Commission’s findings that Vasquez
18 and the Petitioner have a long standing relationship, which included Vasquez serving as the
19 Petitioner’s campaign manager in the past, and the Petitioner could not deny that Vasquez would
20 serve as a campaign manager if Petitioner decided to run for office again in the future. (See e.g.
21 ROA at 89-90, 93.)

22 b. First Amendment: Pickering Balancing

23 The Petitioner argues that the Commission’s application of the Nevada Ethics in
24 Government Law in this case is unconstitutional because it violated his First Amendment rights.
25 An “as applied” challenge to a statute is a mixed question of law and fact; meaning a Court must
26 give deference to an administrative agency’s application of a statutory provision and limit its
27 inquiry to determining “whether the agency decision was arbitrary and capricious.” State
28 Environmental Comm’n v. John Lawrence Nevada, 108 Nev. 431, 433-34 (1992). A decision is
arbitrary and capricious if it is made for an improper reason, without reason, is an abuse of

1 discretion or is not supported by substantial evidence. City Council of City of Reno v. Irvine,
2 102 Nev. 277, 280 n. 4 (1986).

3 The First Amendment states, “Congress shall make no law ... abridging the freedom of
4 speech.” U.S. Const. amend. I. The Due Process Clause of the Fourteenth Amendment extends
5 application of the First Amendment to the several States by prohibiting the infringement of an
6 individual’s First Amendment rights by state actors acting under color of government authority.
7 S.O.C., Inc. v. Mirage Casino-Hotel, 117 Nev. 403, 409-10 (2001). Under the First Amendment,
8 a public officer retains the right to speak openly on matters of public import while serving as an
9 elected representative; however that right is not unfettered. Mullin v. Town of Fairhaven, 284
10 F.3d 31, 37 (1st Cir. 2002); DeGrassi v. City of Glendora, 207 F.3d 636 (9th Cir. 2000).

11 In asserting that the Nevada Ethics in Government Law infringes his First Amendment
12 rights, the Petitioner argues that the Nevada Ethics in Government Law is an unconstitutional
13 prior restraint and a content based restriction that requires the Court to apply a strict scrutiny
14 analysis. In contrast, the Commission argues that the appropriate analysis is to employ the
15 balancing test set forth by the United States Supreme Court in Pickering v. Board of Educ., 391
16 U.S. 563 (1968). The Commission argues further, even if the Court finds that strict scrutiny is
17 the proper standard of review, the Nevada Ethics in Government Law survives the heavy burden
18 of a strict scrutiny analysis. Based on the analysis below, the Court disagrees with the
19 Commission and finds that even under the less stringent Pickering balancing test, the
20 Commission’s *Opinion* is unconstitutional as applied.¹⁰

21 While Pickering focused on balancing the First Amendment rights of a public employee
22 against the interests of the employer, the Ninth Circuit has acknowledged that the underlying
23 purpose in balancing a public officer’s First Amendment rights against the interest of the State is
24 essentially the same. DeGrassi, 207 F.3d at 647 (9th Cir. 2000) (“While the free speech rights of
25 elected officials may well be entitled to broader protection than those of public employees
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27
28 ¹⁰ Because the Court finds that the Commission’s *Opinion* does not survive an as applied challenge under Pickering,
it is unnecessary for the Court to address the Petitioner’s assertion that strict scrutiny is the proper standard of
review. Accordingly, the Court makes no finding regarding the appropriate standard of review.

1 generally, the underlying rationale remains the same.”). Under Pickering, to determine whether
2 the First Amendment’s protection reaches the Petitioner’s right to vote on matters pertaining to
3 the Project, and thus renders the Commission’s *Opinion* unconstitutional, the Court must engage
4 in an analysis of balancing the Petitioner’s First Amendment interests against the State’s
5 legitimate interests in the operation of its government.

6 A case like this is very difficult because the interests of the parties are complimentary to
7 each other. There is no doubt that the Petitioner has a protectable First Amendment interest in
8 voting on matters that come before the Sparks City Council; faithfully discharging his obligation
9 to represent the will of his constituency. The State, by and through the Commission, also has an
10 interest in ensuring that the Petitioner faithfully discharges his obligations to his constituents. In
11 fact, a recent amendment to NRS 281A.420(4)(b) expressly states:

12 [b]ecause abstention by a public officer disrupts the normal course of
13 representative government and deprives the public and the public officer's
14 constituents of a voice in governmental affairs, the provisions of this section are
15 intended to require abstention only in clear cases where the independence of
16 judgment of a reasonable person in the public officer's situation would be
17 materially affected by the public officer's acceptance of a gift or loan, the public
18 officer's pecuniary interest or the public officer's commitment in a private
19 capacity to the interests of others.

20 This new addition to the Nevada Ethics in Government Law reflects a declaration by the
21 Legislature that only where it is *clear* that a public officer has a personal interest that *conflicts*
22 with his duty to represent the interests of his constituents should the public officer be compelled
23 to abstain from voting.¹¹ Thus, where the difference between the interests of the Petitioner and
24 the State potentially lies depends upon whether the Petitioner has an interest identified by NRS
25 281A.420(2) that interferes with his duty to represent the interests of his constituents.

26 _____
27 ¹¹ The Court recognizes that the amendments to NRS 281A.420 regarding public policy on abstention became
28 effective on May 28, 2009; just twenty-one (21) days *after* the Commission’s hearing on the Petitioner’s request for
an advisory opinion. However, although the amendments were not effective as of the date of the Petitioner’s
hearing, the Court need not, and does not, treat them as a change in public policy. See Welfare Division of the Dept.
of Health and Welfare v. Maynard, 84 Nev. 525, 529 (1968) (“A statutory enactment can be simply a legislative
pronouncement of already existing law.”). Rather, the Court considers them a codification of previously existing
public policy.

1 Nevada has elected to use a representative form of government “to aid in the conduct of
2 the people’s business.” NRS 241.010; see also Nev. Const. Art. 9, § 1. Complimentary to that
3 goal, the purpose of the Nevada Ethics in Government Law is ensuring that the voice of the
4 people is not drowned out by a self-interested elected representative. See NRS 281A.020(1)(a)
5 (“A public office is a public trust and shall be held for the sole benefit of the people.”). The
6 Commission argues that the Ethics in Government Law is necessary to protect the due process
7 rights of the citizens of Sparks. While the Court does not disagree that there are circumstances
8 where the existence of an actual conflict of interest will require a public officer to abstain, the
9 Court questions which citizens of Sparks’ due process rights are being protected by requiring the
10 Petitioner to abstain from voting.

11 As the Commission notes in its own briefing, the Project was a heavily contested issue
12 during the 2006 Sparks City Council Election. In fact, the candidate that challenged the
13 Petitioner for the Fourth Ward’s seat on the Spark City Council focused his campaign on
14 preventing development of the Project. (See ROA at 96:12-97:7.) In a case like this, where the
15 Petitioner clearly stated his position on the Project during the campaign, the opposing candidate
16 focused his campaign around opposing the Petitioner’s position on the Project, and the citizenry
17 voted the Petitioner in to office with full knowledge of his position on the Project; it is anything
18 but clear that an actual conflict of interest exists. In the absence of an actual, existing conflict of
19 interest, this Court finds it at odds with the aims of due process to deprive the citizens of the
20 Fourth Ward of their representative voice on issues pertaining to the Project, effectively silencing
21 their vote at the ballot box from November of 2006.

22 While the Court must give deference to the Commission’s factual findings, in the absence
23 of evidence establishing an actual, existing conflict of interest the scales of the Pickering
24 balancing test must tilt in favor of the Petitioner’s First Amendment right to vote on matters of
25 public importance. Thus, only when there is an actual, existing conflict of interest should the
26 public officer’s First Amendment rights give way to NRS 421A.420(2)’s abstention requirement.
27 The record before the Commission is insufficient to establish an actual, existing conflict of
28 interest. Rather, the Commission’s *Opinion* is based on the Petitioner’s inability to deny that a

1 conflict will arise in the future. Accordingly, the Court finds that the Commission's *Opinion* is
2 based upon an improper purpose, rendering the *Opinion* arbitrary and capricious, in violation of
3 the First Amendment.

4 **Conclusion**

5 The Commission seeks an order changing venue and an order dismissing the case or
6 entering judgment in the Commissions favor as a matter of law. Based on the analysis above, the
7 *Motion to Dismiss or in the Alternative, Motion for Summary Judgment* is **GRANTED** in part
8 and **DENIED** in part, and the *Motion for Change of Venue* is **DENIED**.

9 The Petitioner brought this *Petition for Judicial Review* to challenge an *Opinion* from the
10 Commission on Ethics, which found that NRS 281A.420(2) required the Petitioner to abstain
11 from voting on matters involving the Lazy 8 Project in Sparks, Washoe County, Nevada. In
12 reviewing the Commission's *Opinion*, the Court finds that there is sufficient evidence to support
13 the Commission's finding; however, the Court finds that the Commission's application of NRS
14 281A.420(2) and NRS 281A.420(8) violated the Petitioner's First Amendment rights.
15 Accordingly, the Court **REVERSES** the Commission's *Opinion* in In re Carrigan, Comm'n on
16 Ethics Opinion No. 09-28A.

17
18 DATED this 2 day of ~~July~~ 2010.

19
20 
21 PATRICK FLANAGAN
22 District Judge
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CERTIFICATE OF SERVICE

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Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 2 day of July, 2010, I electronically filed the following with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

- Yvonne Goodson, Esq. for Nevada Commission on Ethics; and
- Douglas Thornley, Esq. for Michael Carrigan;

I deposited in the Washoe County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:



Judicial Assistant