DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock St., Denver, CO 80202	DATE FILED: January 3, 2019 4:02 PM CASE NUMBER: 2018CV32664
Plaintiff: MICHAEL DUNAFON, v. **Defendant:** APRIL JONES, JO ANN SORENSEN, WILLIAM J. LEONE, and MATT SMITH, in their official capacities as members of the Independent Ethics Commission, and the INDEPENDENT ETHICS COMMISSION, a tribunal of the State of Colorado.	▲ COURT USE ONLY ▲ Case Number: 18CV32664 Courtroom: 368

ORDER

This matter comes before the Court for judicial review pursuant to C.R.C.P. 106. Plaintiff, Michael Dunafon ("Mayor Dunafon"), filed a complaint asserting claims under Rule 106(a)(4) against Defendant, the Independent Ethic's Commission ("IEC"), and its individual commissioners.

The Court has reviewed Mayor Dunafon's Opening Brief and attachments (filed on September 21, 2018), the IEC's Answer Brief (filed on October 26, 2018) and Mayor Dunafon's Reply Brief and attachment (filed on November 9, 2018).

Having reviewed the pleadings, the court file, the briefs, relevant legal authority, and being otherwise fully advised, the Court makes the following findings, conclusions, and orders.

I. Preliminary Matters

Pursuant to C.R.C.P. 106(a)(4)(III):

> *If* the complaint is accompanied by *a motion and proposed order requiring certification of a record, the court shall order the defendant body or officer to file with the clerk on a specified date, the record or such portion or transcript thereof as is identified in the order, together with a certificate of authenticity.* The date for filing the record shall be after the date upon which an answer to the complaint must be filed.

(Emphasis added.)

In an effort to clarify the parties' understanding about the record on appeal, the Court—noting that there was no motion to certify the record after the parties stipulated to a Rule 106 briefing schedule—had the clerk send out the following email to all counsel:

From: hen, karen [mailto:karen.hen@judicial.state.co.us]
Sent: Tuesday, September 11, 2018 3:20 PM
To: Benenson, Richard B.; Dunn, Jason R.; Weiss, Joshua A.; gina.cannan@coag.gov
Subject: 18CV32664 Dunafon v. Jones et al.

Counselors:

The Court issued an order approving your briefing deadlines. The Court noticed, however, that the record in this case has not been certified.

Please advise on the status.

Thanks,
Karen

Karen Hen
Law Clerk to the Hon. Edward D. Bronfin
Denver District Court – Courtroom 368
720-865-8305

to which Mayor Dunafon's attorney replied:

From: Weiss, Joshua A. <jweiss@bhfs.com>
Sent: Wednesday, September 19, 2018 9:49 AM
To: hen, karen; Benenson, Richard B.; Dunn, Jason R.; gina.cannan@coag.gov
Subject: RE: 18CV32664 Dunafon v. Jones et al.

Follow Up Flag: Follow up
Flag Status: Flagged

Dear Ms. Hen:

The parties have conferred and are of the shared understanding that, under Rule 106, certification of the record is not mandatory. Plaintiff does not intend to certify the record and Defendants do not intend to supplement the record. Thanks very much.

Sincerely,
Josh Weiss

Joshua A. Weiss
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202
303.223.1268 tel
jweiss@bhfs.com

(*Counsel's Email Re: Certification of Record*, filed September 21, 2018.)

Given (i) the language of Rule106 (a)(4)(III), (ii) that all counsel agreed that certification of the record was not mandatory and that no party intended to certify the record, and (iii) the lack of any contemporaneous objection by the IEC to the September 21, 2018 communication, the Court finds that a certification of the record was not mandatory. Had the IEC sought certification of a record, or wanted to supplement the record, the IEC could have moved for certification and/or filed exhibits to their Answer Brief. Having elected to proceed without either, the Court rejects the IEC's argument that the Court should decline to consider the arguments because Mayor Dunafon failed to certify the record.

II. Background

Mayor Dunafon is the Mayor of the City of Glendale, Colorado.

The IEC received two complaints about Mayor Dunafon's actions as Mayor. After an investigation that lasted approximately three years, the IEC concluded it had jurisdiction to consider the complaints made against Mayor Dunafon. Per that conclusion, the IEC decided to move forward with an investigation of complaints made against Mayor Dunafon.

Immediately after the IEC determined that it had jurisdiction over the City and the complaints made against Mayor Dunafon, Mayor Dunafon commenced this action seeking: (i) a declaratory judgment stating that the IEC lacks jurisdiction to consider the complaints made against him; (ii) a reversal of the IEC's jurisdictional determinations with respect to the complaints against 3 him; (iii) a permanent injunction enjoining any investigation or adjudication of complaints filed with the IEC against Mayor Dunafon; and (iv) a preliminary injunction[1] enjoining any investigation or adjudication of complaints filed with the IEC.[2]

III. Legal Background

A. Jurisdiction of the IEC

In 2006, Colorado voters passed Amendment 41, a constitutional citizen initiative. Amendment 41 was codified into Article XXIX of the Colorado Constitution. The purpose of Article XXIX was to allow for an independent commission to hear complaints, issue findings, and assess penalties in connection with "ethics issues arising under [Article XXIX] and under any other

[1] The Court set this case for a preliminary injunction hearing, however, the parties agreed to vacate the hearing as the Court determined it will issue a ruling on the merits of the case by January 2019.

[2] The parties agreed to proceed with a Rule 106 briefing schedule to address these issues.

standards of conduct and reporting requirements as provided by law." Colo. Const. art. XXIX § 5(1). Moreover, Article XXIX allows for the IEC to issue advisory opinions on certain matters.

Significant to the issues raised in this case, Article XXIX contains an explicit exemption which limits the jurisdiction of the IEC. Section 7 of Article XXIX provides:

> Any county or municipality may adopt ordinances or charter provisions with respect to ethics matters that are more stringent than any of the provisions contained in this article. The requirements of this article shall not apply to home rule counties or home rule municipalities that have adopted charters, ordinances, or resolutions that address the matters covered by this article.

Thus, the IEC lacks jurisdiction in home rule counties or home rule municipalities that have "address[ed] the matters covered by this article." Colo. Const. art. XXIX, § 7.

B. City of Glendale's Status

The City of Glendale is a home rule municipality. The Preamble to the Glendale Municipal Code states:

PREAMBLE

We, the people of Glendale, Colorado, under the authority of the Constitution of the State of Colorado, and the Municipal Home Rule Act, do ordain, establish and adopt this Home Rule Charter for the City of Glendale.

Glendale Colo. Charter, Preamble.

C. Glendale's Code of Ethics

In 2006, after the adoption of Article XXIX, the City of Glendale enacted Chapter 2.14 "Code of Ethics." Section 2.14.010 to the Glendale Colo. Code states:

2.14.010 General purpose.

The purpose of this chapter is to promote public confidence in city government, to provide guidance to members of City Council, members of city boards and commissions, and city officers, employees, and independent contractors by this code of ethics. This chapter is intended to supersede Article XXIX of the Colorado Constitution approved by the electorate as Amendment 41 at the election held on November 7, 2006. As a home rule city, Glendale is herein addressing matters covered by Article XXIX. (Ord. 2006-12 § 1 (part))

Glendale Colo. Code § 2.14.010.

The Code proceeds to define penalties and violations of ethical rules by elected officials and other public employees of the City of Glendale:

2.14.030 Penalties.

In addition to any other penalty provided for in the Charter, this code or any other applicable law, any elected official, officer, board member, employee, or independent contractor who violates any provision of this chapter is subject to the following penalties:

A. If a violation is established to the satisfaction of the majority of members of the City Council, the person may be subject to an official reprimand or disciplinary action as allowed under the applicable rules and regulations and standards of the city.

B. The penalties provided for in this section shall not preclude the application of any other penalty or remedy if applicable to elected officials, officers, board members, employees, or independent contractors of the home rule city of Glendale. (Ord. 2006-12 § 1 (part))

Id. § 2.14.030.

2.14.040 Violations.

A. No elected official, officer, board member, employee, or independent contractor shall engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties.

B. No elected official, officer, board member, employee, or independent contractor shall perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative or agent.

C. The following shall not be prohibited under this section:

1. Campaign contributions as allowed by law.

2. An unsolicited item of trivial value.

3. An unsolicited token or award of appreciation such as a plaque, trophy, desk item, wall memento or similar item.

4. Unsolicited informational material, publications or subscriptions related to the recipient's performance of official duties.

5. Payment of, or reimbursement for, actual and necessary expenditures for registration, travel and subsistence for attendance at a convention or other meeting at which an elected official, officer, board member or employee is scheduled to attend or participate.

6. Reimbursement for or acceptance of an opportunity to participate in a social function or meeting which is offered to an elected official, officer, board member, employee, or independent contractor which is not extraordinary when viewed in light of the position held by such elected official, officer, board member, employee, or independent contractor.

7. Items of perishable or nonpermanent value, including but not limited to, meals, lodging, travel expenses or tickets to sporting, recreational, educational or cultural events.

8. Payment for speeches, debates or other public events, reported as honorariums.

9. Payment of salary for employment, including other government employment, in addition to that earned from being an elected official, officer, board member, employee, or independent contractor.

10. Items available for free to the general public at trade conventions or other public exhibitions, and items offered at a discount to elected officials, officers, board members, government employees, or independent contractors.

11. The use of Glendale government facilities or equipment to communicate or correspond with constituents, family members or business associates.

12. The receipt of a benefit as an indirect consequence of transacting local government.

D. No member of the City Council shall vote on any question concerning the member's own conduct.

E. The City Council may dismiss frivolous complaints submitted by persons under this chapter. Complaints dismissed as being frivolous shall be maintained confidential by City Council.

F. With respect to complaints under this chapter that City Council does not deem to be frivolous, City Council may hold a public hearing. City Council may render findings on nonfrivolous complaints orally or in writing. There is hereby established a presumption that the findings shall be based upon a proof beyond a reasonable doubt standard. (Ord. 2006-12 § 1 (part))

Glendale Colo. Code § 2.14.040.

The code enumerates rules that prohibit: (i) elected officials from engaging in substantial financial transactions for their private business purposes with people that they supervise or direct; and (ii) elected officials from preforming official acts that substantially and directly affecting the economic benefit of said official's business or "other undertaking [in] which [the official has] a substantial financial interest . . .." Glendale Colo. Code § 2.14.040 (2006).

The code establishes an impartial procedure for hearing and adjudicating ethics complaints and it contains penalty provisions for individuals found to have violated the ethical rules. *Id.* § § 2.14.040 (D-F) and 2.14.030.

In addition to the Code of Ethics codified in Glendale Colo. Code § 2.14, the Charter for the City of Glendale ("Charter"), which defines, in part, mayoral duties, also creates ethical rules for the Mayor and City Council members.

Section 4.9 Mayor.

a. The Mayor shall preside over meetings of the Council, have the power to administer oaths and affirmations, and have the right to vote only in case of tie. Mayor votes and may veto — two-thirds (2/3) vote of the City Council to override veto. He shall be recognized as head of the City government for all ceremonial purposes. He shall execute and authenticate legal instruments requiring his signature as such an official.

Glendale Colo. Charter, Ch. IV, § 4.9 .

Section 4.19 Conflict of Interest.

a. No member of the Council shall be interested directly or indirectly in any contract, including purchases or sales, with the City, except that such contract may be made by the City if the members of the Council in office at the time the vote is taken, having no such interests, shall unanimously determine that the best interests of the City shall be served by the making of such contract and if, either such contract is made after comparative prices are obtained or if the members of the Council having no interest shall unanimously determine that the obtaining of comparative prices is not feasible in such particular case.

Id. § 4.19.

Section 4.27 Organization and Rules of the Council.

The Council shall determine its own organization, rules and order of business subject to the following provisions:

a. Minutes of the proceedings of each regular or special meeting shall be kept in the English language by the Clerk and shall be signed by the Presiding Officer and Clerk of the meeting at which the minutes are approved.

b. A roll call vote upon all ordinances shall be taken by "Yes" or "No" vote and entered upon the records, except that where the vote is unanimous it shall only be necessary to state that the vote was unanimous.

c. No member of the Council shall vote on any question in which he has a financial interest, other than the common public interest, or on any question concerning his own conduct.

Id. § 4.27.

Section 9.12 Acceptance of Gratuities Prohibited.

It shall be a violation of this Charter for any City elected or appointed officer or any City employee to accept gratuities, favors, or gifts in connection with or relative to any contract or business of the city.

Glendale Colo. Charter, Ch. IX § 9.12.

Viewed in combination, both the Code and the Charter provide rules and regulations to address and resolve issues concerning alleged unethical conduct

by elected and other governmental officials of the City of Glendale.

IV. Complaints Against Mayor Dunafon

The City of Glendale received two complaints about Mayor Dunafon.

The first complaint, filed on January 26, 2016, was made by Colorado Ethics Watch. It alleged Mayor Dunafon had a conflict of interest when he cast a tie-breaking vote at a February 3, 2015 City Council meeting.

The second complaint was filed by M.A.K. Investment Group, LLC ("M.A.K.").[3] M.A.K. alleged in Complaint 17-14 that Mayor Dunafon improperly voted on a consent item that was passed by the City Council.

V. Standard of Review

In an appeal of the actions of an administrative agency, the reviewing court is not permitted to weigh the evidence or substitute its opinion for that of the agency. Rather, the limited matters which may properly be considered on appellate review to the district court on a Rule 106 review are whether the agency or governmental body either: (1) exceeded its jurisdiction or (2) abused its discretion based on the evidence in the record which was presented to that agency. C.R.C.P. 106(a)(4)(I); *see also Bd. of County Comm'rs of Routt County v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996).

An administrative agency or governmental entity exceeds its jurisdiction or abuses its discretion only if it misapplies the law or if there is *no* competent evidence in the record to support its decision. *Bd. of County Comm'rs v. Conder*, 927 P.2d 1339, 1343 (Colo. 1996). An agency's misinterpretation of the governing law may also constitute an alternative basis for finding an abuse of discretion under Rule 106(a)(4). *Whitelaw, supra, v. Denver City Council*, 405 P.3d 433, 438 (Colo. App. 2017)(internal citations omitted).

"No competent evidence" means that the agency's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Whitelaw, supra,* 405 P.3d at 437 (internal citations omitted).

In a Rule 106 review, the reviewing court cannot consider if the agency's "findings are right or wrong, substitute [its] judgment for that of the [agency], or

[3] The Court finds that M.A.K. filed two complaints, 16-02 and 17-14. Complaint 16-02 3 encompassed the same alleged conflict surrounding Colorado Ethic's Watch's complaint as it alleged that Mayor Dunafon had a conflict of interest when he cast a tie-breaking vote at a February 3, 2015 City Council meeting, however, it also included allegation that Mayor Dunafon improperly voted on consent items before the City Council on April 7, 2015 and September 1, 2015.

interfere in any manner with the [agency's] findings if there is any competent evidence to support the same." *State Civil Serv. Comm'n v. Hazlett*, 201 P.2d 616, 619 (1948). "The administrative agency, not the reviewing courts, has the task of weighing the evidence and resolving any conflicts." *Bd. of Assessment Appeals of State of Colo. v. Colorado Arlberg Club,* 762 P.2d 146, 151 (Colo. 1988). "Where. . . the evidence is conflicting, the [agency's factual] finding is binding on appeal, and a reviewing court may not substitute its judgment for that of the [agency]." *Marek v. State, Dep't of Revenue, Motor Vehicle Div.,* 709 P.2d 978, 979 (Colo. App. 1985).

Nor may the reviewing court act as the agency's board of appeals by weighing the evidence. *IBC Denver II, LLC v. City of Wheat Ridge,* 183 P.3d 714, 717 (Colo. App. 2008); *see O'Dell*, 920 P.2d at 50 (citing *Garrett v. City of Littleton*, 493 P.2d 370 (Colo. 1972)). Thus, "absent a clear abuse of discretion" by a governmental agency, "courts should not interfere with the[ir] decision[.]" *O'Dell*, 920 P.2d at 50.

VI. Analysis

A. Under Article XXIX, Section 7 the IEC Lacks Jurisdiction Over the City of Glendale and Mayor Dunafon.

The Court reviews *de novo* the interpretation of a constitutional provision. *Lambert v. Ritter Inaugural Comm., Inc.,* 218 P.3d 1115, 1121 (Colo. App. 2009). In determining the intent of the provision, the Court must "start[] with the plain language of the provision and giv[e] the words their ordinary meaning." *Id.* In cases where "intent is not clear from the language of the Amendment, [the court] should construe the Amendment in light of the objective sought to be achieved and the mischief sought to be avoided by the measure." *Patterson Recall Comm., Inc. v. Patterson*, 209 P.3d 1210, 1214 (Colo. App. 2009). Further, the Court must "interpret constitutional provisions as a whole and attempt to harmonize all of the contained provisions." *Lambert, supra*, 218 P.3d at 1121 (quoting *Bruce v. City of Colorado Springs*, 129 P.3d 988, 992 (Colo. 2006)).

Finally, the Court "must favor a construction of a constitutional amendment that will render every word operative, rather than one that may make some words meaningless or nugatory." *Patterson Recall Comm., Inc.*, 209 P.3d at 1215. This requires that the Court must endeavor to "avoid an unreasonable interpretation or one that produces an absurd result." *Id.*

In conducting this analysis courts are to use general principles of statutory interpretation and aids in construction. *Id.*

1. Plain language of Section 7

The IEC concedes that Section 7 was intended to allow home rule jurisdictions to adopt variations in their ethics laws that differ from Article XXIX. (Answer Br., at 15.) However, the parties disagree with the definition of the operative word "address."

The plain language of the second sentence of Section 7 states: "[t]he *requirements* of this article *shall not apply to home rule counties* or home rule municipalities *that have adopted charters, ordinances, or resolutions that address the matters covered by this article*." *Id.* (emphasis added.)

This means:

- The requirements of Article XXIX;

- do not apply to home rule municipalities (*e.g.*, the City of Glendale)

- that have adopted charters and codes (in this case, Glendale Colo. Charter, Ch. IV, § § 4.9, 4.19 and 4.27; Glendale Colo. Charter, Ch. IX § 9.12; and Glendale Colo. Code § § 2.14.010, 2.14.030 and 2.14.40 (2006))

- that "address" which means "to direct the efforts or attention" or "to deal with;" (using the plain meaning of address as found in Merriam-Webster Dictionary, definition of Address, available at https://www.merriam-webster.com/dictionary/address (last visited Dec. 13, 2018))

- the matters covered by this article (Article XXIX, Ethics in Government).

Put simply, Section 7 provides a carve-out for home rule counties who have passed charters and ordinances regulating ethics in government.[4]

The IEC seeks to engraft the word "meaningfully" before "address." (Answer Br., p. 12)("On the other hand, the IEC believes that the purpose, intent, and language of Article XXIX require a home rule entity to *meaningfully address*

---

[4] The Court agrees with Mayor Dunafon, that such a carve-out is supported by other exemptions applied to home rule municipalities more broadly. *See, e.g.,* Colo. Const. art. XX, § 6 (providing that home rule charters and ordinances "shall supersede . . . state law in conflict therewith" and providing home rule municipalities "power to legislate upon, provide, regulate, conduct and control," *inter alia*, "imposition, enforcement and collection of fines and penalties for the violation of any of the provisions of the charter, or of any ordinance adopted in pursuance of the charter."), § 8 ("Anything in the constitution of this state in conflict or inconsistent with the provisions of this amendment is hereby declared to be inapplicable to the matters and things by this amendment covered and provided for.").

the kind of conduct that Article XXIX is aimed at. . ..")(emphasis added.) However, the Court is required look at the plain language and to give words their ordinary meaning. *Lambert*, 218 P.3d at 1121. The Court agrees with the IEC that "address" does not mean "to ignore" or "to partially undertake,"[5] but disagrees with the IEC's argument that the word "address" is synonymous with "meaningfully address." The latter interpretation, urged by the IEC, would task a court with the subjective and entirely unworkable obligation of determining, prospectively and without any factual backdrop, the court's own view of what is "meaningful" or not. *See Patterson Recall Comm., Inc. v. Patterson*, 209 P.3d at 1215 (holding that that Court "should avoid an unreasonable interpretation" of the plain language of the statute).

Further, the Court reads the second sentence of Section 7 in conjunction with the first sentence. The first sentence of Section 7 applies to "any" county or municipality, which plainly includes those counties and municipalities that are not home rule. But, the second sentence applies only to "home rule counties" and "home rule municipalities." As to the latter group, Section 7 plainly and unambiguously provides that if such a home rule county or home rule municipality has adopted an ethics code, Article XXIX does not apply. Because the language in the first sentence applies more generally to non-home rule counties or municipalities, the second sentence must be read to mean that if a home rule county or municipality has adopted an ethics code (more or less stringent than Article XXIX), such a home-rule county or municipality is not governed by Article XXIX.

The Court thus concludes that the plain language of Section 7 is clear, and allows for a carve-out for a home rule municipality so long as it adopts rules that deal with ethical standards of conduct. Whether this is a wise decision is not for the Court to decide.

2. Intent of the drafters

The Court finds the plain language of the statute is clear, but nonetheless will look to the intent of the drafters, which further bolsters the Court's conclusion. *Khelik v. City & Cty. of Denver*, 411 P.3d 1020, 1023 (Colo. App. 2016) (citing *Waste Mgmt. of Colo., Inc. v. City of Commerce City*, 250 P.3d 722, 725 (Colo. App. 2010)("Our primary task in interpreting statutes and municipal enactments is to give effect to the intent of the drafters, which we do by looking to the plain language.").

---

[5] The Court finds the City of Glendale, in codifying the Code of Ethics in Glendale Colo. Code § 2.14.010, *et seq.*, (2006) and addressing ethical issues in their charter, did not "partially undertake" or "ignore" the overarching purpose of Article XXIX which is to ensure that ethical violations were properly addressed and to preserve public confidence and propriety. *See* Section VI ¶ A (3), *infra*.

The Court has considered the Title Setting Board hearing regarding the proposed initiative that would become Article XXIX. *See* C.R.S. § 1-40-106. At that hearing, the chairman of the Title Board asked counsel for the drafters of the measure whether, under the carve-out language in Section 7, "home rule jurisdictions could have weaker ethics laws and that could prevail over this measure?" The response was: "You are correct that, if a home rule city has adopted by charter, ordinance, or resolution measures that address the matters covered in this article, then the home rule will prevail."[6]

Along with the plain language of Section 7, this strongly supports the conclusion that the drafters intended to treat home rule counties and municipalities differently from non-home rule counties and municipalities. As to the former, home rule prevails, whether the ethics code is more, equal, or less stringent than Article XXIX.

This history reinforces the conclusion that the drafters of Article XXIX intended that any home rule municipality is exempt from Article XXIX *provided* that the home rule entity has enacted an ethical code. It follows that the jurisdiction of the IEC is determined by whether the public entity is or is not a home rule entity. As to home rule entities, Article XXIX "shall not apply," irrespective of the stringency of the home rule entity's ethics code — *provided* that such an ethics code has been adopted by the home rule entity.

The IEC misconstrues *Gessler v. Smith*, 419 P.3d 964, 970, *cert. denied*, No. 18-284, 2018 WL 4257806 (U.S. Oct. 29, 2018)(Colo. 2018) when it states that the *IEC*'s role is to regulate "activities that allow covered individuals working in government, including elected officials, to gain improper personal financial benefit through their public employment." (Answer Br., at 11.) Rather, the Court in *Gessler*, found that the purpose of the entire *article* was to ensure that there is a set of rules in place to oversee such conduct. 419 P.3d at 970. Section 7 of Article XXIX, however, provides a carve-out for home rule jurisdictions that enact ethical standards, likewise ensures that standards for combatting such violations are in place. Again, the providence of this distinction is not for the Court to consider.

The Court is also persuaded by Mayor Dunafon's argument that the electorate also intended this result.[7]

---

[6] The audio recording of this Title Board meeting is available from the Colorado Secretary of State at http://pub.sos.state.co.us/20060517131606. The exchange quoted here begins at 2:30:16 and concludes at 2:31:25. It is telling that the attorney corrected herself after mistakenly reading that it should be "more stringent;" when she corrected herself the above colloquy ensued.

[7] Based on the above-described exchange, the Title Board drafted a ballot title for the measure that captured the breadth of Section 7's carveout for home rule municipalities. The title of the initiative specifically described the initiative as "specifying that the measure shall not apply to home rule jurisdictions that have adopted laws *concerning* matters covered by the measure."

The Court finds that the drafters of Section 7 clearly anticipated that home rule governmental entities might pass ethics codes that were less stringent that those prescribed by Article XXIX. That was the design: to allow home rule entities to take advantage of the Section 7 carve-out *provided* the home rule entity enacted an ethics code.

3. Case law

Finally, in conducting these types of analyses, the Court also looks to case law interpreting similar or identical statutes. *See Khelik*, 411 P.3d at 1023 (looking to Colorado case law also interpreting the word "or" in a statute).

Mayor Dunafon argues that *In re City of Colorado Springs*, 277 P.3d 937 (Colo. App. 2012) is informative as to how this Court should interpret the carve-out language in Section 7. In that case the Court of Appeals considered whether the City of Colorado Springs, a home rule municipality, exempted itself from the Colorado Fair Campaign Practices Act ("FCPA"). The relevant provision of the FCPA provided: "[t]he requirements of article XXVIII of the state constitution and of this article shall not apply to . . . home rule municipalities that have adopted charters, ordinances, or resolutions that address the matters covered by article XXVIII and [the FCPA]." *Id.* at 941; (citing § 1–45–116, C.R.S. 2011).

The Court of Appeals concluded:

> The City falls within this exclusion because its Charter and campaign practices ordinance address those matters. The City Charter requires the City Council to enact ordinances for disclosure of election campaign expenditures and contributions. Colo. Springs City Charter art. XI, § 11–50. The campaign practices ordinance addresses disclosure requirements for campaign expenditures and contributions, and it adopts by reference the provisions of the FCPA as amended. City Code § 5.2.201.
>
> Among other provisions, the campaign practices ordinance prescribes a method for filing the reports required by the incorporated FCPA provisions and states that knowing violation of these reporting requirements is punishable as a misdemeanor and a fine in the amount of $500 for each offense. City Code §§ 5.2.202, 5.2.204(A). Additionally, a candidate who violates the reporting requirements forfeits the right to serve in the office to which he or she may have been elected. City Code § 5.2.204(A). The campaign practices ordinance further

---

Ex. O, Leg. Council of the Colo. Gen. Assembly, *Analysis of the 2006 Ballot Proposals* at 30 (emphasis added). The use of "concerning" here complements and confirms the plain meaning of "address" described above. Home rule municipalities need only enact rules concerning ethical standards broadly, as opposed to a particular set of rules with specific contours or minimum standards. The drafting history and intent of the electorate thus clearly support what the plain language of Section 7 states: any home rule municipality that enacts its own ethical rules falls outside of Article XXIX and the jurisdiction of the IEC.
(Opening Br., pp. 15-16.)

> provides that, in addition to these sanctions, the sanctions provided in the FCPA, as incorporated, shall apply. City Code § 5.2.204(B).
>
> The City Code also provides for enforcement of the campaign practices ordinance. Any person may file an affidavit with the City Attorney alleging a violation of the campaign practices ordinance. City Code § 5.1.111(A). The City Attorney then investigates and prosecutes the violation in the municipal court in the same manner as other municipal ordinance violations. *Id.*

In re City of Colorado Springs, 277 P.3d at 940.

The IEC argues that this analysis is inapplicable here because "the Court [of Appeals] detailed a myriad of ways in which Colorado Springs' ordinances were adequate to displace the state law." (Answer Br., p. 14.)

The Court disagrees. Glendale detailed the methods by which it would consider and address ethical violations.

The City of Glendale is a home rule municipality. Glendale Colo. Charter, Preamble, *supra*. By adopting Charter, Chapters IV, § § 4.9, 4.19 and 4.27, Ch. IX § 9.12, and Code §§ 2.14.010, 2.14.030 and 2.14.040 (2006), Glendale clearly intended to take advantage of Amendment XXIX's carve-out provision. These statutes and rules, recited above, section III ¶¶ A, B, C *supra*, specifically address, *i.e.*, deal with, ethical standards of conduct for government officials.

Glendale's Code of Ethics provides that if there is a violation by a governmental employee, the employee is subject to official reprimand or disciplinary action in addition to any other penalty provided for in the Charter, Code, or any other applicable law. Glendale Colo. Code § 2.14.030. The Code describes methods in which the City Council may address issues by holding public hearings and making findings on non-frivolous complaints. Glendale Colo. Code § § 2.14.040 (E) and (F). The Code even sets forth a standard of proof. *Id.* Further, the Code describes that violations occur: (i) when the government officer engages in substantial financial transactions with individuals who the officer supervises or inspects in the course of official duty; and (ii) when an officer preforms an official act that directly and substantially affects the officer's economic benefit, a business, or other undertaking where the officer has a substantial financial interest. *Id.* § § 2.14.040 (A) and (B).

In addition to the Code of Ethics codified in Code § 2.14.010, *et. seq.*, Glendale enumerates a number of ethical standards of conduct expected of city officials. There is a prohibition on interested persons contracting with the City, and a mechanism that requires unanimity if such a contract is made by the City. Charter, Ch. IV, § 4.19. There is a prohibition on any member of the City Council "voting on any question in which he has a financial interest, other than the common public interest, or on any question concerning his own conduct." *Id.* § 4.27.

The IEC argues that the difference between the facts here and the facts in *In re City of Colorado Springs* is that the issue there was one of "local concern," 277 P.3d at 941 ("[f]inally, the Colorado Supreme Court and divisions of this court have previously held that municipal elections are a matter of local concern."), while ethical standards of elected officials are a matter of statewide concern. (Answer Br., at 15.) That conclusion conflicts with the carve-out provision of Section 7. It would be absurd for this Court (whatever its viewpoints are on the issue) to hold that ethical standards of elected officials are a matter of statewide concern in view of the very specific carve-out provision that does not apply to home rule counties and municipalities, provided such a county or municipality has adopted an ethical code.

In sum, the Court finds that the Glendale has not partially undertaken or ignored ethical standards of conduct. Rather, these issues have been addressed by and enumerated within the Code of Ethics. Because the intent of Amendment XXIX was to permit home rule counties and municipalities to implement their own ethical codes of conduct that did not necessarily comport with or were less stringent than Amendment XXIX, the Court finds that the City of Glendale has in fact addressed ethical issues regarding government employees, and is thus subject to the carve-out provision of Section 7.

VII. Conclusion

The Court finds that (a) the plain language of Section 7 allows for a carve-out for home rule municipalities that address ethical standards of conduct in their ordinances; (b) the drafters allowed for home rule municipalities to pass less stringent ethical standards for government employees than those set forth in Amendment XXIX; and, (c) the City of Glendale has addressed ethical standards of conduct for government employees in both their Code and Charter. Thus, the Court finds that Section 7 applies to the City of Glendale, and the IEC lacks jurisdiction over the City of Glendale and Mayor Dunafon.

Given this Court's finding that the IEC lacks jurisdiction, the Court will not address the substantive issues regarding the methodology by which the City of Glendale handled the Complaints against Mayor Dunafon.

The Court enters judgment in favor of Mayor Dunafon and against the IEC, and its individual Defendants. The Court **reverses** the IEC's jurisdictional determination. Any decision made by the IEC is deemed null and void and is **vacated**. Any and all pending and further IEC investigations as about the complaints against Mayor Dunafon are permanently enjoined.

Dated: January 3, 2019

Edward D. Bronfin
District Court Judge

cc: All counsel – efiling