

745 34-4

No. 93723-1

745 34-4

No. 74534-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

PHILIP WATSON, an Individual, et al.,

Appellants,

v.

CITY OF SEATTLE, a Municipality, et al.,

Respondents.

Appeal from the Superior Court of Washington
for King County
No. 15-2-20613-3 SEA

BRIEF OF RESPONDENTS

PETER S. HOLMES
Seattle City Attorney

Kent C. Meyer, WSBA #17245
Carlton W.M. Seu, WSBA #26830
Seattle City Attorney's Office
Columbia Center
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Tel: (206) 684-8288
Fax: (206) 684-8284
Email: kent.meyer@seattle.gov
carlton.seu@seattle.gov

STEPTOE & JOHNSON LLP

William F. Abrams*
Laurie Edelstein*
Sarah K. Jackel*
David H. Kwasniewski*
1891 Page Mill Road, Suite 200
Palo Alto, CA 94304
Tel: (650) 687-9500
Fax: (650) 687-9499
Email: wabrams@steptoe.com
ledelstein@steptoe.com
sjackel@steptoe.com
dkwasniewski@steptoe.com

*Admitted Pro Hac Vice

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 MAY - 11 PM 2:06

GORDON TILDEN THOMAS &
CORDELL LLP

Jeffrey I. Tilden, WSBA #12219
Franklin D. Cordell, WSBA #26392
1001 Fourth Avenue, Suite 4000
Seattle, Washington 98154
Tel: (206) 467-6477
Fax: (206) 467-6292
Email: jtilden@gordontilden.com
fcordell@gordontilden.com

Attorneys for Respondents

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE ISSUES.....	4
ASSIGNMENT OF ERROR	4
STATEMENT OF THE CASE.....	5
STANDARD OF REVIEW	10
ARGUMENT.....	11
I. THE ORDINANCE IMPOSES A TAX	13
A. The Primary Purpose of the Ordinance is to Raise Revenue.....	13
B. The Funds Collected Will Be Used for Research and Public Education.....	18
C. The Ordinance Imposes a Uniform Flat Tax Rate to Fund Research into Gun Violence and Education Programs	21
II. THE ORDINANCE IS A LAWFUL EXERCISE OF SEATTLE’S TAXING AUTHORITY	24
III. RCW 9.41.290 DOES NOT PREEMPT THE ORDINANCE	33
A. RCW 9.41.290 Does Not Preempt Taxes	33
B. RCW 9.41.290 Preempts Only Conflicting Criminal Regulations	36
C. The Ordinance is not a Criminal Regulation	39
IV. THE TRIAL COURT’S DISMISSAL OF THE CASE IN ITS ENTIRETY WAS PROPER GIVEN THE RECORD.....	41
V. PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF	44
CONCLUSION.....	46

TABLE OF AUTHORITIES

	Page
CASES	
<i>Agrilink Foods, Inc. v. State Dep't of Revenue</i> , 153 Wn.2d 392, 103 P.3d 1226 (2005).....	11
<i>Arborwood Idaho, L.L.C. v. City of Kennewick</i> , 151 Wn.2d 359, 89 P.3d 217. (2004).....	<i>passim</i>
<i>Asarco Inc. v. Dep't of Ecology</i> , 145 Wn.2d 750, 43 P.3d 471 (2002).....	43
<i>Bowie v. Washington Dep't of Revenue</i> , 171 Wn.2d 1, 248 P.3d 504 (2011).....	11, 15
<i>Chan v. City of Seattle</i> , 164 Wn. App. 549, 265 P.3d 169 (2011).....	40
<i>Cherry v. Mun. of Metro. Seattle</i> , 116 Wn.2d 794, 808 P.2d 746 (1991).....	37, 38, 39
<i>Citizens for Financially Responsible Gov't v. City of Spokane</i> , 99 Wn.2d 339, 662 P.2d 845 (1983).....	24
<i>City of Seattle v. Campbell</i> , 27 Wn. App. 37, 611 P.2d 1347 (1980).....	25, 40
<i>City of Seattle v. King</i> , 74 Wn. 277, 133 P. 442 (1913).....	29
<i>City of Spokane ex rel. Wastewater Mgmt. Dep't v. Washington State Dep't of Revenue</i> , 145 Wn.2d 445, 38 P.3d 1010 (2002).....	11
<i>Covell v. City of Seattle</i> , 127 Wn.2d 874, 905 P.2d 324 (1995).....	<i>passim</i>
<i>DeLong v. Parmelee</i> , 157 Wn. App. 119, 150, 236 P.3d 936 (2010).....	45

<i>Enter. Leasing, Inc. v. City of Tacoma, Fin. Dep't,</i> 93 Wn. App. 663, 970 P.2d 339 (1999), <i>aff'd</i> , 139 Wn.2d 546, 988 P.2d 961 (1999).....	27
<i>ERP, Inc. v. Ali,</i> No.13 CH 07263 (Ill. Cir. Ct. Cook Cnty. Jan. 22, 2014)	36
<i>Fleetwood v. Read,</i> 21 Wn. 547, 58 P. 665 (1899).....	29
<i>Ford Motor Co. v. City of Seattle,</i> 160 Wn.2d 32, 156 P.3d 185 (2007).....	26
<i>Hillis Homes, Inc. v. Public Utility District No. 1,</i> 105 Wn.2d 288, 714 P.2d 1163 (1986) (" <i>Hillis Homes II</i> ").....	16, 17
<i>Int'l Franchise Ass'n, Inc. v. City of Seattle,</i> 803 F.3d 389 (9th Cir. 2015)	18
<i>Isla Verde Int'l Holdings, Inc. v. City of Camas,</i> 146 Wn.2d 740, 49 P.3d 867 (2002).....	43
<i>King Cnty. Fire Prot. Dists. v. Housing Auth. of King Cnty.,</i> 123 Wn.2d 819, 872 P.2d 516 (1994).....	23
<i>Kucera v. Dep't of Transp.,</i> 140 Wn.2d 200, 995 P.2d 63 (2000).....	44, 45
<i>Lane v. City of Seattle,</i> 164 Wn.2d 875, 194 P.3d 977 (2008).....	23
<i>Leonard v. City of Spokane,</i> 127 Wn.2d 194, 897 P.2d 358 (1995).....	10
<i>Okeson v. City of Seattle,</i> 150 Wn.2d. 540, 78 P.3d 1279 (2003).....	<i>passim</i>
<i>Olympic Tug & Barge, Inc. v. Washington State Dep't of Revenue,</i> 188 Wn. App. 949, 355 P.3d 1199 (2015).....	10, 11
<i>P. Lorillard Co. v. City of Seattle,</i> 83 Wn.2d 586, 521 P.2d 208 (1974).....	29

<i>Pac. Nw. Shooting Park Ass'n v. City of Sequim,</i> 158 Wn.2d 342, 144 P.3d 276 (2006).....	37, 38, 39
<i>Pac. Tel. & Tel. Co. v. City of Seattle,</i> 172 Wn. 649, 654, 21 P.2d 721 (1933).....	24, 25, 40
<i>Samis Land Co. v. City of Soap Lake,</i> 143 Wn.2d 798, 23 P.3d 477 (2001).....	19, 20, 21, 23
<i>San Telmo Assocs. v. City of Seattle,</i> 108 Wn.2d 20, 735 P.2d 673 (1987).....	21
<i>Seattle Times Co. v. Benton Cnty.,</i> 99 Wn.2d 251, 661 P.2d 964 (1983).....	17
<i>State ex rel. Citizens against Tolls (CAT) v. Murphy,</i> 151 Wn.2d 226, 88 P.3d 375 (2004).....	18
<i>State ex rel. King Cnty. v. Tax Comm'n of State of Washington,</i> 174 Wn. 336, 342, 24 P.2d 1094 (1933).....	27
<i>State v. Immelt,</i> 173 Wn.2d 1, 6, 267 P.3d 305 (2011).....	10
<i>State v. Kirwin,</i> 165 Wn.2d 818, 203 P.3d 1044 (2009).....	10
<i>Teter v. Clark Cnty.,</i> 104 Wn.2d 227, 704 P.2d 1171 (1985).....	16, 22, 23
<i>Trimen Dev. Co. v. King Cnty.,</i> 124 Wn.2d 261, 877 P.2d 187 (1994).....	10
<i>Tyler Pipe Indus., Inc. v. Dep't of Revenue,</i> 96 Wn.2d 785, 638 P.2d 1213 (1982).....	45
<i>Washington State Republican Party v. Washington State Pub. Disclosure Comm'n,</i> 141 Wn.2d 245, 4 P.3d 808 (2000).....	35
<i>Western Telepage, Inc. v. City of Tacoma Dep't of Financing,</i> 140 Wn.2d 599, 998 P.2d 884 (2000).....	26, 31

STATUTES

Ak. Stat. § 29.35.145(a).....	36
Az. Rev. Stat. § 13-3108	36
Fla. Stat. § 790.33(1).....	36
Ind. Code § 35-47-11.1-2.....	36
Ky. Rev. Stat. § 65.870	36
Mich. Compiled Laws 123.1102.....	36
Mont. Code 45-8-351	36
N.H. Rev. Stat. § 159:26(I).....	36
RCW 9.21.290	9
RCW 9.41	37
RCW 9.41.290	<i>passim</i>
RCW 9.41.300	34
RCW 35.21.706	33
RCW 35.21.710	<i>passim</i>
RCW 35.22.010	24
RCW 35.22.280(32).....	<i>passim</i>
RCW 35.22.570	25
RCW 35.22.900	25
RCW 35.23.440(8).....	25
RCW 35.102.030	30
RCW 35.102.210	30

RCW 35A.82.020.....	25
RCW 82.32.070	20
R.I. Gen. Stat. § 11-47-58.....	36
Tenn. Code § 39-17-1314(A)	36
Wis. Stat. § 66.0409	36

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (10th ed. 2014)	13, 14
Wash. Dep't of Revenue, <i>Tax Reference Manual</i> (January 2010)	28, 30

Defendants and respondents City of Seattle, Ed Murray, Seattle Department of Finance and Administrative Services, and Glen Lee (“Seattle” or the “City”) respectfully submit this brief in opposition to plaintiffs and appellants’ brief on appeal. The trial court’s order that Seattle Ordinance 124833 (the “Ordinance”) is constitutional and a lawful exercise of the City’s taxing authority and its dismissal of plaintiffs’ case in its entirety should be affirmed.

INTRODUCTION

Gun violence kills more than 125 Seattle citizens a year and costs the City over \$180 million annually. Seattle passed the Ordinance to raise revenue for the general benefit of all Seattle residents to conduct research and public education programs regarding gun violence. The tax does not limit or restrict in any way the right to own, use, sell, or buy a gun. It does not prohibit, require or control any conduct relating to guns, nor impose any duty on owners, users, buyers, or sellers of guns. The Ordinance is a proper means to raise revenue for the benefit of everyone in Seattle.

The NRA’s attack on the Ordinance is the latest in the NRA’s decades-long efforts to block research regarding gun violence at every governmental level throughout the United States. The NRA argues that the Ordinance is a regulation preempted by the Washington State Firearms Preemption Statute – RCW 9.41.290 – which restricts regulation of

conduct relating to guns to the state government and, that even if not preempted, the Ordinance exceeds the City's taxing authority. The trial court properly rejected these arguments and entered judgment for Seattle.

Seattle has the constitutional and statutory right to raise revenue for the general benefit of its citizens through an excise tax on the business of selling guns and ammunition. The Ordinance, which imposes a tax of \$25 per firearm sold and \$0.02 to \$0.05 per round of ammunition, falls within Seattle's broad and longstanding power to impose excise taxes under RCW 35.22.280(32). The trial court properly rejected as too narrow the NRA's interpretation of RCW 35.21.710 as restricting cities' power to tax businesses to a gross receipts tax. No court has ever held that cities may impose only gross receipts taxes on businesses that make retail sales, and the NRA has presented no basis for the Court to do so here.

The Ordinance also complies with RCW 9.41.290. RCW 9.41.290 only preempts specific types of gun regulations. It does not prohibit cities from taxing the business of making retail sales of guns – the express purpose of the Ordinance. Taxation and regulation are distinct municipal functions, and taxation is specifically excluded from the list of preempted areas enumerated in RCW 9.41.290. The Ordinance falls outside its preemptive scope.

The trial court's decision to dismiss the NRA and other plaintiffs' case in its entirety was also proper given that the court's decision on Seattle's cross-motion for summary judgment left no issues to be resolved. Plaintiffs presented no evidence or legal authority in support of their purported "reserved argument" that the Ordinance, even if a tax, is still preempted because it will operate as a de facto regulation. Nor could the plaintiffs present any such evidence because at the time of the motions and hearing, the Ordinance was not yet in effect. Once the trial court determined that the Ordinance is a constitutional tax within Seattle's lawful taxing authority, no issue remained before the court.

The NRA insists that the funds will be used to reduce access to firearms, and to track and monitor the number of guns sold in Seattle. This is a paranoid leap, consistent with the NRA's crusade to block any research into gun violence. The Ordinance says nothing about reducing access to guns or tracking gun ownership. The revenue raised will be used for research into the causes of gun violence and public education programs. As the trial court emphatically declared, research is not regulation. Public education programs are not regulation.

This court should affirm the trial court's order granting summary judgment to Seattle and dismissing the case in its entirety.

STATEMENT OF THE ISSUES

1. Whether the trial court properly determined that Ordinance 124833 imposes a tax, not a regulation, where the primary purpose of the Ordinance is to raise funds for research and public education programs?

2. Whether the trial court properly determined that Ordinance 124833 is a lawful exercise of Seattle's taxing authority under RCW 35.22.280(32), which grants first class cities broad authority to raise revenues by imposing a tax?

3. Whether the trial court properly determined that RCW 9.41.290 does not preempt Ordinance 124833 because RCW 9.41.290 preempts only regulation, not taxation, of guns and ammunition?

4. Whether the trial court properly granted summary judgment to Seattle and dismissed plaintiffs' case in its entirety when no issue remained to be resolved by the court?

ASSIGNMENT OF ERROR

1. Whether the trial court erred in concluding that if Ordinance 124833 were a regulation, it would violate RCW 9.41.290 because it provides that failure to pay the tax is a gross misdemeanor, even though no conduct is regulated by the Ordinance and the penalty merely seeks to enforce payment of a tax?

STATEMENT OF THE CASE

More than 125 people are killed by guns in Seattle every year. (CP 66.)¹ The total economic cost of gun violence in Seattle is nearly \$180 million annually. (*Id.*) Seattle taxpayers bear many of these costs. (*Id.*)

Little is known about the causes and effects of gun violence in the United States. That is because the NRA and the gun lobby have successfully blocked federal funding of research for two decades. (CP 132 ¶ 5; CP 67.) In 2013, Seattle became the first city in the United States to fund basic gun safety research directly by commissioning a study into the predictors and consequences of gun violence. (CP 132 ¶ 5.) The study – conducted by the Harborview Injury Prevention and Research Center – showed, among other things, that gun violence leads to more gun violence. People hospitalized for a gun injury are thirty times more likely to be re-hospitalized for gun violence. (CP 67.) Following its study, in late 2014, Harborview developed a hospital-based gun violence intervention program but had difficulty obtaining funding for the program because the gun lobby had successfully blocked federal public health funding related to gun violence. (CP 133 ¶ 7.)

¹ References to “CP” are to the Clerk’s Papers. Where the document has paragraph numbers, the paragraph number is indicated.

Because basic research and prevention programs can reduce long-term costs and save lives, on July 8, 2015, Seattle City Council President Tim Burgess introduced Ordinance 124833 (then, City Council Bill 118437) to raise general revenue to fund public safety research and gun violence prevention programs to benefit the residents of Seattle. (CP 67; CP 133 ¶ 9.) Before introducing the Ordinance, Council President Burgess addressed the Washington firearms preemption statute to ensure that any measure he introduced would comply with the law. (CP 133 ¶ 7.)

The Ordinance is entitled: “AN ORDINANCE related to imposing a tax on engaging in the business of making retail sales of firearms and ammunition.” (CP 66.)² Section 1 of the Ordinance explicitly states that its purpose is to raise general revenue to fund programs and research to address gun violence:

The City finds and declares that gun violence directly affects the City and its residents. Therefore, the City intends to exercise its taxing authority, as granted by the Washington State Constitution and as authorized by the Washington State Legislature, to raise general revenue for the City and to use that revenue to provide broad-based public benefits for residents of Seattle related to gun violence by funding programs that promote public safety, prevent gun violence and address in part the cost of gun violence in the City.

² A copy of the Ordinance is attached in Appendix A to this brief.

(CP 68.) Section 13 of the Ordinance describes the public benefits as including “basic research, prevention and youth education and employment programs.” (CP 78.) The tax is not designed to mitigate the direct economic costs of gun violence.

The Ordinance, codified at SMC chapter 5.50, imposes a “tax on every person engaging within the City in the business of making retail sales of firearms or ammunition” (the “Firearms and Ammunition Tax”). (CP 76; *see also* SMC 5.50.030(A).) The tax rate is “\$25 per firearm sold at retail, \$.02 per round of ammunition that contains a single projectile that measures .22 caliber or less sold at retail, and \$.05 per round of ammunition for all other ammunition sold at retail.” (CP 76; *see also* SMC 5.50.030(B).) Sales of guns or ammunition delivered to buyers outside of Seattle, sales to federal, state, or city agencies, and sales of antique guns are not taxed. (CP 77; *see also* SMC 5.50.050.)

On August 5, 2015, the Education and Governance Committee debated the Ordinance in a public session. (CP 135–36 ¶¶ 2–6.) Representatives from the Department of Finance Administrative Services estimated the tax would generate approximately \$300,000 to \$500,000 in revenue per year. (CP 135 ¶ 2.) At the same meeting, members of the Council stated their intent in enacting the Ordinance was to raise revenue to fund research into gun violence prevention programs. (CP 135–36 ¶¶ 3–

4.) Councilmembers also acknowledged that funding for such research at the federal level had “been blocked since 1996” and a House of Representatives committee had recently voted to extend the ban. (CP 136 ¶ 5.) They determined that if the City wanted to see any research money, it would have to raise revenue at a local level. (*Id.*)

During a Council meeting on August 10, 2015, Council President Burgess stated the purpose of the Ordinance was not to “attack business[es]” or “deal only with criminal assault with firearms,” but rather to help combat “the problem of gun violence no matter who it touches, whether it’s unintentional, whether unfortunately it’s the taking of one’s own life.” (CP 136–37 ¶ 7.) The Council unanimously passed the Ordinance on August 10, 2015, and Mayor Ed Murray signed it into law on August 21, 2015. (CP 80.) The Ordinance went into effect on January 1, 2016. (CP 80.)

On August 24, 2015, the NRA, the Second Amendment Foundation, Inc. (“SAF”), the National Shooting Sports Foundation (“NSSF”), two gun retailers – Outdoor Emporium and Farwest Sports, Inc. – and two individual gun purchasers – Philip Watson and Ray Carter – filed a complaint challenging the Ordinance as unconstitutional. (CP 1–11.) On October 23, 2015, the NRA and the other plaintiffs moved for summary judgment on the grounds that the Ordinance was not a tax, but

an impermissible regulation of guns in violation of RCW 9.41.290. (CP 32–35.) The NRA also argued that even if the Ordinance is a tax, it is an impermissible tax because it fails to satisfy the statutory requirements for business and occupation taxes under RCW 35.21.710. (CP 35–39.) The NRA did *not* argue that if the Ordinance is a tax, it is still preempted because RCW 9.41.290’s preemptive effect applies to taxes in addition to regulation.

Seattle cross–moved for partial summary judgment on November 20, 2015, seeking a declaration that the Ordinance is a tax, RCW 9.21.290 does not preempt the Ordinance, and the Ordinance is a lawful exercise of Seattle’s taxing authority. (CP 99.)

On December 18, 2015, the trial court heard oral argument on the motions that lasted more than an hour. Following the detailed argument and briefing, on December 22, 2015, the trial court issued an Order that the Ordinance imposes a tax, not a regulation; the tax is not preempted by RCW 9.41.290; and the Ordinance is a lawful exercise of Seattle’s taxing authority. (CP 178–182.) The court thus denied the NRA’s motion for summary judgment, determined Seattle was entitled to summary judgment as a matter of law, and dismissed plaintiffs’ case in its entirety. (*Id.*)

STANDARD OF REVIEW

Questions of constitutional limitations and statutory interpretation are issues of law that are reviewed de novo on appeal. *See Okeson v. City of Seattle*, 150 Wn.2d 540, 549, 78 P.3d 1279, 1284 (2003); *Olympic Tug & Barge, Inc. v. Washington State Dep't of Revenue*, 188 Wn. App. 949, 952, 355 P.3d 1199, 1201 (2015). Municipal ordinances are presumptively valid and constitutional. *See State v. Kirwin*, 165 Wn.2d 818, 825, 203 P.3d 1044, 1047 (2009). They should not be interpreted “to deprive a municipality of the power to legislate on a particular subject unless that clearly is the legislative intent.” *Trimen Dev. Co. v. King Cnty.*, 124 Wn.2d 261, 270, 877 P.2d 187, 192 (1994). The party challenging an ordinance bears the burden of establishing its unconstitutionality. *See State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305, 307 (2011). Courts interpret ordinances in a manner that upholds their constitutionality if possible. *See Leonard v. City of Spokane*, 127 Wn.2d 194, 197–98, 897 P.2d 358, 360 (1995).

The primary objective in interpreting an ordinance, like a statute, “is to ascertain and carry out the legislature’s intent.” *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217, 221. (2004). If the ordinance’s “meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative

intent.” *Id.* The Washington Supreme Court has repeatedly affirmed that the “inquiry ends” with the plain language “because plain language does not require construction.” *Bowie v. Washington Dep’t of Revenue*, 171 Wn.2d 1, 11, 248 P.3d 504, 508 (2011); *see also Agrilink Foods, Inc. v. State Dep’t of Revenue*, 153 Wn.2d 392, 396–97, 103 P.3d 1226, 1228–29 (2005). Only if the statute remains ambiguous after this plain meaning analysis should the court look at other sources of interpretation, such as legislative history. *See Olympic Tug & Barge*, 188 Wn. App. at 953.

These principles of statutory interpretation apply to tax statutes, as well as other legislation. Where, as here, the “statutory language is plain and unambiguous,” a tax statute’s meaning “must be derived from the wording of the statute itself.” *Bowie*, 171 Wn.2d at 10. If the taxing statute is unambiguous, courts will not construe it against the taxing authority. *See, e.g., City of Spokane ex rel. Wastewater Mgmt. Dep’t v. Washington State Dep’t of Revenue*, 145 Wn.2d 445, 452, 38 P.3d 1010, 1013 (2002) (because the statute was unambiguous, it did not need to be construed against the taxing power).

ARGUMENT

After careful consideration and analysis, the trial court determined that the Ordinance is what it says it is: a tax. The plain language and operation of the Ordinance and binding supreme court precedent support

the trial court's decision. The Ordinance does not regulate the sale, use, possession, or any other aspect of guns. It does not control, command, prohibit, or require any conduct relating to guns or ammunition. It imposes a tax to raise revenue to provide broad-based public benefits for Seattle residents by funding research and programs to promote public safety and reduce gun violence. The Ordinance is a tax, not a regulation.

Consistent with longstanding authority, the trial court also properly concluded that the Ordinance is a lawful exercise of Seattle's constitutional and legislative taxing power. Under RCW 35.22.280(32), Seattle has broad authority to raise revenue by imposing taxes on businesses within city limits. That authority is not limited to a gross receipts tax on businesses making retail sales. Seattle has the authority to tax businesses making retail sales based on other measures, such as volume of goods sold.

The Ordinance also complies with RCW 9.41.290, which preempts only the *regulation* of guns. The statute does not mention *taxation* and does not preempt it. The City's power to tax is constitutionally separate from its power to regulate. The Ordinance, as a tax, falls outside the scope of RCW 9.41.290's preemptive effect.

The Ordinance is a constitutional tax within Seattle's lawful taxing authority. The court should affirm the trial court's order dismissing

plaintiffs' case in its entirety. No issue remains to be resolved by the trial court.

I. THE ORDINANCE IMPOSES A TAX

The express language of the Ordinance and its operation establish that the Ordinance's purpose is to generate revenue for research and programs to promote gun safety and prevent gun violence. Raising revenue to fund broad-based public benefits is a tax, not a regulation. Each of the factors the Supreme Court of Washington identified in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), further confirms that the Ordinance imposes a tax, not a regulatory fee.

A. The Primary Purpose of the Ordinance is to Raise Revenue

The first *Covell* factor examines whether the primary purpose of the tax is to raise revenue or whether it is to regulate. *See Covell*, 127 Wn.2d at 879. Black's Law Dictionary defines "regulation" as "[c]ontrol over something by rule or restriction." BLACK'S LAW DICTIONARY (10th ed. 2014). By contrast, "tax" is defined as "[a] charge, usu. monetary, imposed by the government on persons, transactions, or property to yield public revenue." *Id.* The trial court properly concluded that the primary purpose of the Ordinance is to raise revenue, not regulate.

Under the Washington Constitution, Seattle's authority to enact regulations pursuant to its police power is separate and distinct from its

authority to levy and collect taxes. *Cf.* Const. art. IX, § 11 *with* Const. art. VII, § 9 and art. IX, § 12; *see also* *Arborwood*, 151 Wn.2d at 365–66 (explaining distinction between cities’ power to regulate and power to tax). The Seattle City Council enacted the Ordinance under its constitutional and legislative authority to tax – Const. art. VII, § 9 and art. IX, § 12 and RCW 35.22.280(32) – not under its separate authority to regulate. *See* Const. art. IX, § 11. (CP 68.)

As the trial court recognized, the Ordinance’s text makes plain that the primary purpose of the tax is to raise revenue for the general public welfare. (CP 180.) The revenue will be used “to provide broad-based public benefits for residents of Seattle related to gun violence by funding programs that promote public safety, prevent gun violence and address in part the cost of gun violence in the City.” (CP 68.) The Ordinance has no regulatory purpose. As the trial court ruled, it “does not place any burden or restriction on the plaintiffs in terms of their conduct other than to require payment of fees and it does not prescribe any activity other than the non-payment of [the tax].” (CP 180.) The Ordinance does not regulate anyone’s ability to possess, sell, own, or use guns or ammunition in Seattle. The Ordinance does not set out any rules or restrictions that “control” the retail sale of guns or ammunition. BLACK’S LAW DICTIONARY (definition of regulation).

As in *Covell*, the tax does not regulate “the entity or activity being assessed.” *Covell*, 127 Wn.2d at 881. *See also Arborwood*, 151 Wn.2d at 371–72 (flat monthly fee for ambulance service did not “regulate[] its residents’ use of the ambulance service”; language was “very general in nature and lacking an overall plan for regulating emergency and ambulance services”); *Okeson*, 150 Wn.2d at 553 (charge on utility customers for streetlights was not a regulatory measure because “the primary purpose behind shifting the costs for lighting the streets is to free up revenue for the city, and not to regulate streetlights”).

Recognizing that the plain language of the Ordinance leads to the unassailable conclusion that the purpose of the Ordinance is to raise revenue to benefit the public at large, plaintiffs urge the Court to ignore the Ordinance’s text and find a regulatory purpose in the Ordinance’s “overall plan” of regulation or what plaintiffs consider to be the “legislative history” of the Ordinance. (*See* Appellants’ Opening Brief (“AOB”) at 9.) But where, as here, the language of the Ordinance is unambiguous, the meaning is derived from the plain text. No further inquiry, including into legislative history, is warranted or permitted. *See e.g., Bowie*, 171 Wn.2d at 10.

Even if the Court were to look beyond the plain language of the Ordinance, plaintiffs do not identify any “overall plan” of regulation

because there is none. The Ordinance's overall plan and structure shows the Ordinance imposes a tax, not a plan of regulation. The Ordinance collects \$25 for each retail sale of a gun and \$0.02 to \$0.05 per round of ammunition and uses the revenue for broad-based public benefits for all Seattle citizens, such as research into gun violence and other safety measures. (CP 78.) Seattle already provides several such programs without a gun tax. Enacting a new tax does not transform these programs into regulations.

The Ordinance's purpose to raise revenue to fund research and public education programs sharply contrasts with the regulatory purpose of the ordinances in *Teter v. Clark Cnty.*, 104 Wn.2d 227, 704 P.2d 1171 (1985), and *Hillis Homes, Inc. v. Public Utility District No. 1*, 105 Wn.2d 288, 714 P.2d 1163 (1986) ("*Hillis Homes II*"), upon which plaintiffs rely. In *Teter*, the ordinance's own statement of purpose was to create "effective *regulation* and control of storm and surface water." *Teter*, 104 Wn.2d at 233 (emphasis added).³ And in *Hillis Homes II*, the "connection charge" imposed on new water utility customers was "part of an overall

³ The *Teter* court also pointed to a county and city report discussing the purposes of the ordinance, which stated the county would adopt "a single plan for the drainage area that will govern the public and private actions in the basin." *Teter*, 104 Wn.2d at 239.

plan to regulate the use of water” – named the “Comprehensive Plan for the Snohomish–Lake Stevens area” – which was amended and expanded over the course of a decade. *Hillis Homes II*, 105 Wn.2d at 290–94, 299.

Plaintiffs also fail to cite to actual legislative history in support of their contention that the Ordinance evidences a regulatory purpose.

Plaintiffs point only to the statements of individual Councilmembers, a “Gun Violence Tax FAQ” that describes the purpose of the Ordinance as funding “gun violence prevention programs and research in order to improve gun safety in our neighborhoods,” and documents concerning two community meetings at which preemption statutes across the country were discussed to understand their scope. (*See* AOB at 10–11 (citing August 10, 2015 Seattle City Council Meeting at 1:24:39, 1:25:44 & 1:27:39; CP 88 and CP 52 & 61–62).) These documents do not constitute the type of “legislative history” courts consider as evidence of legislative intent. *See, e.g., Covell*, 127 Wn.2d at 887 (considering “final legislative reports” as evidence of legislative intent).⁴ Further, it is well settled that “[t]he interpretation of a statute by an individual legislator does not show

⁴ Plaintiffs cite to *Seattle Times Co. v. Benton Cnty.*, 99 Wn.2d 251, 661 P.2d 964 (1983), but there the evidence of legislative intent consisted of formally prepared letters and memoranda. *Id.* at 255 n.1. The court resorted to statements of legislators only “for lack of a more substantial record of the legislative history.” *Id.*

legislative intent.” *State ex rel. Citizens against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 238, 88 P.3d 375, 381 (2004).⁵

In any event, none of the statements or documents establishes that the Ordinance’s purpose is to regulate access to or use of guns. Many of the cited statements from the August 10, 2015 Council Meeting are simply reflections on gun violence in general and do not address the intent of the Ordinance. Plaintiffs also ignore the City Council’s lengthy discussion on the need to fund research into the causes of gun violence. (See CP 135–36 ¶¶ 3–8.) The documents show that the public and members of the Council were reasonably exploring what they could do to address the growing epidemic of gun violence within the confines of the law.

The trial court’s conclusion that the primary purpose of the Ordinance is to raise revenue for broad-based public benefits, not to regulate, is correct. Plaintiffs fail to demonstrate any regulatory purpose.

B. The Funds Collected Will Be Used for Research and Public Education

Plaintiffs also attack the Ordinance as imposing a regulatory fee, claiming without support or evidence that the funds raised will be

⁵ See also *Int’l Franchise Ass’n, Inc. v. City of Seattle*, 803 F.3d 389, 407 n.10 (9th Cir. 2015) (rejecting argument that Seattle’s minimum wage increase was motivated by animus, where statements of members of a committee established by the mayor were “of little value in determining the motivations of the City Council and Mayor”).

segregated from the general fund “and used to regulate the sale of firearms and ammunition.” (AOB at 11.) But as the trial court ruled, the money generated by the tax will be used for public education and research and that “is not a regulatory purpose.” (CP 180.) None of the money collected will be used to require or control any conduct relating to guns or ammunition.

Although the funds collected will be deposited in a special account, courts in the *Covell* line of cases have consistently held that depositing a tax to a dedicated fund does not turn the tax into a regulatory fee or the funded activity into a regulation. As the supreme court explained in *Okeson*:

All funds could be deposited into special accounts, and that would not necessarily turn taxes into fees. If the costs imposed do not regulate the activity, then the increased rates would, by definition, not be allocated for an authorized “regulatory” purpose. They would simply be a clever device by which taxes are guised as fees by virtue of the account in which they are deposited.

Okeson, 150 Wn.2d at 553. The core inquiry under the second *Covell* factor is whether the charges are “used to regulate the entity or activity being assessed.” *Covell*, 127 Wn.2d at 886; *see also Samis Land Co. v. City of Soap Lake*, 143 Wn.2d 798, 810, 23 P.3d 477, 485 (2001).

Plaintiffs attempt to manufacture a regulatory purpose by insisting that the funds collected by the gun violence tax will be used for “research

on how to reduce access to firearms” and “funding the collection, tracking, and auditing of the number of firearms and rounds of ammunition sold by retailers.” (AOB at 11.) They also claim that “Seattle’s proposed research and intervention programs are not an end to themselves, but rather a means to more closely monitor and minimize the sale of firearms and ammunition.” (*Id.* at 12.) But Plaintiffs’ paranoid assertions have no support in the record. The Ordinance says nothing about reducing access to guns or tracking gun ownership. The tax revenue will be used only for research and public education programs. As the trial court recognized, research “is not a regulatory purpose.” (CP 180.) The tax is not transformed into a regulation simply because in enforcing the tax, Seattle may have the ability to audit retailers’ firearms sales. If that were the case, Seattle’s gross receipts tax would be a regulation, when it is not. The Washington Department of Revenue also audits gun retailers for compliance with the state gross receipts tax and sales tax collection, *see* RCW 82.32.070, and that statute is not a regulation. Plaintiffs’ assertions about the purported monitoring purpose of the Ordinance show that the NRA’s fear of research and visibility into the causes of gun violence may be the real reason it challenges the Ordinance.

The tax imposed by the Ordinance is akin to the street charge imposed in *Covell*, which the court determined was a tax, not a regulatory

fee, even though the fees were placed in a separate fund. *See Covell*, 127 Wn.2d at 886. It is also similar to the charge imposed on electrical utility ratepayers to pay for streetlights in *Okeson*, which the court held was a tax, not a regulatory fee, despite being deposited in a special account. *See Okeson*, 150 Wn.2d at 553.⁶

The trial court correctly rejected plaintiffs' efforts to imbue the Ordinance with a regulatory purpose where there is none. The tax imposed by the Ordinance is a tax.

C. The Ordinance Imposes a Uniform Flat Tax Rate to Fund Research into Gun Violence and Education Programs

As for the third *Covell* factor, which examines whether there is a “direct relationship’ between the fee charged and either a service received by the fee payers or a burden to which they contribute,” *Okeson*, 150 Wn.2d at 554–55, the trial court properly determined that no such direct relationship exists. (*See* CP 180.)

⁶ *See also Samis Land*, 143 Wn.2d at 810–11 (charges imposed on vacant lots were taxes even though allocated to a “Water Capital Improvement Fund” because entities assessed were not subject to any identifiable regulatory activity); *San Telmo Assocs. v. City of Seattle*, 108 Wn.2d 20, 24, 735 P.2d 673, 674–75 (1987) (ordinance requiring landlords demolishing low-income housing either to build replacement housing or contribute to a low-income housing fund imposed a tax because payment was not used to regulate demolition; instead, City was shifting the social costs of development and such “cost shifting was a tax”).

To be sure, there is a relationship between the existence of guns and gun violence. Gun violence does not exist without guns. But there is no direct correlation between the flat \$25 tax per gun sold that the Ordinance imposes and any burden created by the sale of each gun. The trial court correctly ruled: “Neither party articulated a direct relationship between the number of guns or rounds of ammunition sold by a retailer and the impact on health or public safety. The guns or ammunition may never be used, may only be used at a range, or may be used exclusively for safe and legal purposes.” (CP 180.)

The tax is not designed to mitigate the economic costs of gun violence. The funds generated by the tax are to be used to finance broad-based public programs that will result in shared benefits for all Seattle residents, including research into the causes of gun violence and public education programs. (CP 68, 78.)

The Ordinance’s tax is thus quite distinct from the particularized and variable regulatory scheme in *Teter* where property owners were assessed variable charges to pay for storm water control facilities that were part of an overall regulatory plan for a drainage basin. The fee charged in *Teter* depended on categories of buildings and was set based on formulas devised after studies of engineering reference material, aerial photographs, contour maps, and on-site examinations of properties within

the basin. *See Teter*, 104 Wn.2d at 235. *See also King Cnty. Fire Prot. Dists. v. Housing Auth. of King Cnty.*, 123 Wn.2d 819, 831, 872 P.2d 516, 522 (1994) (charge varied depending on the distance from regularly maintained fire protection equipment, the level of fire prevention services provided to the properties, or the need of the properties for specialized services).

Instead, the Ordinance's tax is similar to the streetlight charge imposed on utility customers in *Okeson*, where the court concluded the charge was a tax because the charge and the service received or burden produced by the utility customers was "unrelated." *Okeson*, 150 Wn.2d at 554. It is also akin to the flat fee imposed in *Arborwood* for ambulance services. *See Arborwood*, 151 Wn.2d at 373. *See also Lane v. City of Seattle*, 164 Wn.2d 875, 883, 194 P.3d 977, 980 (2008) (hydrant charge was tax where purpose was to increase revenue and no direct relationship between charges and user benefit; direct benefit was shared benefit of enhanced fire suppression); *Samis Land*, 143 Wn.2d at 813–14 (no direct relationship between annual flat standby charge imposed on vacant lots and service received or burden produced).

* * * *

The Ordinance has all the hallmarks of a tax. Its primary purpose is to raise revenue to fund broad-based public benefits. The Ordinance does

not regulate the ownership, possession, use, sale, or purchase of guns. The funds generated go to research and public education. The Ordinance is a tax, not a regulatory fee.

II. THE ORDINANCE IS A LAWFUL EXERCISE OF SEATTLE'S TAXING AUTHORITY

The trial court rejected plaintiffs' argument that cities are limited to taxing businesses that make retail sales exclusively based upon their gross receipts, holding that the Ordinance is a lawful exercise of Seattle's broad taxing authority under RCW 35.22.280(32). Plaintiffs provide no basis to reverse the trial court's ruling, which is consistent with longstanding authority.

The trial court recognized that RCW 35.22.280(32) grants first class cities, like Seattle, *see* RCW 35.22.010, the power to “grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor.” (CP 181 (quoting RCW 35.22.280(32).) The Supreme Court of Washington long ago held that RCW 35.22.280(32)'s broad grant of authority includes the power to raise revenues by imposing a tax on businesses. *See Pac. Tel. & Tel. Co. v. City of Seattle*, 172 Wn. 649, 654, 21 P.2d 721, 723 (1933); *see also Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 343–44, 662 P.2d 845, 847–48

(1983); *City of Seattle v. Campbell*, 27 Wn. App. 37, 40 & n.1, 611 P.2d 1347, 1349 (1980).⁷

The supreme court further explained in *Pacific Telephone and Telegraph Company*, that the tax is “an excise” tax. *Pac. Tel. & Tel. Co.*, 172 Wn. at 654. It “is levied upon the right to do business, not upon the right to exist; nor upon the property.” *Id.* The Legislature has directed that the power to tax granted to cities under RCW 35.22.280(32) “be liberally construed.” RCW 35.22.900.

Consistent with the Legislature’s direction that a city’s power to tax pursuant to RCW 35.22.280(32) be liberally construed, the trial court concluded that an excise tax *may* include a tax measured by gross receipts, but it is not limited to a gross receipts tax. (CP 181.) In so holding, the court correctly rejected as too narrow plaintiffs’ interpretation of RCW 35.21.710 as limiting a city’s authority to impose a tax on businesses making retail sales to a gross receipts tax. (*Id.*) RCW 35.21.710 states in part:

⁷ RCW 35.22.570 also grants first class cities, like Seattle, all powers given to other cities by Title 35 RCW and other state laws, including specific authority for municipal business taxes. Seattle thus has the power to “collect a license tax for the purposes of revenue and regulation,” which is granted to second class cities. *See* RCW 35.23.440(8). It also has the power to “to impose excises for regulation or revenue,” which is granted to code cities. *See* RCW 35A.82.020.

Any city which imposes a license fee or tax upon business activities consisting of the making of retail sales of tangible personal property which are measured by gross receipts or gross income from such sales, shall impose such tax at a single uniform rate upon all such business activities. The taxing authority granted to cities for taxes upon business activities measured by gross receipts or gross income from sales shall not exceed a rate of .0020

RCW 35.21.710. The statute does not say that a city may impose only a gross receipts tax on businesses making retail sales of tangible personal property. Rather, by its express terms, the statute governs only gross receipts taxes and places certain restrictions on gross receipts taxes when a city uses gross receipts as the measure of the tax imposed.⁸

Plaintiffs have presented no authority to extend RCW 35.21.710 beyond its express terms. In *Western Telepage, Inc. v. City of Tacoma Department of Financing*, 140 Wn.2d 599, 608–609, 998 P.2d 884, 890 (2000), the supreme court declared: “In judicial interpretation of statutes, the first rule is the court should assume that the legislature means exactly what it says. Plain words do not require construction.” (internal quotations

⁸ In *Ford Motor Co. v. City of Seattle*, 160 Wn.2d 32, 39, 156 P.3d 185, 188 (2007), the supreme court explained the structure of excise taxes: “A tax statute has three basic elements: ‘First, there must be an incident that triggers the tax.’ The ‘taxable incident’ is the ‘activity that the legislature has designated as taxable.’ Second, there must be a base that represents the value of the taxable incident. This is known as the ‘tax measure.’ Third, there must be a ‘tax rate,’ which, when multiplied by the tax measure, determines ‘the amount of tax due.’” (citations omitted).

and citation omitted). That the Legislature has chosen to limit cities' gross receipts taxing authority does not mean the Legislature also intended to limit the authority to impose other types of taxes on retail businesses. If the Legislature had intended to alter fundamentally cities' longstanding authority to tax businesses, it surely would have done so by express language, not by implication as plaintiffs suggest. Repeals by implication are disfavored. *See State ex rel. King Cnty. v. Tax Comm'n of State of Washington*, 174 Wn. 336, 342, 24 P.2d 1094, 1097 (1933). And the "preemption or restraint of municipal taxing authority may be accomplished only through specific, express statutory language." *Enter. Leasing, Inc. v. City of Tacoma, Fin. Dep't*, 93 Wn. App. 663, 669, 970 P.2d 339, 342 (1999), *aff'd*, 139 Wn.2d 546, 988 P.2d 961 (1999). No such express statutory language exists here.

Instead, the language of RCW 35.21.710 contemplates the existence of other types of license fees or taxes on retail businesses that are *not* "measured by gross receipts or gross income." It provides that when a city imposes "a license or tax" on a business making retail sales that is measured by gross receipts or gross income, "*such tax*" – that is, a tax measured by gross receipts or gross income – must be imposed at a uniform rate. RCW 35.21.710 (emphasis added). The statute thus contemplates the use of different tax bases or measures to tax retail

businesses, and in fact, many cities rely on their authority under RCW 35.22.280(32) to impose taxes using a measure other than gross receipts taxes. *See* Wash. Dep't of Revenue, *Tax Reference Manual* (January 2010) at 126.

As the trial court noted (*see* CP 181), the Tax Reference Manual issued by the Washington Department of Revenue recognizes three general types of taxes: property, income, and excise taxes. *See Tax Reference Manual* at 3. Taxes measured by gross receipts or gross income from sales – what plaintiffs refer to as the business and occupation or B&O tax – are a type of excise tax levied by cities under RCW 35.22.280(32). But not all cities use gross receipts as a tax base. As the Department of Revenue has noted, “many municipalities reported using another type of tax base for their annual municipal business tax or license fee.” *Tax Reference Manual* at 126. Some cities tax businesses based on a particular type of activity, the number of employees, or square footage of buildings. *Id.* at 126–27. Indeed, in addition to its business license tax measured by gross receipts, from 2008 through 2015, Seattle imposed a square footage tax on businesses measured by the number of square feet of business floor space and other floor space. *See* SMC Chapter 5.46. The square footage tax applied to all businesses, including retail businesses,

and was in addition to the business license tax imposed on gross receipts under SMC Chapter 5.45.

The supreme court has recognized that not all excise taxes are identical and has distinguished them based on the measure of the tax. *See P. Lorillard Co. v. City of Seattle*, 83 Wn.2d 586, 588–90, 521 P.2d 208, 209–11 (1974) (holding that state statute imposing a per–cigarette tax did not preempt Seattle’s gross receipts tax upon cigarette wholesalers because the state tax was a per–cigarette tax while Seattle’s tax was measured by gross receipts). The supreme court has also upheld cities’ use of their business licensing authority to impose taxes using a tax base other than gross receipts. *See City of Seattle v. King*, 74 Wn. 277, 133 P. 442 (1913) (annual flat rate “vehicle license fee” was lawful tax imposed under City’s authority to license for revenue); *Fleetwood v. Read*, 21 Wn. 547, 58 P. 665 (1899) (\$100 “stamp license fee” was valid exercise of city’s taxing authority).

Plaintiffs also point to chapter 35.102 RCW, Washington’s Model Municipal Business and Occupation Tax Statute (“Model Statute”), as limiting a city’s ability to tax businesses making retail sales to a gross receipts tax. But plaintiffs’ reliance on the Model Statute is misplaced, and their reading of the statute as requiring that a tax on businesses making retail sales “must be imposed only on the gross receipts or gross income

of such sales” is incorrect. (AOB at 18.) Chapter 35.102 RCW imposes certain requirements on gross receipts taxes, but like RCW 35.21.710, by its terms, it is limited to gross receipts taxes and does not otherwise restrict cities’ taxing authority. *See* RCW 35.102.030.⁹

Further, plaintiffs mischaracterize the purpose of the Model Statute. The Model Statute was enacted in 2003 to address multiple or double taxation of gross receipts of businesses *across the approximately 38 cities that impose gross receipts taxes*. *See* RCW 35.102.210; Washington Final Bill Report, 2003 Reg. Sess. H.B. 2030 (Jul. 1, 2003); *Tax Reference Manual* at 126. The Legislature enacted the Model Statute to create uniformity between cities and to allow businesses to apportion income fairly among the jurisdictions in which they do business. *Id.* But the Model Statute applies only to gross receipts taxes. It says nothing about a city’s ability to tax businesses based on measures other than gross receipts.

⁹ Plaintiffs claim that RCW 35.21.710 “aligns with the Model Statute’s requirement that municipal B&O taxes on the making of retail sales of tangible personal property must be imposed only on the gross receipts or gross income of such sales.” (AOB at 18; *see also id.* at 19.) RCW 35.21.710, however, was enacted in 1972, decades before the Model Statute. *See* Laws of 1972, 1st Exec. Sess., ch. 134.

Plaintiffs also rely on *Western Telepage* to contend that cities are limited to taxing businesses based on gross receipts and that RCW 35.21.710 imposes a statutory rate cap on all types of taxes imposed on businesses making retail sales. But in *Western Telepage*, the supreme court held that a tax increase on cellular telecommunications was *not* subject to RCW 35.21.710 when it was expressly authorized by a different state statute allowing cities to tax telephone businesses. *See Western Telepage*, 140 Wn.2d at 614. Because the city “did not raise the B & O tax rate on such services,” any limitations in RCW 35.21.710 were inapplicable. *Id.* Here, Seattle has not raised the gross receipts tax rate applicable to retailers of guns and ammunition. The Ordinance imposes a tax that uses an entirely different tax measure. It imposes a uniform per-gun sale tax collected regardless of the total income generated by each sale. Nothing in RCW 35.21.710 or the Model Statute says that a city is limited to taxing the gross receipts of a business making retail sales or that the cap on the gross receipts tax applies to all taxes on businesses making retail sales. As the trial court concluded, “The tax provided for in the ordinance and codified at SMC 5.50 is not a tax on gross proceeds and is not limited by the multiplier in SMC 5.45.050(c) any more than sales tax is limited to a multiplier of .00215.” (CP 181.)

Plaintiffs' reliance on *Okeson* likewise is misplaced. There, the court stated that even if the charge imposed to fund streetlights had been specifically authorized as a tax, it would have been unlawful because it exceeded the statutory limit on all taxes imposed on electrical utilities. *See Okeson*, 150 Wn.2d at 556. Not only was the court's statement *dicta* – in the preceding paragraph, the court ruled the tax unconstitutional – the issue in *Okeson*, unlike here, was that the tax exceeded the maximum statutory cap on all taxes on electrical utilities. Here, RCW 35.21.710 sets a cap only on gross receipts taxes and does not apply to other taxes. Plaintiffs point to no case or other authority holding that a city is limited to taxing businesses that makes retail sales based on gross receipts or that a city is restricted from imposing more than one type of tax on certain businesses.

Plaintiffs' attempt to show that that Ordinance exceeds Seattle's taxing authority through a hypothetical about booksellers is similarly unavailing. Plaintiffs' hypothetical, at best, presents a policy argument in favor of restricting cities from imposing more than one type of tax on certain businesses. Any policy debate, however, must take place before the Legislature, not the courts.

Plaintiffs accuse Seattle of “subterfuge” in imposing the Ordinance's flat \$25 per gun sale tax. (AOB at 22, 29.) But Seattle has

been entirely transparent in enacting the tax. Seattle “freely admits” that the Ordinance does not satisfy the gross receipt tax requirements of RCW 35.21.710. (AOB at 22).¹⁰ That is because the Ordinance is *not* a gross receipts tax. It is an excise tax based on a tax measure distinct from gross receipts and is authorized by the City’s broad taxing authority under RCW 35.22.280(32).

III. RCW 9.41.290 DOES NOT PREEMPT THE ORDINANCE

A. RCW 9.41.290 Does Not Preempt Taxes

The NRA and other plaintiffs argue for the first time on appeal that even if the Ordinance is a constitutional and valid tax within Seattle’s taxing authority – which it is – it still falls within the preemptive scope of RCW 9.41.290. In the trial court, the NRA argued only that “*all regulation*” of guns is preempted under RCW 9.41.290. (CP 148 (emphasis added).) It did not argue that RCW 9.41.290’s preemptive scope extends to taxation, perhaps because nothing in the text or legislative history of RCW 9.41.290 even suggests that its preemptive effect applies to taxes. Now, however, in light of the trial court’s ruling

¹⁰ Plaintiffs point out that the Ordinance is subject to RCW 35.21.706, which relates to challenging a business and occupation tax by referendum. (See AOB at 20 (citing Section 16 of the Ordinance (CP 79).) This provision was included because RCW 35.21.706 does not define “business and occupation tax,” and it is not clear whether it applies only to business license taxes based on gross receipts or to all municipal business taxes.

that the Ordinance is a tax, not a regulation, plaintiffs have changed their argument. They now contend that RCW 9.41.290 preempts “all laws” concerning guns and ammunition, not just regulations, and that even if the Ordinance is a tax, it is preempted. (AOB at 32.)¹¹ Plaintiffs have waived this argument, which was not presented to or decided by the trial court. See RAP 2.5.¹²

If the Court decides to consider plaintiffs’ newly-formulated argument, the argument has no merit. RCW 9.41.290 does not preempt taxation. The statute identifies many legislative actions that the statute preempts but omits any reference to taxes on guns or ammunition:

¹¹ Throughout their opening brief on appeal, plaintiffs substitute “legislation” where they had previously said “regulation.” Compare Heading B.1 in Plaintiffs’ Opposition and Reply on Summary Judgment (CP 147 (emphasis added)) – “The plain text of RCW 9.41.290 unambiguously governs both criminal and civil *regulation*” – with Heading C.1 in AOB at 30 (emphasis added) – “the plain text of RCW 9.41.290 unambiguously governs both criminal and civil *legislation*.” Likewise, in the trial court, plaintiffs argued, “Equally, important, the current text of RCW 9.41.300 itself supports a finding that preemption applies to civil *regulation*.” (CP 149 (emphasis added).) Now, plaintiffs contend, “Equally, important, the current text of RCW 9.41.300 itself supports a finding that preemption applies to civil *legislation* as well.” (AOB at 34 (emphasis added).)

¹² Plaintiffs claim to have preserved the issue of whether the tax imposed by the Ordinance is actually a regulatory fee in its purpose and substance and therefore preempted. (See AOB at 40; CP 31–32 n.2; CP 142 n.1.) That argument, however, is distinct from the issue of whether RCW 9.41.290 on its face preempts all taxation – an issue plaintiffs did not raise or argue below.

The state of Washington hereby fully occupies and preempts the entire field of firearms regulation within the boundaries of the state, including the registration, licensing, possession, purchase, sale, acquisition, transfer discharge, and transportation of firearms, or any other element relating to firearms or parts thereof, including ammunition and reloader components. Cities, towns, and counties or other municipalities may enact only those laws and ordinances relating to firearms that are specifically authorized by state law, as in RCW 9.41.300, and are consistent with this chapter.

RCW 9.41.290. The exclusion of taxation from the list of preempted areas in RCW 9.41.290 unambiguously evidences a legislative intent to allow municipalities to impose taxes related to guns and ammunition. *See Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 280, 4 P.3d 808, 827 (2000) (“Where a statute specifically lists the things upon which it operates, there is a presumption that the legislating body intended all omissions, i.e., the rule of *expressio unius est exclusion alterius* applies.”).

Plaintiffs note that the Legislature has amended RCW 9.41.290 several times. (*See* AOB at 32–34.) But the Legislature has never added taxation to the list of preempted activities, which it had every opportunity to do. The Legislature’s omission of taxes from RCW 9.41.290 is consistent with Washington’s longstanding recognition of the fundamental distinction between a tax – a means to raise revenue that does not limit or mandate conduct – and a regulation – a rule that limits or mandates

conduct. *See Arborwood*, 151 Wn.2d at 365–66. Numerous other states with nearly identical preemption statutes expressly include taxes in their list of preempted fields, affirming that Washington’s omission of taxes from its preemption statute is no accident.¹³ And the one court to consider an identical tax challenged on identical grounds concluded the applicable preemption statute did not apply. *See ERP, Inc. v. Ali*, No.13 CH 07263 (Ill. Cir. Ct. Cook Cnty. Jan. 22, 2014) (slip op.) (CP 127–28) (Illinois statute preempting local “regulation, licensing, possession, registration, and transportation” of firearms, did not preempt taxation of firearms: “Taxes are conspicuously absent from the list of measures that are preempted.”).

RCW 9.41.290 does not preempt taxes. The Ordinance, which imposes a tax, falls outside RCW 9.41.290

B. RCW 9.41.290 Preempts Only Conflicting Criminal Regulations

Even if the Ordinance were considered a regulation – which it is not – the Ordinance would still fall outside the preemptive scope of RCW 9.41.290 because as the Supreme Court of Washington has twice held,

¹³ *See e.g.*, Ak. Stat. § 29.35.145(a); Az. Rev. Stat. § 13–3108; Fla. Stat. § 790.33(1); Ind. Code § 35–47–11.1–2; Ky. Rev. Stat. § 65.870; Mich. Compiled Laws 123.1102; Mont. Code 45–8–351; N.H. Rev. Stat. § 159:26(I); R.I. Gen. Stat. § 11–47–58; Tenn. Code § 39–17–1314(A); Wis. Stat. § 66.0409.

RCW 9.41.290 preempts only conflicting criminal gun regulations, and the Ordinance is not a criminal gun regulation. *See Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 356, 144 P.3d 276, 283 (2006); *Cherry v. Mun. of Metro. Seattle*, 116 Wn.2d 794, 801, 808 P.2d 746, 749 (1991).

The supreme court has consistently interpreted the preemptive effect of RCW 9.41.290, which is part of the Washington Uniform Firearms Act, “in light of its penal nature.” *Cherry*, 116 Wn.2d at 800. In *Cherry*, a Seattle bus driver challenged the termination of his employment for violating a rule prohibiting guns, arguing that Seattle’s internal policy prohibiting its employees from possessing concealed weapons while on duty or on city property was preempted by RCW 9.41.290. The supreme court rejected the employee’s preemption argument as “unpersuasive in the light of the penal nature of the Uniform Firearms Act and the complete lack of support for [his] position in legislative history of the 1983 and 1985 amendments to RCW 9.41.” *Id.* The court elaborated: “RCW 9.41.290 was enacted to reform that situation in which counties, cities, and town could each enact conflicting local criminal codes regulating the general public’s possession of firearms.” *Id.* at 801. The court thus unequivocally rejected an expansive constructive of RCW 9.41.290, ruling that its preemptive force is limited to conflicting criminal gun regulations:

We hold that the Legislature, in amending RCW 9.41.290, sought to eliminate a multiplicity of local laws relating firearms and to advance uniformity in criminal firearms regulations.

Id.

In *Pacific Northwest Shooting Park Association v. City of Sequim*, the supreme court again addressed the scope of RCW 9.41.290's preemptive effect and once again highlighted the penal nature of the statute. The court noted that although RCW Title 35 is the principal source of grants and limitations on the power of Washington cities, RCW 9.41.290 was enacted as part of RCW Title 9, the penal code. *See Sequim*, 158 Wn.2d at 356 n.6. The court explained:

We note that the legislature placed the preemption clause in Title 9 of the Washington criminal code rather than in Title 35, which governs activities of cities and towns, or Title 36, which governs activities of counties. Although this placement is not conclusive of the legislature's intent, it supports our analysis in *Cherry* regarding the penal focus of the preemption clause.

Id. Finding “the penal nature of the Firearms Act, chapter 9.41 RCW, to be particularly significant,” the court once again rejected an expansive reading of RCW 9.41.290 and reaffirmed its ruling in *Cherry* that “the central purpose of RCW 9.41.290 was to eliminate *conflicting municipal criminal codes* and ‘to advance uniformity in *criminal firearms regulation.*’” *Sequim*, 158 Wn.2d at 356 (quoting *Cherry*, 116 Wn.2d at 801) (emphasis in *Sequim*).

Plaintiffs urge this Court to disregard the clear principles the Supreme Court of Washington established in *Cherry* and *Sequim* for construing the preemptive scope of RCW 9.41.290. They point to the legislative history surrounding certain amendments to RCW 9.41.290, claiming it establishes that RCW 9.41.290 preempts all legislation – both civil and criminal. (*See* AOB at 32–36.) The supreme court, however, considered that legislative history in *Cherry* and *Sequim* and conclusively determined that RCW 9.41.290 is penal in nature and intended to eliminate conflicting municipal criminal codes and to advance uniformity in criminal firearms regulation. The Legislature could have amended the RCW 9.41.290 following the *Cherry* and *Sequim* decisions to provide that the preemptive scope of RCW 9.41.290 extends to all legislation. But it did not do so. This Court is bound by the supreme court’s determination in *Cherry* and *Sequim* that RCW 9.41.290 is penal in nature and covers only criminal regulations.

C. The Ordinance is not a Criminal Regulation

The Ordinance provides that any person who fails to pay the tax imposed is “guilty of a gross misdemeanor.” (CP 73.) This is the same penalty imposed for the non-payment of other taxes under the Seattle Municipal Code. *See* SMC 5.55.220(B). Like other tax provisions, the Ordinance criminalizes the failure to pay the tax; it does not criminalize

the act of selling guns or ammunition at retail and cannot be considered a criminal regulation. Otherwise, every tax provision that includes a penalty to enforce payment would be a criminal regulation. But that is not the case.

In *City of Seattle v. Campbell*, 27 Wn. App. 37, 40, 611 P.2d 1347, 1349 (1980), for instance, the supreme court ruled that an ordinance requiring lawyers to file and remit a business license tax and that imposed a penalty for failure to pay the tax, including fine or imprisonment, was not a regulation. The ordinance was “purely a revenue raising measure” and did not “impinge upon the Supreme Court’s power to regulate the Bar.” *Id.* The penalty punished only noncompliance with tax measure. The supreme court in *Pacific Telephone and Telegraph Company* likewise explained that a penalty associated with the failure to pay a business license tax is merely a mode of enforcing payment; it does not convert the tax into a criminal regulation. *See Pac. Tel. & Tel. Co.*, 172 Wn. at 654.

Plaintiffs attempt to analogize the penalty for failure to pay the tax imposed by the Ordinance with the use of the criminal trespass laws in *Chan v. City of Seattle*, 164 Wn. App. 549, 565–66, 265 P.3d 169, 178 (2011), to prosecute anyone who violated the ban on guns in public parks. (See AOB 35–36.) But in *Chan*, the use of the criminal trespass laws directly criminalized the act of carrying a gun in public parks. Here, in

contrast, the Ordinance does not regulate or criminalize any conduct relating to guns or ammunition. It merely seeks to enforce payment of a tax.

IV. THE TRIAL COURT'S DISMISSAL OF THE CASE IN ITS ENTIRETY WAS PROPER GIVEN THE RECORD

Following extensive briefing and hearing on the parties' motions, the trial court dismissed plaintiffs' case in its entirety, concluding that no genuine issue of material fact remained and that Seattle was entitled to summary judgment in its favor. (CP 176.) Plaintiffs assert the trial court's dismissal of its case was improper because they intended to preserve a "second argument" regarding the validity of the Ordinance to be resolved following discovery. But plaintiffs are not entitled to a second bite at the apple when they failed to present any cognizable legal theory or genuine issue of disputed fact in support of that purported argument. Based on the record before the court, it was entirely proper for the trial court to conclude that the case should be dismissed in its entirety, and plaintiffs have articulated no valid basis to reverse that decision on appeal.

Plaintiffs moved for summary judgment on the ground that the Ordinance, on its face, is a regulation and therefore preempted by RCW 9.41.290. (CP 31.) They insist on appeal they "explicitly established" that they were preserving "a secondary contention" that the Ordinance is

preempted because it is a de facto regulation. (AOB at 40.) Plaintiffs provided only a cursory explanation of this purported “de facto” argument to the trial court. (See CP 32 n.6 (“the excessive amount charged to firearm and ammunition businesses operates to regulate firearm sales even if it were a proper tax, and is therefore preempted”; CP 142 n.1 (“the present issue of whether the Ordinance is facially a regulation or a tax does not address the question of whether the Ordinance regulates the sale of firearms and ammunition even if it is deemed a tax”).) Nowhere in their briefs did plaintiffs advance any legal or factual argument demonstrating they possess a colorable legal claim the tax operates as a regulation. Plaintiffs did not cite a single legal authority standing for the proposition that where, as here, a court determines under *Covell* that an Ordinance is a tax and not a regulation, it nevertheless may proceed to find that Ordinance operates as a de facto regulation. Plaintiffs likewise did not present a shred of evidence showing a disputed issue of material fact as to whether the tax has the purported “suppressive” effect on business and sales they claim. Nor could they have presented any such evidence given that the Ordinance was not yet in effect.

Based on this record, it not surprising that the trial court dismissed plaintiffs’ case in its entirety. In its cross-motion, Seattle asked the Court to determine:

1. Whether the Ordinance imposes a tax, not a regulation.
2. Whether the tax imposed by the Ordinance under the City's constitutional and legislative authority to impose taxes, which is separate from its regulatory authority under its police power, is not preempted by RCW 9.41.290.
3. Whether the Ordinance is a lawful exercise of Seattle's taxing authority.

(CP 99.) After it answered each of those questions in Seattle's favor, it was reasonable for the trial court to conclude that no genuine issue remained to be resolved. The Ordinance was not yet in effect, and Seattle had not yet levied the tax on plaintiffs or any other business. It follows that plaintiffs did not have (and could not have had) a ripe, colorable claim regarding the effect – suppressive or otherwise – of the tax on business or sales, regardless of what plaintiffs may have wished to preserve. *See Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 770, 49 P.3d 867, 883 (2002) (as applied challenge to city parks and open space fee was not ripe for judicial review because city had not yet imposed such fee); *Asarco Inc. v. Dep't of Ecology*, 145 Wn.2d 750, 759, 43 P.3d 471, 475 (2002) (“If we find ‘applied challenges’ justiciable before anything has been applied, we risk becoming an advisory court and overstepping our constitutional authority.”)

It was thus proper for the trial court to conclude that its resolution of the issues presented in Seattle's cross-motion amounted to a dismissal

of plaintiffs' case in its entirety. The trial court's decision to dismiss the case in its entirety should be affirmed.

V. PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF

Plaintiffs' contention that the retail plaintiffs – Farwest Sports Inc. and Precise Shooter LLC – are entitled to injunctive relief barring Seattle from enforcing the Ordinance is similarly unavailing. Injunctive relief is an extraordinary remedy reserved for cases where a party establishes (1) that it has a clear legal or equitable right, (2) that it has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to it. *See Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 210, 995 P.2d 63, 69 (2000). Plaintiffs failed to demonstrate they meet this high standard.

To prevail on their claim for injunctive relief, plaintiffs necessarily must prove they are likely to prevail on their claim that the Ordinance is preempted and unconstitutional on its face. But as detailed above and as the trial court determined, the Ordinance is neither preempted nor unconstitutional. Because plaintiffs cannot establish any risk of invasion of their legal or equitable rights, there is no basis for granting an injunction.

Plaintiffs also fail to make the showing of harm necessary to warrant an injunction. It is well established under Washington law that injunctive relief requires proof of imminent and substantial actual harm as well as proof that such harm would be irreparable. *See DeLong v. Parmelee*, 157 Wn. App. 119, 150, 236 P.3d 936, 952 (2010). Although plaintiffs characterize the tax as “substantial” (AOB at 39), they offer no evidence to show the tax will cause them any harm other than a monetary loss. The supreme court has held that the payment of a tax does not constitute the type of actual and substantial injury required for injunctive relief. *See Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 96 Wn.2d 785, 794–95, 638 P.2d 1213, 1218 (1982).

The retail plaintiffs have also presented no evidence that they will suffer irreparable harm if the Ordinance goes into effect. Under Washington law, plaintiffs must demonstrate they have no adequate remedy at law. *Id.* at 791. Remedies are inadequate in only three circumstances: “(1) the injury complained of by its nature cannot be compensated by money damages, (2) the damages cannot be ascertained with any degree of certainty, and (3) the remedy at law would not be efficient because the injury is of a continuing nature.” *Kucera*, 140 Wn.2d at 210. Here, the only claimed harm is monetary – the cost of the tax – and damages may be calculated easily by multiplying the tax rate by the

number of firearms or rounds of ammunition sold. Any injury will not outlast this case because a declaration that the tax is invalid will end its collection, and a declaration of validity means there is no injury.

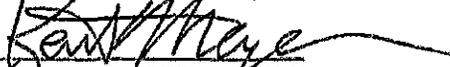
CONCLUSION

Plaintiffs have failed to meet their burden of establishing that the Ordinance is unconstitutional and an invalid tax. Defendants and respondents City of Seattle, Ed Murray, Seattle Department of Finance and Administrative Services, and Glen Lee respectfully request that the Court affirm the trial court's order holding that the Ordinance is a constitutional tax within the lawful exercise of Seattle's taxing authority, granting summary judgment to Seattle, and dismissing plaintiffs' case in its entirety.

DATED this 4th day of May, 2016.

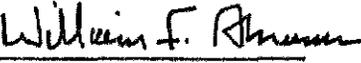
PETER S. HOLMES
Seattle City Attorney
Attorneys for Defendants City of Seattle

By


Kent C. Meyer, WSBA #17245
Carlton M. Seu, WSBA #26830
Seattle City Attorney's Office
Columbia Center
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
Tel: (206) 684-8288
Fax: (206) 684-8284
Email: kent.meyer@seattle.gov
carlton.seu@seattle.gov

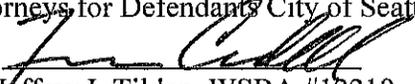
STEPTOE & JOHNSON LLP
Attorneys for Defendants City of Seattle

By


William F. Abrams*
Laurie Edelstein*
Sarah K. Jackel*
David H. Kwasniewski*
1891 Page Mill Road, Suite 200
Palo Alto, CA 94304
Tel: (650) 687-9500
Fax: (650) 687-9499
Email: wabrams@steptoe.com
ledelstein@steptoe.com
sjackel@steptoe.com
dkwasniewski@steptoe.com
*Admitted Pro Hac Vice

**GORDON TILDEN THOMAS &
CORDELL LLP**

Attorneys for Defendants City of Seattle

By 

Jeffrey I. Tilden, WSBA #12219

Franklin D. Cordell, WSBA #26392

1001 Fourth Avenue, Suite 4000

Seattle, Washington 98154

Tel: (206) 467-6477

Fax: (206) 467-6292

Email: jtilden@gordontilden.com

fcordell@gordontilden.com

DECLARATION OF SERVICE

The undersigned hereby certifies that on May 4, 2016, a copy of this document was served to the following via hand delivery to the party named below:

Attorneys for Appellants

Steven W. Fogg

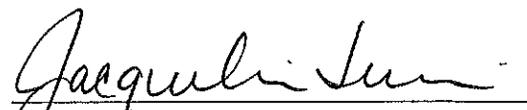
David B. Edwards

Corr Cronin Michelson Baumgardner Fogg & Moore LLP

1001 Fourth Avenue, Suite 3900

Seattle, WA 98154-1051

Signed this 4th day of May, 2016 at Seattle, Washington


Jacqueline Lucien, Legal Secretary
Gordon Tilden Thomas & Cordell LLP

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 MAY -4 PM 2:06

APPENDIX A



SEATTLE CITY COUNCIL

Legislative Summary

CB 118437

Record No.: CB 118437

Type: Ordinance (Ord)

Status: Passed

Version: 2

124833

In Control: City Clerk

File Created: 07/08/2015

Final Action: 08/21/2015

Title: AN ORDINANCE related to imposing a tax on engaging in the business of making retail sales of firearms and ammunition; amending Sections 5.30.010, 5.30.060, 5.55.010, 5.55.040, 5.55.060, 5.55.150, 5.55.165, 5.55.220, and 5.55.230 of the Seattle Municipal Code; and adding a new Chapter 5.50 to the Seattle Municipal Code.

Notes:

Filed with City Clerk:

Mayor's Signature:

Sponsors: Burgess, Bagshaw, Godden, Harrell, Licata, O'Brien, Okamoto, Rasmussen, Sawant

Vetoed by Mayor:

Veto Overridden:

Veto Sustained:

Attachments:

Drafter: jodee.schwinn@seattle.gov

Filing Requirements/Dept Action:

History of Legislative File

Legal Notice Published:

Yes

No

Version:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
1	City Clerk	07/08/2015	sent for review	Council President's Office			
	Action Text: The Council Bill (CB) was sent for review, to the Council President's Office						
	Notes:						
1	Council President's Office	07/08/2015	sent for review	Education and Governance Committee			
	Action Text: The Council Bill (CB) was sent for review, to the Education and Governance Committee						
	Notes:						
1	Full Council	07/13/2015	referred	Education and Governance Committee			
1	Education and Governance Committee	07/15/2015					

CITY OF SEATTLE
ORDINANCE 124833
COUNCIL BILL 118437

AN ORDINANCE related to imposing a tax on engaging in the business of making retail sales of firearms and ammunition; amending Sections 5.30.010, 5.30.060, 5.55.010, 5.55.040, 5.55.060, 5.55.150, 5.55.165, 5.55.220, and 5.55.230 of the Seattle Municipal Code; and adding a new Chapter 5.50 to the Seattle Municipal Code.

WHEREAS, in 2013 Public Health Seattle & King County published a report detailing the effects of gun violence, finding that there were on average 131 firearms deaths per year in King County from 2006-2010, with another 536 individuals hospitalized for nonfatal firearm injuries during this same five year period; and

WHEREAS, Public Health estimated the total economic costs of firearm deaths and injuries in the County to average \$181 million per year from 2009-2013; and

WHEREAS, in 2014 alone, the direct medical costs of treating 253 gunshot wound victims at Harborview Medical Center, the regional trauma center for the Pacific Northwest, reached more than \$17 million, or approximately \$68,000 per gunshot victim; and

WHEREAS, taxpayer funds covered more than \$12 million of Harborview's 2014 direct medical costs, with private health care payments covering the balance; and

WHEREAS, after the December 2012 massacre of 20 schoolchildren and six adults at Sandy Hook Elementary School in Newtown, Connecticut, the Seattle City Council renewed in earnest its efforts to seek solutions for gun safety at the municipal level; and

WHEREAS, in June 2013 the City Council passed C.B. 117770, a public health gun safety package that made Seattle the first city in the nation to provide local government funding for basic gun safety research; and

1 WHEREAS, in July 2014 the Harborview Injury Prevention and Research Center presented a
2 groundbreaking report on the predictors and consequences of firearm violence in King
3 County, later published in the peer-reviewed *Annals of Internal Medicine* (Vol. 162, No.
4 7: April 7, 2015); and

5 WHEREAS, the study found that “gun violence begets gun violence,” with individuals
6 hospitalized for a firearm injury being 30 times more likely to be re-hospitalized for
7 another firearm injury than people admitted to the hospital for non-injury reasons; and

8 WHEREAS, the data from this report led Harborview to develop a hospital-based intervention
9 program modeled on a similar approach piloted for alcohol interventions in the 1990s that
10 reduced injuries requiring hospital admission for those served by nearly 50 percent; and

11 WHEREAS, basic research and prevention programs can reduce long-term costs and save lives
12 but often need funding to get started; and

13 WHEREAS, due to successful efforts by the gun lobby, funding for research into the causes of
14 gun violence has been blocked at the federal level since 1996; and

15 WHEREAS, the firearms industry is financially healthy and robust in this country, as
16 demonstrated by the number of firearms imported into the U.S. or manufactured in the
17 U.S. between 2008 and 2012 (excluding exports) increasing from 6,876,842 to
18 13,135,646, a 91 percent increase; and

19 WHEREAS, the creation of a sustained local revenue source through a tax on the sale of firearms
20 and ammunition would provide broad-based public benefits for residents of Seattle
21 related to gun violence by funding programs that promote public safety, prevent gun
22 violence and address in part the cost of gun violence in the City;; NOW, THEREFORE,

23 **BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:**

1 Section 1. The City finds and declares that gun violence directly affects the City and its
2 residents. Therefore, the City intends to exercise its taxing authority, as granted by the
3 Washington State Constitution and as authorized by the Washington State Legislature, to raise
4 general revenue for the City and to use that revenue to provide broad-based public benefits for
5 residents of Seattle related to gun violence by funding programs that promote public safety,
6 prevent gun violence and address in part the cost of gun violence in the City.

7 Section 2. Section 5.30.010 of the Seattle Municipal Code which section was last
8 amended by Ordinance 123063, is amended as follows:

9 **5.30.010 Definition provisions ((~~r~~))**

10 The definitions contained in this ((chapter)) Chapter 5.30 shall apply to the following
11 chapters of the Seattle Municipal Code: Chapters 5.32 (Amusement Devices), 5.35 (Commercial
12 Parking ((Taxes)) Tax), ((5.37 (Employee Hours Taxes)),) 5.40 (Admission ((Taxes)) Tax), 5.45
13 (Business License ((Taxes)) Tax), 5.46 (Square Footage ((Business)) Tax), 5.48 (((Utility
14 Taxes)) Business Tax – Utilities), 5.50 (Firearms and Ammunition Tax), 5.52 (Gambling
15 ((Taxes)) Tax), and 5.55 (General Administrative Provisions) unless expressly provided for
16 otherwise therein, and shall also apply to other chapters and sections of the Seattle Municipal
17 Code in the manner and to the extent expressly indicated in each chapter or section. Words in the
18 singular number shall include the plural and the plural shall include the singular. Words in one
19 gender shall include ((both)) the other genders.

20 Section 3. Subsection 5.30.060.B of the Seattle Municipal Code, which section was last
21 amended by Ordinance 124808, is amended as follows:

22 **5.30.060 Definitions, T-Z**

1 B. "Taxpayer" means any "person," as herein defined, required by Chapter 5.55 to have a
2 business license tax certificate, or liable for any license, tax or fee, or for the collection of any
3 tax or fee, under Chapters 5.32 (Amusement Devices), 5.35 (Commercial Parking Tax), 5.40
4 (Admission Tax), 5.45 (Business License Tax), 5.46 (Square Footage ((Business)) Tax), 5.48
5 (((Utility Tax)) Business Tax – Utilities), 5.50 (Firearms and Ammunition Tax), and 5.52
6 (Gambling Tax) or who engages in any business or who performs any act for which a tax or fee
7 is imposed under those chapters.

8 Section 4, Section 5.55.010 of the Seattle Municipal Code, last amended by Ordinance
9 123063, is amended as follows:

10 **5.55.010 Application of chapter stated ((§))**

11 Unless expressly stated to the contrary in each chapter, the provisions of this ((chapter))
12 Chapter 5.55 shall apply with respect to the licenses and taxes imposed under this ((chapter))
13 Chapter 5.55 and ((SMC)) Chapters 5.32 (Amusement Devices), 5.35 (Commercial Parking
14 ((Taxes)) Tax), 5.37 (Employee Hours Taxes), 5.40 (Admission Tax), 5.45 (Business License
15 Tax), 5.46 (Square Footage ((Business)) Tax), 5.48 (((Utility Tax)) Business Tax – Utilities),
16 5.50 (Firearms and Ammunition Tax), and 5.52 (Gambling Tax) and under other titles, chapters
17 and sections in such manner and to such extent as indicated in each such title, chapter or section.

18 Section 5, Subsection 5.55.040.A of the Seattle Municipal Code, which section was last
19 amended by Ordinance 124808, is amended as follows:

20 **5.55.040 When due and payable – Reporting periods – Monthly, quarterly, and annual**
21 **returns – Threshold provisions – Computing time periods – Failure to file returns**

22 A. Other than any annual license fee or registration fee assessed under this ((chapter))
23 Chapter 5.55, the tax imposed by ((SMC)) Chapters 5.32 (Amusement Devices), 5.35

1 (Commercial Parking Tax), 5.40 (Admission Tax), 5.45 (Business License Tax), 5.46 (Square
2 Footage ((Business)) Tax), 5.48 ((Utility Tax)) Business Tax – Utilities, 5.50 (Firearms and
3 Ammunition Tax), and 5.52 (Gambling Tax) shall be due and payable in quarterly installments.

4 The Director may use ((his or her)) discretion to assign businesses to a monthly or annual
5 reporting period depending on the tax amount owing or type of tax. Taxes imposed by ((SMC
6 Section)) subsections 5.52.030.A.2 and 5.52.030.B.2 for punchboards and pulltabs shall be due
7 and payable in monthly installments. Tax returns and payments are due on or before the last day
8 of the next month following the end of the assigned reporting period covered by the return.

9 Section 6. Subsection 5.55.060.A of the Seattle Municipal Code, which section was last
10 amended by Ordinance 123361, is amended as follows:

11 **5.55.060 Records to be preserved – Examination – Inspection – Search warrants – Estoppel**
12 **to question assessment ((r))**

13 A. Every person liable for any fee or tax imposed by this ((chapter)) Chapter 5.55 ((r))
14 and Chapters 5.32, 5.35, 5.40, 5.45, 5.46, 5.48, 5.50, and 5.52 shall keep and preserve, for a
15 period of five years after filing a tax return, such records as may be necessary to determine the
16 amount of any fee or tax for which the person may be liable; which records shall include copies
17 of all federal income tax and state tax returns and reports made by the person. All books, records,
18 papers, invoices, ticket stubs, vendor lists, gambling games, and payout information, inventories,
19 stocks of merchandise, and other data, including federal income tax and state tax returns, and
20 reports needed to determine the accuracy of any taxes due, shall be open for inspection or
21 examination at any time by the Director or a duly authorized agent. Every person's business
22 premises shall be open for inspection or examination by the Director or a duly authorized agent.

1 Section 7. Subsection 5.55.150.E of the Seattle Municipal Code, which section was last
2 amended by Ordinance 123899, is amended as follows:

3 **5.55.150 Appeal to the Hearing Examiner**

4 E. The Hearing Examiner shall ascertain the correct amount of the tax, fee, interest, or
5 penalty due either by affirming, reversing, or modifying an action of the Director. Reversal or
6 modification is proper if the Director's assessment or refund denial violates the terms of this
7 Chapter 5.55, or Chapters 5.30, 5.32, 5.35, 5.37, 5.40, 5.45, 5.46, 5.48, 5.50, or 5.52.

8 Section 8. Section 5.55.165 of the Seattle Municipal Code, last amended by Ordinance
9 123361, is amended as follows:

10 **5.55.165 Director of Finance and Administrative Services to make rules ((:))**

11 The Director of Finance and Administrative Services shall have the power and it shall be
12 ~~((his or her))~~ the Director's duty, from time to time, to adopt, publish and enforce rules and
13 regulations not inconsistent with this ~~((chapter))~~ Chapter 5.55, ~~((SMC))~~ Chapters 5.30, 5.32,
14 5.35, 5.40, 5.45, 5.46, 5.48, 5.50, or 5.52, or with law for the purpose of carrying out the
15 provisions of such chapters, and it shall be unlawful to violate or fail to comply with, any such
16 rule or regulation.

17 Section 9. Subsections 5.55.220.A and 5.55.220.B of the Seattle Municipal Code, which
18 section was last amended by Ordinance 124808, are amended as follows:

19 **5.55.220 Unlawful actions—Violation—Penalties ((:))**

20 A. It shall be unlawful for any person subject to the provisions of this Chapter 5.55, or
21 Chapters 5.32, 5.35, 5.40, 5.46, 5.45, 5.48, 5.50, and 5.52:

1 1. To violate or fail to comply with any of the provisions of this Chapter 5.55, or
2 Chapters 5.32, 5.35, 5.40, 5.45, 5.46, 5.48, 5.50, and 5.52, or any lawful rule or regulation
3 adopted by the Director;

4 2. To make or manufacture any license required by this ~~((chapter))~~ Chapter 5.55
5 except upon authority of the Director;

6 3. To make any false statement on any license, application, or tax return;

7 4. To aid or abet any person in any attempt to evade payment of a license fee or
8 tax;

9 5. To refuse admission to the Director to inspect the premises and/or records as
10 required by this ~~((chapter))~~ Chapter 5.55, or to otherwise interfere with the Director in the
11 performance of duties imposed by Chapters 5.32, 5.35, 5.40, 5.45, 5.46, 5.48, 5.50, and 5.52;

12 6. To fail to appear or testify in response to a subpoena issued pursuant to Section
13 3.02.120 in any proceeding to determine compliance with this ~~((chapter))~~ Chapter 5.55 and
14 Chapters 5.32, 5.35, 5.40, 5.45, 5.46, 5.48, 5.50, and 5.52;

15 7. To testify falsely in any investigation, audit, or proceeding conducted pursuant
16 to this Chapter 5.55;

17 8. To continue to engage in any business activity, profession, trade, or occupation
18 after the revocation of or during a period of suspension of a business license tax certificate issued
19 under Section 5.55.030; or

20 9. In any manner, to hinder or delay the City or any of its officers in carrying out
21 the provisions of this Chapter 5.55 or Chapters 5.32, 5.35, 5.40, 5.45, 5.46, 5.48, 5.50, and 5.52.

22 B. Each violation of or failure to comply with the provisions of this ~~((chapter))~~ Chapter
23 5.55, or ~~((SMC))~~ Chapters 5.32, 5.35, 5.37, 5.40, 5.45, 5.46, 5.48, 5.50, or 5.52 shall constitute a

1 separate offense. Except as provided in subsection 5.55.220.C, any person who commits an act
2 defined in subsection 5.55.220.A (~~(of this section)~~) is guilty of a gross misdemeanor, punishable
3 in accordance with (~~(SMC)~~) Section 12A.02.070. The provisions of Chapters 12A.02 and 12A.04
4 (~~(of the Seattle Municipal Code)~~) apply to the offenses defined in subsection 5.55.220.A of this
5 section, except that liability is absolute and none of the mental states described in (~~(SMC)~~)
6 Section 12A.04.030 need be proved.

7 Section 10. Subsection 5.55.230.A of the Seattle Municipal Code, which section was last
8 amended by Ordinance 124808, is amended as follows:

9 **5.55.230 Denial, revocation of, or refusal to renew business license tax certificate**

10 A. The Director, or the Director's designee, has the power and authority to deny, revoke,
11 or refuse to renew any business license tax certificate or amusement device license issued under
12 the provisions of this (~~(chapter)~~) Chapter 5.55. The Director, or the Director's designee, shall
13 notify such applicant or licensee in writing by mail in accordance with section 5.55.180 of the
14 denial, revocation of, or refusal to renew, the license and on what grounds such a decision was
15 based. The Director may deny, revoke, or refuse to renew any license issued under this
16 (~~(chapter)~~) Chapter 5.55 on one or more of the following grounds:

- 17 1. The license was procured by fraud or false representation of fact.
- 18 2. The licensee has failed to comply with any provisions of this Chapter 5.55.
- 19 3. The licensee has failed to comply with any provisions of Chapters 5.32, 5.35,
20 5.40, 5.45, 5.46, 5.48, 5.50, or 5.52.
- 21 4. The licensee is in default in any payment of any license fee or tax under Title 5
22 or Title 6.

1 5. The property at which the business is located has been determined by a court to
2 be a chronic nuisance property as provided in Chapter 10.09.

3 6. The applicant or licensee has been convicted of theft under Section
4 12A.08.060.A.4 within the last ten years.

5 7. The applicant or licensee is a person subject within the last ten years to a court
6 order entering final judgment for violations of RCW 49.46, 49.48, or 49.52, or 29 U.S.C. 206 or
7 29 U.S.C. 207, and the judgment was not satisfied within 30 days of the later of either:

8 a. the expiration of the time for filing an appeal from the final judgment
9 order under the court rules in effect at the time of the final judgment order; or

10 b. if a timely appeal is made, the date of the final resolution of that appeal
11 and any subsequent appeals resulting in final judicial affirmation of the findings of violations of
12 RCW 49.46, 49.48, or 49.52, or 29 U.S.C. 206 or 29 U.S.C. 207.

13 8. The applicant or licensee is a person subject within the last ten years to a final
14 and binding citation and notice of assessment from the Washington Department of Labor and
15 Industries for violations of RCW 49.46, 49.48, or 49.52, and the citation amount and penalties
16 assessed therewith were not satisfied within 30 days of the date the citation became final and
17 binding.

18 9. Pursuant to subsection 14.20.070.F ((14.20.070.F.6)), the applicant or licensee
19 has failed to promptly comply with a final order by the Division Director of the Office of Labor
20 Standards within the Office for Civil Rights issued under Chapter 14.20, for which all appeal
21 rights have been exhausted, and the Division Director of the Office of Labor Standards within
22 the Office for Civil Rights has requested that the Director refuse to issue, refuse to renew, or
23 revoke any business license held or requested by the applicant or licensee. The refusal to issue,

1 refusal to renew, or revocation shall remain in effect until such time as the violation under
2 Chapter 14.20 is remedied.

3 10. The business is one that requires a license under Title VI and is operating
4 without one or cannot lawfully obtain one at the time of its application.

5 11. The business has been determined under a separate enforcement process to be
6 operating in violation of law.

7 Section 11. A new Chapter 5.50 is added to the Seattle Municipal Code as follows:

8 **Chapter 5.50 FIREARMS AND AMMUNITION TAX**

9 **5.50.010 Administrative provisions**

10 All of the provisions contained in Chapter 5.55 shall have full force and application with
11 respect to taxes imposed under this Chapter 5.50 except as may be expressly stated to the
12 contrary herein.

13 **5.50.020 Definitions**

14 The definitions contained in Chapter 5.30 of the Seattle Municipal Code shall be fully
15 applicable to this chapter except as may be expressly stated to the contrary herein. The following
16 additional definitions shall apply throughout this Chapter 5.50:

17 "Ammunition" means any projectiles with their fuses, propelling charges, or primers
18 designed to be fired from firearms. Ammunition shall include any shotgun shell and any rifle,
19 pistol, or revolver cartridge.

20 "Round of ammunition" means a single unit of ammunition.

21 "Antique firearm" means a firearm or replica of a firearm not designed or redesigned for
22 using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or
23 before 1898, including any matchlock, flintlock, percussion cap, or similar type of ignition

1 system and also any firearm using fixed ammunition manufactured in or before 1898, for which
2 ammunition is no longer manufactured in the United States and is not readily available in the
3 ordinary channels of commercial trade.

4 "Family or household member" means "family" or "household member" as used in RCW
5 10.99.020.

6 "Firearm" means a weapon from which a projectile or projectiles may be fired by an
7 explosive such as gunpowder.

8 "Law enforcement officer" includes a general authority Washington peace officer as
9 defined in RCW 10.93.020, or a specially commissioned Washington peace officer as defined in
10 RCW 10.93.020. "Law enforcement officer" also includes a limited authority Washington peace
11 officer as defined in RCW 10.93.020 if such officer is duly authorized by the officer's employer
12 to carry a concealed pistol.

13 "Licensed dealer" means a person who is federally licensed under 18 U.S.C. 923(a).

14 **5.50.030 Tax imposed; rates**

15 A. There is imposed a tax on every person engaging within the City in the business of
16 making retail sales of firearms or ammunition. The amount of the tax due shall be equal to the
17 quantity of firearms sold at retail and the quantity of ammunition sold at retail multiplied by the
18 applicable tax rates that are stated in Section 5.50.030.B.

19 B. The tax rate shall be \$25 per firearm sold at retail, \$.02 per round of ammunition that
20 contains a single projectile that measures .22 caliber or less sold at retail, and \$.05 per round of
21 ammunition for all other ammunition sold at retail.

22 **5.50.040 Firearms and ammunition tax - When due**

1 The tax imposed by this Chapter 5.50 shall be due and payable in accordance with
2 Section 5.55.040 in the same manner as the business license tax under Chapter 5.45. Taxpayers
3 filing and paying their business license tax on a quarterly basis shall file and pay the firearms and
4 ammunition tax on a quarterly basis and taxpayers filing and paying their business license tax on
5 an annual basis shall file and pay the firearms and ammunition tax on an annual basis. Forms for
6 such filings shall be prescribed by the Director. Persons discontinuing their business activities in
7 Seattle shall report and pay the firearms and ammunition tax at the same time as they file their
8 final business license tax return.

9 **5.50.050 Deductions**

10 A. In computing the tax, the taxpayer may deduct from the measure of the tax all firearms
11 or ammunition:

- 12 1. That the taxpayer delivers to the buyer or the buyer's representative at a
13 location outside the State of Washington.
- 14 2. That the taxpayer sells to an office, division, or agency of the United States, or
15 the State of Washington or any of its municipal corporations.

16 B. In computing the tax, the taxpayer may deduct from the measure of the tax all antique
17 firearms.

18 **5.50.060 Exemptions**

19 A. A person who sells no more than one firearm within the City in any quarterly tax
20 reporting period is exempt from the tax on the business of making retail sales of firearms for that
21 period.

1 B. A person who sells fewer than 50 rounds of ammunition within the City in any
2 quarterly tax reporting period is exempt from the tax on the business of making retail sales of
3 ammunition for that period.

4 C. A licensed dealer is exempt from the tax for retail sales of firearms in which the
5 licensed dealer's only role is to facilitate sales of firearms between two unlicensed persons by
6 conducting background checks under chapter 9.41 RCW.

7 Section 12. A new Firearms and Ammunition Tax Fund is hereby created in the City
8 Treasury, to which revenues received from the tax imposed by this ordinance shall be deposited
9 and from which associated expenditures may be paid for the purposes described in Section 13
10 below.

11 Section 13. The purpose of the Firearms and Ammunition Tax Fund authorized in Section
12 12 above is to provide broad-based public benefits for residents of Seattle related to gun violence
13 by funding programs that promote public safety, prevent gun violence and address in part the
14 cost of gun violence in the City. Such public benefits may include, but are not limited to, basic
15 research, prevention and youth education and employment programs, and the administrative
16 costs to manage the fund and make tax system modifications as needed.

17 Section 14. The Director of Finance is authorized to create other subfunds, accounts, or
18 subaccounts as may be needed to implement the purpose of the Firearms and Ammunition Tax
19 fund as established by this ordinance. The fund shall receive earnings on its positive balances
20 and pay interest on its negative balances.

21 Section 15. If any part, provision, or section of this ordinance is held to be void or
22 unconstitutional, all other parts, provisions, and sections of this ordinance not expressly so held
23 to be void or unconstitutional shall continue in full force and effect.

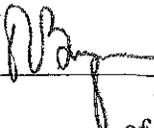
1 Section 16. Pursuant to RCW 35.21.706, this ordinance is subject to the referendum
2 procedure specified in that state law. A referendum petition may be filed within seven days of
3 the passage of the ordinance with the filing officer of the City, which is hereby designated to be
4 the City Clerk, located on the third floor of City Hall, 600 Fourth Avenue, Seattle, Washington.
5 Within ten days of filing the petition, the City Clerk shall confer with the petitioner concerning
6 the form and style of the petition, issue the petition an identification number, and secure an
7 accurate, concise, and positive ballot title from the City Attorney. The petitioner shall then have
8 thirty days in which to secure the signatures of not less than fifteen percent of the registered
9 voters of the City, as of the last municipal general election, upon petition forms which contain
10 the ballot title and the full text of the measure to be referred. Signed petition forms that are
11 timely submitted to the City Clerk shall be transmitted to the King County Director of Records
12 and Elections who shall verify the sufficiency of the signatures on the petition and report to the
13 City Clerk. If sufficient valid signatures are properly submitted, the City Clerk shall so inform
14 the City Council, which shall submit the referendum measure to the voters at a special election to
15 be held on the next City election date, as provided in RCW 29A.04.330, that occurs not less than
16 forty-five days after the county's report of sufficiency is received by the City Clerk, unless a
17 general election will occur within ninety days of receipt of that report, in which event the
18 proposed ordinance will be submitted at the general election. State law, RCW 35.21.706,
19 provides that the referendum procedure in this section is exclusive and that this ordinance is not
20 subject to any other referendum or initiative process.

21

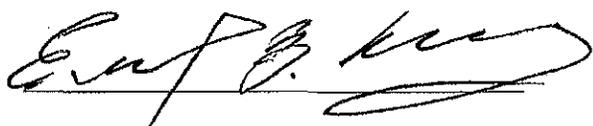
1 Section 17. Sections 1 through 15 of this ordinance shall take effect on January 1, 2016
2 and the Firearms and Ammunition Tax shall be imposed beginning January 1, 2016 on every
3 person engaging within the City in the business of making retail sales of firearms or ammunition

4 Section 18. This ordinance shall take effect and be in force 30 days after its approval by
5 the Mayor, but if not approved and returned by the Mayor within ten days after presentation, it
6 shall take effect as provided by Seattle Municipal Code Section 1.04.020.

7 Passed by the City Council the 10th day of AUGUST, 2015, and
8 signed by me in open session in authentication of its passage this
9 10th day of AUGUST, 2015.

10
11 
12 _____
13 President _____ of the City Council

14 Approved by me this 21st day of AUGUST, 2015.

15 
16 _____
17 Edward B. Murray, Mayor

18 Filed by me this 21st day of AUGUST, 2015.

19 
20 _____
21 Monica Martinez Simmons, City Clerk

22 (Seal)