

NO. 34170-1-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

City of Tacoma, *Petitioner*

v.

Michael Purdy, an individual resident and employee in the City of Tacoma; Charly Lanier, an individual resident and employee in the City of Tacoma; Derrick Leggin, an individual resident and employee in the City of Tacoma; Elizabeth Johnson, and individual resident and employee in the City of Tacoma, and Associated Casino Employees for Survival (ACES), a Washington Association,
Respondents

BRIEF OF PETITIONER

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I. Assignments of Error

1. The Superior Court erred in its order, entered on December 20, 2005, by granting Plaintiffs' motion for an injunction both tolling Tacoma Substitute Ordinance No. 26515, which would have prohibited commercial card room gambling in Tacoma, beginning January 1, 2006, and enjoining the Defendant City of Tacoma from enforcing the prohibition until a vote on Plaintiffs' initiative measure.

2. The Superior Court erred in its order, entered on December 20, 2005, by granting Plaintiffs' motion for a writ of mandate ordering the Tacoma City Council to adopt a resolution calling for a March 2006 special election for consideration of Plaintiffs' initiative measure.

II. Issues Pertaining to Assignments of Error

1. Whether the Superior Court erred as a matter of law in enjoining the enforcement of a Tacoma City ordinance that prohibits commercial card room gambling in Tacoma on the basis that the prohibition at issue is lawful and was properly adopted by the Tacoma City Council and that the mere filing of an initiative

petition, which might ultimately result in amendment of the ordinance, does not give Respondents a clear legal or equitable right to enjoin the enforcement of a lawful ordinance.

2. Whether the Superior Court erred as a matter of law in ordering the Petitioner to place Respondents' initiative petition on a special election ballot in March 2006 on the basis that the decision of whether to call a special election is within the legislative discretion of the elected Tacoma City Council and courts may not use mandamus to compel acts that are within the discretion of a legislative body.

III. Statement of the Case

On October 5, 1999, by Substitute Ordinance No. 26515, the Tacoma City Council, as authorized by RCW 9.46.295, prohibited all state-licensed gambling activities within the City of Tacoma. In a separate section of the ordinance, the City Council allowed existing state-licensed gambling activities to continue for a six-year period to provide for recoupment of the businesses' initial investments. That section of the ordinance allowed existing state-licensed gambling activities to continue until January 1, 2006. Following that date, all state-licensed commercial card room gambling in Tacoma would be prohibited.

In addition to the prohibition and the recoupment period for existing licensed gambling, the City Council, at Sections 4 through 6 of the ordinance, directed as follows:

Section 4. Following any amendments to the State Gambling Act, chapter 9.46 RCW, by the State legislature, which increase authority of municipalities to regulate social card games, or by December 31, 2002, whichever is sooner, the City Council shall review the provisions of this ordinance.

Section 5. The City shall complete appropriate action, through the Planning Commission, to identify the proper zoning of social card rooms as a means to regulate them.

Section 6. The City, through its representative, shall seek reaffirmation, from the Washington State Legislature, of the City's existing constitutional and legislative authority to exercise its police power of zoning as a means of regulating the location of social card rooms. (Certified copy of Substitute Ordinance No. 26515, passed October 5, 1999, attached as **Appendix 1.**)

At the Tacoma City Council's public Committee of the Whole meeting, held on October 22, 2002, the City Council reviewed the

prohibition on state-licensed gambling within the City of Tacoma.

The minutes of that meeting describe the following as the first order of business:

1. Gambling and Zoning Legislation

Randy Lewis provided background information on gambling and zoning legislation. Tacoma Council Member Connie Ladenburg and Lakewood Council Member Ruth McGovern had discussed the possibility of establishing a joint task force to develop a strategy for approaching the Legislature on gambling and zoning in the next legislative session. The issues involve clarification that cities retain authority to allow gambling, state licensing of gambling facilities, and no pre-emption of local governments. Members discussed the moratorium and the impacts of a partial ban. Following a discussion of the issues the Council agreed to participate in the task force. Deputy Mayor Sharon McGavick, City Council Members Connie Ladenburg and Rick Talbert agreed to represent the Tacoma City Council. (Minutes of the Tacoma City Council Committee of the Whole meeting October 22, 2002, attached as Exhibit 1 to the Amended Memorandum in Opposition to Plaintiff's Motion for Injunction and Mandamus, December 7, 2005, **CP 134-136.**)

The City Council also discussed the gambling prohibition and gambling tax revenues at two Committee of the Whole

meetings in November 2002 and one more in December 2002. All the meetings were public. (Minutes of the Tacoma City Council Committee of the Whole meetings November 5, 2002, attached as Exhibit 2 to the Amended Memorandum in Opposition to Plaintiff's Motion for Injunction and Mandamus, December 7, 2005, **CP 138-140**; November 12, 2002, attached as Exhibit 3 to the Amended Memorandum in Opposition to Plaintiff's Motion for Injunction and Mandamus, December 7, 2005, **CP 142-144**; and December 3, 2002, attached as Exhibit 4 to the Amended Memorandum in Opposition to Plaintiff's Motion for Injunction and Mandamus, December 7, 2005, **CP 146-148**.) To date, the state legislature has not amended RCW 9.46 to allow greater local control of gambling.

On August 12, 2005, Respondents filed the initiative petition at issue with the Tacoma City Clerk. Pursuant to Section 2.19(b) and (c) of the Tacoma City Charter, the City Clerk transmitted the petition to the City Attorney for review as to form and preparation of a ballot title. (Memo transmitting petition to City Attorney, August 15, 2005, attached as Exhibit 5 to the Amended Memorandum in Opposition to Plaintiff's Motion for Injunction and Mandamus, December 7, 2005, **CP 150**.) The following day, the

City Attorney's Office completed the review and preparation of a ballot title and sent a letter to Respondents regarding those matters. (Letter from Steve Victor to ACES, August 16, 2005, attached as Exhibit 6 to the Amended Memorandum in Opposition to Plaintiff's Motion for Injunction and Mandamus, December 7, 2005, **CP 152**.)

The ACES initiative petition seeks to amend the City ordinance that would ban state-licensed commercial card rooms in Tacoma, beginning January 1, 2006. The petition would allow the four (4) existing card rooms to continue in operation, but would continue the prohibition on new card rooms. (ACES Initiative Petition, attached as Exhibit "A" to Complaint for Writ of Mandate and Injunction, November 23, 2005, **CP 10-11**.)

On August 31, 2005, Respondents submitted a revised form of the petition for approval as to form by the City Attorney's Office; and, on September 1, 2005, the City Attorney's Office approved the petition as to form. (E-mail from Karen Owens to Steve Victor, August 31, 2005, attached as Exhibit 7 to the Amended Memorandum in Opposition to Plaintiff's Motion for Injunction and Mandamus, December 7, 2005, **CP 155**.) and E-mail response from Steve Victor, September 1, 2005,

attached as Exhibit 8 to the Amended Memorandum in Opposition to Plaintiff's Motion for Injunction and Mandamus, December 7, 2005, **CP 157.**)

On October 24, 2005, Respondents made an initial filing of signed petitions with the City Clerk. On November 1, 2005, Respondents completed their filing. Section 2.19(h) requires that the signatures submitted be those of registered Tacoma voters. Under state law, the election official for the City of Tacoma is the Pierce County Auditor. The Auditor maintains voter registration records. On October 27, 2005, and November 2, 2005, the City Clerk's Office transmitted signed petitions to the Pierce County Auditor for verification of the signatures as being those of registered Tacoma voters. (Letters from the City Clerk to the County Auditor, October 27, 2005, attached as Exhibit 9 to the Amended Memorandum in Opposition to Plaintiff's Motion for Injunction and Mandamus, December 7, 2005, **CP 159**; and November 2, 2005, attached as Exhibit 10 to the Amended Memorandum in Opposition to Plaintiff's Motion for Injunction and Mandamus, December 7, 2005, **CP 161.**)

In the October 27, 2005, letter (**CP 159**), the City Clerk notes that the City Council will likely call a special municipal election in

February 2006 and requests that the Auditor complete verification by November 9, 2005. Section 2.19(j) of the City Charter directs that after validation of a sufficient number of signatures, the City Council has up to thirty (30) days to choose to enact the measure or, if it does not, refer the measure to the voters. If the initiative is referred to the voters, it may not appear on a regular or municipal election ballot sooner than ninety (90) days following verification of a sufficient number of signatures.

By requesting that the Auditor complete verification of signatures by November 9, the City Clerk was attempting to create a circumstance where Respondents' petition would be eligible for the February 2006 special election ballot if the City Council chose to call such an election, as the City Council subsequently did for consideration of bonds to renovate and improve the Tacoma Dome. Because of the workload associated with the November 8, 2005, general election, the Auditor was unable to complete verification by November 9, 2005. On December 5, 2005, the Pierce County Auditor certified that a sufficient number of valid signatures had been filed. (Letter from Pierce County Auditor, dated December 5,

2005, attached as Exhibit 11 to the Amended Memorandum in Opposition to Plaintiff's Motion for Injunction and Mandamus, December 7, 2005, **CP 163-164.**)

Following certification of a sufficient number of signatures, Section 2.19(j) of the Tacoma City Charter provides as follows:

The City Clerk shall verify the sufficiency of the signatures on the petition. If the petition is validated, the City Council may enact or reject the Initiative, but shall not modify it. If it rejects the Initiative or within thirty (30) calendar days fails to take final action on it, the City Council shall submit the proposal to the people at the next Municipal or General Election that is not less than ninety (90) days after the date on which the signatures on the petition are validated. Because the signatures were not verified until December 5, 2005, under the terms of the Tacoma City Charter, Respondents' petition was not eligible for the February 7, 2006, special election because that election was less than 90 days from the date on which the signatures were validated.

On November 23, 2005, Respondents filed a Complaint for Writ of Mandate and Injunction in Pierce County Superior Court, seeking an order from the court enjoining Petitioner from enforcing its prohibition commercial card room gambling in Tacoma until a vote on Respondents' initiative measure and further seeking a writ

of mandamus ordering Petitioner to place the initiative measure on the February 7, 2005, special election ballot. (Complaint for Writ of Mandate and Injunction, November 23, 2005, **CP 1-20**.)

On December 20, 2005, the Superior Court entered its order in the matter. (Findings of Fact and Conclusions of Law and Writ of Mandamus, December 20, 2005, **CP 165-172**). The order, in practical effect, directed the Tacoma City Council to adopt a resolution calling for a March 2006 special election for consideration of Respondents' initiative measure. In addition, the order both tolled Tacoma Substitute Ordinance No. 26515, which would have prohibited commercial card room gambling in Tacoma, beginning January 1, 2006, and enjoined the Petitioner from enforcing the prohibition until a vote on Respondents' initiative measure.

The Tacoma City Council did not enact the initiative measure, and on January 17, 2006, by Resolution No. 36754, the City Council fulfilled its duty under Charter Section 2.19(j) and placed Respondents initiative petition on the November 2006 ballot. (Certified copy of Resolution No. 36754, adopted January 17, 2006, attached as **Appendix 2**.)

IV. Summary of Argument

The Superior Court order at issue in this matter provides, in pertinent part:

The Defendant City of Tacoma shall notify the Pierce County Auditor by resolution that I-2 shall be placed upon the ballot on a March 2006, special election, and the expiration date of the exception in Tacoma City Ordinance 8.36.020 is tolled and the implementation hereby enjoined until the election is certified. (**CP 171.**)

The foregoing language contains two separate and legally distinct orders as follows:

First, the Superior Court enjoins the City of Tacoma from implementing the prohibition in Tacoma Municipal Code ("TMC") Section 8.36 (the codification of Substitute Ordinance No. 26515) on state-licensed gambling and tolls the effective date of the exception in TMC Section 8.36.020 until the March election is certified. The referenced exception provides as follows:

B. Social card games licensed by the Washington State Gambling Commission for operation in the City of Tacoma on or before the effective date of this ordinance may be conducted and operated in accordance with the provisions of RCW 9.46, and the rules and regulations adopted thereunder, until 2:00 a.m. January 1, 2006.

Second, the Superior Court authorizes a writ of mandamus that in effect orders each member of the Tacoma City Council to vote affirmatively to adopt a resolution, pursuant to RCW 29A.04.330, requesting that the Pierce County Auditor call a special election in March 2006 for consideration of Respondents' initiative petition. Both elements of the order implicate separate legal standards. Respondents have met none of the applicable legal standards, and the Superior Court erred as a matter of law in issuing the order.

The threshold test for entitlement to injunctive relief is that the person seeking such relief must show that he or she have a clear legal or equitable right to injunctive relief. Physicians v. Tacoma Stands Up for Life, 106 Wn.2d 261, 265, 721 P.2d 946 (1986). No legal authority supports the proposition that the proponents of an initiative petition, by the mere filing of a validly signed petition to amend or repeal an ordinance, thereby gain a clear legal right to enjoin enforcement of the ordinance until voters consider their petition.

Assuming only for purposes of argument that Respondents' circumstances as casino employees could create an equitable right

to an injunction in order to preserve the potential fruits of their petition, no such equitable right can exist in this case because the substance of Respondents' petition is unlawful. The purpose of Respondents' petition is to allow the four existing state-licensed, mini-casinos in Tacoma to continue to operate while preserving the prohibition on any new mini-casinos. Under state law, a city may only ban all state-licensed gambling or may allow all state-licensed gambling, but may not engage in any other regulatory activity such as limiting the number of state-licensed gambling establishments. Edmonds Shopping Center v. Edmonds, 117, Wn. App. 344, 71 P.3d 233 (2003).

If voters ultimately approve the petition in the November 2006 election, the resulting amendment of Tacoma's ordinance will be unlawful and will inevitably fall to a third party challenge or to a declaratory judgment action by the Petitioner, and the prohibition on commercial card room gambling in Tacoma will remain. Because the petition is unlawful, Respondents have no equitable right to an injunction and no real interest that can be preserved by an injunction.

With respect to the portion of the Superior Court's order that directed the Tacoma City Council to adopt a resolution calling for a

March 2006 special election for consideration of Respondents' initiative measure, it is well settled that courts cannot use mandamus to compel acts that involve the exercise of discretion. State ex rel Tubbs v. Spokane, 53 Wn.2d 35, 38 (1958); Vangor v. Munro, 115 Wn.2d 536, 543 (1990).

In Tacoma, if a petition with a valid number of signatures is filed, the City Council may enact the petition measure, or, if it does not, Section 2.19(j) of the City Charter provides that the "City Council shall submit the proposal to the people at the next Municipal or General Election that is not less than ninety (90) days after the date on which the signatures on the petition are validated." With reference to the filing date of Respondents' petition, that election is the election of November 2006. The City Council did not enact Respondents' measure and by Resolution No. 36754, adopted January 17, 2006, placed the measure on the November 2006 ballot.

The decision of whether to call an earlier special election is solely within the discretion of the City Council, and mandamus cannot be used to compel the City Council to take a discretionary act.

V. Argument

A. The mere filing of a validly signed petition to amend or repeal an ordinance does not give the measure's proponents a clear legal or equitable right to enjoin enforcement of the ordinance until voters consider their petition.

1. Respondents have no legal right to injunctive relief.

The rule regarding entitlement to a preliminary injunction is well settled. A party seeking relief by a preliminary injunction must satisfy each of three criteria:

It is an established rule in this jurisdiction that one who seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he 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 him. *Physicians v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265, 721 P.2d 946 (1986) (Citing *Port of Seattle v. International Longshoremen's Union*, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958)).

Where any of the three criteria is unsatisfied, courts will deny injunctive relief.

The court erred in granting an injunction because the Respondents have identified no legal right to an injunction

precluding the City from enforcing its prohibition on state-licensed social card games. Respondents have identified no improper or unlawful conduct by the City that would entitle them to such an injunction, and the record demonstrates that the validity of the ordinance was not at issue in this matter.

The adoption by the Tacoma City Council of a prohibition on state-licensed gambling in the City of Tacoma was a lawful act in accordance with the authorization provided in RCW 9.46.295. The prohibition would have gone into effect without further action by the City Council on January 1, 2006. Respondents have failed to identify as a matter of fact or law that they have a clear legal right to an injunction restraining the City from enforcing the prohibition. The ordinance containing the prohibition was lawfully enacted and, subsequently, the City Council reviewed the prohibition in 2002 in a series of public meetings. (**CP 134-136, 138-140, 142-144, and 146-148.**)

The Tacoma City Council made a legislative decision to prohibit state-licensed gambling in the City. It is understandable that Respondents are unhappy with that legislative decision, but that unhappiness does not give rise, as a

matter of law, to an entitlement to injunctive relief. Nor is the ordinance linked as a matter of law to Respondents' initiative petition.

Though the Superior Court's order is silent as to the specific legal grounds for issuance of the injunction, the only apparent legal basis is identified in Conclusions of Law Nos. 4 and 10, which provide:

4. Also included, are the civil rights violations suffered by the employees who have never been afforded an opportunity to be heard, or to participate in self governance in a meaningful manner. (**CP 170.**)

10. In order to protect the due process rights of the citizens of Tacoma, and to allow the citizens the use and enjoyment of the rights of self governance by way of the initiative process, the expiration date set forth in Tacoma City Ordinance 8.36.020 (B) must be tolled until such time as the citizens have voted on I-2 on February 7, 2006, and the election results are certified. (**CP 171.**) (The reference to a February election date was, in error, left unrevised to the March date in the order.)

These conclusions of law apparently relate to a single finding of fact in the order. Finding of Fact No. 21 provides:

21. The employees and ACES were never invited to participate in any review process, and did not participate in any review process. (CP 168.)

This finding apparently refers to the fact that the City Council, in Substitute Ordinance No. 26515, directed itself to review the prohibition on gambling not later than December 2002. It is a matter of public record that the City Council did so in an open public meeting in October 2002. (CP 134-136.)

No legal authority was cited to the Superior Court, and none exists, to support the proposition that the City was required to extend a special invitation to Respondents to participate in the review. The law is entirely to the contrary. It is well settled that with respect to legislative enactment, the legislative process provides all the process that is due. In re Pers. Restraint of Metcalf, 92 Wn. App. 165, 176, 963 P.2d 911 (1998), cert. denied, 527 U.S. 1041 (1999). Constitutional due process rights do not attach to purely legislative acts. Holbrook v. Clark County, 112 Wn. App 354, 364, 49 P.3d 142 (2002), citing Earle M. Jorgenson Co. v. City of Seattle, 99 Wn.2d 861, 865, 665 P.2d 1328, cert. denied, 464 U.S. 982 (1983).

From the language of the order, it is clear that the court relied on the same factual and legal grounds to toll the exception in TMC 8.36.020, (Substitute Ordinance No. 26515) and that element of the order is thus equally invalid as a matter of law. Based on the actual language of the order, the court's express intention was not to toll the exception, but to extend it and thereby effectively amend the ordinance to change the date of expiration of the exception from January 1, 2006, to the date on which the March 2006 special election was certified. It is undisputed, as a matter of law, that a court cannot amend legislation.

The fundamental doctrine of separation of powers prohibits the judicial branch from invading the right of a legislative body to exercise its legislative powers. In Re Call, 109 Wn.2d 954, 958, 749 P.2d 674 (1988).

There is no legal basis for the Superior Court to enjoin the implementation of the prohibition on gambling in TMC 8.36, (Substitute Ordinance No. 26515) or to extend the date of the exception in that ordinance.

- 2. Respondents have no equitable right to an injunction because the substance of their initiative petition is unlawful and, therefore, Respondents have no right or interest arising from the petition that can be preserved by an injunction.**

Respondents' initiative petition would amend Tacoma
Substitute Ordinance No. 26515 in material part as follows:

Social card games licensed by the
Washington State Gambling
Commission and operating within the
City of Tacoma on or before October 5,
1999, may continue to be conducted
and operated in accordance with the
provisions of RCW 9.46, and the rules
and regulations adopted thereunder.
(CP 10-11.)

The express purpose of Respondents' petition is to allow the
four existing state-licensed, mini-casinos in Tacoma to continue to
operate while preserving the prohibition on any new mini-casinos.
The measure would preserve Petitioner's ban on the location of
new mini-casinos in Tacoma and would only remove the January 1,
2006, prohibition date for those state-licensed commercial card
room gambling establishments currently operating in Tacoma.
(CP 10-11)

Washington courts have already determined that, under
state law, a city may only ban all state-licensed gambling or may
allow all state-licensed gambling, but may not engage in any other
regulatory activity such as limiting the number of state-licensed
gambling establishments. The lead case in this respect is

Edmonds Shopping Center v. Edmonds, 117, Wn. App. 344, 71 P.3d 233 (2003), wherein the court found “No less restrictive means are available (than a total ban) because RCW 9.46.245 allows municipalities to either totally prohibit gambling or to not act at all.” Edmonds at 366. In that case the City of Edmonds ordinance prohibiting state-licensed gambling was challenged on a number of grounds. The court upheld the ban but also held that under the language of RCW 9.46.295, a city may only prohibit or allow state-licensed gambling, it may not regulate it in any manner. Edmonds at 356-357. Accord, Paradise Bowling Center and Casino v. Pierce County, 124 Wash. App. 759 (2004).

Respondents’ initiative petition, therefore, seeks to accomplish an end that has already been determined to be unlawful. When the petition was filed, Petitioner had a procedural duty under Section 2.19 of the City Charter that it was required to fulfill, regardless of the legal substance of the petition, and Petitioner has fulfilled that duty. See Generally, Philadelphia II v. Gregoire, 128 Wn.2d 707, 911 P.2d 389 (1996). However, Petitioner also informed Respondents of the legal issue associated with the substance of their petition at the time it first filed. (CP 152.) Respondents chose not to modify their petition. If voters approve

the petition, the resulting amendment of Tacoma's ordinance will be unlawful and will inevitably fall to a third party challenge or to a declaratory judgment action by the Petitioner and the prohibition on commercial card room gambling in Tacoma will remain.

Respondents have no equitable right to injunctive relief because their petition seeks to amend a City ordinance to achieve a result that is not permitted under state law and has already been determined by the courts to be unlawful. Because the substance of their petition is unlawful, the benefits that Respondents are seeking to preserve by injunction can never be achieved. Respondents have no real interest that can be preserved by an injunction.

B. There is no legal or equitable basis for a mandamus order compelling the Tacoma City Council to call a special election for Respondents' initiative petition because courts cannot use mandamus to compel elected legislators to perform a discretionary act.

It is well settled in Washington law that a court may issue a writ of mandamus only in circumstances where two tests are met. The first test is whether the official or officials against whom the writ of mandate is sought have a clear statutory duty to perform the act which is sought to be compelled, and the official or officials are failing or refusing to perform that duty. The determination of

whether a statutory duty exists is a question of law. The second test is whether there is any other plain, speedy, and adequate remedy at law, other than a writ of mandate. The determination of whether there is any other plain, speedy, and adequate remedy at law is a question left to the discretion of the court. River Park Square v. Miggins, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001).

A mandamus action may not be used to compel a public official to perform acts or duties which involve the exercise of discretion on the part of the public official. In re Call, 109 Wn.2d 954, 749 P.2d 674 (1988); Cedar County Committee v. Munro, 134 Wn.2d 377, 950 P.2d 446 (1998); Walker v. Munro, 124 Wn.2d 402, 879 P.2d 920 (1994). For mandamus to properly lie, "the duty to act must be imposed expressly by law, and involve no discretion." Cedar County Committee v. Munro, supra, citing State ex. Rel. Clark, v. Seattle, 137 Wash. 455, 461, 242 P.2d 966, 46 ALR 253 (1926).

With respect to the portion of the Superior Court's order that directs the Tacoma City Council to vote to adopt a resolution requesting that the Pierce County Auditor call a special election in March 2006 to consider Respondents' initiative measure, Respondents cannot meet the first element of the test for issuance

of a writ of mandamus. Every officer and employee of the City of Tacoma on whom the City Charter places a duty relating to initiative petitions has, to date, fully performed those obligations, and neither the Tacoma City Charter nor any other law places a legal duty on the members of the Tacoma City Council to call a special election for consideration of Respondent's initiative measure.

The relevant language in Section 2.19(j) of the Tacoma City Charter is as follows:

The City Clerk shall verify the sufficiency of the signatures on the petition. If the petition is validated, the City Council may enact or reject the Initiative, but shall not modify it. If it rejects the Initiative or within thirty (30) calendar days fails to take final action on it, the City Council shall submit the proposal to the people at the next Municipal or General Election that is not less than ninety (90) days after the date on which the signatures on the petition are validated.

On December 5, 2005, the Pierce County Auditor verified that a sufficient number of signatures were filed with the petition. The City Council, thereafter, had thirty (30) days to determine whether to adopt the measure and, if it did not, was required to and

did refer the measure to the voters in the next municipal or general election that was not less than ninety (90) days after the date on which the signatures on the petition are validated.

A general election occurs every November in the state of Washington, pursuant to RCW 29A.04.321. In odd years, the ballot is generally limited to municipal issues in accordance with RCW 29A.04.321 and RCW 29A.04.330. The City Charter might also reasonably be read to include any election on which municipal issues are included on the ballot as a "municipal election" within the meaning of Section 2.19(j). Thus, if municipal issues appear on the ballot for the September primary or the City Council chooses to request a special municipal election, then those may be considered municipal elections.

However, neither Section 2.19(j) of the City Charter nor any other law imposes a legal duty on the City Council to request that the Pierce County Auditor call a special election, pursuant to RCW 29A.04.330(2). There is no other legal process by which the City of Tacoma may call a special election. The decision of whether to call a special election rests wholly within the legislative discretion of the City Council and, therefore, is not subject to

mandamus. The Superior Court's order includes no Findings of Fact or any Conclusions of Law supporting a mandate that the City Council be ordered to call a special election.

The only elements of the Superior Court's order that appear to pertain to the issue are Findings of Fact No. 31, and Conclusion of Law No. 7, which provide:

31. The employees and ACES have substantially complied with the City Charter's provisions relative to its petition, and have complied with RCW 29A.04.330. (CP 169.)

7. RCW 29A.04.330 authorizes the County Auditor to call a special election forty-five days prior to the proposed election date, which would allow sufficient time for I-2, the employees' initiative to be on the February 7, 2006 ballot. (CP 171.)

Finding of Fact No. 31 is in error because the plain language of RCW 29.04.330(2) makes it clear that Respondents have no role in the calling of a special election. That process occurs solely between the City Council and the Pierce County Auditor.

Conclusion of Law No. 7 is in error because under RCW 29.04.330(2), the Pierce County Auditor may only call a special election at the request of the City Council, not independently as is implied in the order.

Respondents have filed a sufficient number of signatures to have their initiative measure placed on the ballot. The process in City Charter Section 2.19(j) will be followed and if the City Council does not enact the measure within thirty (30) days from the date of signature verification, it will refer the measure to the voters in the next municipal or general election that is not less than ninety (90) days after the date on which the signatures on the petition were validated. However, no provision of the Superior Court's order supports the writ of mandamus ordering the City Council to adopt a resolution calling for a special election in March 2006. As a matter of law, that is within the legislative discretion of the City Council and cannot be compelled by mandamus.

VI. Conclusion

As outlined herein, the Superior Court erred as a matter of law in granting Respondents' motions for injunction and mandamus. The Superior Court erred in granting the injunction against enforcement of Petitioner's prohibition on commercial card room gambling because Respondents have no legal or equitable right to such an injunction. The Superior Court erred in granting a mandate that would have compelled the Tacoma City Council to

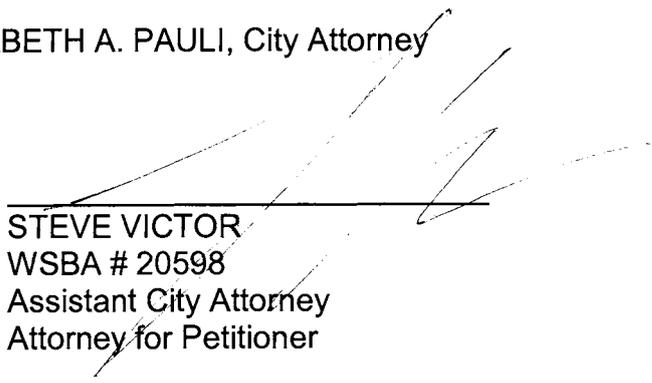
call a special election because decision of whether to call such an election is wholly within the legislative discretion of the City Council.

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the Superior Court's order of December 20, 2005, in all respects.

DATED this 24th day of May 2006.

ELIZABETH A. PAULI, City Attorney

By:



STEVE VICTOR
WSBA # 20598
Assistant City Attorney
Attorney for Petitioner

APPENDIX 1

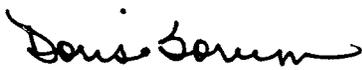


City of Tacoma
General Services Department

CITY CLERK'S CERTIFICATE

I, DORIS SORUM, City Clerk of the City of Tacoma, Pierce County, Washington,
do hereby certify that the attached is a full, true, and correct copy of
Substitute Ordinance No. 26515, passed by the Tacoma City Council on the
5th day of October 1999.

WITNESS MY HAND and the Seal of said City this 25th day of May 2006.


DORIS SORUM
City Clerk

FILED
COURT REPORTERS
06 MAY 26 PM 1:46
STATE OF WASHINGTON
BY _____
CLERK



**SUBSTITUTE
ORDINANCE NO. 26515**

1 BY REQUEST OF DEPUTY MAYOR KIRBY AND COUNCIL MEMBERS
2 CROWLEY, MILLER, AND SILAS

3 AN ORDINANCE relating to gambling; amending Title 8 of the Tacoma Municipal
4 Code by repealing and reenacting Chapter 8.36 thereof; prohibiting social
5 card games conducted as a commercial stimulant within the City; creating a
6 five-year amortization period for such activities; establishing violation of the
7 prohibition as a misdemeanor; and terminating the moratorium established
8 by Ordinance No. 26393, and further extended by Ordinance No. 26508.

9 WHEREAS, commencing in 1996, a series of changes were made by the
10 Washington State Legislature and Washington State Gambling Commission in the
11 operation of licensed card rooms under RCW 9.46, by increasing the number of
12 tables a card room could operate from 5 to 15; and, further, in 1997, house bank
13 or player-funded banking games were authorized by the legislature, and

14 WHEREAS there has been a substantial increase in the number of
15 applications for such gambling uses in Washington State, and

16 WHEREAS RCW 9.46.295 authorizes municipalities to prohibit certain
17 gambling activities otherwise authorized, and

18 WHEREAS in addition to its constitutional and statutory authority, as a
19 charter city of the first class, the City of Tacoma possesses the broadest
20 degree of self-government authority available, and

21 WHEREAS there is no express or implied language in Chapter 9.46 RCW
22 which exempts any gambling activity, including social card games, from being
23 regulated as a land use through the City's zoning authority, and

24 WHEREAS by Ordinance No. 26393, effective April 6, 1999, the City
25 Council placed a moratorium on the establishment, expansion, location, or
26



1 permitting of card rooms, gambling establishments, and game parlors with any
2 social card games, and

3 WHEREAS the moratorium was further extended by Ordinance No. 26508,
4 and

5 WHEREAS the moratorium exempted "existing businesses in their current
6 level of operations" and "any applications for new or modified gambling activities
7 that have vested" [prior to April 6, 1999], and

8 WHEREAS the City Council has held public hearings and considered the
9 testimony of the general public and the operators of social card games, and

10 WHEREAS a five-year amortization period to allow the operators of existing
11 social card games to recoup their investments is reasonable, and

12 WHEREAS the City Council finds it to be in the public's interest and welfare
13 to prohibit social card games conducted as a commercial stimulant as defined in
14 RCW 9.46.0282; Now, Therefore,

15
16
17 BE IT ORDAINED BY THE CITY OF TACOMA:

18 Section 1. That Title 8 of the Tacoma Municipal Code is hereby amended
19 by repealing and reenacting Chapter 8.36, to read as follows:

20
21 **Chapter 8.36**

22 **PLACES OF AMUSEMENT — CARD PLAYING**

23 Sections:

24 ~~8.36.010 — Card playing unlawful in certain places.~~

25 ~~8.36.020 — Violation — Penalty.~~



1 A. Bona fide, charitable, or nonprofit organizations may operate or conduct
2 social card games pursuant to RCW 9.46.0311.

3 B. Social card games licensed by the Washington State Gambling
4 Commission for operation in the City of Tacoma on or before the effective date of
5 this ordinance may be conducted and operated in accordance with the provisions
6 of RCW 9.46, and the rules and regulations adopted thereunder, until 2:00 a.m.
7 January 1, 2006.

8 **8.36.030 Violation - Penalty.**

9 Any person, firm, or corporation violating the provisions of this chapter shall
10 be guilty of a misdemeanor and, upon conviction thereof, shall be fined a sum not
11 to exceed \$1,000, or imprisonment in the Pierce County Jail for a period not to
12 exceed six months, or both such fine and imprisonment.

13 Section 2. After adoption of this ordinance, the City Clerk shall provide a
14 copy of this ordinance to the Washington State Gambling Commission pursuant to
15 Washington Administrative Code 230-04-500.

16 Section 3. The moratorium established under Ordinance No. 26393, and
17 extended under Ordinance No. 26508, shall terminate as of the effective date of
18 this ordinance.

19 Section 4. Following any amendments to the State Gambling Act,
20 chapter 9.46 RCW, by the State legislature, which increase authority of
21 municipalities to regulate social card games, or by December 31, 2002, whichever
22 is sooner, the City Council shall review the provisions of this ordinance.



1 Section 5. The City shall complete appropriate action, through the
2 Planning Commission, to identify the proper zoning of social card rooms as a
3 means to regulate them.

4 Section 6. The City, through its representative, shall seek reaffirmation,
5 from the Washington State Legislature, of the City's existing constitutional and
6 legislative authority to exercise its police power of zoning as a means of regulating
7 the location of social card rooms.
8

9 Section 7. If any section, sentence, clause, or phrase of this ordinance
10 should be held to be invalid or unconstitutional by a court of competent
11 jurisdiction, such invalidity or unconstitutionality will not affect the validity or
12 constitution of any other section, sentence, clause, or phrase of this ordinance.
13

14 Passed OCT 5 1999

15 *Rick Rosenthal*
16 Attest: City Clerk

Bu Stale
Mayor

17
18 Approved as to form and legality:

19 *Oliver Jensen*
20 _____
21 City Attorney

APPENDIX 2



City of Tacoma
General Services Department

CITY CLERK'S CERTIFICATE

I, DORIS SORUM, City Clerk of the City of Tacoma, Pierce County, Washington,
do hereby certify that the attached is a full, true, and correct copy of
Resolution No. 36754, adopted by the Tacoma City Council on the 17th day of
January 2006.

WITNESS MY HAND and the Seal of said City this 25th day of May 2006.


DORIS SORUM
City Clerk



RESOLUTION NO. 36754

1 WHEREAS, on August 31, 2005, a group called Associated Casino
2 Employees for Survival ("ACES") filed an initiative petition with the City, which
3 was approved as to form by the City Attorney's Office, and
4

5 WHEREAS the ACES initiative petition seeks to amend City
6 Ordinance No. 26515, passed October 5, 1999, that would ban all
7 state-licensed commercial gambling in Tacoma, beginning January 1, 2006,
8 and

9 WHEREAS the petition, if approved, would allow existing state-licensed
10 commercial gambling activity in Tacoma to continue, and
11

12 WHEREAS, on November 1, 2005, ACES completed the filing of
13 signatures in support of its initiative petition, and

14 WHEREAS, on December 5, 2005, it was validated that a sufficient
15 number of signatures of registered Tacoma voters had been filed in support of
16 the ACES petition, and

17 WHEREAS Section 2.19(j) of the Tacoma City Charter provides that if a
18 petition is validated, the City Council may enact or reject the initiative but shall
19 not modify it, and
20

21 WHEREAS, if the City Council rejects the initiative or, within 30 calendar
22 days, fails to take final action on it, the City Council shall submit the proposal to
23 the people at the next Municipal or General Election that is not less than
24 90 days after the date on which the signatures on the petition are validated, and
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WHEREAS more than 30 days have elapsed since it was validated that a sufficient number of signatures of registered Tacoma voters had been filed in support of the ACES petition, and

WHEREAS the City Council has not enacted the measure that is the subject of the ACES initiative petition, and

WHEREAS, pursuant to Section 2.19 (j) of the City Charter, the City Council shall submit the proposal to the people at the next Municipal or General Election that is not less than 90 days after the date on which the signatures on the petition are validated, and

WHEREAS, under state law, a General Election occurs in Washington State on the first Tuesday following the first Monday in November of every year, and

WHEREAS, under state law, a Municipal Election is held on the first Tuesday following the first Monday in November in every odd year and/or is any election in which municipal issues appear on the ballot; Now, Therefore,

BE IT RESOLVED BY THE COUNCIL OF THE CITY OF TACOMA:

That the Tacoma City Council hereby requests that the Pierce County Auditor, as ex officio supervisor of elections for the City of Tacoma, place the Associated Casino of Employees for Survival initiative measure on the ballot

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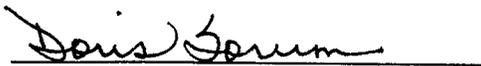


1 at the next Municipal or General Election that is not less than 90 days after
2 December 5, 2005, which was the date on which the signatures on the petition
3 were validated.

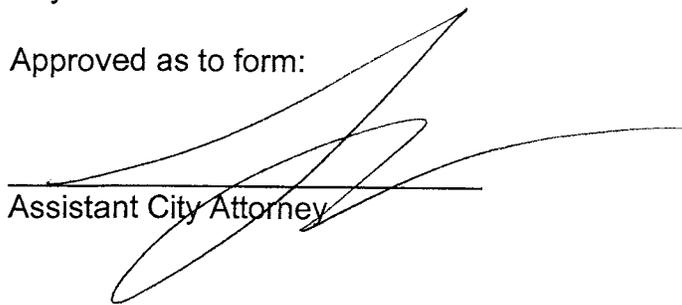
4 Adopted JAN 17 2006

5
6 
7 Deputy Mayor

8 Attest:

9 
10 City Clerk

11 Approved as to form:

12 
13 Assistant City Attorney

NO. 34170-1-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

City of Tacoma, *Petitioner*

v.

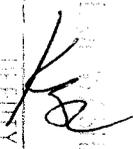
Michael Purdy, an individual resident and employee in the City of Tacoma; Charly Lanier, an individual resident and employee in the City of Tacoma; Derrick Leggin, an individual resident and employee in the City of Tacoma; Elizabeth Johnson, and individual resident and employee in the City of Tacoma, and Associated Casino Employees for Survival (ACES), a Washington Association,
Respondents

AFFIDAVIT OF SERVICE OF BRIEF OF PETITIONER

ELIZABETH A. PAULI, City Attorney

STEVE I VICTOR
Attorney for Respondent City of Tacoma

Tacoma City Attorney's Office
747 Market Street, Suite 1120
Tacoma, Washington 98402
(253) 591- 5885
WSB #20598

FILED
COURT OF APPEALS
06 MAY 26 PM 1:45
STATE OF WASHINGTON
BY  IDENTITY

ORIGINAL

