

Case No. 43459-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STEVE FABRE, individually; and POINT DEFIANCE CAFÉ AND
CASINO, LLC,

Plaintiffs / Appellants

v.

TOWN OF RUSTON, a municipal corporation,

Defendant / Respondent

BRIEF OF RESPONDENT

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I. INTRODUCTION

A. Parties

Appellants (Plaintiffs below) are Steve Fabre and his business, Point Defiance Café and Casino, LLC (hereafter “Mr. Fabre”). Respondent (Defendant below) is the Town of Ruston, a Washington municipal corporation (hereafter “Ruston” or the “Town”).¹ Ruston is a town with a population of 750,² governed by an elected mayor and five elected Town Councilmembers.³

Ruston withdraws its cross appeal, as it is able to submit the necessary points and authorities to affirm the trial court’s dismissal in response to Mr. Fabre’s appeal, given the rule that a trial court can be affirmed on any basis supported by the record. RAP 2.5(a); *Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696 (2003).

B. Summary

Decades of precedent holds that municipalities are not liable in tort for the legislative acts of their officers. Even in the situation where the municipal officers’ actions are *ultra vires*, or beyond their authority, the municipal corporation is immune. In this appeal, Mr. Fabre asks the Court to overturn well-established precedent on immunity and public duty, and

¹ CP 81:24.

² Population census reflected in the 2012-2013 Washington City and Town Officials Directory, published by the Municipal Research Services Center.

³ CP 81:25.

find the Town of Ruston liable in tort for a series of procedural errors relating to its handling of ordinances implementing the Gambling Act. Mr. Fabre characterizes his claims as claims of “first impression,” and cites no authority for creation of negligent or tortious legislation.⁴

This is the third in a series of lawsuits Mr. Fabre has filed against the Town, the first two requested declaratory and injunctive relief. In this case, he seeks damages based on tort for the Town’s adoption of ordinances relating to (1) a tax increase on house-banked social card rooms; and (2) a prohibition that was conditioned on a referendum to determine voter support. Although Mr. Fabre admittedly never paid the tax increase and discontinued his house-banked card games on August 3, 2008, two years before the Town adopted its conditional prohibition on August 2, 2010, he now asks that this Court find that he is entitled to damages in tort based on the Town Council’s adoption of the two ordinances, alleged procedural errors in passing the ordinances, and his perception of the motives of the Councilmembers who passed these ordinances. Mr. Fabre sued four Town Councilmembers on the same claims. They were dismissed base on legislative immunity. Their dismissal was not appealed.

⁴ Appellant’s Brief (hereafter “App. Br.”), 15.

II. COUNTER-STATEMENT OF THE CASE

A. General Background

According to his tax returns from the Point Defiance Café and Casino, Mr. Fabre's casino never generated revenues in excess of operating expenses on an annual basis during its existence (between 2003-2008).⁵ Even during its best year (2007), the business generated a net loss of \$50,000.⁶ Before he closed it in August 2008, Mr. Fabre admitted that since "2005, the Point Defiance Café and Casino has lost \$849,516.00 Losses remain significant [in 2008]."⁷ He acknowledged that there were other economic factors contributing to his losses, including "proximity to tribal casinos ... and the worst economy in 20 years."⁸

Mr. Fabre's experience is not unique. Two competitors (Chips Casino and Freddie's Club of Fife) also experienced significant revenue declines, despite their larger size, from 2005 through 2010.⁹ In fact, net receipts of all private, non-tribal social card rooms operating in Washington have declined each year since 2005.¹⁰ This downward trend is primarily attributable to the growth of tribal casinos and their domination

⁵ CP 1265:22-24.

⁶ CP 1266:4-5.

⁷ CP 367.

⁸ CP 371.

⁹ CP 1265:10-16.

¹⁰ CP 1263:2-5.

of the gambling market in Washington.¹¹ Tribal casinos do not operate under the same regulatory environment as non-tribal operators, providing a significant advantage.¹² The collective net receipts of tribal casinos operating in Washington have grown from approximately \$50 million in 1996 to almost \$2 billion in 2011.¹³ Net receipts of tribal casinos represented approximately 10.5 percent of the total gambling receipts in Washington in 1996, and by 2011 these net receipts had grown to almost 80 percent of the total gambling receipts in Washington.¹⁴

B. Regulation of House-Banked Social Card Rooms

The Gambling Act (Chapter 9.46 RCW) allows legislative authorities of counties, cities, and towns to adopt ordinances taxing house-banked social card rooms at a rate not exceeding 20 percent of the gross revenue from such games. RCW 9.46.110(1) and (3)(f). Any taxes collected by a municipality on gambling activities that are authorized by RCW 9.46.110 were to be used primarily for enforcement of the Gambling Act.¹⁵ In 2010, this was amended to be primarily for public safety. RCW 9.46.113. Municipalities also have the authority to ban house-banked

¹¹ CP 1263:7-8.

¹² CP 1263:8-10.

¹³ CP 1263:12-14.

¹⁴ CP 1263:14-17.

¹⁵ This was interpreted in *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 10-11, 802 P.2d 784 (1991) to include providing a police presence in the community to provide a deterrent to crime.

social card games. RCW 9.46.295.

C. Ruston’s Regulation of House-Banked Social Card Games

In March 2003, the Town of Ruston adopted an ordinance that imposed a graduated tax on social card games (Ordinance 1132).¹⁶ In April 2003, this was amended to provide a graduated 12 percent tax (Ordinance 1133).¹⁷ Mr. Fabre submits that he recommended that the Town adopt this tax rate.¹⁸

Mr. Fabre began operation of the Point Defiance Café and Casino in the Town of Ruston during 2003-2004.¹⁹ He asserts that Ruston’s Mayor at the time, Kim Wheeler, “promised him the opportunity to recover his significant investment by linking the tax rate to his revenues earned.”²⁰ Even if it were true that the Mayor promised Mr. Fabre that no tax ordinance would be passed that was not linked to his revenues earned, such an assurance was beyond a mayor’s authority. Mayors in towns organized under Chapter 35.27 RCW cannot guarantee anyone a particular tax rate on his/her business, and have no authority to vote on any ordinances except in case of a tie. RCW 35.27.370(16); RCW 35.27.280; *infra* § III.C.3.

¹⁶ Appendix 1.

¹⁷ Appendix 2.

¹⁸ App. Br. 33.

¹⁹ CP 82:11-16.

²⁰ App. Br. 33-34; CP 492.

According to Mr. Fabre, various homeowners in Ruston “did not like [his] business,” “expressed their dislike of him,” “will not speak to [him],” “did not like the service or food at his business,” and did “not like gambling.”²¹ When complaints about his business appeared in community news (the Ruston Connection), he sued for defamation and later settled the case.²² Some of the people that Mr. Fabre believed “did not like [his] business” became Mayor and Town Councilmembers in early 2008.²³

In April 2008, the Ruston Town Council considered an increase to the tax on house-banked social card games.²⁴ Mr. Fabre wrote to the Council in opposition to the tax increase.²⁵ He also spoke with Town Councilmembers.²⁶ He believed that in the adoption of any ordinance affecting his taxes, the Town officials were required to negotiate with him and give “deference” to his objections.²⁷ As indicated, Mr. Fabre’s casino operated at a net loss every year²⁸ and he did not want to pay additional taxes.

On July 7, 2008, the Town of Ruston adopted Ordinance 1253,

²¹ App. Br. 3.

²² *Id.* at 4.

²³ *Id.* at 4-5.

²⁴ CP 83:17-18.

²⁵ CP 367.

²⁶ CP 136 (Albertson Dep. 21:20-22:3), 195 (Hunt Dep. 55:5-10), 207 (Huson Dep. 25:17-24).

²⁷ App. Br. 5-6.

²⁸ His business tax records show: in 2003, the net loss was \$358,257; in 2004, the net loss was \$326,556; in 2005, the net loss was \$362,339; in 2006, the net loss was \$347,177; in 2007, the net loss was \$50,032. CP 1261:19-1262:4, 1273.

which amended the existing graduated 12 percent tax on social card rooms and adopted a flat tax of 12 percent.²⁹ This tax increase was well below the 20 percent established in the Gambling Act, which a Town was authorized to enact. RCW 9.46.110(3)(f). Mayor Everding wrote a letter to Mr. Fabre on July 15, 2008, informing him of the tax and its effect on him.³⁰

On July 18, 2008, Mr. Fabre filed a lawsuit against Ruston (hereafter “Fabre I”), alleging that the ordinance adopting the tax increase was procedurally defective.³¹

Mr. Fabre never paid Ruston any increased taxes under Ordinance 1253.³² He closed the house-banked social card game operation at the casino on August 3, 2008.³³ He has not reopened it.

On May 28, 2010, the trial court in Fabre I determined that, in order to pass, Ordinance 1253 should have had a four to one vote of the Town Council.³⁴ Because the vote on the Ordinance was three to one, the court held that Ordinance 1253 was void.³⁵ Mr. Fabre’s motion for an injunction preventing the Town from enforcing the ordinance was denied

²⁹ CP 84:17; Appendix 4.

³⁰ CP 299:7-10, 321; RP 100:4-6.

³¹ CP 94-102; Pierce County Superior Court Cause No. 08-2-10459-7.

³² CP 719 (he spent “the taxes withheld to pay for the litigation, thus there was nothing to get back from Ruston at trial.”), 1269 n.1.

³³ CP 1166.

³⁴ CP 744:3-4, 744:8-9.

³⁵ CP 744:9-12.

and not renewed.³⁶ Neither party appealed the court's final declaratory Ruling, and the Town Council voted to repeal Ordinance 1253 on December 20, 2010.³⁷

On August 2, 2010, the Ruston Town Council adopted Ordinance 1316, which was an ordinance "to prohibit House-Banked Social Card Games within the Town of Ruston, subject to and contingent upon passage of a referendum to the voters of the Town."³⁸ With the aid of the Town attorney, the Council chose to use the referendum process to "give the people a choice in whether or not there should be house banked card games allowed in the Town of Ruston."³⁹ Mr. Fabre has claimed that the actions of a few Town Councilmembers, in drafting the "pro" statement for the voter's pamphlet on the referendum, evidenced "hostility" towards him and his business.⁴⁰ Councilmember Jim Hedrick was one of the "pro" statement authors, and had been the only Councilmember who voted against the flat tax, Ordinance 1253.⁴¹ The Council believed that its use of this process demonstrated that the Council was not discriminating against Mr. Fabre or his business, as the public was in favor of the prohibition, by

³⁶ App. Br. 19; Appendix 8.

³⁷ CP 1227-28; Appendix 6 (The date line on the Ordinance inadvertently states December 23, 2011, when it was December 23, 2010.); App. Br. 8 n.2.

³⁸ CP 1081.

³⁹ CP 878.

⁴⁰ Ap. Br. 7; CP 1119.

⁴¹ CP 507-08, 1119.

a margin of 52.27 percent.⁴²

In response, Mr. Fabre filed another lawsuit against the Town (hereafter “Fabre II”), asking the court to determine that Ordinance 1316 was void.⁴³ Rather than engage in yet another lawsuit with Mr. Fabre, the Town repealed the ordinance that provided for the conditional prohibition/referendum, No. 1316.⁴⁴ The parties stipulated to a dismissal of Fabre II before there was any court determination on the validity of Ordinance 1316.⁴⁵

D. Procedural History

Mr. Fabre filed his *First Amended Complaint for Negligence, Intentional and Negligent Interference ...* on December 8, 2010 (hereafter sometimes referred to as “Fabre-III”).⁴⁶ He submitted five causes of action: (1) Negligence; (2) Tortious Interference; (3) Breach of Contract/Estoppel; (4) Abuse of Process; and (5) Conversion.⁴⁷

On June 24, 2011, the court orally ruled that Ruston Councilmembers were immune from liability by virtue of legislative immunity, and that “all” of Mr. Fabre’s claims against the

⁴² CP 878, 1129.

⁴³ CP 122-28; Pierce County Superior Court Cause No. 10-2-15875-3, filed December 13, 2010.

⁴⁴ Ordinance 1316 was repealed by Ordinance 1328. CP 114; Appendix 7.

⁴⁵ *Id.*

⁴⁶ CP 1-16.

⁴⁷ CP 11-15.

Councilmembers were dismissed, based on legislative immunity.⁴⁸ Mr. Fabre had alleged the same claims against the Town Councilmembers as the Town.⁴⁹ Ruston was found to be immune for all acts or inaction prior to May 28, 2010, the date of the Fabre I declaratory Ruling.⁵⁰ The court stated that Mr. Fabre “should be entitled to pursue [negligence and tortious interference] claims that may survive these motions that arose after the declaratory judgment decision.”⁵¹ The trial court stated, “Given the posture of the case at this point, the Court believes there are issues of fact.”⁵² Since all claims and Defendants were not dismissed, the court entered an interlocutory order granting summary judgment in favor of the Town Councilmembers and partial summary judgment in favor of Ruston.⁵³ CR 54(b); CR 56(b).

On March 23, 2012, Ruston moved for summary judgment on the remaining negligence and tortious interference claims, based on the absence of duty and immunity.⁵⁴

On April 25, 2012, the trial court issued a letter ruling granting Ruston’s 2012 motion for summary judgment, and an order granting

⁴⁸ RP 95:17-24, 100:9-13.

⁴⁹ CP 1-16.

⁵⁰ RP 103:1-4, 103:16-104:17.

⁵¹ RP 103:13-15.

⁵² RP 106:9-10.

⁵³ CP 722:24-723:25.

⁵⁴ CP 725-39.

summary judgment.⁵⁵ The trial court denied Ruston’s motion to strike Mr. Fabre’s cross motion, considered the aspects of Mr. Fabre’s cross motion that were in opposition to summary judgment, and the cross motion is listed in the order dismissing Ruston.⁵⁶ The trial court determined that Mr. Fabre’s cross motion for summary judgment violated the Case Schedule Order for dispositive motions.⁵⁷ Mr. Fabre appealed the dismissal of his negligence and tortious interference claims against Ruston.⁵⁸

III. ARGUMENT

A. Standard of Review of Summary Judgment

On review, an appellate court engages in the same inquiry as the trial court. *Barr v. Day*, 124 Wn.2d 318, 324, 879 P.2d 912 (1994). The summary judgment must be affirmed if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). A factual dispute is immaterial if “the result in the case is compelled as a matter of law.” 14A Karl B. Tegland, *Wash. Prac., Civil Procedure* § 25:19 (2011).

“The purpose of a summary judgment is to avoid a useless trial

⁵⁵ CP 1352-53, 1354-56.

⁵⁶ CP 1354:21-23, 1371-73.

⁵⁷ RP 118:3-17.

⁵⁸ App. Br. 1.

when no genuine issue of material fact remains to be decided.” *Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998) (citation omitted). Only the evidence and issues timely called to the attention of the trial court may be considered. *City of East Wenatchee v. Douglas County*, 156 Wn. App. 523, 530, 233 P.3d 910 (2010); RAP 9.12. Issues raised for the first time by appeal are not considered. “The purpose of this limitation is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.” *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 462, 909 P.2d 291 (1996) (citation omitted). However, a new ground may be raised if it is offered to affirm summary judgment and is supported by the record. *Allstot*, 116 Wn. App. at 430. Factual or legal conclusions that are not appealed become the law of the case. *Detonics .45 Associates v. Bank of California*, 97 Wn.2d 351, 353, 644 P.2d 1170 (1982); *State v. Slanaker*, 58 Wn. App. 161, 165, 791 P.2d 575 (1990). This would include the unappealed determinations that the Town Council defendants who were dismissed were acting legislatively and were immune; the dismissal of the contract claim against Ruston; and the dismissal of the estoppel claim against Ruston.⁵⁹

B. The Trial Court Properly Determined Ruston Was Immune

In Section III.C of his appeal brief, Mr. Fabre submits that

⁵⁹ RP 95:17-24, 100:9-13; CP 722:25-723:7.

immunity does not apply.⁶⁰ Although the Washington legislature abolished sovereign immunity through RCW 4.96.010, common law immunity continues for legislative, judicial, and purely executive acts. *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 252-53, 407 P.2d 440 (1965); *Holland v. City of Tacoma*, 90 Wn. App. 533, 545, 954 P.2d 290 (1998). The abolishment of sovereign immunity did not make a governmental entity liable for every harm. *Evangelical*, at 253. It “‘is not a tort for government to govern’ or, conversely, not to govern.” *Linville v. State*, 137 Wn. App. 201, 208, 151 P.3d 1073 (2007) (citing *Evangelical*, at 253, and *Dalehite v. United States*, 346 U.S. 15, 73 S.Ct. 956 (1953)).

1. Ruston is entitled to discretionary immunity.

The Supreme Court has set out four preliminary questions to help determine whether an act is a discretionary governmental process, and therefore non-tortious:

- (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
- (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
- (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
- (4) Does the governmental agency involved possess the requisite constitutional, statutory, or

⁶⁰ App. Br. 13.

lawful authority and duty to do or make the challenged act, omission, or decision?

Evangelical, at 255. If these four questions can be answered affirmatively, then the challenged act, decision, or omission can reasonably be “classified as a discretionary governmental process and nontortious, regardless of its un wisdom.” *Id.* (emphasis added). Additionally, to be entitled to immunity, a municipality must “make a showing that such a policy decision, consciously balancing risks and advantages, took place.” *Cougar Business Owners Ass’n v. State*, 97 Wn.2d 466, 472, 647 P.2d 481 (1982) (citation omitted).

a. Amending the tax rate was a high-level discretionary act.

The *Evangelical* test shows that Ruston’s action of amending its tax rate was a discretionary act and non-tortious or immune. First, amending tax rates to address economic issues involved a basic governmental policy and objective. The Town Council, as the legislative body of the Town, is the only one that could determine this. Const. art. XI, § 12; RCW 35.27.370(16); RCW 9.46.110(1); *Town of Othello v. Harder*, 46 Wn.2d 747, 752-53, 284 P.2d 1099 (1955). Second, the policy decision was to increase the tax rate. Passing an ordinance was the only way the gambling tax could be increased. *Id.* Third, the preamble to Ordinance No. 1253 and testimony from Ruston Councilmembers demonstrate that the

amendment of the tax rate required exercise of judgment and basic policy evaluation.⁶¹ Fourth, RCW 9.46.110(1) and (3)(f) grant the Town Council the specific power to raise the tax rate for social card games up to 20 percent of gross revenue. These factors show the necessary policy decisions were made. In sum, Ruston's 2008 tax amendment meets and satisfies all requirements for discretionary immunity.

b. Prohibition of social card games was a high-level discretionary act.

The *Evangelical* test demonstrates that conditionally passing the prohibition was a high-level discretionary act, despite Mr. Fabre's contention that it was mistaken or neglectful to seek the will of voters by referendum. First, whether to allow gambling is a basic governmental policy or objective. *Edmonds Shopping Center Associates v. City of Edmonds*, 117 Wn. App. 344, 352, 71 P.3d 233 (2003) ("Case law and statutes make clear that the regulation of gambling is a valid exercise of a municipality's police power."). Second, the Ruston Town Council could only act by passing an ordinance, and in the exercise of judgment, sought the will of voters.⁶² *Town of Othello*, 46 Wn.2d at 752-53; RCW 35.27.370(16). Third, whether to outright prohibit or to seek the will of voters, as the Ruston Town Council chose, was basic policy evaluation and judgment. Fourth, by statute, Ruston's Town Council was the only

⁶¹ CP 196 (Hunt Dep. 55:17-23), 446 (Albertson Dep. 85:14-86:18); Appendix 4.

⁶² CP 107-08, 878.

body authorized to make the judgment to utilize an ordinance conditioned on a public vote to determine the will of voters. RCW 35.27.370(16). The authority for Ruston to prohibit card games is provided by RCW 9.46.295(1) and (2) (“A city or town with a prohibition ...”). See *Edmonds*, 117 Wn. App. at 360 (“Here, we have a statute that allows municipalities to prohibit all gambling ...”). These factors show that the necessary policy decisions were made. The authority to prohibit card games is addressed in more detail in Section III.C.9 *infra*.

In sum, Ruston’s acts in connection with prohibiting social card games meet the requirements for non-tortious government process or discretionary immunity. The trial court can be affirmed on any ground supported by the record. *Allstot*, 116 Wn. App. at 430. As a result, dismissal of all claims should be affirmed.

c. Public policy requires discretionary immunity for Ruston.

Discretionary and legislative immunity are particular categories of common law immunity that have been preserved. *Evangelical*, 67 Wn.2d at 252-54; *Holland*, 90 Wn. App. at 545. They are not sovereign immunity, as argued by Mr. Fabre.⁶³ These immunities are supported by the policy that “in any organized society there must be room for basic governmental policy decision and the implementation thereof,

⁶³ App. Br. 13.

unhampered by the threat or fear of” tort liability. *Evangelical*, at 254. They apply, “however unwise, unpopular, mistaken, or neglectful a particular decision or act might be.” *Id.* at 253-54 (citation omitted). Denying Ruston discretionary immunity or legislative immunity would improperly work against the public policies that form the basis of these two common law categories of immunity.

2. Ruston is entitled to legislative immunity.

Washington courts have distinguished legislative from administrative acts as follows:

Actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative.

Citizens for Financially Responsible Government v. City of Spokane, 99 Wn.2d 339, 347, 662 P.2d 845 (1983). In *Citizens*, an ordinance adopting a tax was determined to be legislative. *Id.*

The rule that municipalities have legislative immunity for local legislative acts was confirmed in *J.S.K. Enterprises, Inc. v. City of Lacey*, 6 Wn. App. 433, 493 P.2d 1015 (1972); *Holland*, at 545. The *J.S.K. Enterprises* court held that there is no tort liability for negligence or damages alleged to relate to a loss of business income due to the adoption of an ordinance. *J.S.K. Enterprises*, at 433. In *J.S.K. Enterprises*, an

operator of a sauna massage parlor sued the City of Lacey over an unconstitutional city ordinance and alleged damages for the loss of business income. *Id.* Even after acknowledging that the ordinance was unconstitutional, the court denied the plaintiff damages. *Id.* The court explained its holding: “The enactment of the ordinance was a legislative act and legislative acts of the city cannot be characterized as tortious, however mistaken or unwise they may have been.” *Id.*

While the *J.S.K. Enterprises* court found that the City of Lacey had acted in good faith, there is no indication in the case that the court was given an opportunity to consider the precedent and prohibition on considering alleged legislative motive outlined in *Goebel v. Elliott*, 178 Wash. 444, 447-48, 35 P.2d 44 (1934). For nearly 80 years, Washington courts have held that, “Under no consideration or circumstance will the motives of legislators, considered as the moral inducement for their votes on a particular enactment, be inquired into by a judicial tribunal, and no principle of law is more firmly established.” *Id.*

The U.S. Supreme Court has long held that legislative immunity is not thwarted by allegations of improper motive:

The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The

privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

Tenney v. Brandhove, 341 U.S. 367, 377, 71 S.Ct. 783 (1951). See *Soon Hing v. Crowley*, 113 U.S. 703, 5 S.Ct. 730 (1885) (courts cannot inquire into alleged hostile motive).⁶⁴ Hence, the portion of *J.S.K. Enterprises* that refers to the city council motive or good faith is not a limit on immunity.

In *Holland v. City of Tacoma*, the plaintiff alleged that the City of Tacoma was negligent and had breached a duty not to violate his constitutional rights by the adoption of a noise ordinance under which he was arrested. *Holland*, at 537, 545. Even though the court determined that the Tacoma ordinance was unconstitutional, it held that Tacoma “has immunity for its lawmaking functions,” and dismissed the negligence claim. *Id.* at 545. As in the instant case, the *Holland* court noted, “Holland has cited no cases creating ... a duty.” *Id.*

Here, just as in *Holland*, Ruston engaged in legislative action when it enacted its ordinances. Respectfully, under the precedent of *Evangelical*, *J.S.K. Enterprises*, and *Holland*, Ruston is entitled to common law

⁶⁴ Additional authority that motive cannot be considered is cited at CP 1205:20-1207:7.

legislative immunity from Mr. Fabre's tort claims. Dismissal of all claims should be affirmed in order to give effect to the policies set out in *Evangelical, Holland, and J.S.K. Enterprises*.

C. Mr. Fabre's 14 Points for Tort Liability are Not Supported by Law and Some are Untimely

1. The Town is not liable in tort for its legislative actions.

In Section III.C.1 of his appeal brief, Mr. Fabre alleges that the Town negligently taxed and negligently exercised its authority under the Gambling Act by prohibiting house-banked social card games.⁶⁵ This argument has three fatal flaws.

First, Mr. Fabre cites to no authority to support his argument that such duties actually exist.⁶⁶ Consequently, the negligence argument should not be considered. RAP 10.3(a)(6); *American Legion Post No. 32*, 116 Wn.2d at 7, 10.

Second, precedent holds that the passing of an ordinance that is later determined to be void or unconstitutional is a non-tortious or non-actionable legislative act. *E.g., Holland*, at 545. In *J.S.K. Enterprises*, it was specifically held that a business owner did not have a claim for damages in the form of business losses caused by the enactment of an

⁶⁵ App. Br. 14-15.

⁶⁶ The only case cited for negligent legislation is *Howe v. Douglas County*, 146 Wn.2d 183, 192, 43 P.3d 1240 (2002). *Howe* is inapplicable. It does not involve alleged negligent legislation. *Id.* *Howe* involved negligent maintenance of a drainage system Douglas County had contracted to maintain. *Id.*

unconstitutional ordinance. *J.S.K. Enterprises*, at 433. Such legislative action is *ultra vires*: “No liability is created against a municipal corporation by acts of its officers done under an unconstitutional or void ordinance enacted in exercise of governmental powers.” 18 Eugene McQuillin, *The Law of Municipal Corporations*, § 53.64 (3rd ed.). Washington courts have long followed this rule. *See Savage v. Tacoma*, 61 Wash. 1, 112 P. 78 (1910); *Woodward v. City of Seattle*, 140 Wash. 83, 248 P. 73 (1926); *City of Seattle v. Puget Sound Traction, Light & Power Co.*, 103 Wash. 41, 174 P. 464 (1918).

Third, as shown in the following two Sections, there is no duty.

2. No duty has been shown.

In order for Mr. Fabre to succeed on his negligence claim, he must prove that Ruston “(1) owed a duty to [him]; (2) breached that duty; and (3) caused [him] damages, both legally and proximately.” *Vergeson v. Kitsap County*, 145 Wn. App. 526, 534, 186 P.3d 1140 (2008). Respectfully, the Court must address the threshold question of whether the Town owes a duty of care to Mr. Fabre. “The existence of a legal duty is a question of law ... [and if] a plaintiff cannot establish that the defendant owes a duty of care, we need not determine the remaining elements of a negligence claim.” *Linville*, 137 Wn. App. at 208.

While Mr. Fabre acknowledges that he must show the existence of

a duty owed to him by the Town, he has not provided one applicable to the circumstances in this case. Instead, he erroneously alleges that the Town owed him a “general duty of care,” based on cases involving roadways, premises liability, and service delivery.⁶⁷ He also fails to acknowledge that the Town had authority under state law to take action to increase taxes under RCW 9.46.110(1) and (3)(f) and prohibit social card rooms under RCW 9.46.295, regardless of whether it was “foreseeable” that his business would close. “A tax on gambling is not novel.” *Imperial Drum & Bugle Corps, Inc. v. City of Seattle*, 14 Wn. App. 845, 848, 545 P.2d 1235 (1976). It is “one of the notorious incidents of social life.” *Id.* Prohibition of gambling is similarly not novel. *E.g., Edmonds*, 117 Wn. App. at 365; *Paradise, Inc. v. Pierce County*, 124 Wn. App. 759, 776, 102 P.3d 173 (2004).

3. The public duty doctrine bars the negligence claim.

a. The public duty doctrine applies to the public, not individuals.

If the Gambling Act or any other statute cited by Mr. Fabre created a duty, the Town owed it to the public, not Mr. Fabre individually. “The public duty doctrine provides that regulatory statutes impose a duty on public officials which is owed to the public as a whole, and that such a statute does not impose any actionable duty that is owed to a particular

⁶⁷ App. Br. 16-18.

individual.” *Honcoop v. State*, 111 Wn.2d 182, 188, 759 P.2d 1188 (1988). “The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *U.S. Oil Trading, LLC v. State, Office of Financial Management*, 159 Wn. App. 357, 362, 249 P.3d 630 (2011) (citation omitted).⁶⁸

b. Special relationship exception.

There are certain exceptions to the public duty doctrine. Mr. Fabre raised one, the special relationship exception.⁶⁹ Under the special relationship exception:

A governmental entity is liable for negligence, under the special relationship exception, when there is (1) direct contact between the public official and injured plaintiff, (2) express assurance given by the public official to the injured plaintiff, and (3) justifiable reliance by the plaintiff on such express governmental assurance. ... “It is only where a direct inquiry is made by an individual and incorrect information is clearly set forth by the government, the government intends that it be relied upon and it is relied upon by the individual to his detriment, that the government may be bound.”

⁶⁸ In *U.S. Oil Trading*, the plaintiff alleged that State agencies “intentionally and negligently” failed to follow a law requiring the State to determine the cost of any bill that was introduced into the house of representatives or the senate if the bill “raised taxes.” *U.S. Oil Trading*, at 360-61. The plaintiff claimed that the state’s failure to prepare a fiscal note on one particular bill would result in over \$11 million in damages, which was the estimated present value of future taxes that the plaintiff would have to pay if that bill became law. *Id.* at 360. After an analysis of the exceptions to the public duty doctrine, the *U.S. Oil Trading* court found that no duty was owed by the state to any individual member of the public, and the tort claims were dismissed.

⁶⁹ App. Br 32-37 (§§ III.C.9-12).

U.S. Oil Trading LLC, 159 Wn. App. at 365 (citations omitted).

The second and third elements are absent.⁷⁰ According to Mr. Fabre, the “express assurance” given by Ruston was Mayor Wheeler’s promise of “the opportunity to recover [Mr. Fabre’s] significant investment by linking the tax rate to his revenues earned.”⁷¹ Even if this were a true statement, no “justifiable reliance” could be made on this “express assurance.” The mayor of a town has no authority to act on an ordinance, except in the case of a tie vote of the town council. RCW 35.12.100; RCW 35.27.280. If Mayor Wheeler made such a statement, it was *ultra vires*, and the Town Council was not estopped from adopting an increase to the social card room tax. *See Town of Othello*, 46 Wn.2d at 753-54 (no ordinance “empowered Mayor Wilson to speak for the town council and bind the town.”); *Choi v. City of Fife*, 60 Wn. App. 458, 465, 803 P.2d 1330 (1991) (mayor’s authorization of a use prohibited by the city’s zoning code was *ultra vires* and the city was not estopped from denying permit for nonconforming use).

c. Town officials do not have authority to bind future Town Councils.

Neither Mayor Wheeler nor the Town Council had authority to

⁷⁰ The first element is also absent. Mr. Fabre cited no authority that lobbying a town council on taxes or gambling sets a lobbyist or business owner apart from the general public. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 787, 30 P.3d 1261 (2001). Ruston focuses on the absence of the second and third elements.

⁷¹ App. Br. 33-34.

restrict the Town Council’s legislative authority to set the tax rate for social card rooms in the future. *King County v. Taxpayers of King County*, 133 Wn.2d 584, 609, 949 P.2d 1260 (1997) (“A local government may not alter or restrict a legislative grant of power to that local government or its officers.”); *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 301, 174 P.3d 1142 (2007) (future legislative bodies are free to amend legislation).

Taxation is a uniquely legislative act, and tax laws are not subject to ordinary principles of judicial precedent in matters of individual relationship. *Everett v. Adamson*, 106 Wash. 355, 357, 180 P. 144 (1919).

We have held consistently that taxation is a matter involving the sovereign power of the state and subject only to the limitations which that sovereignty has imposed upon itself, either in the constitutional or positive law of the state. To read into the operations of the tax laws the particular principles which form the accretion of judicial precedent in matters of individual relationship and of contract would be an unwarranted invasion of the legislative power. The power to tax includes the power to retax and impose other burdens of taxation upon the same subjects of taxation ...

Id. at 357 (emphasis added). Municipalities derive their ability to tax from Const. art. XI, § 12. “The legislature ... may, by general laws, vest in the corporate authorities thereof, the power to assess and collect taxes for such purposes.” *Id.*

In this case, RCW 35.27.370(16) and RCW 9.46.110(1) and (3)(f)

granted Ruston the authority to tax. Neither the constitution nor the state statutes grant individuals the authority to set their own tax rates or bind future town councils. Taxation is not subject to “the accretion of judicial precedent in matters of individual relationship.” *Everett*, at 357.

When a plaintiff is dealing with a town or mayor, he is “presumed to have knowledge of the power and authority of such officer or officers, and that, when he deals with such officer or officers in a manner not in compliance with the law, he does so at his peril.” *Stoddard v. King County*, 22 Wn.2d 868, 883-84, 158 P.2d 78 (1945).

Mr. Fabre also contends that Ruston “expressly assured [him] that he could operate a cardroom in Ruston ... Ruston then reversed its position and expressly assured him he had to pay a flat tax and later that he could not operate at all because he was banned.”⁷² First, there is no citation to the record to identify the speaker of the assurance that he could perpetually operate a cardroom. As shown, a town official cannot bind the town council. *E.g., Town of Othello; Stoddard; Choi*. As a result, even if such express assurances were given by a Town official, Mr. Fabre could not have reasonably relied on them because they are contrary to law. *See King County*, 133 Wn.2d at 609; *Laymon v. Washington State Dept. of Natural Resources*, 99 Wn. App. 518, 526, 994 P.2d 232 (2000). The

⁷² App. Br. 36.

Gambling Act clearly allowed the Town to increase the tax on social card rooms up to 20 percent, and to prohibit them.

d. Contact with Town does not constitute special relationship.

In the remainder of his brief, Mr. Fabre describes contact he had with Ruston, without demonstrating how such contact satisfied the special relationship exception to the public duty doctrine. For example, Mr. Fabre, asserts that the Town owed him a duty because he owned “the only cardroom in town” and he was “the only one to challenge Ruston’s actions.”⁷³ Respectfully, this does not provide reasoned argument with citation to authority and should be disregarded. *See Holland*, 90 Wn. App. at 538 (passing treatment of an issue or lack of reasoned argument is insufficient for judicial review); *American Legion Post No. 32*, 116 Wn.2d at 7, 10; RAP 10.3(a)(6).

In sum, Mr. Fabre has not shown that the Town owed him a duty, nor has he demonstrated that the special relationship exception to the public duty doctrine applies. The legislative context and public duty limitations of this case foreclose any assertion of a viable negligence claim against the Town.

4. No duty arose from an undertaking.

Mr. Fabre did not plead negligent undertaking in his *First*

⁷³ App. Br. 15.

Amended Complaint nor assert it in the course of the summary judgment proceedings. Hence, it cannot be considered. *Mithoug*, 128 Wn.2d at 462. If the court considers the argument, Ruston's passing of ordinances was legislative action that is either non-tortious, immune, or not supported by a duty, as shown in Sections III.B. and C.1-3 of this response brief.

Each town council is free to amend ordinances. The *Evangelical, Holland*, and *J.S.K. Enterprises* precedent that establishes that governing is non-tortious, and the *Washington State Farm Bureau, King County, Town of Othello*, and *Stoddard* precedent that prohibits limiting the authority to amend a tax or alter legislation, demonstrate that there can be no tortious taxing or prohibition of gambling. The cases cited by Mr. Fabre are distinguishable. They do not involve legislative acts or an undertaking by a municipality in respect to legislation that is embodied in an ordinance. For example, they involve permitting of a sawmill with a finding of no special relationship;⁷⁴ a gun dealer selling a gun to an intoxicated man;⁷⁵ a car accident;⁷⁶ and similar inapposite settings. Respectfully, no actionable undertaking exists to support a duty.

5. Legislation does not support an actionable foreseeable harm; this claim is also untimely.

There are two procedural bases that bar review of Mr. Fabre's

⁷⁴ *Meaney v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988).

⁷⁵ *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 653 P.2d 280 (1982).

⁷⁶ *Keller v. City of Spokane*, 104 Wn. App. 545, 17 P.3d 661 (2001).

foreseeable harm claim. First, Mr. Fabre did not allege a claim of an actionable duty by virtue of foreseeable harm in his *First Amended Complaint*, nor in the course of the summary judgment proceedings. Therefore, his foreseeability argument in Section III.C.3⁷⁷ of his appeal brief should not be considered. *Mithoug*, 128 Wn.2d at 462. Second, he did not cite a single case supporting foreseeable harm as a basis to treat ordinances as tortious.⁷⁸ So, again, his foreseeability argument should not be considered. *Holland*, at 538; *American Legion Post No. 32*, at 7, 10; RAP 10.3(a)(6). Without waiving the procedural limits, this argument is contrary to the explicit legislative directive that municipalities can tax up to 20 percent and prohibit social card rooms. RCW 9.46.110(1) and (3)(f); RCW 9.46.295. As a matter of law, it is “foreseeable” to every person opening a social card room in the State of Washington that his/her social card room might be taxed up to 20 percent or prohibited at any time.⁷⁹ Mr. Fabre acknowledged that he was aware of this.⁸⁰ In sum, Mr. Fabre’s third argument, premised on foreseeability of harm, does not support tort liability.

⁷⁷ App. Br. 18-21.

⁷⁸ *Id.*

⁷⁹ *Edmonds*, 117 Wn. App. at 366 (“Finally, Dykes should have anticipated the ordinance because he knew that, under RCW 9.46.295, the possibility existed for the City to prohibit gambling activities.”); *Paradise*, 124 Wn. App. at 776.

⁸⁰ CP 326 (Fabre Dep. 88:6).

6. Ruston acted legislatively, did not enforce its ordinances, and had no duty to repeal.

a. Ruston did not enforce its ordinances.

In Section III.C.4 of his appeal brief, Mr. Fabre argues that the Town enforced its tax and prohibition ordinances and does not have legislative immunity.⁸¹ The town's immunity is shown in Section III.B of this response brief. The enforcement claim is also barred by the public duty doctrine, as shown in Section III.C.3 of this response brief.

In addition, to the extent an enforcement contention is argued to be administrative, this Court has applied the public duty doctrine to bar alleged negligence claims concerning administrative actions. *Vergeson*, at 535-42 (public duty doctrine barred negligence claim for not removing warrant that resulted in plaintiff being arrested); *Hannum v. Washington State Dept. of Licensing*, 144 Wn. App. 354, 359-61, 181 P.3d 915 (2008) (DOL erroneously placed a medical certificate notation on plaintiff's driver's license. Plaintiff alleged negligence, as he lost work as a commercial driver as a result.). Both of these cases serve as additional authority to bar the enforcement claim under the public duty doctrine.

Additionally, Mr. Fabre's cases do not support his enforcement contentions. He has not cited authority to support a claim that the Town

⁸¹ App.Br. 21-24.

enforced its tax or conditional prohibition. He cites *Prison Legal News, Inc. v. Department of Corrections*, 154 Wn.2d 628, 640, 115 P.3d 316 (2005) and contends, “Law enforcement means the act of putting the law into effect.”⁸² *Prison Legal* involved the public disclosure act and exemption issues. It did not involve legislation or ordinances. Furthermore, it observed that law enforcement involved more than putting a law into effect, it involved “the carrying out of a mandate or command”; “the imposition of sanctions for illegal conduct”; the “detection and punishment of violations of the law.” *Id.* at 640. Mr. Fabre admitted he paid no taxes.⁸³ The Town did not impose any sanctions or punishment. *Prison Legal* is inapposite.

Mr. Fabre’s remaining three cases do not support a tort action for damages. *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719 (1980) is cited by Mr. Fabre for the argument that an enforcement action by a legislative body exposes it to a tort action. That is not what the case holds. Rather, it holds that the Virginia Supreme Court was entitled to absolute immunity for its legislative functions in passing professional conduct rules, just as the judges who enacted the rules. *Id.* at 734. Additionally, to the extent it acted in an enforcement capacity by maintaining the rules, the court was subject to injunctive or declaratory

⁸² App. Br. 23.

⁸³ CP 719.

remedies. *Id.* at 735 (“For this reason the Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief ...”). *Robinson v. City of Seattle*, 119 Wn.2d 34, 830 P.2d 318 (1992) involved Seattle intentionally enforcing an ordinance after being enjoined two times. The *Robinson* court instructed, “A city cannot be held liable in damages for mere enforcement of an unconstitutional or void ordinance in the nature of a police power regulation.” *Id.* at 60-61 (emphasis added). *R/L Associates, Inc. v. City of Seattle*, 113 Wn.2d 402, 780 P.2d 838 (1989) also involved Seattle intentionally enforcing a void ordinance after it had been enjoined. Seattle was held to have been in contempt of court. However, the trial court’s award of damages was reversed because the city could not be held liable in damages for the mere enforcement of an unconstitutional or void ordinance. *Id.* at 412. In the case at bar, Mr. Fabre sought an injunction but it was not granted. Most importantly, the cases he cites support denial of a tort action for damages and they do not support characterizing his allegations as enforcement.

b. Ruston had no duty to repeal.

“The repeal of ordinances is a legislative function.” 18 McQuillin, *The Law of Municipal Corporations*, § 53.22.40 (3rd ed.). The May 28, 2010 declaratory Ruling made no provision requiring Ruston to repeal the

tax ordinance.⁸⁴ Mr. Fabre was a party to the declaratory ruling and neither party appealed. A “void legislative act is of no effect.” *Swartout v. City of Spokane*, 21 Wn. App. 665, 674, 586 P.2d 135 (1978). Mr. Fabre did not cite a single case holding that a government entity has a duty to repeal a void ordinance or to not codify a void ordinance.⁸⁵ As shown, “it is not a tort for government to govern, or, conversely, not to govern.” *Evangelical*, 67 Wn.2d at 253. *E.g., Linville*, at 208 (the “State owes no common law duty to victims ... to implement a statute ...”).

Numerous cases finding legislation void or unconstitutional that were not repealed buttress the absence of duty. In *Spokane Arcades, Inc. v. Ray*, 449 F.Supp. 1145 (1978), owners of movie houses and bookstores throughout the state sought to declare Chapter 7.48 RCW unconstitutional, and they were successful. The statute regulated “moral nuisances.” *Spokane Arcades*, at 1147. Municipalities as well as citizens could bring nuisance actions, and the plaintiffs “had every reason to believe” that they would “imminently prosecute one or more of the plaintiffs on the basis of Initiative 335.” *Id.* at 1158. The plaintiffs sought both a declaratory judgment and an injunction. *Id.* at 1148. As in the case at bar, the request for an injunction was not granted. *Id.*⁸⁶ The unconstitutional Initiative

⁸⁴ CP 104-05; Appendix 8.

⁸⁵ App. Br. 21-24.

⁸⁶ CP 100, 104-05; Appendix 8.

Measure No. 335, codified as Chapter 7.48 RCW, continued to be codified in the revised code decades later.⁸⁷

Similarly, in *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), the plaintiff sought to declare a Seattle utility ordinance that was based on Chapter 82.80 RCW unconstitutional. The ordinance was voided. *Id.* at 891. Chapter 82.80 RCW was questioned, but continues to be published without repeal. As in the case at bar, the *Covell* plaintiff sought an injunction, but it was not granted. *Id.*⁸⁸

c. Codification.

Contrary to Mr. Fabre’s contention, codification of an ordinance does not mean that it is effective.⁸⁹ As shown by *Swartout*, a void ordinance is of no effect. *Swartout*, 21 Wn. App. at 674. Codification involves nothing more than the “editing, rearrangement and/or grouping of ordinances under appropriate titles, parts, chapters and sections.” RCW 35.21.500. Codification cannot re-enact an invalid ordinance. *State ex rel. Weiks v. Town of Tumwater*, 66 Wn.2d 33, 37, 400 P.2d 789 (1965). (codification of a void ordinance “does not result in the re-enactment” of

⁸⁷ CP 1335-48.

⁸⁸ To further illustrate, in *State v. Kolocotronis*, 73 Wn.2d 92, 105, 436 P.2d 774 (1968), the criminal insanity statute remained in the Revised Code of Washington for 57 years after it had been repealed. When the repeal was voided, the criminal insanity statute was revived without further legislation. *Id.* CP 1195-96 n.19 provides extensive citation to case law supporting no obligation to repeal or no obligation to not publish statutes and ordinances that were declared void or unconstitutional.

⁸⁹ App. Br. 22-23. In the event Mr. Fabre argues that conditions resulted in a loss of sale, he admitted he was not trying to and did not intend to sell. CP 1218:17-21, 1219:5-7.

it).

Analogous to the holding in *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988), if a governmental entity was liable for the innumerable number of void ordinances and statutes that are not repealed or are codified while void, governmental entities would be open to unlimited liability. No such precedent exists and, as in *Taylor*, none should be created. *Id.* at 170.⁹⁰

7. Local jurisdictions are entitled to legislative immunity.

In Section III.C.5 of his appeal brief, Mr. Fabre again contends that legislative immunity does not apply to a municipality.⁹¹ As demonstrated in Section III.B.2 of this response brief, municipalities have legislative immunity. *E.g.*, *Holland*, at 545; *J.S.K. Enterprises*, at 433. Mr. Fabre relied on a 42 USC § 1983 immunity analysis. The § 1983 rules do not apply to state law tort claims against a municipality.⁹² Moreover, the public duty doctrine and absence of an express assurance that Mr. Fabre could justifiably rely on provide an alternative bar to his claims.

⁹⁰ In the event that Mr. Fabre argues that the absence of repeal or codification resulted in a loss of sale, he admitted in deposition that he was not trying to and did not intend to sell. CP 1218 (Fabre Dep. 122:17-123:7).

⁹¹ App. Br. 24-26.

⁹² *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 127, 829 P.2d 746 (1992) “We decline to apply the ... immunity analyses of § 1983 to state tort law claims.”).

8. RCW 9.46.110(3)(f) authorized Ruston to tax; Mr. Fabre’s argument is also untimely.

Mr. Fabre argues that Ruston’s passage of the tax ordinance amendment (No. 1253) was an “administrative function,” “not legislative in nature,” and “purely administrative.”⁹³ Respectfully, this claim should be denied on two procedural grounds. First, this is a new claim and it cannot be raised for the first time on review. *Mithoug*, 128 Wn.2d at 462. Additionally, Mr. Fabre offers no authority that passing an ordinance is an administrative function not entitled to immunity.⁹⁴ Arguments that are not supported by citation to authority should not be considered. *American Legion Post No. 32*, 116 Wn.2d at 7, 10; *Holland*, 90 Wn. App. at 538; RAP 10.3(a)(6).

Mr. Fabre’s contentions are also contrary to the express terms of RCW 9.46.110(1), which authorized the “legislative authority of any ... town ... [to] provide for the taxing of any gambling activity authorized by this chapter within its jurisdiction.” (Emphasis added.) RCW 9.46.110(3)(f) authorized taxing of social card games up to 20 percent. As shown in Section III.B. of this response brief, the Town is immune for its legislative actions. In the alternative, if one of the Town Council’s acts is characterized as administrative, the claim is barred by the absence of duty

⁹³ App. Br. 27 (§ III.C.6).

⁹⁴ *Id.*

and the public duty doctrine.⁹⁵ In sum, Mr. Fabre’s sixth set of arguments is not supported by law.

9. RCW 9.46.295 authorized Ruston to prohibit house-banked card games.

Ruston possessed the authority to legislate “to maintain the peace, good government and welfare of the town.” RCW 35.27.370(16); RCW 9.46.110(1). In the first paragraph, RCW 9.46.010 declares, “The public policy of the state ... on gambling is to ... promote the social welfare of the people by limiting ... gambling activities” In the last paragraph it declares, “the provisions of this chapter shall be liberally construed to achieve such end.” RCW 9.46.295(2) expressly recognized a town’s right to prohibit social card games stating, “A city or town with a prohibition on house-banked social card game licenses” (Emphasis added.) RCW 9.46.295(2) also referred to a town “that allowed” or “that allows” social card games.⁹⁶ RCW 9.46.295(2) stated that a town “is not required to allow additional social card game businesses.” RCW 9.46.192 provides, “Every city or town is authorized to enact as an ordinance of that city or town any or all of the sections of this chapter” (Emphasis added.)

Statutes are construed as a whole to give effect to all the language.

Edmonds, 117 Wn. App. at 356. Statutes will be construed to avoid

⁹⁵ Section III.C.2-3 of this response brief.

⁹⁶ RCW 9.46.295 was amended July 22, 2011. The quoted language was retained in new Sections 2(a) and 2(b).

strained or absurd results. *Id.* In *Edmonds*, the court approved an ordinance prohibiting card games as a legitimate exercise of police power. In its holding, the court explicitly stated that RCW 9.46.295 is a statute that permits “municipalities” to prohibit all gambling. *Edmonds*, at 360 (emphasis added).

Manifestly, a town could not have a “prohibition on house-banked social card game[s]” as provided in RCW 9.46.295(2) if it did not have the power to prohibit them. In sum, construing RCW 9.46.295 and related sections of Chapter 9.46 RCW as a whole, Ruston had the right to prohibit house-banked social card games.

10. Ruston sought the will of voters by referendum when it could have done so by advisory vote; this is not actionable.

The 2010 Ruston Town Council was aware it could pass an ordinance prohibiting gambling activities under RCW 9.46.295.⁹⁷ However, the Council decided to measure the support of the public to ensure that the Council’s actions reflected the will of voters.⁹⁸

Mr. Fabre acknowledged that Ruston possessed authority to seek the will of its citizens by an advisory vote. In his summary judgment submission, he provided the Municipal Research and Services Center’s

⁹⁷ CP 107.

⁹⁸ CP 107, 878.

Initiative and Referendum Guide.⁹⁹ It states: “In ... towns, the council may submit an issue to the voters on an advisory ballot basis. This means that the voters may vote on an issue or an ordinance, but the results of the vote are not legally binding.”¹⁰⁰ Passing a conditional prohibition on gambling and seeking the will of the public was a legislative act, non-tortious or at least immune, given the decades of precedent chronicled in Section III.B of this response brief.

11. Ruston did not owe Mr. Fabre a duty of care separate from the public.

In Section III.C.9 of his appeal brief, Mr. Fabre alleges that the special relationship exception to the public duty doctrine supports a duty.¹⁰¹ He then argues the elements in Sections III.C.10-12.¹⁰² Sections III.C.1 and 3 of this response brief demonstrate no special relationship and no individual duty, in part because Washington law prevents justifiable reliance.

12. Mr. Fabre did not justifiably rely on taxes not changing or future councils not exercising rights under the gambling act.

In Section III.C.12 of his appeal brief, Mr. Fabre is essentially arguing that Ruston’s Town Council could never amend or change its tax

⁹⁹ CP 1085, 1087, 1088 (Decl. of Joan K. Mell, Ex. 10).

¹⁰⁰ CP 1085, 1088.

¹⁰¹ App. Br. 32-33.

¹⁰² App.Br. 33-37.

or gambling policies without his consent.¹⁰³ Procedurally, he should be foreclosed from arguing reliance. First, his claim of estoppel was dismissed on summary judgment and not appealed.¹⁰⁴ In turn, he should be foreclosed from arguing justifiable reliance under the law of the case. *Slanaker*, 58 Wn. App. at 165. Second, the points and authorities in Section III.C.3 of this response brief demonstrate that Mr. Fabre could not justifiably rely on taxes or gambling policy not changing with future Town Councils, irrespective of what he believed or a town official may have said.

Additionally, in *Paradise*, 124 Wn. App. 759, an owner of a card game operation brought an equitable estoppel claim against Pierce County after it passed an ordinance banning social card games. The plaintiff claimed that the county's issuance of a building permit created a reasonable expectation that the gambling business could continue operation for at least a period sufficient to allow him to recoup his investments. *Id.* at 776.

The Court of Appeals disagreed because RCW 9.46.295 allowed the county to prohibit gambling at any time. *Id.* There was no guarantee in the statute that a gambling operation could recoup its investments, and the plaintiff was aware of RCW 9.46.295 and "chose to take the risk as a

¹⁰³ App. Br. 36-37.

¹⁰⁴ RP 106:13-107:9; CP 723:3-7; App. Br. 1.

business decision.” *Id.* The Court concluded, “The fact that the County took action that Paradise knew all along that it might take did not work a manifest injustice.” *Id.*

Here, RCW 9.46.295 gave Ruston the power to prohibit social card games. In his deposition, Mr. Fabre acknowledged being aware that Ruston had authority to prohibit house-banked card games.¹⁰⁵ As in *Paradise*, Mr. Fabre could not justifiably rely on an expectation that a gambling prohibition would never occur. As a matter of law, Mr. Fabre cannot meet all three elements for a special relationship.

13. There was no actionable negligent misrepresentation; this claim is untimely.

Mr. Fabre contends that former Mayor Everding’s July 15, 2008 letter and Ruston’s conditional prohibition ordinance are negligent misrepresentations.¹⁰⁶ Negligent misrepresentation was not pled in the *First Amended Complaint* nor raised in the course of the summary judgment proceedings. Consequently, it cannot be considered in this appeal. *Mithoug*, 128 Wn.2d at 462; *Van Dinter v. Orr*, 157 Wn.2d 329, 333-34, 138 P.3d 608 (2006). In the alternative, if the Court considers this new claim, the elements include (1) negligently supplied, (2) false existing facts, (3) that Mr. Fabre justifiably relied on. *Van Dinter*, at 333. The

¹⁰⁵ CP 326 (Fabre Dep. 88:6).

¹⁰⁶ App. Br. 38.

essential elements cannot be met. First, as shown in Section III.B of this response brief, Ruston's legislative acts are not torts, and the Town is immune. Second, as shown in Sections III.C.1-3 of this response brief, there is no duty and the public duty doctrine bars a claim of negligence. Third, nothing in the July 15, 2008 letter was false on July 15, 2008. The tax was not determined to be void until May 28, 2010.¹⁰⁷ And, the prohibition was conditionally passed by the Town Council.¹⁰⁸ Fourth, as shown in Sections III.C.3 and 12 of this response brief, Mr. Fabre could not justifiably rely on a former Mayor's representation that the tax would not be amended or that the Town policy on gambling would not change, because the Mayor had no authority and as a matter of law future Town Councils were not prohibited from amending or changing policy. In sum, the negligent misrepresentation claim is not timely, and the elements cannot be met, as a matter of law.

14. There was no actionable tortious interference.

A claim for tortious interference with a business expectancy requires a plaintiff to demonstrate five elements:

- (1) the existence of a valid contractual relationship or business expectancy;
- (2) that defendants had knowledge of that relationship;
- (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy;
- (4) that defendants interfered for an improper

¹⁰⁷ CP 743-44.

¹⁰⁸ CP 107-08; Appendix 5.

purpose or used improper means; and (5) resultant damage.

Leingang v. Pierce County Medical Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997). Purposeful “interference denotes purposefully improper interference.” *Id.* at 157 (citation omitted). Intentional interference “requires an improper objective or the use of wrongful means that in fact cause injury.” *Id.* (citation omitted). In other words, “The defendant had a ‘duty of non-interference’” *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989) (citation omitted).

Interference with a business relationship or expectancy is justified as a matter of law when the interferer engages in the exercise of a right equal to or superior to the right that is allegedly invaded. *Plumbers and Steamfitters Union Local 598 v. Washington Public Power Supply System*, 44 Wn. App. 906, 920, 724 P.2d 1030 (1986). In *Plumbers and Steamfitters*, the defendant had both a statutory and common law right to protect its property. Consequently, it could not be liable for tortious interference as a result of barring plaintiffs from entering defendant’s property. *Id.*

Mr. Fabre cannot establish the elements of tortious interference for four reasons. First, the Town Council had the authority to increase taxes, and to prohibit social card games. RCW 9.46.110(1) and (3)(f) and RCW 9.46.295 authorized the Town Council to do it. Second, it is not a tort to

govern. *Evangelical; J.S.K. Enterprises*; Section III.B., *supra*. Third, Ruston's acts are discretionarily and legislatively immune. Section III.B., *supra*. Fourth, Mr. Fabre is barred from challenging the good faith or motive of the Town Council's legislative acts under *Goebel*, 178 Wash. at 447-48.

Additionally, the authority Mr. Fabre cites to support his tortious interference claim for legislative acts is not applicable. *Westmark Development Corp. v. City of Burien*¹⁰⁹ does not involve Burien's legislative acts. Burien used its quasi-judicial authority to delay permits. Similarly, in *Pleas*, Seattle improperly blocked a construction project by refusing to grant permits and delaying the project.

In this case, the trial court correctly determined that, because Ruston had the authority to both increase the tax rate and prohibit social card rooms, tortious interference does not apply. Mr. Fabre cannot claim that the Town acted tortiously when it was merely exercising its legal authority under the Gambling Act to impose a social card room tax up to the legal limit or prohibit social card rooms.

D. The Trial Court Did Not Conclude That a Cross Motion on Summary Judgment Equates to an Admission of Undisputed Facts

Mr. Fabre submits that the trial court applied an incorrect standard

¹⁰⁹ 140 Wn. App. 540, 166 P.3d 813 (2007).

and concluded that since he moved for summary judgment in response to Ruston's motion, there was no issue of fact.¹¹⁰ He offered no authority for his conclusion. The Court should decline to review, given the absence of authority. *American Legion Post No. 32*, 116 Wn.2d at 7, 10; RAP 10.3(a)(6). He also did not provide the standard of review. PCLR 16(a)(3) provides that motions for summary judgment shall not be heard after the case schedule order cutoff, without a motion and order showing good cause. Hence, it appears to be an abuse of discretion standard. *See generally Idahosa v King County*, 113 Wn. App. 930, 937, 55 P.3d 657 (2002) ("The trial court has considerable latitude in managing its court schedule ..."). Mr. Fabre did not submit the required motion to show cause. Consequently, there is a second procedural reason this claim of error should not be heard. PCLR 16(a)(3).

Additionally, Mr. Fabre's contention is incorrect. In its letter ruling, the trial court was observing what Mr. Fabre had submitted in oral argument and in his brief in opposition to and in support of summary judgment, that the court could decide duty as a matter of law.¹¹¹ While the trial court held that Mr. Fabre's cross motion was untimely and outside the case schedule order,¹¹² it considered it to the extent it presented points and

¹¹⁰ App. Br. 11-12 (§ III.B)

¹¹¹ RP 115:8-13, 115:19-116:5; CP 1017:18-19.

¹¹² RP 118:11-15.

authority in opposition to Ruston’s 2012 motion for summary judgment.¹¹³ If a party does not comply with court rules and a case schedule order, the trial court has discretion to decline to consider its motion. PCLR 16(a)(3) (“[No] pretrial dispositive motions shall be heard after the cutoff date provided in the Order Setting Case Schedule except by order of the court and for good cause shown.”). Alternatively, irrespective of Mr. Fabre’s contention, the legal defenses of immunity, the absence of negligence, and the absence of the elements for tortious interference necessitate summary judgment.

E. The Trial Court Properly Declined to Hear Mr. Fabre’s Motion in Limine

A decision on a motion in limine is reviewed under an abuse of discretion standard. *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976). Mr. Fabre cited no authority for the standard of review or the merits of his motion in limine theory.¹¹⁴ “In the absence of ... citation to authority, an issue raised on appeal will not be considered.” *American Legion Post No. 32*, 116 Wn.2d at 7; RAP 10.3(a)(6). Hence, Mr. Fabre’s motion in limine theory should not be considered.

If the Court does consider it, motions in limine are pretrial motions

¹¹³ RP 118:9-17; CP 1354:21-23, 1371-73.

¹¹⁴ App. Br. 41.

to exclude evidence “to simplify trials and avoid the prejudice which often occurs when a party is forced to object in front of the jury to the introduction of inadmissible evidence.” *Fenimore*, at 89. Ruston filed a *Notice Re: Response To Plaintiffs’ Motion in Limine*.¹¹⁵ Ruston had been notified by the trial court’s judicial assistant that the court would consider motions in limine¹¹⁶ on the day of trial.¹¹⁷ Ruston gave notice it intended to respond at the time of trial and would do so under PCLR 7(a)(5).¹¹⁸

In declining to hear Mr. Fabre’s motion in limine in connection with the 2012 motion for summary judgment, the court found that the motion in limine was premised on discovery issues and that, “No discovery motions have been brought in this court.”¹¹⁹ If a party responds to discovery but allegedly does not respond to all of it, “a motion to compel answers under CR 37(a) should be brought.” *Teratron General v. Institutional Investors Trust*, 18 Wn. App. 481, 492, 569 P.2d 1198 (1977). PCLR 7(a)(1) provides that discovery motions are to be heard by the assigned judge. In sum, the trial court did not abuse its discretion in declining to hear a motion in limine premised on alleged incomplete discovery when there had been no discovery motions and an opportunity

¹¹⁵ CP 1349-50.

¹¹⁶ Mr. Fabre’s motion in limine was accompanied by a declaration with 238 pages of documents. CP 765-1003.

¹¹⁷ CP 1349:21-23.

¹¹⁸ CP 1349:25-28.

¹¹⁹ RP 120:8-11.

to respond. Additionally, the motion in limine would have had no effect on the legal determination of immunity and the absence of duty as demonstrated in Sections III.B and C of this response brief. In sum, the motion in limine theory should not be considered.

IV. COSTS

Without presuming the outcome of this appeal, Ruston respectfully requests an award of costs and recoverable fees in accordance with the court rule, which provides in part “the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2; *Kirby v. City of Tacoma*, 124 Wn. App. 454, 475, 98 P.3d 827 (2004). Ruston reserves the opportunity to file a cost bill to set forth its costs and fees that are recoverable under Washington law and appellate procedure.

V. CONCLUSION

Respectfully, summary judgment should be affirmed. Decades of Washington State precedent show that municipal ordinances or legislative acts on behalf of a municipal entity are not torts, they are immune, and they do not support a duty to a particular individual. Mr. Fabre could not justifiably believe that future Ruston Town Councils would not ordain their own tax and gambling policies. There is no cause of action for negligent legislation, negligent exercise of governmental police power, or

tortious interference through legislative acts. Consequently, there is no actionable tort based remedy. To overturn policy and create tort remedies for legislation or ordinances would unnecessarily involve the judicial branch of government in the legislative branch. This would open the state and local jurisdictions to unlimited claims and liability for allegedly tortious statutes and ordinances. Mr. Fabre has electoral remedies and he exercised his declaratory and injunctive relief remedies, which are the available remedies recognized in the context of legislative acts.

Dated this 21ST day of November, 2012.



Stephen M. Lamberson, WSBA #12985
Raymond F. Clary, WSBA #13802



Carol A. Morris, WSBA #19241

Attorneys for Defendant/Respondent

Appendix 1

TOWN OF RUSTON

ORDINANCE NO. 1132

AN ORDINANCE OF THE TOWN OF RUSTON, WA, AMENDING SECTION 5.02.020 OF THE RUSTON MUNICIPAL CODE RELATING TO THE RATE FOR THE TAX IMPOSED ON PUNCH BOARDS, PULL TABS, AND SOCIAL CARD GAMES.

Be it ordained by the Town Council of the Town of Ruston, Washington, as follows:

Section 1. Town of Ruston ordinance 660, passed December 2, 1974, and R.M.C. 5.02.020 shall be amended as follows:

5.02.020 Punch boards and pull tabs

(a) RCW 9.46 is hereby incorporated in total by reference, including definitions contained therein and any amendments which may be adopted.

(b) There is hereby levied a tax upon the gross revenue of bingo, raffles, and amusement games which shall be imposed upon and collected from bona fide charitable and nonprofit organizations duly licensed to conduct such activities in the Town of Ruston. The rate of tax imposed herein shall be ten percent (10%) of the net receipts received by the bona fide charitable or nonprofit organization conducting the activity. Bona fide charitable or non-profit organizations conducting such activities no more than once each calendar year and earning less than \$10,000.00 gross annual revenue therefrom shall be exempt from taxation under this resolution, but shall nevertheless file the declaration of intent required by Section 5.02.020 (e) herein.

(c) There is hereby levied a tax which shall be imposed upon and collected from all persons, associations, or organizations including, but not limited to all bona fide charitable or nonprofit organizations, which utilize or operate punch boards and/or pull tabs within the boundaries of the Town of Ruston. The rate of tax imposed herein shall be two percent (2%) of the gross receipts from such punch boards and/or pull tabs.

(d) The collection of the tax imposed by sections 2 and 3 shall be by the Clerk-Treasurer pursuant to rules established herein, and such additional rules and regulations as may be adopted by the Washington State Gambling Commission and/or the Pierce County Commissioners.

(e) For the purpose of identifying who shall be taxed, any organization or business intending to conduct any of the activities described in subsections (b) and (c) above within the Town of Ruston from and after the effective date of this chapter, shall prior to the commencement of such activity, file with the Clerk-Treasurer a sworn

declaration of intent to conduct or operate such activity, together with a copy of the license issued by the Washington State Gambling Commission, and thereafter for any period covered by such license, on or before the 15th day of each month, file with the Clerk-Treasurer a sworn statement on a form to be provided and prescribed by the Clerk-Treasurer for the purpose of ascertaining the tax due for the preceding month.

(f) A new declaration of intent to conduct or operate any of the activities described in subsections (b) and (c) herein shall be required prior to the recommencement of the activity following the expiration, suspension, or revocation of any license previously issued by the State Gambling Commission, in the same manner as described in subsection (e) above.

(g) The tax shall be paid by the 15th day of the month following that in which the revenue is received.

(h) The officers, directors, and managers of any organization, licensed by the State Gambling Commission to operate or conduct any of the activities described in subsections (b) and (c), who fail or refuse to pay the tax levied in subsections (b) and (c), or who knowingly falsify any statements required by subsections (b) and (c), shall be held jointly and severally, financially liable, and in addition shall be held individually guilty of a gross misdemeanor in the county jail for not more than ninety (90) days or by a fine of not more than \$300.00, or both.

(i) The Clerk-Treasurer shall adopt and publish such rules and regulations as are necessary to enable the collection of the tax imposed in subsections (b) and (c) herein and shall further prescribe and issue the appropriate forms for determination and declaration of the amount of tax to be paid.

(j) The premises and paraphernalia, and all the books and records of any organization or business conducting or operating any of the activities described in subsections (b) and (c) herein shall be subject to inspection and audit at any reasonable time, with or without notice, upon demand by the Town of Ruston or its designee.

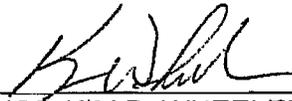
(k) There is hereby imposed a tax, at the rates set forth below, upon social card games when authorized by Chapter 9.46 RCW, and when conducted in the Town:

1. For gross revenue totals below \$300,000.00 per calendar month – zero percent (0%) of the gross monthly revenue;
2. For gross revenue totals between \$300,000.00 and \$400,000.00 per calendar month – two percent (2%) of the gross monthly revenue;
3. For gross revenue totals between \$400,000.00 and \$500,000.00 per calendar month – three percent (3%) of gross monthly revenues;
4. For gross revenue totals between \$500,000.00 and \$600,000.00 per calendar month – four percent (4%) of the gross monthly revenues;

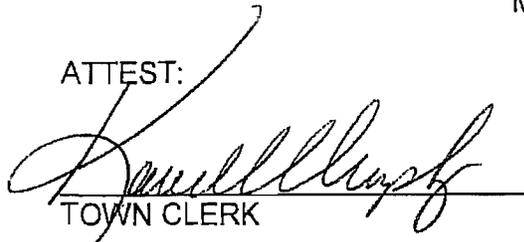
5. For gross monthly revenue totals above \$600,000.00 per calendar month – five percent (5%) of the gross monthly revenues.

Section 2. This Ordinance shall be in full force and effect upon the date of its passage and publication.

PASSED by the Town Council, the Town of Ruston, at its regular meeting on March 17, 2003.



MAYOR KIM B. WHEELER

ATTEST:


TOWN CLERK

Appendix 2

TOWN OF RUSTON
ORDINANCE NO. 1133

AN ORDINANCE OF THE TOWN OF RUSTON, WA,
AMENDING RUSTON MUNICIPAL ORDINANCE NO. 1132
AND SECTION 5.02.020 OF THE RUSTON MUNICIPAL
CODE RELATING TO THE RATE FOR THE TAX IMPOSED
ON SOCIAL CARD GAMES.

Be it ordained by the Town Council of the Town of Ruston, Washington, as follows:

Section 1. Town of Ruston Ordinance 1132, passed March 17, 2003, and R.M.C. 5.02.020 shall be amended as follows:

5.02.020 Punch boards and pull tabs

(a) RCW 9.46 is hereby incorporated in total by reference, including definitions contained therein and any amendments which may be adopted.

(b) There is hereby levied a tax upon the gross revenue of bingo, raffles, and amusement games which shall be imposed upon and collected from bona fide charitable and nonprofit organizations duly licensed to conduct such activities in the Town of Ruston. The rate of tax imposed herein shall be ten percent (10%) of the net receipts received by the bona fide charitable or nonprofit organization conducting the activity. Bona fide charitable or non-profit organizations conducting such activities no more than once each calendar year and earning less than \$10,000.00 gross annual revenue therefrom shall be exempt from taxation under this resolution, but shall nevertheless file the declaration of intent required by Section 5.02.020 (e) herein.

(c) There is hereby levied a tax which shall be imposed upon and collected from all persons, associations, or organizations including, but not limited to all bona fide charitable or nonprofit organizations, which utilize or operate punch boards and/or pull tabs within the boundaries of the Town of Ruston. The rate of tax imposed herein shall be two percent (2%) of the gross receipts from such punch boards and/or pull tabs.

(d) The collection of the tax imposed by sections 2 and 3 shall be by the Clerk-Treasurer pursuant to rules established herein, and such additional rules and regulations as may be adopted by the Washington State Gambling Commission and/or the Pierce County Commissioners.

(e) For the purpose of identifying who shall be taxed, any organization or business intending to conduct any of the activities described in subsections (b) and (c) above within the Town of Ruston from and after the effective date of this chapter, shall prior to the commencement of such activity, file with the Clerk-Treasurer a sworn declaration of intent to conduct or operate such activity, together with a copy of the

license issued by the Washington State Gambling Commission, and thereafter for any period covered by such license, on or before the 15th day of each month, file with the Clerk-Treasurer a sworn statement on a form to be provided and prescribed by the Clerk-Treasurer for the purpose of ascertaining the tax due for the preceding month.

(f) A new declaration of intent to conduct or operate any of the activities described in subsections (b) and (c) herein shall be required prior to the recommencement of the activity following the expiration, suspension, or revocation of any license previously issued by the State Gambling Commission, in the same manner as described in subsection (e) above.

(g) The tax shall be paid by the 15th day of the month following that in which the revenue is received.

(h) The officers, directors, and managers of any organization, licensed by the State Gambling Commission to operate or conduct any of the activities described in subsections (b) and (c), who fail or refuse to pay the tax levied in subsections (b) and (c), or who knowingly falsify any statements required by subsections (b) and (c), shall be held jointly and severally, financially liable, and in addition shall be held individually guilty of a gross misdemeanor in the county jail for not more than ninety (90) days or by a fine of not more than \$300.00, or both.

(i) The Clerk-Treasurer shall adopt and publish such rules and regulations as are necessary to enable the collection of the tax imposed in subsections (b) and (c) herein and shall further prescribe and issue the appropriate forms for determination and declaration of the amount of tax to be paid.

(j) The premises and paraphernalia, and all the books and records of any organization or business conducting or operating any of the activities described in subsections (b) and (c) herein shall be subject to inspection and audit at any reasonable time, with or without notice, upon demand by the Town of Ruston or its designee.

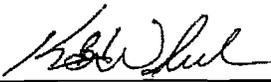
(k) There is hereby imposed a tax, at the rates set forth below, upon social card games when authorized by Chapter 9.46 RCW, and when conducted in the Town:

1. For gross revenue totals up to \$70,000.00 per calendar month – zero percent (0%) of the gross monthly revenue;
2. For gross revenue totals between \$70,000.00 and \$100,000.00 per calendar month – two percent (2%) of the gross monthly revenue;
3. For gross revenue totals between \$100,000.00 and \$150,000.00 per calendar month – three percent (3%) of gross monthly revenues;
4. For gross revenue totals between \$150,000.00 and \$200,000.00 per calendar month – four percent (4%) of the gross monthly revenues;
5. For gross revenue totals between \$200,000.00 and \$250,000.00 per calendar month – five percent (5%) of the gross monthly revenues;

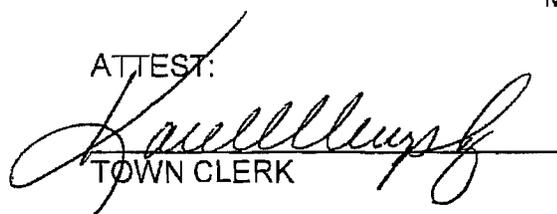
6. For gross revenue totals between \$250,000.00 and \$300,000.00 per calendar month – six percent (6%) of the gross monthly revenues;
7. For gross revenue totals between \$300,000.00 and \$350,000.00 per calendar month – seven percent (7%) of the gross monthly revenues;
8. For gross revenue totals between \$350,000.00 and \$400,000.00 per calendar month – eight percent (8%) of the gross monthly revenues;
9. For gross revenue totals between \$400,000.00 and \$450,000.00 per calendar month – nine percent (9%) of the gross monthly revenues;
10. For gross revenue totals between \$450,000.00 and \$500,000.00 per calendar month – ten percent (10%) of the gross monthly revenues;
11. For gross monthly revenue totals above \$500,000.00 per calendar month – twelve percent (12%) of the gross monthly revenues.

Section 2. This Ordinance shall be in full force and effect upon the date of its passage and publication.

PASSED by the Town Council, the Town of Ruston, at its regular meeting on April 7, 2003.



MAYOR KIM B. WHEELER

ATTEST:


TOWN CLERK

Appendix 3

TOWN OF RUSTON
ORDINANCE NO. 1182

AN ORDINANCE OF THE TOWN OF RUSTON, WA,
AMENDING RUSTON MUNICIPAL ORDINANCE NO. 1133
AND SECTION 5.02.020 OF THE RUSTON MUNICIPAL
CODE RELATING TO THE RATE FOR THE TAX IMPOSED
ON SOCIAL CARD GAMES.

Be it ordained by the Town Council of the Town of Ruston, Washington, as follows:

Section 1. Town of Ruston Ordinance 1133, passed April 7, 2003, and R.M.C. 5.02.020 shall be amended as follows:

5.02.020 Punch boards and pull tabs

(a) RCW 9.46 is hereby incorporated in total by reference, including definitions contained therein and any amendments which may be adopted.

(b) There is hereby levied a tax upon the gross revenue of bingo, raffles, and amusement games which shall be imposed upon and collected from bona fide charitable and nonprofit organizations duly licensed to conduct such activities in the Town of Ruston. The rate of tax imposed herein shall be ten percent (10%) of the net receipts received by the bona fide charitable or nonprofit organization conducting the activity. Bona fide charitable or non-profit organizations conducting such activities no more than once each calendar year and earning less than \$10,000.00 gross annual revenue therefrom shall be exempt from taxation under this resolution, but shall nevertheless file the declaration of intent required by Section 5.02.020 (e) herein.

(c) There is hereby levied a tax which shall be imposed upon and collected from all persons, associations, or organizations including, but not limited to all bona fide charitable or nonprofit organizations, which utilize or operate punch boards and/or pull tabs within the boundaries of the Town of Ruston. The rate of tax imposed herein shall be three and one-half percent (3.5%) of the gross receipts from such punch boards and/or pull tabs.

(d) The collection of the tax imposed by sections 2 and 3 shall be by the Clerk-Treasurer pursuant to rules established herein, and such additional rules and regulations as may be adopted by the Washington State Gambling Commission and/or the Pierce County Commissioners.

(e) For the purpose of identifying who shall be taxed, any organization or business intending to conduct any of the activities described in subsections (b) and (c) above within the Town of Ruston from and after the effective date of this chapter, shall prior to the commencement of such activity, file with the Clerk-Treasurer a sworn declaration of intent to conduct or operate such activity, together with a copy of the

license issued by the Washington State Gambling Commission, and thereafter for any period covered by such license, on or before the 15th day of each month, file with the Clerk-Treasurer a sworn statement on a form to be provided and prescribed by the Clerk-Treasurer for the purpose of ascertaining the tax due for the preceding month.

(f) A new declaration of intent to conduct or operate any of the activities described in subsections (b) and (c) herein shall be required prior to the recommencement of the activity following the expiration, suspension, or revocation of any license previously issued by the State Gambling Commission, in the same manner as described in subsection (e) above.

(g) The tax shall be paid by the 15th day of the month following that in which the revenue is received.

(h) The officers, directors, and managers of any organization, licensed by the State Gambling Commission to operate or conduct any of the activities described in subsections (b) and (c), who fail or refuse to pay the tax levied in subsections (b) and (c), or who knowingly falsify any statements required by subsections (b) and (c), shall be held jointly and severally, financially liable, and in addition shall be held individually guilty of a gross misdemeanor in the county jail for not more than ninety (90) days or by a fine of not more than \$300.00, or both.

(i) The Clerk-Treasurer shall adopt and publish such rules and regulations as are necessary to enable the collection of the tax imposed in subsections (b) and (c) herein and shall further prescribe and issue the appropriate forms for determination and declaration of the amount of tax to be paid.

(j) The premises and paraphernalia, and all the books and records of any organization or business conducting or operating any of the activities described in subsections (b) and (c) herein shall be subject to inspection and audit at any reasonable time, with or without notice, upon demand by the Town of Ruston or its designee.

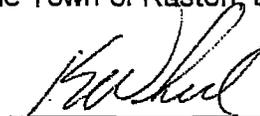
(k) There is hereby imposed a tax, at the rates set forth below, upon social card games when authorized by Chapter 9.46 RCW, and when conducted in the Town:

1. For gross revenue totals up to \$70,000.00 per calendar month – one percent (1%) of the gross monthly revenue;
2. For gross revenue totals between \$70,000.00 and \$100,000.00 per calendar month – two percent (2%) of the gross monthly revenue;
3. For gross revenue totals between \$100,000.00 and \$150,000.00 per calendar month – three percent (3%) of gross monthly revenues;
4. For gross revenue totals between \$150,000.00 and \$200,000.00 per calendar month – four percent (4%) of the gross monthly revenues;
5. For gross revenue totals between \$200,000.00 and \$250,000.00 per calendar month – five percent (5%) of the gross monthly revenues;

6. For gross revenue totals between \$250,000.00 and \$300,000.00 per calendar month – six percent (6%) of the gross monthly revenues;
7. For gross revenue totals between \$300,000.00 and \$350,000.00 per calendar month – seven percent (7%) of the gross monthly revenues;
8. For gross revenue totals between \$350,000.00 and \$400,000.00 per calendar month – eight percent (8%) of the gross monthly revenues;
9. For gross revenue totals between \$400,000.00 and \$450,000.00 per calendar month – nine percent (9%) of the gross monthly revenues;
10. For gross revenue totals between \$450,000.00 and \$500,000.00 per calendar month – ten percent (10%) of the gross monthly revenues;
11. For gross monthly revenue totals above \$500,000.00 per calendar month – twelve percent (12%) of the gross monthly revenues.

Section 2. This Ordinance shall be in full force and effect upon the date of its passage and publication.

PASSED by the Town Council, the Town of Ruston, at its regular meeting on December 19, 2005.



MAYOR KIM B. WHEELER

ATTEST:


TOWN CLERK

Appendix 4

TOWN OF RUSTON
ORDINANCE NO. 1253

**AN ORDINANCE OF THE TOWN OF RUSTON AMENDING RUSTON
MUNICIPAL ORDINANCE 1182 AND SECTION 5.02.020 OF THE
RUSTON MUNICIPAL CODE RELATING TO THE RATE FOR THE TAX
IMPOSED ON SOCIAL CARD GAMES**

Whereas the Town Council of Ruston is responsible to assure that the Town generates sufficient revenue to support the Town's operation, and:

Whereas the Town is currently examining a wide range of fee increases and new revenue initiatives to meet the current annual budget shortfall, and:

Whereas the Council finds that the taxing structure of social card games created in December 2005 is not aligned with taxing levels established by state law and currently imposed in other area jurisdictions; now therefore,

Be it ordained by the Town Council of the Town of Ruston, Washington, as follows:

Section 1. Town of Ruston Ordinance 1182, passed December 19, 2005, and R.M.C. 5.02.020 shall be amended as follows:

5.02.020 Punch boards and pull tabs.

(a) Chapter 9.46 RCW is hereby incorporated in total by reference, including definitions contained therein and any amendments which may be adopted.

(b) There is hereby levied a tax upon the gross revenue of bingo, raffles, and amusement games which shall be imposed upon and collected from bona fide charitable and nonprofit organizations duly licensed to conduct such activities in the Town of Ruston. The rate of tax imposed herein shall be 10percent of the net receipts received by the bona fide charitable or nonprofit organization conducting the activity. Bona fide charitable or nonprofit organizations conducting such activities no more than once each calendar year and earning less than \$10,000 gross annual revenue there from shall be exempt from taxation under this section, but shall nevertheless file the declaration of intent required by subsection (e) of this section.

Ordinance No. 1253
July 7, 2008
Page 1 of 4

(c) There is hereby levied a tax which shall be imposed upon and collected from all persons, associations, or organizations including, but not limited to, all bona fide charitable or nonprofit organizations, which utilize or operate punch boards and/or pull tabs within the boundaries of the Town of Ruston. The rate of tax imposed herein shall be three and one-half percent of the gross receipts from such punch boards and/or pull tabs.

(d) The collection of the tax imposed by subsections (b) and (c) of this section shall be by the Clerk-Treasurer pursuant to rules established herein, and such additional rules and regulations as may be adopted by the Washington State Gambling Commission and/or the Pierce County Commissioners.

(e) For the purpose of identifying who shall be taxed, any organization or business intending to conduct any of the activities described in subsections (b) and (c) of this section within the Town of Ruston from and after the effective date of this chapter, shall prior to the commencement of such activity, file with the Clerk-Treasurer a sworn declaration of intent to conduct or operate such activity, together with a copy of the license issued by the Washington State Gambling Commission, and thereafter for any period covered by such license, on or before the fifteenth day of each month, file with the Clerk-Treasurer a sworn statement on a form to be provided and prescribed by the Clerk-Treasurer for the purpose of ascertaining the tax due for the preceding month.

(f) A new declaration of intent to conduct or operate any of the activities described in subsections (b) and (c) herein shall be required prior to the recommencement of the activity following the expiration, suspension, or revocation of any license previously issued by the State Gambling Commission, in the same manner as described in subsection (e) of this section.

(g) The tax shall be paid by the fifteenth day of the month following that in which the revenue is received.

(h) The officers, directors, and managers of any organization, licensed by the State Gambling Commission to operate or conduct any of the activities described in subsections (b) and (c) of this section, who fail or refuse to pay the tax levied in subsections (b) and (c) of this section, or who knowingly falsify any statements required by subsections (b) and (c) of this section, shall be held jointly and severally, financially liable, and in addition shall be held individually guilty of a gross misdemeanor in the County Jail for not more than 90 days or by a fine of not more than \$300.00, or both.

(i) The Clerk-Treasurer shall adopt and publish such rules and regulations as are necessary to enable the collection of the tax imposed in subsections (b) and (c) herein and shall further prescribe and issue the appropriate forms for determination and declaration of the amount of tax to be paid.

(j) The premises and paraphernalia, and all the books and records of any organization or business conducting or operating any of the activities described in subsections (b) and (c) of this section shall be subject to inspection and audit at any reasonable time, with or without notice, upon demand by the Town of Ruston or its designee.

~~(k) There is hereby imposed a tax, at the rates set forth below, upon social card games when authorized by Chapter 9.46 RCW, and when conducted in the Town:~~

- ~~(1) For gross revenue totals up to \$70,000 per calendar month: one percent of the gross monthly revenue;~~
- ~~(2) For gross revenue totals between \$70,000 and \$100,000 per calendar month: two percent of the gross monthly revenue;~~
- ~~(3) For gross revenue totals between \$100,000 and \$150,000 per calendar month: three percent of gross monthly revenues;~~
- ~~(4) For gross revenue totals between \$150,000 and \$200,000 per calendar month: four percent of the gross monthly revenues;~~
- ~~(5) For gross revenue totals between \$200,000 and \$250,000 per calendar month: five percent of the gross monthly revenues;~~
- ~~(6) For gross revenue totals between \$250,000 and \$300,000 per calendar month: six percent of the gross monthly revenues;~~
- ~~(7) For gross revenue totals between \$300,000 and \$350,000 per calendar month: seven percent of the gross monthly revenues;~~
- ~~(8) For gross revenue totals between \$350,000 and \$400,000 per calendar month: eight percent of the gross monthly revenues;~~
- ~~(9) For gross revenue totals between \$400,000 and \$450,000 per calendar month: nine percent of the gross monthly revenues;~~
- ~~(10) For gross revenue totals between \$450,000 and \$500,000 per calendar month: 10 percent of the gross monthly revenues;~~
- ~~(11) For gross monthly revenue totals above \$500,000 per calendar month: 12 percent of the gross monthly revenues. (Ord. 660, Dec. 2nd, 1974; Ord. 1132 § 1, March 17th, 2003; Ord. 1133 § 1, April 7th, 2003; Ord. 1182 § 1, Dec. 19th, 2005).~~

(k) There is hereby imposed a tax of twelve percent (12%) of the gross monthly revenue upon social card games when authorized by Chapter 9.46 RCW and when conducted in the Town of Ruston.

PASSED BY THE TOWN COUNCIL AT ITS REGULAR MEETING ON JULY 7, 2008.


Mayor Robert G. Everding

ATTEST:


Town Clerk-Treasurer

Ordinance No. 1253
July 7, 2008
Page 4 of 4

Appendix 5

**TOWN OF RUSTON
ORDINANCE NO. 1316**

AN ORDINANCE OF THE TOWN OF RUSTON, WASHINGTON, AMENDING CHAPTER 5.02 OF THE RUSTON MUNICIPAL CODE TO PROHIBIT HOUSE-BANKED SOCIAL CARD GAMES WITHIN THE TOWN OF RUSTON, SUBJECT TO AND CONTINGENT UPON PASSAGE OF A REFERENDUM TO THE VOTERS OF THE TOWN.

WHEREAS, RCW 9.46.295 gives municipal governments authority to absolutely prohibit any or all licensed gambling activities within the jurisdictional limits of the municipality; and

WHEREAS, the Town Council of the Town of Ruston finds that the issue of whether or not to continue to allow house-banked social card games within the Town of Ruston is of great public interest, controversy, and concern, and should be decided by the citizens of the Town as a body rather than by the Town Council in the ordinary course of business; and

WHEREAS, the Town Council of the Town of Ruston therefore finds that it would be in the best interest of, and most consonant with the wishes of, the citizens of the Town, to put the issue of whether or not to continue to allow house-banked social card games within the Town of Ruston to public vote as a referendum under the provisions of RCW 29A.36.071;

NOW, THEREFORE, THE TOWN COUNCIL OF THE TOWN OF RUSTON, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. New Sections RMC 5.02.030, RMC 5.02.040, and RMC 5.02.050 are hereby added to Chapter 5.02 RMC. The new Sections 5.02.030, 5.02.040, and 5.02.050 shall read in their entirety as follows:

5.02.030 House-Banked Social Card Games Prohibited.

The operation of house-banked social card games as defined by RCW 9.46.0282 is prohibited within the Town of Ruston.

Ordinance No. 1316
August 2, 2010
Page 1 of 2

5.02.040 Exemption.

Bona fide charitable or nonprofit organizations as defined in RCW 9.46.0209 may operate or conduct social card games pursuant to RCW 9.46.0311.

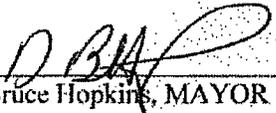
5.02.050 Violation - Penalty.

Any person who violates or fails to comply with any of the provisions of this Chapter shall be guilty of a misdemeanor.

Section 2. Referendum. This Ordinance shall be summarized in a referendum measure pursuant to RCW 29A.36.071; said referendum measure shall be placed on the ballot at the next general election following the enactment by the Council of this Ordinance 1316, and this Ordinance shall not take effect unless and until a majority of the voters in said election approve said referendum measure.

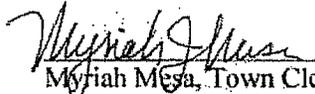
Section 3. Effective Date. If the referendum measure contemplated by Section 3 herein is approved by the voters, this Ordinance shall take effect upon certification of the election results by the Pierce County Auditor's Office.

ENACTED by the Town Council of the Town of Ruston in open public meeting,
SIGNED by the Mayor and attested by the Town Clerk in authentication of such passage
this 2 day of August, 2010.



Bruce Hopkins, MAYOR

ATTEST:



Myriah Mesa, Town Clerk

Ordinance No. 1316
August 2, 2010
Page 2 of 2

Appendix 6

TOWN OF RUSTON

ORDINANCE NO. 1326

AN ORDINANCE OF THE TOWN COUNCIL OF THE TOWN OF RUSTON, REPEALING TOWN OF RUSTON ORDINANCE No. 1253 AND AMENDING RMC 5.02.020, CONCERNING TAXATION OF SOCIAL CARD GAMES.

WHEREAS, on July 7, 2008, the Ruston Town Council enacted Town of Ruston Ordinance No. 1253, imposing a 12% tax on revenues from social card games conducted within the Town of Ruston; and

WHEREAS, Ordinance 1253 was subsequently invalidated by an Order of the Pierce County Superior Court in Fabre et al. v. Town of Ruston, Pierce County Superior Court No. 08-2-10459-7, and no appeal was taken from said Order;

NOW THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE TOWN OF RUSTON, WASHINGTON:

Section 1. Town of Ruston Ordinance No. 1253 is hereby REPEALED.

Section 2. RMC 5.02.020 is hereby amended to read in its entirety as follows:

(a) Chapter 9.46 RCW is hereby incorporated in total by reference, including definitions contained therein and any amendments which may be adopted.

(b) There is hereby levied a tax upon the gross revenue of bingo, raffles, and amusement games which shall be imposed upon and collected from bona fide charitable and nonprofit organizations duly licensed to conduct such activities in the Town of Ruston. The rate of tax imposed herein shall be 10 percent of the net receipts received by the bona fide charitable or nonprofit organization conducting the activity. Bona fide charitable or nonprofit organizations conducting such activities no more than once each calendar year and earning less than \$10,000 gross annual revenue therefrom shall be exempt from taxation under this section, but shall nevertheless file the declaration of intent required by subsection (e) of this section.

(c) There is hereby levied a tax which shall be imposed upon and collected from all persons, associations, or organizations including, but not limited to, all bona fide charitable or nonprofit organizations, which utilize or operate punch boards and/or pull tabs within the boundaries of the Town of Ruston. The rate of tax imposed herein shall be three and one-half percent of the gross receipts from such punch boards and/or pull tabs.

(d) The collection of the tax imposed by subsections (b) and (c) of this section shall be by the Clerk-Treasurer pursuant to rules established herein, and such additional rules and regulations as may be adopted by the Washington State Gambling Commission and/or the Pierce County Commissioners.

(e) For the purpose of identifying who shall be taxed, any organization or business intending to conduct any of the activities described in subsections (b) and (c) of this section within the Town of Ruston from and after the effective date of this chapter, shall prior to the commencement of such activity, file with the Clerk-Treasurer a sworn declaration of intent to conduct or operate such activity, together with a copy of the license issued by the Washington State Gambling Commission, and thereafter for any period covered by such license, on or before the fifteenth day of each month, file with the Clerk-Treasurer a sworn statement on a form to be provided and prescribed by the Clerk-Treasurer for the purpose of ascertaining the tax due for the preceding month.

(f) A new declaration of intent to conduct or operate any of the activities described in subsections (b) and (c) herein shall be required prior to the recommencement of the activity following the expiration, suspension, or revocation of any license previously issued by the State Gambling Commission, in the same manner as described in subsection (e) of this section.

(g) The tax shall be paid by the fifteenth day of the month following that in which the revenue is received.

(h) The officers, directors, and managers of any organization, licensed by the State Gambling Commission to operate or conduct any of the activities described in subsections (b) and (c) of this section, who fail or refuse to pay the tax levied in subsections (b) and (c) of this section, or who knowingly falsify any statements required by subsections (b) and (c) of this section, shall be held jointly and severally, financially liable, and in addition shall be held individually guilty of a gross misdemeanor in the County Jail for not more than 90 days or by a fine of not more than \$300.00, or both.

(i) The Clerk-Treasurer shall adopt and publish such rules and regulations as are necessary to enable the collection of the tax imposed in subsections (b) and (c) herein and shall further prescribe and issue the appropriate forms for determination and declaration of the amount of tax to be paid.

(j) The premises and paraphernalia, and all the books and records of any organization or business conducting or operating any of the activities described in subsections (b) and (c) of this section shall be subject to inspection and audit at any reasonable time, with or without notice, upon demand by the Town of Ruston or its designee.

(k) ~~There is hereby imposed a tax of twelve percent (12%) of the gross monthly revenue upon social card games when authorized by Chapter 9.46 RCW and when conducted in the Town of Ruston.~~ There is hereby imposed a tax, at the rates set forth below, upon social card games when authorized by Chapter 9.46 RCW, and when conducted in the Town:

(1) For gross revenue totals up to \$70,000 per calendar month: one percent of the gross monthly revenue;

(2) For gross revenue totals between \$70,000 and \$100,000 per calendar month: two percent of the gross monthly revenue;

(3) For gross revenue totals between \$100,000 and \$150,000 per calendar month: three percent of the gross monthly revenue;

(4) For gross revenue totals between \$150,000 and \$200,000 per calendar month: four percent of the gross monthly revenue;

(5) For gross revenue totals between \$200,000 and \$250,000 per calendar month: five percent of the gross monthly revenue;

(6) For gross revenue totals between \$250,000 and \$300,000 per calendar month: six percent of the gross monthly revenue;

(7) For gross revenue totals between \$300,000 and \$350,000 per calendar month: seven percent of the gross monthly revenue;

(8) For gross revenue totals between \$350,000 and \$400,000 per calendar month: eight percent of the gross monthly revenue;

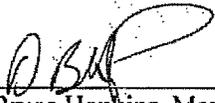
(9) For gross revenue totals between \$400,000 and \$450,000 per calendar month: nine percent of the gross monthly revenue;

(10) For gross revenue totals between \$450,000 and \$500,000 per calendar month: ten percent of the gross monthly revenue;

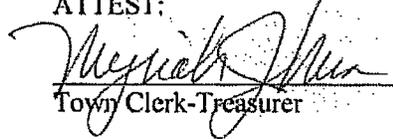
(11) For gross revenue totals above \$500,000 per calendar month: twelve percent of the gross monthly revenue.

Section 3. Effective Date. This ordinance shall be effective upon publication.

PASSED THE COUNCIL AND APPROVED by me this 23 day of Dec 2011.



Bruce Hopkins, Mayor

ATTEST:


Town Clerk-Treasurer

Appendix 7

**TOWN OF RUSTON
ORDINANCE NO. 1328**

**AN ORDINANCE OF THE TOWN OF RUSTON, WASHINGTON, REPEALING
TOWN OF RUSTON ORDINANCE No. 1316, AND RMC SECTIONS 5.02.030,
5.02.040, AND 5.02.050, REGARDING SOCIAL CARD GAMES.**

WHEREAS, On August 2, 2010, the Town Council of the Town of Ruston passed Ordinance No. 1316, prohibiting house-banked social card games, subject to the outcome of a referendum that asked the voters of the town whether Ordinance No. 1316, as passed by the Council, should be approved or rejected by the voters of the Town in the November 2, 2010 general election; and

WHEREAS, Steve Fabre has filed a civil lawsuit seeking, in part, a declaratory judgment invalidating the referendum; and

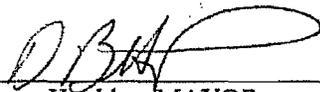
WHEREAS, the Town Council finds that it is in the Town's best interest to avoid useless and costly litigation over the validity or invalidity of Ordinance 1316 and the November 2 referendum;

**NOW, THEREFORE, THE TOWN COUNCIL OF THE TOWN OF RUSTON,
WASHINGTON, DOES ORDAIN AS FOLLOWS:**

Section 1. Town of Ruston Ordinance No. 1316, and RMC Sections 5.02.030, 5.02.040, and 5.02.050, are hereby REPEALED.

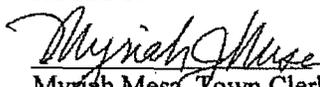
Section 2. Effective Date. This Ordinance shall take effect upon publication, as provided by law.

ENACTED by the Town Council of the Town of Ruston in open public meeting,
SIGNED by the Mayor and attested by the Town Clerk in authentication of such passage
this 7th day of February, 2011.



Bruce Hopkins, MAYOR

ATTEST:



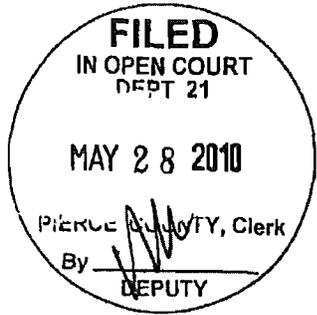
Myriah Mesa, Town Clerk

Ordinance No. 1328
February 7, 2011
Page 1 of 1

Appendix 8



08-2-10459-7 34410265 CTD 06-02-10



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IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STEVE FABRE,

Cause No: 08-2-10459-7

Plaintiff(s) ,

RULING

vs.

TOWN OF RUSTON,

Defendant(s) .

THIS COURT HEREBY DECLARES that Ordinance 1253 amending Ruston Municipal Code (RMC) § 5.02.020(k) was improperly enacted and is therefore VOID.

FINDINGS OF FACT

The Court adopts the facts stipulated to by the parties which are incorporated herein by reference.

CONCLUSIONS OF LAW

1. The Ruston Town Counsel failed to comply with its municipal code and its Rules of Procedure when it enacted Ordinance 1253.
2. Ruston Municipal Code 1.16.060(d) defines "law" which when appropriate, includes any and all rules and regulations promulgated thereunder. RMC 1.16.060(d).
3. Ruston Municipal Code 1.16.060(9) defines "ordinance" as a law of the town and provides that administrative actions may be in the form of a resolution. RMC 1.16.060(9).
4. Provisions of the Ruston Municipal Code and all proceedings under it are to be construed with a view to effect its objects and to promote justice. RMC 1.16.090.
5. Rule 22 of the Ruston Town Council Rules of Procedure adopted April 1, 2008 provides in relevant part that an ordinance may be put to its final passage on the same day on which it

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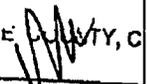
was introduced by a vote of one more than the majority of the members of the council. The term "majority" is not defined in the Rules of Procedure. The dictionary definition of "majority" is "a number greater than half of a total", Webster's Dictionary. In this case, the Ruston Town Council has five (5) members; therefore, a majority is three members. A majority plus one would require a vote of four (4) members of the Council.

- 6. The plain language of Rule 22(A) is clear. It requires a majority of the members of the Council plus one to pass an ordinance on the same day on which it was introduced. If, as defendants argue, the rule required a majority of the Council members "present" plus one to pass Ordinance 1253; four votes would still be required since three votes would be greater than half the total. Thus a majority plus one would require four votes under either interpretation of the rule.
- 7. In this case only three members of the Council voted for consider final passage of Ordinance 1253 on the same day it was introduced. Therefore, the Ordinance was not properly enacted pursuant to the Council's Rules of Procedure Rule 22(A).
- 8. An improperly enacted ordinance is void. Swartout vs. City of Spokane, 21 Wn.App.665, 673, 586 P2d 135 (1978). (Citing, Tennent vs. Seattle, 83 Wash. 108 (1914); Savage vs. Tacoma, 61 Wash. 1, (1910).
- 9. There is no evidence the Council's rules were suspended or otherwise amended prior to the vote on Ordinance 1253. Therefore, the Ordinance is void.
- 10. Since Ordinance 1253 was not properly enacted, this Court does not consider whether the Ordinance was void for vagueness due to the lack of an effective date. The Court also does not consider whether the tax proposed to be enacted through Ordinance 1253 complied with the intent of the Washington State Gambling Statute RCW 9.46.110 et seq.
- 11. Defendant's counterclaims are dismissed with prejudice. The Town of Ruston's counterclaims do not constitute a SLAPP suit under Washington law.
- 12. Plaintiff's request for attorney fees is DENIED.

DATED this 26th day of May, 2010.



 JUDGE FRANK CUTHBERTSON

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THE LAW OF MUNICIPAL CORPORATIONS

THIRD EDITION

EUGENE McQUILLIN

2003 REVISED VOLUME

By the Publisher's Editorial Staff

VOLUME 18

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The regulation of traffic is a governmental function, and a city may not be held liable for acts or omissions with respect to it;⁵ and this

ing commissioner through misinterpretation of code).

Ind. *Cummins v. City of Seymour*, 79 Ind. 491, 1881 WL 7142 (1881).

Kan. *Busch v. City of Augusta*, 9 Kan. App. 2d 119, 674 P.2d 1054 (1983).

Mich. *City of Pontiac v. Carter*, 32 Mich. 164, 1875 WL 6430 (1875).

Miss. *Anderson v. Vanderslice*, 240 Miss. 55, 126 So. 2d 522 (1961); *City of Hattiesburg v. Buckalew*, 240 Miss. 323, 127 So. 2d 428 (1961).

Mo. *Connelly v. City of Sedalia*, 222 Mo. App. 109, 2 S.W.2d 632 (1928).

Neb. *Greenwood v. City of Lincoln*, 156 Neb. 142, 55 N.W.2d 343, 34 A.L.R.2d 1203 (1952) (holding that city cannot ratify an act which it had no authority to perform).

N.Y. *Oeters v. City of New York*, 270 N.Y. 364, 1 N.E.2d 466 (1936); *Lacock v. City of Schenectady*, 224 A.D. 512, 231 N.Y.S. 379 (3d Dep't 1928), *aff'd*, 251 N.Y. 575, 168 N.E. 433 (1929).

N.C. *Baker v. City of Lumberton*, 239 N.C. 401, 79 S.E.2d 886 (1954); *Hamilton v. Town of Hamlet*, 238 N.C. 741, 78 S.E.2d 770 (1953).

Pa. *Betham v. City of Philadelphia*, 196 Pa. 302, 46 A. 448 (1900).

Tex. *Green v. City of Amarillo*, 244 S.W. 241 (Tex. Civ. App. Amarillo 1922), writ granted, (Dec. 13, 1922) and *aff'd*, 267 S.W. 702 (Tex. Comm'n App. 1924) (city immunity same as state's).

W. Va. *Hayes v. Town of Cedar Grove*, 126 W. Va. 828, 30 S.E.2d 726, 156 A.L.R. 702 (1944).

⁵ **Fla.** *City of Miami v. Albro*, 120 So. 2d 23 (Fla. Dist. Ct. App. 3d

Dist. 1960) (standards of care required of traffic officer).

Ill. *Locigno v. City of Chicago*, 32 Ill. App. 2d 412, 178 N.E.2d 124 (1st Dist. 1961); *Scarpaci v. City of Chicago*, 329 Ill. App. 434, 69 N.E.2d 100 (1st Dist. 1946).

Iowa. *Bradley v. City of Oskaloosa*, 193 Iowa 1072, 188 N.W. 896 (1922).

Kan. *Wilburn v. Boeing Airplane Co.*, 188 Kan. 722, 366 P.2d 246 (1961).

Ky. *Sandmann v. Sheehan*, 279 Ky. 614, 131 S.W.2d 484 (1939).

Minn. *Luke v. City of Anoka*, 277 Minn. 1, 151 N.W.2d 429 (1967).

Mo. *Gillen v. City of St. Louis*, 345 S.W.2d 69 (Mo. 1961); *Carruthers v. City of St. Louis*, 341 Mo. 1073, 111 S.W.2d 32 (1937).

N.J. *Visidor Corp. v. Borough of Cliffside Park*, 48 N.J. 214, 225 A.2d 105 (1966) (involving invalid designation of avenue as one-way street).

N.C. *Hamilton v. Town of Hamlet*, 238 N.C. 741, 78 S.E.2d 770 (1953); *Rappe v. Carr*, 4 N.C. App. 497, 167 S.E.2d 48 (1969).

N.D. *Hanson v. Berry*, 54 N.D. 487, 209 N.W. 1002, 47 A.L.R. 816 (1926).

Okla. *Young v. Chicago R. I.&P. R. Co.*, 1975 OK 130, 541 P.2d 191 (Okla. 1975); *Kirk v. City of Muskogee*, 1938 OK 526, 183 Okla. 536, 83 P.2d 594 (1938).

Tex. *City of Austin v. Daniels*, 160 Tex. 628, 335 S.W.2d 753, 81 A.L.R.2d 1180 (1960); *Sarmiento v. City of Corpus Christi*, 465 S.W.2d 813 (Tex. Civ. App. Corpus Christi 1971) (school crossing guard hired by city).

includes the regulation and control of street parking,⁶ and the maintenance and checking of parking meters.⁷

However, there is authority to the effect that a police officer's negligence in performing routine operational duties may subject the municipality to liability.⁸

§ 53.22.40 — Passage, enforcement and repeal of ordinances.

West Key No. Digests

Municipal Corporations ⇨ 723 to 732, 745.5, 747

Jurisprudence

Am. Jur. Municipal and State Tort Liability §§ 67 to 70

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The enactment of ordinances is a legislative function as is also their enforcement.¹ Consequently, where immunity is conferred

City was not liable for failure of police officers to direct traffic around stalled car with which motorist collided, or to remove the car from the roadway. *Jackson v. City of Corpus Christi*, 484 S.W.2d 806 (Tex. Civ. App. Corpus Christi 1972), writ refused n.r.e., (Dec. 27, 1972).

⁶ **Tex.** *City of Austin v. Daniels*, 160 Tex. 628, 335 S.W.2d 753, 81 A.L.R.2d 1180 (1960).

Municipal off-street parking, see § 53.107.10.

⁷ **Okla.** *White v. City of Lawton*, 373 P.2d 25 (Okla. 1961) (painting and maintenance of lines, designating parking area within meter zones).

⁸ **Tenn.** *Johnson v. City of Jackson*, 194 Tenn. 20, 250 S.W.2d 1, 33 A.L.R.2d 756 (1952).

⁸ **Fla.** *Kaisner v. Kolb*, 543 So. 2d 732 (Fla. 1989).

[Section 53.22.40]

¹ **U.S.** *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998).

Traweek v. City and County of San Francisco, 659 F. Supp. 1012 (N.D. Cal. 1984), *aff'd* in part, vacated in part on other grounds, 920 F.2d 589 (9th Cir. 1990); *City of Philadelphia, to Use of Warner Co. v. National Sur. Corp.*, 48 F. Supp. 381 (E.D. Pa. 1942), judgment *aff'd*, 140 F.2d 805 (C.C.A. 3d Cir. 1944).

D.C. *Roberson v. District of Columbia*, 86 A.2d 536 (Mun. Ct. App. D.C. 1952).

Mo. *Bean v. City of Moberly*, 350 Mo. 975, 169 S.W.2d 393 (1943), citing this treatise.

upon those acts performed in the exercise of a legislative function, no recovery may be allowed in a proceeding asserting the invalidity of a municipal enactment.² An ordinance or resolution must be a purely legislative act to enjoy immunity.³ Unless the duty to make such an enactment is imposed by statute,⁴ the failure to pass a needful law or ordinance is the omission by the state, or city as an agency of the state, of a legislative duty for which no action lies,⁵ and in most

N.Y. Whittaker v. Village of Franklinville, 265 N.Y. 11, 191 N.E. 716, 93 A.L.R. 1351 (1934).

N.C. Wall v. City of Raleigh, 121 N.C. App. 351, 465 S.E.2d 551 (1996).

Ohio. In enacting ordinances, a municipality is engaged in the most elemental of its governmental functions, the exercise of its police power. Superior Uptown, Inc. v. City of Cleveland, 39 Ohio St. 2d 36, 68 Ohio Op. 2d 21, 313 N.E.2d 820 (1974).

Okla. Fidelity Laboratories v. Oklahoma City, 1942 OK 289, 191 Okla. 473, 130 P.2d 834 (1942).

Tenn. Powell v. City of Nashville, 167 Tenn. 334, 69 S.W.2d 894, 92 A.L.R. 1493 (1934) (failure to enforce ordinance relating to stop sign).

Va. Jones v. City of Williamsburg, 97 Va. 722, 34 S.E. 883 (1900).

Enactment of ordinances, see § 16.01 et seq., enforcement, § 27.01 et seq.

² **U.S.** Knights of Columbus v. Town of Lexington, 138 F. Supp. 2d 136 (D. Mass. 2001) (challenging regulation prohibiting unattended structures in town parks, legislative immunity applies).

Ill. Glenn v. City of Chicago, 256 Ill. App. 3d 825, 195 Ill. Dec. 380, 628 N.E.2d 844 (1st Dist. 1993).

N.C. Wall v. City of Raleigh, 121 N.C. App. 351, 465 S.E.2d 551 (1996).

Okla. McCracken v. City of Lawton, 1982 OK 63, 648 P.2d 18 (Okla. 1982) (construing tort immunity act to preclude claim for attorney fees in action contesting zoning regulations).

³ **N.J.** Seal Tite Corp. v. Bressi, 312 N.J. Super. 532, 712 A.2d 262 (App. Div. 1998).

⁴ **Iowa.** State ex rel. Wright v. Iowa State Board of Health, 233 Iowa 872, 10 N.W.2d 561 (1943) (permissive grant of power to adopt ordinances).

⁵ **U.S.** Knights of Columbus v. Town of Lexington, 138 F. Supp. 2d 136 (D. Mass. 2001) (challenging regulation prohibiting unattended structures in town parks, legislative immunity applies).

Bogan v. Scott-Harris, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998).

Colo. Noble v. Canon City, 73 Colo. 374, 215 P. 867 (1923).

Ill. Glenn v. City of Chicago, 256 Ill. App. 3d 825, 195 Ill. Dec. 380, 628 N.E.2d 844 (1st Dist. 1993).

Iowa. Heller v. Smith, 188 N.W. 878 (Iowa 1922), on reh'g, 196 Iowa 104, 194 N.W. 271 (1923).

La. Taylor v. City of Shreveport, 29 So. 2d 792 (La. Ct. App. 2d Cir. 1947) (operation of buses at safety zones).

Md. Cox v. Board of Com'rs of Anne Arundel County, 181 Md. 428,

jurisdictions a municipality is not liable for failure to enforce ordinances and laws which have been enacted.⁶ The United States

31 A.2d 179 (1943) (animals running at large).

Minn. Curran v. Chicago Great Western Ry. Co., 134 Minn. 392, 159 N.W. 955 (1916).

N.J. Visidor Corp. v. Borough of Cliffside Park, 48 N.J. 214, 225 A.2d 105 (1966) (involving invalid designation of avenue as one-way street).

Va. Jones v. City of Williamsburg, 97 Va. 722, 34 S.E. 883 (1900).

Wash. Kitsap County Transp. Co., Inc. v. City of Seattle, 75 Wash. 673, 135 P. 476 (1913).

⁶ **U.S.** 400*Fowle v. Common Council of Alexandria, 28 U.S. 398, 7 L. Ed. 719 (1830); Clark v. Atlantic City, 180 F. 598 (C.C.D. N.J. 1910).

Cal. Shipley v. City of Arroyo Grande, 92 Cal. App. 2d 748, 208 P.2d 51 (2d Dist. 1949); Campbell v. City of Santa Monica, 51 Cal. App. 2d 626, 125 P.2d 561 (2d Dist. 1942) (lack of signs, barricades, or police in streets).

Colo. Veraguth v. City of Denver, 19 Colo. App. 473, 76 P. 539 (1904).

Conn. Thelin v. Downs, 109 Conn. 662, 145 A. 50 (1929) (permitting party wall to stand in street).

D.C. Roberson v. District of Columbia, 86 A.2d 536 (Mun. Ct. App. D.C. 1952).

Ill. Glenn v. City of Chicago, 256 Ill. App. 3d 825, 195 Ill. Dec. 380, 628 N.E.2d 844 (1st Dist. 1993).

Roumbos v. City of Chicago, 332 Ill. 70, 163 N.E. 361, 60 A.L.R. 87 (1928); Chambers v. Palaggi, 88 Ill. App. 2d 221, 232 N.E.2d 69 (1st Dist. 1967); Stigler v. City of Chicago, 48 Ill. 2d 20, 268 N.E.2d 26 (1971).

The city is not liable for failing to enforce an ordinance enacted to benefit the public health and safety of

the people of the city, such as, a housing code, in the absence of any statutory imposition of liability. Stigler v. City of Chicago, 48 Ill. 2d 20, 268 N.E.2d 26 (1971).

Ind. City of Gary By and Through Dept. of Redevelopment v. Ruberto, 171 Ind. App. 1, 354 N.E.2d 786 (3d Dist. 1976).

Iowa. Heller v. Town of Portsmouth, 196 Iowa 104, 194 N.W. 271 (1923) (negligent firing of anvils in public ways).

Kan. Kebert v. Board of Com'rs of Wilson County, 134 Kan. 401, 5 P.2d 1085 (1931) (sewer construction ordinances).

Ky. Martin v. City of Winchester, 278 Ky. 200, 128 S.W.2d 543 (1939).

Md. Wynkoop v. City of Hagerstown, 159 Md. 194, 150 A. 447 (1930).

Mich. Scheurman v. Department of Transp., 434 Mich. 619, 456 N.W.2d 66 (1990) (failure to enforce ordinance requiring property owners to trim hedges).

Miss. Bradley v. City of Jackson, 153 Miss. 136, 119 So. 811 (1928).

Mo. Strother v. Kansas City, 316 Mo. 1067, 296 S.W. 795 (1927); Ryan v. Kansas City, 232 Mo. 471, 134 S.W. 566 (1911); Von Der Haar v. City of St. Louis, 226 S.W.2d 376 (Mo. Ct. App. 1950).

N.H. The enforcement of laws in general, and zoning ordinances in particular, is the kind of discretionary, governmental activity which as a general proposition ought not to lead to tort liability. Hurley v. Town of Hudson, 112 N.H. 365, 296 A.2d 905 (1972).

Supreme Court has held that local government officials have absolute immunity from personal liability for voting on an ordinance, as long as the ordinance in question is "quintessentially legislative."⁷ Whether an act is legislative, and thus protected by absolute immunity, turns on the nature of the act itself rather than on the motive or intent of the official performing it.⁸ The court pointed out that immunity is especially important at the local level where legislators

N.J. *Brown v. Klein*, 133 N.J.L. 533, 45 A.2d 319 (N.J. Sup. Ct. 1946), judgment aff'd, 135 N.J.L. 19, 48 A.2d 780 (N.J. Ct. Err.&App. 1946) (not in laches in enforcing provisions of ordinance); *Kilburg v. Township Committee of Hillside Tp.*, 14 N.J. Super. 533, 82 A.2d 499 (Law Div. 1951) (failure to enforce penalty provision of zoning ordinance).

N.Y. *Whitney v. City of New York*, 27 A.D.2d 528, 275 N.Y.S.2d 783 (1st Dep't 1966) (failure to conduct inspections of boiler as required by city administrative code); *Stranger v. New York State Elec.&Gas Corp.*, 25 A.D.2d 169, 268 N.Y.S.2d 214 (3d Dep't 1966) (use of defective open-flame gas heater in violation of building and housing codes); *Reid v. City of Niagara Falls*, 29 Misc. 2d 855, 216 N.Y.S.2d 850 (Sup 1961) (abatement of nuisances); *Meadows v. Village of Mineola*, 190 Misc. 815, 72 N.Y.S.2d 368 (Sup 1947) (building codes).

N.C. *Hull v. Town of Roxboro*, 142 N.C. 453, 55 S.E. 351 (1906).

Ohio. *City of Mansfield v. Bristler*, 76 Ohio St. 270, 81 N.E. 631 (1907); *Bidinger v. City of Circleville*, 86 Ohio L. Abs. 449, 177 N.E.2d 408 (Ct. App. 4th Dist. Pickaway County 1961) (enforcement or lack of enforcement of criminal ordinances).

Okla. *Marth v. City of Kingfisher*, 1908 OK 227, 22 Okla. 602, 98 P. 436 (1908).

Burden of the asserted failure of the railroad company to fulfill its statutory duty to erect suitable crossing signals cannot be thrust upon the city to make it liable for the railroad's asserted negligence. *Young v. Chicago R. I.&P. R. Co.*, 1975 OK 130, 541 P.2d 191 (Okla. 1975).

Pa. *Jacob v. City of Philadelphia*, 333 Pa. 584, 5 A.2d 176 (1939); *Doughty v. Philadelphia Rapid Transit Co.*, 321 Pa. 136, 184 A. 93 (1936), citing this treatise; *Smith v. Borough of Selinsgrove*, 199 Pa. 615, 49 A. 213 (1901); *Weckler v. City of Philadelphia*, 178 Pa. Super. 496, 115 A.2d 898 (1955).

Tex. *City of Desdemona v. Wilhite*, 297 S.W. 874 (Tex. Civ. App. Eastland 1927).

Any irregularity in city's procedures in amending site plan in exercise of zoning power was governmental function and hence city was immune from liability for damages in connection therewith. *Young v. Jewish Welfare Federation of Dallas*, 371 S.W.2d 767 (Tex. Civ. App. Dallas 1963), writ refused n.r.e., (Mar. 4, 1964).

⁷ **U.S.** *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998) (local legislator voting on budget ordinance which eliminated city positions).

⁸ **U.S.** *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998).

are often part-time employees of the city.⁹ Tort liability may not be imposed upon a city for violation of an ordinance, even though the ordinance has become the standard of care and the measure of liability so far as the conduct of members of the general public is concerned.¹⁰ Although a city may not be liable for failure to enforce the state law, it cannot be excused for violating its duty, to avoid the creation of conditions that are dangerous to its citizens or the public generally, by encouraging individuals to disobey it. And, in some circumstances liability may be imposed on a city for a nuisance resulting from a violation of law.¹¹

The statement of the general rule is sometimes varied to the effect that, while the ordinances¹² themselves do not make a *prima facie* case they may be considered with other facts in determining the question of negligence or no negligence on the part of the city.¹³ It has been often held that an exception to the general rule exists with reference to maintaining public streets and ways in a reasonable condition for public travel in the usual modes.¹⁴ However, such duty exists in most jurisdictions irrespective of the enactment or enforcement of ordinances for this purpose.¹⁵

This rule of nonliability applies although the charter makes it the duty of the mayor, councilmen, and chief of police to enforce diligently all ordinances the council may enact.¹⁶ So, it is also held that there is no liability arising from the fact that an ordinance has been suspended.¹⁷ Likewise, there is generally no liability even though the ordinances relate to the use of streets, provided the failure to pass or enforce an ordinance does not result in an actionable defect in a street or the creation of a nuisance.¹⁸ The rule that a municipal

⁹ **U.S.** *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998).

¹⁰ **Mo.** *Bean v. City of Moberly*, 350 Mo. 975, 169 S.W.2d 393 (1943).

¹¹ **Cal.** *Quelvog v. City of Long Beach*, 6 Cal. App. 3d 584, 86 Cal. Rptr. 127 (2d Dist. 1970).

¹² **Ohio.** *Gaines v. Village of Wyoming*, 147 Ohio St. 491, 34 Ohio Op. 406, 72 N.E.2d 369 (1947).

Nuisances, see § 53.59.10 et seq.

¹³ **Mo.** *Salmon v. Kansas City*, 241 Mo. 14, 145 S.W. 16 (1912).

¹⁴ **Kan.** *Everly v. Adams*, 95 Kan. 305, 147 P. 1134 (1915).

¹⁵ See ch 54.

¹⁶ **Colo.** *Veraguth v. City of Denver*, 19 Colo. App. 473, 76 P. 539 (1904).

¹⁷ **Ariz.** *Fifield v. Common Council of City of Phoenix*, 4 Ariz. 283, 36 P. 916 (1894) (ordinance forbidding discharge of fireworks).

¹⁸ **N.Y.** *Shaw v. Village of Hempstead*, 15 Misc. 2d 72, 177 N.Y.S.2d 744 (Sup 1958), order modified, 11 A.D.2d 789, 204 N.Y.S.2d 945 (2d Dep't 1960) (defective fire prevention devices).

corporation is not liable for the nonexercise of its legislative powers, or for failure to enforce its ordinances, should be reasonably applied.¹⁹ To illustrate, municipal liability is denied for failure to enforce such ordinances as, among others,²⁰ the following: an ordinance forbidding the unlawful use of the streets, as by coasting (unless such use amounts to the maintenance of a public nuisance);²¹ an ordinance prohibiting swine, cattle, dogs or other animals from running at large;²² a housing code requiring removal or covering flaking paint containing more than one percent lead compounds;²³ an ordinance forbidding the use of fireworks within the corporate limits;²⁴ and an ordinance directing the city to remove

¹⁹ N.Y. Speir v. City of Brooklyn, 139 N.Y. 6, 34 N.E. 727 (1893).

²⁰ Ohio. Bidinger v. City of Circleville, 86 Ohio L. Abs. 449, 177 N.E.2d 408 (Ct. App. 4th Dist. Pickaway County 1961) (ordinance enfranchising garbage and trash collector).

²¹ D.C. Roberson v. District of Columbia, 86 A.2d 536 (Mun. Ct. App. D.C. 1952) (permitting loitering and playing with wagons in street).

Ohio. City of Mingo Junction v. Sheline, 130 Ohio St. 34, 3 Ohio Op. 78, 196 N.E. 897 (1935) (closing off street for coasting).

²² Colo. Addington v. Town of Littleton, 50 Colo. 623, 115 P. 896 (1911) (taking and killing vicious dogs).

Municipality could not be held liable for injuries suffered by minor bitten by a dog belonging to residents, even if municipality had insurance coverage, where claim against municipality arose prior to effective date of Governmental Immunity Torts Act, and was based on municipality's failure to enforce or negligent enforcement of ordinance relating to impounding of

vicious dogs. Ochoa v. Sherman, 534 P.2d 834 (Colo. Ct. App. 1975).

N.Y. Levy v. City of New York, 3 N.Y. Super. Ct. 465 (1848).

Wis. Kelley v. City of Milwaukee, 18 Wis. 83, 1864 WL 2282 (1864).

²³ Ill. Stigler v. City of Chicago, 48 Ill. 2d 20, 268 N.E.2d 26 (1971).

²⁴ Ariz. Fifield v. Common Council of City of Phoenix, 4 Ariz. 283, 36 P. 916 (1894).

Iowa. Ball v. Town of Woodbine, 61 Iowa 83, 15 N.W. 846 (1883).

Kan. Monical v. City of Howard, 139 Kan. 537, 31 P.2d 1000 (1934).

Mass. Morrison v. City of Lawrence, 98 Mass. 219, 1867 WL 5738 (1867).

N.C. Love v. City of Raleigh, 116 N.C. 296, 21 S.E. 503 (1895); Hill v. Aldermen of City of Charlotte, 72 N.C. 55, 1875 WL 2603 (1875).

Ohio. Robinson v. Village of Greenville, 42 Ohio St. 625, 1885 WL 57 (1885).

W. Va. Bartlett v. Town of Clarksburg, 45 W. Va. 393, 31 S.E. 918 (1898).

Wis. See Aron v. City of Wausau, 98 Wis. 592, 74 N.W. 354 (1898).

obstructions in a navigable river.²⁵ Likewise, the same rule has been enforced with respect to failure to enact and enforce ordinances to prevent riding of bicycles on sidewalks.²⁶

The repeal of ordinances is a legislative function,²⁷ as is the amendment of an ordinance is a legislative function.²⁸

§ 53.22.50 — Granting, refusing, or revoking licenses and permits.

West Key No. Digests

Municipal Corporations ⇨ 723 to 732, 748, 745.5, 749

ALR Annotations

Municipal liability for negligent performance of building inspector's duties, 24 AL5th 200

Jurisprudence

Am. Jur. Municipal and State Tort Liability §§ 67 to 70

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Municipal liability for negligence in issuing a building or safety permit is usually analyzed under the public duty doctrine, which is discussed in an earlier section.¹ Nevertheless, courts have also con-

²⁵ N.Y. Coonley v. City of Albany, 10 N.Y.S. 512 (Gen. Term 1890), aff'd, 132 N.Y. 145, 30 N.E. 382 (1892).

²⁶ Ala. Hill v. Reaves, 224 Ala. 205, 139 So. 263 (1932).

Ind. Millett v. City of Princeton, 167 Ind. 582, 79 N.E. 909 (1907).

N.Y. Walker v. City of New York, 107 A.D. 351, 95 N.Y.S. 121 (2d Dep't 1905); Rogers v. City of Binghamton, 101 A.D. 352, 92 N.Y.S. 179 (3d Dep't 1905), aff'd, 186 N.Y. 595, 79 N.E. 1115 (1906).

Va. Jones v. City of Williamsburg, 97 Va. 722, 34 S.E. 883 (1900).

²⁷ Tex. Brown v. Grant, 2 S.W.2d 285 (Tex. Civ. App. San Antonio 1928).

²⁸ N.J. Timber Properties, Inc. v. Chester Tp., 205 N.J. Super. 273, 500 A.2d 757 (Law Div. 1984).

See also § 53.04.10.
[Section 53.22.50]

¹ See § 53.04.40.

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THE LAW OF
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THIRD EDITION

EUGENE McQUILLIN

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By the Publisher's Editorial Staff

VOLUME 18

Cite as: **McQuillin Mun Corp § — (3rd Ed)**

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stadia and playing fields.⁴

§ 53.63.30 Streets, sewers.

West Key No. Digests

Municipal Corporations ⇨732, 745.5

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The ultra vires acts of a municipality pertaining to streets,¹ or to sewers and drains,² are not grounds for municipal tort liability.³

§ 53.63.40 Municipal businesses; utilities.

West Key No. Digests

Municipal Corporations ⇨733(1)

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fit in city park, acts of city officials in conducting fair under third party's management were not ultra vires as matter of law. *Scroggins v. City of Harlingen*, 131 Tex. 237, 112 S.W.2d 1035 (1938), judgment set aside on reh'g, 131 Tex. 237, 114 S.W.2d 853 (1938) (case remanded to consider minor issues not involving the main issue that the action was not ultra vires).

⁴ **Ga.** See *Pollock v. City of Albany*, 88 Ga. App. 737, 77 S.E.2d 579 (1953) (municipal powers as to stadium operation).

Miss. *City of Jackson v. McFadden*, 181 Miss. 1, 177 So. 755 (1937) (maintenance of stadium by city not ultra vires).

S.D. *Jensen v. Juul*, 66 S.D. 1, 278 N.W. 6, 115 A.L.R. 1280 (1938) (baseball park not ultra vires town).

[Section 53.63.30]

¹ See § 30.01 et seq.

² See § 31.01 et seq.

³ **U.S.** *Public Service Co. of New Hampshire v. Town of West Newbury*, 835 F.2d 380 (1st Cir. 1987) (town's selectmen determining permits invalidly issued not deprivation of property without due process).

Colo. A municipality which grants a mining company permission to build a flume in its streets is not liable to adjoining property, it having no power to make the grant. *Springs v. Woodward*, 10 Colo. 104, 14 P. 49 (1887).

N.D. *Johnson v. City of Granville*, 36 N.D. 91, 161 N.W. 721 (1917).

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There is no municipal liability for torts connected with the ultra vires conduct of public utilities.¹ For example, there is no liability for injuries caused by the operation of an electric light plant,² or a public ferry,³ or other business which the municipality operates.⁴

§ 53.64 Acts under void ordinances.

West Key No. Digests

Municipal Corporations ⇨723, 724, 732, 744, 745, 745.5

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No liability is created against a municipal corporation by acts of its officers done under an unconstitutional or void ordinance enacted in the exercise of governmental powers,¹ and a municipality is not

[Section 53.63.40]

¹ **N.M.** *Contra* see *Cole v. City of Las Cruces*, 99 N.M. 302, 657 P.2d 629 (1983) (operation of natural gas pipeline beyond geographical limit prescribed by statute).

Business conducted for profit, extent permissible, see § 36.02.

Utilities, see § 35.01 et seq.

² **Ala.** *Posey v. Town of North Birmingham*, 154 Ala. 511, 45 So. 663 (1907).

Ill. *Village of Palestine v. Siler*, 225 Ill. 630, 80 N.E. 345 (1907) (furnishing electricity to private users).

³ **La.** *Hoggard v. City of Monroe*, 51 La. Ann. 683, 25 So. 349 (1899).

⁴ **Tex.** *City of Dallas v. Smith*, 130 Tex. 225, 107 S.W.2d 872 (Comm'n App. 1937) (operating hospital for profit), citing this treatise.

Utah. *Lund v. Salt Lake County*, 58 Utah 546, 200 P. 510 (1921) (private enterprise, unauthorized).

Va. A city is not liable for injury caused by blasting in a rock quarry, whereby a plaintiff's horse became frightened and injured the plaintiff, if its operation of the quarry was unauthorized. *City of Radford v. Clark*, 113 Va. 199, 73 S.E. 571 (1912).

[Section 53.64]

¹ **U.S.** *Clark v. Atlantic City*, 180 F. 598 (C.C.D. N.J. 1910); *Masters v. Village of Bowling Green*, 101 F. 101 (C.C.N.D. Ohio 1899).

Ark. *Parish v. Pitts*, 244 Ark. 1239, 429 S.W.2d 45 (1968).

Ga. *Bond v. City of Royston*, 130 Ga. 646, 61 S.E. 491 (1908); *Bartlett*

liable in damages to a person arrested under a void ordinance passed in the exercise of its governmental functions.² The enforcement of a void ordinance by arrest is not actionable although the license revenues arising from the enforcement of such ordinance go into the treasury of the municipality.³

There is no municipal tort liability where the municipality is acting under an unconstitutional statute.⁴

v. City of Columbus, 101 Ga. 300, 28 S.E. 599 (1897).

Ill. City of Chicago v. Turner, 80 Ill. 419, 1875 WL 8773 (1875).

Iowa. Easterly v. Incorporated Town of Irwin, 99 Iowa 694, 68 N.W. 919 (1896).

Kan. City of Caldwell v. Prunelle, 57 Kan. 511, 46 P. 949 (1896).

Ky. Hershberg v. City of Barbourville, 142 Ky. 60, 133 S.W. 985 (1911) (ordinance making it unlawful to smoke cigarettes); Twyman's Adm'r v. Frankfort, 117 Ky. 518, 25 Ky. L. Rptr. 1620, 78 S.W. 446 (1904); Maydwell v. City of Louisville, 116 Ky. 885, 25 Ky. L. Rptr. 1062, 76 S.W. 1091 (1903).

Mich. Stevens v. City of Muskegon, 111 Mich. 72, 69 N.W. 227 (1896).

N.Y. McCauslan v. City of New York, 183 Misc. 954, 52 N.Y.S.2d 215 (City Ct. 1944) (action by building superintendent under invalid ordinance).

Okla. Silva v. City Council of City of McAlester, 1915 OK 199, 46 Okla. 150, 148 P. 150 (1915); Cummings v. Lobsitz, 1914 OK 382, 42 Okla. 704, 142 P. 993 (1914).

Tex. City of Desdemona v. Wilhite, 297 S.W. 874 (Tex. Civ. App. Eastland 1927).

Wash. J. S. K. Enterprises, Inc. v. City of Lacey, 6 Wash. App. 433, 493 P.2d 1015 (Div. 2 1972) (licensing ordinance regulating massagers).

² **Alas.** Nelson v. Town of Cordova, 7 Alaska 555, 1927 WL 1369 (Terr. Alaska 1927) (unconstitutional ordinance no basis for false arrest action).

Ky. McCray v. City of Lake Louisville, 332 S.W.2d 837 (Ky. 1960), citing this treatise; Hershberg v. City of Barbourville, 142 Ky. 60, 133 S.W. 985 (1911) (not liable for arrest for violation of void ordinance prohibiting all cigarette smoking).

³ **U.S.** An ordinance requiring the sale of streetcar tickets on streetcars in the city, limiting the price to be paid, enacted without authority, resulting in loss to a streetcar company, creates no municipal liability, since if a municipality ever acts in a purely governmental capacity, it would seem to act so in the passage of an ordinance of this kind in relation to a subject in which the general public is alone concerned, and in which it has no private or proprietary interest. Seattle Elec. Co. v. City of Seattle, 206 F. 955 (W.D. Wash. 1913).

Wash. Simpson v. City of Whatcom, 33 Wash. 392, 74 P. 577 (1903).

⁴ **Ill.** Although statute barring certain handicapped persons from employment as firemen was in violation of state constitution, good faith enforcement of statute barred action

IV. RESPONDEAT SUPERIOR

§ 53.65 In general.

West Key No. Digests

Master and Servant ⇨315 to 324

Municipal Corporations ⇨744, 745, 753

Jurisprudence

Am. Jur. Municipal and State Tort Liability §§ 145, 146, 158 to 166

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Municipal corporations generally fall within the rule that the superior or employer must answer civilly for the negligence or want of skill of his or her agent or servant in the course of the agent's employment.¹ In other words, the rule of respondeat superior

for damages. Melvin v. City of West Frankfort, 93 Ill. App. 3d 425, 48 Ill. Dec. 858, 417 N.E.2d 260 (5th Dist. 1981).

N.Y. City of Albany v. Cunliff, 2 N.Y. 165, 1849 WL 5312 (1849).

[Section 53.65]

¹ **U.S.** Lewis v. City of St. Petersburg, 260 F.3d 1260 (11th Cir. 2001) (applying Florida law to shooting of motorist by police officer).

City of Green Cove Springs v. Donaldson, 348 F.2d 197 (5th Cir. 1965).

Ala. City of Lanett v. Tomlinson, 659 So. 2d 68 (Ala. 1995); Whitely v. Food Giant, Inc., 721 So. 2d 207 (Ala. Civ. App. 1998).

Fla. Lewis v. City of St. Petersburg, 260 F.3d 1260 (11th Cir. 2001) (applying Florida law to shooting of motorist by police officer).

City of Miami v. Simpson, 172 So. 2d 435 (Fla. 1965); Fisher v. City of Miami, 172 So. 2d 455 (Fla. 1965).

N.J. Snell v. Murray, 117 N.J. Super. 268, 284 A.2d 381 (Law Div. 1971), judgment aff'd, 121 N.J. Super. 215, 296 A.2d 538 (App. Div. 1972).

N.Y. Kamnitzer v. City of New York, 265 A.D. 636, 40 N.Y.S.2d 139 (1st Dep't 1943) (modern tendency against immunity of municipality for acts of employees); Hardin v. City of Schenectady, 154 Misc. 411, 278 N.Y.S. 28 (County Ct. 1935) (degree of care required in operating municipal equipment).

N.D. Binstock v. Fort Yates Public School Dist. No. 4, 463 N.W.2d 837, 64 Ed. Law Rep. 911 (N.D. 1990).

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NO. 43459-8-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STEVE FABRE, individually; and
POINT DEFIANCE CAFÉ AND
CASINO, LLC,

Appellant/Cross-Respondent,

v.

TOWN OF RUSTON, a municipal
corporation,

Respondent/Cross-Appellant.

CERTIFICATE OF SERVICE OF
RESPONDENT'S BRIEF

I hereby certify that on November 21, 2012, I caused to be served a true and correct copy of the Respondent's Brief by the method indicated below, and addressed to the following:

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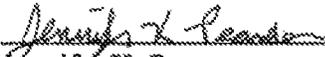
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Jennifer K. Pearson