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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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DIVISION I  
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STAR NORTHWEST, INC. d/b/a KENMORE LANES and 11<sup>th</sup> FRAME  
RESTAURANT & LOUNGE, a Washington corporation,

Plaintiff/Appellant,

v.

CITY OF KENMORE, a Washington municipal corporation, and  
KENMORE CITY COUNCIL, the legislative body of the City of  
Kenmore,

Defendants/Respondents.

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**REPLY BRIEF OF APPELLANT STAR NORTHWEST, INC.**

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## I. INTRODUCTION

In this reply, Appellant Star Northwest Inc ("Star Northwest") will explain that the City of Kenmore (the "City") increased a social card room tax to tap its revenues to fund capital projects having nothing to do with gambling law enforcement and its ordinance plainly exceeded its authority under the Gambling Act. Furthermore, the City's subsequent decision to ban Star Northwest's card room was a taking under state and federal law requiring just compensation, and the City's claim that Star Northwest lacked a property right to be taken is unavailing. The superior court's decisions granting summary judgment dismissing both claims were error and must be reversed.

## II. ARGUMENT – GAMBLING TAX CLAIM

### A. **The City's Card Room Tax Increase Does Not Comply With RCW 9.46.113.**

Nothing in the City's brief explains how its ordinance increasing the social card room tax from eleven to fifteen percent and providing that "an amount equal to four-fifteenths of the social card room game tax paid by operators of social card games *shall* be dedicated to funding City Capital Facilities Plan projects" (emphasis added) can comply with the Gambling Act's requirement that it "use the revenue from such tax primarily for the purpose of enforcement of the provisions of [the Gambling Act]." Instead, the City sought to avoid scrutiny of the

ordinance's plain non-compliance with State law by (1) claiming a high standard for any challenge; (2) attacking the standing to sue of the sole tax payor; (3) using a proviso to rewrite dedication of tax proceeds to non-gambling tax enforcement; or (4) severing the offending language. None of these strategies work.

The City first claimed a "clear, cogent, and convincing" standard for any challenge to its ordinance. City of Kenmore's Response Brief ("City Br.") at p. 14, citing *City Housing Authority v. City of Pasco*, 120 Wn. App. 39, 843, 86 P.3d 1217 (2004). *City of Pasco* and the City's other authorities on this point do not reach this far, however. They concern challenges to the process by which municipal ordinances are enacted, not a claim, such as this, that an ordinance exceeds the authority granted by statute. Star Northwest explained in its opening brief that "when an ordinance is beyond the scope of authority delegated to a City from the legislature, it is invalid." The City did not rebut this proposition and it must guide the Court in review of Star Northwest's challenge to the City's ordinance. See *Brown v. Yakima*, 116 Wn.2d 556, 559, 807 P.2d 353 (1991) (Ordinance will be found invalid if it conflicts with state statute). See also *City of Spokane v. J-R Distributors, Inc.*, 90 Wn.2d 722, 725, 731, 585 P.2d 784 (1978), and Star Northwest's Opening Brief at pp. 18-19.

The City next rewrote the operative language of its ordinance by arguing that the ordinance's requirement that the increased tax "shall be" dedicated to City Capital Facilities Plan projects was modified by the proviso stating that revenue from the tax shall be expended primarily for the purpose of enforcement of gambling laws. Star Northwest showed in the superior court (and in its opening brief at pp. 9-10) that City Capital Facilities Plan Projects did not include enforcement of gambling laws, so the proviso did not limit or direct implementation of the ordinance—it rewrote it.<sup>1</sup> The City did not explain how this interpretation of its ordinance could be squared with Washington law providing that provisos do not operate to revise or add to statutory text, they are strictly construed and that no proviso may be construed to destroy the general provisions of the ordinance. *West Valley Land Company, Inc., v. Knob Hill Water Association*, 107 Wn.2d 359, 369, 729 P.2d 42 (1986); *Western Machinery Exchange v. Grays Harbor County*, 190 Wash. 477, 453, 68 P.2d 613 (1937). See Star Northwest's Opening Brief at p. 20. Ignoring these principles the City argued that the proviso's use of the word "primarily," as defined by the Washington Supreme Court in *American Legion Post 32 v.*

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<sup>1</sup> The City concedes that plan projects consist of "storm water projects, road improvements, and the new City Hall." City Br. at p. 10. On appeal, the City argues that its Capital Facilities Plan included placing a police station in a future City Hall. That is speculation at best. See Star Northwest's Opening Br. at pp. 11-12. The Superior Court correctly found disputed issues of fact on that issue. RP 4-5 (1/11/08).

*City of Walla Walla*, 116 Wn.2d 1, 802 P.2d 784 (1991), required it to deposit the tax proceeds first in its general fund and, therefore, be available for use for gambling enforcement; and then if not used for that purpose the funds would be used for the indicated purpose in the ordinance—funding City Capital Facilities Plan projects. See City Br. at pp. 16-17. And, the superior court accepted this argument. RP 16 (01/11/08); City Br. at p. 17.

In addition to ignoring Washington law regarding application of provisos, this argument reduces the Supreme Court's interpretation of RCW 9.46.113 in *American Legion* to mere formalism. The Supreme Court gave municipalities wide latitude in use of gambling tax proceeds as long as the proceeds were used first to enforce the Gambling Act. But, nothing in *American Legion* authorizes a municipality to reverse the analysis and first increase the tax and direct the proceeds to non-gambling tax enforcement and then gain statutory compliance by depositing the proceeds in its general fund where—like the rest of the fund—they conceivably could be used for gambling enforcement.

The difficulty with the City's argument is, perhaps, best illustrated by the superior court's framing of it. The superior court, in the section quoted in the City's Brief begins by stating "[O]n its face what this ordinance indicates is that funds collected from the tax go first to the

purpose of enforcing the gambling laws and that any remainder is dedicated to funding City Capital Facility, facilities planned projects." The Court concluded by saying "it is true that the ordinance also specifically indicates an interest in taking anything else that may be available and putting it—dedicating it to funding the capital fund." This reading reversed the order of the text. The ordinance does not end with an allocation of remaining funds to City Capital Facilities Plan projects, it begins with mandatory language dedicating the proceeds of the tax to funding of City Capital Facilities Plan projects.<sup>2</sup> It ends where the superior court began by providing the funds collected from the tax go first to enforce the gambling laws. The superior court's reordering and rewriting of the ordinance may have transformed it into something that might have complied with RCW 9.46.113, but that is not what the ordinance says. What the City wrote directly conflicts with RCW 9.46.113 and must be invalidated.

The City argues that even if its ordinance violates RCW 9.46.113 by allocating gambling tax proceeds to non-gambling enforcement purposes, Star Northwest has no remedy under *American Legion*, reasoning that Star Northwest is only challenging the allocation of a

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<sup>2</sup> The City's use of the word "shall" creates an imperative obligation unless a different legislative intent can be discerned. *State v. Q.D.*, 102 Wn.2d 19, 29, 685 P.2d 557 (1984). See *Spokane v. Spokane Police Guild*, 87 Wn.2d 457, 465, 553 P.2d 1315 (1976) (term "shall" can be mandatory or directory).

properly drafted ordinance. That is plainly incorrect as Star Northwest challenges the ordinance itself. Certainly, Star Northwest presented evidence of the City's lack of identified need for additional funds for gambling enforcement and its purpose to use the gambling tax to fund capital improvements and not gambling enforcement. But this evidence confirmed the unauthorized purpose of the ordinance, not improper implementation of it. It is only the City that offers evidence of its implementation of the ordinance.

Although the City does not clearly state it, it may be arguing that Star Northwest lacks standing to claim that the ordinance is illegal. The superior court rejected this argument and recognized that as Star Northwest was the sole taxpayer paying this tax it plainly had standing.

A party has standing if (1) it has interests "arguably within the zone of interests to be protected or regulated by the statute," *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004), and (2) the party has "suffered from an injury in fact, economic or otherwise." *Branson v. Port of Seattle*, 152 Wn.2d 862, 876, 101 P.3d 67 (2004). Star Northwest is clearly within the zone of interests to be regulated – the ordinance was adopted to tax its social card game operations. And Star Northwest has injury in fact – it has paid over one million dollars to the City imposed under the illegal ordinance.

The City cites *American Legion* for the proposition that Star Northwest lacks standing because it is merely disagreeing with a discretionary decision of the City. *American Legion* requires that a taxpayer "must show a special injury where he or she challenges an agency's lawful, discretionary act." *Kightlinger v. PUD No. 1 of Clark County*, 119 Wn. App. 501, 506, 81 P.3d 876 (2003), review granted, 152 Wn.2d 1001, 101 P.3d 865 (2004), case dismissed (July 26, 2005) (citing *American Legion*, 116 Wn.2d at 7-8) (emphasis original). This does not apply here because, like the taxpayers in *Kightlinger*, Star Northwest does not challenge a lawful discretionary act but the City's authority to enact the ordinance and impose an illegal tax. *Id.* Therefore, Star Northwest is "not required to demonstrate a unique injury." *See id.*

If Star Northwest were required to demonstrate a unique injury, it is clear that the ordinance interferes with its legal rights and privileges—Star Northwest is the sole card room taxed under the ordinance, and the City has collected over one million dollars from Star Northwest under an illegal ordinance. "The kernel of the standing doctrine is that one who is not adversely affected by a statute may not question its validity." *Haberman v. WPPSS*, 109 Wn.2d 402, 419, 879 P.2d 920 (1994). Star Northwest's unique injury meets this standard.

### III. ARGUMENT – FIFTH AMENDMENT TAKINGS CLAIM

#### A. *Williamson County* Ripeness Standards Are Satisfied by Pursuit of a Claim in State Court Not by Pursuit of a State Claim.

The City of Kenmore argues that Star Northwest's Fifth Amendment takings claims is unripe because, according to the City, Star Northwest must first litigate a state inverse condemnation claim before proceeding in state court with a Fifth Amendment takings claim. City Br. at pp. 26-28. The City ignores the applicable procedural history. Star Northwest stated claims based on both the Fifth Amendment's taking clause and Article 1, Section 16 of the Washington State Constitution (CP 23-24) and argued to the superior court that the standard is the same under the federal and state claims. RP (7/10/09) at 15:9-25. The superior court noted that Star Northwest could proceed with its federal takings claim in state court (RP (7/10/09) at 47:4-17), and the City did not cross appeal.

Moreover, the City has no authority to support its argument that a state inverse condemnation must precede a federal Fifth Amendment takings claim, and it misunderstands the *Williamson County Reg. Planning Comm. v. Hamilton County*, 473 U.S. 172 (1985), ripeness principles. *Williamson County* is concerned with the jurisdiction in which a takings claim is first litigated, not with whether that takings claim is framed under federal or state protections. In *Williamson County*, the United States

Supreme Court reminded that a government may take private property for public use and does not violate the Fifth Amendment unless the government does not pay just compensation for the taking. 473 U.S. at 194. The Court posited that when it is a state (rather than federal) government that is claimed to have taken property, the state should be afforded the first opportunity to decide whether a taking has occurred for which just compensation will be paid; otherwise, the state's action is incomplete. *Id.* at 195. The *Williamson County* Court determined that, if a state court has an adequate procedure for hearing just compensation claims, until such time as the state judiciary makes a final ruling on such a claim, federal courts lack jurisdiction. *Id.*

The City misses the jurisdictional principle in *Williamson County* and misinterprets a Ninth Circuit opinion, *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997), to argue a double ripeness standard: that not only does a federal court lack original jurisdiction over any takings claim asserted against a state instrumentality, but also a Washington superior court lacks jurisdiction over a Fifth Amendment takings claim until a state inverse condemnation claim has been litigated. *Macri* does not support such an awkward conclusion. There, the Ninth Circuit generally commented that Washington has "an adequate procedure for reimbursement for the taking of property." *Macri*, 126 F.3d at 1129

(citing *Guimont v. Clarke*, 121 Wn.2d 586, 594, 854 P.2d 1 (1993)). The Washington state court procedure deemed "adequate" by the *Macri* court is the two-part threshold takings test articulated in *Guimont v. Clarke* in response to a *federal* takings claim. See 121 Wn.2d at 593. The City cites no Washington case in which a Fifth Amendment takings claim was dismissed as premature because a state inverse condemnation had not been first litigated to finality.

**B. The Prior Federal Court Litigation Does Not Collaterally Estop Star Northwest from Pursuing its Fifth Amendment Claim in State Court.**

The City never answers Star Northwest's argument that the non-prejudiced dismissal of its Fifth Amendment takings claim for lack of ripeness cannot serve as the basis for collateral estoppel in State court. See *United States v. Antelope*, 395 F.3d 1128, 1132 (9th Cir. 2005) (until a claim is ripe a federal court has no jurisdiction) (citation omitted). Collateral estoppel does not apply unless the earlier claim ended in a "judgment on the merits." *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). The federal district court dismissed Star Northwest's Fifth Amendment takings claim without prejudice and, expressly, without "reach[ing] the merits of that cause of action." CP 734. The City did not meet its burden in asserting collateral estoppel, and the superior court erred in applying the doctrine. See *Luisi*

*Truck Lines, Inc. v. Washington Utilities and Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967) ("The party asserting collateral estoppel has the burden of showing that issues are identical and that they were *determined on the merits* in the first proceeding") (citation omitted) (emphasis added).

Next, without ever stating the elements of collateral estoppel, the City of Kenmore argues that the doctrine bars Star Northwest's Fifth Amendment taking claim in Washington state court because Star Northwest's Fourteenth Amendment substantive due process claim was fully litigated. City Br. at p. 30. For collateral estoppel to apply, the issue litigated in the earlier proceeding must be *identical* to the issue in the later proceeding. The standard that previously litigated issues be "identical" is not met here because an issue that arises in the context of different claims is not identical for the purposes of collateral estoppel. *Cf. Pub. Employees Mut. Ins. Co. v. Fitzgerald*, 65 Wn. App. 307, 316, 828 P.2d 63 (1992) (adjudication of insanity in a criminal action does not preclude a contrary finding in a civil action).

**C. Star Northwest's Card Room Is Not Excluded from the Protections of the Fifth Amendment Takings Clause.**

1. The Washington State Gambling Act does not preclude the payment of just compensation when a gambling business is taken.

The City relies on the Washington State Gambling Act, chapter 9.46 RCW, as a per se shield from the obligation to pay just compensation for taking Star Northwest's card room. *See* City Br. at pp. 24-26, 31. The statute does not offer such an exemption. The City emphasizes the Act's permission to "absolutely prohibit" gambling activities, RCW 9.46.295, but does not recognize that language's context within the statute. There, the Act confirms that cities may ban gambling but goes on to *prohibit* cities from changing the scope of an issued license – such regulation is preempted by the State. *See* RCW 9.46.295. Rather than affirmatively granting the City with a power to ban (which the City would have possessed without such statutory language), RCW 9.46.295 is rather a limitation on municipal authority (forbidding the City from regulating a business which it otherwise could have regulated under its police power).

Additionally, although RCW 9.46.295 recognizes that cities may absolutely prohibit gambling activities, nowhere does the statute absolve cities of the obligation to pay just compensation when such prohibitions result in takings. Thus, the statutory language authorizing prohibition of gambling activity may support the Fifth Amendment takings clause's first

criterion—that takings be accomplished for "public use"—but it does not even address the clause's second criterion—that even takings for public use require the payment of just compensation.

The City also makes much of the Gambling Act's provision that card room licenses are granted for one-year periods. *See, e.g., City Br.* at p. 24. The licensing framework of the State Gambling Commission has no bearing on whether the City must pay just compensation for the taking of Star Northwest's card room business. A gambling license, like any business license, does not create or define the property right in the business. The property right exists by virtue of the establishment of the business. *Lee & Eastes v. Pub. Serv. Comm'n*, 52 Wn.2d 701, 704, 338 P.2d 700 (1958). At most, the inferences that may be drawn from the one-year licensing program should be put to the trier of fact and were not suitable for resolution on summary judgment.

2. No Washington case law supports the City's position that a gambling business may be summarily terminated without the payment of just compensation.

The City argues that a gambling business is significantly different than other activities, *City Br.* at p. 31, thus permitting the City to close Star Northwest's card room's doors without any contemplation of paying just compensation, but the Washington cases on which the City relies do not support the City's argument.

- (a) Washington substantive due process case law does not address whether the City must pay just compensation for a taking.

The City cites substantive due process cases supporting the position that, because gambling has been historically subject to high regulation, governments may ban gambling in its entirety. City Br. at pp. 32-34, citing *Northwest Greyhound Kennel Ass'n v. State*, 8 Wn. App. 314, 320-21, 506 P.2d 878 (1973); *State v. Gedarro*, 19 Wn. App. 826, 829, 579 P.2d 949 (1978); *City of Seattle v. Bittner*, 81 Wn.2d 747, 751, 505 P.2d 126 (1973); *Tarver v. City Comm.*, 72 Wn.2d 726, 731, 435 P.2d 531 (1967). Not only do those cases predate the Gambling Act amendment which expressly legalized licensed card room activities, they address whether gambling activities, in general, may be banned by regulation, not whether the government must pay just compensation for the loss of an existing business as a result of such regulation.

- (b) The City's exercise of its police power does not provide exemption from paying just compensation.

In a related argument, the City argues that the regulation of gambling is authorized under the City's police power, relying on *Rousso v. State*, 149 Wn. App. 344, 359-61, 204 P.3d 243, rev. granted 166 Wn.2d 1032 (2009). City Br. at p. 33. *Rousso* is not analogous. There, an Internet poker participant challenged the State Gambling Act itself because the activity in which he wanted to engage was *illegal* under the

Gambling Act. 149 Wn. App. at 365. Here, there is no dispute that Star Northwest's card room was operating legally under the Gambling Act. In any event, the City is not exempted from paying just compensation simply because it acts under its police power. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014, 1020 (1984) (the scope of the Fifth Amendment's "public use" requirement is coterminous with the scope of police powers, but even a taking that is permissible by virtue of its satisfaction of the "public use" requirement is still subject to payment of just compensation) (citation omitted).

- (c) *Edmonds* and *Paradise* do not support the summary judgment dismissal of Star Northwest's takings claim.

Contrary to the City's position, neither the *Paradise*<sup>3</sup> nor *Edmonds*<sup>4</sup> card room opinions controls. The City concedes that both *Paradise* and *Edmonds* proceeded with the second of the two-part threshold inquiry established in *Guimont* (City Br. at p. 46), and that analysis renders both those opinions inapplicable to Star Northwest's total taking claim. As the City recognizes (City Br. at p. 44), the first of the two-part threshold inquiry embodies the total taking question of whether a deprivation of all economically viable use has occurred. *Guimont*, 121 Wn.2d at 602. If the

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<sup>3</sup> *Paradise, Inc. v. Pierce County*, 125 Wn. App. 759, 102 P.3d 173 (2004).

<sup>4</sup> *Edmonds Shopping Ctr. Assocs. v. City of Edmonds*, 117 Wn. App. 344, 71 P.3d 233 (2003).

answer is "yes," a per se taking has occurred, *and the court does not proceed to the second threshold inquiry. Id.* at 603 (where a total taking claim is proved "the owner is entitled to just compensation without case-specific inquiry . . ."). Because Star Northwest offered evidence on that claim (*e.g.*, CP 1447), analysis under *Guimont's* second threshold inquiry is inappropriate, *Guimont*, 121 Wn.2d at 600, and *Edmonds'* and *Paradise's* analysis under the second threshold inquiry has no bearing on Star Northwest's total taking claim.

Arguing that *Edmonds* and *Paradise* are highly analogous, the City does not acknowledge that the plaintiff in *Edmonds* did not assert a total takings claim or that the *Paradise* plaintiff alleged only that the regulation affected its card room rather than its other business operations that had been successfully operating prior to the enhanced card room license. *Paradise*, 124 Wn. App. at 770. In contrast, Star Northwest offered evidence that the closure of its card room results in the loss of *all* economically viable use of its business operations. CP 1447. The City offered no opposing evidence, and in light of Star Northwest's unopposed evidence of total economic loss, the trial court's dismissal on summary judgment was error.

Furthermore, *Edmonds* and *Paradise* do not support dismissal of Star Northwest's *Penn Central*<sup>5</sup> regulatory taking claim. Because the City concedes that both *Paradise* and *Edmonds* proceeded to the second *Guimont* threshold inquiry, it is compelled to argue that the two-part threshold inquiry survives. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005). It makes this argument by taking a narrow view of *Lingle*, limiting that opinion to nothing more than a rejection of the "substantially advances" takings analysis employed in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The City suggests that *Guimont*'s two-part threshold inquiry remains intact after *Lingle* because *Guimont*'s "substantially advances" analysis *follows* the two-part threshold inquiry. City Br. at p. 45.<sup>6</sup> This argument directly conflicts with the *Lingle* opinion. There, the United States Supreme Court explained that a plaintiff asserting a takings claim may proceed *directly* on a *Penn Central* regulatory taking claim. 544 U.S. at 548. In other words, no threshold inquiry may be subjected on a takings claim plaintiff, regardless of the nature of that threshold inquiry.

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<sup>5</sup> *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>6</sup> The City, thus, implicitly recognizes that because the *Guimont* takings formulation includes the repudiated "substantially advances" test, Washington's takings analysis must be revised.

Moreover, here, the nature of the *Guimont* second threshold inquiry<sup>7</sup> also runs counter to *Lingle*. The *Guimont* second inquiry resonates in substantive due process, not takings, and under *Lingle*, the two analyses cannot be commingled: a regulation is first tested under a Fourteenth Amendment substantive due process test and a Fifth Amendment "public use" test, and if the regulation is not invalidated under those tests, may then be subject to a Fifth Amendment claim for just compensation. *See Lingle*, 544 U.S. at 543 (a substantive due process inquiry is "logically prior to and distinct from the question whether a regulation effects a taking"). In *Edmonds* and *Paradise*, the plaintiffs' claims both failed *Guimont's* second threshold inquiry, so the business owners were prevented from litigating *Penn Central's* three prongs.<sup>8</sup> *Paradise*, 124 Wn. App. at 773; *Edmonds*, 117 Wn. App. at 364.

Although the City wishes that the second threshold inquiry is sufficiently relevant to the *Penn Central* factors (City Br. at p. 45), the fact remains that neither *Edmonds* nor *Paradise* considered a *Penn Central* argument,

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<sup>7</sup> The second threshold inquiry asks whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area, or whether the regulation seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit. *Guimont*, 121 Wn.2d at 603.

<sup>8</sup> The three prongs under *Penn Central* are: (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action. *Penn Central*, 438 U.S. at 124. Notably, the *Penn Central* Court declined to create a bright-line test and instead stated that the analysis "depends largely upon the particular circumstances" and consists of "essentially ad hoc, factual inquiries." *Id.* Thus, a *Penn Central* claim is particularly ill-suited to disposal on summary judgment.

and, thus, do not dictate the outcome of Star Northwest's *Penn Central* regulatory taking claim.

- (d) Washington case law does not support the City's argument that a card room is a per se nuisance.

Finally, the City conclusorily states that because gambling has been historically highly regulated, Star Northwest's card room can be terminated as a nuisance-like operation.<sup>9</sup> City Br. at p. 34.<sup>10</sup> The City does not answer Star Northwest's authority that a business operating under statute—undisputedly the status of Star Northwest's card room—cannot be summarily deemed a nuisance; investigation must be made. *See Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998) ("A lawful business is *never*

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<sup>9</sup> The City cites *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), and complains that Star Northwest did not explain how its card room business could be entitled to Fifth Amendment protections but not to First Amendment protections. City Br. at p. 37. The answer is simple: commercial *speech* has long been subject to regulation under the First Amendment. *Edge Broadcasting*, 509 U.S. at 426 ("For most of this Nation's history, purely commercial advertising was not considered to implicate the protections of the First Amendment"). *Edge Broadcasting* simply acknowledges that speech about gambling may be restricted. *Edge Broadcasting*, 509 U.S. at 424. Such conclusion has no bearing on the *property* right at issue in a Fifth Amendment takings claim context.

<sup>10</sup> The City relies, in part, on the general statement in McQuillin's Law of Municipal Corporations that a "gaming house is a public nuisance or a nuisance per se," City Br. at p. 34, n.30, but the City does not acknowledge that the Washington State Gambling Act expressly deems card rooms as permitted activities:

The legislature further declares that the conducting of bingo, raffles, and amusement games and the operation of punchboards, pull-tabs, card games and other social pastimes, when conducted pursuant to the provisions of this chapter and any rules and regulations adopted pursuant thereto, are hereby authorized, as are only such lotteries for which no valuable consideration has been paid or agreed to be paid as hereinafter in this chapter provided.

RCW 9.46.010. The Act prohibits only "professional" gambling – those activities that are conducted in violation of the Act. RCW 9.46.0269.

a nuisance per se") (emphasis added).<sup>11</sup> Without the requirement of investigation, any local government could shut down any legally-established, but politically disfavored, business operation without a showing that the business had actually caused any harm. More is required.

3. The City misunderstands the background principles of nuisance and property law at issue in *Lucas v. South Carolina Coastal Commission*.

The City confuses the Supreme Court's discussion of background principles of nuisance and property law in *Lucas v. South Carolina Coast Commission*, 505 U.S. 1003 (1992). The City reads a requirement into *Lucas* that entitlement to just compensation for a total taking is predicated on affirmative proof that the taken property was associated with a constitutionally protected right. City Br. at p. 38. That is needlessly circular. Private property is subject to Fifth Amendment takings clause protections. U.S. Const., Amend. V. And, when a regulation deprives a property owner of all economically viable use, a per se taking has occurred. *Lingle*, 544 U.S. at 538 (citing *Lucas*, 505 U.S. at 1019)). The *Lucas* Court explained that the only exception to this rule occurs when, at the time of acquisition, the property lacked a right of use because of the application of then-existing nuisance principles and state law restrictions.

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<sup>11</sup> The City attempts to distinguish *Tiegs* on the basis that it did not concern "nuisance-like" activity (City Br. at p. 40), but that argument directly contradicts *Tiegs*' recognition that a lawful business is never a nuisance per se.

*Id.* at 1022-32. There can be no dispute that at the time that Star Northwest acquired the card room it was neither a nuisance (businesses operating under statute can never be a nuisance, RCW 7.48.160) nor illegal (the card room had been licensed continuously since it opened).

#### IV. CONCLUSION

For the reasons stated, Star Northwest requests that the trial court's orders granting summary judgment to dismiss Star Northwest's causes of action be reversed.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of March, 2010.

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Inc.

**DECLARATION OF SERVICE**

I, Linda J. Cooper, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein.

On March 10, 2010, I served true and correct copies of the document to which this Declaration is attached on:

COURT OF WASHINGTON  
COUNTY OF KING  
STATE OF WASHINGTON  
FILED  
2010 MAR 10 10:55  
2010 MAR 10 10:55

<p>Dan S. Lossing Inslee, Best, Doezie &amp; Ryder, P.S. 777 – 108<sup>th</sup> Avenue, Suite 1900 Bellevue, Washington 98004</p> <p><input type="checkbox"/> First Class Mail <input type="checkbox"/> Hand Deliver <input checked="" type="checkbox"/> E-mail: dlossing@insleebest.com <input type="checkbox"/> Facsimile</p>	<p>Jayne L. Freeman Keating Bucklin &amp; McCormack, Inc. P.S. 800 Fifth Avenue, Suite 4141 Seattle, Washington 98104</p> <p><input type="checkbox"/> First Class Mail <input type="checkbox"/> Hand Deliver <input checked="" type="checkbox"/> E-mail: jfreeman@kbmlawyers.com <input type="checkbox"/> Facsimile</p>
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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

SIGNED on March 10, 2010, at Seattle, Washington.

  
Linda J. Cooper