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NO. 63971-4

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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

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## I. INTRODUCTION

In this appeal, the Court must decide if a legally-established and legally-operating business can be taken by government regulation without just compensation paid to the business owner.

Appellant Star Northwest, Inc. ("Star Northwest"), the plaintiff below, operated a card room, restaurant, bowling alley, and lounge in the city of Kenmore for many years. The card room was duly licensed and operated under the authority of the Washington State Gambling Act, chapter RCW 9.46. In 2005, the City of Kenmore passed an ordinance to ban all card rooms in Kenmore, including Star Northwest's existing card room. The City of Kenmore had no evidence that Star Northwest's card room was the source of any harm to the community; in fact, the record discloses evidence that Star Northwest's business provided community benefits. Nevertheless, the City determined that it would close Star Northwest's card room without provision of an amortization period or payment of any compensation.

In response to the City of Kenmore's motion for summary judgment seeking to dismiss Star Northwest's claims based on the Fifth Amendment takings clause, Star Northwest offered evidence supporting elements of a *Lucas*<sup>1</sup> total takings claim and a *Penn Central*<sup>2</sup> regulatory

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<sup>1</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

takings claim. All of Star Northwest's evidence was either uncontroverted or presented with clashing evidence by the City of Kenmore, causing the claims to be unsuitable for dismissal on summary judgment. Nevertheless, the trial court granted the City's motion for summary judgment on an erroneous conclusion that a prior federal court proceeding *not reaching the merits of Star Northwest's claim* satisfied the doctrine of collateral estoppel. The trial court committed further error when it ruled, in the alternative, that Star Northwest held no cognizable property interest in its card room based on a misinterpretation of the United States Supreme Court's limited takings clause exception for nuisances.

Before closing Star Northwest's business, the City of Kenmore used a Social Card Room Tax that applied solely to Star Northwest, to tap its gross revenues to fund City Capital Facilities Plans, in direct violation of Washington's Gambling Act. RCW 9.46.113 requires that proceeds of taxes on gambling activities must be used primarily for enforcement of the Act. On December 13, 2004, the City passed its Ordinance No. 04-0223 increasing the tax from 11% to 15% of gross revenues and provided that the proceeds would be used to fund City Capital Facilities Plan Projects. Star Northwest challenged the increased tax because the proceeds were not directed to gambling act enforcement. The trial court dismissed the claim,

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<sup>2</sup> *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

on summary judgment, incorrectly concluding that this increase satisfied RCW 9.46.113 because the City added a fig leaf proviso to the gambling tax ordinance stating that it would use the funds primarily for gambling enforcement and deposited the increased tax revenues in its general fund. That was error and must be reversed.

## **II. ASSIGNMENTS OF ERROR**

**A.** The trial court erred in granting summary judgment dismissing Star Northwest's challenge to the City of Kenmore's increase in the Social Card Room tax from 11% to 15% as a violation of RCW 9.46.113 (tax on gambling must be used primarily for enforcement of The Gambling Act) when evidence indicated that the increase was planned for and dedicated to the Capital Improvement Fund, not Gambling Act enforcement.

**B.** The trial court erred in granting summary judgment dismissing Star Northwest's Fifth Amendment takings clause claim (and related injunctive relief and 42 U.S.C. §§ 1983, 1983 claims) when no nuisance-style exception denies Star Northwest's business Fifth Amendment protections, when uncontroverted evidence indicated that Kenmore's card room ordinance would deprive Star Northwest of all economically viable use of its business, and when clashes of material

evidence existed on Star Northwest's alternative claim that the card room ordinance results in a *Penn Central* regulatory taking.

### III. STATEMENT OF THE CASE

**A. Star Northwest Operates a 50-Lane Bowling Alley, a Card Room, a Restaurant, and a Lounge in the City of Kenmore, Washington.**

Star Northwest operated a bowling alley, a card room (the "11<sup>th</sup> Frame"), a restaurant, and a bar (collectively, the facilities are hereinafter referred to as "Kenmore Lanes") in the City of Kenmore, Washington. CP 58 at ¶ 2. The bowling alley has been in continuous operation at the same location since 1958, 40 years before the City of Kenmore incorporated. *Id.* at ¶ 3. Its 11<sup>th</sup> Frame card room had been operating continuously at that location since the mid-1970s, *id.* at ¶ 4, and did not close until the summer of 2009 when the City of Kenmore ordinance banning card rooms took effect. Since before Frank Evans acquired it in 1994,<sup>3</sup> the 11<sup>th</sup> Frame had been continuously licensed for card room operations by the State Gambling Commission. CP 815 at ¶ 4.

Since 1997, Star Northwest invested approximately \$5.5 million improving the bowling alley, the bar, the restaurant and the card room. CP 1165 at ¶ 9. After September 2004 when the Kenmore citizens voted "no" to a ballot proposition asking whether card rooms should be banned, Star

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<sup>3</sup> Evans conveyed the business to Star Northwest in 1997. CP 1458 at ¶ 3. Evans and his wife are the sole shareholders of Star Northwest.

Northwest invested an additional \$1 million improving Kenmore Lanes. CP 1165 - 1166 at ¶ 10. In the last 6 months of 2005, before the ban at issue was adopted, Star Northwest borrowed \$500,000 and completely rebuilt the bar, added a new HVAC system, added smoking areas to comply with the new state law, built a conference room and banquet room, improved the pool area, constructed a dart board area, remodeled the outside deck and installed new signage. *Id.* Despite all of these improvements, the bowling alley, restaurant and bar lose money; survival of the business relies on the card room. CP 1166 at ¶ 11.

**B. The City of Kenmore Imposes a Card Room Tax.**

The 11<sup>th</sup> Frame card room is heavily regulated by the State Gambling Commission. The parameters of that regulation are set forth in chapter 230-40 of the Washington Administrative Code ("WAC"). CP 998-999. That chapter of the Code is comprised of 63 sections, covering many facets of card room operation from security to the location of tables. Enforcement of these provisions is the exclusive responsibility of the State Gambling Commission. RCW 9.46.285 and it is actively enforced. CP 815 at ¶ 4. The City of Kenmore has not investigated any violations of state gambling laws. *Id.* at ¶ 5. It does not train its officers in enforcement of gambling offenses. CP 914, lines 18-25. In fact, the only two instances of gambling law enforcement arising out of Kenmore

Lanes for the past 10 years were instances in which Star Northwest itself asked for an investigation by the Gambling Commission and the Kenmore Police Department became involved only after the investigation was complete. CP 815 at ¶ 5; CP 915, line 19 – CP 917, line 3.<sup>4</sup>

RCW 9.46.113 permits the City to collect a tax on gambling activities, but provides that the City "shall use the revenue from such tax primarily for the purpose of enforcement of the provisions of [the Gambling Act] by the county, city or town law enforcement agency." Beginning in 1998, the City of Kenmore imposed a tax on gambling activities in Kenmore, including bingo and raffles, punch boards and pull tabs, and social card games. CP 922-928. In 1998 the tax on social card games, codified at Kenmore Municipal Code 3.15.020(C), was eleven percent (11%). CP 923

Until the 11<sup>th</sup> Frame closed in 2009, Star Northwest paid this tax. CP 815 at ¶ 6. Indeed, it has been the City's largest tax payer. At one time, its payments comprised 11% of the City budget. CP 931, line 22 – CP 932, line 2. It was the only entity subject to the card room tax. CP 815 at ¶ 6.

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<sup>4</sup> The Kenmore Police Chief only recalled one of these instances. CP 915, line 19 – CP 916, line 3.

**C. In 2004, the City of Kenmore Increased the Gambling Tax from 11% to 15%, But Did Not Identify or Project any Increased Cost for Gambling Enforcement.**

In budget sessions that occurred in November and December, 2004, the City of Kenmore considered whether to increase the gambling tax from 11% to 15%. During this period, the City Council did not undertake any identification of the costs of gambling enforcement or any projection of costs for such enforcement in the future. CP 934, line 17 – CP 935, line 25. The City Council did not need that information because it planned to allocate the 4% increase to assist in funding capital projects. In 2005, a budget update authored by the City's Finance Department explicitly states that the budget includes gambling "taxes at the new rate of 15% from 11%; the 4% increment will assist in funding capital projects." CP 992. Stephen Anderson, the then-City Manager, answered an inquiry from the City Council on November 22, 2004 in the following way:

3. We decided to add the 4% gambling increase to the Capital Fund, so in the end there should be \$216,000 more money at year's end in that fund?

The proposed 4% card room tax increase of \$218,176 is built into the \$2,600,000 transfer from the General Fund to the Capital Projects Fund.

CP 994.

Ultimately, the city staff made a proposal that the gambling tax be increased from 11% to 15% and were very explicit about the reason for this increase:

The proposed Ordinance will amend the gambling tax rate on social card rooms to 15% from the current 11% rate. This increase in card room tax receipts represents approximately \$218,180 based on 2004 revised estimates. As the Ordinance stipulates, four-fifteenths (4/15<sup>th</sup>) of the collected card room taxes could be dedicated to funding projects in the City's Capital Facilities Plan.

CP 996. The City's goal was explicit: "Deliver services at a level greater than prior to incorporation of the City." *Id.* Its fiscal impact was also explicit "estimated to increase general fund revenues by \$218,180 per year (proposed to be transferred to the Capital Projects Fund). *Id.*

On December 13, 2004, the Kenmore City Council adopted Ordinance No. 04-0223, AN ORDINANCE OF THE CITY OF KENMORE, WASHINGTON,; [sic] AMENDING KMC 3.15.020 TO INCREASE TO FIFTEEN PERCENT THE TAX RATE FOR OPERATORS OF SOCIAL CARD GAMES; PROVIDING FOR SEVERABILITY; AND ESTABLISHING AN EFFECTIVE DATE (the "Tax Ordinance"). CP 940-941. Section 1 of the Tax Ordinance amends KMC 3.15.020 as follows:

Social Card Games Playing. Operators shall pay a tax equal to ~~eleven~~ fifteen percent of the gross receipts from such games. An amount equal to four fifteenths of the

social card game tax paid by operators of social card games shall be dedicated to funding City Capital Facilities Plan projects; provided, however, that revenue collected from this tax shall be expended primarily for the purpose of enforcement of gambling laws pursuant to RCW 9.46.113.

*Id.* Star Northwest paid the increased social card game tax since December 23, 2004, the effective date of the Tax Ordinance. The total social card game tax paid by Star Northwest in 2005 alone totaled \$855,817.54. CP 54, ¶ 4.

**D. The City Capital Facilities Plan Is a 6 Year Plan to Improve "City Facilities including City Hall, Park and Recreation, Surface Water and Transportation" and Is Not Concerned with Enforcement of the Provisions of the Gambling Act.**

The City Capital Facilities Plan is described in the Capital Facilities Element of the City's Comprehensive Plan. CP 943-972. The Comprehensive Plan explains that "[t]he Capital Facilities Element is intended to assist the City of Kenmore and its officials [sic] make the financial decisions to ensure that the public facilities and services city residents rely on will continue to adequately support City residents today and into the future." CP 945. The Comprehensive Plan states that "[t]his Element contains a 6 year plan for capital improvements that support the City of Kenmore's current and future population and economy." *Id.*

The City Capital Facilities Plan has nothing to do with enforcing the provisions of the Gambling Act. Rather, it states a series of goals relating to public infrastructure improvements such as "Establish

appropriate lines of service for public facilities . . ." (CP 960), "Provide adequate public facilities concurrent with the impact of new development" (CP 962), "Coordinate capital facility plans with state, county and local agencies and districts" (CP 963), "Prepare and maintain a capital facilities plan that is fully funded and financially feasible" (CP 964), and "Ensure growth paced proportionate costs of capital facilities required to serve the growth" (CP 965).

**E. The City Cannot Say How Much It Spends on Gambling Enforcement and No Basis to Say that It Needed More for that Purpose.**

The City of Kenmore had no knowledge of the amount spent on enforcement of gambling laws or actions taken to enforce the gambling laws. CP 976-979.<sup>5</sup> In fact, the then-City Manager, Steve Anderson, confirmed that the City had not undertaken to determine the amount expended on gambling enforcement. CP 934-935. Such calculations have not been part of its budget calculations. *Id.*

The City's lack of knowledge of the costs and actions involved in gambling enforcement may be explained by the fact that the City was well aware that there had been only one gambling-related police response in the

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<sup>5</sup> In response to a CR 30(b)(6) notice seeking knowledge on the two subjects, the City's counsel advised that it had no individual with knowledge on these subjects. CP 977-979.

City of Kenmore since January 2001.<sup>6</sup> Nor is there any unusual incidence of other criminal activity at Kenmore Lanes. As it turns out, reports of criminal activity associated with Kenmore Lanes was no different than that of the Safeway in the City of Kenmore. In 2002, Police Chief Sether was asked by the City Council to investigate reports of criminal activity associated with Kenmore Lanes. In response, he provided a chart showing the level of criminal activity had declined substantially in the preceding three years. CP 981-983. In addition, he reported to the Council that the level of criminal activity at Kenmore Lanes was similar to that of Safeway. CP 911, line 23 – CP 913, line 4. *See also* CP 985-990. When asked repeatedly for evidence of unusual criminal activities at Kenmore Lanes, the Police Chief repeatedly said that was not the case. CP 987-989.

**F. City Expenditures to Place A Police Department in a New City Hall Were Pure Speculation.**

The City claimed that portions of the Comprehensive Plan Capital Facilities Element funds would be expended on a new courthouse that might include Police Department headquarters. CP 125 at ¶ 6. Testimony

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<sup>6</sup> Responses by the Police Department to reports of criminal activity are collected by the King County Sheriff on a yearly basis. Responses to reports of criminal activity in the City of Kenmore are compiled by the Sheriff in annual reports presented by the Kenmore Police Chief to the City Council. CP 908, line 6 – CP 909, line 15. Excerpts of these reports are attached to the Decl. of Margaret M. Moynan (CP 786-813). The authenticity of these reports was stipulated to by the parties. CP 909, line 18 – CP 910, line 12. These excerpts list responses to reports of criminal activity by types of crime. While there have been many responses to different types of crimes, these excerpts show that there has been only one response to a report of gambling activity.

from the Kenmore Police Chief revealed that this claim was speculative at best. The possible need for a new location for the City of Kenmore Police Department was based on concern that the Sheriff may move the existing precinct in Kenmore to a location in Eastern King County. CP 937-938. Without that move, there would be no need for a new Police Department. *Id.* The Kenmore Police Chief testified that the subject of a possible move of the precinct had been discussed for years but there was no plan to move that precinct. CP 918, line 20 – CP 920, line 17. Such a move would be at least 5 to 10 years away. *Id.*

**G. Star Northwest's Card Room Had Been Continuously Licensed by the Washington State Gambling Commission and Did Not Cause any Harm in the City of Kenmore.**

Since before Star Northwest acquired it in 1994, the 11<sup>th</sup> Frame card room had been continuously licensed for card room operations by the Washington State Gambling Commission. CP 815 ¶ 3. Such licensure had benefits for the City of Kenmore. A gambling license requires substantial security procedures and staffing. That helped Star Northwest maintain a safe and pleasant environment. *See* CP 62, ¶ 22; *see also* CP 883 at 20. A long-time City Council member confirmed that Star Northwest was not the source of any unusual criminal activity or any other negative impact. CP 884 at 21, lines 14-24; CP 884 at 23, lines 10-17.

Nor were other City Council members aware of any evidence that card rooms caused injury to surrounding communities, CP 1099 at 22-23, and annually issued a moratorium prohibiting any new card room businesses but allowing the 11<sup>th</sup> Frame to continue to operate. The City did not undertake any investigation of the impact of card room operations in its community. CP 1102 at 66-67; CP 1109 at 28. This may be because City Council members who later voted for the ban knew that Star Northwest was not the source of any unusual criminal activity or any other negative impact. CP 1099 at 21, 23.

Moreover, community attitudes about gambling were evidently positive as state-authorized gambling activities are ubiquitous in Kenmore and surrounding King County communities. Washington Lottery tickets are sold at 10 locations in Kenmore (CP 1191-1192) and 806 locations in King County. CP 1177-1240. Pull tabs are sold in five locations in Kenmore (CP 1355) and 317 locations in King County.<sup>7</sup> Charitable poker games in which participants take half the pot are sponsored by local grocery stores. CP 1170 ¶ 6. Card rooms operate at 48 locations in King County.<sup>8</sup>

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<sup>7</sup> Pull tab license numbers begin with "05" as shown in the "License" column throughout CP 1328-1390.

<sup>8</sup> Card room license numbers begin with "60" "65" and "67" as shown in the "License" column throughout CP 1328-1390.

**H. The City Bans All Card Room Operations in Kenmore, Including Star Northwest's Existing Business—But Does Not Explain Its Purpose.**

On December 19, 2005, the City Council considered Ordinance No. 05-0237 which purported to ban all card rooms in the City of Kenmore. CP 1025-1033. As City Council had staff prepared it, the proposed ordinance would have allowed Kenmore Lanes to remain in business until the 11<sup>th</sup> Frame card room's license expired at the end of 2006, allowing Star Northwest a form of amortization period for its business.<sup>9</sup> Alternatively, the City Council had advice from its legal counsel that it could impose a ban with an effective date in the future. CP 1112 at 44.

However, the City Council voted to remove the provision allowing Star Northwest to operate its card room through 2006, intentionally denying Star Northwest its right to operate the card room for even the duration of its current license. CP 1035-1037.<sup>10</sup> Thus, as adopted, Ordinance No. 05-0237 (the "Card Room Ordinance") does not provide for the payment of just compensation for the closure of existing card room

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<sup>9</sup> The proposed ordinance concluded with this result: "Nothing in this ordinance shall be construed to prohibit the continued operation of any licensed social card game during the remainder of the current term of any license issued by the State Gambling Commission for any such social card game." As originally written, the proposed ordinance permitted Star Northwest to operate for the remaining term of its license (one year). CP 1039-1046.

<sup>10</sup> When asked why he would second guess the opinion of legal counsel, Mr. Colwell said, with the hubris of a Council member legislating to take away someone else's hard-earned business, "[b]ecause I can." CP 1112 at 44.

operations nor does it provide for an amortization period in which the owner could recoup some of its investment.

The City never explained the purpose of the City Council in the action it took to immediately ban all card rooms. When pressed in deposition, Council members mentioned economic development, CP 1099 at 21-22, but no document states a purpose.

**I. Enforcement of the City of Kenmore's Card Room Ordinance Will Close All of Kenmore Lanes' Operations; and, Because It Cannot Relocate, Star Northwest Will Be Deprived of All Economically Viable Use of Its Business.**

The 11<sup>th</sup> Frame card room was Star Northwest's largest revenue source, accounting for 60% of revenues, but only 40% of total operating costs. The profits from the card room subsidize Star Northwest's bowling alley, restaurant, employee benefits, and all of Star Northwest's community and charitable activities. Closure of the card room renders the entire business valueless . CP 1095 at 111; CP 1115 at 41 – CP 1116 at 42. Relocation of Star Northwest's card room, restaurant and bowling alley to a different location would cost more than the business is worth. CP 1440-1456. Nor is there any alternative business for the card room that would generate sufficient profits to cover the losses in the restaurant and bowling alley. This means that enforcement of the Card Room

Ordinance causes Star Northwest to lose the entire value of its investment, valued at \$4,936,000 as of December 2005. CP 1452-1455.

**J. Procedural History.**

In December 2005, after the Card Room Ordinance was passed but before it became effective, Star Northwest filed suit against the City of Kenmore and Kenmore City Council in the United States District Court for the Western District of Washington (hereinafter, the "federal district court"), Cause No. CV-05-02133-MJP. The federal court lawsuit challenged both the Tax Ordinance and the Card Room Ordinance, seeking injunctive and declaratory relief and damages. In 2006, the federal district court granted summary judgment in favor of defendants and dismissed all of Star Northwest's claims, dismissing its challenge of the Tax Ordinance and its Fifth Amendment takings claim (directed at the Card Room Ordinance) without prejudice to be tried in state court. CP 1429-1439. Star Northwest appealed, but in a Memorandum opinion and an amended Memorandum opinion, the Ninth Circuit affirmed. CP 1506-1515 and RP (7/10/09) at 46:8-12.

Meanwhile, in 2006, Star Northwest filed suit in the Superior Court of King County (hereinafter, the "trial court") on the claims that the federal court had dismissed without prejudice. Star Northwest stated the following causes of action:

- First cause of action: Taking Property in Violation of the Fifth Amendment;
- Second cause of action: Relief under 42 U.S.C. §§ 1983 and 1988;
- Third cause of action: Injunctive relief; and,
- Fourth cause of action: Refund of Illegal Gambling Tax Revenues.

CP 15-27.

In 2008, the trial court granted the City of Kenmore's and Kenmore City Council's partial summary judgment motion to dismiss Star Northwest's fourth cause of action (gambling tax claim). In 2009, the trial court granted the City of Kenmore's and Kenmore City Council's partial summary judgment motion on all remaining causes of action (relating to the Fifth Amendment takings challenge). At that time, an injunction expired that had been in place allowing Star Northwest to continue to operate its card room, and the card room closed. Star Northwest timely filed a Notice of Appeal of the trial court's decisions to this Court, challenging the dismissal on summary judgment of all four causes of action.

#### **IV. ARGUMENT – STANDARD OF REVIEW**

The grant of summary judgment is reviewed *de novo*. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).  
"Summary judgment is appropriate when 'there is no genuine issue as to

any material fact and ... the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting *Locke v. City of Seattle*, 162 Wn.2d 474, 483, 172 P.3d 705 (2007) (alteration in original) (quoting CR 56(c)). When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party. *Id.* (relying on *Reid v. Pierce County*, 136 Wn.2d 195, 201, 961 P.2d 333 (1998)). A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation. *Id.*

Additionally, the decision to apply collateral estoppel is a question of law that is reviewed *de novo*. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004); *LeMond v. Dep't of Licensing*, 143 Wn. App. 797, 803, 180 P.3d 829 (2008).

## V. ARGUMENT – GAMBLING TAX CLAIM

### A. The City's Ordinance Increasing Gambling Tax Rates from 11% to 15% Facially Violates RCW 9.46.113.

The City of Kenmore is a "creature[] of the state and derive[s] all of its authority and power from either the state constitution or the legislature." *City of Spokane v. J-R Distributors, Inc.*, 90 Wn.2d 722, 726, 585 P.2d 784 (1978). The City must have express authority to levy a tax:

It is elementary that the power of taxation, subject to constitutional limitations, rests solely in the legislature. Municipal corporations have no inherent power to levy taxes. Their powers are derived solely in the legislature.

Municipal corporations have no inherent power to levy taxes. Their powers are derived through legislative grant, and are strictly construed.

*State v. Kelly*, 176 Wash. 689, 690, 30 P.2d 638 (1934); *see also Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982) ("This court has clearly stated that county authorities must have express authority, either the constitution or an act of the legislature, to levy taxes") (internal citations omitted).<sup>11</sup> When an ordinance is beyond the scope of authority delegated to a city from the legislature, it is invalid. *J-R Distributors*, 90 Wn.2d at 725, 731; *see also Hillis Homes*, 97 Wn.2d at 808 ("Therefore, the Counties are without express authority to impose taxes in the form of development fees and the ordinances imposing such fees are invalid").

RCW 9.46.113 permits the City to collect gambling tax, but requires the City to use "the revenue from [its gambling tax] primarily for the purpose of enforcement of the provisions of [the Gambling Act]." The portion of the Ordinance providing that "an amount equal to four-fifteenths of the social card game tax paid by operators of social card games shall be dedicated to funding City Capital Facilities Plan Projects" plainly violates RCW 9.46.113's requirement that the City "shall use the revenue for such tax primarily for the purpose of enforcement of the

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<sup>11</sup> Counties, like cities, are creatures of the state. *Hillis Homes*, 97 Wn.2d at 808.

provisions of [the Gambling Act]." Far from using the proceeds "primarily for enforcement of the Gambling Act, the Ordinance provided that none of the funds would be used for that purpose.

The City will maintain that its dedication of the tax proceeds to non-Gambling Act enforcement purposes is saved from violating RCW 9.46.113 by the proviso it added stating that ""provided, however, that revenue collected from this tax shall be expended primarily for the purpose of enforcement of gambling laws pursuant to RCW 9.46.113." Provisos do not operate to revise or add to statutory text, though; they are strictly construed and operate only make exception or to limit the text to which they refer. *West Valley Land Company, Inc. v. Knob Hill Water Association*, 107 Wn.2d 359, 369, 729 P.2d 42 (1986).

The City's use of a proviso here operates to repeal the portion of the Ordinance that provides that the proceeds will be used to fund City Capital Facilities Plan projects. This cannot be squared with Washington law. The role of a proviso "is not to repeal the main provisions of the act but to limit their application, no proviso should be so construed as to destroy those provisions." *Western Machinery Exchange v. Grays Harbor County*, 190 Wash. 447, 453, 68 P.2d 613 (1937). Consequently, a

construction of a proviso which would make it plainly repugnant to the body of the act should be rejected. *Id.*<sup>12</sup>

The City made no serious effort to show that funding for City Capital Facilities Plan projects included Gambling Act enforcement. And, the trial court recognized as much. See RP (1/11/08) at 7:2-6. ("I am going to assume for purposes of this motion that the capital fund is simply out there for any capital project the City may want and has no particular connection to police activity or any other activity.") So, the Ordinance stands or falls on the question of whether the proviso can cure its dedication of tax proceeds to non-gambling enforcement. As there is no subset or limitation of City Capital Facilities Plan projects that satisfies RCW 9.46.113's primary use requirement, the Ordinance fails.

The City may contend that its Ordinance should be read to mean that the increased tax proceeds are dedicated to non-gambling enforcement purposes, but will be used for gambling enforcement, if necessary. As explained below, the City raised the tax for the explicit purpose of funding its capital projects gave no consideration to needs for gambling law

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<sup>12</sup> Multiple Washington cases illustrate the limiting or excepting role of a proviso. *See, e.g., West Valley Land Company*, 107 Wn.2d at 362 (definition of water company did not apply to a water system serving less than 60 customers), *State v. Wright*, 84 Wn.2d 645, 648, 529 P.2d 453 (1974) (proviso limited authority to regulate vehicular traffic on ocean beaches in circumstances involving driving over clam beds), and *Hall v. Corporation of Catholic Archbishop of Seattle*, 80 Wn.2d 797, 498 P.2d 844 (1972) (proviso excluded monumental entrances from "all stairways"). No case applies a proviso to contradict or alter the general provision.

enforcement. The City's unauthorized purpose cannot be made legal by a proviso promising action that the City had no reason to believe would happen.

**B. The City Has Not Complied With RCW 9.46.113.**

Granting Star Northwest all reasonable inferences from the evidence, the trial court was required to conclude that the City increased the tax from eleven percent to fifteen percent to raise additional funds for its City Capital Facilities Plan and not to do anything to enforce the Gambling Act. Certainly, internal memorandum from City officials and information included in the City Council's packet confirm this purpose and the City offered no evidence contradicting it . CP 994, 996. Nor was there any evidence that gambling tax proceeds were actually needed for gambling enforcement. Nonetheless, the trial court concluded that because the funds were deposited first to the general fund, where they *could* have been used for gambling enforcement, it need not consider how the funds were intended to be used or actually used and the statutory requirement was satisfied. RP (1/11/08) at 11:9-18:19, citing the Supreme Court's decision in *American Legion v. Walla Walla*, 116 Wn.2d 1, 802 P.2d 784 (1991).

The trial court's reading of *American Legion* was much too broad; in effect it rewrites RCW 9.46.113 to provide that proceeds must be

"available" for Gambling Act enforcement rather than "used primarily" for such purposes. While the Supreme Court said that gambling tax proceeds must be used "first of all to enforce to enforce the gambling act" the trial court read *American Legion* to require only that "on an overall view of the use of the City's budget that in the first instance monies are funded to gambling enforcement activity such as police budget." Such a reading allows municipalities to impose or raise gambling taxes where no need for enforcement funds exists and that cannot be squared with the statute.

The trial court's deferential approach to City use of gambling taxes was plain from the outset. (" . . . nor does the Court appropriately get involved in a detailed scrutiny of how a municipality or another government body actually implements its laws"). RP (1/11/08) at 9:3-5. It was unwilling to consider whether the City never had any reason to believe it would need the increased tax proceeds for gambling proceeds. Yet, that is a question that the Supreme Court would ask. In *American Legion*, the Supreme Court found no genuine issue of fact because "[t]here is no contention by Legion that the gambling revenues have been spent for other than enforcement of the gambling act; nor is there evidence in the record to support such a conclusion." 116 Wn.2d at 11.

Nor did the trial court give adequate weight to the other key differences between *American Legion* and this case. The American

Legion was one of 109 establishments that paid gambling taxes and its payments totaled \$51,000 compared to a police budget of \$1,927,600. 116 Wn.2d at 4. In this case, Star Northwest is the sole Social Card Room taxpayer and it paid \$855,817.54 in gambling tax in 2005 alone. When the City increased the tax from 11% to 15% it identified the increased proceeds it would receive (\$218,180) and planned to apply that specific amount to capital projects. CP 994. *American Legion* may shield a City that imposes an 11% tax and does not always need all or even most of the proceeds, but it does not shield a City that increases the tax when it does not need the additional funds for gambling enforcement.

The Court's reference to United States Supreme Court's interpretation of "primarily" in *Malat v. Riddell*, 383 U.S. 569,571-72 (1966) ("[W]e note that the Supreme Court has similarly interpreted "primarily" to mean "of first importance" or "principally" rather than "substantially"), 116 Wn.2d at 9, confirms this view. "Principally" connotes an intention that the tax is directed at gambling enforcement purposes, even if it turns out that not all of it is needed. Neither this term nor "of first importance" or "primarily" can apply when a City has no intention of using the money for gambling enforcement.

**C. The Severability Clause Does Not Save The Tax Increase.**

An ordinance may be invalid in its entirety if its "provisions are unseverable and it cannot be reasonably be believed that the legislative body would have passed one without the other, or unless elimination of the invalid part would render the remaining part useless to accomplish the legislative purposes." *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 227-228, 11 P.3d 762 (2000) (internal citations omitted); *see also J-R Distributors*, 90 Wn.2d at 731. While a severability clause "may provide the assurance that the legislative body would have enacted remaining sections even if others are found invalid ... a severability clause is not necessarily dispositive on the question of whether the legislative body would have enacted the remainder of the act." *Amalgamated Transit*, 142 Wn.2d at 228 (internal citations omitted).

The City's allocation of four fifteenths of the social card game tax revenue to the Capital Facilities Plan projects was illegal, the entire Ordinance must be invalidated. The purpose of the Ordinance is clear — the City increased the tax from eleven to fifteen percent for the purpose of allocating that increased amount to funding Capital Facilities Plan projects. Those provisions are interrelated and cannot be severed while retaining the purpose of the Ordinance. *See State v. Williams*, 144 Wn.2d 197, 212-213, 26 P.3d 890 (2001) (two clauses could be severed because

the two clauses do not "serve [the Ordinance's] purpose independently"). Moreover, a Court cannot presume that the City Council would have enacted the increased tax if could not dedicate the increased revenue to fund Capital Facilities Plan projects.<sup>13</sup> "When there is doubt, taxing statutes are construed most strongly against the government and in favor of the taxpayer." *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 802, 123 P.3d 88 (2005) (internal citations and quotations omitted).

The language that the City might propose to sever: "An amount equal to four fifteenths of the social card game tax paid by operators of social card games shall be dedicated to funding City Capital Facilities Plan projects" plainly confirms the Ordinance's illegal result. But, taking it out does not save what remains. Such a deletion reflects the City's reason for increasing the tax. Whether the purpose is stated in the Ordinance or the other evidence that has been submitted, the Ordinance remains illegal. *See State v. Anderson*, 81 Wn.2d 234,236, 501 P.2d. 184 (1972). Put differently, as the evidence shows that funding the Capital Facilities Plan was the reason for the tax increase and the funds were not needed for gambling enforcement, taking the direction to use the proceeds for that purpose out of the Ordinance does not change its impact.

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<sup>13</sup> The City made no showing that it needed increased tax revenues for gambling enforcement.

*Bond v. Burrows*, 103 Wn.2d 153, 162, 690 P.2d 1168 (1984), is illustrative. The Court was concerned with discerning whether the Legislature intended that the sales tax vary across the state. Having concluded that uniformity was intended, it struck inconsistent language. Here, the City has the opposite problem. Its intention to use the increased tax to pay for capital improvements is manifest. Deleting language in the Ordinance implementing that intent does not save the Ordinance.

**D. Star Northwest is Entitled to a Refund of Taxes Paid Under the Ordinance.**

Since the Ordinance imposing the social card game taxes is invalid, Star Northwest is entitled to a refund of the taxes paid pursuant to the Ordinance totaling \$1,235,489.48. *See Hillis Homes*, 97 Wn.2d at 811 ("[Plaintiffs] are entitled to a refund of those [taxes], even though the fees were not paid under protest.... Plaintiffs are entitled to recover the [taxes] paid under the invalid ordinances."); *see also Hemphill v. Department of Revenue*, 153 Wn.2d 544, 552, 105 P.3d 391 (2005) ("Appellants are due a refund of [invalid] estate taxes collected by the Department since January 1, 2002").<sup>14</sup>

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<sup>14</sup> The City of Kenmore may argue that it should only refund the increased tax amounts paid pursuant to the Ordinance, which total \$329,463.83. Both *Hillis Homes* and *Hemphill*, *supra*, support a full refund of taxes paid under an invalid ordinance. *See also Schooley v. City of Chehalis*, 84 Wash. 667, 676, 147 P. 410 (1915) (Washington law appears to support the doctrine that an amendment to an ordinance voids the original ordinance, and invalidation of the amending ordinances does not revive the original ordinance).

## VI. ARGUMENT – FIFTH AMENDMENT TAKINGS CLAIM<sup>15</sup>

### A. Star Northwest's Taking Claim Was Not Litigated to Finality in the Prior Federal Court Proceeding.

The trial court ruled that the issue of whether Star Northwest held a federally-protected property interest in the operation of its card room had been fully and finally litigated in the prior federal court proceeding. RP (7/10/09) at 49:4-8. The trial court's ruling stands in direct conflict with Washington Supreme Court authority which precludes the application of collateral estoppel unless four mandatory elements are satisfied:

- (1) **the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding,**
- (2) **the earlier proceeding ended in a judgment on the merits,**
- (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and
- (4) **application of collateral estoppel does not work an injustice on the party against whom it is applied.**

*Christensen*, 152 Wn.2d at 307, 326-27 (citations omitted) (emphasis added); *World Wide Video, Inc. v. City of Spokane*, 125 Wn. App. 289, 305 103 P.3d 1265 (2005) (citing *Christensen*). The collateral estoppel doctrine will not be applied without affirmative proof as to "each and every prong of this inquiry." *Christensen*, 152 Wn.2d at 326-27 (citation omitted) (emphasis added). Here, three of the four collateral estoppel elements were not satisfied.

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<sup>15</sup> This argument also applies to Star Northwest's related claims for injunctive relief and for damages and attorneys' fees under 42 U.S.C. §§ 1983, 1988.

First, contrary to the second collateral estoppel argument, the earlier federal court proceeding, on which the trial court relied, dismissed Star Northwest's taking claim without prejudice for lack of ripeness, expressly stating that the federal district court was not reaching the merits of the takings claim:

On the basis of the finding that [Star Northwest's] takings claim is not yet ripe, **this opinion does not reach the merits of that cause of action.**

CP 1435, lines 8-9 (emphasis added). The federal district court's statement that it was not reaching the merits of the takings claim was appropriate in light of the jurisdictional ripeness grounds for the dismissal. *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). And, the federal district court's express acknowledgment that the dismissal of the takings claim was not made on that claim's merits means that the second element of the collateral estoppel doctrine was not satisfied. *See also Déjà Vu-Everett-Federal Way, Inc. v. City of Federal Way*, 96 Wn. App. 255, 263, 979 P.2d 464 (1999) (a dismissal for lack of jurisdiction is not an adjudication on the merits, and collateral estoppel will not be applied). For that reason, the trial court should have regarded the federal

court's statements preceding the non-prejudiced dismissal, CP 1433, lines 11-21, as dicta.<sup>16</sup>

Second, contrary to the fourth collateral estoppel element, application of that doctrine to Star Northwest's taking claim has worked an injustice on Star Northwest. Agreeing with a line of cases under *Williamson County Reg. Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-95 (1985), the federal district court ruled that Star Northwest could not proceed with its Fifth Amendment takings claim in federal court because Star Northwest must first proceed in state court. CP 1433, lines 23-24. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985) ("[B]ecause the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking, [a s]tate's action is not 'complete' until the

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<sup>16</sup> Moreover on appeal of the federal district court's ruling, the Ninth Circuit's Memorandum, as amended, accepted that Star Northwest had a property right supporting federal constitutional claims, overriding any contrary holding by the district court. The Ninth Circuit's original Memorandum, dated May 28, 2008, found that Plaintiff had no property right, relying on the "vesting" provision of WAC 230-04-175. (The Ninth Circuit said nothing about the City's theory that "nuisance-like" businesses had no constitutional rights.) After being apprised by Plaintiff that the "vesting" provision had been repealed effective January 1, 2008, the Ninth Circuit analyzed Plaintiff's Fourteenth Amendment substantive Due Process claim and concluded that the high standard of proof had not been met (Plaintiff must prove that "the regulation 'fails to serve any legitimate governmental objective' rendering it 'arbitrary or irrational.' *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528,542 (2005)"). In reaching the substance of the Fourteenth Amendment claim (and having abandoned its rejection of a property right), the Ninth Circuit necessarily accepted that Plaintiff had the property right necessary to advance a constitutional claim. CP 1505-1515 and RP (7/10/09) at 46:8-12.

[s]tate fails to provide adequate compensation for the taking"). It was for precisely that reason that Star Northwest filed its taking claim in state court: for adjudication of Star Northwest's compensation claim by a state tribunal. The trial court's dismissal on a collateral estoppel basis of a claim that the federal district court ordered be tried in state court works an injustice on Star Northwest and conflicts with *Williamson County* cases holding that a taking claim is not complete until the *state* has denied compensation.

Third, the issue considered in the federal court proceeding was not identical to the issue before the trial court. The federal court presumed that Star Northwest asserted only a "regulatory taking" not a *Lucas* "total taking" claim.<sup>17</sup>

**B. The Trial Court Erred When It Ruled that Star Northwest's Had No Constitutionally-Protected Property Right in Its Card Room Business that Would Entitle Star Northwest to Fifth Amendment Takings Clause Protections.**

In one of its alternate grounds for dismissing Star Northwest's takings claim, the trial court ruled that Star Northwest could not seek Fifth

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<sup>17</sup> Finally, even the trial court itself concluded that a dismissal on collateral estoppel grounds was potential error:

But let's assume that I'm wrong about that and that, because of the simultaneous ruling on quickness and on the existence of a property interest, that there, in fact, is not collateral estoppel here. In other words, let's assume for the moment that one can only take Judge Pechman's ruling as saying that federal courts don't have jurisdiction yet and the 9th Circuit can only be taking the same that they agree that the federal courts don't have jurisdiction yet.

RP (7/10/09) at 49:9-17.

Amendment takings clause protection because its card room business was not a "cognizable property interest." RP (7/10/09) at 54:8. The trial court's ruling cannot be reconciled with Washington case law recognizing businesses as property interests, with the four United States Supreme Court opinions on which the trial court relied, or with traditional nuisance principles.

1. In Washington, businesses are property rights afforded Fifth Amendment protection; no authority exists to support the trial court's conclusion that Star Northwest's card room is not a cognizable property interest.

The Fifth Amendment itself does not create property rights; rather, property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (citations omitted); *see also Lucas*, 505 U.S. at 1030 (citations omitted) (recognizing that property rights are defined by state law). Under Washington law, a business is a property interest entitled to Fifth Amendment protection. *Lee & Eastes v. Pub. Serv. Comm'n*, 52 Wn.2d 701, 704, 338 P.2d 700 (1958) ("the right to operate a lawful business is a property right") (internal citations omitted). *And see Rhod-A-Zalea & 35<sup>th</sup>, Inc., v. Snohomish County*, 131 Wn.2d 1, 9, 959 P.2d 1024 (1998) ("Local governments, of course, can terminate nonconforming uses but

they are constitutionally required to provide a reasonable amortization period").

This verity was treated as a matter of course in the two Washington card room opinions relied on by the trial court,<sup>18</sup> *Edmonds Shopping Ctr. Assocs. v. City of Edmonds*, 117 Wn. App. 344, 362, 71 P.3d 233 (2003) (reaching the merits of plaintiff's takings claim and assuming that the card room business has a property right subject to Fifth Amendment takings considerations) and *Paradise, Inc. v. Pierce County*, 124 Wn. App. 759, 766, 102 P.3d 173 (2004) (same).

2. None of the four United States Supreme Court opinions relied upon by the trial court supports the dismissal of Star Northwest's takings claim.

From this state law tenet that businesses are cognizable property interests, the trial court carved out an exception for gambling businesses by borrowing from nuisance principles:

[T]here is a considerable body of authority, it's [sic] none that is directly on point, that indicates that one cannot claim a property interest to do things such as operate a nuisance on one's property. Gambling, like liquor, has traditionally been viewed as, essentially, nuisance-style activity subject to state or government regulation.

RP (7/10/09) at 50:6-13. The trial court's "nuisance-style" exception is based on four opinions of the United States Supreme Court. Not one of

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<sup>18</sup> See RP (7/10/09) at 57:17 ("the facts of Edmonds are close here") and 58:21-22 ("Frankly, the facts in this case look very, very close to Paradise").

them supports the trial court's conclusion that a card room business cannot avail itself of Fifth Amendment protection.

**a. *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), is an inapposite First Amendment opinion.**

The trial court was apparently persuaded by the comment in *Edge Broadcasting* that "[G]ambling implicates no constitutionally protected right, rather it falls into a category of vice activity that could be, and frequently has been, banned altogether." *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993). See RP (7/10/09) at 45:9-12, 50:14-15 ("I cannot say that there's any case more on point than the Edge decision").

The *Edge Broadcasting* Court's statement that "gambling implicates no constitutionally protected right" must be placed within context. *Edge Broadcasting* is a First Amendment case that applied a constitutional test for restrictions on commercial speech to confirm that restrictions on gambling-related speech do not fail *Central Hudson's*<sup>19</sup> constitutional requirements. *Edge Broad.*, 509 U.S. at 424. Thus, when the *Edge Broadcasting* Court declared that gambling had no constitutional protection, it referred to the absence of First Amendment protection of the subject matter, which enabled the government to regulate gambling-related speech. The Fifth Amendment was not at issue in *Edge*

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<sup>19</sup> *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

*Broadcasting*; thus, the Court did not address the government's obligation to provide just compensation for the taking of an *established* gambling business.<sup>20</sup> While gambling – like many things – can be banned, just compensation is still due to an established gambling business terminated by such ban. *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014-19 (1984) (upholding a federal law as valid under the "public use" requirement of the Fifth Amendment takings clause but acknowledging that just compensation nevertheless must be paid).

**b. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Andrus v. Allard*, 444 U.S. 51 (1979), offer only narrow exceptions to the takings clause.**

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court clarified that "background principles of nuisance and property law" could serve as exceptions to the rule that a "total taking" – one depriving the owner of all economically beneficial use – requires the payment of just compensation. *Lucas*, 505 U.S. at 1030. In its decision explaining the scope of the background principles exception, the Court rejected the notion that a "noxious-use" justification could serve

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<sup>20</sup> Moreover, the Supreme Court has since modified its view of gambling's social acceptance. In *Greater New Orleans Broadcasting Ass'n, Inc., v. United States*, 527 U.S. 173 (1999), the Court noted that Congress has promoted gambling and whatever the prior policy, "the federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal." 527 U.S. at 187. The trial court's ruling did not reveal any recognition of the Supreme Court's change in view.

as the basis for departing from the rule that total takings must be compensated; otherwise, the Court observed, "departure would virtually always be allowed." *Lucas*, 505 U.S. at 1026. Instead, a state (and, thus, a city) "may resist compensation *only* if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027 (emphasis added).

The Court explained:

A law or decree [prohibiting all economically beneficial use] must, in other words, **do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners** (or other uniquely affected persons) under the State's law of private nuisance, **or by the State** under its complementary power to abate nuisances that affect the public generally, or otherwise. The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others.

*Id.* at 1029 & n.16 (emphasis added). In other words, a city avoids paying compensation only if the use at issue was not lawful when the property interest was created. *See Lucas*, 505 U.S. at 1030 (legislation that expressly prohibits what was "always unlawful" does not entitle a property owner to compensation).<sup>21</sup>

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<sup>21</sup> On this point, *Lucas*'s holding should be measured against a prior United States Supreme Court opinion cited in *Paradise v. Pierce County*, 124 Wn. App. 759, 102 P.3d 173 (2004). *Paradise* invoked the nuisance analysis from *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987), which – like *Lucas* – explained that if

Star Northwest's card room did not fall within *Lucas*'s narrow nuisance exception because there was no evidence that the card room was "always unlawful." Star Northwest acquired the card room in 1997, long after the passage of and in compliance with the 1973 Gambling Act. Washington's nuisance law provides that "Nothing which is done or maintained under the express authority of a statute, can be deemed a nuisance." RCW 7.48.160 (unmodified since 1881); *see also Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998) ("A lawful business is never a nuisance per se"). Thus, the card room was a lawful business when Star Northwest acquired it.

Moreover, the City never offered any evidence that, subsequent to the business's establishment, the nature of Star Northwest's card room operations *created* a nuisance.<sup>22</sup> The determination that the business

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evidence showed that a *particular* use was "injurious" or "noxious," the property could be taken without compensation. *Keystone*, 480 U.S. at 489. *And see id.* at 492 n.20 ("The nuisance exception to the taking guarantee is not coterminous with police power itself") (quoting *Penn Central*, 438 U.S. at 145 (Rehnquist, C.J. dissenting)).

But, in its rejection of "noxious-use" justifications, *Lucas* further limited the scope of *Keystone*'s nuisance analysis which had more broadly endorsed business regulation. *See Lucas*, 505 U.S. 1068 (Stevens, J., dissenting) ("Under our reasoning in *Mugler*, a State's decision to prohibit or to regulate certain uses of property is not a compensable taking just because the particular uses were previously lawful. Under the Court's opinion today, however, if a State should decide to prohibit the manufacture of asbestos, cigarettes, or concealable firearms, for example, it must be prepared to pay for the adverse economic consequences of its decision").

<sup>22</sup> Even if the City had alleged that the card room interfered with the use and enjoyment of property, determinations of whether a business constitutes a nuisance are fact-laden inquiries that should be weighed by the trier of fact rather than resolved on summary judgment. *See Tiegs*, 135 Wn.2d at 15 (the question of whether a business created a nuisance "is one for the jury").

constitutes a nuisance cannot be based on moral objections to the type of business conducted. *See Crawford v. Central Steam Laundry*, 78 Wash. 355, 357, 139 P.56 (1914) (a business does not rise to the level of nuisance merely because it is "productive of inconvenience" or "shocks the taste").

In its ruling, the trial court did not attempt to digest *Lucas's* 11-page<sup>23</sup> explanation of the "background principles of nuisance and property law" but instead focused on *Lucas's* brief comment that an owner of goods ought to be aware that new regulation could render her goods economically worthless. RP (7/10/09) at 50:21-25 (citing *Lucas*, 505 U.S. at 1027 and *Lucas's* reference to *Andrus v. Allard*, 444 U.S. 51 (1979)<sup>24</sup>). The trial court's focus on goods is entirely off-point: Kenmore's ordinance did not ban the sale (or manufacture for sale) of any goods owned by Star Northwest. The trial court erred in concluding that the *Lucas* Court's comments about the regulation of goods made the point that "sometimes the kind of conduct that a person has on their land raises the expectation that's subject to being banned." RP (7/10/09) at 51:13-15.

In fact, the trial court turned to the very "noxious-use" justification that the *Lucas* Court deemed unsupportable, observing that gambling is "in

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<sup>23</sup> *Lucas*, 505 U.S. at 1022-32.

<sup>24</sup> In *Andrus*, the Supreme Court considered whether new regulations forbidding the sale of previously-acquired parts of birds constituted a compensable taking. *Andrus*, 444 U.S. at 64. The Court described its opinion as one addressing "trade in . . . goods" and held only that no taking had occurred in that case, not that a goods-based takings claim could not be successful. *See id.* at 67-68.

many places . . . completely unlawful . . . and subject to heavy state and government regulations." RP (7/10/09) at 52:6-10. Whether gambling is "completely unlawful" in other places is irrelevant; there was evidence in the record that when Star Northwest's card room came into operation it was permitted under the State Gambling Act, chapter RCW 9.46. Whether gambling is or is not subject to "heavy state and government regulation" is irrelevant; there was evidence in the record that when Star Northwest acquired the card room it complied with applicable regulations. Nor was there any evidence that after it commenced operations, the card room ran afoul of state statute or regulations.

- c. ***Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), did not expand the taking clause exceptions, clarified that determinations of public harm and benefit have no part in takings analyses, and authorized Star Northwest to proceed on its *Penn Central* takings claim.**

Finally, the trial court considered the Supreme Court's 2005 takings opinion, *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). After seemingly concluding that *Lingle* accomplished little more than endorsing *Lucas* (RP (7/10/09) at 53:4-14), the trial court erroneously read *Lingle* to "require[ ] that one simply not be able to make any economic use of one's property before it can be said that there is a cognizable constitutional claim or a taking based on passage of a regulation such as

this ordinance." RP (7/10/09) at 59:5-9. *Lingle* stands for no such requirement.

The crux of the *Lingle* opinion was a rejection of the former, pervasive commingling of substantive due process and takings analyses. *Lingle*, 544 U.S. at 543 (rejecting the "substantially advances" takings analysis because it probes the regulation's underlying validity, a proper test for a substantive due process challenge). Instead, the *Lingle* Court explained, a takings analysis should be formed around the questions of the "magnitude" and "distribution" of a regulation's impacts. *Lingle*, 544 U.S. at 529. Challenges to the validity of the regulation itself (i.e., does the regulation mitigate harm? does the regulation impose the conferring of public benefits?) properly belong to a substantive due process challenge, which logically precedes a takings challenge. *Id.* at 543. The Court explained: If a regulation is invalid because of subject matter or methodology, no amount of compensation can correct it. *Id.* Such a regulation violates due process rights. However, a regulation that may otherwise be valid in nature, may still "go too far" in its impact on a property owner and, thus, constitute a taking of property requiring compensation. *Id.* at 537-38.

In addition to delivering its core message, the *Lingle* Court also took the opportunity to clarify that plaintiffs may invoke one (or more) of the following Fifth Amendment takings tests, *Lingle*, 544 U.S. at 548:

[W]e reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above-by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central*<sup>25</sup> taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.

Thus, contrary to the trial court's read that *Lingle* requires deprivation of all economic use before a plaintiff can make out a takings claim, *Lingle* actually provided express authority for a plaintiff like Star Northwest to proceed directly on both a *Lucas* "total taking" claim and on a *Penn Central* taking claim which alleged a regulatory taking that did not deprive the owner of all economically viable use.<sup>26</sup>

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<sup>25</sup> *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

<sup>26</sup> And, in fact, the existence of disputed material facts on Star Northwest's *Penn Central* takings claim further renders the trial court's grant of summary of judgment reversible error.

In *Penn Central*, the Court evaluated the question of when a regulation not depriving the owner of all economically viable use constitutes a taking requiring just compensation under the Fifth Amendment. *Penn Central*, 438 U.S. at 124. The Court noted its previous refusal to establish a bright-line test, instead describing the analysis as one that "depends largely upon the particular circumstances" and consists of "essentially ad hoc, factual inquiries." *Id.* The Court did, however, provide three factors for courts to consider when weighing a takings claim: (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. *See id.*

**Factor 1: Economic impact.** Star Northwest demonstrated that the shutting down of its card room would have devastating economic impact on Star Northwest's business. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 529 (1998) ("considerable financial burden" met first *Penn Central* prong). Star Northwest explained that without profits from the

In sum, under established Washington law, a business is a "cognizable property right," there is no carve-out for disfavored businesses such as card room establishments, and the trial court erred in finding such an exception.

**C. The Trial Court Erred When It Disregarded Evidence Presented by Star Northwest on Its "Total Taking" Claim.**

In addition to misapprehending *Lucas's* background principles of nuisance and property law, the trial court also erroneously rejected Star Northwest's evidence offered on the merits of its *Lucas* total takings claim.

Star Northwest (the business owner) proffered evidence that the loss of the card room (a cognizable property interest) will deprive Star Northwest of all economically viable use of the business. "Without [the card room's] profits, the entire Star Northwest business entity, including

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card room, it will lose money on its other operations and must close. CP 1167, ¶ 17. The business cannot be moved and no substitute business in the card room space would generate sufficient profits, so Star Northwest's \$4.9 million investment would be lost. CP 1444-1456.

Factor 2: Investment-backed expectations. Star Northwest offered evidence of its investment-backed expectations. Frank Evans explained in his declaration, over the past 12 years, Star Northwest invested approximately \$500,000 per year (\$5.5 million) in the business. CP 1165, ¶9. After the 2004 proposition in which Kenmore citizens voted "no" on banning card rooms, Star Northwest invested more than \$1 million. In late 2005, Star Northwest borrowed \$500,000 to upgrade facilities and expand operations. CP 1165-1166, ¶ 10.

Factor 3: Character of the government action. Post-*Lingle*, courts should apply the character of government action prong to – rather than weigh government objectives – measure the degree to which the challenged regulation approaches the level of a physical invasion. See *Penn Central*, 438 U.S. at 124, affirmed by *Lingle*, 544 U.S. at 538-39. See also *ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1312 (N.D. Okla. 2007) (in analyzing the character of the government action, the court, citing *Lingle*, observed that the challenged regulations resulted in a "significant 'physical invasion'"). Star Northwest's evidence showed that the Ordinance will be tantamount to a physical invasion of Star Northwest's business.

the bowling alley, restaurant, bar and arcade, would become valueless." CP 1447, ¶ 9. The trial court, on summary judgment, erroneously stepped into the role of factfinder when it rejected Star Northwest's evidence for its own conclusions that "one can think of lots of other things that would be economically beneficial that a commercial operator on [sic] a tenant could perform on this property than a card room." RP (7/10/09) at 55:5-8. The trial court also erred when it disregarded Star Northwest's evidence that loss of the card room means loss of the entire business (restaurant, lounge, and bowling alley) and – with no relevant evidence from the City – concluded on its own that those other elements of the business "are still perfectly operable." RP (7/10/09) at 55:20.<sup>27</sup>

**D. The Trial Court Erred When It Concluded that It Was Bound by *Edmonds* and *Paradise*.**

Finally, the trial court concluded that two courts of appeals decisions were either instructive or dispositive on the issues of Star Northwest's takings claim: *Edmonds*, 117 Wn. App. 344, and *Paradise*, 124 Wn. App. 759. This, too, was error.

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<sup>27</sup> Nor was the trial court's reliance on *Schreiner Farms, Inc. v. Smitch*, 87 Wn. App. 27, 940 P.2d 274 (1997), to suggest that Star Northwest could substitute other business activities well-placed. In *Schreiner Farms*, only one aspect of the business (its sale of elk) was impacted by regulation; there was no claim that the restriction on elk sales deprived the entire farm business of all economically viable use. *Schreiner Farms*, 87 Wn. App. at 33. Furthermore, Schreiner Farms had offered nothing beyond pure speculation or conjecture to support its assertion that the regulation would force it to make forced or distressed sales. *Id.* at 35-36.

The trial court's reliance on those two opinions was misplaced because, as explained below, *Edmonds* and *Paradise* reached a two-part threshold inquiry that (1) must not be employed when a plaintiff alleges a "total taking," as *Star Northwest* did here and (2) does not survive *Lingle*.

1. Background: *Guimont v. Clarke*'s two-part threshold inquiry.

The Washington Supreme Court has established a two-part threshold inquiry that a plaintiff must first address to determine whether a takings analysis is warranted:

First threshold inquiry: The court asks whether the regulation destroys or derogates any *fundamental attribute* of property ownership: including the right to possess; to exclude others; or to dispose of property.

Second threshold inquiry: The court 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 v Clarke*, 121 Wn.2d 586, 602, 603, 854 P.2d 1 (1993) (emphasis added).<sup>28</sup> The *Guimont* Court, responding to the then-recent United States Supreme Court opinion in *Lucas v. South Carolina Coastal Council*, 505

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<sup>28</sup> *Star Northwest* explains *infra* that the *Guimont* two-part threshold inquiry will not survive when Washington courts apply the U.S. Supreme Court's *Lingle v. Chevron USA Inc.*, 544 U.S. 528 (2005), opinion to takings analyses. When the Washington courts eliminate the two-part threshold inquiry, plaintiffs claiming a "total taking" may proceed directly under *Lucas* or *Penn Central*. See *infra*.

U.S. 1003 (1992), declared that challenges implicating "fundamental attributes" described in the first threshold inquiry include allegations of "total takings" in which a property owner is deprived of all economically viable use of her property. *Guimont*, 121 Wn.2d at 599-600.

If the court answers "yes" to the first threshold inquiry (destruction or derogation of fundamental attribute of ownership including a "total taking") then a per se taking has occurred, and *the court does not reach the second threshold inquiry*. *Guimont*, 121 Wn.2d at 601 ("If the plaintiff proves a 'physical invasion' or 'total taking' occurred, the plaintiff need not proceed with the remainder of the [takings] analysis"). This is because "*Lucas* makes clear that a 'total taking' claim, alleging deprivation of all economically viable use, does not require analysis of whether the regulation goes beyond preventing a public harm to conferring a public benefit." *Guimont*, 121 Wn.2d at 600 (citing *Lucas*, 120 L. Ed. 2d at 819). In short, when a total taking occurs, it constitutes a per se taking entitling the plaintiff to compensation. *Guimont*, 121 Wn.2d at 602-03; *Lucas*, 505 U.S. at 1019.

2. *Paradise* and *Edmonds* do not control because the courts there proceeded to the second *Guimont* threshold inquiry, which is irrelevant when a total taking is alleged.

The *Edmonds* and *Paradise* opinions proceeded to analyze the second *Guimont* threshold inquiry, the plaintiffs having failed to satisfy

the first threshold inquiry. *Edmonds*, 117 Wn. App. at 362-64; *Paradise*, 130 Wn. App. at 770-73. In strong words, the *Guimont* Court explained that the second threshold inquiry *is not reached* if a plaintiff satisfies the "total taking" first threshold inquiry:

According to *Lucas*, challenges implicating fundamental attributes of ownership, such as "*total takings*" or "physical invasions", are subject to categorical treatment and *do not require analysis of the purpose of the regulation or the legitimacy of the State's interest*.

*Guimont*, 121 Wn.2d at 600 (citing *Lucas*, 120 L. Ed. 2d at 812-13)

(emphasis added). "[A]ny analysis of the public interest advanced in support of the regulation is *irrelevant* to a 'total takings' claim . . . ." *Id.*

(emphasis added).

Despite this, the trial court relied on both *Edmonds'* and *Paradise's* conclusions that the answer to the second *Guimont* threshold inquiry was "no." RP (7/10/09) at 57:15-22 (noting that it was "bound by" *Edmonds*, which answered "no" to the second threshold inquiry) and 58:6-20 (adopting the *Paradise* second threshold inquiry analysis). Those two opinions' weighing of public interests under the second *Guimont* inquiry should have had no role in the trial court's summary judgment analysis because, in contrast to the *Edmonds* and *Paradise* plaintiffs,<sup>29</sup> Star

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<sup>29</sup> See *Edmonds*, 117 Wn. App. at 362-64 (no total taking was alleged); *Paradise*, 130 Wn. App. at 770-73 (although a total taking was alleged, there was no allegation that business would close).

Northwest alleged a total taking and presented evidence that it would be deprived of all economically viable use.

3. The *Guimont* two-part threshold inquiry does not survive *Lingle*.

The trial court dismissed the impact that the 2005 *Lingle* opinion will have on *Guimont's* two-part threshold inquiry, RP (7/10/09) at 58:22-59:9, and this too was error. *Lingle* explains in clear terms that a plaintiff stating a cause of action sounding in the Fifth Amendment takings clause may proceed directly on a "physical invasion" claim, a *Lucas* total taking claim, a *Penn Central* regulatory taking claim, or a *Nollan/Dolan* exactions claim. *Lingle*, 544 U.S. at 548. In light of this guidance, *Guimont's* edict that a plaintiff must first address two threshold inquiries before achieving eligibility to pursue a *Penn Central* claim clashes with United States Supreme Court precedent. *And see Paradise*, 124 Wn. App. at 773 (plaintiff "skipped the second of the two threshold questions and proceeding directly to the takings analysis. But that is not the proper analysis").

Moreover, *Lingle* educates that *Guimont's* second threshold inquiry (balancing the prevention of harm with the imposition of public benefit) is aimed at measuring a regulation's underlying validity and, thus, fails as a takings analysis. *See Lingle*, 544 U.S. at 543 (explaining that the similar

"substantially advances" analysis is a substantive due process inquiry, not a takings inquiry). Therefore, *Guimont's* second threshold inquiry does not belong in a takings claim analysis, but rather, in a substantive due process analysis.

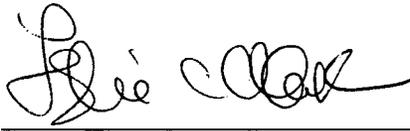
For these reasons, the *Guimont* two-part threshold inquiry cannot survive *Lingle*, and the trial court's ruling, which relied on *Edmonds'* and *Paradise's* application of that inquiry,<sup>30</sup> must be reversed.

## VII. CONCLUSION

For all of the foregoing reasons, 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 7<sup>th</sup> day of January, 2010.

SHORT CRESSMAN & BURGESS PLLC

By 

Paul J. Dayton, WSBA No. 12619  
Leslie C. Clark, WSBA No. 36164  
Attorneys for Appellant Star  
Northwest, Inc.

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<sup>30</sup> For example, contrary to *Lingle's* principles, *Paradise* held banning gambling will always equate to "regulating a public harm" and thus yield a "no" answer to *Guimont's* second threshold inquiry. 124 Wn. App. at 773.

**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.

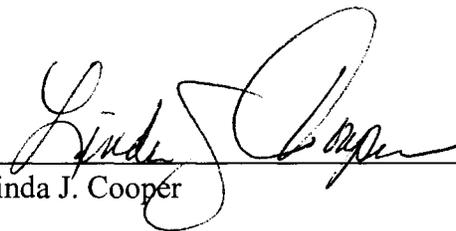
On January 7, 2010, I served true and correct copies of the document to which this Declaration is attached on:

<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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STATE OF WASHINGTON  
2010 JAN -7 PM 4:49

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

SIGNED on January 7, 2010, at Seattle, Washington.

  
Linda J. Cooper

NO. 63971-4

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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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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**ERRATA TO BRIEF OF APPELLANT STAR NORTHWEST, INC.**

---

Paul J. Dayton, WSBA No. 12619  
Leslie C. Clark, WSBA No. 36164  
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STATE OF WASHINGTON  
2010 JAN -8 AM 10:58

On January 7, 2010, Appellant Star Northwest, Inc. filed and served its Brief of Appellant. Footnote 25, on pages 41-42, should be modified as follows:

<sup>25</sup> And, in fact, the existence of disputed material facts on Star Northwest's *Penn Central* takings claim further renders the trial court's grant of summary of judgment reversible error.

In *Penn Central*, the Court evaluated the question of when a regulation not depriving the owner of all economically viable use constitutes a taking requiring just compensation under the Fifth Amendment. *Penn Central*, 438 U.S. at 124. The Court noted its previous refusal to establish a bright-line test, instead describing the analysis as one that "depends largely upon the particular circumstances" and consists of "essentially ad hoc, factual inquiries." *Id.* The Court did, however, provide three factors for courts to consider when weighing a takings claim: (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. *See id.*

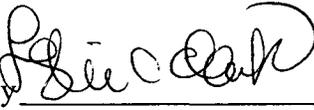
Factor 1: Economic impact. Star Northwest demonstrated that the shutting down of its card room would have devastating economic impact on Star Northwest's business. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 529 (1998) ("considerable financial burden" met first *Penn Central* prong). Star Northwest explained that without profits from the card room, it will lose money on its other operations and must close. CP 1167, ¶ 17. The business cannot be moved and no substitute business in the card room space would generate sufficient profits, so Star Northwest's \$4.9 million investment would be lost. CP 1444-1456.

Factor 2: Investment-backed expectations. Star Northwest offered evidence of its investment-backed expectations. Frank Evans explained in his declaration, over the past 12 years, Star Northwest invested approximately \$500,000 per year (\$5.5 million) in the business. CP 1165, ¶9. After the 2004 proposition in which Kenmore citizens voted "no" on banning card rooms, Star Northwest invested more than \$1 million. In late 2005, Star Northwest borrowed \$500,000 to upgrade facilities and expand operations. CP 1165-1166, ¶ 10.

Factor 3: Character of the government action. Post-*Lingle*, courts should apply the character of government action prong to – rather than weigh government objectives – measure the degree to which the challenged regulation approaches the level of a physical invasion. *See Penn Central*, 438 U.S. at 124, *affirmed by Lingle*, 544 U.S. at 538-39. *See also ConocoPhillips Co. v. Henry*, 520 F. Supp. 2d 1282, 1312 (N.D. Okla. 2007) (in analyzing the character of the government action, the court, citing *Lingle*, observed that the challenged regulations resulted in a "significant physical invasion"). Star Northwest's evidence showed that the Ordinance will be tantamount to a physical invasion of Star Northwest's business.

DATED this 8<sup>th</sup> day of January, 2010.

SHORT CRESSMAN & BURGESS PLLC

By 

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Paul J. Dayton, WSBA No. 12619  
Leslie C. Clark, WSBA No. 36164  
Attorneys for Appellant Star  
Northwest, Inc.

**DECLARATION OF SERVICE**

I, Linda Sutton, certify and declare:

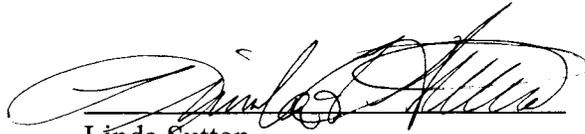
I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein.

On January 8, 2010, I served true and correct copies of the document to which this Declaration is attached on:

<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 January 8, 2010, at Seattle, Washington.

  
Linda Sutton