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No. 63971-4-I

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

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

Plaintiff/Appellant,

vs.

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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**CITY OF KENMORE'S RESPONSE BRIEF**

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ORIGINAL

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## I. NATURE OF THE CASE

This appeal concerns Star Northwest's challenge to two Kenmore Ordinances: (1) Ordinance No. 04-0223, which increases the City's tax on card rooms, and (2) Ordinance No. 05-0237, which prohibits card rooms. However, both Ordinances are expressly authorized by and consistent with state statutes and case law interpreting those statutes.

Regarding Ordinance No. 04-0223, RCW 9.46.110 authorizes cities to impose a gambling tax on card rooms (up to 20% of gross revenue). RCW 9.46.113 requires that a city use gambling tax revenue "primarily for the purpose of enforcement of the provisions of this chapter." Consistent with these statutes, the Ordinance increases the gambling tax from eleven to fifteen percent, and states that four-fifteenths of the tax shall be dedicated to funding capital facility 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." The Ordinance's plain language requires compliance with RCW 9.46.113. The Washington Supreme Court has already interpreted RCW 9.46.113, and held that the term "primarily" means "in the first instance;" a city does not violate RCW 9.46.113 by using gambling tax revenue for other purposes, if so much of the tax as is necessary for Gambling Act enforcement is used for that purpose. And, "enforcement" of the Gambling Act includes general police presence in the community. *American Legion Post 32 v. City of Walla Walla*, 116 Wn.2d 1, 802 P.2d 784 (1991). Star Northwest can not establish that the City has not used gambling tax revenue necessary for enforcement costs, on those costs.

Regarding Ordinance No. 05-0237, Star Northwest claims the card room prohibition is a "taking" of its gambling business under the federal Constitution. However, a federal court already held that Star Northwest does not have a constitutionally-protected property right in continued operation of its gambling business. Even if collateral estoppel did not apply, the Superior Court ruled there is no constitutionally-protected property right in a gambling business, a nuisance-like activity traditionally subject to local prohibition. As recognized by two Washington courts, RCW 9.46.295 authorizes the City to "absolutely prohibit" a gambling activity, and if the City does, the City can not allow existing gambling activity to continue. The City simply exercised its statutory authority; the Ordinance is not an unconstitutional taking.

Accordingly, the Superior Court properly dismissed Star Northwest's challenges to the City's Ordinances; this Court should affirm.

## **II. STATEMENT OF ISSUES**

- A.** Whether Star Northwest met its burden to prove that Ordinance No. 04-0223 violates RCW 9.46.113, when the Ordinance specifies the gambling tax shall be used primarily for enforcement of gambling laws?
- B.** Whether Star Northwest is collaterally estopped from asserting a constitutionally-protected property right to its gambling business?
- C.** Whether the Superior Court erred by determining that Star Northwest does not have a constitutionally-protected property right to continued operation of its gambling business?
- D.** Whether Star Northwest met its heavy burden to prove that enactment of Ordinance No. 05-0237 pursuant to RCW 9.46.295 is a "taking" of property under the Fifth Amendment to the federal Constitution?

### III. STATEMENT OF THE CASE

#### A. The Kenmore City Council Has Considered Potential Gambling Regulations Since Kenmore Incorporated in 1998.

Star Northwest owns and operates the 11<sup>th</sup> Frame Casino, a commercial card room, as well as a restaurant and bowling alley on the same property in the City, known as Kenmore Lanes. Star Northwest does not own the real property, but merely leases the site. CP 769-72.

Upon incorporation in 1998, the City began preparing a Comprehensive Plan and related regulations, as required by the Growth Management Act. As part of that process, the City conducted citizen surveys, which included questions on whether gambling should be allowed in the City. To preserve the status quo during the lengthy public participation phase of the planning process, the City Council adopted moratoria, covering adult entertainment, card rooms, cell towers, and other matters. CP 323-4.

A local businessman, Len Griesel, announced his intent to open a mini-casino in Kenmore. Consequently, the specter of multiple casinos in the City was not merely theoretical.<sup>1</sup> Thus, the Council analyzed options to regulate gambling, held eight public hearings on the gambling issue between 1999 and 2002, discussed the issue at seven other meetings, and began convening special community meetings in 2003. CP 324.

The first such meeting took place on January 27, 2003. CP 324, 338-446. Of the 40 people to testify, 36 urged the Council to ban all gambling in Kenmore, citing a litany of social and economic effects of gambling at both

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<sup>1</sup> Other organizations also expressed interest in locating a gambling establishment in Kenmore. CP 324.

the private and public level. *Id.*<sup>2</sup> Of the few people who supported gambling (primarily employees of Kenmore Lanes), most did not ask the Council to allow gambling, but simply urged the Council to “grandfather” the 11th Frame if a ban was enacted. The same thing happened the next month, when 50 citizens spoke, with the vast majority urging a complete ban or asking that the 11th Frame be “grandfathered.” CP 324, 448-51.

In March 2003, after lengthy discussion, the Council enacted an ordinance banning card rooms, but giving the 11th Frame a “grandfather clause.” The ordinance (03-167) was approved on March 10, 2003. CP 325.

**B. In 2003, Washington Courts Removed Municipal Discretion to Regulate Gambling Short of a Complete Ban.**

After the Council adopted its “grandfather” ordinance, the Court of Appeals decided *Edmonds Shopping Center Ass'n. v. City of Edmonds*, 117 Wn.App. 344, 71 P.3d 233 (2003). In *Edmonds*, the city prohibited future card rooms and instituted a phase-out of existing card rooms. The plaintiff challenged the ordinance based on RCW 9.46.295, under which cities may “absolutely prohibit, but may not change the scope of license, any or all of the gambling activities for which the license was issued.” The Court held that “[i]nstituting a schedule to phase out existing gambling activities is not

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<sup>2</sup> Citizens testified that gambling had torn their families apart, leading to divorce, economic instability, depression, unemployment, and a host of other problems (CP 360-70); others told of their own problems resulting from gambling (CP 376-9); property value concerns (CP 374), experiences living in cities with a large amount of gambling, and the impact those establishments had on those cities. CP 389-91. Still others noted reliance on gambling revenue was inconsistent with the City's Vision Statement and Comprehensive Plan adopted in 2000 (CP 397-8, 430-1), and that surveys had already reflected citizens' opposition to gambling in Kenmore. CP 395-6, 409-10.

absolutely prohibiting gambling activities. ... [D]ifferentiating between existing and future uses is more regulatory in nature, thus violating RCW 9.46.295.” 117 Wn.App. at 358. A complete ban on gambling was constitutional, but the Court struck down the “grandfather” ordinance that exempted existing card rooms from the ban. *Id.*<sup>3</sup> *Edmonds* cast doubt on whether Kenmore’s ordinance -- which allowed the 11th Frame to operate while prohibiting all other card rooms -- was consistent with the newly-interpreted application of RCW 9.46.295. CP 325, 453-6.

Mr. Griesel immediately threatened to file suit to enforce his right to open a casino. CP 325. To preserve the status quo while examining its options, the Council adopted a 12-month moratorium in July 2003, and repealed the grandfather ordinance in November 2003. CP 325, 458-72. Mr. Griesel filed suit in October 2003, challenging the City’s right to allow the 11th Frame to continue while prohibiting all future card rooms. CP 325.<sup>4</sup>

Throughout 2004, the City continued to receive testimony and discuss options for regulation, including meetings in January, February, March, April, and July. CP 325-6. The Council decided to conduct a public advisory vote on the card room issue. In July, the Council extended the moratorium on new gambling establishments for another six months. CP 326.<sup>5</sup>

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<sup>3</sup> This interpretation of RCW 9.46.295 was confirmed in December of 2004 in *Paradise, Inc. v. Pierce County*, 124 Wn. App. 759, 103 P.3d 173 (2004).

<sup>4</sup> The Council continued discussing its options, including pending House Bill 1667, which would have overridden *Edmonds* by providing express authority for cities to establish zoning and other regulations for gambling establishments. HB 1667 failed to pass. CP 325.

<sup>5</sup> Throughout the summer of 2004, citizens voiced opposition to gambling in the City. CP 326, 474-80 (7/26/04)(all public speakers except for 11th Frame employees and one concerned that his 83-year old father wouldn’t have a place to *bowl* if Star Northwest was not able to subsidize its bowling business with gambling income).

In September 2004, the City conducted its advisory vote on whether to prohibit card rooms. The measure failed by a mere 50.39% to 49.61% margin. CP 326. After the vote, it appeared that the process had actually created more confusion than it alleviated.<sup>6</sup> CP 326, 488-531 (9/27/04) (citizens voice confusion over issued supposedly decided by vote); (11/8/04) (citizens urge Council to ban gambling despite the vote, citing state election results on slot machines, private/public ills resulting from gambling, and clouding of issues during the recent vote).

**C. In 2004, the King County Superior Court Ordered the City to Either Prohibit or Allow All Card Rooms.**

On December 13, 2004, the Council extended the card room moratorium, hoping to reach a decision on the best way to control gambling in the City. CP 326. Ten days later, Judge Lukens ruled in *Griesel* that the City's repeated use of moratoria, which allowed the 11th Frame to continue operation while prohibiting other gambling facilities, was *regulation* of gambling. CP 326, 533-6. Under *Edmonds*, such local regulation of gambling was contrary to the express language of RCW 9.46.295. Judge Lukens ruled that at the end of the current moratorium, the City would have to decide whether to *ban* or allow *all* gambling, but it could not allow one facility (the 11th Frame) to operate while prohibiting others. CP 533-6.

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<sup>6</sup> For example, although the Voters Pamphlet included statements "for" and "against" the gambling ban, the pro-gambling statement spoke nearly exclusively about Kenmore Lanes, *the bowling alley*, not 11<sup>th</sup> Frame, the card room. CP 326, 485. The statement indicated that a "yes" vote (*i.e.*, to ban gambling) was a vote to *close the local bowling alley*. *Id.* As a result, citizens reported that many "no" votes were less a vote in favor of gambling than votes in support of the bowling alley. CP 495, 497-9.

Under this direct order from the court, the City Council again began deliberating the issue, and held another series of public hearings. The meetings, debates, and public testimony continued throughout 2005.<sup>7</sup>

**D. In 2005, the City Council Prohibited Card Rooms in Kenmore After Years of Public Debate and Court Rulings Limiting Options for Municipal Regulation of Gambling.**

On December 19, 2005, after taking even more citizen comment (CP 617-724), the City Council adopted Ordinance No. 05-0237, prohibiting card rooms. CP 327, 329-36. Based on RCW 9.46.295, *Edmonds, Paradise*, and Judge Lukens' order, the City was prohibited from allowing the 11th Frame to continue operating after the ban went into effect. Consequently, the Ordinance did not allow the 11th Frame a grandfather clause or amortization period. The ban was to take effect on December 29, 2005. *Id.*<sup>8</sup>

**E. In 2004, the City Increased the Gambling Tax on Card Rooms.**

When the City incorporated in 1998, and through the present, RCW

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<sup>7</sup>CP 326, 538-50 (01/24/05)(citizens complain about misinformation distributed during the gambling vote); CP 326, 553-7 (05/23/05)(nearly 30 people speak, with only 10 in favor of allowing gambling, seven of whom were employees of the 11th Frame or Kenmore Lanes); CP 326, 559-63 (06/27/05)(14 people comment, eight of whom were against allowing gambling. Of the six who spoke in favor, four were employees of the 11th Frame, and the other two only opined the advisory vote was the final say); CP 326, 565-614 (07/11/05)(eight people urge the Council to ban gambling completely; one mentions that recent events prohibited grandfathering the 11th Frame. Several address specific experiences they or their family had with gambling. One cites concerns about owning property next to casinos, which decreased property values and safety); CP 327 (11/14/05) (after lengthy discussion, the Council sets a vote on a proposed ordinance banning card rooms for the December 19 meeting. One Councilmember notes that given the people elected to the Council in the recent election, the citizens indicated they did not want gambling in the City).

<sup>8</sup> Star Northwest immediately filed an action in federal court and obtained a preliminary injunction against enforcement of the ordinance. The district court dismissed Star Northwest's claims, but Star Northwest appealed to the Ninth Circuit. The City remained enjoined from enforcing the ordinance during the federal court proceedings. CP 327.

9.46.110 authorized cities to impose a gambling tax on card rooms in an amount up to "twenty percent of the gross revenue from such games." *RCW 9.46.110(3)(f)*. In July 1998, the City enacted Ordinance No. 98-0013, which established a gambling tax on card rooms, in the amount of "eleven percent (11%) of the gross receipts from such games." CP 124, 131.

On December 13, 2004, the Council enacted Ordinance No. 04-0223, increasing the tax on card rooms from 11% to 15% of gross revenue. CP 125, 138-9. Even as increased, the tax is under the statutorily authorized twenty percent. Consistent with *RCW 9.46.113*, the Ordinance states:

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*.**

CP 138 (Ord. No. 04-0223, § 1, amending *KMC 3.15.020C*)(emph. added).

**F. The City Uses Gambling Tax Revenue Primarily for Purposes of Enforcement of Gambling Laws Pursuant to *RCW 9.46.113*.**

The City's Police Department enforces all laws in the City. CP 125. Due to economies of scale and overall public safety service, the City contracts with King County for police services, paying a flat fee every year for all police services. CP 125. Under the interlocal agreement for police services, King County provides the City with twelve deputy sheriffs, along with equipment and supplies. CP 125. The County pays the officers' salaries and benefits, and provides vehicles, 911 communications, and other support services. *Id.* The City provides some officer training, cell phones, radar

guns, computers, bicycles, and other equipment for the officers. *Id.*

Currently, the City's police officers work out of the County's local precinct facility. CP 125. However, the City is planning a new City Hall, which will contain space for the City's officers. The new City Hall is included in the City's Capital Facilities Plan. CP 125, 142.

Since 2001, the City has paid the County the following annual amounts for all police services: \$1,651,484 (2001), \$1,937,047 (2002), \$1,929,614 (2003), \$2,024,152 (2004), \$2,175,464 (2005), and \$2,280,793 (2006). CP 125. Because the City makes an annual lump-sum payment to the County for all police services, the City's financial documents do not segregate the cost of enforcing gambling laws from the cost of enforcing other laws. *Id.* While the budget has line items for the cost of police services in general, there is not a line item solely for costs of enforcing gambling laws. CP 126.

Other City departments also perform functions that relate to enforcing gambling laws. For example, the finance department administers the gambling tax. Finance department staff prepare tax forms, provide tax returns to taxpayers, receive quarterly tax payments, track receipts in the City's financial system, send collection letters when tax is not paid, calculate interest and penalties on delinquencies, and collect the delinquencies. CP 126. The City pays for the cost of these actions from the "general fund," which is the primary fund of the City, accounting for all resources except those required or elected for accounting in another fund. *Id.* The general fund receives a variety of revenue sources, only one of which is gambling tax revenue. In addition, the general fund contains property tax revenue, sales

and use tax revenue, criminal justice sales tax revenue, utility tax revenue, franchise fees, state-shared revenues, liquor excise tax revenue, development fees, investment interest, and many other types of revenue. CP 126.

The City deposits all gambling taxes collected into the general fund. CP 126. For the years 2001 through 2006, the City collected gambling tax on card rooms, and the general fund had a total balance, as listed below:

<u>Year</u>	<u>Total General Fund Revenue</u>	<u>Card Room Tax</u>	<u>Total Gambling Tax Revenue</u>
2001	\$8,378,020	\$457,291	\$573,535
2002	\$8,745,885	\$509,463	\$621,248
2003	\$8,418,607	\$524,057	\$655,555
2004	\$8,982,576	\$602,436	\$750,991
2005	\$10,080,417	\$818,017	\$957,816
2006	\$10,084,409	\$573,606	\$684,490

CP 127.

Each year, the City pays the contractual amount for police services to King County from the general fund. These payments are not tracked to any particular revenue source within the general fund. Likewise, the City pays for the law enforcement support that it provides from the general fund. CP 127. The police service payments far exceed the card room tax revenue.

Each year, the City transferred between \$400,000 and \$5,900,000 from the general fund to the capital projects fund. The capital projects fund is used to pay for projects listed in the City's Capital Facilities Plan, such as storm water projects, road improvements, and the new City Hall. CP 127. Even without card room tax revenue, the City would have made the same transfers from the general fund to the capital projects fund. *Id.* In fact, for the year

2006, the City did not budget any revenue at all for card room taxes (other than taxes from fourth quarter 2005, received in first quarter 2006), because the card room prohibition was to take effect on December 29, 2005. Yet, the City still budgeted a \$2,429,140 transfer from the general fund to the capital projects fund, only \$170,860 less than was transferred in 2005. CP 128.

**G. Statement of Procedural History.**

Immediately after the City Council adopted Ordinance No. 05-0237 prohibiting card rooms, Star Northwest filed suit in federal court, challenging both Ordinance No. 05-0237 (card room prohibition), including claims the Ordinance violates the federal Constitution's takings and substantive due process clauses, and Ordinance No. 04-0223 (gambling tax increase). The parties stipulated to stay enforcement of Ordinance No. 05-0237.

The federal district court granted the City's motion for summary judgment and dismissed Star Northwest's claims challenging the card room prohibition. CP 128. The district court ruled in part that (1) there is no constitutionally-protected property right in a gambling operation, and (2) the federal takings claim was not ripe, because Star Northwest had not first sought relief in state court for inverse condemnation. CP 732-4. The court declined to exercise supplemental jurisdiction over the gambling tax refund claim, and dismissed it as well. CP 128, 740-2. Star Northwest appealed these rulings to the Ninth Circuit, and the injunction remained in effect.

Star Northwest then filed this state action, alleging Ordinance No. 04-0223 violates RCW 9.46.113, and Ordinance No. 05-0237 violates the

federal Constitution's takings clause. CP 15-26. The Superior Court denied Star Northwest's motion for summary judgment on the gambling tax claim, and its motion for reconsideration, agreeing that the Ordinance does not violate RCW 9.46.113. CP 1679-80, 1687-8. The Court then granted the City's motion for summary judgment and dismissed that claim. CP 1691-3.

Meanwhile, the Ninth Circuit denied Star Northwest's appeal of the district court's decision (CP 1605-17), and the United States Supreme Court denied Star Northwest's petition for review. Subsequently, the Superior Court granted the City's motion for summary judgment and dismissed the takings claim. CP 1695-7. Star Northwest then filed this appeal, challenging the Superior Court's denial of Star Northwest's motion for summary judgment and grant of the City's motion on the tax ordinance, and the grant of the City's motion for summary judgment on the takings claim.

#### IV. AUTHORITY AND ARGUMENT

##### A. Standard of Review.

The City agrees that the grant of a motion for summary judgment is reviewed de novo. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

This case involves construction of a city ordinance (Ordinance No. 04-0223). Considerable judicial deference is given to the construction of an ordinance by the officials charged with its enforcement.<sup>9</sup>

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<sup>9</sup> See *Milestone Homes v. City of Bonney Lake*, 145 Wn.App. 118, 127, 186 P.3d 357 (2008)("[i]n any doubtful case, the court should give great weight to the contemporaneous construction of an ordinance by the official charged with its enforcement"); *Mall, Inc. v. Seattle*, 108 Wn.2d 369, 377-8, 739 P.2d 668 (1987); *Neighbors of Black Nugget Road v. King County*, 88 Wn.App. 773, 778, 946 P.2d 1188 (1997)(Courts give considerable

**B. The Superior Court Properly Determined that Ordinance No. 04-0223 Does Not Violate RCW 9.46.113.**

**1. The City has express authority under RCW 9.46.110 to impose a gambling tax on card rooms.**

RCW 9.46.110 clearly authorizes the City to impose a tax on gambling activities, including card rooms, only limiting the amount of the tax to "twenty percent of the gross revenue from such games." *RCW 9.46.110(1), (3)(f)*. In 1998, the City exercised its authority under RCW 9.46.110 and imposed an eleven percent tax on card room gross receipts. CP 124, 131 (Ord. No. 98-0013)(codified at KMC 3.15.020C). Star Northwest does not allege the tax imposed by the 1998 Ordinance is invalid for any reason.

**2. Ordinance No. 04-0223 is consistent with RCW 9.46.113.**

RCW 9.46.113 limits the use of revenue generated by a gambling tax:

Any county, city or town which collects a tax on gambling activities authorized pursuant to RCW 9.46.110 shall use the revenue from such tax primarily for the purpose of enforcement of the provisions of this chapter by the county, city or town law enforcement agency.

*RCW 9.46.113*. In 2004, the City Council enacted Ordinance No. 04-0223, increasing the card room gambling tax to fifteen percent of gross receipts:

**C. 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**

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deference to enforcing agency's interpretation of ordinance). Under this standard, the agency's interpretation is upheld if it is plausible and not contrary to legislative intent. *Pitts v. DSHS*, 129 Wn.App. 513, 523, 119 P.3d 896 (2005).

**gambling laws pursuant to RCW 9.46.113.**

CP 125, 138-9 (Ord. No. 04-0223, amending KMC 3.15.020C)(bold added).

As stated in *Housing Authority v. City of Pasco*:

Municipal ordinances are presumed to be validly enacted. *City of Bothell v. Gutmschmidt*, 78 Wn.App. 654, 660, 898 P.2d 864 (1995). The entity challenging the ordinance has the burden to show by clear, cogent and convincing evidence that the ordinance was not validly enacted. *Id.*

*Housing Authority v. City of Pasco*, 120 Wn.App. 839, 843, 86 P.3d 1217 (2004). The rule that an ordinance is presumed valid applies to cases where a statutory violation is alleged. *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 561, 29 P.3d 709 (2001); *Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103 Wn.App. 411, 416, 12 P.3d 1022 (2000).

Star Northwest alleges that Ordinance No. 04-0223 is invalid because it refers to use of four-fifteenths of gambling tax revenue for Capital Facilities Plan projects. However, that argument ignores the "proviso" in the Ordinance, which plainly states that four-fifteenths of card room tax revenue will be dedicated to Capital Facilities 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." On its face, the Ordinance does not violate RCW 9.46.113; in fact, the Ordinance repeats the language in RCW 9.46.113. The proviso operates as a limitation, clearly requiring that the tax revenue be spent in accordance with RCW 9.46.113, before it is used for any other purpose. *West Valley Land Co., Inc. v. Nob Hill Water Ass'n.*, 107 Wn.2d 359, 369, 729 P.2d 42 (1986)(proviso operates

as limitation on or exception to the general terms of the statute).<sup>10</sup>

Ordinance No. 04-0223 is not ambiguous on this point, so statutory interpretation is unnecessary.<sup>11</sup> But even if the Ordinance was ambiguous, it still does not violate RCW 9.46.113, since ordinances must be interpreted to effect the legislative body's intent.<sup>12</sup> The rule that the spirit or intent of legislation should prevail over express but inept language requires a statute to be construed as a whole to ascertain its purpose and effect.<sup>13</sup>

When construing legislation, courts are duty bound to give meaning to every word the legislature included and to avoid rendering any language superfluous or meaningless. *City of Seattle v. Williams*, 128 Wn.2d 341, 349, 908 P.2d 359 (1995); *Sleasman v. City of Lacey*, 159 Wn.2d at 646; *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

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<sup>10</sup> It is well-established that a proviso in a legislative enactment operates as a restraint, limitation on, or exception to the provision preceding the proviso. *West Valley Land Co.*, 107 Wn.2d at 369; *State v. Murphy*, 138 Wn.2d 800, 812, 982 P.2d 611 (1999)(proviso "is a restraint or limitation upon, and not an addition to, that which precedes it"); *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974)(Applying these rules, court determines proviso's meaning "in the context of the overall intent and purpose of the legislature"); *Garvey v. St. Elizabeth Hosp.*, 103 Wn.2d 756, 759, 697 P.2d 248 (1985).

<sup>11</sup> If the ordinance's meaning is plain on its face, then the court gives effect to that plain meaning as an expression of legislative intent. *Udall v. T.D. Escrow Services, Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007); *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007). The plain meaning of an ordinance is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Udall*, 159 Wn.2d at 909; *Griffin v. Thurston Cty. Bd. of Health*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008).

<sup>12</sup> *Grader v. Lynnwood*, 45 Wn.App. 876, 880, 728 P.2d 1057 (1986); *Troxell v. Rainier Sch. Dist.*, 154 Wn. 2d 345, 350, 111 P.3d 1173 (2005).

<sup>13</sup> *Dando v. King County*, 75 Wn.2d 598, 603, 452 P.2d 955 (1969). Related statutes must be considered in relation to each other. *State v. Alvarez*, 74 Wn.App. 250, 259, 872 P.2d 1123 (1994); *Vaughn v. Chung*, 119 Wn.2d 273, 282, 830 P.2d 668 (1992) (Statutes are read in their entirety, not in a piecemeal fashion). Municipal ordinances cannot be read in isolation; related provisions must be read together and harmonized so that no provision is rendered meaningless. *City of Puyallup v. Pac. NW Bell Tel. Co.*, 98 Wn.2d 443, 448, 656 P.2d 1035 (1982).

Courts cannot add words to a statute when the legislature has chosen not to include that language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2002); *Applied Ind. v. Mellon*, 74 Wn.App. 73, 79, 872 P.2d 87 (1994). Consistent with the rule that ordinances are presumed valid, courts attempt to interpret ordinances in a manner that upholds their validity. *Storedahl Properties v. Clark County*, 143 Wn.App. 489, 496, 178 P.3d 377 (2008); see *Arnold v. Dept. of Retirement*, 128 Wn.2d 765, 772, 912 P.2d 463 (1996). Star Northwest's position intentionally ignores the proviso, and renders it superfluous or meaningless. The Court should not adopt this interpretation.

Further, the legislature “is presumed to know the existing state of the case law in those areas in which it is legislating, and a statute will not be construed in derogation of the common law unless the legislature has clearly expressed its intention to vary it.” *Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). When Ordinance No. 04-0223 was enacted in 2004, the Washington Supreme Court had already interpreted the terms “primarily” and “enforcement” in RCW 9.46.113; the City Council is presumed to have been aware of the judicial interpretation. See *American Legion Post 32 v. City of Walla Walla*, 116 Wn.2d 1, 802 P.2d 784 (1991) and Section IV.B.3 and 4 below.<sup>14</sup> By including the proviso in the Ordinance, the City Council clearly intended that the City would comply with RCW 9.46.113, as interpreted and applied by the Court.

In granting the City's motion for summary judgment on this issue, the

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<sup>14</sup> In more than a decade since *American Legion* was decided, the State Legislature has taken no action to revise RCW 9.46.110 or 9.46.113 suggesting it disagreed with the Court's interpretation of the law.

Superior Court agreed with the City that the Ordinance is consistent with RCW 9.46.113, as interpreted by *American Legion*:

On 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. I say that because the only other way to read this ordinance would be read [sic] out the proviso. The ordinance requires the city to in the first instance, under the word primarily, put revenues for the tax into gambling law enforcement purposes. And by routing its revenue directly into the general fund from which the police are paid, under *American Legion v. Walla Walla*, it appears to this Court that is exactly what the city has done.

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. But that doesn't remove the effect of the proviso.

RP 16 (01/11/08 Transcript); see RP 6-8 (02/09/07 Transcript). The Superior Court did not err in this regard.

**3. Star Northwest challenges the City's allocation of gambling tax proceeds, not the City's authority to impose the tax.**

Star Northwest does not claim the fifteen percent tax rate exceeds the City's authority. Rather, it alleges that the City has allocated four-fifteenths of the tax revenues to an improper purpose. Even if this were accurate, it still would not provide grounds to invalidate the tax, or refund tax payments to Star Northwest. *American Legion Post 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

In *American Legion*, the plaintiff operated bingo, punchboards and pull tabs. The City of Walla Walla imposed a gambling tax on these games under RCW 9.46.110, placing all tax proceeds in its general fund, without specific

allocation to gambling law enforcement. The city paid for its general police budget from the general fund. The city conceded there was no way to trace the actual expenditure of the tax revenue, and the city had a low incidence of gambling-related crime. Plaintiff alleged the gambling tax exceeded the city's authority under RCW 9.46.113, because the city did not use tax proceeds "primarily" to enforce the Gambling Act. The Court disagreed:

There is no authority ... that renders an otherwise constitutionally levied tax unconstitutional merely because it is purportedly utilized for a purpose other than what is required. ... We find its argument encompasses nothing more than a challenge to Walla Walla's allocation of the gambling tax.

*American Legion*, 116 Wn.2d at 7, 13 (finding remedy is political, not legal).

Star Northwest makes the identical argument as in *American Legion*: that the City is not using tax revenue consistent with RCW 9.46.113. Just as *American Legion* held that the claim was merely a challenge to allocation of tax revenue, Star Northwest's claim only challenges the City's allocation of card room tax revenue, and is not grounds for a tax refund.<sup>15</sup>

**4. The City uses card room tax revenue "primarily" for costs of enforcing the gambling laws, pursuant to RCW 9.46.113.**

Star Northwest relies solely on the language in Ordinance No. 04-0223 referencing Capital Facilities Plan projects to support its claim that the City does not use card room tax revenue "primarily" for enforcement of gambling laws. First, as noted above, this argument ignores the proviso which limits that language, and states the tax revenue "shall be expended primarily for the

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<sup>15</sup> Star Northwest has never sought a writ of mandamus to require the City to use card room tax revenues in a different manner than it does.

purpose of enforcement of gambling laws pursuant to RCW 9.46.113."

More importantly, even if the Ordinance did not include the proviso, the City has fully complied with RCW 9.46.113. The state Supreme Court has interpreted the term "primarily" in RCW 9.46.113, and held that a city does not have to devote **all** or even **most** gambling tax collected to enforcement of gambling laws; rather, a city must devote gambling tax revenue "in the first instance" to gambling law enforcement:

We agree with the Attorney General to the extent that **"primarily" means "in the first instance."** Thus, **regardless of amount, the tax must be utilized first of all to enforce the gambling act.** If this requires all of the revenue, then it must be utilized. Similarly, **if only 5 percent is needed, then that is all that must be used.**

We find no support for the position that "primarily" means "for the most part" or "substantially." To attribute such interpretation to the term defies logic. Municipalities would be required to allocate at least 51 percent of the gambling tax to enforce the gambling act even if a lesser amount would suffice. In short, we would be attributing to the Legislature an intent that municipalities spend money even though it was not needed.

*American Legion*, 116 Wn.2d at 9 (emphasis added).

*American Legion* also addressed the claim that "enforcement" under RCW 9.46.113 should be measured by the number of gambling violations investigated and police training devoted specifically to gambling. The Court found this position "untenable," and broadly defined the term "enforcement" to include general police presence in the community:

Enforcement does not necessarily encompass only that police activity which can be specifically related to gambling, as Legion contends. Among other things, it would be ludicrous to suggest that general police presence in the community does not have an

inhibitive effect on those who contemplate engaging in illegal gambling. Police do not exist merely to deal with existent crime; they also act as a deterrent to the establishment of crime. ...

[A]lthough the gambling dollars are not readily traceable, the tax is placed in the general police budget and contributes to the ongoing existence and functioning of the police force. While police conduct in general is not always specifically dedicated to preventing gambling-related offenses, it is undisputable that the general presence and continuous activity of the police within the community impacts and helps to deter illegal gambling.

*American Legion*, 116 Wn.2d at 10-11.<sup>16</sup> The Court also noted that the "relatively low rate of gambling offenses" indicated that Walla Walla was enforcing the Gambling Act as mandated. *Id.*

Thus, *American Legion* held that RCW 9.46.113 does not require a city to use all, or even most, gambling tax revenue on costs of enforcing gambling laws. A city is only required to use the revenue "in the first instance" for enforcement costs. A city has authority to tax card rooms up to twenty percent of gross revenues, and must only use so much of the tax revenue as is needed for enforcement to satisfy RCW 9.46.113. "If only 5 percent is needed, then that is all that must be used." *American Legion*, 116 Wn.2d at 9. Moreover, "enforcement" of gambling laws includes the general police presence in the City. The Superior Court's decision was guided by, and is wholly consistent with, *American Legion*.

Here, there is no evidence that the City is not using **all** gambling tax revenue on police services. The City places all gambling tax revenue in the City's general fund. The City pays King County for police services from the

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<sup>16</sup> Actually, Walla Walla placed its gambling tax revenue in the general fund, just as the City places its gambling tax revenue in the general fund. *American Legion*, 116 Wn.2d at 4.

general fund, as well as for police training and equipment. Every year, the amount remaining in the general fund after payment for police services exceeds the other general fund expenditures, including transfers to the capital projects fund. Put another way, the card room tax increase means that there are more funds in the general fund for use on the wide variety of proper general fund purposes, including police services and transfers to the capital projects fund. However, this does not render the 15% tax illegal, nor does the City's desire to use the increase on capital projects after paying for gambling enforcement. In fact, the 2006 budget did not include any revenue for card room taxes (other than taxes on gross receipts from 2005, received in 2006), yet the City still transferred \$2,429,140 from the general fund to the capital projects fund, only \$170,860 less than was transferred in 2005.

In addition, other City staff perform tasks associated with enforcing aspects of the Gambling Act. For instance, the City's finance department takes actions necessary to collect the City's gambling tax imposed under the Gambling Act. Under *American Legion's* definition of enforcement, a portion of finance department costs are costs of enforcing the gambling laws.

Further, Star Northwest has no evidence the City has actually "used" any gambling tax dollars, even if it was possible to determine that specific dollars had been transferred to the capital projects fund. Each year, the capital projects fund has a large ending balance. Arguably, the gambling tax dollars remain in that fund, and have not been "used" on anything.<sup>17</sup>

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<sup>17</sup> Moreover, the City's Capital Facilities Plan lists the new City Hall facility, which will contain space for the City's police officers. Under the broad definition of enforcement in *American Legion*, a portion of the cost of the new City Hall is a cost of police services, and

Star Northwest attempts to distinguish *American Legion* on the grounds that American Legion was one of many gambling tax payers in Walla Walla, while Star Northwest is the only card room operation in Kenmore. However, this is a distinction without a difference. The fact that Walla Walla had many tax payers played no part in the Supreme Court's analysis.

**5. Ordinance No. 04-0223 contains a severability clause.**

Ordinance No. 04-0223 amends KMC 3.15.020C as follows:

C. 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.

CP 138. Star Northwest's entire argument focuses on alleged impropriety of the first clause in the newly-added second sentence. But even if Star Northwest's allegation as to the second sentence had merit, Ordinance No. 04-0223 contains a "severability" clause. CP 139.

A legislative act is not invalid in its entirety because one provisions is invalid, unless the invalid provision is not severable and it cannot reasonably be said that the legislature would have passed one without the other, or unless elimination of the invalid part renders the remainder incapable of accomplishing the legislative purpose. *State v. Anderson*, 81 Wn.2d 234, 236, 501 P.2d 184 (1972); *State v. Williams*, 144 Wn.2d 197, 212-3, 26 P.3d

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thus a cost of enforcing gambling laws.

890 (2001). The remaining portion is subject to alternative tests: (1) whether the legislature would have passed the remaining portion without the invalid portion, or (2) whether the elimination of the invalid portion so destroys the legislation as to render it incapable of accomplishing its purposes.<sup>18</sup>

When a severability clause exists, courts "routinely excise select words from a sentence to honor legislative intent and preserve an otherwise valid statute, regulation or ordinance."<sup>19</sup> Here, even if the first clause of the second sentence is invalidated for any reason, the first sentence would still accomplish the City's purpose of increasing the tax to 15%. Even if Star Northwest's position had merit, the remainder of the Ordinance is effective.

Further, even if Ordinance No. 04-0223 was invalidated entirely, Star Northwest would not be entitled to a refund of all gambling tax paid:

It is the rule in [Washington] that an invalidly enacted statute is a nullity. It is as inoperative as if it had never been passed. *State ex rel. Evans v. [Bhd.] of Friends*, 41 Wn.2d 133, 247 P.2d 787 (1952). The natural effect of this rule ... is that once the invalidly enacted statute has been declared a nullity, it leaves the law as it stood prior to the enactment. *Boeing Co. v. State*, 74 Wn.2d 82, 442 P.2d 970 (1968); 82 C.J.S. *Statutes* § 75, at 132 (1953); 16 [AM. JUR. 2D] *Constitutional Law* § 177, at 402 (1964).

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<sup>18</sup> *State v. Anderson*, 81 Wn.2d at 236; *Gerberding v. Munro*, 134 Wn.2d 188, 197, 949 P.2d 1366 (1998)(test for severability is whether the provisions "are so connected ... that it could not be believed that the legislature would have passed one without the other, or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislation").

<sup>19</sup> *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 839, 92 P.3d 243 (2004); *In re Boot*, 130 Wn.2d 553, 567, 925 P.2d 964 (1996)(severability clause preserves statute's validity despite invalidation of other sections of the Act); *Bond v. Burrows*, 103 Wn.2d 153, 162, 690 P.2d 1168 (1984). The severability clause provides the necessary assurance that the remaining provisions would have been enacted without the invalidated provision. *State v. Anderson*, 81 Wn.2d at 236; *Gerberding*, 134 Wn.2d at 197; *City of Seattle v. Davis*, 32 Wn.App. 379, 385, 647 P.2d 436 (1982).

*Palermo at Lakeland v. City of Bonney Lake*, 147 Wn.App. 64, 85, 193 P.3d 168 (2008). Star Northwest does not challenge the validity of Ordinance No. 98-0013, which originally imposed the City's 11% gambling tax. Even if Ordinance No. 04-0223 was invalid, the 1998 Ordinance remains in effect.

**C. The Superior Court Properly Dismissed Star Northwest's Taking Claim.**

- 1. Under RCW 9.46.295, the City has the authority to prohibit gambling activity, and if the City does so, the City cannot “grandfather” existing gambling activity.**

In Chapter 9.46 RCW, the Washington state legislature has enacted extensive regulations governing gambling.<sup>20</sup> Under RCW 9.46.0325, persons operating a business engaged in selling food or drink for consumption on premises may conduct card games, "when licensed and utilized or operated pursuant to [Chapter 9.46]." Under RCW 9.46.070, only the State Gambling Commission may issue a license to operate card games, and **only for a period not to exceed one year.**<sup>21</sup>

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<sup>20</sup> The legislative intent states: "The public policy of the state of Washington on gambling is to keep the criminal element out of gambling and to promote the social welfare of the people by limiting the nature and scope of gambling activities and by strict regulation and control. It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; to restrain all persons from patronizing such professional gambling activities; to safeguard the public against the evils induced by common gamblers and common gambling houses engaged in professional gambling; ..." *RCW 9.46.010*. All factors incident to activity authorized in Chapter 9.46 RCW shall be closely controlled, and Chapter 9.46 RCW shall be liberally construed to achieve that end. *Id.*

<sup>21</sup> Star Northwest alleges the 11<sup>th</sup> Frame obtained a license on November 28, 2005 entitling it to operate its card room through December 31, 2006. Because enforcement of Ordinance No. 05-0237 was stayed during the federal litigation, the card room continued to operate even after that license expired, throughout the pendency of the federal suit (more than **three and a half years** after the Ordinance's effective date).

In Chapter 9.46 RCW, the state preempted the licensing and regulating of gambling activity. *RCW 9.46.285*. Under the statutory scheme, cities only have the authority to prohibit "absolutely" any or all gambling activities for which a license was issued by the Commission, but otherwise may not change the scope of a license:

**Licenses, scope of authority -- Exception.** Any license to engage in any of the gambling activities authorized by this chapter ... and issued under the authority thereof shall be legal authority to engage in the gambling activities for which issued ..., **except that a city located therein with respect to that city, or a county with respect to all areas within that county except for such cities, may absolutely prohibit, but may not change the scope of license, any or all of the gambling activities for which the license was issued.**

*RCW 9.46.295 (emphasis added).*

Washington courts have interpreted RCW 9.46.295, and held a city has no authority to "grandfather" existing gambling or to grant existing gambling operations an amortization period. Rather, a city may only institute a complete ban on gambling activity. The local prohibition must apply equally to all future **and existing** gambling activity. *Edmonds*, 117 Wn.App. at 358.

In *Edmonds*, Edmonds enacted an ordinance that (1) prohibited card rooms, and (2) established a five year amortization period for existing card rooms. The Court affirmed a city's right to prohibit all card rooms, including existing card rooms, under RCW 9.46.295. *Edmonds*, 117 Wn.App. at 356-7.

The Court then held the provision for amortization was preempted:

RCW 9.46.295 allows cities only to "absolutely prohibit, but ... not change the scope of license, any or all of the gambling activities for which the license was issued." Instituting a schedule

to phase out existing gambling activities is not absolutely prohibiting gambling activities. Rather, it is regulation. ... RCW 9.46.295 does not give municipalities the authority to prohibit selectively gambling activities.

*Edmonds*, at 358-9; *Paradise, Inc. v. Pierce County*, 124 Wn.App. 759, 774, 102 P.2d 173 (2004) (“a ban on gaming was the only means available to the County to realize the public purpose of stopping card room gaming”).

Thus, Washington courts have already addressed the issue of a city's authority to permit existing gambling activity to continue or provide an amortization period. Under RCW 9.46.295, a city can do neither. A city is limited strictly to either banning or allowing all such activity. Here, in Ordinance No. 05-0237, the City simply chose the first option and exercised the authority expressly delegated to it by RCW 9.46.295.

**2. Star Northwest's Fifth Amendment takings claim is not ripe.**

Star Northwest claims it complied with the federal courts' requirement to pursue state law remedies. In reality, all Star Northwest has done is refile the *exact same federal claim* in state court. This attempt to relitigate the identical federal takings claim that the federal court dismissed – and the Superior Court's failure to dismiss that federal claim for ripeness – is based on a fundamental misunderstanding of the issues involved.<sup>22</sup>

The United States Supreme Court has directly addressed this issue. In *Williamson County Reg. Planning Comm. v. Hamilton Bank*, 105 S.Ct. 3108, 473 U.S. 172, 87 L.Ed.2d 126 (1985), the plaintiff filed a Fifth Amendment

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<sup>22</sup> The Superior Court ruled that Star Northwest waived any takings claim under Washington Constitution, Art. I, § 16, based on failure to plead or brief that claim. RP 18, 46 (07/10/09 Transcript). Star Northwest does not appeal this ruling.

takings claim in federal court. The Court noted: “The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation. Nor does the Fifth Amendment require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking.” 473 U.S. at 194 (cites omitted). Thus, “if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.” *Id.* In other words, an owner does not suffer a violation of the Fifth Amendment “until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation.” *Id.* at 195. Since the plaintiff had not brought a claim under the state inverse condemnation statute, his Fifth Amendment claim was not ripe. *Id.* at 195-6 (“Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature”); see *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997)(federal takings claim dismissed as not ripe due to failure to pursue state court claim first); *Spoklie v. State of Montana*, 411 F.3d 1050, 1057 (9th Cir. 2005)(“Until state court has finally ruled on the state takings claim, the federal takings claim is not ripe”).

The same is true here: (1) the Washington Constitution clearly provides a remedy by which an owner can seek compensation for an alleged taking in state court, and (2) Star Northwest has not attempted to use that state remedy

and procedure. For this reason, the federal district court and the Ninth Circuit held that Star Northwest's takings claim was premature. CP 732-4, 1605-17. Star Northwest recognizes *Williamson's* ruling, and asserts for that reason, Star Northwest filed its federal taking claim in state court. *Opening Brief*, 30-1. This argument misses the point of *Williamson*: the question is not only which court hears the claim, but which claim the court hears. The takings claim was not dismissed solely because it was filed in the wrong court; it was dismissed because it was based on the wrong law. The federal claim is no more ripe in state court than it was in federal court. Until Star Northwest utilizes the state procedure under Wash. Const. Art. I, §16 for obtaining compensation, its Fifth Amendment claim is premature.

**3. Star Northwest has no constitutionally protected property right to the continued operation of a gambling business.**

The United States Constitution provides that private property shall not be taken for public use, without just compensation. *U.S. Const., Amend. V*. To prevail on its claim that Ordinance 05-0237 is a "taking" under the federal Constitution, Star Northwest must first establish a constitutionally protected property right to continue its gambling business, the "property" allegedly the subject of the claim. *Showalter v. City of Cheney*, 118 Wn.App. 543, 549, 76 P.3d 782 (2003)("no inverse condemnation if no property right exists").<sup>23</sup>

**a. Star Northwest is collaterally estopped from relitigating issues already decided by the federal court.**

The doctrine of collateral estoppel, or issue preclusion, prevents

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<sup>23</sup> Star Northwest does not own the property on which the card room is located; it leases the site for its businesses, and had a one-year license to operate the card room.

relitigation of an issue after a party had a full and fair opportunity to litigate his or her case. *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 263, 956 P.2d 312 (1998). Here, Star Northwest persists in arguing at least two positions contrary to the federal court's rulings in the related federal action.

First, Star Northwest asserts that it has a protected property right in its gambling business. However, the federal district court held that federal law (*U.S. and Fed. Comm. Commission v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993)) combined with state gambling regulations in effect when Star Northwest obtained its license, "renders plaintiff unable to claim a protectable right in the operation of the 11<sup>th</sup> Frame card room." CP 732 (Corrected Order, p. 5).

Similarly, Star Northwest continues to argue there is no "nuisance-like" exception to the takings clause for vice activity such as gambling. However, the district court, citing *Edge Broadcasting*, held that "gambling 'implicates no constitutionally protected right; rather, it falls into a category of "vice" activity that could be, and frequently has been, banned altogether.'" *Id.*

In light of the federal court's decisive statements, the Superior Court properly ruled that Star Northwest is collaterally estopped from asserting a property right in its gambling business. Star Northwest argues that the federal court's rulings do not support collateral estoppel, because the federal takings claim was dismissed as not ripe. This position ignores that the district court's decision contained alternative rulings.<sup>24</sup> First, the court held

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<sup>24</sup> Star Northwest agrees that the district court's rulings were alternative grounds for dismissing the takings claim. Opening Brief, p. 31.

that Star Northwest has no constitutionally-protected property right in continued operation of its gambling business. Then, the court held that any takings claim was not ripe, because Star Northwest had not exhausted state remedies. While the district court did not reach the "merits" of whether Star Northwest had established the elements of its takings claims, that court did reach the merits of whether Star Northwest has a constitutionally-protected property right in continued operation of a gambling business.<sup>25</sup>

Star Northwest argues that collateral estoppel does not apply, because the federal court required it to file its claim in state court. However, Star Northwest elected to initiate its takings claim in federal court, along with substantive due process and other claims. The issue of whether Star Northwest has a constitutionally-protected property right was relevant to its substantive due process claim, and was litigated all the way to the United States Supreme Court. Star Northwest had a full and fair opportunity to litigate the property right issue; collateral estoppel works no injustice against it. Star Northwest would simply like a second chance to litigate that issue.

Finally, Star Northwest asserts the issue in the federal proceeding was not the same as here, because the federal court assumed Star Northwest only alleged "regulatory" takings, not "total" takings. This distinction is baseless. To prevail on any taking claim, Star Northwest must first establish a constitutionally-protected right to continue its gambling business. That issue

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<sup>25</sup> Contrary to Star Northwest's allegation (Opening Brief, p. 30, n. 16), the Ninth Circuit did not "accept" that Star Northwest has a protected property right. The Ninth Circuit simply did not address the issue, because it ruled that all of Star Northwest's constitutional claims should be dismissed for other reasons. CP 1605-17.

does not change based on the manner in which the takings claim is framed.

**b. Washington and federal law establish there is no constitutionally-protected property right in a gambling business.**

Even if the federal court's rulings are not given collateral estoppel effect, the Superior Court alternatively ruled that the district court was correct; there is no constitutionally protected property right to a gambling operation. The Superior Court and the federal district court are correct.

As recognized by *Star Northwest*, state law defines the scope of property rights protected by the federal Constitution. *Lucas v. South Carolina Coastal Comm.*, 505 U.S. 1003, 1030 (1992). Here, the State has created and defined the limited scope of any right to operate a card room. RCW 9.46.0325 authorizes card games, but only when licensed and operated consistent with Chapter 9.46. The Gambling Commission may issue a license to operate a card room, but only for "not to exceed one year." *RCW 9.46.070*. State statutes completely preempt regulation of gambling activity, and expressly authorized cities to "absolutely prohibit, but ... not change the scope of license, any and all gambling activities for which the license was issued." *RCW 9.46.295*; see *RCW 9.46.285*. Washington courts have ruled that under RCW 9.46.295, a city may absolutely prohibit a gambling activity, but if so, may not authorize existing gambling activity to continue, or be phased out. *Edmonds*, 117 Wn.App. at 358; *Paradise*, 124 Wn.App. at 344.

Gambling activity is significantly different from other activity. As stated by the United States Supreme Court, gambling "implicates **no**

**constitutionally protected right**; rather, it falls into a category of ‘vice’ activity that could be, and frequently has been, banned altogether.” *U.S. & Fed. Comm. Commission v. Edge Broadcasting Co.*, 509 U.S. 418, 113 S.Ct. 2696, 125 L.Ed.2d 345 (1993)(*emph. added*);<sup>26</sup> see *Holliday Amusement Co. v. South Carolina*, 493 F.3d 404 (4th Cir. 2007)(Court dismisses claim that video gaming machine ban was an unconstitutional taking of owner's gambling business stock, contracts and good will, stating: "We believe that Supreme Court case law makes clear that **gambling regulations ... per se do not constitute takings**, and thus analysis under existing takings framework is unnecessary.")(emph. added).<sup>27</sup>

Washington law is in accord. Gambling operations are characterized as falling within the category of activity involving a “social or economic evil,” subject to local government’s broad power of prohibition or suppression. *Northwest Greyhound Kennel Ass'n. v. State*, 8 Wn.App. 314, 320-1, 506 P.2d 878 (1973).

Social or economic evils, such as gambling, and other activities which jeopardize the public health and safety, are subject to the legislature’s prohibition, some absolute and others conditional.

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<sup>26</sup> *Carolina-Virginia Racing Ass'n v. Cahoon*, 214 F.2d 830, 833 (4th Cir. 1954)("no property right to engage in gambling contrary to state law"); *Payne v. Fontenot*, 925 F.Supp 414 (1995)(no property or liberty interest in gaming license under statute making license a privilege within state's discretion, and no right to earn a living by operating gaming establishment); *Jacobsen v. Hannifin*, 627 F.2d 177, 180 (9th Cir.)(no protectable property interest in gaming license based on statute allowing denial for any cause deemed reasonable); *Kraft v. Jacka*, 872 F.2d 862 (9th Cir. 1989).

<sup>27</sup> *Holliday* compared gambling regulations to regulation of the sale of alcohol, which did not give rise to takings claims. *Holliday*, 493 F.3d 404 (2007)("Plaintiff's claim resembles previous, unsuccessful takings claims arising from another classic exercise of state police power: regulation of the sale of alcoholic beverages. The Supreme Court consistently rejected takings challenges to Prohibition-era regulations of previously acquired stock").

*Tarver v. City Comm'n.*, 72 Wn.2d 726, 731-33, 435 P.2d 531 (1967). Proscriptions imposed upon gambling activity are entirely within the legislative domain and are essentially immune from judicial interpretation. *Northwest Greyhound Kennel Ass'n., Inc. v. State*, 8 Wn.App. 314, 506 P.2d 878 (1973). Consequently, **any approved gambling activity is a legislative privilege and not an inherent right.**

*State v. Gedarro*, 19 Wn.App. 826, 829, 579 P.2d 949 (1978)(*emph. added*); *Paradise*, 124 Wn.App. at 772-3. Most recently, this Court held "it is critical to recognize ... Washington from its inception considered gambling to be an activity with significant negative effects and has always strictly regulated gambling," and "[p]ut simply, Washington has a longstanding and legitimate interest in tightly controlling gambling. That interest is a pure exercise of the traditional police power, and is justified by the State's desire to safeguard its citizens both from the harms of gambling itself and from professional gambling's historically close relationship with organized crime." *Rouso v. State*, 149 Wn.App. 344, 359-61, 204 P.3d 243 rev. granted 166 Wn.2d 1032 (2009)("gaming' generally has long been considered to fall 'within the category of social and economic evils").

Thus, as stated in *Paradise, Inc. v. Pierce County*:

RCW 9.46.295 clearly and specifically stated that the [municipality] could ban all gambling at any time. There is no guarantee in the statute that any gambling operation could recoup its investment if gambling was banned.

*Paradise*, 124 Wn.App. at 776. Just like the plaintiff in *Paradise*, Star Northwest has been on notice since enactment of RCW 9.46.295 in 1974 that the City has authority to prohibit absolutely its card room business.<sup>28</sup> Simply

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<sup>28</sup> When Star Northwest obtained its gambling license in 2005 shortly before Ordinance

put, Star Northwest had no constitutionally-protected right to operate a card room for any length of time (certainly not longer than a one year license).<sup>29</sup>

Put another way, gambling activity is in the nature of a public nuisance that can be terminated immediately, and such termination is **not** a "taking." Gambling activities are "characterized as in the nature of a public nuisance." *Paradise*, 124 Wn.App. at 772-3, citing *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).<sup>30</sup> Land use regulations that restrict nuisance-like activity are permissible. *Paradise*, 124 Wn.App. at 772. In a virtually identical fact pattern as here, *Paradise* held:

It is permissible for legislative bodies to wield police power to prevent activities which are similar to public nuisances. ... Thus, **land use regulation in the nature of restricting nuisance-like**

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05-0237 was enacted, state regulations specifically warned applicants: "issuance of any license by the commission **shall not be construed as granting a vested right** in the privileges so conferred." *WAC 230-04-175* (in effect in 2005). This regulation is consistent with and simply confirmed the common law that there is no right to continued operation of a gambling business or license. In the past, Star Northwest has argued that because *WAC 230-04-175* was repealed in 2007, this negates Chapter 9.46 RCW and long-established case law on this point. The fact remains the regulation was in effect when Star Northwest obtained its license in November 2005, and when the City enacted the Ordinance in December 2005.

<sup>29</sup> Courts also recognize that gambling poses such a specific threat to the public welfare that "protections from the due process clause do not come into play." *Payne v. Fontenot*, 925 F.Supp. 414 (M.D. La. 1995); see *Medina v. Rudman*, 545 F.2d 244 (1st Cir. 1976)(participation in gambling establishment is not a "fundamental or natural" right, and did not implicate due process concerns); *Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir.); *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980)(upholds Nevada law giving gaming commission power to deny licenses); *Casino Ventures v. Stewart*, 183 F.3d 307, 310 (4th Cir. 1999)(because gambling restrictions "are aimed at promoting the welfare, safety, and morals of South Carolinians, they represent a well-recognized exercise of state police power"); *United States v. Williams*, 124 F.3d 411, 423 (3d Cir. 1997)(upholds Pennsylvania statute prohibiting certain gaming activity).

<sup>30</sup> See MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 24.129 (3rd ed 1997)("The maintenance of a gaming house is a public nuisance or a nuisance per se, at common law and usually under statute, at least where it is maintained in violation of law; and as such it is subject to abatement by injunction").

**activity is permissible. ...**

**Here, the ordinance regulates gambling activities, which have been characterized as in the nature of a public nuisance. ...**

The regulation is expressly authorized by state statute, RCW 9.46.295. And Paradise advances no persuasive argument that the state legislature has exceeded its authority by expressly authorizing the elimination of gambling activities within the jurisdiction of Pierce County.

*Paradise*, 124 Wn.App. at 772 (*emph. added, cites omitted*);<sup>31</sup> see *Malbrain v. Dept. of Agriculture*, 120 Wn.App. 737, 748, 86 P.3d 222 (2004) ("Property owners do not have a right to use and enjoy their property so as to create a nuisance or interfere with the general welfare of the community. ... For this reason, the State 'has not "taken" anything when it asserts its power to enjoin the nuisance-like activity"); *Sintra v. City of Seattle*, 119 Wn.2d 1, 15, 829 P.2d 765 (1992) ("It is permissible for legislative bodies to wield police power to prevent activities which are similar to public nuisances").

Star Northwest cites no case for the proposition that it has a protected property right to continue its gambling operation. The few cases cited by Star Northwest do not involve gambling. Opening Brief, p. 32-3, citing *Lee & Eastes v. Pub. Serv. Comm'n*, 52 Wn.2d 701, 338 P.2d 700 (1958) (freight carrier); *Rhod-a-Zalea & 35th, Inc. v. Snohomish County*, 136 Wn.2d 1, 959 P.2d 1024 (1998) (peat mine). Thus, Star Northwest's cited authority does not control this case; the authority specific to gambling does.

In prior phases of this litigation, Star Northwest argued that because its gambling business was permitted when it began, it has a property interest in

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<sup>31</sup> The *Paradise* plaintiff operated a card room in connection with a bowling alley and restaurant, just like Star Northwest.

the card room, and at a minimum must be given an amortization period. To the extent a legal nonconforming use is given an amortization period, amortization is allowed under the theory that immediate termination may be improper "if it brings about a deprivation of **property rights** out of proportion to the public benefit obtained therefrom." *State v. Thomasson*, 61 Wn.2d 425, 427-8, 378 P.2d 441 (1963)(*emph. added*).<sup>32</sup>

Thus, the general rule disapproving of immediate termination of a legal non-conforming use assumes existence of a *constitutionally-protected* property right to the use. Here, even if the card room qualified as a "legal non-conforming use," Star Northwest has no property right to continue to operate the card room for any length of time. And even assuming a right to operate for the term of its license, Star Northwest did so (and for more than three and a half years after the Ordinance took effect).

**c. The United States Supreme Court decisions cited by the Superior Court support dismissal of the takings claim.**

Star Northwest asserts that the Superior Court improperly relied on four United States Supreme Court decisions to "carve out" a property right exception for gambling and other nuisance-style uses. First, in addition to the substantial body of federal law supporting the ruling, Washington courts

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<sup>32</sup> Local governments "are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution." *Rhod-A-Zalea*, 136 Wn.2d at 7-8. Commentators agree that nonconforming uses limit the effectiveness of land-use-controls, imperil the success of community plans and injure property values. ... For these reasons, nonconforming uses are uniformly disfavored and this court has repeatedly acknowledged the desirability of eliminating such uses. ... Thus, it is clear that local governments have the authority to preserve, regulate and even, within constitutional limitations, terminate nonconforming uses." *Id.*

also hold there is no property right in nuisance-like activity, and gambling is "nuisance-like." See Section IV.C.3.b above. The Superior Court did not create the exception for nuisance-like activity, including gambling businesses; Washington (and federal) courts already did so.

Moreover, each of the United States Supreme Court cases supports the principles relied on by the Superior Court. First, Star Northwest argues that *Edge Broadcasting* involved a claim that the federal Constitution's First Amendment was violated, not the Fifth Amendment. Opening Brief, p. 34-5.<sup>33</sup> However, Star Northwest makes no attempt to explain why gambling activity would be a protected property right for Fifth Amendment purposes, but not the First Amendment.<sup>34</sup> Further, federal courts have held that gambling regulations per se do not constitute a taking. See e.g., *Holliday Amusement Co. v. South Carolina*, 493 F.3d 404 (4th Cir. 2007).

Second, Star Northwest objects to the Superior Court's reliance on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and *Andrus v. Allard*, 444 U.S. 51 (1979), arguing that *Lucas* rejected a "noxious-use" exception to takings protection, which prevents a determination that there is

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<sup>33</sup> Star Northwest also states that Supreme Court has modified its view of gambling's social acceptance since *Edge*, citing *Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999). However, *Greater New Orleans* does not alter or even address the basic premise stated in *Edge*, that gambling does not implicate a constitutionally protected right. When the Court indicated that the federal policy of discouraging gambling was "equivocal," the Court was referring to the fact that "federal gambling legislation reflects a decision to defer to, and even promote, differing gambling policies in different States." 527 U.S. at 187. It is within a state's prerogative to make the decision as to the extent to which gambling is allowed in that state, if at all. *Id.* Here, RCW 9.46.295 authorizes local government to ban absolutely gambling activity at any time.

<sup>34</sup>*Ruckelhaus v. Montezano Co.*, 467 U.S. 986 (1984), cited by Star Northwest, does not involve a gambling operation.

no property right in continued operation of a gambling business. Opening Brief, p. 35-39. However, neither *Lucas* nor *Andrus* alters the long-standing principle that to prevail on a takings claim, the "right" allegedly taken must be part of the claimant's title, based on background principles of property, nuisance and other state law. In fact, *Lucas* affirms this principle.

Star Northwest confuses *Lucas's* discussion of an older "harmful or noxious use" principle with the obligation to establish a constitutionally protected property right, before asserting a taking claim. In *Lucas*, the Council enacted regulations that prevented any economically beneficial use of Lucas's coastal property. When Lucas claimed a taking, the Council argued that preventing new development was necessary to protect valuable public resources, bringing the case within law upholding the state's use of its police power to prevent activity akin to public nuisances. *Lucas*, 505 U.S. at 1022. The Court noted that "[t]he 'harmful or noxious' uses principle was the Court's early attempt to describe in theoretical terms why government may ... affect property values by regulation without incurring an obligation to compensate -- a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power." *Lucas*, 505 U.S. at 1022-3. The Court held the "noxious-use justification" was not grounds to depart from the rule that total takings must be compensated (*Id.* at 1026), explaining:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it 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. This accords, we think, with our "takings" jurisprudence, which has traditionally been

guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "as long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413. And in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale). See *Andrus v. Allard*, 444 U.S. 51, 66-67, 62 L.Ed.2d 210, 100 S.Ct. 318 (1979)(prohibition on sale of eagle feathers).

*Lucas*, 505 U.S. at 1027-8. Thus, *Lucas* (and *Allard*)<sup>35</sup> confirm that to prevail on a takings claim, the owner must establish the "property" allegedly taken was actually part of the owner's "bundle of rights," based on background principles of state law. In discussing those cases, the Superior Court was simply acknowledging these long standing rules. RP 50-2 (07/10/09 Transcript). Importantly, both cases hold that an owner of commercial personal property must be aware that new regulations could render the property economically worthless, based on government's traditional high degree of control over commercial dealings.<sup>36</sup> Here, not only does Star

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<sup>35</sup> Star Northwest attempts to distinguish *Allard* because it involved a claim that commercial goods (protected bird feathers) were taken. Opening Brief, p. 38. However, while Star Northwest does not allege that "goods" were taken, both cases involve a claim that "personal property" was taken, as opposed to real property. Owners of personal property, are deemed aware that regulations could render the property economically worthless. *Lucas*, 505 U.S. at 1028. As noted in *Allard*, "loss of future profits -- unaccompanied by any physical property restriction -- provides a slender reed upon which to rest a takings claim. ... Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." *Allard*, 444 U.S. at 66.

<sup>36</sup> Even *Lingle* confirms that government must pay compensation, except to the extent

Northwest allege a taking of commercial personal property, but the alleged "property" is the right to continue a gambling business, one of the most highly regulated industries, and traditionally classified as a "social or economic evil" subject to governmental prohibition.

In connection with this argument, Star Northwest revives its position that to avoid paying compensation, the City must establish the card room is a "public nuisance" under state law, and that it is entitled to compensation because the card room was lawful when it began, citing *Tiegs v. Watts*, 135 Wn.2d 1, 15, 954 P.2d 877 (1998) and *Crawford v. Central Steam Laundry*, 78 Wash. 355, 357, 139 Pac. 56 (1914). However, neither case involved a gambling operation, or any other activity deemed nuisance-like.<sup>37</sup>

Finally, Star Northwest unduly emphasizes one sentence in the Superior Court's oral ruling relating to *Lingle*. Opening Brief, p. 39-42, citing RP 59

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that background principles of nuisance and property law independently restrict the owner's intended use of the property. 125 S.Ct. at 2081 (2005); see *Keystone Bituminous Coal Ass'n v. DeBenedicts*, 480 U.S. 470, 491-2, fn. 20, 22, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987)("all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community ... and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it").

<sup>37</sup> Star Northwest assumes that to prohibit its gambling business, the City must establish the card room is a "nuisance" under Title 7 RCW or common law, through a fact-specific inquiry. That is not the case. Under federal and Washington decisions, gambling activity in general is characterized as a nuisance. Likewise, Chapter 9.46 RCW provides that gambling activity, when not conducted as authorized in that Chapter, is a nuisance. *RCW 9.46.010; 9.46.250* ("All gambling premises are common nuisances ..."); *RCW 9.46.0269(a)*(a person is engaged in professional gambling when "**acting other than** as a player or **in the manner authorized by this chapter**, the person knowingly engages in conduct which materially aids any form of gambling activity ..."). *RCW 9.46.295* expressly authorizes cities to prohibit gambling activity. Since enactment of Ordinance No. 05-0237, Star Northwest's gambling operation has not been conducted in a manner authorized by Chapter 9.46, and is a "common nuisance." While Star Northwest argues that its card room was permitted under Chapter 9.46 when the card room began, Star Northwest ignores that *RCW 9.46.295* specifies that the City could prohibit the use at any time, and that under *RCW 9.46.070*, its card room license was only issued for "not to exceed one year."

(07/10/09)(objecting to the last sentence of Court's 19-page analysis, that *Lingle* "requires 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"). First, the Court made that remark after it ruled that Star Northwest has no constitutionally-protected property right in its gambling operation; the remark was not part of the Court's analysis of that fundamental issue. Second, the remark was made in the context of Star Northwest's claim that the Ordinance is a "total taking" of its gambling business. To establish a "total taking," the owner must establish the regulation deprives the owner of all economically beneficial use of the property. *Lingle v. Chevron USA*. 544 U.S. 528, 538, 125 S.Ct. 2047, 161 L.Ed.2d 876 (2005). As recognized by the Superior Court, *Paradise* addresses this very point in a virtually identical fact pattern, and held there was no total taking, because the owner could make other uses of its property, such as an existing bowling alley and restaurant. *Paradise*, 124 Wn.App. at 770.

**4. The Superior Court did not disregard evidence presented by Star Northwest on its "Total Taking" claim.**

Similarly, Star Northwest objects to the Superior Court's observation that it could make other uses of the property that would be economically beneficial, claiming the Court "erroneously stepped into the role of fact finder." Star Northwest also alleges the Court improperly "disregarded" its evidence that loss of the card room means other elements of its business (restaurant, lounge and bowling alley) are lost. Opening Brief, p. 42-3.

However, the Superior Court's observation was undisputable, given that Star Northwest's casino is located on property zoned for commercial uses and is in the City's business district. Ordinance No. 05-0237 only prohibits the card room; it does not affect any other use, including the existing restaurant, bowling alley and lounge. Put another way, the Court simply recognized that as a matter of law, Star Northwest can use the site for any other commercial use allowed by the zoning code, and the Ordinance does not require Star Northwest to close the existing restaurant, lounge and bowling alley. Star Northwest alleges it will do so because it will not make enough profit, but that is its own choice; it is not required by the Ordinance. Star Northwest cites no authority for the proposition that a "total taking" occurs when a regulation requires termination of one element of a business, or when termination of one business element makes other elements less profitable. In fact, *Paradise* held just the opposite. *Paradise*, 124 Wn.App. at 770.

**5. The Superior Court properly relied on *Edmonds* and *Paradise*.**

Because Star Northwest cannot establish a protected property right in continued operation of its gambling business, it is not necessary to reach the takings analysis. However, assuming this Court reaches the takings analysis, the Superior Court properly concluded that *Edmonds* and *Paradise* are either instructive or dispositive as to Star Northwest's takings claim. See Opening Brief, p. 43.

*Edmonds* and *Paradise* employed Washington's traditional takings analysis, which includes a two-part threshold test, and then two additional

questions.<sup>38</sup> Star Northwest argues that both decisions should be disregarded because (1) the two-part test cannot be used when a "total takings" is alleged, and (2) the two-part test does not survive *Lingle*.<sup>39</sup> However, Star Northwest does not correctly state the relationship between a total takings claim and Washington's threshold tests, and it ignores that *Paradise* did address the

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<sup>38</sup> Under the Washington takings analysis, courts first address two threshold questions:

First, "whether the regulation destroys or derogates any fundamental attribute of property ownership, including the right to possess, to exclude others, to dispose of property, or to make some economically viable use of the property." If the landowner claims less than a 'physical invasion' or a 'total taking' and if a fundamental attribute of ownership is not otherwise implicated, then we reach the second threshold question: "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.'"

*Paradise*, 124 Wn.App. at 768, citing *Edmonds*, 117 Wn.App. at 362. If both threshold questions are answered in the negative, then there is no taking. *Edmonds*, 117 Wn.App. at 362. If one or both questions is answered "yes," then two additional points are considered:

"First, whether the regulation advances a legitimate state interest. Second, a balancing test to determine if the state interest in the regulation is outweighed by its adverse economic impact to the landowner, with particular attention to the regulation's economic impact on the property, the extent to which the regulation interferes with investment-backed expectations, and the character of the government action."

*Edmonds*, 117 Wn.App. at 363.

<sup>39</sup> In *Lingle*, the Supreme Court clarified that a plaintiff challenging a regulation as an uncompensated taking may proceed by alleging (1) permanent physical invasion of property, (2) complete deprivation of all economically beneficial use of property, or (3) a *Penn Central* analysis, which involves review of factors such as "the economic impact of the regulation on the claimant, and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations" and the "'character of the governmental action' -- for instance whether it amounts to a physical invasion of or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Lingle v. Chevron USA*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), referring to *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646 (1978). *Lingle* clarified that the question of whether a regulation "substantially advances" a legitimate state interest is an inquiry in the nature of due process, not takings analysis. *Lingle*, 125 S.Ct. at 2083.

total takings claim. Likewise, Star Northwest does not correctly interpret the connection between the second threshold question and the *Lingle* decision. And, even if *Lingle* does render the second threshold question inapplicable, that inquiry remains relevant under the *Penn Central* factors. *Edmonds* and *Paradise* remain dispositive, and at the very least instructive, on the issues presented by Star Northwest's takings claim.

First, *Lingle* confirms that an owner can prevail on a takings claim, if the owner establishes that the governmental action results in complete deprivation of all economically beneficial use of property. *Lingle*, 505 U.S. at 538. This "total takings" test is embodied in the first threshold question of Washington's analysis. *Paradise*, 124 Wn.App. at 768, citing *Edmonds*, 117 Wn.App. at 362 ("First, 'whether the regulation destroys or derogates any fundamental attribute of property ownership, including the right to possess, to exclude others, to dispose of property, or **to make some economically viable use of the property**'"). Thus, the threshold test is not inconsistent with a total takings claim; rather, total takings analysis is embodied in the first test.

Contrary to Star Northwest's argument, *Paradise* addressed the first threshold test, and found the ordinance was not a total taking, did not eliminate all economically viable use of the property, and did not destroy a fundamental attribute of ownership, because it only prevented gambling, not *Paradise*'s bowling alley and restaurant. *Paradise*, 124 Wn.App. at 768. Here, just as in *Paradise*, the City's Ordinance only affects card rooms, not the bowling alley, restaurant, or any other use.

Star Northwest also alleges that the two-part threshold test does not

survive *Lingle*, focusing on the second question: "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.'" *Paradise*, 124 Wn.App. at 768; *Edmonds*, 117 Wn.App. at 362. *Lingle* clarified that the question of whether a regulation "substantially advances" a legitimate state interest is an inquiry in the nature of due process, not takings. *Lingle*, 125 S.Ct. at 2083. Under Washington's takings analysis, the "substantially advances a legitimate state interest" test is contained in the first question after the threshold tests: "whether the regulation advances a legitimate state interest." *Edmonds*, 117 Wn.App. at 363. Thus, it is not clear that *Lingle* repudiates the second threshold test.

However, even if the second threshold test was inconsistent with *Lingle*, *Lingle* confirms that a takings may be established under the *Penn Central* analysis, which involves review of factors such as "the economic impact of the regulation on the claimant, and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations" and "'character of the governmental action' -- for instance whether it amounts to a physical invasion of or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" *Lingle*, 544 U.S. at 538-9, citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646 (1978). The inquiry performed under Washington's second threshold test remains entirely relevant under the *Penn Central* factors,

particularly in relation to the character of the governmental action.

In *Edmonds* and *Paradise*, the courts addressed the second threshold question and rejected claims that the ordinances were not a valid exercise of local police power:

Here, as in *Edmonds*, the local government acted under the specific legislative authority given to it under RCW 9.46.295 to ban gambling within its jurisdiction. To do so is undeniably the exercise of police power for the protection of the "public health, safety, and welfare," as we discussed in more detail in *Edmonds*. There is nothing in this case to distinguish it from that case insofar as our conclusion that the banning of gaming activities within a local government's jurisdiction pursuant to RCW 9.46.295 is a proper exercise of the police power.

*Paradise*, 124 Wn.App. at 771.

Regarding whether the ordinance "seeks less to prevent a harm than to impose on those regulated the requirement of providing an affirmative public benefit," the *Paradise* plaintiff argued that its substantial investment in modifying its premises for gambling activity demonstrated that it bore the economic burden of providing a public benefit. The Court disagreed, based on a local government's ultimate authority to prevent nuisance-like activity:

If the challenged regulation is merely an exercise of the police power to safeguard the public interest in health, safety, the environment, or fiscal integrity, it is not a taking. *Presbytery*, [114 Wn.2d] at 329[, 787 P.2d 907]. ... The threshold test is designed to prevent undue chilling on legislative bodies' attempts to properly and carefully structure land use regulations which prevent public harms. **It is permissible for legislative bodies to wield police power to prevent activities which are similar to public nuisances.** In *Keystone*, the Supreme Court discussed the difference between preventing harm and providing a benefit as follows:

"Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. ... Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' and the Takings Clause did not transform that principle to one that requires compensation whenever the state asserts its power to enforce it. ... '[A] taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest,' and we recognized that this question 'necessarily requires a weighing of private and public interests.'"

(Footnotes and citations omitted.) *Keystone*, at 491-92. Thus, land use regulation in the nature of restricting nuisance-like activity is permissible.

*Paradise*, 124 Wn.App. at 772-3 (*emph. added*). The card room prohibition simply regulated a public harm pursuant to express statutory authority:

Here, the ordinance regulates gambling activities, which have been characterized as in the nature of a public nuisance. The regulation is expressly authorized by state statute, RCW 9.46.295. And *Paradise* advances no persuasive argument that the state legislature has exceeded its authority by expressly authorizing the elimination of gambling activities within the jurisdiction of Pierce County. There simply is no showing that the ordinance goes beyond regulating a public harm in this case.

*Paradise*, 124 Wn.App. at 773.<sup>40</sup>

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<sup>40</sup> The United States Supreme Court has long recognized that local police power includes authority to prohibit gambling activity. *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894)("The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance. Under this power it has been held that the state may order... prohibition of gambling houses..."); *Posadas de Puerto Rico v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986). Washington courts recognize that municipal police powers include authority to regulate gambling. *Edmonds*, 117 Wn.App. at 352 ("Case law and statutes make clear that the regulation of gambling is a valid exercise of a municipality's police power. ... there can be no doubt that the regulation

Here, as in *Paradise* and *Edmonds*, Ordinance No. 05-0237 does no more than prohibit a gambling activity, characterized as in the nature of a public nuisance. The City acted under express legislative authority granted in RCW 9.46.295 to prohibit card rooms within its jurisdiction. This case is indistinguishable from *Paradise* and *Edmonds* insofar as the City's prohibition of card rooms is a proper exercise of police power.

Even if this Court reached the *Penn Central* analysis, as a matter of law the City's prohibition of a gambling activity is not a taking under the *Penn Central* factors. The character of the Ordinance does not amount to a physical invasion of property; the Ordinance merely affects the gambling business through a proper and traditional police power regulation, and does nothing more than prohibit one type of gambling consistent with state law. Star Northwest currently operates a bowling alley, restaurant, and bar, and the Ordinance does nothing to restrict these enterprises or any other use.

Star Northwest could not have had any reasonable "investment-backed expectation" in continued operation of its gambling business. Under Washington law, the state gambling commission only grants one-year licenses to gambling operations. *RCW 9.46.070*. State law has long provided that the City can ban gambling at any time. *RCW 9.46.295*. Washington courts confirmed this authority in 2003. *Edmonds, supra; Paradise, supra*. Indeed, since 1894 the United States Supreme Court has recognized that local governments have authority to prohibit gambling activities. *Lawton v. Steele*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894).

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of gambling, whether licensed or not, is within the police power ... .").

Other jurisdictions have addressed this issue, and hold that under *Penn Central*, an owner has no legitimate investment-backed expectation in continued use of property for a gambling business:

Plaintiff contends that the fact that video gaming was legal in South Carolina for years gave him a legitimate expectation of its continued legality and hence the continued well-being of his business enterprise. But, as the Supreme Court pointed out in *Lucas*, the owner of any form of personal property must anticipate the possibility that new regulation might significantly affect the value of his business. *See* 505 U.S. at 1027-28.[note 2] This is all the more true in the case of a heavily regulated and highly contentious activity such as video poker. The pendulum of politics swings periodically between restriction and permission in such matters, and prudent investors understand the risk.

[Note 2] ... under the *Penn Central* test for partial diminutions in value, partial takings claims entail "ad hoc, factual inquiries," focusing on, inter alia, the regulation's economic impact, particularly its interference with "distinct investment-backed expectations;" and "the character of the governmental action." ... Plaintiff's participation in a traditionally regulated industry greatly diminishes the weight of his alleged investment-backed expectations, while the challenged governmental action is a classic "instance[] in which a state tribunal reasonably concluded that the health, safety, morals, or general welfare would be promoted" by the prohibition embodied in Act 125.

*Holliday Amusement Co.*, 493 F.3d at 411; see *Westside Quik Shop, Inc. v. Stewart*, 341 S.C. 297, 306, 534 S.E.2d 270 (2000)(Court dismisses gambling machine business owner's takings claim, stating: "[E]ven where he is deprived of all economically viable use of his property, an owner must still have reasonable investment-backed expectations to establish a taking. ... A property owner operating in a highly regulated field cannot assert a reasonable expectation that government regulation will not be altered to his

detriment"), overruled on other grounds by *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005).<sup>41</sup>

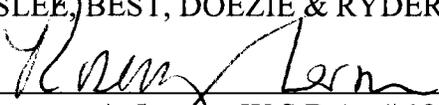
Here, as demonstrated by the lengthy history of legislative debate over gambling in the City, in which Star Northwest actively participated, there is no question that Star Northwest should have anticipated such regulation. As a matter of law, Star Northwest could not have had a legitimate "investment-backed expectation" in the continued operation of its card room. And, Star Northwest continued to operate its gambling business for more than three years after the Ordinance was passed, and the Ordinance does not affect the existing bowling alley, restaurant and lounge, or any other use. Because Ordinance No. 05-0237 only prohibits one type of gambling, a nuisance-like activity, the Superior Court properly ruled that the Ordinance is not a taking.

#### V. CONCLUSION

Based on the foregoing, this Court should affirm the decisions of the Superior Court, and dismiss the appeal.

DATED this 8th day of February, 2010.

INSLEE, BEST, DOEZIE & RYDER, P.S.

By   
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<sup>41</sup> *Byrd* indicated that in light of *Lingle*, it was overruling prior cases to the extent that they applied *Agins v. City of Tiburon* alone, or both the *Agins* and *Penn Central* analysis, and that *Westside Quik Shop* applied the two separately. *Byrd*, 620 S.E.2d at 80, n. 9. *Byrd* did not overrule *Westside's* discussion of "reasonable investment-backed expectations."

**CERTIFICATE OF SERVICE**

I, Carol Cotto, hereby certify that on this 8th day of February, 2010, I caused to be served a true and correct copy of CITY OF KENMORE'S RESPONSE BRIEF on the individual(s) named below in the specific manner indicated:

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

DATED: February 8, 2010, at Bellevue, Washington.

  
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Carol Cotto