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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PHILIP WATSON, an individual; RAY CARTER, an individual; FARWEST SPORTS, INC., dba OUTDOOR EMPORIUM, a Washington corporation; PRECISE SHOOTER LLC, a Washington limited liability company; THE SECOND AMENDMENT FOUNDATION, INC., a Washington nonprofit corporation; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., a New York non-profit association; AND NATIONAL SHOOTING SPORTS FOUNDATION, a Connecticut nonprofit association,

Plaintiffs,

v.

CITY OF SEATTLE, a municipality; ED MURRAY, Mayor of the City of Seattle, in his official capacity; SEATTLE DEPARTMENT OF FINANCE AND ADMINISTRATIVE SERVICES, a department of the City of Seattle; and GLEN LEE, Director of Finance and Administrative Services, in his official capacity,

Defendants.

NO. 15-2-20613-3 SEA

MEMORANDUM OPINION

On August 21, 2015, Seattle Mayor Ed Murray signed Ordinance 124833 into law. Section

1 of that ordinance provides:

The City finds and declares that gun violence directly affects the city and its residents. Therefore, the City intends to exercise its taxing authority, as

1 granted by the Washington State Constitution and as authorized by the
2 Washington State Legislature, to raise general revenue for the City and to use
3 that revenue to provide broad-based public benefits for residents of Seattle
related to gun violence by funding programs that promote public safety,
prevent gun violence and address in part the cost of gun violence in the City.

4 The ordinance created a new Firearms and Ammunition Tax Fund:

5 to provide broad-based public benefits for residents of Seattle related to gun
6 violence by funding programs that promote public safety, prevent gun
7 violence and address in part the cost of gun violence in the City. Such public
8 benefits may include, but are not limited to, basic research, prevention and
youth education and employment programs.

9 Plaintiffs, sellers and purchasers of firearms and ammunition in the City of Seattle, and
10 the National Rifle Association, Second Amendment Foundation, Inc. and National Shooting
11 Sports Foundation, sued the City, Mayor Murray, Seattle Department of Finance and
12 Administrative Services and Glenn Lee, Director. Plaintiffs seek a declaratory judgment
13 declaring that the ordinance violates Washington statutory and constitutional law, and an
14 injunction prohibiting the City from collecting the tax or enforcing the ordinance. They argue
15 the ordinance is an impermissible regulation of firearms in violation of RCW 9.41.290 and that,
16 if a tax, it is an impermissible tax.

17
18 At oral argument the City argued that, even if the ordinance is a regulation it does not run
19 afoul of RCW 9.41.290 because it does not impose any criminal penalty in the event of a
20 violation. However, the ordinance provides that violation is a gross misdemeanor, punishable in
21 accordance with Section 12A.02.070. Section 12A.02.070 is entitled Punishment of Crime and
22 provides that every crime designated as a misdemeanor may be punished by a fine not to exceed
23 one thousand dollars or by imprisonment for a term not to exceed ninety days or both. The
24 City's argument fails on this point.

1 The parties agree that the question whether the ordinance is a regulation or a tax is to be
2 answered with reference to the three-part test set forth in *Covell v. City of Seattle* 127 Wash.2d
3 874 (1995) and *Okeson v. City of Seattle* 150 Wash.2d 540 (2003).

4 The first issue is whether the primary purpose of the city is to raise revenue for general
5 governmental purposes or to regulate. Here, the ordinance states its purpose is to provide broad-
6 based public benefits. It does not place any burden or restriction on the plaintiffs in terms of
7 their conduct other than to require payment of fees and it does not prescribe any activity other
8 than the non-payment of the sums set forth in SMC 5.50.030(B).

9 The second issue is whether the fees are allocated to a regulatory purpose. If so, the
10 conclusion that the ordinance imposes a regulation is buttressed. On the other hand, if the costs
11 do not regulate an activity, the fee is more likely a tax. *Okeson* at 553. In this case, the money
12 generated goes to public education and research. That is not a regulatory purpose.

13 The third issue is whether there is a direct relationship between the fee and the service
14 received or burden produced. Neither party articulated a direct relationship between the number
15 of guns or rounds of ammunition sold by a retailer and the impact on public health or safety. The
16 guns and ammunition may never be used, may be used only at a range, or may be used
17 exclusively for safe and legal purposes. Accordingly, the fee imposed is a tax rather than a
18 regulation.

19 However, that is not the end of the inquiry. The City must have authority to impose a tax
20 before it can impose and collect it. Plaintiffs argue that, absent express statutory authority, the
21 City may only impose sales taxes, property taxes, and business and occupation taxes. Further,
22 they argue that any B&O tax (any tax which is not a sales tax or tax on real property) can only be
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1 levied at a single uniform rate imposed on gross receipts or gross income from sales and that the
2 amount of such taxes is limited. RCW 35.21.710

3 Plaintiffs' reading of the Chapter 31 RCW is too narrow. The Tax Reference Manual
4 authored by the Washington State Department of Revenue states that there are three general
5 types of taxes: property, income and **excise** taxes. (*emphasis added*) Tax Reference Manual,
6 Washington Department of Revenue, January, 2010 at 3.) B&O taxes are a type of excise tax,
7 but not all excise taxes are levied under RCW 35.21.710: "Other excise taxes include the
8 selective sales taxes on specific products (cigarettes, gasoline, etc.) and the various taxes which
9 are levied in lieu of property tax (e.g. harvested timber, leaseholds, etc.)" Tax Reference
10 Manual, Washington Department of Revenue, January, 2010 at 3.

11
12 SMC 5.45.050 provides that the City Business License tax is a tax on the gross proceeds
13 of such sales of the business. The tax provided for in the ordinance and codified at SMC 5.50 is
14 not a tax on gross proceeds and is not limited by the multiplier in SMC 5.45.050(c) any more
15 than sales tax is limited to a multiplier of .00215.

16
17 RCW 35.22.280 grants first class cities the power to "grant licenses for any lawful
18 purpose, and to fix by ordinance the amount to be paid therefor." That statute has been
19 interpreted to include the ability to raise revenues by imposing a tax. "The tax is an excise. It is
20 levied upon the right to do business, not upon the right to exist; nor upon the property." *Pacific*
21 *Tel. & Tel. Co. v. City of Seattle*, 172 Wash 649, 654 (1933). It may include a tax on gross
22 receipts, but is not limited such a tax. In *Pacific Tel & Tel Co.* the Supreme Court ruled that the
23 City of Seattle had authority, by virtue of Rem. Comp. Stat Sections 8966 and 8981 (comparable
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1 to RCW 35.22.280) to grant licenses for any lawful purpose and to charge for those licenses for
2 the purpose of generating revenue.

3 In *Alderwood Idaho, LLC v Kennewick*, 151 Wash.2d 359, 367 (2004) the Supreme Court
4 considered whether the city of Kennewick's ordinance imposing a monthly ambulance service
5 charge on every household, business and industry, but which was billed to the holders of utility
6 accounts, was within the City's authority under RCW 35.22.280:

7 Our cases establish that an assessment is a valid excise tax if (1) the
8 obligation to pay an excise tax is based upon the voluntary action of the
9 person taxed in performing the act, enjoying the privilege, or engaging in
10 the occupation which is the subject of the excise tax, and (2) the element of
absolute and unavoidable demand is lacking.

11 Because the tax was imposed on its utility customers, rather than those who used ambulance
12 services, the court held the charges exceeded the authority granted the city in the statute and was
13 thus unenforceable.

14 The ordinance at issue was enacted as an amendment to SMC Title 5, "Revenue, Finance
15 and Taxation." Subtitle II Title 5 imposes a number of excise taxes in addition to the B&O tax.
16 Ordinance 124833 is a tax imposed under authority granted to the City by RCW 35.22.280(32).
17 Plaintiffs' requests for declaratory relief and an injunction are denied. Defendants' Motion for
18 summary Judgment is granted. A separate order is attached.
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20 Dated this 22nd day of December, 2015.

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23 Honorable. Palmer Robinson
24 Superior Court Judge
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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

PHILIP WATSON, an individual; RAY CARTER, an individual; FARWEST SPORTS, INC., dba OUTDOOR EMPORIUM, a Washington corporation; PRECISE SHOOTER LLC, a Washington limited liability company; THE SECOND AMENDMENT FOUNDATION, INC., a Washington nonprofit corporation; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., a New York non-profit association; AND NATIONAL SHOOTING SPORTS FOUNDATION, a Connecticut nonprofit association,

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CITY OF SEATTLE, a municipality; ED MURRAY, Mayor of the City of Seattle, in his official capacity; SEATTLE DEPARTMENT OF FINANCE AND ADMINISTRATIVE SERVICES, a department of the City of Seattle; and GLEN LEE, Director of Finance and Administrative Services, in his official capacity,

Defendants.

NO. 15-2-20613-3 SEA

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER having come for hearing before the undersigned Judge on Plaintiffs' Motion for Summary Judgment and Defendants' Cross-Motion for Partial Summary Judgment,

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

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1 and the Court having considered the record, oral argument, and all materials filed on this issue,
2 including:

3 1. Plaintiffs' Motion for Summary Judgment;

4 2. Declaration of Steven W. Fogg in Support of Plaintiffs' Motion for Summary
5 Judgment, and the exhibits attached thereto;

6 3. Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and Cross-
7 Motion for Partial Summary Judgment;

8 4. Declaration of Laurie Edelstein in support of Defendants' Opposition to
9 Plaintiffs' Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment, and
10 the exhibits attached thereto;

11 5. Declaration of Seattle City Council President Tim Burgess in support of
12 Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for
13 Partial Summary Judgment;

14 6. Declaration of Samantha Vu in support of Defendants' Opposition to Plaintiffs'
15 Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment;

16 7. Defendants' Request for Judicial Notice in support of their Opposition to
17 Plaintiffs' Motion for Summary Judgment and Cross-Motion for Partial Summary Judgment;

18 8. Plaintiffs' Opposition and Reply on Summary Judgment;

19 9. Declaration of Steven W. Fogg in Support of Plaintiffs' Opposition and Reply on
20 Summary Judgment;

21 10. Defendants' Reply in support of their Cross-Motion for Summary Judgment; and
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1 The Court hereby finds that plaintiffs are not entitled to judgment as a matter of law. The
2 Court further finds that there is no genuine issue of material fact and that defendants are entitled
3 to ^{partial} ~~partial~~ summary judgment as a matter of law.

4 NOW, THEREFORE, IT IS HEREBY ORDERED:

- 5 1. Plaintiffs' Motion for Summary Judgment is DENIED;
- 6 2. Defendants' Cross-Motion for Summary Judgment is GRANTED;
- 7 3. Ordinance 124833 (the "Ordinance") imposes a tax, not a regulation;
- 8 4. The tax imposed by the Ordinance under the City's constitutional and legislative
9 authority to impose taxes, which is separate from its regulatory authority under its police power,
10 is not preempted by RCW 9.41.290; and
- 11 5. Ordinance 124833 is a lawful exercise of Seattle's taxing authority.
- 12 6. Plaintiffs' Complaint is dismissed with prejudice. Defendants are awarded their
13 taxable costs and statutory attorneys' fees.

14 Dated this 22 day of December, 2015.

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18 Hon. Palmer Robinson
19 Superior Court Judge

20 Presented by:

21 **PETER S. HOLMES**
22 **Seattle City Attorney**
23 Attorneys for Defendants City of Seattle

24 By: s/ Kent C. Meyer
25 Kent C. Meyer, WSBA #17245
26 Carlton W.M. Seu, WSBA #26830

ORDER DENYING PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND GRANTING
DEFENDANTS' CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT - 3

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