602 S.W.3d 459
Supreme Court of Texas.

The **CITY** OF **FORT** **WORTH** and David Cooke, in His Official Capacity as **Fort** **Worth** **City** Manager, Petitioners,

v.

Stephannie Lynn **RYLIE**, Texas C & D Amusements, Inc., and Brian and Lisa Scott d/b/a TSCA and d/b/a River Bottom Pub, Respondents

No. 18-1231
|
Argued January 28, 2020
|
Opinion delivered: May 8, 2020

Synopsis

Background: Operators of pubs with electronic gaming machines known as "eight-liners" brought action seeking to have **city** ordinances regulating gaming machines declared invalid. **City** counterclaimed, seeking to have "fuzzy animal exception" to state prohibition against gambling declared unconstitutional. The 17th District Court, Tarrant County, No. 017-276483-15, Melody Wilkinson, J., 2017 WL 10591962, on parties' cross-motions for summary judgment, declared that only conflicting portions of ordinances were preempted by state statute regulating skill or pleasure coin-operated machines, and that fuzzy-animal exclusion was constitutional. Parties cross-appealed. The **Fort** **Worth** Court of Appeals, Kerr, J., 563 S.W.3d 346, affirmed in part and reversed in part. Parties filed petitions for review.

[Holding:] The Supreme Court, Boyd, J., held that remand was warranted for Court of Appeals to decide in first instance whether "eight-liners" were unconstitutional or illegal.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion for Declaratory Judgment.

West Headnotes (7)

[1] **Gaming and Lotteries** Lotteries and raffles

For purposes of the constitutional provision requiring the Legislature to pass laws prohibiting lotteries, a "lottery" includes not just contests involving scratch-off tickets and numbered ping-pong balls, but a wide array of activities that involve, at a minimum: (1) the payment of consideration; (2) for a chance; (3) to win a prize. Tex. Const. art. 3, § 47; Tex. Penal Code Ann. § 47.01(7).

1 Case that cites this headnote

[2] **Gaming and Lotteries** Slot and pinball machines

Statute regulating legal skill or pleasure coin-operated machines does not apply to unconstitutional or illegal machines. Tex. Const. art. 3, § 47; Tex. Occ. Code Ann. §§ 2153.001, 2153.003.

[3] **Statutes** Undefined terms

Statutes Dictionaries

When a statute does not define a term, courts typically apply the term's common, ordinary meaning, derived first from applicable dictionary definitions, unless a contrary meaning is apparent from the statute's language.

5 Cases that cite this headnote

[4] **Statutes** Unintended or unreasonable results; absurdity

Courts will not construe a statute's language to produce patently nonsensical results, but this absurdity bar is high, and should be, because mere oddity does not equal absurdity.

5 Cases that cite this headnote

[5] **Statutes** Powers and duties of legislature in general

The legislature cannot change or ignore the meaning of the constitution's text.

[6] **Constitutional Law** Avoidance of constitutional questions

Courts must construe statutes to avoid constitutional infirmities.

3 Cases that cite this headnote

[7] **Appeal and Error** Particular Issues

Question of whether pub operators' electronic gaming machines known as "eight-liners" were unconstitutional or illegal presented relevant and justiciable issue of first impression that Court of Appeals failed to address, on operators' appeal from trial court's determination that only conflicting portions of **city** ordinances regulating amusement redemption machines and associated game rooms within **city** were preempted by state statute regulating skill or pleasure coin-operated machines, and, thus, remand was warranted for Court of Appeals to decide issue in first instance after full briefing and argument by parties; statute only applied to constitutional and legal gaming machines, and it could only preempt ordinances if "eight-liners" were unconstitutional and illegal. Tex. Const. art. 3, § 47; Tex. Occ. Code Ann. §§ 2153.001, 2153.003; Tex. Penal Code Ann. § 47.01(4)(B).

5 Cases that cite this headnote
More cases on this issue

***460** ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Attorneys and Law Firms

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Opinion

Justice Boyd delivered the opinion of the Court.

The issue in this case is whether (and if so, to what extent) a state statute that regulates "coin-operated machines" preempts **city** ordinances that regulate "eight-liners" and the "game rooms" that offer them. We cannot reach that issue today, however, because the answer depends initially on whether the eight-liners at issue are constitutional and legal. The court of appeals did not address the constitutionality or legality of the eight-liners because it believed the question is irrelevant to the preemption issue. Because we disagree, we reverse the court of appeals' judgment and remand the case to that court so that it can decide in the first instance whether the eight-liners are constitutional and legal.

I.

Background

[1] For as long as the State of Texas has been the State of Texas, its citizens have elected to constitutionally outlaw most types of "lotteries."[1] Contrary to the term's popular understanding, a "lottery" ***461** includes not just contests involving scratch-off tickets and numbered ping-pong balls, but a wide array of activities that involve, at a minimum, (1) the payment of "consideration" (2) for a "chance" (3) to win a "prize." *City of Wink v. Griffith Amusement Co.*, 129 Tex. 40, 100 S.W.2d 695, 698 (1936).[2] Since its ratification in 1876, our current constitution has affirmatively required the legislature to "pass laws prohibiting" lotteries. TEX. CONST. art. III, § 47.[3]

A. Gambling and gambling devices

To fulfill its constitutional obligation, the legislature has enacted statutes making it a criminal offense to engage in or promote most forms of "gambling"[4] or to own,

manufacture, transfer, or possess a "gambling device." TEX. PENAL CODE §§ 47.02–.06. The term "gambling device" includes "any electronic, electromechanical, or mechanical contrivance ... that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance." *Id.* § 47.01(4). This includes, as examples, electronic or mechanical versions of "bingo, keno, blackjack, lottery, roulette, [and] video poker." *Id.* § 47.01(4)(A).

B. The fuzzy-animal exclusion

As technology developed in recent decades, the statutory prohibition against gambling devices presented a peculiar problem for increasingly popular "family entertainment centers."[5] These establishments offer electronic and mechanical games that at least arguably constitute lotteries or gambling devices: patrons pay consideration for the chance to win as many tickets as possible, with an eye toward the prize counter. Behind the prize counter lies a bounty of gadgets, toys, and stuffed animals (most of which are worth far less than the amount expended to win the tickets) and a few big-ticket items (usually available only to those who win a rare jackpot or spend a few hundred hours playing Skee-Ball).

In 1993, the legislature made the policy decision to resolve this perceived problem ***462** by adopting what has become known as the "fuzzy-animal exclusion."[6] *See* Act of May 31, 1993, 73d Leg., R.S., ch. 774, § 1, 1993 Tex. Gen. Laws 3027, 3027–28 (amended 1995) (codified at TEX. PENAL CODE § 47.01(4)(B)). Under the fuzzy-animal exclusion, a machine that would otherwise constitute a "gambling device" is excluded from the definition if (1) it is used "solely for bona fide amusement purposes," (2) it rewards only "noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items," and (3) the reward for "a single play of the game or device" is worth no more than the lesser of $5 or ten times the cost of the single play. TEX. PENAL CODE § 47.01(4)(B).

C. Eight-liners

Soon after the legislature adopted the fuzzy-animal exclusion, owners of machines known as "eight-liners" began taking the position that their machines fall within the exclusion's protection.[7] Eight-liners generally operate like a video slot machine: a patron pays to play the machine, which displays nine electronic symbols arranged in three columns and three rows; the machine records the payment as credits; and the player bets some or all of those credits by pushing a button to cause the three columns to start spinning. If the columns stop (either automatically or when the player pushes the button a second time) with three of the same symbols in one of eight possible lines—three vertical, three horizontal, and two diagonal—the player wins a predetermined amount of additional credits. At that point, the player can either push the button to play again or end the game and withdraw a ticket or coupon representing the value of the player's remaining credits. The player can then exchange the coupon for a "prize"—much like the children at Chuck E. Cheese—or for a "right of replay," meaning credits to use on a different machine.

Community opposition to eight-liners and the "game rooms" that offer them led not only to arguments that the machines do not qualify under the fuzzy-animal exclusion, but also to arguments that the exclusion itself is unconstitutional because it authorizes lotteries—games involving consideration, chance, and a prize.[8] Because the constitution affirmatively requires the legislature to prohibit lotteries, the opponents argued, it necessarily prohibits the legislature from enacting an exclusion that allows them. A few years after the legislature adopted the fuzzy-animal exclusion, Texas Attorney General Dan Morales issued an opinion agreeing that the exclusion is unconstitutional "because it contravenes the Texas Constitution's proscription of 'lotteries.' " Tex. Att'y Gen. Op. No. DM-466, 1998 WL 78772, at *3 (Jan. 23, 1998). About ten years later, then-Attorney General Greg Abbott reaffirmed that conclusion. Tex. Att'y Gen. Op. No. GA-0527, 2007 WL 709285, at *3 n.6 (Mar. 6, 2007). We have never addressed ***463** that issue,[9] and the exclusion remains intact, giving rise to legal disputes over whether the exclusion covers particular variations of eight-liners.[10]

D. Chapter 2153

Meanwhile, chapter 2153 of the Texas Occupations Code[11] "provide[s] comprehensive and uniform statewide regulation" of "skill or pleasure coin-operated machines." TEX. OCC. CODE § 2153.001.[12] Subject to certain exceptions, *see id.* §§ 2153.004–.008, chapter 2153 requires any person who manufactures, owns, buys, sells, rents, trades, maintains, transports, stores, or imports a skill or pleasure coin-operated machine to first obtain a license or registration

from the comptroller, *id.* §§ 2153.151–.153, to pay an annual fee for the license or registration, *id.* §§ 2153.154, .157, to maintain detailed records regarding the machine, *id.* §§ 2153.201–.204, and to pay an annual occupations tax on each machine, *id.* § 2153.401. The chapter allows a county or municipality to impose an additional local tax on each machine, but only in an amount not greater than one-fourth of the state tax. *Id.* § 2153.451. It also allows them to impose zoning restrictions on places that "exhibit" the machines based on the property's "principal use," and specifically permits them to restrict the exhibition of a machine "within 300 feet of a church, school, or hospital." *Id.* § 2153.452. However, the chapter expressly does not "authorize or permit the keeping, exhibition, operation, display, or maintenance of a machine [that is] prohibited by the constitution of this state or the Penal Code." *Id.* § 2153.003.

E. The Fort Worth Ordinances

In 2014, the **Fort Worth City** Council grew weary of what it concluded were the "deleterious" effects of eight-liners in their communities. According to the **City**, eight-liner game rooms cause "increased crime, such as gambling, theft, criminal trespass, criminal mischief, and burglary," contribute "to urban blight," and "downgrad[e] the quality of life" in their surrounding areas. So the **City** Council passed two ordinances to regulate "amusement redemption ***464** machines" and associated "game rooms" within the **City**. The "zoning ordinance" imposes, among other things, zoning restrictions confining game rooms to industrial-zoned areas and prohibiting them from operating within 1000 feet of a residential district, church, school, hospital, or another game room. The "licensing ordinance" generally requires game-room operators to obtain a license from the **City** and to pay a licensing and inspection fee.

F. The lawsuit

Stephannie **Rylie**, Texas C & D Amusements, Inc., and Brian and Lisa Scott (doing business as TSCA and River Bottom Pub) (collectively "the Operators") own and operate eight-liners in **Fort Worth**. At least for purposes of this case, the Operators admit that their eight-liners qualify as "gambling devices," but they contend that they operate their machines in a way that brings them within the fuzzy-animal exclusion. The Operators filed this suit against the **City** seeking a declaration that chapter 2153 completely preempts the ordinances, or alternatively, that it partially preempts the ordinances to the extent of any conflict between the two. [13]

In response, the **City** argued that chapter 2153 does not preempt the ordinances at all because the Operators' eight-liners are unconstitutional lotteries and illegal gambling devices and, by its own terms, chapter 2153 does not apply to unconstitutional or illegal machines. TEX. OCC. CODE § 2153.003 ("This chapter does not authorize or permit the keeping, exhibition, operation, display, or maintenance of a machine, device, or table prohibited by the constitution of this state or the Penal Code."). [14] In addition, the **City** filed a counterclaim for declaratory relief, requesting a declaration that the fuzzy-animal exclusion is unconstitutional because it purports to authorize lotteries, which the constitution requires the legislature to prohibit.

All parties moved for summary judgment. [15] The trial court granted the Operators' motion in part, holding that chapter 2153 does not completely preempt the ordinances but does preempt ten specific ordinance provisions that conflict with chapter 2153's provisions. [16] The court denied the **City's** summary-judgment motion and instead declared that the fuzzy-animal exclusion is constitutional. The parties voluntarily ***465** dismissed all other claims and defenses, and the trial court entered a final judgment incorporating its summary-judgment orders.

Both sides appealed. The Operators argued the trial court erred by holding that chapter 2153 does not completely preempt the ordinances and by addressing the merits of the **City's** constitutional attack on the fuzzy-animal exclusion. The **City** argued the trial court erred by holding that chapter 2153 applies to the machines and partially preempts the ordinances. Importantly, the **City** did not appeal from the trial court's denial of its motion for summary judgment on its counterclaim seeking a declaration that the fuzzy-animal exclusion is unconstitutional. 563 S.W.3d at 358 n.13. Although it argued that the exclusion is unconstitutional, it did so in defense against the Operators' complete-preemption argument (i.e., in support of its argument that chapter 2153 does not apply to the Operators' eight-liners), not to show that the court erred by dismissing its counterclaim.

The court of appeals affirmed in part and reversed in part. 563 S.W.3d at 365–66. First, it agreed with the Operators that the trial court should not have addressed the fuzzy-animal exclusion's constitutionality when deciding whether chapter 2153 preempts the ordinances, reasoning that chapter 2153 applies to the Operators' eight-liners regardless of whether the eight-liners are constitutional or legal. *Id.* at 356–57. Specifically, the court noted that section

2153.003 provides that chapter 2153 does not "authorize or permit" unconstitutional or illegal machines, not that it "exempt[s]" them from chapter 2153's regulations or that it does not "apply to" or "regulate" them. *Id.* at 357. In the court's view, nothing prevents the legislature from regulating and taxing unconstitutional or illegal conduct, and section 2153.003 merely clarifies that the chapter does not make an unconstitutional or illegal machine legitimate or legal just because the chapter applies to, regulates, and taxes it.

Based on this conclusion, the court held that the machines' constitutionality or legality (and thus the fuzzy-animal exclusion's constitutionality) is irrelevant to the preemption issue,[17] so any decision on the machines' constitutionality or legality would be advisory and that issue is therefore non-justiciable in this case. *Id.* (citing TEX. R. APP. P. 47.1; *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993)). The court thus reversed the portion of the trial court's judgment declaring the exclusion constitutional and dismissed the **City's** counterclaim for want of jurisdiction. *Id.* at 365–66.[18]

The court then agreed with the trial court's holding that chapter 2153 does not completely preempt the ordinances but does preempt conflicting provisions. *Id.* at 359. In the court's view, section 2153.001's ***466** statement that the chapter's purpose is to "provide comprehensive and uniform statewide regulation" of such machines does not express "with unmistakable clarity" an intent to preempt the "field" of regulation of coin-operated machines. *Id.* (citing *S. Crushed Concrete, LLC v. **City** of Houston*, 398 S.W.3d 676, 678 (Tex. 2013)).

Both sides petitioned this Court for review. The Operators argue that the court of appeals, like the trial court before it, erred in holding that chapter 2153 does not *completely* preempt the **City's** ordinances. The **City** argues: (1) the court of appeals erred in holding that the fuzzy-animal exclusion's constitutionality is irrelevant to the preemption issue and thus non-justiciable; (2) chapter 2153 does not preempt the ordinances *at all* because it does not "authorize or permit," and thus does not apply at all to, unconstitutional or illegal machines; and (3) the Operators' machines are unconstitutional lotteries or, alternatively, they are illegal gambling devices that the fuzzy-animal exclusion does not legalize because (a) they do not fall within the exclusion or, if they do, (b) the exclusion itself is unconstitutional.

II.

Justiciability

The parties' arguments in this Court present a cobweb of issues that, as an initial matter, challenge us to determine which we should address first. As we have explained, the ultimate issue in this Court is whether chapter 2153 preempts the **City's** ordinances, either completely (as the Operators contend), in part because of conflicts (as the court of appeals held), or not at all (as the **City** contends). But to resolve that issue, we must first decide whether chapter 2153 even applies to and regulates the Operators' eight-liners. If it does not, it cannot preempt the ordinances—completely, partially, or at all. So we must begin by considering whether chapter 2153 applies to and regulates the Operators' eight-liners.

But that issue presents sub-issues as well. The **City** argues that chapter 2153 *does not* apply to or regulate the Operators' eight-liners *if* (as the **City** contends) the machines or the fuzzy-animal exclusion are unconstitutional or illegal. The court of appeals concluded that chapter 2153 *does* apply to and regulate the eight-liners, *regardless* of whether the machines or the fuzzy-animal exclusion are unconstitutional or illegal. So to decide whether chapter 2153 applies to and regulates the eight-liners, we must first decide (1) whether their constitutionality and legality affect chapter 2153's applicability, and if so, then decide (2) whether they are constitutional and legal. On the first point, we conclude that constitutionality and legality matter because chapter 2153 does not apply to or regulate unconstitutional or illegal machines. We do not address the second issue, however, because it represents an important issue of first impression in this Court and the court of appeals did not reach it. We thus remand the case to that court so that it can address and decide that issue in the first instance.

A. Chapter 2153's applicability

[2] As described, chapter 2153 regulates "skill or pleasure coin-operated machines." TEX. OCC. CODE § 2153.001. In this Court, the **City** does not contest that the Operators' eight-liners qualify as coin-operated machines, but instead contends that chapter 2153 does not apply to them at all if they are unconstitutional or illegal. We agree.

[3] Section 2153.003 provides that chapter 2153 "does not *authorize or permit* the keeping, exhibition, operation,

display, or maintenance of a machine, device, or table prohibited by the constitution of ***467** this state or the Penal Code." TEX. OCC. CODE § 2153.003 (emphasis added). To "authorize" means to "give legal authority," and to "permit" means to "consent to formally," or "to allow or admit of" an activity. *Authorize*, *Permit*, BLACK'S LAW DICTIONARY 129, 1160 (7th ed. 1999).[19] So under section 2153.003, chapter 2153 does not give legal authority to unconstitutional or illegal machines, and it does not consent to or allow people to keep, exhibit, or operate such machines.

Adopting the court of appeals' reasoning, the Operators argue that section 2153.003 (which is entitled "Construction of Chapter Consistent With Other Laws") merely clarifies that, although the chapter applies to and regulates unconstitutional and illegal machines, it does not thereby make them constitutional or legal. *See* TEX. OCC. CODE § 2153.003. As they construe it, although the state may license and tax machines, the chapter does not provide a shield of legality to someone charged with operating an illegal machine. The Operators support this construction by noting that section 2153.003 states that the chapter "does not authorize or permit" unconstitutional or illegal machines, while the next section, 2153.004, provides a list of machines to which the chapter "does not apply," and that list does not include unconstitutional or illegal machines. *See* TEX. OCC. CODE § 2153.004.

The Operators concede that their construction renders section 2153.003 surplusage, because it is a "well-established truism" that the legislature cannot "license" unconstitutional activities. But, they contend, the **City's** construction leads to an "absurd" result. Under the **City's** construction, they argue, "an amusement machine operator acting within the law is taxed and regulated, while someone who operates outside the law is not."

[4] We are not convinced. To begin with, we do not agree that the result the Operators complain of is absurd. We will not construe a statute's language to produce "patently nonsensical results," but this absurdity bar "is high, and should be," because "mere oddity does not equal absurdity." *Combs v. Health Care Servs. Corp.*, 401 S.W.3d 623, 630 (Tex. 2013). It may seem "odd" that the legislature would choose to license, tax, and regulate legal machines but not illegal ones, yet that's exactly what it does with a multitude of other products and activities. It regulates and taxes authorized pharmaceuticals but not illicit drugs, permissible firearms but not illegal weapons, and legitimate personal services but not forbidden ones. Indeed, the legislature does not *usually* regulate and tax illegal activities—it *usually* punishes and prohibits them. And that's what the constitution demands in this context: "The Legislature shall pass laws prohibiting lotteries." TEX. CONST. art. III, § 47. If the legislature exercises power the constitution says it doesn't have—that is, if it permits lotteries when it only has the power to prohibit them—we take the constitution's word over that of the legislature. In light of the constitution's requirement that the legislature prohibit lotteries, construing chapter 2153 to apply to, license, and tax unconstitutional or illegal gambling devices seems far more absurd than construing it not to apply.

But more importantly, we do not find the Operators' textual arguments convincing either. While we acknowledge that section 2153.004 expressly addresses machines ***468** to which the chapter "does not apply" and does not include unconstitutional or illegal machines in the list, *See* TEX. OCC. CODE § 2153.004, the legislature need not state what it does not have the power to do. Section 2153.004's list does not include slot machines, video-poker machines, or any of the other machines the penal code labels as illegal gambling devices, yet no one argues that chapter 2153 applies to, licenses, regulates, and taxes those machines.

This illuminates the problem at hand. The Operators argue that chapter 2153 applies to their eight-liners because the state has literally licensed their machines. The Operators hold general business licenses issued by the state to operate their eight-liners. And the state generates revenue from the machines through the taxes and fees it imposes. *See* TEX. OCC. CODE § 2153.401 (imposing an occupation tax on coin-operated machines). But those facts do not establish that chapter 2153 applies to unconstitutional or illegal machines.

[5] The Operators themselves contend that their machines are constitutional and legal, in which case chapter 2153 would apply to them even under the **City's** construction of section 2153.003. And if (as the **City** contends) they are unconstitutional or illegal, the fact that the state has licensed and taxed them would not change the meaning of section 2153.003 any more than it could change the meaning of the constitution's requirement that the legislature prohibit lotteries. The legislature cannot change or ignore the meaning of the constitution's text. *See Ferguson v. Wilcox*, 28 S.W.2d 526, 533 (Tex. 1930) ("[W]hen the Constitution provides and commands that a thing shall be done, the matter must be done as directed, and neither the Legislature, Executive, nor the courts have the authority to set aside the mandates."). If the

legislature were permitting activities the constitution requires it to prohibit, that action would be *ultra vires* and cannot be allowed to stand, no matter the Operators' good-faith reliance on those actions.

But most importantly, we think section 2153.003's plain language makes it clear that chapter 2153 does not apply to unconstitutional or illegal machines. As explained, chapter 2153 requires that coin-operated machines to which the chapter applies and their owners be licensed or registered and pay an annual licensing fee and occupations tax. *Id.* §§ 2153.151–.154, .157, .401. Assuming compliance with the chapter's requirements, the license or registration provided under chapter 2153 literally authorizes or permits the owner to keep, exhibit, operate, or maintain the machine. *See id.* § 2153.356 (making it a criminal offense to operate a machine to which chapter 2153 applies without a valid license or registration certificate). In this context, section 2153.003's statement that the chapter does not authorize or permit an unconstitutional or illegal machine can only mean that such a machine cannot be licensed or registered under chapter 2153. And if the machine cannot be licensed under chapter 2153, the taxes, zoning restrictions, and other provisions that regulate licensed and registered machines do not apply to those machines.

[6] Because of this, we cannot accept the court of appeals' construction of section 2153.003. Courts must construe statutes to avoid constitutional infirmities. *Barshop v. Medina Cty. Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996). The legislature is commanded to pass laws to prohibit lotteries, and construing section 2153.003 to apply to lotteries has the effect of legitimizing them. The text permits another reasonable construction that abides by the statute's plain language while avoiding those constitutional infirmities. Chapter 2153 does not ***469** "authorize" (give legal authority to) or "permit" (consent to or allow to operate by law) unconstitutional or illegal machines. If it "applied to" unconstitutional or illegal machines, it would necessarily give legal authority to them and allow them to legally operate, in violation of the constitution. We conclude that, in light of section 2153.003, chapter 2153 does not apply to unconstitutional or illegal machines.

B. Constitutionality and legality

[7] Because we conclude that chapter 2153 does not apply to unconstitutional or illegal machines, the next question is whether the Operators' machines are unconstitutional or illegal. Contrary to the court of appeals' conclusion, that question is relevant and justiciable because if the machines are unconstitutional or illegal, then chapter 2153 does not apply to them and thus cannot preempt the **City's** ordinances.[20] But as described, the court of appeals did not address that question. Because the question presents an important issue of first impression in this Court, we decline to address the question in the first instance and defer instead for the court of appeals to address it after full briefing and argument by the parties. *See Pidgeon v. Turner*, 538 S.W.3d 73, 87 (Tex. 2017) (declining to "render a final ruling on the merits before the parties have had a full opportunity to make their case"); *Wasson Interests, Ltd. v. **City** of Jacksonville*, 489 S.W.3d 427, 439 (Tex. 2016) (remanding case for "court of appeals to address [unaddressed] questions in the first instance").

III.

Conclusion

We hold the court of appeals erred by concluding that the issue whether the Operators' machines are constitutional and legal is irrelevant to the question whether chapter 2153 preempts the **City's** ordinances and is therefore non-justiciable. We reverse the court of appeals' judgment and remand the case to that court so that it can address and resolve that issue in the first instance.

All Citations

602 S.W.3d 459, 63 Tex. Sup. Ct. J. 1036

Footnotes

1 *See* TEX. CONST. OF 1876 art. III, § 47 ("The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other

evasions involving the lottery principle, established or existing in other States."); TEX. CONST. OF 1869 art. III, § XXVII ("The Legislature shall not authorize any lottery, and shall prohibit the sale of lottery tickets."), art. XII, § XXXVI ("No lottery shall be authorized by this State; and the buying and selling of lottery tickets within this State is prohibited."); TEX. CONST. OF 1866 art. VII, § 17 ("No lottery shall be authorized by this State; and the buying or selling of lottery tickets within this State is prohibited."); TEX. CONST. OF 1861 art. VII, § 17 ("No lottery shall be authorized by this State; and the buying or selling of lottery tickets within this State is prohibited."); TEX. CONST. OF 1845 art. VII, § 17 ("No Lottery shall be authorized by this State; and the buying or selling of Lottery Tickets within this State, is prohibited.").

2 *See* TEX. PENAL CODE § 47.01(7) (" 'Lottery' means any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration for a chance to win anything of value, whether such scheme or procedure is called a pool, lottery, raffle, gift, gift enterprise, sale, policy game, or some other name."); *Randle v. State*, 42 Tex. 580, 585 (1875) (defining lottery as a "scheme for the distribution of prizes by chance"); *see also Fed. Commc'ns Comm'n v. Am. Broad. Co.*, 347 U.S. 284, 290 n.8, 74 S.Ct. 593, 98 L.Ed. 699 (1954) ("[W]hatever may be the factual differences between a 'lottery,' a 'gift enterprise,' and a 'similar scheme,' the traditional tests of chance, prize, and consideration are applicable to each."); *Queen v. State*, 93 Tex.Crim. 173, 246 S.W. 384, 386 (1922) ("A slot machine is a lottery.").

3 Beginning in 1980, Texans ratified a series of constitutional amendments to allow certain types of lotteries, including the state lottery and charitable bingo and raffles. *See* TEX. CONST. art. III, § 47(b), (c), (d), (e). The legislature must prohibit all lotteries the constitution does not expressly authorize. *Id.* § 47(a); *see generally Hardy v. State*, 102 S.W.3d 123, 130 (Tex. 2003) (discussing constitutional amendments regarding lotteries).

4 "Gambling" generally refers to participation in lottery-type activities involving, at a minimum, consideration, chance, and a prize. *See generally* TEX. PENAL CODE §§ 47.01(1) (defining "bet"), .01(4) (defining "gambling device"), .02 (prohibiting "gambling"), .03 (prohibiting "gambling promotion").

5 Texas is home to a number of these centers: Dave & Busters, founded and headquartered in Dallas; Main Event, headquartered in Plano; and Chuck E. Cheese, headquartered in Irving.

6 *See, e.g.*, *Twenty-Nine (29) Gambling Devices v. State*, 110 S.W.3d 146, 148 (Tex. App.—Amarillo 2003, no pet.) (noting that section 47.01(4)(B) is "commonly called the 'fuzzy animal' exclusion").

7 *See Hardy*, 102 S.W.3d at 125–26 (describing eight-liners and addressing whether they fall within the exclusion).

8 The Operators argue that although their eight-liners constitute "gambling devices" under the penal code (albeit protected by the fuzzy-animal exclusion), they are not lotteries under the constitution because a lottery must involve elements in addition to consideration, chance, and a prize, and their eight-liners do not involve those elements. According to the Operators, "while all lotteries are a form of gambling, not all forms of gambling are lotteries." For the reasons discussed, we do not address that issue here.

9 A few Texas courts of appeals have addressed the issue to varying degrees, and have declined to find the exclusion unconstitutional. *See Owens v. State*, 19 S.W.3d 480, 481–84 (Tex. App.—Amarillo 2000, no pet.); *Tex. Alc. Bev. Comm'n v. Amusement & Music Operators of Tex., Inc.*, 997 S.W.2d 651, 656 (Tex. App.—Austin 1999, pet. dism'd w.o.j.); *Weaver v. Head*, 984 S.W.2d 744, 746–747 (Tex. App.—Texarkana 1999, no writ).

10 *See*, *e.g.*, *State v. $1,760.00 in U.S. Currency*, 406 S.W.3d 177, 178 (Tex. 2013) (per curiam) (holding that eight-liners that "awarded tickets that could be redeemed for non-immediate rights of replay" did not fall within

the exclusion); *Hardy*, 102 S.W.3d at 125 (holding "that an eight-liner that rewards the player with cash, even if that cash is used only to play another machine, fails to satisfy the section 47.01(4)(B) exclusion").

11 Enacted in 1999, chapter 2153 codified statutes initially adopted in 1969 to regulate and tax coin-operated machines. *See generally Thompson v. Calvert*, 489 S.W.2d 95, 96–98 (Tex. 1972) (discussing chapter 2153's predecessor statutes).

12 A "coin-operated machine" includes "any kind of machine or device operated by or with a coin or other United States currency, metal slug, token, electronic card, or check, including a music or skill or pleasure coin-operated machine." TEX. OCC. CODE § 2153.002(1). A "skill or pleasure coin-operated machine" includes "any kind of coin-operated machine that dispenses, or is used or is capable of being used to dispense or afford, amusement, skill, or pleasure or is operated for any purpose, other than for dispensing only merchandise, music, or service." *Id.* § 2153.002(9). This includes a machine "that dispenses merchandise or commodities or plays music in connection with or in addition to dispensing skill or pleasure," but does not include "an amusement machine designed exclusively for a child." *Id.* § 2153.002(9)(A) & (B).

13 The Operators also alleged that the Texas Alcoholic Beverage Code preempts ordinance provisions that prohibit or restrict the sale, purchase, possession, or consumption of alcoholic beverages within a game room. The court of appeals agreed. 563 S.W.3d 346, 365–66 (Tex. App.—**Fort Worth** 2018). Because neither party challenges that holding in this Court, we do not address it.

14 The **City** also argued that the Operators' machines are not skill or pleasure coin-operated machines under chapter 2153. The trial court and court of appeals rejected that argument, *See* 563 S.W.3d at 356, and the **City** accepts that ruling for purposes of this appeal.

15 The **City** conceded, "for the sole purposes of" its motion seeking summary judgment on its counterclaim, "that the [fuzzy-animal exclusion] authorizes the Operators' machines." In response to the Operators' summary-judgment motion, however, the **City** argued that the fuzzy-animal exclusion does not apply to the Operators' eight-liners.

16 For example, the court held that: (1) section 2153.452, which allows municipalities to impose zoning rules restricting the exhibition of a machine "within 300 feet of a church, school, or hospital," preempts the zoning ordinance's prohibition of game rooms within 1000 feet of a residential district, church, school, hospital, or other game room; and (2) section 2153.453, which allows municipalities to seal a machine if the owner fails to pay the **city's** tax and charge "not more than" $5 to unseal it preempts the licensing ordinance's imposition of a $100 unsealing fee.

17 563 S.W.3d at 358–59 ("[B]ecause chapter 2153 (and the **City's** ordinances) apply to the Operators' machines regardless of whether they are illegal or unconstitutional, section 47.01(4)(B)'s constitutionality is irrelevant here.").

18 We note that in the trial court, the exclusion's constitutionality may actually have been justiciable even if it were irrelevant to the preemption issue because it was indisputably relevant to the **City's** *independent* counterclaim seeking declaratory judgment on that very issue. The **City** does not complain about the court of appeals' failure to recognize this distinction, however (presumably because it did not appeal from the portion of the trial court's judgment dismissing its counterclaim), and instead appealed only to challenge the portion of the judgment addressing the Operators' preemption claim. Because the **City** did not appeal the dismissal of its counterclaim, the only issue before us is whether the constitutionality/legality issue is relevant to the preemption issue and therefore justiciable.

19 When, as here, a statute does not define a term, we typically apply the term's common, ordinary meaning, derived first from applicable dictionary definitions, unless a contrary meaning is apparent from the statute's

language. *Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 34–35 (Tex. 2017).

20 Of course, a finding that the machines are unconstitutional or illegal would also lead to the question whether the **City** could license, regulate, and tax them through the **City's** ordinances. That question, however, has not been raised in this case.

649 S.W.3d 246
Court of Appeals of Texas, Fort Worth.

The CITY OF FORT WORTH and David Cooke, in his official capacity as Fort Worth City Manager, Appellants/Cross-Appellees

v.

Stephannie Lynn RYLIE, Texas C&D Amusements, Inc., and Brian and Lisa Scott d/b/a TSCA and d/b/a River Bottom Pub, Appellees/Cross-Appellants

No. 02-17-00185-CV
|
Delivered: March 17, 2022
|
Reconsideration En Banc Denied July 21, 2022

Synopsis

Background: Operators of pubs with electronic gaming machines known as "eight-liners" brought action seeking to have city ordinances regulating gaming machines declared invalid. The 17th District Court, Tarrant County, Melody Wilkinson, J., 2017 WL 10591962, on parties' cross-motions for summary judgment, declared that only conflicting portions of ordinances were preempted by state statute regulating skill or pleasure coin-operated machines. The Fort Worth Court of Appeals, Kerr, J., 563 S.W.3d 346, affirmed in part and reversed in part. The Supreme Court, Boyd, J., 602 S.W.3d 459, reversed and remanded, holding that remand was warranted for Court of Appeals to decide in first instance whether "eight-liners" were unconstitutional or illegal.

Holdings: The Court of Appeals, Kerr, J., held that:

[1] "eight-liners" were unconstitutional and illegal, and

[2] city ordinances were not preempted by state statute.

Affirmed in part and reversed in part.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion for Declaratory Judgment.

West Headnotes (11)

[1] **Appeal and Error** Constitutional law
Appeal and Error Statutory or legislative law

De novo standard of review applies to both constitutional and statutory interpretation.

[2] **Gaming and Lotteries** Lotteries and raffles

Unless a scheme for the awarding of a prize requires that it be awarded by a chance, it is not a lottery that is prohibited by the constitution. Tex. Const. art. 3, § 47.

[3] **Gaming and Lotteries** Lotteries, raffles, and bingo

The legislature cannot sanction a lottery of any type as it violates the constitutional prohibition against lotteries; a constitutional amendment is necessary. Tex. Const. art. 3, § 47.

[4] **Gaming and Lotteries** Lotteries, raffles, and bingo

The Legislature is prohibited by constitutional provision prohibiting lotteries from indirectly authorizing, licensing, or legalizing lotteries by way of exemption from criminal prosecution. Tex. Const. art. 3, § 47.

[5] **Constitutional Law** Intent in general
Constitutional Law Context of the times

In undertaking a task of constitutional interpretation, courts consider the intent of the people who adopted it, looking to the history of the times out of which it grew and to which it may be rationally supposed to have direct relationship, the evils intended to be remedied and the good to be accomplished.

[6] **Constitutional Law** Plain, ordinary, or common meaning

Because discerning long-ago intent of constitutional drafters is inherently difficult, courts must principally give effect to the constitution's plain language, relying heavily on its literal text.

[7] **Constitutional Law** Meaning of Language in General

Constitutional Law Plain, ordinary, or common meaning

Courts strive to give constitutional provisions the effect their makers and adopters intended, and in that process courts presume the constitution's language was carefully selected, and courts interpret words as they are generally understood.

[8] **Gaming and Lotteries** Slot and pinball machines

Gaming machines known as "eight-liners" operated by pubs were unconstitutional and illegal lottery machines, where machines awarded prizes by chance for consideration. Tex. Const. art. 3, § 47; Tex. Occ. Code Ann. § 2153.003.

[9] **Constitutional Law** Constitution as supreme, paramount, or highest law

Constitutional Law Intent in general

Courts need not exert their ingenuity to find reasons to thwart intention of people clearly expressed in Constitution, which is supreme law of land.

[10] **Statutes** Powers and duties of legislature in general

The Legislature cannot change or ignore meaning of Constitution's text.

[11] **Gaming and Lotteries** Gambling devices

City ordinances regulating amusement redemption machines and associated game rooms within **city** were not preempted by state statute regulating skill or pleasure coin-operated machines; statute only applied to constitutional and legal gaming machines, and ordinance regulated unconstitutional and illegal gaming machines, such as "eight-liners" operated in pubs within **city**. Tex. Occ. Code Ann. § 2153.003.

More cases on this issue

West Codenotes

Validity Called into Doubt
Tex. Penal Code Ann. § 47.01(4)(B)

***247** On Appeal from the 17th District Court, Tarrant County, Texas, Trial Court No. 017-276483-15, HON. MELODY WILKINSON, Judge

Attorneys and Law Firms

ATTORNEY FOR APPELLANTS: GERALD PRUITT, CHRISTOPHER B. MOSLEY, **CITY** OF **FORT WORTH**, **FORT WORTH**, TEXAS, DAVID E. KELTNER, DEE J. KELLY, JR., JOE GREENHILL, KELLY HART & HALLMAN LLP, **FORT WORTH**, TEXAS.

ATTORNEY FOR APPELLEES: THOMAS M. MICHEL, LAUREN LOCKETT, GRIFFITH, JAY & MICHEL, LLP, **FORT WORTH**, TEXAS.

Before Sudderth, C.J.; Kerr and Bassel, JJ.

OPINION ON REMAND

Opinion by Justice Kerr

The Texas Constitution commands that the legislature pass laws prohibiting lotteries, *see* Tex. Const. art. III, § 47(a), and the legislature has largely done so, *see, e.g.*, Tex. Penal Code Ann. §§ 47.01–.11. ***248** That command is at the heart of an issue the Texas Supreme Court has asked us to decide and that we sidestepped in this appeal's first go-round: whether the eight-liner gambling machines at issue here, which are owned and operated by the appellees (the Operators), are unconstitutional or illegal. ***City** of **Fort Worth***

v. Rylie (*Rylie II*), 602 S.W.3d 459, 460, 469 (Tex. 2020), *rev'g* (*Rylie I*), 563 S.W.3d 346 (Tex. App.—Fort Worth 2018). The eight-liners are unconstitutional if they are lotteries; they are illegal either if not within the Penal Code's so-called "fuzzy animal" exclusion from the definition of outlawed gambling devices—an exclusion on which the Operators rely—or if the exclusion is itself unconstitutional, as the appellant City of Fort Worth contends. *See* Tex. Penal Code Ann. § 47.01(4)(B).

A categorization as either unconstitutional or illegal will resolve the underlying preemption issue pitting Texas Occupations Code Chapter 2153, which regulates "skill or pleasure coin-operated machines," *see* Tex. Occ. Code Ann. § 2153.001, against City licensing and zoning ordinances regulating game rooms that contain "amusement redemption machines," a term that includes eight-liners. That is because the Occupations Code "does not authorize or permit" the keeping or operating of a machine or device that is "prohibited by the constitution of this state *or* the Penal Code." *Id.* § 2153.003 (emphasis added). If either scenario exists, Chapter 2153 of the Occupations Code has no preemptive effect because it does not apply to the Operators' machines. *Rylie II*, 602 S.W.3d at 468 (observing that "chapter 2153 does not apply to unconstitutional or illegal machines").

Because we conclude that these eight-liner video slot machines are lotteries—a term more expansive than most would assume—they are unconstitutional. As a result, the trial court erred in holding that the Occupations Code preempts certain parts of the ordinances, and we will reverse and render judgment in the City's favor on that part of the Operators' claims. We will affirm the trial court's judgment denying the rest of the Operators' Occupations Code preemption claims. Finally, Section 2153.003's disjunctive nature means that we need not reach the fuzzy-animal exclusion's applicability or constitutionality. *See* Tex. R. App. P. 47.1.

I. BACKGROUND [1]

The Operators run game rooms containing eight-liner machines. Responding to what it perceived as such establishments' deleterious effects on the community, in 2014 the Fort Worth City Council passed two ordinances designed to rein in the proliferation of game rooms. The Operators challenged the ordinances, seeking a declaration that the Alcoholic Beverage Code and the Occupations Code preempt the ordinances in certain ways. *See* Tex. Alco. Bev. Code Ann. § 1.06 ("Code Exclusively Governs"); Tex. Occ. Code Ann. §§ 2153.001–.453 ("Coin-Operated Machines"). The City counterclaimed for a declaration that the Penal Code's fuzzy-animal exclusion—under which the Operators claim they can legally possess and operate the machines—is an unconstitutional end-run around the Texas Constitution by attempting to authorize otherwise-forbidden lotteries by statute rather than by constitutional amendment. *See* Tex. Const. art. III, § 47; Tex. Penal Code Ann. § 47.01(4)(B).

***249** **[1]** The trial court partially agreed with the Operators, holding that certain of the City's ordinances were preempted, and denied relief on the City's counterclaim, concluding as a matter of law that the fuzzy-animal exclusion is constitutional. We affirmed in part and reversed in part, in the process concluding that whether the Operators' machines are constitutional or legal was irrelevant to the preemption issue. The supreme court disagreed. *Rylie II*, 602 S.W.3d at 469 ("We hold the court of appeals erred by concluding that the issue whether the Operators' machines are constitutional and legal is irrelevant to the question whether [Occupations Code] chapter 2153 preempts the City's ordinances and is therefore non-justiciable" and "remand the case to that court so that it can address and resolve that issue in the first instance."). We now do so, using the de novo standard of review that applies to both constitutional and statutory interpretation. *E.g.*, *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 87 (Tex. 2015); *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 585 (Tex. 2013).

II. APPLICABLE LAW

A. The Texas Constitution and lotteries

[2] Since 1845, the Texas Constitution has continuously prohibited lotteries. [2] As ratified in 1876 and to the present, our constitution affirmatively requires the legislature to "pass laws prohibiting" them. Tex. Const. art. III, § 47. As the supreme court noted in its opinion remanding this case to us, "[c]ontrary to the term's popular understanding," the word lottery includes a "wide array of activities that involve, at a minimum, (1) the payment of 'consideration' (2) for a 'chance' (3) to win a 'prize.' " *Rylie II*, 602 S.W.3d at 460–61 (citing *City of Wink v. Griffith Amusement Co.*, 129 Tex. 40, 100 S.W.2d 695, 698 (1936)). Texas caselaw has reflected this broad understanding as far back as 1874, shortly before Texas citizens approved the 1876 constitution. *See Randle v. State*, 42 Tex. 580, 589 (1874) (observing that the activity's name "makes not the slightest difference"; it is a lottery "when

the element of chance is connected with, or enters into the distribution of its prizes"). And as made clear in *City of Wink* some 85 years ago, "[I]t may be said that chance is the basic element of a lottery. Unless a scheme for the awarding of a prize requires that it be awarded by a chance, it is not a lottery." 100 S.W.2d at 701 (referring to the "ingredient of chance" as the "evil principle which the law denounces and will eradicate, however it may be clothed, or however it may conceal itself in a fair exterior"). [3]

***250** The tripartite view of what constitutes a lottery—chance, prize, and consideration—is ubiquitous. *See, e.g., Fed. Commc'ns Comm'n v. Am. Broad. Co.*, 347 U.S. 284, 290, 74 S. Ct. 593, 598, 98 L.Ed. 699 (1954) (laying out the "three essential elements"); *U.S. Postal Serv. v. Amada*, 200 F.3d 647, 651 (9th Cir. 2000) (noting that absent a statutory definition, "the appropriate definition to apply is the common law lottery definition consistently used by the courts and described by the Supreme Court as the 'traditional tests of chance, prize and consideration' "); *United States v. Tansley*, 986 F.2d 880, 886 (5th Cir. 1993) (same); *Roberts v. Commc'ns Inv. Club of Woonsocket*, 431 A.2d 1206, 1211 (R.I. 1981) ("It is well settled that a 'lottery' proscribed in either a state constitution or statute is defined as a scheme or plan having three essential elements: consideration, chance, and prize.... If all of the elements are present, the scheme is a lottery, regardless of the purpose of its sponsor.").

[3] **[4]** Even with the best of intentions, the legislature cannot sanction a lottery of any type; a constitutional amendment is necessary. *See Tussey v. State*, 494 S.W.2d 866, 869 (Tex. Crim. App. 1973). In *Tussey*, the court of criminal appeals analyzed a 1971 amendment to the Penal Code that excepted from prosecution churches, religious societies, veterans organizations, and other nonprofit charitable organizations that conducted lotteries for their own benefit. Holding that the legislature had exceeded its authority, the court of criminal appeals gave the backdrop of both the 1869 and 1876 constitutions and concluded that "any effort by the Legislature to authorize, license[,] or legalize lotteries is unconstitutional in light of the constitutional provision" requiring the "passage of laws against the establishment of lotteries in various forms." *Id.* at 869. "Further, the Legislature is likewise prohibited from indirectly doing so by way of exemption from criminal prosecution." *Id.* (citing *City of Wink*, 100 S.W.2d at 700–02). The *Tussey* court drove the point home: "It is clear that the Legislature was not authorized to exempt from the laws relating to lotteries the sale or drawing of a prize at a fair for the benefit of a church, religious society, veteran's organization, etc." *Id.*; *see also State v. Amvets Post No. 80*, 541 S.W.2d 481, 482–83 (Tex. App.—Dallas 1976, no writ) (entering temporary injunction against veterans-club bingo game and stating that "a lottery is no less a lottery if the proceeds are used for charitable purposes" (citing *Tussey*)).

Several years after *Tussey* and *Amvets*, the legislature proposed and voters approved a 1980 constitutional amendment to allow charitable bingo. Tex. Const. art. III, § 47(b)–(c) (added by Tex. S.J. Res. 18, 66th Leg., R.S., 1979 Tex. Gen. Laws 3221) (authorizing legislature to allow and regulate "bingo games conducted by a church, synagogue, religious society, volunteer fire department, nonprofit veterans organization, fraternal organization, or nonprofit organization supporting medical research or treatment programs"). A later amendment permitted "charitable raffles" to be held by the same types of organizations. Tex. Const. art. III, § 47(d) (added by Tex. H.J. Res. 32, 71st Leg., R.S., 1989 Tex. Gen. Laws 6427). Most recently, in 1991, Texans authorized a state lottery. Tex. Const. art. III, § 47(e) (added by Tex. H.J. Res. 8, 72d Leg., 1st C.S., 1991 Tex. Gen. ***251** Laws 1113). As it stands, these are the only types of lotteries that the Texas Constitution allows.

B. Lotteries and slot machines (video or otherwise)

Given the expansive common-law definition—chance, prize, and consideration—it's hard to imagine any circumstance under which a slot machine is not a lottery. And indeed, Texas authorities have unanimously so concluded: "A slot machine is a lottery." [4] *Queen v. State*, 93 Tex.Crim. 173, 246 S.W. 384, 386 (1922) (citing *Prendergast v. State*, 41 Tex.Crim. 358, 57 S.W. 850, 851 (1899)); *see also* Tex. Att'y Gen. Op. No. DM-302, at *4 (1994) ("If ... the slot machine pay out is based entirely on chance rather than skill, we can say that the operation of that device constitutes a 'lottery' as a matter of law.") (citing *State v. Fry*, 867 S.W.2d 398 (Tex. App.—Houston [14th Dist.] 1993, no writ); *State v. Mendel*, 871 S.W.2d 906 (Tex. App.—Houston [14th Dist.] 1994, no writ)). [5]

"Eight-liners generally operate like a video slot machine," with "nine electronic symbols arranged in three columns and three rows." *Rylie II*, 602 S.W.3d at 462; *see also In re Gambling Devices & Proceeds*, 496 S.W.3d 159, 161 (Tex. App.—San Antonio 2016, pet. denied) (involving "electronic slot machines commonly known as 'eight liners' "); *Mendel*, 871 S.W.2d at 907 (describing devices as "Lucky 8 Liner

video slot machines"); Jason Johns, Comment, *Win, Lose, or Draw: The Rise of Eight-Liner Video Devices in Texas*, 34 Tex. Tech. L. Rev. 263, 290 (2003) ("Even if some electronic gambling machines [such as draw poker and pinball] present elements of skill, eight-liners do not appear to fall within this category. Their operation is very similar to a slot machine['s] with the only difference being the game is played on a video screen rather than mechanical columns and reels."). [6]

C. The Penal Code and the fuzzy-animal exclusion

In obeying the constitution's lottery-denouncing mandate, the legislature enacted what became Penal Code Chapter 47, titled "Gambling." [7] ***252** Tex. Penal Code Ann. § 47.01–.11. Among other things, this chapter makes it a criminal offense to "own, manufacture, transfer, or possess a 'gambling device.' " ***Rylie*** *II*, 602 S.W.3d at 461.

> The term "gambling device" includes "any electronic, electromechanical, or mechanical contrivance ... that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance." [Tex. Penal Code Ann.] § 47.01(4). This includes, as examples, electronic or mechanical versions of "bingo, keno, blackjack, lottery, roulette, [and] video poker." *Id.* § 47.01(4)(A).

Id. (second alteration in original).

By the early 1990s, the rise of amusement centers such as Chuck E. Cheese, Dave & Busters, and Main Event, with their "electronic and mechanical games that at least arguably constitute lotteries or gambling devices," *id.*, posed a potential problem. Were tiny birthday-party-goers complicit in lawbreaking? Was this merry mouse a mobster in the making?

TM

Although the **City** notes that the games at "carnival-like operations (e.g., Chuck E. Cheese and Dave & Buster's)" require skill, not chance, to win—meaning that most family-fun-center games probably wouldn't be lotteries or gambling devices in the first place—the legislature approached the issue proactively and enacted the 1995 [8] fuzzy-animal exclusion by adding Section 47.01(4)(B) to the Penal Code. *See* Tex. Penal Code Ann. § 47.01(4)(B); H. Rsch. Org., Bill Analysis, Tex. S.B. 522, 73d Leg., R.S. (1993) ("SB 522 would clear up a gray area in the law by exempting bona fide amusement games such as the kind that allow persons to use skill to win fuzzy animals ...."). Under this definitional exclusion, the term "gambling device"

> does not include any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, ***253** toys, or novelties, or a representation of value redeemable for those items, that have a wholesale value available from a single play of the game or device of not more than 10 times the amount charged to play the game or device once or $5, whichever is less.

Tex. Penal Code Ann. § 47.01(4)(B).

Eight-liner owners began to rely on the fuzzy-animal exclusion in arguing that their machines are not illegal

gambling devices. ***Rylie*** *II*, 602 S.W.3d at 462. Depending on how eight-liners awarded prizes of particular types, that argument succeeded or failed in varying measures. *See State v. $1,760.00 in U.S. Currency*, 406 S.W.3d 177, 181 (Tex. 2013) (holding that eight-liners in question did "not fall within the exclusion in section 47.01(4)(B) because the distributed tickets were not redeemable *exclusively* for noncash merchandise prizes, toys, or novelties"); *Hardy*, 102 S.W.3d at 132 (affirming forfeiture of eight-liners that, because they awarded gift certificates as prizes, "[did] not meet the section 47.01(4)(B) exclusion and were [thus] subject to forfeiture or destruction as gambling devices"); *see also State v. One Super Cherry Master Video 8-Liner Mach.*, 102 S.W.3d 132, 133 (Tex. 2003) (referring to *Hardy*'s same-day holding and reciting that person in possession of alleged gambling device has "the burden to prove, by a preponderance of the evidence, at a show cause hearing either that the machine is not a gambling device or that the exclusion in Penal Code section 47.01(4)(B) applies"). [9]

III. DISCUSSION

Precedent stretching back more than a century and roughly contemporaneous with the 1876 constitution's ratification—and, indeed, reinforced in the supreme court's opinion in the very case at hand—leaves us with no doubt that the Operators' eight-liners are lotteries and that without an amendment to the Texas Constitution, they are forbidden. [10] *See* Tex. Const. art. III, § 47; ***Rylie*** *II*, 602 S.W.3d at 460–61; *Hardy*, 102 S.W.3d at 130 ("Our current constitution requires that the Legislature prohibit all lotteries or gift enterprises other than those the constitution expressly authorizes."); ***City*** *of Wink*, 100 S.W.2d at 698; *Randle*, 42 Tex. at 589; *cf. Tussey*, 494 S.W.2d at 869 (holding that legislature cannot indirectly authorize lotteries by way of exemption from criminal prosecution).

Although the Operators gamely put forth what the **City** has categorized as three arguments for their eight-liners' constitutionality, we are unpersuaded. [11]

A. The legislature can't define around the constitution. Citing *Willis v. State*, 790 S.W.2d 307, 314 (Tex. Crim. App. 1990), the Operators assert that because the Texas Constitution does not define "lottery," the legislature is ***254** free to decide—within reason—what the word means, as it can also establish and define criminal offenses and applicable defenses. Thus, they say, the fuzzy-animal exclusion represents nothing more than a proper exercise of the legislature's power to establish the definitional contours of lotteries. [12] But that approach does not comport with how we are to construe the constitution.

[5] **[6]** **[7]** In undertaking such a task, we consider "the intent of the people who adopted it," looking to "the history of the times out of which it grew and to which it may be rationally supposed to have direct relationship, the evils intended to be remedied and the good to be accomplished." *Edgewood ISD v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989) (cleaned up). But because discerning long-ago intent is inherently difficult, we must principally give effect to the constitution's plain language, "rely[ing] heavily on its literal text." *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 89 (Tex. 1997). We "strive to give constitutional provisions the effect their makers and adopters intended," and in that process "[w]e presume the constitution's language was carefully selected, and we interpret words as they are generally understood." *Garofolo v. Ocwen Loan Servicing, L.L.C.*, 497 S.W.3d 474, 477 (Tex. 2016); *see also Armbrister v. Morales*, 943 S.W.2d 202, 205 (Tex. App.—Austin 1997) ("In interpreting the constitution, we give words their natural, obvious, and ordinary meanings as they are understood by the citizens who adopted them."); *Mumme v. Marrs*, 120 Tex. 383, 40 S.W.2d 31, 35 (1931) ("Constitutional provisions, like statutes, are properly to be interpreted in the light of conditions existing at the time of their adoption ...."); *Mellinger v.* ***City*** *of Houston*, 68 Tex. 37, 3 S.W. 249, 252 (1887) ("In the construction of a constitution, it is to be presumed that the language in which ***255** it is written was carefully selected, and made to express the will of the people, and that in adopting it they intended to give effect to every one of its provisions.").

Certainly by 1876, a lottery was understood to involve the elements of chance, consideration, and prize. [13] Indeed, the Texas Supreme Court's *Randle* decision of 1874, addressing as it did those commonly recognized elements, reinforces that courts and voters all knew what they had in mind when condemning lotteries in 1876. *Randle*, 42 Tex. at 589 (holding that scheme for distributing prizes by chance was a "lottery within the very letter and spirit of the law"); *see* Tex. Const. art. III, § 47.

[8] **[9]** Because the Operators stipulated that their eight-liners award prizes by chance and for consideration, the machines are lotteries, and the legislature cannot define around that fact. *See* ***Rylie*** *II*, 602 S.W.3d at 468 (observing

that the legislature "cannot change or ignore the meaning of the constitution's text"); *cf. Panas v. Tex. Breeders & Racing Ass'n*, 80 S.W.2d 1020, 1023–24 (Tex. App.—Galveston 1935, writ dism'd) (determining that legislature could allow pari-mutuel betting on horse races because that system is not a lottery); Tex. Att'y Gen. Op. DM-302, at *4–5, *5 n.6 (discussing *Panas* and noting that "pari-mutuel betting on horse or dog races is not entirely a game of chance. The legislature is not empowered to remove from the definition of 'lottery' a game which inarguably conforms to the constitutional meaning of 'lottery' "). [14] "Courts need not exert their ingenuity to find reasons to thwart the intention of the people clearly expressed in the Constitution, which is the supreme law of the land." *Carpenter v. Sheppard*, 135 Tex. 413, 145 S.W.2d 562, 567 (1940).

Another case on which the Operators rely deferred to the legislature—wrongly, in our view—to define what "lottery" means. *Owens v. State*, 19 S.W.3d 480 (Tex. App.—Amarillo 2000, no pet.). Owens had an establishment in Lubbock with over sixty "video poker or video lottery machines, commonly known as eight-liners," and was charged with promoting gambling and with possessing gambling machines. *Id.* at 481; *see* Tex. Penal Code Ann. §§ 47.03, .06. When she tried to raise a Section 47.01(4)(B) defense, the State convinced the trial court that the fuzzy-animal exclusion was unconstitutional based on a then-recent AG opinion to that effect. *Owens*, 19 S.W.3d at 482 (discussing Tex. Att'y Gen. Op. No. DM-466 (1998)). After entering a plea deal, Owens argued on permissive appeal [15] that the trial court had erred in declaring the exclusion—her only defense—unconstitutional.

***256** Agreeing with the defendant, our sister court included its view that the presumptive validity of the legislature's definition of "gambling device" in Section 47.01(4)(A) and (B) meant that the trial court had erred in holding the fuzzy-animal exclusion to be unconstitutional. *Id.* at 484. Among the court's reasons was that because Article III, Section 47 is not self-executing, the legislature is to "implement public policy," "may define terms [such as *lottery*] which are not defined in the Constitution itself," and "possesses the power to create and define offenses within its sound discretion." *Id.*

[10] We see this analysis as flawed, principally because by deferring to the legislature, the *Owens* court bypassed its threshold duty to construe the constitution's meaning with reference to 1876 common understanding. *See, e.g., Armbrister*, 943 S.W.2d at 205 ("In interpreting the constitution, we give words their natural, obvious, and ordinary meanings as they are understood by the citizens who adopted them."). As we have already discussed, by the late 19th century everyone understood that lotteries comprise chance, prize, and consideration. The legislature simply can't "change or ignore the meaning of the constitution's text." ***Rylie*** *II*, 602 S.W.3d at 468; *see also* Tex. Att'y Gen. Op. DM-302, at *5 n.6 ("The legislature is not empowered to statutorily remove from the definition of 'lottery' a game which inarguably conforms to the constitutional meaning of 'lottery.' "). Although the *Owens* court acknowledged that legislature-supplied definitions must "constitute reasonable interpretations of the constitutional language" and "not do violence to the plain meaning and intent of the constitutional framers," it did not engage in such interpretation and construction. *Owens*, 19 S.W.3d at 483–84. We thus find *Owens* unhelpful.

B. That not all forms of gambling are lotteries is irrelevant.

The Operators also contend, rightly, that "while all lotteries are a form of gambling, not all forms of gambling are lotteries." Indeed, they quote from a 1938 opinion that explains the distinction—and explains also why lotteries are the worst form:

> It is doubtless true that lotteries occupy a unique place in the history of legislation against gambling in Texas. Every constitution of our State from 1845 down, has contained provisions against lotteries similar to those in our present constitution. And it is true that no other form of gambling has been thus singled out, and expressly denounced.... [O]ne of the chief characteristics of lotteries is that they infest the whole community, reach every class, prey upon the hard-earned savings of the poor, and plunder the ignorant and simple, whereas, in comparison, other forms of gambling affect only a few individuals.

State v. Robb & Rowley United, Inc., 118 S.W.2d 917, 921 (Tex. App.—Galveston 1938, no writ) (op. on reh'g). And because the "prohibition against lotteries was placed in the

constitution," the legislature "could not, if it wished, legalize any gambling device that would in effect amount to a lottery, while it has inherent power either to prohibit or regulate any other form of gambling." [16] *Id.*

The Operators point to a case in which—"most significantly," in their view—a marble machine was not found to be a lottery. *Stanley v. State*, 142 Tex.Crim. 495, 154 S.W.2d 856 (1941). From that case, the Operators deduce that "the question of what is, and what is not, a lottery does not ***257** distil to a handy three-part test." [17] Yet *Stanley* was so light on facts as to be useless in drawing any conclusions about the machine at issue there and how the three-part test did or didn't fit. Stanley was convicted of keeping a marble machine (a "gaming device") for the purpose of gambling. *Id.* at 857. For reasons not explained, on rehearing he urged that the court "erred in not holding that the marble machine ... was a slot machine and came within the category of a lottery." *Id.* at 859 (op. on reh'g). The court's only response was, "We are not favorably impressed with the appellant's contention that the marble machine here involved fell within the category of a lottery. Hence we overrule that contention." *Id.* The machine was never described, the tripartite test never mentioned. *See id.*

In any event, the Operators have not explained what elements beyond chance, consideration, and prize are arguably pertinent when it comes to whether their eight-liners are unconstitutional lotteries. We conclude that, in fact, "what is, and what is not, a lottery" *does* "distil to a handy three-part test." *See* ***Rylie*** *II*, 602 S.W.3d at 461 (describing a lottery as involving the three elements "at a minimum"); ***City*** *of Wink*, 100 S.W.2d at 698. That additional features might be present in a given lottery does not mean that a scheme or machine consisting merely of the three—as the Operators have stipulated to here—is somehow not a lottery.

C. The 1980 constitutional amendment didn't change the fact that eight-liners are lotteries.

Before 1980, Article III, Section 47 read, "The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, *as well as* the sale of tickets in lotteries, gift enterprises or *other evasions involving the lottery principle*, established or existing in other States." Tex. Const. art. III, § 47 (emphases added). After voters approved charitable bingo in 1980, and charitable raffles and the state lottery later, the section now reads, "The Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than those authorized by Subsections (b), (d), (d-1), and (e) of this section." *Id.* § 47(a).

The Operators see legal significance in the 1980 deletion of language about lottery "evasions," and we suppose it might be significant to some hypothetical scheme in some hypothetical case. But eight-liners are not evasions involving the lottery principle; they *are* lotteries, plain and simple. Because the constitution has required the legislature to prohibit lotteries both before and after 1980, the "as well as ... evasions" deletion is beside the point here. [18]

And despite the Operators' efforts to parse it favorably, in our view ***City*** *of Wink* does not support their idea that the supreme court "did not suggest" that the three elements "are sufficient alone." The only reason the court there discussed the ***258** theater's "bank night" drawing in terms of a lottery evasion, as opposed to holding that it was an outright lottery, was that to be entered into the weekly chance drawing at the theater for a cash prize, one did not have to buy a movie ticket—that is, pay consideration. ***City*** *of Wink*, 100 S.W.2d at 697. Anyone could register at the window for free, so the scheme lacked one of the three primal lottery elements. [19] The court denounced the scheme as "obviously an evasion of the lottery laws" because it "[avoided] a direct charge for prize chances (all other elements of a lottery being present), but, nevertheless, having the object of enriching [the theater operator] by the 'chance' of gain just as much as though a direct charge had been made therefor." *Id.* at 701. So although the Operators are technically correct that ***City*** *of Wink* "holds only for the proposition that an activity lacking in one of the three elements is not a lottery" (but could be a lottery evasion), in the case before us—because of the parties' stipulations—that holding is irrelevant. We thus see nothing about the 1980 constitution's dropping the "evasions" clause that is outcome-determinative or legally significant.

[11] In sum, the Operators' eight-liners are lotteries, and they are unconstitutional. Accordingly, because Occupations Code Section 2153.003 provides that Chapter 2153 does not "authorize" or "permit" unconstitutional machines, the Code's preemptive effect—argued by the Operators as a way to avoid the **City's** ordinances—falls by the wayside. And the further disjunctive in Section 2153.003, referring to machines "prohibited by the constitution of this state or the Penal Code," underpins our assigned task to decide "whether the Operators' machines are unconstitutional *or* illegal." ***Rylie*** *II*, 602 S.W.3d at 466–67, 469 (emphasis added). On these facts and in this procedural posture, answering one of those

questions is enough; any thoughts we might offer on the machines' possible illegality and the fuzzy-animal exclusion's constitutionality would be dicta.

IV. CONCLUSION

Because the Operators' eight-liner machines are lotteries and thus are unconstitutional machines, Chapter 2153 of the Occupations Code does not preempt the **City's** ordinances regulating game rooms and eight-liners. We thus reverse the trial court's judgment holding that the Occupations Code preempts certain parts of the **City's** ordinances and render judgment for the **City** on that part of the Operators' claims. [20] We affirm the trial court's judgment ***259** denying the rest of the Operators' Occupations Code preemption claims. In all other respects, our original disposition remains the same.

All Citations

649 S.W.3d 246

Footnotes

1 Both the supreme court's opinion, ***Rylie*** *II*, 602 S.W.3d at 464–66, and our earlier opinion, ***Rylie*** *I*, 563 S.W.3d at 351–55, contain more detailed factual and procedural backgrounds, which we do not repeat here.

2 *See* Tex. Const. art. III, § 47 (amended 2021) ("The Legislature shall pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle, established or existing in other States."); Tex. Const. of 1869, art. III, § XXVII ("The Legislature shall not authorize any lottery, and shall prohibit the sale of lottery tickets."), art. XII, § XXXVI ("No lottery shall be authorized by this State; and the buying and selling of lottery tickets within this State is prohibited."); Tex. Const. of 1866, art. VII, § 17 ("No lottery shall be authorized by this State; and the buying or selling of lottery tickets within this State is prohibited."); Tex. Const. of 1861, art. VII, § 17 ("No lottery shall be authorized by this State; and the buying or selling of lottery tickets within this State is prohibited."); Tex. Const. of 1845, art. VII, § 17 ("No lottery shall be authorized by this State; and the buying or selling of lottery tickets within this State, is prohibited."). We address 20th-century amendments authorizing charitable bingo, charitable raffles, and the state lottery later in this opinion.

3 The 1800s had witnessed a sea-change in public attitudes toward lotteries. Though widely used in America's early days as revenue-raising devices to compensate for the lack of a strong central government and a weak tax base, as more mature forms of taxation increased—alongside lottery fraud and the social miseries accompanying gambling addictions—lotteries became almost universally prohibited in state constitutions by the end of the 19th century. Ronald J. Rychlack, *Lotteries, Revenue and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. Rev. 11, 12, 37–38 (1992).

4 The supreme court here seems almost to have buried the lede by (approvingly) quoting that sentence in a footnote. ***Rylie*** *II*, 602 S.W.3d at 461 n.2.

5 The Operators stipulated that their eight-liners are all "played solely or predominantly by chance, involving little or no skill on the part of the player" and that "[t]he player has no control over the odds of winning." This stipulation means that we need not ponder such metaphysical questions as whether a device that a player has a mere 1% chance of losing to would be a prohibited lottery. We do note that a sister court has considered (and rejected) a sliding-scale-type argument advanced in connection with a void-for-vagueness challenge, holding that something is indeed a "gambling device" if it incorporates "*any* element of chance, even if the exercise of skill also influences the outcome." *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (emphasis added).

6 The Comment author also opines that "eight-liner machines, even if used within the bounds of the [fuzzy-animal] exception, have all the elements of a lottery, and are thus only allowable if the Texas Legislature amends the constitution to provide for their use." Johns, *supra*, at 209; *see also* Tex. Att'y Gen. Op. No. DM-302, at *3 ("It is clear that the term 'lottery' will be broadly construed by the courts, and that any game newly sanctioned by the legislature must be carefully scrutinized to determine whether it is a 'lottery.' If it is, it cannot be lawfully operated without a constitutional amendment.").

7 The Penal Code as enacted in its modern form in 1973 resulted from the "substantial revision process conducted by the Texas Penal Code Revision Project, a collaborative effort of the Texas Bar Association and the Texas Legislative Council, from 1965 to 1973. This was the first full recodification since the Code's previous enactment in 1856." *Texas Penal Code Revision Research Guide*, Legislative Reference Library of Texas, https://lrl.texas.gov/collections/PenalCodeIntro.cfm (last visited Mar. 14, 2022).

8 As the supreme court has explained,

> Paragraph (B) was introduced in Senate Bill 522, which amended section 47.01(4) and became effective August 30, 1993. Act of May 31, 1993, 73rd Leg., R.S., ch. 774, § 1, 1993 Tex. Gen. Laws 3027, 3027–28. Yet when the new Penal Code became effective on September 1, 1994, it did not contain paragraph (B). Tex. Penal Code § 47.01(4) (1994). Consequently, the Legislature re-enacted the amendment in 1995. Act of May 27, 1995, 74th Leg., R.S., ch. 318, § 19, 1995 Tex. Gen. Laws 2734, 2742.

Hardy v. State, 102 S.W.3d 123, 131 n.5 (Tex. 2003).

9 None of these supreme-court cases involved an express challenge to the fuzzy-animal exclusion's constitutionality, and the court has "never addressed that issue." ***Rylie*** *II*, 602 S.W.3d at 462–63.

10 The several amendments to Article III, Section 47 cannot be read as signaling voter approval of eight-liners, nor do the Operators argue that they do. *Cf.* Tex. Att'y Gen. Op. No. GA-0103, at *2–7 (2003) (explaining that in approving a state lottery as the ballot proposition phrased it, and given the popular definition of that term in 1991 when Article III, Section 47 was last amended, Texas voters did not also intend to approve state-run slot machines).

11 The bulk of the Operators' briefing on remand deals with the eight-liners' alleged legality under the fuzzy-animal exclusion rather than mounting a full-throated defense of the machines' constitutionality—that is, as "not-lotteries." Particularly in light of the Operators' stipulations, their focus isn't surprising.

12 As the Operators put it, "The Legislature gets to determine that [a] 'fuzzy animal' [game] is not a 'lottery' the Constitution meant to prohibit." If that were true, though, the legislature's earlier attempt to exclude lotteries with noble purposes—charitable bingo, for one—would surely not have been held unconstitutional. *See* *Tussey*, 494 S.W.2d at 869; *Amvets*, 541 S.W.2d at 482–83.

The history of bingo in the United States, incidentally, refutes by analogy the Operators' additional argument that the 1845 constitution could not have considered slot machines to be lotteries because slot machines weren't invented until the mid-1890s. But the same could have been argued more forcefully of bingo as a "not-lottery": bingo wasn't played in America until even later, in the 1920s, although the exact year and place at which it emerged are murky. *See, e.g.*, Mary Bellis, *Bingo: History of the Game*, ThoughtCo., https://www.thoughtco.com/history-of-bingo-4077068 (June 24, 2019) ("When the game reached North America in 1929, it became known as 'beano.' It was first played at a carnival near Atlanta, Georgia."); *Bingo (American version)*, Wikipedia, https://en.wikipedia.org/wiki/Bingo_ (American_ version) (last visited Mar. 14, 2022) ("In the early 1920s, Hugh J. Ward created and standardized the game at carnivals in and around Pittsburgh and the Western Pennsylvania area."); *The Popularity of Bingo: UK vs. USA*, The Antelope Valley Times (Jan. 28, 2021), https://theavtimes.com/2021/01/28/the-popularity-of-bingo-uk-vs-usa/ ("Originally arriving

on American shores in the 1920s, the game inspired by European lotto was first known as 'Beano.' This was down to the fact that players covered their cards of numbered squares with rows of beans."); *Where did Bingo begin? The history for one of the world's most popular pastimes*, Manchester Evening News, https://www.manchestereveningnews.co.uk/special-features/history-bingo-look-one-worlds-6618763 (Jan. 30, 2014, 12:46 PM) ("The game travelled to North America in the 1920s where its name evolved to 'Beano'—players used to shout this when they found all numbers in a row"; "by the 1940s people were playing bingo across the country"); *see also* Tex. Att'y Gen. Op. No. DM-302, at *1–4 (rejecting argument, like the Operators', that "in 1876, 'lottery' could not have been intended to proscribe slot machines since that device was not invented until 1895").

13 That understanding has not changed. *Cf.* ***Rylie*** *II*, 602 S.W.3d at 460–61, 461 n.2 (noting the three elements and that a "wide array of activities" involve them).

14 We are unpersuaded by the Operators' appeal to Mississippi authority. In the case they cite, the Mississippi Supreme Court held that bingo, which that state's legislature had exempted from statutes criminalizing lotteries and other types of gambling, was not a "lottery" under the popular understanding of the word and also because the Mississippi Constitution twice refers to lottery "tickets," something that "clearly connotes a particular kind of lottery: one with tickets." *Knight v. State ex rel. Moore*, 574 So. 2d 662, 669 (Miss. 1990) ("The provision strongly suggests a restrictive definition—that not all forms of lottery (assuming bingo is even a form) are banned (*i.e.*, only those with tickets).... Few commonly consider bingo as having tickets that are sold, and any attempt to equate a bingo card with a lottery ticket would be superficial at best and unpersuasive at worst."). The Texas Constitution is not comparable to Mississippi's in this regard.

15 *See* Tex. R. App. P. 25.2(a)(2).

16 Pari-mutuel betting, for example.

17 The Operators also claim that *Stanley* is "important" here because a marble machine was a device that the legislature had recently begun taxing as a " 'skill or pleasure coin-operated machine' under the predecessor to current Chapter 2153" of the Occupations Code. They have not cited us any authority for that statement. But more importantly, the supreme court has already told us that Chapter 2153 "does not give legal authority to unconstitutional or illegal machines." ***Rylie*** *II*, 602 S.W.3d at 467.

18 The *Owens* court concluded that the amendments essentially relaxed the conception of lotteries, writing that before the "as well as" clause was deleted, "lotteries were denounced in any form." 19 S.W.3d at 483–84. We respectfully disagree that, post-1980, the legislature was thereby free to define (or redefine) the term.

19 "True, no doubt if any one had applied for a free registration to the drawing, it would have been given, but human nature is such that the average person would seldom, if at all, suffer the natural embarrassment of asking for a free registration.... In fact, the whole plan is built up and made profitable because no normal person likes to 'bum' his neighbor for something, and by an appeal to the psychology of cupidity which makes some take a chance of making large gains by a small outlay [that is, the price of a theater ticket]. Those who invented and formulated the plan may not have been 'learned in the law,' but their knowledge of mass-psychology was not wanting." ***City*** *of Wink*, 100 S.W.2d at 697–98.

20 Left open is what happens now with those ordinances. As the supreme court noted, "Of course, a finding that the machines are unconstitutional or illegal would also lead to the question whether the **City** could license, regulate, and tax them through the **City's** ordinances. That question, however, has not been raised in this case." ***Rylie*** *II*, 602 S.W.3d at 469 n.20; *see also* ***Rylie*** *I*, 563 S.W.3d at 357 n.11 ("The **City** fails to explain how, if the State may not regulate an allegedly illegal machine, the **City** itself may nevertheless validly impose and enforce a comprehensive regulatory scheme on that same machine.").

End of Document

ORDINANCE NO. 27222-10-2024

AN ORDINANCE AMENDING CHAPTER 20, LICENSES AND MISCELLANEOUS BUSINESS REGULATIONS OF THE CODE OF THE CITY OF FORT WORTH (2015), AS AMENDED, BY REPEALING ARTICLE II, "AMUSEMENTS", DIVISION 6, "GAME ROOMS AND AMUSEMENT REDEMPTION MACHINES", AND AMENDING CHAPTER 23, "OFFENSES AND MISCELLANEOUS PROVISIONS" TO ADD A SECTION TO PROHIBIT AMUSEMENT REDEMPTION MACHINES; PROVIDING THAT THIS ORDINANCE SHALL BE CUMULATIVE; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A SAVINGS CLAUSE; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, on October 14, 2014, the City Council adopted Ordinance No. 21500-10- 2014 adopting licensing regulations for game rooms and amusement redemption machines in the City of Fort Worth; and

WHEREAS, in *City of Fort Worth v. Rylie, Court of Appeals Second Appellate District of Texas No. 02-17-00185-CV,* the Second Court of Appeals of Texas, Fort Worth, found that electronic gaming machines, the amusement redemption machines that includes games that are more commonly referred to as "eight-liners", were unconstitutional because they are illegal lotteries as they require consideration for a chance to win a prize, and that city ordinances regulating such machines were not preempted by the Texas Occupation Code; and;

WHEREAS, game rooms that operate amusement redemption machines, such as but not limited to eight liners, can have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime, such as gambling, theft, criminal trespass, criminal mischief, and burglary; and

WHEREAS, game rooms that operate amusement redemption machines have objectionable operational characteristics contributing to urban blight and downgrading the quality of life in the adjacent area; and

WHEREAS, the City Council desires to minimize and to control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect citizens from increased crime; preserve the quality of life; preserve property values and character of surrounding neighborhoods and deter the spread of urban blight; and

WHEREAS, the City Council of Fort Worth has determined that it is in the best interest of the public health, safety, and general welfare to prohibit the operation of said electronic gaming devices within the City of Fort Worth; and

WHEREAS, the City Council is repealing Division 6 of Chapter 20, Article II to remove such provision in its entirety from the City Code and amending Chapter 23 to add a section prohibiting amusement redemption machines from operating in the City.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FORT WORTH, TEXAS:

SECTION 1.

That Chapter 20, "Licenses and Miscellaneous Business Regulations," Article II, "Amusements," Division 6, "Game Rooms and Amusement Redemption Machines" of the Code of the City of Fort Worth, Texas (2015), as amended, is hereby repealed in its entirety.

SECTION 2.

That Chapter 23, "Offenses and Miscellaneous Provisions" of the Code of the City of Fort Worth, Texas (2015), as amended, is hereby amended to add section 23-22 prohibiting certain amusement redemption machines, to read as follows:

Sec. 23-22 Certain Amusement Redemption Machines Prohibited

(a) The following words, terms, and phrases when used in this section, shall have the meaning ascribed to them in this section, exception where the context clearly indicates different meaning:
Amusement Redemption Machine. Any electronic, electromechanical or mechanical contrivance, including sweepstakes machines, designed, made, and adapted solely for

bona fide amusement purposes, and that by operation of chance or a combination of skill and chance affords the user, in addition to any right of replay, an opportunity to receive exclusively non-cash merchandise prizes, toys or novelties, or a representation of a value redeemable for those items and is in compliance with Texas Penal Code section 47.01(4)(b).

Amusement Redemption Machine **does not include:**

(1) A machine that awards the user non-cash merchandise prizes, toys or novelties solely and directly from the machine, including claw, crane or other similar machines; or

(2) A machine from which the opportunity to receive non-cash merchandise prizes, toys or novelties, or a representation of value redeemable for those items, varies depending on the user's ability to throw, roll, flip, toss, hit or drop a ball or other physical objects into the machine or a part thereof, including basketball, golf, bowling or similar machines. A representation of value means cash paid under authority of sweepstakes contestants as provided by the Texas Business and Commerce Code Section 43, or a gift certificate or gift card that is presented to a merchant in exchange for merchandise.

City Official. A police officer, code enforcement officer, fire marshal or building official of the City.

Gambling device means any electronic, electromechanical, or mechanical contrivance that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance. The term includes, but is not limited to, gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or credits so awarded and the cancellation or removal of the free games or credits.

Game Room. A building, facility or other place where Amusement Redemption Machines or Gambling Devices are present.

(b) Restrictions, regulations, controls and limitations.

(1) It shall be an offense for any person, firm, or corporation to maintain, display for patronage or otherwise keep for operation by the patrons any Amusement Redemption Machine or Gambling Device.

(2) No person, firm, or corporation shall operate a Game Room within the City limits, nor shall Game Rooms be permitted in any zoning district.

(3) Nothing contained herein shall be construed or have the effect to license, permit, authorize or legalize any existing or future machine, device, table, amusement redemption machine, gambling device or gaming machine, the keeping, exhibition, operation, display or maintenance of which is illegal or in violation of any ordinance of the city, any section of the penal code of this state, or the constitution of this state.

(c) Enforcement.

(1) In addition to prohibiting certain conduct by individuals, it is the intent of this section to hold a corporation or association criminally responsible for prohibited conduct performed by an agent acting on behalf of a corporation or association and within the scope of the agent's office or employment.

(2) The City of Fort Worth Municipal Court shall have the power to issue to the City Official or their designee search warrants, or other process allowed by law, where necessary to aid in enforcing this section.

(3) A person who violates any provision of this section is guilty of a separate offense for each day or portion of a day during which the violation is continued. Each offense is punishable by a fine in accordance with applicable law.

(4) This section may be enforced by civil court action as provided by state and federal law.

(5) In addition to the criminal offenses and penalties prescribed in this section, the City may pursue other remedies such as abatement of nuisances, injunctive relief, administrative adjudication and revocation of licenses or permits. Any person found guilty of violating the provisions of this section shall become liable to the City for any expense, loss, or damage incurred by the City by reason of remediating such violation.

SECTION 3.

That this ordinance shall be cumulative of all provisions of ordinances and of the Code of the City of Fort Worth, Texas (2015), as amended, except where provisions of this ordinance are in direct conflict with the provisions of such ordinances and such Code, in which the conflicting provisions of such ordinances and such Code are hereby repealed.

SECTION 4.

It is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses and phrases of the ordinance are severable, and if any phrase, clause, sentence, paragraph or section of this ordinance shall be declared unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs and sections of this ordinance, since the same would have been enacted by the City Council without the incorporation in this ordinance of any such unconstitutional phrase, clause, sentence, paragraph or section.

SECTION 5.

All rights and remedies of the City of Fort Worth, Texas, are expressly saved as to any and all violations of the City Code, or any amendments thereto that have accrued at the time of the effective date of this ordinance; and as to such accrued violations, and all pending litigation, both civil and criminal, same shall not be affected by this ordinance but may be prosecuted until final disposition by the courts.

SECTION 6.

That any person, firm, or corporation who violates, disobeys, omits, neglects or refuses to comply with or who resists the enforcement of any of the provisions of this ordinance shall be fined not more than Five Hundred Dollars ($500.00) for each offense. Each day that a violation exists shall constitute a separate offense.

SECTION 7.

That the City Secretary of the City of Fort Worth, Texas, is hereby directed to publish this ordinance for two (2) days in the official newspaper of the City of Fort Worth, Texas, as

authorized by the Texas Local Government Code Subsection 52.013.

SECTION 8.

This ordinance shall take effect and be in full force and effect from and after its adoption, and publication as required by law.

APPROVED AS TO FORM AND LEGALITY:

Melinda Ramos

Melinda Ramos, Deputy City Attorney

ATTEST:

Jannette S. Goodall

Jannette S. Goodall, City Secretary

ADOPTED: October15, 2024

EFFECTIVE: November 1, 2024

CITY OF FORT WORTH TEXAS

ORDINANCE NO. 27381-12-2024

AN ORDINANCE AMENDING THE ZONING ORDINANCE OF THE CITY OF FORT WORTH, BEING ORDINANCE NO. 21653 AS AMENDED, CODIFIED AS APPENDIX "A" OF THE CODE OF THE CITY OF FORT WORTH, BY AMENDING CHAPTER 4 "DISTRICT REGULATIONS" TO AMEND ARTICLE 3 "PLANNED DEVELOPMENT ("PD") DISTRICT" TO REPEAL GAME ROOM DEVELOPMENT STANDARDS IN SECTION 4.305.C AND RESERVE SUBSECTION; TO AMEND SECTION 4.803 "NONRESIDENTIAL DISTRICT USE TABLE" TO AMEND GAME ROOMS TO REVISE DISTRICTS WHERE USE IS NOT PERMITTED AND REVISE REFERENCE TO SUPPLEMENTAL USE STANDARD; TO AMEND 4.1203, "FORM BASED DISTRICTS USE TABLE" TO ADD "GAME ROOM" TO THE USE TABLE, ADD WHERE USE IS NOT ALLOWED AND ADD REFERENCE TO SUPPLEMENTAL USE STANDARD; TO AMEND CHAPTER 9, "DEFINITIONS", SECTION 9.101, "DEFINED TERMS" TO REMOVE THE DEFINITIONS OF "AMUSEMENT REDEMPTION MACHINE," "GAMBLING DEVICE" AND "GAME ROOM" ; PROVIDING THAT THIS ORDINANCE SHALL BE CUMULATIVE; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A PENALTY CLAUSE; PROVIDING A SAVINGS CLAUSE; PROVIDING FOR PUBLICATION; AND PROVIDING AN EFFECTIVE DATE

WHEREAS, on October 14, 2014, the City Council adopted Ordinance No. 21499-10-2014 adopting zoning regulations for game rooms and amusement redemption machines in the City of Fort Worth; and

WHEREAS, in *City of Fort Worth v. Rylie, Court of Appeals Second Appellate District of Texas No. 02-17-00185-CV,* the Second Court of Appeals of Texas, Fort Worth, found that electronic gaming machines, the amusement redemption machines that includes games that are more commonly referred to as "eight-liners", were unconstitutional because they are illegal lotteries as they require consideration for a chance to win a prize, and that city ordinances regulating such machines were not preempted by the Texas Occupation Code; and;

WHEREAS, game rooms that operate amusement redemption machines, such as but not limited to eight liners, can have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime, such as gambling, theft, criminal trespass, criminal mischief, and burglary; and

WHEREAS, game rooms that operate amusement redemption machines have objectionable operational characteristics contributing to urban blight and downgrading the quality of life in the adjacent area; and

WHEREAS, the City Council desires to minimize and to control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect citizens from increased crime; preserve the quality of life; preserve property values and character of surrounding neighborhoods and deter the spread of urban blight; and

WHEREAS, the City Council of Fort Worth has determined that it is in the best interest of the public health, safety, and general welfare to prohibit the operation of said electronic gaming devices and game rooms and within the City of Fort Worth; and

WHEREAS, the City Council is amending the Zoning Ordinance to prohibit game rooms and amusement redemption machines from operating in the City

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF FORT WORTH, TEXAS:

SECTION 1.

Chapter 4, "District Regulations", Article 3, "Planned Development ("PD") District, Subsection 4.305.C. "Specified Commercial Uses Permitted in "PD" District only" of Ordinance No. 21653, the Zoning Ordinance of the City of Fort Worth, is hereby amended to delete item numbers 1 through 5 and delete item number 6 related to the development standard language for game rooms and reserve that subsection, to read as follows:

4.305 Uses

C. *Reserved*

~~**Specified Commercial Uses Permitted in "PD" District Only**~~

~~6. Game rooms~~

~~Game rooms shall only be considered in existing Light Industrial ("I"), Medium Industrial ("J") or Heavy Industrial ("K") districts and the use must then be approved as a Planned Development ("PD") District. A person, including the manager, operator or owner of a game room, commits an offense if he or she operates or permits the operation, or establishment of a game~~

~~room in any other zoning district. Additional development controls shall be required, as follows:~~

~~a. No game room shall be located within 1,000 feet of a residential use or residential district, church, school, or hospital. The distance shall be measured in a straight line without regard to interfering objects or structures from property line to property line or property line to district boundary, whichever is more restrictive.~~

~~b. No game room shall be located within 1,000 feet of any other game room from property line to property line.~~

~~c. Each entrance to a game room shall be marked with a sign that:~~

~~i. bears the word "GAME ROOM" in six inch or larger black block letters; and~~

~~ii. is legible from a distance of 25 feet.~~

~~d. Every game room shall provide transparent glass in at least one exterior game room window with a dimension of at least four feet in width and four feet in height and shall not cover or otherwise block or obscure the view through a game room window by the use of drawn shades, blinds, partitions, tinting or other structures or obstructions. The window shall allow a clear, unobstructed view of the manager station and all amusement redemption machines in the game room.~~

~~e. The sale, purchase, possession or consumption of any alcoholic beverages as defined by the Texas Alcoholic Beverage Code shall not be permitted unless the premises is licensed under the provisions of said code for the sale, purchase, or possession of alcoholic beverages.~~

~~f. Every game room shall be limited to a maximum of 30 amusement redemption machines.~~

~~g. Only one game room shall be allowed on any lot or in any single building, structure or tenant space in a strip center.~~

~~h. Only one game room shall be permitted on any platted lot or in any building, structure or strip center.~~

~~i. Game rooms are limited to the operation of amusement redemption machines; gambling devices shall not be allowed.~~

~~j. a site plan, landscape plan and floor plan of the game room interior shall be submitted in addition to any other plans that may be required by the city's ordinances, drawn to scale and sealed by a professional engineer or professional architect licensed by the state depicting the layout of the game room interior specifically including, but not limited to, the location of all amusement redemption machines, the manager's station(s), restroom facilities, kitchen and bar facilities, if any, and all areas to which patrons will not be permitted;~~

k. Existing game rooms shall comply with the requirements of this section within ninety (90) days of the effective date of these regulations.

l. One designated parking space shall be provided for each two amusement redemption machines within the game room, plus one additional parking space for each employee per shift.

m. The Board of Adjustment shall not grant any variances to the requirements of this section.

SECTION 2.

Chapter 9, "Definitions" of Ordinance No. 21653, the Zoning Ordinance of the City of Fort Worth, Section 9.101, "Defined Terms" is hereby amended to repeal the definitions for gambling device, game room and amusement redemption machine as follows:

9.101 Defined Terms

Gambling device means any electronic, electromechanical, or mechanical contrivance that for a consideration affords the player an opportunity to obtain anything of value, the award of which is determined solely or partially by chance, even though accompanied by some skill, whether or not the prize is automatically paid by the contrivance. The term includes, but is not limited to, gambling device versions of bingo, keno, blackjack, lottery, roulette, video poker, or similar electronic, electromechanical, or mechanical games, or facsimiles thereof, that operate by chance or partially so, that as a result of the play or operation of the game award credits or free games, and that record the number of free games or credits so awarded and the cancellation or removal of the free games or credits.

Amusement Redemption Machine means any electronic, electromechanical, or mechanical contrivance, including sweepstake machines, designed, made, and adapted solely for bona fide amusement purposes, and that by operation of chance or a combination of skill affords the user, in additional to any right of replay, an opportunity to receive exclusively non-cash merchandise prizes, toys, or novelties, or a representation of a value redeemable for those items and is in compliance with Section 47.01(4)(b) of the Texas Penal Code. Amusement Redemption Machine does not include:

1. A machine that awards the user non-cash merchandise prizes, toys, or novelties solely and directly from the machine, including claw, crane, or similar machines; nor
2. A machine from which the opportunity to receive non-cash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items, varies depending upon the user's ability to throw, roll, flip, toss, hit, or drop a ball or other physical objects into the machine or a part thereof, including basketball, golf, bowling, or similar machines. A representation of value means cash paid under authority of sweepstakes contestants as provided by the Texas Business and Commerce Code, Section 43, or a gift certificate or gift card that is presented to a merchant in exchange for merchandise.

~~*Game room* means a building, facility or other place where one or more amusement redemption machines are present.~~

SECTION 3.

Chapter 4, Article 8, of Ordinance No. 21653, the Zoning Ordinance of the City of Fort Worth, Section 4.803, "Non-Residential District Use Table" is hereby amended to revise section "Entertainment and Eating", to revise "Game rooms" to delete "PD" under the "I," "J" and "K" columns leaving the cells empty to indicate the use is not allowed and replace the reference to section 4.305.C with section 5.105 under the Supplemental Standards column.

SECTION 4.

Chapter 4, Article 12, of Ordinance No. 21653, the Zoning Ordinance of the City of Fort Worth, Section 4.1203, "Form Based Code District Use Table" is hereby amended to add "Game room" to the list of uses in the category "Entertainment and Eating" with an empty cell under all zoning districts to indicate the use is not allowed and adding a reference to section 5.105 under the Supplemental Standards column.

SECTION 5.

Chapter 5, Article 1, of Ordinance No. 21653, the Zoning Ordinance of the City of Fort Worth, is hereby amended to amend Section 5.105, "Reserved" to retitle the section to "Game room" to and to add language to add a reference to Section 23-22 of the City Code to not permit game rooms in all zoning districts and to clarify that a conditional use permit overlays shall not be granted for said use, to read as follows:

Sec. 5.105 Game room

A game room as defined in Section 23-22 of the City Code is not permitted in all zoning districts A conditional use permit overlay shall not be granted for a game room.

SECTION 6.

This ordinance shall be cumulative of all other ordinances of the Code of the City of Fort Worth, Texas (2015), as amended, affecting zoning and shall not repeal any of the provisions of such ordinances, except in those instances where provisions of such ordinance are in direct conflict with the provisions of this ordinance.

SECTION 7.

That all rights or remedies of the City of Fort Worth, Texas, are expressly saved as to any and all violations of Ordinance Nos. 3011, 13896, 21653 or any amendments thereto that have accrued at the time of the effective date of this ordinance; and as to such accrued violations, and all pending litigation, both civil or criminal, same shall not be affected by this ordinance but may be prosecuted until final disposition by the courts.

SECTION 8.

That it is hereby declared to be the intention of the City Council that the sections, paragraphs, sentences, clauses and phrases of this ordinance are severable, and if any phrase, clause, sentence, paragraph or section of this ordinance shall be declared void, ineffective or unconstitutional by the valid judgment or decree of any court of competent jurisdiction, such voidness, ineffectiveness or unconstitutionality shall not affect any of the remaining phrases, clauses, sentences, paragraphs or sections of this ordinance, since the same would have been enacted by the City Council without the incorporation herein of any such void, ineffective or unconstitutional phrase, clause, sentence, paragraph or section.

SECTION 9.

That any person, firm or corporation who violates, disobeys, omits, neglects or refuses to comply with or who resists the enforcement of any of the provisions of this ordinance shall be

fined not more than Two Thousand Dollars ($2000.00) for each offense. Each day that a violation is permitted to exist shall constitute a separate offense.

SECTION 10.

That the City Secretary of the City of Fort Worth, Texas is hereby directed to publish this ordinance for two (2) days in the official newspaper of the City of Fort Worth, Texas, as authorized by Section 52.013, Texas Local Government Code.

SECTION 11.

This ordinance shall take effect after adoption and publication as required by law.

APPROVED AS TO FORM AND LEGALITY:

By: Melinda Ramos

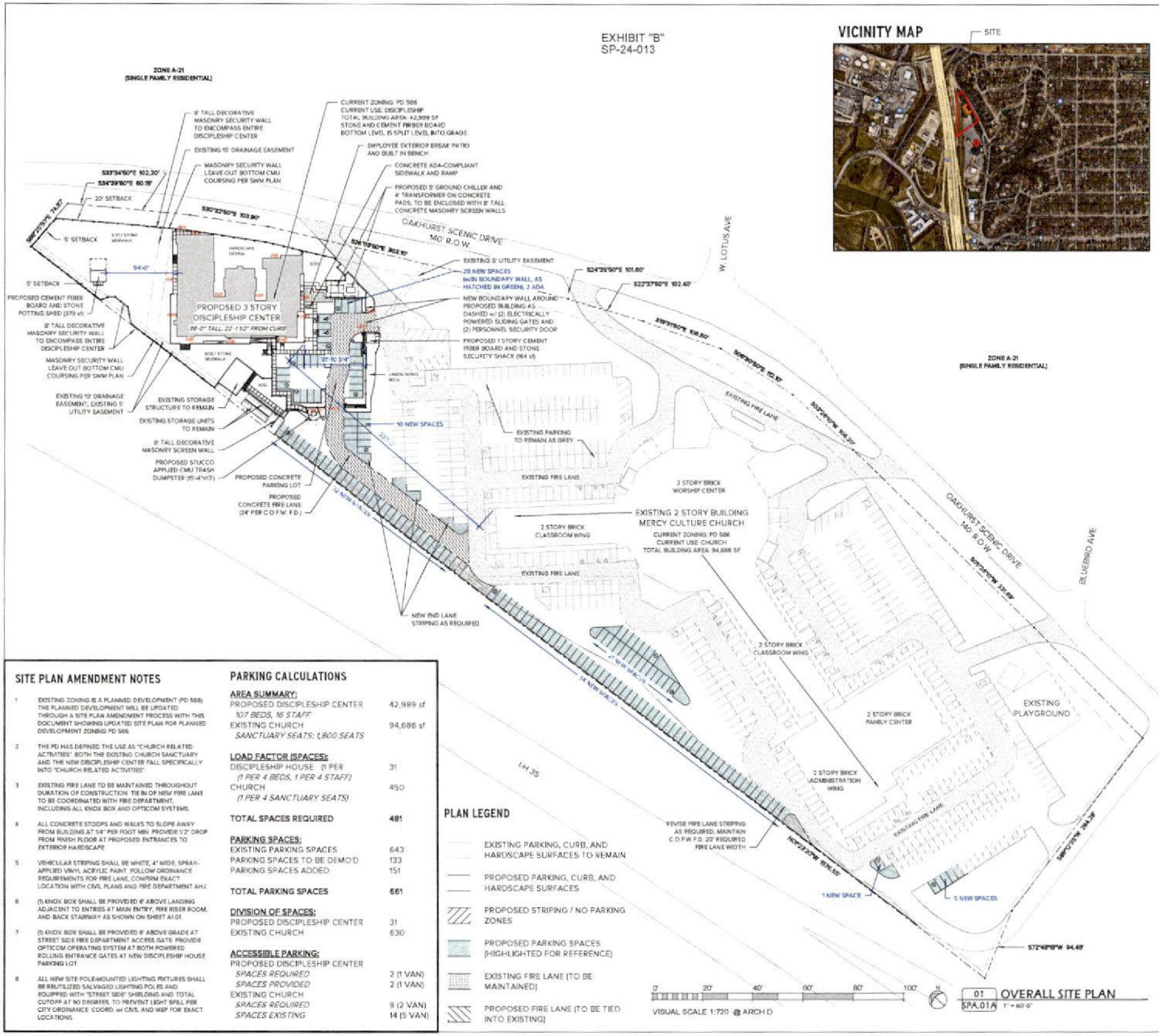
Melinda Ramos, Deputy City Attorney

Jannette S. Goodall, City Secretary

Adopted: December 10, 2024

Effective: December 20, 2024

EXHIBIT "B"
SP-24-013



VICINITY MAP

SITE PLAN AMENDMENT NOTES

1. EXISTING ZONING IS A PLANNED DEVELOPMENT (PD 586) THE PLANNED DEVELOPMENT WILL BE UPDATED THROUGH A SITE PLAN AMENDMENT PROCESS WITH THIS DOCUMENT SHOWING UPDATED SITE PLAN FOR PLANNED DEVELOPMENT ZONING PD 586
2. THE PD HAS DEFINED THE USE AS "CHURCH RELATED ACTIVITIES" BOTH THE EXISTING CHURCH SANCTUARY AND THE NEW DISCIPLESHIP CENTER FALL SPECIFICALLY INTO "CHURCH RELATED ACTIVITIES"
3. EXISTING FIRE LANE TO BE MAINTAINED THROUGHOUT DURATION OF CONSTRUCTION. TIE IN OF NEW FIRE LANE TO BE COORDINATED WITH FIRE DEPARTMENT, INCLUDING ALL KNOX BOX AND OPTICOM SYSTEMS.
4. ALL CONCRETE STOOPS AND WALKS TO SLOPE AWAY FROM BUILDING AT 1/4" PER FOOT MIN. PROVIDE 1/2" DROP FROM FINISH FLOOR AT PROPOSED ENTRANCES TO EXTERIOR HARDSCAPE
5. VEHICULAR STRIPING SHALL BE WHITE, 4" WIDE, SPRAY-APPLIED VINYL, ACRYLIC PAINT. FOLLOW ORDINANCE REQUIREMENTS FOR FIRE LANE, CONFIRM EXACT LOCATION WITH CIVIL PLANS AND FIRE DEPARTMENT AHJ
6. (1) KNOX BOX SHALL BE PROVIDED 6' ABOVE LANDING ADJACENT TO ENTRIES AT MAIN ENTRY, FIRE RISER ROOM, AND BACK STAIRWAY AS SHOWN ON SHEET A1.01.
7. (1) KNOX BOX SHALL BE PROVIDED 6' ABOVE GRADE AT STREET SIDE FIRE DEPARTMENT ACCESS GATE. PROVIDE OPTICOM OPERATING SYSTEM AT BOTH POWERED ROLLING ENTRANCE GATES AT NEW DISCIPLESHIP HOUSE PARKING LOT.
8. ALL NEW SITE POLE-MOUNTED LIGHTING FIXTURES SHALL BE REUTILIZED SALVAGED LIGHTING POLES AND EQUIPPED WITH "STREET SIDE" SHIELDING AND TOTAL CUTOFF AT 90 DEGREES, TO PREVENT LIGHT SPILL PER CITY ORDINANCE. COORD. w/ CIVIL AND MEP FOR EXACT LOCATIONS.

PARKING CALCULATIONS

AREA SUMMARY:

PROPOSED DISCIPLESHIP CENTER	42,989 sf
107 BEDS, 16 STAFF	
EXISTING CHURCH	94,686 sf
SANCTUARY SEATS: 1,800 SEATS	

LOAD FACTOR (SPACES):

DISCIPLESHIP HOUSE (1 PER *(1 PER 4 BEDS, 1 PER 4 STAFF)*	31
CHURCH *(1 PER 4 SANCTUARY SEATS)*	450
TOTAL SPACES REQUIRED	**481**

PARKING SPACES:

EXISTING PARKING SPACES	643
PARKING SPACES TO BE DEMO'D	133
PARKING SPACES ADDED	151
TOTAL PARKING SPACES	**661**

DIVISION OF SPACES:

PROPOSED DISCIPLESHIP CENTER	31
EXISTING CHURCH	630

ACCESSIBLE PARKING:

PROPOSED DISCIPLESHIP CENTER	
SPACES REQUIRED	2 (1 VAN)
SPACES PROVIDED	2 (1 VAN)
EXISTING CHURCH	
SPACES REQUIRED	9 (2 VAN)
SPACES EXISTING	14 (5 VAN)

PLAN LEGEND

- EXISTING PARKING, CURB, AND HARDSCAPE SURFACES TO REMAIN
- PROPOSED PARKING, CURB, AND HARDSCAPE SURFACES
- PROPOSED STRIPING / NO PARKING ZONES
- PROPOSED PARKING SPACES (HIGHLIGHTED FOR REFERENCE)
- EXISTING FIRE LANE (TO BE MAINTAINED)
- PROPOSED FIRE LANE (TO BE TIED INTO EXISTING)

THE JUSTICE REFORM
DISCIPLESHIP CENTER
2001 OAKHURST SCENIC DRIVE,
FORT WORTH, TEXAS 76111
LOT 1R1, BLOCK 1
MIDWOTH CHURCH OF CHIRST SITE
AN ADDITION TO THE CITY OF FORT WORTH
ZONING: PD 586R
12.46 ACRES (542,779 SF)

THIS PROJECT WILL COMPLY WITH SECTION 6.301, LANDSCAPING.
THIS PROJECT WILL COMPLY WITH SECTION 6.302, URBAN FORESTRY.
ALL SIGNAGE WILL CONFORM TO ARTICLE 4, SIGNS.
ALL PROVIDED LIGHTING WILL CONFORM TO THE LIGHTING CODE.

BUILDING HEIGHT FOR THIS STRUCTURE IS 38'-0" FROM LOWEST LEVEL SLAB, DUE TO ORDINANCE XX, HEIGHT IS MEASURED FROM TOP OF CURB (576.00) - BUILDING HEIGHT IS REVISED TO BE 22'-1 1/2".

APPROVED BY:

DIRECTOR OF PLANNING SERVICES

DATE

PROJECT:
THE JUSTICE REFORM DISCIPLESHIP CENTER

2001 OAKHURST SCENIC DRIVE,
FORT WORTH, TX 76111
LOT 1R1, BLOCK 1 | MIDTOWN CHURCH OF CHRIST SITE, AN ADDITION TO THE CITY OF FORT WORTH

DATE OF PREPARATION:
AUGUST 5TH, 2024

SP-24-013

PROJECT TEAM:
OWNER:
THE JUSTICE REFORM
1301 OAKHURST SCENIC DRIVE,
FORT WORTH, TX 76111
HEATHER@MERCYCULTURE.COM | 520.425.0296

ARCHITECT:
BRNS DESIGN
1301 SOLANA BLVD, STE 5200, WESTLAKE, TX 76262
JOSH@BRNSDESIGN.COM | 817.675.4905

CIVIL ENGINEER:
DEC DEVELOPMENT ENGINEERING CONSULTANTS
5300 TOWN & COUNTRY BLVD, STE 150,
FRISCO, TX 75034
DSTEWART@DEC-EN.COM | 469.850.0060

STRUCTURAL ENGINEER:
HUNT & JOINER, INC.
1825 MARKET BLVD., STE 620,
DALLAS, TX 75207
AMILLER@H-JINC.COM | 214.760.7000

MEP ENGINEER:
SCHMIDT & STACY CONSULTING ENGINEERS, INC.
2711 N. HASKELL AVE., STE 2900,
DALLAS, TX 75204
RDEVERO@SCHMIDT-STACY.COM | 214.874.0200

LANDSCAPE ARCHITECT:
VALLEY QUEST DESIGN
222 S ELM ST., STE 102,
DENTON, TX 76201
ANDREW@VQ-DESIGN.COM | 214.783.1715

SURVEYOR:
EAGLE SURVEYING
222 S ELM ST, STE 200, DENTON, TX 76201

BRNS
ARCHITECTURE & DESIGN
1301 SOLANA BLVD, BLDG 5, STE 5200
WESTLAKE, TX 76262
817.410.2787 | JOSH@BRNSDESIGN.COM

CLIENT

THE JUSTICE REFORM

REGISTERED ARCHITECT JOSHUA BARNES 23878 STATE OF TEXAS

11.11.2024

THE JUSTICE REFORM -
NEW CONSTRUCTION

2001 OAKHURST SCENIC DRIVE | FORT WORTH, TX 76111
LOT 1R1, BLOCK 1 | MIDTOWN CHURCH OF CHRIST SITE
AN ADDITION TO THE CITY OF FORT WORTH
CONFIDENTIAL - NOT FOR PUBLIC RELEASE

No.	Description	Date

OVERALL SITE PLAN

Project Number 23005
Date 03.05.2024

SPA.01A

AMMENDMENT A

11/1/2024 2:46:57 PM

at five times greater in canopy area than the removed specific tree canopy. The additional planting of five to one (5 to 1) will be in excess of the required tree coverage on the site and can be provided offsite when designated as part of the associated urban forest permit and entered into a conservation easement;

3. Payment into the tree fund in accordance with Section 2-322 of the City Code for the mitigation fees for the removal of significant trees.; or
4. Urban design commission approves a plan that mitigates the removal of significant or large trees.

	Southern magnolia	*Magnolia grandiflora*	Not recommended for high heat areas
	Texas red oak	*Quercus buckleyi*	
	Trident maple	*Acer buergerianum*	
*	Western soapberry	*Sapindus saponaria*	
Small Canopy Trees (less than 25 feet tall or 10 inches in diameter when mature)			
	American smoketree	*Cotinus obovatus*	
	Carolina buckhorn	*Frangula caroliniana*	Not recommended for high heat areas
	Cherry-laurel	*Prunus caroliniana*	
*	Crapemyrtle	*Lagerstroemia indica*	
*	Desert willow	*Chilopsis linearis*	
*	Eve's necklace	*Styphnolobium affine*	
	Indian cherry	*Frangula caroliniana*	
	Japanese maple	*Acer palmatum*	Not recommended for high heat areas
	Mexican buckeye	*Ungnadia speciosa*	
	Mexican plum	*Prunus mexicana*	
	Possumhaw holly	*Ilex decidua*	
	Rough -leaf dogwood	*Cornus drummondii*	Not recommended for high heat areas
	Rusty blackhaw	*Viburnum rufidulum*	
*	Texas persimmon	*Diospyros texana*	
	Texas redbud	*Cercis canadensis var. texensis*	
	Waxmyrtle	*Myrica cerifera*	
*	Yaupon holly	*Ilex vomitoria*	
* Drought tolerant species			

Preservation of significant or large trees.

a. Significant trees 24 inches in diameter (75.36 inches in circumference) for protected species and 18 inches in diameter (56.55 inches in circumference) for Post Oaks and Blackjack Oaks can only be removed by permit of the city forester. The reduced diameter for Post Oaks and Blackjack Oaks is in recognition of the naturally occurring Post Oak Savannahs within the Cross Timbers Zone. Preservation of a significant tree will be credited to the required canopy cover one and one-half times the actual canopy size.

b. Significant trees may be removed if one of the following conditions is met:

   1. An area one and one-half times the area of the canopy of the tree identified for removal is retained on the same site or offsite when designated as part of the associated urban forest permit and entered into a conservation easement. The one and one-half retention of existing trees shall be of the same species as the tree being removed if Post Oak or Blackjack Oak and be in excess of the required tree coverage on the site/tract;

   2. Planting of new trees from the preferred list (see Table B of subsection (l) below)

Attachment A - Tree Standards

Preservation of existing canopy coverage using protected trees only. See Table A below for a list of protected and preferred trees.

I. At least 25% of the protected trees must be retained, 50% of the post oaks and blackjack oaks must be preserved onsite or offsite when designated as part of the associated urban forest permit, provided however, significant or large trees must be preserved as outlined in subsection below.

II. An onsite tree survey noting the location, size and species (diameter of trees six inches or greater) and canopy coverage of each protected tree with a diameter of six inches or greater will be required. This survey shall be completed and signed/sealed by one of the following: Texas licensed landscape architect, certified arborist, Texas licensed landscape contractor or Texas certified nurseryman.

Table A. Protected Species and Preferred Planting Trees			
Large Canopy Trees (over 40 feet tall and 20 inches or more in diameter when mature)			
	Baldcypress	*Taxodium distichum*	
	Black walnut	*Juglans nigra*	
*	Bur oak	*Quercus macrocarpa*	
*	Cedar elm	*Ulmus crassifolia*	
*	Chinquapin oak	*Quercus muhlenbergii*	
	Lacebark elm	*Ulmus parvifolia*	
*	Live oak	*Quercus virginiana*	
	Pecan	*Carya illinoinensis*	Not recommended for high heat areas
	Pond cypress	*Taxodium ascendens*	
	Post oak	*Quercus stellate*	Must preserve 50% if on site
	Red oak	*Quercus shumardii*	Not recommended for high heat areas
Medium Canopy Trees (25 to 50 feet tall, 10 to 20 inches in diameter when mature)			
*	Afghan pine	*Pinus elderica*	
*	Arizona cypress	*Hesperocyparis arizonica*	
	Blackjack oak	*Quercus marilandica*	Must preserve 50% if on site
*	Bigtooth maple	*Acer grandidentatum*	
*	'Caddo' maple	*Acer saccharum 'Caddo'*	
*	Chinese pistache	*Pistache chinensis*	
*	Eastern redcedar	*Juniperus virginiana*	
	Ginkgo	*Ginkgo biloba*	
	Japanese Black Pine	*Pinus thunbergiana*	
	Lacey oak	*Quercus laceyi*	
*	Monterrey oak	*Quercus polymorpha*	
	Shantung maple	*Acer truncatum*	
	Shin oak (Bigelow)	*Quercus sinuata var. breviloba*	

to a publicly accessible street or open space shall include at least two variations in wall plane per 100 linear feet. Variations shall be not less than three feet in depth or projection.

j. Fenestration
   i. Architectural walls, fences, non-conditioned architectural elements or buildings, Religious Structures, Monuments, Stupas, Prangs (brick towers), or other non-commercial building facades are not required to conform with Fenestration Requirements.

l Building Materials
   i. Not less than 50 percent (50%) of all new building facades (not including door and window areas) shall be constructed of the following materials: stone, brick, terra cotta, patterned pre-cast concrete, cement board siding, cast stone or prefabricated brick panels, tile, metal, wood, or stucco.

M. Building Entries
   i. Building entrances shall incorporate arcades, roofs, porches, alcoves or awnings that protect pedestrians from the sun and rain.
   ii. Each use with exterior, street-oriented exposure shall have an individual public entry from the street or from a publicly accessed courtyard.
   iii. Primary entrances shall be provided at intervals not to exceed 125 linear feet of street-oriented residential building frontage.

ii. Gates will be constructed per the PD site plan and supporting plans.

h. Facade design standards for new construction
   i. Statement of Intent - The following design standards are intended to encourage new buildings that complement neighborhood character, add visual interest, and support a pedestrian-oriented environment. The standards are not intended to encourage architectural uniformity or the imitation of older buildings.
   ii. Required Drawings - To illustrate compliance with the following standards, developers shall submit with the site plan, elevation drawings for those building facades that are oriented to:
      - Public streets;
      - Private streets and walkways that are publicly accessible through a public access easement; or
      - Publicly accessible open space.

i. Facade Variation
   i. Applicable to Tract 3 only. Tract 4 shall not be restricted to the following requirements.
   ii. Each new building façade or architectural site wall oriented to a publicly accessible street or open space shall at a minimum incorporate three or more of the following four scaling elements for building facades greater than 50 feet in width, and at least two of the following elements for building facades less than 50 feet in width:
      - Expression of building structural elements such as:
         - Floors (banding, belt courses, etc. not less than one inch deep and four inches wide),
         - Columns (pilasters, piers, quoins ,lintels, chofa (rooftop ornamentation), decorative articulation, brackets, awnings, etc. not less than four inches deep and six inches wide), or
         - Foundation (water tables, rustication);
      - Variation in wall plane (not less than 18"-24" inches) through the use of projecting and recessed elements. Such elements could include patterns of door and window openings (and the use of sills, mullions, and other scale providing window elements), and/or more pronounced architectural features, such as porches, alcoves, and roof dormers; lintels, colonnades, porticos, overhangs, etc.
      - Changes in material or material pattern. Each change of material shall involve a minimum 6" variation in wall plane; and
      - Changes in color.
      - Use of decorative elements

   iii. Each sequential block of new construction shall contain a unique building facade so as to encourage architectural variety within large projects, using the required architectural elements listed in Section a.ii. above and/or other architectural features. Facades associated with the stupa and other religious worship facilities shall not be limited to this requirement.

   iv. New Community/Religious Dormitory residential building facades oriented

Rosedale Street

3. Signage area not to exceed 140sf

ii. Primary Ceremonial Entry Gate
   1. Functions as a primary entrance into the campus facing Rosedale Street.
   2. The area of lettering is limited to 120 square feet.

iii. Secondary Ceremonial Entry Gate
   1. Functions as a secondary entrance into the campus facing South Edgewood Terrance.
   2. The area of lettering is limited to 120 square feet.

iv. Medium Stupas
   1. Medium stupas (as shown in the plans) are memorial items on the site to honor certain patrons or donors. These are excluded from the signage ordinance.
   2. Not visible from Rosedale Street.

v. Small Stupas
   1. Small stupas (as shown in the plans) are memorial items on the site to honor certain patrons or donors. These are excluded from the signage ordinance.
   2. Not visible from Rosedale Street.

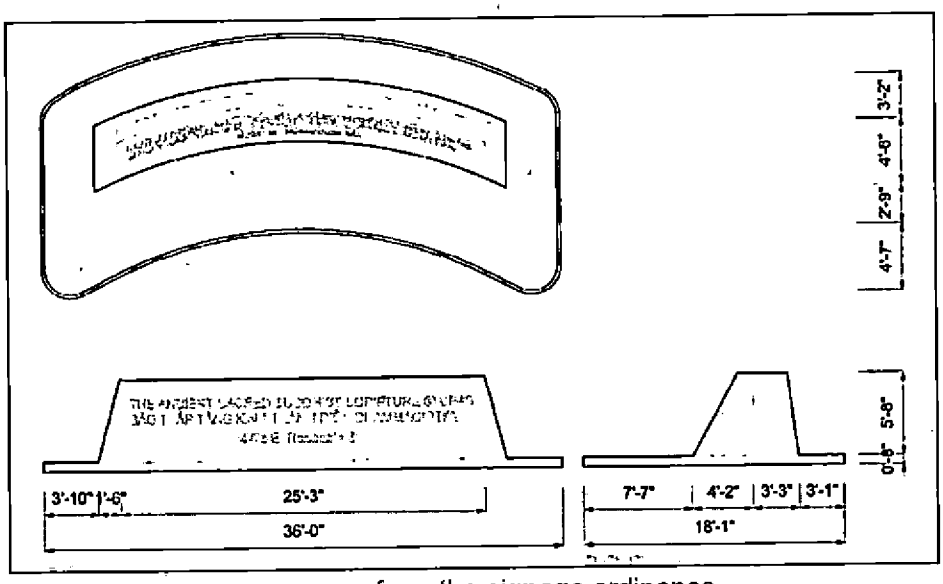


Figure 1.

f. Entrances
   i. In order to create a pedestrian-oriented environment in which the main stupa is oriented toward publicly accessible streets and sidewalks, it must have its main entrance from a private sidewalk or plaza that is connected to public accessible sidewalks or plazas.. Non main stupa entrances from parking lots are permitted. Interior buildings constructed as part of a campus development are exempt from these requirements.

g. Fences and gates
   i. Fences and site enclosing walls up to 10 feet high shall be allowed within the side and rear setbacks of Tracts 3 and 4.

b. Off-Street Parking and Loading
    i. Parking for all tracts will be provided on Tracts 1, 2 and 3.
    ii. Tracts 1, 2 and 3 are required to have a combined minimum of 120 spaces
    iii. No maximum number of parking spaces
    iv. Surface parking shall be permitted between a building front and the street but is limited to a single drive aisle with double loaded spaces

c. Landscaping and Buffers
    i. Tracts 1, 2, 3 and 4 will be considered a non-residential district.
    ii. Submittal of Landscape Plan is required. The location and description of decorative paving, sidewalk, furniture or other decorative elements (including religious iconography, statuary, ornamentation, plant materials, etc) shall be indicated on the landscape plan when presented during the Site Plan submission stage.
    iii. Landscape Area Required. When there is a front yard setback of at least five feet, front yard landscaping is required. This front yard landscaping must adhere to the tree and shrub planting requirements of Section 6.301.H. as well as other applicable landscaping requirements described or referenced within the CF regulations. Street trees planted in the parkway abutting the property may be credited towards the tree planting requirement described in Section 6.301.H. if the property owner assumes responsibility for their maintenance through formal agreement with the Parks and Recreation Department. This credit is applicable to properties with or without required front yard landscaping. Campus living shall conform to the requirements of institutional uses in Section 6.301.H.
        1. Edgewood Terrance is considered the "front" yard.
        2. East Rosedale is considered a "side" yard.
    iv. Irrigation: An irrigation system shall not be required if the landscape plan demonstrates that use of drought resistant plants do not require irrigation. Trees shall require an irrigation system, regardless of species, and the irrigation system may be provided entirely within the property boundary.
    v. Miscellaneous Requirements: Sections 6.301.J shall not apply. In addition to required trees and shrubs, all of the required landscape area must be covered with grass, organic mulch, live groundcover, decorative paving, sidewalk furniture or other decorative elements.

d. Landscaping in Parking and Driveway Areas
    i. Landscape islands shall be required in parking lots with 12 or more parking spaces. The total area of each landscape island shall be a minimum of 162 square feet.

e. Signs
Sign requirements included in chapter 6.408 and 6.409, shall apply to the district, with the following exception(s):
    i. Main Entry Sign
        1. Per the spec included, Figure 1
        2. Allowed within the building setback of Tract 4 oriented along

ii. Rear Yard: 5' minimum, unless adjacent to an alley, then 0'
iii. Side Yard: 5' minimum
iv. Maximum Height: 2 stories

b. Tract 2
Tract 2 is to include those uses as listed in the above chart and are subject to the applicable sections of the Zoning Ordinance.
i. The living quarters use is for the resident monks, nuns and traveling members of the church, meditators, and similar uses related to the religious facility. These rooms are not multi-family nor for long-term rentals.
ii. Front Yard: 20 minimum
iii. Rear Yard: 5' minimum, unless adjacent to an alley, then 0'
iv. Side Yard: 5' minimum

c. Tract 3:
Tract 3 is to include those uses as listed in the above chart and are subject to the applicable sections of the Zoning Ordinance.
i. The living quarters use is for the resident monks, nuns and traveling members of the church, meditators, and similar uses related to the religious facility. These rooms are not multi-family nor for long-term rentals.
ii. Front Yard: 20 minimum
iii. Rear Yard: 5' minimum, unless adjacent to an alley, then 0'
iv. Side Yard: 5' minimum
v. Maximum Height: 40'

d. Tract 4:
Tract 4 is for the Sacred Stupa, religious facility and subject to the Zoning Ordinance with the following modifications:
i. Front Yard: 20 minimum
1. Enclosing wall be outside of the front setback along Rosedale Street.
ii. Rear Yard: 5' minimum
iii. Side Yard: 5' minimum
iv. Maximum Height: stupa or steeples are limited to 175' height

E. Other Development Standards

a. Urban Forestry
i. Notes:
1. To be consistent with an upcoming revision to the Urban Foresty ordinance, low quality trees are not included in the calculations for this site.
ii. Tree Preservation percentage for the development (all tracts)
1. Before construction: 25%
2. After construction: 5%
3. Waiver for the standard existing canopy preservation requirement.
4. Provided canopy for institutional use of 30% will be met.
5. Provided canopy for parking use of 40% will be met.
iii. Significant Tree Preservation and Mitigation
1. Subject to Attachment "A".

EXHIBIT A

"PD" Planned Development for certain "CF" Community Facilities uses detailed in attached Exhibit A and on file in the Development Services Department, plus the following accessory uses to a place of worship: visitor lodging, event center, exhibit hall, vendor food court, and indoor storage; Specific development standards for height, parking, signs and urban forestry attached as Exhibit A and on file in the Development Services Department; site plan required

SACRED STUPA DISTRICT

900-1100 blocks South Edgewood Terrace and 4627-4811 (odds) East Rosedale Street

Existing Zoning:	E, B & I
Proposed Zoning:	PD-CF
Purpose:	Amending existing E, I and B districts to a Planned Development with "CF" as the base district. A site plan will be submitted and processed at a later date.
Nomenclature:	"Sacred Stupa District" is interchangeable with "PD-CF"

A. Purpose and Intent

It is the purpose and intent of the Sacred Stupa District (PD-CF) to provide a unified development for the religious institution to contain a stupa with associated parking and facilities to accommodate visitors at the address listed above.

B. PD Site Plan

Prior to building permit, an approved PD Site Plan will be required for each Tract as defined in this narrative. Each PD Site Plan can contain one or more tracts at a time.

C. Uses

All uses in the CF district are included with the following allowances:

Uses Specifically Not Allowed:

Country club (private or public), golf course, golf driving range, wastewater treatment facilities, water supply facilities, water treatment or storage facility, gas drilling, gas production and/or gas lift compressor station.

Uses Allowed:

TRACTS	USES
1	Parking
2	Parking and living quarters* (monks and nunnery)
3	Uses to support a religious campus, including but not limited to event center, exhibit hall, meditation house, memorial house**, garden, private indoor recreation (games, movies, reading, etc), kitchen/café, vendor food court, library, classrooms, study center, indoor storage for campus use, religious worship, retail relating to religious uses, 3 residential bungalows, 3 residences (for the monks) and living quarters* (nunnery and visitor).
4	Stupa, Religious Facility

*Living quarters are dormitory style and limited to a maximum of 150 units plus the existing 30 units. This max can be spread over Tracts 2 and 3.

** Memorial house is a place set aside to worship one's ancestors and those who contributed to the center who have passed away.

D. Development Standards

a. Tract 1

Tract 1 is to include those uses as listed in the above chart and are subject to the applicable sections of the Zoning Ordinance.

i. Front Yard: 20 minimum