IN THE SUPREME COURT OF THE STATE OF OREGON

MT & M GAMING, INC., a Washington corporation,
Plaintiff-Appellant,
Petitioner on Review,

v.

CITY OF PORTLAND, an Oregon municipal corporation,
Defendant-Respondent,
Respondent on Review.

Court of Appeals
A154206

S063648

PETITIONER MT & M GAMING, INC.'S REPLY BRIEF ON REVIEW

Thomas R. Rask, III, OSB No. 934031
trask@kelrun.com
Kell, Alterman & Runstein, L.L.P.
520 SW Yamhill St., Suite 600
Portland, OR 97204-1329
Telephone No.: (503) 222-3531

Attorney for Petitioner on Review

Denis M. Vannier, OSB No. 044406
denis.vannier@portlandoregon.gov
City of Portland, Oregon
1221 SW 4th Ave., Suite 430
Portland, OR 97204-1900
Telephone No.: (503) 823-4047

Attorney for Respondent on Review

April 2016

Thomas M. Christ, OSB No. 834064
tchrist@cosgravelaw.com
Cosgrave Vergeer Kester LLP
888 SW 5th Ave., Suite 5000
Portland, OR 97204-2019
Telephone No.: (503) 323-9000

Attorney for ACLU Foundation of Oregon, Inc., as *Amicus Curiae*

Carl Sniffen
csniffen@orcities.org
Sean E. O'Day
soday@orcities.org
League of Oregon Cities
1201 NE Court St., Suite 200
Salem, OR 97301-4194
Telephone: (503) 540-6570

Attorneys for League of Oregon Cities, as *Amicus Curiae*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

I. The Interpretation of ORS 167.127 is properly before this Court on Review, as is the propriety of Petitioner's Amended Complaint.

There are two assertions of Respondent City which Petitioner takes issue with. The first concerns whether the interpretation of ORS 167.127 is properly before the Court. The second concerns whether Petitioner properly requested leave to amend in order to add a prayer for a declaration that it may operate with a City permit, in the same manner as other City permittees, without violating Oregon criminal law.

A. The Merits are properly before this Court.

With regard to the first issue, Petitioner filed and argued a motion for summary judgment and for a declaration that charging daily cover charges to poker players amounts to a violation of ORS 167.127, in that it constitutes house income from the operation of gambling games. ER-6. The judgment of the trial court expressly denied Petitioner's motion.

Petitioner assigned error to the denial of its summary judgment motion in its Third Assignment of Error before the Court of Appeals. Petitioner recognizes that neither the trial court nor the Court of Appeals addressed the merits of Petitioner's motion because they found Petitioner lacked standing. The factual record supporting the motion is, nevertheless, fully developed and undisputed, and the City position has been consistent and simply stated.

The City considers there to be no difference between its recent poker room permittees who collect cover charges or door fees from poker players (most do not even bother to call it a membership fee), and the Multnomah Athletic Club or the Riverside Golf and Country Club, whose members may or may not sometimes gather to play poker (or gin rummy) among themselves without charge. Petitioner finds the comparison to be unreasonable, if not specious, and it requests this Court to reject the argument and to declare that ORS 167.127 prohibits the City's poker rooms' permittees from collecting any form of house income from poker players.

Although the City (and the permittees) may claim they do not know why their customers are attending their facilities when they collect cover charges, Petitioner believes the claim to be mostly a patent pretense under the present record. Even if that were not so, when the City permittees do "discover" that a given customer is attending to play poker in their poker rooms, a fair interpretation of ORS 167.127 requires that door fees be refunded in order not to run afoul of the no-house-income prohibition from the operation of their poker games.

B. Petitioner's Amended Complaint is properly before this Court, and should be allowed.

Petitioner has candidly conceded that its initial complaint did not include a prayer for relief for a declaration that it may lawfully operate in Portland in the same manner as other permittees without violating Oregon criminal law. As Petitioner explained to the Court of Appeals, Petitioner did not seriously consider

at the outset of this case that the City's interpretation of the no-house-income prohibition was "actually correct, or even plausible." Opening Brief, P. 22.

When the trial court noted, however, that the lack of such a prayer was a factor in considering Petitioner's standing, Petitioner requested leave to file an amended complaint to include that prayer. Petitioner made the request both at oral argument and by written motion, before the trial court issued its opinion letter. Petitioner also assigned the trial court's express denial of its motion to amend as its Second Assignment of Error before the Court of Appeals.

Petitioner does not concede that a prayer allowing competition in Portland on the same conditions as other permittees is a necessary element in determining its standing. If this Court should determine otherwise, Petitioner respectfully requests the Court to reverse that ruling of the trial court, and to allow the amended complaint. In either event, Petitioner notes that the City's assertion or implication that Petitioner never requested such relief is not accurate.

II. The City's and the *Amicus*'s proposed rule of law adding a "zone of interest" test has as a condition of standing under ORS 28.020 is unnecessary; this case is not an appropriate vehicle for considering such a novel rule of law in Oregon.

The City cites ten cases from other jurisdictions in support of its proposal for a new standing test. Only three of the cited cases actually discuss the proposed rule—the U.S. Supreme Court case and the two Washington Supreme Court cases. The other seven cited cases considered standing under (complex and largely

irrelevant) declaratory judgment actions in a manner quite similar to the analyses adopted by this Court.

The Wisconsin cases for example (*Zehner* and *Darboy Joint Sanitary*) held, respectively, that tenants had no standing to complain about water/sewer fees charged to their landlord, and that town and sanitary districts had no standing under Wisconsin law to complain about annexations by other cities. The Connecticut case (*Stefanoni*) held that plaintiff developers had no standing to complain about an affordable housing certificate issued to another developer, because the decision did not affect any specific application of their own.

The Montana and Louisiana cases (*Doty* and *Melancon*) held, respectively, that a political candidate had no standing to complain about a state commissioner's discretionary refusal to prosecute a political rival of the plaintiff for alleged false statements, and that a disputed workers' compensation claimant failed to prove that he was affected by the particular statute he wished to have declared unconstitutional.

The cited federal Ohio case (*Aarti Hospitality*) held that existing hotels had no standing under Ohio law to complain about a tax abatement granted to a new hotel, because the damages, if any, were still speculative, and the abatement was equally available to the plaintiffs, but they had not requested one. *Aarti Hospitality, LLC v. City of Grove City*, 350 Fed Appx 1 (6th Cir 2009) at 10.

It is correct that the U.S. Supreme Court adopted a "zone of interest" test in determining who had a right to bring a private statutory action for false advertising prohibited by section 43(a) of the Lanham Act. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). The Court held that only injured competitors (not deceived customers) may bring the actions, and it relied upon an "unusually detailed" statement of the Act's purposes found in the Act itself. *Id*., 134 S. Ct. at 1389.

It is noteworthy that the *Lexmark* case ended up in the U.S. Supreme Court in order to clarify the proper analysis of Lanham Act standing questions which had divided the circuits three different ways. *Id.*, 134 S. Ct. at 1385. It is also noteworthy that established federal jurisprudence governing some federal statutes protect a "more-than-usually 'expan[sive]' range of interests." *Id*., 134 S. Ct. 1388-89. In those cases Justice Scalia noted that the test is not "especially demanding," and he cited with approval a prior holding as follows:

> We have said, in the APA context, that the test is not " 'especially demanding,'" *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. ——, ——, 132 S. Ct. 2199, 2210, 183 L.Ed.2d 211 (2012). In that context we have often "conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff," and have said that the test "forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that'" Congress

> authorized that plaintiff to sue. *Id*., at ___, 132 S. Ct. 2199, 2210, 183 L. Ed. 211, 225.

Id. at 1389.

The City is also correct that the Supreme Court of Washington has adopted a formulation which includes a "zone of interest" test in determining whether a given declaratory judgment plaintiff has standing. The formulation reads quite differently from this Court's formulation, which looks for a real, present, non-speculative injury or impact upon the plaintiff beyond, an abstract interest in the correct application of law.

The Washington formula is found in *Five Corners Family Farmers v. State*, 173 Wash 2d 293, 302-03 (2011):

> In order to establish that a party's "rights, status or other legal relations are affected by a statute," *id*., we employ a two-part standing test: [footnote omitted] (1) the interest asserted must be "'arguably within the zone of interests to be protected or regulated by the statute . . . in question'" and (2) the challenged action must have "caused 'injury in fact,' economic or otherwise, to the party seeking standing."

It is not obvious that the Washington formula would result in different outcomes than would this Court's formulations. In the *Five Corners* case the Washington Supreme Court held that a disputed withdrawal of groundwater for stock watering purposes was exempt from permit requirements under Washington law. At the same time it also held that competing claimants to the water, and environmental organizations, and the Sierra Club, had standing to bring a

declaratory judgment action contesting the amount of the withdrawal. This was so, because standing requirements are "relaxed" when the alleged injury is procedural (as they arguably were), and because the plaintiffs were within the zone of interests protected by the Washington statute which requires the Department of Ecology to consider existing water rights and the public welfare.

The second Washington opinion cited by the City, *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wash 2d 791 (2003), involved contested annexations by the cities of Moses Lake and Snoqualmie. The Washington Supreme Court ultimately held that the procedures used did not violate the Washington constitution. In the process, however, it also denied standing to the fire districts, because they were not within the zone of interests protected by the statutes and constitution, and because the districts themselves suffered no injury. *Id*., 150 Wash 2d 802-03.

The Washington Supreme Court acknowledged that Washington precedents call for a "less rigid and more liberal approach" when dealing with certain issues of public importance, but it held that that approach applies only to cases where there is a single plaintiff and the liberal approach was necessary to insure judicial review of important public issues. In the *Grant County* case the court held that there were other plaintiffs available to effectively argue the constitutional questions. *Id*., 150 Wash 2d at 803-04.

The City has not articulated how its proposed zone of interest test should actually apply to this case. No cited precedent discussed or analyzed how it applies to a criminal prohibition. No person anywhere, regardless of where they reside, may generate house income from gambling games in Oregon. From that perspective Petitioner is well within the zone of persons targeted by ORS 167.127.

Nor is there any Oregon precedent available to help determine who has the burden of proof to prove the scope of the "zone of interest" intended by the Legislature, or whether the issue is of sufficient importance so as to 'expand and relax' requirements. The City's suggestion that this Court adopt another state's jurisprudence out of whole cloth is calculated to generate little except confusion and uncertainty among the Bar, and the lower courts, when dealing with standing disputes in declaratory judgment actions.

A similar argument was raised in *Associated Reforestation Contractors, Inc. v. State Workers Compensation Board*, 59 Or App 348 (1982). In that case the appellant argued that its competitors had no right to complain about their failure to pay workers compensation premiums for their reforestation workers, because they made no showing that the statute it allegedly violated was designed to protect them. Judge Van Hoomissen rejected the argument.

> In an action for a declaratory judgment, such concrete and identifiable harm as this, directly caused by the allegedly illegal conduct of defendant, is sufficient to

> confer standing without regard to the class of persons protected by the statute defendant is alleged to have violated.

Id., 59 Or App at 351 (emphasis added).[1]

Petitioner recognizes that the above holding is not binding precedent on this Court, but it does reflect a fair reading of the analysis this Court has employed for decades when dealing with declaratory judgment standing questions. Besides, the City's suggestion is unnecessary. This case presents an active, real, present, non-hypothetical, demonstrated injury to Petitioner. A declaration by a court regarding the proper interpretation of ORS 167.127, and of ORS 167.117(21), will be effective to resolve the dispute for both parties. That is sufficient for standing under every precedent issued by this Court. The City's new proposed test and standard would add little to the analysis and does not alter the result in any event.

Petitioner, therefore, prays the Court to reverse the rulings of the trial court and of the Court of Appeals, and to allow Petitioner's amended complaint, if this Court considers it relevant to Petitioner's standing to sue, and further to find that

[1] The City's *Amicus* cited this same passage in its own brief, pp. 5-6, but it omitted the last 17 words.

Petitioner does indeed have standing to bring this action, and to declare that collecting cover charges from poker players constitutes a violation of ORS 167.127.

DATED this 25th day of April, 2016.

KELL, ALTERMAN & RUNSTEIN, L.L.P.

BY s/ Thomas R. Rask, III
Thomas R. Rask, III
OSB No. 934031
Of Attorneys for Petitioner on Review

CERTIFICATE OF COMPLIANCE

Brief length: I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and the word count of this brief is 2,169 words.

Type size: I hereby certify that the size of the type in this brief is not smaller than 14 point for both text and footnotes as required by ORAP 5.05(4)(f).

CERTIFICATE OF SERVICE AND FILING

I certify that on April 25, 2016, I electronically filed the foregoing PETITIONER MT & M GAMING, INC.'S BRIEF ON REVIEW with the State Court Administrator by so doing either caused a true copy to be served electronically on the following parties or served them by conventional e-mail should the system have failed to provide such service:

Denis M. Vannier
denis.vannier@portlandoregon.gov
City of Portland, Oregon
1221 SW 4th Ave., Suite 430
Portland, OR 97204-1900

Attorney for Respondent on Review

Thomas M. Christ
tchrist@cosgravelaw.com
Cosgrave Vergeer Kester LLP
888 SW 5th Ave., Suite 5000
Portland, OR 97204-2019

Attorney for ACLU Foundation of Oregon, Inc., as *Amicus Curiae*

Carl Sniffen
csniffen@orcities.org
Sean E. O'Day
soday@orcities.org
League of Oregon Cities
1201 NE Court St., Suite 200
Salem, OR 97301-4194

Attorneys for League of Oregon Cities,
as *Amicus Curiae*

s/ Thomas R. Rask, III
Thomas R. Rask, III, OSB No. 934031
Attorney for Petitioner on Review