

2. Mt. Airy has operated its business center in the City since July 1, 2008, without interference from the City, and Mt. Airy continues today to operate its business center in the City. However, the City has attempted, by its adoption and enforcement of the Amendments, to single out Mt. Airy's business center and, by the threatened enforcement of the Amendments, to force it to close or otherwise effectively prevent Mt. Airy's business center from operating in the City.

3. As the pretext for drafting and prosecuting the Amendments, the City determined that Mt. Airy's business center was a prohibited use under the UDO by virtue of Mt. Airy's operation of electronic promotional sweepstakes at its business center. The City further determined that Mt. Airy's business center was an "illegality" under the UDO. Finally, the City determined that Mt. Airy's business center had no "grandfather rights," because it was an "illegality." Each of the foregoing governmental determinations were rendered by the City in violation of Mt. Airy's procedural and substantive due process rights as guaranteed by North Carolina law, the United States Constitution and the North Carolina Constitution.

4. The City acted under color of state law in the adoption of these Amendments.

5. Because the aforesaid pretext for the drafting and prosecuting of Amendments into local law was arbitrary, capricious and fundamentally unfair, the City's

adoption of the Amendments violated Mt. Airy's constitutional rights to due process of law.

6. The City, through the aforesaid pretextual determination and subsequent adoption of the Amendments, singled out Mt. Airy for unfair and unequal treatment. Many national retail chains and other businesses in the City offer or have offered electronic promotional sweepstakes at their locations in the City; however, the City has not made similar determinations that these business enterprises were prohibited by the UDO, were illegalities or lacked grandfather rights. Additionally, the record developed by the City in connection with the City's adoption of the Amendments fails to show a rational basis for the adoption of the Amendments. The City's actions in singling out Mt. Airy's business in connection with its adoption of the Amendments as well as in failing to develop a record which shows any rational basis for the Amendment amount to violations of Mt. Airy's constitutional rights to equal protection under the law.

7. The language of the Zoning Amendment and the record developed by the City in connection with the City's adoption of the Zoning Amendment demonstrate that the Zoning Amendment was not a regulation of the use of land or location of buildings and structures on land. Instead, the Zoning Amendment was a regulation of "business enterprises," which the City adopted without statutory authority. Likewise, the City adopted the Business Regulation Amendment without statutory authority.

8. Not only was the pretextual determination that Mt. Airy's business center was a prohibited use under the UDO unfair, illegal and false, but, the record developed by the City in connection with the adoption of the Amendments completely fails to show that business enterprises offering electronic promotional sweepstakes have different land use or community impacts than business enterprises not operating sweepstakes.

9. The language of the Amendments demonstrates that the City adopted vague, ambiguous and overly broad local laws in violation of Mt. Airy's federal and state constitutional rights, and that those Amendments are facially unconstitutional under both the United States and North Carolina Constitutions. Further, the Tax Amendment violates and is preempted by federal law.

10. The result of the City's unlawful and unconstitutional actions in adopting the Amendments is that there now exists an actual controversy between Mt. Airy and the City with regard to the enforcement of the Amendments against business enterprises singled out for closure, such as Mt. Airy's business center, insofar as the City does not intend uniform enforcement against other business enterprises located in the City or against other business enterprises opening in the City after the adoption of the Amendments. Such foreseeable, selective enforcement actions will cause further deprivation of Mt. Airy's federal and state constitutional rights.

11. This actual controversy between Mt. Airy and the City is ripe for determination not just as a result of the City's threatened enforcement of the

Amendments but also because of the operation of N.C.G.S. §160A-364.1, which provides:

A cause of action as to the validity of any zoning ordinance, or amendment thereto, adopted under this Article or other applicable law shall accrue upon adoption of the ordinance, or amendment thereto, and shall be brought within two months as provided in G.S. 1-54.1.

PARTIES

12. Mt. Airy is a corporation organized under the laws of the State of North Carolina.

13. The City is a North Carolina municipality located in Cabarrus and Rowan Counties and chartered by the State of North Carolina, and is part of the government of the State of North Carolina.

VENUE AND JURISDICTION

14. This Court has jurisdiction over the subject matter pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343 in that Mt. Airy's federal claims arise under the Constitution and laws of the United States, and this lawsuit is brought under 42 U.S.C. §1983 and 28 U.S.C. §2201.

15. This Court also has supplemental jurisdiction over the subject matter pursuant to 28 U.S.C. §1367(a) in that Mt. Airy's state law and state constitutional claims arise out of the same events or connected series of events and are so related to federal claims in this action within the Court's original jurisdiction that those state law and state constitutional claims form part of the same case or controversy.

16. Venue is proper in this Court pursuant to 28 U.S.C. §1391 in that the City is a municipality located in Cabarrus County and in Rowan County and chartered by the State of North Carolina, and is part of the government of the State of North Carolina and a substantial part of the transactions, events or omissions giving rise to this action occurred in this District.

FACTUAL ALLEGATIONS

A. MT. AIRY'S BUSINESS CENTER.

17. Mt. Airy engages in the business of opening and operating business centers in retail locations such as shopping centers. In its business centers, Mt. Airy offers a variety of retail services for fixed fees such as on-site personal computer rental and internet access time; photocopying, duplicating, and other document copying services; facsimile and word processing services; general office product sales; and vending services. All of the personal computer terminals located in Mt. Airy's business center are connected to the internet and provide internet access to Mt. Airy's customers.

18. The services purchased at Mt. Airy's business centers provide access to a host of protected political, religious, educational and other expressive materials as well as the ability to publish the same. Mt. Airy's business centers also afford the opportunity to assemble and associate on the physical premises as well as in virtual meeting space through the World Wide Web.

19. In order to promote and market its business service and retail product offerings, Mt. Airy makes available a "no purchase necessary" electronic promotional

sweepstakes to its customers and potential customers. Mt. Airy's electronic promotional sweepstakes are "no purchase necessary" because entries may be obtained without the purchase of any computer rental or internet access time, business service, or retail good from Mt. Airy. Every person entered into Mt. Airy's promotional sweepstakes has three options with regard to participation in the sweepstakes: (a) he/she may ignore his/her entry into the electronic promotional sweepstakes and not spend any effort to find out whether he/she won; (b) he/she may instantly learn the results of his/her entry into the promotional sweepstakes, without playing any game; or (c) he/she may play entertaining games on Mt. Airy's computer terminals which slowly display, but in no way affect or determine, the results of his/her entry into the electronic promotional sweepstakes. Time devoted to playing these entertaining games does not reduce or "cut into" the amount of computer rental or internet access time initially purchased by the customer.

20. Recently, electronic promotional sweepstakes have become a matter of significant public debate in North Carolina. Some officials representing the State of North Carolina have attempted to prosecute businesses offering electronic promotional sweepstakes, or to otherwise threaten such businesses with enforcement actions by issuing statements aiming to declare certain electronic promotional sweepstakes to be illegal. In June 2009, however, the State was enjoined by the North Carolina Superior Court in *Hest Technologies, Inc. and Int'l Internet Technologies, LLC v. State*, 08 CVS 457 ("Supplemental Preliminary Injunction") from prosecuting or "issuing any

statement” that certain “sweepstakes systems [including International Internet Technologies, LLC’s (“IIT”) sweepstakes systems] constitute an[] illegal gambling arrangement, lottery, game of chance, slot machine, or unlawful device” and the State was enjoined from compelling or coercing “any retail establishment in North Carolina” to “refrain from selling or operating” these IIT electronic promotional sweepstakes systems.

21. In late March 2010, the North Carolina Superior Court issued another order in *Hest Technologies, Inc. and Int’l Internet Technologies, LLC v. State*, 08 CVS 457 (“Burke County Injunction”) clarifying that “the Orders previously entered by this [Court] are intended to apply, and do apply, to ANY law enforcement officer ... acting on behalf of the State of North Carolina” and specifically enjoining Burke County, North Carolina law enforcement officials from undertaking “any efforts to seize equipment or property associated with [IIT electronic promotional sweepstakes systems] or institute any criminal charges against anyone using [IIT] software systems”

22. Mt. Airy exclusively offers IIT electronic promotional sweepstakes systems in its business centers.

23. Prior to July 1, 2008, Mt. Airy identified a location for one of its business centers in a shopping center located on West C Street in the City (the “Shopping Center”). At that time, other businesses in the City were already offering or had offered electronic promotional sweepstakes to their customers and potential customers, and the City allowed these businesses to locate, open and operate throughout the City under the

terms of the UDO without the application of any specific regulations or the imposition of any license taxes relating to the offering of those promotional sweepstakes.

24. On or about June 2008, Mt. Airy entered into a lease with the owner of the Shopping Center for the operation of its business center (the "Lease"). Thereafter, Mt. Airy expended substantial time, effort and money up-fitting the leased premises for occupation.

25. On or about July 1, 2008, Mt. Airy opened its business center in the Shopping Center under the trade name West C Street Business Center (the "Center").

26. When Mt. Airy entered into the Lease, the Center was a permitted use under the UDO, the Center was not regulated as a business enterprise by any provision of the Code of Ordinances and the Center was not subject to the imposition of a license tax.

27. Since on or about July 1, 2008, and until the adoption of the Amendments, Mt. Airy operated the Center in the Shopping Center without interference from the City.

B. THE CITY'S PRETEXT AND THE ADOPTION OF THE AMENDMENTS.

28. Upon information and belief, the City's Planning Director served at all relevant times as the Planning Administrator pursuant to N.C.G.S. §160A-388 and City law.

29. North Carolina law and City law contain typical provisions promulgated to ensure compliance with due process and equal protection requirements of federal law and to promote procedural and substantive fairness in the zoning and land use context:

(1) the City must provide private citizen(s) with written notice of official determinations by the Planning Administrator when those determinations affect the rights of the private citizen(s); (2) the City must provide a meaningful opportunity for those private citizen(s) to appeal official determinations to a neutral fact-finder; (3) the appeal before a neutral fact-finder must take the form of a *quasi-judicial* hearing, where evidence is taken and where witnesses are examined and cross-examined under oath; (4) the neutral fact-finder must render a written decision at the close of all evidence and testimony, if any; (5) the written decision rendered by the neutral fact-finder may be appealed to the North Carolina Superior Court, where the written decision rendered by and the whole evidentiary record considered by the neutral fact-finder are subject to judicial review; (6) the decision rendered by the North Carolina Superior Court may be appealed to the North Carolina Court of Appeals, where the Superior Court decision and the evidentiary record before the Superior Court are reviewed by the North Carolina Court of Appeals; and (7) in some cases, the North Carolina Supreme Court may review a determination by the North Carolina Court of Appeals.

30. The basic purpose of these guarantees under N.C.G.S. §160A-388 and City law is to ensure that constitutional due process and equal protection rights are afforded by cities when adopting and implementing zoning laws. Without such protections, the constitutionality of zoning laws would be subject to attack under the Fourth and

Fourteenth Amendments to the United States Constitution and the Law of the Land Clause of the North Carolina Constitution.

31. On or about January 26, 2010, for reasons unknown to Mt. Airy, the City staff published proposals to amend the laws of the City in order to regulate “electronic gaming operations” and which had the effect of singling out the Center in such a manner as to force the Center to cease operating (the “Staff Proposals”).

32. At the time the City staff published the Staff Proposals, the Center had been operating for over a year in the Shopping Center and the City staff knew that fact. Despite that knowledge, however, the City had not commenced any enforcement action against or issued any official determination to Mt. Airy regarding the legality of the Center’s location and operation in the Shopping Center under the UDO or otherwise.

33. Upon publishing the Staff Proposals, which contained the Amendments, the Planning Administrator declared that the Amendments were necessary for adoption because electronic gaming operations were a new use in the City, because electronic gaming operations were prohibited under the City’s UDO as a result of being a new use, and because the Center—and any other business in the City where electronic gaming operations were occurring (and presumably had occurred in the past)—opened and operated illegally as a result of being prohibited in the City under the UDO. Neither the City nor the Planning Administrator informed Mt. Airy of these official determinations before or at the time the official determinations were made.

34. The Planning Administrator rendered these official determinations as if they complied with North Carolina and City law. However, at the time those determinations were made, neither the City nor the Planning Administrator had afforded Mt. Airy any written notice of his intent to issue those official determinations, an opportunity to be heard or develop an evidentiary record regarding those official determinations, an opportunity to appeal those official determinations, or the right to otherwise contest those determinations under the legal process required by City law, North Carolina law and the Constitutions of the United States and North Carolina.

35. Because the Planning Administrator officially determined, without complying with North Carolina and City law, that Mt. Airy opened and operated the Center illegally as a result of being prohibited in the City under the UDO, the Planning Administrator made the further official determination that Mt. Airy's Center, which had existed and had been operating in the City for almost two years, possessed no grandfather rights.

36. Upon information and belief, these official determinations—casting the Center as an “illegality” from its inception and declaring electronic gaming operations to be a prohibited use—served as a pretext that the Planning Administrator and the City used to publish and prosecute the Staff Proposals and the Amendments into City law.

37. In addition to depriving Mt. Airy of its procedural right to challenge those official determinations, the City, by way of this pretext, placed Mt. Airy at a significant

disadvantage and substantially interfered with Mt. Airy's ability to fully and fairly participate in the City's subsequent process regarding the adoption of the Amendments.

38. The City's Planning and Zoning Commission and the City Council relied upon the Planning Administrator's official determinations, and the City Council adopted the Amendments as drafted by the City staff and without modification.

C. THE ZONING AMENDMENT.

39. The Amendments each define "Electronic Gaming Operations," and generally do so in a virtually identical manner:

Electronic Gaming Operations. Any business enterprise, whether as a principal or an accessory use, where persons utilize electronic machines, including, but not limited to computers and gaming terminals, to conduct games of chance, including sweepstakes, and where cash, merchandise, or other items of value are redeemed or otherwise distributed, whether or not the value of such distribution is determined by electronic games played or by predetermined odds. The term includes, but is not limited to internet sweepstakes, internet sweepstakes café, video sweepstakes, or cybercafés, [who/which] have a finite pool of winners. This does not include any lottery endorsed by the State of North Carolina.

40. The Zoning Amendment prohibits business enterprises defined as Electronic Gaming Operations, whether principal to or accessory to other land uses, from locating in all zoning districts in the City except in C-2 districts (General Commercial District), I-1 districts (Light Industrial District), and I-2 districts (General Industrial District).

41. The Center is not located in one of these three zoning districts to which the Zoning Amendment limits the location of business enterprises defined as Electronic Gaming Operations.

42. The Zoning Amendment also completely prohibits Electronic Gaming Operations from locating, whether as a principal or an accessory use: (1) within 500 feet in any direction of the following City-controlled zoning districts—Agricultural District, Residential Low Density District, Rural Estate District, Residential Village District, Residential Compact District, Residential Medium Density-1 District and Residential Medium Density-2 District; (2) within 1000 feet in any direction of another business enterprise offering Electronic Gaming Operation, whether a principal or accessory use; (3) within 1000 feet in any direction of any cemetery, congregate care facility, religious institution, public or private child care center or child care facility or public or private school; and (4) within 200 feet of roads designated, in the sole discretion of the City, as so-called “gateway corridors.”

43. Moreover, the Zoning Amendment: (1) prohibits Electronic Gaming Operations from posting any type or kind of sign on or in the windows that may be visible from the exterior of the establishment; (2) limits all Electronic Gaming Operations to the installation of no more than 20 terminals/computers/machines/gaming stations in any business enterprise; and (3) requires that all such equipment “be open and visible from the exterior front of the establishment.”

44. Although described by the City staff as a “zoning” regulation, the Zoning Amendment does not regulate the use of land or the location of buildings on land and is actually a business regulation operating under the guise of a zoning law.

45. The City lacks the statutory authority to regulate the business enterprise of Electronic Gaming Operations.

46. Upon information and belief, the City intends to enforce the Zoning Amendment against Mt. Airy and the Center but the City has no intention of applying the Zoning Amendment to other businesses enterprises operating in the City, such as national business chains or retailers, which operate electronic promotional sweepstakes in their stores and award cash, merchandise or other items of value as a result of those sweepstakes.

47. The Zoning Amendment is not connected to the purposes for which the City was empowered to adopt zoning laws.

D. THE BUSINESS REGULATION AMENDMENT.

48. The Business Regulation Amendment states that business enterprises conducting Electronic Gaming Operations: (1) shall “be open for direct, unobstructed access” by and “shall be visible from the exterior front of the establishment” to police, fire and emergency response personnel, and shall allow police, fire and emergency response personnel “direct access to the premises without requiring assistance from an employee, agent, or owner of the establishment”; (2) are prohibited from operating

“before 10:00 a.m. or after 12:00 midnight”; and (3) are prohibited from “allowing[ing], permit[ing] or condon[ing] any person under the age of 18 to engage in electronic gaming operations.”

49. The City lacks statutory authority to adopt the Business Regulation Amendment.

50. Upon information and belief, the Business Regulation Amendment is not connected to the health, safety or welfare of the City’s citizens or to the peace and dignity of the City, and to the extent the Business Regulation Amendment applies to the Center, the Business Regulation Amendment is not connected to the health, safety or welfare of the City citizens’ or the peace and dignity of the City.

51. Upon information and belief, the record developed by the City in connection with the adoption of the Business Regulation Amendment shows that the City’s adoption of the Business Regulation was arbitrary and capricious and is otherwise an unreasonable time, place and manner restriction upon the exercise by the Center’s customers of their rights to freedom of speech, press, assembly and association.

52. Upon information and belief, the City intends to enforce the Business Regulation Amendment against Mt. Airy and the Center but the City has no intention of applying the Business Regulation Amendment to other businesses operating in the City, now or in the future, and currently offering or eventually offering Electronic Gaming Operations in their stores.

E. THE TAX AMENDMENT.

53. In addition to the Zoning Amendment and the Business Regulation Amendment, the Staff Proposals included the Tax Amendment, which the City Council likewise adopted without modification.

54. The Tax Amendment assesses a flat tax of \$500.00 per “electronic machine” which includes computers or terminals that “conduct games of chance, including sweepstakes” (“Tax”).

55. The Tax is specifically directed to “internet sweepstakes, internet sweepstakes cafés, video sweepstakes or cybercafés.”

56. The City’s power to adopt the Tax Amendment is limited under North Carolina law and federal laws, and the Tax Amendment is outside of the City’s limited taxing authority.

57. Upon information and belief, the Tax Amendment is not connected to the health, safety or welfare of the City’s citizens or to the peace and dignity of the City, and the record developed by the City in connection with the adoption of the Tax Amendment shows that the City’s adoption of the Tax Amendment was arbitrary, capricious and confiscatory.

58. Upon information and belief, the City intends to enforce the Tax Amendment against Mt. Airy and the Center but the City has no intention of applying the

Tax Amendment to other businesses currently operating or eventually operating in the City, and currently offering or eventually offering Electronic Gaming Operations.

CLAIMS FOR RELIEF

Claim One
(Procedural Due Process, 42 U.S.C. §1983)

59. Mt. Airy incorporates by reference the allegations in paragraphs 1-58 as allegations of this claim.

60. The Zoning Amendment, Business Regulation Amendment and Tax Amendment must be consistent with the United States Constitution and federal laws.

61. This Court shall declare the rights and legal remedies of the parties pursuant to 28 U.S.C. §2201 and Fed. R. Civ. P. 57, and there exists an actual, justiciable controversy as to whether the City deprived Mt. Airy of its right to due process.

62. The City adopted the Zoning Amendment, Tax Amendment and Business Regulation Amendment under color of state law.

63. The City rendered official determinations regarding the legality of Mt. Airy's Center without affording Mt. Airy any written notice of those official determinations, an opportunity to be heard or to develop an evidentiary record regarding those official determinations, or an opportunity to appeal those official determinations through the legal process required by City law and North Carolina law.

64. These official determinations served as a pretext that the City used to justify the adoption of the Amendments, a process that was unfair to Mt. Airy and

contrary to North Carolina law and City law intended to protect private property interests from being adversely affected by administrative determinations made by the City's Planning Administrator and City staff without providing advance notice and a meaningful opportunity to be heard.

65. The City, in rendering official determinations regarding Mt. Airy's Center and in adopting the Amendments, has deprived Mt. Airy of its rights guaranteed by the Due Process Clause of Fourteenth Amendment to the United States Constitution.

66. The City's official determination was invalid, and the Amendments adopted on the basis of that official determination are void *ab initio* and unconstitutional.

Claim Two
(Other Constitutional Rights, 42 U.S.C. §1983)

67. Mt. Airy incorporates by reference the allegations in paragraphs 1-66 as allegations of this claim.

68. The Zoning Amendment, Business Regulation Amendment and Tax Amendment must be consistent with the United States Constitution and the federal laws.

69. This Court should declare the rights and legal remedies of the parties pursuant to 28 U.S.C. §2201 and Fed. R. Civ. P. 57, and there exists an actual, justiciable controversy as to whether the Zoning Amendment, Tax Amendment and Business Regulation Amendment violate the United States Constitution.

70. The City adopted the Zoning Amendment, Tax Amendment and Business Regulation Amendment under color of state law.

71. By its adoption and enforcement of the Amendments, the City improperly singles out, regulates, taxes and restricts Mt. Airy's offering of an electronic promotional sweepstakes while allowing, without those same regulations and restrictions, other electronic promotional sweepstakes offered by private companies, such as Walmart, Target, McDonald's, BP gas station, Subway sandwich shops and other establishments; while exempting any lottery sponsored by the State of North Carolina from the application of those Amendments; and where the City has no intention of applying the Amendments uniformly to all business enterprises operating in the City, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

72. The City's adoption and enforcement of the Amendments affects, abridges, infringes upon, restricts and prohibits the exercise by and deprives Mt. Airy and its customers of their freedom of speech and of the press as well as their right to assemble and associate by regulating and restricting the Center from operating in the City, and the Amendments are not rationally related to a government interest in ameliorating demonstrated undesirable secondary impacts, in violation of the First Amendment to the United States Constitution.

73. The City's adoption and enforcement of the Amendments regulates, restricts, and discriminates against Mt. Airy, which is engaged in interstate commerce, in order to protect City businesses and the North Carolina lottery, which are in-state

economic interests, though the Amendments are not related to legitimate local or government interests, in violation of the Dormant Commerce Clause of the United States Constitution.

74. The City's adoption of the Amendments requires that Mt. Airy allow law enforcement "direct, unobstructed access" to the Center "without requiring assistance from an employee, agent, or owner of the establishment" and that Mt. Airy keep its computers "visible at all times" from the exterior of the premises, requirements which infringe upon Mt. Airy's and its customers' rights to be secure in their persons and effects and against unreasonable searches and seizures in violation of the Fourth Amendment and Fourteenth Amendment to the United States Constitution. Alternatively, these provisions of the Amendments are so fundamentally unfair as to violate the substantive due process rights guaranteed to Mt. Airy and its customers under the Fifth and Fourteenth Amendments to the United States Constitution.

75. The Zoning Amendment, Business Regulation Amendment and Tax Amendment are void *ab initio* and unconstitutional on their face under the United States Constitution.

Claim Three
(Violation of the North Carolina Constitution)

76. Mt. Airy incorporates by reference the allegations in paragraphs 1-75 as allegations of this claim.

77. The Zoning Amendment, Business Regulation Amendment and Tax Amendment must be consistent with the North Carolina Constitution.

78. This Court should declare the rights and legal remedies of the parties pursuant to 28 U.S.C. §2201 and Fed. R. Civ. P. 57, and there exists an actual, justiciable controversy as to whether the Zoning Amendment, Tax Amendment and Business Regulation Amendment violate the North Carolina Constitution.

79. The City rendered official determinations regarding the legality of Mt. Airy's Center without affording Mt. Airy any written notice of those official determinations, an opportunity to be heard or to develop an evidentiary record regarding those official determinations, and without an opportunity to appeal those official determinations; these official determinations served as a pretext that the City used to justify the adoption of the Amendments, a process that was fundamentally unfair to Mt. Airy and in violation of the Law of the Land Clause of the North Carolina Constitution.

80. By its adoption and enforcement of the Amendments, the City improperly singles out, regulates, taxes and restricts Mt. Airy's offering of an electronic promotional sweepstakes while allowing, without those same regulations and restrictions, other electronic promotional sweepstakes offered by private companies, such as Walmart, Target, McDonald's, BP gas station, Subway sandwich shops and other establishments; while exempting any lottery sponsored by the State of North Carolina from the application of those Amendments; and where the City has no intention of applying the

Amendments uniformly to all business enterprises operating in the City, in violation of the Equal Protection Clause of the North Carolina Constitution.

81. The City's adoption and enforcement of the Amendments affects, abridges, infringes upon, restricts and prohibits the exercise by and deprives Mt. Airy and its customers of their freedom of speech and of the press as well as their right to assemble and associate by regulating and restricting the Center from operating in the City, and the City's adoption of the Amendments is not rationally related to a government interest in ameliorating demonstrated undesirable secondary impacts, in violation of the Freedom of Speech and Press and Freedom of Assembly Clauses of the North Carolina Constitution.

82. The City's adoption of the Amendments requires that Mt. Airy allow law enforcement "direct, unobstructed access" to the Center "without requiring assistance from an employee, agent, or owner of the establishment" and that Mt. Airy keep its computers "visible at all times" from the exterior of the premises, requirements which infringe upon Mt. Airy and its customers' rights to be secure in their persons and effects and against unreasonable searches and seizures in violation of the General Warrants Clause of the North Carolina Constitution. Alternatively, these provisions of the Amendments are so fundamentally unfair as to violate the substantive due process rights guaranteed to Mt. Airy and its customers under the Law of the Land Clause to the North Carolina Constitution.

83. The Zoning Amendment, Business Regulation Amendment and Tax Amendment are void *ab initio* and unconstitutional on their face under the North Carolina Constitution.

Claim Four
(Preemption)

84. Mt. Airy incorporates by reference the allegations in paragraphs 1-83 as allegations of this claim.

85. The Tax Amendment must be consistent with the United States Constitution and federal laws.

86. This Court should declare the rights and legal remedies of the parties pursuant to 28 U.S.C. §2201 and Fed. R. Civ. P. 57, and there exists an actual, justiciable controversy as to whether the Tax Amendment is preempted by federal law.

87. By its enactment of the Internet Tax Freedom Act, 47 U.S.C. §151 *et seq.*, the federal government expressly preempted state and local law regarding the imposition of taxes upon any methods or means of internet access.

88. The Tax Amendment imposes a License Tax upon certain business enterprises in the amount of \$500.00 per computer terminal where those computer terminals may be connected to the internet and where those computers terminals may be utilized to access the internet.

89. The Tax Amendment is preempted by federal law, the Internet Tax Freedom Act, 47 U.S.C. §151 *et seq.*, and is void *ab initio*.

Claim Five
(Lack of Statutory Authority)

90. Mt. Airy incorporates by reference the allegations in paragraphs 1-89 as allegations of this claim.

91. The Zoning Amendment, Business Regulation Amendment and Tax Amendment must be consistent with North Carolina law, and the City's adoption of the Amendments must be consistent with North Carolina law.

92. This Court should declare the rights and legal remedies of the parties pursuant to 28 U.S.C. §2201 and Fed. R. Civ. P. 57, and there exists an actual, justiciable controversy as to whether the City adopted the Amendments pursuant to its ordinance-making powers.

93. In publishing and prosecuting the Staff Proposals and adopting the Amendments, the City failed to present or develop any record that Electronic Gaming Operations were adversely affecting the health, safety or welfare of the City's citizens or the peace and dignity of the City or were otherwise resulting in demonstrated undesirable secondary impacts.

94. Upon information and belief, the City lacked statutory authority to adopt the Amendments under the guise of laws regulating the use of land and location of buildings on land, and the City lacked statutory authority to adopt the Amendments under the guise of laws regulating the health, safety or welfare of the City's citizens and regulating the peace and dignity of the City.

95. The Zoning Amendment, Business Regulation Amendment and Tax Amendment are void *ab initio* and enforceable.

Claim Six
(Adoption of Amendments Unsupported by Whole Record)

96. Mt. Airy incorporates by reference the allegations in paragraphs 1-95 as allegations of this claim.

97. The City must adopt the Zoning Amendment, Business Regulation Amendment and Tax Amendment consistent with North Carolina law.

98. This Court should declare the rights and legal remedies of the parties pursuant to 28 U.S.C. §2201 and Fed. R. Civ. P. 57, and there exists an actual, justiciable controversy as to whether the City's adoption of the Amendments was arbitrary and capricious and was unsupported by the whole record.

99. The City failed to develop a record in prosecuting the Amendments into law showing a rational basis for the adoption of the Amendments, and the City instead relied on pretextual determinations made by the City in violation of state and federal law, the actions by other local governments, and little else, if anything, in prosecuting the Amendments into local laws without modification.

100. The City's adoption of the Amendments was not supported by the whole record of the proceedings associated with the Town's adoption of the Amendments, it was arbitrary and capricious, and it was not in furtherance of the objectives and public purposes of the North Carolina statutes enabling the City to adopt ordinances.

101. The Zoning Amendment, Business Regulation Amendment and Tax Amendment are void *ab initio*.

RELIEF REQUESTED

WHEREFORE, Mt. Airy requests that this Court:

1. Enter judgment declaring that the City's adoption of the Zoning Amendment, Business Regulation Amendment and Tax Amendment was not supported by the whole record, was arbitrary and capricious, and was not in furtherance of the objectives and public purposes of the enabling statutes; that the City lacked the statutory authority to adopt the Amendments; that the Amendments are void *ab initio*; and that the City cannot lawfully enforce the Amendments;

2. Enter judgment declaring that the Zoning Amendment, Business Regulation Amendment and Tax Amendment are void *ab initio* and unconstitutional in violation of the federal law and the United States Constitution, and that the City cannot lawfully enforce the Amendments;

3. Enter judgment declaring that the Zoning Amendment, Business Regulation Amendment and Tax Amendment are void *ab initio* and unconstitutional in violation of North Carolina laws and the North Carolina Constitution, and that the City cannot lawfully enforce the Amendments;

4. Enter judgment declaring the Tax Amendment to be preempted by federal law and therefore void *ab initio*, and that the City cannot lawfully enforce the Tax Amendment;

5. In the alternative, enter judgment directing the City to enforce the Amendments against all business enterprises currently located within the City or which will locate in the future within the City;

6. Award Mt. Airy its reasonable costs, including attorney's fees, pursuant to 42 U.S.C. §1988; and

7. Grant such other relief as the Court deems is just and proper.

JURY TRIAL DEMAND

Mt. Airy hereby demands a Jury Trial on all the issues so triable.

This the 21st day of April, 2010.

WOMBLE CARLYLE SANDRIDGE & RICE,
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ATTORNEYS FOR PLAINTIFF
MT. AIRY BUSINESS CENTER, INC.

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2010 I electronically filed the foregoing **COMPLAINT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to Defendant City of Kannapolis, North Carolina and I hereby certify that I have mailed the document to the following non-CM/ECF participant by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

City of Kannapolis, North Carolina
c/o Mayor Bob Misenheimer
246 Oak Avenue
Kannapolis, North Carolina 28081

This the 21st day of April, 2010.

WOMBLE CARLYLE SANDRIDGE & RICE,
a Professional Limited Liability Company

By: /s/ John C. Cooke

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