

Staff Proposed Rule Changes

- **Clarifying requirements for authorized card games.**

November 2013 - Up for Discussion and Possible Filing

October 2013 – Study Session

September 2013 – Study Session

August 2013 – Study Session

ITEM: 8

- a) **Amendatory Section WAC 230-15-040**
Requirements for authorized card games.



Proposed Amendments to

Amendatory Section WAC 230-15-040 Requirements for authorized card games.

November 2013 –Up for Discussion and Possible Filing

October 2013 – Study Session

ITEM 8(a) on the November 2013 Commission Meeting Agenda.	Statutory Authority RCW 9.46.070 & 9.46.0282
Who proposed the rule change?	
Staff.	
Proposed Change	
<p>Staff is proposing an amendment to clarify the rule to allow more than one “envy” and “share the wealth” “bonus features” to be offered in a single card game. Staff proposes adding definitions and clarifications to bring agency rules in-line with current practice.</p> <p>Adding new definitions for:</p> <ol style="list-style-type: none"> 1) “Separate game”; 2) “Bonus features”; and 3) “Envy” and “share the wealth” “bonus features”. <p>Clarifying that:</p> <ol style="list-style-type: none"> 4) Card games and “bonus features” must be approved by the director or the director’s designee; 5) The prize in a “bonus feature” is based on achieving the predetermined specific hand; 6) “Bonus features” may not be combined with a progressive jackpot; 7) Approved card games must be operated as documented on our agency website; 8) Only one player may place a wager per wager area in the game of Mini-Baccarat; 9) Other game features that do not require a separate wager are considered “bonus features”; and 10) For variations of the game of Pai Gow Poker, a player may bank every other hand as authorized in approved card game rules. <p>Attachment: Stakeholder letter dated October 15, 2013, which was e-mailed to manufacturers, distributors, service suppliers, and Tribal Gaming Agencies.</p>	
History of Rule	
<p>“Envy” and “share the wealth” “bonus feature” wagers were authorized for house-banked card games in April 2000 when the rules were adopted at the conclusion of the Card Room Enhancement Program for house-banked card games.</p>	
Impact of the Proposed Change	
<ul style="list-style-type: none"> • Definitions and requirements for card games will be clarified in rule for licensees and staff. • More than one “envy” and “share the wealth” “bonus feature” may be offered in a single card game. <p>A Small Business Economic Impact Statement was not prepared because the rule change would not impose additional costs on any licensees. Licensees are not required to offer “envy” and/or “share the wealth” “bonus features”.</p>	
Regulatory Concerns	
None.	

Resource Impacts
Including definitions in the rule should help reduce questions we receive from licensees.
Policy Consideration
None.
Statements Regarding the Proposed Rule Change
None.
Statements Opposing the Proposed Rule Change
None.
Statements Supporting the Proposed Rule Change
None.
Stakeholders Directly Impacted By the Change
House-banked card game licensees, manufacturers, distributors, and service suppliers.
If approved, Tribal casinos would also be able to offer this game.
Staff Recommendation
File for further discussion.
Proposed Effective Date for Rule Change
Staff recommends an effective date of 31 days from filing the adopted rule.

Amendatory Section:

WAC 230-15-040 Requirements for authorized card games.

(1) In order for a card game to be authorized, it must be approved by the director or the director's designee and must:

(a) Be played with standard playing cards or with electronic card facsimiles approved by the director or the director's designee; and

(b) Offer no more than four "separate games" with a single hand of cards (~~(-However,)) and no more than three of the "separate games" may offer a wager that exceeds five dollars each. ((We consider bonus features and progressive jackpots separate games. If a player does not have to place a separate wager to participate, we do not consider it a separate game. An example of this is an "envy" or "share the wealth" pay out when another player achieves a specific hand; and (e)))~~

(i) "Separate game" means each individual objective to be achieved within a card game that requires a separate wager and results in a distinct and separate payout based upon the outcome.

(ii) "Progressive jackpots are considered "separate games".

(c) Identify "bonus features" to be allowed in each card game:

(i) "Bonus feature" means an added prize and/or variation based on achieving the predetermined specific hand required to win the prize and does not require a separate wager. More than one "bonus feature" may be offered per card game. A "bonus feature" must not be combined with a progressive jackpot. Examples include, but are not limited to, "envy" and "share the wealth" "bonus features" when operated as described below.

(ii) A "bonus feature" is not considered a separate game.

(d) Operate "envy" and "share the wealth" "bonus features" as follows:

(i) If a player makes a wager that qualifies for an "envy" "bonus feature" payout, they are entitled to receive a prize if another player's hand achieves the predetermined specific hand. If a player is playing more than one wagering area or if a hand they are playing is split into two or more hands and any one of their hands achieves the predetermined specific hand, their other hand with a qualifying wager is entitled to receive a prize also.

(ii) If a player makes a wager that qualifies for a "share the wealth" payout, they are entitled to receive a prize if their hand(s) or another player's hand(s) achieves the predetermined specific hand.

(e) Not allow side bets between players.

(2) Card game licensees may use more than one deck of cards for a specific game. They also may remove cards to comply with rules of a specific game, such as Pinochle or Spanish 21.

(3) Players must:

(a) Compete against all other players on an equal basis for nonhouse-banked games or against the house for house-banked games. All players must compete solely as a player in the card game, except as authorized in approved card game rules for variations of the game of Pai Gow poker where a player may bank the game every other hand; and

(b) Receive their own hand of cards and be responsible for decisions regarding such hand, such as whether to fold, discard, draw additional cards, or raise the wager; and

(c) Not place wagers on any other player's or the house's hand or make side wagers with other players, except for:

(i) An insurance wager placed in the game of Blackjack; or

(ii) "Envy" or "share the wealth" "bonus features" ((An ~~"envy" or "share the wealth"~~ wager which allows a player to receive a prize if another player wins a jackpot or odds-based wager)); or

(iii) A tip wager made on behalf of a dealer.

(4) Mini-Baccarat is authorized when operated in the manner explained for Baccarat in the most current version of *The New Complete Hoyle, Revised* or *Hoyle's Encyclopedia of Card Games*, or similar authoritative book on card games we have approved, and as further described in the commission approved game rules on our website. However:

(a) Card game licensees may make immaterial modifications to the game; and

(b) Subsection (3) of this section does not apply; and

(c) The number of players is limited under WAC 230-15-055 and only one player may place a wager per wager area.

(5) A player's win or loss must be determined during the course of play of a single card game, except for a carryover pot game. A carryover pot is an optional pot that accumulates as a dealer and participating players contribute to the pot. The winner of the pot is not necessarily determined after one game and the pot can be carried over to more than one game. Carryover pots must not carryover more than ten (10) games. Participants must include at least one player and the dealer competing for the highest qualifying winning hand. Game rules must state how the pot is distributed. If the carryover pot has not been won by the tenth game, the dealer will divide it equally between the remaining players still participating in the pot and the house or, if allowed by game rules, only the players still participating in the pot.



STATE OF WASHINGTON
GAMBLING COMMISSION

"Protect the Public by Ensuring that Gambling is Legal and Honest"

October 15, 2013

To: House-banked card game, manufacturer, distributor and gambling service supplier licensees.

Subject: **NOTICE OF PROPOSED CHANGES TO CARD GAME RULES**
WAC 230-15-040 Requirements for authorized card games.

We have received a petition for rule change requesting a change to the card game Mini-Baccarat (See attachment #1 for proposed rule change):

- The petitioner is requesting in the game of Mini-Baccarat that a player be allowed to make an optional wager on either the player hand or banker hand winning the next three consecutive games. Under the current rule, a player's win or loss must be determined during a *single* card game. Mini-Baccarat uses community cards where two shared hands are dealt to positions called the "bank" and the "player;" but, unlike other card games, players are not dealt their own individual hands. Players bet on one of the two shared hands dealt, rather than on their own hand.

Additionally, staff is proposing the following changes to this rule (See attachment #2 for proposed rule change):

- Allowing more than one "bonus feature," including "envy" and "share the wealth" to be offered per card game.
- Adding definitions and clarifications to bring agency rules in-line with current practice.

Public Comment: Please submit your comments by **November 12, 2013**.

Mail:
Rules Coordinator
Gambling Commission
P.O. Box 42400
Olympia, WA 98504-2400

E-mail:
Susan.Newer@wsgc.wa.gov

FAX:
(360) 486-3625

For questions, please contact Susan Newer, Rules Coordinator, e-mail above or (360) 486-3466.

These proposed rule changes will be considered at the November 15, 2013, Commission meeting ([Click here for meeting dates and locations](#)). Visit our website about two weeks before each meeting to confirm meeting dates and start times. Commission meetings are open to the public and you are invited to attend.

If you can't attend the November Commission meeting, we will give your written comments to the Commissioners at that if you get your feedback to us by **November 12, 2013**.

Amendatory Section:

WAC 230-15-040 Requirements for authorized card games.

(1) In order for a card game to be authorized, it must be approved by the director or the director's designee and must:

(a) Be played with standard playing cards or with electronic card facsimiles approved by the director or the director's designee; and

(b) Offer no more than four separate games with a single hand of cards. However, no more than three of the games may offer a wager that exceeds five dollars each. We consider bonus features and progressive jackpots separate games. If a player does not have to place a separate wager to participate, we do not consider it a separate game. An example of this is an "envy" or "share the wealth" pay out when another player achieves a specific hand; and

(c) Not allow side bets between players.

(2) Card game licensees may use more than one deck of cards for a specific game. They also may remove cards to comply with rules of a specific game, such as Pinochle or Spanish 21.

(3) Players must:

(a) Compete against all other players on an equal basis for nonhouse-banked games or against the house for house-banked games. All players must compete solely as a player in the card game; and

(b) Receive their own hand of cards and be responsible for decisions regarding such hand, such as whether to fold, discard, draw additional cards, or raise the wager; and

(c) Not place wagers on any other player's or the house's hand or make side wagers with other players, except for:

(i) An insurance wager placed in the game of Blackjack; or

(ii) An "envy" or "share the wealth" wager which allows a player to receive a prize if another player

(iii) A tip wager made on behalf of a dealer.

(4) Mini-Baccarat is authorized when operated in the manner explained for Baccarat in the most current version of *The New Complete Hoyle, Revised* or *Hoyle's Encyclopedia of Card Games*, or similar authoritative book on card games we have approved. However:

(a) Card game licensees may make immaterial modifications to the game; and

(b) Subsection (3) of this section does not apply; and

(c) The number of players is limited under WAC 230-15-055.

(5) A player's win or loss must be determined during the course of play of a single card game, except for:

(a) A carryover pot game. A carryover pot is an optional pot that accumulates as a dealer and participating players contribute to the pot. The winner of the pot is not necessarily determined after one game and the pot can be carried over to more than one game. Carryover pots must not carryover more than ten games. Participants must include at least one player and the dealer competing for the highest qualifying winning hand. Game rules must state how the pot is distributed. If the carryover pot has not been won by the tenth game, the dealer will divide it equally between the remaining players still participating in the pot and the house or, if allowed by game rules, only the players still participating in the pot; and ((-))

(b) In the game of Mini-Baccarat, a player may make an optional wager on the player hand winning the next three consecutive games, or the banker hand winning the next three consecutive games.

Staff proposed rule change:
 Allowing multiple bonus features per card game.
 Adding needed definitions and clarifications.

Amendatory Section:

WAC 230-15-040 Requirements for authorized card games.

(1) In order for a card game to be authorized, it must be approved by the director or the director's designee and must:

(a) Be played with standard playing cards or with electronic card facsimiles approved by the director or the director's designee; and

(b) Offer no more than four "separate games" with a single hand of cards (~~(-However,)~~) and no more than three of the "separate games" may offer a wager that exceeds five dollars each (~~(-We consider bonus features and progressive jackpots separate games. If a player does not have to place a separate wager to participate, we do not consider it a separate game. An example of this is an "envy" or "share the wealth" pay out when another player achieves a specific hand))~~); and

(c) Not allow side bets between players.

(2) The following definitions and requirements apply to this section:

(a) "Separate game" means each individual objective to be achieved within a card game that requires a separate wager and results in a distinct and separate payout based upon the outcome. Progressive jackpots are considered "separate games".

(b) "Bonus feature" means an added prize and/or variation based on achieving the predetermined specific hand required to win the prize and does not require a separate wager. More than one "bonus feature" may be offered per card game. A "bonus feature" must not be combined with a progressive jackpot. Examples include, but are not limited to, "envy" and "share the wealth" "bonus features" when operated as described below; and

(c) "Envy" and "share the wealth" "bonus features" must be operated as follows:

(i) If a player makes a wager that qualifies for an "envy" "bonus feature" payout, they are entitled to receive a prize if another player's hand achieves the predetermined specific hand. If a player is playing more than one wagering area or if a hand they are playing is split into two or more hands and any one of their hands achieves the predetermined specific hand, their other hand with a qualifying wager is entitled to receive a prize also.

(ii) If a player makes a wager that qualifies for a "share the wealth" payout, they are entitled to receive a prize if their hand(s) or another player's hand(s) achieves the predetermined specific hand.

(3) Card game licensees may use more than one deck of cards for a specific game. They also may remove cards to comply with rules of a specific game, such as Pinochle or Spanish 21.

~~(3)~~ (4) Players must:

(a) Compete against all other players on an equal basis for nonhouse-banked games or against the house for house-banked games. All players must compete solely as a player in the card game, except as authorized in approved card game rules for variations of the game of Pai Gow poker where a player may bank the game every other hand; and

(b) Receive their own hand of cards and be responsible for decisions regarding such hand, such as whether to fold, discard, draw additional cards, or raise the wager; and

(c) Not place wagers on any other player's or the house's hand or make side wagers with other players, except for:

(i) An insurance wager placed in the game of Blackjack; or

(ii) "Envy" or "share the wealth" "bonus features" ((An "envy" or "share the wealth" wager which allows a player to receive a prize if another player wins a jackpot or odds-based wager)); or

(iii) A tip wager made on behalf of a dealer.

(4) ~~(5)~~ Mini-Baccarat is authorized when operated in the manner explained for Baccarat in the most current version of *The New Complete Hoyle, Revised* or *Hoyle's Encyclopedia of Card Games*, or similar authoritative book on card games we have approved, and as further described in the commission approved game rules on our website. However:

(a) Card game licensees may make immaterial modifications to the game; and

(b) Subsection (3) of this section does not apply; and

(c) The number of players is limited under WAC 230-15-055 and only one player may place a wager per wager area.

~~(5)~~ (6) A player's win or loss must be determined during the course of play of a single card game, except for a carryover pot game. A carryover pot is an optional pot that accumulates as the dealer and participating players contribute to the pot. The winner of the pot is not necessarily determined after one game and the pot can be carried over to more than one game. Carryover pots must not carryover more than ten (10) games. Participants must include at least one player and the dealer competing for the highest qualifying winning hand. Game rules must state how the pot is distributed. If the carryover pot has not been won by the tenth game, the dealer will divide it equally between the remaining players still participating in the pot and the house or, if allowed by game rules, only the players still participating in the pot.

Staff Proposed Rule Change

- **Allowing pull-tab prizes of \$20 or less to be added to cash cards used in electronic video pull-tab dispensers.**

November 2013 – Up for Discussion and Possible Filing

ITEM: 9

- a) **Amendatory Section: WAC 230-14-047**
Standards for electronic video pull-tab dispensers.



Proposed Amendment to
WAC 230-14-047 Standards for electronic video pull-tab dispensers.

November 2013 – Up for Discussion and Possible Filing

ITEM 9 (a) on the November 2013 Commission Meeting.	Statutory Authority 9.46.070 & 9.46.110
Who proposed the rule change?	
Staff.	
Proposed Change	
<p>This rule proposal is in response to a recent Thurston County Superior Court decision, where the court directed the Commission to allow a specific electronic video pull-tab dispenser, which permits the purchase of a pull-tab at the dispenser and allows pull-tab winnings of \$20 or less to be added onto a cash card at the dispenser.</p> <p>This amendment adds language to WAC 230-14-047 to allow pull-tab prizes of \$20 or less to be added to cash cards used in electronic video pull-tab dispensers. Most prizes are below \$20.</p> <p>Commission staff's review of this issue began in 2005 and has led to several court proceedings involving many different legal issues. The following is a brief summary of the Commission staff's, Commission's, Administrative Law Judge's (ALJ) and judicial decisions as they related specifically to cash cards used in electronic video pull-tab dispensers:</p> <ul style="list-style-type: none">• In April 2005, the manufacturer requested Commission staff approve an electronic video pull-tab dispenser ("VIP") that would allow winnings of \$20 or less to be put on a cash card. Staff denied the request.• In September 2005, the manufacturer submitted a request to Commission for a declaratory action authorizing the VIP.• In October 2005, the Commissioners referred the matter to an ALJ for an Initial Order.• In May 2006, the ALJ issued his Initial Order and concluded that the VIP was not a gambling device under RCW 9.46.0241, but that the pull-tab dispenser's cash card features violated the Commission's then-current regulations. Both the manufacturer and the Commission staff sought final review by the full Commission.• In August 2006, the Commission upheld the ALJ's determination that the VIP violated the Commission's then-current regulations. The Commission "vacated and specifically disavowed" the ALJ's decision regarding whether the VIP was an illegal gambling device. The Commission, however, did not issue a final decision on this issue having determined that the device violated the regulations.• In August 2007, the Thurston County Superior Court found that cash cards were equivalent to both cash and merchandise and, therefore, were lawful under the Commission's regulations. The Commission appealed this decision to the Court of Appeals.	

- In August 2009, the Court of Appeals held that “substantial evidence did not support the Gambling Commission’s determination that the prepaid cards failed to satisfy the regulatory definition of cash.” The Commission appealed this decision to the Washington Supreme Court.
- In January 2012, the Washington Supreme Court affirmed the lower court’s decision, finding that ZDI met its burden of showing that the Gambling Commission “erred in concluding that the VIP machine violated then-in force regulations.” The Court remanded the matter back to the Commission for proceedings consistent with its opinion.
- In March 2013, the Commission issued a Final Order on Remand adopting the Washington State Supreme Court’s findings with respect to cash cards and determining that the VIP was a gambling device under RCW 9.46.0241. ZDI sought judicial review of this decision.
- In August 2013, the Thurston County Superior Court reversed the Commission’s Final Order on Remand. Among the superior court’s findings, the court concluded that the VIP was not a gambling device under RCW 9.46.0241 and should be allowed. The superior court’s order was entered on October 18, 2013.

Attachments:

- Proposed amendment to WAC 230-14-047 Standards for electronic video pull-tab dispensers.
- Thurston County Superior Court Order dated October 18, 2013 (Order on ZDI’s Second Petition for Judicial Review).
- Supreme Court of Washington Order (page 7 addresses cash cards and cash equivalents).

History of Rule

In 2008, the Commission adopted WAC 230-14-047, which sets out standards for electronic video pull-tab dispensers. At that time, the Commission decided not to adopt language to allow electronic video pull-tab dispensers to add prizes of \$20 or less onto cash cards.

Impact of the Proposed Change

The rule change would allow other manufacturers to develop similar electronic video pull-tab dispensers. It is difficult to predict whether other manufacturers will do so.

Resource Impacts

- Because the feature of allowing pull-tab winnings of \$20 or less to be added onto a cash card is new, we may receive an increased number of questions from the public and may experience an increase in complaints related to the electronic video pull-tab dispensers.
- We will need to incorporate this electronic video pull-tab dispenser into our regulatory program.

Policy Considerations

This rule proposal is consistent with the Thurston County Superior Court’s order, where the court directed the Commission to allow a specific electronic video pull-tab dispenser that allows pull-tab winnings of \$20 or less to be put onto a cash card at the dispenser.

Stakeholder Statements Supporting the Proposed Rule Change

None.

Stakeholder Statements Opposing the Proposed Rule Change

None.

Licensees Directly Impacted By the Change

Licensed manufacturers, distributors, and pull-tab operators.

Staff Recommendation

File for further discussion.

Effective Date

31 days from filing the adopted rule change.

Amendatory Section:

WAC 230-14-047 Standards for electronic video pull-tab dispensers.

Electronic video pull-tab dispensers must be approved by us prior to use, meet the requirements below, and may incorporate only the features below and not perform additional functions.

- (1) Electronic video pull-tab dispensers must dispense a paper pull-tab as defined in WAC 230-14-010 and follow the rules for:
 - (a) Pull-tabs; and
 - (b) Flares; and
 - (c) Authorized pull-tab dispensers.
- (2) Electronic video pull-tab dispensers that use a reading and displaying function must:
 - (a) Use a video monitor for entertainment purposes only; and
 - (b) Open all, or a portion of, the pull-tab in order to read encoded data that indicates the win or loss of the pull-tab if the dispenser is equipped to automatically open pull-tabs; and
 - (c) Dispense the pull-tab to the player and not retain any portion of the pull-tab; and
 - (d) Read the correct cash award from the pull-tab either when it is dispensed or when the pull-tab is reinserted into the dispenser; and
 - (e) Display the cash award from the pull-tab, one pull-tab at a time; and
 - (f) Provide:
 - (i) An electronic accounting of the number of pull-tabs dispensed; and
 - (ii) A way to identify the software version and name; and
 - (iii) A way to access and verify approved components; and
 - (iv) Security on the dispenser to prevent unauthorized access to graphic and prize amount displays.
- (3) ~~((Gift certificates or gift))~~ Cash cards used in electronic video pull-tab dispensers must:
 - (a) Be purchased with cash, check, gift certificates, gift cards or electronic point-of-sale bank transfer before use in the dispenser; and
 - (b) Be convertible to cash at any time during business hours; and
 - (c) Subtract the cash value for the purchase of the pull-tab one pull-tab at a time.
- (4) Electronic video pull-tab dispensers that accept cash cards may award any pull-tab cash prize of twenty dollars or less onto the cash card.

3

FILED
SUPERIOR COURT
CLATSOP COUNTY, WA

2013 OCT 18 AM 8:49

BETTY J. GOULD, CLERK

1 EXPEDITE
2 No Hearing Set
3 Hearing is Set
4 The Honorable Gary Tabor

7 STATE OF WASHINGTON
8 THURSTON COUNTY SUPERIOR COURT

9 ZDI GAMING, INC.,

NO. 06-2-02283-9

10 Petitioner,

ORDER ON ZDI'S SECOND
PETITION FOR JUDICIAL REVIEW

11 v.

12 THE STATE OF WASHINGTON, by
13 and through the WASHINGTON
STATE GAMBLING COMMISSION,

14 Respondent.

15 On August 16th, 2013, the above captioned matter came before the Court for hearing
16 on ZDI Gaming, Inc.'s Second Petition for Judicial Review. ZDI Gaming, Inc. appeared by
17 and through its attorney of record Joan K. Mell of III Branches Law, PLLC. The State of
18 Washington, by and through the Washington State Gambling Commission (the "Commission")
19 appeared by and through its attorneys of record the Attorney General of Washington Robert W.
20 Ferguson, and Assistant Attorney General Callie A. Castillo. The Court heard oral argument
21 and considered the administrative record, the opening and reply briefs of ZDI Gaming, Inc.,
22 and the responsive brief of the Commission.
23

24 The Court deeming itself fully advised enters the following order:

25 1.1 ZDI Gaming, Inc.'s second petition for judicial review is granted.
26

1 1.2 ZDI's electronic video pull-tab dispenser upgraded with cash card features that (1)
2 permit the purchase of a pull-tab at the dispenser and (2) allow for any pull-tab prize of \$20 or
3 less to be added to the cash card at the dispenser is allowed (hereinafter "ZDI's VIP").

4 1.3 The Commission did not comply with the Administrative Procedure Act ("APA"),
5 RCW 34.05.464(4) and .570(3)(f) when it did not decide all issues requiring resolution by the
6 agency upon ZDI's petition for declaratory relief. Specifically, the Commission erred as a
7 matter of law when it failed to decide the issue of whether ZDI's VIP was a gambling device in
8 its August 2006 Final Order.
9

10 1.4 The Commission engaged in unlawful procedure or decision-making process under the
11 APA, RCW 34.05.570(3)(c), when it considered the issue of whether ZDI's VIP was a
12 gambling device in 2012.
13

14 1.5 The Commission's determination in its 2012 Final Order on Remand that ZDI's VIP is
15 a gambling device under RCW 9.46.0241 is vacated as outside the statutory authority of the
16 agency under the APA, RCW 34.05.570(3)(b), and as an erroneous interpretation or
17 application of the law under the APA, RCW 34.05.570(3)(d). The portion of the
18 Administrative Law Judge's Initial Declaratory Order determining that ZDI's VIP is not a
19 gambling device is reinstated as the correct application of the law. ZDI's VIP is not a
20 gambling device under RCW 9.46.0241. ZDI's VIP is not prohibited under the Gambling Act,
21 RCW 9.46, or the Commission's regulations.
22

23 1.6 The Commission is ordered to allow ZDI's VIP for manufacturing, distribution, and use
24 in the State.

25 ///

26 ///

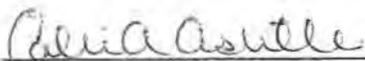
1 1.7 ZDI Gaming, Inc. shall be awarded its fees and costs incurred from the date of filing its
2 petition under the Equal Access to Justice Act in the amount of \$8,316.60.

3 Dated this 18 day of Oct, 2013.

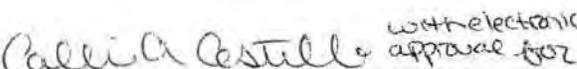
4
5 
6 THE HONORABLE GARY TABOR
7

8 Presented by:

9 ROBERT W. FERGUSON
10 Attorney General

11 
12 CALLIE A. CASTILLO, WSBA #38214
13 Assistant Attorney General
14 Attorneys for Respondent

15 Approved as to form:

16 
17 JOAN K. MELL, WSBA #21319
18 III Branches Law, PLLC
19 Attorney for ZDI Gaming, Inc.
20
21
22
23
24
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173 Wash.2d 608
Supreme Court of Washington,
En Banc.

ZDI GAMING, INC., Respondent,
v.
The STATE of Washington by and through the
WASHINGTON STATE GAMBLING
COMMISSION, Petitioner.

No. 83745-7. | Argued Nov. 16, 2010. | Decided Jan.
12, 2012. | As Corrected March 20, 2012. |
Reconsideration Denied March 21, 2012.

Synopsis

Background: Gaming supply distributor sought review of state Gambling Commission's denial of application for permission to distribute electronic pull-tab machine incorporating cash card technology. After the Superior Court, Pierce County, Bryan Chushcoff, J., transferred venue of case, the Superior Court, Thurston County, Christine A. Pomeroy, J., reversed and awarded attorney fees to distributor. Both parties appealed. The Court of Appeals, 151 Wash.App. 788, 214 P.3d 938, affirmed in part and remanded. Review was granted.

Holdings: The Supreme Court, en banc, Chambers, J., held that:

^[1] statute providing that court in single state county had jurisdiction over proceedings against state Gambling Commission did not limit subject matter jurisdiction to single state county in violation of state constitution, and

^[2] electronic pull-tab machine that allowed player to purchase pull-tabs from machine using prepaid card and that either credited player's pull-tab winnings on to card or directed player to an employee of gaming establishment to receive payment did not violate former regulation requiring that pull-tab player receive winnings in cash or merchandise.

Affirmed.

J.M. Johnson, J., filed dissenting opinion in which Barbara A. Madsen, C.J., Mary E. Fairhurst, J., and Gerry Alexander, Justice Pro Tem, joined.

West Headnotes (11)

iii Gaming

←Licenses and taxes

Statute providing that court in single state county had jurisdiction over proceedings against state Gambling Commission did not limit subject matter jurisdiction to single state county in violation of provision of state constitution precluding subject matter jurisdictional restrictions as among state superior courts, as statute related to venue rather than to subject matter jurisdiction. West's RCWA Const. Art. 4, § 6; West's RCWA 9.46.095.

[2] Courts

←Washington

Provision of state constitution vesting superior court with original jurisdiction in all cases in which jurisdiction was not vested exclusively in some other court precludes any subject matter restrictions as among superior courts. West's RCWA Const. Art. 4, § 6.

2 Cases that cite this headnote

[3] Courts

←Grounds and essentials of jurisdiction

"Jurisdiction" is the power and authority of the court to act.

1 Cases that cite this headnote

[4] Courts

←Jurisdiction of Cause of Action

"Subject matter jurisdiction" is a particular type

of jurisdiction, and it critically turns on the type of controversy; if the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.

1 Cases that cite this headnote

^[9] **Venue**
↔ Nature and necessity of venue in action

“Venue” denotes the setting, location, or place where the power to adjudicate is to be exercised, that is, the place where the suit may or should be heard.

^[6] **Venue**
↔ Nature and necessity of venue in action

If a court has jurisdiction over the subject matter of a controversy, it need not exercise that authority if venue lies elsewhere.

^[7] **Venue**
↔ Nature and necessity of venue in action

Court need not dismiss case for improper venue, even if the statute of limitations lapses before the defect in venue is discovered.

^[8] **Constitutional Law**
↔ Presumptions and Construction as to Constitutionality

Court interprets statutes as constitutional if possible.

1 Cases that cite this headnote

^[9] **Courts**
↔ Washington
Venue
↔ Constitutional and statutory provisions

Legislature may impose limitations on venue, but not upon subject matter or original jurisdiction, of individual superior courts. West’s RCWA Const. Art. 2, § 26, Art. 4, § 6.

1 Cases that cite this headnote

^[10] **Gaming**
↔ Prizes or premiums

Electronic pull-tab machine that allowed player to purchase pull-tabs from machine using prepaid card and that either credited player’s pull-tab winnings on to card or directed player to an employee of gaming establishment to receive payment did not violate former regulation requiring that pull-tab player receive winnings in cash or merchandise; card was functionally equivalent to cash in that card could be immediately converted into cash currency at establishment where player was playing. WAC 230–12–050 (2003).

^[11] **Administrative Law and Procedure**
↔ Scope
Administrative Law and Procedure
↔ Limitation of scope of review in general

In reviewing decision of administrative agency, Supreme Court reviews the agency record directly and shows all due deference to that agency.

Attorneys and Law Firms

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Opinion

****931** CHAMBERS, J.

***611** ¶ 1 This case was filed in a county other than where it was to be adjudicated. We are asked today to decide whether, as a consequence, the case will not be ***612** heard. We conclude that the proper forum is a question of venue, not the subject matter jurisdiction of superior courts. We affirm the Court of Appeals. *ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 151 Wash.App. 788, 214 P.3d 938 (2009).

FACTS

¶ 2 For many years ZDI Gaming Inc., a family owned business, has provided “just about anything to do with the gambling industry in the state of Washington.” Administrative Record (AR) at 410 (quoting Verbatim Report of Proceedings (VRP) at 88); Clerk’s Papers (CP) at 18. This includes distributing pull-tabs and pull-tab machines. A pull-tab machine is a fairly modern gaming device. A traditional pull-tab involves a paper ticket containing a series of windows that hide numbers or symbols. The player “opens one of the windows to reveal the symbols below to determine if the ticket is a winner.” CP at 1026. If the ticket’s combination of numbers or symbols matches those listed on a sheet called a “flare” as a winning ticket, the ticket’s purchaser is entitled to a prize. *Id.* Modern pull-tab machines can both dispense and read pull-tab tickets and can produce sounds and displays mimicking electronic slot machines.

¶ 3 In 1973, when gambling was legalized in Washington State, the legislature declared pull-tabs, along with certain other games of chance, would be authorized, but “closely controlled.” Laws of 1973, ch. 218, § 1 (currently codified as RCW 9.46.010); AR at 410. Accordingly, the Washington State Gambling Commission (Gambling Commission) has heavily regulated pull-tabs and pull-tab machines. E.g., former WAC 230-02-412(2) (2001); former WAC 230-08-017 (2003), former WAC 230-12-050 (2003); former WAC 230-08-010(2) (2004).

¶ 4 Historically, and broadly in the context of games of chance, the commission prohibited giving gifts or extending ***613** credit to players for the purposes of gambling. Former WAC 230-12-050. Accordingly, players were required to pay the consideration “required to participate in the gambling activity ... in full by cash, check, or electronic point-of-sale bank transfer, prior to participation,” with some exceptions not relevant here. Former WAC 230-12-050(2). The Gambling Commission also had required a pull-tab player to receive winnings “in cash or in merchandise.” Former WAC 230-30-070(1) (2001).

¶ 5 ZDI Gaming distributes the VIP (video interactive display) machine, an electronic pull-tab machine featuring a video display screen, a currency bill acceptor, and (in later version) a cash card acceptor, all housed in a decorative cabinet. ZDI Gaming intentionally designed the current VIP machine to resemble a video slot machine and programmed it to use the same “attractor” sounds used to lure players. Players see rows of spinning characters that ultimately line up and stop in winning or losing combinations. The version of the machine at issue allows a player to purchase pull-tabs from the machine itself using a prepaid card. The VIP machine credits pull-tab winnings of \$20 or less back to the card. If a player wins more than \$20, the VIP machine directs the player to an employee to receive payment. A player who stops playing the VIP machine with a balance on the card can use it to purchase food, drink, merchandise, or turn it in for cash at the establishment featuring the VIP machine.

¶ 6 An earlier version of the VIP machine was approved by the Gambling Commission in 2002. However, once the cash card acceptor was added to the machine, things became more complicated. While initially, it appears Gambling Commission employees were “optimistic” that such technology would be approved, once they understood that a player’s winnings would be credited directly back onto the card itself, they became concerned. AR at 14. After working with Gambling Commission staff for some time, ZDI Gaming submitted a formal application to the Gambling Commission ***614** requesting permission to distribute the new VIP machine, with the cash card acceptor, in Washington. After the assistant director of licensing operations ****932** formally denied the application, ZDI Gaming filed a petition for declaratory relief with the Gaming Commission. An administrative law judge (ALJ) agreed with ZDI Gaming that the VIP machines did not violate gambling statutes. However, he found the machines extended credit and allowed gambling without prepayment by “‘cash, check, or electronic point-of-sale bank transfer,’ ” violating then-operative regulations. AR at 419, 423 (citing former WAC

230–12–050). ZDI Gaming strenuously contended the cash card utilized by its VIP machine was functionally equivalent to cash. The ALJ rejected the argument, reasoning that the “difficulty with a cash card is that it’s only valid at one location. It is impossible to take the cash card from the Buzz Inn to a local Harley Davidson dealer and purchase a new helmet.... [C]ash cards are not cash because they require an additional step on the part of the consumer to utilize in any other location.” AR at 420–21. The ALJ also found that the VIP machine violated a regulation that required that all prizes be in either cash or merchandise. AR at 422–23 (citing former WAC 230–30–070).¹ On August 10, 2006, the full Gambling Commission issued a final declaratory order upholding the ALJ’s decision that the VIP machine violated the regulations, though it disavowed the ALJ’s decision that the machine complied with the statutory requirements as superfluous. AR at 961–93.

¹ Perhaps presciently, the ALJ noted that “[t]he Commission was justified in denying approval for the equipment based on violation of the above regulations but has the inherent authority to revise the rules to better comport with the modern realities of the industry if it elects to do so.” AR at 423–24. Since then, many of these rules have been revised.

¶ 7 On September 11, 2006, ZDI Gaming filed a petition for judicial review in Pierce County Superior Court challenging the validity of the rules the ALJ and the Gambling Commission found it had violated. Ten days later, the State informed ZDI Gaming that, in its view, RCW 9.46.095 *615 granted exclusive jurisdiction of the matter to the Thurston County Superior Court and suggested that it may wish to withdraw its petition from Pierce County and file in Thurston County before the statute of limitations would run on October 4, 2006. The State told ZDI Gaming that it would otherwise move to dismiss the case for want of jurisdiction after October 4, 2006.² ZDI Gaming declined, and the State so moved. Noting that sometimes “when the Legislature uses the word ‘jurisdiction,’ it really mean[s] ‘venue.’” Judge Chushcoff denied the State’s motion to dismiss, but did transfer the case to the Thurston County Superior Court. VRP (Dec. 1, 2006) at 5; CP at 8, 17.³

² We are mindful of the fact that the State has acted forthrightly by bringing this issue to ZDI Gaming’s attention.

³ Judge Chushcoff also observed, with a great deal of insight, that “sometimes when the state Supreme Court uses the word ‘jurisdiction,’ they mean something else.” VRP (Dec. 1, 2006) at 5.

¶ 8 The Thurston County Superior Court reversed the Gambling Commission. It found that cash cards were the equivalent to both cash and merchandise and thus lawful under the regulations. The court denied the Gambling Commission’s motion for reconsideration, remanded the case to the Gambling Commission for action, and awarded ZDI Gaming \$18,185 in attorney fees under the equal access to justice act, RCW 4.84.350, which was less than ZDI Gaming had sought.

¶ 9 Both parties appealed. The Court of Appeals affirmed in part, holding that the Pierce County Superior Court had subject matter jurisdiction over the appeal under the Administrative Procedure Act, ch. 34.05 RCW, and that substantial evidence did not support the Gambling Commission’s determination that the prepaid cards failed to satisfy the regulatory definition of “cash.” *ZDI Gaming*, 151 Wash.App. at 795, 214 P.3d 938. The court remanded the case to the Thurston County Superior Court, directing it to reconsider its decision to exclude fees that ZDI Gaming spent responding to the Gambling Commission’s motion to dismiss. *Id.* at 812, 214 P.3d 938. *616 The State petitioned for review, contending that the use of the word “jurisdiction” in RCW 9.46.095 was unambiguous, that the courts below erred in concluding that “cash” included cash cards, and that the Court of Appeals shifted the burden of proof to the Gambling Commission. ZDI **933 Gaming answered the petition and sought review of the attorney fee award. We granted the State’s petition for review and denied ZDI Gaming’s request for review of the attorney fee issue. *ZDI Gaming, Inc. v. Wash. State Gambling Comm’n*, 168 Wash.2d 1010, 227 P.3d 853 (2010).

ANALYSIS

[1] [2] ¶ 10 Whether Pierce County Superior Court had subject matter jurisdiction over this case is controlled by *Shoop v. Kittitas County*, 149 Wash.2d 29, 37, 65 P.3d 1194 (2003). “[A]rticle IV, section 6 of the Washington Constitution ... states in relevant part: ‘The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court [.]’ That provision precludes any subject matter restrictions as among superior courts.” *Id.*

¶ 11 Among other things, jurisdiction is a fundamental building block of law. Our state constitution uses the term “jurisdiction” to describe the fundamental power of courts

to act. Our constitution defines the irreducible jurisdiction of the supreme and superior courts. It also defines and confines the power of the legislature to either create or limit jurisdiction. See WASH. CONST. art. IV, § 4 (defining the power of the supreme court), § 6 (defining the power of the superior courts), § 30(2) (explicitly giving the legislature the power to provide for jurisdiction of the court of appeals). Our constitution recognizes and vests jurisdiction over many types of cases in the various courts of this State. WASH. CONST. art. IV, §§ 1, 4, 6, 30. Superior courts have original jurisdiction in the categories of cases listed in the constitution, which the legislature cannot take away. *617 WASH. CONST. art. IV, § 6; *State v. Werner*, 129 Wash.2d 485, 496, 918 P.2d 916 (1996) (quoting *Blanchard v. Golden Age Brewing Co.*, 188 Wash. 396, 415, 63 P.2d 397 (1936)). As we ruled long ago, “Any legislation, therefore, the purpose or effect of which is to divest, in whole or in part, a constitutional court of its constitutional powers, is void as being an encroachment by the legislative department upon the judicial department.” *Blanchard*, 188 Wash. at 415, 63 P.2d 397. The legislature can, however, expand and shape jurisdiction, consistent with our constitution. WASH. CONST. art. IV, § 6; *Dougherty v. Dep’t of Labor & Indus.*, 150 Wash.2d 310, 316–17, 76 P.3d 1183 (2003). But *Dougherty*, *Shoop*, and *Young v. Clark*, 149 Wash.2d 130, 134, 65 P.3d 1192 (2003), all reject the principle that all procedural requirements of superior court review are jurisdictional. E.g., *Dougherty*, 150 Wash.2d at 316, 76 P.3d 1183. Simply put, the existence of subject matter jurisdiction is a matter of law and does not depend on procedural rules. 14 KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 3.1, at 20 (2d ed.2009).

¶ 12 The term “jurisdiction” is often used to mean something other than the fundamental power of courts to act. The current edition of *Black’s Law Dictionary* devotes six pages to different types of jurisdiction, ranging from agency jurisdiction to voluntary jurisdiction, touching on equity jurisdiction, in rem jurisdiction, and spatial jurisdiction, along with many others. BLACK’S LAW DICTIONARY 927–32 (9th ed.2009). Sometimes “jurisdiction” means simply the place or location where a judicial proceeding shall occur. Where jurisdiction describes the forum or location of the hearing, it is generally understood to mean venue. See, e.g., *Werner*, 129 Wash.2d 485, 918 P.2d 916.

[3] [4] ¶ 13 In *Dougherty*, 150 Wash.2d 310, 76 P.3d 1183, we discussed the important distinction between jurisdiction and venue. “Jurisdiction ‘is the power and authority of the court to act.’ ” *Id.* at 315, 76 P.3d 1183 (citing 77 AM. JUR.2d *Venue* § 1, at 608 (1997)). Subject

matter jurisdiction is a particular type of jurisdiction, and it critically turns on “the ‘type of controversy.’ ” *618 *Id.* at 316, 76 P.3d 1183 (quoting *Marley v. Dep’t of Labor & Indus.*, 125 Wash.2d 533, 539, 886 P.2d 189 (1994)). “ ‘If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction.’ ” * *Marley* 125 Wash.2d at 539, 886 P.2d 189 (quoting Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on **934 Appeal: Reining in an Unruly Horse*, 1988 BYU L. REV. 1, 28 (1988)).

[5] [6] [7] ¶ 14 By contrast, as we explained in *Dougherty*, rather than touching on the power or authority of courts to act on certain subjects, venue denotes the setting, location, or place “ ‘where the power to adjudicate is to be exercised, that is, the place where the suit may or should be heard.’ ” *Dougherty*, 150 Wash.2d at 316, 76 P.3d 1183 (quoting 77 AM. JUR. 2d, *Venue* § 1, at 608). As we explained in *Dougherty*, if a court has jurisdiction over the subject matter of the controversy, it need not exercise that authority if venue lies elsewhere. *Id.* at 315, 76 P.3d 1183 (citing *Indus. Addition Ass’n v. Comm’r of Internal Revenue*, 323 U.S. 310, 315, 65 S.Ct. 289, 89 L.Ed. 260 (1945)). Nor need it dismiss the case even if the statute of limitations lapses before the defect is discovered. *Id.* (citing *Indus. Addition Ass’n*, 323 U.S. at 315, 65 S.Ct. 289 (noting that “[w]here petition timely filed in circuit court as required by statute but in wrong venue, case need not be dismissed but can be transferred to circuit court with proper venue”)).

¶ 15 With these principles in mind, we turn to the statute before us. It says:

No court of the state of Washington other than the superior court of Thurston county shall have jurisdiction over any action or proceeding against the commission or any member thereof for anything done or omitted to be done in or arising out of the performance of his or her duties under this title: PROVIDED, That an appeal from an adjudicative proceeding involving a final decision of the commission to deny, suspend, or revoke a license shall be governed by chapter 34.05 RCW, the Administrative Procedure Act.

*619 RCW 9.46.095. Read as the State would have us read it, this statute violates article IV, section 6 because it would limit the original jurisdiction of the superior court bench

county by county. *Contra Dougherty*, 150 Wash.2d at 317, 76 P.3d 1183; *Shoop*, 149 Wash.2d at 37, 65 P.3d 1194; *Young*, 149 Wash.2d at 134, 65 P.3d 1192 (finding that reading former RCW 4.12.020(3) (1941) to relate to jurisdiction rendered it unconstitutional). Just as our constitution does not allow the legislature to decree that only King County judges have subject matter jurisdiction to hear child dependency actions or that only Pend Oreille County judges have subject matter jurisdiction to hear shareholder derivative actions, our constitution does not allow the legislature to decree that only Thurston County judges have subject matter jurisdiction to hear cases involving the Gambling Commission. If RCW 9.46.095 restricts the original jurisdiction of the superior court to one county, it is unconstitutional.

¹⁸ ¶ 16 We interpret statutes as constitutional if we can, and here we can. The legislature wanted to have cases involving the Gambling Commission heard in Thurston County. By interpreting the word “shall” to be permissive, RCW 9.46.095 relates to venue, not jurisdiction. *Cf. In re Elliott*, 74 Wash.2d 600, 607, 446 P.2d 347 (1968) (interpreting the legislature’s use of the term “shall” as permissive to save the constitutionality of an otherwise unconstitutional statute).⁴ We therefore hold that the statute establishes the proper venue for judicial review of cases involving the Gaming Commission ruling in Thurston County.

⁴ Interpreting jurisdiction as venue is precisely what the Pierce County Superior Court and the Court of Appeals did below. *ZDI Gaming*, 151 Wash.App. at 801, 214 P.3d 938; VRP (Dec. 1, 2006) at 14 (“I do think that although the word ‘jurisdiction’ is used here, the effective meaning of this is as a venue matter.... I will order that the venue be changed to Thurston County.”).

¶ 17 We recognize that here, the superior court was sitting in its appellate capacity. Our constitution suggests, and our cases have from time to time assumed, that the legislature has greater power to sculpt the appellate jurisdiction of the individual superior courts. *See* *620 WASH. CONST. art. IV, § 6 (“The superior court.... shall have such appellate jurisdiction in cases arising in justices’ and other inferior courts in their respective counties as may be prescribed by law.”). But whether or not the appellate jurisdiction of the superior court can be limited county by county, the simple fact is, *original jurisdiction may not be*. *Werner*, 129 Wash.2d at 494, 918 P.2d 916; *Shoop*, 149 Wash.2d at 37, 65 P.3d 1194 (citing WASH. **935 CONST. art. IV, § 6). Again, as we held in *Shoop*, “[t]hat provision precludes any subject matter restrictions as among the superior courts.” 149 Wash.2d at 37, 65 P.3d 1194 (emphasis added).

ARTICLE II, § 26

¹⁹ ¶ 18 The State contends that under article II, section 26 of the Washington State Constitution, the legislature has the authority to limit trial court jurisdiction to consider suits against the State. That provision says that “[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.” CONST. art. II, § 26. It is true that prior to the general legislative abolition of sovereign immunity, we held that the legislature could limit which county could hear suits brought against the State under one of the more limited waivers, and often couched the legislature’s power in terms of the court’s jurisdiction. *See, e.g., State ex rel. Thielicke v. Superior Court*, 9 Wash.2d 309, 311–12, 114 P.2d 1001 (1941); *State ex rel. Shomaker v. Superior Court*, 193 Wash. 465, 469–70, 76 P.2d 306 (1938); *State ex rel. Pierce County v. Superior Court*, 86 Wash. 685, 688, 151 P. 108 (1915); *Nw. & Pac. Hypotheek Bank v. State*, 18 Wash. 73, 50 P. 586 (1897). The classic formulation appears in *Pierce County*:

the state being sovereign, its power to control and regulate the right of suit against it is plenary; it may grant the right or refuse it as it chooses, and when it grants it may annex such condition thereto as it deems wise, and no person has power to question or gainsay the conditions annexed.

Pierce County, 86 Wash. at 688, 151 P. 108; *see also Thielicke*, 9 Wash.2d at 311–12, 114 P.2d 1001 (“when a suit against the state is commenced in a *621 superior court outside Thurston county, such court does not have jurisdiction over the action”).

¶ 19 But in 1961, the Washington State Legislature abolished sovereign immunity. LAWS OF 1961, ch. 136, § 1, codified as RCW 4.92.090. We have recognized that in so doing, the State intended to repeal all vestiges of the shield it had at common law. *See Hunter v. N. Mason High Sch.*, 85 Wash.2d 810, 818, 539 P.2d 845 (1975); *Cook v. State*, 83 Wash.2d 599, 613–17, 521 P.2d 725 (1974) (Utter, J., concurring). We noted long ago that the waiver of sovereign immunity was “unequivocal” and abolished special procedural roadblocks placed in the way of claimants against the State. *Hunter*, 85 Wash.2d at 818, 539 P.2d 845 (striking a 120 day nonclaims statute that effectively operated as a statute of limitations). Simply put, the State may not create procedural barriers to access to the superior courts favorable to it based upon a claim of immunity it has unequivocally waived.

¶ 20 Article II, section 26 and article IV, section 6 may be harmonized. In order to give effect to both, we hold that the legislature can sculpt the venue, but not the subject matter or original jurisdiction, of the individual superior courts in this State.

CASH CARDS AND CASH EQUIVALENTS

¶ 21 We must decide whether the agency erred in concluding that the VIP machine violated these repealed regulations. We sit in much the same position as the trial court, reviewing the agency record directly and showing all due deference to that agency. *Ingram v. Dep't of Licensing*, 162 Wash.2d 514, 521–22, 173 P.3d 259 (2007). As the challenger, ZDI Gaming bears the burden of demonstrating that the agency erred. RCW 34.05.570(1)(a). We conclude it has met that burden.

¶ 22 ZDI Gaming argues that its cash card is the functional equivalent of cash and that “[d]efining cash to *622 exclude cash equivalents was an abuse of discretion because cash equivalents are commonly accepted forms of cash.” Suppl. Br. of Resp’t at 7. One can find several definitions of “cash” in dictionaries: *Black’s Law Dictionary* and *The American Edition of the Oxford Dictionary*. AR at **936 420. *Black’s* defines “cash” as “1. Money or its equivalent. 2. Currency or coins, negotiable checks, and balances in bank accounts.” BLACK’S, *supra*, at 245. According to the ALJ, “[t]he American Edition of the Oxford Dictionary defines cash as ‘money in coins or bills, as distinct from checks or orders.’ ” AR at 420 (quoting THE OXFORD DICTIONARY AND THESAURUS, AMERICAN EDITION (1996)).

¶ 23 If a player wins more than \$20 on a VIP machine, the machine directs the player to an employee of the establishment to receive cash, food, drink, or merchandise, and a player who stops playing can similarly immediately receive cash or the credits to make purchases from the gaming establishment. While we agree with the State that an extra step is required to convert the cash card to cash, the step is de minimis. Unlike gift certificates, coupons, or rebates, the player does not have to travel or wait to receive cash. Because the cash card can be immediately converted into cash currency at the establishment where the player is playing, the VIP cash card is functionally equivalent to cash.

¶ 24 ZDI Gaming’s request for attorney fees under RAP 18.1 is denied as untimely.

CONCLUSION

¶ 25 Despite its invocation of the word “jurisdiction,” we find that RCW 9.46.010 is a venue statute and that the courts below properly considered ZDI Gaming’s suit. We find that ZDI Gaming has met its burden of showing the Gambling Commission erred in concluding that the VIP *623 machine violated then-in force regulations. Accordingly, we affirm.

WE CONCUR: CHARLES W. JOHNSON, SUSAN OWENS, and DEBRA L. STEPHENS, Justices, RICHARD B. SANDERS, Justice Pro Tem.

J.M. JOHNSON, J. (dissenting).

¶ 26 In contrast to the majority’s view, the question in this case is whether the Washington State Constitution prohibits the legislature from adopting a statute granting exclusive jurisdiction to Thurston County Superior Court to review appeals of certain decisions of the Washington State Gambling Commission (Commission). RCW 9.46.095 limits the superior court’s appellate jurisdiction rather than its original jurisdiction. Additionally, sovereign immunity concerns attach where the state or one of its agencies is named as a party to the suit. I would hold that RCW 9.46.095 does not violate the grant of general jurisdiction to superior courts found in article IV, section 6 of the Washington Constitution, and thus dissent.

¶ 27 RCW 9.46.095 expressly grants Thurston County Superior Court exclusive jurisdiction to review the decisions of the Commission and provides that “[n]o court of the state of Washington other than the superior court of Thurston county shall have *jurisdiction* over any action or proceeding against the [C]ommission.” (Emphasis added.) The Commission denied the application of ZDI Gaming Inc. to distribute its VIP (video interactive display) electronic pull tab machine. ZDI Gaming filed in Pierce County Superior Court to seek review. I would hold that Pierce County Superior Court lacked subject matter jurisdiction and dismiss the case.

1. The History of Gambling in Washington

¶ 28 I begin my analysis by briefly noting the history of gambling in Washington State. In 1889, our state constitution *624 originally provided that “[t]he legislature

shall never authorize any lottery” WASH. CONST. art. II, § 24 (orig.text) (emphasis added), *amended by* WASH. CONST. amend. 56. In subsequent cases, we interpreted the term “lottery” broadly to encompass virtually any game involving “‘prize, chance and consideration’” so long as it did not involve “‘any substantial degree of skill or judgment’” *State ex rel. Evans v. Bhd. of Friends*, 41 Wash.2d 133, 150, 247 P.2d 787 (1952) (quoting *State v. Coats*, 158 Or. 122, 132, 74 P.2d 1102 (1938)).

¶ 29 In 1972, the people of the state of Washington amended the state constitution to remove this broad and absolute prohibition. WASH. CONST. amend. 56. The amended article II, section 24 permitted lotteries, but only where affirmatively approved by a supermajority (i.e., 60 percent) of the legislature. **937 Wash. Const. art. II, § 24. In light of this new constitutional authority, the legislature enacted the gambling act of 1973, chapter 9.46 RCW. Though the gambling act now authorizes some forms of gaming, it expressly recognizes the potential dangers presented by legalized gambling and requires that all such activities be “closely controlled....” RCW 9.46.010. Within this context, I turn to the issue presented.

2. Subject Matter Jurisdiction over Claims against the Commission

¶ 30 With respect to subject matter jurisdiction, the proper standard of review is de novo. “Whether a court has subject matter jurisdiction is a question of law reviewed de novo.” *Dougherty v. Dep’t of Labor & Indus.*, 150 Wash.2d 310, 314, 76 P.3d 1183 (2003) (citing *Crosby v. Spokane County*, 137 Wash.2d 296, 301, 971 P.2d 32 (1999)).

¶ 31 The term “subject matter jurisdiction” refers to the power of a court to hear a case. *Morrison v. Nat’l Austl. Bank Ltd.*, — U.S. —, 130 S.Ct. 2869, 2877, 177 L.Ed.2d 535 (2010). The subject matter jurisdiction of the superior courts comes from either the Washington Constitution or *625 the State’s legislature. WASH. CONST. art. IV, § 6 (establishing jurisdiction of superior courts and authorizing jurisdiction “as may be prescribed by law”); *see also Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 165 Wash.2d 275, 295, 197 P.3d 1153 (2008) (stating that the legislature may confer limited appellate review of administrative decisions to the superior courts); *Dougherty*, 150 Wash.2d at 314, 76 P.3d 1183 (describing legislation that grants appellate jurisdiction to the superior courts); *Bellingham Bay Imp. Co. v. City of New Whatcom*, 20 Wash. 53, 63, 54 P. 774 (holding that an act conferring appellate review of administrative decisions to the superior courts did not violate the Washington Constitution), *aff’d*

on reh’g, 20 Wash. 231, 55 P. 630 (1898). The Washington Constitution distinguishes between two types of subject matter jurisdiction: “original jurisdiction” and “appellate jurisdiction.” *See* WASH. CONST. art. IV, § 6. An appeal from an administrative agency invokes a superior court’s appellate jurisdiction. *Skinner v. Civil Serv. Comm’n*, 168 Wash.2d 845, 850, 232 P.3d 558 (2010). “Because an appeal from an administrative body invokes the superior court’s appellate jurisdiction, ‘all statutory requirements must be met before jurisdiction is properly invoked.’” *Id.* at 850, 232 P.3d 558 (internal quotation omitted) (quoting *Fay v. Nw. Airlines, Inc.*, 115 Wash.2d 194, 197, 796 P.2d 412 (1990)).

¶ 32 In addition to these broad jurisdictional considerations, special sovereign immunity concerns attach where the state or one of its agencies is named as a party to the suit as well. The state constitution provides that “[t]he legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state.” WASH. CONST. art. II, § 26. “It may be said without question that an action cannot be maintained against the state without its consent.... Since the state, as sovereign, must give the right to sue, it follows that it can prescribe the limitations upon that right.” *O’Donoghue v. State*, 66 Wash.2d 787, 789, 405 P.2d 258 (1965). As we said regarding article II, section 26:

*626 “the state being sovereign, its power to control and regulate the right of suit against it is plenary; it may grant the right or refuse it as it chooses, and when it grants it may annex such condition thereto as it deems wise, and no person has power to question or gainsay the conditions annexed.”

State ex rel. Shomaker v. Superior Court, 193 Wash. 465, 469–70, 76 P.2d 306 (1938) (quoting *State ex rel. Pierce County v. Superior Court*, 86 Wash. 685, 688, 151 P. 108 (1915)). For these reasons, if the State chooses to subject itself to suit exclusively in Thurston County, then “when a suit against the state is commenced in a superior court outside of Thurston [C]ounty, such court does not have jurisdiction over the action.” *State ex rel. Thielicke v. Superior Court*, 9 Wash.2d 309, 311–12, 114 P.2d 1001 (1941).

¶ 33 Thurston County Superior Court possesses exclusive appellate jurisdiction over challenges to the decisions of the Commission. The Washington State gambling act provides:

**938 *No court of the state of Washington other than the superior court of Thurston county shall have jurisdiction over any action or proceeding against the commission or any member thereof for anything done or*

omitted to be done in or arising out of the performance of his or her duties under this title: PROVIDED, That an appeal from an adjudicative proceeding involving a final decision of the commission to deny, suspend, or revoke a license shall be governed by chapter 34.05 RCW, the Administrative Procedure Act.

RCW 9.46.095 (emphasis added).¹ ZDI Gaming challenged the Commission's action in Pierce County Superior Court. *627 Due to the legislature's exclusive grant of jurisdiction to the superior court of Thurston County, the Pierce County Superior Court lacked subject matter jurisdiction over ZDI Gaming's appeal of the Commission's decision. "When a court lacks subject matter jurisdiction, dismissal is the only permissible action the court may take." *Shoop v. Kittitas County*, 149 Wash.2d 29, 35, 65 P.3d 1194 (2003). Because the court lacked jurisdiction, dismissal is the appropriate remedy.

¹ ZDI Gaming also argues that RCW 9.46.095 provides an exception to the Thurston County jurisdictional requirement for licensing decisions. This argument fails. First, the Commission licenses gaming *businesses*; it does not license gaming *equipment*. See WAC 230-14-001 (defining "licensees" as "the business holding the punch board and pull-tab license."); see also WAC 230-14-045(1) (defining the requirements for "[a]uthorized pull-tab dispensers"). Second, both the superior court and the Court of Appeals applied the jurisdictional provision and treated it as a venue provision with respect to ZDI Gaming's appeal. The determination of the lower courts also warrants our review of this provision.

¶ 34 The Court of Appeals reached the opposite conclusion. It incorrectly rewrote the legislature's term "jurisdiction" in RCW 9.46.095 to read "venue." *ZDI Gaming, Inc. v. Wash. State Gambling Comm'n*, 151 Wash.App. 788, 801, 214 P.3d 938 (2009). In arriving at this conclusion, the Court of Appeals relied heavily on this court's decisions in *Dougherty* and *Shoop*. *Id.* at 801-03, 214 P.3d 938. The Court of Appeals interpreted *Shoop* to preclude "any subject matter [jurisdiction] restrictions as among superior courts" under article IV, section 6 of the Washington Constitution. *Id.* at 803, 214 P.3d 938 (alteration in original) (quoting *Shoop*, 149 Wash.2d at 37, 65 P.3d 1194). Based on this principle, the court concluded that a "constitutional reading" of RCW 9.46.095 "suggests that the statute was intended to govern venue...." *Id.* at 804, 214 P.3d 938.

¶ 35 The Court of Appeals misapplied the case law. In *Dougherty*, we held that the filing requirements of a different statute, RCW 51.52.110, referred to venue and not to subject matter jurisdiction. *Dougherty*, 150 Wash.2d

at 320, 76 P.3d 1183. *Dougherty* was an injured worker who filed an industrial insurance claim for worker's compensation. *Id.* at 313, 76 P.3d 1183. The Department of Labor and Industries (Department) denied the claim. *Id.* The statute² at issue in *Dougherty* directed the claimant to file his appeal in his county of residence, the *628 county where the injury occurred, or Thurston County. *Id.* at 315, 76 P.3d 1183. *Dougherty* appealed the Department's decision to Skagit County Superior Court, but he did not live in Skagit County, and the injury did not occur in Skagit County. *Id.* at 313, 76 P.3d 1183. The superior court granted the Department's motion to dismiss and the Court of Appeals affirmed, holding that Skagit County Superior Court lacked subject matter jurisdiction. *Id.* at 313-14, 76 P.3d 1183. We reversed the Court of Appeals, holding that RCW 51.52.110 referred to venue and that Skagit County Superior Court did not lack subject matter jurisdiction over **939 *Dougherty's* appeal. *Id.* at 320, 76 P.3d 1183.

² The text of the statute at issue in *Dougherty* reads as follows:

"In cases involving injured workers, an appeal to the superior court shall be to the superior court of the county of residence of the worker or beneficiary, as shown by the [Department of Labor and Industries'] records, or to the superior court of the county wherein the injury occurred or where neither the county of residence nor the county wherein the injury occurred are in the state of Washington then the appeal may be directed to the superior court for Thurston county."

Dougherty, 150 Wash.2d at 315, 76 P.3d 1183 (quoting RCW 51.52.110).

¶ 36 The statute at issue in *Dougherty* did not use either the term "jurisdiction" or "venue." *Id.* at 315, 76 P.3d 1183. After engaging in a conceptual analysis of the doctrines of jurisdiction and venue, we announced a general canon of statutory interpretation that "[u]nless mandated by the clear language of the statute, we generally decline to interpret a statute's procedural requirements regarding location of filing as jurisdictional." *Id.* at 317, 76 P.3d 1183 (emphasis added). In the case at bar, the statute is very different. The statute expressly reserves all "jurisdiction" over actions against the Commission to Thurston County Superior Court. RCW 9.46.095 ("No court of the state of Washington other than the superior court of Thurston county shall have *jurisdiction* over any action or proceeding against the commission" (emphasis added)). Because the clear language of the statute addresses jurisdiction, the interpretive canon announced in *Dougherty* does not apply.

¶ 37 Only a few months prior to the decision in *Dougherty*, we decided *Shoop*. In *Shoop*, we held that the requirements

of the statute there at issue, former RCW 36.01.050 (1997),³ *629 related only to venue and not to subject matter jurisdiction. *Shoop*, 149 Wash.2d at 37, 65 P.3d 1194. *Shoop* brought a personal injury claim against several unnamed defendants and Kittitas County. *Id.* at 32, 65 P.3d 1194. The statute at issue in *Shoop* directed the plaintiff to commence her action against Kittitas County in either Kittitas County or one of the two nearest counties. *Id.* at 35, 65 P.3d 1194. The two nearest counties were Yakima County and Grant County. *Id.* at 32, 65 P.3d 1194. *Shoop* brought her suit in King County. *Id.* Kittitas County moved to dismiss for lack of subject matter jurisdiction. *Id.* The superior court granted the motion and the Court of Appeals reversed. *Id.* at 32–33, 65 P.3d 1194. We affirmed the Court of Appeals, holding that the requirements of former RCW 36.01.050 (1997) relate to venue rather than subject matter jurisdiction. *Id.* at 37–38, 65 P.3d 1194.

³ The text of the statute at issue in *Shoop* reads as follows:

“(1) All actions against any county may be commenced in the superior court of such county, or in the superior court of either of the two nearest counties....

“(2) The determination of the nearest counties is measured by the travel time between county seats using major surface routes, as determined by the office of the administrator for the courts.”

Shoop, 149 Wash.2d at 35, 65 P.3d 1194 (alteration in original) (quoting former RCW 36.01.050 (1997)).

¶ 38 The primary issue in *Shoop* was our previous holding in *Cossel v. Skagit County*, 119 Wash.2d 434, 834 P.2d 609 (1992), overruled by *Shoop v. Kittitas County*, 149 Wash.2d 29, 65 P.3d 1194 (2003). In *Cossel*, we held that a predecessor statute, former RCW 36.01.050 (1963), restricted the subject matter jurisdiction of the superior courts. *Shoop*, 149 Wash.2d at 34, 65 P.3d 1194. In *Shoop*'s case, the Court of Appeals distinguished *Cossel* on grounds that the 1997 legislative amendments transformed former RCW 36.01.050 (1997) into a venue rather than a jurisdictional statute. *Id.* at 35, 65 P.3d 1194. We disagreed with the Court of Appeals' conclusion that the 1997 legislative amendments transformed the statute. *Id.* at 36–37, 65 P.3d 1194. Nonetheless, we affirmed the Court of Appeals. *Id.* at 37, 65 P.3d 1194. Though *Cossel*'s jurisdictional reading of RCW 36.01.050 (1997) still controlled, such a reading would violate article IV, section 6 of the Washington Constitution. *Id.* To avoid this constitutional problem, we overruled *Cossel* and construed the statute as a restriction on venue *630 rather than jurisdiction. *Id.* In short, *Shoop* overruled *Cossel*, determined that a jurisdictional reading of former RCW 36.01.050 (1997) violated the state constitution, and, for that reason, construed the statute as a restriction on venue rather than a limit on subject matter jurisdiction. *Id.*

¶ 39 This case does not raise the constitutional issues at stake in *Shoop*. *Shoop* involved constitutional original jurisdiction of a superior court. *Id.* at 32, 65 P.3d 1194. So long as the amount in controversy surpasses the jurisdictional threshold, a superior court's original jurisdiction comes directly from the state constitution. **940 WASH. CONST. art. IV, § 6 (“The superior court shall have original jurisdiction in all cases at law ... and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law....”). While the legislature can restrict the superior court's jurisdiction by changing the amount-in-controversy requirement or abolishing the substantive law for a particular type of common law tort claim (see *Dougherty*, 150 Wash.2d at 314, 76 P.3d 1183), the legislature cannot otherwise restrict the type of tort controversy that a superior court may adjudicate.⁴

⁴ See I WILFRED J. AIREY, A HISTORY OF THE CONSTITUTION AND GOVERNMENT OF WASHINGTON TERRITORY 466 (June 5, 1945) (unpublished Ph.D. dissertation, University of Washington) (on file with Washington State Law Library) (stating that the Constitutional Convention of 1889 fixed the jurisdiction of the Washington courts and that “[t]he superior courts were always to be open and to have original jurisdiction in practically all types of criminal, civil, and probate cases if the amount in civil actions exceeded \$100”).

¶ 40 In contrast to *Shoop*, the present case involves legislatively created appellate jurisdiction of a superior court to review an administrative agency decision. Appellate jurisdiction over administrative decisions is a creature of statute. *Residents Opposed to Kittitas Turbines*, 165 Wash.2d at 295, 197 P.3d 1153. “This court has consistently held that a right of direct review in superior court of an administrative decision invokes the limited appellate jurisdiction of the court.” *Id.* at 294, 197 P.3d 1153. The state constitution does not expressly provide for this type of appellate jurisdiction; however, “[a]llowing only limited appellate *631 review over administrative decisions, rather than original or appellate jurisdiction as a matter of right, ‘serves an important policy purpose in protecting the integrity of administrative decisionmaking.’” *Id.* at 295, 197 P.3d 1153 (quoting *King County v. Wash. State Boundary Review Bd.*, 122 Wash.2d 648, 668, 860 P.2d 1024 (1993)). “The legislature may confer such limited appellate review by statute.” *Id.*

¶ 41 With respect to the Commission, the legislature clearly determined that Thurston County Superior Court possesses exclusive jurisdiction. Thus, Pierce County

Superior Court lacked subject matter jurisdiction. *Shoop* has defined the remedy: "When a court lacks subject matter jurisdiction, dismissal is the only permissible action the court may take." 149 Wash.2d at 35, 65 P.3d 1194.

WE CONCUR: MARY E. FAIRHURST, Justice, GERRY L. ALEXANDER, Justice Pro Tem. and BARBARA A. MADSEN, Chief Justice.

CONCLUSION

¶ 42 I would hold that, under RCW 9.46.095 as written by the legislature, the Thurston County Superior Court possesses exclusive subject matter jurisdiction to review Commission orders. Because the Pierce County Superior Court lacked subject matter jurisdiction, I would dismiss the case.

Parallel Citations

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