UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-1744

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION, a Michigan Nonprofit Corporation (WOMP); BOWERS HARBOR VINEYARD & WINERY, INC, a Michigan Corporation; BRYS WINERY, LC, a Michigan Corporation; CHATEAU GRAND TRAVERSE, LTD., a Michigan Corporation; GRAPE HARBOR INC., a Michigan Corporation; MONTAGUE DEVELOPMENT, LLC, a Michigan limited liability company; OV THE FARM LLC, a Michigan liability company; TABONE VINEYARDS, LLC, a Michigan liability company; TWO LADS, LLC, a Michigan liability company; VILLA MARI, LLC, a Michigan liability company; WINERY AT BLACK STAR FARMS LLC, a Michigan liability company; CHATEAU OPERATIONS, LTD, a Michigan Corporation

Plaintiffs – Appellees

v.

TOWNSHIP OF PENINSULA, MI, a Michigan Municipal Corporation

Defendant

and

PROTECT THE PENINSULA, INC.

Movant – Appellant.

Appeal from the United States District Court
Western District of Michigan
Honorable Paul L. Maloney

BRIEF OF MOVANT-APPELLANT PROTECT THE PENINSULA, INC.

Tracy J. Andrews (P67467)
LAW OFFICE OF TRACY JANE ANDREWS, PLLC
420 E. Front Street
Traverse City, MI 49686
(231) 946-0044
Attorney for Movant-Appellant

I. CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 26.1, counsel for Movant-Appellant Protect the Peninsula, Inc., certifies that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

IV. STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure and Sixth Circuit Rule 34(a), Movant-Appellant respectfully requests oral argument on the present appeal. This appeal raises important issues relating to an organization's right to intervene under Federal Rule of Civil Procedure 24 as it relates to state zoning law and Sixth Circuit precedent.

V. STATEMENT OF JURISDICTION

The District Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 over Plaintiffs' claims that certain provisions in the Peninsula Township Zoning Ordinance violate the First, Fifth, Tenth, and Fourteenth Amendments of the United States Constitution. Plaintiffs assert that the District Court also has supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over Plaintiffs' purely state law claims that other zoning provisions are preempted by the Michigan Liquor Control Code and violate the Michigan Zoning Enabling Act. Movant-Appellant disputes that the District Court has subject matter jurisdiction over Plaintiffs' state law claims because they do not derive from a common nucleus of operative facts with the federal claims. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966).

The Court of Appeals has subject matter jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. On October 21, 2021, the District Court denied Movant-Appellant's motions to intervene and to supplement its intervention motion with a motion to dismiss Plaintiffs' state law claims on jurisdictional and other grounds. The October 21 order is a final order that disposes of Movant-Appellant's request to intervene in the pending lawsuit. On November 18, 2021, Movant-Appellant filed a timely notice of appeal with the District Court.

VI. STATEMENT OF ISSUES

Whether Movant-Appellant Protect the Peninsula Inc. (PTP) may intervene in the lawsuit because it and its members have substantial interests in the subject of this case, the case may impair their ability to protect their interests, and Defendant Peninsula Township may not adequately represent their interests. Further, whether the District Court erred in deciding that, between when the intervention motion was filed and ruled upon, Movant-Appellant lacked authority to seek to supplement its intervention motion with a motion to dismiss Plaintiffs' state law claims.

VII. STATEMENT OF THE CASE

Eleven wineries and their trade association sued Peninsula Township to invalidate long-standing township zoning provisions under constitutional and state law theories. All the wineries are located in the township agricultural district. They challenge zoning provisions that limit commercial activities at wineries unless the activity is tied to agriculture and in line with other agricultural uses in the district. Where tasting rooms have latitude to serve their wine with limited food and retail sales of ag-related items, as well as host limited ag-related events, the lawsuit seeks to authorize unlimited retail, restaurants, drink sales, and events centers, all operational until 2:00 am. At bottom, the wineries want the operational rights of

commercial enterprises with the pastoral benefits of an agricultural setting – scenic vistas of orchards and vineyards along the pristine Lake Michigan shoreline.

The wineries know their neighbors oppose commercial hotspots displacing agriculture. Since before there were wineries in Peninsula Township, Protect the Peninsula, Inc., (PTP) has been advocating before township decision-makers and state judges, as well as at the negotiating table and on the campaign trail, to protect the agricultural character of the community and to limit efforts to undermine it, whether by golf course developers or wineries. PTP represents and is led by people who live, farm, and own businesses in the township and dedicate uncountable hours to protecting the unique farming character of the community they have invested in.

Peninsula Township is the third leg of the stool. The township is blessed with miles of pristine shoreline, thousands of acres of public lands, and a unique micro-climate ideal for fruit crops like cherries, apples, and grapes, which collectively make it a desirable place to live, farm, and visit. Balancing these attributes render land use decision-making in Peninsula Township oftentimes contentious.

For over 30 years, the wineries and PTP have supported or opposed the township numerous times in various ways. PTP has been working to protect farmland and the pastoral quality of life, and supporting or opposing township land-use decisions accordingly. Since the pioneer wineries first organized to lobby the township for less ag-like and more commercial-like zoning, PTP has been organized

to support zoning that keeps the ag district agricultural. Where the wineries are represented by their trade group (Plaintiff Wineries of the Old Mission Peninsula Assoc., (WOMP)), their residents and farmers are represented by PTP. Both WOMP and PTP serve to unify and amplify the voices of their respective constituents before the township. Without PTP in this lawsuit advocating for residents and farmers and countering the wineries' claims, there is substantial risk the township will mount a feeble defense or be coerced into acquiescing to avoid monetary damages and make peace, with irreparable harm to the peninsula's residents, farmers, and rural character.

1. Old Mission Peninsula

Peninsula Township sits on Old Mission Peninsula, a long, narrow sliver of land that juts out into the Grand Traverse Bay of Lake Michigan, dividing the bay into its east and west arms. The township has one main road (Center Road) traveling its spine approximately 18 miles south to north, and prides itself in having no traffic lights. The geography and ubiquitous proximity to the Bay support a particular micro-climate that makes it a prime area to grow fruit. The peninsula is rural, predominantly farmland interspersed with residences, which are concentrated at its south end adjoining Traverse City. The township maintains commercial activities in central areas for markets, restaurants, offices, galleries, and other services. The

wineries host tasting rooms, overnight guests, food seminars, ag events, and retail shops, so they already exceptionally "commercial" for the ag district.

Peninsula Township holds dearly to its agricultural heritage. This is demonstrated by resident surveys, community master plans, zoning, and community support for the township purchase of development rights (PDR) program. The township was a trailblazer as the first municipality to approve PDR as a farmland preservation tool funded by successive voter-approved local millages. To date, the 6,000 residents have taxed themselves in excess of $22 million dedicated to agricultural protection, and have preserved more than 6,000 acres of productive farmland and scenic vistas. The millage expired; a renewal campaign commences in 2022. Commercialization of the ag district may threaten community support for continuing the farmland preservation millage. (Jacobs Affidavit, R. 41-4, PageID.2091-2093; Wunch Affidavit, R. 41-3, PageID.2081-2083.)

While traffic may be a universal plight, traffic concerns are exacerbated on the peninsula because it is like an island with one main entry point. A bottle neck at the base of the peninsula challenges emergency vehicles, delays school buses, impedes farm trucks delivering fruit to processing plants on hot afternoons, frustrates commuting residents, and inconveniences everyone. The peninsula hosts miles of phenomenal public beaches and thousands of acres of parks with maintained trails. These public amenities bring significant traffic, which the community tolerates as a

consequence of hosting outstanding public spaces. Carefully township planning mitigates these impacts. Increasing non-ag commercial activities as sought in this case would bring many more trips on and off the peninsula, as well as other community impacts, without attendant community and public benefits and contrary to established township planning and zoning. (Wunsch Affidavit, R. 41-3, PageID.2086-2087; Nadolski Affidavit, R. 41-2, PageID.2074; Phillips Affidavit, R. 41-5, PageID.2098; Zebell Affidavit, R. 41-6, PageID.2103-2104.)

2. The Zoning Ordinance

Peninsula Township adopted its first zoning ordinance in 1972, when cherry and apple trees predominated the landscape and there were no grapevines. In 1986, the township's first wine maker petitioned for the establishment of Old Mission Peninsula as a viticultural area to market wines made principally from grapes grown on the peninsula. 27 CFR 9.114; 52 Fed. Reg. 21515 (June 8, 1987). The township has amended the ordinance iteratively to accommodate evolving winery enterprises.

The winery provisions in the zoning ordinance are generally consistent with and maintain the rural nature of the ag district and the zoning ordinance generally. The overarching purposes of the zoning ordinance include "limiting types and locations of buildings and regulating the location of trades, industries, and buildings designated for specific uses," and "to encourage the use of lands and resources of

the Township in accordance with their character and adaptability." Peninsula Township Zoning Ordinance (PTZO), Section 2.1 (PageID.43.) The zoning ordinance divides the township into districts according to uses, with identified residential, planned development, commercial, and agricultural districts. PTZO, Section 6.1.1 (PageID.69.)

The intent of the agricultural district is

> to recognize the unique ecological character of the Peninsula and to preserve, enhance, and stabilizing existing areas within the Township which are presently being used predominately for farming purposes, yet recognize that there are lands within the district which are not suited to agriculture, therefore allowing other limited uses which are deemed to be compatible with agricultural and open space uses.

PTZO, Section 6.7.1 (PageID.81.) The ordinance allows by right various farm-related activities in the ag district (*e.g.*, field and fruit farming, keeping livestock, 150-square foot farmstands, agricultural labor camps, barns), residences, cemeteries, day care homes, and parks. PTZO, Section 6.7.2 (PageID.81.) The ordinance also allows in the ag district various activities by special use permit, such as veterinary hospitals and planned developments. PTZO, Section 6.7.3 (PageID.89-90.) The intent of special use permitting is to "allow, on one hand practical latitude for the investor or developer, but that will at the same time, maintain sound provisions for the protection of the health, safety, convenience, and general welfare of Township inhabitants." PTZO, Section 8.1.1 (PageID.143.) The ordinance allows food

production (including wine-making) at a Food Processing Facility by special use permit on 5-acre parcels in the ag district. PTZO, Section 8.5 (PageID.160.) Wine *making* in the ag district is virtually unrestricted, and this case is not about that.

Since 1989, the township has adopted three zoning sections specific to wine tasting and winery activities. First, the ordinance allows a winery with at least 40 acres to host a tasting room with limited retail sales as a use by right Farm Processing Facility. PTZO Section 6.7.2(19) (PageID.84-89.) The intent of this section is "to promote a thriving local agricultural production industry and preservation of the rural character of the community." PTZO, Section 6.7.2(19)(a) (PageID.84.) The Farm Processing Facility section specifically is "not intended to allow a bar or restaurant on agricultural property and the Township shall not approve such a license." *Id.* Moreover, "weddings, receptions, and other social functions for hire are not allowed." *Id.*

Second, the ordinance allows a winery with at least 50 acres to host a tasting room, maintain guest rooms and residences, and provide limited Guest Activity Uses (ag-related meetings and events) by special use permit as a Winery-Chateau. PTZO, Section 8.7.3(10) (PageID.169-176.) The intent of this section is to "maintain the agricultural environment, be harmonious with the character of the surrounding land and uses, and [] not create undue traffic congestion, noise, or other conflict with the surrounding properties." PTZO, Section 8.7.3(10)(a) (PageID.169.)

Third, the ordinance allows a winery that produces wine at one location to host a tasting room with limited retail sales at a different location by special use permit as a Remote Tasting Room. PTZO, Section 8.7.3(12) (PageID.179-180.)

These three winery sections were drafted and amended over time in response to winery requests for additional permitted uses. Much of the ordinance was written iteratively by winery owners and PTP leaders, and the ordinance reflects an attempt to balance competing interests and ensure land use appropriate to the agricultural district. The ordinance, and the winery provisions in particular, while not perfect, reflect that it was drafted by the people impacted by it – peninsula farmers, wine-makers, and residents. (Wunch Affidavit, R. 41-3, PageID.2081-2082, 2084-2085; Nadolski Affidavit, R. 41-2, PageID.2071.)

3. The Wineries' Lawsuit

Plaintiffs include the eleven wineries located in the agricultural district. They are three Farm Processing Facilities, seven are Winery-Chateaus, and one Remote Tasting Room. (First Amended Complaint, R. 29, PageID.1088-1110.) Their lawsuit challenges provisions in the Farm Processing Facility, Winery-Chateau, and Remote Tasting Room sections under federal and state law. Each winery elected the zoning section they operate under and has been subject since inception to the provisions they now challenge. In other words, the township did not amend provisions

applicable to any winery after it began operations, except permissively (*e.g.*, sale of wine by the glass was permitted in 2009 after state law allowed winery licensees to sell wine by the glass (PTZO, Amendment 181 (PageID.191))).

Plaintiffs allege some winery provisions violate their federal constitutional rights. Within the 3 sections, the District Court counted that "Plaintiffs challenge at least 11 specific subsections as violative of parts of the Constitution":

Ordinance	Constitutional Argument
6.7.2(19)(b)(v) 8.7.3(12)(i) 8.7.3(12)(k)	Content-based speech regulations that violate the First Amendment
8.7.3(10)(u)1(b)	Compelled speech that violates the First Amendment
8.7.3(10)(u)	Prior restraint on speech that violates the First Amendment; Violation of the First Amendment's Freedom of Association
8.7.3(10)(u)2(d)	Violation of the First Amendment's Freedom of Religion
8.7.3(10)	Void for vagueness
8.7.3(10)(u)(2)(b), (c), (e) 8.7.3(10)(u)(3) 6.7.2(19)(b)	Violations of the Commerce Clause and the Dormant Commerce Clause
8.7.3(10)(c), (h)	Constitutes a Taking

(Order Denying Preliminary Injunction, R. 34, PageID.1865, 1869-1875.) These challenged provisions restrict what non-wine-related items can be sold in winery retail shops; limit non-wine-related retail advertising; prohibit events at wineries, including weddings; limit non-tasting activities at wineries to agricultural-related groups and events; impose minimum parcel and produce acreages; and limit some wine tasting to the Old Mission Peninsula appellation. (*Id.*)

Plaintiffs allege other provisions are preempted by state liquor laws. They challenge the provision restricting winery hours of operation to 9:30 pm on the basis that state liquor law prohibits liquor sales only between 2:00 am and 7:00 am. (First Amended Complaint, R. 29, PageID.1125-1126.) They also challenge the express prohibitions on restaurants, outside catering, and some amplified music at wineries on the assertion that state law allows wineries to do these things. (*Id.*) Plaintiffs also allege the winery sections collectively contravene the Michigan Zoning Enabling Act because they do not promote public health, safety and welfare. (*Id.* at PageID.1126-1127.)

The wineries seek to nullify all challenged zoning provisions:

> Plaintiffs have not applied for and do not seek a variance from Peninsula Township's ordinances (the "Ordinances"). Rather, this is a case facially challenging those Ordinances as unconstitutional. The Ordinances violate the First Amendment, the Commerce Clause and are preempted by Michigan law. The proper remedy is to enjoin their enforcement and declare them invalid.

(Plaintiffs' Preliminary Injunction Reply Brief, R. 28, PageID.1070). If successful, peninsula wineries would be liberated from key or all zoning provisions that endeavor to limit non-agricultural commercialization in the ag district in order to preserve the agricultural character of the township.

4. The Township's Defense

The wineries take the position that, before filing this lawsuit, the township "admitted that the ordinances [] violate Plaintiffs' constitutional rights and are preempted by Michigan law." (First Amended Complaint, R. 29, PageID.1087.) In support, they rely on an August 23, 2019, letter from the township attorney to the wineries' attorney. (First Amended Complaint, R. 29, PageID.1113-1115; Township Attorney Opinion Letter, R. 29-16.) That letter opined that the zoning requirement to close operations at 9:30 pm is preempted by state law that allows licensees to serve alcohol until 2:00 am. (Attorney Opinion Letter, R. 29-16, PageID.1391-1392) The letter found several other zoning provisions potentially preempted or unconstitutional, and nevertheless in need of revision. (*Id.* at PageID.1386-1397.) The letter concluded that working collaboratively with the wineries to revise the ordinance would "protect the Township's interests in promoting the success of these business and permit the Wineries to advance their own business interests as well." (*Id.*, PageID.1399.)

As explained by Defendant, the township began negotiating with the wineries in 2019 to find a suitable resolution to address the legal issues raised by the wineries and addressed in the opinion letter. (Township Preliminary Injunction Response, R. 24, PageID.948-950.) The wineries and a township subcommittee engaged, negotiated, discussed, and attempted to reconcile differences with respect to the

ordinance provision. (*Id.*) When the township had not repealed the supposedly-invalid provisions by October 2020, the wineries ceased engaging and sued in federal court to void the provisions and for over $1 million in damages plus attorney fees. (*Id.*; First Amended Complaint, R. 29, PageID.1115-1116.)

Starting in August 2021, according to the wineries, Plaintiffs and Defendant mediated for 25 hours and settled the lawsuit on September 13, but then the township board reneged. (Motion to Enforce Settlement, R. 101.) The District Court denied the wineries' request to enforce the settlement but sanctioned the township for the rejection. (Order Denying Motion to Enforce Settlement, R. 117; Order Granting Attorney Fees, R. 139.) Settlement talks resumed in January 2022 and continue. (Minutes, R. 141, PageID.4960.)

5. PTP and its Efforts to Intervene

PTP is a Michigan non-profit corporation formed for the purpose of, among other activities, responding to local government land-use decisions adverse to its interests and protecting the community's residential and agricultural interests. PTP's founders, leaders, and practically all its members, are people who own homes and farms on the peninsula. (Nadolski Affidavit, R. 41-2, PageID.2069.)

PTP supports decisions and efforts that protect township agricultural character and quality of life and opposes decisions that threaten those interests. PTP organized

two successful citizen referendums (1979 and 1986) that overturned township zoning approvals for developments that threatened the community's agricultural character. When the township again approved a similar development, PTP sued in Grand Traverse County in 1988 (*Protect the Peninsula v. Peninsula Township*, Case No. 88-6390-NZ), to overturn the decision. PTP intervened in a case in Grand Traverse County in 1998 (*Chateau Chantal v. Peninsula Township*, Case No. 98-17195-CZ), to defend the ordinance against a winery challenge seeking more food and guest services. When the township board adopted an expansive winery section in 1999, PTP helped spearhead a landslide referendum that overturned it. Then PTP joined the Agricultural Preservation League (APL), WOMP's predecessor, in 2001 to negotiate the replacement Farm Processing Facility section. For over 40 years, PTP has participated in hundreds of township meetings to comment on pending applications, support or oppose planning commission business, address zoning variance requests, develop master plans, report on resident surveys, assist in zoning revisions, and much more. PTP and its leaders also developed and supported the township PDR program and successive millages to fund PDR. (Nadolski Affidavit, R. 41-2, PageID.2069-2072; Wunsch Affidavit, R. 41-3, PageID.2079-2084.)

PTP has demonstrated interest in the protection of the agricultural character of the community, including specifically the challenged winery provisions that promote that character, which PTP helped to foster, support, preserve, and develop.

PTP seeks to represent its own and its members' interests, including the interests of members who live near wineries. The eleven wineries are spread across the peninsula, so they have many neighbors. For example, Mark Nadolksi lives in the historic schoolhouse across the road from Black Star Winery; Michele Zebell shares a border with Bowers Harbor Winery; Scott Phillips lives about two-tenths of a mile from Mari Vineyard. The peninsula's lumpy and watery geography mean nearby neighbors can see and hear winery activities. John Jacobs sees two wineries (Chateau Chantal and Two Lads) separated mostly by water that carries sound voices to his house. John Wunsch and his family operate farms across 16 to 20 parcels, covering more than 1,000 acres across the peninsula. These PTP members each have interest in their continued used and enjoyment of property consistent with the zoning they relied upon making their home investments. (Nadolski Affidavit, R. 42-2, PageID.2068, 2074-2075; Zebell Affidavit, 41-6, PageID.2103-2105; Phillips Affidavit, R. 41-5, PageID.2097-2099; Jacobs Affidavit, R. 41-4, PageID.2091-2094; Wunsch Affidavit, R. 41-3, PageID.2086-2087.)

On February 16, 2021, PTP moved to intervene. (Motion to Intervene, R. 40.) Plaintiffs opposed intervention but Defendant did not. (Plaintiffs' Opposition to Intervention, R. 46; Defendant's Concurrence to Intervention, R. 47.)

On February 19, responding to PTP's requested intervention and a District Court order preliminarily concluding Plaintiffs' constitutional claims lack apparent merit, Plaintiffs' attorney publicly declared its state preemption claim to be primary:

> WOMP attorney Joseph Infante sees promise in Judge Maloney's findings. "The court denied [our injunction motion], but the judge gave the parties direction of where he sees the strengths and weaknesses [of the case]," Infante tells The Ticker. "He said that the preemption claims by the wineries have merit, and those are sort of our core claims -- dealing with restaurant, catering, hours of operation, entertainment, music, that kind of stuff. So we were very happy with that language."

(*New Wrinkles Emerge,* R. 56-1, PageID.2625.) On April 14, Plaintiffs moved for summary judgment on its state preemption claim. (Plaintiffs' Preemption Summary Judgment Brief, R. 53.) If successful, the preemption claim would void seven provisions and prohibit township zoning over co-located restaurants, catering services, amplified music, hours of operation, entertainment, and dancing. (PageID.2290-2301.)

On April 27, before a ruling on intervention, PTP moved for leave to supplement its intervention motion with a motion to dismiss Plaintiffs' state law claims. (Motion for Leave to Supplement, R. 56.) PTP's motion requested the District Court consider whether it has jurisdiction over Plaintiffs' purely state law claims, including the dominant preemption claim raised in Plaintiffs' summary judgment motion. (*Id.*) On April 30, Plaintiffs moved to strike PTP's motion for leave. (Plaintiffs' Motion to Strike, R. 60.) On May 5, Defendant filed a cross motion

on the state preemption claim but did not raise any jurisdictional defect. (Defendants' Preemption Summary Judgment Brief, R. 63.) To the contrary, Defendant previously conceded federal jurisdiction. (Joint Rule 26(f) Conference, R. 37, PageID.1959); Plaintiffs' Motion to Strike, R. 60, PageID.2727) ("The Wineries and Peninsula Township, the only current parties to this action, agreed that this Court has jurisdiction over this case when filing their Rule 26(f) Report.")).

On October 21, the District Court denied PTP's motion to intervene, PTP's motion to supplement its intervention motion, and Plaintiffs' motion to strike. (Order Denying Intervention, R. 108, PageID.4175.) The District Court has not ruled on the preemption summary judgment motions. On November 18, PTP filed notice of appeal of the October 21 order. (Notice of Appeal, R. 121, PageID.4343.)

VIII. SUMMARY OF THE ARGUMENT

PTP appeals two issues: whether it may intervene in the lawsuit as a matter of right under Fed. R. Civ. P. 24(a)(2) (Rule 24); and whether it was authorized under Rules 7(b) and 24(c) to seek leave to supplement its intervention motion with a proposed motion to dismiss under.

PTP has substantial legal interest both as an organization that works to protect the local character and quality of life and whose members have substantial interests in protecting their zoning and property rights. If PTP is not permitted to intervene,

and if the wineries are successful in voiding the challenged winery provisions, then PTP and its members would suffer irreparable harms as a result of increasing commercial enterprises throughout the agricultural district. There is substantial basis to conclude PTP's interests are not otherwise adequately represented.

The District Court did not consider the evidence documenting PTP's and its members' interests, potential impairment to those interests, and the adequacy of Defendant's representation. Instead, the District Court applied narrow and unsupported interpretations of the intervention standards, finding only wineries and farms have interest in the winery provisions and that Defendant and PTP share the same ultimate goal. This misunderstands the zoning ordinance, is contrary to state and federal caselaw, and is unsupported by the factual circumstances here.

The District Court also erred in holding that a proposed intervener may not seek to supplement an intervention motion after it is filed. Not only is it permissible to do so under Rules 7(b) and 24(c), but prohibiting supplementation would disincentivize timely filing, a threshold requirement for intervention.

IX. ARGUMENT

A. Intervention under Rule 24(a)(2)

Under Rule 24(a)(2), an intervenor must establish four elements to intervene by right: (1) timeliness; (2) substantial legal interest in the case subject matter; (3)

its ability to protect that interest may be impaired, absent intervention; and (4) the existing parties may not adequately represent its interest. *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997).

An order completely denying intervention is immediately reviewable by interlocutory appeal. *Sales v. Marshall*, 873 F.2d 115, 120 (6th Cir. 1989) (citation omitted). The district court timeliness determination is reviewed for abuse of discretion; the remaining factors are reviewed *de novo*. *Id.* at 121 (citations omitted); *Purnell v. City of Akron*, 925 F.2d 941, 945 (6th Cir. 1991) (citations omitted). In determining whether intervention should be allowed, appellate courts accept as true the non-conclusory allegations and evidence submitted in support of the motion. *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001) (citations omitted); *Horrigan v. Thompson,* 1998 U.S. App. LEXIS 9506, 1998 WL 246008, No. 96-4138 (6th Cir. May 7, 1998) (citing *Lake Investors Dev. Group v. Egidi Dev.* Group, 715 F.2d 1256, 1258 (7th Cir. 1983)). Since timeliness is undisputed, this appeal addresses the three factors that are subject to *de novo* review.

(1) Substantial Legal Interest

The Sixth Circuit "subscribe[s] to a 'rather expansive notion of the interest sufficient to invoke intervention of right.'" *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (quoting *Mich. State AFL-CIO*, 103 F.3d at 1245). Whether an

intervenor has substantial interest is fact-specific. *Id.* Rule 24(a)(2) does not require the proposed intervenor to have "a specific legal or equitable interest" or "the same standing necessary to initiate a lawsuit." *Id.* (citations omitted). Close cases "should be resolved in favor of recognizing an interest under Rule 24(a)." *Id.* at 399 (quoting *Mich. State AFL-CIO*, 103 F.3d at 1247). PTP has substantial interest in the subject of this case as the organization that works to protect the agricultural character and to preserve the rural quality of life on Old Mission Peninsula and whose members have substantial interest in protecting their zoning and property rights.

(a) PTP's substantial interests as an organization

The Sixth Circuit has recognized the interest of a public interest group involved in the adoption of legislation to subsequently defend it against a challenge. In *Mich. State AFL-CIO*, the Chamber of Commerce asserted interest based on its involvement in the political process that culminated in the adoption of challenged campaign finance laws, and whose members were regulated by parts of the challenged law. 103 F.3d at 1245-47. The court agreed its interests were substantial because the Chamber was a "vital participant" in the law's adoption, a repeat player in campaign finance litigation, "a significant party which is adverse to the challenging union in the political process," and an entity also regulated by some of the challenged statutory provisions. *Id.* at 1247.

A few years later, the Sixth Circuit granted intervention to a coalition of prospective minority students and a non-profit that sought to preserve minority access in higher education in a case challenging the university race-conscious admissions policy. *Grutter,* 188 F.3d at 397. The court found the coalition asserted substantial interest in maintaining the use of race as an admission factor to preserve educational opportunity for minority students. *Id.* at 398. The court rejected the argument that intervention required the proposed interveners to have a "legally enforceable right" under the admissions policy, noting the Chamber in *Mich. State AFL-CIO* had "no legal 'right' to the enactment of the challenged legislation," but nevertheless had substantial legal interest by virtue of its role in the process the resulted in its adoption. *Id.* at 399.

PTP has substantial interest in the validity of the challenged winery provisions. PTP's interests are similar to the Chamber's in *Mich. State AFL-CIO* and the coalition in *Grutter.* As discussed on pages 20 to 21, Peninsula farmers and residents formed PTP to protect productive farming and the residential quality of life and oppose decisions that undermine that mission. Since before there were grapes and wine-makers, PTP was working to protect the peninsula's farming character and quality of life against land use threats resulting from commercial encroachments and farmland conversion in the ag district. After wine-makers organized into APL then WOMP, PTP has been their most significant local adversary. PTP was a vital

participant in the adoption of winery provisions specifically, as evidenced by its leadership in overturning the permissive winery section adopted in 1999 and its post-referendum rewrite with APL in 2002, as well with subsequent amendments. PTP is a repeat player in Peninsula Township land use decision-making, advocating to support policies and decisions that protect the character and quality of life and to oppose those that threaten its mission. This includes two successful lawsuits (including *Chateau Chantal v. Peninsula Township,* where the winery sought zoning change for more food and guest services); two PDR millage campaigns for fund farm protection; three zoning referendums; and uncountable meetings on amendments, special use permit applications, zoning interpretations, and PDR implementation. As WOMP represents wine-makers whose property is subject to the zoning ordinance, so PTP represents residents and farmers whose property is subject to the same ordinance. (Nadolski Affidavit, R. 41-2, PageID.2069-2072; Wunsch Affidavit, R. 41-3, PageID.2079-2084.)

(b) The substantial interests of PTP members

PTP members, particularly those who live near wineries, have substantial legal interest in the continuation of agricultural activities and the prevention of non-ag commercial activities on winery parcels in the ag district. For example, when Michelle Zebell has moved in to her home 24 years ago, her neighbor was a farm

with cattle, horses, and vineyards; now it is Bowers Harbor Winery with a tasting room, gift shop, and other facilities, regularly trafficked by cars and tourist busses. (Zebell Affidavit, R. 41-6, PgeID.2103). Increasing allowable uses to extend hours, serve drinks not processed onsite, offer restaurant and catering services, outdoor events with live music, reduced farm acreage, and so on will increase noise and reduce vehicular and pedestrian safety as well as interfere with use and enjoyment of her property. (PageID.2104.) Such changes would shift the activity of visiting a tasting room to learn about, taste, and purchase wine, which is agricultural, to entirely commercial activities. These changes undermine the expectation that activities at Bowers Harbor Winery would remain agricultural in nature, consistent with current plans, zoning and permits. (PageID.2104.)

Scott Phillips testified to similar observations and concerns resulting from his proximity to Mari Vineyard, which opened in 2016. (Phillips Affidavit, R. 41-5, PageID.2097-2098.) He experiences disruptions associated from Mari's current operations, and identified concerns that increasing commercial operations would further disrupt enjoyment of his property, have a detrimental impact on his of life, as well as potentially lowering property values due to the proximity to nearby commercial uses. (PageID.2098-2099.) Mark Nadolski, who lives across the road from Black Star Farm Winery, testified that increasing commercial activities at the winery, including restaurants, later hours, more retail space, and more and bigger

events, including outdoor events, resulting in more noise and traffic, and less agriculture immediately adjacent to his home, threatens the value and peaceful use and enjoyment of his home. (Nadolski Affidavit, R. 41-2, PageID.2073-2075.)

John Wunsch testified about several impacts to the traditional farms his family operates caused by more commercial and non-agricultural activities at wineries. For example, increased traffic burdens traditional farmers, who must move fruit off the peninsula to distributors and retailers quickly during harvest to maintain freshness and minimize cost. More traffic also burdens the efficient transfer of harvest equipment and crews between parcels to avoid spoilage or loss during the short ripening windows. In the longer-term, increasing non-ag commercial activities at wineries has the potential to result in adverse economic consequences for traditional farming enterprises, which lack similar opportunity to commercialize, and which may drive out more traditional growing activating. (Wunsch Affidavit, 41-3, PageID.2086-2087.)

These and other PTP members have substantial interest in not living in a *de facto* commercial district and sharing community resources with additional non-agricultural commercial uses in the ag district. The zoning ordinance limits commercial-type activities that may take place on winery parcels. This includes restricting the hours when wineries may engage in non-farming Guest Activity Uses. PTZO, Section 8.7.3(10)(u)(5)(b) (PageID.174) The ordinance limits food service to

that associated with wine tasting or agricultural related-activities (*e.g.*, seminars and demonstrations) and retail service to wine-related items. PTZO, Section 6.7.2(19)(a), (b)(1)(v), 8.7.3(10)(d)(2), 8.7.3(10)(u)(2) (PageID.84, 170, 172-73.) Nullifying these would mean more visitors, and not for wine-tasting experiences but to eat, drink, shop and have events. The zoning ordinance requires adjacent landowners to tolerate commercialized agriculture so visitors may taste wine produced on the peninsula during reasonable hours, but the lawsuit would force them also to accommodate restaurant patrons, bar hoppers, and event goers well into the night.

Michigan courts recognize the manifest desirability of zoning stability "once it has been ordained and relied upon for any fair period of repose by home builders and homeowners." *Raabe v. Walker*, 383 Mich. 165, 177 (1970). Zoning changes must be carefully considered because "private arrangements, property purchases and uses, the location of business in commercial or industrial zones, and the making of homes in residential districts, occur with reasonable anticipation of the stability of existing zones." *Id.* (citation omitted). This is why zoning amendment "ordinarily embraces safeguards similar to or greater than those of the original zoning, against unreasonable, capricious, needless and harmful rezoning or changes of use classification, including petitions, notices, protests, hearings, study by commissions or committees, and initiative and referendum of amending measures." *Id.*

Michigan courts further recognize the *un*desirability of spot zoning. *Penning v. Owens*, 340 Mich 355, 367 (1954) ("creating a small zone of inconsistent use within a larger zone is commonly designated as 'spot zoning'. [Citations omitted.] Such an ordinance is closely scrutinized by a court and sustained only when the facts and circumstances indicate a valid exercise of the zoning power."). And Michigan courts acknowledge that zoning is profoundly local and legislative:

> This Court is not equipped to zone particular parcels of land. We do not see the land, we do not see the community, we do not grapple with its day-to-day problems. When we interpose with our writ and command, for example, that a certain tract on Woodward avenue be turned over to commercial pursuits, the owners of the tract across the street are before us for similar dispensation the next day, and the areas north and south the day after. Thus we assume the zoning function. Their argument is cogent and not difficult to follow: What is sauce for the goose is sauce for the gander.

Brae Burn, Inc. v. Bloomfield Hills, 350 Mich. 425, 436-37 (1957).

These fundamental principles of Michigan zoning law are the source of PTP's members' substantial interests in the subject of this lawsuit – the validity of the winery provisions. Plaintiffs' lawsuit has the characteristics of asking a federal court to spot zone commercial wineries into a district intended to promote agricultural. PTP members reasonably invested in their homes and farms with the expectation that the agricultural district would remain one of agricultural activities, unless the township changed the community plan and zoning ordinance, in which case they would have legal and political recourse. This lawsuit threatens the zoning plan,

ordinance, and process, in which adjacent and nearby landowners have strong and protected interests.

In *Wolpe v. Poretsky*, the court considered intervention by neighbors to challenge an unfavorable zoning decision. 144 F.2d 505 (D.C. Cir. 1944). After the district court denied intervention, the appellate court considered a special appeal on the question: "Under what circumstances may adjoining property owners intervene in a suit to enjoin the enforcement of a zoning order which affects the value or use of their property?" *Id*. at 507. The court found one objective of the District of Columbia zoning law was to encourage the "stability of districts and of land values therein." *Id*. The court found the neighbors had sufficient interest to intervene by right and permissively:

> Adjoining property owners in a suit to vacate a zoning order have such a vital interest in the result of that suit that they should be granted permission to intervene as a matter of course unless compelling reasons against such intervention are shown.

Id. at 508.

The Sixth Circuit recognizes the substantial interest of neighbors in maintaining existing zoning that regulate neighboring land uses. In *Joseph Skillken & Co. v. Toledo,* which was a federalized zoning dispute, the neighbors' intervention interest arose out of their standing to bring suit to challenge zoning decisions under state law. 528 F.2d 867 (6th Cir. 1975), *vacated on other grounds sub nom. Joseph Skilken & Co. v. Toledo*, 429 U.S. 1068 (1977). The court ruled that, under Ohio

law, the neighbors' interest in the existing zoning of nearby property, and the potential that a change in zoning may affect their property values, sufficiently demonstrated the neighbors' intervention interest relating to the property subject of the action. 528 F.2d at 873-74.

More recently in *Midwest Realty Mgmt. Co. v. Beavercreek,* an unpublished opinion, this Court considered a late-filed motion to intervene from adjacent property owners opposing a settlement between the plaintiff developer and defendant city. 93 Fed. Appx. 782 (6th Cir.2004). The subject parcel had been rezoned for development, the rezoning was overturned by referendum, and then in a federal lawsuit by the developer, the city agreed to re-rezone the parcel for the development. *Id.* at 783-84. The neighboring landowners asserted an interest in the zoning of the subject parcel, and the district court found they made a *prima facie* showing of legitimate purpose for intervention, but their motion was untimely. *Id*. at 785, 787. On appeal, this court found, "considering the zoning controversy surrounding this parcel, that the legal interests asserted are substantial and deserving of further consideration." *Id.* at n. 4. *See Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action,* 558 F.2d 861, 869 (8th Cir. 1997) (property owners near proposed clinic had sufficient interest in defending validity of ordinance banning clinics to preserve property values, which "are the most elementary type of right that Rule 24(a) is designed to protect.") (citation omitted).

Michigan courts have also long recognized that, due to the special impacts of changing zoning on an adjacent parcel, neighboring lot owners have sufficient interest for standing or intervention to defend against the impacts to their property. *Randall v. Meridian Twp,* 342 Mich. 605, 607 (1955) ("Possible adverse effects of the change on their property create in them such an interest in the subject matter as to entitle them to maintain an action for that purpose."). In *Brown v. East Lansing Zoning Board of Appeals*, in finding non-abutting neighbors had standing to challenge a zoning variance due to the change "in their immediate vicinity," the court recognized that "[it] is important that persons who have an interest in preserving an established plan have an opportunity to be heard when use changes are contemplated." 109 Mich. App. 688, 701 (1981). In *Connell v. Lima Twp*, the court recognized the unique interests of adjacent neighbors in rezoning the adjoining parcel from residential to industrial:

> Similarly, because plaintiffs in this case own real property immediately adjacent to the real property that the Township Board conditionally rezoned, and because they alleged special injuries flowing from this legislative decision that are distinct from those suffered by the general public, they have standing to challenge the conditional rezoning because they have a substantial interest that is detrimentally affected in a manner distinct from that of the general public.

__ Mich. App. ___ (Case No. 353871, Mich. Ct. App. Mar. 4, 2021).

In *Vestevich v. West Bloomfield Twp.,* the court held that adverse impacts from a change in use from residential to commercial affected neighbors because they "had

obtained their parcels in reasonable expectation that the residential zoning of the property would be maintained." 245 Mich. App. 759, 762 (2001). Though the parties negotiated a consent decree that included terms "obviously intended to address the concerns of nearby landowners," the court found that "does not mean that defendant could not have failed to address all concerns of all affected landowners." *Id.* The court further found that the impacts were not limited to abutting landowners, but also those in nearby neighborhoods:

> There is no dispute that the more distant of the intervening homeowners were close enough to the subject property to be concerned that their interests would be affected by the commercial development of the residentially zoned parcel, by way of neighborhood character, property values, traffic patterns, and the like.

Id. *See also Jacobs, Visconsi & Jacobs Co. v.Burton*, 108 Mich. App. 497, 498-99 (1981) (where township rezoned property to permit development for regional shopping mall, court recognized township as being "apparently caught in the middle;" citizen association of neighbors objecting to rezoning was permitted to intervene and "as a practical matter, is the real party in interest."); *D'Agostini v. Roseville*, 396 Mich. 185, 189-90 (1976).

Michigan law recognizes the interests of adjacent landowners in zoning changes on neighboring parcels by requiring direct notice to landowners within 300 feet of proposed rezoning or special use permit applications. MCL 125 § 3306(1), MCL § 3401(2), 3502(2). Michigan law also grants neighbors within 300 feet the

right to be heard at a public hearing on rezoning and special use permit applications. MCL 125 §§ 3306(2), 3502(3). *See also Connell*, __ Mich.App. ___ (neighbors adjacent parcel proposed for rezoning had standing because their "statutory entitlement to notice means that they are not merely adjoining property owners."). Among others, PTP members Michelle Zebelle and Mark Nadolski own property within 300 feet of a winery parcel. (PageID.2103, 2068).

PTP members include neighbors with substantial interest in the maintenance of current zoning, the avoidance of spot rezoning, and continued peaceful enjoyment of their property; PTP formed to protect their interests, so PTP has sufficient interest to intervene on their behalf. Representational standing is well recognized in state and federal law. *See Speech First, Inc. v. Schlissel*, 939 F.3d 756, 763 (6th Cir. 2019) (association has standing to bring suit on behalf of members when members otherwise have standing in their own right, the interests it seeks to protect are germane to its purpose, and the claim does not require participation of individual members); *Fleming v. Citizens for Abermarle, Inc.*, 577 F.2d 236, 238 (4th Cir. 1978) (substantial legal interest found for non-profit corporations representing "upwards of 1000 residents or property owners in the County who, not without reason, feared that the 'planned community' would endanger the purity and potableness of the water in the Albemarle County Reservoir"); *Karrip v. Cannon Twp.*, 115 Mich. App. 726, 734 (1982) ("non-profit organizations representing

injured members have standing and a right to intervene"); *Whitelake Improvement Ass'n v Whitehall*, 22 Mich App 262, 274 (1970) ("The most expedient way for the riparian owners to obtain a determination on the merits is to allow them to combine and join together for this purpose with others of a like interest under a single banner both before and at the time of suit"); *Trout Unlimited Muskegon-White River Chapter v. White Cloud*, 195 Mich. App. 343 (1992) (non-profit corporation with specific purpose of protecting cold water resources, where vast majority of local members own property and use river, had standing to advocate the interests of its members).

(c) The District Court's analytical errors

In deciding PTP lacks substantial legal interest for intervention, the District Court drew two erroneous conclusions: (1) that PTP is not regulated by the ordinance at issue because "it is not a winery or a farm;" and (2) that PTP's interest is to "maintain the current ordinances," which is too general and could allow every township resident to intervene. (Order Denying Intervention, R. 108, PageID.4169-4170.) The Court cited two cases to support its conclusions: *Coalition to Defend Affirmative Action v. Granholm,* 501 F.3d 775 (6th Cir. 2007) and *Northland Family Planning Clinic, Inc., v. Cox*, 487 F3d. 323 (6th Cir. 2007).

The conclusion that PTP is not regulated by the ordinance because it is neither a winery nor farm is erroneous in three ways. First, it ignores that PTP may litigate on its members' behalf. *See Speech First*, 939 F.3d at 763; *Whitelake Improvement Ass'n*, 22 Mich App at 274. As discussed above, PTP members own farms and live by wineries; their interests and properties are protected by the winery sections and regulated by the zoning ordinance. Nullifying provisions that limit hours and activities at winery parcels threatens PTP members' peaceful use and enjoyment of their own property and impacts PTP members' farming operations. PTP members' interests are germane to PTP's organizational purpose, and those members need not personally participate in order for PTP to defend the legality of ordinance. By the District Court's reasoning, Plaintiff WOMP too lacks a substantial legal interest in its own case, and would lack standing, because WOMP is not regulated by the ordinance as it is neither a winery nor farm; yet the District Court found WOMP has associational standing on behalf of its members. (Order Denying Preliminary Injunction, R. 34, PageID.1875-1876.)

Second, the District Court's analysis was overly narrow. The standard for intervention is whether the proposed intervener "claims an interest relating to the property or transaction that is the subject of the action." Rule 24(a)(2); *Harris v. Pernsley*, 820 F.2d 592, 601 (3d Cir. 1987) (intervention requires consideration of practical consequences of litigation); *Purnell,* 925 F.2d at 948 ("interest" is to be

liberally construed and need not be a specific legal or equitable interest). PTP need not be a winery to have a substantial interest in the validity of winery provisions.

Third, the District Court's analysis misunderstands the zoning ordinance, which reciprocally regulates and protects all landowners in the agricultural district and township. Land use regulation, particularly zoning, grew out of the nuisance concept that no landowner may use their property in a manner that would injure their neighbor. 12 POWELL ON REAL PROPERTY § 79B.01(2) (2022). With growth and increasing population densities, and the limits of nuisance law, the legal system recognized government "could best control the physical, economic, and social impact that one form of land use has on adjacent property and on the community as a whole." *Id.* In this way, zoning is "really a form of Rousseau's social contract." *Id.* In its landmark zoning case, the Supreme Court recited the maxim *sic utere tuo ut alienum non laedas* as a fundamental principle of zoning founded in nuisance law – "use your own property in such a way that you do not injure your neighbor's." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); BOUVIER LAW DICTIONARY (2012). Land use regulates "not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard." *Euclid*, 272 U.S. at 388 (internal citation omitted).

The winery provisions do not regulate wineries in the abstract. Michigan law requires zoning be developed relative to the neighbors, the district, and the plan. *See* MCL § 125.3201(1) (zoning may "ensure that use of the land is situated in appropriate locations and relationship"); MCL § 125.3201(2) ("the [zoning] regulations shall be uniform for each class of land or buildings, dwellings, and structures within a district."); MCL § 125.3203(1) ("A zoning ordinance shall be based on a plan . . . ."). As recited on pages 13 to 15, the Peninsula Township Zoning Ordinance limits commercial activities at a winery to protect surrounding land uses, prevent nuisances, ensure compatible and uniform land uses in the district, and maintain consistency with the master plan.

The ordinance is reciprocal: it limits uses on all parcels for the protection of each relative to the other, as well as to protect the intent of the district. The ordinance does not prevent only winery parcels in the ag district from hosting restaurants – no parcel in the district may be a restaurant; this protects all neighbors against incompatible uses. The ordinance protects the winery by prohibiting a commercial hog farm from establishing next to its tasting room. PTZO, Section 6.7.2(6) (prohibiting commercial feeder lots in ag district). (PageID.81-82.) The winery need not be a feedlot to have a substantial, cognizable interest in the provision prohibiting feedlots. Landowners within 300 feet of a parcel get notice and may be heard on rezoning and special uses. MCL §§ 125.3103(2), 3306, 3502. If the winery

provisions regulate and protect only wineries, then only another winery neighbor may be noticed and heard, but the ordinance requires all neighbors to be heard.

The District Court also erred in finding PTP's interest is generally to "maintain the current ordinances," which, without more, is insufficient for intervention. (Order Denying Intervention, R. 108, PageID.4170.) This narrow characterization is contrary to the evidence. As discussed above on pages 28 to 29, PTP seeks to intervene to protect the agricultural character and quality of life resulting from commercialized encroachments, adverse land use decisions, changed zoning, and discontinued PDR. PTP seeks also to protect the quality of life for people who live on the peninsula and near wineries, which may be disrupted by increasing traffic and noise, late night restaurants, outdoor amplified music, and so on, discussed on pages 29 to 32.

Neither of the two cases relied upon by the District Court support its erroneous conclusions. In *Northland*, STTOP, a Michigan ballot question committee formed to promulgate anti-abortion legislation, tried to intervene in a lawsuit challenging the constitutionality of the legislation. 487 F.3d at 328. Considering the *Mich. State AFL-CIO* factors, the court found STTOP was not a repeat player as it was only created for one specific ballot initiative and it was not regulated by any statutory provisions at issue. *Id.* at 345. STTOP's legal interest was limited to the passage of the Act rather than the subsequent implementation and enforcement of it. *Id.* The

court distinguished the *Mich. State AFL-CIO* interveners, noting "public interest groups who are regulated by the new law, or, similarly, *whose members are affected by the law*, may likely have an ongoing legal interest in its enforcement after it is enacted." *Id.* (emphasis added).

In *Granholm*, two groups – a ballot question committee and nonprofit – were substantially involved in the process leading to passage of a citizen ballot initiative measure, which was then challenged in court. 501 F.3d at 780. The court found *Northland* "directly on point and controls our decision." *Id.* at 780-81. Because the groups' legal interest was limited to the measure's passage, they lacked substantial legal interest in a subsequent challenge to its validity. *Id.* at 782.

The *Granholm* court recognized that not all organizations that advocate for passage of a law lack substantial legal interest in a suit challenging its subsequent enforcement – such as where the group is regulated or its members affected by the law. *Id.* at 782. While the proposed intervener groups each "has at least a few members that are Michigan residents," the court found that amounted to "only a generic interest shared by the entire Michigan citizenry." *Id.* The court distinguished the group (CAAP) that had substantial legal interest in *Grutter:*

> CAAP was clear in its intervention motion that its members would be directly affected by the outcome of the litigation. *See* [*Gratz v. Bollinger*, 183 F.R.D. 209, 212 n.4 (E.D. Mich. 1998), rev'd by *Grutter*, 188 F.3d 394]. ("CAAP asserts that its membership consists of individuals, some of whom are parents or grandparents of prospective African-American and Latino

> students in the State of Michigan."). Consistent with this, in *Grutter*, we held that CAAP, by virtue of its minority members, "enunciated a specific interest in the subject matter of th[e] case, namely [its] interest in gaining admission to the University of Michigan . . . ." 188 F.3d at 399. Here, the MCRI and the ACRF have made no such specific "enunciation."

Id. at 783. The *Granholm* court thus found insufficient interest where a few members were mere residents, but sufficient interest where the group had minority members (parents or grandparents of prospective minority students), who were part of the class that the challenged policy was intended to benefit.

PTP is not a one-and-done group like those in *Northland* and *Granholm*. As discussed on pages 20 to 21, this is PTP's third lawsuit to protect residents and farmers against improper zoning changes. PTP has been involved in three successful zoning referendums. PTP has appeared at innumerable township meetings to protect the pastoral character and quality of life. PTP is not a statewide or national nonprofit with a handful of members who live locally; it is a Peninsula Township group made up entirely of people who have homes and farms in the township and whose community and quality of life is defined and assured by the Peninsula Township plan and zoning ordinance. PTP's interest in the subject of this lawsuit is different in kind than the groups in *Northland* and *Granholm,* which lacked both purpose beyond passage of the measures and members with any enunciated interest in the enforcement of the challenged measures.

The District Court characterized PTP's interests to be too generalized for intervention, asserting that if PTP's interest was enough, "then every resident in Peninsula Township could intervene." (Order Denying Intervention, R. 108, PageID.4170.) First, this is factually inaccurate. PTP is the longstanding group that consistently works to protect productive farmland and the pastoral quality of life in this township, and PTP advances the interests of PTP members who near a winery. Many township residents unquestionably value the community attributes that PTP seeks to protect, but not all could articulate the specific interests PTP has enunciated.

Second, the number of township residents who have substantial interest in the zoning plan and provisions that this lawsuit threatens is a function of the breadth, scope, and nature of the wineries' claims, not a measure of PTP's interest. If one winery had challenged one or a few zoning provisions in its special use permit, then the universe of residents with substantial legal interest would be confined. Here, 11 wineries challenge the validity of about 18 provisions, as well as the extent of township zoning authority over commercial activities on winery parcels in the ag district. Plaintiffs' shotgun approach threatens the interests of many neighbors.

Third, whether a proposed intervene has a substantial legal interest turns on the facts of the case and their enunciated interests, not on the number of non-interveners who might share that interest. *See Mich. State AFL-CIO,* 103 F.3d at 1245; *Granholm*, 501 F.3d at 783. In *Grutter*, there may have been thousands of

prospective minority student applicants who shared the proposed interveners' legal interests. 188 F.3d at 397. That many people may hold a substantial legal interest does not make it insubstantial or unprotectable by the proposed intervener.

(2) Impairment

A proposed intervenor "must show only that impairment of its substantial legal interest is possible if intervention is denied," which is a minimal burden. *Mich. State AFL-CIO*, 103 F.3d at 1247 (citing *Purnell*, 925 F.2d at 948). The question of impairment is not separate from the question of the existence of an interest. *Natural Resources Defense Council v. U.S. Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978)).

In *Mich. State AFL-CIO,* the court found that the case outcome may have *stare decisis* effects in future litigation challenges and the Chamber may also lose the opportunity to ensure that future election campaigns are conducted "under legislatively approved terms that the Chamber believes to be fair and constitutional." 103 F.3d at 1247. In *Grutter*, the court found "little room for doubt" that an outcome undoing the challenged race-conscious admissions policy would impair minority student access to and enrollment in the university "to some extent." 188 F.3d at 400.

The outcome of this case may be a court order nullifying winery provisions and limiting zoning jurisdiction over commercial activities on winery parcels. This

would result in commercial activities unconnected to agriculture haphazardly authorized at wineries throughout the ag district, contrary to the township plan and zoning ordinance. A final valid order voiding the challenged provisions would be precedential on the issues, effectively binding PTP and its member interests discussed above. This includes interest in the continued validity of provisions PTP helped developed and PTP members rely on to protect the value and peaceful enjoyment of property; interest in the zoning plan and the compatibility of land uses in the ag district; and interest in the avoidance of spot zoning commercial enterprises into the ag district. An order that the township lacks zoning authority over commercial aspects of winery operation impair PTP and its members interests in the protection of traditional farming and the farming character of the peninsula. (Nadolski Affidavit, R. 41-2, PageID.2073-2075; Wunch Affidavit, R. 41-3, PageID.2084-2087.) An order finding zoning provisions preempted by state law would likely have permanent precedential effect on zoning not just for winery parcels but also other liquor licensees (breweries, distilleries), and an order declaring provisions unconstitutional would likewise have precedential effect.

In addition, an order authorizing expanded winery activities threatens to result in nuisance conditions for neighbors, yet it may also limit the neighbors' legal rights to challenge the authorized expanded activities. *See Linton v. Commission of Health & Env't*, 973 F.2d 1311, 1319 (6th Cir. 1992) (interest impairment where case would

result in stare decisis effect on subsequent cases); *Jansen v. Cincinnati,* 904 F.2d 336, 342 (1990) (impairment found where judicial outcome voiding prior consent judgment would prevent interveners from enforcing their benefits that were provided by the challenged consent judgment). Here, a court order that the township cannot (for example) restrict winery hours of operation would limit the right of adjoining landowners to seek to enjoin as a nuisance *per se* their late night operations, which would otherwise violate zoning. *See Towne v. Harr,* 185 Mich. App. 230, 231 (1990) (violation of zoning is a nuisance per se that individuals alleging special damages may sue to enjoin). The winery would undoubtedly assert the neighbor is bound by the outcome in this case. *Skillken,* 528 F.2d at 875 ("It seems clear that a judgment which declares a zoning order to be void would bind adjoining property owners to the extent of taking away their statutory right to an independent action based on the order.") (quoting *Wolpe v. Poretsky,* 144 F.2d at 507); *Planned Parenthood,* 558 F.2d at 869 (judicial declaration that municipality could not restrict or impose special zoning requirements on clinics would impair nearby property owners' opportunity to "endeavor to uphold the ordinance as a legitimate and constitutional exercise of municipal power.") (citation omitted); *D'Agostini,* 396 Mich. at 190-91 (landowners' ability to protect interests may be practically impaired by neighbor's lawsuit seeking to rezone parcel from single- to multifamily residential).

PTP and its members' interests may be impaired by the outcome, and short of intervention, they have no other forum to protect their interests. *See Solid Waste Agency v. United States Army Corps of Eng'rs,* 101 F.3d 503, 507 (7th Cir. 1996) ("The strongest case for intervention is not where the aspirant for intervention could file an independent suit, but where the intervenor-aspirant has no claim against the defendant yet a legally protected interest that could be impaired by the suit.") (citation omitted). Intervention is the only effective way for PTP to protect its interests in the continuation of the current zoning provisions. *See Green Oak Twp. v. Green Oak MHC,* 255 Mich. App. 235 n. 7 (2003) (proper way for neighbors to protect interests in neighboring land use decision was to intervene in litigation between the developer and township before consent judgment, not to seek to overturn a consent decree by referendum).

The District Court erroneously concluded PTP's interests would not be impaired, even if it had an interest, "because PTP is not regulated by the zoning ordinances, [so] there is no effect on PTP if the zoning ordinances are amended." (Order Denying Intervention, R. 108, PageID.4171.) As in its consideration of substantial legal interest, the District Court did not address PTP representing its members. Moreover, this conclusion is contrary to the foundations of Michigan zoning discussed in the preceding section, and as exhibited throughout the Peninsula Township Zoning Ordinance, which provides reciprocal regulation and protection

by defining land use throughout the district and township for compatibility and consistency. The consequences of amending the ordinance as Plaintiffs seek to do in this case would undoubtedly affect neighbors listening to music at midnight, residents sharing the roads with the patrons of the eleven new restaurants on the peninsula, and the farmers who remain restricted to strictly agricultural activities.

(3) Inadequate representation

The burden of establishing inadequate representation is also "minimal because it is sufficient that the movant[] prove that representation may be inadequate." *Mich. State AFL-CIO*, 103 F.3d at 1247 (quoting *Linton*, 973 F.2d at 1319); *see also Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972), The proposed intervener need show only the potential for inadequate representation. *Grutter,* 188 F.3d at 400 (citations omitted). *See also Natural Resources Defense Council*, 578 F.2d at 1346 ("While the interest of the two applicants may appear similar, there is no way to say that there is no possibility that they will not be different and the possibility of divergence of interest need not be great in order to satisfy the burden of the applicant") (citing *National Farm Lines v. ICC,* 564 F.2d 381 (10th Cir. 1977)).

This minimal burden applies even when the existing party is a governmental entity. *Grutter*, 188 F.3d at 400. The government may inadequately represent the private interests of a proposed intervener because the government may abandon

some arguments "under a sense of public duty," whereas a private entity may advance them. *Anglers of the Au Sable v. U.S. Forest Service,* 590 F. Supp. 2d 877, 882-83 (E.D. Mich. 2008) (citations omitted). *See also Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) ("The government must represent the broad public interests, not just the economic concerns of the timber industry."); *National Farm Lines,* 564 F.2d at 384 (agency undertakes "task which on its face is impossible" when it seeks to protect both public and private interests).

There is ample basis to find PTP may be inadequately represented by Defendant. While there may be overlapping commonality, PTP's interests in this case are sufficiently adverse to the Township's. In *Skillken,* the Sixth Circuit found that the City of Toledo would not adequately represent neighboring property owners:

> The property owners, on the other hand, were interested solely in protecting the values of their own property which they did not want to be diminished by a change in the zoning. The municipal defendants had enough to do to defend themselves against the charges leveled against them by the plaintiffs. They do not have the same interest in protecting the values of the homeowners' properties as do the homeowners themselves.

528 F.2d at 876. *See also Planned Parenthood,* 558 F.2d at 870 (disparate interests between city interest in defending rationality of ordinance and neighbors who were interested in protected property rights). Michigan courts similarly recognize different interests, and the potential for diversion, between homeowners and the municipality. *See Vestevich,* 245 Mich. App. at 762 (township inadequately

represented neighbors where township was willing to allow commercial development in residential area, where neighbors had obtained homes with reasonable expectation of continued zoning); *D'Agostini*, 396 Mich at 189-90 (municipality-defendant is primarily concerned with zoning pattern and cannot be guided solely by consideration of individual hardships to adjoining landowner) (citing *Bredberg v. City of Wheaton*, 24 Ill.2d 612 (1962)).

PTP and its members have strong protected interests in maintaining the ag district for agriculture, where Defendant may prefer economic benefits with increasing commercial operations. Defendant may enjoy increased tax base from commercial wineries in a district otherwise limited to less tax-valuable farmland; PTP does not share that interest. Defendant may prefer to promote local jobs associated with restaurants, bars, and events, rather than farmland, whereas PTP is dedicated to protecting traditional farming. Defendant has general governmental interests in zoning; PTP members have acute property and quality of life interests in zoning. The wineries seek money damages and attorney fees under their Section 1983 claims (First Amended Complaint, R. 29, PageID.1116-1128), so Defendant's priority may be to protect the township treasury; PTP is not likewise burdened. Because their interests are substantially different, the Township cannot adequately represent PTP's interests.

The record indicates Defendant and PTP may not share the same ultimate objective. *See Bradley v. Milliken,* 828 F.2d 1186, 1192 (6th Cir. 1987) (citations omitted). Defendant's attorney initially acquiesced to the wineries' preemption and constitutional theories and recommended revising many of the provisions PTP seeks to defend. (Attorney Opinion Letter, R. 29-16, PageID.1386-1397). Defendant's attorney stated that revising the provisions would "protect the Township's interest in promoting the success of [winery] businesses and permit the Wineries to advance their own business interests as well." (PageID.1399.) According to the wineries, Defendant's letter admissions combined with the township's continued enforcement of the supposedly illegal winery provisions caused the wineries to sue. (First Amended Complaint, R. 29, PageID.1087, 1113-1116.) The township board subsequently distanced itself from the attorney's analysis on the basis it did not approve it and it was developed for settlement purposes. (Township Preliminary Injunction Response, R. 24, PageID.960-962.) While Defendant should not be bound by its attorney's interpretations of law, *U.S. v. Owens Contracting Services,* 884 F. Supp 1095, 1108 (E.D. Mich. 1994) (citing *American Title Insurance Co. v. Lacelaw Corp.,* 861 F.2d 224, 226 (9th Cir. 1985)), the memo raises the specter that Defendant's and PTP's interest and resolve to defend the provisions do not align.

Further, the legal opinion memo is not robust and accepts many of the wineries' novel theories. (*See, e.g.,* PageID.1386, 1391-1392.) It fails to consider

compatibility with the ag district and zoning. It is unredeeming that the memo was provided to aid the township in settlement. (PageID.960 (opinion provided "for the sole purpose of aiding the Township subcommittee that was engaged with Plaintiffs in settlement discussions"); PageID.961 ("these opinions were part of negotiations")). To the contrary, that the memo was intended to aid in negotiations with the wineries casts further doubt as the adequacy of Defendant's representation of PTP interests. It is inexplicable how an anemic memo essentially concurring with many winery assertions and supporting revisions to assist would put township in a strong negotiation position. Armed principally with that opinion memo supporting revisions to promote winery business, the township brought a knife to a gunfight with the wineries. This is ample basis to conclude Defendant's interests may be different that PTP's, and its ultimate goals contrary to PTP's. *See Trbovich,* 404 U.S. at 539 (intervention by union member granted because, even if Secretary of Labor "is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer'").

The board's decision to distance itself from the memo does not resolve the matter. (PageID.961, ("the Township Board[] publicly disagreed with some of the opinions provided in the Opinion and refused to adopt or approve the Opinion as its own.")) Since March 2021, Defendant engaged in extensive settlement talks with Plaintiffs. (Order Denying Enforcement, R. 117, PageID.4308). The District Court

found there was an agreement (terms unknown), then board members changed their mind. (Order on Sanctions, R. 139, PageID.4950.) After being sanctioned for rejecting the deal, Defendant requested the District Court order the board back into settlement with the wineries prior to receiving direction on the merits of the winery claims. (Transcript of Dec. 2, 2021, Hearing, ECF No. 131, PageID.4454-4457; Minute, R. 141, PageID.4960.) It appears Defendant prefers a compromise, and there is no basis to find that would adequately protect PTP and its members' interests.

PTP has demonstrated that it is likely to more vigorously defend the challenged provisions by asserting dispositive defenses to key claims, which the Township has instead abandoned. In *Mich. State AFL-CIO,* the court found the Chamber would harbor an approach and reasoning to uphold the challenged statutes in a way that will differ markedly from those of the state, and also that the existing parties decided not to appeal. 103 F.3d at 1247-84. In *New York Public Interest Research Group, Inc. v. Regents of University of State of New York*, the court found a likelihood the proposed interveners would make some arguments more vigorously than existing parties. 516 F.2d 350, 352 (2nd Cir.1975).

Before the District Court denied intervention, PTP filed leave to supplement the intervention motion with a motion to dismiss Plaintiffs' state liquor law preemption claim on the basis the federal court lacks supplementation jurisdiction over this purely state and local issue under 28 U.S.C. § 1367(a) and (c). (PTP Motion

for Leave, R. 56.) The winery provisions that are allegedly preempted by state law relate to hours of operation, amplified music, and restaurant and catering services. (First Amended Complaint, R. 29, PageID.1125-1126.) These claims threaten significant and direct harm to the interests PTP seeks to protect in this case.

Defendant Peninsula Township has accepted federal jurisdiction over Plaintiffs' state law claims. (Plaintiffs' Motion to Strike, R. 60, PageID.2727 ("The Wineries and Peninsula Township, the only current parties to this action, agreed that this Court has jurisdiction over this case when filing their Rule 26(f) Report.")). Early in the case, on January 15, 2021, the District Court found the wineries' constitutional claims lacking apparent merit though "more merit" in its preemption arguments. (Order Denying Preliminary Injunction, R. 34, PageID.1875). On January 25, the Township conceded federal jurisdiction in the Rule 26 Report. (PageID.1959.) On February 19, the wineries' attorney publicly announced their preemption claim, which would allow restaurants and late hours at wineries, to be its "core" claim. (PageID.2625.) On April 14, the wineries moved for summary judgment on their preemption claim, which showed their preemption claim to be factually independent of their federal claims and legally based solely in state and local law. (Plaintiffs' Preemption Summary Judgment Brief, R. 54.) Then on April 27, PTP sought leave to raise the jurisdictional issues, fulling briefing that Plaintiffs' preemption claims do not arise out same operative facts as the federal constitutional

claims, implicate delicate balancing between state and liquor laws and local zoning, assert novel interpretations of state laws, and involve complex issues that Michigan courts have not previously considered, which are necessary standards for federal supplemental jurisdiction. (PTP Motion for Leave, R. 56-1.)

Notwithstanding this context, on May 11, Defendant filed for summary judgment on preemption but declined to raise a jurisdictional defense. (Defendants' Preemption Summary Judgment Brief, R. 63.) Because the lack of jurisdiction should be raised once the basis for it is clear, it appears Defendant has no intent to raise this dispositive defense. *See Rubin v. Buckman*, 727 F.2d 71, 72 (3rd Cir. 1984) (dismissal for lack of subject matter jurisdiction is ripe whenever the issue become apparent). Defendant apparently decided to abandon a dispositive defense and instead allow a federal court to determine matters of quintessentially state and local but not federal interests – *i.e*., liquor control and zoning. *Bundo v. Walled Lake*, 395 Mich. 679, passim (1976) (local community has broad control over and special interests in regulation of establishments selling alcoholic beverages); *Roselind Inn, Inc. v McClain*, 118 Mich. App. 724, 731 (1982) (recognizing "a local community's power to control the alcoholic beverage traffic in its area"); *Ken-N.K., Inc. v. Vernon Twp*., 18 Fed. Appx. 319 (6th Cir. 2001) (invoking abstention in part because pending state proceedings "implicate an important state and local interest: the

enforcement and application of zoning ordinances and land-use regulations.") (citations omitted).

The Township's refusal to raise jurisdictional defects that PTP would assert further supports the conclusion that it may not adequately represent PTP's interests in this case. *City of St. Louis v. Velsicol Chem. Corp*., 708 F. Supp. 2d 632, 667 (E.D. Mich. 2010) (citing *Michigan State AFL-CIO*, 103 F.3d at 1247) ("Among other things, the possible failure of existing parties to make all of the prospective intervenor's arguments may be sufficient to show inadequate representation.").

B. Authority to Supplement Pending Motion to Intervene

After PTP moved to intervene in February, the wineries' moved for summary judgment on their preemption claim. (Plaintiffs' Preemption Summary Judgment Brief, R. 54.) In response, in order to timely raise a foundational jurisdictional defense, PTP filed leave to supplement to its intervention with a proposed motion to dismiss Plaintiffs' state law claims. (PTP Motion for Leave, R. 56.) The District Court denied PTP's motion to intervene and its motion to supplement. (Order Denying Intervention, R. 108, PageID.4172-4173.) The District Court reasoned that PTP failed to cite authority as "merely a proposed intervener" to supplement its intervention motion. The District Court further found PTP's motion to supplement

was really a disguised motion to dismiss, and PTP as an intervener lacked standing to seek dismissal.

PTP made no attempt to disguise the fact that its motion sought to raise dispositive jurisdictional and substantive defenses to Plaintiffs' state law claims. (PageID.2554.) Under Rule 24(c), there is no dispute that a proposed intervener may file a motion to dismiss "along with a motion to intervene," though the motion will not be granted if intervention is denied. (Order Denying Intervention, R. 108, PageID.4173) (citations omitted). However, PTP respectfully disagrees with the District Court assertion that a proposed intervener lacks authority or standing to supplement a pending intervention motion two months after it was filed, before it is ruled upon, and following a series of events. The District Court may have simply rejected the motion to supplement when it denied PTP's motion to intervene, and PTP may have reserved the opportunity to refile if successful in this appeal. The issue here is the propriety of PTP's effort to supplement its intervention motion.

There is nothing untoward or improper about a proposed intervener filing a proposed motion to dismiss before their motion to intervene is granted. To the contrary, it is permitted by Rule 24(c), and proposed intervener routinely file proposed motions to dismiss before the court has ruled on their intervention motion. Fed. R. Civ. P. 24(c) (motion to intervene must "be accompanied by a pleading that sets out the claim or defense for which intervention is sought."); *see, e.g., League of*

Women Voters of Mich. v. Johnson, 902 F.3d 572 (6th Cir. 2018) (accepting proposed intervenors' proposed motion to dismiss filed with motion to intervene); *Dubay v. Wells*, 506 F.3d 422 (6th Cir. 2007) (same); *Donald Trump for President v. Benson*, 2020 (W.D. Mich. Nov. 17, 2020) (proposed interveners filed proposed motions to dismiss with motion to intervene; court granted intervention and ordered Clerk to accept the proposed motions to dismiss for docketing).

The District Court found PTP was not a party but "merely a proposed intervener," and failed to cite authority to file the motion. (PageID.4172-4173.) PTP was authorized under Rule 24(c) to file a pleading as part of its intervention motion. After events arose, PTP properly requested a court order under Rule 7(b) to supplement its pending motion to intervene. (PageID.3086.) Rule 7(b) does not limit filings by parties, it provides authority to request a court order. Fed. R. Civ. P. 7(b).

There is no practical reason to require a proposed intervener to file a pleading, including a motion to dismiss, *with* their intervention motion but prohibit an intervener from filing a supplemental motion to dismiss before intervention is ruled on, particularly when the dismissal circumstances arose in the interim. The District Court decision would undermine the timeliness requirement in Rule 24, which requires consideration of the length of time that the case has proceeded and the prejudice to the other parties, among other factors. *Grubbs v. Norris,* 870 F.2d 343, 345 (6th Cir. 1989). A proposed intervener risks denial of intervention if they delay

filing once knowing of their claim. As in this case, the basis to seek dismissal may not be apparent at the time of filing for intervention. But if the proposed intervener who files a timely motion to intervene early in the case thereafter is prohibited from supplementing the pending motion until the court rules on its motion, then the proposed intervener may be paralyzed to protect their interests implicated in the litigation. This may dissuade early intervention.

Recognizing the opportunity for a proposed intervener to supplement intervention would not result in practical adverse impacts to other parties: no response to the motion to dismiss would be triggered unless and until intervention is granted. Moreover, the District Court cited no case to support its decision. The Court cited authority for the undisputed proposition that, after intervention is granted, the intervener is treated as an original party. (Order Denying Intervention, R. 108, PageID.4173) (citing *N.Y. News Inc. v. Newpaper & Mail Deliveries' Union of N.Y.*, 139 F.R.D 291, 293 (S.D.N.Y. 1991) and Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1920 (3d ed. 2021)). That does not resolve whether a proposed intervener, after the intervention filing but before it is granted, may supplement their pending motion.

PTP respectfully request that this Court recognize that a proposed intervener may seek leave to supplement a pending motion to intervene before it is rule upon.

X. CONCLUSION

For the reasons provided herein, Movant-Appellant respectfully requests that this Court grant it the right to intervene under Rule 24(a). Movant-Appellant further respectfully requests that the Court recognize that a proposed intervener may file a request under Rule 7(b) for leave to supplement a pending intervention motion with a pleading under Rule 24(c), including a motion to dismiss.

Date: January 11, 2022 s/ TJ Andrews

Tracy Jane Andrews (P67467)
LAW OFFICE OF TRACY JANE ANDREWS, PLLC
420 E. Front Street
Traverse City, MI 49686
(231) 946-0044
Attorney for Movant-Appellant

XI. CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(g), I hereby certify that the forgoing brief complies with the type-volume limitation in F.R.A.P. 32(a). Movant-Appellant's Brief is 63 pages, contains 12,791 words of Time New Roman (proportional) 14-point type, and consists of 1,128 lines. The word processing software used to prepare this brief was Microsoft Word 2016 MSO for Windows. In addition, the Brief contains a table replicated on page 17, which contains about 69 words and numbers.

Date: January 11, 2022 s/ TJ Andrews

Tracy Jane Andrews (P67467)
LAW OFFICE OF TRACY JANE ANDREWS, PLLC
420 E. Front Street
Traverse City, MI 49686
(231) 946-0044
Attorney for Movant-Appellant

XII. CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2022, this document was served on all parties or their counsel of record through the CM/ECF system.

Date: January 11, 2022 s/ TJ Andrews

Tracy Jane Andrews (P67467)
LAW OFFICE OF TRACY JANE ANDREWS, PLLC
420 E. Front Street
Traverse City, MI 49686
(231) 946-0044
Attorney for Movant-Appellant

XIII. ADDENDUM DESIGNATION OF DOCUMENTS

District Court Documents

Peninsula Township Zoning Ordinance (PTZO), ECF No. 1-1, PageID.33-195

Township Preliminary Injunction Response, R. 24, PageID.948-951, 960-92

Plaintiffs' Preliminary Injunction Reply Brief, R. 28, PageID.1070

First Amended Complaint, R. 29, PageID.1086-1129

Attorney Opinion Letter, R. 29-16, PageID.1368-1394

Order Denying Preliminary Injunction, R. 34, PageID.1865, 1869-1876

Joint Rule 26(f) Conference, R. 37, PageID.1959

Motion to Intervene, R. 40, PageID.1965-1966

Brief in Support of Motion to Intervene, R. 41, PageID.1967-1983

Nadolski Affidavit, R. 41-2, PageID.2068-2076

Wunsch Affidavit, R. 41-3, PageID.2078-2088

Jacobs Affidavit, R. 41-4, PageID.2091-2094

Phillips Affidavit, R. 41-5, PageID.2096-2100

Zebell Affidavit, R. 41-6, PageID.2102-2106

Plaintiffs' Opposition to Intervention, R. 46, PageID.2132-2149

Defendant's Concurrence to Intervention, R. 47, PageID.2150-2155

Plaintiffs' Preemption Summary Judgment Brief, R. 54, PageID.2272-1421

PTP Motion for Leave, R. 56, PageID.2553-2566

PTP Proposed Motion to Dismiss, R.56-1, PageID.2567-2627

New Wrinkles Emerge, R. 56-1, PageID.2625

Plaintiffs' Motion to Strike, R. 60, PageID.2727

Defendants' Preemption Summary Judgment Brief, R. 63, PageID.2739-2771

Brief Supporting Motion to Enforce Settlement, R. 101, PageID.4011-4077

Order Denying Intervention, R. 108, PageID.4167-4175

Order Denying Enforcement, R. 117, PageID.4308

Notice of Appeal, R. 121, PageID.4343

Transcript of Dec. 2, 2021, Hearing, ECF No. 131, PageID.4455-4457

Order Granting Attorney Fees, R. 139, PageID.4950-4958

Minutes, R. 141, PageID.4960

Unpublished Cases

Horrigan v. Thompson, 1998 U.S. App. LEXIS 9506, 1998 WL 246008, No. 96-4138 (6th Cir. May 7, 1998) **(Attached – Addendum 1)**

Ken-N.K., Inc. v. Vernon Twp., 18 Fed. Appx. 319 (6th Cir. 2001) **(Attached – Addendum 2)**

Midwest Realty Mgmt. Co. v. Beavercreek, 93 Fed. Appx. 782 (6th Cir. 2004) **(Attached – Addendum 3)**

Published case not yet available in Michigan Court of Appeals Reports

Connell v. Lima Twp __ Mich. App. ___, 2021 Mich. App. LEXIS 1458 (Case No. 353871, Mich. Ct. App. Mar. 4, 2021) **(Attached – Addendum 4)**

Horrigan v. Thompson

United States Court of Appeals for the Sixth Circuit

May 7, 1998, Filed

No. 96-4138

Reporter

1998 U.S. App. LEXIS 9506 *

JOHN J. HORRIGAN, et al., Plaintiffs-Appellees, v. WILLIAM J. THOMPSON, Defendant-Appellee, SHARP & LANKFORD, Appellant.

Notice: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: Reported in Table Case Format at: 1998 U.S. App. LEXIS 19635.

Prior History: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. 91-00253. Aldrich. 9-10-96.

Disposition: Case REMANDED to the district court for a determination on the motion to intervene.

Counsel: For JOHN J. HORRIGAN, Plaintiff - Appellee: James F. Burke, Jr., Burke, Kainski & Van Buren, Akron, OH.

For JOHN J. HORRIGAN, Plaintiff - Appellee: Dale F. Kainski, Law Firm of Dale F. Kainski, Cleveland, OH.

For WILLIAM J. THOMPSON, Defendant - Appellee: A. Russell Smith, Laybourne, Smith, Gore & Goldsmith, Akron, OH.

For WILLIAM J. THOMPSON, Defendant - Appellee: Paul V. Castellitto, Washington, DC.

For SHARP & LANKFORD, Appellant: Thomas R. Bagby, Woods, Rogers & Hazlegrove, Roanoke, VA.

Judges: BEFORE: GUY, DAUGHTREY, and GIBSON [*], Circuit Judges. **[*2]**

Opinion

PER CURIAM. Sharp & Lankford, an Ohio law firm, appeals the district court's denial of its motion to intervene as a matter of right in the present lawsuit, pursuant to Fed. R. Civ. P. 24(a)(2). Sharp & Lankford represented and had a contingency fee contract with William J. Thompson, the defendant in the present lawsuit, when Thompson entered into a settlement agreement with the plaintiffs. After the settlement, but before all of the payments to Thompson were made pursuant to the settlement, Thompson discharged Sharp & Lankford. The firm now contends that in order to protect and enforce its contingent attorney fee agreement with Thompson, it must be allowed to intervene in the ongoing dispute between Thompson and the plaintiffs concerning the interpretation of the settlement agreement. Because the district court denied

[*] The Hon. John R. Gibson, United States Court of Appeals for the Eighth Circuit, sitting by designation.

the motion without explanation, we find it necessary to remand for additional findings.

FACTUAL AND PROCEDURAL HISTORY

In February 1991, John J. Horrigan and James Burke filed a federal lawsuit against William J. Thompson, Thomas E. Rawlings, and Cellwave, Inc., alleging that defendants engaged in securities fraud, breach of fiduciary duty, and **[*3]** RICO violations. Thompson retained A. Russell Smith and the law firm of Sharp & Lankford to defend him in the lawsuit, and entered into a fee agreement with Smith and the law firm in March 1991. The fee agreement provided:

> 1. Attorneys shall receive, as their fees for representing William J. Thompson in the two lawsuits, twenty-five percent (25%) of the gross dividends, earnings, income, and/or receipts which he, his wife, heirs, assigns, or any others claiming through him, may receive at any time from any interest that he may have, or shares that he, his wife, heirs, assigns, or any others claiming through him, may have in Cellwave, Inc. and all its assets, its affiliates, subsidiaries and successors.
> 2. Attorneys shall also receive as fees, twenty-five percent (25%) of any recovery which William J. Thompson may obtain from any counter-claims or cross-claims which may be brought on his behalf against any party in the two lawsuits.

In July 1991, the parties to the lawsuit entered into a settlement agreement, with a mutual release of all claims, which provided that Thompson would relinquish all of his shares and interest in Cellwave, Inc., in exchange for plaintiffs **[*4]** paying him a percentage of the proceeds from the sale of the company's cellular radio broadcast licenses in Michigan and Ohio.

In October 1995, the district court ordered plaintiffs to make a payment of $ 10,626,714.61 to Thompson. A month later, Thompson paid Sharp & Lankford $ 1.3 million, 12.5 percent of the total sum it had received from plaintiffs, pursuant to the attorney fee agreement. In January 1996, the plaintiffs paid Thompson an additional $ 2,554,697.31, of which he has not paid Sharp & Lankford any amount.

On March 5, 1996, Sharp & Lankford terminated its relationship with Paul Castellitto, the only lawyer in the firm who had worked on the Thompson case. Three days later, Sharp & Lankford informed Thompson that they, rather than Castellitto, would be representing him in the future. The firm subsequently requested that Thompson pay them $ 319,337.16 -- 12.5 percent of the $ 2,554,697.31 that Thompson had received from plaintiffs in January. Thompson did not make this payment and, on March 18, he discharged Sharp & Lankford and purported to terminate the contingent attorney fee agreement with the law firm. Thompson then filed suit against Sharp & Lankford in the Court **[*5]** of Common Pleas of Summit County, Ohio, seeking damages for breach of contract and requesting a declaratory judgment both that Thompson is not required to pay the law firm under the fee agreement until final disposition of the settlement agreement enforcement proceedings and also declaring that the firm's basis for a fee recovery is in *quantum meruit*. In the lawsuit, Thompson also requested an order requiring Sharp & Lankford and Castellitto to settle between themselves their rights, if any, to the $ 319,337.16 payment for the legal services which Castellitto provided to Thompson before the firm was discharged.

At the end of April 1996, Sharp & Lankford moved to intervene in the ongoing federal lawsuit between Thompson and the plaintiffs as a matter of right, pursuant to Fed. R. Civ. P. 24(a)(2). The district court denied the motion with only a marginal entry, and Sharp & Lankford now timely appeals the district court's

decision.

ANALYSIS

This court has held that a "district court's denial of a party's motion to intervene as a matter of right is reviewed *de novo*." Purnell v. City of Akron, 925 F.2d 941, 945 (6th Cir. 1991). In determining whether intervention **[*6]** should be allowed, we "must accept as true the non-conclusory allegations of the motion." Lake Investors Dev. Group v. Egidi Dev. Group, 715 F.2d 1256, 1258 (7th Cir. 1983).

An applicant for intervention under Fed. R. Civ. P. 24(a)(2) must show that (1) the applicant has timely applied to intervene; (2) the applicant has a substantial legal interest in the pending litigation; (3) the applicant's ability to protect that interest is impaired; and (4) the parties before the court do not adequately represent that interest. Cuyahoga Valley Ry. Co. v. Tracy, 6 F.3d 389, 395 (6th Cir. 1993). The parties do not dispute that Sharp & Lankford's application to intervene was timely filed.

Sharp & Lankford satisfies the second element of the test for intervention as a matter of right by establishing that the law firm may be entitled to a percentage of any recovery received by its former client, Thompson, in the underlying lawsuit. Thompson argues that the discharged firm does not have a protectable interest in the lawsuit because, under Ohio law, an attorney who has been discharged by his or her client is entitled to recover only the reasonable value of services rendered prior to the **[*7]** discharge on the basis of *quantum meruit*. See Fox & Assocs. Co. v. Purdon, 44 Ohio St. 3d 69, 541 N.E.2d 448, 450 (Ohio 1989). However, as the Ohio Supreme Court pointed out in Fox, "an attorney who substantially performs under the contract may be entitled to the full price of the contract in the event of discharge 'on the courthouse steps,' or just prior to settlement." Id. In the present case, Thompson's discharge of Sharp & Lankford occurred after the settlement agreement between Thompson and the plaintiffs, and after the law firm performed a considerable amount of post-judgment work to enforce the settlement. Consequently, under Ohio law the law firm may be entitled to "the full price of the contract."

Horrigan and the other plaintiffs in the underlying federal lawsuit against Thompson oppose Sharp & Lankford's motion to intervene and argue that the law firm does not have a protectable interest in the suit because Thompson's claims (of which Sharp & Lankford's claim to attorneys fees is derivative) are meritless. The district court has not yet made any determination regarding the merits of the underlying dispute, and Thompson has not had an opportunity to argue the merits of his **[*8]** position before this court. Hence, it would be premature for us to deny Sharp & Lankford's motion to intervene on the basis that the underlying action is meritless.

It is the third factor of the intervention test that gives us the greatest pause. To satisfy the third factor, Sharp & Lankford must demonstrate that the law firm's ability to protect its interests would be substantially impaired or impeded were it not allowed to intervene. This question "must be put in practical terms rather than in legal terms." 7C Wright, Miller & Kane, Federal Practice and Procedure § 1908, p. 301 (2d ed. 1986). In other words, intervention should be allowed when a party might be practically disadvantaged by the disposition of the action, not just when a party will be legally bound as a matter of *res judicata*. Id.

The law firm seeks to intervene in this action to protect and enforce its interest in a percentage of any recovery that Thompson receives from the settlement agreement the firm helped forge. Thompson argues that this issue can be litigated in the action he brought in state court alleging, among other things, that Sharp & Lankford

breached its contract with him. However, requiring [*9] Sharp & Lankford to defend its interest in state court when a federal judge who has presided over this case for many years is already familiar with the relevant facts and legal issues appears, from our vantage point, to create a practical impediment to the firm's ability to protect its interests. It is on this issue that a finding from the district court would be the most helpful.

The fourth and final prong of the test for intervention as a matter of right asks whether the parties before the court adequately represent the interests of the would-be intervenor. With regard to this prong of the test, the Supreme Court of the United States has observed that "the burden of making that showing should be treated as minimal." Trbovich v. United Mine Workers, 404 U.S. 528, 538 n.10, 30 L. Ed. 2d 686, 92 S. Ct. 630 (1972). This court has noted that a party's opposition to the motion to intervene is evidence that the party does not adequately represent the intervenor. See Purnell, 925 F.2d at 950; see also Venegas v. Skaggs, 867 F.2d 527, 530 (9th Cir. 1989) ("In the case of a former attorney seeking intervention in order to secure rights under a contingent fee agreement, neither [*10] of the existing parties is concerned with protecting the [attorney's] interest.'") (citing Gaines v Dixie Carriers, Inc., 434 F.2d 52, 54 (5th Cir. 1970)). In the present case, Sharp & Lankford's interest is to enforce its fee agreement with Thompson and to recover its share of any proceeds that Thompson recovers in this federal lawsuit. Clearly neither the plaintiffs nor Thompson adequately represent this interest.

We have previously held that "although attorneys' fee arrangements are contracts under state law, the federal court's interest in fully and fairly resolving the controversies before it requires courts to exercise supplemental jurisdiction over fee disputes that are related to the main action." Kalyawongsa v. Moffett, 105 F.3d 283, 287 (6th Cir. 1997). Hence, in addition to the four factors derived from the federal rule itself, "judicial economy is a relevant consideration in deciding a motion for . . . intervention." Venegas, 867 F.2d at 531 (citations omitted). As this court has recently noted, "resolution of related fee disputes is often required to provide a full and fair resolution of the litigation. Unlike a state court judge hearing a separate contract [*11] action, a federal judge who has presided over the case is already familiar with the relevant facts and legal issues. Considerations of judicial economy are at stake." Kalyawongsa, 105 F.3d at 287. In the instant case, the district judge is familiar with both the litigation that has ensued over the past six to seven years and also with the relationships among the parties. Hence, It may well be in the interest of judicial economy for the district court to determine this question on the record.

CONCLUSION

For the reasons set out above, we **REMAND** this case to the district court for a determination on the motion to intervene, in the event that the merits of the issue concerning attorneys fees have not been concluded in the state court action. In remanding, we also emphasize that this court has repeatedly stated that marginal entry orders are disfavored. See, e.g., FDIC v. Bates, 42 F.3d 369, 373 (6th Cir. 1994); United States v. Woods, 885 F.2d 352, 353-54 (6th Cir. 1989). They are deficient because they fail to comply with Fed. R. Civ. P. 58, which requires judgments to be set forth on a separate document, 885 F.2d at 353, and they hinder appellate review, [*12] by forcing the parties and the reviewing court to guess as to the district court's reasoning. Id. At 354.

End of Document

Ken-N.K., Inc. v. Vernon Twp.

United States Court of Appeals for the Sixth Circuit

August 23, 2001, Filed

No. 98-1871

Reporter

18 Fed. Appx. 319 *; 2001 U.S. App. LEXIS 19453 **

KEN-N.K., INC., doing business as Uncle Buck's Northern Exposure, a Michigan Corporation; KENNETH R. CANFIELD; NINA R. CANFIELD, Plaintiffs-Appellants, v. VERNON TOWNSHIP, a Michigan DISTRICT OF MICHIGAN Municipal Corporation; SHIAWASSEE COUNTY; MICHIGAN LIQUOR CONTROL COMMISSION; JACQUELYN A. STEWART, Chairman of the Board, individually; FRANK J. KELLY, individually, Defendants-Appellees.

Notice: [**1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Prior History: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. 98-71630. O'Meara. 07-23-98.

Disposition: Plaintiffs' claims against the state and county defendants with instructions to STAY THE PROCEEDINGS pending resolution of the state court litigation REMANDED, and Canfields' request for attorney fees with respect to their claims against the township defendants DENIED.

Counsel: For KEN-N.K., INC., KENNETH R. CANFIELD, NINA R. CANFIELD, Plaintiffs - Appellants: Allan S. Rubin, Rubin & Rubin, Southfield, MI.

For KEN-N.K., INC., KENNETH R. CANFIELD, NINA R. CANFIELD, Plaintiffs - Appellants: Bradley J. Shafer, Shafer & Associates, Lansing, MI.

For VERNON TOWNSHIP, Defendant - Appellee: Kevin T. McGraw, John P. Seurynck, Joel W. Baar, Foster, Swift, Collins & Smith, Lansing, MI.

For MICHIGAN LIQUOR CONTROL COMMISSION, JACQUELYN A. STEWART, [**2] FRANK J. KELLY, Defendants - Appellees: Charles E. Donahue, Department of Attorney General, Farmington, MI.

For SHIAWASSEE CNTY, Defendant - Appellee: David R. Brinks, Johnson, Rosati, LaBarge, Aseltyne & Field, Lansing, MI.

For SHIAWASSEE CNTY, Defendant - Appellee: Marcia L. Howe, Margaret T. Debler, Johnson, Rosati, LaBarge, Aseltyne & Field, Farmington Hills, MI.

Judges: Before: BATCHELDER and MOORE, Circuit Judges; O'MALLEY, District Judge. * Alice M. Batchelder, Circuit Judge, concurring in part and dissenting in part.

Opinion by: KAREN NELSON MOORE

---

* The Honorable Kathleen McDonald O'Malley, United States District Judge for the Northern District of Ohio, sitting by designation.

Opinion

[*321] KAREN NELSON MOORE, Circuit Judge.

Appellants Ken and Nina Canfield, and Ken-N.K., Inc. d/b/a Uncle Buck's Northern Exposure ("Canfields"), appeal from a district court judgment dismissing their 42 U.S.C. § 1983 complaint on jurisdictional grounds.

I. BACKGROUND

The Canfields own a restaurant/tavern known as the "Crossroads Lounge" in Vernon Township, Shiawassee County, Michigan. The lounge is located in a B-1 "Commercial" zoning district, where **[**3]** "restaurants and taverns serving meals, snacks, or beverages for indoor consumption" are permitted as of right. [1] Shiawassee County, Mich., Zoning Ordinance § 9.14.2(l) (Dec. 22, 1981). In August of 1997, the Canfields secured the approval of the township for an entertainment permit, to be issued by the Michigan Liquor Control Commission ("MLCC"). The Canfields did not advise the township officials that the entertainment they intended to present included topless dancing; however, the entertainment permit issued by MLCC allowed such dancing.

In January of 1998, the Canfields renamed their business "Uncle Buck's Northern Exposure," and, without applying for a building permit, began to make various alterations to the establishment's structure. On January 21, the Canfields visited the county zoning office to ask whether the local zoning ordinance would allow an "adult entertainment" facility to be opened at **[**4]** Uncle Buck's. Within a week, county officials sent the Canfields two letters indicating that adult entertainment was not one of the uses listed in the ordinance as a use as of right in a B-1 district, and the Canfields would have to apply to the zoning board of appeals for a use classification. The Canfields did not apply for a use classification, but began presenting female topless dancers at Uncle Buck's on January 30. The same day, the township issued a stop work order for the construction at Uncle Buck's. The Canfields obtained a building permit on February 2, but the township revoked it the next day, noting in the revocation letter that the Canfields were not in compliance with county zoning law and citing the letters to that effect that county officials had very recently sent the Canfields.

On February 4, 1998, the county filed suit against the Canfields in Shiawassee Circuit Court, seeking to enjoin the Canfields' use of their property for adult entertainment purposes because it violated the county's zoning ordinance and was a nuisance per se. Answering the county's complaint, the Canfields claimed that the zoning ordinance was unconstitutional as applied and on its face. After **[**5]** an evidentiary hearing, the state court issued a preliminary injunction against the continued use of the property for adult entertainment, noting that the ordinance did not prohibit adult entertainment entirely, and opining that the Canfields were not likely to prevail on their constitutional arguments. The Canfields appealed the state court injunction.

On March 9, 1998, the township passed the Vernon Township public nudity ordinance, **[*322]** Ordinance No. 11, which essentially prohibited topless dancing within the township. During the federal proceedings--the proceedings before us here--the township stipulated that it would not enforce the ordinance against the Canfields, and shortly thereafter, repealed the ordinance.

---

[1] Crossroads Lounge held a Michigan Class C liquor license, which permits sale of alcohol by the glass.

On April 13, 1998, the State of Michigan amended its Liquor Control Act. The revised statute provides, among other things, that in counties with populations of 95,000 or less, no on-premises licensee shall permit topless dancing without first applying for a topless activity permit from the MLCC. In a newspaper interview, the chairwoman of the House Regulatory Affairs Committee indicated that the law was designed "to fix Durand's problems." (Vernon Township is just outside **[**6]** of Durand.) Jerry Ernst, *Limits on Nude Dancing Criticized*, Flint Journal (Flint, Mich.), Apr. 16, 1998, at E1 (included in Joint Appendix ("J.A.") at 294-95). The chairwoman also noted that the statute's 95,000 population figure was intended to pertain to Shiawassee and Eaton Counties.

Also on April 13, 1998, the Canfields wrote to the Shiawassee Community Development Director requesting a determination of whether a non-alcoholic adult entertainment dance club or an adult bookstore would be permitted at the site where they currently operated Uncle Buck's. The Director responded that the dance club would not be a use permitted as of right in a B-1 zoning district, where Uncle Buck's is located, and that he did not have sufficient information to determine whether the adult bookstore would be a permitted use. The Canfields then requested that the county zoning board classify three particular uses: 1) an establishment serving alcoholic beverages and offering topless dancing--the current use of the premises; 2) an establishment serving non-alcoholic beverages and offering fully nude dancing; and 3) an adult bookstore/video store/sexual toy store with private viewing booths for x-rated **[**7]** movies. In addition, the Canfields appealed the earlier determination by county officials that topless dancing represented a change in use of the premises. The board held a meeting on June 17, 1998, and five days later issued its decision upholding the change-in-use determination of the county officials, classifying the Canfields' first two proposed uses as uses permitted by right in a B-3 Commercial Zoning District, and tabling the request for classification of the third proposed use. The Canfields then appealed this determination to the same Shiawassee Circuit Court, at which point this appeal was consolidated with the Canfields' appeal of the county injunction action. The newly-consolidated appeal was argued in September 2000, and the state court has yet to issue a decision in these matters.

On April 16, 1998, the Canfields filed a complaint in federal court naming as defendants Vernon Township; Shiawassee County; the Michigan Liquor Control Commission; Jacquelyn A. Steward, Chairman of the Commission, in her individual capacity; and Frank J. Kelley, Attorney General of Michigan, in his individual capacity. The complaint alleged that both the township's public nudity ordinance **[**8]** and the county's zoning ordinance violated the Canfields' First, Fifth, and Fourteenth Amendment rights, and sought a declaratory judgment, injunction, and attorney fees under 42 U.S.C. § 1988. Further, the complaint sought declaratory and injunctive relief and attorney fees against the state defendants, claiming that §§ 916 and 917 of the Michigan Liquor Control Recodification Act constituted a bill of attainder in violation of Article I, section 10 of the United States Constitution, violated the Canfields' procedural and substantive **[*323]** due process rights as guaranteed by the Fifth Amendment, and violated the Equal Protection Clause of the Fourteenth Amendment. The Canfields then filed a motion for a temporary restraining order and preliminary injunction on all of the claims in the complaint. The district court denied the motion and dismissed all of the claims as to all of the defendants. The court held that the claims against the township were not ripe because the township had not enforced or threatened to enforce its public nudity ordinance against the Canfields. Invoking the abstention

doctrines of *Rooker-Feldman* and *Younger*, the court declined to decide **[**9]** the claims against the county because the Michigan courts were considering the nuisance abatement action brought by the county in which the Canfields had raised their constitutional claims as a defense. *See Rooker v. Fid. Trust Co.*, 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983); *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). Finally, the court concluded that the claims against the state defendants were barred by the Eleventh Amendment and did not present a case or controversy.

The Canfields filed a motion for reconsideration which the district court denied. This timely appeal followed.

II. THE COUNTY DEFENDANTS

The challenged provisions of the Shiawassee County Zoning Ordinance state:

> A use of land, buildings, or structures not specifically mentioned in the provisions of this ordinance shall be classified upon appeal or by request of the Zoning Administrator by the Board of Appeals pursuant to Section 6.4.4 of this ordinance.

Shiawassee County Zoning Ordinance § 9.3(C).

The Board of Appeals **[**10]** shall have the power to:

. . .

> C. Classify, upon receipt of an application therefore, a use which is not specifically mentioned in the use regulations of any district according to the following standards:
>
> > (1) The unmentioned use shall conform to the purpose and intent of the district in which it is allowed as a permitted principal use or accessory use or as a special land use.
> >
> > (2) The chosen use classification and permitted district(s) shall be that (those) which is (are) most similar to the unmentioned use being classified.
> >
> > The classification of the unmentioned use does not automatically permit the use, it only identifies the district in which it may be located and the zoning regulations with which it must conform.

Id. § 6.4.4.

Proceeding on the theory that the Canfields' presentation of topless dancing was a change in use that required classification in accordance with the zoning ordinance, the county brought an action in state court to enjoin such use. The Canfields defended by claiming that the zoning ordinance violated the First Amendment. The state court granted the injunction, ruling that the Canfields were unlikely to succeed on their **[**11]** First Amendment claim. Two weeks later, the Canfields brought this federal court action seeking declaratory and injunctive relief on the grounds that the zoning ordinance violates the First Amendment. Relying on the *Younger* abstention and *Rooker-Feldman* doctrines, the district court declined to exercise jurisdiction **[*324]** over the matter. We review that decision de novo. *Traughber v. Beauchane*, 760 F.2d 673, 676 (6th Cir. 1985).

Abstention in favor of state proceedings is proper where there exist: (1) ongoing state judicial proceeding; (2) an important state interest; and (3) an adequate opportunity in the state judicial proceedings to raise constitutional challenges. *Fieger v. Thomas*, 74 F.3d 740, 744 (6th Cir. 1996). The Canfields' challenge to the Shiawassee County zoning ordinance is a textbook candidate for abstention. There are ongoing state judicial proceedings: the Canfields' appeal of the county injunction action and county zoning board use classifications is still pending. These ongoing

proceedings implicate an important state and local interest: the enforcement and application of zoning ordinances and land-use regulations. *See, e.g.* **[**12]** *, Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603-04, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975) (applying *Younger* abstention where state brought a civil nuisance action against a theater showing pornographic movies); *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1083 (9th Cir. 1987) (holding that a city's civil enforcement action to compel compliance with a municipal zoning ordinance involved an important state interest). Finally, the Canfields had the opportunity to raise, and did in fact raise, their constitutional claims in the state court proceedings.

Abstention was therefore appropriate unless the Canfields can demonstrate that one of the three exceptions to the *Younger* abstention doctrine applies: (1) "the state proceeding is motivated by a desire to harass or is conducted in bad faith," *Huffman*, 420 U.S. at 611; (2) "the challenged statute is flagrantly and patently violative of express constitutional prohibitions[,]" *Moore v. Sims*, 442 U.S. 415, 424, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979) (quotation omitted); or, (for there is "an extraordinarily pressing need for immediate **[**13]** federal equitable relief," *Kugler v. Helfant*, 421 U.S. 117, 125, 44 L. Ed. 2d 15, 95 S. Ct. 1524 (1975). These exceptions have been interpreted narrowly. *Zalman v. Armstrong*, 802 F.2d 199, 205 (6th Cir. 1986).

The Canfields argue that the state court action in this case was prosecuted in bad faith. In support of this allegation, they note that a county official was quoted in the papers as saying that "the County could go after Canfield through criminal channels, citing him for misdemeanor zoning violations," and that the county refused to allow them a permit to reinstall pizza ovens without a site plan review, even though the county has only a "spotty history" of performing such reviews." While these incidents are troubling, they do not suffice to establish a pattern or practice of discriminatory enforcement that would suggest that the different, albeit related, action of seeking the injunction was motivated by bad faith. *Fieger*, 74 F.3d at 750 (applying an equal protection analysis to determine whether a claim of selective prosecution amounted to bad faith). This is particularly true given that both of the incidents cited by the **[**14]** Canfields occurred after the state court action had been filed. [2] **[*325]** Because none of the exceptions to *Younger* apply in this case, it is clear that the district court did not err in abstaining on *Younger* grounds.

Although we agree with the district court that *Younger* abstention was appropriate, rather than dismissing **[**15]** the Canfields' constitutional claims against the county, the district court should have stayed the plaintiffs' claims until the state court proceedings concluded. *Brindley v. McCullen*, 61 F.3d 507, 509 (6th Cir. 1995). As we noted in *Brindley*, "issuing a stay avoids the costs of refiling, allows the plaintiffs to retain their place on the court docket, and avoids placing plaintiffs in a sometimes difficult position of refiling their case before the statute of limitations expires." *Id.* Thus, in the event the state courts fail to address the merits of the Canfields' constitutional claims in resolving any appeal of the county's injunction action, a federal forum

---

[2] Commentators have noted that the Supreme Court has applied the "bad faith" exception to only one specific set of facts: where state officials initiate repeated prosecutions to harass an individual or deter his conduct, and where the officials have no intention of following through on these prosecutions. Erwin Chemerinsky, Federal Jurisdiction § 13.4, at 806-08 (3d ed. 1999). In this case, Shiawassee County followed through with its nuisance suit against the Canfields and, indeed, was successful in enjoining the Canfields from continuing to present adult entertainment. The facts of this case simply do not fit within the Supreme Court's narrow interpretation of the bad faith exception.

for these claims is preserved. Staying the proceedings also will give plaintiffs an opportunity to amend their complaint to seek monetary damages under 42 U.S.C. § 1983, an option they originally wished to pursue at the district court level. J.A. at 764 (Pls.' Reply Br. to Shiawassee County). Because we decide this issue on the grounds of *Younger* abstention, we do not reach the question of the applicability of the *Rooker-Feldman* doctrine.

III. THE MICHIGAN STATUTE AND [**16] THE STATE DEFENDANTS

The sections of the Michigan statute that were challenged at the district court level provide:

> (3) An on-premises licensee shall not allow topless activity on the licensed premises unless the licensee has applied for and been granted a topless activity permit by the commission. This section is not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premises located within that local unit of government. This subsection applies only to topless activity permits issued by the commission to on-premises licensees located in counties with a population of 95,000 or less.
>
> . . .
>
> (8) In the case of a licensee granted an entertainment or dance permit under R. 436.1407 of the Michigan administrative code who, after January 1, 1998, extended the activities conducted under that permit to regular or fulltime topless activity, that licensee shall apply to the commission for a topless activity permit under this section within 60 days after the effective date of this section in order to continue topless activity. Except as otherwise provided for in this subsection, this section applies only to entertainment **[**17]** or dance permits issued after the effective date of this section.

Mich. Comp. Laws § 436.1916(3), (8). The section has an effective date of April 14, 1998. Issuance of a topless activity permit requires the approval of the MLCC, the local legislative body, and the chief law enforcement officer of the jurisdiction. *Id.* § 436.1916(6).

The district court concluded that the Eleventh Amendment barred the claims against the state defendants. The court also held that the Canfields lacked standing and that their challenge was not ripe. After reviewing the unusual status of the concurrent state and federal litigation ongoing in this case, we conclude that the plaintiffs have no standing at this stage of the proceedings to bring their claims against the state defendants. More specifically, **[*326]** the plaintiffs lack Article III standing because they are unable to demonstrate with specific, concrete facts that they "personally would benefit in a tangible way from the court's intervention." *Warth v. Seldin*, 422 U.S. 490, 508, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975).

It is well established that in order to invoke a federal court's jurisdiction, a party must demonstrate: **[**18]**

> (1) injury in fact, by which we mean an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.

Northeastern Fla. Contractors Chapter of the

Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663-64, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993) (quotations omitted); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).

The plaintiffs have suffered an injury in fact in this case arising from the operation of the Michigan statute. A close reading of § 436.1916(8) makes clear that any business wishing to conduct "topless activity" **[**19]** on its premises that had previously received an entertainment license from the MLCC was *required* to apply for a topless activity permit from the MLCC within sixty days of April 14, 1998, the effective date of this provision, in order to continue conducting topless activity. Because the Canfields did not apply for this permit at all, let alone within sixty days of the statute's effective date, the Michigan statute automatically revoked their right to conduct topless activity, thus effectively invalidating a portion of the plaintiffs' previously-issued entertainment license. As we have noted, the revocation of a plaintiff's license or permit constitutes "a distinct and palpable injury in fact[.]" *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1075 (6th Cir. 1994). Thus, this element of the Supreme Court's Article III standing test has been met. [3]

[20]** Although the Canfields have met the first element of the Article III standing test, it is clear that they are unable to meet the test's "redressability" requirement. As stated above, the redressability element of Article III standing requires the plaintiffs to show that, should this court decide in their favor with respect to the validity of the state statute, a favorable decision in this regard would likely remedy their injury. As Chemerinsky explains, the redressability requirement ultimately asks: "Will the federal court decision make a difference?" Chemerinsky, Federal Jurisdiction § 2.3.3, at 74. In this case, there **[*327]** simply is no telling whether any relief we might award to the plaintiffs with regard to the state statute would have any effect on their ability to present topless dancing at Uncle Buck's.

As the litigation now stands, the Canfields cannot present topless dancing at Uncle Buck's in its present location because the county zoning ordinance does not permit that kind of entertainment within that zoning district. No action taken by this court with regard to the validity of the state permit scheme could provide the Canfields with the relief they seek because that relief **[**21]** is entirely contingent on the outcome of the state court proceedings regarding the county zoning ordinance. If the county ordinance is ultimately upheld at the conclusion of the ongoing state litigation, it will serve as an independent bar to the Canfields' presenting topless dancing in Shiawassee County. In that event, it is clear that any ruling we make with respect to the Michigan statute would not provide them with the relief they seek: the ability to present topless dancing at Uncle Buck's. Thus, due to the ongoing state court litigation, the redressability of the Canfields' claims against the state defendants is simply too speculative at this time to provide the Canfields with Article III standing.

---

[3] The automatic operation of the Michigan statute resulting in the denial of the Canfields' right to present topless activity also made their claims against the state defendants ripe for review. As we have explained, "ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997). Indeed, ripeness is typically at issue when an individual is seeking *pre-enforcement* review of a statute or regulation. *Kardules v. City of Columbus*, 95 F.3d 1335, 1343 (6th Cir. 1996). As we explained above, this is not a case of pre-enforcement review of the Michigan statute. To the contrary, the Michigan statute has already operated to deprive the Canfields of their right, under the entertainment permit previously issued to them by the MLCC, to conduct topless activity on their premises.

If, however, the county ordinance is struck down in the state court proceedings, then it is clear that the only provision preventing the plaintiffs from presenting topless dancing would be the Michigan statute. In that case, the plaintiffs' standing to challenge the state statute would be firmly rooted. Thus, given the extraordinary circumstances of this case, we believe that the best course of action is to stay, rather than dismiss, the plaintiffs' claims against the state defendants **[**22]** along with staying their claims against the county. While our general practice is to dismiss claims if there is no standing, in this case, it is the ongoing state court proceedings that render the plaintiffs' standing to sue the state defendants uncertain. By staying the plaintiffs' claims against the state defendants until the conclusion of the state court proceedings, we ensure that, if the plaintiffs can successfully challenge the county ordinance in the state court proceedings, there will be a federal forum available for their then-proper constitutional claims against the state defendants.

We acknowledge that, because of its standardless nature, § 6 of the Michigan statute might, in another case, chill the exercise of First Amendment rights and thus create standing to sue. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755, 100 L. Ed. 2d 771, 108 S. Ct. 2138 (1988) ("When a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially . . . ."). In this case, however, the expressive activity the Canfields seek to practice, **[**23]** *i.e.*, presenting topless dancing at their liquor establishment, is already prohibited by the county zoning ordinance. If the county prevails in the state court action, the recently enacted Michigan statute will have no effect whatsoever--chilling or otherwise--on the Canfields' activities at their current location.

Because the Plaintiffs lack standing at this time, we need not address whether any of the state defendants are immune from suit under the Eleventh Amendment. Determination of Eleventh Amendment immunity and application of the *Ex Parte Young* exception to that immunity are inextricably bound to the constitutionality of the acts performed by the government officials. Here, we do not reach the constitutionality of the Michigan statute. Accordingly, we REMAND the plaintiffs' claims against the county and state defendants to the district court with instructions to **[*328]** STAY THE PROCEEDINGS pending resolution of the state court litigation.

IV. THE TOWNSHIP DEFENDANTS

The township repealed its public nudity ordinance shortly after the conclusion of proceedings in the district court. Both parties agree that the Canfields' constitutional challenge to the ordinance is now **[**24]** moot. However, the Canfields argue that the repeal makes them "prevailing parties" eligible for attorney fees within the meaning of 42 U.S.C. § 1988. We disagree.

This circuit has previously held that, even when no judicial relief is ordered in a plaintiff's favor, the plaintiff can still be considered a prevailing party if the "lawsuit produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment[.]" *Payne v. Bd. of Educ., Cleveland City Schs.*, 88 F.3d 392, 397 (6th Cir. 1996) (quotation omitted). In these situations, under past circuit precedent, the plaintiff was required to show that it was their suit which was the "catalyst" that sparked the defendant's change in past practices. *Id.*

The Supreme Court, however, has recently struck down the use of the "catalyst theory" as a permissible basis for an award of attorney fees. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*,

149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001). Rather than consider a plaintiff to have "prevailed" when its suit caused the defendant voluntarily to change its past **[**25]** conduct, the Supreme Court in *Buckhannon* held that only an enforceable judgment on the merits or a court-ordered consent decree can serve as the basis for prevailing party status and, thus, an award of attorney fees. Because the Canfields obtained neither a judgment on the merits nor a consent decree with respect to their claims against the township defendants, they cannot be considered "prevailing parties" under 42 U.S.C. § 1988. Thus, their request for attorney fees is DENIED.

V. CONCLUSION

For the foregoing reasons, we REMAND the plaintiffs' claims against the state and county defendants with instructions to STAY THE PROCEEDINGS pending resolution of the state court litigation, and DENY the Canfields' request for attorney fees with respect to their claims against the township defendants.

Concur by: Alice M. Batchelder (In Part)

Dissent by: Alice M. Batchelder (In Part)

Dissent

Alice M. Batchelder, Circuit Judge, concurring in part and dissenting in part. I concur with the majority's conclusion that the plaintiffs lack standing to bring this claim at this point in time, because given the zoning dispute proceeding in state court, we are unable to grant the **[**26]** injunctive relief sought. I respectfully dissent in regard to the majority's determination to maintain jurisdiction over the matter pending the outcome of the state case.

First, I think that the appropriate procedure in this case would be to dismiss without prejudice rather than to stay the proceedings. In *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 721, 135 L. Ed. 2d 1, 116 S. Ct. 1712 (1996), the Supreme Court summarized the options available to the federal courts when declining to decide the merits of a case on abstention grounds:

> We have thus held that in cases where the relief being sought is equitable in nature or otherwise discretionary, federal courts not only have the power to stay the action based on abstention principles, but can also, in otherwise appropriate circumstances, decline to exercise jurisdiction altogether by either dismissing the suit or remanding it to the state **[*329]** court. By contrast, while we have held that federal courts may stay actions for damages based on abstention principles, we have not held that those principles support the outright dismissal or remand of damages actions.

In this case the Canfields have not sought **[**27]** money damages; the only relief they request is equitable in nature. Therefore, *Carroll v. City of Mount Clemens*, 139 F.3d 1072, 1075-76 (6th Cir. 1998), in which the plaintiff sought money damages under 42 U.S.C. § 1983, simply has no bearing on the proper disposition of this case. The question is whether this case presents "otherwise appropriate circumstances" for dismissal. Because it is highly likely that the state courts can resolve all issues in the case so far as the County is concerned, including the constitutional ones, I think that dismissal represents the most logical disposition of this case.

Second, we have not concluded that there is no standing or ripeness in this case on abstention grounds; rather, the proposed opinion concludes that the inability of the Canfields to comply with the county zoning requirements means that the State may never have the

opportunity to enforce the statute against them. That may change depending on the outcome of the state court proceedings or a future relocation of the Canfields' operation. Either eventuality would make ripe the claims against the State and confer standing on the Canfields; dismissal **[**28]** without prejudice assures the availability of a federal forum for resolution of their constitutional claims. Until one of these events happens, however, our jurisdiction remains entirely hypothetical because it depends on contingent events. In such circumstances, I think dismissal is constitutionally required:

> We decline to endorse [the doctrine of hypothetical jurisdiction] because it carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers. This conclusion should come as no surprise, since it is reflected in a long and venerable line of our cases. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex Parte McCardle*, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1868).

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998). Since the claims against the State here confront two jurisdictional bars, I see nothing left for us to do **[**29]** but declare the fact and dismiss without prejudice.

End of Document

Midwest Realty Mgmt. Co. v. City of Beavercreek

United States Court of Appeals for the Sixth Circuit

March 22, 2004, Filed

No. 02-3387

Reporter

93 Fed. Appx. 782 *; 2004 U.S. App. LEXIS 5972 **

MIDWEST REALTY MANAGEMENT COMPANY, Plaintiff-Appellee, v. THE CITY OF BEAVERCREEK, Defendant-Appellee, ALOYS NIENHAUS, ROBERT NIECK, TANYA NIECK, RANDALL LEE AMSTUTZ, Proposed Intervenors-Appellants.

Notice: [1]** NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Prior History: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. 98-00294. Merz. 3/7/02.

Disposition: Order denying intervention reversed. Agreed Order upon Settlement vacated and matter remanded.

Counsel: For MIDWEST REALTY MANAGEMENT COMPANY, Plaintiff - Appellee: Roger Makley, Coolidge, Wall, Womsley & Lombard, Dayton, OH.

For CITY OF BEAVERCREEK, Defendant - Appellee: Stephen M. McHugh, Matthew D. Stokely, Matthew R. Steinke, Altick & Corwin, Dayton, OH.

For ALOYS T. NIENHAUS, ROBERT C. NEICK, TANYA NEICK, RANDALL LEE AMSTUTZ, Appellants: Richard D. Schuster, Adam J. Hall, Vorys, Sater, Seymour & Pease, Columbus, OH.

Judges: Before: MARTIN and MOORE, Circuit Judges; and McKEAGUE, District Judge. *

Opinion

[*783] PER CURIAM. This is an appeal from an order of the District Court for the Southern District of **[**2]** Ohio denying appellants' motion to intervene in a civil action that had been settled between the parties, but not yet closed. The proposed intervenors wished to challenge terms of the pending settlement, but their motion was denied as untimely. Appellants contend the district court abused its discretion. For the reasons that follow, we agree. The order denying the motion to intervene will be reversed and the matter remanded to the district court for further proceedings.

I

The seed of the present controversy was first sown in 1996. At that time plaintiff-appellee Midwest Realty Management Company ("Midwest") entered into a contract to sell a 30-acre parcel of land in the City of Beavercreek, then zoned for agricultural use. The sale, to Pedcor Investments, was conditioned on re-zoning of

* The Hon. David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation.

the property for development as a large apartment complex. The Beavercreek City Council approved the requested re-zoning by ordinance in October 1997. The ordinance was overturned, however, by referendum in a May 1998 election.

This action followed. In July 1998, Midwest asserted various claims against the City of Beavercreek, alleging that the restored agricultural zoning of its parcel is **[**3]** **[*784]** arbitrary and unreasonable and represents an unconstitutional taking without just compensation and without due process. The City initially defended by moving for dismissal of Midwest's claims. After the motion was denied in July 1999, however, settlement negotiations ensued. These negotiations ripened into a proposed settlement agreement that was approved by the City Council by resolution on February 12, 2001. Pursuant to the proposed settlement agreement, the City, in exchange for dismissal of Midwest's claims, agreed to re-zone the subject property from "Agricultural" to "Residential Planned Unit Development," essentially allowing Pedcor Investments to proceed with development of the apartment complex. In essence, the settlement effected a circumvention of the referendum.

Before the settlement agreement was finalized, the parties advised the district court that a settlement had been reached. The district court issued a "conditional dismissal order" on May 3, 2001, dismissing the action with prejudice, "provided that any of the parties may, upon good cause shown not later than June 4, 2001, reopen the action if settlement is not consummated." The order expressly contemplated subsequent **[**4]** entry of a judgment order consistent with the settlement agreement and retained to the district court jurisdiction to enforce the settlement agreement.

On June 4, 2001, appellants Aloys Nienhaus, Robert Nieck, Tanya Nieck and Randall Lee Amstutz, all residents of the City of Beavercreek and owners of property adjacent to Midwest's 30-acre parcel, filed their motion for leave to intervene as defendants. The proposed intervenors contended they had interests relating to the subject property that were not being adequately represented by the City. On June 27, 2001, while the motion to intervene was still pending, Midwest and the City submitted their Agreed Order Upon Settlement to the district court for approval. The district court issued its ruling on both matters, denying the motion to intervene and approving the Agreed Order, on March 7, 2002.

The district court denied the motion to intervene as untimely for two reasons. First, it viewed its conditional dismissal order as having been immediately effective to foreclose exercise of continuing jurisdiction except insofar as it had been expressly retained. In its conditional order, the district court had retained jurisdiction only to reopen **[**5]** the case on motion of any party for good cause shown, to enter a judgment order embodying the parties' settlement agreement, and to enforce the settlement agreement. Finding that the proposed intervention would not serve any of these purposes, the district court denied intervention because its jurisdiction to adjudicate any claim or defense the proposed intervenors would assert had already been extinguished. Secondly, the district court held the motion to intervene was untimely because the movants ought to have known as early as March 31, 2000, when the parties moved to vacate the trial date in order to pursue settlement negotiations, that their interests might not be adequately represented by the City.

II

The denial of a motion to intervene under Fed. R. Civ. P. 24(a) is immediately appealable as a collateral matter. *Stringfellow v. Concerned Neighbors in Action,*

480 U.S. 370, 375, 377, 94 L. Ed. 2d 389, 107 S. Ct. 1177 (1987); *Purnell v. City of Akron,* 925 F.2d 941, 944 (6th Cir. 1991). Rule 24 is to be broadly construed in favor of potential intervenors. *Stupak-Thrall v. Glickman,* 226 F.3d 467, 472 (6th Cir. 2000). **[**6]** In order to demonstrate entitlement **[*785]** to intervention as of right under Rule 24(a), the proposed intervenors were required to show (1) that their motion to intervene was timely; (2) that they have a substantial legal interest in the subject matter of the pending litigation; (3) that the disposition of the action might impair or impede their ability to protect their legal interest absent intervention; and (4) that the parties to the litigation may not adequately represent their interest. *Id.* at 471; *Jansen v. City of Cincinnati,* 904 F.2d 336, 340 (6th Cir. 1990). The district court held that the proposed intervenors had made a prima facie showing sufficient to satisfy all but the first of these four requirements. This holding has not been challenged by the appellees. Hence, the focus of this appeal is on the district court's timeliness determination, which we review for abuse of discretion. *Stupak-Thrall,* 226 F.3d at 471, 472.

A. Jurisdictional Question

The district court's first rationale for denying the motion to intervene is a jurisdictional one. The court did not hold that it lacked jurisdiction to grant the motion to intervene. **[**7]** Rather, the court held that if intervention were allowed, it *would* lack jurisdiction to reopen the merits of the litigation settled. [1] **[**8]** Hence, in effect, the court ruled that the motion to intervene came too late because the action had already been dismissed and the jurisdiction retained was too narrow to accommodate the proposed intervention. [2]

The district court's ruling is based on a misapprehension of the effect of its *conditional* dismissal order. A conditional dismissal order is not final until the time to satisfy the condition expires. *Otis v. City of Chicago,* 29 F.3d 1159, 1165 (7th Cir. 1994). Here, the dismissal was subject to a condition subsequent. By the express terms of the order, if the settlement was not consummated and if any party, for good cause shown, moved to reopen not later than June 4, 2001, the dismissal would be undone.

As of June 4, 2001, the settlement had not been consummated. In fact, the settlement agreement was not even submitted to the court for approval until some three weeks later. And on June 4, 2001, *putative* parties moved, in effect, to reopen the matter. While the proposed intervenors were not parties to the case when they filed their motion to intervene, they did employ proper **[**9]** means to become parties before the action was effectively dismissed. In this respect, their motion was timely and the district court clearly had jurisdiction

---

[1] The district court noted that the motion to intervene was not "accompanied by a pleading setting forth the claim or defense for which intervention is sought," as required by Fed. R. Civ. P. 24(c). The court did not rely on this technical defect as grounds for denial of intervention, but was admittedly handicapped in its assessment of the proposed intervenors' position. The court thus presumed that the proposed intervenors' objection to the proposed settlement agreement would entail scrutiny of the merits of Midwest's constitutional claims. Such an inquiry was deemed to be outside the scope of the limited jurisdiction retained by the district court. Appellants insist they have no interest in litigating the merits of Midwest's claims, but merely seek to ensure that any agreement approved by the City is in conformity with the requirements of the City's charter and zoning code. In light of the analysis that follows, the precise nature of the proposed intervenors' claim or defense is of little consequence.

[2] To the extent the district court's analysis includes a jurisdictional component, we review its determination *de novo. Green v. Ameritech Corp.,* 200 F.3d 967, 972 (6th Cir. 2000).

to entertain and grant the motion to intervene.

It follows that the district court's concerns about the limits of jurisdiction retained **[*786]** post-judgment were inapposite. The limits of jurisdiction retained post-judgment simply do not come into play because the efficacy of the conditional dismissal order was nullified by the occurrence of the condition subsequent. [3] Accordingly, whether the district court's first rationale for denying intervention is deemed to be a function of its assessment either of subject matter jurisdiction, subject to *de novo* review, or of timeliness, subject to review for abuse of disaction, we find the analysis flawed and erroneous.

[10]** *B. Timeliness*

Secondly, the district court denied the motion to intervene as untimely based on its finding that the movants had constructive notice of the settlement negotiations between Midwest and the City as early as March 31, 2000 and their failure to move for intervention until after the case was settled was inexcusable. Timeliness of a motion to intervene is evaluated in the context of all relevant circumstances, including the following considerations:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Stupak-Thrall, 226 F.3d at 472-73 (quoting *Jansen,* 904 F.2d at 340).

The district court's denial of the motion to intervene was based at least implicitly on the **[**11]** first three of these considerations. The district court was troubled by the fact that Midwest's action was commenced in July 1998, had progressed to the point of a tentative settlement, and was subject to a conditional dismissal order by the time the proposed intervenors filed their motion on June 4, 2001. This chronology, viewed in the abstract, undeniably militates against allowing intervention. Yet, the time between the filing of the complaint and the motion to intervene, in itself, is among the least important circumstances. *See Stupak-Thrall,* 226 F.3d at 475. What is more critical is the progress made in discovery and motion practice during the course of the litigation. *Id.* Here, it appears that after the City's motion to dismiss was denied, although the discovery period had expired, little or no energy was devoted to discovery before the parties embarked on settlement negotiations. For this reason, the first factor weighs only slightly against intervention.

Considering the purpose for intervention, the district court characterized it as an attempt to uphold the referendum in order to prevent development of the subject property. This purpose was significant **[**12]** to the district court only insofar as it portended a reopening of the merits of the litigation, a purpose which the district

---

[3] Interesting in this regard is the district court's reliance on the terms of the proposed Agreed Order Upon Settlement as defining the limits of its retained jurisdiction. The Agreed Order Upon Settlement was not submitted to the court for approval until *well after* the motion to intervene had been filed and was not approved and issued by the court until the motion to intervene was denied, on March 7, 2002. The Agreed Order Upon Settlement can hardly be deemed to have retroactively limited the court's authority to afford redress to the proposed intervenors.

court erroneously deemed outside the scope of its retained jurisdiction. In other words, the district court did not expressly **[*787]** evaluate the purpose of intervention in terms of the importance of the legal interests asserted, the ability of the proposed intervenors to otherwise protect those interests, or the adequacy of existing parties' representation of those interests. The court did, however, find that a satisfactory prima facie showing of legitimate purpose for intervention had been made. Decision and order, p.3, J.A. 217. This finding, essentially unchallenged on appeal and adequately supported in the record, weighs in favor of allowing intervention. [4]

[13]** Third, and most troubling to the district court, was the length of time the proposed intervenors knew or should have known of their interest in the case before they finally moved to intervene. The district court implicitly recognized that the proposed intervenors were entitled to rely on the City to protect their interests as it defended against Midwest's claims when the litigation began. The reasonableness of this reliance was confirmed by the City's motion to dismiss Midwest's claims, in which the City vigorously defended the integrity of the referendum process. After the motion to dismiss was denied and the case was set for trial in April 2000, there was no reason to question the adequacy of the City's representation of the proposed intervenors' interests until March 31, 2000, when the parties moved to adjourn the trial in order to pursue settlement negotiations. Then, in the opinion of the district court, "a person attentive to the docket of this case would have known as early as thirteen months before the Conditional Dismissal Order that the City of Beavercreek was willing to negotiate a settlement with Midwest, i.e., that it was probably not going to insist on the complete victory **[**14]** which the Proposed Intervenors seek." Decision and order p. 4, J.A. 318. That is, the mere fact of settlement negotiations was deemed to represent constructive notice to interested residents that the City might compromise their interests. Acknowledging that the negotiations were conducted privately, the court nonetheless held that the pendency of negotiations represented inquiry notice to a person interested in the progress of the case.

There is no evidence that any of the proposed intervenors had *actual* knowledge of the possibility of a settlement jeopardizing their legal interests before April 2001. They contend they first learned of the "collusive negotiations" between the parties in late April 2001, shortly before the conditional dismissal order issued. They maintain that they moved to protect their rights by the June 4, 2001 deadline established by the conditional dismissal order even though they were unaware of the terms of the proposed settlement agreement until after June 27, 2001, when the parties finally reached agreement and submitted the Agreed Order Upon Settlement to the court. They insist the mere pendency of negotiations cannot be deemed to have put them on notice **[**15]** that the City would collude in subverting or circumventing the law.

The proposed intervenors undoubtedly knew that this litigation could affect their legal interests from the beginning. However, it was not until there was reason to believe their interests were not being adequately represented by the City that they **[*788]** would have

[4] Midwest and the City argue that the proposed intervenors' motivation is selfish, not noble. They question the sincerity of the avowed desire to vindicate the integrity of the citizens' right of referendum and maintain the proposed intervenors are determined simply to prevent development of the property, irrespective of the best interests of the City and its residents. While we express no opinion on the merits of the proposed intervenors' objection to the settlement agreement, we are satisfied, considering the zoning controversy surrounding this parcel, that the legal interests asserted are substantial and deserving of further consideration.

been alerted to the need to seek intervention. *See Jansen,* 904 F.2d at 341. The mere pendency of settlement negotiations cannot be deemed to trigger such awareness. Only notice of objectionable terms in a proposed settlement will ordinarily suffice. *See Beckert v. TPLC Holdings, Inc. (In re Telectronics Pacing Sys.),* 221 F.3d 870, 882 (6th Cir. 2000). Here, on the present record, it appears the proposed intervenors did not have actual notice of such objectionable terms until after June 27, 2001. In other words, they moved to intervene even before their suspicions of inadequate representation were confirmed.

The district court's reliance on its assessment of what "a person attentive to the docket of this case" would have deduced from the parties' joint motion to adjourn trial creates a standard that is neither substantiated by legal authority nor supported **[**16]** by a reasonable interpretation of the record facts. We simply are unwilling to endorse such a standard in the absence of other corroborating evidence that the proposed intervenors, or a reasonable person in their position, should have been aware of the pending negotiations and should have had reason to believe the City would not defend the referendum vote which restored the agricultural zoning of the property.

Midwest and the City insist that constructive notice of the terms of the settlement agreement was afforded by the February 12, 2001 City Council meeting, when the City Council expressed its willingness to approve the proposed agreement. There is no evidence that any of the proposed intervenors was present at the meeting. Nor does the record disclose whether the terms of the proposed agreement were published at the meeting. Further, although the City Council approved the proposed agreement at the meeting, Midwest did not actually do so until June 26, 2001. Finally, even if publication of the proposed terms of settlement at the meeting was deemed to put the proposed intervenors on notice of the need to intervene, the passing of four months before they filed their motion, during **[**17]** which apparently no progress was made in the litigation, does not constitute the sort of undue delay or reflect the sort of unexcused dilatoriness that would disqualify them from intervention -- especially in the absence of any showing of prejudice to Midwest or the City resulting from that four-month delay.

In denying the motion to intervene for untimeliness, we therefore conclude, the district court abused its discretion. This conclusion is buttressed by consideration of the last two governing factors, which the district court appears not to have considered. As indicated above, there is no evidence of prejudice sustained by the original parties due to the proposed intervenors' failure to intervene until almost four months after the February 12, 2001 meeting. Moreover, we are satisfied that this case does present unusual circumstances justifying intervention even though the dispute between the original parties was nearly settled. Where the City's first re-zoning of this property to allow residential development was overturned by referendum, the City's second attempt to accomplish the same re-zoning, arguably in derogation of both local and state law, through settlement of litigation **[**18]** under the imprimatur of federal court order, certainly poses conflicts of legitimate interests that bear further scrutiny. Based on evaluation of all the relevant circumstances we thus hold that the motion to intervene was not untimely.

III

For all the foregoing reasons, and recognizing that Rule 24 intervention is to be broadly allowed, we conclude the motion to intervene was improperly denied. The order denying intervention is therefore **REVERSED.** **[*789]** Appellants Aloys Nienhaus, Robert Nieck.

Tanya Nieck and Randall Lee Amstutz shall be allowed to intervene as parties defendant.

Further, because the Agreed Order Upon Settlement simultaneously issued by the district court was premised on agreement of less than all the parties properly before the court, it too must be **VACATED.** While we express no opinion on the merits of the intervenors' objections to the proposed settlement agreement, it is clear they are entitled to assert their interests in this litigation and are entitled to an adjudication thereof by the district court in the first instance. This matter is accordingly **REMANDED** to the district court for further proceedings consistent **[**19]** with this opinion.

End of Document

Connell v. Lima Twp.

Court of Appeals of Michigan

March 4, 2021, Decided

No. 353871

Reporter

2021 Mich. App. LEXIS 1458 *; 2021 WL 833299

KAREN CONNELL, LARRY CONNELL, JAMES P. EYSTER, KIM E. MICHENER, RITA MICHENER, DIANA NEWMAN, MICHAEL B. O'LEARY, and LAURA OUELLETTE, Plaintiffs-Appellants, v LIMA TOWNSHIP and LIMA TOWNSHIP PLANNING COMMISSION, Defendants-Appellees.

Notice: THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE MICHIGAN COURT OF APPEALS REPORTS.

Prior History: **[*1]** Washtenaw Circuit Court. LC No. 19-000834-CZ.

Counsel: For KAREN CONNELL, Plaintiff-Appellant: JAMES P. EYSTER.

For LIMA TOWNSHIP, Defendant-Appellee: LUCAS FREDERICK.

Judges: Before: SWARTZLE, P.J., and RONAYNE KRAUSE and RICK, JJ.

Opinion by: Brock A. Swartzle

Opinion

SWARTZLE, P.J.

Lima Township rezoned property in its jurisdiction, subject to certain conditions proposed by the property owner. Adjacent property owners sought to challenge the rezoning decision in circuit court, but the court concluded that they did not exhaust certain administrative remedies and were not aggrieved parties. The critical issue on appeal is whether the rezoning decision was a legislative act or an administrative/quasi-judicial act. As explained, rezoning is a legislative act, in contrast to, for example, the decision to grant a conditional-use permit. Given this, plaintiffs were not required to exhaust administrative remedies or show that they were aggrieved parties, and the circuit court erred by granting summary disposition to defendants on these grounds.

I. BACKGROUND

A. THE 2018 CONDITIONAL-REZONING APPLICATION

The subject property is a 3.41-acre parcel in Lima Township. In 1945, a factory was built on the property. The facility was used as **[*2]** a factory until 1986, and thereafter the facility was used for other purposes, including as a prior nonconforming use due to a zoning change. The facility was eventually abandoned, and it remained abandoned for approximately 30 years; at some point, the property was rezoned Rural Residential (RR). Several residences were constructed nearby when the facility was no longer being used as an active factory. In 2016, the property owners began to repair the facility.

In the fall of 2018, one of the owners of the subject property, James Smith, requested that the Township

conditionally rezone the subject property from Rural Residential (RR) to Light Industrial (LI). A conditional rezoning involves a property owner's offer to impose certain conditions on the use of property in exchange for a rezoning to a new use classification. The Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.*, specifically allows a local unit of government to engage in conditional rezoning:

> (1) An owner of land may voluntarily offer in writing, and the local unit of government may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map.
>
> (2) In approving the conditions **[*3]** under subsection (1), the local unit of government may establish a time period during which the conditions apply to the land. Except for an extension under subsection (4), if the conditions are not satisfied within the time specified under this subsection, the land shall revert to its former zoning classification.
>
> (3) The local government shall not add to or alter the conditions approved under subsection (1) during the time period specified under subsection (2) of this section.
>
> (4) The time period specified under subsection (2) may be extended upon the application of the landowner and approval of the local unit of government.
>
> (5) A local unit of government shall not require a landowner to offer conditions as a requirement for rezoning. The lack of an offer under subsection (1) shall not otherwise affect a landowner's rights under this act, the ordinances of the local unit of government, or any other laws of this state. [MCL 125.3405.]

Thus, the keystone of a conditional rezoning is that the conditions are voluntarily offered by the property owner in writing, and the local unit of government cannot require the landowner to offer conditions as a requirement for rezoning.

The Township designated Smith's request for conditional rezoning as Application 2018-002, and this designation appears **[*4]** on all of the minutes from the relevant meetings of the Lima Township Planning Commission and the Lima Township Board of Trustees. Plaintiffs have provided a copy of the Township's zoning map to illustrate the location of the subject property and the surrounding land uses. This map shows the crossroads and the zoning districts in the area, as well as the location of surrounding homes; it illustrates that the subject property is entirely surrounded by residential uses located in either the Agriculture-1 (AG-1) or Rural Residential (RR) Districts.

It is uncontested that plaintiffs, as owners of adjoining parcels, received written notice of a Planning Commission meeting held on August 27, 2018, at which the proposal for a conditional rezoning of the subject property from Rural Residential (RR) to Light Industrial (LI) was first considered. Several of the plaintiffs spoke during the public hearing. After the hearing concluded, the Planning Commission considered action on the application, but eventually postponed action until a site plan was submitted. From this point forward, the Planning Commission did not provide plaintiffs with any specific notice regarding meetings on the application **[*5]** for a conditional rezoning; rather, the meetings were simply noticed under the more general requirements of the Open Meetings Act, MCL 15.261 *et seq*, as acknowledged by both parties during oral argument on appeal.

At its next meeting on September 24, 2018, the Planning Commission briefly considered the application. The Planning Commission's meeting minutes report that the chairman "stated that there has not been a site plan filed for Application 2018-002." The Planning

Commission again voted to "postpone Application 2018-002 until a Site Plan is filed."

At its meeting on October 22, 2018, the Planning Commission again considered the application. The Planning Commission's meeting minutes for that date report that the chairman "stated a site plan was received on October 3, 2018." (The trial-court record does not contain a copy of this site plan.) The Planning Commission had also received a report from the Lima Township Planner which stated that all surrounding land uses were residential in nature, and that "the development pattern immediately surrounding the subject site is well established." The report noted that the application was one for conditional rezoning, and the applicant had offered several conditions **[*6]** in exchange for the rezoning. The Township Planner ultimately opined that the site plan submitted by the applicant was inadequate, and recommended that the Planning Commission "postpone action until the applicant has had a chance to revise their application." The Planning Commission voted to direct staff "to draft a resolution recommending denial of the requested conditional rezoning for Application 2018-002."

At its next meeting on November 26, 2018, the Planning Commission considered the application. The Planning Commission's meeting minutes indicate the following regarding Application 2018-002:

> Chair Consiglio stated that a Public Hearing was held in August with public comments.
>
> Received Resolution of Findings and Recommendation from Township Planner Paul Montagno, dated received November 19, 2018.
>
> At this time Chair Marlene Consiglio read the terms of the standards A through G from the Resolution of Findings and Recommendations. Discussion followed.
>
> Motion by Elizabeth Sensoli, seconded by Marlene Consiglio to forward Application 2018-002 to the Lima Township Board and recommend that they deny the application for a conditional rezoning from RR-Rural Residential to LI-Limited Industrial **[*7]** for the parcel located at 1035 North Fletcher Road, Chelsea, MI 48118.

The Planning Commission's vote to recommend denial of the requested conditional rezoning was five members in favor, two members opposed. The meeting minutes do not report that any member of the Planning Commission abstained from voting or was absent.

In their amended complaint, plaintiffs referred to this November 26, 2018 vote of the Planning Commission. Plaintiffs alleged that, following the August 2018 public hearing during which public comment was received, the Planning Commission voted to deny the conditional rezoning request on November 26, 2018. Plaintiffs further alleged that they "all understood that this ended the application process for rezoning." As the subsequent proceedings would reveal, however, plaintiffs' understanding was incorrect.

As explained in more detail in the next section, rezoning is a legislative act that can be accomplished only by the Lima Township Board of Trustees; the Planning Commission can only issue a *recommendation* to the Township Board. The Lima Township Zoning Ordinance addresses amendments (including the rezoning of parcels) in Section 14.3, titled "Amendment Procedures." The Zoning Ordinance **[*8]** provides that an amendment may be initiated by petition of one or more property owners of Lima Township, and all proposed amendments must be referred to the Planning Commission for review and recommendation before action may be taken thereon by the Township Board. (Lima Township Zoning Ordinance, § 14.1.) The Planning Commission must hold at least one public hearing on a requested rezoning (Lima Township Zoning Ordinance, §14.3.2), and must forward any

recommendation to the Township Board:

> 14.3.7. The Planning Commission shall, following the public hearing and action on the petition, transmit the petition and a summary of comments received at the public hearing and recommendation to the Township Board.
>
> 14.3.8. The Planning Commission shall report its findings, a summary of comments from the public hearing, and its recommendations for disposition of the petition to the Township Board following the public hearing within a reasonable amount of time from the filing date. If the Township Board shall deem advisable any changes, additions, or departures as to the proposed amendment, it shall refer it to the Planning Commission for a report thereon within a time specified by the Board. Thereafter, the Board **[*9]** may act upon the petition. [Lima Township Zoning Ordinance, §§ 14.3.7-14.3.8.]

Therefore, the Planning Commission's decision on November 26, 2018, to recommend denial of Smith's application for a conditional rezoning was simply that—a recommendation—and one that was not final until acted upon by the Township Board. Thus, as noted, plaintiffs were incorrect in believing that the November 26, 2018, recommendation concluded the matter.

Meeting minutes of the Township Board indicate that the Planning Commission did forward its recommendation to the board. (Although the Township Board's meeting minutes are not part of the record on appeal, at oral argument before this Court, counsel for both parties agreed that this Court could take judicial notice of these public records.) The Township Board's minutes of the meeting held on December 10, 2018, state in relevant part: "1035 N Fletcher Rd—re-zoning: Findings Report from Twp. Planner was too intensive for recommending application approval." The next month, the Township Board returned the application to the Planning Commission, as reflected by the January 14, 2019, minutes:

> 1035 N. Fletcher Rd.—Rezoning RR to LI Conditional Application #2018-002
>
> Moved by Bater, **[*10]** supported by Laier referring application #2018-002 back to the Planning Commission so modifications may be made to the application by the applicant and presented again. Motion carried 4 ayes, 1 nay (Havens)

The Planning Commission once again considered the application for a conditional rezoning at its meeting on March 25, 2019. The Planning Commission's meeting minutes for that date indicate: "The list of limited formal uses need[s] to be typed up by the applicant and given to the Planning Commission for conditional rezoning, and also the prior Site Plan needs to be attached to the rezoning request." The meeting minutes also indicate that the Planning Commission voted to direct the Township Planner "to develop a draft for a resolution in favor of conditional rezoning with conditions for Application 2018-002, and to table this until April 22, 2019." (The record does not indicate that anything of note occurred on April 22, 2019.)

On May 17, 2019, Smith submitted another revised site plan. The record does not contain the site plan or the list of conditions proposed for the subject property.

At its next meeting on June 24, 2019, the Planning Commission again considered the application for **[*11]** conditional rezoning of the subject property. The Planning Commission's meeting minutes report the following regarding Application 2018-002:

> Motion by Howard Sias, seconded by Marlene Consiglio, to recommend to the Township Board for approval of application #2018-002 for conditional rezoning for 1035 N. Fletcher Road, with the conditions offered by the applicant on their site plan

> dated May 14, 2019, and based on the Planning Commissions' [sic] Resolution of Findings and Recommendation dated June 24, 2019.

The Planning Commission's vote was three members in favor, one member opposed, one member abstaining, and two members absent.

On July 8, 2019, the Township Board met to consider the Planning Commission's recommendation that it approve Smith's revised application. According to plaintiffs, none of the owners of adjoining parcels received notice about this meeting, and the Township Board did not receive any correspondence from those neighbors regarding the revised site plan filed in May 2019.

The Township Board's minutes from its July 8, 2019 meeting state:

> 1035 N. Fletcher Rd. - Rezoning RR to LI Conditional Application #2018-002
>
> Now therefore be it resolved, that the Planning Commission **[*12]** recommends to the Township Board, that they approve the application for a rezoning from RR-Rural Residential to LI,—Light Industrial with the conditions offered by the applicant in a the [sic] letter received on May 17, 2019, and the site plan with final revision date of 5-14-19, case # 2018-002, for the parcel located at 1035 North Fletcher, Chelsea, MI 48118, with tax parcel ID # G-0-08-400-012.
>
> Moved by Luick, seconded by Bater to follow the Planning Commission's recommendation and give approval to 1035 N. Fletcher Road for rezoning with conditions from RR-Rural Residential to LI-Light Industrial.
>
> ROLL CALL VOTE: AYE: Bater, Maier, Luick NAY: Havens, Laier ABSENT: None
>
> Motion passed

The very next day, by letter dated July 9, 2019, plaintiffs James Eyster, Michael O'Leary, Karen Connell, Larry Connell, and Diana Newman filed a written request for an appeal to the Lima Township Clerk. The letter was stamped "Received" on July 10, 2019. In that letter, plaintiffs stated, "[W]e are filing this appeal of the decision of the Planning Commission and Township Board to approve a re-zoning of the property located at 1035 N. Fletcher Road, which was approved on July 8, 2019. Please notify Mr. **[*13]** Eyster as to the amount of the fee to be paid." The letter presented detailed arguments regarding why plaintiffs believed that the approval of the request for a conditional rezoning was invalid, including: (1) the Planning Commission failed to provide proper notice to surrounding property owners under Township Zoning Ordinance § 14.3.8; (2) the conditional rezoning amounted to illegal spot zoning; (3) Township Zoning Ordinance § 14.7 allowed conditional rezoning only for uses of "land and natural resources" but not for structures; (4) the rezoning did not comply with the Township's Master Plan; (5) the legislative decision to rezone was arbitrary and capricious; and (6) several Planning Commission members improperly abstained from the vote. Defendants do not dispute that plaintiffs filed this letter with the Township Clerk or that the Township Clerk stamped it "Received."

According to plaintiffs' counsel, the Lima Township Supervisor subsequently contacted plaintiffs by telephone and informed them that the appeal would not be accepted and that their only remedy was to file suit in circuit court. Although plaintiffs did not provide an affidavit regarding the contents of this telephone call, defendants **[*14]** do not dispute that the Township Supervisor rejected plaintiffs' attempt to pursue an administrative appeal of the decision to rezone the subject property.

B. THE CIRCUIT-COURT LAWSUIT

On August 6, 2019, plaintiffs sued defendants in circuit court, challenging the conditional rezoning of the subject property. Plaintiffs made the following claims: (1) taking without just compensation/inverse condemnation/regulatory taking; (2) violation of plaintiffs' substantive-due-process rights; and (3) violation of plaintiffs' procedural-due-process rights. In support of their claims, plaintiffs alleged that the Township's approval of the conditional rezoning had caused plaintiffs to suffer "a special injury or right, or substantial interest which will be detrimentally affected in a manner different from the citizenry at large," and that they would "suffer special damages, distinct from the public generally" because they were "abutting residential property owners on all four sides" of the subject property. Plaintiffs alleged that their special damages included:

> a. Deprivation of the quiet enjoyment of their homes and property;
>
> b. Loss in property values;
>
> c. Unrestricted exposure to paint fumes, metal **[*15]** and wood dust, and industrial noise up to twelve hours a day, seven days a week;
>
> d. Unrestricted visual exposure to a stark, gray, monolithic building with boarded-up windows;
>
> e. Daily subjection to ten or more cars and trucks being driven around the northern side of the factory to an extensive new parking lot;
>
> f. Legal expenses, including, but not limited to, actual attorney fees, consultant fees, overhead, and disbursements.

Plaintiffs subsequently moved for partial summary disposition under MCR 2.116(C)(10). Plaintiffs requested that the circuit court enter a "declaration that the conditional rezoning from Rural Residential to Light Industrial of the property located at 1035 N. Fletcher Road in Lima Township, Washtenaw County, Michigan is invalid by failure to properly notify adjacent landowners of the Planning Commission meeting of June 24, 2019 at which the application for rezoning was considered and approved." The issue that plaintiffs raised in their motion for summary disposition—the alleged inadequacy of notice—was only one claim among the various claims raised in their amended complaint.

Defendants opposed the motion and argued that the circuit court should grant summary disposition in their **[*16]** favor under MCR 2.116(I)(2). Because the circuit court later adopted defendants' arguments by reference as the holding of the court, we will describe defendants' arguments in some detail.

First, defendants argued that plaintiffs had failed to exhaust their administrative remedies before filing the lawsuit. They argued that under section 604 of the MZEA, MCL 125.3604(1), plaintiffs were required, as persons "aggrieved" by a zoning decision of a municipal board, to appeal to the Lima Township Zoning Board of Appeals before suing in circuit court. Defendants argued that plaintiffs skipped this step, and accordingly failed to exhaust available administrative remedies.

Second, defendants argued that plaintiffs failed to qualify as parties "aggrieved" by the Township's rezoning action, citing *Olsen v Chikaming Twp*, 325 Mich. App. 170; 924 N.W.2d 889 (2018). Defendants argued that, to qualify as an "aggrieved" party with standing to sue under the MZEA, a party is required to show that the party suffered special damages not common to other property owners who were similarly situated. Defendants further argued that "mere ownership" of an adjoining parcel of land is insufficient to show that a party is aggrieved. Therefore, even if plaintiffs had exhausted their administrative remedies, they could **[*17]** not challenge the Township's rezoning decision because they were not "aggrieved" parties.

Third, defendants argued that, even if plaintiffs were "aggrieved" parties under the MZEA, defendants had satisfied all of the procedural requirements of the MZEA before rezoning the subject property. Defendants argued that the Planning Commission held one public hearing on Smith's conditional-rezoning request, and it issued all required notices for that public hearing. Because the Planning Commission held that one public hearing, the Township was required to do nothing more because it had met the procedural requirements of the MZEA and was "free to proceed with its business."

Finally, defendants argued that plaintiffs had improperly relied on "unsworn testimony as statements of fact." Specifically, defendants were referring to plaintiffs' allegations that they "did not receive notice of any regular meeting of the Planning Commission other than the initial hearing." Defendants objected that plaintiffs' argument on this point was "not supported by affidavits or deposition testimony" and therefore could not be considered by the circuit court.

At the hearing on plaintiffs' motion for summary disposition, **[*18]** plaintiffs addressed defendants' argument regarding exhaustion of administrative remedies. Plaintiffs' counsel stated:

> Defendants have responded that plaintiffs failed to exhaust their administrative remedies. That's not true, Your Honor. Exhibit O is a letter of appeal stamped received by the Lima Township clerk on July 10th, 2019, which is a—a request for an appeal. We did not receive back a letter, but the [township] supervisor called us and told us that we'd have to go to court if we wanted resolution of this issue; that we didn't have standing, because we were not the landowner himself.

Plaintiffs also addressed defendants' argument that plaintiffs had submitted only unsworn arguments to support their allegations about notice. Plaintiffs relied on defendants' answer to paragraph 30 of the amended complaint, stating:

> Defendants have admitted, and their answer to our paragraph 30 states that no new notices were sent to neighbors prior to the June 24th planning commission meeting, at which approval of the request was recommended, and the Township board then approved at their next meeting this recommendation, in part quote, based on the planning commission's resolution of findings and **[*19]** recommendation dated June 24th, 2019.
>
> * * *
>
> Defense states that no affidavits have been submitted, saying that notice had not been provided, but defense has already admitted that no notices were sent or required. Again, see the answer to our paragraph 30.

We note that plaintiffs are correct on this point. Referring to the June 24, 2019 meeting of the Planning Commission, plaintiffs alleged in paragraph 30 of their amended complaint, "None of the residential property owners received notice from the Township about this meeting of the Planning Commission as required by MCL § 125.3103." In answer to this allegation, defendants stated: "Admit the allegation in paragraph 30 that no new notices were sent out by the Township but for further answer state that no new notices were required by law."

At the conclusion of the hearing, the circuit court adopted defendants' arguments, explaining:

> So gentlemen, first of all, I really appreciate your professionalism, and I did read the briefs and the argument as—your arguments are well set out.
>
> It did cause me to reflect when I read these, I'm in my third decade on the bench, can you believe it, 30 years starting, and I was thinking about this, and the most times I've **[*20]** been reversed by the

> Court of Appeals is always when I find for the individual against the zoning board. I think there's only one case that I—ever where I found for the—the claimant, and it was reversed by the Court of Appeals, but the Supreme Court actually reinstated, you know, my opinion.
>
> So I am going to rest on the briefs. I'm agreeing, because it just seems this happens over and over, this time with you, [defendants' counsel], so I agree that your analysis is correct, I adopt it, and believe me, I'd love the Court of Appeals to come back and tell me sometimes that maybe the individual is correct, so motion is denied.

Plaintiffs' counsel immediately asked the circuit court to clarify the grounds for its decision, and the following exchange occurred:

> [*Plaintiffs' Counsel*]: Oh my gosh. Your Honor, could you explain to me—I—I don't understand that.
>
> *The Court*: What I'm saying is, is my experience is—I've—I adopt [defendants' counsel's] analysis in his written motion—
>
> [*Plaintiffs' Counsel*]: Mm-hmmm.
>
> *The Court*: —and I find that to be correct, and I hope you can convince the Court of Appeals I'm wrong.

After the circuit court denied plaintiffs' motion for partial summary disposition, defendants' **[*21]** counsel asked about the request for summary disposition in their favor under MCR 2.116(I)(2), and the circuit court granted that relief on the basis that plaintiffs were not "aggrieved" parties:

> [*Defendants' Counsel*]: Your Honor, are you—on this matter, I—we'd also asked for summary under 116.(I) regarding the fact that he is not an aggrieved party as that term is defined.
>
> *The Court*: Yes.
>
> [*Defendants' Counsel*]: Granting on that also?
>
> *The Court*: Yes.
>
> [*Defendants' Counsel*]: OK.
>
> *The Court*: Take it up, and if the Court of Appeals—
>
> [*Defendants' Counsel*]: Thank you.
>
> *The Court*: —agrees with you—if the Court of Appeals disagrees with you, I'm happy to give you a hearing.
>
> [*Defendants' Counsel*]: Thank you, Your Honor.
>
> *The Court*: All right.

The circuit court entered an order denying plaintiffs' motion for partial summary disposition and granting summary disposition in favor of defendants, "for the reasons set forth in defendants' response to plaintiffs' motion for summary disposition." The order specified that defendants were "granted summary disposition on all claims raised by plaintiffs" under MCR 2.116(I)(2).

This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision to grant or deny **[*22]** summary disposition under MCR 2.116(C)(10), *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 166; 667 NW2d 93 (2003), and under MCR 2.116(I)(2), *Brandon Charter Twp v Tippett*, 241 Mich App 417, 421; 616 NW2d 243 (2000). A circuit court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law. *Sharper Image Corp v Dep't of Treasury*, 216 Mich App

698, 701; 550 NW2d 596 (1996). "In addition, we review de novo issues involving the construction of statutes and ordinances," and "also review de novo the legal question whether a party has standing." *Olsen*, 325 Mich App at 180.

B. EXHAUSTION OF ADMINISTRATIVE REMEDIES

When it denied plaintiffs' motion for summary disposition and granted summary disposition in favor of defendants, the circuit court adopted as its own analysis the arguments set forth in defendants' brief opposing plaintiffs' motion. In that brief, defendants argued that plaintiffs could not proceed with this lawsuit because plaintiffs failed to exhaust their administrative remedies. To the contrary, the exhaustion requirement does not apply because the relevant administrative appellate body could not have provided plaintiffs with any relief.

"As this Court has repeatedly recognized, when an administrative scheme of relief exists an individual must exhaust those remedies before a circuit court has jurisdiction." *In re Harper*, 302 Mich App 349, 356; 839 NW2d 44 (2013). "The doctrine of **[*23]** exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court." *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009), citing *Trever v Sterling Heights*, 37 Mich App 594, 596; 195 NW2d 91 (1972). "The converse, however, is that where the administrative appellate body cannot provide the relief sought, the doctrine does not apply." *Id.* Furthermore, when local law makes no provision for an administrative appeal, a party is not barred from filing a lawsuit in circuit court because of failure to exhaust his administrative remedies. *Wenner v Southfield*, 365 Mich 563, 566-567; 113 NW2d 918 (1962).

"The MZEA grants local units of government authority to regulate land development and use through zoning." *Olsen*, 325 Mich App at 180 (citation omitted). Defendants maintain that, under § 604 of the MZEA, plaintiffs were required to appeal the Township Board's rezoning decision to the Lima Township Zoning Board of Appeals. The statute provides in pertinent part:

> (1) An appeal to the zoning board of appeals may be taken by a person aggrieved or by an officer, department, board, or bureau of this state or the local unit of government. In addition, a variance in the zoning ordinance may be applied for and granted under section 4 of the uniform condemnation procedures act, 1980 PA 87, MCL 213.54, and as provided under this act. The zoning board **[*24]** of appeals shall state the grounds of any determination made by the board. [MCL 125.3604(1).]

This statute must be read, however, in light of the distinction between a "legislative" decision versus an "administrative" decision involving zoning matters. Generally speaking, "[i]t is settled law in Michigan that the zoning and rezoning of property are *legislative* functions." *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000) (emphasis added); see also *Inverness Mobile Home Community, Ltd v Bedford Twp*, 263 Mich App 241, 247; 687 NW2d 869 (2004); *Essexville v Carrollton Concrete Mix, Inc*, 259 Mich App 257, 265; 673 NW2d 815 (2003); *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650, 662; 645 NW2d 50 (2002). In contrast, actions "such as site-plan review and the approval of special use permit requests, are essentially administrative in nature." *Sun Communities*, 241 Mich App at 669; see also *Mitchell v Grewal*, 338 Mich 81, 87-88; 61 NW2d 3 (1953).

For purposes of the MZEA, the "legislative body" of a township is defined as its board of trustees. MCL 125.3102(n). "The function of the township board in enacting a zoning ordinance is legislative." *Randall v*

Meridian Twp, 342 Mich 605, 607; 70 NW2d 728 (1955). "The adoption of a zoning ordinance is a legislative act . . . [and] the rezoning of a single parcel of land from one district to another is an amendment of the zoning ordinance and is likewise a legislative act." *Sun Communities*, 241 Mich App at 669, quoting Crawford, Michigan Zoning and Planning (3d ed.), § 1.11, p 53. "The delegation of legislative power with respect to zoning matters to administrative boards and officers is unconstitutional and void." *McQuillan on Municipal Corporations* (3d ed revised), **[*25]** § 25:231, p 285.

Consistent with this legislative-versus-administrative distinction, the Lima Township Zoning Ordinance provides the Board of Appeals with the following authority:

> The Board of Appeals shall:
>
> A. Hear and decide appeals of any *administrative decision* of any official or body on any requirement of this ordinance.
>
> B. Grant or deny requests for variances.
>
> C. Grant or deny requests for the expansion or alteration of non-conforming buildings and structures.
>
> D. Grant or deny requests for substitutions of non-conforming uses. The use being considered as a substitute must be equal to or less intense than the nonconforming use being replaced.
>
> [Lima Township Zoning Ordinance § 13.4.1 (emphasis added).]

Thus, under the Township's Ordinance, the Board of Appeals could hear and decide an appeal from various administrative decisions, such as the Zoning Administrator's interpretation of the Lima Township Zoning Ordinance under § 3.2.1.J, the Planning Commission's decision to grant special-use permits under § 3.3, or the Zoning Administrator's refusal to issue a certificate of zoning compliance under § 3.4. Furthermore, the Board of Appeals could grant or deny requests for variances, requests for the expansion or alteration of **[*26]** non-conforming buildings or structures, or grant or deny requests for substitutions of non-conforming uses. (Lima Township Zoning Ordinance, § 13.4.1.) There is nothing in the Township's Ordinance, however, providing the Board of Appeals with any authority over the legislative acts of the Township Board. An administrative body cannot enlarge its scope of authority beyond that which is granted to it by law.

Another section of the Township's Ordinance makes clear the limits on the Board of Appeals' authority. As delimited by § 13.4.2, the Board of Appeals "shall not alter or change the zoning district classification of any property." A conditional rezoning approved by the Township Board necessarily entails making a "zoning district classification," and this cannot be altered or changed by the Board of Appeals under § 13.4.2. To be clear, rezoning is a *legislative* decision, and the appointed Board of Appeals is neither a legislative body nor a body to which legislative powers may be delegated. *McQuillan, Municipal Corporations* (3d ed. revised), § 25:231, pp 287-288. Thus, the Board of Appeals lacked the authority to hear any appeal from the Township Board's decision to rezone the subject property from Rural Residential **[*27]** (RR) to Light Industrial (LI).

And, even setting aside the legislative nature of the conditional rezoning and the Township Ordinance delimiting the Board of Appeals' authority, an administrative body cannot rule on constitutional claims. *Houdini Props, LLC v Romulus*, 480 Mich 1022, 1022-1023; 743 NW2d 198 (2008) ("The zoning board of appeals did not have jurisdiction to decide the plaintiff's substantive due process and takings claims.") A plaintiff who brings a "due process challenge that claims

arbitrariness or capriciousness" on the part of the governmental agency "need not exhaust any administrative remedies." *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 177; 667 NW2d 93 (2003). Plaintiffs brought both procedural-due-process and substantive-due-process claims, alleging that the Township acted capriciously when it granted the conditional rezoning. Because the exhaustion requirement does not apply to these claims, the trial court erred in ruling that plaintiffs' lawsuit was barred because they had failed to exhaust their administrative remedies.

Against this, defendants argue that under our Supreme Court's decision in *Paragon Props Co v Novi*, 452 Mich 568; 550 NW2d 772 (1996), plaintiffs were still required to appeal to the Board of Appeals before suing in circuit court. Defendants read too much into *Paragon*.

In that case, our Supreme Court considered a landowner's challenge to a **[*28]** city council's decision to deny a requested rezoning of real property. The city argued that the property owner had failed to seek a use variance from the city's zoning board of appeals and, therefore had not obtained a final decision as to the potential uses of the property. *Id.* at 572. The Supreme Court noted that, under the city's zoning ordinance, its zoning board of appeals was authorized to grant a land-use variance, and the board had "the authority to allow a use in a zoning district that would not otherwise be allowed." *Id.* at 574-575. The Supreme Court noted the rule of finality, as follows:

> A challenge to the validity of a zoning ordinance "as applied," whether analyzed under 42 USC § 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality.
>
> The finality requirement is concerned with whether the initial decisionmaker has arrived at a definite position on the issue that inflicts an actual, concrete injury . . . . [*Id.* at 576-577 (cleaned up).]

The Supreme Court concluded that the city council's decision to deny the landowner's requested rezoning of real property was "not a final decision because, absent a request for a variance, there is no **[*29]** information regarding the potential uses of the property that might have been permitted." *Id.* at 580.

In contrast to the facts presented in *Paragon*, the Township Board's decision in this case to grant the conditional rezoning was a final decision subject to review in the circuit court. Defendants point to no procedure in the Township's Ordinance that would allow owners of adjacent property to seek a use variance for the subject property. Further, defendants cite no appellate caselaw standing for the proposition that a legislative body's decision to grant a rezoning request is not a final decision. Unlike in *Paragon*, where there was "no information regarding the potential uses of the property that might have been permitted," 452 Mich at 580, the conditional rezoning request that was approved in this case carried with it very express conditions describing the uses of the property that were permitted by the Township Board. The circuit court erred in ruling that plaintiffs' lawsuit was barred because they had failed to exhaust their administrative remedies.

C. AGGRIEVED PARTIES

The circuit court also concluded that plaintiffs lacked standing to sue because they were not "aggrieved" parties under § 604 the MZEA and the **[*30]** Township Ordinance. The MZEA provides: "An appeal to the zoning board of appeals may be taken by a person aggrieved . . . ." MCL 125.3604(1). As the text indicates, this statutory subsection applies to appeals filed with the Board of Appeals. But as explained in the previous

subsection, plaintiffs had no avenue of appeal to that board. This case presents a circuit-court challenge to a Township's decision to rezone property, not an appeal of the Township Board's decision to the Board of Appeals. Therefore, the text of MCL 125.3604(1) is inapplicable to the present case. Moreover, because plaintiffs could not appeal to the Board of Appeals given the nature of their claims, it is beside the point whether they would qualify as "any aggrieved person" under § 13.8.2 of the Township Ordinance.

This Court's decisions in *Arthur Land Co* and *Sun Communities* further illustrate why plaintiffs' challenge to the Township's decision to rezone the subject property is a matter that falls within the circuit court's original jurisdiction, not within its appellate decision (as it would be if the circuit court were reviewing on appeal a decision from an administrative appellate body such as the Board of Appeals). "Because rezoning is a legislative **[*31]** act, its validity and the validity of a refusal to rezone are governed by the tests which we ordinarily apply to legislation," and the circuit court is not reviewing as an appellate court whether an administrative decision was supported by competent, material, and substantial evidence. *Arthur Land Co*, 249 Mich App at 664 (cleaned up); see also *Sun Communities*, 241 Mich App at 670. "There is no authority that requires a party to pursue *an appeal* to challenge the constitutionality of a legislative act of rezoning." *Sun Communities*, 241 Mich App at 672 (emphasis added).

In *Ansell v Delta Co Planning Commission*, ___ Mich App ___, ___; ___ NW2d ___, 2020 Mich. App. LEXIS 3688 (2020) (Docket No. 345993); slip op at 3, this Court recently considered whether the "aggrieved party" standard contained in § 604 of the MZEA applies to "appeals of zoning decisions where there was no provision for review by a zoning board of appeals." Relying on MCR 7.103(A)(3) and 7.122(A)(1), the *Ansell* Court concluded, "Both appeals from a township board and municipal zoning commission planning board are entitled to the same review." 2020 Mich. App. LEXIS 3688 at *7. We note, however, that *Ansell* involved the township's decision to grant a conditional-use permit (an administrative decision), not a rezoning (a legislative decision). 2020 Mich. App. LEXIS 3688, [slip op.] at 2. The *Ansell* Court relied on Const 1963, art 6, § 28, which provides: "All final decisions, findings, rulings and orders of any *administrative officer or agency* existing under the constitution **[*32]** or by law, which are *judicial or quasi-judicial* and affect private rights or licenses, shall be subject to direct review by the courts as provided by law." 2020 Mich. App. LEXIS 3688 at *6, quoting Const 1963, art 6, § 28 (emphasis added). The holding in *Ansell* therefore applies to a township's zoning decisions that are administrative in nature, but not to a township's zoning decisions that are legislative in nature, such as a rezoning. Even though the *Ansell* Court applied the "aggrieved party" provision of the MZEA to other types of appeals, including appeals from the administrative decisions of a township board, that decision does not apply to original actions in circuit court to challenge a township's legislative actions.

The provision of the MZEA relied upon by the circuit court to hold that plaintiffs were not "aggrieved parties" who could file an appeal, MCL 125.3604(1), does not apply in this case. The circuit court erroneously granted summary disposition to defendants under MCR 2.116(I)(2) on the grounds that plaintiffs did not qualify as "aggrieved" parties who could have—but failed to—file an appeal to the Zoning Board of Appeals under MCL 125.3604.

D. STANDING

Even setting aside the question of plaintiffs' aggrieved-party status, there remains the question whether plaintiffs' **[*33]** have standing to sue. "[T]he term

'standing' generally refers to the right of a plaintiff initially to invoke the power of a trial court to adjudicate a claimed injury." *Olsen*, 325 Mich App at 180. In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010) (cleaned up), our Supreme Court explained that the "purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to ensure sincere and vigorous advocacy." Thus, "the standing inquiry focuses on whether a litigant is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." *Id.* (cleaned up).

In *Olsen*, this Court noted the distinction between a party's attempt to "invoke the power of the trial court regarding a claimed injury" and a party's attempt to trigger "appellate review of a local unit of government's zoning decision when review is sought by a 'party aggrieved' by the decision" of a zoning board of appeals. *Id.* at 193. In contrast to *Olsen*, the present case does not involve a party's attempt to appeal a decision of a zoning board of appeals, but involves a party's attempt to challenge a rezoning decision made by the legislative body of the municipality. Similarly, although this Court in *Olsen* discussed and relied on *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688, 693, 700; 311 NW2d 828 (1981), the **[*34]** *Brown* Court considered a circuit-court appeal from the decision of a local zoning board of appeals to grant a variance, rather than a legislative decision of a local unit of government. Furthermore, the *Brown* Court applied a standing provision contained in a now-repealed statutory section. See *Olsen*, 325 Mich App at 189. Thus, neither *Olsen* nor *Brown* undermines plaintiffs' standing here.

Our Supreme Court's decision in *Randall* does shed some light on the standing required of a plaintiff who seeks to challenge the legislative zoning decision of a local unit of government. In *Randall*, the plaintiffs sought to enjoin a township board from amending a zoning ordinance to rezone real property from an agricultural zone to a commercial zone. *Randall*, 342 Mich at 606. The Supreme Court noted, "While it is within the province of the courts to pass upon the validity of statutes and ordinances, courts may not legislate nor undertake to compel legislative bodies to do so one way or another." *Id.* at 608. The Supreme Court ruled that, while the courts did not have the authority to order a township board to refrain from engaging in the legislative act of rezoning a parcel of real property, the courts did have the authority to review "the validity of the amendment **[*35]** once it is adopted." *Id.* The plaintiffs in that case owned property adjacent to the property that the township sought to rezone. *Id.* at 606. Despite the township's argument that the plaintiffs had no "vested or contractual right to keep the adjacent property in its present zoning classification," the Supreme Court held:

> It does not follow, however, that plaintiffs have no standing in a court of equity to challenge the validity of an amendment to the zoning ordinance on the grounds of arbitrariness or unreasonableness of the proposed change *or irregularities in the proceedings*. Possible adverse effects of the change on their property create in them such an interest in the subject matter as to entitle them to maintain an action for that purpose. [*Id.* at 607 (emphasis added).]

Because the plaintiffs owned adjacent property, they had "an interest which would entitle them to maintain an action to challenge the validity of the amendment once it is adopted . . . and the courts have jurisdiction to entertain such actions." *Id.* at 608.

Similarly, because plaintiffs in this case own real property immediately adjacent to the real property that the Township Board conditionally rezoned, and because

they alleged special injuries **[*36]** flowing from this legislative decision that are distinct from those suffered by the general public, they have standing to challenge the conditional rezoning because they have a substantial interest "that is detrimentally affected in a manner distinct from that of the general public." *Lansing Sch Ed Ass'n*, 487 Mich at 378; see also *Randall*, 342 Mich at 607-608. And even if *Olsen* applied here (which it does not because this is not an appeal from a zoning board), plaintiffs' statutory entitlement to notice means that they are not merely adjoining property owners.

E. NOTICE

Finally, we briefly address the matter of notice. In moving for partial summary disposition, plaintiffs argued that they had not received notice of the Planning Commission's meetings when it considered the request for a conditional rezoning of the subject property. With regard to notice, the MZEA provides in relevant part that "the zoning commission shall give a notice of a proposed rezoning in the same manner as required under section 103." MCL 125.3202(2). It is undisputed that the Planning Commission is a "zoning commission" under the MZEA. MCL 125.3301(1)(b). Section 103 addresses the notice required when a zoning commission holds a public hearing:

> (1) Except as otherwise provided under this act, if a local unit of government conducts **[*37]** a public hearing required under this act, the local unit of government shall publish notice of the hearing in a newspaper of general circulation in the local unit of government not less than 15 days before the date of the hearing.
>
> (2) Notice required under this act shall be given as provided under subsection (3) to the owners of property that is the subject of the request. Notice shall also be given as provided under subsection (3) to all persons to whom real property is assessed within 300 feet of the property that is the subject of the request and to the occupants of all structures within 300 feet of the subject property regardless of whether the property or structure is located in the zoning jurisdiction. Notification need not be given to more than 1 occupant of a structure, except that if a structure contains more than 1 dwelling unit or spatial area owned or leased by different persons, 1 occupant of each unit or spatial area shall be given notice. If a single structure contains more than 4 dwelling units or other distinct spatial areas owned or leased by different persons, notice may be given to the manager or owner of the structure, who shall be requested to post the notice at the primary entrance to the **[*38]** structure.
>
> (3) The notice under subsection (2) is considered to be given when personally delivered or when deposited during normal business hours for delivery with the United States postal service or other public or private delivery service. *The notice shall be given not less than 15 days before the date the request will be considered*. If the name of the occupant is not known, the term "occupant" may be used for the intended recipient of the notice.
>
> (4) A notice under this section shall do all of the following:
>
> (a) Describe the nature of the request.
>
> (b) Indicate the property that is the subject of the request. The notice shall include a listing of all existing street addresses within the property. Street addresses do not need to be created and listed if no such addresses currently exist within the property. If there are no street addresses, other means of identification may be used.
>
> (c) State when and where the request will be considered.
>
> (d) Indicate when and where written comments will be received concerning the request. [MCL

125.3103 (emphasis added).]

Thus, under the MZEA, the Planning Commission was required to "give a notice of a proposed rezoning," MCL 125.3202(2), to "all persons to whom real property is assessed within **[*39]** 300 feet of the property that is the subject of the request and to the occupants of all structures within 300 feet of the subject property" (i.e., plaintiffs, as owners of adjoining parcels), MCL 125.3103(2), "not less than 15 days before the date the request will be considered," MCL 125.3103(3).

In addition to the MZEA, the Township Ordinance also contains notice requirements relevant to a request for rezoning. Section 14.3.3 provides, "If an individual property or ten (10) or fewer adjacent properties are proposed for rezoning the Township shall provide written notice in accordance with the requirements of Section 14.3.2." Those notice requirements are as follows:

> The original petition and fourteen (14) copies thereof shall be filed with the Township Clerk. The Clerk shall transmit the petition and ten (10) copies thereof to the Township Planning Commission for review and report to the Township Board. The Planning Commission shall conduct at least one (1) public hearing on the petition. Notice of the public hearing shall be given in the following manner:
>
> A. The notice of the request shall be published in a newspaper of general circulation in the Township not less than fifteen (15) days before the date the application will be considered by **[*40]** the Planning Commission.
>
> B. The notice shall also be sent not less than fifteen (15) days before the date the application will be considered by the Planning Commission to all persons to whom real property is assessed within three hundred (300) feet of the property and to occupants of all structures within three hundred (300) feet of the property regardless of whether the property or occupant is located in the zoning jurisdiction. If the name of the occupant is not known, the term "occupant" may be used in making notification.
>
> C. Each electric, gas, pipeline public utility company, each telecommunication service provider, each railroad operating within the district or zone affected, and the airport manager of each airport, that registers its name and mailing address with the Planning Commission shall receive a notice.
>
> D. The notice shall do all of the following:
>
> 1. Describe the nature of the request.
>
> 2. Indicate the property that is the subject of the request.
>
> 3. The notice shall include a listing of all existing street addresses within the property. Street addresses do not need to be created and listed if no such addresses currently exist within the property.
>
> 4. If there are no street addresses, **[*41]** other means of identification may be used.
>
> 5. State when and where the request will be considered.
>
> 6. Indicate when and where written comments will be received concerning the request.
>
> 7. Indicate the place(s) and time at which the request may be examined. [Lima Township Zoning Ordinance § 14.3.2.]

Thus, under its own Ordinance, the Township was required to provide written notice of a proposal for rezoning to plaintiffs, as owners of adjoining parcels, "not less than fifteen (15) days before the date the application will be considered by the Planning Commission." (Lima Township Zoning Ordinance § 14.3.2.A.)

It is uncontested that defendants did provide the

required notice for the August 27, 2018 meeting of the Planning Commission, when that body first considered Smith's application for conditional rezoning of the subject property. Plaintiffs argue, however, that the Planning Commission did not resolve the request for a conditional rezoning on that date, and the Planning Commission was required to issue additional written notices when it considered Smith's revised application. Plaintiffs maintain that to allow the Planning Commission to provide a single notice to adjoining property owners, despite the fact **[*42]** that it considered taking action on the request at several separate public meetings held over the course of 10 months, fails to accord meaning to the MZEA's requirement that the Planning Commission provide notice to owners of adjoining property "not less than 15 days before the date the request will be considered," MCL 125.3103(3), and the similar requirement of § 14.3.2 of the Township Ordinance.

In granting summary disposition to defendants, the circuit court did not take up plaintiffs' notice arguments. Because we are remanding the matter, we decline to take up plaintiffs' notice claim in the first instance. Instead, we vacate the circuit court's denial of summary disposition on this issue, and the parties may take up this matter, as well as other pertinent matters, in the normal course on remand.

III. CONCLUSION

By granting the application for conditional rezoning, the Township Board engaged in a legislative act, not an administrative or quasi-judicial one. From this fact, it follows that plaintiffs did not have to exhaust administrative remedies that were not available to them, nor did they have to establish that they were aggrieved parties to have standing. Accordingly, for the reasons stated, we reverse **[*43]** the circuit court's grant of summary disposition to defendants, we vacate its denial of plaintiffs' motion for partial summary disposition, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction, nor do we impose costs.

/s/ Brock A. Swartzle

/s/ Amy Ronayne Krause

/s/ Michelle M. Rick

End of Document