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

REPLY BRIEF OF MOVANT-APPELLANT PROTECT THE PENINSULA

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II. ARGUMENT

Movant-Appellant Protect the Peninsula, Inc. (PTP) replies to Appellees Wineries of Old Mission Peninsula Assoc., *et al* (collectively, the Wineries). Much of the Wineries' brief resembles their District Court briefing, which PTP addressed in its principal brief.

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

The primary issue on appeal is whether PTP satisfies the standards in Fed. R. Civ. P 24(a) to intervene by right. PTP's principal brief fully addresses the legal and factual bases supporting its right to intervene. This brief responds to the opposing arguments in the order advanced by the Wineries.

1. The Wineries misunderstand the evidentiary standard.

The Wineries assail the evidentiary basis for PTP's appeal. They state that PTP's appeal contains factual allegations "with no record citations" and "no support in the records, facts or law," and that the "actual parties to this lawsuit [] have engaged in discovery and developed a complete record which does not include many of the assertions made by PTP." (App'ee Brief, p. 11, n. 2.) Regarding what they call "generalized harms" that PTP and its members have raised if the Wineries' claims are successful (more traffic, noise, visitors, and longer hours), the Wineries state:

"Discovery is now closed, yet there is no evidence that any of these things will occur." (App'ee Brief, p. 20, n. 3.) The Wineries claim there is no evidence in the record regarding the size of PTP's membership and notes PTP members were not elected to the Township Board. (App'ee Brief, p. 20, n. 4.)

Two short responses are warranted. First, the Wineries neither cite nor provide any evidence to oppose, contradict or undermine whatever PTP-cited evidence they find objectionable. PTP filed 5 affidavits (about 40 pages of testimony), referenced facts in the District Court record, and cited each reference by page number. The Wineries provide no basis for this Court to disregard this evidence. (*See* App. Brief, p. 26, appellate courts accept non-conclusory allegations supporting intervention.)

Second, evidence relevant to whether PTP may intervene is likely to be different than evidence relevant to whether the zoning ordinance is unconstitutional or preempted by state law because these are different legal issues. The Wineries unsupported assertion that a complete record was developed through discovery is unhelpful in this appeal.

2. PTP and its members are regulated and protected by the zoning ordinance.

The Wineries' repeatedly assert that PTP and its members should not be permitted to intervene in this case because they are not regulated by the zoning ordinance winery provisions and therefore not affected by the lawsuit outcome.

(App'ee Brief, pp. 3, 7, 12, 20, 25, 26, 31.) PTP discussed at length its and its members' interests, the way this lawsuit threatens them, and also the specific assertion that PTP it is not regulated by zoning. (App. Brief, pp. 27-43.) PTP members and WOMP members are bound by the same zoning, some by limitations and protections, and some by opportunity. PTP members rely on the limitations and protections of the winery provisions, where WOMP members benefit from the opportunities of the winery provisions. The Wineries barely acknowledge, and fail to counter, the factual and legal foundation supporting PTP's motion to intervene.

In addition, the Wineries' theory is logically flawed. By the Wineries' logic, only other wineries are affected by changes to winery provisions in the zoning ordinance. Per this theory, another winery (however far away) may be affected by zoning changes, but not the farmer next door. That perspective is contrary to the locational premise of zoning – zoning regulates *where* land uses may take place in relation to other land uses. *See Deruiter v. Byron Twp,* 505 Mich. 130, 135-36 (2020) (zoning contains locational restrictions on particular activities); *Morgan v. US Dept of Justice,* 473 F. Supp. 2d 756, 770 (E.D. Mich. 2007) ("[A]s the Michigan Supreme Court has repeatedly recognized, zoning ordinances of general application which merely regulate the location of certain categories of businesses, activities, or dwellings are not properly viewed as 'entering into' an underlying substantive field of regulation governing a particular type of business, activity, or dwelling -- *e.g.*,

adult entertainment [], trailer parks [], or mobile homes [].") (citations omitted). The zoning ordinances regulates locational aspects of winery operations. All the zoning provisions the Wineries complain about apply only in the agricultural district to limit non-ag aspects of these operations; wineries located in the commercial district may do all the things the Wineries want to do. *See, e.g.,* PTZO, Section 6.6.2(1) (PageID.79) (retail stores and restaurants); App. Brief, pp. 13-17 (identifying ag district winery provisions).

PTP and its members, who are participants in, regulated by, and beneficiaries of the subject zoning, have a protected interest in this suit that seeks to nullify parts of the ordinance. *See Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm'n,* 834 F.3d 562, 566-67 (5th Cir. 2016) (association that is intended beneficiary of regulatory scheme had legally protectable interest to intervene to defend the scheme); *see also Mich. State AFL-CIO v. Miller,* 103 F.3d 1240, 1247 (6th Cir. 1997); *Grutter v. Bollinger,* 188 F.3d 394, 399 (6th Cir. 1999); App. Brief, pp. 29-38.[1]

[1] In Appellant's Brief on page 37, there is a series of citations to the Michigan Zoning Enabling Act that includes typographical errors. The citations were intended to reference MCL §§ 125.3306(1), 125.3401(2), and 125.3502(2). While there are admittedly other typographical errors in Appellant's Brief, these may be particularly confusing.

3. PTP has substantial legal interests in this case.

PTP's brief provides the evidence and law establishing its substantial legal interest to intervene. (App. Brief, pp. 26-47.) The sections below address arguments raised by the Wineries that PTP did not already address.

(a) *Providence Baptist* does not support denial of PTP's intervention.

In contesting PTP's legal interest in the underlying lawsuit, the Wineries rely on three cases: *Coalition to Defend Affirmative Action v. Granholm*, 501 F.3d 775 (6th Cir. 2007), *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007), and *Providence Baptist Church v. Hillandale Committee, Ltd*., 425 F.3d 309 (6th Cir. 2005). (App'ee Brief, pp. 12, 16-20.) The District Court relied on the first two (*Granholm* and *Northland*), so PTP distinguished them. (App. Brief, pp. 43-46.) PTP here also distinguishes *Providence Baptist*.

In *Providence Baptist,* a church challenged the lawfulness of zoning that prevented a predominantly African-American congregation from developing property for a church and homes. 425 F.3d at 311. The Sixth Circuit denied intervention to Hillandale Committee, a ballot committee whose claimed interest was that it circulated referendum petitions opposing rezoning. *Id.* at 317. After the referendum succeeded and the church sued, the parties agreed to undo the referendum and allow the requested zoning in order to settle the case. *Id.* at 312. The

committee "took no position on the merits of the referendum; rather, it simply asked that the ordinance rezoning Providence's land be submitted to the electors for their approval or rejection." *Id.* After the election took place and was certified without incidence, the committee's legal interests terminated, so this Court found it had no cognizable interest in the litigation. *Id.*

PTP's interests are different than Hillandale Committee's. PTP is a non-profit corporation, not a ballot question committee. (Nadolski Affidavit, R. 41-2, PageID.2069); MCL § 169.202(3). PTP supported the successful 1999 referendum that overturned a prior winery ordinance, but PTP also worked for 20 years before and 22 years after to draft, support, oppose, revise, challenge, and enforce winery provisions, golf course provisions, subdivision provisions, ag preservation programs and provisions, master plans, and numerous proposed developments. (Nadolski Affidavit, R. 41-2, PageID.2069-2072; Wunsch Affidavit, R. 41-3, PageID.2079-2083.) The Hillandale Committee wanted to maintain pre-amendment zoning that the referendum voided; PTP seeks to defend the intent of some winery provisions enacted after the referendum, which winery and PTP representatives negotiated. (Wunch Affidavit, R. 41-3, PageID.2082.) There was no evidence that Hillandale Committee represented members who were affected by the subject zoning; PTP represents members who for over 20 years reasonably relied upon zoning, including winery provisions, to ensure the district remained agricultural and not commercial,

and whose property and quality of life values are at stake if the Wineries succeed in their current challenge to the winery ordinances. (Nadolski Affidavit, R. 41-2, PageID.2074-2075; Jacobs Affidavit, R. 41-4, PageID.2092-2094; Phillips Affidavit, R.41-5, PageID.2098-2099; Zebell Affidavit, R. 41-6, PageID.2103-2105.) Like its progeny (*Granholm* and *Northland*), *Providence Baptist* is inapplicable here. *See Benalcazar v. Genoa Twp.,* Case No. 2:18-cv-01805, 2020 U.S. Dis. LEXIS 63756 (S.D. Ohio, April 13, 2020), *acq*., 1 F.4th 421, 427 (6th Cir. 2021) (unlike *Providence Baptist,* interest of organization of township residents formed to protect rights of neighbors and members owning property near subject rezoned parcel, which supported successful referendum, "did not become moot when their referendum found its way onto the [] ballot.").

(b) <u>This is a zoning case, and PTP and its members have a protected interest in zoning.</u>

The Wineries say "this is not a zoning case," distinguishing their constitutional zoning challenge from a local zoning board decision. (App'ee Brief, p. 21.) The Wineries cite no case supporting this distinction. Contrary to the Wineries' argument, the question for intervention focuses on practical impacts of the lawsuit on the proposed intervener's interests. Fed. R. Civ. P. 24(a)(2) (requiring interveners to show they are "so situated that they disposition of the action *may as a practical matter* impair or impede their ability to protect that interest.") (emphasis

added). In *Joseph Skillen & Co. v. Toledo*, developers filed suit under 42 U.S.C. § 1983 to change zoning, and this Court recognized the practical impact of spot rezoning on neighbors. 528 F.2d 867, 874 (1975), *vacated on other grounds sub nom. Joseph Skilken &Co. v. Toledo*, 429 U.S. 1968 (1977) ("The motion to intervene alleges facts which have not been contradicted that the change in the zoning law will result in a serious and substantial diminution of value of the properties in the Ragan Woods Subdivision."). The Eighth Circuit recognized the legal interests of a neighborhood association and nearby property owners to protect their property values in litigation challenging the constitutionality of zoning in *Planned Parenthood of Minnesota Inc. v. Citizens for Community Action.* 558 F.2d 861, 869 (8th Cir. 1977).

There is no logical reason to treat a constitutional challenge differently than a case arising from a local planning commission. The Wineries' opposition to the zoning ordinance has not succeeded locally, so now the Wineries want to nullify the winery provisions in federal court. The provisions were drafted and applied decades ago; if the Wineries had challenged them immediately through a zoning appeal, there would not be decades of interim development and programs (farmland protection) that relied on those provisions and the zoning scheme. MCL § 125.3606(3) (appeal must be taken within 30 days after decision). Attempting to nullify those same provisions now, whatever the legal theory, exacerbates rather than reduces or

eliminates PTP's and its members' interests. (*See, e.g.,* Wunch Affidavit, R. 41-3, PageID.2082-2086; Jacobs Affidavit, R. 41-4, PageID.2092-2094; Zebell Affidavit, R. 41-6, PageID.2103-2104).

Federal courts consider state law "for guidance as to the rights of property owners who have purchased and developed their properties relying on existing zoning." *Skillken,* 52 F.2d at 874. Michigan courts recognize neighbors' interests in cases seeking zoning changes, whether by court or planning commission. *See D'Agostini v. Roseville,* 396 Mich. 185, 189-90 (1976) (owners of adjoining property would be adversely affected if court granted developers' request to enjoin enforcement of zoning ordinance) (citing *Bredberg v. City of Wheaton,* 182 N.E.2d 742 (1962)); *Vestevich v. West Bloomfield Twp,* 245 Mich. App. 759, 762 (2001) (owners near parcel may intervene where developer and township agreed to zoning changes through consent judgment).

In an attempt to distinguish federal cases cited by PTP, which recognize neighbors' interests to intervene in zoning change cases, the Wineries argue three cases pre-date *Providence Baptist* and its progeny. (App'ee Brief, pp. 21-23, discussing *Skillken*, *supra; Wolpe v. Poresky,* 144 F.2d 505 (D.C. Cir. 1944); *Midwest Management Co. v. Beavercreek*, 93 F. App'x 782 (6th. Cir. 2004)). The sequence of decisions is inconsequential because these sets of case address different intervener interests. *Providence Baptist, Northland,* and *Granholm* considered the

interests of ballot committees in legal challenges to the enacted ballot measure the groups worked to put on the ballot. *Providence Baptist* 425 F.3d at 316-17; *Northland*, 487 F.3d at 344-46; *Granholm*, 501 F.3d at 781-83. *Skillken, Wolpe,* and *Midwest Management* recognized the interests of neighbors in legal challenges that would change zoning. *Joseph Skillken,* 528 F.2d at 874; *Wolpe,* 144 F.2d at 507-508; *Midwest Management,* 93 F. App'x at 786-87. As discussed above, PTP is not a ballot committee, so the *Providence Baptist* line is not instructive here.

The Wineries hypothesize that "PTP is raising zoning concerns because it wants a seat at the settlement table." (App'ee Brief, p. 23.) That is untrue. PTP is raising zoning concerns because the Wineries' lawsuit challenges the lawfulness of zoning provisions that PTP and its members debated and relied upon for decades. PTP seeks to intervene because the Wineries are trying to upend a zoning scheme that threatens their property and equity interests. (App. Brief, pp. 13-16, 20-22.) The Wineries' speculation about ulterior motives for PTP is unsupported, unhelpful, and inappropriate.

4. PTP's interests may be impaired absent intervention.

PTP articulated how the outcome of this case may impair its interests if intervention is denied: PTP and its members would effectively be bound by a decision that, for example, state law preempts township zoning that restricts the

location of restaurants and hours of operation for winery licensees. (App. Brief, pp. 48-50.) Contrary to the District Court's conclusion, PTP and its members are regulated and protected by the zoning ordinance, and they would be harmed by ordinance changes if the Township loses or settles this case against their interests. (App. Brief, pp. 39-42, 50-51.)

The Wineries disagree. They assert that, if the Wineries are successful and able to sell logoed merchandise or if traffic increases, then PTP either will be unaffected or may petition other entities to address whatever concerns may arise. (App'ee Brief, p. 25.) Much more is at stake than merchandise and traffic. The Wineries seek to nullify at least 11 different zoning provisions that help ensure wineries do not convert from tasting rooms to commercial islands of restaurants, bars, and retail shops inside the agricultural district. (App. Brief, p. 17.)

The Wineries' assertion that PTP would be unaffected if the Wineries may sell logoed merchandise is confusing and misplaced. It is confusing because the Wineries *may* already sell logoed wine-related merchandise. PTZO, Section 6.7.2(19)(b)(v) (PageID.84-85). They claim a constitutional right to sell anything, logoed or not. (Order Denying Preliminary Injunction, R. 34, PageID.1869.) Their assertion is misplaced because the logo merchandise provision is part of the zoning scheme – it is one brick in a wall: retail is generally not allowed in the ag district (it is instead to be concentrated in the commercial district), but the ordinance grants this

limited exception for wineries. The harms PTP seeks to avoid by defending this provision result from the conversion of agricultural parcels with tasting rooms and accessory shops into convenience stores.

As for the opportunity to resolve problems by petitioning other entities, it is unclear what entity other than the Township Planning Commission PTP may petition to prevent a winery from operating a restaurant and staying open until 2 a.m. in an area designated for agricultural-compatible land uses. There is no other entity or regulatory scheme apart from local zoning that establishes *where* in the community retail stores and restaurants may be located and remain compatible with neighboring land uses (*e.g.*, by limiting hours of operation). Petitioning the Michigan Department of Transportation to lower the speed limit on Center Road is not an adequate alternative to township zoning that prohibits restaurants in the ag district.

5. PTP's interests are inadequately represented.

PTP demonstrated that its interests are inadequately represented by the Township. (App. Brief, pp. 51-59.) The Wineries counter that the Township adequately represents PTP because both "want the exact same thing – continued enforcement of the Winery Ordinance." (App'ee Brief, p. 27.) The Wineries also maintain that that PTP is not the "target" of the Winery Ordinances, so its interest is limited to the general concept of enforcing those Ordinances against another party,

which they say is insufficient. (App'ee Brief, pp. 26, 31.) These and other Winery arguments are addressed below.

(a) PTP does not want "the exact same thing" the Township wants.

The Wineries offer little to support their conclusory assertions about what the Township wants and that it is "the exact same thing" PTP wants. The Wineries point repeatedly to the fact that the Township responded to and prevailed on the Wineries' motion for preliminary injunction. (App'ee Brief, pp. 27, 29, 30, 31, citing Township Preliminary Injunction Response, R. 24.) That the Township responded to the preliminary motion, and that the District Court declined preliminarily to enjoin decades-old ordinance provisions, provides no insight into the Township's "ultimate objective," whether it is consistent with PTP's, nor whether the Township may adequately represent the interests of PTP and its members.

While the Township may want the ordinance to remain, there is ample basis to conclude the Township may be open to other outcomes. The Township attorney has said the Township would like to improve the business interests of the wineries. (App. Brief, p. 54, citing R. 29-16, PageID.1399.) The Township was willing in 2019 to rewrite the zoning ordinance, and it may prefer the cover of changing zoning by federal consent judgment rather than through what would likely be a politically contentious local rezoning process. (*See* Township Preliminary Injunction

Response, R. 24, PageID.950; Order Denying Enforcement, R. 117, PageID.4308-4312.) According to the Wineries, the Township has taken this litigation as an opportunity to reinterpret the meaning of zoning provisions. (App'ee Brief, p. 5, claiming the Township "finally admitted" in this litigation that the ordinance allows wedding receptions, despite a decades-long contrary position.)

There are germane differences between PTP's and the Township's risks and interests in this litigation. The Wineries' constitutional claims carry a risk of money damages under 42 U.S.C. § 1983 and voiding infirm provisions. The Township, a rural community of about 6,000 people, faces a claim for over $200 million in damages. (Plaintiffs' Constitutional Summary Judgment Brief, R. 136, PageID.4752.) PTP and its members have no direct financial risk of money damages under Section 1983.

The relative risks from preemption are different. The Township does not face risk of a money damages award under the Wineries' state law claims. Winery success on preemption would result in voiding provisions that limit operations until 9:30 p.m. and prohibit restaurants and entertainment venues. This outcome directly threatens the quality of life and property values of nearby property owners. (Nadolski Affidavit, R.41-2, PageID.2074; Jacobs Affidavit, R-41-4, PageID.2094; Phillips Affidavit, R.41-5, PageID.2099; Zebell Affidavit, R.41-6, PageID.2104).

In addition to opposite financial risks (the Township facing a claim for enormous damages, PTP facing none), the injunctive relief risks are also opposing. Enjoining the challenged provisions would liberate the Wineries to expand operations in numerous ways – late hours, restaurants, retail shops, wedding receptions, entertainment venues, and so on. Such an outcome would impose on PTP and its members significant direct harm to their quality of life and property values. The resulting impairment to the Township would be more diffuse, and potentially even financially beneficial as increasing revenue accruing from new commercial opportunities at wineries increases the value of winery parcels.[2] (Attorney Opinion Letter, R. 29-16, PageID.1399 (noting Township interest in promoting the success of businesses). There is no similar up-side benefit to PTP and its members if the zoning provisions are enjoined.

These significant differences in the potential harms facing the Township and PTP – financial and injunctive – are sufficient evidence of potential inadequate

[2] The Wineries assert without support that they are "already taxed as commercial" and therefore it is "wrong" that increased commercial operations would increase tax base. (App'ee Brief, p. 31.) This misunderstands municipal revenues, which are a function of property value and tax rate. Even if the Wineries are already taxed as commercial, if zoning restrictions are voided, their profit potential increases and likely also their property values. (Attorney Opinion Letter, R. 29-16, PageID.1382, noting some proposed actions, including engaging in typical restaurant type business, may result in commercial taxes; Order Denying Preliminary Injunction, R. 34, PageID.1868, noting primary irreparable harm allegedly suffered is lost opportunities for profit.).

representation to support intervention. In *Grutter,* the proposed interveners argued that the University faced less risk of harm resulting from a finding that the race-conscious admissions policy is unlawful than the people whom the policy protects – *i.e*., prospective minority students and a non-profit that sought to preserve minority access to higher education. 188 F.3d at 400-401; *see also Mausolf v. Babbitt,* 85 F.3d 1295, 1303-1304 (8th Cir. 1996) (while conservation groups shared government interest in upholding regulations, their interests were inadequately represented because government inevitably must favor certain uses over others, and recreation and conservationist purposes sometimes unavoidably conflict) (citations omitted); *Planned Parenthood of Minn.* 558 F.2d at 870 (municipality whose representatives faced liability inadequately represented nearby property owners who not face risk of liability and were concerned with property values)*; Dimond v. Dist. of Columbia,* 792 F.2d 179, 192 (D.C. Cir. 1986) (proposed interveners not adequately represented where their interests were more narrow than general public interest the government represented); *see also Glancy v. Taubman Centers, Inc.*, 373 F.3d 656, 675 (6th Cir. 2004) ("Courts have held that asymmetry in the intensity of the interest can prevent a named party from representing the interests of the absentee.").

These differences between the Township's and PTP's interests and risk exposure impact their respective litigation priorities and strategies. PTP is interested

in vigorously defending the state preemption claims because, if voided, the Wineries would be permitted much later hours, restaurants and events venues, which would seriously adversely impact the interests of PTP and its members. To that end, PTP would immediately contest federal jurisdiction over the Wineries state law claims. (PTP Proposed Motion to Dismiss, R. 56.) Yet the Township has conceded federal jurisdiction over these claims. (App. Brief, p. 57-58.) *See Grutter*, 188 F.3d at 400 ("it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments.").

The Township's risk of $200 million in damages, which PTP does not share, is also likely to influence the Township's resolution strategy. The Township may be willing to concede zoning changes to avoid damages. Following pre-litigation negotiations aimed at revising the ordinance (see Order Denying Preliminary Injunction, R. 34, PageID.1865-1866), the Wineries and the Township have continued settlement talks in litigation. (Minutes, R. 141, PageID.4960.) The Township was willing to negotiate revisions before the litigation, and then the Wineries sued the Township for over $200 million; it is foreseeable the Township may agree to sacrifice zoning revisions to avoid monetary damages to the Wineries. *See Mille Lacs Band of Chippewa Indians v. Minn.*, 989 F.2d 994, 1001 (8th Cir. 1993) (interests of defendant-state and proposed-interveners county and private landowners may generally align in initial pleadings, but may diverge substantially if

case disposed by settlement, where state lacked interest in preserving interveners' property values); *Mausolf,* 85 F.3d at 1302-1302 (noting potential harm to conservation groups' interests if government settled case against their interests).

At bottom, while the Township and PTP may be generally aligned in opposing the Wineries, there is ample basis in the record to find they do not share the same ultimate objective.

(b) PTP and its members have protected interests in the challenged ordinances.

The Wineries maintain that PTP is not regulated by the challenged zoning provisions, which means its interests are in the enforcement of those ordinances against others, and therefore the Township's representation is adequate. (App'ee Brief, pp. 26, 31.) If true, private individuals and entities would never be allowed to challenge zoning. The faulty premise of this argument is addressed above on pages 6-8. Moreover, this unsupported theory is contrary to state and federal law recognizing municipalities may not adequately represent the particular interests of nearby property owners associated with challenges to zoning. *See D'Agostini,* 396 Mich. at 189-90 (municipality "cannot be guided solely by a consideration of individual hardships" to neighbors resulting from rezoning) (quoting *Bredberg*, 24 Ill. 2d 623-24); *Vestevich,* 245 Mich. App. at 762 (township representation of nearby landowners' interests in residential zoning likely inadequate in rezoning dispute);

Planned Parenthood of Minn., 558 F.2d at 870 (inadequate representation of nearby landowners who were concerned about their own property values); *Joseph Skillken,* 528 F.2d at 876 ("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.").

(c) PTP has demonstrated adverse interests and failed duty.

The Wineries assert that either collusion, adverse interests, or failed duty by an existing party are necessary to find inadequate representation, and that none is present here. (App'ee Brief, pp. 26, 29-30, citing *Jordan v. Mich. Conf. of Teamsters Welfare Fund,* 207 F.3d 854, 863 (6th Cir. 2000)). Two responses are warranted.

First, it appears inaccurate to presume representation is adequate *unless* one of these factors is demonstrated. *See* 7C Wright, Miller & Kane, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 1909, at 393 (2021) (courts err in holding inadequate representation cannot be shown unless one of three circumstances are present; "The wide variety of cases that come to the courts make it unlikely that there are three and only three circumstances that would make representation inadequate and suggest that adequacy of representation is a very complex variable."); *Daggett v. Comm'n on Govtl. Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999) (rejecting

argument that there is an exclusive list of circumstances that rebut a presumption of adequacy). Rather, these are factors to be considered in deciding the adequacy of representation. *Triax Co. v. TRW, Inc*., 724 F.2d 1224, 1228 (6th Cir. 1984) ("These three factors, however, cannot be said to be a comprehensive list of the circumstances where intervention of right ought to be granted."); *Purnell v. City of Akron*, 925 F.2d 941, 949 (6th Cir. 1991) (trilogy are some relevant factors in determining adequacy of representation).

Second, PTP has demonstrated that it has interests adverse to the Township's and that the Township has not fulfilled its duty with respect to PTP's interests. "In order to show adversity of interest, an intervenor must demonstrate that its interests diverge from the putative representative's interests in a manner germane to the case." *Texas v. United States*, 805 F.3d 653, 662 (5th Cir. 2015). In *Walmart Stores, Inc. v. Tex. Alcoholic Bev. Comm'n,* the court found adversity of interest where a trade association intended to advance more targeted arguments than the government and its interests in protecting its members' businesses was narrower than the regulator's "broad public mission." 834 F.3d 562, 569 (5th Cir. 2016). *See also National Farm Lines v. ICC,* 564 F.2d 381, 384 (10th Cir. 1977) (in lawsuit over constitutionality of regulations to protect unfair competition, government agency cannot adequately protect interest of the public and also private interests of interveners whose economic interests are protected by the subject statutory scheme). As discussed in

subsubsection (a) above and PTP's principal brief, PTP's interests and priorities are different and more targeted than the Township's. (App. Brief, pp. 52-56.) In addition, the Township waived critical defenses to the Wineries' core state law claims, which PTP seeks to advance to protect its distinct property and quality of life interests. (*Id.* at 56-59.) PTP has established that its interests diverge in germane ways from the Township and that the Township has failed to raise critical defenses to claims that directly threaten PTP's interests.

(d) PTP raised its arguments to the District Court.

The Wineries erroneously assert that PTP forfeited arguments related to inadequacy of representation by not raising them to the District Court. (App'ee Brief, p. 30, referencing App. Brief, pp. 54-57.) The cited pages of PTP's brief address the Township's legal opinion memo and waiver of a supplemental jurisdiction defense as evidence of inadequate representation. PTP highlighted its opposition to the Township attorney's opinion memo in its motion to intervene to the District Court. (Brief in Support of Motion to Intervene, R. 41, PageID.1982.) PTP raised the supplement jurisdiction issue in its request to supplement its motion to intervene. (PTP Motion for Leave, R. 56, PageID.2254 *et seq*). It was the Wineries' motion for partial summary on preemption, which was filed after PTP's original motion to intervene, that made the case for lack of federal jurisdiction. (*Id.* at PageID.5559-

5560; Plaintiffs' Preemption Summary Judgment Brief, R. 54.) After PTP filed its motion to supplement, the Township responded to the Wineries' preemption motion and declined to challenge jurisdiction. (Defendant's Preemption Summary Judgment Brief, R. 63.) PTP raised these issues in a timely and appropriate way to the District Court.

The Wineries also assert that PTP raised for the first time on appeal other "previously unarticulated arguments" – namely, potential economic and job benefits resulting from increasing commercial activities at wineries. (App'ee Brief, p. 31, referencing App. Brief, p. 53.) PTP raised the same concerns in its motion to intervene: "The Township may have an interest in balancing [PTP's] interests against the economic benefits from increasing winery commercial operations." (Brief in Support of Motion to Intervene, R. 41, PageID.1981.) PTP properly reiterated the concern in its appeal brief in response to the District Court's order.

6. This intervention is timely.

The Wineries do not contest the timeliness of PTP's motion to intervene (App'ee Brief, p. 14), but then they argue it would be improper to grant intervention "at this late stage." (*Id.* at p. 32.) They note the lawsuit has progressed to summary judgment, though trial is not scheduled until August 2022. According to the Wineries, intervention "would significantly delay the resolution of the case." (*Id.*)

Three responses are warranted. First, Rule 24(a) requires a "timely *motion*." Fed. R. Civ. P. 24(a) (emphasis added). The District Court properly found PTP's motion was timely. (Order Denying Intervention, R. 108, PageID.4169 ("timeliness[] is not challenged because PTP timely filed its motion to intervene."). There is no lawful basis to deny this appeal due to the passage of time between when PTP filed its motion in February 2021 and this timely appeal following the District Court's denial in October 2021.

Second, prudential or administrative concerns resulting from intervention "at this late stage" may be managed, but they are not a proper basis to deny intervention. Courts recognize intervention of right "may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." *San Juan County v. United States*, 503 F.3d 1163, 1189 (10th Cir. 2007) (quoting Rule 24 Advisory Committee notes to the 1966 Amendment). PTP does not agree that restrictions are appropriate; the point is that denial of the right to intervene would be an overbroad and unfair remedy.

Third, the Wineries speculate that the case is near resolution and granting intervention would delay resolution. As they acknowledge, the legal issues have been submitted to the District Court on motions for summary judgment. (R. 53, R. 135; R. 142.) Depending on when and how the District Court rules on the motions, PTP may participate as an intervening defendant at trial, on appeal, or during post-

appeal litigation (*e.g.*, remand). This case many continue for years. Timing is not a basis to deny intervention to PTP in this case.

B. Motion to Supplement Intervention

PTP showed that the District Court erred in rejecting PTP's motion for leave to supplement its motion to intervene. (App. Brief, pp. 59-62.) The Wineries offer three new rationales to support the District Court decision: (a) Rule 24(c) allows only a single responsive pleading; (b) the proposed filing (a motion to dismiss) was untimely; and (c) any error is harmless. Each is addressed below.

1. Rule 24(c) does not permit only one pleading.

The Wineries argue that PTP's request to supplement its motion to intervene with a motion to dismiss violated Rule 24(c), which allows an intervener to file one pleading. (App'ee Brief, p. 33.) They reach this conclusion because Rule 24(c) says a motion to intervene must be accompanied by "a pleading," and Rule 7(a) says an answer is a "pleading." Fed. R. Civ. P. 7(a), 24(c). After PTP filed a motion to intervene accompanied by an answer, it was out of pleadings, say the Wineries.

The Wineries misinterpret Rule 24(c). It requires a petitioner to attach a pleading. That does not mean a petitioner may not attach more than one pleading, or a motion and a pleading. Nor does it mean a petitioner may not subsequently request

leave to attach an additional pleading or motion. Rule 24(c) establishes the minimum filing requirement, but it is silent on what else a petitioner may file.

Moreover, even on the minimum requirement to attach a pleading, the Sixth Circuit "favor[s] a permissive approach." *Providence Baptist*, 425 F.3d at 314-15. In that case, proposed intervener Hillandale Committee did not attach a pleading with their motion to intervene, and the district court dismissed the motion partly for not complying with Rule 24(c). *Id.* at 313. Thereafter, the Committee filed a motion for relief from judgment with an answer attached. *Id.* at 315. In adopting the permissive approach, the Sixth Circuit noted the rationale for requiring strict enforcement of Rule 24(c) under circumstances such as "where the parties are not on notice as to the grounds asserted for intervention, or there is some other prejudice to the parties[.]" *Id.* at 314-15.

Providence Baptist provides two instructive points. First, Rule 24(c) is not interpreted with strict rigidity. Second, the Sixth Circuit had no apparent problem with the Hillandale Committee filing a motion for relief after its motion to intervene was denied. This is similar to what PTP did, except in *Providence Baptist,* the second motion came after denial of intervention, whereas here, PTP's second motion came while its intervention motion remained pending. If there is no error when a denied intervener files a motion for relief in district court, there should be none when a proposed intervener does the same.

2. PTP's proposed motion to dismiss was not untimely.

The Wineries next argue that the motion to dismiss that PTP sought permission to file was untimely because PTP had already filed a proposed answer. (App'ee Brief, pp. 33-34.) The Wineries cite Rule 12(b) and an unpublished case in support. The Wineries are wrong. Lack of subject matter jurisdiction may be raised "at any juncture," including by the court *sua sponte*, and must be evaluated before any consideration of the merits. *Klepsky v. UPS,* 489 F.3d 264, 269 (6th Cir. 2007) (quoting *Thornton v. Southwest Detroit Hosp.,* 895 F.2d 1131, 1133 (6th Cir. 1990)); *U.S. v. Adesida,* 129 F.3d 846, 850 (6th Cir. 1997) (citations omitted); Fed. R. Civ. P. 12(h)(3). PTP filed its motion for leave to supplement its pending motion to dismiss for lack of jurisdiction as soon the basis for it became clear from the Wineries' preemption summary judgment motion. (R. 54, R. 56.)

3. The error in rejecting PTP's motion was not harmless.

The Wineries argue that any error in rejecting PTP's motion was harmless because the District Court has discretion to accept or decline supplemental jurisdiction over the state law preemption claim, and the District Court is retaining jurisdiction. (App'ee Brief, pp. 2, 35-36.) The Wineries interpret three events to mean the District Court has decided to exercise supplemental subject matter jurisdiction: (1) the District Court did not decline supplemental jurisdiction when it

rejected the Wineries' motion for preliminary injunction; (2) the Wineries and Township agreed to supplemental jurisdiction; and (3) there have been cross motions for summary judgment on the state law claim pending for over a year, so "it is safe to say the District Court is retaining jurisdiction." (App'ee Brief, p. 36.)

The Wineries misunderstand federal supplemental jurisdiction. The threshold requirement is that the state claims must be "so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). In order to find supplemental jurisdiction over state claims, the state and federal claims must derive from a common nucleus of operative fact. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). If the state claims meet the "common nucleus of operative facts" standard, only then does the district court have discretion to exercise or decline supplemental jurisdiction. 28 U.S.C. § 1367(c) ("The district court *may decline* to exercise supplemental jurisdiction" under four circumstances) (emphasis added). District courts have no discretion to "accept" jurisdiction if the claims do not share a common nucleus of operative facts with the federal claims. PTP's rejected motion to dismiss demonstrated both: the state law preemption claims lack common operative facts with their constitutional claims, (PTP Proposed Motion to Dismiss, R.56-1, PageID.2576-2579); and the state law claims raise novel, complex,

and quintessentially state and local issues, and also threaten to predominate over the federal claims. (*Id.*, PageID.2579-2586.)

Contrary to the Wineries' assertion, the District Court has not yet made a decision that it has supplemental jurisdiction. The Township has not raised the issue, instead acquiescing to federal jurisdiction over the state claims. (App. Brief, pp. 57-59.) The District Court has not addressed the issue *sua sponte*. The District Court did not reach the state preemption claim when it denied preliminary injunctive relief. (Order Denying Preliminary Injunction, R. 34, PageID.1875.) The issue is not waived by agreement, nor does it matter how long state law cross-motions have been pending. *Adesida,* 129 F.3d at 850. In sum, the issue remains ripe, and PTP properly and timely sought to raise it.

III. CONCLUSION

For the reasons provided herein, Movant-Appellant PTP 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: February 28, 2022 s/ TJ Andrews

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V. 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 Reply Brief is 32 pages, contains 6,392 words of Time New Roman (proportional) 14-point type, and consists of 565 lines. The word processing software used to prepare this brief was Microsoft Word 2016 MSO for Windows.

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VI. CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2022, this document was served on all parties or their counsel of record through the CM/ECF system.

Date: February 28, 2022 s/ TJ Andrews

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UPDATED 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.1368-1399

Order Denying Preliminary Injunction, R. 34, PageID.1864-1876

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.4308-4312

Notice of Appeal, R. 121, PageID.4343

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

Plaintiffs' Constitutional Summary Judgment Brief, R. 135, PageID.4752

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

Minutes, R. 141, PageID.4960

Defendant's Constitutional Summary Judgment Brief, R. 142, PageID.4968-5001_

Unpublished Cases

Horrigan v. Thompson, 1998 U.S. App. LEXIS 9506, 1998 WL 246008, No. 96-4138 (6th Cir. May 7, 1998) **(Addendum 1 / filed with PTP Brief)**

Ken-N.K., Inc. v. Vernon Twp., 18 Fed. Appx. 319 (6th Cir. 2001) **(Addendum 2 / filed with PTP Brief)**

Midwest Realty Mgmt. Co. v. Beavercreek, 93 Fed. Appx. 782 (6th Cir. 2004) **(Addendum 3 / filed with PTP Brief)**

Benalcazar v. Genoa Twp., Case No. 2:18-cv-01805, 2020 U.S. Dis. LEXIS 63756 (S.D. Ohio, April 13, 2020) (**Attached – Addendum 5**)

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) **(Addendum 4 / filed with PTP Brief)**

Benalcazar v. Genoa Twp.

United States District Court for the Southern District of Ohio, Eastern Division

April 13, 2020, Decided; April 13, 2020, Filed

Case No. 2:18-cv-01805

Reporter

2020 U.S. Dist. LEXIS 63756 *; 2020 WL 1853212

BENTON BENALCAZAR, et al., Plaintiffs, v. GENOA TOWNSHIP, OHIO, Defendant.

Subsequent History: Dismissed by, in part, Motion denied by, in part, Motion granted by, Motion denied by, As moot Benalcazar v. Genoa Twp., 2020 U.S. Dist. LEXIS 152718 (S.D. Ohio, Aug. 24, 2020)

Counsel: **[*1]** For Benton Benalcazar, Katherine Benalcazar, Plaintiffs: Joseph R Miller, LEAD ATTORNEY, Vorys Sater Seymour & Pease - 2, Columbus, OH; Christopher Logan Ingram, Columbus, OH; Elizabeth S. Alexander, Vorys, Sater, Seymour and Pease LLP, Columbus, OH.

For Genoa Township, Ohio, Defendant: David Alan Riepenhoff, LEAD ATTORNEY, Fishel Hass Kim Albrecht Downey LLP, New Albany, OH; Stephanie Leigh Schoolcraft, Fishel Downey Albrecht Riepenhoff LLP, New Albany, OH.

For GTRRD, INC., Luke Schroeder, Janine Schroeder, Movants: Peggy S. Guzzo, LEAD ATTORNEY, Guzzo Law Office, LLC, Dublin, OH.

Judges: ALGENON L. MARBLEY, CHIEF UNITED STATES DISTRICT JUDGE. Magistrate Judge Deavers.

Opinion by: ALGENON L. MARBLEY

Opinion

OPINION & ORDER

I. INTRODUCTION

This matter is before the Court on Movants GTRRD, Inc. and Luke and Janine Schroeder's Motions to Intervene. Docs. 22 & 24. All three Movants assert an identical legal interest for intervening in this action and will thus be treated as a single intervenor for purposes of this Opinion and Order. For the reasons set forth below, the Court **GRANTS** Movants' Motions [#22, #24].

II. BACKGROUND

A. Underlying Lawsuit

Plaintiffs Benton and Katherine Benalcazar own property located in Genoa Township, **[*2]** Ohio. On April 9, 2018, the Genoa Township Board of Trustees approved Plaintiffs' application to re-zone their property from a Rural Residential property to a Planned Residential Development. Doc. 1 at 12. The Board also approved Plaintiffs' preliminary development plan. *Id.* After the Trustees approved Plaintiffs' application, members of the public circulated a petition, seeking a referendum to restore Plaintiffs' property to its original zoning designation. *Id.* at 14. That referendum made its way onto the November 2018 ballot and passed by a majority vote. *Id.* at 14-15. Consequently, Plaintiffs' property was returned to its Rural Residential designation. *Id.*

Following the November 2018 vote, Plaintiffs filed this action against Defendant Genoa Township, Ohio, asserting two causes of action: (1) Deprivation of Property and Liberty Interests Without Due Process of Law, in violation of 42 U.S.C. § 1983; and (2) Unequal Protection of the Law, in violation of 42 U.S.C. § 1983. *Id.* at 15-17. Plaintiffs also sought a Declaratory Judgment that subjecting their property to a Rural Residential zoning designation was unconstitutional. *Id.* at 17-18. On June 7, 2019, the parties participated in a lengthy mediation, with settlement discussions continuing for several months **[*3]** thereafter. Doc. 38 at 2. Finally, on January 17, 2020, the parties filed a Proposed Consent Decree pursuant to Ohio Revised Code § 505.07,[1] which, pending Court approval, would re-zone Plaintiffs' property to a Planned Residential Development. Doc. 38-7.

B. Motion to Intervene

Movant GTRRD, Inc. is an association of residents in Genoa Township, Ohio that neighbor Plaintiffs' property. Movants Luke and Janine Schroeder are members of GTRRD, Inc. and own property that abuts Plaintiffs' property.[2] In 2003, Genoa Township adopted a Zoning Resolution, whereby any owner desiring to have their property designated as a Planned Residential District was required to apply for a zoning map amendment per Ohio

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[1] **O.R.C. § 505.07 Settlement of Court Action — Zoning Issue Subject to Referendum**. "Notwithstanding any contrary provision in another section of the Revised Code, section 519.12 of the Revised Code, or any vote of the electors on a petition for zoning referendum, a township may settle any court action by a consent decree or court-approved settlement agreement which may include an agreement to rezone any property involved in the action as provided in the decree or court-approved settlement without following the procedures in section 519.12[.]"

[2] Hereinafter, except where specified, all three Movants will be referred to collectively as the "Movants."

Revised Code § 519.12. Doc. 22 at 4. Any application for amendment was then subject to the right of neighboring residents to file a referendum, reserving for themselves the final decision to vote on the rezoning application, such as what happened during the November 2018 election. *Id.* Movants seek to intervene in this action, claiming the parties' Proposed Consent Decree violates the Genoa Township Zoning Resolution, as it arbitrarily overturns their vote and takes away their right **[*4]** to decide whether to amend the zoning map. Doc. 22 at 5.

III. ANALYSIS

A. Whether Movants may Intervene as a Matter of Right

Movants seek to intervene in this action as a matter of right under Federal Rule of Civil Procedure 24(a). Movants maintain that they have a legal interest in ensuring that the development of property in Genoa Township is consistent with the Township's Zoning Resolution. Movants also assert an interest in preserving their right under the Resolution to decide -- via vote -- whether to amend the Township's zoning map.

Federal Rule of Civil Procedure 24(a)(2) provides that, on timely motion, the Court must permit anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). More plainly, the Sixth Circuit has identified four factors a movant must satisfy before intervention as of right will be granted:

> (1) timeliness of the application to intervene; (2) the applicant's substantial legal interest in the case; (3) impairment of the applicant's ability to protect that interest in the absence of **[*5]** intervention; and (4) inadequate representation of that interest by parties already before the court.

Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997). A "failure to meet one of the criteria will require that the motion to intervene be denied." *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989).

1. Whether Movants' Motion is Timely

The determination of whether a motion to intervene is timely must "be evaluated in the context of all relevant circumstances." *Jansen v. City of Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990). Five factors guide the Court's

analysis:

> (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 arties 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.

Id. The Court will analyze each of these five factors, in turn, below.

i. Stage of the Proceeding

The first timeliness factor requires the Court to look at the point to which the lawsuit has progressed. Importantly, "the time between the filing of the complaint and the motion to intervene, **[*6]** in itself, is among the least important circumstances. What is more critical is the progress made in discovery and the motion practice during the course of the litigation." *Midwest Realty Mgmt. Co. v. City of Beavercreek*, 93 F. App'x 782, 786 (6th Cir. 2004) (internal citation omitted).

Here, although roughly a year has elapsed between the filing of the underlying Complaint and the Motions to Intervene, the parties have engaged in very limited motion practice during this time. In fact, the only Motion filed was a Joint Motion for Protective Order. *See* Doc. 11. Moreover, while the parties assert that they have engaged in extensive written discovery -- exchanging over 25,000 documents -- this case was stayed nearly three months before the discovery deadline passed, so the parties could finalize settlement discussions. *See* Doc. 16. It thus appears that the energy devoted towards discovery was minimal. Accordingly, this first factor will weigh in favor of timeliness. *See Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 370, 33 V.I. 311 (3d Cir. 1995) (finding intervention four years after complaint was filed timely where "there were no depositions taken, dispositive motions filed, or decrees entered during the four year period in question").

ii. Purpose of Intervention

The second timeliness factor is the purpose for which intervention is sought. Here, **[*7]** Movants seek to intervene in this case to file a motion to dismiss Plaintiffs' Complaint, arguing no actual controversy exists, such that it would permit the parties to use Ohio Revised Code § 505.07 to circumvent Movants' right to decide whether to amend the Genoa Township zoning map. While O.R.C. § 505.07 gives the parties

a statutory right to resolve -- via consent decree -- court actions involving zoning disputes, this does not strip Movants of the ability to challenge whether an actual case or controversy exists between the parties. As such, the Court finds the proffered reason for seeking intervention legitimate and, therefore, this second factor weighs in favor of timeliness.

iii. Time Preceding Application to Intervene

The third factor concerns "the length of time preceding the [Movants'] motion to intervene, during which they knew, or should have known, of their interest in the case." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 477 (6th Cir. 2000). The Sixth Circuit has instructed that "[t]he mere pendency of settlement negotiations" is not sufficient to put prospective intervenors on notice that their interests might be impaired. *Midwest Realty Mgmt. Co.*, 93 F. App'x at 788. Rather, "[o]nly notice of objectionable terms in a proposed settlement will ordinarily suffice." *Id.*

Here, Movants filed their Motions to intervene **[*8]** on December 12, 2019 and December 27, 2019 respectively. *See* Doc. 22 & 24. Undoubtedly, they were aware prior to December 2019 that this litigation could affect their legal interests. Indeed, according to Defendant, its counsel received a call on March 12, 2019 from Jim Carter -- an incorporator of Movant GTRRD, Inc. -- requesting a meeting to discuss the case and to encourage Defendant not to settle with Plaintiffs. *See* Doc. 27 at 6. Nevertheless, the record suggests that Movants did not have actual notice of the terms of the settlement agreement until November 23, 2019, the date on which the parties' Proposed Consent Decree was first published to the public. *See* Doc. 26 at 5. Given that Movants acted within weeks of receiving this notice, the Court finds that the Motions to Intervene were filed without undue delay. *See Midwest Realty Mgmt. Co.*, 93 F. App'x at 788 ("[E]ven 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 which apparently no progress was made in the litigation, does not constitute the sort of undue delay or reflect the sort of unexcused dilatoriness **[*9]** that would disqualify them from intervention[.]"). As such, this third factor weighs in favor of timeliness.

iv. Prejudice to Original Parties

The fourth timeliness factor looks to the prejudice caused by Movants' failure promptly to intervene after they knew or reasonably should have known of their interest in the case. The appropriate focus is "the prejudice caused by the *untimeliness*, not the

intervention itself." *United States v. City of Detroit*, 712 F.3d 925, 933 (6th Cir. 2013).

Here, the Court finds that the parties would not be prejudiced by Movants intervening at this stage of the proceedings. Though the parties have reached a settlement, the Court has yet to approve of the Proposed Consent Decree or enter Judgment. Moreover, Movants do not seek to rewrite the provisions of the Consent Decree, which would necessarily require the parties to restart their settlement negotiations. Instead, Movants seek to dispose of all claims in Plaintiffs' Complaint by way of a motion to dismiss. Because permitting Movants to intervene in this action for a limited purpose would not overtly prejudice the parties, this factor will weigh in favor of timeliness. *Cf. United States v. BASF-Inmont Corp.*, 1995 U.S. App. LEXIS 9158, 1995 WL 234648, at *4 (6th Cir. Apr. 18, 1995) ("Where intervention would require renewal of negotiations and a delay **[*10]** in implementing CERCLA remediation, the intervention would prejudice the parties' interests.").

v. Unusual Circumstances

The final factor concerns whether there are any unusual circumstances that weigh in favor of or against granting a motion to intervene. Plaintiffs argue that two unusual circumstances militate against intervention: (1) Movant GTRRD, Inc. is an entity created specifically for the purpose of intervention; and (2) members of the public already had the opportunity to voice their concerns about the Proposed Consent Decree during a public hearing held on December 16, 2019.

With respect to the first argument raised, Plaintiffs provide no case law to support the notion that an entity should be precluded from intervening in an action merely because it was created for that specific purpose. Similarly, Plaintiffs' second argument carries little weight. Even if Movants had the opportunity to voice their concerns about the Proposed Consent Decree at the December 2019 public hearing, this was not a forum in which Movants could seek to dismiss Plaintiffs' lawsuit in its entirety. Accordingly, there are no unusual circumstances that factor into the Court's decision.

In short, four of **[*11]** the five factors discussed above weigh in favor of a finding of timeliness. On balance, the Court finds that Movants' Motions to Intervene were timely filed.

2. Whether Movants have a Substantial Legal Interest in this Case

To intervene as a matter of right, Movants must show that they have a substantial legal interest in the subject matter of this litigation.

In the Sixth Circuit, "we subscribe 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) (internal quotations and citation omitted). It follows that "[t]he inquiry into the substantiality of the claimed interest is necessarily fact-specific." *Id.*

Here, Movants assert that they have a substantial legal interest in ensuring that the development of property in Genoa Township is consistent with both the Township's Zoning Resolution and Ohio law, and that their right to decide whether to amend the Township's zoning map is preserved. The Sixth Circuit has already recognized such as a legitimate legal interest. *See Midwest Realty Mgmt. Co.*, 93 F. App'x at 788 ("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 **[*12]** derogation of both local and state law, through settlement of litigation under the imprimatur of federal court order, certainly poses conflicts of legitimate interests that bear further scrutiny.").[3]

Notwithstanding the above, the parties raise several arguments for why they believe Movants have no cognizable legal interest in this case. First, the parties argue that there is no evidence establishing that Movant GTRRD, Inc. is what it purports to be: an organization of residents of Genoa Township, Ohio. For example, the parties assert that Movant GTRRD, Inc, has not identified any of its members. As such, the parties maintain that Movant GTRRD, Inc. is nothing more than a public interest group representing the "generic interest" of Township residents in the enforcement of the Township's Zoning Resolution.

Contrary to the parties' position, Movant GTRRD, Inc. has put forth evidence establishing itself as an organization of residents of Genoa Township, Ohio. James Carter -- one of GTRRD, Inc.'s incorporators -- submitted an affidavit identifying each of the founding and managing members of **[*13]** the organization. *See* Doc. 35-1 at 2. Amongst these members are five individuals who own property abutting Plaintiffs' property and one

[3] The parties note that *Midwest Realty Management Company* was decided prior to the passage of O.R.C. § 505.07, which expressly permits litigants to resolve -- via consent decree -- court actions involving zoning disputes. As such, they argue that *Midwest Realty Management Company* is distinguishable from this case because the Proposed Consent Decree here does not violate state or local law. Movants' position, however, is that no actual case or controversy exists between Plaintiffs and Defendant and, therefore, § 505.07 cannot be invoked. Stated differently, Movants argue that the Proposed Consent Decree violates state and local law. For this reason, the Court finds *Midwest Realty Management Company* instructive.

individual who owns property within five-hundred feet of Plaintiffs' property. *See id.* Further, Mr. Carter's affidavit attests that Movant GTRRD, Inc. was formed specifically to protect the rights of Plaintiffs' neighbors who voted against the rezoning of Plaintiffs' property, but who had that vote nullified by the Proposed Consent Decree. *See id.* The parties' first argument is, therefore, without merit.

Second, the parties argue that Movants' interest in the negotiated settlement is too generalized to support a claim for intervention as a matter of right. Citing to the Sixth Circuit's opinion in *Providence Baptist Church v. Hillandale Committee, Ltd.*, 425 F.3d 309, 317 (6th Cir. 2005), the parties contend that Movants' "advocacy in getting the zoning ordinance on the November . . . ballot does not suffice to make it a real party in interest in the transaction which is the subject of the proceeding" -- the Proposed Consent Decree between Plaintiffs and Defendant. The parties' reliance on *Providence Baptist Church*, however, is misplaced.

Unlike in *Providence Baptist Church*, Movants are not merely a committee that was created to circulate zoning **[*14]** referendum petitions for the November 2018 election. *See id.* at 317 ("We will assume for this issue that Hillandale Committee is what it claims to be: the duly authorized committee which circulated the referendum petitions.") (internal quotations omitted). Rather, as discussed above, Movants were formed specifically to protect the rights of Plaintiffs' neighbors who voted against the rezoning of Plaintiffs' property, but who had that vote nullified by the Proposed Consent Decree. Hence, Movants' interest in this case did not become moot when their referendum found its way onto the November 2018 ballot. *See id.* ("The referendum petition took no position on the merits of the referendum; rather, it simply asked that the ordinance rezoning Providence's land be submitted to the electors for their approval or rejection. As such, Hillandale Committee had no interest in the outcome of the election or in any negotiations between Euclid and Providence after the election was held."). For this reason, *Providence Baptist Church* is distinguishable, and the parties' second argument falls flat.

Finally, the parties argue that Movants -- as neighboring property owners -- do not have a substantial legal interest **[*15]** in the enforcement of zoning laws. But the cases that the parties cite in support stand only for the proposition that a proposed intervenor must present more than an economic interest involving their own property or a general interest in the enforcement of zoning laws to

establish a substantial legal interest. *See, e.g., Nextel W. Corp. v. Twp. of Scio*, 2007 U.S. Dist. LEXIS 58863, 2007 WL 2331871, at *2 (E.D. Mich. Aug. 13, 2007) ("Applicants allege they are local property owners who have a legally protectable interest in this litigation because the construction of the tower will lower their property values, destroy wooded areas, and adversely affect the environment in the surrounding area. These allegations are economic interests involving their own properties in the Township and do not rise to a legally protectable interest to justify intervention."); *North Shore-Chicago Rehab. Inc. v. Vill. of Skokie*, 1993 U.S. Dist. LEXIS 12626, 1993 WL 356928, at *3 (N.D. Ill. Sept. 13, 1993) ("Certainly, the residents' general interest in the enforcement of the [zoning] laws is insufficient for intervention as of right."). Here, however, Movants are seeking to intervene to preserve their right under Genoa Township's Zoning Resolution to decide whether to amend Genoa Township's zoning map. The Sixth Circuit recognized this as a substantial legal interest in *Midwest Realty Management Company*, and this Court will follow suit. *See* ***[*16]*** 93 F. App'x at 788 ("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 under the imprimatur of federal court order, certainly poses conflicts of legitimate interests that bear further scrutiny.").

3. Whether Movants can Protect their Substantial Legal Interest Absent Intervention

To satisfy the third element of the intervention test, "a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." *Grutter*, 188 F.3d at 399. This burden is minimal. *Id.*

The Court has already found that Movants have a substantial legal interest in preserving their right under Genoa Township's Zoning Resolution to decide whether to amend Genoa Township's zoning map. To that end, Movants seek to file a motion to dismiss the claims in Plaintiffs' Complaint, arguing no actual controversy exists, such that it would permit the parties to use Ohio Revised Code § 505.07 to circumvent Movants' rights under the Zoning Resolution. Because intervening in this action is the only avenue for Movants to file a motion to dismiss, **[*17]** this third factor weighs in favor of intervention.

4. Whether the Existing Parties Adequately Represent Movants' Legal Interest

Finally, Movants must show that the existing

Defendant -- Genooa Township, Ohio -- may not adequately represent their interests. Importantly, Movants are "not required to show that the representation will in fact be inadequate." *Id.* at 400. Rather, "[i]t may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Id.*

Here, the parties maintain that Defendant adequately represents Movants' interests because the arguments raised in Movants' proposed motion to dismiss are the same defenses raised in Defendant's answer. *See* Doc. 8 at 13 ("**Second Defense**: Plaintiffs' Complaint fails to state a claim upon which relief may be granted."). But even accepting this as true, Defendant did not follow through by filing a motion to dismiss Plaintiffs' Complaint. Instead, Defendant entered into a settlement with Plaintiffs. Movants have thus shown that Defendant will not advance all of their arguments and, therefore, will not adequately represent their interests in this action. Accordingly, the Court **[*18]** will permit Movants to intervene in this action as a matter of right.

B. Whether Permissive Intervention is Appropriate

Even if intervention as a matter of right were not appropriate in this case, the Court would permit Movants to intervene permissively pursuant to Federal Rule of Civil Procedure 24(b). *See* Fed. R. Civ. P. 24(b)(1)(B) ("On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."). "Rule 24(b) grants the district court discretionary power to permit intervention if the motion is timely, and if the applicant's claim or defense and the main action have a common question of law or fact in common." *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991). The Court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.* at 951.

Here, the Court has already found that Movants' motion was timely filed and that intervention would not unduly prejudice the rights of the original parties. Given that Movants' claim/defense surrounds protecting their rights under the Township's Zoning Resolution, and because the Resolution is directly at issue in this action, the Court would have permitted Movants to intervene pursuant Rule 24(b).

IV. CONCLUSION

For the **[*19]** reasons stated herein, the Court **GRANTS** Movants GTRRD, Inc. and Luke and

Janine Schroeder's Motions to Intervene [#22, #24]. Movants will be permitted to intervene in this action for the limited purpose of challenging the sufficiency of Plaintiffs' Complaint.

IT IS SO ORDERED.

/s/ Algenon L. Marbley

ALGENON L. MARBLEY

CHIEF UNITED STATES DISTRICT JUDGE

DATED: April 13, 2020

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