UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal corporation,

Defendant.

Case No. 1:20-cv-01008

HON. PAUL L. MALONEY MAG. JUDGE RAY S. KENT

TOWNSHIP'S BRIEF IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT

ORAL ARGUMENT REQUESTED

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*** * * ORAL ARGUMENT REQUESTED * * ***

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CONCISE STATEMENT OF ISSUE PRESENTED

Whether the Court should alter or amend the Judgment issued on June 3, 2022, in part, and vacate the Injunction?

STANDARD OF REVIEW

A party may file a motion to alter or amend a judgment within 28 days after the entry of judgment. Fed. R. Civ. P. 59(e). A Rule 59 motion asks the court to review matters "properly encompassed in a decision on the merits." *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451 (1982). A district court may grant the Rule 59(e) motion for one of four reasons: (1) an intervening change in the controlling law; (2) newly discovered evidence; (3) to correct a clear error of law; or (4) to prevent manifest injustice. *GenCorp, Inc. v. American Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). Whether to grant or deny a Rule 59 motion falls within a court's discretion. *Nagle Indus., Inc. v. Ford Motor Co.*, 175 F.R.D. 251, 254 (E.D. Mich. 1997).

INTRODUCTION

This brief is a "Hail Mary" pass, long, straight, and true, thrown with purpose and hope that it will be well-received by the Court and find its mark.

This case is important because it will shape the essential character of Old Mission Peninsula, a place that Plaintiffs, the Township, and its 6,068 residents call home. 42 miles of Great Lakes shoreline cradle 18 thousand acres of predominantly prime agricultural land and distinct microclimate, federally designated as an American viticultural area ("AVA") uniquely adapted to growing fruit, particularly grapes that produce appellation wine of recognized high quality and value.

Sharing this narrow Peninsula with only one main road in and out requires a delicate balance among the land uses that want to locate here. The residents of Old Mission Peninsula struck that balance many years ago, including by reaching a mutual compact in the form of the ordinances at issue in this litigation. The Township had no obligation to allow any commercial processing, events, or retail sales or consumption of wine on the Peninsula's fragile agriculturally-zoned lands. But 35 years ago, Plaintiffs and their predecessors sought to conduct these ancillary activities subject to restrictive requirements they proposed themselves in these ordinances. Simultaneously and consistently, Plaintiffs worked from 1986 to create a federally-recognized AVA on the Peninsula, designating a special appellation for the wines produced by the Peninsula's distinctive grapes.

The Township and its other residents embraced the compact offered by Plaintiffs, not only by adopting the ordinances and allowing the limited new ancillary uses within Plaintiffs' proposed constraints, but also by reaching into their own pockets year after year to fund a significant purchase of development rights ("PDR") program that has to date paid many millions of dollars to

Peninsula farmers to permanently preserve their lands for agricultural use. This has allowed the agricultural uses on the Peninsula to not just survive but to thrive.

Now, decades later, after enjoying the fruits of the compact that created and maintained the current delicate balance of land uses within the Peninsula, Plaintiffs seek in this litigation to upend the compact in the pursuit of speculative new profits. But the quality of the lives and livelihoods of the Peninsula's 6,068 residents are at stake in this case, including those of its permanent and seasonal residents, Plaintiffs, and other local farmers. Frankly, the issues in this case are too important to end in the numerous findings by the Court in its recent Opinion that the Township "failed to carry its burden" on so many issues. Therefore, to correctly identify and carry its lawful and appropriate burden, the Township files this motion and brief.

ARGUMENT

I. The Court's injunction is unfounded and contrary to the Court's own ruling on laches.

A. Plaintiffs did not ask for the injunction that the Court granted, but instead conceded that their injunction claim involved disputed issues of fact.

The Court recognized the axiomatic standard that "[s]ummary judgment is appropriate only if . . . there is no issue of material fact" (PageID.5982), but then departed from that standard. Plaintiffs did not seek summary judgment on their injunction claim (Count X of the Complaint) and admitted in their reply brief that it "involves disputed facts and should be decided by the trier of fact" (PageID.5646). It was clear error for the Court to *sua sponte* grant relief that Plaintiffs conceded they should not have due to issues of fact.

B. The Court's injunction is contrary to the Court's ruling that there are issues of fact on the Township's laches defense.

The Township sought summary judgment on all of Plaintiffs' claims based on the affirmative defense of laches. The Court correctly rejected Plaintiffs' argument that laches does not apply to Constitutional claims, recognizing that: "[A] constitutional claim can become time-barred just as any other claim can" (PageID.6022, quoting *United States v. Clintwood Elkhorn Mining Co.,* 553 U.S. 1, 9 (2008)). The Court also correctly recognized that laches in a particular case is "a fact-dependent inquiry" (PageID.6022, quoting *Michigan Chamber of Commerce v. Land,* 725 F.Supp. 2d 665, 681 (W.D. Mich., 2010)). The Court denied summary judgment to the Township on laches, finding issues of fact (PageID.6023). Since laches applies to all of Plaintiffs' claims and involves issues of fact, the Court clearly erred by granting relief that was contrary to its own ruling.

Although the Court properly noted the shifting burdens of proof on summary judgment (PageID.5983), it neglected to apply them here. To demonstrate laches, the Township must show: (1) a lack of diligence by Plaintiffs; and (2) prejudice to the Township. *Land, supra.* The first element is beyond reasonable dispute, as the oldest challenged Ordinance is 30 years old, and the most recent challenged Ordinance is approximately 20 years old (PageID.6021).

The Court was concerned whether the Township presented sufficient evidence of prejudice, but the Sixth Circuit holds that where a plaintiff delays beyond the applicable statute of limitations to bring its claims, plaintiff's actions are "presumptively prejudicial and unreasonable, creating a rebuttable presumption of laches." *Nartron Corp v. STMicroelectronics, Inc.*, 305 F.3d 397, 409 (6th Cir., 2002). There is a three-year statute of limitations for all of Plaintiffs' claims. MCL 600.5805(2). Thus, "a delay beyond the three-year statutory period is presumptively prejudicial and unreasonable." *Nartron,* 305 F.3d at 408.

The time for measuring whether a delay has occurred "begins to run when plaintiff had actual or constructive knowledge of the alleged infringing activity." *Id.* That time was long ago, as the Court observed (PageID.5985: "The Township Ordinances have sparked problems among the parties for years. The Wineries allege that after a decade of attempting to change the Township Ordinances with no success, they were forced to file this lawsuit"). The Court should have recognized the presumption that Plaintiffs' delay was "prejudicial and unreasonable" (*Nartron, supra*) and shifted the burden of demonstrating that no prejudice exists onto Plaintiffs.

The Court's comments about prejudice also indicate an overly-narrow view of these proceedings and the Township's approach in balancing the agricultural community interests with limited commercial activities. This is a zoning case, so public interests are at stake. The prejudice is not just to the Township, but also to its farmers and residents who value their agrarian community. (PageID.4971, 5103-5104, 5009, 5015). Representatives of Plaintiffs initiated these ordinances allowing limited ancillary commercial uses in the Township's agricultural district, assuring the Township that such limited commercial uses would not include expansive events, traffic, and loss of agricultural land. (PageID.5121-5125, 5136,5148-5150, 5152-56, 5195-5196). The Township accepted these restricted provisions to maintain the agricultural culture and accommodate the limited capacity of the infrastructure within the Township. (PageID.5102-5104). The Township and the wineries have relied upon operating under these provisions for decades with only a single early challenge that was resolved with a consent judgment to continue many of the same limitations. (PageID.5188; PageID.2806-2895, 2993-3061, 3073-3078.)

This Court failed to adhere to the Michigan Supreme Court's fundamental principle that the "Court does not sit as a super-zoning commission. Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny … The people of

the community, through their appropriate legislative body, and not the courts, govern its growth and its life." *Brae Burn v. Bloomfield Hills*, 350 Mich. 425, 430-3; 86 N.W.2d 166 (1957). See also, *Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 68; 101 S.Ct. 2176, 2182; 68 L.Ed. 2d 671 (1981) ("The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities"). The Court's acceptance of Plaintiffs' claims and invalidation of these zoning regulations grants the very stakeholders who proposed the ordinance limitations expansive commercial uses that would never have otherwise been authorized in the Township decades previously. Had Plaintiffs challenged such regulations within the applicable statute of limitations, the Township also would have been saved from the increased impact of more than ten wineries in the succeeding years (PageID.946 (listing the wineries' approval dates over a period in excess of the applicable statute of limitations from the initial authorized wineries).

C. The Court prematurely issued a permanent injunction, despite issues of fact for trial, and without considering the mandatory factors for issuing an injunction.

The Court noted that it "has already denied Plaintiffs' motion for a preliminary injunction . . . However, 'findings of fact and conclusions of law made by a Court [at the] preliminary injunction [phase] are not binding at trial on the merits'" (PageID.6028-6029, quoting *Univ. of Texas v. Camenish*, 451 U.S. 390, 395 (1981)). But a summary judgment hearing is *not* a trial on the merits. Plaintiffs conceded and the Court found issues of fact that preclude injunctive relief, and that must be further addressed in the *upcoming* trial on the merits. The Court effectively granted a premature permanent injunction at the preliminary injunction stage, despite even Plaintiffs' acknowledgement that they were not entitled to that relief.

The Court suggested that Plaintiffs' right to an injunction rose or fell with their arguments (PageID.6029). To the contrary, the Supreme Court recently summarized:

> [A] preliminary injunction is an "an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (208). As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits. *See id*., at 32, 129 S.Ct. 365. Rather, the Court must also consider whether the movant has shown "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id*., at 20, 129 S.Ct. 365. [*Benisek v. Lamone*, 138 S.Ct. 1942, 1943-44 (2018)].

The Township incorporates its discussion above (reflecting that an injunction is against the public interest). The Township also emphasizes that a party seeking an injunction has the burden of proving the required elements (as indicated in the quote above), but Plaintiffs failed to make that showing. Instead, they conceded that they were not entitled to an injunction based upon remaining issues of fact.

II. The Township's zoning ordinance does not conflict with the Michigan Liquor Control Code ("MLCC"), so it is not preempted.

The applicable standard is that "an ordinance is not conflict preempted as long as its additional requirements do not contradict the requirements set forth in the statute." *DeRuiter v. Township of Byron*, 949 N.W.2d 91, 100 (Mich. 2020). The Court correctly recognized this standard (PageID.5987-5988) but erred in not applying it.

A. The MLCC addresses only music and does not preempt the zoning ordinance's additional condition on the amplification of music.

The zoning ordinance relevantly provides:

> No *amplified* instrumental music is allowed, however *amplified* voice and recorded background music is allowed, provided the *amplification level* is no greater than normal conversation at the edge of the area designated within the building for guest purposes. [Section 8.7.3(10)(u)(5)(g), emphasis added.]

The Court held "that the complete prohibition of amplified instrumental music is preempted by Michigan law, which expressly allows certain licensees to have musical instrument performance without a permit" (PageID.5991). This is clear error because the MLCC does not address *amplified* music at all. Instead, the MLCC just allows a licensee to engage in the "performance or playing of an orchestra, piano, or other types of musical instruments, or singing" without an MLCC entertainment permit. MCL 436.1916(11)(a).[1]

The Court clearly erred by expanding the plain statutory language of the MLCC to include an additional "amplification" provision. *DeRuiter, supra* (holding that zoning ordinance regulating where a caregiver may cultivate marijuana did not conflict with the statute allowing medical use of marijuana). Recently, the Supreme Court reversed a judicial decision adding words to a statute, explaining that if the legislature had intended to add those words, "it would have included language to that effect. But it did not, and we interpret the statute as written. … We are bound to respect the Legislature's linguistic choice …" *American Civil Liberties Union of Michigan v. Calhoun County Sheriff's Office*, ___ N.W.2d ___ (February 4, 2022) (2022 WL 351046 at *5-6). The same analysis applies here. It would have been simple for Michigan's Legislature to add "amplification" language to MCL 436.1916(11), but it did not. The Legislature's linguistic choice must be respected.

Thus, the zoning ordinance does not conflict with MLCC's allowance of "playing of an orchestra, piano, or other types of musical instruments, or singing" as allowed by MCL 436.1916(11). The zoning ordinance just adds a "no amplification" condition. The Court elsewhere correctly recognized that "a local unit of government may add conditions to rights granted in a

[1] MCL 436.1916(11)(a) refers to a "permit under this section," which is an MLCC entertainment permit. That section does not govern or concern any other kinds of state or local permits.

state statute because 'additional regulation to that of a state law does not constitute a conflict therewith'" (PageID.5988, quoting *Nat'l Amusement Co. v. Johnson*, 259 N.W. 342, 343 (Mich. 1935)). The Court also correctly recognized the distinction between a conflict and an additional condition in holding that the Ordinance does not conflict with the MLCC regarding hours of operation (PageID.5990).

The Court should correct its decision to comply with controlling law and plain statutory language by holding that Ordinance section 8.7.3(10)(u)(5)(g) is not preempted.

B. The MLCC addresses only the "catering" of alcohol and does not preempt the zoning ordinance's regulation of food catering.

The Court similarly erred in neglecting to recognize regulatory differences between food and alcohol (PageID.5992). The Court's error appears to have arisen from an implicit assumption that the MLCC concerns "catering" in the generic sense extending to off-site food service. This assumption is contrary to the MLCC's plain statutory language. The MLCC section defining "catering permit" clearly limits it to catering alcoholic beverages:

> "Catering permit" means a permit issued by the commission to a … holder of a public on-premises license for the sale of beer, wine, or spirits, or any combination thereof, that is also licensed as a food service establishment or retail food establishment under the food law of 2000, 2000 PA 92, MCL 289.1101 to 289.8111, which *permit authorizes the permit holder to sell and deliver beer, wine, and spirits in the original sealed container to a person for off-premises consumption but only if* the sale is not by the glass or drink and *the permit holder serves the beer, wine, or spirits*. The permit does not allow the permit holder to deliver, but not serve, the beer, wine, or spirits. [MCL 436.1547(1)(b), emphasis added].

Other MLCC sections consistently confirm that the statute concerns only the catering of alcoholic beverages, and not the use of kitchen facilities to serve food off-site. See MCL 436.1547(3) and MCL 436.1547(8). In contrast, the zoning ordinance concerns food, stating: "Kitchen facilities may be used for on-site *food service* related to Guest Activity Uses but not for

off site catering." (Section 8.7.3(10)(u)(5)(i), emphasis added.) There is no conflict with the MLCC's regulation of alcohol catering, so there can be no conflict preemption.

The Court should correct its decision to comply with MLCC's plain statutory language by holding that ordinance section 8.7.3(10)(u)(5)(i) is not preempted.

C. MLCC Rules and Plaintiffs' MLCC licenses expressly state that Plaintiffs must comply with local zoning ordinances.

The discussion above is dispositive, but for completeness there is another fundamental reason why the Court clearly erred. The Rules promulgated pursuant to the MLCC require that licensees must comply with all local zoning ordinances:

> A ***licensee shall***[2] ***comply with all*** state and local building, plumbing, ***zoning***, sanitation, and health laws, rules, and ***ordinances*** as determined by the state and local law enforcement officials who have jurisdiction over the licensee. [M.A.C. R. 436.1003(1), emphasis added.]
>
> * * *
>
> ***An application*** for a new license, an application for any transfer of interest in an existing license, or an application for a transfer of location of an existing license ***shall be denied if*** the commission is notified, in writing, that ***the application does not meet all*** appropriate state and local building, plumbing, ***zoning***, fire, sanitation, and health laws and **ordinances** as certified to the commission by the appropriate law enforcement officials. [M.A.C. R. 436.1105(3), emphasis added.]

This requirement that MLCC licensees comply with local zoning ordinances is further reflected by a *proviso* on all MLCC licenses, as well as in MLCC Orders approving the initial licensure or the transfer of ownership of licensees, specifically requiring the licensee to comply with all local zoning ordinances. Plaintiffs' MLCC licenses contain a *proviso* that they must "comply with all state and local building, plumbing, zoning, sanitation, and health laws, rules, and

[2]It is axiomatic that the word "shall" is mandatory. *Macomb Co. Rd. Comm'n v. Fisher*, 428 N.W.2d 744, 746 (1988); *Southfield Twp. v. Drainage Bd*, 97 N.W.2d 821, 830 (1959).

ordinances as determined by the state and local law enforcement officials who have jurisdiction over the licensee." (MLCC licenses attached as **Exhibit A**.)

III. The zoning ordinance does not violate the dormant Commerce Clause.

Dormant Commerce Clause jurisprudence concerns in-state vs. out-of-state discrimination. The Township's zoning ordinance has no such out-of-state discrimination. Non-local grapes (whether they be from Rochester, Michigan or Rochester, New York) are treated the same. There is equal treatment, not discriminatory treatment, so strict scrutiny does not apply. The zoning ordinance passes the applicable *Pike*[3] balancing test in light of its incidental effects on interstate commerce and the Township's local public interest to protect the Peninsula's agricultural character. (PageID.5101 (Parsons testifying to Township's longstanding actions to preserve agriculture); (PageID.4971, 5009, 5015) (Master Plan demonstrating emphasis since 1968 on preserving agricultural lands).

The zoning ordinance is aligned with and supports the Peninsula as an American viticultural area ("AVA") under federal regulation. (PageID.5018-5019). Such geographically-labeled wines (similar to "Napa Valley" or "Sonoma County") identify the viticultural area where the grapes were grown and carry "prestige value." Plaintiffs sought and benefitted from the federally-recognized appellation for Old Mission Peninsula wine.

A. Strict scrutiny does not apply and the ordinance passes the *Pike* balancing test.

The Court found "Plaintiffs' arguments under the dormant Commerce Clause persuasive" (PageID.5998), citing *Alexis Bailly Vineyard, Inc. v. Harrington*, 482 F.Supp.3d 820, 824 (D.

[3] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142; 90 S.Ct. 844; 25 L.Ed. 2d 174 (1970).

Minn., 2020) as if that case were analogous.[4] It is not. *Alexis Bailly* concerned the percentage of ingredients that must "originate in Minnesota." This case concerns the percentage of ingredients that must originate within the Peninsula. This is also a zoning case, which inherently involves local rather than state or interstate concerns. *Guschke v. Oklahoma City*, 763 F.2d 379, 384 (10th Cir. 1985) ("[T]he Commerce Clause creates an implied limitation on the several states' authority to enact laws which restrict interstate commerce. States are not, however, prohibited from regulating matters of legitimate local concern, such as zoning, even though such regulation may affect interstate commerce").

Neglecting this state versus local distinction, the Court found that "[b]ecause the Township Ordinances, on their face, discriminate against all out-of-state farmers, they are *per se* invalid unless these sections pass strict scrutiny" (PageID.5998). But all the cases on which the Court relied involved legislation that specifically disfavored ***all*** interstate commerce and protected ***all*** in-state farmers and fruit. *Alexis Bailly, supra*, 482 F.Supp. 3d at 826-27) ("[T]he [Minnesota] Act mandates disparate treatment of in-state and out-of-state winemaking ingredients, favoring the former and disfavoring the latter"); *Granholm v. Heald*, 544 U.S. 460; 125 S.Ct. 1885; 161 L.Ed. 2d 796 (2005) (statute preventing out-of-state wineries from shipping product directly to Michigan consumers); *S. Dakota Farm Bureau, Inc. v. Hazeltine,* 340 F.3d 583, 587 (8th Cir. 2003) (state

[4] The Court's analysis seems to assume that all wine production on the Peninsula is limited to restrictions requiring 85% of local wine ingredients. This ignores the amount of wine-making that can occur without such restrictions. Section 8.5 permits unlimited wine making on five-acre parcels without restrictions as to geographic origin. The Township's commercial zoning district allows unlimited sale of wine and wine tasting without restrictions as to geographic region. Additionally, there is unlimited sale of wine (by the glass or bottle) within a Winery-Chateau tasting room or the processing of non-local grapes at a Winery-Chateau. See Section 8.7.3(10)(a)-(t).

constitution prohibited corporations from acquiring or obtaining an interest in land used for farming).

In contrast, this ordinance provides equal treatment to in-state agricultural products (grown off the Peninsula) and out-of-state agricultural products, affecting interstate commerce only incidentally. In some circumstances, the ordinance limits the percentage of ingredients grown off the Peninsula—a burden that falls on Michigan farmers (outside the Peninsula) and out-of-state farmers alike. For example, grapes produced in Fennville or the Leelanau Peninsula (separate AVAs) are subject to the same restriction as grapes from Napa Valley or Sonoma County.

The ordinance is not discriminatory under the dormant Commerce Clause. *Cleveland, Ohio v. Brook Park, Ohio,* 893 F.Supp.742, 752-54 (ND Ohio, 1995) ("States are generally not prohibited from making zoning decisions, even those that incidentally affect interstate commerce"). In *Cheryl Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 35-36 (1st Cir., 2007), the court held "the mere fact that a statutory regime has a discriminatory *potential* is not enough to trigger strict scrutiny under the dormant commerce clause" (emphasis in original), and since Maine treated in-state and out-of-state vineyards evenhandedly, *Granholm* was inapplicable and plaintiff had to present evidence that the law was discriminatory in its effect.[5] Plaintiffs cannot carry that burden; instead, they benefit from being able to market and sell Old Mission Peninsula wine.

Strict scrutiny does not apply here, so the Court should have applied the *Pike* balancing test. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed

[5] *See also Loesel v. Frankenmuth,* No. 08-11131-BC, 2009 WL 817402, at *22 (E.D. Mich., March 27, 2009); *Wood Marine Service Inc. v. Harahan*, 858 F.2d 1061, 1064 (5th Cir. 1988); and *Creekside Parking, Inc. v. Chelsea*, No. 192808, 1994 WL 16193975, at *1 (Mass Land Ct, July 29, 1994).

on such commerce is *clearly excessive in relation to the putative local benefits*." *Pike*, 397 U.S. at 142.

Evidence supports that one local public interest is protecting the Peninsula's agricultural character by requiring, for wineries that want to engage in ancillary commercial activities, that most of the wine they process and sell here must also be grown here. Former Supervisor Manigold testified that the purpose of the ordinance is to "maintain the [Township's] character by keeping a strong agricultural component" (PageID.4759). Manigold testified the Wineries would harm this public interest by purchasing a larger percentage of their grapes outside the Peninsula since "[i]t takes away from the farming component on Peninsula Township" (Page ID.4768).

The Court stated that although these may be legitimate public interests, it does not appear that the ordinance actually helps the Township achieve these interests because sometimes there are not enough grapes grown on the Peninsula to satisfy demand (PageID.6000). The Court's reasoning neglects the value of federally-recognized Old Mission Peninsula wine, as further discussed below. There are not enough Ferraris to satisfy demand either. But if they were made from Toyota parts, they would not be Ferraris.

B. The ordinance parallels the federal wine regulation granting prestigious status to Old Mission Peninsula wine.

Old Mission Peninsula is a federally-recognized American viticultural area ("AVA"). 27 C.F.R. 4.25.(e)(3)(ii); and 27 C.F.R. 9.114. This is reflected and supported by ordinance section 6.7.2(19)(b)(1)(ii), which provides: "Grape wine that is processed, tasted and sold in a Farm Processing Facility under this section is limited to 'Old Mission Peninsula' appellation wine meaning 85% of the juice will be grown from fruit grown on Old Mission Peninsula." The Court

erred by finding that this and other similar ordinance sections violated the dormant Commerce Clause (PageID.6001).

Federal wine packaging regulation controls how wineries may use geographic areas on wine labels. 27 C.F.R. 4.25. The strongest restrictions are placed on wines listing the name of an AVA because these regions are the "crown jewels" of the American wine industry. A wine producing region must file a detailed petition with the U.S. Alcohol and Tobacco Tax and Trade Bureau ("TTB") to gain AVA recognition, including demonstrating "features of the proposed AVA affecting viticulture that make it distinctive." 27 C.F.R. 9.12 (a)(3). TTB's *American Viticultural Area (AVA) Manual for Petitioners* (p. 20) explains that: "For a wine to be labeled with an AVA name or with a brand name that includes an AVA name …, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name …"[6] See *Wawszkiewicz v. Department of Treasury*, 670 F.2d 296, 297-98 (DC Cir. 1981), explaining the wine appellation regulatory framework and "geographical rules" requiring the percentage of local grapes in wine must be "85 if a so-called 'viticultural area' is connoted." Thus, the Township's requirement of a high percentage of local grapes for some of Plaintiffs' wines parallels federal wine regulation.

There is no dormant Commerce Clause violation under these circumstances. *See Bronco Wine Co. v. Jolly*, 129 Cal. App. 4th 988, 1015-1028 (2005), *cert. den.* 546 U.S. 1150; 126 S.Ct. 1169; 163 L.Ed. 2d 1129 (2006) (recognizing federal wine appellations regarding the percentage of local grapes that can be used, the allowance for the state to establish stricter wine labeling requirements destined for interstate distribution, and that the state's interest in protecting the

[6] https://www.ttb.gov/images/pdfs/p51204_ava_manual.pdf (last accessed June 29, 2022).

"reputation of one of its premier food industries" satisfies the second tier of *Pike*); and *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 87–88; 104 S.Ct. 2237, 2240; 81 L.Ed. 2d 71 (1984) (the dormant Commerce Clause does not proscribe state regulation "where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests").

Plaintiffs and their predecessors petitioned the TTB for Old Mission Peninsula AVA status. Then they requested the Township to enact zoning regulations parallel to the TTB's AVA regulations to permit them to capitalize on their product, thus reinforcing the market conditions to promote the Peninsula's AVA—a nationally-recognized laurel intended to financially benefit Plaintiffs.

The Court should find that the ordinance provisions do not discriminate against interstate commerce on their face. The Court should then find that the zoning ordinance satisfies the *Pike* balancing test or proceed to trial on any remaining issues of fact.

IV. The zoning ordinance does not violate the First Amendment.

A. The ordinance sections are conduct-oriented, not speech-oriented, thus subject to "rational basis" review rather than "strict scrutiny."

The Court treated several ordinance sections as "commercial speech" and applied the *Central Hudson* test[7] based on the premise that the Township conceded this test applied to all the listed ordinances except those related to conducting weddings and similar social functions (PageID.6004-6005). To the contrary, the Court was obligated to apply the test required by law to the plain language of the ordinance in this zoning case. The Township did not concede anything

[7] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm.,* 447 U.S. 557; 100 S.Ct. 2343; 65 L.Ed. 2d 341 (1980).

by not belaboring what should be apparent. Most of the ordinance sections control conduct—essentially Plaintiffs' ability to provide goods or services for a profit.[8] "The First Amendment's core concern is with the free transmission of a message or idea from speaker to listener, not with the speaker's ability to turn a profit or with the listener's ability to act upon the communication." *Wine & Spirits Retailers, Inc. v. Rhode Island*, 418 F.3d 36, 48 (1st Cir., 2005).

"Commercial speech" is defined as the *proposal* of a commercial transaction, which is legally distinguishable from the provision of goods or services for a profit. *Wine & Spirits*, 418 F.3d at 49. See also, *Wine And Spirits Retailers*, *Inc. v. Rhode Island,* 481 F.3d 1, 6 (1st Cir., 2007) (upholding statute's bar of participation in coordinated or common advertisement of franchisees holding Class A liquor license as not "commercial speech").

The conduct addressed by the ordinance is also similar to the statute before the 6th Circuit in *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 697 (6th Cir. 2014), where the Court stated:

> This case does not turn on advertising or solicitation, it turns on whether the business in question holds itself out to the public, which can occur by posting a sign, placing goods in an open window, simply conducting business in a manner that is visible to the public, or otherwise making its wares available to the public.

The ordinance addresses the *kind of commercial activity* that is consistent with agricultural zoning. The regulations are not triggered by communication, but by establishing businesses that would not otherwise be permitted in the agricultural zoning district, such as events, large gatherings, retail activity, meeting facilities, and food and beverage services.

Since the ordinance sections are conduct-oriented and not speech-oriented, they are subject to a "rational basis" review. *Liberty Coins* summarized this standard:

[8] These include: the type of items that can be sold at Farm Processing Facilities, the size and dimensions of Farm Processing Facilities, limitations on the uses of facilities at Winery-Chateaus, sound level limitations at Winery-Chateaus, and location of merchandise displays.

> Under rational basis review, a law is upheld so long as it is rationally related to a legitimate government purpose. There is a strong presumption of constitutionality and the regulation will be upheld so long as its goal is permissible and the means by which it is designed to achieve that goal are rational. *Nat'l Ass'n for Advancement of Psychoanalysis*, 228 F.3d at 1050. "This standard is highly deferential; courts hold statutes unconstitutional under this standard of review only in rare or exceptional circumstances." *Doe*, 490 F.3d at 501. "Under rational basis scrutiny, government action amounts to a constitutional violation only if it is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government's actions were irrational." *Michael v. Ghee,* 498 F.3d 372, 379 (6th Cir.2007) (internal quotation marks omitted). Finally, under rational basis review, the government "has no obligation to produce evidence to sustain the rationality of its action; its choice is presumptively valid and 'may be based on rational speculation unsupported by evidence or empirical data.'" *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 790 (6th Cir.2005) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). [748 F.3d at 694.]

Courts have long recognized that zoning laws may protect valued local land uses. See, *e.g.*, *Berman v Parker,* 348 U.S. 26, 33; 75 S.Ct. 98, 102–03; 99 L.Ed. 27 (1954) ("[i]t is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clear, well-balanced as well as carefully patrolled"). Maintaining and preserving the community's rural character is well within legitimate municipal goals. See, *e.g.*, *Ybarra v Los Altos Hills*, 503 F.2d 250, 254 (9th Cir., 1974). See also, *Belle Terre v Boraas,* 416 U.S. 1, 9; 94 S.Ct. 1536, 1541; 39 L.Ed. 2d 797 (1974); *Henry v. Jefferson Cnty. Planning Comm.*, 215 F.3d 1318 (4th Cir., 2000).

The ordinance was drafted in cooperation with local farmers, including Plaintiffs and their predecessors, who sought to create ancillary uses to their grape growing in the agricultural district. For these enterprises, the ordinance limits the production, retail, event, and hospitality activity to preserve the Peninsula's agricultural and rural character and prevent it from evolving into a commercially-active destination that would attract large crowds, invite choking traffic, and disturb

the Township's long and well-known plan to preserve the agricultural district predominantly for agricultural use.

B. Even if the ordinance restricted both commercial activity and speech, the Court was required to conduct a further inquiry, which is reason alone to revisit this Court's Opinion.

For ordinances to regulate "commercial speech" under the First Amendment (rather than time, place, and manner restrictions), the 6th Circuit has held that courts are required to conduct an analysis under *U.S. v. O'Brien,* 391 U.S. 367; 88 S.Ct. 1673; 20 L.Ed. 2d 672 (1968):

> [T]he district court failed to conduct the proper analysis of a regulation of communicative activity. Once the district court determined that sampling and continuity programs were a regulation of conduct, it was required to analyze those provisions of the Act under *United States v. O'Brien*, which it did not do. Under *O'Brien*:
>
> > when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.... [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *United States v. O'Brien*, 391 U.S. 367, 376–77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). [*Disc. Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 538 n. 10 (6th Cir., 2012).]

C. Detailed review of the ordinance demonstrates that the Court clearly erred in holding that it "unquestionably regulates commercial speech."

The zoning ordinance imposes few, if any, limitations on speech *at all*. The Court indicated that the following sections "unquestionably regulate[s] commercial speech" (PageID.6008). Taken in order from the Court's opinion, the ordinance sections below do not regulate "commercial speech":

> **Section 6.7.2(19)(b)(1)(v)**: "Logo merchandise may be sold provided:
> 1. The logo merchandise is directly related to the consumption and use of the fresh and/or processed agricultural produce sold at retail;
> 2. The logo is prominently displayed and permanently affixed to the merchandise;
> 3. Specifically allowed are: a) gift boxes/packaging containing the approved products for the specific farm operation; b) Wine Glasses; c) Corkscrews; d) Cherry Pitter; and e) Apple Peeler; and
> 4. Specifically not allowed are unrelated ancillary merchandise such as: a) Clothing; b) Coffee Cups; c) Bumper Stickers."

This section permits limited retail activity under the condition that the products contain a logo related to the zoning classification of the area, *i.e.*, agriculture. This does not ***limit*** speech at all. It does not forbid non-logo information to be placed on merchandise. It does not even require that ***only*** logo merchandise may be sold. It is also permissive, stating that a Farm Processing Facility ***may*** sell certain merchandise (*i.e.*, products directly related to the farm operation) with its logo on it, and limits the type of goods that may be sold.

> **Section 6.7.2(19)(b)(6)**: "A Farm Processing Facility may include a retail space. The total floor area of the Farm Processing Facility (above finished grade) shall equal 250 square feet per acre of land owned or leased for the specific farm operation, but may not exceed 30,000 square feet of total floor area (above finished grade). The facility may consist of more than one building, however all buildings shall be located on the 20-acre minimum parcel that contains the Farm Processing Facility. Retail space may be a separate room in a Farm Processing Facility and shall be the lesser of 1,500 square feet in area or 25% of the total floor area of the Farm Processing Facility (above finished grade). Underground facilities used only for processing or packaging of agricultural produce may be in addition to the permitted square footage of floor area provided it is entirely below pre-existing ground level and has no more than one loading dock exposed."

This does not regulate speech. These are just square footage restrictions, which are plainly appropriate for zoning.

> **Section 8.7.3(10)(m)**: "Accessory uses such as facilities, meeting rooms, and food and beverage services shall be for registered guests only. These uses shall be located on the same site as the principal use to which they are accessory and are included on the approved Site Plan. Facilities for accessory uses shall not be greater in size or number than those reasonably required for the use of registered guests."

This section limits commercial ***activity***, namely, the manner in which meeting rooms and food and beverage services are permitted in the agriculturally-zoned area. Again, they do not limit speech.

> **Section 8.7.3(10)(u)(1)(b)**: "Guest Activity Uses are intended to help in the promotion of Peninsula agriculture by: a) identifying 'Peninsula Produced' food or beverage for consumption by the attendees; b) providing 'Peninsula Agriculture' promotional brochures, maps and awards; and/or c) including tours through the winery and/or other Peninsula agriculture locations."

This provision does not mandate any activity but expresses an intention to help promote agriculture on the Peninsula. Even assuming that this provision was misapplied (but see Argument 8 below), it is still facially valid for Constitutional analysis. Other remedies may exist for its misapplication but declaring an otherwise-valid provision unconstitutional on this basis is not one of them.

> **Section 8.7.3(10)(u)(1)(d)**: "Guest Activity Uses do not include wine tasting and such related promotional activities as political rallies, winery tours and free entertainment (Example – 'Jazz at Sunset') which are limited to the tasting room and for which no fee or donation of any kind is received."

This is not regulating "commercial speech." This section is content-neutral, but limits activities that include speech (*e.g.,* political rallies) to the tasting room of the facility. This section is subject to the First Amendment's "time, place, and manner" standard, as further discussed below.

> **Section 8.7.3(10)(u)(2)(a)**: "Wine and food seminars and cooking classes that are scheduled at least thirty days in advance with notice provided to the Zoning Administrator. Attendees may consume food prepared in the class."

This provision regulates *conduct* that has an incidental impact on speech, as this activity involves speech as a core activity. The conduct and speech are not prohibited but are regulated. The speech involved is not "commercial speech" because it is not proposing a commercial

transaction. The issue then is whether, under *O'Brien*, it is expressive speech and if so whether it meets the test in that case.

> **Section 8.7.3(10)(u)(5)(c)**: "No alcoholic beverages, except those produced on the site, are allowed with Guest Activity Uses."

Again, this restriction on conduct does not concern speech at all.

> **Section 8.7.3(10)(u)(5)(g)**: "No amplified music is allowed, however amplified voice and recorded background music is allowed, provided the amplification level is no greater than normal conversation at the edge of the area designated within the building for guest purposes."

This noise restriction should not have been reviewed under the commercial speech analysis, but rather as content-neutral time, place or manner regulations. *See Ward v. Rock Against Racism,* 491 U.S. 781, 792; 109 S.Ct. 2746, 2754; 105 L.Ed. 2d 661 (1989) and *Polaris Amphitheater Concerts, Inc. v. Westerville*, 267 F.3d 503, 509 (6th Cir., 2001). The ordinance is not susceptible to "unbridled discretion at the hands of a government official." *Id.* Instead, there is a narrowly drawn standard that can be applied equally to any situation, regardless of content.

> **Section 8.7.3(10)(u)(5)(h)**: "No outdoor displays of merchandise, equipment or signs are allowed."

This provision is content neutral, so the time, place, and manner test would again apply.

> **Section 8.7.3(12)(i)**: "Retail sale of non-food items which promote the winery or Peninsula agriculture and has the logo of the winery permanently affixed to the item by silk screening, embroidery, monogramming, decals or other means of permanence. Such logo shall be at least twice as large as any other advertising on the item. No generic or non-logo items may be sold. Promotional items allowed may include corkscrews, wine glasses, gift boxes, t-shirts, bumper stickers, etc."

These are restrictions on ***what*** may be sold, but not on communication, so it is not subject to tests related to prohibited speech.

> **Section 8.7.3(12)(k)**: "Signs and other advertising may not promote, list or in any way identify any of the food or non-food items allowed for sale in the tasting room."

The Township acknowledges this section is directed at commercial speech and must be analyzed under the *Central Hudson* test.

Section 6.7.2(19)(a) (as the Court agreed) and **Section 6.7.2(19)(b)(6)** do not regulate or implicate speech but are directed solely at activity.

Section 8 of the ordinance concerns special use permits (SUPs). Plaintiffs largely take issue with sections concerning prohibited or limited ***conduct*** that have nothing to do with speech, let alone commercial speech, as discussed above. **Sections 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(5)(h), and 8.7.3(12)(k)** either impose time, place and manner restrictions on content-neutral speech, or in the case of **8.7.3(12)(k)**, do regulate commercial speech.

The Supreme Court's test for time, place, and manner scrutiny was stated in *Ward, supra*:

> Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." 491 U.S. at 791.

The Supreme Court's test for scrutinizing commercial speech was articulated in *Central Hudson, supra*:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Id.*, at 566.

Contrary to this Court's Opinion (PageID.6006), the final criterion of *Central Hudson* is "less onerous" than the "least-restrictive-means standard,"[9] as the Sixth Circuit explained that

[9] The words "least restrictive means" appear nowhere in the Court's *Central Hudson* opinion.

criterion in *First Choice Chiropractic, LLC v. DeWine*, 969 F.3d 675, 682 (6th Cir., 2020) ("The state must demonstrate narrow tailoring of the challenged regulation to the asserted interest— 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'") A restriction can be justified "through various kinds of proof, including reference to empirical data, studies, and anecdotes, and perhaps even through "history, consensus, and simple common sense." *Flying Dog Brewery, LLLP v. Michigan Liquor Control Comm.,* 597 Fed.Appx. 342, 355 (6th Cir., 2015) (quoting *Fla. Bar v. Went For It, Inc*., 515 U.S. 618, 628, 115 S.Ct. 2371, 132 L.Ed. 2d 541 (1995). Applying "history" and "common sense" here, the Township historically allowed no commercial uses at all in the agricultural district, and it has no obligation to do so. Since the Township could lawfully exclude all commercial uses from the agricultural district, allowing some of those uses pursuant to Plaintiffs' proposed restrictions was much less restrictive than had historically been the case. Why would a municipality ever allow even limited commercial uses in its agricultural district if those limits could not be enforced?

Plaintiffs also complain about restrictions in their SUPs for ancillary commercial uses in districts that have been zoned agricultural for many years. The statement of legislative intent of the ordinance's agricultural district and its SUP provisions must be read together:

> Section 6.7.1 Intent and Purpose: This District is intended 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.
>
> Section 8.7.1 Authorization: Because of particular functional and other inherent characteristics, certain land and structure uses have a high potential of being injurious to surrounding properties by depreciating the quality and value of such property. Many of these uses may also be injurious to the Township as a whole unless they are controlled by minimum standards of construction and operation. It

> is the intent of this Section to provide a framework of regulatory standards which can be utilized by the Township Board as a basis for approving or disapproving certain special uses which may be permitted by the issuance of a special use permit within the particular zone districts cited.
>
> Section 8.7.3(10) Winery-Chateau (a) It is the intent of this section to permit construction and use of a winery, guest rooms, and single family residences as a part of a single site subject to the provisions of this ordinance. The developed site must maintain the agricultural environment, be harmonious with the character of the surrounding land and uses, and shall not create undue traffic congestion, noise, or other conflict with the surrounding properties.

These sections seek to preserve agricultural land for agricultural uses, and acknowledge that special uses must be conducted in a way that does not detract from the purposes of the agricultural district, which are well within the governmental interests approved by *Berman v. Parker, supra.* To satisfy time, place, and manner scrutiny, the ordinance must be narrowly tailored to serve these interests. To satisfy the "commercial speech" test, it must directly advance the interest asserted, and not be more extensive than is necessary. As noted by *Hucul Advertising, LLC v. Charter Township of Gaines*, 748 F.3d 273, 276 (6th Cir. 2014), the two tests impose similar requirements.

Winery-Chateaus are wine production and tasting facilities that feature guest rooms and offer food to registered guests. A 2004 amendment to the ordinance also allowed additional "Guest Activity Uses," which allow activities for people who are not tasting room visitors or registered guests. These activities are limited to enumerated uses. **Section 8.7.3(10)(u)(1)(d)** simply distinguishes "Guest Activity Uses" from other activities such as wine tasting and registered guest uses. These Guest Activities, which may include a much larger number of participants than registered guests, are governed by **Section 8.7.3(10)(u)(2) and (4)**, which permit such uses in consideration of the space available for the size of the group and prevent "adverse impacts on adjacent properties, lack of parking spaces or other site specific conditions." This approach may

not represent "necessarily the single best disposition but one whose scope is in proportion to the interest served.'" *First Choice Chiropractic, LLC v. DeWine*, 969 F.3d 675, 682 (6th Cir., 2020)(in plainer words, it need not be perfect, but must be reasonable).

Section 8.7.3(10)(u)(2)(a) is permissive. It describes an activity that is ***allowed*** as a Guest Activity Use, i.e., cooking classes. The activity simply requires notice to the zoning administrator 30-days before the activity. Once again, this notice assures that the remaining conditions related to safety and impact to adjacent properties may be reviewed.

Section 8.7.3(10)(u)(5)(h) prohibits outdoor displays of merchandise, equipment, and signs. The governmental interest in aesthetic appearance is recognized as substantial. *Berman,* 348 U.S. at 33. The restriction relates only to Guest Activity Uses. Unlike wine tasting, these are not "drop-in" activities where advertising might draw in passing traffic. Guest Activity Uses, as described in **Section 8.7.3(10)(u)(2)**, must be planned, organized activities (e.g., cooking, meetings, conferences, etc.). Thus, preventing outdoor advertising does not burden the activities associated with Guest Use Activities, because those members of the public are necessarily drawn to the chateau through scheduling, planning, and other means. At the same time, the aesthetic goals of preserving the agricultural character of the agricultural zoning district are served by this regulation of non-agricultural enterprises.

The Court should revisit its Opinion and determine that none of the above ordinance sections violate the applicable review standard under First Amendment jurisprudence.

D. Plaintiffs' regulatory taking claim should be dismissed.

The Court agreed with the Township that Plaintiffs have not been denied all economically-beneficial and productive uses of their land; however, the Court denied the Township summary judgment, reasoning that the Township did not further assess the "economic impact" prong of the

Penn. Central[10] balancing test (PageID.6026). But the other factors in the *Penn. Central* balancing test (interference with distinct investment-backed expectations and the character of the government action) do not affect the analysis or result. Since Plaintiffs cannot establish a regulatory taking, the Court should have granted the Township summary judgment on Plaintiffs' regulatory taking claim.

E. Plaintiffs are thriving under the zoning ordinance.

Giving deferential treatment to zoning ordinances is essential because "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[11] Numerous cases including *Penn Central* recognize that regulatory action does not constitute a compensable taking merely because the result diminishes the value of private property, reduces profits, or prevents the most beneficial use of property. The Supreme Court has upheld restrictions that reduce real property by 75% and 92% of value. *Euclid, Ohio v. Ambler Realty Co*., 272 U.S. 365, 384; 47 S.Ct. 114; 71 L.Ed. 303 (1926) and *Hadacheck v. Sebastian*, 239 U.S. 394, 405; 36 S.Ct. 143; 60 L.Ed. 348 (1915).

Plaintiffs misled the Court with a false analogy to a case involving a regulatory taking where compliance with the tree removal ordinance was "economically prohibitive" because the cost to remove the trees exceeded the cost of the property.[12] Here, in contrast, Plaintiffs have thriving businesses enabled by the zoning ordinance maintaining the Peninsula as a pastoral setting that shares its wine with retail customers and opens its doors to celebrate wine and farming with

[10] *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124; 98 S.Ct. 2646, 2659; 57 L.Ed. 2d 631 (1978).

[11] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413; 43 S.Ct. 158; 67 L.Ed. 322 (1922).

[12] *F.P. Dev., LLC v. Charter Twp. of Canton*, 456 F.Supp. 3d 879, 889-90 (E.D. Mich. 2020), *aff'd*, 16 F.4th 198 (6th Cir., 2021). *See* (PageID.5747, p. 39).

the community and visitors, giving the wineries prestige and corresponding economic benefits. Indeed, Plaintiffs would likely be less well-off if these zoning ordinance provisions had never been adopted (which is why Plaintiffs sought these provisions in the first place!).

V. The zoning ordinance does not interfere with Plaintiffs' reasonable investment-backed expectations.

The issue here is what use the landowner could reasonably expect to make of the land under the regulations in effect at the time of purchase. *K. & K. Const., Inc. v. Dep't of Nat. Res*., 575 N.W.2d 531, 538, n. 10 (1998). Plaintiffs' businesses were built or inherited either when the zoning ordinance completely prohibited the commercial activities that Plaintiffs now enjoy under the challenged sections, or when the zoning ordinance was more restrictive than it is now. Moreover, these zoning provisions arose at the request of Plaintiffs and their predecessors, at a time when the zoning ordinance lawfully prohibited the commercial uses in the agricultural district that the wineries wanted to enjoy. Having any expectation predicated on overturning selected sections of long-standing laws[13] is patently unreasonable. *K. & K. Const., supra.*

F. The zoning ordinance is a proper exercise of police power.

The final aspect of the *Penn. Central* balancing test addresses the character of the governmental action and considers that action along a spectrum. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *Penn. Central,* 438 U.S. at 124. At the other end of the spectrum are cases such as this involving police power. Plaintiffs claim that they suffered a regulatory taking because they cannot further expand commercial operations in an agricultural zoning district. That position is as

[13] As the Court noted, the oldest challenged Ordinance is 30 years old, and the most recent challenged Ordinance is approximately 20 years old (Ex. A, p. 41).

untenable as that of the appellants in *Penn. Central* who complained about not being able construct a 50-story office building over Grand Central Terminal.

In summary: (1) Plaintiffs are thriving under the zoning; (2) Plaintiffs have no reasonable expectation to change this zoning, which Plaintiffs and their predecessors helped to create; and (3) the zoning ordinance is an appropriate exercise of police power to maintain the agricultural character of the Peninsula. Plaintiffs' arguments seeking extended commercial development are untenable and their regulatory takings claim should be dismissed.

VI. The zoning ordinance clearly prohibits wedding events at Farm Processing Facilities and as Guest Activity Uses at Winery-Chateaus.

The zoning ordinance, Sec 6.7.2(19)(a) provides that: "Activities such as weddings, receptions and other social functions for hire are not allowed" on Farm Processing Facilities. For Winery-Chateaus, Sec 8.7.3(10)(u)(2)(d) says that: "Guest Activity Uses do not include entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass." Although the Court correctly held that these zoning regulations do not violate First Amendment protections (PageID.6004-6005), the Court then incorrectly held (based on a misinterpretation of witness Deeren's deposition testimony) that "the hosting of large gatherings such as weddings" is in fact permitted at Farm Processing Facilities and as Guest Activity Uses at Winery-Chateaus (PageID.6005, 6019-6021). The Court misinterpreted witness Deeren's testimony and erroneously attributed her testimony as a "concession" by the Township and enjoined the Township from enforcing the above ordinance restrictions (PageID.6021).

Witness Deeren's testimony (PageID.4819) first confirmed that weddings are not allowed as Guest Activity Uses in a Winery-Chateau. Then, in response to counsel's misleading follow-up question, she affirmed that her approval as zoning director was not needed for weddings in a

Winery-Chateau, which is also correct, as her authority only includes approval of allowed Guest Activity Uses. Since weddings are not allowed Guest Activity Uses, her approval for them is not possible and therefore not "needed." Further, counsel's question and her testimony had nothing to do with Farm Processing Facilities, so of course she was not testifying that weddings were permitted in those facilities either (weddings prohibited by Sec 6.7.2(19)(a)). The Court misinterpreted witness Deeren's testimony, which was not a "concession" by Deeren nor by the Township that weddings are permitted either in Farm Processing Facilities or as Guest Activity Uses in Winery-Chateaus. The Court was misled and should correct its Opinion.

VII. The Township zoning ordinance requires that the hours of Guest Activity Uses may not extend beyond 9:30 p.m.; the Township Board may also set reasonable hours of operation in any special use permit.

Sec 8.7.3(10)(u)(5)(b) of the ordinance requires that: "Hours of operation for Guest Activity Uses shall be as determined by the Town Board, but no later than 9:30 PM daily." In addition, pursuant to Sec 8.1.2(3)(f)2&3, applicable to all special use permits generally, the Board may establish "reasonable conditions" on granting any special use permit, including:

> [P]rotecting the natural environment and conserving natural resources and energy, insuring compatibility with adjacent uses of land, and promoting the use of land in a socially and economically desirable manner [which] … shall be designed to protect natural resources and the public health, safety and welfare of individuals in the project and those immediately adjacent, and the community as a whole, shall be reasonably related to the purpose affected by the special use permit, and shall be necessary to meet the intent and purpose of this Ordinance, and be related to the objective of insuring compliance with the standards of this Ordinance.

The allowance for such "reasonable conditions" is authorized by the controlling zoning statute for zoning decisions involving discretion. MCL 125.3504(4). The reasonableness of hours of operation conditions depends upon the "particular circumstances." *Whittaker & Gooding Co. v. Scio Twp.*, 122 Mich.App. 538, 545; 332 N.W.2d. 527 (1983).

This Court correctly found that the 9:30 p.m. closing time was not preempted by the MLCC (PageID.5990). Later, however, the Court expressed concern with former Township Supervisor Manigold's deposition testimony (PageID.4779) that "inferred" a 9:30 p.m. closing time applied to winery business other than Guest Activity Uses (PageID.6020). No context is contained in the deposition to discern what late evening activity was involved, or whether the late evening activity involved a business subject to a special use permit. Without context, it is not appropriate or even possible for the Court to make any decision about whether the 9:30 closing time may be enforced, since the reasonableness of hours of operation conditions depends on the "particular circumstances." *Whittaker,* 122 Mich.App. at 545. The Court should correct its Opinion in this respect.

VIII. The ordinance term "Guest Activity Uses" is not unconstitutionally vague.

Sec 8.7.3(10) of the Township zoning ordinance allows the issuance of a special use permit for Winery-Chateaus, consisting of a winery, guest rooms, and residences on a single site. Initially, Sec 8.7.3(10)(a)-(t) limited activities provided at Winery-Chateaus to registered guests staying overnight in the facility's guest rooms and residences. Amendment 141 to the zoning ordinance (August 10, 2004) added Sec 8.7.3(10)(u), allowing Winery-Chateaus to request SUP amendments to offer new Guest Activity Uses (PageID.5173). If approved by SUP, Winery-Chateaus could thus provide a limited number of activities to "persons who may or may not be registered guests."

Sec 8.7.3(10)(u)2 explains and limits what uses may be approved as Guest Activity Uses in Winery-Chateaus. They include *only* "wine and food classes and cooking classes," "Meetings of 501- (C)(3) non-profit groups within Grand Traverse County," and "Meetings of Agricultural Related Groups that have a direct relationship to agricultural production," all subject to additional conditions. Sec 8.7.3(10)(u)2(c)ii gives the Zoning Administrator a list of "types of Agricultural

Related Groups as a guide for determining 'direct relationship to agricultural production'" in approving "meetings of agricultural related groups" as Guest Activity Uses in Winery-Chateaus under Sec 8.7.3(10)(u)2(c). Sec 8.7.3(10)(u)2(e) allows wine tasting and limited food service as part of a Guest Activity Use. Sec 8.7.3(10)(u)2(d) expressly prohibits "entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass" as Guest Activity Uses in Winery-Chateaus. Sec 8.7.3(10)(u)2(e)3-8 provide additional requirements and conditions for Guest Activity Uses.

The Court did not attempt to construe or judicially interpret the provisions of Sec 8.7.3(10)(u), which are clear on their face. Instead, the Court relied on testimony by two Township officials to suggest that *they* were confused about "what constitutes a 'Guest Activity'" (PageID.6017). Based solely on these depositions, and without reference to the actual clarity of the language in Sec 8.7.3(10)(u), the Court found that "there is no genuine dispute of material fact as to whether the term 'Guest Activity' in § 8.7.3(10) is vague—it is vague in violation of the Due Process Clause ... Therefore, any subsection of §8.7.3(10) that uses the term 'Guest Activity,' is unconstitutional and must be stricken from the Township Ordinances" (PageID.6019).

The Court failed to follow its cited authority, *Coates v. Cincinnati,* 402 U.S. 611, 619; 91 S.Ct. 1686; 29 L.Ed. 2d 214 (1971), in determining whether the words "Guest Activity Uses" "are unconstitutional on their face." The *Coates* Court did not review witness testimony to determine whether the ordinance was vague. It confined itself to the language of the ordinance "on its face." *Coates*, 402 U.S. at 612, 616. Also see *Belle Maer Harbor v. Charter Twp. of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999) ("… we must examine the Ordinance on its face to determine whether it lacks sufficient definiteness to meet the requirements of the Due Process Clause"). Interpretation of an ordinance is a question of law, not an issue of fact. *Huggett v. Dept. of Nat. Res.*, 232

Mich.App. 188, 193; 590 N.W.2d 747 (1998). It is improper to use extrinsic testimony or other parol evidence to modify or create an ambiguity in the plain language of a statute or ordinance. *Williamston v. Wheatfield Twp.*, 142 Mich.App. 714, 717-19; 370 N.W.2d 325 (1985). The Court should reconsider its holding and find that the zoning ordinance is clear and constitutional on its face.

CONCLUSION

Defendant Peninsula Township respectfully requests that this Honorable Court grant its Motion to Alter or Amend Judgment by correcting the clear errors discussed above, vacating its Injunction, and award any other relief that is appropriate and just under the circumstances.

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Co-Counsel for Defendant

Dated: July 1, 2022

William K. Fahey (P27745)
John S. Brennan (P55431)
Christopher S. Patterson (P74350)
4151 Okemos Road
Okemos, MI 48864
(517) 381-0100

CERTIFICATE OF COMPLIANCE PURSUANT TO LOCAL RULE 7.2

This brief complies with the type-volume limitation of Local Rule 7.2 because it contains 10,622 words, excluding the parts exempted by Local Rule 7.2(b)(i). This brief was prepared using Microsoft Word 365.

Respectfully submitted,

Fahey Schultz Burzych Rhodes PLC
Co-Counsel for Defendant

Dated: July 1, 2022

William K. Fahey (P27745)
John S. Brennan (P55431)
Christopher S. Patterson (P74350)
4151 Okemos Road
Okemos, MI 48864
(517) 381-0100

CERTIFICATE OF SERVICE

I, Kaylin J. Marshall, hereby certify that on the 1st day of July, 2022, I electronically filed the foregoing document with the ECF system which will send a notification of such to all parties of record.

/s/ Kaylin J. Marshall
Kaylin J. Marshall

EXHIBIT A

STATE OF MICHIGAN - LIQUOR CONTROL COMMISSION

Department of Licensing and Regulatory Affairs

This is to certify that a License is hereby granted to the person(s) named with the stipulation that the licensee is in compliance with Commission Rule R 436.1003, which states that a licensee shall comply with all state and local building, plumbing, zoning sanitation, and health laws, rules, and ordinances as determined by the state and local law enforcement officials who have jurisdiction over the licensee. Issuance of this license by the Michigan Liquor Control Commission does not waive this requirement. The licensee must obtain all other required state and local licenses, permits, and approvals for this business before using this license for the sale of alcoholic liquor on the licensed premises.

This License is granted in accordance with the provisions of Act 58 of the Public Acts of 1998 and shall continue in force for the period designated unless suspended, revoked, or declared null and void by the Michigan Liquor Control Commission. Failure to comply with all laws and rules may result in the revocation of this license.

THIS LICENSE SUPERSEDES ANY AND ALL OTHER LICENSES ISSUED PRIOR TO FEBRUARY 8, 2021

BUSINESS ID: 200216 FILE NUMBER: G200216

TWO LADS, LLC
D/B/A TWO LADS

16985 SMOKEY HOLLOW RD,
TRAVERSE CITY, MI 49686-9749

GR TRAVERSE COUNTY
G-139
PENINSULA TWP

LICENSE #	LICENSE:	ACT:
L-000167223	Small Wine Maker	
L-000171157	Direct Shipper	
L-000417872	On-Premises Tasting Room Permit	

TOTAL BARS: 0 OUTDOOR SERVICE AREA: 2 ROOMS:
DIRECT-CONNECTIONS: 0 PASSENGERS:

PERMIT
Outdoor Service Area(2), Off-Premises Storage, Entertainment, Sunday Sales (AM)

IN WITNESS WHEREOF, this License has been duly signed and sealed by both the Michigan Liquor Control Commission and the Licensee(s).

LIQUOR CONTROL COMMISSION

LICENSEE(S) SIGNATURE(S)

LICENSE EFFECTIVE MAY 1, 2020 - EXPIRES APRIL 30, 2021

2020
2021

Exhibit A

WOMP0000008

STATE OF MICHIGAN - LIQUOR CONTROL COMMISSION

Department of Licensing and Regulatory Affairs

This is to certify that a License is hereby granted to the person(s) named with the stipulation that the licensee is in compliance with Commission Rule R 436.1003, which states that a licensee shall comply with all state and local building, plumbing, zoning sanitation, and health laws, rules, and ordinances as determined by the state and local law enforcement officials who have jurisdiction over the licensee. Issuance of this license by the Michigan Liquor Control Commission does not waive this requirement. The licensee must obtain all other required state and local licenses, permits, and approvals for this business before using this license for the sale of alcoholic liquor on the licensed premises.

This License is granted in accordance with the provisions of Act 58 of the Public Acts of 1998 and shall continue in force for the period designated unless suspended, revoked, or declared null and void by the Michigan Liquor Control Commission. Failure to comply with all laws and rules may result in the revocation of this license.

THIS LICENSE SUPERSEDES ANY AND ALL OTHER LICENSES ISSUED PRIOR TO JUNE 16, 2020

BUSINESS ID: 237290 FILE NUMBER: G237290

TABONE VINEYARDS, LLC
D/B/A

GR TRAVERSE COUNTY
G-139
PENINSULA TWP

14916 PENINSULA DR,
TRAVERSE CITY, MI 49686

LICENSE #	LICENSE:	ACT:
L-000411924	Small Wine Maker	
L-000417922	On-Premises Tasting Room Permit	
L-000415337	Direct Shipper	

TOTAL BARS: 0 OUTDOOR SERVICE AREA: 1 ROOMS:
DIRECT-CONNECTIONS: 0 PASSENGERS:

PERMIT
Sunday Sales (AM), Outdoor Service Area(1)

IN WITNESS WHEREOF, this License has been duly signed and sealed by both the Michigan Liquor Control Commission and the Licensee(s).

LIQUOR CONTROL COMMISSION

LICENSEE(S) SIGNATURE(S)

LICENSE EFFECTIVE MAY 1, 2020 - EXPIRES APRIL 30, 2021

2020
2021

Exhibit A

STATE OF MICHIGAN - LIQUOR CONTROL COMMISSION

Department of Licensing and Regulatory Affairs

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This License is granted in accordance with the provisions of Act 58 of the Public Acts of 1998 and shall continue in force for the period designated unless suspended, revoked, or declared null and void by the Michigan Liquor Control Commission. Failure to comply with all laws and rules may result in the revocation of this license.

THIS LICENSE SUPERSEDES ANY AND ALL OTHER LICENSES ISSUED PRIOR TO APRIL 9, 2020

BUSINESS ID: 226015 FILE NUMBER: G226015

CHATEAU OPERATIONS, LTD.
D/B/A

1000 CAMINO MARIA,
TRAVERSE CITY, MI 49686-9310

GR TRAVERSE COUNTY
G-142
TRAVERSE CITY

LICENSE #	LICENSE:	ACT:
L-000218280	Small Wine Maker	
L-000417799	On-Premises Tasting Room Permit	
L-000219775	Direct Shipper	

TOTAL BARS: OUTDOOR SERVICE AREA: 1 ROOMS:
DIRECT-CONNECTIONS: PASSENGERS:

PERMIT
Outdoor Service Area(1), Sunday Sales (AM), Beer & Wine Tasting

IN WITNESS WHEREOF, this License has been duly signed and sealed by both the Michigan Liquor Control Commission and the Licensee(s).

LIQUOR CONTROL COMMISSION

LICENSEE(S) SIGNATURE(S)

LICENSE EFFECTIVE MAY 1, 2020 - EXPIRES APRIL 30, 2021

2020
2021

Exhibit A

WOMP0000912

STATE OF MICHIGAN - LIQUOR CONTROL COMMISSION

Department of Licensing and Regulatory Affairs

This is to certify that a License is hereby granted to the person(s) named with the stipulation that the licensee is in compliance with Commission Rule R 436.1003, which states that a licensee shall comply with all state and local building, plumbing, zoning sanitation, and health laws, rules, and ordinances as determined by the state and local law enforcement officials who have jurisdiction over the licensee. Issuance of this license by the Michigan Liquor Control Commission does not waive this requirement. The licensee must obtain all other required state and local licenses, permits, and approvals for this business before using this license for the sale of alcoholic liquor on the licensed premises.

This License is granted in accordance with the provisions of Act 58 of the Public Acts of 1998 and shall continue in force for the period designated unless suspended, revoked, or declared null and void by the Michigan Liquor Control Commission. Failure to comply with all laws and rules may result in the revocation of this license.

THIS LICENSE SUPERSEDES ANY AND ALL OTHER LICENSES ISSUED PRIOR TO APRIL 21, 2020

BUSINESS ID: 18792 FILE NUMBER: G18792

CHATEAU GRAND TRAVERSE, LTD.
D/B/A CHATEAU GRAND TRAVERSE

12301 CENTER RD,
TRAVERSE CITY, MI 49686-8558

GR TRAVERSE COUNTY
G-139
PENINSULA TWP

LICENSE #	LICENSE:	ACT:
L-000146488	Direct Shipper	
L-000179022	Small Distiller	
L-000417807	On-Premises Tasting Room Permit	
L-000083317	Outstate Seller of Wine	
L-000000003	Wine Maker	

(NONTRANSFERABLE)

TOTAL BARS:
DIRECT-CONNECTIONS: 1
OUTDOOR SERVICE AREA: 1
PASSENGERS:
ROOMS:

PERMIT
Outdoor Service Area(1), Direct Connection(1), Sunday Sales (AM)

IN WITNESS WHEREOF, this License has been duly signed and sealed by both the Michigan Liquor Control Commission and the Licensee(s).

LIQUOR CONTROL COMMISSION

LICENSEE(S) SIGNATURE(S)

LICENSE EFFECTIVE MAY 1, 2020 - EXPIRES APRIL 30, 2021

2020
2021

WOMP0000815

Exhibit A