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, LC, a Michigan Limited Liability Company, WINERY AT BLACK STAR FARMS, LLC, a Michigan Limited Liability Company,

Plaintiffs,

v

TOWNSHIP OF PENINSULA, a Michigan Municipal Corporation,

Defendant

Case No. 1:20-cv-01008

Hon. Paul L. Maloney

Mag. Judge Ray S. Kent

DEFENDANT, PENINSULA TOWNSHIP'S MOTION FOR STAY OF INJUNCTION PENDING APPEAL PURSUANT TO RULE 62(C) AND BRIEF IN SUPPORT

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DEFENDANT, PENINSULA TOWNSHIP'S MOTION FOR STAY OF INJUNCTION PENDING APPEAL PURSUANT TO RULE 62(C)

NOW COMES Defendant Peninsula Township, by and through Undersigned Counsel, and moves for an Order Staying the Injunction Pending Appeal, more particularly as follows:

1. On June 3, 2022, the Court issued a Summary Judgment Opinion and Order which enjoined Peninsula Township "from enforcing all of the sections of the Township Ordinance that the Court has found unconstitutional or contrary to law." (Ex A, ECF 162, p 49 of 50.)

2. Under 28 USC 1292(a)(1), the Court's injunction ruling is immediately appealable as of right.

3. On June 17, 2022, Defendant Peninsula Township filed a Notice of Appeal (ECF 164).

4. On June 21, 2022, the Sixth Circuit Court of Appeals docketed the appeal and assigned it docket number 22-1534 (ECF 165).

6. For the reasons expressed more fully in the attached Brief in Support of this Motion, the Court should enter the attached Order that stays enforcement of the injunction pending appeal.

7. Under Local Rule 7.1(d), concurrence in the relief requested was sought but denied by opposing counsel.

Respectfully Submitted,

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Dated: June 24, 2022

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CONCISE STATEMENT OF ISSUE PRESENTED

Whether the Court should grant a stay of the injunction issued on June 3, 2022 pending appeal?

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Michigan Coalition of Radioactive Material Users, Inc, v Griepentrog, 945 F2d 150 (CA6 1991) (the factors concerning whether a stay pending appeal is appropriate include whether the party seeking the stay has a strong likelihood of success on the merits; whether the movant would suffer irreparable harm absent a stay; whether granting the stay would cause substantial harm to others; and whether the public interest would be served by granting the stay.)

Maryland v King, 567 US 1301, 1303; 133 Sct 1 (2012) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.")

Michigan Coal of Radioactive Material Users, Inc v Griepentrog, 945 F2d 150, 153 (CA 6 1991) ("The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other.")

INTRODUCTION

> "There is no power the exercise of which is more delicate, requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing of an injunction." [Detroit Newspaper Publishers Ass'n v Detroit Typographical Union, 471 Fed 872, 876(CA6 1972).]

The urgency of a grant of injunctive relief is codified in 28 U.S.C. § 1292(a)(1) which provides a right of immediate appeal of an interlocutory order that grants an injunction, an appellate remedy already taken here by Defendant Peninsula Township with the filing of a Notice of Appeal on June 17, 2022 (ECF 164). This right of immediate appellate review was made for cases like this one and the Court should preserve the Sixth Circuit's appellate jurisdiction by maintaining the status quo by staying the injunction pending appeal.

The Court's June 3, 2022 Opinion and Order Granting Summary Judgment in favor of Plaintiff on virtually all of its claims represents an existential threat to Defendant Peninsula Township, both (a) **culturally** as to how the Township has existed and thrived for more than 50 years and (b) **economically** in light of the Court's ruling that the August 16, 2022 trial will be essentially be "damages only" where Plaintiff's claim is for an eye popping $203 million in damages against a township with a population of 6,068.

In contrast to the bustling commercial center of neighboring Traverse City, Peninsula Township has been defined by its status as a farming community since its inception in 1839. The agricultural

charm is reflected in the zoning ordinance which has always treated the Plaintiffs' properties as farmlands first, and wineries second, an agreement each Plaintiff assented to.

This agricultural lifestyle is further reflected in the elected officials that have administered Peninsula Township in this manner for more than 50 years. Plaintiffs' lawsuit is an end run around the orderly democratic process and an attempt to achieve via litigation what they could not accomplish at the ballot box because the local residents are against them. We think before the culture of Old Mission Peninsula is irreparably changed, the appellate process should be allowed to play out and the jurisdiction of the Court of Appeals should be preserved. This Court specifically noted the revolutionary relief Plaintiffs were requesting when the preliminary injunction was denied (ECF 34: "Plaintiffs seek to completely upset the status quo in Peninsula Township.")

In addition to a Notice of Appeal that was filed on June 17, 2022 and assigned Sixth Circuit Court of Appeals Docket Number 22-1534, this is the first in a series of motions that will be filed by Defendant Peninsula Township to contest this Court's June 3, 2022 Summary Judgment Opinion and Order which also enjoined the Township from enforcing the ordinances deemed constitutionally invalid by the Court (ECF 162, Summary Judgment Opinion and Order, Ex A, p 49 of 50). Respectfully, the Township believes both the issuance of the injunction and the summary judgment ruling, which

Peninsula Township will ask the Court to certify for appeal under 28 U.S.C. § 1291, are likely to be reversed on appeal, if not by this Court following the Township's forthcoming Motion to Amend or Alter under FRCP 59(e) which the Township hopes will result in an order setting aside the Summary Judgment ruling.

The standards for issuing a stay pending appeal are discussed in greater detail below, but as a starting point, the most important factor in favor of issuing a stay, irreparable harm, is presumptively met. Maryland v King, 567 US 1301, 1303; 133 Sct 1 (2012) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") Because irreparable harm is *per se* established, a lesser showing regarding success on the merits is required, although the Township respectfully believes it has a very strong chance of success on the merits. Michigan Coal of Radioactive Material Users, Inc v Griepentrog, 945 F2d 150, 153 (CA 6, 1991) ("The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Simply stated, more of one excuses less of the other.")

Irreparable harm will be suffered by all parties, Plaintiffs included, if a stay is not issued pending appeal. In the event Plaintiffs act on the Court's June 3 Order, and all indications are that they will, the burdens of an appellate reversal will consist

of the time, effort and substantial resources poured into expanded operations, such as the opening of dining rooms and kitchen expansions to provide offsite catering. The wineries will have angry customers if weddings and other pre-planned events are cancelled because of an appellate reversal. For this reason, Peninsula Township believed, naively it turned out, that Plaintiffs would agree to maintain the status quo, but concurrence in this request was denied. Unless the Court protects Plaintiffs' interests for them by granting a stay, Plaintiffs will be proceeding at their own risk.

There is also very real risk of harm to the public and third parties as well if the injunction is not stayed. Township residents have already vocalized their deep concerns with expanded winery operations which if allowed, would trump the secondary use of winery properties (retail operations) over the primary purpose (farming). Residents have sought to vocalize these concerns with the filing of a Motion to Intervene by Protect the Peninsula (ECF 40-41). The affidavits in support of that motion speak to the disruptions that have already invaded the peace and tranquility of the peninsula and those disruptions are set to expand exponentially.

Even if the Court does not ultimately Grant the Motion to Amend or Alter or disagrees that the Township has a good chance of success on the merits of the appeal, under the terms of the Court's

Summary Judgment ruling, an injunction was premature and improper, we contend, because a potentially dispositive defense to Plaintiffs' claims (laches) is set to be litigated at trial. The Court Denied Defendant's Motion for Summary Judgment regarding laches, but did not Grant judgment as a matter of law in favor of Plaintiffs, reserving a ruling on this absolute defense pending the results of trial (ECF 162, p 43).

A hearing is required and an injunction is not properly granted where triable issues remain. United States v McGee, 714 F2d 607, 613 (CA6 1983). With laches still subject to resolution at trial, and where no hearing on injunctive relief was held, it was error to issue the injunction, we respectfully contend.

The Court should not enjoin the Township from enforcing its ordinance and should not "green light" Plaintiffs into acting on the Court's June 3 Summary Judgment ruling until such time that the appellate system has weighed in on the merits of the case.

ARGUMENT

When determining whether to enter a stay of an injunction pending an appeal, the Court must review and balance the following factors:

1. Whether the party seeking the stay has a strong likelihood of success on the merits;
2. Whether the movant would suffer irreparable harm absent a stay;

3. Whether granting the stay would cause substantial harm to others; and

4. Whether the public interest would be served by granting the stay.

Michigan Coalition of Radioactive Material Users, Inc, v Griepentrog, 945 F2d 150 (CA6 1991). See also, Norris v Stanley, 2021 WL 6694208 (WDMI, 2021).[1]

Here, the irreparable harm factor is conclusively met because the Township is enjoined from enforcing a duly enacted ordinance. Maryland, supra, 567 US at 1303 ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") The harm is all the more substantial where the ordinance that can no longer be enforced has been on the books for almost 50 years.

Although as argued below, as well as argued in our forthcoming Motion to Amend or Alter, the Township believes it has a strong chance of success on the merits of its appeal, where irreparable harm is established, a lesser showing on the merits is required to justify a stay pending appeal. See Griepentrog, supra, 945 F2d at 153 ("To justify the granting of a stay, however, a movant need not always establish a high probability of success on the merits. The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will

[1] All unpublished cases are attached as Exhibit B.

suffer absent the stay. Simply stated, more of one excuses less of the other.") (internal citations omitted.)

1. Irreparable Harm It is the Township, and more succinctly, the local residents of Peninsula Township, that suffer irreparable harm if a stay is not granted pending appeal because the ordinance will not enforced. Maryland, supra, 567 US at 1303. See also, District 4 Lodge v Raimondo, 18 F4th 38, 47 (CA1 2021), citing, Maryland, supra; Thompson v DeWine, 976 F3d 610, 619 (CA6 2020); Org for Black Struggle v Ashcroft, 978 F3d 603, 609 (CA8 2020); NM Dep't of Game & Fish v US Dept of Interior, 854 F3d 1236 (CA10 2017); Planned Parenthood of Greater Tex Surgical Health Servs v Abbott, 734 F3d 406, 419 (CA5 2013).

Setting aside, for the moment, the fact that the Court's injunctive relief unwinds the Legislative will of the local residents of Peninsula Township, the Court's order has real world consequences on the day to day business in Peninsula Township that warrant a stay pending the Sixth Circuit's decision. The Court has dispatched the core of Peninsula Township's zoning ordinance at the request of Plaintiffs who seek to elevate the secondary use of their properties (retail) over the primary use (farming). Because the Order struck numerous provisions of the zoning ordinance, there is no coherent, legislatively designed and implemented policy in the A-1 Agricultural district.

Further, and applicable to this case, it is anticipated that

Plaintiffs will argue in short order that they are entitled to rely upon the Court's ruling to proceed now to implement their form of local commercialism. However, when the Sixth Circuit rules, it is very likely that Plaintiffs will have expended tens of thousands of dollars in vain, and seek to recover damages or take advantage of some yet-unknown litigation device to recover these additional damages that arise out of the June 3, 2022 order. They may also seek to schedule a political rally or host a wedding in 2023; but what would the Court tell the bride that has scheduled her wedding at a chateau that no longer has a venue for the most important day of her life? These are just some of the reasons why restraint is necessary and why, under these circumstances, discretion is the best part of valor.

Finally, injunctive relief is typically intended to maintain the status quo specifically so that irreparable harm is not suffered by one of the parties. United Food and Commerical Workers Union v Southwest Ohio Regional Transit Authority, 163 F3d 341, 348 (CA6 1998). But, "if the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury." Here, the existing status quo created by the Court on June 3, 2022 inexorably caused the Township to suffer irreparable harm. Without a proper and functioning zoning ordinance in place, the will of the local residents through their duly elected local government has been

upended. While Plaintiffs may trivialize the Township's right to regulate, the fact is "[t]he Michigan Legislature has empowered local municipalities to establish zoning regulation through the Zoning Enabling Act, MCL 125.3203(1)." Tuscola Wind III, LLC v Ellington Township, 2018 WL 1291161, *4 (E.D. MI, 2018). "The Michigan legislature has also provided local municipalities the power to adopt ordinances regulating the public health, safety, and general welfare of person and property." Id., citing, MCL 41.181. This is why ordinances are presumed to be constitutionally valid, a presumption that, despite the Court's ruling, should continue while an appeal is pending. Curto v City of Harper Woods, 954 F2d 1237 (CA6 1992) ("An ordinance which represents an exercise of the municipality's police powers is presumed to be constitutionally valid, with the burden of showing unreasonableness being cast upon those who challenge the ordinance.").

2. Substantial Harm to Others Plaintiffs will inevitably argue that they will suffer substantial harm if a stay of the Court's permanent injunction is entered pending the Township's appeal. Typically, a party is incapable of demonstrating irreparable harm if damages are compensable by monetary damages. Harper v Chemtrade Logistics, Inc, 2014 WL 7359024 (MD TN, 2014). Here, the Plaintiffs have submitted an expert report seeking to recover monetary damages in excess of $200 million. Plaintiffs' claims for monetary damages demonstrate that the harm they will allegedly suffer would be

purely economic (if proven), and therefore, is not so substantial or irreparable that it will be unrecoverable in the unlikely event that they prevail on appeal. While Plaintiffs *may* be able to demonstrate harm, there is nothing substantial or irreparable about it.

3. Public Interest Supports a Stay Finally, and perhaps the most important of the factors for the purposes of this motion, is the public's interest in seeing a stay entered by the Court. It is noted above, but it bears repeating that the vast majority of local residents in Peninsula Township support the township board that it duly elected. A group of Peninsula Township residents have already sought to intervene in this case to express their great concern about what expanded winery operations would mean to their way of life that has been entrenched for nearly 50 years (ECF 40-41).

Here, the local legislative body is the Township Board, and the State Legislature has given it the power to locally determine the best public policy when it comes to zoning. MCL 125.3203(1). Notably, it did so again when it created the Liquor Control Commission, which has subsequently required Plaintiffs' to comply with their local zoning ordinances. While this Court has a place when called upon to adjudicate disputes between parties such as those here, it should recognize that the judicial branch is "limited to one set of facts in each lawsuit, which is shaped and limited by arguments from opposing counsel who seek to advance

purely private interests." Woodman ex rel Woodman v Kera LLC, 486 Mich 228, 247l 785 NW2d 1 (2010).

The inherent limitations of the judiciary when judging public policy and the Michigan Courts' recognition that local legislative bodies are best placed and suited to determine issues of policy, all reveal the important need to defer to the local government. League of Women Voters of Michigan v Secretary of State, 333 Mich App 1;959 NW2d 1 (2020) (finding that for Legislative policy issues such as when an election deadline should be set, is one that the "court should typically defer to the Legislature."). See also, Michigan Alliance for Retired Americans v Secretary of State, 334 Mich App 238; 964 NW2d 816 (2020) (As compared to the judiciary, "[w]hen formulating public policy for this state, the Legislature possesses superior tools and means for gathering facts, data, and opinion and assessing the will of the public.") More importantly, the Michigan Courts and Legislature are entitled to this Court's deference and restraint where they have created a model and precedent for local control, even if this Court believes the Township is not so equipped. And, if the Court finds that it should not place its trust in the Township, the Michigan Legislature, or the Michigan Judiciary, it should find solace in the local residents of Peninsula Township. See, Arizona State Legislature v Arizona Independent Redistricting Com'n, 576 US 787, ; 135 SCt 2652 (2015) ("[T]he power to legislate in the enactment of the laws of

a State is derived from the people of the State.... The Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a [Supreme] Power to remove or alter the Legislative, when they find the Legislative act contrary to the trust reposed in them."), quoting John Locke, "Two Treatises of Government § 149, p 385 (P. Laslett ed. 1964).

4. Strong Likelihood of Success On this factor, the movant "is always required to demonstrate more than the mere possibility of success on the merits and the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay." Id. See also, Baker v Adams Cnty/Ohio Vallen School Bd, 310 F3d 927; 54 FedRServ3d 452 (2002). "However, in order to justify a stay of the district court's ruling, the defendant must demonstrate at least serious questions going to the merits and irreparable harm that decidedly outweighs the harm that will be inflicted on others if a stay is granted." Id., at 928, citing, In re DeLorean Motor Co, 755 F2d 1223, 1229 (6th Cir., 1985). What follows is a review of the factors the Court should consider when granting a motion to stay enforcement.

Respectfully, Peninsula Township has a strong likelihood of success on the merits of its case. As discussed in further detail below, where irreparable harm in this matter is established as a matter of law (and it is), proof of the Township's likelihood of

success need not be as strong. Baker, supra, at 928. Yet, in this case the Township has absolute defenses which strike at the heart of each of the Plaintiffs' claims.

To assist the Court in adjudicating this motion, but in an effort to maintain the proper word count, the Township will identify the key areas where it believes it is very likely to prevail on the merits, but will reserve for oral argument, and its Motion to Amend or Alter, a full-throated argument on all errors the Township ascribes to the June 3, 2022 Opinion and Order.

A. Laches

The Plaintiffs did not seek summary judgment on the Township's laches claim, which in the context of the Constitutional claims raised by Plaintiffs, is an absolute defense. The Court denied Defendant's Summary Judgment Motion on laches, but did not Grant Summary Judgment in Plaintiffs' favor, leaving this issue set for trial (Ex A, p 43).

"A constitutional claim can become time-barred just as any other claim can." Michigan Chamber of Commerce v Land, 725 FSupp2d 665, 680 (WD Mich,2010). "Laches is the negligent and unintentional failure to protect one's rights." Nartron Corp v STMicroelectronics, Inc, 305 F3d 397(6th Cir, 2002). While the determination of the application of laches to a particular case is a question for the Court, such a determination is a fact-dependent inquiry. Land, supra. Where, as here, the Court sits as the arbiter

of facts at trial and has found a question of fact exists as to laches, the issue remains unresolved.

To demonstrate laches the Township must show: 1) a lack of diligence by the Plaintiffs, and 2) prejudice to the Township. Id. The Court's opinion on these two elements recognizes that there is likely a very substantial delay. Though, for purposes of clarity, the Township argues that the Ordinances at the very least have been in place for over 20 years and, as such, raising these Constitutional issues now is exceedingly tardy, even if non-legal attempts at change were made.

As to prejudice, the Court was concerned that there was an insufficient showing of evidence to warrant summary judgment. Respectfully, the Township disagrees with the Court's analysis. In the Sixth Circuit, there is a strong presumption that, where a plaintiff has delayed beyond the applicable statute of limitations to bring its Constitutional claims, the plaintiff's actions are "prejudicial and unreasonable." Nartron, supra, 305 F3d 397. In Michigan, the proper time for filing a claim for relief pursuant to 42 USC § 1983, the basis for all of Plaintiffs' allegations, is three years. MCL 600.5805(2). Thus, "a delay beyond the three-year statutory period is presumptively prejudicial and unreasonable." Nartron, supra. Further, 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.

As the Court noted in its Opinion and Order, the oldest challenged Ordinance is 30 years old, and the most recent challenged Ordinance is approximately 20 years old (Ex A, p 41). Meanwhile, "[t]he 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" (Ex A, p 5). The Plaintiffs, therefore, had notice of the alleged infringing activity conducted by the Township for at least two decades.

Meanwhile, the period of limitations begins to run "when the plaintiff knows or has reason to know of the injury which is the basis of his action." Basista Holdings, LLC v Ellsworth Township, 710 Fed Appx 688, 691 (CA6 2017). Based upon the evidence the Court found and, in the light most favorable to the Plaintiffs, the limitations period began to run at least 10 years ago (Ex A, p 5). Therefore, the Plaintiffs have, *as a matter of law*, brought this action past the applicable statute of limitations.

Consequently, there is a "strong" presumption that the Plaintiffs' delay was prejudicial and unreasonable. Nartron, supra. While the Court found a question of fact on the Township's laches defense, respectfully, it should have recognized the presumption of prejudice and shifted the burden of demonstrating that none exists onto the Plaintiffs. Nartron, supra.

B. Preemption

On preemption, the Court employed a heightened standard where any difference between an ordinance and statute constitutes preemption. See, e.g., discussion of Sections 8.7.3(10)(u)(5)(g) and (10)(u)(5)(I). Yet, Michigan law is clear that "a local ordinance that regulates in an area where a state statute also regulates, with mere differences in detail, is not rendered invalid due to a conflict." USA Cash #1, Inc v City of Saginaw, 285 Mich App 262, 267; 776 NW2d 346 (2009). Additionally, the Opinion and Order does not address the state administrative code and its requirement that a licensee (such as Plaintiffs) comply with all zoning ordinances as determined by state and local officials with jurisdiction. See, Mich Admin Code R 436.1003. Consequently, on those sections of the Ordinance that the Court found preemption, such as the "amplified instrumental music" ordinance, and the "off-site catering" ordinance, are not pre-empted under USA Cash. The Township believes it will prevail on the merits on this issue.

C. The Township Is Likely to Prevail on the Commerce Clause

Relying on Alexis Bailly Vineyard, Inc v Harrington, 482 F Supp 3d 820, 824 (D Minn, 2020), the Court found that several sections of the Township's zoning ordinance, "on their face, discriminate against all out-of-state farmers, "and thus were "*per se* invalid." (Ex A, 19.) The Court's application and holding were incorrect, we respectfully contend, because the Court exclusively

relied on dormant commerce clause cases addressing laws and regulations that impacted ***state-wide*** markets. E.g., Granholm v Heald, 544 US 460; 125 S Ct 1885; 161 L Ed 2d 796 (2005); and Alexis Bailly, supra, 482 F Supp 3d at 824.

Since Peninsula Township's zoning ordinance did not discriminate against interstate commerce (it made no distinction between in state and out-of-state farmers equally) and the local benefits far exceed its burdens on interstate commerce, the Court should have upheld Peninsula Township's zoning ordinance provisions like other courts in the Sixth Circuit and beyond who have routinely upheld local zoning ordinances when they allegedly burden interstate commerce. Loesel v City of Frankenmuth, No. 08-11131-BC, 2009 WL 817402, at *22 (ED Mich, March 27, 2009); City of Cleveland, Ohio v City of Brook Park, Ohio, 893 F Supp 742, 752 (ND Ohio, 1995); Wood Marine Service Inc v City of Harahan, 858 F2d 1061, 1064 (5th Cir 1988); and Creekside Parking, Inc v City of Chelsea, 1994 WL 16193975, at *1 (Mass Land Ct, July 29, 1994).

Instead of applying the standard articulated in the Court's Opinion and Order, the Court should have considered whether the Township's ordinances were "demonstrably justified by a valid factor unrelated to economic protectionism" or whether there were "nondiscriminatory alternatives adequate to preserve the local interests at stake." New Energy Co of Indiana v Limbach, 486 US

269, 274; 108 S Ct 1803, 1808; 100 L Ed 2d 302 (1988); Hunt v Wash State Apple Adver Comm'n, 432 US 333, 353, 97 S Ct 2434, 53 L Ed 2d 383 (1977). Significantly, the zoning ordinance treats in-state agricultural products (grown off Old Mission Peninsula) the same as out-of-state agricultural products. This means, as a matter of law, the zoning ordinance is not facially discriminatory because in-state and out-of-state commerce are equally burdened. City of Cleveland, Ohio 893 F Supp at 752. This equal treatment necessarily requires a finding that the zoning ordinance is not discriminatory in purpose or effect, on its face. See Wood Marine Service Inc, 858 F2d at 1064.

Had the Court not been misled by its application of Alexis Bailly, it would have applied the Pike balancing test. Pike v Bruce Church, Inc, 397 US 137, 142 (1970). That standard applies to laws that only indirectly or incidentally burden interstate commerce, but do not discriminate. City of Cleveland, Ohio, 893 F Supp at 753. Under the Pike balancing test "[w]here 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 on such commerce is clearly excessive in relation to the putative local benefits." 397 US at 142.

CONCLUSION

WHEREFORE, the Defendant, Peninsula Township, respectfully requests that this Honorable Court grant its Motion for Stay of Injunction Pending Appeal and award any other relief that is appropriate and just under the circumstances.

Respectfully Submitted,

/s/ Timothy A. Diemer

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Dated: June 24, 2022

CERTIFICATE OF COMPLIANCE
PURSUANT TO LOCAL RULE 7.3(b)(i)

1. This brief complies with the type-volume limitation of Local Rule 7.3 because:
   X this brief contains 4283 words, excluding the parts exempted by Local Rule 7.3(b)(i)

2. This Brief was prepared using Word Perfect 2021.

Respectfully submitted,

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Dated: June 24, 2022

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2022, I electronically filed the foregoing paper with the Clerk of the Court using the CM-ECF system which will send notification of such filing to the following:

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Dated: June 24, 2022

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, LLC, a Michigan Limited Liability Company,

Plaintiffs,

v

TOWNSHIP OF PENINSULA, a Michigan Municipal Corporation,

Defendant

Case No. 1:20-cv-01008

Hon. Paul L. Maloney

Mag.Judge Ray S. Kent

INDEX OF EXHIBITS TO DEFENDANT'S MOTION FOR STAY OF INJUNCTION PENDING APPEAL

EXHIBIT NO	DESCRIPTION
A	**Opinion & Order Regarding Summary Judgment Motions [ECF No. 162] Dated 6/3/22**
B	**CASE LAW** *Creekside Parking v City of Chelsea* *Harper v Chemtrade Logistics* *Loesel v City of Frankenmuth* *Norris v Stanley* *Tuscola Wind III, LLC v Ellington Twp*

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION, *et al.*, Plaintiffs,	)	
-v-	)	No. 1:20-cv-1008
PENINSULA TOWNSHIP, Defendant.	)	Honorable Paul L. Maloney

OPINION REGARDING SUMMARY JUDGMENT MOTIONS

This matter is before the Court on multiple motions for summary judgment: Plaintiffs' motion for partial summary judgment (ECF No. 53); Defendant's cross motion for partial summary judgment (ECF No. 62); Plaintiffs' motion for partial summary judgment (ECF No. 135); and Defendant's motion for summary judgment (ECF No. 142). The Court held a hearing on these motions on April 22, 2022.

I. Content of Each Motion

Each party has filed a summary judgment motion containing preemption arguments, and each party has also filed a summary judgment motion containing constitutional arguments. The content of each motion is as follows:

Plaintiffs' motion for partial summary judgment (ECF No. 53) seeks summary judgment on Count VIII[1]: state law preemption.

[1] *See Plaintiffs' First Amended Complaint*, ECF No. 29.

Defendant's cross motion for partial summary judgment (ECF No. 62) seeks summary judgment on Count VIII: state law preemption.

Plaintiffs' motion for partial summary judgment (ECF No. 135) seeks summary judgment on Count I: facial challenge to violation of rights to free speech, expression, and religion; Count II: as-applied challenge to violation of free speech; Count IV: violation of due process; Count V: violation of the dormant commerce clause via discrimination against interstate commerce; Count VI: violation of the dormant commerce clause via an excessive burden on interstate commerce; and Count VII: a regulatory taking in violation of the Fifth Amendment.[2]

Defendant's motion for summary judgment (ECF No. 142) seeks summary judgment on all counts, except Count VIII, which is addressed in its first motion for partial summary judgment.

For the following reasons, the Court will grant in part and deny in part each preemption summary judgment motion, grant in part and deny in part Plaintiff's constitutional summary judgment motion, and deny in its entirety Defendant's constitutional summary judgment motion.

II. Summary Judgment Standard

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ.

[2] Neither of Plaintiffs' motions seek summary judgment on Count III: violation of freedom of association; Count IX: violation of the Michigan Zoning Enabling Act; or Count X: injunctive relief.

P. 56(c); *Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008). The burden is on the moving party to show that no genuine issue of material fact exists, but that burden may be discharged by pointing out an absence of evidence supporting the nonmoving party's case. *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). The facts, and the inferences drawn from them, must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Once the moving party has carried its burden, the nonmoving party must set forth specific facts, supported by evidence in the record, showing there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The question is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–252. The function of the district court "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Resolution Trust Corp. v. Myers*, 9 F.3d 1548 (6th Cir. 1993) (unpublished table opinion) (citing *Anderson*, 477 U.S. at 249).

However, the party opposing the summary judgment motion "must do more than simply show that there is some metaphysical doubt as to the material facts." *Amini v. Oberlin College*, 440 F.3d 350, 357 (6th Cir. 2006) (quoting *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 800 (6th Cir. 1994)) (quotation marks omitted). A mere "scintilla of evidence" in support of the non-moving party's position is insufficient. *Daniels v. Woodside*, 396 F.3d 730, 734–35 (6th Cir. 2005) (quoting *Anderson*, 477 U.S. at 252). Accordingly, the non-

moving party "may not rest upon [his] mere allegations," but must instead present "specific facts showing that there is a genuine issue for trial." *Pack v. Damon Corp.*, 434 F.3d 810, 814 (6th Cir. 2006) (quoting Fed. R. Civ. P. 56(e)) (quotation marks omitted). In sum, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

III. Facts

The Plaintiffs[3] (collectively, "Plaintiffs" or "the Wineries") in this matter are several wineries located in Peninsula Township, Traverse City, Michigan. Plaintiffs have sued Peninsula Township ("Defendant" or "the Township") for several restrictions and regulations in the Peninsula Township Zoning Ordinance. Specifically, the sections that apply to Plaintiffs are Section 6.2.7(19), which governs Farm Processing Facilities;[4] Section 8.7.3(10), which governs Winery-Chateaus;[5] and Section 8.7.3(12), which governs Remote Winery Tasting Rooms.[6] Whether a property constitutes a Farm Processing Facility, Winery-Chateau, or Remote Winery Tasting Room depends on how the property is zoned. For this

[3] Specifically, Plaintiffs are the Wineries of the Old Mission Peninsula Association ("WOMP"), Bowers Harbor Vineyard & Winery, Inc. ("Bowers Harbor"), Brys Winery, LC ("Brys Estate"), Chateau Grand Traverse, Ltd. ("Grand Traverse"), Chateau Operations, Ltd. ("Chateau Chantal"), Grape Harbor, Inc. ("Peninsula Cellars"), Montague Development, LLC ("Hawthorne"), OV the Farm LLC ("Bonobo"), Tabone, Vineyards, LLC ("Tabone"), Two Lads, LLC ("Two Lads"), Villa Mari, LLC ("Villa Mari"), and Winery at Black Star Farms LLC ("Black Star").

[4] Plaintiffs Black Star, Two Lads, and Tabone have licenses to operate Farm Processing Facilities (ECF No. 29 at PageID.1092).

[5] Plaintiffs Bowers Harbor, Brys Estate, Grand Traverse, Chateau Chantal, Bonobo, and Villa Mari have licenses to operate Winery-Chateaus (ECF No. 29 at PageID.1097-98). Pursuant to a joint venture and lease agreement between Hawthorne and Chateau Chantal, Chateau Chantal conducts licensed Winery-Chateau operations, under the Township Ordinances, on Hawthorne's property (*Id.* at PageID.1107).

[6] Plaintiff Peninsula Cellars has a license to operate a Remote Winery Tasting Room (ECF No. 29 at PageID.1108).

opinion, collectively, these three sections of the Peninsula Township Zoning Ordinance will be referred to as the "Township Ordinances" or the "Ordinances."

Some of the restrictions in the Township Ordinances that Plaintiffs challenge include: regulations of advertising, regulations of bar and restaurant operations, vagueness of the term "Guest Activity," limitations on hours of operation, prohibition of hosting events such as weddings and family reunions, prohibition of amplified music, and regulations requiring the Wineries to use a certain percentage of Old-Mission-Peninsula-grown grapes and ingredients in producing wine, among numerous other restrictions. 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 (ECF No. 136 at PageID.4719).

IV. Preemption Summary Judgment Motions[7]

A. Plaintiffs' Motion for Partial Summary Judgment (ECF No. 53)

This motion seeks summary judgment on Count VIII: state law preemption. Plaintiffs ask the Court to find that §§ 6.7.2(19)(a), 6.7.2(19)(b)(1)(iv), 8.7.3(10)(u)(2)(a)–(c), 8.7.3(10)(u)(2)(e), 8.7.3(10)(u)(5)(b), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(i) of the Township Ordinances are preempted by Michigan law. Interestingly, the first amended complaint does not challenge all of these sections in Count VIII. It only alleges that

[7] The Court notes that not every Plaintiff has standing to challenge every section of the Ordinances at issue: § 6.7.2(19) only applies to Farm Processing Facilities, § 8.7.3(10) only applies to Winery-Chateaus, and § 8.7.3(12) only applies to Remote Winery Tasting Rooms. See *supra* notes 4–6 for a breakdown of what type of entity each Winery constitutes. Because the first amended complaint does not delineate which Plaintiffs are challenging which sections of the Township Ordinances (*see* ECF No. 29), the Court will note which Plaintiffs have standing to raise each argument in a footnote after each heading. Only WOMP, via associational standing, has standing to raise every challenge in the first amended complaint.

§§ 8.7.3(10)(u)(5)(b), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(i) are preempted by state law (ECF No. 29 at PageID.1125-26).

It appears that the discrepancy between the number of challenged Township Ordinances sections in the first amended complaint and the partial summary judgment motion is due to the first amended complaint being the operative pleading, which is worded more narrowly than the original complaint. While the original complaint did not name any specific sections in the preemption count, the first amended complaint specifically alleged that §§ 8.7.3(10)(u)(5)(b), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(i) are preempted by Michigan law (*compare Complaint*, ECF No. 1 at PageID.28) ("Peninsula Township has enacted ordinances which prohibit conduct which is expressly allowed by the Michigan Liquor Control Code . . . The Peninsula Township ordinances which conflict with Michigan law are preempted."), (*with First Amended Complaint*, ECF No. 29 at PageID.1125-26) (naming three specific sections that Plaintiffs argue are preempted).

Although the first amended complaint was the operative pleading at the time Plaintiffs filed their motion for partial summary judgment, Plaintiffs were apparently unaware that their first amended complaint narrowed the scope of their preemption challenge (*see Transcript of Summary Judgment Motion Hearing*, ECF No. 159 at PageID.5909). Moreover, Plaintiffs argue that, through discovery, they learned that the Township is enforcing more restrictions than those specifically outlined in the Township Ordinances, leading Plaintiffs to broaden the scope of their challenges (*Id.*). However, because the first amended complaint only challenges three specific sections of the Township Ordinances, the Court will only determine whether those three sections—§§ 8.7.3(10)(u)(5)(b), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(i)—

are preempted by Michigan law. At this time, there remains a genuine issue of material fact as to whether any section of the Township Ordinances other than the three specifically named sections in the first amended complaint are preempted by Michigan law.

1. Plaintiffs' State-Granted Licenses

To operate a winery in Michigan, a license from the Michigan Liquor Control Commission is required. The Michigan Liquor Control Code ("MLCC") governs winery operations and allows wineries to have certain licenses and permits. Each Plaintiff possesses multiple permits and at least one license (wine maker,[8] small wine maker,[9] small distiller,[10] or brandy manufacturer,[11] for example) (*see* ECF No. 54 at PageID.2277-78) (showing a table of each Plaintiff's license(s) and permits). Plaintiffs argue that the Township Ordinances conflict with many of the rights that they have been granted under the MLCC, according to their respective licenses and permits.

2. Conflict Preemption Standard

"In the context of conflict preemption, a direct conflict exists when 'the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits.'" *DeRuiter v. Township of Byron*, 949 N.W.2d 91, 96 (Mich. 2020) (quoting *People v. Llewellyn*, 257 N.W.2d 902, 904 n.4 (Mich. 1977)); *see also Walsh v. City of River Rouge*, 189 N.W.2d 318, 324 (Mich. 1971) ("Assuming the city may add to the conditions, nevertheless the ordinance attempts to prohibit what the statute permits. Both statute and

[8] Plaintiff Grand Traverse has a Wine Maker license.
[9] Plaintiffs Bowers Harbor, Brys Estate, Chateau Chantal, Peninsula Cellars, Hawthorne, Bonobo, Tabone, Two Lads, Villa Mari, and Black Star have Small Wine Maker licenses.
[10] Plaintiffs Grand Traverse and Bonobo have Small Distiller licenses.
[11] Plaintiff Chateau Chantal has a Brandy Manufacturer license.

ordinance cannot stand. Therefore, the ordinance is void."). However, a local unit of government may add conditions to rights granted in a state statute because "additional regulation to that of a state law does not constitute a conflict therewith." *Nat'l Amusement Co. v. Johnson*, 259 N.W. 342, 343 (Mich. 1935). But where a state statute allows certain conduct and a local ordinance forbids it, "the ordinance is void." *Id.*

3. Analysis[12]

Based on the standard outlined above, the Township Ordinances may add limitations or restrictions to the rights granted in the MLCC, but they may not contain an absolute prohibition on what the MLCC permits. In other words, restrictions and limitations are permissible, but outright prohibitions (on permitted activities under the MLCC) are not.

The following table summarizes the sections of the Township Ordinances that Plaintiffs challenge based on preemption, compared with the relevant Michigan law:

Activity Regulated	Type of Facility Regulated	Township Ordinance	Michigan Law
Hours of Operation	Winery-Chateau	Section 8.7.3(10)(u)(5)(b): "Hours of operation for Guest Activity Uses shall be determined by the Town Board, but no later than 9:30 PM daily."	Mich. Comp. Laws § 436.2114(1): "Notwithstanding R 436.1403 and R 436.1503 of the Michigan administrative code and except as otherwise provided under this act or rule of the commission, an on-premises and an off-premises licensee shall not sell, give away, or furnish alcoholic liquor between the hours of 2 a.m. and 7 a.m. on any day."
Music	Winery-Chateau	Section 8.7.3(10)(u)(5)(g): During Guest Activity Uses, "No amplified instrumental	Mich. Comp. Laws § 436.1916(11): "The following activities are allowed without the granting of a permit under

[12] Only sections of the Township Ordinances applicable to Winery-Chateaus are challenged in Count VIII. Thus, only Plaintiffs Bowers Harbor, Brys Estate, Grand Traverse, Chateau Chantal, Bonobo, Villa Mari, and Hawthorne (through its joint venture and lease agreement with Chateau Chantal) have standing the raise the following arguments.

		music is allowed, however amplified voice and 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 section: (a) The performance or playing of an orchestra, piano, or other types of musical instruments, or singing."
Catering	Winery-Chateau	Section 8.7.3(10)(u)(5)(i): During Guest Activity Uses, "Kitchen facilities may be used for on-site food serve related to Guest Activity Uses but not for off site catering."	Mich. Comp. Laws § 436.1547: Authorizes holders of catering permits 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."

a. Section 8.7.3(10)(u)(5)(b): Limitation of Hours of Operation at Winery-Chateaus

This section of the Township Ordinances governs the hours of operation of Winery-Chateaus during Guest Activity Uses: "Hours of operation for Guest Activity Uses shall be determined by the Town Board, but no later than 9:30 PM daily." *See* § 8.7.3(10)(u)(5)(b). On the other hand, the MLCC allows holders of certain licenses to operate later than 9:30 p.m. Under Michigan law, these establishments are instead prohibited from selling alcohol between 2:00 a.m. and 7:00 a.m. on Monday–Saturday, and between 2:00 a.m. and noon on Sundays. *See* Mich. Comp. Laws § 436.2114(1); Mich. Admin. Code R. 436.1403; Mich. Admin. Code R. 436.1503.

Plaintiffs rely on *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005) in support of their argument that the hours restrictions in the Township Ordinances are preempted. However, *Keego Harbor* is not a preemption case; it is an unconstitutional

conditions case, and it is entirely distinguishable. In *Keego Harbor*, the city engaged in "an unlawful harassment campaign" to force Goose Island, a brewery and the plaintiff in the case, to close at 11:00 p.m. *Id.* at 431. Although the Sixth Circuit held that the city could not force Goose Island to close at 11:00 p.m., the rationale behind this holding was that by withholding governmental benefits from Goose Island unless it closed at 11:00 p.m., the city was violating the unconstitutional conditions doctrine. *Id.* at 436. There was no preemption discussion in *Keego Harbor*, and nowhere did the Sixth Circuit hold that the city's 11:00 p.m. closing rule conflicted with Michigan law. Therefore, the Court does not find *Keego Harbor* to be persuasive.[13]

The Court holds that the Township Ordinances do not conflict with Michigan law regarding hours of operation. Rather, they place a further limitation on the hours that MLCC licensees may sell alcohol. Had Michigan law *expressly permitted* license holders to sell alcohol between the hours of 7:00 a.m. and 2:00 a.m. the following day on Monday–Saturday, and between the hours of noon on Sunday and 2:00 a.m. the following Monday morning, then the Township Ordinance's prohibition on furnishing alcohol after 9:30 p.m. would be preempted. *See id.* at 435 ("On its face, the [Michigan law] rule does not grant licensees a right to remain open *until* 2:00 a.m. but merely provides that licensees cannot sell

[13] Plaintiffs also cite to *Noey v. City of Saginaw*, 261 N.W. 88 (Mich. 1935) in support of their argument that when a municipality shortens the hours of operation permitted by state law, the ordinance is preempted. The Court finds this case unpersuasive and easily distinguishable. When this case was decided, the Michigan Constitution contained a provision stating that the liquor control commission "shall exercise complete control over the alcoholic beverage traffic within the state." *Id.* at 88. Based on that language, the Michigan Supreme Court held that "Under the broad power thus conferred upon the liquor control commission by the Constitution and the statute, it must be held that its regulations relative to the hours of closing are binding upon all licensees. . . ." *Id.* at 89. Today, the Michigan Constitution contains no such provision, meaning that the hours of operation of establishments with licenses pursuant to the MLCC are *not* binding on all licensees. Thus, *Noey* is not applicable to the current case. *See also Mutchall v. City of Kalamazoo*, 35 N.W.2d 245 (Mich. 1948) (explaining that the MLCC was adopted to "meet the objections raised in *Noey*, so as to permit local authorities to control the closing time of licenses establishments") (internal citation omitted).

liquor *after* 2:00 a.m."). However, because the Township Ordinances merely place a further limitation on a right granted under Michigan law, and because Winery-Chateaus can comply with both the hours limitations in the Township Ordinances and Michigan law at the same time, the Court holds that § 8.7.3(10)(u)(5)(b) is not preempted.

b. Section 8.7.3(10)(u)(5)(g): Prohibition of Amplified Instrumental Music and Regulation of Amplification Level of Music at Winery-Chateaus

Section 8.7.3(10)(u)(5)(g) regulates amplified music played at Winery-Chateaus during Guest Activity Uses: "No amplified instrumental music is allowed, however amplified voice and 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." *See* § 8.7.3(10)(u)(5)(g). Under Michigan law, establishments that hold an "on-premise consumption" license under the MLCC are not required to receive a permit for "The performance or playing of an orchestra, piano, or other types of musical instruments, or singing." Mich. Comp. Laws § 436.1916(11).

This section of the Township Ordinances can be broken down into two distinct restrictions: (1) a prohibition of amplified instrumental music, and (2) a limitation on the amplification level of music. The Court holds that the complete prohibition of amplified instrumental music is preempted by Michigan law, which expressly allows certain licensees to have musical instrument performances without a permit. However, the limitation on the amplification level of music is merely a limitation and not a prohibition. Thus, the "No amplified instrumental music is allowed" language is preempted by Mich. Comp. Laws

§ 436.1916(11), but the regulation of the amplification level of music—a mere limitation—is not preempted.

c. Section 8.7.3(10)(u)(5)(i): Prohibition of the Use of Kitchens for Off-Site Catering at Winery-Chateaus:

The last section of the Township Ordinances that Plaintiffs challenge via preemption is the section regarding catering by Winery-Chateaus during Guest Activity Uses: "Kitchen facilities may be used for on-site food service related to Guest Activity Uses but not for off site catering." *See* § 8.7.3(10)(u)(5)(i). This section appears to permit Winery-Chateaus to use their kitchens to prepare food for events on the premises, but it prohibits Winery-Chateaus from preparing food in their kitchens for events taking place off the premises.

The relevant section of the MLCC contains no such restriction. Mich. Comp Laws § 436.1547 authorizes holders of catering permits 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 Court finds that conflict preemption exists between these two statutes. The Township Ordinances prohibit the use of Winery-Chateau kitchens for off-site catering, while Michigan law permits the use of Winery-Chateau kitchens (if they have a catering permit[14]) for off-site catering, with limited restrictions. Therefore, the Court holds that § 8.7.3(10)(u)(5)(i) is preempted by Mich. Comp. Laws § 436.1547.

[14] The Court notes that no Winery-Chateau currently possesses a catering permit (ECF No. 54 at PageID.2277-78). However, despite the fact that no Winery-Chateau currently possesses the rights associated with a catering permit, the Court does not believe that there is a standing issue for the Winery-Chateaus here. Plaintiffs note that the "Winery Chateaus . . . would like to use their kitchens for off-site catering" (*Id.* at PageID.2299). Although Defendant argues that the Winery-Chateaus "never asked" to use their kitchens for catering, and thus, they essentially do not have standing to challenge a restriction on catering, the Court finds that such a request would be futile. Why would Winery-Chateaus go through the hassle of requesting a catering permit from the State if the Township prohibits the Wineries from off-site

In sum, the Court finds that § 8.7.3(10)(u)(5)(i) and the part of § 8.7.3(10)(u)(5)(g) prohibiting amplified instrumental music are preempted by state law, and Plaintiffs' partial summary judgment motion as to these sections will be granted. But § 8.7.3(10)(u)(5)(b) and the remaining language of § 8.7.3(10)(u)(5)(g) are not preempted by state law, and Plaintiffs' motion as to these sections will be denied.

B. Defendant's Cross Motion for Partial Summary Judgment (ECF No. 62)

Contained in the Township's response to the Wineries' motion for partial summary judgment on the preemption claim, the Township also moved for summary judgment on the preemption claim. The Township argues that the three sections of the Township Ordinances analyzed above—§§ 8.7.3(10)(u)(5)(b), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(i)—are not conflict preempted by state law.

1. Effect of the Special Use Permits

At the outset, much of the Township's motion argues that Plaintiffs have agreed to the challenged regulations through Special Use Permits ("SUPs"),[15] which the Township argues constitute contracts (*see* ECF No. 63 at PageID.2755-58). The Township asserts: "[T]he SUPs approved and agreed to by the Plaintiffs are contractual agreements between each Winery and the Township and, each contract contains an express agreement by the Plaintiffs to abide by the very terms and conditions they now claim are preempted" (*Id.* at PageID.2756).

catering? As Plaintiff's counsel noted at the summary judgment motion hearing, there is no "exhaustion" requirement to bring a preemption claim (ECF No. 159 at PageID.5919).

[15] The SUPs are attached to Defendants' motion as exhibits 1, 2, 4, 5, 6, 8, 9, 10, 11, 12, and 13. The Court also notes that Plaintiffs Two Lads, Black Star, and Tabone are not subject to an SUP (*see* ECF No. 70 at PageID.3146).

The Court finds that the SUPs that Plaintiffs are subject to are not contractual agreements. "A valid contract requires five elements: (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Innovation Ventures v. Liquid Mfg.*, 885 N.W.2d 861, 871 (Mich. 2016). The SUPs are not supported by consideration. "To have consideration there must be a bargained-for exchange"; "[t]here must be a benefit on one side, or a detriment suffered, or service done on the other." *Id.* When the Township approved the SUPs for the Wineries, there was no bargained-for exchange. After the approval of each Winery's respective SUP, the Wineries were then permitted to engage in certain commercial activities that otherwise would not be permitted. However, it is unclear what the Township has received from issuing the SUPs. There does not appear to be any bargained-for exchange that would meet the consideration requirement of a valid contract. *See Trevino & Gonzalez Co. v. R.F. Muller Co.*, 949 S.W.2d 39, 42 (Tex. Ct. App. 1997) ("[W]hen a building permit is issued, none of the elements of a contract are present. There is no offer, no acceptance, and no consideration."); *Forest Serv. v. Emps. For Env't Ethics v. U.S. Forest Serv.*, 689 F. Supp. 2d 891, 903 (W.D. Ky. 2010) (holding that despite the parties classifying their agreements as "contracts," "the plain meaning of the documents [is] that these 'contracts' were intended to be special-use permits," and identifying the difference between permits and contracts).

2. Analysis

As outlined in Section IV.A.3, some of the challenged sections of the Township Ordinances are preempted, while others are not. In accordance with the analysis above, the Township's motion for partial summary judgment will be granted as to § 8.7.3(10)(u)(5)(b)

and part of § 8.7.3(10)(u)(5)(g), and it will be denied as to § 8.7.3(10)(u)(5)(i) and part of § 8.7.3(10)(u)(5)(g).

V. Constitutional Summary Judgment Motions

A. Plaintiffs' Motion for Partial Summary Judgment (ECF No. 135)

Plaintiffs also seek summary judgment as to Counts I, II, IV, V, VI, and VII of the first amended complaint based on constitutional arguments.

1. Commerce Clause & Dormant Commerce Clause[16]

The Wineries' first argument in their constitutional summary judgment motion is that several sections of the Township Ordinances violate the dormant Commerce Clause because they discriminate against and place an excessive burden on out-of-state commerce. The Commerce Clause allows Congress to regulate interstate commerce. U.S. Const. art. 1, § 8, cl. 3. The Commerce Clause also contains a "negative" aspect (the "dormant Commerce Clause") that denies states the ability to unjustifiably "discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994); *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) ("This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.").

[16] Only sections of the Township Ordinances applicable to Farm Processing Facilities and Winery-Chateaus are challenged under the Commerce Clause. Thus, only Plaintiffs Black Star, Two Lads, Tabone, Bowers Harbor, Brys Estate, Grand Traverse, Chateau Chantal, Bonobo, Villa Mari, and Hawthorne (through its joint venture and lease agreement with Chateau Chantal) have standing the raise the following arguments.

State laws that are challenged under the dormant Commerce Clause are subject to a two-tiered analysis. *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 593 (8th Cir. 2003). First, the court determines whether the challenged state law discriminates against interstate commerce. *See Or. Waste Sys.*, 511 U.S. at 99. The term "discrimination" in this context means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* If the challenged state law is discriminatory, it is *per se* invalid. *Granholm v. Heald*, 544 U.S. 460, 476 (2005). Unless the state can demonstrate "under rigorous scrutiny, that it has no other means to advance a legitimate local interest," the *per se* invalid law must be struck down. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994). Only if the court determines that the challenged law is *not* discriminatory must it proceed to the second tier of the analysis: the statute will be invalidated as unconstitutional "if the burden [the statute] imposes on interstate commerce 'is clearly excessive in relation to its putative local benefits.'" *Hazeltine*, 340 F.3d at 593 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Plaintiffs challenge several sections of the Township Ordinances as invalid pursuant to the dormant Commerce Clause. The following sections place regulations on produce and wine sold at certain wineries, according to how much of the produce and grapes/wine were produced at the winery. Some sections also limit wine sales, during Guest Activity Uses, to only wine produced on-site.

- Section 6.7.2(19)(a) – applies to Farm Processing Facilities
    - Ordinance text: "The majority of the produce sold fresh or processed has to be grown on the specific farm operation (land owned or leased for the specific farm operation) of the party owning and operating the Specific Farm

Processing Facility. Eighty-five (85) percent of the produce sold fresh or processed has to be grown on Old Mission Peninsula."

- Section 6.7.2(19)(b)(1)(ii) – applies to Farm Processing Facilities
  - Ordinance text: "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 from fruit grown on Old Mission Peninsula."

- Section 6.7.2(19)(b)(1)(iii) – applies to Farm Processing Facilities
  - Ordinance text: "Fruit wine, other than grape wine, that is processed, tasted and sold in a Farm Processing Facility under this section is limited to wine bearing a label identifying that 85% of the juice is from fruit grown on Old Mission Peninsula."

- Section 6.7.2(19)(b)(2)(i) – applies to Farm Processing Facilities
  - Ordinance text: "Not less than 85 percent of all of the agricultural produce sold fresh or processed shall be grown on Old Mission Peninsula and a majority shall be grown on the land owned or leased for the specific farm operation by the same party owning and operating the specific Farm Processing Facility."

- Section 6.7.2(19)(b)(2)(v) – applies to Farm Processing Facilities
  - Ordinance text: "Dried fruit, a minimum of 85% by weight which is grown on Old Mission Peninsula and a minimum of 50% by weight which is grown on the farm, may be dried off premises and sold in the Farm Processing Facility retail room, provided no more than the amount of fruit sent out for this processing is returned for retail sale."

- Section 8.7.3(10)(u)(2)(e) – applies to Winery-Chateaus
  - Ordinance text: "No food service other than as allowed above or as allowed for the wine tasting may be provided by the Winery-Chateau. If wine is served, it shall only be served with food and shall be limited to Old Mission appellation wine produced at the Winery, except as allowed by Section 6. below."

- Section 8.7.3(10)(u)(3) – applies to Winery-Chateaus
  - Ordinance text: "In order to offer Guest Activity Uses, the owner of the Winery-Chateau shall, in addition to the agricultural production on the minimum acreage required for the Winery-Chateau, grow in Peninsula Township or purchase grapes grown in Peninsula Township for the previous growing season equal to 1.25 tons of grapes for each person allowed to participate in Guest Activity Uses up to the maximum number approved by the Township Board in a Special Use Permit. If the amount of grapes cannot

be documented by the Zoning Administrator, the numbers of persons allowed to participate in Guest Activity Uses shall be reduced proportionally."

- Section 8.7.3(10)(u)(5)(c) – applies to Winery-Chateaus
  - Ordinance text: "No alcoholic beverages, except those produced on the site, are allowed with Guest Activity Uses."

- Section 8.7.3(10)(u)(5)(d) – applies to Winery-Chateaus
  - Ordinance text: "Sales of wine by the glass or sales of bottles of wine for ON PREMISES consumption are NOT ALLOWED except as provided in Section 2(e) above."

The Court finds that Plaintiffs' arguments under the dormant Commerce Clause persuasive. In a recent case out of the District of Minnesota, the court recently struck down the Minnesota Farm Wineries Act, which required a "farm winery to produce wine 'with a majority of the ingredients grown or produced in Minnesota.'" *Alexis Bailly Vineyard, Inc. v. Harrington*, 482 F. Supp. 3d 820, 824 (D. Minn. 2020). Under the first step of the dormant Commerce Clause's two-tier analysis, the court found this provision to be discriminatory on its face because it "expressly favors and benefits in-state economic interests— namely, in-state growers and producers of winemaking ingredients as well as wineries that use mostly in-state ingredients—while disfavoring and burdening those same economic interests outside of Minnesota." *Id.* at 827. Because the provision was discriminatory, the court then analyzed the statute under strict scrutiny. *Id.* In an attempt to justify the law, the state argued that it had an interest in promoting "an agro-tourism industry for wine growers and producers on Minnesota farm land." *Id.* at 828. The court found that even though Minnesota may have had a legitimate interest in encouraging domestic industry, the dormant Commerce Clause invalidated the provision. *Id.* In reaching this conclusion, the court stated:

> The Commissioner has neither argued nor presented evidence that out-of-state winemaking ingredients are more dangerous than in-state winemaking ingredients. And the Act itself belies any such suggestion, as the Act permits a licensed farm winery to use out-of-state ingredients so long as those ingredients do not exceed 49 percent of the final product. Moreover, the Commissioner makes no effort even to suggest that there are no reasonable nondiscriminatory alternative methods of promoting an "agro-tourism industry" for wine in Minnesota.

Id. As such, the court struck down, under the dormant Commerce Clause, the requirement that Minnesota wine makers must use a majority of ingredients grown in the state to produce wine. *Id.*

Here, the Township Ordinances impose even stricter regulations. For example, for Farm Processing Facilities to make wine, 85% of the juice that they use must come from grapes and fruit grown on Old Mission Peninsula. *See* §§ 6.7.2(19)(b)(1)(ii), 6.7.2(19)(b)(1)(iii). Because the Township Ordinances, on their face, discriminate against all out-of-state farmers, they are *per se* invalid unless these challenged sections pass strict scrutiny. *See Granholm*, 544 U.S. at 473 ("Allowing States to discriminate against out-of-state wine 'invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.'"); *Hazeltine*, 340 F.3d at 593. Thus, the Court need not move to the second tier of the dormant Commerce Clause analysis. Rather, the Township must demonstrate that these sections of the Township Ordinances survive under strict scrutiny. *See Hazeltine*, 340 F.3d at 593.

To meet its burden, Defendant must justify the Township Ordinances with a legitimate purpose and show that no other non-discriminatory means could achieve this purpose. *See id.* The Township's stated justification is:

> The intent and interests advanced by this section, at the most basic level, are in preservation of agricultural [sic] in the Township (outlined extensively above by Mr. Parsons and Mr. Hayward's testimony) and to ensure that, in these limited circumstances, distinctly non-commercial retail activity in the A-1 District is at least tied to active farming production elsewhere in that zoning district.

(ECF No. 143 at PageID.5365). Moreover, Township Supervisor Robert Manigold—whom the Township specifically identified to testify as to the governmental interests that the Township Ordinances seek to advance (ECF No. 159 at PageID.5973, 5947-48)—identified the governmental interest of "maintain[ing] the [Township's] character by keeping a strong agricultural component" (ECF No. 136-1 at PageID.4759). When Supervisor Manigold was asked whether there is a harm to this governmental interest if the Wineries purchased a percentage of their grapes outside of Peninsula Township, he answered "yes," because "[i]t takes away from the farming component on Peninsula Township" (*Id.* at PageID.4768).

Even if "the preservation of the agricultural industry and associated lands themselves" (ECF No. 143 at PageID.5373) and "maintain[ing] the [Township's] character by keeping a strong agricultural component" (ECF No. 136-1 at PageID.4759) are legitimate Township interests, (which they likely are not considering such protection of a local industry is exactly what the dormant Commerce Clause seeks to prohibit), it does not appear that the Township Ordinances actually help the Township achieve this interest. The owner of Two Lads vineyard testified that there are years where the supply of grapes on Old Mission Peninsula simply cannot meet the demand (*see* ECF No. 136-12 at PageID.4878). He testified that in some years, "there's not enough fruit" to be grown on the Peninsula, and that they cannot keep the tasting room satisfied, let alone make as much wine as they could sell (*Id.*). In

essence, it appears that the Township Ordinances' requirements regarding how much Old Mission Peninsula fruit must go into the Wineries' wine harms the Wineries—which are local agricultural businesses.[17] The Court finds that the Township has failed to meet its burden under strict scrutiny as to any section requiring the Wineries to purchase a certain percentage of product from Old Mission Peninsula farmers. Accordingly, the Court will render unlawful §§ 6.7.2(19)(a), 6.7.2(19)(b)(1)(ii), 6.7.2(19)(b)(1)(iii), 6.7.2(19)(b)(2)(i), 6.7.2(19)(b)(2)(v), 8.7.3(10)(u)(2)(e), 8.7.3(10)(u)(3), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(d) as violations of the dormant Commerce Clause.

2. Regulation of Commercial Speech[18]

Next, Plaintiffs challenge several sections of the Township Ordinances as an unlawful regulation of commercial speech. "Commercial speech" is defined as "expression related solely to the economic interests of the speaker and its audience," and as "speech proposing a commercial transaction." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 493 (1995) (Stevens, J., concurring). When laws restrict commercial speech, they "need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). This analysis is colloquially called the *Central Hudson* test. *See generally Cent. Hudson Gas & Elec. Corp. v. Pub. Serv.*

[17] Mr. Infante's comments at a public meeting further support the conclusion that these restrictions harm the Wineries' businesses:

> [There have been] [c]omments about the Wineries not wanting to buy OMP fruit anymore. That's—they're actually sort of really surprised by that. Old Mission Fruit is amazing fruit. They will buy every grape that you guys make. They can't get enough grapes from Old Mission. That's sort of the problem, there aren't enough grapes being grown for the Wineries, so they can't make as much wine as they can sell. So they will buy it if it is there.

(ECF No. 110 at PageID.4197).

[18] Sections of the Township Ordinances applicable to all Plaintiffs are challenged as unlawful regulations of commercial speech; all Plaintiffs have standing to raise the following arguments.

Comm'n, 447 U.S. 557 (1980). Under the *Central Hudson* test, if the speech concerns lawful activity and is not misleading, then the burden is on the government to (1) identify a substantial governmental interest, (2) show that the regulation directly advances that interest, and (3) show that the regulation "is not more extensive than necessary to serve that interest." *Id.* at 566.

The sections that Plaintiffs argue unconstitutionally regulate their commercial speech are as follows:[19]

- Section 6.7.2(19)(a) – applies to Farm Processing Facilities
  - Ordinance text: "Activities such as weddings, receptions and other social functions for hire are not allowed, however, participation in approved township wide events is allowed."

- Section 6.7.2(19)(b)(1)(v) – applies to Farm Processing Facilities
  - Ordinance text: "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."

- Section 6.7.2(19)(b)(6) – applies to Farm Processing Facilities
  - Ordinance text: "The total floor area above finished grade (one or two stories) of the Farm Processing Facility including retail space room shall be no larger than 6,000 square feet or .5% of the parcel size whichever is less. The retail state shall be a separate room and may be the greater of 500 square feet in area or 25% of the floor area above finished grade. The facility must consist of more than one building, however, all buildings shall be located on the 20 acre minimum parcel that contained the Farm Processing Facility. Underground buildings are not limited to, and may be in addition to, the 6,000 square feet

[19] The Court has already determined that the *Central Hudson* test applies to three of these challenged sections (*see* ECF No. 34 at PageID.1869). The Court finds that it also applies to the remainder of these sections, excluding §§ 6.7.2(19)(a) and 8.7.3(10)(u)(2)(d).

of floor area provided that it is below pre-existing ground level and has not more than one loading sock exposed."

- Section 8.7.3(10)(m) – applies to Winery-Chateaus
  - Ordinance text: "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."

- Section 8.7.3(10)(u)(1)(b) – applies to Winery-Chateaus
  - Ordinance text: "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."

- Section 8.7.3(10)(u)(1)(d) – applies to Winery-Chateaus
  - Ordinance text: "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."

- Section 8.7.3(10)(u)(2)(a) – applies to Winery-Chateaus
  - Ordinance text: "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."

- Section 8.7.3(10)(u)(2)(d) – applies to Winery-Chateaus
  - Ordinance text: "Guest Activity Uses do not include entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass."

- Section 8.7.3(10)(u)(5)(c) – applies to Winery-Chateaus
  - Ordinance text: "No alcoholic beverages, except those produced on the site, are allowed with Guest Activity Uses."

- Section 8.7.3(10)(u)(5)(g) – applies to Winery-Chateaus
  - Ordinance text: "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."

- Section 8.7.3(10)(u)(5)(h) – applies to Winery-Chateaus
    - Ordinance text: "No outdoor displays of merchandise, equipment or signs are allowed."

- Section 8.7.3(12)(i) – applies to Remote Winery Tasting Rooms
    - Ordinance text: "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."

- Section 8.7.3(12)(k) – applies to Remote Winery Tasting Rooms
    - Ordinance text: "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."

At the outset, the Township questions whether weddings and other similar types of large gatherings constitute "commercial speech" (*see* ECF No. 143 at PageID.5373-74). Presumably then, the Township argues that the *Central Hudson* test cannot apply to §§ 6.7.2(19)(a) and 8.7.3(10)(u)(2)(d), which prohibit Farm Processing Facilities and Winery-Chateaus from hosting weddings, family reunions, and other social functions. The Township has not argued that the *Central Hudson* test does not apply to any of the other sections listed above. Accordingly, the Township has conceded that the *Central Hudson* test is applicable in determining if the remaining sections constitute unlawful violations of commercial speech.

As for whether weddings and other similar activities constitute commercial speech, the Court agrees with the Township that the prohibition of these types of events does not constitute a regulation of commercial speech under the First Amendment because weddings themselves are not speech intended to promote a commercial transaction. Plaintiffs identify

two Ninth Circuit cases that held that weddings are protected expression under the First Amendment, but neither identifies weddings as *commercial* speech. *See Epona v. Cty. of Ventura*, 876 F.3d 1214 (9th Cir. 2017); *Kaahumanu v. Hawaii*, 682 F.3d 789 (9th Cir. 2012). Nevertheless, in her deposition, the Township's Director of Zoning, Christina Deeren, conceded that the Township has likely been improperly restricting the Wineries from hosting weddings, family reunions, etc. (*see* ECF No. 136-6 at PageID.4819). As explained below in Section V.A.7, the Wineries will be granted summary judgment as to any section of the Township Ordinances that prohibits the hosting of weddings and other similar social gatherings, given the Township's concessions.

Excluding §§ 6.7.2(19)(a) and 8.7.3(10)(u)(2)(d), the Court will apply the *Central Hudson* test to the remaining eleven sections of the Township Ordinances that the Wineries challenge as unlawful regulations of commercial speech. Under this test, the burden is on the Township to justify the sections of the Ordinances that restrict commercial speech with a substantial government interest. *See Cent. Hudson*, 447 U.S. at 566. The Court finds that the Township has failed to meet its burden.

In response to Plaintiffs' motion for summary judgment, the Township completely ignored the *Central Hudson* test (*see* ECF No. 143 at PageID.5373-75), and in its own motion for summary judgment, the Township's analysis of the *Central Hudson* test was limited to about two pages (*see* ECF No. 142 at PageID.4983-85). The Township's alleged justification for these sections of the Ordinances is to (1) preserve the agricultural industry and provide permanent land for this industry, (2) maintain the township's agricultural character, (3) provide economically feasible public sewer and water systems, and (4) establish

a "complete buildout population scenario," and permit the vertical integration of agricultural production without changing the agriculturally zoned lands of the township to commercial property inconsistent with the use of those respective districts. (*Id.* at PageID.4982-83). In a nutshell, these stated interests are "to preserve the agricultural environment in the Agricultural district of the Township" (*Id.* at PageID.4984).

Even assuming that the preservation and maintenance of the agricultural environment of Peninsula Township is indeed a substantial Township interest, the Township has failed to establish that the Township Ordinances (1) directly advance that interest, and (2) are narrowly tailored using the least-restrictive means. Not only does the Township's motion completely fail to address the last two prongs of the *Central Hudson* test, but Supervisor Manigold's deposition also confirms that these challenged sections of the Township Ordinances likely do not advance the stated interests, and that the Township never considered less-restrictive means:

> Q. Okay. So if we're talking about logoed items, how does limiting the sale of merchandise to logoed items that relate to fresh or processed agriculture, how does that further one of these four governmental interests?
>
> A. I don't know.
>
> Q. Okay. And if you don't know how it furthers it, I mean, do you know what the harm is the government was trying to prevent by having this ordinance?
>
> A. No.
>
> Q. Okay. And do you know if the government considered less-restrictive means?
>
> A. Whatever we considered is in that document.
>
> Q. In the ordinance?

A. Mmm-hmm.

Q. So there's nothing else that says, "We considered these four other ordinances and we rejected those?"

A. I'm unaware of that.

Q. Okay. Is the Township still enforcing this ordinance?

A. Yes.

Q. And at the end it says: Specifically not allowed are unrelated ancillary merchandise such as clothing, coffee cups, bumper stickers.
Okay, how does prohibiting clothing, coffee cups, and bumper stickers, how does that further a governmental interest?

A. I can tell you, at the time there was a concern if we were going to get this passed that it not turn agricultural into commercial uses. So I'm guessing, my guess is that's what that's in there for.

Q. Okay, but that wasn't one of the four governmental interests the Township has identified, right? So how does it fit into one of these four governmental interest that you—

A. Don't know.

Q. And what is the harm, what is the harm if a farm processing facility sells a logoed T-shirt? What's the harm to the governmental interest?

A. Don't know.

Q. I'm assuming you don't know if there were any less-restrictive means considered?

A. Not that I recall.

(*Deposition of Robert Manigold*, ECF No. 136-1 at PageID.4770).

Given the Township's admissions, the Court finds that the Township Ordinances do not directly advance the four governmental interests that the Township has identified (ECF

No. 142 at PageID.4982-83). Moreover, the Township admits that it did not consider less-restrictive means when drafting these sections of the Township Ordinances that unquestionably regulate commercial speech. Therefore, the Township has failed to meet its burden under the *Central Hudson* test, and the Wineries are entitled to summary judgment on their commercial speech claim as to §§ 6.7.2(19)(b)(1)(v), 6.7.2(19)(b)(6), 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(5)(c), 8.7.3(10)(u)(5)(g), 8.7.3(10)(u)(5)(h), 8.7.3(12)(i), and 8.7.3(12)(k). Plaintiffs' summary judgment motion on their commercial speech claim as to §§ 6.7.2(19)(a) and 8.7.3(10)(u)(2)(d) is denied.

3. Content-Based Restrictions on Speech[20]

Next, Plaintiffs argue that certain sections of the Ordinances act as content-based restrictions on speech, that the Township cannot carry its burden under strict scrutiny, and that these sections should consequently be struck down.

Plaintiffs argue that the following sections are content-based restrictions:

- Section 8.7.3(10)(u)(1)(b) – applies to Winery-Chateaus
    - Ordinance text: "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."

- Section 8.7.3(10)(u)(2)(b) – applies to Winery-Chateaus
    - Ordinance text: "Meetings of 501(c)(3) non-profit groups within Grand Traverse County. These activities are not intended to resemble a bar or restaurant use and therefore full course meals are not allowed, however light lunch or buffet may be served."

[20] Only sections of the Township Ordinances applicable to Winery-Chateaus are challenged as content-based regulations of speech. Thus, only Plaintiffs Bowers Harbor, Brys Estate, Grand Traverse, Chateau Chantal, Bonobo, Villa Mari, and Hawthorne (through its joint venture and lease agreement with Chateau Chantal) have standing the raise the following arguments.

- Section 8.7.3(10)(u)(2)(c) – applies to Winery-Chateaus
  - Ordinance text: "Meetings of Agricultural Related Groups that have a direct relationship to agricultural production [may be approved], provided that:
    i. The meetings are scheduled at least one month in advance with the Zoning Administrator given adequate advance notice of the scheduling so that the Zoning Administrator can give prior approval;
    ii. The Zoning Administrator shall use the following types of Agricultural Related Groups as a guide for determining 'direct relationship to agricultural production';
      (a) Food/wine educational demonstrations; (b) Cooking showcasing Peninsula produce and wine; (c) Farmer's conferences; (d) Regional farm producers; (e) Cherry Marketing Institute and Wine Industry Conference (f) Farm Bureau Conference (g) Future Farmers of America and 4-H; (h) Michigan State University/agricultural industry seminars.
    iii. These meetings may include full course meals to demonstrate connections between wine and other foods.
    iv. An appeal of the Zoning Administrators determination can be made to the Township Board."

- Section 8.7.3(10)(u)(5)(a) – applies to Winery-Chateaus
  - Ordinance text: "Requirements for Guest Activity Uses –
    (a) All Guest Activity Uses shall include Agricultural Production Promotion as part of the activity as follows:
      i. Identify 'Peninsula Produced' food or beverage that is consumed by the attendees;
      ii. Provide 'Peninsula Agriculture' promotional materials;
      iii. Include tours through the winery and/or other Peninsula agricultural locations."

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). The Wineries argue that the four sections above are content-based restrictions because they *only* apply to the Wineries, not golf courses, country clubs, bed & breakfasts, and other special uses that also take place in agricultural zones. Because those facilities—unlike Winery-Chateaus—do not have any restrictions on what merchandise can be

sold, what events can be held, and what food/alcohol can be served, Plaintiffs argue that these restrictions are content-based because they "depend on a Winery being the speaker" (ECF No. 136 at PageID.4736).

This argument misconstrues the definition of "content-based." Content-based speech targets a certain type of speech based on its message or content, not who conveys that message or content. For example, in *Reed*, a regulation that prohibited the display of outdoor signs without a permit but exempted 23 categories of signs, including "ideological signs," "political signs," and "temporal directional signs," was an unconstitutional content-based regulation of speech because the regulation depended "entirely on the communicative content of the sign." 576 U.S. at 159-60, 164. In *Reed*, who was communicating this content was irrelevant; rather, it was the content itself that was regulated. Applying this definition to the present matter, the Township Ordinances do not prohibit certain content. Instead, they place regulations on the Wineries during certain activities. Accordingly, Plaintiffs' motion for summary judgment as to their content-based regulation of speech claim will be denied.

4. Prior Restraints[21]

Plaintiffs argue that the following sections are unlawful prior restraints on speech, and that again, the Township cannot carry its burden under strict scrutiny:

- Section 6.7.2(19)(b)(6) – applies to Farm Processing Facilities
    - Ordinance text: "The total floor area above finished grade (one or two stories) of the Farm Processing Facility including retail space room shall be no larger than 6,000 square feet or .5% of the parcel size whichever is less. The retail state shall be a separate room and may be the greater of 500 square feet in area

[21] Only sections of the Township Ordinances applicable to Farm Processing Facilities and Winery-Chateaus are challenged as an unlawful prior restraint on speech. Thus, only Plaintiffs Black Star, Two Lads, Tabone, Bowers Harbor, Brys Estate, Grand Traverse, Chateau Chantal, Bonobo, Villa Mari, and Hawthorne (through its joint venture and lease agreement with Chateau Chantal) have standing the raise the following arguments.

or 25% of the floor area above finished grade. The facility must consist of more than one building, however, all buildings shall be located on the 20 acre minimum parcel that contained the Farm Processing Facility. Underground buildings are not limited to, and may be in addition to, the 6,000 square feet of floor area provided that it is below pre-existing ground level and has not more than one loading sock exposed."

- Section 8.7.3(10)(u)(2)(a) – applies to Winery-Chateaus
  - Ordinance text: "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."

- Section 8.7.3(10)(u)(2)(b) – applies to Winery-Chateaus
  - Ordinance text: "Meetings of 501(c)(3) non-profit groups within Grand Traverse County. These activities are not intended to resemble a bar or restaurant use and therefore full course meals are not allowed, however light lunch or buffet may be served."

- Section 8.7.3(10)(u)(2)(c) – applies to Winery-Chateaus
  - Ordinance text: "Meetings of Agricultural Related Groups that have a direct relationship to agricultural production [may be approved], provided that:
    i. The meetings are scheduled at least one month in advance with the Zoning Administrator given adequate advance notice of the scheduling so that the Zoning Administrator can give prior approval;
    ii. The Zoning Administrator shall use the following types of Agricultural Related Groups as a guide for determining 'direct relationship to agricultural production';
      (a) Food/wine educational demonstrations; (b) Cooking showcasing Peninsula produce and wine; (c) Farmer's conferences; (d) Regional farm producers; (e) Cherry Marketing Institute and Wine Industry Conference (f) Farm Bureau Conference (g) Future Farmers of America and 4-H; (h) Michigan State University/agricultural industry seminars.
    iii. These meetings may include full course meals to demonstrate connections between wine and other foods.
    iv. An appeal of the Zoning Administrators determination can be made to the Township Board."

"The term 'prior restraint' describes administrative and judicial orders that block expressive activity before it can occur." *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 506 (6th Cir. 2001). There is a "heavy presumption" against the

constitutional validity of prior restraints. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). If a licensing statute places "unbridled discretion in the hands of a government official or agency, [it] constitutes a prior restraint and may result in censorship." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988). The elements of a prior restraint are: (1) one who seeks to exercise First Amendment rights is required to apply to the government for permission; (2) the government is empowered to determine whether the applicant should be granted permission on the basis of a review of the content of the proposed expression; (3) approval is dependent upon the government's affirmative action; and (4) approval is not a routine matter, but involves an examination of the facts, an exercise of judgment, and the formation of an opinion. *See Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940).

Pursuant to the three sections above applicable to Winery-Chateaus, Winery-Chateaus cannot host wine and food seminars, cooking classes, meetings of 501(c)(3) non-profit groups, and meetings of agriculture-related groups without the prior approval from the Director of Zoning. Moreover, before Plaintiffs can host a "Guest Activity," the Director of Zoning must approve the event. According to Director Deeren, such activities must be "agriculturally related" (ECF No. 136 at PageID.4742-43). Director Deeren determines whether an activity is "agriculturally related" based on what information the winery-host provides (*Id.* at PageID.4743). There does not appear to be any definite criteria or definition to determine what type of activity is "agriculturally related." Instead, Director Deeren makes that determination, and she has regularly denied many events, such as Yoga in the Vines, Painting in the Vines, and snow shoeing (*Id.*).

It appears that Director Deeren can exercise unfettered discretion when choosing whether or not to allow a Winery to host a Guest Activity. The Township Ordinances fail to define "agriculturally related," leaving room for Director Deeren to make that determination. Plaintiffs have provided multiple examples where they have applied to host a certain Guest Activity and Director Deeren has denied their application to do so (*Id.* at PageID.4743-44). The Court originally denied Plaintiffs' motion for a preliminary injunction on their prior restraint claim because "Plaintiffs have provided no proof that approval is not a routine matter, instead pointing only to the discretion provided to the Board by the Ordinance" (ECF No. 34 at PageID.1871). Now that discovery is completed, Plaintiffs provide Director Deeren's statements in her deposition, as well as correspondence between different Wineries and Township representatives showing the Township denying a Winery's request to host a Guest Activity (*see* ECF Nos. 136-6, 136-14, 136-15, 136-16, 136-17).

The Court holds that Plaintiffs have demonstrated the necessary elements to show that §§ 8.7.3(10)(u)(2)(a)–(c) of the Township Ordinances constitute an unlawful prior restraint. In the Township's motion for summary judgment,[22] it asserts that

> §§ 8.7.3(10)(u)(2)(a) through (d) are content-neutral and permit the Plaintiffs to associate with organizations, groups, as well as advertise, sell items, etc. in a manner not entirely in control of the Township. These location-specific (A-1 District) and narrowly tailored provisions are not prior restraints because they merely place minimal conditions on these activities—they are not entirely precluded as the standard. This is not a prior restraint; they are conditional approvals.

[22] The Township makes no attempt to carry its burden under strict scrutiny in its response to the Plaintiffs' motion (*see* ECF No. 143 at PageID.5376-77).

(ECF No. 142 at PageID.4986). This meager argument is not enough to carry the Township's burden under strict scrutiny. Not only does the Township fail to explain how these sections are narrowly tailored (it simply makes that conclusion), but the Township also provided no evidence in support of its statement that these events are not entirely precluded. Plaintiffs provided multiple examples of events that they were prohibited from holding, while the Township did not provide examples of any events it permitted Plaintiffs to hold.

Plaintiffs will be granted summary judgment as to their prior restraint claim regarding §§ 8.7.3(10)(u)(2)(a)–(c). Because Plaintiffs' motion contains no argument regarding § 6.7.2(19)(b)(6) as a prior restraint, and the motion merely makes such a conclusion (*see* ECF No. 136-9 at PageID.4852), there is still a genuine issue of material fact as to whether § 6.7.2(19)(b)(6) acts as a prior restraint of speech. Accordingly, Plaintiffs' motion for summary judgment on their prior restraint claim will be granted as to §§ 8.7.3(10)(u)(2)(a)–(c), and it will be denied as to § 6.7.2(19)(b)(6).

5. Compelling Speech[23]

Next, Plaintiffs argue that the following sections unlawfully compel speech and that the Township has failed to carry its burden under strict scrutiny:

- Section 8.7.3(10)(u)(1)(b) – applies to Winery-Chateaus
    - Ordinance text: "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."

[23] Only sections of the Township Ordinances applicable to Winery-Chateaus are challenged for unlawfully compelling speech. Thus, only Plaintiffs Bowers Harbor, Brys Estate, Grand Traverse, Chateau Chantal, Bonobo, Villa Mari, and Hawthorne (through its joint venture and lease agreement with Chateau Chantal) have standing the raise the following arguments.

- Section 8.7.3(10)(u)(5)(a) – applies to Winery-Chateaus
    - Ordinance text: "Requirements for Guest Activity Uses -
        (a) All Guest Activity Uses shall include Agricultural Production Promotion as part of the activity as follows:
            i. Identify 'Peninsula Produced' food or beverage that is consumed by the attendees;
            ii. Provide 'Peninsula Agriculture' promotional materials;
            iii. Include tours through the winery and/or other Peninsula agricultural locations."

"Laws that compel speakers to utter or distribute speech bearing a particular message are subject to . . . rigorous [strict] scrutiny." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Plaintiffs argue that the above two sections compel speech because they require a Winery-Chateau to promote Township agriculture at all Guest Activities by doing one of the following: (1) identifying "Peninsula Produced" food or beverages, (2) providing "Peninsula Agriculture" promotional materials, or (3) including tours through the wineries or other agricultural locations. In denying Plaintiffs' motion for a preliminary injunction, the Court found that these sections of the Township Ordinances merely clarify the intent of Guest Activity Uses, but that they did not mandate—in violation of the First Amendment—Plaintiffs to take these actions during a Guest Activity Use (ECF No. 34 at PageID.1870). However, during Director Deeren's deposition, she explained that when hosting a Guest Activity, the winery-host is not required to comply with all three of the criteria, but they *must* comply with at least one criterion in order to host the activity (*see* ECF No. 136 at PageID.4745). Because the Township requires the Wineries to comply with at least one of the above three criterion when they host a Guest Activity, these sections do function as a mandate, and in turn, do compel speech.

The Court will grant Plaintiffs' summary judgment motion as to their compelling speech claim because again, the Township failed to carry its burden under strict scrutiny. In its response to Plaintiffs' motion for summary judgment, the Township failed altogether to raise an argument that these sections do not compel speech (*see* ECF No. 143). In its own motion for summary judgment, the Township argues, in six sentences, that these sections do not compel speech because these provisions describe the Township Ordinances' intent rather than mandate speech (ECF No. 142 at PageID.4986) ("[T]his provision *only* states an intent, not a requirement compelling anyone to do anything."). However, after discovery, Plaintiffs' motion demonstrates that the Township is indeed enforcing these sections as a mandate, and as such, the Township has failed to meet its burden.

Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) unlawfully compel speech in violation of the First Amendment, and Plaintiffs' summary judgment motion will be granted as to their compelling speech claim.

6. Vagueness of "Guest Activity" in Violation of the Due Process Clause[24]

The term "Guest Activity" is used numerous times throughout § 8.7.3(10) of the Township Ordinances, which is applicable to Winery-Chateaus. When a Winery-Chateau is hosting a "Guest Activity," they are subject to additional restrictions. *See, e.g.*, § 8.7.3(10)(u)(2)(e) (prohibiting food service during Guest Activity Uses); § 8.7.3(10)(u)(5)(b) ("Hours of operation for Guest Activity Uses shall be determined by the Town Board, but

[24] Only sections of the Township Ordinances applicable to Winery-Chateaus are challenged under the Due Process Clause. Thus, only Plaintiffs Bowers Harbor, Brys Estate, Grand Traverse, Chateau Chantal, Bonobo, Villa Mari, and Hawthorne (through its joint venture and lease agreement with Chateau Chantal) have standing the raise the following arguments.

no later than 9:30 PM daily."); § 8.7.3(10)(u)(5)(g) (prohibiting "amplified instrumental music" during Guest Activity Uses). Plaintiffs argue that the term "Guest Activity" is void for vagueness in violation of the Due Process Clause.

"[L]aws so vague that a person of common understanding cannot know what is forbidden are unconstitutional on their face." *Coates v. City of Cincinnati*, 402 U.S. 611, 616 (1971) (invalidating a city ordinance that made it a criminal offense for people on sidewalks to "conduct themselves in a manner annoying to persons passing by"). The question of whether a law is void for vagueness rests on whether its prohibitions are clearly defined. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-14 (1972) (upholding an "antipicketing" and "antinoise" ordinance because it was "clear what the ordinance as a whole prohibits").

Section 8.7.3(10)(u) defines "Guest Activity Uses" as "Activities by persons who may or may not be registered guests." Section 8.7.3(10)(u)(2) then gives examples of Guest Activity Uses that "may be approved" by the Township Board: wine and food seminars, cooking classes, meetings of 501(c)(3) non-profit groups, and meetings of agriculture groups. However, this language is ambiguous as to whether these activities are the *only* permitted Guest Activity Uses (subject to approval by the Board) or whether they are merely examples.

During their depositions, different Township representatives appeared to have differing definitions of "Guest Activity" (*compare Deposition of Christina Deeren*, ECF No. 136-6 at PageID.4812) (concluding that a Guest Activity is "limited to persons who are renting a lodging room"), (*with Deposition of Gordon Hayward*, ECF No. 136-5 at PageID.4805) (concluding that a Guest Activity is "an activity allowed under the winery-chateau site for persons who are not staying overnight"). Moreover, Supervisor Manigold

admitted that he did not know what "Guest Activity" means, and he stated that he felt the entirety of § 8.7.3(10) must be rewritten (*See Deposition of Robert Manigold*, ECF No. 136-1 at PageID.4773).

Based on multiple Township representatives' depositions, there appears to be clear confusion as to what constitutes a "Guest Activity," and consequently, whether Winery-Chateaus may host certain activities and what regulations are applicable during different activities. The Township has represented that weddings, wedding receptions, entertainment events, and family reunions are not Guest Activities for which a Winery-Chateau needs Township approval, but that wine pairings, vineyard tours, painting classes, and happy hours are Guest Activities that require prior Township approval (*see* ECF No. 136 at PageID.4750). What types of activities require prior approval and what types of activities do not is certainly confusing and this determination is important, given that "violations will not be tolerated" and "court enforcement action" will be taken in the event of a violation (ECF No. 136-23 at PageID.4928).

In response, the Township asserts that multiple Winery representatives have testified that they understand what the term "Guest Activity Use" means, and that one Winery owner initially helped draft § 8.7.3(10) of the Township Ordinances (*see* ECF No. 143 at PageID.5377). Moreover, the Township cites the Court's order denying Plaintiffs' motion for a preliminary injunction, where the Court found that the provision defining Guest Activity Uses "makes it plain" what types of activities are permitted (ECF No. 34 at PageID.1874).

However, if the Township had quoted the entirety of the Court's preliminary injunction order, it would have noted that the Court found that "this subsection makes it

plain that wine or food seminars, meetings of 501(C)(3) groups, and meetings of agricultural related groups are permitted; all other events are not" (*Id.*).[25] But after discovery, it is clear that these three activities are not the *only* permitted Guest Activity Uses (*see Deposition of Christina Deeren,* ECF No. 136-6 at PageID.4819). Given the Township's understanding of (or lack thereof) the term, it is entirely ambiguous.

Further, even if the Plaintiffs think they understand the term "Guest Activity," what is important is how *the Township* understands and enforces the term. And if the Township is enforcing varying meanings of the term, it is certainly vague. The Court finds 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 and Plaintiffs' motion will be granted as to this claim. Therefore, any subsection of § 8.7.3(10) that uses the term "Guest Activity," is unconstitutional and must be stricken from the Township Ordinances.

7. Weddings & Hours of Operation[26]

Lastly, Plaintiffs contend that, based on Township representatives' answers during depositions, the Township conceded that the Wineries may indeed host weddings, receptions, family reunions, and other similar gatherings, and that there is no explicit closing time for non-Guest-Activity-Uses (*see* ECF No. 136 at PageID.4751-52).

[25] At this stage in this litigation, this Court's "determinations at the preliminary-injunction stage have no preclusive effect upon its determinations at the merits stage regarding [a motion for summary judgment]." *Resurrection Sch. v. Hertel*, -- F.4th --, 2022 WL 1656719, at *21 (6th Cir. May 25, 2022) (Bush, J., dissenting).

[26] Only Winery-Chateaus—Plaintiffs Bowers Harbor, Brys Estate, Grand Traverse, Chateau Chantal, Bonobo, Villa Mari, and Hawthorne (through its joint venture and lease agreement with Chateau Chantal)—have standing to challenge the wedding prohibition under § 8.7.3(10)(u)(2)(d) and the hours restriction under § 8.7.3(10)(u)(5)(b). Only Farm Processing Facilities—Plaintiffs Black Star, Two Lads, and Tabone—have standing to challenge the wedding prohibition under § 6.7.2(19)(a).

In regard to the prohibition on Farm Processing Facilities and Winery-Chateaus from hosting weddings and other gatherings in §§ 6.7.2(19)(a) and 8.7.3(10)(u)(2)(d), the Township has admitted that the Wineries do not need prior approval before hosting such events:

> Q. [W]e've established that under 2(d), entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass are not guest activity uses, correct?
>
> A. Yes.
>
> Q. Okay. So then my follow-up question to that is, because they are not guest activity uses, winery-chateaus do not need your approval, as the director of zoning, to engage in entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass, correct?
>
> A. Yes.

(ECF No. 136-6 at PageID.4819).

As to the restriction on hours of operation in § 8.7.3(10)(u)(5)(b)—which applies *only* to Winery-Chateaus during Guest Activity Uses—Supervisor Manigold explained that he "infers" this restriction to apply to all Wineries during all activities. He stated that even though the Township Ordinances do not require Winery-Chateaus to close at 9:30 p.m. during non-Guest-Activity-Uses, he believes the 9:30 closing time is "inferred" as applicable to every activity and Winery, and he enforces it as such (ECF No. 136-1 at PageID.4779). In other words, the language of § 8.7.3(10)(u)(5)(b) only requires Winery-Chateaus to close at 9:30 p.m. during Guest Activity Uses, yet the Township enforces the 9:30 p.m. closing time for *all* business at *all* Wineries.

Plaintiffs argue that based on the Township's concessions regarding weddings and enforcement of a closing-time requirement that is not written into the Township Ordinances, they should be granted summary judgment on these issues. The Township failed to respond to this argument all together. Neither the Township's response to Plaintiffs' motion for summary judgment nor the Township's own motion for summary judgment discusses Plaintiffs' wedding/closing-time argument or the Township's concessions. As such, the Township has conceded these issues. *See Hicks v. Concorde Career Coll.*, 449 F. App'x 484, 487 (6th Cir. 2011). Accordingly, Plaintiffs' motion for summary judgment will be granted as to §§ 6.7.2(19)(a) and 8.7.3(10)(u)(2)(d), which prohibit the hosting of large gatherings such as weddings, and § 8.7.3(10)(u)(5)(b), which establishes the 9:30 p.m. closing time. Moreover, the Township is prohibited from enforcing such restrictions on any Plaintiff.

B. Defendant's Motion for Summary Judgment (ECF No. 142)

1. Laches

Before addressing its substantive arguments, the Township asserts that it is entitled to summary judgment on all claims because Plaintiffs' claims are barred by the affirmative defense of laches. The Township notes that the most recent Ordinance was enacted almost twenty years ago, and the oldest challenged Ordinance was enacted over thirty years ago (ECF No. 142 at PageID.4980).

"A party asserting laches must show: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting it." *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 493 (6th Cir. 2007). The defense of laches is assessed on a case-by-case basis: "Whether the party confronted with a laches defense has been

sufficiently diligent is a fact-dependent inquiry. In other words, how quickly a party must seek judicial review of a challenged statute or state action depends on all the circumstances." *Mich. Chamber of Commerce v. Land*, 725 F. Supp. 2d 665, 681 (W.D. Mich. 2010).

The Township argues that laches applies because the Wineries are challenging the Township Ordinances decades after their enactment, and due to this delay "certain individuals"—many people involved in requesting, considering, and drafting the Ordinances—are no longer available, which is prejudicial to the Township (ECF No. 142 at PageID.4981).

Although the Township may be able to meet the first element of laches (delay), it has failed to established evidence of the second element (prejudice). The Township has not named any essential individuals who are "no longer present," and this argument is undermined considering the Township asserts that the Wineries' owners have helped craft the Ordinances. Moreover, the Wineries assert that they have "been trying for decades" to change the Township Ordinances, and when it was clear that negotiation was unsuccessful, the Wineries brought this lawsuit (*see* ECF No. 136 at PageID.4719). The Wineries also claim that five of the Plaintiff-Wineries were established within the last eight years, and some of the older Wineries have recently been passed down to a second generation (ECF No. 146 at PageID.5728), which would explain their more recent challenges to the Township Ordinances and refute any Township claim as to lack of diligence by the Wineries.[27]

[27] The Wineries also argue that laches does not apply to Constitutional claims, but that argument does not hold water. *See United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 9 (2008) ("[A] constitutional claim can become time-barred just as any other claim can."); *MI Chamber of Commerce*, 725 F. Supp. 2d at 680 (applying a laches analysis to federal constitutional claims).

Given that the Township has not shown that it is prejudiced by the Wineries' delay in bringing this suit, the Court finds that the Township has failed to meet its burden in proving the affirmative defense of laches.

2. Commercial Speech

The Township has moved for summary judgment as to §§ 6.7.2(19)(b)(1)(v), 8.7.3(12)(i), and 8.7.3(12)(k), arguing that these sections of the Township Ordinances do not constitute unlawful regulations of commercial speech (ECF No. 142 at PageID.4981). For the reasons explained above in Section V.A.2, the Township has failed to meet its burden under the *Central Hudson* test as to these three sections, as well as the eight other sections that Plaintiffs challenge under their commercial speech argument. As such, the Township's motion for summary judgment on the commercial speech claims will be denied.

3. Prior Restraints

Defendant next argues that §§ 8.7.3(10)(u)(2)(a)–(d) are merely "conditional approvals," and thus do not act as prior restraints (ECF No. 142 at PageID.49486). For the reasons stated above in Section V.A.4, the Court finds that §§ 8.7.3(10)(u)(2)(a)–(c) are indeed unlawful prior restraints on speech; Defendant's motion for summary judgment on the prior restraint claim as to these sections will be denied. In regard to § 8.7.3(10)(u)(2)(d), the Court need not determine whether this section functions as an unlawful prior restraint because the Court has already struck this unlawful section. *See supra*, Section V.A.7.[28]

[28] Defendant somewhat intertwines a "content-based" argument in the section of its motion regarding prior restraints: "§§ 8.7.3(10)(u)(2)(a) through (d) are content-neutral and permit the Plaintiffs to associate with organizations, groups, as well as advertise, sell items, etc. in a manner not entirely in control of the Township" (ECF No. 142 at PageID.4986). However, it does not appear that Defendant has moved for summary judgment premised on a "content-based" argument. As the Court explained above in Section V.A.3, Plaintiffs are not entitled to summary judgment on their content-based

4. Compelling Speech

The Township only moves for summary judgment on the compelling speech claim as to one section of the Township Ordinances: § 8.7.3(10)(u)(1)(b) (ECF No. 142 at PageID.4986). For the reasons stated above in Section V.A.5, the Township has failed to carry its burden under strict scrutiny for this argument. The Township's motion for summary judgment will be denied as to the compelling speech claim.

5. Freedom of Association/Freedom of Religion

The Township requests dismissal of Plaintiffs' freedom of association/freedom of religion claim because "Plaintiffs have not requested summary judgment for the same and appear to have abandoned it" (ECF No. 142 at PageID.4987). However, as Plaintiffs point out, choosing not to move for summary judgment on a claim does not mean that they have abandoned it (ECF No. 145 at PageID.5645). Rather, Plaintiffs presumably seek to litigate this claim at trial. A motion for summary judgment is a discretionary motion. *See* Fed. R. Civ. P. 56(a) ("A party *may* move for summary judgment. . . ."). Because neither party's summary judgment motion properly developed an argument on this claim, neither party will receive a judgment as a matter of law as to the freedom of association/freedom of religion claim.[29] The Township's summary judgment motion as to this claim will be denied, and the claim will not be dismissed.

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regulation of speech argument, but due to Defendant's failure to move for summary judgment on this argument, Defendant is also not entitled to summary judgment on the content-based regulation of speech claim.

[29] The Wineries ask for summary judgment on this claim in their response to Defendant's motion for summary judgment (ECF No. 146 at PageID.5744), but the Court will not consider this request, which has been raised for the first time in a response to a motion. *See Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008).

6. Commerce Clause & Dormant Commerce Clause

Next, the Township seeks summary judgment as to §§ 8.7.3(10)(u)(2)(b)–(c), 8.7.3(10)(u)(2)(e), 8.7.3(10)(u)(3), and 6.7.2(19)(b), arguing that these sections do not violate the Commerce Clause because they do not discriminate against or create an excessive burden on interstate commerce (ECF No. 142 at PageID.4987). For the reasons stated above in Section V.A.1, the Court finds that these sections of the Township Ordinances violate the dormant Commerce Clause. Defendant's motion for summary judgment as to the Commerce Clause claim will thus be denied.

7. Due Process

The Township also seeks summary judgment as to Count IV, which alleges that the term "Guest Activity," used several times throughout § 8.7.3(10), is vague in violation of the Due Process Clause. For the reasons stated above in Section V.A.6, the Court holds that the term "Guest Activity" is indeed unconstitutionally vague. Thus, Defendant's summary judgment motion as to this claim will be denied.

8. Regulatory Taking

Defendants next seek summary judgment on Count VII of Plaintiffs' first amended complaint, which alleges that the Township Ordinances "deprive Plaintiffs of the full use of their property," constituting a regulatory taking (ECF No. 29 at PageID.1124). The Fifth Amendment's Takings Clause protects private citizens from the government taking their property "for public use, without just compensation." U.S. Const. amend. V. There are several different types of takings: (1) a *per se* taking via a physical invasion, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); (2) a regulatory taking where

a regulation denies a property owner full use of their property, *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); and (3) takings where a regulation denies all economically beneficial or productive use of land, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

At issue here is a regulatory taking where the Township Ordinances deny Plaintiffs the full benefit of their land. Accordingly, the Court must address the *Penn Central* factors to determine if the Ordinances constitute a regulatory taking. These factors include: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectation, and (3) the character of the governmental action. *See Penn Central*, 438 U.S. at 124.

Defendant's motion fails to address the *Penn Central* factors. Instead, it focuses its discussion on the fact that the Wineries have not been denied *all* economically beneficial and productive uses of their land (*see* ECF No. 142 at PageID.4995). This contention is indeed correct because presumably, the Wineries operate businesses that generate revenue. However, under the *Penn Central* factors, 100% economic deprivation is not required to find a regulatory taking. Rather, the Court must simply assess the "economic impact" of the regulation. Because the Township's motion fails to do so, the Court will deny the Township summary judgment as to this claim.

In response, Plaintiffs—without moving for summary judgment as to this claim in their own summary judgment motion—now seek summary judgment on their Count VII Takings Clause claim. In support, they argue that their "economic expert" has estimated that over the last five years, the Wineries have lost at least $200 million in profits due to the Township

Ordinances (ECF No. 146 at PageID.5747). However, they provide no evidentiary support for this number. Moreover, it is procedurally improper for the Wineries to seek summary judgment in a response to the Township's motion for summary judgment. *See Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008). As such, neither party will receive summary judgment as to the Takings Clause claim.

9. Michigan Zoning Enabling Act

Next, Defendant seeks summary judgment on Count IX of Plaintiffs' first amended complaint, which alleges that the Township Ordinances "do not promote public health, safety, and welfare" (ECF No. 29 at PageID.1127) in violation of the Michigan Zoning Enabling Act ("MZEA"). *See* Mich. Comp. Laws § 125.3101, *et seq.* Defendant argues that the Township Ordinances do not violate the MZEA because they "are not unconstitutional nor are they contrary to law" (ECF No. 142 at PageID.4998) Under Michigan law, local townships may establish zoning regulations and "adopt ordinances regulating the public health, safety, and general welfare of persons and property." Mich. Comp. Laws § 41.181. More specifically,

> A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare.

Mich. Comp. Laws § 125.3201(1). Although zoning ordinances are generally presumed valid, *see Kirk v. Tyrone Twp.*, 247 N.W.2d 848, 852 (Mich. 1976), they cannot be unconstitutional or contrary to law, *see Adams Outdoor Advert. v. City of Holland*, 600 N.W.2d 339, 344 (Mich. Ct. App. 1999). Because of this presumption of validity, the burden of proof is on the party challenging the zoning ordinance. *Id.* at 345.

Plaintiffs have not moved for summary judgment on this claim. Instead, in their response to the Township's motion for summary judgment, they note that their MZEA claim rises and falls with their constitutional/preemption arguments (ECF No. 146 at PageID.5748). In other words, whatever sections that the Court ultimately determines are unconstitutional will also violate the MZEA, and vice versa. *See Crossroads Outdoor LLC v. Green Oak Charter Twp.*, No. 18-cv-11368, 2019 WL 1326641, at *12 (E.D. Mich. Mar. 25, 2019) (declining to dismiss the plaintiff's MZEA claim because a constitutional claim was still pending). This contention aligns with Defendant's argument that it is entitled to summary judgment on the MZEA claim because "the Ordinances at issue are not unconstitutional nor are they contrary to law" (ECF No. 142 at PageID.4998). Because the Court has determined that numerous sections of the Township Ordinances are unconstitutional, and in turn, they also violate the MZEA, Defendant cannot be granted summary judgment on this claim.

10. Injunctive Relief

Lastly, Plaintiffs' first amended complaint contains an injunctive relief count. The Court has already denied Plaintiffs' motion for a preliminary injunction (ECF No. 34). The Court found that, at that time, Plaintiffs were unlikely to succeed on the merits of their claims and that they were not facing an irreparable harm, considering some of the Township

Ordinances have been on the books since 1972 (*see id.* at PageID.1867). The Township argues that the Court's ruling is instructive. It argues that because injunctive relief was inappropriate at the beginning of this lawsuit, it is also inappropriate now.

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." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Now that discovery is completed, Plaintiffs' arguments on the merits are much stronger. As with the MZEA claim, Plaintiffs' right to enjoin certain sections of the Township Ordinances rises and falls with their constitutional/preemption arguments. In accordance with this opinion, the Court will enjoin the Township from enforcing all of the sections of the Township Ordinances that the Court has found unconstitutional or contrary to law.

ORDER

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' motion for partial summary judgment (ECF No. 53) is **GRANTED** in part and **DENIED** in part in accordance with the opinion above.

IT IS FURTHER ORDERED that Defendant's cross motion for partial summary judgment (ECF No. 62) is **GRANTED** in part and **DENIED** in part in accordance with the opinion above.

IT IS FURTHERED ORDERED that Plaintiffs' motion for partial summary judgment (ECF No. 135) is **GRANTED** in part and **DENIED** in part in accordance with the opinion above.

IT IS FURTHER ORDERED that Defendant's motion for summary judgment (ECF No. 142) is **DENIED** in its entirety in accordance with the opinion above.

IT IS SO ORDERED.

Date: June 3, 2022

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

EXHIBIT B

2014 WL 7359024
Only the Westlaw citation is currently available.
United States District Court,
M.D. Tennessee,
Nashville Division.

Corey L. HARPER, Plaintiff,

v.

CHEMTRADE LOGISTICS, INC., Defendant.

No. 3:14–01952.
|
Signed Dec. 22, 2014.

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MEMORANDUM

KEVIN H. SHARP, District Judge.

***1** Pending before the Court in this removed action involving a non-competition agreement is Defendant Chemtrade Logistics, Inc.'s Motion to Dismiss (Docket No. 6). That Motion will be denied.

I.

In moving to dismiss, Defendant summarizes the pertinent allegations from Plaintiff's Complaint and the documents attached thereto as follows:

According to Plaintiff's Complaint, Plaintiff began working for Southern Water Consultants as a technical/sales representative in or around May 2011. Plaintiff's sales territory was Kentucky, Tennessee, and North Alabama. Southern Water Consultants manufactured chemicals and coagulants for a wide array of direct sales clients as well as distribution networks. In or around February 2012, Plaintiff asserts that Southern Water Consultants entered into an agreement for substantially all of their assets to be purchased by General Chemical LLC. Plaintiff received correspondence via email from Robert D. Novo, Chief Administrative and Compliance Officer for General Chemical on or about February 3, 2012. This correspondence included an offer of employment to the Plaintiff, contingent upon the completion of General Chemical LLC's transaction with Southern Water Consultants and, among other things, Plaintiff's execution of a non-competition agreement with General Chemical LLC.... While employed by General Chemical LLC, Plaintiff was a sales representative and his territory was Kentucky, Tennessee, North Carolina, and Virginia, where he sold chemicals in the municipal and industrial markets.

On or around January 24, 2014, Chemtrade purchased General Chemical LLC. After Chemtrade's acquisition, Plaintiff's territory was realigned by his direct superior, Mike Ellis. Plaintiff asserts that the territories covered by Chemtrade were assigned among existing Chemtrade sales representatives, Plaintiff, and one (1) other General Chemical LLC sales representative. Plaintiff's new title, after the territory reassignment, was Account Manager for Kentucky, Tennessee, and Southeast Arkansas. Plaintiff was told to focus on customer service, functioning in an account manager role.

In June, 2014, Plaintiff received a letter from Leon Arts, Vice President of Sales Marketing for Chemtrade. This document informed Plaintiff that he would receive a merit increase of one thousand six hundred dollars ($1,600.00). Plaintiff claims that he was also presented with a second non-compete agreement that he ultimately refused to sign. On or about July 10, 2014, Plaintiff met with his supervisor and submitted his resignation.

Plaintiff began a new job with USALCO, a competitor of Chemtrade, on August 1, 2014. On or about September 5, 2014, USALCO's Vice President of Sales, Terry Badwak, called Plaintiff and informed him that a representative from Chemtrade had contacted Mr. Badwak

and demanded USALCO terminate Plaintiff's employment because Plaintiff had signed a non-competition agreement three (3) years prior when Southern Water Consultants was acquired by General Chemical LLC. USALCO terminated Plaintiff's employment on or about September 12, 2014.

***2** (Docket No. 7 at 1–3, footnotes and internal citation to Complaint omitted).

Based upon the foregoing, Defendant moves to dismiss Plaintiff's claims for breach of contract (Count 1) and specific performance (Count 3), and his requests for injunctive relief (Count 2) and specific performance (Count 4). Although Defendant may at some point be entitled to judgment on one or more of Plaintiff's claims, its present request is premature given the standards governing a Motion to Dismiss.

II.

A.

Defendant first moves to dismiss the breach of contract claim because there is no self-standing claim for breach of the duty of good faith and fair dealing under Tennessee law, citing, *Lynch v. Farmers Ins. Exchange,* 26 S.W.3d 888, 894 (Tenn.Ct.App.2006). But as *Lynch* itself states, the breach of the covenant of good faith and fair dealing is "a part of a breach of contract cause of action," *id.* and, as the Tennessee Supreme Court has recently reiterated, "[i]t is well-established that '[i]n Tennessee, the common law imposes a duty of good faith in the performance of contracts,' " and these obligation "are imposed in the performance and enforcement of every contract." *Dick Broadcasting Co., Inc. of Tennessee v. Oak Ridge FM, Inc.,* 395 S.W.3d 653, 658 (Tenn.2013) (quoting *Wallace v. Nat'l Bank of Commerce,* 938 S.W.2d 684, 686 (Tenn.1996)).

Here, Plaintiff does not bring a stand-alone claim for the breach of duty of good faith and fair dealing. Rather, Count 1 is captioned "Breach of Contract and Good Faith," and specifically references "the non-competition agreement executed by Plaintiff." (Docket No. 1–6, Complaint at ¶ 15).

Defendant next argues "Plaintiff's breach of contract claim should be dismissed because he has utterly failed to establish the required elements of a breach of contract claim under Tennessee law." (Docket No. 7 at 6). As Defendant correctly notes, the elements of a breach of contract claim "include (1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract." *C & W Assets Acquisition LLC v. Oggs,* 230 S.W.3d 671, 676–77 (Tenn.Ct.App.2007). But the time to *establish* those element comes later; for now the issue under Rule 12(b)(6) of the Federal Rules of Civil Procedure is whether the Complaint " 'contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). It does.

In arguing otherwise, Defendant asserts that "Plaintiff contends that Chemtrade altered the terms of his employment, thus nullifying the non-competition agreement executed by Plaintiff" and, that "Plaintiff may be attempting to assert a claim under the 'material change' rule under ***Massachusetts*** law." (Docket No. 7 at 6) (emphasis in the original). Why Plaintiff would rely on Massachusetts law is unclear—Plaintiff alleges he is a resident of Tennessee, Defendant is Delaware corporation with operations in Tennessee and a principal office in Ohio, and the non-compete agreement attached to the Complaint, though blurry and hard to read, does not appear to specify the law to be applied.

***3** Regardless, Defendant misplaces reliance on Judge Trauger's decision in *Lewis v. MedAssets Net Rev. Sys., LLC,* 2012 WL 3061855 (M.D.Tenn.2012) and her citation to *Teter v. Republic Parking Sys., Inc.,* 181 S.W.3d 330, 337–338 (Tenn.2005). While *Lewis* quotes *Teter* for the proposition that "modification of an existing contract cannot be accomplished by the unilateral action of one of the parties" and that "there mut be the same mutuality of assent and meeting of minds as required to make a contract," both cases were decided in the context of a motion for summary judgment where the facts in relation to the breach of contract claim were undisputed. *Lewis,* 2012 WL 3061855, at *11; *Teter,* 181 S.W.3d at 337.

Moreover, the relevant issue in both cases was whether the plaintiffs, who had lost their jobs because they failed to sign a new non-compete, had been terminated or had voluntarily resigned their positions. Although both cases indicate that the prior non-compete remained in effect, it does not appear that there was an issue about whether the employer had met its obligations under the agreement pursuant to which Plaintiff worked. Here, in contrast, Plaintiff alleges that Chemtrade unilaterally altered Plaintiff's agreement with

General Chemical, resulting in overall decrease in salary and benefits and an alteration of his job responsibilities.

B.

With respect to Plaintiff's claims for injunctive relief, Defendant observes that "a district court must consider the following factors: '(1) whether the movant would suffer irreparable harm without the injunction; (2) whether issuance of the injunction would cause substantial harm to others; (3) whether the public interest would be served by the issuance of the injunction; and (4) whether the movant has demonstrated a strong likelihood of the merits as to each claim.' " (Docket No. 9 at 7, quoting, *Banc Card Georgia, LLC v. United Cmty. Bank,* 2013 WL 3700602, at *4 (E.D.Tenn. July 24, 2014). It quotes the same case for the proposition that " '[a] plaintiff's harm from the denial of a preliminary injunction is irreparable ***if it is not fully compensable by monetary damages."*** (*Id.,* emphasis by Defendant).

Thus far, Plaintiff has not filed a motion for temporary restraining order and so there is no "movant" within the meaning of Rule 65 of the Federal Rules of Civil Procedure, let alone any basis to consider whether Plaintiff can demonstrate a strong likelihood of success on the merits. Plaintiff also request permanent injunctive relief, however, and the Court cannot say as a matter of law that such relief is not available.

C.

Defendant moves to dismiss Plaintiff's request for specific performance because the Complaint "does not provide Defendant 'fair notice' of the 'ground upon which Plaintiff's specific performance claim rests,' and ... is precisely the skeletal pleading for which *Twombly* and *Iqbal* were intended to provide redress.' " (Docket No. 7 at 10). This Court disagrees.

***4** The specific performance count incorporates by reference all of the prior paragraphs in the Complaint and pleads that "there is no reasonable alternative in equity but to specifically require the Defendants to release Plaintiff from the non-competition agreement as set forth above." (Docket No. 1–7, Complaint ¶ 25). This is more than sufficient to provide Defendant with fair notice as to the claim.

Defendant also asserts that the allegations in the Complaint " 'ignores long-standing Tennessee precedent that specific performance is not available to a party as of right,' " and that " '[i]n Tennessee, the award of specific performance is within the discretion of the trial court upon consideration of all the facts and circumstances surrounding the transaction.' " (Docket No. 7 at 1011, quoting *Hometown Folks, LLC v. S & B Wilson, Inc.,* 2008 WL 918519, at *3 (E.D.Tenn. April 3, 2008).

Obviously, the Court is not in a position to consider "all of the facts and circumstances surrounding the transaction" in the context of a Motion to Dismiss. Accordingly, the Court will not dismiss Plaintiff's specific performance claim.

D.

Finally, Defendant seeks dismissal of Plaintiff's request for a declaratory judgment. It points out that "a declaratory judgment action cannot be used by a federal court to decide theoretical questions," that "federal courts do not use declaratory judgment actions to render advisory opinions," that there "must be an 'actual controversy' " which is "definite and concrete" for declaratory relief to be available, and that such relief must not be an "abstract decision" but must " 'settle the controversy' or 'serve a useful purpose in clarifying the legal relations' " between the parties. (Docket No. 7 at 11–12) (citations omitted). No doubt, all of these propositions are correct, but there is nothing abstract or advisory about determining whether, under the facts of this case, and given Plaintiff's allegation that Defendant breached the agreement and failed to act in good faith, the particular non-compete at issue should be enforced.

III.

For the reasons set forth above, Defendant's Motion to Dismiss will be denied. An appropriate Order shall enter.

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United States District Court, W.D.
Michigan, Southern Division.

Jeanna NORRIS, Plaintiff,

v.

Samuel L. STANLEY, Jr., et al., Defendants.

No. 1:21-cv-756
|
Signed 10/29/2021

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ORDER DENYING MOTION FOR EMERGENCY STAY AND FOR INJUNCTION

Paul L. Maloney, United States District Judge

***1** On October 8, 2021, this Court declined to issue a preliminary injunction enjoining Defendants from enforcing the Michigan State University (MSU) vaccine mandate policy (ECF No. 42). Plaintiff now asks the Court to stay these proceedings and issue an injunction, as to her, enjoining MSU's vaccine mandate because "her constitutional rights to bodily autonomy and to decline medical treatment are being infringed," pending an appeal of this Court's order denying her a preliminary injunction (ECF No. 51).

Fed. R. App. P. 8(a)(1) permits a district court to stay a judgment or order pending the appeal of that judgment or order. In determining whether a stay should be granted, courts consider the four factors that are traditionally considered in evaluating granting a preliminary injunction: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Mich. Coal. Of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

Additionally, Fed. R. App. P. 8(c) allows a district court to issue an order suspending, modifying, restoring, or granting an injunction while an appeal is pending. The same four factors are applicable in this analysis as well. *See Baker v. Adams Cty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2012).

The Court will decline to grant a stay or an injunction. Procedurally, Plaintiff's motion fails because she has not filed a notice of appeal yet. To properly request a stay and the granting of an injunction under Fed. R. App. P. 8, Plaintiff must first file a notice of appeal of the order denying her preliminary injunction. *See, e.g.*, *Roe v. United States*, No. 0CV00425-MSK-MJW, 2005 WL 2978611, at *2 (D. Col. Nov. 7, 2005) ("Because the Plaintiffs have not filed a Notice of Appeal, their request for stay is premature and denied.").

Nevertheless, the Court finds that Plaintiff's motion also fails on the analysis of the above four factors. Plaintiff's assertion that she "need only show a 'serious question going to the merits' to succeed on this application," (ECF No. 51 at PageID.1023) is incorrect. Rather, the standard is that "the movant is always required to demonstrate more than the mere 'possibility' of success on the merits," and "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay." *Griepentrog*, 945 F.2d at 153-54. Because of this inverse relationship, Plaintiff need only show a "serious question" as to the merits *after* she demonstrates irreparable harm. *See id.*

For the reasons stated in this Court's order denying Plaintiff's motion for temporary restraining order (ECF No. 7) and order denying a preliminary injunction (ECF No. 42), the Plaintiff has not demonstrated that she faces an irreparable harm absent injunctive relief. For the first time, Plaintiff contends in her present motion that she is considering getting the COVID-19 vaccine in order to avoid financial hardship from losing her job (*see* ECF No. 51 at PageID.756), which she characterizes as an irreparable injury from unwanted medical treatment. However, MSU is not "forcing" her to get the vaccine. With

all due regard to the difficult financial considerations, Plaintiff still has the choice as to whether she wants to get the vaccine or not. And if she chooses not to get it, then MSU may choose to terminate her because of her at-will employee status. As this Court has explained, being wrongfully terminated is not an irreparable injury.

***2** Because Plaintiff cannot show that she is facing an irreparable injury absent an injunction, she must show a substantial likelihood of success on the merits to receive her requested relief. This likelihood of success must be even more likely than when she originally moved for injunctive relief based on the "inversely proportional" relationship between these two factors when evaluating them on a motion for a stay. *See Griepentrog*, 945 F.2d at 153. Plaintiff cannot do so. Plaintiff essentially argues that the Court improperly applied a rational basis standard of review and that strict scrutiny should apply instead. Yet, Plaintiff fails to assert any new arguments why strict scrutiny should apply. This Court —along with the Supreme Court, the Seventh Circuit, and multiple federal district courts—have held that rational basis analysis applies to generally applicable COVID-19 vaccine mandates due to *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). *See, e.g.*, *Klaassen v. Trs. of Ind. Univ.*, 7 F.4th 592, 593 (7th Cir. 2021); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring); *Harris v. Univ. of Mass., Lowell*, No. 21-cv-11244-DJC, 2021 WL 3848012 (D. Mass. Aug. 27, 2021); *Kheriaty v. Regents of the Univ. of Cal.*, No. 8:21-cv-01367 (C.D. Cal. Sept. 29, 2021). The Court maintains that rational basis applies.

Plaintiff further argues that even if rational basis applies, the MSU vaccine mandate does not meet rational basis here. Plaintiff contends that the "battle of the experts," which the Court observed during the preliminary injunction hearing, establishes that "there is no logical reason to assign vaccine acquired immunity greater validity than that attained through natural infection" (ECF No. 52 at PageID.1024). But based on the record, Defendants presented ample evidence that vaccine immunity is effective. "Any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny." *See Am. Express Travel Related Servs. Co., Inc. v. Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011). MSU's vaccine mandate clearly survives rational basis scrutiny despite Plaintiff's arguments.

Accordingly, the Court finds that Plaintiff is not entitled to a stay of these proceedings or an injunction as applied to her enjoining the MSU vaccine mandate.

IT IS HEREBY ORDERED that Plaintiff's motion for emergency stay and for an injunction (ECF No. 51) is **DENIED**.

IT IS SO ORDERED.

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United States District Court, E.D.
Michigan, Northern Division.

TUSCOLA WIND III, LLC, Plaintiff,

v.

ELLINGTON TOWNSHIP, et al., Defendants.

Case No. 17-cv-11025
|
Signed 03/13/2018

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ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS AS TO COUNT ONE

THOMAS L. LUDINGTON, United States District Judge

***1** On March 31, 2017, Plaintiff Tuscola Wind III, LLC, ("Tuscola") filed a complaint naming the Ellington Township ("Township") and Ellington Township Board ("Board") as Defendants. ECF No. 1. Tuscola is challenging the Board's decision to institute a moratorium on consideration of all wind energy projects in the Township. On November 2, 2017, Tuscola filed a motion for judgment on the pleadings as to Count One of the complaint, which asserts that Defendants violated the Zoning Enabling Act, M.C. L. 125.3101 *et seq.*, when the Board enacted the moratorium by resolution. For the following reasons, that motion will be granted.

I.

For clarity, Plaintiff's allegations will be summarized, and then the factual allegations which Defendants admit will be identified. Tuscola Wind III, LLC, is a Delaware limited liability company which is owned by NextEra Energy Resources, LLC. Comp. at 3, 4. NextEra is "the largest generator of wind energy in the United States." *Id.* at 4. NextEra has previously constructed two wind energy centers in Tuscola County and Bay County, Michigan, named the Tuscola Wind Energy Centers I and II. *Id.* at 4–5. In 2015, Tuscola "proposed to construct the Tuscola III Wind Energy Center ... in Tuscola County Michigan." *Id.* at 5. That project is the source of the current litigation.[1] The proposed Tuscola III Wind Energy Center would include fifty-five wind turbines, with nineteen of those turbines to be sited in Ellington Township. *Id.* at 5–6.

A.

Prior to 2014, the Township's wind ordinance was half a page long. *Id.* at 7. In anticipation of the Tuscola III Wind Energy Center Project, the Ellington Township Board "determined that it needed to re-examine its wind ordinance." *Id.* The Board hired a third-party consultant, the Spicer Group, to assist in revising the ordinance. *Id.* On September 30, 2014, the Planning Commission held a hearing on the proposed amendments and recommended adoption. Several months later, the Board unanimously adopted the amended wind ordinance, which "remains in effect today." *Id.* at 8. This updated ordinance is "much stricter than its predecessor," and includes sound pressure limits, setback requirements, and shadow flicker limits. *Id.* Pursuant to the current ordinance, "utility grid wind energy systems are considered a Special Land Use, requiring the Planning Commission to approve an application for a Special Land Use Permit." *Id.* (citing Ordinance at § 502(M)(4), Ex. 2).

After Tuscola formally proposed the project, and approximately a year after the wind ordinance was amended, "a group [named the Ellington-Almer Township Concerned Citizens Group] was formed to oppose the Project and to pressure the Township to enact a much more restrictive wind ordinance." *Id.* According to Tuscola, the anti-wind Group has connections with a larger group, called the Interstate Informed Citizens Coalition, that "opposes wind as a matter of policy and lobbies against wind energy in Ohio and Michigan." *Id.* at 9. The Group contends in public that it is "pro-reasonable regulation" of wind energy, but Tuscola believes that the Group is fundamentally opposed to wind energy. *Id.* Tuscola also believes that the interstate Coalition coaches local anti-wind groups on "tactics of intimidation,

threats of lawsuits, referenda, and recalls ... in an effort to prevent the development of wind projects." *Id.* at 10.

***2** Among other tactics, the local anti-wind Group decided to run some of its members as candidates for the Township Board. *Id.* Four members of the Group ran in the 2016 election, and all four were elected. *Id.* The members of the anti-wind Group have provided contentious and confrontational opposition to pro-wind advocates in the community. Tuscola alleges that these tactics have included "threats and intimidation." *Id.* at 11.

In terms of policy, members of the anti-wind Group have repeatedly "stated in public meetings their belief that the Township should" amend its wind ordinance. *Id.* Specifically, they believe that the Township should "model its setback and sound requirements to those found in the recently amended wind ordinance in neighboring Huron County." *Id.*

B.

In early 2016, the anti-wind Group began lobbying for the Board "to pass a moratorium on the development of wind energy systems in the Township" in order to provide the Board time to amend the wind ordinance. *Id.* at 12. The Township Board held a meeting on April 4, 2016, to consider enacting a 120 day moratorium on consideration of applications for approval to build wind energy systems. The proposed moratorium contained the following conditions for its termination: "if either (a) the Board adopted a 'sufficient' regulation to protect the health, safety, and welfare of the citizens; or (b) the Planning Commission recommended that no additional amendments were necessary to protect the health, safety, and welfare of the citizens." *Id.* at 12–13 (citing First Moratorium Res., ECF No. 1, Ex. 6). The moratorium was enacted.

While the moratorium was in place, the Planning Commission considered several amendments to the wind ordinance which the anti-wind group supported. "Ultimately, after reviewing the proposed amendments to the Ordinance and studying the impacts of the proposed turbines, the Planning Commission did not recommend any changes to the Ordinance, and the First Moratorium was lifted." *Id.* at 13.

C.

After the first moratorium ended, Tuscola submitted a Special Land Use Permit ("SLUP") application seeking permission to construct the wind energy project. *Id.* at 14. According to Tuscola, the SLUP application was designed to "far exceed[ ] the Ordinance's sound and setback requirements." *Id.* Tuscola "expended substantial time and money in preparing its SLUP application" and additionally "supplied the Township with $65,000.00 to fund an escrow account so the Township can pay its consultants and other service providers to review the materials." *Id.* at 15.

On October 10, 2016, the Township's Planning Commission "scheduled a public hearing to be held on December 5, 2016, to consider" the SLUP application. *Id.* Earlier dates were considered, but members of the anti-wind group "strongly encouraged the Planning Commission to set the public hearing for a date after the new Board was set to take office on November 20, 2016." *Id.*

D.

On November 8, 2016, four new Board members were elected to the Ellington Township Board. As explained above, all four were members of the anti-wind group. *Id.* at 16. The new Board members took office on November 20, 2016. On the same day, the Almer Township Board "issued a notice for a special meeting to be held on Tuesday, November 22, 2016." *Id.* Early the next morning, the Ellington Township Board "issued a notice for a special meeting to be held 90 minutes earlier on the same date and at the same location." *Id.* Tuscola believes that "both boards reserved the [location for the special meetings] before they officially took office." *Id.*

***3** At the November 22, 2016, special meeting, the Ellington Township Board's first action was to hire an attorney—Michael Homier of Foster Swift—to advise the Board on matters regarding the wind ordinance and SLUP application. *Id.* at 17. Mr. Homier "indicated that he was informed that 'the Township may desire to look at its WEC ordinance' and that he had drafted a 12 month moratorium, with the option to renew, for Board review." *Id.* at 18. The second moratorium was approved by a four to one vote, with all four new Board members voting for the moratorium. *See id.* (citing Sec. Moratorium Res., ECF No. 1, Ex. 9). The second moratorium was "passed by the Board, ostensibly pursuant to its 'police power,' and according to the resolution, the purpose of the Second Moratorium is to protect the 'health, safety, and

welfare' of Township residents." *Id.* (citing Sec. Moratorium Res., ECF No. 1, Ex. 9).

"As a result of the Second Moratorium, the Planning Commission has been precluded from considering or deciding on Tuscola Wind III's SLUP Application." *Id.* at 19. Tuscola argues that "Defendants are not in the process of developing a new zoning ordinance related to the regulation of wind energy." *Id.* at 20. Further, Tuscola asserts that "a zoning ordinance may not be suspended or amended by resolution." *Id.* at 21. For these reasons, Tuscola believes that the second moratorium violates the Zoning Enabling Act.

E.

In their answer to the complaint, Defendants deny most of Plaintiff's factual allegations. In particular, Defendants deny Plaintiff's attempts to attribute certain purposes or intentions to actions by Defendants or members of the anti-wind group. Defendants do, however, admit certain allegations.

Specifically, Defendants admit that the Board amended the wind ordinance on January 13, 2015, and that the ordinance as amended remains in effect today. Ans. at 8, ECF No. 12. Defendants also admit that "four of the five current members of the Township Board were newly elected in the November 8, 2016 general election." *Id.* at 2. There is likewise no dispute that the Township enacted a moratorium via resolution soon after the election. *Id.* Defendants admit that Tuscola has submitted a SLUP application and that "Plaintiff supplied Defendants with $65,000 to fund an escrow account for consultants and other service providers to review materials." *Id.* at 17. Finally, Defendants admit that new Planning Commission members have been appointed.

But Defendants deny all allegations "which concern nonparties," which attempt to "characterize[ ] or interpret[ ] the contents of the Ordinance" or resolutions, or which contain conclusions of law. *See, e.g.*, *id.* at 9, 14, 22.

II.

Tuscola has filed a motion for partial judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). "The standard of review for a [motion for] judgment on the pleadings [under Rule 12(c)] is the same as that for a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." *E.E.O.C. v. J.H. Routh Packing Co.*, 246 F.3d 850, 851 (6th Cir. 2001). "For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *S. Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973). However, the court "need not accept as true legal conclusions or unwarranted factual inferences." *Mixon v. State of Ohio*, 193 F.3d 389, 400 (6th Cir. 1999). A motion for judgment on the pleadings "is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *Paskvan v. City of Cleveland Civil Serv. Comm'n*, 946 F.2d 1233, 1235 (6th Cir. 1991). *See also JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007).

III.

***4** Tuscola is seeking judgment on the pleadings for Count One of the complaint, which asserts that the second moratorium violates the Zoning Enabling Act. Pursuant to the standard articulated, Tuscola is entitled to judgment only if, considering all uncontested facts, there is not a material issue of fact regarding whether the moratorium violated Michigan law.

A federal court adjudicating claims premised on state law must "apply state law in accordance with the controlling decisions of the state supreme court." *Allstate Ins. Co. v. Thrifty Rent-A-Car Sys., Inc.*, 249 F.3d 450, 454 (6th Cir. 2001). "If the state supreme court has not yet addressed the issue presented, we must predict how the court would rule by looking to all the available data." *Id.* The decisions of state appellate courts should not " 'be disregarded unless [the court is] presented with persuasive data that the Michigan Supreme Court would decide otherwise.' " *Id.* (quoting *Kingsley Assoc. v. Moll PlastiCrafters, Inc.*, 65 F.3d 498, 507 (6th Cir. 1995)).

A.

Tuscola argues that the Ellington Township Board did not have authority to suspend the operation of the zoning ordinance by passing a moratorium via resolution. In response, Defendants argue that the moratorium resolution did not "suspend or nullify the Zoning Ordinance." Def. Resp. Br. at 9, ECF No. 19.

"The Constitution of the State confers no grant of police power of zoning directly upon cities." *Krajenke Buick Sales v. Kopkowski*, 322 Mich. 250, 254 (1948). Accordingly, "a local unit of government must be specifically authorized by the Legislature to exercise any zoning authority." *Whitman v. Galien Twp.*, 288 Mich. App. 672, 679 (2010) (citing *Krajenke Buick Sales*, 322 Mich. at 254). The Michigan Legislature has empowered local municipalities to establish zoning regulation through the Zoning Enabling Act, M.C.L. 125.3202(1). *See id.* ("In 2006, the Legislature consolidated the three separate zoning enabling acts for cities and villages, townships, and counties into the MZEA. The MZEA governs the creation and administration of local zoning ordinances.").

The Michigan legislature has also provided local municipalities the power to "adopt ordinances regulating the public health, safety, and general welfare of persons and property." M.C.L. § 41.181. *See also Square Lake Hills Condo. Ass'n v. Bloomfield Twp.*, 437 Mich. 310, 320 (1991). These two independent grants of authority, however, do not overlap. "A local government may not avoid the substantive and procedural limitations of a zoning enabling act by merely claiming that a zoning ordinance is valid as an enactment pursuant to the general police power." *Little Mack Entm't II, Inc. v. Twp. of Marengo*, 625 F. Supp. 2d 570, 574 (W.D. Mich. 2008) (citing *Krajenke Buick Sales*, 322 Mich. 250 (1948)). *See also Square Lake Hills Condo. Ass'n*, 437 Mich. 310, 323 (distinguishing between municipality authority to use its police power to regulate "activity" and zoning ordinance power to regulate "uses" of land);[2] *id.* at 345 (Levin, J., dissenting) ("[U]nless the procedural requirements set forth in a zoning enabling act for the enactment of a zoning ordinance are 'strictly adhered' to, the enactment is not valid") (collecting sources); *Forest Hill Energy-Fowler Farms, L.L.C. v. Twp. of Bengal*, No. 319134, 2014 WL 6861254, at *5 (Mich. Ct. App. Dec. 4, 2014) (adopting "use" versus "activity" distinction); *Nat. Aggregates Corp. v. Brighton Twp.*, 213 Mich. App. 287, 300, 539 N.W.2d 761, 768 (1995) (same).

***5** This conclusion is the logical extension of the long-standing rule that municipalities can enact zoning ordinances only by strictly complying with the requirements of the statute which authorizes that exercise of power.[3] *See Korash v. City of Livonia*, 388 Mich. 737, 746 (1972) ("Indeed, this Court has consistently held that the procedures outlined in the Zoning Enabling Act must be strictly adhereed to.... Therefore, the amendment to the ordinance, having been enacted by a procedure different from and contrary to the procedure required by the Zoning Enabling Act, is invalid."); *Stevens v. City of Madison Heights*, 358 Mich. 90, 93 (1959) ("The statute spells out a certain procedure that must be followed to enact a zoning ordinance; this procedure admittedly was not followed by the city in this case; and therefore the ordinance in question is invalid."); *Krajenke Buick Sales*, 322 Mich. 250 (1948) (same); *Whitman*, 288 Mich. App. at 679 ("A local unit of government may regulate land use through zoning only to the limited extent authorized by [zoning enabling] legislation.").

B.

Accordingly, the initial question is whether the second moratorium amended or enacted a zoning ordinance. If so, then the second moratorium is valid only if enacted pursuant to the ZEA. If not, then the second moratorium is valid if it was a permissible use of the Ellington Township's police power.

1.

"A zoning ordinance is defined as an ordinance which regulates the use of land and buildings according to districts, areas, or locations." *Square Lake Hills Condo.*, 437 Mich. at 323 (Riley, J). *See also Forest Hill Energy-Fowler Farms, L.L.C. v. Twp. of Bengal*, No. 319134, 2014 WL 6861254, at *5 (Mich. Ct. App. Dec. 4, 2014) (adopting Justice Riley's formulation); *Nat. Aggregates Corp.*, 213 Mich. App. at 300; *Forest Hill Energy-Fowler Farms*, 2014 WL 6861254, at *5. "The question whether or not a particular ordinance is a zoning ordinance may be determined by a consideration of the substance of its provisions and terms, and its relation to the general plan of zoning in the city." *Id.* "Zoning ordinances regulate land uses, while regulatory ordinances regulate activities." *City of Bloomfield Hills v. Froling*, No. 288766, 2010 WL 1687676, at *4 (Mich. Ct. App. Apr. 27, 2010).

Regulation of wind energy systems clearly involves the regulation of land, not the regulation of activities. *See Forest Hill Energy-Fowler Farms*, 2014 WL 6861254, at *5 ("The construction of an infrastructure of wind turbines as part of a wind energy system is not merely an activity on land, but rather relates to a permanent land use."). Defendants attempt to distinguish *Forest Hill*, arguing that "[t]he Moratorium

served only to pause the issuance of permits, and did not change the substance of the Zoning Ordinance. It is the Zoning Ordinance, not the Moratorium, that regulates the 'use' of the land." Def. Resp. Br. at 21. Thus, Defendants draw a distinction between "substantive" zoning regulations and requirements—which they admit must be enacted pursuant to the ZEA—and "temporary moratoria" which merely pause the issuance of permits. *See id.* at 20–21.

Defendants' argument is counterintuitive. If Defendants admit that the ordinance which establishes procedures for SLUP applications for wind energy systems is a zoning ordinance (which appears self-evident), then it seems to follow that a suspension of those procedures is a substantive change. Prior to the moratorium, SLUP applications for approval of wind energy systems were permitted and the Board was required to consider them; during the moratorium, neither of those things were true. In other words, the moratorium prevented any use of land for a wind energy system in the Township, albeit temporarily.

***6** Defendants argue that there is a distinction between "suspending" an ordinance and instituting a "moratorium." *See* Def. Resp. Br. at 10. The only legal authority which Defendants cite in support of that assertion is the Black's Law Dictionary definition of "moratorium." *See id.* & n.34 (citing Black's Law Dictionary, 6th Ed.) (published in 1990). According to Defendants, the Sixth Edition defines "moratorium" as including "[d]elay or postponement of a legal obligation or an action or proceeding." *Id.* The Tenth Edition of the Black's Law Dictionary, published in 2014, defines "moratorium" as "[a]n authorized postponement ... in the deadline for paying a debt or performing an obligation.... The suspension of a specific activity." The Tenth Edition defines "suspend" as follows: "To interrupt; postpone; defer."

There is no meaningful legal distinction between these terms. As Tuscola points out, the definition for "moratorium" includes the words "postpone[ ]" and "suspen[d]." The definition for "suspend" includes the word "postpone." Given the interrelationship between these definitions, Defendants' assertion that there is a meaningful distinction between suspending an ordinance and imposing a moratorium on that ordinance has no merit. *See also Deighton v. City Council of Colorado Springs*, 902 P.2d 426, 429 (Colo. App. 1994) ("[T]he moratoria changed the administrative operation of the zoning ordinance as effectively as if it had been amended or repealed.... Whether categorized as a suspension of the zoning ordinance, a temporary amendment, a temporary reclassification, or a temporary setting aside of the ordinance as to new adult uses, these actions had the practical effect of changing the rules temporarily pending a study which was expected to result in a permanent change.") (internal citations omitted).

The only distinction between the moratorium and an ordinance repealing the existing wind energy ordinance is the fact that the moratorium had a time limit. The court is unable to locate any legal authority from Michigan which suggests that a temporary limitation on the use of land does not constitute zoning. To the contrary, the Supreme Court of Michigan has held that a "temporary measure" adopted by a city council and designed to allow the issuance of building permits until the zoning ordinance was adopted" was "void" because it did not comply with requirements of the enabling act. *Krajenke*, 322 Mich. at 253, 255.

The only potentially contradictory Michigan case which Defendants identify is *Heritage Hill Ass'n, Inc. v. City of Grand Rapids*. 48 Mich. App. 765, 768 (1973). In that case, the Grand Rapids Zoning Ordinance placed various restrictions on land use, but did "not prevent the demolition of a building after land owners obtain[ ] a permit to do so." *Id.* at 766–67. The suit arose after the owner of historic properties sought to demolish certain structures. "In order to preserve the historical and architectural integrity of the [Heritage Hill section of Grand Rapids], the city's building code was amended to" prohibit building officials from accepting any applications for a building permit which would require demolition of any structure. *Id.* at 767.

The zoning appeals board eventually granted an exception for the landowner to demolish the buildings, and suit was brought. On appeal, the Michigan Court of Appeals held that "the amendment to the building code is not in the nature of a zoning ordinance which regulates land uses in a particular district. The amended building code in the case at bar did not alter the provisions of the Grand Rapids Zoning Ordinance but rather only placed a moratorium on the issuance of building permits in a particular district of the city for a reasonably limited time." *Id.* at 768. This dicta provides minimal guidance in the current dispute. For one, the amendment in *Heritage Hill* did not change or suspend any part of the zoning ordinance. The amendment to the *building code* simply provided a short-term limitation on building demolition in a certain part of the city.

***7** Thus, the language and operation of the zoning ordinance were unchanged after the amendment. It did not prevent demolition of buildings before the amendment, and did not prevent demolition after. In other words, the amendment to the building code regulated something which the zoning code did not address. In the present case, on the other hand, the moratorium changed the operation of an express guarantee of the zoning code. The Board was required to consider SLUP applications for wind energy systems before the moratorium, and after the passage of the moratorium they were not. *Heritage Hill* is distinguishable and thus provides limited guidance.

And there is persuasive non-Michigan authority which suggests that even temporary moratoria on the operation of zoning ordinances substantially interfere with the use of land and thus constitute zoning regulation. *See Cherokee Country Club, Inc. v. City of Knoxville*, 152 S.W.3d 466, 472 (Tenn. 2004) (citing *Square Lake* and collecting other authority). *See also City of Sanibel v. Buntrock*, 409 So. 2d 1073, 1075 (Fla. Dist. Ct. App. 1981) (finding that a one year moratorium on the issuance of permits was a zoning regulation because "[t]o entirely prohibit a person from building upon his property even temporarily is a substantial restriction upon land use"); *Vulcan Materials Co. v. Iredell Cty.*, 103 N.C. App. 779, 782 (1991) (quoting and relying upon *Buntrock*); *Temporary or interim measures*, 8 McQuillin Mun. Corp. § 25:68 (3d ed.) ("A municipal corporation or other zoning authority may enact a temporary or interim zoning ordinance ... [but] statutory provisions pertaining to the adoption of municipal zoning ordinances may not be disregarded in the enactment of temporary measures.") (citing *Krajenke Buick Sales v. Kopkowski*, 322 Mich. at 255).

Thus, numerous states have concluded that a temporary moratorium on the operation of a zoning ordinance constitutes a zoning regulation. The only controlling Michigan authority which the Court has identified confirms that "temporary" zoning regulations must nonetheless comply with the procedural requirements of the enabling act. Defendants admit that the moratorium was not adopted in accordance with ZEA procedures. *See* Def. Resp. Br. at 1, 10. *See also* M.C.L. §§ 125.3201; 125.3202; 125.3306; 125.3308. Accordingly, the moratorium is "void." *Krajenke Buick Sales v. Kopkowski*, 322 Mich. at 255.[4]

2.

Even if the Court concluded that the moratorium did not regulate land use and thus could have been adopted pursuant to the Board's police powers, the moratorium would still be void. As Plaintiffs argue, under Michigan law, an ordinance cannot be suspended by resolution.

It is axiomatic that "an ordinance may not be repealed or amended without action of equal dignity to that required in its enactment." *City of Saginaw v. Consumers' Power Co.*, 213 Mich. 460, 469 (1921). *See also Lorencz v. Brookfield Twp.*, No. 319235, 2015 WL 1931967, at *2 (Mich. Ct. App. Apr. 28, 2015) ("[A]n ordinance may only be repealed by an act of equal dignity, which requires the township to repeal by ordinance and not resolution."); *Lee v. City of Taylor*, 63 Mich. App. 221, 223 (1975) ("It is settled that a municipal corporation may only repeal an ordinance by an act of equal dignity and formality."); *McCarthy v. Vill. of Marcellus*, 32 Mich. App. 679, 688–89 (1971) ("An ordinance or resolution cannot be amended, repealed, or suspended by another act by a council of less dignity than the ordinance or resolution itself."); *Expiration and suspension*, 5 McQuillin Mun. Corp. § 15:40 (3d ed.) ("A city may suspend an ordinance by ordinance. However, the operation of an ordinance cannot be suspended by the act of municipal officers, even though the suspension is attempted by resolution."). This is the doctrine of legislative equivalency.

***8** Michigan law also addresses the distinction between ordinances and resolutions. In *Rollingwood*, the court of appeals explained that "the difference between municipal ordinances and resolutions is in what the actions do, rather than in the manner in which they are passed. Resolutions are for implementing ministerial functions of government for short-term purposes. Ordinances are for establishing more permanent influences on the community itself." *Rollingwood Home Owners Corp. v. City of Flint*, 26 Mich. App. 1, 9–10 (1970) (citing *Resolutions and ordinances distinguished*, 5 McQuillin Mun. Corp. § 15:2 (3d ed.)). The court of appeals concluded that "a large-scale rezoning of property for the purpose of providing for public or quasi-public housing and involving the building of multi-million dollar housing complexes" was not a "ministerial function" and thus could not be accomplished by resolution. *Id.* at 10. The court of appeals acknowledged that, "[n]ormally, when faced with the fact of a resolution passed by a city government in an area where an ordinance is required, this Court would respond by declaring the resolution void." *Id.* (citing 5 McQuillin Mun. Corp. § 16.10). Nevertheless, the court of appeals opted to

permit the resolution to "stand as an ordinance" and subject it to referendum procedures. *Id.*

On appeal, the Michigan Supreme Court rejected the court of appeals' rationale on two grounds. *Rollingwood Homeowners Corp. v. City of Flint.* 386 Mich. 258 (1971). First, the Supreme Court concluded that "[t]here is nothing inherently legislative about a decision to acquire real estate" and thus no "ordinance was required." *Id.* at 267–68. Second, the Supreme Court determined that, if an ordinance had been required, the correct remedy was to declare the resolution a "nullity," not to permit the resolution to "operate as a de facto ordinance." *Id.* at 265, 267.

In *Dan & Jan Clark, LLC v. Charter Twp. of Orion*, the Michigan Court of Appeals interpreted *Rollingwood* in the context of a moratorium. No. 284238, 2009 WL 1830749, at *4 (Mich. Ct. App. June 25, 2009). In that case, the Orion Township passed a moratorium on applications for "new development, expansion, or rezoning" in a certain area for 120 days (later extended for an additional 180 days). *Id.* at *1. The plaintiff challenged the enactment of the moratorium, arguing that "its due process rights were violated because the moratorium was simply a resolution and could not trump the existing Township ordinances." *Id.* at *4. In rejecting that argument, the court of appeals concluded that "the substance of the zoning board's action did not require the adoption of an ordinance." *Id.* The *Clark* opinion cited *Rollingwood* for the proposition that "[r]esolutions are for implementing ministerial functions of government for short-term purposes, [while] [o]rdinances are for establishing more permanent influences." *Id.*[5] The *Clark* opinion reasoned as follows:

> The moratorium lasted less than a year, even with the extension, making it clearly short-term. Additionally, it did not create new procedures or even affect all petitions related to rezoning and special use. Rather, it simply deferred consideration of any new petitions until after a review of the master plan. We conclude that the moratorium was properly enacted as a resolution and did not operate as a de facto ordinance.... Applicants were not denied a right to apply for rezoning, but instead were informed that decisions about such matters were temporarily deferred. Applicants were not even absolutely prevented from having their petitions considered, but were given the opportunity to request a waiver from the moratorium and receive a hearing on their applications for waiver, giving them the opportunity to show that the moratorium was interfering with their constitutional rights.

Id. at *4–5.

***9** *Clark* does imply that a moratorium on land use applications does not run afoul of the doctrine of legislative equivalency. But there are a number of persuasive reasons to believe that the Michigan Supreme Court would not adopt the holding in *Clark* and apply it to the present scenario. To begin with, there are a number of factual differences. The *Clark* opinion emphasizes that the moratorium lasted less than a year (300 days total). But the Township's second moratorium has already lasted more than a year, appears likely to last at least eighteen months, and may be extended further. Sec. Moratorium Res., ECF No. 1, Ex. 9. And the second moratorium was preceded by the *first* moratorium, which lasted 120 days. First Moratorium Res., ECF No. 1, Ex. 6. The two moratoria were separated by a three month respite. In other words, by the time the second moratorium ends, the wind energy ordinance will have been suspended for the better part of two years. Given that fact, there is reason to believe that the Michigan Supreme Court would find that the moratorium here was more akin to a "permanent influence on the community" than a "short-term" ministerial function. Finally, the second moratorium here does not provide Tuscola the right to seek a waiver, unlike the moratorium in *Clark.*

The *Clark* opinion carries limited persuasive value for several additional reasons. First, the opinion is unpublished. Under Michigan Court Rule 7.215(C), it is not "precedentially binding" and "should not be cited for propositions of law for which there is published authority." Second, and relatedly, the *Clark* opinion fails to directly grapple with the doctrine of legislative equivalency. The resolution in *Rollingwood* did not compromise the operation of an existing ordinance, and so that issue was not addressed by the Supreme Court. Other published cases from Michigan courts, however, have confirmed that ordinances cannot be suspended by resolution. *See Consumers' Power Co.*, 213 Mich. at 469; *Lee*, 63 Mich. App. at 223; *McCarthy*, 32 Mich. App. at 688–89. *See also Lorencz v. Brookfield Twp.*, 2015 WL 1931967, at *2. In other words, an ordinance can be amended or suspended only by ordinance because the nature of the action is inherently legislative. *See Rollingwood*, 386 Mich. at 267 ("The attempt to legislate by resolution is simply a nullity.... Size and scope are not the proper yardsticks. There may be small ordinances and big resolutions: the difference lies in the nature of the act, not its impact."). *Clark*'s failure to directly consider these holdings dramatically undermines its persuasive value.

Courts in other states consistently hold that an ordinance can be suspended only by passage of another ordinance. In *Deighton v. City Council of Colorado Springs*, the Colorado Court of Appeals held that a moratorium enacted by resolution was void because it suspended the operation of a valid zoning ordinance. 902 P.2d at 429. The court confirmed that zoning moratoria are permissible in certain situations, but explained that a suspension of an ordinance can be effected only by passage of another ordinance. *Id.*[6] *See also State ex rel. Brown v. Corp. of Bolivar*, 209 W. Va. 138, 142 (2000) (explaining that a blanket moratorium on issuance of building permits was void because an ordinance cannot be suspended by a resolution); *Valley Brook Dev., Inc. v. City of Bettendorf*, 580 N.W.2d 730, 731 (Iowa 1998) ("In the first place a city council resolution cannot undermine a city ordinance. The validity of an ordinance is not affected by a resolution; it is amended, repealed, or suspended only by an ordinance."); *Simpkins v. City of Gaffney*, 315 S.C. 26, 29 (Ct. App. 1993) ("We hold the moratorium passed by the city council on the issuance of permits under the existing ordinance is invalid. First, the city council did not possess the power to suspend the ordinance temporarily. Second, to suspend operation of the existing zoning ordinance regulating the construction of duplexes and multi-family dwellings, the ordinance must be either repealed or succeeded by another ordinance or an instrument of equal dignity."); *People ex rel. J. C. Penney Properties, Inc. v. Vill. of Oak Lawn*, 38 Ill. App. 3d 1016, 1018–1019 (1976) (holding that a moratorium passed by motion had "no legal standing" because it "had never been adopted as an ordinance or incorporated as an amendment to the Village's zoning ordinance"); *Harrell v. City of Lewiston*, 95 Idaho 243, 246 (1973) ("Because the City of Lewiston elected to establish and amend its zoning regulations by ordinance, any legislative act by the Lewiston City Council effecting a zoning change must in substance be accomplished by an ordinance."); *Expiration and suspension*, 5 McQuillin Mun. Corp. § 15:40 (3d ed.).

***10** In response to Tuscola's argument regarding legislative equivalency, Defendants contend that there is longstanding precedent which establishes that Michigan municipalities have the power to impose temporary moratoria. But that power is not in dispute. Tuscola admits that municipalities may enact moratoria. Rather, the question raised by Tuscola's motion is whether a municipality may enact a moratorium by resolution which suspends the operation of a valid zoning ordinance. For the reasons stated above, the answer is no.

The cases which Defendants cite in support of the proposition that the moratorium here is valid are all legally or factually distinguishable. Defendants cite a long line of cases where courts address whether moratoria on zoning applications constitute a regulatory "taking" under the Fifth Amendment of the United States Constitution. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321, 122 S. Ct. 1465, 1478, 152 L.Ed. 2d 517 (2002) (finding that a 32 month moratorium did not constitute a per se constitutional taking); *Parkview Homes, Inc. v. City of Rockwood*, No. 05-CV-72708-DT, 2006 WL 508647, at *6 (E.D. Mich. Feb. 28, 2006) (concluding that a moratorium did not violate the United States Constitution); *Oaks v. Montague Twp.*, No. 222401, 2001 WL 1512033, at *8 (Mich. Ct. App. Nov. 27, 2001) (holding that a moratorium did not constitute a regulatory taking); *See also Loesel v. City of Frankenmuth*, 692 F.3d 452 (6th Cir. 2012) (finding that a genuine issue of fact existed regarding whether a zoning ordinance violated the plaintiff's equal protection rights and noting as an aside that the amended ordinance was adopted after a moratorium was enacted); *Lamar OCI N. Corp. v. City of Walker*, 803 F. Supp. 2d 707, 711 (W.D. Mich. 2011) (finding in the context of a First Amendment freedom of speech claim that the municipality was "constitutionally permitted to enact a moratorium for a reasonable period of time").

The question of whether a moratorium violates the federal constitution is entirely different from the question of whether the moratorium was validly enacted, pursuant to state law, in the first place. The cases which Defendants cite provide guidance for the first question, but not the second. And Tuscola's motion rises and falls on whether the moratorium was validly enacted. The remainder of the cases which Defendants rely upon mention that moratoria were enacted, but do not squarely consider their validity. *See Adams Outdoor Advert. v. E. Lansing*, 439 Mich. 209, 224 n.8 (1992) (Levin, J., dissenting) (noting, in the context of a challenge to the city's authority to enact and enforce its sign ordinance, that a moratorium was enacted before the new sign code was adopted); *City of Brighton v. Twp. of Hamburg*, 260 Mich. App. 345, 346 (2004) (holding that a zoning ordinance was preempted by state law and noting that the invalid ordinance was adopted after a moratorium was enacted); *Guenther v. City of Plymouth*, No. 239902, 2003 WL 22204735, at *1 (Mich. Ct. App. Sept. 23, 2003) (finding that the plaintiff had not exhausted his administrative remedies because no land use application or variance had been sought and noting that the plaintiff had filed the lawsuit before a moratorium had expired); *Cent. Advert. Co. v. St. Joseph Twp.*, 125 Mich. App.

548, 553–55 (1983) (noting that an amended ordinance was timely adopted after the court invalidated the old ordinance because a moratorium was adopted, but also noting that "moratoria are not regarded favorably by the courts).

***11** None of these cases provide guidance for the questions raised by Tuscola's motion. At best, they indicate that municipalities may validly enact moratoria in certain circumstances. But that proposition is undisputed here. The cases cited by Defendants do not expressly address the doctrine of legislative equivalency. To the extent any of these cases involve moratoria which suspended valid ordinances, the portions Defendants cite to are dicta because the validity of the moratorium's enactment was never considered. *See Hinchman v. Moore*, 312 F.3d 198, 204 (6th Cir. 2002) (explaining that if a portion of the rationale of a prior case was not essential to the ultimate resolution, the language is not binding); *Pew v. Michigan State Univ.*, 307 Mich. App. 328, 334 (2014) ("Dictum is a judicial comment that is not necessary to the decision in the case."). The cases where courts have squarely considered the doctrine of legislative equivalency control over the few cases Defendants identify where courts did not consider whether the moratorium was validly enacted. The doctrine of legislative equivalency is well established in Michigan, and the moratorium Defendants adopted by resolution violated that doctrine. "The attempt to legislate by resolution is simply a nullity." *Rollingwood*, 386 Mich. at 267.

C.

Because the moratorium was invalidly enacted, the remaining issue is the proper remedy. Tuscola contends that it "is entitled to have its SLUP application processed under the requirements of the Ordinance that existed when the Application was originally submitted," but admits that "Michigan courts have yet to address the proper remedy for the Township's violation." Mot. Judg. Pleadings at 16. In support of its request, Tuscola cites *Bittinger v. Corp. of Bolivar,* 183 W. Va. 310, 315 (1990). In *Bittenger*, the court found that the town council had improperly attempted to suspend a valid ordinance by passing a moratorium by resolution. Because the moratorium was thus void, the court found that the plaintiffs were "entitled to have their applications for permits which were submitted within that moratorium period considered under the ordinances existing at that time and granted, if the ordinances as written would permit." *Id. See also Corp. of Bolivar*, 209 W. Va. at 142–44 (following *Bittenger* and holding that the plaintiffs were "entitled to develop and use the property for any lawful purpose as they might have prior to the void moratorium and the now repealed zoning ordinance").

Several facts are relevant in considering the appropriate remedy. First, Tuscola submitted a SLUP application during the period between the first and second moratorium. The public hearing on that application was scheduled for after the 2016 election date. As noted above, after being elected, the new Ellington Township Board members instituted the moratorium. Because of the moratorium, no further consideration of the SLUP application has occurred. Second, the zoning ordinance provides no deadlines for Defendants to review the SLUP application. Third, both parties agree that the zoning ordinance has not been amended during the pendency of the moratorium. *See* Mot. Judg. Pleadings at 8; Def. Resp. Br. at 9–10.

Because the moratorium is void, Defendants cannot use the moratorium as a reason to refuse to consider the SLUP application. In other words, the operative law in Ellington Township is the existing zoning ordinance. Tuscola is entitled to the procedures and consideration guaranteed by the ordinance. As Defendants emphasize, however, that zoning ordinance provides no deadlines for the Planning Commission or Township Board to review the application. Accordingly, the appropriate timeline for consideration of Tuscola SLUP application is uncertain. The due process implications of that issue are not framed by the current motion, and thus are left unresolved.

IV.

Accordingly, it is **ORDERED** that Plaintiff Tuscola Wind III, LLC's, motion for judgment on the pleadings, ECF No. 16, is **GRANTED** as to Count One.

***12** It is further **ORDERED** that the second moratorium, reproduced at ECF No. 1, Ex. 9, is **VOID.**

All Citations

Not Reported in Fed. Supp., 2018 WL 1291161

Footnotes

1 The same project is also the source of a suit brought by Tuscola against the Almer County Township and Township Board. *See Tuscola Wind III, LLC, v. Almer Charter Township*, et al., Case No. 17-cv-10497. That case is also pending before this Court.

2 The primary opinion in *Square Lake* (written by Justice Riley) did not garner a majority of the Michigan Supreme Court and so the opinion is not binding precedent. *See* Nat. Aggregates Corp. v. Brighton Twp., 213 Mich. App. 287, 297, 539 N.W.2d 761, 767 (1995). However, the Michigan Courts of Appeal have generally adopted Justice Riley's rationale. *See id.*; *Forest Hill Energy-Fowler Farms, L.L.C. v. Twp. of Bengal*, No. 319134, 2014 WL 6861254, at *5 (Mich. Ct. App. Dec. 4, 2014).

3 This said, the Michigan Constitution also provides that the "provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution." Mich. Const. Art 7, § 34. *See also* Square Lake Hills Condo. Ass'n, 437 Mich. at 319.

4 Defendants attempt to argue that the Court has already rejected Tuscola's argument in the related suit Tuscola has brought against Almer Township and the Almer Township Board. In that suit, Tuscola did challenge the legitimacy of a moratorium which the Township enacted. But the Township considered Tuscola's SLUP application on the merits notwithstanding the moratorium. For that reason, the Court expressly declined to determine whether the moratorium was legitimately enacted. *See* Nov. 3, 2017, Op. & Order at 32 n.9, Case No. 17-cv-10497, ECF No. 39. Because that issue was not resolved there, that opinion provides no guidance. In this suit, the Township declined to consider the SLUP application on the merits.

5 Tuscola argues that *Clark* is relying upon the (reversed) court of appeals rationale which the Michigan Supreme Court rejected in *Rollingwood*, but that is incorrect. As explained above, the Michigan Supreme Court agreed that the distinction between resolutions and moratoria was the intention of the legislative body in taking the action. 386 Mich. at 264. *See also* Kalamazoo Mun. Utilities Ass'n v. City of Kalamazoo, 345 Mich. 318, 328 (1956) ("[T]he act which amends, modifies or repeals the law should be of equal dignity with the act which enacts or establishes the law. A resolution is not a law or an ordinance but merely the form in which a legislative body expresses a determination or directs a particular action. An ordinance prescribes a permanent rule for conduct of government, while a resolution is of special or temporary character."). The relevant "reasoning" which the Michigan Supreme Court rejected in *Rollingwood* was the court of appeals' conclusion that a resolution could "stand as an ordinance." 386 Mich. at 264.

6 Defendants attempt to distinguish *Deighton* by citing *Droste v. Bd. of Cty. Comm'rs of Cty. of Pitkin*, 159 P.3d 601 (Colo. 2007). In *Drost*, the Colorado Supreme Court confirmed that municipalities have the authority to "adopt ordinances, confirmed through public hearings, imposing a temporary moratorium on land use applications reviews." *Id.* at 603. *Drost* and *Deighton* are entirely compatible. *Deighton* involved a moratorium passed by resolution; *Drost* involved a moratorium passed by ordinance. Both cases demonstrate that moratoria are permissible if proper procedures are followed. The distinction is that, in *Deighton*, the proper procedures were not satisfied.

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1994 WL 16193975
Only the Westlaw citation is currently available.
Massachusetts Land Court.

CREEKSIDE PARKING, INC., Plaintiff

v.

CITY OF CHELSEA, Harry Spence, as he is the Receiver of the City of Chelsea, and Robert J. Luongo, as he is the Zoning Administrator for the City of Chelsea, Defendants

No. 192808.
|
July 29, 1994.

DECISION GRANTING PARTIAL SUMMARY JUDGMENT

SCHEIER, J.

***1** In this action brought under G.L. c. 185 § 1 (j 1/2); c. 240 § 14A, and c. 231A, Plaintiff, Creekside Parking, Inc. ("Creekside"), seeks a declaration that certain provisions of the Chelsea Zoning Ordinance which prohibit commercial docks on property located within the "Waterfront District" are unconstitutional. Also, under G.L.C. 40A, § 17, Creekside is appealing the Chelsea Zoning Administrator's decision that Creekside is not entitled to a Certificate of Occupancy or use variance authorizing operation of a commercial dock on its property.

Creekside's amended complaint asserts the following federal constitutional claims:

Count I: Chelsea's Zoning Ordinance prohibiting commercial docks in the Waterfront District is pre-empted by the Federal Coastal Zone Management Act ("CZMA") and by the Massachusetts Coastal Zone Management Plan ("CZM Plan") promulgated pursuant to the CZMA; Count II: the Zoning Ordinance unconstitutionally interferes with interstate and foreign commerce and therefore violates Article 1 § 8 cl. 3 (the "Commerce Clause") of the United States Constitution; Count III: the Zoning Ordinance is arbitrary, capricious, unreasonable and in excess of the City's police power, and therefore violates Creekside's substantive due process rights; Count V: the Zoning Ordinance violates Article VI, cl. 2 of the United States Constitution (the "Supremacy Clause"), as it unconstitutionally encroaches onto the federal interest in regulation of commerce within navigable waterways; and Count VI: the Zoning Ordinance denies Creekside a "reasonable economic return" on its property and thereby constitutes a taking of its property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.
The parties have cross moved for summary judgment on Counts I and II of the complaint. Additionally, the City has moved for summary judgment on Counts III and V. Both parties submitted affidavits and extensive briefs. Counsel argued their motions on April 20, 1994.[1]

For reasons detailed below, summary judgment is granted in the City's favor on Count I (the Pre-emption claim) and Count V (the Supremacy Clause claim). Summary Judgment on Count II is granted in part and denied in part and thus requires a trial on those issues left open by this decision. Summary Judgment on Count III is denied, as it presents critical factual issues whose resolution requires a trial.

Facts

Creekside owns property at 71-85 Marginal Street, Chelsea (the "property") located on Chelsea Creek which flows into Boston Harbor. The Chelsea Creek, including the portion along the Creekside property, is part of the Port of Boston which serves as a local, national and international commercial port facility. The Port of Boston also includes certain waterfront areas in East Boston, Charlestown, South Boston, Revere and Everett. Under the State's Coastal Zone Management Program, the Department of Environmental Quality Engineering, now the Massachusetts Department of Environmental Protection ("DEP"), identifies the entire portion of the Chelsea Creek located downriver from the Boston and Maine railroad bridge near Railroad Street, Chelsea (including the riverfront along Creekside's property), as a Designated Port Area ("DPA").

***2** According to the City's zoning map, the Creekside property lies within the "Waterfront District" where, since 1986, commercial dock facilities have not been an allowed use. Under Section 2.1.22 of the Ordinance "Commercial Dock" is defined as an "area of a wharf, or pier, which is used in connection with some type of waterborne commercial activity". Under Section 4.7.2 of the Ordinance,

uses allowed in the Waterfront District include multi-family residences, hotels, motels and inns, retail business or personal service establishments, research and development offices, professional, business or government offices, and, by special permit, restaurants and bars. Waterfront-related uses that are allowed include fish piers (provided fish are not processed), yacht clubs and marinas (including boat sales and rentals), and, by special permit, ferry and excursion boat facilities. It is admitted by the City that, by oversight or mistake, commercial docks are currently allowed by special permit only within the "Industrial District", which is almost completely landlocked and has no access to any navigable waterway.

By St.1991 c. 200, the City of Chelsea was placed under receivership and the appointed receiver was granted broad administrative powers, including the power, within prescribed limits, to change the City's Zoning Ordinance, in order to help turn the City's affairs around.[2]

Chelsea's waterfront has long been used for manufacturing and for commercial docking of various cargoes, particularly oil and petroleum products. Clusters of oil storage tanks line both the Chelsea and East Boston sides of the Chelsea Creek. The parcel abutting the Creekside property along the river is owned by Eastern Minerals, Inc. whose president, Leo D. Mahoney, is also the vice president of Creekside. That parcel is the site of a commercial dock where barges containing mineral salt are unloaded. The Eastern Mineral parcel is dominated by large uncovered piles of this salt which is distributed to various highway departments for use on roadways during the winter.

By all accounts, the Chelsea waterfront has decayed over the years. Several sites have been abandoned or are unused and several others, including the Cabot Paint and Stain Company site upriver, are contaminated by hazardous waste materials and require extensive environmental clean up. The Bellingham residential neighborhood immediately across Marginal Street from the waterfront is drug and crime-ridden. Several of the commercial docking facilities operating in 1986, when the City prohibited Commercial Docks within the Waterfront District, continue today as valid non-conforming uses; while others have been abandoned or are no longer operating. The parties dispute the current number or overall percentage of actively-operating commercial docks within the Waterfront District.

The lines in the current controversy were drawn when, in December 1992, Creekside applied to the Chelsea Zoning Officer for a Certificate of Occupancy to use its property as a commercial dock. On December 16, 1992 the request was rejected on the grounds that the Zoning Ordinance prohibits such use in the Waterfront District. Creekside appealed the Zoning Officer's decision to the Zoning Administrator who upheld the decision of the Zoning Officer on April 5, 1993.[3] This lawsuit followed on April 26, 1993. With this factual setting in mind, I take up the individual claims for which summary judgment is sought.

Count I-Pre-emption

***3** This claim entails purely questions of law, devining the intent and general operation of both 16 U.S.C. 1451, *et seq,* the Federal Coastal Zone Management Act ("CZMA") and 301 C.M.R. 20.03, the Massachusetts Coastal Zone Management Program and the CZM Plan and how they interact with the challenged Zoning Ordinance. Hence, the matter is appropriate for summary judgment.

Pointing to the Chelsea Creek's current and past use for commercial docking, and to its designation by the DEP as a Designated Port Area, Creekside contends that Chelsea's zoning ban on commercial docks clashes with federal and state law, which encourage the location of maritime commerce and development in areas "where such development already exists", 16 U.S.C. § 1452(2)(c) (CZMA), and which have been "designated as port areas", 301 C.M.R. 20.05(3)(a)(7). According to Creekside, the City's Zoning Ordinance runs afoul of these legislative objectives and is pre-empted by them. I disagree.

Pre-emption of municipal law by federal or state law is not to be inferred lightly. *Rogers v. Town of Provincetown,* 384 Mass. 179 (1981). Municipalities are given broad latitude within which to legislate and "a sharp conflict" between the local and state provision is required before the local ordinance is struck down. *Id.* at 181, citing *Bloom v. Worcester,* 363 Mass. 136, 154 (1973). A conflict appears either when the legislature has plainly stated its intention to preclude local action in a particular area or when "the purpose of the [state] statute cannot be achieved in the face of the local by-law" *Id.* At the federal level, the constitutional test for pre-emption of state (or local) law by federal law is similar, *Wardair Canada, Inc. v. Florida Department of Revenue,* 477 U.S. 1, 6 (1986). Express congressional intent to displace particular state or local law is required; or where not so stated by Congress, there

must exist an actual conflict between what federal and local law prescribe. Absent either of these requirements, evidence is needed of congressional intent to exclusively occupy the field covered by the local law. *Id.*

The material Creekside cites fails to show within the CZMA or its state counterpart, either any expressed intent on Congress' or the General Court's part to preclude land use control in coastal zones through local zoning or intent to exclusively occupy the field of coastal zone land management. The CZMA is designed simply to "encourage and assist the states to exercise effectively their responsibilities in the coastal zone". *Norfolk Southern Corp. v. Oberly,* 822 F.2d 388, at 393 (3rd. cir.1987) (citing 16 U.S.C. § 1451(i)). Through § 1456(e) of the CZMA, Congress expressly disclaims an intent to "diminish Federal or state authority in the areas affected by the Act". *Id.* at 394. (citation omitted) Through grants in aid, the CZMA provides incentives, and thus encourages individual states to develop programs that coordinate, standardize and systematically review land use decisions affecting their coastal zones. Under Federal regulations promulgated pursuant to the CZMA, an individual state may choose to exert pre-emptive centralized state control over all such local land use decisions either by regulation or by agency adjudication, 15 C.F.R. §§ 923.42-43, but nowhere is this required. *See* 15 C.F.R. § 923.44, allowing for case by case review through a state administrative program of local actions that affect coastal zone use.

***4** The Massachusetts Coastal Zone Management Plan (the "CZM Plan") makes clear at 301 CMR §§ 20.02(1)-(2), that the intent and purpose behind the CZM Plan is to "ensure that the diverse powers and responsibilities within the Executive Office of Environmental Affairs which operate or affect the resources of the coastal zone are administered in a coordinated and consistent manner", *Id.* at (1); but to *"rely solely on existing statutory authority* so that none of the policies ... and proposed regulations is interpreted to allow an expansion of governmental authority beyond existing law", *Id.* at (2), (emphasis added). Thus, the CZM Plan neither vests additional powers within the Commonwealth, nor diminishes the local zoning power already allowed under G.L. c. 40A. The latter point is made explicitly in the DEP's Waterways Regulations (portions of which are incorporated by specific reference as part of the overall CZM Plan): "[a]ny project [for which a Tideland's license is sought] located on private tidelands or filled Commonwealth tidelands must ... comply with applicable zoning ordinances and by-laws of the municipality(ies) in which such tidelands are located", 310 C.M.R. § 9.34(1). The absence in both the CZMA and the CZM Plan of any use or dimensional controls (except for a general encouragement that maritime-dependent uses be sited in identified areas) strongly suggests that neither Congress nor the Legislature intended to adopt a comprehensive legislative scheme meant to supplant local zoning in coastal or port areas.

Absent express pre-emption in the legislative texts, the inquiry shifts to whether "a sharp conflict" nevertheless exists between the CZMA and the CZM Plan on the one hand, and the Chelsea Zoning Ordinance on the other, such that the statutory purposes of coastal zone management cannot be achieved in the face of Chelsea's prohibition of Commercial Docks within the Waterfront District.

Cases concerning pre-emption of state over local action make clear that more is required than a finding that a local enactment does not neatly dove-tail with a particular state scheme. *See Grace v. Brookline,* 379 Mass. 43, 53-54 (1979). As the Supreme Judicial Court made clear in *Bloom v. Worcester, supra* at 156, in the absence of language explicitly precluding local action on the same subject matter, it must be found that the aim or purposes of the statute cannot be realized in the face of the local ordinance.

For the proposition that Chelsea's Zoning Ordinance thwarts the overall aim of the CZMA and the CZM Plan, Creekside relies heavily on the Commonwealth's regulatory policy set forth within the CZM Plan at 301 CMR 20.05(3)(a)(7) ("Policy 7") to "encourage the location of maritime commerce and development in segments of urban waterfronts designated as port areas [and][w]ithin these areas, prevent the exclusion of maritime dependent industrial uses that require the use of lands subject to tidelands licenses". Policy 7 reflects a goal of the CZMA, 16 USC § 1452(2)(c), that "priority consideration" be given to coastal dependent uses and that "to the maximum extent practicable" new maritime-dependent commercial and industrial development be sited "in or adjacent to areas where such development already exists". Designated Port Areas under the CZM Plan include "already developed [port] areas", 301 CMR 20.99, and thus fit comfortably within the federal description quoted above.

***5** Policy 7 is more fully developed in 301 C.M.R. 20.99 Appendix: Policy 7, which makes clear that that regulation does not operate comprehensively to control or govern all land uses within port areas, but seeks to apply unified criteria and guidelines for state issuance of tidelands licenses and

other state or federal permits required in siting a particular project within a coastal zone or port. Hence, when faced with competing proposals between maritime-dependent and non maritime-dependent uses within these areas, Policy 7 weighs heavily in favor of the former use in the issuance of such state permits or licenses. Appendix: Policy 7 further states that "priority to the use of designated port areas for maritime dependent industrial development ... will encourage such uses to locate there ... [and thus will] minimize the need for dredging of new deepwater channels ... and maximize the use of prior public investments ... in existing ports".

The foregoing makes clear that Policy 7 in particular and the CZM Plan generally, are not intended to override local zoning by mandating the siting of commercial and industrial maritime-dependent uses within Designated Port Areas. This conclusion is further reinforced by noting the complete absence of statutory language of command (e.g. "shall", "shall not", "order", "mandate", "require") within either the CZMA or the CZM Plan. Rather, language of aspiration and general purpose is employed throughout, (e.g. "encourage", "encourage and facilitate", "minimize", "priority consideration", "to the maximum extent practicable"). In light of this, it cannot be said that, on its face, the challenged Zoning Ordinance operates to prevent fulfillment of these general legislative objectives.

The CZMA encourages the siting of *"new commercial development"* within already developed areas. Similarly, Policy 7 encourages the location of *"maritime commerce and development"* within Designated Port Areas. Neither the Act nor the Plan defines, or otherwise qualifies, these phrases to include only commercial uses of the sort Creekside comtemplates, while excluding those marine-related commercial uses which the Ordinance does allow, any one of which fits equally well within the commonly accepted meaning and usage of those phrases. Had the Zoning Ordinance prohibited from the Waterfront District *all* water-dependent uses, we would have a different situation. Here, however, several types of commercial water-dependent uses are allowed while others are prohibited.

The standards required for pre-emption of the local zoning provision by either the CZM Plan or the CZMA, (or both), as those standards have been enunciated in the applicable caselaw, are not met in the instant case. Accordingly, Creekside's motion for summary judgment on Count I is denied and the City's cross motion is granted.

Count II. The Commerce Clause

Article I, § 8, cl. 3 of the United States Constitution (the "Commerce Clause") grants Congress broad and plenary power to "regulate commerce with foreign Nations, and among the several States ...". By negative implication, the Commerce Clause sharply limits-but does not altogether proscribe-actions by individual states which may affect the free flow of articles of commerce throughout the nation. *Maine v. Taylor,* 477 U.S. 131, 138 (1986). The negative, or dormant Commerce Clause, prohibits state actions that unreasonably burden, clog, or inhibit the free flow of goods into and out of individual states, and prevents states from insulating themselves from the national economic mainstream through protectionist measures. *Wyoming v. Oklahoma,* 502 U.S. 437, 112 S.Ct. 789, (1992). The Commerce Clause thus reflects the framer's central concern over "the tendencies toward economic balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation", *Hughes v. Oklahoma,* 441 U.S. 322, 325-326 (1979). The Commerce Clause applies with equal force to the individual states and to their political subdivisions. *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951); and thus, municipal actions that affect interstate or foreign commerce are also subject to Commerce Clause limits.

***6** The dormant Commerce Clause is a judicially created constitutional doctrine out of which certain caveats have evolved. Analysis of state action falls into two categories. First, state (or municipal) actions which, on their face or in their intended effect, discriminate or directly burden interstate commerce are subject to a "virtually per se rule of invalidity", *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1978). Such actions are afforded the "strictest scrutiny" requiring the state to demonstrate both a legitimate local purpose and that non-discriminatory means of achieving that purpose are unavailable, *Hughes v. Oklahoma, supra* at 336.

A second category includes state actions which, while neutral on their face or in their intended effects, nevertheless indirectly or incidentally burden the free flow of goods interstate. Those actions are subject to burden-benefit balancing where the state must show that the incidental burdens to interstate commerce are not "clearly excessive in relation to the putative local benefits". *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

The first category of cases-the direct burdening cases-includes those where, in explicit terms, the state measure

overtly blocks articles of commerce at its borders. *See* e.g. *Philadelphia v. New Jersey, supra* (measure prohibiting importation of solid and liquid waste into the state declared invalid); *Hughes v. Oklahoma, supra* (measure prohibiting exportation of live minnows from the state declared invalid); *compare, Maine v. Taylor, supra* (measure prohibiting importation of certain live bait fish declared valid as necessary measure to protect state's wild fish population from disease and parasites). The direct burdening cases also include those measures which, while facially neutral, nonetheless, intentionally discriminate against interstate commerce, or which have the effect of directly burdening such commerce, often to the benefit of competing in-state interests. *See Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977) (North Carolina measure requiring that U.S. Department of Agriculture grading standards be the only standards applied to imported apples found to impermissibly favor in-state apple growers and to discriminate against out-of-state growers).

The second category-the incidental burdening cases-includes those state measures that, by their terms or in their effects, do not favor in-state over out-of-state interests, but which nonetheless, have a disproportionate or excessive effect on interstate commerce in relation to the local benefits the measure seeks to advance. *See Pike v. Bruce Church, Inc. supra,* (requirement that melon growers use in-state packaging facilities declared invalid as excessive burdening when weighed against state's relatively minor interest in enhancing reputation of its own melon industry). Compare, *Minnesota v. Clover Leaf Creamery Co.,* 449 U .S. 456 (1981) (Minnesota statute outlawing plastic, nonreturnable milk containers regulates evenhandedly, and poses minor burden on interstate commerce that is outweighed by state interest in promoting energy conservation and easing in-state waste disposal problems).

***7** Citing as persuasive authority *Pittston Warehouse Corp. v. City of Rochester,* 528 F.Supp. 653 (W.D.N.Y.1981), Creekside argues first that "[i]t is evident from the face of the Chelsea Zoning Ordinance that the City has unconstitutionally discriminated against the use of its waterfront for interstate and foreign commerce", and that consequently its action is a *per se* violation of the Commerce Clause. This position is without merit. The zoning provision prohibiting commercial docks in the Waterfront District is facially neutral. Nowhere in its text does the Ordinance distinguish between in-state maritime carriers and freight services from out-of-state or foreign ones.

Although non-discriminatory on its face, a measure may nevertheless be motivated by discriminatory purpose or have clear discriminatory effect. Such economic protectionist actions are also subject to the "virtually per se rule of invalidity" and thus trigger strict scrutiny under the *Hughes v. Oklahoma* test. For Example, in *Bacchus Imports Ltd. v. Dias,* 468 U.S. 263 (1984), Hawaii's action exempting certain local distillers from a 20% wholesale excise tax on liquors was motivated by the discriminatory purpose of aiding an in-state industry. *Id.* at 270-271. Unlike the measure struck down as having discriminatory purpose or effect in *Bacchus Imports,* the burdens imposed by the Chelsea Zoning Ordinance are aimed not at out-of-state commercial interests, but at local property owners who, like Creekside, may not establish new commercial docking facilities along the Chelsea Creek. The provision does not discriminate "intentionally or in effect, against out-of-state goods or suppliers", *Wood Marine Service, Inc. v. City of Harahan,* 858 F.2d. 1061, 1065 (5th cir.1988).

Like the zoning ordinance upheld in *Wood Marine,* whose purpose was to halt further commercial development within the alluvial land on Harahan's portion of the Mississippi River shore, Chelsea's Ordinance seeks to halt further commercial dock use of its port area, and not "to favor local companies and the local economy at the expense of out-of-state rivals". *Id.* at 1065. Creekside argues nevertheless that by favoring local marine uses such as fish piers, marinas, and excursion and ferry services over out-of-state and foreign maritime freight carriers, the ordinance in effect discriminates and should therefore be strictly scrutinized. Precisely the same argument was advanced in *Norfolk Southern Corp. v. Oberly, supra.* at 401-402. In response, the *Norfolk* court observed that "[t]he Supreme Court has never adopted such a broad gauged view of a discriminatory effect; it has found discriminatory effects only where the state law advances in-state business in relation to out-of-state business in the same market". *Id.* at 402. Local measures equally affecting both inter-state and intra-state movement or trade in particular articles of commerce do not implicate the dormant Commerce Clause. What matters for Commerce Clause analysis is not so much that local action burdens *commerce* generally; but that it particularly affects *inter-state commerce,* while leaving the intra-state movement of the same type of commerce largely unaffected. *Old Bridge Chemicals v. New Jersey Department of Environmental Protection,* 965 F.2d. 1287, 1295 (3rd cir.1992) (in-staters and out-of-staters alike are equally burdened by state requirement to code and identify recyclible by-products of hazardous

waste materials). Thus, in *Philadelphia v. New Jersey, supra* at 629, New Jersey's effort to slow the flow of trash into the state's landfills was struck down because intra-state movement of trash continued largely unimpeded, while trash originating out-of-state was stopped at the State's doorstep. *Id.* New Jersey could, however, legitimately pursue the same ends by curtailing or slowing the flow of *all* waste, including that generated within the state, even though the flow of trash coming from out-of-state would be impeded. *Id.* at 626.

***8** At this juncture, Creekside has not even identified specific out-of-state or foreign commercial interests wishing to use its proposed docking facilities and which, as a consequence, have been adversely affected by the zoning provision's ban on such uses. But even if, as Creekside maintains, the only businesses wishing to engage the use of commercial dock facilities along the Chelsea Creek happen to be out-of-state or foreign freight carriers, that fact alone is insufficient to trigger strict scrutiny of a facially even-handed land use provision that prohibits such use. *Norfolk Southern Corp., supra* at 402.

The Pittston-Warehouse case, *supra* is distinguishable on its facts from the Chelsea situation. With broad, sweeping strokes, the U.S. District Court in *Pittston* struck down the City of Rochester's actions to close its port to manufacturing uses and to most commercial shipping and water-born freight services in order to promote use of the port as a recreational marine area. The plaintiff leased the entire port from the City and had publicly announced the imminent start-up of a roll-on/roll-off freight service between the Port of Rochester and the Province of Ontario, Canada. In direct response to that announcement, the City Council passed Ordinance 80-199 banning roll-on/roll-off freight services. The Court found that Ordinance 80-199 was plainly motivated by discriminatory intent and, in blocking an identified international shipping service, the Ordinance directly affected not only Pittston, but also its contract partner, a Canadian carrier. *Pittston Warehouse Corp.,* 528 F.Supp., at 657 and 663. The River Harbor Enactments (also invalidated) seemed similarly motivated. They were passed and put into immediate effect at the very same City Council meeting in which Pittston had explained its proposal for roll-on/roll-off freight service. *Id.* at 656. Here by contrast, there is no showing that when the commercial dock prohibition was enacted in 1986, the provision was motivated by a discriminatory purpose.

More important, in *Pittston Warehouse,* Rochester controlled the entire port and, consequently, there were no alternate means for interstate or foreign shipping to get through. Here by contrast, the rest of the Port of Boston-including port areas in Boston proper, Charlestown, South Boston, East Boston, Everett and Revere-remains open and, commercial docking that is now banned from Chelsea's portion of the Chelsea Creek might be accommodated in other port areas. As such, the situation here is more like that in *Wood Marine Service, Inc. v. City of Harahan, supra* where the Fifth Circuit Court of Appeals found that Harahan's closing of a portion of its riverfront (the "batture" area) to freight transfers would have no demonstrable effect on the movement of affected goods into that area of the state over the Mississippi River, *Wood Marine Service, Inc.,* 858 F.2d, at 1065. *Pittston Warehouse,* was in fact distinguished by the U.S. District Court from the Harahan situation on this very point, *Wood Marine Service, Inc. v. East Jefferson Levee District,* 653 F.Supp. 434 (E.D.LA.1986) (rev'd on other grounds *Wood Marine Service, Inc. v. City of Harahan,* 858 F.2d 1061 (1988)). As stated at 447 of the District Court decision, the "availability of other areas is a factor which must be considered". If every city and village along that portion of the Mississippi were to enact the same ordinance, commerce might be blocked. But it is not sufficient to assert "what would happen if other jurisdictions enacted similar ... laws" *Id.*[4]

***9** In light of the foregoing discussion, I rule that Chelsea's prohibition of commercial docking in the Waterfront District is facially neutral. By its terms, it does not directly burden interstate and foreign commerce. Further, I rule that the provision, in its purposes and intended effects, does not discriminate against interstate and foreign commerce in favor of competing in-state or local commercial interests.

A local measure which regulates even-handedly and which in its effects only indirectly or incidentally burdens interstate or foreign commerce, may nevertheless be invalidated on Commerce Clause grounds if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits", *Pike v. Bruce Church, Inc.,* supra at 142. I rule that the balancing test called for in *Pike* is the proper standard to be applied in Creekside's Commerce Clause claim. Material factual issues remain unresolved and thus preclude me from entering summary judgment in either parties' favor on this aspect of the Commerce Clause claim. Therefore, a trial is necessary in order to determine whether in fact the Zoning Ordinance imposes an excessive burden on interstate commerce in relation to the "putative local benefits".

Through its affidavits and other summary judgment materials, Creekside has adequately established by summary judgment standards a triable issue of material fact on this question. In his affidavit, Leo D. Mahoney maintains that certain docks used or operated by him have at one time or another received interstate and foreign freight shipments in or around Boston, including Chelsea where, because of the zoning ban on commercial docks, such shipments may no longer be received unless grandfathered under c. 40A § 6. Additionally, Anne D. Aylwood's[5] affidavit submitted by the City in which she maintains that alternate docking facilities more suitable for the types of cargo Creekside is likely to handle are available in other parts of the Port of Boston, has adequately been met by Creekside's countervailing assertion that such alternate sites may either be unavailable or inadequate.

Once Creekside has met its initial burden of production at trial as to incidental burdening, the city must then establish that the incidental burdens imposed by its Ordinance are not "clearly excessive" in relation to the putative benefits. That will require expanded evidence as to the purpose of the prohibition on Commercial Docks and the nature of the local benefits which the Zoning Ordinance seeks to advance, and whether alternate and less burdensome means are available to the City that would likely accomplish the same end.

The cross motions for summary judgment on Count II, therefore, are allowed in part and denied in part.

Count III. Substantive Due Process

In Count III, Creekside challenges Chelsea's prohibition of Commercial Docks within the Waterfront District on due process grounds as "arbitrary, capricious and unreasonable, and therefore unconstitutional", both on its face, and as applied to its property.

***10** The principals governing this type of claim are easily stated, but more difficult to apply. *Sturges v. Chilmark,* 380 Mass. 246, 256 (1980). Creekside bears "the heavy burden" of showing that the zoning action is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare". *Id.* quoting *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395 (1926). "Every presumption is made in favor of the [provision's constitutionality] and its enforcement will not be refused unless it is shown beyond reasonable doubt that it conflicts with the constitution...." *Caires v. Building Commissioner of Hingham,* 323 Mass. 589, 594 (1949). If its reasonableness is "fairly debatable", the judgment of the local zoning authority should prevail. *Turnpike Realty Co. v. Dedham,* 362 Mass. 221, 233 (1972). Thus "any rational connection" between the zoning provision and a legitimate local zoning purpose will sustain the regulation, *Sturges v. Chilmark,* at 257; and, although better or more artful means might have been used to fulfill the local purposes, the court may not substitute its judgment for that of the local zoning body. *National Amusements, Inc. v. Boston,* 29 Mass.App. 305, 309 (1990).

However deferential, judicial review of the validity of a zoning regulation on due process grounds does not take place in a vacuum. *Sturges v. Chilmark,* at 257. Existing circumstances at the time of the zoning action are to be considered and the municipality must "bring forward some indication that the zoning provision has some reasonable prospect of a tangible benefit to the community." *Id.* Hence, there must be some showing on the record of a reasonable basis for the zoning action.

The City now moves for summary judgment on Count III and in support offers a collection of affidavits and other documents that purport to show a lengthy and deliberative planning process on its part leading up to the 1986 zoning change at issue. Nonetheless, it cannot be shown by summary judgment standards that Creekside categorically will not be able to sustain its "heavy burden" at trial of showing that, in fact, the City's action is arbitrary; unreasonable and without rational relationship to any legitimate zoning purpose. *See Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 713 (1991) (entry of summary judgment is appropriate where non-moving party has "no reasonable expectation of proving an essential element of [its] case").

Creekside's claim entails a fact-intensive inquiry for which summary judgment is generally not warranted. Among other things, that inquiry requires fairly extensive evidence both of the legislative aims and purposes underlying the zoning change; and whether, when enacted in 1986, and in its continuing operation since then, the provision offers a "reasonable prospect of a tangible benefit to the community". For these reasons, the City's motion on this Count must be, and hereby is denied.

Count V. The Supremacy Clause

***11** In this Count, Creekside maintains that the Chelsea Zoning Ordinance "encroaches on paramount federal policy in the regulation of commerce and navigable waterways" and thereby violates Article VI cl. 2 (the Supremacy Clause) of the

United States Constitution. The Supremacy Clause provides simply that "[t]his Constitution and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land." According to Creekside, the "supreme law" here is the Commerce Clause of the United States Constitution, and the related federal servitude over interstate navigable waters.

The navigational servitude over the nation's waterways and the submerged lands beneath derives from and is coextensive with the commerce clause. *Kaiser Aetna v. United States,* 444 U.S. 164, 173 (1979) ("Reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce. It has long been settled that Congress has extensive authority over this nation's waters under the Commerce Clause ... The authority is as broad as the needs of commerce...." *Id.*) Accordingly, little additional constitutional analysis beyond that in Count II, *supra* is called for. It may simply be stated that "all navigable waters are under the control of the United States *for the purpose of regulating and improving navigation" Scranton v. Wheeler,* 171 U.S. 141, 156 (1900) (emphasis added). This means that, although title to the submerged lands and shore may lie with individual States or private individuals, the title "is always subject to the servitude" *Id.*

Navigable waterways, such as Chelsea Creek, as well as submerged lands below the mean low-water mark, and "tidelands" or "flats" between the mean high-water and low-water marks are similarly impressed with a state-based public trust that, among other things, protects the public's rights to navigation. *See* generally, *Boston Waterfront Development Corp. v. Commonwealth,* 378 Mass. 629, 631-639 (1979); *Opinion of the Justices,* 383 Mass. 895, 900-906 (1981); *See also Wood Marine Service, Inc. v. City of Harahan,* 858 F.2d. 1061, 1064 (5th cir.1988) (discussing Louisiana's analagous state-reserved public uses over the Mississippi waterway).

Creekside misapprehends the basic nature of the federal and state servitudes over navigable waterways, each of which assures the public right in the free movement of all waterborn traffic inter-state and intra-state. The Chelsea Zoning Ordinance is aimed primarily at certain private riparian rights originating just beyond the Chelsea Creek channel. But nowhere does the provision, by its terms or in its effects, directly regulate or impede the free use of Chelsea Creek. Furthermore, the zoning provision does not seek to interfere with or extinguish private riparian rights, other than to prohibit commercial cargoes from being loaded and unloaded at parcels fronting on the channel. In this regard the Chelsea situation is on all fours with *Wood Marine Service, Inc., supra* where it will be recalled the City of Harahan prohibited commercial development along the "batture" area of its portion of the Mississippi shore. That restriction was found not to contradict Louisiana's (or the nation's) right to "utilize the river and the batture for navigation and commerce" *Id.* at 1064.

***12** Creekside's Supremacy Clause claim as it has been advanced is based solely on the Commerce Clause and on related grounds of the federal navigational servitude over the Chelsea Creek channel. Because the federal interest in the free navigability of interstate waterways and the analagous state interest are both legally unaffected by the Zoning Ordinance, the City's motion for summary judgment on this claim must be, and hereby is granted.

All Citations

Not Reported in N.E.2d, 1994 WL 16193975

Footnotes

1 Count IV of the complaint is an appeal under G.L. c. 40A § 17 from the Zoning Administrator's decision dated April 5, 1993 denying Creekside's appeal from the Zoning Officer's refusal to issue it a Certificate of Occupancy to use its property as a commercial dock, and denying Creekside's request for a use variance. Count VII argues that the Zoning Ordinance and decision of the Zoning Administrator violate the zoning uniformity requirements of G.L.C. 40A, § 4. Neither party has moved for summary judgment on Counts IV, VI, or VII of the complaint.

2 The City is due to adopt changes to the Zoning Ordinance, including creation of a Waterfront Industrial Overlay District ("WIOD") which, among other water-related commercial and industrial uses, allows for commercial dock facilities by special permit. The proposed WIOD covers a significant portion of the Chelsea Creek shoreline upriver from the Creekside parcel, but excludes the Creekside parcel itself and its immediate surrounding area. At this point, the proposed zoning changes, including the WIOD, have not gone into effect and today's decision therefore does not take them into account.

3 Creekside also asked for a use variance which was denied by the Zoning Administrator.

4 In its reply brief, Creekside cites, among other authority, *Fort Gratiot Landfill v. Michigan Department of Natural Resources,* 504 U.S. 353, 112 S.Ct. 2019 (1992) for the contrary proposition that Chelsea's discrimination against commercial shipping "is not justified by the fact that commercial shipping is permitted in other parts of the Port of Boston". In *Fort Gratiot,* individual Michigan counties were permitted the choice by state regulation to exclude from their landfills trash originating from outside the county. However, trash blocked from one county could enter neighboring counties that had not taken steps to exclude out-of county trash. *Id.* at 2022. Except for the local (versus state-wide) basis of the regulation, the *Fort Gratiot* situation mirrored that in *Philadelphia v. New Jersey;* and, on the authority of the latter case, the *Fort Gratiot* Court invalidated Michigan's regulatory scheme. *Id.* at 2024. In both cases however, local waste producers were afforded "complete *protection from competition* from out-of-state waste producers who seek to use local waste disposal areas". *Id.* (emphasis added). That situation clearly does not obtain here as the Zoning Ordinance does not involve advantaging local or in-state interests at the expense of out-of-state competitors.

5 Anne D. Aylwood is currently Executive Director of the National Commission on Intermodal Transportation, and formerly Massport's Maritime Director.

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Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Northern Division.

Ronald LOESEL, Arthur Loesel, Plaintiffs,

v.

CITY OF FRANKENMUTH, Defendant.

No. 08-11131-BC.
|
March 27, 2009.

Attorneys and Law Firms

Andrew Kochanowski, David J. Szymanski, Sommers, Schwartz, Southfield, MI, for Plaintiffs.

David K. Otis, Plunkett & Cooney, East Lansing, MI, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR TO DISMISS

THOMAS L. LUDINGTON, District Judge.

***1** Plaintiffs Ronald and Arthur Loesel filed a complaint against Defendant City of Frankenmuth on March 17, 2008. Plaintiffs are owners of a tract of land on the outskirts of Frankenmuth. They entered into an option agreement with Wal-Mart for Wal-Mart to purchase the land for four-million dollars if it could build one of its stores on the land. Defendant learned of the contract, became concerned about the impact that a Wal-Mart and other similar stores would have on Defendant, and eventually adopted a zoning ordinance, which may have precluded Wal-Mart from building one of its stores on Plaintiffs' property. Wal-Mart abandoned its application to build a store on Plaintiffs' property and terminated the option contract with Plaintiffs. Plaintiffs' complaint alleges claims against Defendant City of Frankenmuth based on equal protection, due process, the Privilege and Immunities Clause of the Fourteenth Amendment, and the Commerce Clause. Plaintiff seeks both monetary damages and an order declaring that Defendant's zoning ordinance is unconstitutional.

Now before the Court is Defendant's motion to dismiss and for summary judgment [Dkt. # 13], filed August 28, 2008. Plaintiff filed a response [Dkt. # 18] on October 14, 2008, and Defendant filed a reply [Dkt. # 21] on November 26, 2008. The Court held a hearing on December 10, 2008. Defendant first contends that the Court should dismiss all of Plaintiffs' claims for lack of jurisdiction because Plaintiffs lack standing. Second, Defendant contends that the Court should dismiss Plaintiffs' equal protection and due process claims for lack of jurisdiction because those claims are not ripe. Third, Defendant argues that it is entitled to summary judgment on all of Plaintiffs' claims based on the merits. Plaintiffs argue that they have standing and that their claims are ripe. To the extent that Defendant moves for summary judgment on the merits of Plaintiffs' claims, Plaintiffs oppose the motion because more discovery is necessary under Federal Rule of Civil Procedure 56(f).

I

The following facts are as alleged by Plaintiffs, unless otherwise noted:

Plaintiffs at all relevant times were and continue to be tenants in common in approximately thirty-seven acres of land located in the Township of Frankenmuth, Saginaw County, Michigan. Plaintiffs' property is located in the Township of Frankenmuth, contiguous with Defendant. Many of Defendant's citizens have a German heritage, and Defendant has promoted itself as "Michigan's Little Bavaria." Defendant profits from an influx of day and overnight tourists to Main Street, which emphasizes retail and restaurant establishments with a Bavarian theme. One of these establishments, Bronner's, is a retail store specializing in Christmas ornaments and other merchandise, is approximately 400,000 square feet, and has over one-hundred employees. Nearby, other establishments serve fried-chicken dinners and sell souvenirs to tourists. All of the Bavarian-themed establishments are located in the southern end of Defendant, generally south of Genesee Street.

***2** The northern part of Defendant abuts the Township of Frankenmuth. The north end of town contains the non-tourist retail properties used by Defendant's residents, including banks, car dealerships, and grocers. A prominent shopping center, the Bavarian Mall, contains a number of retail stores and is located just north of Genesee Street. The northern

part of Defendant is described in its Master Growth Plan as follows:

> Serving as the center of local commerce for an area much larger than the township, the North Main Street local shopping area is also the gateway to the South Main tourist business district in Frankenmuth. Main Street is multifunctional and services a combination of pedestrian and automobile traffic. Main Street is also state trunkline-83 and serves as the main point of ingress from the Birch Run exit at I-75.

According to Defendant, its Zoning and Planning Code designates two commercial planned unit development districts, consisting of only undeveloped land: Commercial Local-Planned Use Development ("CL-PUD") and Commercial Tourist Planned Use Development ("CT-PUD"). Plaintiffs' property is zoned CL-PUD. The CL-PUD districts provide for the sale of goods and services to meet the general needs of the residents of Defendant. The CT-PUD districts are those which provide for the sale of goods and services to meet the general needs of visitors. According to Defendant's Master Growth Plan, the zoning was designed to encourage innovation in land use and variety in design, layout, and type of structures constructed. Prior to the adoption of the ordinance at issue in this case, Defendant did not have any zoning ordinances imposing a size limit on structures. Defendant did, however, have minimum lot size restrictions in order to discourage structures being placed too close to one another.

The commercial establishments north of Main Street typically do not incorporate the Bavarian look. The north end of town is typically a mixed-zone of commercial and residential use properties. As zoned prior to the events that led to this lawsuit, Plaintiffs' property was contiguous to other commercially-zoned properties. Defendant had planned that commercial expansion would likely occur in the direction of Plaintiffs' property, that is, northward of the north-south commercial corridor.

At least as early as in 1996, the Township of Frankenmuth and Defendant, through resolutions and agreements, agreed that Defendant would furnish water and sewer services to, among others, Plaintiffs' property, with the tract to be annexed by Defendant if requested by a developer. As a result of these resolutions and agreements, at all times relevant to this lawsuit, the future development of Plaintiffs' property has been under the actual zoning control of Defendant.

On May 26, 2005, Plaintiffs and third-party Wal-Mart Real Estate Business Trust entered into an option agreement for Plaintiffs to sell and Wal-Mart to purchase a portion of Plaintiffs' land. The option agreement was later amended to expand the original purchase of the land from approximately 23.55 acres to approximately 37 acres. The amended option agreement between Wal-Mart and Plaintiffs called for Wal-Mart to pay Plaintiffs $4,000,000.00 for the property, contingent on Wal-Mart's ability to actually build the store.

***3** A review of the agreement also reveals that Wal-Mart maintained "sole and absolute discretion" to cancel the agreement within 180 days of the date of the agreement based on "the feasibility of Wal-Mart's planned development of the Property." The purchase was also contingent on the outcome of an environmental investigation conducted by Wal-Mart, which it had 270 days to complete. Finally, the agreement expressly conditioned the agreement on "zoning of the Property for business retail usage."

On March 29, 2005, upon hearing a rumor that Plaintiffs were talking to Wal-Mart, Defendant's City Manager Charles Graham emailed a planner acquaintance at the Michigan Department of Transportation ("MDOT") stating that "[City Clerk] Phil Kerns has now confirmed there will be a meeting here on April 7th pertaining to the Loesel property on North Main." The next day, Graham emailed the planner at MDOT and said, "We have heard rumors that the proposed project is a Walmart which I am totally opposed to, and I think most people in Frankenmuth will be opposed to." However, Graham acknowledged that Plaintiffs' property was properly commercially zoned and that as a consequence, absent action by Defendant, Plaintiffs had a right to sell the property to Wal-Mart for a store to be built in the northern end of town.

At a point after Plaintiffs had signed the agreement with Wal-Mart, Graham began to solicit information concerning other communities' efforts to exclude Wal-Mart from their towns. On June 22, 2005, in response to an email he sent requesting assistance on how to oppose the Wal-Mart, Graham was told that Defendant could, "[a]dd a provision to the zoning ordinance that limits the size of any commercial building. That will stop them from enlarging and may stop them from beginning if they know they cannot enlarge." In the same email, Graham was advised: "Be sure to do a good internet search first because WalMart has challenged some of those provisions and won when they were poorly drafted, but lost when they weren't, if I recall correctly." Graham was further

advised: "It is definitely better for citizens to fight it instead of the city and township."

On July 14, 2005, Graham attended a meeting of the Frankenmuth Economic Development Corporation ("EDC"). At the meeting Graham acknowledged that he had reviewed the proposed site plan submitted by Wal-Mart's engineers, and admitted that, as shown, it appeared that the zoning allowed the proposed project. The EDC estimated that the Wal-Mart store would generate between $40,000 and $50,000 in annual tax revenue for Defendant, which would have added an additional two-percent to Defendant's annual property tax revenue, with total tax revenue for the county and schools amounting to between $200,000 and $250,000.

The Frankenmuth Downtown Development Authority ("DDA") was established by Defendant in 1983 to promote economic growth. Its board is appointed by the Mayor of Frankenmuth, and the DDA is a city organization. On July 15, 2005, Sheila Stamiris, Executive Director of the DDA, sent a memorandum to the Frankenmuth Mayor and City Council. She advised Defendant's Mayor and the City Council that Plaintiffs had been offered a large sum of money by Wal-Mart for their land. She said:

> ***4** Tuesday we awkwardly discussed the proposed Walmart project. As I already suggested, we have not brought the discussion to the public agenda. If there is anything good to say about the project, we can say that we have been given a heads up by the owner and perhaps we have been given a gift of time to adequately plan for this controversial project. I feel strongly that the City should remain neutral while fact finding is completed.

Stamiris expressly advised Defendant that the proposed store was a 104,000 square-foot super-center including sundry and drygoods, a grocery, a pharmacy, and a tire center. Stamiris identified the precise location of the proposed store. Shortly after writing the memorandum, Stamiris advised Graham and other of Defendant's officials that other Michigan towns had not experienced problems with Wal-Mart stores. She forwarded an email from the Downtown Development Authority of DeWitt, Michigan, a town roughly the same size as Defendant, that said in response to her inquiry:

> We have three Wal-Marts within a twenty mile radius. To this point we have not noticed that specifically, Wal-Mart has negatively impacted our downtown. We recently lost a dollar store, but am not sure it could be contributed to the opening of a Wal-Mart. It seems that folks in this area are of the opinion that shoppers will go where they can get the best deal and Wal-Mart has good deals. We feel that the Big Box stores offering one stop shopping appeal to younger shoppers with convenience as their goal.

Stamiris also forwarded to Defendant an Economic Impact Report that estimated the new Wal-Mart store would generate between three- and five-hundred jobs and contribute $70,000 in taxes in the first year of operation. After receiving the report, Graham again solicited an MDOT planner for help in opposing the proposed store. In an email that acknowledged that Wal-Mart itself advised that it would create three-hundred jobs paying nearly ten dollars per hour, he asked MDOT, "Do you know of any localities that have ordinances that prohibit 24 hour operation?"

On July 20, 2005, Defendant was advised by Tom Johnston, a local businessman, that an anti-Wal-Mart group called Citizens for Frankenmuth First had been set up, and that Johnston was involved in the group as a Vice-President. Johnston had operated an IGA store for several years until it was purchased by the Kroger Company, which operates over three-thousand stores in the United States, in 2003. The Kroger is located on North Main Street, several blocks north of Genesee Street within the Bavarian Mall, which is zoned B-3, highway commercial.

Citizens for Frankenmuth First retained attorney Robert LaBelle to assist in its anti-Wal-Mart efforts. Its website featured LaBelle's name. In August 2005, the Frankenmuth City Planning Commission suggested a moratorium on construction of certain new large commercial buildings. An official moratorium, Resolution No.2005-92, was passed and adopted by Defendant shortly after that meeting, halting the approval process related to the development of any retail facility of at least 70,000 square feet, for a period of 120 days.

***5** On August 25, 2005, Graham attended an anti-Wal-Mart rally sponsored by Citizens for Frankenmuth First. Even though the moratorium was in effect, Defendant knew from Wal-Mart's Ann Arbor-based engineering firm that Wal-Mart still wanted to purchase Plaintiffs' property to build a 100,000 square-foot store. In early September 2005, Graham and several City Council members met with attorney LaBelle.

An individual who was known for his anti-Wal-Mart views, transmitted to Graham and Kerns the text of a Maryland ordinance that limited retail establishments to 65,000 square feet. Later, Graham and Kerns obtained an article from the

American Planning Association entitled "Practice Big Box Regulation," which explained some methods by which towns could zone away stores like Wal-Mart. On September 14, Graham sent an email to Kerns that suggested how such an ordinance could be formulated.

In the days that followed, but before any public hearing on the issue, Graham continued to pursue "size-cap" ordinances as the means of blocking Wal-Mart. On September 14, 2005, he contacted the Institute for Local Self-Reliance, an anti-Wal-Mart website that sells books entitled, "Big Box Swindle," among others. He inquired about anti-Wal-Mart ordinances as follows:

> I read your article on store size caps. My question is: Have any of these communities been sued for establishing these store size caps and if so what were the results? If we adopt this type of ordinance, does it have a chance of withstanding potential litigation? Our recently updated community master plan does provide a good foundation for adoption of this type of ordinance. Our City Council is interested in pursuing this type of ordinance, but there is some hesitancy about it because of the fear of law suits.

The following day, Graham sent an email to Kerns and Johnston concerning the legality of size-cap ordinances. On September 16, 2005, Graham sent a memorandum to the City Council and others requesting that Defendant not take a public position on the Wal-Mart development in response to a Citizens for Frankenmuth First survey. On September 27, 2005, Graham first internally introduced the idea of an ordinance capping the size of a retail establishment. Two days later, Graham introduced LaBelle to the Frankenmuth Ordinance Review Committee ("ORC") and invited LaBelle to attend the meeting with the ORC, scheduled for October 5, 2005.

At the time this occurred, Defendant's only economic development report concerning a Wal-Mart in Frankenmuth was the positive assessment Defendant obtained during the summer of 2005. On October 5, 2005, Graham sought an opinion from the City's insurer about liability coverage in the event of a lawsuit. On October 11, 2005, Graham forwarded to members of the ORC committee a proposed ordinance that would limit store size. The proposed ordinance was drafted by LaBelle, and his services were paid for by Citizens for Frankenmuth First. The zoning ordinance would establish a Neighborhood Commercial Overlay Zone, set standards and regulations within the zone, and limit the size of retail establishments to 65,000 square feet. On October 18, 2005, Wal-Mart made a presentation to Defendant indicating that it was willing to design its store to fit in architecturally with the Bavarian appearance maintained in the historic part of town.

***6** After the first draft of the ordinance was circulated, Graham continued to communicate with LaBelle about the potential Wal-Mart store. In an email dated October 21, 2005, Graham expressed concern to LaBelle that having the ordinance apply only to the northern end of town was discriminatory and Graham expressed further concern that were the ordinance to be applied city-wide, the established, local businesses on the southern end would object to having a limitation that stopped them from building in the future. In his email to LaBelle, Graham said:

> The Planning Commission will also have to decide which of the two versions of the 65,000 square foot store ordinance they want to adopt. As our Ordinance Review Committee was reviewing the findings section at the beginning of the ordinance, we could not see how those findings justified only allowing a building of less than 65,000 square feet north of Genesee Street. We also felt that in a court of law a judge would view this approach as more even handed because it will be applicable to the entire City. Having the ordinance only apply north of Genesee is discriminatory to that area of town. That s why the one version of the ordinance would have to apply to the entire City.

In the same email to LaBelle, Graham said:

> However, the Committee also recognizes that the local businesses who are in the tourist business may object to having this limitation apply to their area of town, i.e., the area south of Genesee. The example we keep hearing is, What if Cabella s wants to locate a store here? That s the reason for drafting the ordinance version that applies to the area north of Genesee. I think this version of the ordinance would be fine if we could all feel comfortable with the justification of why it would only apply to the area north of Genesee. Up to this point, I don't think we have adequate justification for restricting it to that area.

Graham then created two new drafts of the ordinance, with one draft limiting the store cap size only to an area north of Genesee Street, and one draft establishing a Commercial Overlay Zone encompassing all properties within Defendant.

On the same day, Graham received an email from Stamiris, which included information that she had received from Professor Kenneth Stone. Dr. Stone is a professor of

economics of Iowa State University, and the author of a 1988 study entitled "The Effect of Wal-Mart Stores on Business In Host Towns and Surrounding Towns in Iowa." Dr. Stone was asked by Stamiris for his view on the proposed zoning ordinance. His email response was that store cap restrictions such as those proposed by Graham are very narrow-minded, and that a Wal-Mart in a town like Frankenmuth usually draws a few other national chains such as an office supply store, a chain restaurant, an apparel store, or a short-line furniture store.

The first formal step towards passing the ordinance was to secure its approval by the Planning Commission, a body with nine voting members. Within days of the new language and in advance of the Planning Commission's next scheduled meeting concerning the ordinance, the Frankenmuth DDA and the EDC advised the Planning Commission that they had no position for or against the proposed zoning ordinance.

***7** Graham edited the language for the size cap draft, sent it to LaBelle for comment, and then revised the proposed ordinance again before submitting it to the Planning Council. The following day, Graham incorporated the definition of a building suggested by LaBelle to make it impossible for Wal-Mart to build two 65,000 square foot stores joined by a walkway. Shortly before it was set for a vote by the Planning Commission, Graham explicitly noted that the proposed zoning ordinance should not be written to affect Bronner's:

> We can't restrict this Special Use Permit to CT-PUD districts because we may have a proposed project in another commercial zone such as B-3. The property where Bronners is located is zoned B-3 and I don't want to have to tell them they can't qualify for a 70,000 square foot addition.

After making edits, Graham consulted with attorneys officially retained by Defendant. Following the attorneys' advice to hire a professional planner, Graham retained Larry Nix, a planner from Grand Rapids. A few days later, Graham again consulted with LaBelle, and expressed concern that the zoning ordinance that would soon come to a Planning Commission vote would affect Bronner's. He said:

> If this ordinance is adopted, what will it mean for existing buildings? Bronner's Christmas Wonderland is currently about 400,000 square feet. If this ordinance is adopted it obviously doesn't have any impact on the existing building, but what if they want to add a 50,000 square foot building addition? Would the new ordinance only apply to the addition or would it apply to the entire building?

On November 16, 2005, Stamiris sent Graham an e-mail notifying him that Johnston was concerned that the zoning ordinance could affect the ability of Kroger to expand its operation. After being assured that Johnston was fine with the ordinance, Graham formally submitted it to the Planning Commission and for public hearing.

The Planning Commission public hearing concerning the size-cap zoning ordinance was scheduled for November 22, 2005. On November 16, 2005, Graham arranged for Nix to meet with two or three of the Planning Commission members in advance of the scheduled public meeting. In an email to Nix, Graham said:

> If you are able to come here for the Planning Commission meeting on Tuesday, would it be possible for you to come an hour early for the purpose of meeting with two or three City Council members so they could hear some of your comments and thoughts about the appropriateness of adopting the 65,000 sq. ft. ordinance and what your thoughts are on potential litigation? There are three Council members that would be well served to hear your comments in a separate meeting so that you could discuss this more freely than you will be able to do at the public hearing. It's quite probable that Wal-Mart will have one or two or three representatives at the public hearing, including a Saginaw attorney they hired to represent them.

A few days before the Planning Commission meeting, to be attended by the public, and in response to concern that the ordinance could affect Bronner's and other businesses in the south end of town, Graham and Kerns, with the input of Nix, decided to shrink the size of the proposed zone to simply exclude the part of the town immediately south of Plaintiffs' property. By this action, Bronner's, the fried chicken restaurants, and the rest of Little Bavaria visited by tourists, continued to be free to add commercial structures or additions of any size.

***8** Graham asked Nix to write a letter to him that would justify, from the planner's perspective, the restrictive ordinance about to be proposed for public hearing. Nix delivered a two-page letter to Graham on November 21, 2005. No economic studies of any kind were performed by Defendant concerning the Wal-Mart, with the exception of the report forwarded by the DDA, which estimated the Wal-Mart would bring between three- and five-hundred jobs to the area. The overlay zone, referred to as CL-PUDOZ, was enacted

on December 6, 2005, as Ordinance 2005-10. It exclusively applies to areas that are zoned CL-PUD.

According to Defendant, on January 13, 2006, representatives of Defendant and the Township of Frankenmuth conducted a pre-application meeting under the PUD approval ordinance with Atwell Hicks, a Wal-Mart representative. Following that meeting, on January 27, 2006, Graham wrote a letter to Hicks indicating the deficiencies in their submission and identifying those additional requirements and items that would need to be submitted to Defendant to proceed with the approval process, including a traffic impact study, economic impact study, landscaping plans and compliance with storm water drainage regulations. Hicks was instructed that following submission of the requested items, a second pre-application conference would follow in preparation for formal proceedings of the Planning Commission and City Council. Following the transmittal of the letter, Defendant received no further communication from Wal-Mart and Defendant took no formal action with regard to any regulatory approval necessary for a Wal-Mart store on Plaintiffs' property.

II

Defendant moves to dismiss various of Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction based on standing and ripeness requirements. Rule 12(b)(1) motions can be raised at any time, even after trial and the entry of judgment. Fed.R.Civ.P. 12(h)(3); *Arbaugh v. Y & H Corp.,* 546 U.S. 500, 506, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006). When the defendant challenges subject matter jurisdiction through a motion to dismiss, the plaintiff bears the burden of establishing jurisdiction. *Angel v. Kentucky,* 314 F.3d 262, 264 (6th Cir.2002). In reviewing a 12(b) (1) motion, the court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction, and both parties are free to supplement the record by affidavits.

Motions to dismiss for lack of subject matter jurisdiction can fall into two general categories: facial attacks and factual attacks. *United States v. Ritchie,* 15 F.3d 592, 598 (6th Cir.1994). A facial attack is a challenge to the sufficiency of the pleading itself; in such an attack, the court takes the material allegations of the complaint as true, and construes them in the light most favorable to the nonmoving party. *Id.* (internal citation omitted.) A factual attack challenges the factual existence of the subject matter jurisdiction. On such a motion, "no presumptive truthfulness applies to the factual allegations, and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* (citing *Ohio Nat'l Life Ins. Co. v. United States,* 922 F.2d 320, 325 (6th Cir.1990)). In reviewing a factual attack on jurisdiction, the court has "wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Ohio Nat'l Life,* 922 F.2d at 325 (internal citations omitted).

***9** Defendant also moves for summary judgment on the merits of Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 56(c). Under Rule 56(c), a court must review "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," to conclude that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw all reason able inferences in favor of the non-moving party and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is "material" if its resolution affects the outcome of the case. *Lenning v. Commercial Union Ins. Co.,* 260 F.3d 574, 581 (6th Cir.2001). "Materiality" is determined by the substantive law claim. *Boyd v. Baeppler,* 215 F.3d 594, 599 (6th Cir.2000). An issue is "genuine" if a "reasonable jury could return a verdict for the nonmoving party." *Henson v. Nat'l Aeronautics and Space Admin.,* 14 F.3d 1143, 1148 (6th Cir.1994) (quoting *Anderson,* 477 U.S. at 248). When the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," there is no genuine issue of material fact. *Mich. Paytel Joint Venture v. City of Detroit,* 287 F.3d 527, 534 (6th Cir.2002).

The party bringing the summary judgment motion has the initial burden of informing the court of the basis for its motion and identifying portions of the record which demonstrate the absence of a genuine dispute over material facts. *Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.,* 276 F.3d 845, 848 (6th Cir.2002). The party opposing the motion then may not "rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact," but must make an affirmative showing with proper evidence in order to defeat the motion. *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479 (6th Cir.1989). A party opposing a motion for summary judgment must designate specific facts

in affidavits, depositions, or other factual material showing "evidence on which the jury could reasonably find for the plaintiff ." *Anderson,* 477 U.S. at 252. The party who bears the burden of proof must present a jury question as to each element of the claim, *Davis v. McCourt,* 226 F.3d 506, 511 (6th Cir.2000), rather than raise only "metaphysical doubt as to the material facts ." *Highland Capital, Inc. v. Franklin Nat'l Bank,* 350 F.3d 558, 564 (6th Cir.2003) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). Failure to prove an essential element of a claim renders all other facts immaterial for summary judgment purposes. *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.,* 936 F.2d 889, 895 (6th Cir.1991).

***10** Under Rule 56(f) of the Federal Rules of Civil Procedure, if a party opposing a motion for summary judgment "shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition," a district court has discretion to deny the motion, order a continuance, or issue any other just order. A court should not grant summary judgment "absent *any* opportunity for discovery." *White's Landing Fisheries, Inc. v. Buchholzer,* 29 F.3d 229, 231 (6th Cir.1994). However, a court is not required to allow time for further discovery "if the party does not explain how such discovery would rebut the movant's showing of the absence of a genuine issue of material fact." *Singleton v. United States,* 277 F.3d 864 (6th Cir.2002). Relevant factors include when the party "learned of the issue that is the subject of the desired discovery," the potential impact of the desired discovery on the summary judgment ruling, "how long the discovery period lasted," whether the party was "dilatory in its discovery efforts," and whether the party was "responsive to discovery requests." *Plott v. Gen. Motors Corp.,* 71 F.3d 1190, 1196-1197 (6th Cir.1995) (internal citations omitted).

III

Standing is "the threshold question in every federal case." *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). A plaintiff must satisfy three constitutional requirements:

> First, the plaintiff must have suffered an 'injury in fact'-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations omitted).

In addition to the constitutional requirements, a plaintiff must also satisfy three prudential standing restrictions. *See Coal Operators and Assocs., Inc. v. Babbitt,* 291 F.3d 912, 915-16 (6th Cir.2002). First, a plaintiff must "assert his own legal rights and interests, and cannot rest his claim for relief on the legal rights or interests of third parties." *Warth,* 422 U.S. at 499 (internal citations omitted). Second, a plaintiff's claim must be more than a "generalized grievance" that is pervasively shared by a large class of citizens. *Coal Operators,* 291 F.3d at 916 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 474-75, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982)). Third, in statutory cases, the plaintiff's claim must fall within the "zone of interests" regulated by the statute in question. *Ibid.* "These additional restrictions enforce the principle that, 'as a prudential matter, the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted.' " *Coal Operators,* 291 F.3d at 916 (quoting *Pestrak v. Ohio Elections Comm'n,* 926 F.2d 573, 576 (6th Cir.1991)). "A plaintiff bears the burden of demonstrating standing and must plead its components with specificity." *Id.* at 916.

***11** Whether a plaintiff's claims are ripe also affects a federal court's subject matter jurisdiction. "Ripeness is a mixture of Article III concerns about actual cases or controversies and prudential concerns about the appropriate time for a court to make a decision." *Seiler v. Charter Twp. of Northville,* 53 F.Supp.2d 957, 961 (E.D.Mich.1999) (quoting *Cmty. Treatment Ctrs., Inc. v. City of Westland,* 970 F.Supp. 1197, 1209 (E.D.Mich.1997)). "Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed ." *Id.* (quoting *Bigelow v. Mich. Dep't of Natural Res.,* 970 F.2d 154, 157 (6th Cir.1992)).

Relevant to both standing and ripeness is the distinction between "as-applied" and "facial" constitutional challenges to a zoning ordinance. "An 'as applied' challenge alleges

a present infringement or denial of a specific right or of a particular injury in process of actual application of the rule to a particular parcel of land or landowner." *V. Jacobs & Sons v. Saginaw County Dep't of Pub. Health,* 284 F.Supp.2d 711, 718 (E.D.Mich.2003) (internal citations omitted). "A challenge to the validity of an ordinance 'as applied' ... is subject to the rule of finality, which is concerned with whether the government entity charged with implementing the ordinance has reached a final decision regarding the application of the ordinance to the property at issue." *Id.* (internal citations omitted). In contrast, a facial challenge alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market. *Vill. of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926). Facial challenges are not subject to the finality requirement. *Seiler v. Charter Twp. of Northville,* 53 F.Supp.2d 957, 963 (E.D.Mich.1999).

Defendant contends that the Court lacks subject matter jurisdiction over Plaintiffs' claims for several reasons. First, Defendant contends that all of Plaintiffs' claims are premised on the effect of the ordinance on Wal-Mart rather than on Plaintiffs, contrary to prudential standing requirements. While Plaintiffs do not have standing to bring claims on behalf of Wal-Mart, Defendant aptly concedes that Plaintiffs have standing to raise claims as property owners.

Second, Defendant contends that Plaintiffs do not have standing because they cannot show that there is as a substantial likelihood that their claimed injury, which Defendant characterizes as "the termination of an option agreement to purchase the property as a result of the adoption of Ordinance 2005-10 limiting the size of retail stores in the CL-PUD classification to 65,000 square feet," would be redressed if Plaintiffs prevail. According to Defendant, "it is most likely that Wal-Mart has now focused its efforts on a new location where there is no 65,000 square foot limitation on the size of a retail building." Moreover, Defendant suggests that Plaintiffs cannot obtain redress in the form of monetary damages because they have not alleged a takings claim.

***12** Contrary to Defendant's position, in *Club Italia Soccer & Sports Org., Inc. v. Charter Township of Shelby,* 470 F.3d 286, 294 (6th Cir.2006), the Sixth Circuit found that "economic injury is sufficient to confer standing upon a party," with respect to equal protection and due process claims. Plaintiff is not required to bring a takings claims to challenge the zoning ordinance because the zoning ordinance could offend principles of due process and equal protection, without necessarily amounting to a taking. *See, e.g., JGA Dev., LLC v. Charter Twp. of Fenton,* No. 05-70984, 2006 WL 618881, at *6 (E.D.Mich. Mar.9, 2006) (noting that "[i]t would be possible for Defendant to rezone Plaintiff's property in a way that would violate Plaintiff's due process rights, but not sufficiently decrease the value of the property to support a takings claim"). Plaintiffs could potentially recover, for example, the difference between the value of their property had it remained eligible for development by Wal-Mart ($4,000,000), less its present fair market value. Finally, Plaintiff seeks a declaratory judgment holding the ordinance unconstitutional, which would redress Plaintiffs' injury by eliminating the effect of the ordinance on Plaintiffs' land.

Third, Defendant argues that Plaintiffs' as-applied equal protection and due process claims are not ripe because Defendant has not made a final decision on Wal-Mart's proposed PUD application, since Wal-Mart abandoned its application.[1] Defendant relies on *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 200, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), in which the U.S. Supreme Court found that the plaintiff's due process claim was not ripe because the effect of the zoning ordinance on the plaintiff's property "cannot be measured until a final decision is made as to how the regulations will be applied to [the plaintiff's] property." In contrast, Plaintiffs rely on *Nasierowski Bros. Investment Co. v. City of Sterling Heights,* 949 F.2d 890, 894 (6th Cir.1991), in which the Sixth Circuit found that "a procedural due process claim is instantly cognizable in federal court without requiring a final decision on a proposed development from the responsible municipal agency." Plaintiffs also contend that *Williamson* only applies to due process or equal protection claims when they arise from or are ancillary to a takings claim, which Plaintiffs do not allege.

Plaintiffs are correct that "the type of claim is crucial to determining whether finality is required." *Williamson,* 473 U.S. at 194. Ultimately, "if the [claimed] injury is the infirmity of the process, neither a final judgment nor exhaustion [of administrative remedies] is required." *Hammond v. Baldwin,* 866 F.2d 172, 176 (6th Cir.1989) (internal citations omitted); *JGA,* 2006 WL 618881 (E.D.Mich. Mar.9, 2006). To the extent that Plaintiffs' claims challenge "the infirmity of the process," *Hammond,* 866 F.2d at 176, or facially challenge the zoning ordinance, Plaintiffs' claims are ripe. However, to the extent that Plaintiffs' equal protection and due process claims challenge the zoning ordinance only as it applies to their

property, their claims do not meet the finality requirement. Thus, those claims are not ripe and the Court lacks subject matter jurisdiction over them.

***13** Although Plaintiffs concede that Wal-Mart did not exhaust its remedies because it never completed the necessary application, nor was Wal-Mart contractually obligated to do so, Plaintiffs contend that the finality requirement is met. Plaintiffs are correct that there is a difference between a finality requirement and an exhaustion requirement:

> The question whether administrative remedies must be exhausted is conceptually distinct ... from the question whether an administrative action must be final before it is judicially reviewable .... While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson, 473 U.S. at 192-93; *Bannum v. City of Louisville,* 958 F.2d 1354, 1362 (6th Cir.1992) (stating that "finality" means that "the actions of the city were such that further administrative action by [the plaintiff] would not be productive").

Plaintiffs argue that the finality requirement is met because the record shows that Defendant set out in a series of deliberate and purposeful steps to block the Wal-Mart from being built; had Wal-Mart applied for a variance, the parties' positions would not be better clarified. However, the City Council and Planning Commission consist of several members and absent any definitive action taken by them as a group, evidence of the strength of a single person's point of view (i.e.Graham's) does not adequately show that Defendant would have rejected Wal-Mart's proposal or request for a variance. Moreover, even if the evidence showed that each individual city official opposed the building of a Wal-Mart, Wal-Mart never even completed an initial application for them to consider as a group. To determine that Defendant would have rejected an application that was never completed, based on the result of only a preliminary meeting, would be entirely speculative. Thus, Plaintiffs' claims do not meet the finality requirement, and they may not advance their challenge to the ordinance as applied to their property.

IV

Generally, the zoning of land is a reasonable exercise of government police power. *Euclid,* 272 U.S. at 386-90. In *Euclid,* the U.S. Supreme Court held that a zoning ordinance is unconstitutional only when it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. The Court considered a zoning ordinance that divided Euclid into six classes of use districts, three classes of height districts, and four classes of area districts. *Id.* at 380. The ordinance regulated and restricted "the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc." *Id.* at 379-80. The plaintiff owned sixty-eight acres of property, portions of which were located in the various zones. *Id.* at 379, 382. The plaintiff challenged the zoning ordinance on the ground that it violated his equal protection and due process rights under the Fourteenth Amendment. *Id.* at 384. He alleged that the zoning ordinance restricted and controlled the use of its land "so as to confiscate and destroy a great part of its value." *Id.* The Supreme Court upheld the zoning ordinance as a valid exercise of the police power and explained:

> ***14** Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable.

Id. at 386-87. Many types of zoning restrictions are typically permissible, including "fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential

sections offensive trades, industries and structures likely to create nuisances." *Id.* at 388.

The Michigan zoning enabling act, Mich. Comp. Laws § 125.581, et seq., establishes procedures for the enactment, amendment, and administration of zoning ordinances. The zoning act places discretionary authority to enact a zoning ordinance and to adopt a zoning map with the legislative body of a city or village. Mich. Comp. Laws § 125.584(4). Under the zoning act, the legislative body may amend a zoning ordinance by a text change or alter a zoning map through a rezoning. *Id.* The legislative body of a city or village may also have the discretionary authority to temper the effect of a zoning ordinance through special land use permits, *Id.* § 125.584a, or planned unit development, *Id.* § 125.584b. Further, the zoning board of appeals may grant administrative relief from the strict application of the ordinance in the form of land use variances. *Id.* § 125.585(9).

To the extent that the Court has jurisdiction over Plaintiffs' claims, the Court will now address the merits of Plaintiffs' equal protection, due process, privilege and immunities clause, and commerce clause challenges to the zoning ordinance enacted by Defendant.

A

Traditionally, to establish an equal protection claim, a plaintiff "must show that [he or] she is a member of a protected class and that [he or] she was intentionally and purposefully discriminated against because of [his or] her membership in that protected class." *Jones v. Union County,* 296 F.3d 417, 426 (6th Cir.2002) (citing *Boger v. Wayne County,* 950 F.2d 316, 325 (6th Cir.1991)). In this case, Plaintiffs have not alleged that they are members of a protected class.

***15** Rather, Plaintiffs attempt to establish a "class of one" equal protection claim. A plaintiff who brings a "class of one" equal protection claim must show that (1) it was treated differently from others who are similarly situated and (2) there is no rational basis for the difference in treatment. *Vill. of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); *Engquist v. Or. Dep't of Agriculture,* ---U.S. ----, 28 S.Ct. 2146, 2153 (2008). "A 'class of one' plaintiff may demonstrate that a government action lacks a rational basis in one of two ways: either by negativing every conceivable basis which might support the government action or by demonstrating that the challenged government action was motivated by animus or ill-will." *Warren v. City of Athens,* 411 F.3d 697 (6th Cir.2005) (internal quotations omitted); *Trihealth, Inc. v. Bd. of Comm'rs, Hamilton County, Ohio,* 430 F.3d 783, 788 (6th Cir.2005) ("To prevail, [plaintiffs] must demonstrate that the differential treatment they were subjected to is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the County's actions were irrational."). *See, e.g., Romer v. Evans,* 517 U.S. 620, 634-35, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (finding that a state constitutional amendment lacked a rational basis because the amendment "seems inexplicable by anything but animus toward the class it affects"). By definition, a "conceivable" basis does not even have to have been articulated by the decisionmaker at the time of the decision. *Nordlinger v. Hahn,* 505 U.S. 1, 9, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992).

Plaintiffs argue that Defendant violated their equal protection rights when it intentionally crafted the reach of the ordinance to treat Bronner's and Johnston's interest in Kroger, as well as other similar properties, more favorably than their interest in their property. Neither Bronner's nor Kroger is subject to the overlay zone because it applies only to properties zoned CL-PUD, like the Loesels' property. Kroger and Bronner's are zoned B-3. Plaintiff contends that it is significant that before the overlay ordinance was passed, Defendant not only chose the draft of the ordinance that would except the CT-PUD, but also checked with Johnston to determine whether the 65,000 square-foot limitation would affect his business. Additionally, Plaintiff emphasizes the similarities between Wal-Mart and Bronner's:

> Bronner's is a large retailer much like Wal-Mart .... Both stores were located at similar ends of the town, one in the south, the other in the north. Had the Wal-Mart been built, it would have been the second largest retailer in town, right behind Bronner's. Both stores had and planned to have large parking lots. Both would have used the same main street for primary ingress and egress. The claim that the CL-PUD and overlay ordinance promotes pedestrian traffic in the CT-PUD district, for example, is incompatible with Bronner's boasts that its parking lot 'accommodates 1,250 cars and 50 busses.'

***16** Finally, Plaintiff contends that the 65,000 square-foot limit is an arbitrary limit that was elected solely to exclude Wal-Mart and cites the following email exchange from Graham, the drafter of the ordinance, to LaBelle, as evidence of that fact:

> [H]ow do we justify a specific number? Why does our draft ordinance use the number of 65,000? Why doesn't it say 70,000 or 80,000 or 90,000 or 73,496? In other words, what basis do we have for whatever number we use?

In contrast, Defendant contends that Plaintiffs' property is not similarly situated to the properties on which Bronner's and other tourist-related businesses are located because those businesses are not part of a PUD district. Moreover, Bronner's and the Kroger store had already been operating for many years, in B-3 zones, without any detrimental effect on Defendant.

The fact that the Bronner's and Kroger are zoned B-3, rather than CL-PUD does not mean that they are not similarly situated to Plaintiffs property. Both Kroger and the Loesels' property are located north of Genesee Street, next to North Main Street, in an area primarily zoned B-3, highway commercial. This area is north of the tourist zone, which is primarily zoned B-2, local business. Similarly, Bronner's is located south of East Curtis Road (also known as East and West Jefferson), next to South Main Street, in an area primarily zoned B-3, highway commercial. This area is south of the main tourist zone, although a CT-PUD zone is located nearby. In sum, all three properties are located outside the main tourist area, next to Main street, in areas primarily zoned B-3.

The more difficult question is whether Plaintiff can prove that "there is no rational basis for the difference in treatment." *Olech,* 528 U.S. at 564. Plaintiffs must prove that enactment of the overlay zone, "is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that [Defendant's] actions were irrational." Defendant proffers that the overlay zone serves the legitimate purposes of maintaining land use stability and the character of the community. Indeed, the substance of the ordinance, a size-cap limitation, is a permissible zoning criterion and is consistent with the "findings of fact and concerns" supporting the ordinance. Support for the ordinance includes:

> (1) Frankenmuth has traditionally fostered small and locally owned business enterprises and entrepreneurship providing local employment opportunities and revenue expansion. Frankenmuth also is identified by numerous one-of-a-kind businesses in small scale storefronts, which reflect the Community's ethnic and lifestyle characteristics, building scale, architectural style and historical development.
>
> (2) Because of its unique character, Frankenmuth is renowned throughout Michigan and the Mid-West, and is one of the most popular tourist destinations in Michigan, thereby contributing to the economic benefits of the Frankenmuth Community's visitor trade.
>
> ***17** (3) The unique character of Frankenmuth would be threatened by proposed large scale uses that are incompatible in size and scale with the historic old world character of Frankenmuth and would irreversibly alter its character. These uses would also adversely impact the existing small scale businesses located in Frankenmuth.
>
> (4) Consistent with the City of Frankenmuth and Frankenmuth Township Joint Growth Management Plan, new commercial development should be encouraged in the so called "town center" settings, where small shops are gathered about a central area, with landscaped center features, where walking is encouraged rather than auto traffic, and strip mall developments with large unattractive parking fields are discouraged. Such town center developments are more consistent with the character and tourism goals of Frankenmuth. They promote efficient use of land, promote a safe and comfortable pedestrian scale environment, preserve and enhance the night sky for the enjoyment of a pristine nighttime environment, and encourage excellence in urban design, improvement in the overall Frankenmuth appearance and preserve the wholeness of Frankenmuth's economic base.
>
> (5) Frankenmuth area residents have expressed concerns that current zoning controls are inadequate to: (a) control the size and scale of commercial uses and (b) protect against adverse changes to the unique physical characteristics of the Community, including building and architectural styles.

Compl. Ex. A.

Although the articulated justifications for the ordinance are legitimate, the overlay zone does not appear to serve these interests in a rational manner. In applying the overlay zone exclusively to the CL-PUD zone, Defendant intentionally excluded the main tourist area and the CT-PUD zone, which is intended to cater to tourists, from the size-cap restriction. If the purpose is to maintain land use stability and the character of the community, the main tourist area, that is, the area roughly bounded on the north by Genesee Street and bounded on the south by East Curtis Street, is precisely where the overlay zone would be expected to apply. Similarly, there is

no conceivably rational basis for applying the overlay zone to the CL-PUD zone, but not the CT-PUD zone. Both areas are zoned for development, are substantially surrounded by B-3 zoning, and are located beyond the rough bounds of the main tourist area. In sum, it is impossible to conceive of any rational basis to apply the overlay zone exclusively to the CL-PUD zone, yet not the main tourist zone or the CT-PUD zone.

In certain situations, a government enactment that is "underinclusive," or "do [es] not include all who are similarly situated with respect to a rule, and thereby burden less than would be logical to achieve the intended government end," may be invalidated on equal protection grounds. *See generally* Laurence A. Tribe, *American Constitutional Law,* § 16-4, 1446-49 (2d ed.1988). As the Supreme Court has noted, "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Ry. Express Agency v. New York,* 336 U.S. 106, 112, 69 S.Ct. 463, 93 L.Ed. 533 (1949). Ultimately, however, the government enactment must be "clearly wrong, a display of arbitrary power, not an exercise of judgment." *Mathews v. DeCastro,* 429 U.S. 181, 185, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976). On the record advanced, Defendant is not entitled to summary judgment on Plaintiffs' equal protection claim.

B

***18** The Due Process Clause of the Fourteenth Amendment provides that a person may not be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Plaintiff claims that enactment of the overlay zone violated both his procedural and substantive due process rights. "Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest." *Warren,* 411 F.3d at 708. In contrast, substantive due process is the doctrine that "governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed ." *Bowers v. City of Flint,* 325 F.3d 758, 763 (6th Cir.2003) (internal citation omitted). Generally, "[c]itizens have a substantive due process right 'not to be subjected to arbitrary or irrational zoning decisions.' " *Braun,* 519 F.3d at 573 (quoting *Pearson v. Grand Blanc,* 961 F.2d at 1217).

Both procedural and substantive due process require a constitutionally-protected property or liberty interest. *See Club Italia,* 470 F.3d at 296 ("Importantly, procedural due process rights are only violated when a *protected* liberty or property interest is denied without adequate hearing.") (emphasis in original); *Braun,* 519 F.3d at 573 ("To state a substantive due process claim in the context of zoning regulations, a plaintiff must establish that [ ] a constitutionally protected property or liberty interest exists ...); *Taylor Acquisitions, L.L.C., v. City of Taylor,* No. 07-2242, 2009 WL 415993, at *6 (stating that "insofar as Plaintiff has failed to assert a property interest for purposes of procedural due process, its substantive due process claim also fails"). While the Constitution protects certain property and liberty interests, the Constitution does not actually create or define those property interests. *Thomas v. Cohen,* 304 F.3d 563, 576 (6th Cir.2002). Rather, whether a plaintiff holds a protected property interest depends on "existing rules or on understandings that stem from an independent source, such as state law ...." *Seguin v. City of Sterling Heights,* 968 F.2d 584, 590 (6th Cir.1992) (quoting *Bd. of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). Generally, to create a constitutionally-protected interest, a person must have a "legitimate claim of entitlement." *Roth,* 408 U.S. at 577.

Defendant contends that Plaintiffs do not have a vested interest in the CL-PUD zoning classification without the subsequently enacted overlay zone because they did not obtain a building permit or commence substantial construction before enactment of the overlay zone. Indeed, "[u]nder Michigan law, a landowner does not possess a vested property interest in a particular zoning classification unless the landowner holds a valid building permit and has completed substantial construction." *Seguin,* 968 F.2d at 590 (citing *City of Lansing v. Dawley,* 247 Mich. 394, 225 N.W. 500 (Mich.1929) and *Schubiner v. W. Bloomfield Twp.,* 133 Mich.App. 490, 351 N.W.2d 214, 219 (Mich.Ct.App.1984)); *Dorman v. Twp. of Clinton,* 269 Mich.App. 638, 714 N.W.2d 350, 358-59 (Mich.Ct.App.2006); *Braun v. Ann Arbor Charter Twp.,* 519 F.3d 564, 573 (6th Cir.2008) (stating that "[a] property owner arguably has a property right where the government *rezones* an existing property") (emphasis in original) (citing *Nasierowski,* 949 F.2d at 896).

***19** In response, Plaintiffs generally contend that their protected interest arises from their contract with Wal-Mart because Michigan contract law defines and grants them the power to privately contract to sell their land. Thus, they

contend that they have a pre-existing, enforceable contractual right to convey the CL-PUD zoned land to a third party without a subsequent zoning overlay. It is notable, however, that Wal-Mart did not really have any obligations under the contract, and Wal-Mart's purchase of the land was contingent on several factors, including Wal-Mart's ability to build. Thus, Plaintiffs' interest in the contract was merely a contingent interest, rather than a vested one. Plaintiffs cannot establish a constitutionally-protected property interest, thus, their due process claims fail as a matter of law.

Even if Plaintiffs could establish a protected interest, Plaintiffs' procedural due process claim fails for another reason. Plaintiffs contend that their procedural due process claim arises from "Defendant's decision to proceed with the ordinance without a public hearing and to engage in secret meetings before the opportunity for public comment occurred." Indeed, a plaintiff can "prevail on a procedural due process claim by demonstrating that the property deprivation resulted from ... an established state procedure that itself violates due process rights." *Warren,* 411 F.3d at 709. In *Nasierowski,* the court explained:

> Governmental determinations of a general nature that affect all equally do not give rise to a due process right to be heard. But, when a relatively small number of persons are affected on individual grounds, the right to a hearing is triggered. Falling into that latter category is the situation where, during the amendment process, a governmental unit singles out and specifically targets an individual's property for a zoning change after notice of a general plan of amendment has been published.

949 F.2d at 896 (citing *Harris v. County of Riverside,* 904 F.2d 497, 501-02 (9th Cir.1990)).

According to Plaintiffs, there was no public hearing because the result of the "public" hearing was pre-determined when there was at least one meeting between Graham, Nix and several Planning Commission members that was allegedly held in violation of the Michigan Open Meetings Act, Mich. Comp. Laws, § 15.261, et seq. The analysis of *JGA Development* is applicable to the facts of this case. In *JGA Development,* the plaintiff argued that the "public" hearing was meaningless because the zoning board was biased against it when five of the seven board members were known to oppose its PUD and one board member had also served on the planning commission and voted to recommend rezoning the property at issue. 2006 WL 618881, at *9. The Court rejected the plaintiff's due process claim based on:

> ... the reality that there are fundamental differences between the rights of a criminal defendant, which are guaranteed by the Constitution, and property rights, which are to some extent subject to the political process. State and local governments have broad authority to regulate an owner's property rights through the political process .... Due Process does not require officials to operate in an objective vacuum, i.e., to disregard either their prior political stances or the views of their constituents.

***20** *Id.* at 9-10. Ultimately, the court determined that because the plaintiff "received notice and an opportunity to be heard, its procedural due process claim fails as a matter of law." *Id.* Similarly, in this case Defendant provided Plaintiffs with notice and an opportunity to be heard, regardless of Graham's apparent opposition to Wal-Mart. Accordingly, Defendant is entitled to summary judgment on Plaintiffs' procedural due process claim.

C

The Privileges and Immunities Clause of the Fourteenth Amendment states that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The clause "prevents a state from discriminating against citizens of other states in favor of its own." *Hague v. Comm. for Indus. Org.,* 307 U.S. 496, 511, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). Plaintiffs' claim that the ordinance "interferes with Plaintiffs' rights to engage in a common occupation." Plaintiffs rely primarily on *Wilkerson v. Johnson,* in which the court found that the "freedom to choose and pursue a career, to engage in any of the common occupations of life, qualifies as a liberty interest which may not be arbitrarily denied by the State." 699 F.2d 325, 328 (6th Cir.1983) (internal citation omitted).

However, *Wilkerson* did not address privilege and immunities clause claims. Moreover, in the *Slaughter-House Cases,* 16 Wall. 36, 83 U.S. 36, 78, 21 L.Ed. 394 (1872), the Supreme Court rejected the application of the privileges and immunities clause to the ability to participate in a specific occupation because the right to exercise a trade is a privilege and immunity of the citizens of the State, and therefore left to the state government for security and protection. Thus, Plaintiffs have not identified a right protected by the Privileges and Immunities Clause of the Fourteenth Amendment, and the Court will grant Defendant's motion for summary judgment on this claim.

D

Pursuant to the United States Constitution, Congress has the power to "regulate Commerce ... among the several States." U.S. Const. art. 1, 8, cl. 3. The Commerce Clause "encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Inst. Inc.,* 491 U.S. 324, 326 n. 1, 109 S.Ct. 2491, 105 L.Ed.2d 275, (1989) (internal citations omitted). Under a dormant Commerce Clause analysis, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.,* 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994).

In analyzing the constitutionality of a law under the dormant Commerce Clause, a court engages in a two-step inquiry:

> (1) The court asks whether the law directly burdens interstate commerce or discriminates against out-of-state interests? *E. Ky. Res. v. Fiscal Court of Magoffin County,* 127 F.3d 532, 540 (6th Cir.1997).
>
> ***21** (2) If the statute directly discriminates the court must apply the strictest scrutiny. But, if the statute does not directly discriminate, then the court applies a lower level of scrutiny and asks whether the burdens on interstate commerce are clearly excessive in relation to the putative local benefits. This is known as the Pike balancing test. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

In the first step of the inquiry, a statute can discriminate against out-of-state interests in three different ways: (1) facially, (2) purposefully, or (3) in practical effect. *E. Ky. Res.,* 127 F.3d at 540 (citing *Wyoming v. Oklahoma,* 502 U.S. 437, 454-55, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992)).

State laws that discriminate on their face against interstate commerce are presumptively invalid. *Id.* at 99-100. State laws that purposefully discriminate against out-of-state commerce are also presumptively unconstitutional. *Chem. Waste Mgmt. Inc. v. Hunt,* 504 U.S. 334, 344 & n. 6, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992). However, the burden of establishing that a challenged statute has a discriminatory purpose under the Commerce Clause falls on the party challenging the provision. *Hughes v. Oklahoma,* 441 U.S. 322, 336, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). "[W]here other sources, other than the state's own self-serving statement of its legislative intent, indicate the presence of actual and discriminatory purposes, a state's discriminatory purpose can be ascertained from [those] sources." *E. Ky. Res.,* 127 F.3d at 542 (citing *Chambers Med. Techs. of S. C., Inc. v. Bryant,* 52 F.3d 1252, 1259, 1259 n. 10 (4th Cir.1995)).

Lastly, "[a] statute which has a discriminatory effect, for Commerce Clause purposes, is a statute which favors in-state economic interests while burdening out-of-state interests." *E. Ky. Res.,* 127 F.3d at 543 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.,* 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986)). In other words, "there are two complementary components to a claim that a statute has a discriminatory effect on interstate commerce: the claimant must show both how local economic acts are favored by the legislation, and how out-of-state actors are burdened by the legislation." *E. Ky. Res.,* 127 F.3d at 542. As the United States Supreme Court has noted, "any notion of discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy,* 519 U.S. 278, 298, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997) (discussing the similarly situated requirement in Commerce Clause cases).

If the provision is discriminatory on its face, in purpose, or in effect, the provision is subject to strict scrutiny under which it is the state's burden to show that the discrimination is narrowly tailored to further a legitimate interest. *Sporhase v. Nebraska,* 458 U.S. 941, 954, 102 S.Ct. 3456, 73 L.Ed.2d 1254 (1982); *Lenscrafters, Inc. v. Robinson,* 403 F.3d 798, 802 (6th Cir.2005) ("If the statute is found to be discriminatory, it is virtually per se invalid and the Court applies the 'strictest scrutiny.' "). For a law to survive strict scrutiny, it must be "demonstrably justified by a valid factor unrelated to economic protectionism," *New Energy Co.,* 486 U.S. at 274 (internal citation omitted), and there must be no "nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 353, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

***22** If the provision is not discriminatory on its face, in purpose, or in effect, the question becomes whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142 (1970). "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Id. As the Sixth Circuit has noted, "[t]he party challenging the statute bears the burden of proving that the burdens placed on interstate commerce outweigh the benefits that accrue to intrastate commerce." *E. Ky. Res.,* 127 F.3d at 545 (citing *USA Recycling, Inc. v. Town of Babylon,* 66 F.3d 1272, 1282 (2d Cir.1995)).

First, Plaintiff argues that the ordinance has a discriminatory purpose because the evidence shows that the purpose of the ordinance was to insulate local retailers from Wal-Mart, which in practical effect, limits all interstate retailers from competing against local interests. Plaintiff emphasizes reports that were considered by Defendant indicated that the building of a big-box store such as Wal-Mart would result in the loss and downsizing of local businesses. Plaintiff also argues that "local protectionism" is plain from the findings of fact related to the ordinance which include: "(1) Frankenmuth has traditionally fostered small and locally owned business enterprises and entrepreneurship providing local employment opportunities and revenue expansion. Frankenmuth is also identified by numerous one-of-a kind businesses ... which reflect the Community's ethnic and lifestyle characteristics ... (2) The unique character of Frankenmuth would be threatened by proposed large scale uses [that] would also adversely impact the existing small scale businesses located in Frankenmuth."

Even if Defendant's purpose was to discriminate against Wal-Mart and "large scale uses," such a purpose cannot be characterized as a purpose to discriminate against all interstate retailers. Thus, Plaintiff cannot show that the ordinance has a discriminatory purpose. Plaintiff also argues that the ordinance has a discriminatory effect because it discriminates against out-of-state commerce in favor of in-state interests (i.e. Bronner's and the Kroger store) as a result of the 65,000 square foot size cap. However, according to a report, the size cap would still allow at least sixteen of fifty-six national retailers to build a typical store on Plaintiffs' property. Pl.'s Resp. Ex. OO. Thus, Plaintiff has not carried the burden of showing that the law directly burdens interstate commerce facially, purposefully, or in practical effect. *E. Ky. Res.,* 127 F.3d at 540.

Thus, a lower level of scrutiny applies to the ordinance and the question becomes whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142 (1970). Here, Plaintiffs "bear[ ] the burden of proving that the burdens placed on interstate commerce outweigh the benefits that accrue to intrastate commerce." *E. Ky. Res.,* 127 F.3d at 545 (internal citation omitted). Plaintiffs have not met that burden. Accordingly, Defendant is entitled to summary judgment on Plaintiffs' commerce clause claim.

V

***23** In a Rule 56(f) affidavit attached to Plaintiffs' response as Exhibit K, Plaintiffs indicate that they seek to depose the following witnesses: Defendant's City Manager Charles Graham, Defendant's City Clerk Philip Kerns, Wal-Mart personnel, DDA Director Sheila Stamiris, Tom Johnston, Wally Bronner, Larry Nix, and "certain members of the Planning Commission and City Council who voted in favor of the subject ordinance." Plaintiffs expect that "the depositions will support the extensive documentary trail left by the Defendant-a trail clearly indicating that the subject ordinance was drafted to improperly protect the economic interests of [certain] businesses .... " Plaintiffs expect to obtain discovery setting forth "the negative economic effects on interstate commerce prompted by the discriminatory impact of the ordinance (under both the equal protection and dormant commerce clause claims) and a comparison of the local retail and wage market in Frankenmuth." The affidavit further indicates that more proof will be forthcoming with respect to the "similarly-situated prong of Plaintiffs' equal protection claim" and "disproving the City's defense of having a rational basis for the subject ordinance."

Plaintiffs also submitted two declarations from their attorneys and a declaration from a "professional economist." The declaration of attorney David J. Szymanski [Dkt. # 23] discusses the relationships between Johnston, who was the leader of Citizens for Frankenmuth First, the Bavarian Mall, where Kroger is located, Defendant, and its officials. The attorney states that further discovery is expected to show that Plaintiffs were treated differently than Johnston, who had an interest that would have been affected by Wal-Mart.

The declaration of attorney Andrew Kochanowski [Dkt. # 20] highlights portions of transcripts of meetings of the Frankenmuth City Planning Commission on November 22, 2005, and the Frankenmuth City Council on December 6, 2005. In the highlighted portion of the November planning commission discussion, participant Art Loeffler states:

> Greg, you got, I think a listing from Sheila or somebody that talked about the size of stores. That listed and went

> through the whole gamut of the Wal-Mart, the Meijer, and the K-Mart in regard to the square foot, so yeah you would be eliminating those, I guess, cookie cutter retailers that are out there, and yet there's a whole massive list under 65,000 that would fit and probably be welcomed into this community, so the fact is, yeah, there is some limitation on it, but I think as the master plan stated, somewhere along there we decided what we want and what we don't want as far as the size of a facility.

In the highlighted portion of the December meeting, a member of the public stated:

> We understand that big box development would prove financially ruinous to many, many small locally-owned businesses. Drug stores, appliance stores, photographers, jewelers, eye doctors, car repair shops. These are businesses which have provided service with a smile in Frankenmuth for generations, businesses which have a vested interest in this community, businesses which give back, and businesses which care. We understand that big box retailers, while they spin and smile, smile and spin, to make in-roads in a community in the end care only about the bottom line.

***24** In another highlighted portion, another member of the public stated:

> Honorable Mayor, at one of our town meetings I addressed Mr. Scott (ph) from Wal-Mart. I told him if we-if Wal-Mart comes to Frankenmuth, we have four drug stores in Frankenmuth, I'll be out of business, and my son will be out of business.

Plaintiffs contend that the above excerpts support the dormant commerce clause analysis. The declaration further states that Plaintiffs expect to prove that part of the response to Wal-Mart by the citizens of Frankenmuth was predicated on the fear that minority residents of Saginaw or Buena Vista, Michigan, would work at and frequent the Wal-Mart, in support of their equal protection claim.

The declaration of Patrick L. Anderson, a "professional economist," [Dkt. # 22] does not describe any additional discovery sought by Plaintiffs, but indicates that Anderson expects to prepare a report addressing, inter alia, the valid economic factors for local land use restrictions, how such restrictions apply to the subject ordinance, what is the likely affect of the ordinance on inter- and intrastate commerce, and what information was available to Defendant at the time of the adoption of the ordinance about the likely effects on inter- and intrastate commerce.

First, with respect to Plaintiffs' equal protection claim, there is no justification to delay ruling on Defendant's motion based on Plaintiffs' 56(f) request because the Court has determined that Defendant is not entitled to summary judgment on that claim. Thus, additional discovery relevant to that claim is not necessary for Plaintiff to defend against Defendant's motion.

Second, the discovery that Plaintiffs seek is not material to their due process claims because Defendant is entitled to summary judgment on those claims based on Plaintiffs' inability to establish a constitutionally-protected interest. Third, the discovery that Plaintiffs seek is not relevant to their privileges and immunities clause claim because Defendant is entitled to summary judgment on that claim due to Plaintiffs lack of a protected right. Indeed, Plaintiffs do not indicate that any of the discovery that they seek would be relevant to those claims.

Fourth, and finally, the discovery that Plaintiffs seek is not material to the Court's analysis of their dormant commerce clause claim. While Plaintiffs appear to seek additional time to prepare an expert report plausibly relevant to their dormant commerce clause claim, Plaintiffs do not identify any discovery from Defendant, or even a third-party, that is necessary to preparation of the report. Additionally, the information that Plaintiffs propose that the report would contain is essentially information that was already advanced at hearing-namely, that a 65,000 square foot size cap effectively excludes both a certain number of inter- and intrastate retailers. Based on the above, the Court will deny Plaintiff's Rule 56(f) request.

VI

Accordingly, it is **ORDERED** that Defendant's motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART.**

All Citations

Not Reported in F.Supp.2d, 2009 WL 817402

Footnotes

1 Defendant's motion also states that Plaintiffs' privilege and immunities clause claim is not ripe, however, Defendant did not specifically address the ripeness of that claim in its motion.

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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, LLC, a Michigan Limited Liability Company,

Plaintiffs,

v

TOWNSHIP OF PENINSULA, a Michigan Municipal Corporation,

Defendant

Case No. 1:20-cv-01008

Honorable Paul L. Maloney

Magistrate Judge Ray S. Kent

ORDER GRANTING DEFENDANT'S MOTION FOR STAY OF INJUNCTION PENDING APPEAL PURSUANT TO RULE 62(C)

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ORDER GRANTING DEFENDANT'S MOTION FOR STAY OF INJUNCTION PENDING APPEAL PURSUANT TO RULE 62(C)

On June 24, 2022, Defendant Township of Peninsula filed its Motion for Stay of Injunction Pending Appeal Pursuant to Rule 62(C)[ECFNo. 166]. Oral Arguments having been heard on _____, 2022, and the Court being otherwise fully advised in the premises:

Defendant Township of Peninsula's Motion for Stay of Injunction Pending Appeal Pursuant to Rule 62(C)[ECF No. 166] is hereby **GRANTED** for the reasons stated on the record.

IT IS SO ORDERED.

_____
Hon. Paul L. Maloney
U.S. District Judge

Dated:_____, 2022