UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION PENINSULA ASSOC (WOMP)., 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

PENINSULA TOWNSHIP, a Michigan municipal corporation,

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

Case No. 1:20-cv-01008

HON. PAUL L. MALONEY

MAG. JUDGE RAY S. KENT

PTP'S REPLY TO PLAINTIFFS' RESPONSE [ECF NO. 263] TO PTP'S MOTION TO DISMISS PLAINTIFFS' STATE LAW CLAIMS [ECF NO. 250]

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PTP moved to dismiss the Wineries' state claims because there is no federal jurisdiction over them, this Court should decline jurisdiction over them, and they are meritless. Neither the passage of time since PTP drafted the motion, nor the Wineries' responsive arguments, change the conclusion that their state claims do not belong here – or anywhere.

A. The Court lacks supplemental jurisdiction.

PTP addressed the standard for supplemental jurisdiction. (ECF No. 250, PageID.8922-8925) The state claims must form part of the "same case or controversy" and "derive from a common nucleus of operative fact" with federal claims. 28 U.S.C. § 1367(a); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966) (quotations omitted). This requires inquiry into the "operative facts" underlying the claims. *Salei v. Boardwalk Regency Corp*., 913 F. Supp. 993, 999-1000 (E.D. Mich. 1996) (no supplemental jurisdiction where claims had distinct operative facts and plaintiff could bring them independently); *Corpas v. Essex*, Case No. 20-cv-1806 (N.D. Ohio, March 8, 2021) (**Ex A**) (claims not derived from same "operative facts" where evidence to prove one is irrelevant to the other) (citations omitted).

The Wineries' state preemption and MZEA claims are purely legal questions. No "operative facts" underlie them. (ECF No. 263, PageID.9439, noting these are facial challenges needing no discovery) Their state and federal claims involve different provisions[1] from one

[1] The Wineries note three provisions were previously invalidated under both state and federal theories. (ECF No. 263, PageID.9446). Declaring the entire Winery-Chateau Guest Activity Use section unconstitutionally vague swept in three state preemption claims, and scores of other zoning provisions, without considering the supposedly-preempted sections particularly. PTP maintains there is no practical overlap between between the state and federal claims.

complex body of law – the zoning ordinance, which is law, not fact. *See Bonner v. Brighton*, 495 Mich. 209, 221-22 ("ordinances are treated as statutes"). They have different proper parties (MLCC licensees for state claims, landowners and tenants for federal claims). The Wineries may have brought their state claims independently in state court. There is no factual overlap between them and the federal claims.

The Wineries largely ignore the "case or controversy" standard, focusing on discretion to exercise jurisdiction. These are separate inquiries. Whether a court *has* jurisdiction is a threshold legal question reviewed *de novo*; whether to exercise it (discussed below) is discretionary. *Blakely v. United States*, 276 F.3d 853, 860 (2002) (citations omitted).

Seemingly recognizing that zoning ordinance commonality is no operative fact, the Wineries identify two other connections between their claims: their unavailing zoning amendment efforts and their overarching desire for injunctive relief. (ECF No. 263, PageID.9441) Neither are operative facts. Their lack of success through the political process is background context. *See Wisey's #1 LLC v. Nimellis Pizzeria LLC,* 952 F. Supp. 2d 184, 191 (D.D.C. 2013) (background facts are not operative facts) (citing cases). Their desired relief is neither relevant nor operative.

Ammerman v. Sween is unavailing. 54 F.3d 423 (7th Cir. 1995). It involved federal civil rights and state tort claims against a college and instructor arising out of allegations the instructor sexually assaulted the plaintiff and the college took insufficient remedial actions. Both claims arose from the facts of the assault. *Id*. at 425. This case shares no similarities. Without common operative facts, there is no supplemental jurisdiction here.

B. The Court should decline supplemental jurisdiction.

A district court may decline jurisdiction over a state claim that "raises a novel or complex issue of State law" or "substantially predominates over" federal claims. 28 U.S.C. § 1367(c). These factors emerged from "considerations of judicial economy, convenience and fairness to litigants." *Gibbs*, 383 U.S. at 726 (citation omitted). The Wineries' state claims are novel, complex, and predominant; declining jurisdiction over them promotes judicial economy, fairness, and comity.

Recognizing no Michigan court has found state liquor laws conflict-preempt zoning, the Wineries lean on general principles to suggest their claims are neither novel nor complex. (ECF No. 263, PageID.9442) *Deruiter, Lewellyn,* and *National Amusement* do not address state liquor laws. *Llewellyn* and *National Amusement* are field preemption cases; neither involved zoning. *Llewellyn* stated that, were the ordinance a *zoning* ordinance, a different outcome was likely. *Deruiter* found no conflict *because* the challenged ordinance was a *zoning* ordinance – its locational limits permissibly added to state marijuana regulation. Conflict preemption is case-specific, and the Wineries propose a novel application. *See National Amusement Co. v. Johnson,* 270 Mich. 613, 616 (1935) (conflict preemption questions are "sometimes difficult of solution, and cannot be determined by any fixed rule") (quotations omitted).

The Wineries propose a broader interpretation of novelty, citing *ESI/Employee Solutions L.P. v. Dallas,* 450 F. Supp. 3d 700 (E.D. Tex. 2020). There, the state preemption claim was *not* novel because "state court precedent specifically address[ed] TMWA preemption of a materially similar . . . ordinance." *Id.* at 729. No Michigan court has "already held" state liquor law conflict-preempts zoning. *Id.*

Michigan cases discussed below confirm conflict preemption law is not "just [a] matter[] of statutory interpretation;" it involves consideration of competing state statutory schemes,

legislative history and intent. (ECF No. 263, PageID.9443) Each case the Wineries cite to support their proposition involved state and federal claims arising from the *same* ordinance provision, such that resolving one directly impacts the other. *Swartz Ambulance Serv., Inc. v. Genesee County*, Case No. 08-11448 (E.D. Mich., July 25, 2008) (ordinance triggered interrelated federal and state claims); *LHR Farms, Inc. v. White County*, Case No. 2:09-cv-00177 (N.D. Ga., Mar. 12, 2012) (intertwined state preemption and federal constitutional claims derived from ordinance); *Claridge House One, Inc. v. Verona*, 490 F. Supp. 706, 710-12 (D.N.J. 1980) (ordinance preempted by state law also violated constitutional rights so addressing preemption resolved federal claims).

The Wineries' discussion about "municipal destiny" is misplaced – Michigan zoning is distinctly *local* and not inherently servient. *See Brae Burn, Inc. v. Bloomfield Hills*, 350 Mich. 425, 436-37 (1957) ("This Court is not equipped to zone particular parcels of land. We do not see the land, we do not see the community, we do not grapple with its day-to-day problems."). This theme permeates Michigan conflict preemption caselaw, where the Supreme Court has consistently and repeatedly rejected conflict preemption between local *zoning* and state business regulations (discussed below). The Wineries cite one case, subsequently distinguished, where state law conflict-preempted zoning that effected a complete township-wide prohibition. *See Ter Beek v. Wyoming,* 495 Mich. 1 (2014); *Deruiter v. Byron*, 505 Mich. 130 (2020). The first court to decide whether local zoning regulation of winery uses in one district are conflict-preempted by Michigan liquor laws should not be a federal court.

Predominance further supports dismissal of the state claims. When considering whether a claim substantially predominates, courts consider the proof required, scope of issues, and "comprehensiveness of the remedy sought." *Gibbs*, 383 U.S. at 726. The Wineries acknowledge

their preemption claims require no factual proofs. (ECF No. 263, PageID.9445) This does not save jurisdiction on predominance; it underscores the absence of common operative facts.

The Wineries did assert more federal than state claims, but asserting many meritless federal claims does not make them predominate. The Wineries are unlikely to succeed on many of those claims – this Court preliminarily found none had merit. (ECF No. 34, PageID.1875) The summary judgment order reversed course, but based more on claimed Township concessions than strength in the merits. (ECF No. 162, PageID.5995-6019) The Court was right the first time.

The Wineries' preemption claim predominates because of the practical effect if it succeeds. Conflict-preemption may call into question other provisions[2] and other municipalities' zoning provisions (see below). *See Harjo v. Albuquerque*, 307 F. Supp. 3d 1163, 1193 (D.N.M. 2018), mod'd on other grounds by 326 F. Supp. 3d 1145 (D.N.M. 2018) (declining jurisdiction where outcome of state claim "would greatly affect the balance of" state and local power or "skew[] the state's jurisprudence on a significant state issue" and appropriately accounts for novelty, federalism, and comity).

Some other assertions on jurisdiction warrant brief responses. Neither Township actions nor this Court's prior orders waive jurisdictional issues, which implicate the court's power to hear the claims. *United States v. Cotton*, 535 U.S. 625, 630 (2002). Jurisdiction may be raised any time. *Gibbs*, 383 U.S. at 727 ("whether pendent jurisdiction has been properly assumed . . . remains open throughout the litigation").

[2] The Wineries identified but failed to brief four additional supposedly-conflicted provisions. (ECF No. 54, PageID.2277, suggesting Sections 6.7.2(19)(b)(1)(iv) and 8.7.3(10)(u)(2)(a)-(c) are preempted)

The Wineries frame their MZEA claim as a remedy rather than an independent claim – if zoning provisions are otherwise invalid, they violate MZEA. (ECF No. 263, PageID.9442, 9446) This theory does not change the supplemental jurisdiction analysis; preemption is the driver here.

Declining jurisdiction over their state claims would not prejudice the Wineries. (ECF No. 263, PageID.9448) Resolution may actually come quicker through a state court declaratory judgment action, given the complexity of this federal case. State courts are already familiar with Michigan liquor and zoning law, and there are no preemption facts to develop. Declining jurisdiction may streamline this case and would preserve comity. Even where judicial economy and convenience support keeping claims together (not here), when presented with important public questions, unsettled state law, or inadequate state guidance, convenience must yield to comity. *Gingerich v. White Pigeon Community Schools,* 736 F.Supp. 147, 150 (W.D. Mich. 1990) (citatons omitted).

C. The Wineries' state claims fail as a matter of law.

To find conflict between local zoning and state liquor laws, there must be direct conflict. *See Deruiter*, 505 Mich. at 140. *Deruiter* is the Michigan Supreme Court's most recent decision directly addressing conflict preemption between zoning and a state-regulated activity (cultivating marijuana). PTP discussed it fully; the Wineries barely reference it. (ECF No. 250, PageID.8933-8935). *Deruiter* is clear that zoning limiting *where* in the township state-regulated activity may take place (in residential not commercial districts) causes no conflict. 505 Mich. at 143-44.

To the limited extent federal courts address Michigan conflict preemption standards, they recognize that zoning that regulates where activities or businesses may take place coexists without conflict alongside state laws that comprehensively regulate businesses or commodity trafficking.

Morgan v. U.S. Dep't of Justice, 473 F. Supp. 2d 756, 768 (E.D. Mich. 2007). The *Morgan* court found no conflict between state law that licensed an applicant to deal firearms and township zoning prohibiting the operation of any business, including firearms businesses, in the residential district. *Id.* at 767. The district court quoted extensively from an unpublished decision:

> The ordinance at issue in this case is a zoning ordinance, pure and simple. The ordinance does not seek to regulate the purchase or sale of firearms, nor does it have this effect. Rather, the ordinance prohibits all uses in residential areas except those specifically permitted; and no commercial activities are authorized in such areas except libraries, parks, recreational facilities, golf courses, cemeteries, and temporary construction buildings. The incidental effect of the ordinance – *i.e.*, that plaintiff may not operate his business within an R-A [one-family residential] zone – does not conflict with the state statute.
>
> In the present case, it is quite clear that the zoning ordinance is not preempted. The statute prohibits local units of government from regulating "the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition . . . or components of pistols or other firearms." The St. Clair Shores zoning ordinance imposes no such regulations. Rather, the ordinance simply limits, in a generally applicable manner, the types of uses which are permitted in residential areas. The incidental effect of this ordinance is to prevent plaintiff's business (and all other businesses which are not specifically included among the small number of "principal uses permitted") from operating within R-A zones. This effect is the same as that of the zoning ordinances in [several prior Michigan cases], in which the ordinances survived preemption challenges. The St. Clair Shores ordinance is not directed at firearms, but instead applies generally in prohibiting most commercial activity within residential zones. Plaintiff does not contend that St. Clair Shores has zoned firearms dealers out of existence by zoning the entire city "residential" or that he could not conduct his business in compliance with the zoning ordinance by operating from within a commercially zoned area. While the zoning ordinance in this case may have an indirect effect upon plaintiff's business, the same could be said of the local building codes or local property tax assessments. If plaintiff's preemption argument were carried out to its logical conclusion, any ordinance with any effect on a firearms business would be preempted as well. The court cannot imagine that the Michigan legislature intended such an absurd result.

Id. at 768-79 (quoting *Yenson v. U.S. Dep't of Treasury*, No. 98-70262 (E.D. Mich., Jan. 26, 1999) (**Ex B**)).

The *Morgan* court discussed Michigan Supreme Court cases recognizing that zoning the location of activities does not conflict with state regulation over the businesses:

- *People v. Llewellyn*, 401 Mich. 314, 330-31 (1977) – state's comprehensive obscenity regulation field-preempted local anti-obscenity regulation but not local zoning "governing the location of [erotic and adult entertainment] establishments."
- *Howell v. Kaal*, 341 Mich. 585, 591 (1954) – state licensing and regulation of trailer parks did not conflict with zoning excluding trailer parks from Residential-Agricultural district, partly because zoning "does not undertake to license or regulate trailer coach parks" and they were permitted elsewhere. The state law expressly required permittees to comply with local ordinances.
- *Gackler Land Co. v. Yankee Springs*, 427 Mich. 562, 580 (1986) – zoning ordinance restricting mobile or manufactured homes to mobile parks was not preempted by statutes establishing construction and safety standards because zoning requirements "are not standards regulating the construction and safety of mobile homes" but instead regulate "where mobile homes may be placed and under what conditions."

This comprehensive analysis is on point with *Deruiter* and instructive here. The zoning provisions the Wineries challenge are not directed at winemaking or sales, they are land use regulations that apply generally to limit commercial activities in the agricultural district. They apply if the winery serves hot chocolate or hosts a kids' birthday party. The activities the Wineries say state law lets them do – restaurants, catering, late hours, amplified music – are allowed in the Township outside the agricultural district. Zoning permissibly imposes locational conditions.

The MLCC expressly requires wineries to comply with zoning. Mich. Admin. R. 436.1003 (licensee "shall comply" with zoning). The Liquor Control Commission must deny a license application if the proposed activity does not comply with zoning. Mich. Admin. R. 436.1105(3) (license "shall be denied" if applicant does not meet zoning ordinance). The Commission states the licensee "shall comply with" zoning, and the issuance of a license "does not waive this requirement." (ECF No. 174-1, PageID.6602-6605) If the Commission granted a license to do what zoning prohibits, that license – not the zoning – should yield:

> The [Liquor Control] Commission is compelled to advise Chateau that it must comply with the requirements of R. 436.1003; MAC; supra, in meeting any standards imposed on its business operation through applicable local ordinances. If the ultimate resolution of any litigation or dispute between Chateau and Peninsula Township results in the inability of Chateau to meet the standards imposed through this ruling, any permission expressed or implied in this ruling relative to the Licensee's ability to sell wine it manufactures for on-premises consumption shall be considered null and void.

ECF No. 250-1, PageID.8958 (1998 Declaratory Ruling).

The Wineries cite exactly zero cases finding a zoning ordinance conflicted with state liquor law. In *Oppenhuizen v. Zeeland*, an ordinance completely banning liquor sales was field-preempted by state law. 101 Mich. App. 40 (1980). *Oppenhuizen* is neither a zoning nor conflict preemption case. *Allen v. Liquor Control Comm.* confirmed townships can regulate liquor businesses and the Commission may deny "applicants who, because of valid local ordinances, will be unable to use a license." 122 Mich. App. 718, 720 (1982). *Maple BPA, Inc. v. Bloomfield* found no conflict between zoning restrictions on auto service stations that sell alcohol and the MLCC because zoning imposed no additional constraints on alcohol sales. 302 Mich. App. 505, 514 (2013). *Noey v. Saginaw,* 271 Mich. 595 (1935) and *RSWW v. Keego Harbor,* 397 F.3d 427 (6th Cir. 2005) addressed field preemption and unconstitutional conditions, respectively.

The Wineries invite this Court to take a leap, unsupported by state law, and invalidate zoning that limits the local effects of the business operations of a state-regulated industry. Townships across Michigan limit winery and related business operations through zoning, specifically restricting operating hours, restaurant and food services, and music amplification. Here is a sample from our immediate vicinity: Bingham,[3] Centerville,[4] Elmwood,[5] Leland.[6] If Peninsula Township's zoning limits on hours, food service, and noise at wineries in the agricultural district are conflict-preempted, then likely so are many others. The Wineries' claims are novel, unsupported, and potentially sweeping in impact.

1. Township zoning limiting operating hours does not conflict with state law.

PTP fully briefed the lack of conflict regarding operating hours. (ECF No. 250, PageID.8940-8945) None of the Wineries' arguments command a different conclusion.

There is no direct conflict between state law prohibiting liquor sales between 2:00 a.m. and 7:00 a.m. and zoning requiring guest activities to end at 9:30 p.m. (ECF No. 162, PageID.5990) To find conflict, the Wineries ask the Court to ignore the statutory language and rely instead on

[3] Wineries and cideries must close at 8:00 p.m.; outdoor amplified sound is prohibited. Bingham Twp ZO §§ 5.5.I.1.i and j.vi, available at https://www.leelanau.gov/downloads/pdf_version_062819.pdf.

[4] Wineries, meaderies, and cideries must close by 10:00 p.m.; most food for events must be prepared off-site. Centerville Twp ZO §§ 9.6.9.c, d, available at https://www.leelanau.gov/downloads/ordinance_effective_120707amended_52714_oct_2019.pdf.

[5] Tasting rooms must close at 10:00 p.m.; no outside amplified music. Elmwood Twp ZO § 9.8.J.7, available at https://www.leelanau.gov/downloads/zo_final_as_amended_through_april_29_2022_1.pdf.

[6] Food service is accessory use limited to packaged food. Leland Twp ZO §§ 2.02, 18.25.A.5, available at https://www.leelanau.gov/downloads/complete_zo_october_2016_1.pdf.

court opinions unrelated to conflict preemption – *Noey* and *RSWW*. (ECF No. 250, PageID.8941-8944)

Next, the Wineries ask this Court to find the Michigan Supreme Court was wrong in *Mutchall v. Kalamazoo* when it held state law was amended to meet *Noey* "so as to permit local authorities to control the closing times of licensed establishments." (ECF No. 263, PageID.9455) The Wineries compare pre-*Noey* and post-*Noey* changes to Sections **1** and **19** of the liquor code and conclude nothing relevant changed. They wrongly dismiss PTP's assertion that it was Section **52** of the 1933 Liquor Control Code that changed:

> The conclusion thus reached is also supported by section 52 of the act, which, after specifically repealing a number of acts, provides that – "All other acts and parts of acts, general, special or local, and all ordinances and parts of ordinances inconsistent with or contrary to the provisions of this act are hereby repealed"

Noey¸ 271 Mich. at 599; ECF No. 263-3, PageID.9493-9394 (Act 8 of 1933, Sec. 52, repealing local ordinances). This Court should decline the invitation to second-guess the Michigan Supreme Court's long-standing interpretation of state law, legislative history, and the intersection of state and local authority over liquor establishments.

Next, the Wineries propose interpreting MCL § 436.2114 as giving them the right to stay open until 2:00 a.m. (ECF No. 263, PageID.9457-9458) They say it means local government may only alter *Sunday* sales. The statute does not compel this interpretation: it prohibits liquor sales between 2:00 a.m. and 7:00 a.m. and does not affect MCL §§ 436.1111 and 436.1113. Contrary to their argument, the Michigan Legislature gives local government broad authority to regulate the local effects of liquor establishments through zoning, as Michigan courts recognize. *See Allen,* 122 Mich. App. at 720. This Court should reject the Wineries' new, novel, and unsupported theory.

2. Zoning properly limits, but does not ban, catering kitchens.

The Wineries argue the zoning limit on using kitchens for off-site catering conflicts with MCL § 435.1547, authorizing the Commission to issue catering permits to sell wine off-site. This Court agreed, finding the Township prohibits using kitchens for off-site catering but state law permits it. (ECF No. 152, PageID.5992) Respectfully, this analysis is too narrow and contrary to Michigan law.

The MLCC allows a licensee to obtain a liquor catering permit if it: (a) is a licensed food service establishment under state food laws (MCL § 436.1547(1)(b), (11)), and (b) meets local zoning (MLCC Rule 436.1003). The Commission cannot issue a catering permit when an applicant does not meet both requirements. MLCC Rule 436.1105(3). An MLCC license does not exempt licensees from zoning. (ECF No. 174-1, PageID.6602) State law does not authorize the use of winery kitchens for off-site food catering.

The Wineries argue Township zoning is an "outright prohibition on catering." (ECF No. 263, PageID.9459) They are wrong – it is a locational restriction on commercial kitchens. *Deruiter,* 505 Mich. at 142-43. Zoning limits on *where* state-regulated businesses may locate and under what conditions are proper land use regulations. *Kaal*, 341 Mich. at 591; *Gackler*, 427 Mich. at 580; *Frens Orchards, Inc. v. Dayton,* 253 Mich. App. 129, 137 (2002); *Morgan*, 473 F. Supp. 2d at 768-72.

That "local legislative approval" is not required for liquor catering permits does not mean they are exempt from zoning. (ECF No. 54-13, PageID.2363) Legislative approval involves municipalities approving or denying liquor licenses independent of zoning compliance. *See Roseland Inn, Inc. v McClain*, 118 Mich. App. 724 (1982) (explaining local legislative approval).

PTP is not wrong that an MLCC catering permit does not regulate *food* catering, it regulates *alcohol* distribution by licensed *food* caterers. ECF No. 250, PageID.8937; MCL § 436.1547(1)(b). Subsection 11, requiring an liquor catering permitee to handle food in compliance with Michigan Food Law (2000 PA 92), means this permittee must comply with both liquor and food laws. The MLCC does not regulate food caterers nor their kitchens beyond alcohol trafficking. *See Bundo v. Walled Lake,* 395 Mich. 679, 699 (1976). There is no conflict between a liquor law allowing (not requiring) a licensee to distribute wine off-site with a food catering license add-on and a zoning restriction on food catering kitchens in the agricultural district.

3. The MLCC does not address music amplification.

Township zoning prohibits amplified music at Winery-Chateau guest activities. The MLCC allows instrumental music and singing without an MLCC add-on permit. Wineries may comply with both: they may host instrumental music, and they may not amplify it. The MLCC is silent where the zoning imposes additional regulation. *See Nat'l Amusement Co. v. Johnson*, 270 Mich. 613, 616 (1935) ("Mere differences in detail do not render them conflicting. If either is silent where the other speaks, there can be no conflict between them.") (citing 43 C.J. p. 218).

4. The Court should not invalidate non-pleaded provisions.

The Wineries apparently meant but failed to plead that MLCC preempts zoning provisions for restaurants. (ECF No. 263, PageID.9462-9465; ECF No. 250, PageID.8919 n. 1) PTP briefed restaurant preemption as a proposed intervener. Neither the motion nor this reply constitutes PTP consent to amendment of the Wineries' complaint; constructive amendment is premature. *See*

Stemler v. City of Florence, 126 F.3d 856, 872 (6th Cir. 1997) (parties may constructively amend complaint by agreeing "to litigate fully" an unpleaded issue).

PTP further opposes the Wineries' assertion that this Court should address "all ordinances" they allege are preempted. Besides those addressed in their response, they asserted four others are preempted. (ECF No. 54, PageID.2277) PTP opposes adding claims through constructive amendment, vague requests, and otherwise. PTP is prejudiced because each claim seeks to invalidate more zoning provisions intended to limit the local impacts of winery operations in the agricultural district.

5. Zoning properly limits, but does not ban, restaurants.

This is no conflict between zoning and state law regarding restaurants. (ECF No. 250, PageID.8936-8940) Limited food service is allowed in tasting rooms, but restaurants are not permitted in the agricultural district – they are restricted to the commercial district. PT ZO §§ 6.6.2, 6.7.2(19), 8.7.3(10)(d)(2). These restaurant provisions are not "an outright ban" because restaurants are allowed in the Township and some food service is allowed at wineries. (ECF No. 263, PageID.9467) The MLCC requires licensees to do some things and accepts them doing others. It provides licensees "may" own and operate a restaurant. MCL § 436.1536(7). (ECF No. 250, PageID.8936-8940) It is indifferent to restaurants – allowing but not requiring nor regulating them. This is different than if the MLCC required tasting rooms to provide crackers but the Township prohibited crackers.

The Township's zoning is like *Deruiter,* 505 Mich. at 142-47, where zoning limited marijuana cultivation to certain districts, not *Ter Beek,* where zoning effectively prohibited and penalized it. *Id. Deruiter* held the ordinance's "additional requirements" (locational limitation) did

not "contradict the requirements set forth in the statute," so there was no conflict. *Id.* at 147. Here, unlike the state law in *Deruiter* and *Ter Beek,* which authorizes and regulates marijuana, the MLCC authorizes and regulates alcohol sales, not restaurants. There is no lawful basis to find activities the MLCC tolerates (restaurants, catering, dancing, sporting events) conflict with zoning limiting them to particular districts. *Id.* at 146 ("Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.") (citing *Detroit v. Qualls*, 434 Mich. 340, 362 (1990)). *National Amusement* is not inconsistent. 270 Mich. at 616. It involved a local non-zoning ordinance banning walkathons, which state law authorized under certain conditions. The ordinance was preempted because "both statute and ordinance cannot stand." *Id.* This case is different in two ways: the MLCC does not authorize restaurants, and zoning does not ban them.

IV. Conclusion

For the reasons discussed in PTP's motion and above, the Court should dismiss the Wineries' state claims.

Respectfully submitted,

Date: September 23, 2022

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CERTIFICATE OF SERVICE

I, Tracy Jane Andrews, hereby certify that on the 23rd day of September, 2022, I electronically filed the foregoing document with the ECF system, which will send a notification of such to all parties of record.

By: TJ Andrews

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.2(c)

This Reply Brief complies with the word count limit of L. Civ. R. 7.2(c). This brief was written using Microsoft Word version 2016 and has a word count of 4,273 words.

Respectfully submitted,

Date: September 23, 2022 By: TJ Andrews

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2021 WL 1555004
Only the Westlaw citation is currently available.
United States District Court, N.D. Ohio, Western Division.

Mary CORPAS, Plaintiff,

v.

Matthew ESSEX, et al., Defendants.

Case No. 20-cv-1806
|
Signed 03/08/2021

Attorneys and Law Firms

Jeffrey C. Miller, Brennan, Manna & Diamond, Cleveland, OH, for Plaintiff.

Byron S. Choka, Jennifer A. McHugh, Teresa L. Grigsby, Spengler Nathanson, Toledo, OH, for Defendant.

ORDER

James G. Carr, Sr. U.S. District Judge

***1** This suit arises from a broken engagement between plaintiff Mary Corpas and defendant Edward Urbanek. Corpas claims that Urbanek defamed her when he filed a police report with the Village of Marblehead, Ohio, Police Department ("MPD") claiming plaintiff had stolen an engagement ring. In response to that report, defendant MPD Officer Matthew Essex went to plaintiff's home and retrieved the ring. In doing so, plaintiff alleges, Essex violated her constitutional rights.

Pending is defendant Urbanek's motion to dismiss, (Doc. 9), which plaintiff opposes, (Doc. 13), and defendant has filed a reply. (Doc. 15).

For the reasons that follow, I grant the motion to dismiss.

1. Background

Plaintiff and Urbanek had a long-standing romantic relationship. In November 2017, Urbanek purchased an engagement ring worth approximately $125,000. (Doc. 1, ¶¶ 25, 31, pgID 4). The wedding never occurred. In May 2019, the relationship ended, and plaintiff moved from Urbanek's home. (*Id.*, ¶ 26, pgID 4-5).

Plaintiff's complaint asserts six claims: two civil rights claims against Essex pursuant to 42 U.S.C. § 1983 and a state-law claim against him for intentional infliction of emotional distress; § 1983 claims against the Village of Marblehead and its former police chief; Casey Joy, and two state-law claims against Urbanek.[1]

Plaintiff's claim against Urbanek in Count Five, alleges that he violated O.R.C. §§ 2921.03(A) and (C). Those criminal provisions penalize attempts to intimidate, influence, or hinder public offices, such as police offices, in the discharge of their duties. (*Id.*, ¶¶ 9-104, pgID 13-14). In Count Six, plaintiff asserts a common-law defamation claim against Urbanek for filing an allegedly false police report. (*Id.* ¶¶ 105-117, pgID 14-15).

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Defendant Urbanek makes several arguments in his motion to dismiss: 1) lack of a sufficient nexus between plaintiff's state claims and her federal claims against the other defendants to establish jurisdiction; 2) absolute immunity from being sued protects one who reports criminal activity to the police; and 3) plaintiff's complaint fails under the *Twombley/Iqbal* doctrine.

Because I find that I lack supplemental jurisdiction over plaintiff's state-law claims against Urbanek, I grant Urbanek's motion.[2]

2. Legal Standard

Plaintiff argues that I have supplemental jurisdiction over her claims against Urbanek pursuant to 28 U.S.C. § 1367. (*Id.* ¶ 19, pgID 4). Under § 1367, a court can exercise supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." Cases are "part of the same case or controversy if they 'derive from a common nucleus of operative facts.' *Dotson v. Ally Fin. Inc.*, No. 2:19-CV-2274, 2019 WL 5847848, at *4 (W.D. Tenn.) (quoting *Packard v. Farmers Ins. Co. of Columbus Inc.*, 423 F. App'x 580, 583 (6th Cir. 2011)).

***2** "Operative facts are facts that are relevant to the resolution of the claim." *Vogel v. Ne. Ohio Media Grp. LLC*, No. 1:17CV272, 2017 WL 3157920, at *1 (N.D. Ohio) (Boyko, J.). Where the evidence needed to prove one claim differs materially from that needed to prove the purportedly supplemental claim, the claims do not derive from a common nucleus of operative facts. *See, e.g.*, *Sneed v. Wireless PCS Ohio #1, LLC*, No. 1:16CV1875, 2017 WL 879591, at *3 (N.D. Ohio) (Parker, M.J.); *Cleveland Constr. Inc. v. AJM Contractors, Inc.*, No. 1:12 CV 1680, 2014 WL 12745626, at *1 (N.D. Ohio) (Baughman, J.).

In determining whether claims involve the same case or controversy, I should "avoid" making " '[n]eedless decisions of state law both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.' " *Hughes v. Region VII Area Agency on Aging*, 423 F. Supp. 2d 708, 720 (E.D. Mich. 2006) (quoting *United Mineworkers v. Gibbs*, 383 U.S. 715, 725 (1966)), *aff'd*, 542 F.3d 169 (6th Cir. 2008). When it comes to state-law claims, "[c]omity also supports declining jurisdiction." *Dotson, supra*, 2019 WL 5847848, at *7.

3. Discussion

Plaintiff's claims against Urbanek are not part of the same case or controversy as her claims against Essex because they do not involve the same nucleus of operative facts.

The issue underlying both of plaintiff's claims against Urbanek is whether Urbanek lied when he made the police complaint accusing plaintiff of breaking into his house and stealing the ring. The issue in the plaintiff's § 1983 claims is whether Officer Essex's subsequent conduct in response to Urbanek's complaint violated plaintiff's constitutional rights.

Whether Urbanek falsified his complaint to Essex is irrelevant to whether Essex's alleged misconduct in investigating that complaint violated plaintiff's rights.[3] Conversely, Urbanek completed all the misconduct the complaint alleges when he filed his complaint. Any unlawful action Essex took afterwards is, at most, only tangentially related to whether Urbanek's complaint actually was true. *See Dotson, supra*, 2019 WL 5847848, at *6 (connection between defendant's purportedly supplemental claim to collect loan repayment and plaintiff's claims based on lender's misconduct in its collection efforts was too "superficial and tangential" to confer supplemental jurisdiction).

Thus, the evidence necessary to prove that Essex acted unlawfully in recovering the ring will be irrelevant to the claim that Urbanek lied to Essex. And, the evidence regarding plaintiff's and Urbanek's relationship and whether Urbanek, as plaintiff alleges, actually gifted her the ring will be irrelevant to plaintiff's claims against Essex.

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The only single piece of overlapping evidence is that Urbanek made the allegedly false police complaint. The fact there may be some overlapping evidence between claims does not create supplemental jurisdiction where the claims are otherwise distinct. *See Dotson, supra*, 2019 WL 5847848, at *7 (though loan agreement was relevant to both parties' claims, no supplemental jurisdiction existed because defendant's counterclaim relied on evidence unrelated to lender's claims); *Anderson v. P.F. Chang's China Bistro, Inc.*, No. 16-14182, 2017 WL 3616475, at *5 (E.D. Mich.) (counterclaims "would involve a substantial amount of additional evidence that would not be necessary to prove or defend [plaintiff's] claim.").

***3** Moreover, separate acts of misconduct that are distinct in time and sequence from the acts giving rise to a plaintiff's claims are not part of the same nucleus of operative facts. Thus, in *Harris v. City of Circleville*, No. 2:04 CV 1051, 2005 WL 1793841, at *3 (S.D. Ohio July 27, 2005), the court lacked supplemental jurisdiction over state law tort claims that arose from an EMS team's dropping the plaintiff after officers had allegedly used excessive force in arresting him.

Here, plaintiff argues that the factual background of her federal constitutional § 1983 claims against Officer Essex is "inextricably intertwined" with that of her state law tort claims against Urbanek. This is so, she asserts, because Urbanek's police complaint "precipitated" Essex's subsequent intrusion into her home and seizure of the ring, (Doc. 13, pgID 103),

This contention is meritless: there is no joinder at the hip here.

To be sure, one followed the other. In *Harris,* it was the fall after the arrest; here, the allegedly wrongful intrusion and seizure followed the complaint. But neither was an integral, or even a tangential part of the other. They involved unrelated acts by unrelated actors.

One set of acts and one actor belongs here. The other set belongs in state court.

Accordingly, it is hereby

ORDERED THAT defendant Urbanek's motion to dismiss (Doc. 9) be and the same hereby is, granted; and

2. Counts Five and Six of plaintiff's complaint be, and the same hereby are, dismissed without prejudice to plaintiff's ability to pursue those claims in state court.

So ordered.

All Citations

Slip Copy, 2021 WL 1555004

Footnotes

1 In a prior order, I dismissed Corpas' claims against Marblehead and former Chief Joy. (Doc. 17).

2 As a result, I need not reach Urbanek's arguments regarding immunity and the complaint's sufficiency.

3 Plaintiff has not alleged that Urbanek conspired or colluded with Essex.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN E. YENSON d/b/a
JOHN'S GUNS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
DEPARTMENT OF TREASURY,
BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS, and
JOHN W. MAGAW,

Defendants.
_____/

Civil Action No.
98-CV-70262-DT

HON. BERNARD A. FRIEDMAN

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

and

DENYING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT

This matter is presently before the court on defendants' motion for summary judgment and on plaintiff's motion for declaratory judgment. Both motions have been fully briefed. Pursuant to E.D. Mich. LR 7.1(e)(2), the court shall decide these motions without oral argument.

The facts in this case are not in dispute. Plaintiff John Yenson does business in St. Clair Shores, Michigan, as John's Guns. The business, which deals in firearms, operates from Yenson's private residence, located within city limits. In December 1996, defendant United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms (ATF), denied plaintiff's

application for renewal of his federal license as a firearms dealer. The application was denied pursuant to 18 U.S.C. § 923(d)(1)(F)(i), which requires the applicant to certify that "the business to be conducted under the license is not prohibited by State or local law in the place where the licensed premise is located." The ATF concluded that this requirement was not met in the present case because plaintiff's business is located within an area zoned by local ordinance as "R-A," or one-family residential. With very few exceptions, businesses are not permitted to operate in R-A zones.

Pursuant to 18 U.S.C. § 923(f)(2), plaintiff requested an administrative hearing. The hearing was held in August 1997. On the hearing officer's recommendation, the ATF District Director issued a final decision denying plaintiff's application in November 1997. Pursuant to 18 U.S.C. § 923(f)(3), plaintiff commenced the instant action for review of the administrative decision. This statutory provision states in relevant part:

> In a proceeding conducted under this subsection, the court may consider any evidence submitted by the parties to the proceeding whether or not such evidence was considered at the hearing held under paragraph (2). If the court decides that the Secretary was not authorized to deny the application or to revoke the license, the court shall order the Secretary to take such action as may be necessary to comply with the judgment of the court.

The court's review under this statute is de novo. See Stein's Inc. v. Blumenthal, 649 F.2d 463, 465-67 (7th Cir. 1980); Al's Loan Office, Inc. v. United States Dep't of the Treasury, 738 F. Supp. 221, 223 (E.D. Mich. 1990). In the present case, the facts are not in dispute. A single legal question is at issue, namely, whether defendant erred in concluding that the local zoning ordinance prohibits plaintiff from operating his business in a residential area, thereby authorizing the denial of plaintiff's application pursuant to 18 U.S.C. § 923(d)(1)(F)(i).

The St. Clair Shores zoning ordinance, a copy of which is attached to defendants'

summary judgment motion as Exhibit A, states in relevant part as follows:

> 15.050 R-A ONE FAMILY GENERAL RESIDENTIAL DISTRICT
>
> 15.051 Sec. 35.9 INTENT.
>
> The R-A One-Family General Residential Districts are designed to be among the most restrictive of the residential districts. The intent is to provide for an environment of predominately low-density single unit dwellings along with other residentially related facilities which serve the residents in the district.
>
> * * *
>
> 15.052 Sec. 35.10 PRINCIPAL USES PERMITTED.
>
> In the R-A One-Family General Residential District no building or land shall be used and no building shall be erected except for one or more of the following specified uses, unless otherwise provided in this Ordinance.
>
> (1) One-Family detached dwellings.
>
> (2) Publicly owned and operated libraries, parks, parkways, and recreational facilities.
>
> (3) Golf Courses lawfully occupied on land at the time of this Ordinance.
>
> (4) Cemeteries which lawfully occupied land at the time of adoption of this Ordinance.
>
> (5) Temporary buildings and uses for construction purposes for a period not to exceed one (1) year.

The ordinance also permits certain "accessory buildings/structures," such as parking spaces, boat houses, satellite antennas, and radio towers; and "special land uses," such as churches, schools, and public service buildings. See id. §§ 35.10A, 35.11.

Plaintiff acknowledges that this zoning ordinance "prohibits the operation of a

business from a resident's home." Plaintiff's Memorandum of Law, p. 1. However, plaintiff argues that the zoning ordinance is preempted by a Michigan statute, M.C.L. § 123.1102, which states:

> **Local government regulation of firearms and ammunition**
> Sec. 2. A local unit of government shall not impose special taxation on, enact or enforce any ordinance or regulation pertaining to, or regulate in any other manner the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition for pistols or other firearms, or components of pistols or other firearms, except as otherwise provided by federal law or a law of this state.

Defendants appear to concede that plaintiff's application should be granted if, as plaintiff argues, the zoning ordinance is preempted by § 123.1102. See Plaintiff's Exhibit B (12-8-95 letter from ATF Director John Magaw: "If a local ordinance is pre-empted by State law, a license applicant need not certify to compliance with the local ordinance"). However, defendants argue vigorously that the zoning ordinance is not preempted.

The parties agree that the leading Michigan Supreme Court decision on preemption is People v. Llewellyn, 401 Mich. 314 (1977). In that case, defendants were convicted of violating a local obscenity ordinance. On appeal, the issue was whether the local ordinance was preempted by a state obscenity statute. The Court stated:

> In making the determination that the state has thus pre-empted the field of regulation which the city seeks to enter in this case, we look to certain guidelines.
> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted.
> Second, pre-emption of a field of regulation may be implied upon an examination of legislative history.
> Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-

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> emption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.

401 Mich. at 322-24 (citations and footnotes omitted).

Based on the third and fourth factors, the Court concluded in Llewellyn that the state obscenity statute preempted the local ordinance. The Court found that "the breadth and detail of this statutory scheme provides an indication that the Legislature has pre-empted the definition and deterrence of criminal obscenity, at least to the exclusion of a supplementary ordinance such as the one before us, which seeks to establish its own definition and test for obscenity, to modify the state standards for a prima facie case of the prohibited conduct, and to alter the state-prescribed punishment upon conviction." Id. at 327. In addition, the Court concluded that "the definition and prohibition of obscenity offenses is clearly an area of the law which demands uniform, statewide treatment" due to the "uncertainty and confusion" which would result from varying local ordinances. Id.

The parties spend a great deal of time analyzing the present case under the four factors mentioned in Llewellyn, in an effort to show whether the St. Clair Shores zoning ordinance is preempted by M.C.L. § 123.1102. The court finds it unnecessary to engage in this exercise because the Llewellyn factors come into play only where "the city seeks to enter" . . . "the field of regulation" at issue. 401 Mich. at 322. In Llewellyn, and in the cases cited therein,[1] the municipal

[1] In its discussion of the four-factor preemption analysis, the Llewellyn Court cited Noey v. Saginaw, 271 Mich. 595 (1935) (ordinance regulating the hours during which alcoholic beverages could be sold preempted by state statute giving "sole right, power and duty to control the alcoholic beverage traffic" to the Liquor Control Commission); Walsh v. River Rouge, 385 Mich. 623 (1971) (ordinance granting curfew powers to mayor preempted by state statute

ordinance sought to regulate the very subject matter addressed by the state statute. This is not so in the present case because the ordinance in question does not regulate "the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition for pistols or other firearms, or components of pistols or other firearms." Section 123.1102.

The ordinance at issue in this case is a zoning ordinance, pure and simple. The ordinance does not seek to regulate the purchase or sale of firearms, nor does it have this effect. Rather, the ordinance prohibits all uses in residential areas except those specifically permitted; and no commercial activities are authorized in such areas except libraries, parks, recreational facilities, golf courses, cemeteries, and temporary construction buildings. The incidental effect of the ordinance -- i.e., that plaintiff may not operate his business within an R-A zone -- does not conflict with the state statute. The Court in Llewellyn specifically noted that zoning ordinances generally are not incompatible with state regulatory statutes. After finding that the obscenity ordinance in that case was preempted by the state statute on the same subject, the Court went on to explain why the municipality could still regulate the location (as opposed to the operation) of defendants' business through zoning:

> Moreover, we do not mean to suggest in this opinion that a municipality is pre-empted from enacting ordinances outside the field of regulation occupied by the state statutory scheme governing criminal obscenity. For example, there is not the slightest indication

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granting such powers to the governor); City of Grand Haven v. Grocer's Cooperative Dairy Co., 330 Mich. 694 (1951) (ordinance requiring milk sold within the city to be pasteurized within five miles of city limits preempted by state statute placing only a time limitation between pasteurization and sale); In re Lane, 58 Cal 2d 99 (1962) (ordinance criminalizing intercourse between unmarried persons preempted by similar state statute); Montgomery County Council v. Montgomery Ass'n, Inc., 274 Md. 52 (1975) (ordinances regulating campaign finance practices preempted by state election code).

> that the state Legislature acted in MCLA 750.343a *et seq.*; MSA 28.575(1) *et seq.* to preclude local zoning ordinances governing the location of establishments featuring "adult entertainment" such as that recently approved by the United States Supreme Court in *Young v American Mini Theaters, Inc*, 427 US 50; 96 S Ct 2440; 49 L Ed 2d 310 (1976).
>
> The Detroit ordinance challenged in *Young* involved zoning, not criminal prohibition, and "adult establishments" featuring erotica not defined in terms of obscenity. Clearly, then, such municipal regulation is outside of the state's present statutory scheme governing criminal obscenity. In addition, the need for uniformity which has been in part the foundation of our opinion today has little relevance to such zoning ordinances, which speak to a significant local need to regulate the location of "adult establishments" and which are primarily local in their effect."

401 Mich. at 330-31. See also id. at 320 ("Such municipal zoning ordinances are outside the field of prohibition occupied by the state statutory scheme").

The Llewellyn Court cited several cases in which zoning ordinances have been upheld when challenged on preemption grounds. See id. at 325 n.12. In City of Howell v. Kaal, 341 Mich. 585 (1954), for example, property owners were found to be in violation of a city ordinance when they operated a trailer park in an area of the city zoned R-A ("residential-agricultural"). Defendant argued that the ordinance was preempted by a state statute which provided for the licensing and regulation of trailer parks. In rejecting this argument, the Michigan Supreme Court stated: "The zoning ordinance here in question does not undertake to license, regulate or prohibit trailer coach parks. They are permitted in 3 zones in the city. . . . The zoning ordinance and its provisions zoning defendants' property as R-A are not in conflict with the statute and do not invade an area occupied by it." 341 Mich. at 590-91.

Similarly, in Oshtemo Charter Township v. Central Adver. Co., 125 Mich. App. 538 (1983), a township sued an advertising company which erected a sign without first obtaining a

building permit and approval of a site plan, as required by local ordinance. Defendant argued that the ordinances were preempted by a state statute which regulates outdoor signs. The Michigan Court of Appeals rejected this argument because the statute regulated "size, lighting, and spacing" of signs, whereas the ordinances addressed other, unrelated concerns. 125 Mich. App. at 541-42.

In like manner, the Michigan Supreme Court in Gackler Land Co., Inc. v. Yankee Springs Township, 427 Mich. 562, 579-80 (1986), concluded that a zoning ordinance which regulated the "conditions and locations of mobile homes outside mobile home parks" was not preempted by federal and state statutes which regulated the "construction and safety standards" of mobile homes. The Court agreed with both the trial court and the court of appeals that "standards concerning proper land use, which is the thrust of zoning laws," were distinct from, and perfectly compatible with, the statutes. Id. at 579.

In the present case, it is quite clear that the zoning ordinance is not preempted. The statute prohibits local units of government from regulating "the ownership, registration, purchase, sale, transfer, transportation, or possession of pistols or other firearms, ammunition . . . or components of pistols or other firearms . . . ." The St. Clair Shores zoning ordinance imposes no such regulations. Rather, the ordinance simply limits, in a generally applicable manner, the types of uses which are permitted in residential areas. The incidental effect of this ordinance is to prevent plaintiff's business (and all other businesses which are not specifically included among the small number of "principal uses permitted") from operating within R-A zones. This effect is the same as that of the zoning ordinances in cases such as Young, Kaal, Central Adver. Co., and Gackler Land Co., Inc., in which the ordinances survived preemption challenges. The St. Clair Shores ordinance is not directed at firearms, but instead applies generally in prohibiting most commercial

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activity within residential zones. Plaintiff does not contend that St. Clair Shores has zoned firearms dealers out of existence by zoning the entire city "residential" or that he could not conduct his business in compliance with the zoning ordinance by operating from within a commercially zoned area. While the zoning ordinance in this case may have an indirect effect upon plaintiff's business, the same could be said of the local building codes or local property tax assessments. If plaintiff's preemption argument were carried out to its logical conclusion, any ordinance with any effect on a firearms business would be preempted as well. The court cannot imagine that the Michigan legislature intended such an absurd result.

The court concludes that the St. Clair Shores Zoning Ordinance (specifically Article IV thereof) is not preempted by M.C.L. § 123.1102. Therefore, defendants did not err in denying plaintiff's application for renewal of his federal license as a firearms dealer on the grounds that plaintiff failed to comply with 18 U.S.C. § 923(d)(1)(F)(i). Accordingly,

IT IS ORDERED that defendants' motion for summary judgment on Count I of the complaint is granted.

IT IS FURTHER ORDERED that plaintiff's motion for declaratory judgment as to Count I of the complaint is denied.

BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

Dated: JAN 26 1999
Detroit, Michigan

COPIES MAILED TO: Kerry L. Morgan, Esq., Mary S. Ridgon, Esq.