Case No. 22-1534

United States Court of Appeals for the Sixth Circuit

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION, a Michigan Nonprofit Corporation (WOMP)**; BOWERS HARBOR VINEYARD & WINERY, INC.,** a Michigan Corporation**; BRYS WINERY, LC,** a Michigan Corporation**; CHATEAU GRAND TRAVERSE, LTD,** a Michigan Corporation**; GRAPE HARBOR, INC.,** a Michigan Corporation; **MONTAGUE DEVELOPMENT, LLC,** a Michigan Limited Liability Company; **OV THE FARM, LLC,** a Michigan 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; **CHATEAU OPERATIONS, LTD,** a Michigan Corporation,
Plaintiffs-Appellees,

v.

TOWNSHIP OF PENINSULA, MI,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Michigan

DEFENDANT-APPELLANT PENINSULA TOWNSHIP'S MOTION FOR STAY OF INJUNCTION PENDING APPEAL PURSUANT TO F.R.A.P. 8

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INTRODUCTION

This appeal arises out of the District Court's issuance of an injunction which forbids Defendant-Appellant Township of Peninsula, MI from enforcing its zoning ordinances that have governed the small, agricultural community for decades (ECF 206 Page ID# 7795). The injunction was issued following the District Court's Opinion Regarding Summary Judgment Motions issued on June 3, 2022, which held various sections of the Township's zoning scheme to be unconstitutional or contrary to law (ECF 162 Page ID# 6029). The Township's Motion to Stay the Injunction Pending Appeal was denied by the District Court (ECF 207 Page ID# 7796, Ex A).

Another appeal was previously filed in this case, and this Court's unanimous published Opinion (ECF 215 Page ID# 8177, released on July 27, 2022) calls into question the validity of the injunction and the Summary Judgment Opinion which motivated the District Court to issue the injunction in the first place. A stay under F.R.A.P. 8 is warranted even without this Court's recent ruling, but the Opinion presents even more compelling grounds for this Court to put the brakes on the injunction while its instructions on remand are implemented and legal challenges (including challenges to jurisdiction upon which the District Court relied to issue the

injunction) are lodged as required by this Court (ECF 215 Page ID# 8192).

This Court's Opinion reversed the District Court's Order denying the motion of Protect the Peninsula ("PTP") to intervene under F.R.C.P. 24(a)(2). This Court held that PTP was wrongly denied the right to advocate on behalf of its members, local property owners who have a substantial interest in seeing the zoning ordinances enforced (ECF 215 Page ID# 8185).

PTP challenged the District Court's exercise of supplemental jurisdiction that the Court implemented to strike down ordinance provisions based on state law, but the District Court never decided this challenge because PTP's motion to intervene was denied. This Court's Opinion instructed the District Court on remand to decide PTP's challenge to supplemental jurisdiction on Plaintiffs' state law claims which, if successful, would eliminate many of the Court's Summary Judgment Rulings, restore many of the provisions that the Court struck down on state law grounds, and eliminate issues for trial (ECF 215 Page ID# 8192).

Just today, the Magistrate entered an Order that appears to violate this Court's Opinion a mere 8 days after it was issued by entry of an *In Limine* Order excluding PTP representatives from testifying at trial, a direct

contradiction of this Court's ruling that PTP shall be allowed to participate (ECF 223 Page ID# 8414). Reversible error has likely already occurred, increasing the Township's chances of success on appeal, the first factor governing whether a stay should be issued.

This Court's Opinion also confirms the irreparable harm and public interest factors that warrant a stay pending appeal in a case that the District Court previously recognized represents an attempt by Plaintiffs "to completely upset the status quo in Peninsula Township." (ECF 34.) A year later, the District Court gave Plaintiffs this exact relief with the issuance of the injunction.

Plaintiffs have tried to effectuate these revolutionary changes, but have lost time and time again at the ballot box because local residents of Peninsula Township oppose the wineries' attempts to convert their tranquil farming community into a commercial hot spot like neighboring Traverse City. Just yesterday, the residents of Peninsula Township (by a vote of 2,068 to 937) passed a millage to fund a program under which the Township pays landowners to agree to not use their property for any purpose other than agriculture.[1] Peninsula Township residents have shown

[1] Peninsula Township OKs preservation millage | Local News | record-eagle.com

their steadfast support for the agricultural nature of their community with their votes and pocketbooks, agreeing to raise their own taxes to preserve their way of life.

With its July 27, 2022 Opinion, this Court spoke directly to the local residents and their significant interests that warrant a stay of the injunction pending appeal. This Court's order directing the District Court to re-examine a number, if not all, of its Summary Judgment rulings to effectuate the reversal of the denial of PTP's motion to intervene demonstrate a high chance that the Township and intervenor PTP will be successful on the merits of this appeal. Exhibit A should be reversed.

STATEMENT OF FACTS

In addition to resolving a crucial issue in this case regarding the right of PTP to participate in this litigation, this Court's Opinion provides the background facts of this case.

> Located in Michigan's Grand Traverse County, Peninsula Township (the "Township") is aptly named. The approximately twenty-mile-long municipality occupies Old Mission Peninsula, a landmass that juts north out into, and is surrounded on three sides by, Lake Michigan. . . . Overall, the Township is marked by farmland and residential communities with approximately 5,800 people residing in these communities.
>
> The Wineries also inhabit Old Mission Peninsula, and the Township has adopted zoning ordinances that regulate the vineyards' activities.

***

> Aware that some of its zoning ordinances were unpopular with the Wineries, the Township attempted to negotiate changes. When these negotiations stalled, the Wineries initiated this lawsuit against the Township, claiming that the zoning ordinances were both unconstitutional on various grounds and violated state laws, including being preempted under the Michigan Liquor Control Code, Mich. Comp. Laws § 436.110, *et seq*. As relief, the Wineries requested that the district court enjoin the Township preliminarily and permanently from enforcing the ordinances. The Wineries also sought monetary damages. [ECF 215 Page ID# 8180-8181.]

Early on in this case the District Court recognized that by filing this lawsuit, Plaintiffs were seeking revolutionary changes to the zoning ordinances that have governed the agricultural community of Peninsula Township for decades. In denying Plaintiffs' first request for preliminary injunction, the District Court noted: "Plaintiffs seek to completely upset the status quo in Peninsula Township." (ECF 34.)

Roughly one year later, the District Court awarded Plaintiffs the relief they were looking for by entry of the Summary Judgment Ruling that struck down numerous ordinances on grounds they were unconstitutional or contrary to state law (ECF 162, Page ID# 6029). The Court later entered a preliminary injunction which enjoins the Township from enforcing the ordinances it found unconstitutional or preempted by state law (ECF 206,

Page ID# 7795).

Thereafter, the District Court denied the Township's Motion under F.R.C.P. 59(e) to amend or alter the Summary Judgment Ruling (ECF 211 Page ID# 7805), the Township's motion under 28 U.S.C. § 1292(b) to certify three of its Summary Judgment rulings (ECF 211 Page ID# 7817), and the Township's Motion to Stay the Injunction Pending Appeal (ECF 207 Page ID# 7801), the subject of this Motion in the Sixth Circuit Court of Appeals.

ARGUMENT

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

1. The party seeking the stay has a strong likelihood of success on the merits;
2. The movant would suffer irreparable harm absent a stay;
3. Granting the stay would cause substantial harm to others; and
4. The public interest would be served by granting the stay.

Michigan Coalition of Radioactive Material Users, Inc, v Griepentrog, 945 F2d 150 (CA6 1991).

A. This Court's July 27 Opinion Warrants A Stay

On July 27, 2022, this Court issued a unanimous published opinion holding that PTP should have been allowed to intervene long ago as of

right under F.R.C.P. 24(a)(2) because its interests were not adequately represented by the parties. See Wineries of the Old Mission Peninsula, Ass'n v Township of Peninsula, MI, --- F4th --- (CA6 2022) (Judges Moore, Stranch, and Larsen) (ECF 215). This Court held that PTP, which represents landowners of Peninsula Township, has a substantial interest in the subject matter of this litigation, the validity and enforcement of the zoning ordinances (ECF 215 Page ID# 8182: "Protect the Peninsula describes itself as a 'watchdog' that monitors the Township's 'policies and decisions related to land use inconsistent with the community's agricultural and residential character.'") The interests of PTP include a diminution of its members' property values and quiet enjoyment of their property if the zoning ordinances are struck down and the wineries are permitted to engage in unfettered commercial activities on their A1 Agriculturally zoned property, a move that would completely alter the rural, agricultural, and historical nature of Peninsula Township (ECF 215 Page ID# 8183).

Based on this Court's Opinion, many of the District Court's Summary Judgment rulings must be re-examined by the District Court on remand (ECF 215 Page ID# 8192: "Protect the Peninsula is free to raise its argument regarding supplemental jurisdiction to the district court, which

should decide it in the first instance.") For this and other reasons discussed below, the Injunction should be stayed pending appeal where this Court's Opinion re-opens many if not all of the District Court's bases for granting an injunction, including each of the ordinances struck down on grounds that they are preempted by state law where the District Court is being called to decide whether it should have adjudicated those state law claims in the first place (ECF 215 Page ID# 8192).

The Opinion also strongly suggests, if not outright requires the District Court to re-examine the other aspects of its Summary Judgment ruling where PTP's interests are at stake. In reversing the District Court's refusal to allow PTP to participate by right in these proceedings, the Court's Opinion addressed whether PTP "'has a substantial interest in the subject matter of the litigation.' We hold that the property interests of Protect the Peninsula's members satisfy this requirement." (ECF 215 Page ID# 8183) (internal citation omitted.) The Court further listed the property interests that PTP should have been allowed to advocate for the following interests of its members:

> [PTP] Members who own property near the Wineries fear that their property values will diminish because of the increased commercial activity that could follow from the zoning ordinances being struck down. Members also attest that they purchased their properties in

> partial reliance on these ordinances, and that the quiet enjoyment of their property will diminish if the Wineries win their lawsuit. In a similar vein, members worry that striking down the ordinances would result in additional traffic to the Wineries, which, given the one primary road onto the peninsula, would impair driving to their properties, and harm one of their farming businesses by causing transportation costs to rise. [ECF 215 Page ID# 8183 (internal record citations omitted.)]

This Court's Opinion confirmed that PTP's property interests are directly at stake in the question of whether the Township's zoning ordinances are declared to be unenforceable: "That the ordinances might not survive is sufficient for Protect the Peninsula to satisfy the substantial-interest requirement of Rule 24(a). Simply put, this litigation, which will establish the validity or invalidity of the [zoning] ordinance[s], necessarily bears directly on the property interests [PTP's members] seek to preserve." (ECF 215 Page ID# 8183.) (internal citations omitted.)

Further, this Court's Opinion held that PTP has its own independent, free-standing right to advocate for the continued validity of the Township's zoning ordinances (ECF 215 Page ID# 8185-8192). It is impossible for PTP to advocate on behalf of its members to have the zoning ordinances enforced and upheld if the District Court's Summary Judgment rulings are allowed to stand. A Motion for Relief from the Summary Judgment Order under F.R.C.P. 60 is certainly warranted on remand where PTP was

wrongly denied its right to oppose Plaintiffs' Motion for Summary Judgment which has nullified PTP's ability to advocate for its members' interests.

B. Traditional Stay Factors Warrant A Stay

1. The Township Has A Strong Likelihood of Success on the Merits

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." Griepentrog, 945 F2d at 153-154. In order to justify a stay of the District Court's ruling, the defendant must show "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." In re DeLorean Motor Co, 755 F2d 1223, 1229 (CA6 1985).

Convincing the District Court to stay its own ruling is an uphill battle, as noted by David Knibb's treatise, "Despite the requirement that appellant should initially seek a stay in the district court, as a practical matter the chances of obtaining one are not high. After ruling against appellant on the merits, few district judges will find that appellant is likely to prevail on appeal. That would be tantamount to conceding reversible error" Federal

Court of Appeals Manual, David G. Knibb, Sixth Edition, § 21:5, p 588. This Court's Opinion of July 27, however, makes it certain that the merits of many of the District Court's Summary Judgment rulings must be re-examined on remand, increasing the odds that the Township and PTP will prevail on the merits.

On Stay Motion, Peninsula Township presents succinct summaries of the arguments it expects to prevail on. A full-fledged Motion to Amend or Alter the Summary Judgment Ruling was filed and contains a more expansive view of the legal arguments that the Township believes it will prevail on (ECF 173 Page ID# 6555).

The District Court denied the Motion to Amend or Alter, and although on some issues the Court did express legal reasons why its prior decision would not be revisited, on a number of issues the Court resorted to preservation dodges or cited the heightened review standards of "clear error" or "manifest injustice" to stick with the rulings of June 3, 2022 (ECF 211 Page ID# 7806). The Township's appeal on the merits will not be under heightened standards of review and will instead be subject to *de novo* review. See Franklin v Kellogg Co, 619 F3d 604, 610 (CA6 2010).

An Injunction Was Improper In Advance of a Decision on Laches

The District Court ruled that the Township's laches defense would be litigated as a question of fact at trial but nonetheless issued an injunction in advance of a decision on laches. The Court's reasoning was that laches may limit Plaintiffs' damages due to delay and resulting prejudice in bringing suit decades after the ordinances were passed, but that laches is not a defense to the claims, themselves (ECF 211 Page ID# 7807). This is legal error that would be reversed on appeal. United States v Elkhorn Mining Co, 553 US 1, 9 (2008) ("[A] constitutional claim can become time-barred just as any other claim can"); Thatcher Enterprises v Cache Cnty Corp, 902 F2d 1472, 1476 (CA10 1990) (applying laches where plaintiff waited 17 years after adoption of the ordinance and 9 years from the time they received a conditional use permit allowing limited commercial uses in the agricultural zoning district to make challenges to the zoning ordinance); Non-Profit Hous Corp v City of Walled Lake, 43 Mich App 424, 435; 204 NW2d 274 (1972) (time bar applied because zoning ordinance provision had been in effect for 4 years before it was challenged).

A ruling today of the Magistrate Judge also makes it more likely that the Township will prevail on its laches defense on appeal (ECF 223 Page

ID# 8414). The Magistrate's *In Limine* ruling appears to eviscerate the Townships' ability to present a laches defense by the Grant of Plaintiffs' "Motion in limine to exclude evidence and testimony regarding history of Peninsula Township ordinances and testimony from non-township employees" (Id.), evidence that goes directly to the fact intensive laches inquiry. The Township will file the appropriate objections to the Magistrate's Order and seek further clarity as to its meaning, but if the District Court affirms an Order that denies the Township's ability to present the facts necessary to establish its laches defense, the Township's chances of success on appeal will increase.

Furthermore, the Magistrate's Order is in direct contradiction of this Court's ruling in favor of PTP because it excludes testimony at trial of PTP representatives and members (ECF 183 Page ID# 6810: Plaintiff's Motion *In Limine* sought to strike PTP Representative Parsons and PTP Member Wunsch; see also Page ID# 6811: "The Wineries also request that testimony from non-Township officials including Grant Parsons and John Wunsch"). This Court just held that these members must be allowed to participate; eight days later, the Magistrate entered an Order excluding these witnesses from testifying at trial. Reversible error has likely been

introduced even before trial by entry of an Order that nullifies this Court's July 27 Opinion.

The Township's Ordinance Is Not Pre-Empted By State Law

There are two separate reasons why the Township is likely to prevail on the merits of Plaintiffs' claim that various ordinances are preempted by state law. This Court has instructed the District Court to decide whether it should have exercised supplemental jurisdiction over these state law claims in the first place (ECF 215 Page ID# 8192). Second, the District Court's ruling that the Township's ordinances conflicted with state law is likely to be overturned on *de novo* review on the merits.

To maintain a tranquil, agricultural community, and balance the representations and requests of Plaintiffs' sought-after commercial expansions in the Township's agricultural district, the Township sought to limit "amplified" music, which would be most disruptive to residents' quiet enjoyment of their property. The District Court held "that the complete prohibition of amplified instrumental music is preempted by Michigan law, which expressly allows certain licensees to have musical instrument performance without a permit" (PageID.5991). This is clear error because the state law only allows music to be conducted without a state permit and

does not address *amplified* music at all, meaning there is no conflict. See MCL 436.1916(11)(a).

The District Court also held that the prohibition of off-site catering of food was preempted by a state law governing off-site catering of beer, wine or liquor. The MLCC concerns permitting the sale of alcohol off-premises when conducted with off-site food sales. The statutory section defining "catering permit" clearly limits it to catering alcoholic beverages. MCL 436.1547(1)(b)**Error! Bookmark not defined.**. Other MLCC sections consistently confirm that the statute concerns only the catering of alcoholic beverages when food is being provided off-site, and not use of kitchen facilities to serve food off-site. See MCL 436.1547(3) and MCL 436.1547(8).

The Township's Ordinances do not violate the Dormant Commerce Clause

Dormant Commerce Clause jurisprudence concerns in-state vs. out-of-state discrimination and forbids local protectionism or laws that discriminate against out-of-state commercial entities. The Township's zoning ordinance has no such out-of-state discrimination and Plaintiffs are not out of state entities, in any event. The Township's zoning ordinance allows processing facilities to process an unlimited amount of grapes not

derived from Old Mission Peninsula through both its food processing facilities special use (permitted in the A-1 District) and uses within the Township's commercial district. The zoning ordinance similarly permits the retail sale of wine derived from grapes not grown on Old Mission Peninsula.

Even so, Plaintiffs single-out ordinances provisions with minimal, if any, impact on out-of-state commerce by attempting to strike provisions focused on balancing agricultural and commercial interests in the agricultural zoning district. Those provisions require that 85% of the grapes used by Old Mission Peninsula wineries within the agricultural district be grown within the same agricultural district. Under these provisions, the Township zoning ordinance does not impose restrictions on non-local grapes (whether they be from Rochester, Michigan or Rochester, New York) any differently. There is equal treatment, not discriminatory treatment, so strict scrutiny does not apply and the District Court erred by using the wrong test to assess whether the ordinance violates the dormant commerce clause.

Meanwhile, the zoning ordinance passes the applicable *Pike*[2] balancing test in light of its incidental effects on interstate commerce and

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

the Township's local public interest to protect the Peninsula's agricultural character. The zoning ordinance further aligns with and supports the Peninsula as an American viticultural area ("AVA") under federal regulation. (PageID.5018-5019). Such geographically-labeled wines (such as "Napa Valley" or "Sonoma County") identify the viticultural area where the grapes were grown and carry "prestige value." The federal AVA, which mirrors the zoning ordinance's requirement that certain wineries within the Township's agricultural district use 85% local grapes, represents a clear policy with the purpose and effect of favoring local interests.

The District Court incorrectly relied on a district court opinion out of Minnesota that was not binding and is also completely distinguishable because that case featured a ***state*** statute that favored all in-state wine producers and disfavored all out-state producers. See Alexis Bailly Vineyard, Inc. v. Harrington**,** 482 F.Supp.3d 820, 826-827 (D Minn 2020) ("[T]he [Minnesota] Act mandates disparate treatment of in-state and out-of-state winemaking ingredients, favoring the former and disfavoring the latter.")

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174 (1970)**Error! Bookmark not defined.**.

Unlike Alexis Bailly which addressed a state statute, the present dispute is a zoning case, which inherently involves local rather than state or interstate concerns. Guschke v Oklahoma City, 763 F2d 379, 384 (CA10 1985) ("[T]he Commerce Clause creates an implied limitation on the several states' authority to enact laws which restrict interstate commerce. States are not, however, prohibited from regulating matters of legitimate local concern, such as zoning, even though such regulation may affect interstate commerce"). The District Court is likely to be reversed due to its reliance on non-binding cases that feature state statutes that patently favor in-state interests and disfavor out-state interests.

Strict scrutiny does not apply here, so the District Court should have applied the *Pike* balancing test. "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is *clearly excessive in relation to the putative local benefits*." Pike, 397 US at 142. The zoning ordinances are likely to survive under the Pike test if, as anticipated, this Court holds on *de novo* review that strict scrutiny does not apply.

On *de novo* review, the Township is also likely to prevail on the Dormant Commerce Clause challenge because the ordinances closely parallel federal rules as a federally-recognized American viticultural area ("AVA"). 27 C.F.R. 4.25.(e)(3)(ii); and 27 C.F.R. 9.114, which requires wine bearing the "Old Mission Peninsula" label must be made with grapes that are at least 85% grown in Peninsula Township. Ordinance section 6.7.2(19)(b)(1)(ii) mimics the 85% rule governing AVA wines. There is no dormant Commerce Clause violation where the challenged ordinance follows a federal regulation. See Bronco Wine Co v Jolly, 129 Cal App 4th 988, 1015-1028 (2005) (recognizing federal wine appellations regarding the percentage of local grapes that can be used, the allowance for the state to establish stricter wine labeling requirements destined for interstate distribution, and that the state's interest in protecting the "reputation of one of its premier food industries" satisfies the second tier of *Pike*); and South-Central Timber Development, Inc v Wunnicke, 467 US 82, 87–88 (1984) (the dormant Commerce Clause does not proscribe state regulation "where federal policy is so clearly delineated that a state may enact a parallel policy without explicit congressional approval, even if the purpose and effect of the state law is to favor local interests").

The Township's Ordinance Does Not Violate The First Amendment

The District Court treated several ordinance sections as "commercial speech" and applied the Central Hudson test[3] based on the premise that the Township conceded this test applied to all the listed ordinances except those related to conducting weddings and similar social functions (PageID.6004-6005). This is inaccurate and the majority of the challenged ordinances regulate conduct (conduct that has no bearing on First Amendment expressive activity), not speech, e.g., the percentage of retail vs. processing floor space, the size and dimensions of facilities, limitations on the uses of facilities, sound limitations, and ***location*** of merchandise displays. Thus, the District Court utilized the wrong test to address Plaintiff's First Amendment challenges. These are not free speech issues. Wine & Spirits Retailers, Inc v Rhode Island, 418 F3d 36, 48 (CA1 2005) ("The First Amendment's core concern is with the free transmission of a message or idea from speaker to listener, not with the speaker's ability to turn a profit or with the listener's ability to act upon the communication.")

Since the ordinance sections are conduct-oriented, do not generally even impinge on expressive activity, and are not speech-oriented, they are

subject to a "rational basis" review. The Township's governmental interests show these regulations would survive such review.

The Zoning Ordinance Prohibits Wedding Events

The Township's ordinances include rules regarding Plaintiffs' ability to host wedding events but the District Court dispensed with a legal analysis of their validity on grounds that the Township conceded that weddings are allowed at the wineries' facilities. This is not an accurate interpretation of the evidence produced during discovery and the District Court erred by not interpreting and applying the plain language of the ordinances.

Under Coates v Cincinnati, 402 US 611, 619 (1971), the District Court was supposed to interpret the ordinance to decide whether it is unconstitutionally vague. The Coates Court did not review witness testimony to determine whether the ordinance was vague. It confined itself to the language of the ordinance "on its face," an analysis the District Court did not undertake. See also Belle Maer Harbor v Charter Twp of Harrison, 170 F3d 553, 557 (CA6 1999) ("… we must examine the Ordinance on its face to determine whether it lacks sufficient definiteness to meet the requirements of the Due Process Clause").

[3] Cent Hudson Gas & Elec Corp v Pub Serv Comm., 447 US 557 (1980).

2. Irreparable Harm

Here, the irreparable harm factor is conclusively met because the Township is enjoined from enforcing a duly enacted ordinance. Maryland v King, 567 US 1301, 1303 (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.") In denying the Township's Motion to Stay the Injunction Pending Appeal, the District Court disagreed with the reasoning of the King decision on grounds that a municipality is not harmed when it is enjoined from enforcing an ordinance held to be unconstitutional (ECF 207 Page ID# 7798). This reasoning on a discretionary stay ruling presupposes an affirmation of a legal ruling. It is not a *fait acompli* that the Sixth Circuit Court of Appeals will ultimately affirm the District Court's ruling that various sections of the ordinance are unconstitutional or contrary to law. In fact, the District Court will be called upon to re-examine its ruling under state law now that the PTP's rights to intervene in this lawsuit have been restored (ECF 215 Page ID# 8192).

PTP's intervention is also a confirmation by this Court that it irreparable harm will fall upon local residents if a stay is not granted pending appeal because the ordinance will not be enforced. The Court's

injunction 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.

Local ordinances are presumed to be constitutionally valid, a presumption that, despite the District 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.").

Plaintiffs have opposed the Township's requests for a stay of injunction pending appeal, signifying their intent to proceed to expand their operations and engage in operations they've never previously undertaken. This is a dangerous game Plaintiffs are taking given the Township's belief that it is substantially likely to prevail in its appeal and especially now that all ordinances struck down under state law will have to be re-examined by

the District Court. Ultimately, when the Sixth Circuit rules, it is very possible if not likely that Plaintiffs will have expended tens of thousands of dollars in vain. A stay of the injunction should be entered to prevent this potential outcome.

3. Substantial Harm to Others

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 damages of $135 million. Plaintiffs' claims for monetary damages demonstrate that the harm they *could* 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.

4. 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 most local residents in Peninsula Township support the township board that it duly elected,

including PTP, which has been allowed to intervene in this case to express its great concern about how expanded winery operations would permanently alter their way of life (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 local zoning ordinances.

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. 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.") Thus, the District Court's ruling that local control should heed to judicial authority is inconsistent with the trust the State of Michigan places in local government. And, where the District Court clearly believed that it should not place its

trust in the Township, or the Michigan Legislature and Judiciary, it should have found solace in the local residents of Peninsula Township and their supreme power to replace local government when necessary. 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....")

CONCLUSION

For these reasons, the Township requests the entry of a stay of injunction pending appeal under F.R.A.P. 8.

Respectfully Submitted,

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Dated: August 3, 2022

CERTIFICATE OF COMPLIANCE
PURSUANT TO F.R.A.P. 27(d)(2)(A)

1. This brief complies with the type-volume limitation of F.R.A.P. 27(d)(2)(A) because:

   X this brief contains 5,153 words

2. This Brief was prepared using Microsoft Word.

Respectfully Submitted,

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Dated: August 3, 2022

CERTIFICATE OF SERVICE

I hereby certify that on, August 3, 2022, I electronically filed the foregoing document 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: August 3, 2022

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

ORDER DENYING MOTION TO STAY INJUNCTION

On June 3, 2022, this Court adjudicated the parties' motions for summary judgment and struck several sections of the Township Ordinances (ECF No. 162). The Court indicated that it "will enjoin the Township from enforcing all of the sections of the Township Ordinances that the Court has found unconstitutional or contrary to law" (*Id.* at PageID.6029). On July 19, 2022, the Court, in accordance with the June 3 opinion and order, entered the preliminary injunction pursuant to Fed. R. Civ. P. 58 (ECF No. 206).[1]

28 U.S.C. § 1292(a)(1) permits parties to appeal an interlocutory decision of the district court in which the court grants an injunction. The Township has appealed the

[1] When the Court decided the parties' motions for summary judgment, the Court did not enter a separate Preliminary Injunction order pursuant to Rule 58, albeit referencing in the opinion that the Court "will enjoin" the Township from enforcing the sections of the Township Ordinances that the Court found contrary to law. In Plaintiffs' response to the Township's motion to stay the injunction (ECF No. 171), Plaintiff argued that the Court failed to properly enter a preliminary injunction because Rule 58 requires the Court to do so in a separate document. *See Beukema's Petroleum Co. v. Admiral Petroleum Co.*, 613 F.2d 626, 627 (6th Cir. 1979) ("[T]he express provisions of Rule 58 for entry of judgment on a separate document applies not only to final judgments in the ordinary sense but also to preliminary injunctions entered pursuant to Rule 65, Fed. R. Civ. P., and made appealable under 28 U.S.C. s 1292(a)(1)."); *Salyers v. Sec'y of Health & Human Servs.*, 791 F.2d 935, *2 (6th Cir. 1986) (Table) ("This court has previously held that the express provisions of Rule 58 for entry of judgment on a separate document apply not only to final judgments in the ordinary sense but also to preliminary injunctions.). In light of the *Beukema's* case and in an abundance of caution, the Court subsequently entered the preliminary injunction in a separate document.

summary judgment opinion and order and preliminary injunction. Following the filing of its notice of appeal, the Township filed a motion to stay the injunction pending the appeal of that injunction (ECF No. 169).

Fed. R. App. P. 8(a)(1)(C) permits a district court to stay an injunction pending the appeal of that injunction. 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). "[A] stay is an intrusion into the ordinary processes of administration and judicial review," and "the heavy burden for making out a case for such extraordinary relief rests on the moving party." *Kentucky v. Biden*, 23 F.4th 585, 593 (6th Cir. 2022) (cleaned up).

The Court declines to stay the injunction because it finds that none of the four factors articulated above weigh in favor of a stay. First, looking at irreparable harm, the Township argues that this factor is "conclusively met" because the Township is enjoined from enforcing a duly enacted ordinance (ECF No. 169 at PageID.6229) (citing *Maryland v. King*, 567 U.S. 1301, 1303 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.")). Based on this broad proposition from *King*, the Township argues that it necessarily will suffer an irreparable harm if it cannot enforce its Ordinances. But *King* is not quite as broad as the

Township reads it to be. In actuality, States and municipalities only face irreparable harm in this scenario if the court enjoins a *constitutional* statute. *See Thompson v. Dewine*, 959 F.3d 804, 812 (6th Cir. 2020) (quoting *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018)) ("Unless the statute is unconstitutional, enjoining a 'State from conducting its elections pursuant to a statute enacted by the Legislature . . . would seriously and irreparably harm [the State].'"); *Doe #11 v. Lee*, -- F. Supp. 3d --, 2022 WL 2181800, at *27 (M.D. Tenn. June 16, 2022) (holding that although *King* declares that a State is irreparably harmed "any time" it is enjoined from enforcing a statute, "'any time' actually appears to mean only when the statute at issue is *not unconstitutional*"). Here, because the Court only enjoined the sections of the Ordinances that it found unconstitutional and contrary to law, the Township is not facing an irreparable harm, and this factor weighs in favor of denying a stay.

Second, for the success-on-the-merits factor to weigh in favor of the Township, it must "demonstrate more than the mere 'possibility' of success on the merits." *Griepentrog*, 945 F.2d at 153. Further, "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay." *Id.* at 153-54. Because of this inverse relationship and the fact that the Township has failed to show irreparable harm, the Township must show *more than* "serious questions going to the merits" to win on this factor. *Id.* at 154.

The Township's motion to stay raises two specific arguments as to why the Township is likely to succeed on the merits (laches and preemption), and it also incorporates its

remaining substantive arguments asserted in its motion to alter or amend judgment[2] (ECF No. 169 at PageID.6235-40). Specifically looking at the laches and preemption arguments, the Township has failed to raise more than "serious questions going to the merits." *Griepentrog*, 945 F.2d at 154.

As for the laches argument, the Township purportedly intends to assert this defense at trial. Despite the Court's denial of the Township's summary judgment motion regarding the laches defense, the Township asserts that "this is a matter left for adjudication at trial" because the Wineries did not seek summary judgment on laches (ECF No. 169 at PageID.6236-37). The Township believes that laches is "an absolute defense" and may relieve the Township of any liability (*Id.* at PageID.6236). For the reasons stated in the summary judgment opinion and order, the Court does not find the Township's laches argument to be persuasive (ECF No. 162 at PageID.6021-23) ("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.").

Further, even assuming *arguendo* that the Township properly asserts and wins on its laches defense at trial, it is not an "absolute defense" like the Township believes. *See Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 412 (6th Cir. 2002) ("Laches only bars damages that occurred before the filing date of the lawsuit . . . It does not prevent a plaintiff from obtaining injunctive relief or post-filing damages."). Instead, the Wineries would be barred from collecting certain damages, but they would not be barred from obtaining a

[2] Although the Court has yet to enter an order denying the Township's motion to alter or amend judgment, at the hearing on the motion, the Court indicated that it intended to deny the motion. The Court does not find the Township's remaining substantive arguments asserted in the motion to alter or amend judgment to be persuasive.

permanent injunction or post-filing damages. *See id.* Therefore, the Court finds that the Township's potential laches defense does not establish that it is likely to succeed on the merits.

As for the Township's preemption argument, it argues that the Court failed to address the state administrative code, which apparently has a requirement that licensees comply with local zoning ordinances (*see* ECF No.169 at PageID.6240). The Township then makes the broad assertion that the Court incorrectly found preemption, yet it fails to raise any substantive argument on this issue, nor does it compare any Michigan statute or regulation to the Township Ordinances. Given this complete lack of conducting a true preemption analysis, the Township has failed to show that it will succeed on the merits of its preemption claim.

Therefore, the Township has not shown more than "serious questions going to the merits," and this factor also weighs in favor of denying the motion to stay the injunction.

Finally, looking at the last two factors—the harm to the public and others if the Court grants the stay—the Court holds that they also weigh against a stay. The Wineries cite several cases stating that no harm results from preventing unconstitutional conduct, which the Court finds persuasive (*see* ECF No. 171 at PageID.6358); *see, e.g.*, *Deja Vu of Nashville, Inc. v. Mero. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 400 (6th Cir. 2001) ("[I]f the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment. Moreover, 'it is always in the public interest to prevent violation of a party's constitutional rights.'") (internal citations omitted). On the other hand, the Township argues that if the Court declines to stay the

injunction, the Wineries will proceed with booking events and weddings, and in the event that the Sixth Circuit ultimately reverses this Court on many of the substantive claims in this litigation, the Wineries will be forced to cancel these gatherings. These cancellations would thus harm the public. However, the Wineries have not indicated that they will begin booking events immediately. The harm in enforcing unconstitutional ordinances greatly outweighs the potential harm that may result from a few canceled events. These two factors also weigh against granting the stay.

Given that all four factors weigh against staying the injunction, the Court will deny the Township's motion to stay the injunction pending appeal. Accordingly,

IT IS HEREBY ORDERED that the Township's motion to stay the injunction (ECF No. 169) is **DENIED**.

IT IS SO ORDERED.

Date: July 19, 2022

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