

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; BRYNS WINERY, LC, a Michigan Corporation; CHATEAU GRAND TRAVERSE, LTD., a Michigan Corporation; GRAPE HARBOR INC., a Michigan Corporation; MONTAGUE DEVELOPMENT, LLC, a Michigan limited liability company; OV THE FARM LLC, a Michigan liability company; TABONE VINEYARDS, LLC, a Michigan liability company; TWO LADS, LLC, a Michigan liability company; VILLA MARI, LLC, a Michigan liability company; WINERY AT BLACK STAR FARMS LLC, a Michigan liability company; CHATEAU OPERATIONS, LTD, a Michigan Corporation

Plaintiffs - Appellees

v.

TOWNSHIP OF PENINSULA, MI, a Michigan Municipal Corporation

Defendant - Appellant

**PROTECT THE PENINSULA'S RESPONSE IN OPPOSITION
TO APPELLEE'S MOTION TO STRIKE
PTP's RESPONSE TO PENINSULA TOWNSHIP'S MOTION
TO STAY INJUNCTION PENDING APPEAL**

TABLE OF CONTENTS

Introduction1

 1. The Wineries’ Motion Disregards this Court’s July 27, 2022, Judgment. ...2

 2. Due to an Unexpected Hiccup, the Court Assisted PTP in Filing its Brief. .5

Conclusion.....6

Introduction

On Friday, August 5, 2022, the Clerk for the Sixth Circuit Court of Appeals served and called counsel for Protect the Peninsula (PTP) inviting a response to Appellant Peninsula Township's (Township) Motion to Stay Injunction Pending Appeal. (Dkt 35-1.) Accordingly, PTP filed an appearance that day and a responsive brief August 8 supporting the Township motion. (Dkt 41-1.) Due to a recognized technical glitch beyond PTP's control, the response was filed at 12:33 p.m., 33 minutes after the noon deadline.

On August 10, 2022, Appellees (Wineries) moved to strike PTP's response. Their motion should be denied. This Court issued a judgment July 27 that unequivocally holds PTP has the right to intervene to protect its members' interests threatened in the originating case. (Case No. 21-1734, Dkt. 33-3.) In this appeal from the same originating case, the Court appropriately invited PTP's perspective on the pending motion to stay an order enjoining the very ordinances PTP seeks to vindicate. At the designated filing time, PTP Counsel Legal Assistant Karla Gerds was on the phone with this this Court Clerk's staff working through technical problems in the Electric Filing System that prevented PTP from filing. The short, excusable delay was inconsequential to the Wineries.

1. The Wineries' Motion Disregards this Court's July 27, 2022, Judgment.

On July 27, 2022, this Court issued an opinion holding PTP has substantial legal interests in this litigation, which are already impaired by these proceedings and inadequately represented by the Township. *Wineries of the Old Mission Peninsula v Protect the Peninsula*, __ F.4th __ (6th Cir, 2022) (Op., p. 9, “By enjoining some of the zoning ordinances as either unconstitutional or preempted by state law, the district court has already limited the abilities of Protect the Peninsula’s members to protect their property interests through nuisance per se claims against the vineyards.”).

The Wineries now argue this Court lacks jurisdiction to hear from PTP. At the same time, the Wineries acknowledge this Court has full jurisdiction over PTP and issues related to its intervention. (Dkt. 42, p. 5, “Therefore, this Court still has jurisdiction over everything regarding Protect the Peninsula’s ability to intervene, but Protect the Peninsula only has the ability to make arguments relating to its intervention motion.”). The injunction obviously relates to PTP’s interests and its intervention in this case, as this Court acknowledged in the July 27 opinion.

The Wineries’ position that this injunction appeal and the intervention appeal are separate or distinct, such that this Court has full and exclusive jurisdiction over PTP in the intervention appeal but no jurisdiction to hear from PTP in the injunction appeal, is meritless. This is one and the same Court, these appeals originate from the

same District Court case, and the issues in these two appeals are intertwined as related to PTP interests. The injunction impairs PTP interests that it intervened to protect.

Rather than winning their far-fetched legal claims on the merits, the Wineries' strategy is to win this case by silencing their neighbors.¹ Their consistent position is that PTP has no rights to do anything, before any court, at any stage of the case. On August 1, 2022, in Case No. 21-1744, in response to PTP's motion seeking a stay of trial before this Court issued its judgment, the Wineries asserted this Court lacks jurisdiction to entertain PTP's motion. (Case No. 21-1744, Dkt. 34, pp. 7-9.) The July 27 judgment mooted their argument.

Then on August 8, 2022, in the District Court, in response to PTP's motion seeking leave to stay trial and amend the case schedule, the Wineries argued that Court lacked jurisdiction to consider PTP's motion before the mandate issues. (R. 234, PageID#8488.) The District Court appropriately took up the issue and adjourned trial.

Before that, on February 7, 2022, in briefing PTP intervention, the Wineries argued the case was "in the very late stages" such that PTP should be denied

¹ PTP maintains that the Wineries' federal lawsuit is, at bottom, an attempt to circumvent traditional planning and zoning that protects neighbors, ensures community stability, and reflects the geographic and infrastructure restraints of the peninsula under the guise of meritless constitutional claims and novel state preemption claims.

intervention. (Case No. 21-1744, Dkt. 22, p. 50.) This Court rejected that position. (Case No. 21-1744, Dkt. 34, p. 5, n. 1.)

Back on April 30, 2021, while PTP requested leave to respond to the Wineries' preemption summary judgment motion while its original intervention motion languished, the Wineries argued "[a]t this stage, PTP has no standing" to file anything. (R. 60, PageID#2731.) They sought sanctions for PTP's "frivolous and vexatious" motion. (R. 60, PageID#2729.) The District Court agreed that PTP could not respond to the preemption summary judgment motion but declined sanctions. (R. 108 PageID#4175.) This Court has now cleared PTP to respond to the Wineries' preemption summary judgment motion. (Case No. 21-1744, Dkt. 34, p. 14, n. 4.) Despite their Winery neighbors' persistent attacks and gag attempts, PTP is still here.

It is exactly the unique stage of this case at this moment that makes it appropriate for this Court to consider PTP's perspective on the Township motion to stay the injunction. PTP was wrongfully denied timely intervention in the District Court, this case proceeded without PTP's advocacy and resulted in an adverse opinion based not on the legal merits of the Wineries' claims but on asserted Township defaults and concessions. (Dkt 40-1, pp. 11-13.) The subject injunction followed. There are ample legal defenses to the Wineries' claims the District Court has not yet considered, as recognized in the order denying the Township motion to alter judgement. (R. 211, PageID##7809-7813). PTP maintains that, but for PTP's

exclusion from discovery, depositions, and dispositive motion practice, the adverse opinion and injunction would not exist. The mandate has not issued so PTP is not yet before the District Court to develop and present defenses to the Wineries' claims. The Township properly sought to stay a sweeping injunction that leaves neighbors without their first line of defense against potentially debilitating traffic, noise, and other nuisances, upending decades of zoning stability. PTP's rights are substantial, impaired, and inadequately represented, so its perspective is relevant. It is efficient to consider PTP's view here and now.

Undoubtedly this Court shares PTP's concerns about judicial efficiency, which might be why it invited PTP to respond to the Township's stay motion. (See Ex 1 to the Wineries' Motion, Document 42, page 1.) Clerk Lambert called the undersigned counsel ensuring awareness that any response must be filed before August 9, 2022, at 12:00 pm. The Court is within its authority to request a response from PTP, and PTP is within its right as an intervening party in a pending appeal to provide a response. The Court should deny the Wineries' Motion to Strike accordingly.

2. Due to an Unexpected Hiccup, the Court Assisted PTP in Filing its Brief.

On August 9, 2022, PTP attempted at about 11:55 a.m. to file its response, ahead of the noon filing deadline. (Dkt 38.) Unfortunately, and due to no fault of

PTP, the filing system refused to accept PTP's filing. Undersigned Counsel's Legal Assistant Karla Gerds immediately called the Clerk's Office, who provided efficient technical assistance. PTP was able to file its response brief at 12:33 p.m. (Dkt 41.) Ms. Gerds understood the Court staff would make a note of the technical issue in the file, and that PTP's response brief would be accepted as timely.

PTP was prepared and ready to strictly comply with the Court's 12:00 pm deadline. But for the filing system error beyond PTP's control, which this Court's staff assisted PTP in overcoming, the response brief would have been timely filed. There is no harm apparent to the Wineries resulting from the 33-minute delay. The Court should deny the Wineries' form-over-substance motion accordingly.

Conclusion

PTP respectfully requests that the Court deny the Wineries' motion to strike its support for the Township Motion for Stay for the reasons just described.

CERTIFICATE OF SERVICE

I, Tracy Jane Andrews, hereby certify that on August 12, 2022, I electronically filed the foregoing document with the ECF system which will send a notification of such to all parties of record.

Date: August 12, 2022

By: /s/ Tracy Jane Andrews

Tracy Jane Andrews (P67467)
Law Office of Tracy Jane Andrews,
PLLC
Attorneys for Intervenor
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
tjandrews@envlaw.com