UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION, *et al.*,

Plaintiffs,

v

PENINSULA TOWNSHIP, Michigan Municipal Corporation,

Defendant.

PROTECT THE PENINSULA,

Intervenor-Defendant.

Case No: 1:20-cv-01008

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

PLAINTIFFS' RESPONSE TO PROTECT THE PENINSULA'S MOTION TO DISMISS [250]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Court Rules

Other Authorities

I. INTRODUCTION

This Court has already exercised supplemental jurisdiction over the Wineries' state law claims. There is no reason to change course now. The Wineries' state law claims arise "from a common nucleus of operative fact" with their constitutional claims. Their state and federal claims both seek a permanent injunction of offending provisions of the Winery Ordinances. Some of these theories—the Wineries' claims that the Winery Ordinances are unreasonable under the Michigan Zoning Enabling Act because they are unconstitutional— even depend upon one another. Therefore, the Court has absolute discretion to exercise supplemental jurisdiction.

Peninsula Township agreed at the start of this case that this Court has jurisdiction on those claims and briefed the substantive issues thoroughly. This Court has already ruled on the state law claims twice—once at summary judgment, once on the Township's motion to alter or amend. It makes sense to retain supplemental jurisdiction over those claims instead of remanding back to state court for them to be decided a third time. Therefore, the Wineries request that this Court deny Protect the Peninsula's motion to dismiss.

II. BACKGROUND

A. The Wineries invoked this Court's original jurisdiction under 28 U.S.C. § 1331 because the First Amended Complaint alleged eight constitutional claims.

The Wineries brought ten counts in their first amended complaint. (ECF No. 29.) The first seven alleged violations of the United States Constitution, including claims under the First Amendment (Counts I, II, III), the Due Process Clause (Count IV), the dormant Commerce Clause (Counts V and VI), the takings clause of the Fifth and Fourteenth Amendments (Count VII), and for injunctive relief on the Wineries' constitutional and state law clams. (*Id.*, PageID.1116–1129.) Peninsula Township agreed that this Court had original jurisdiction. (Joint Report of the Parties' Rule 26(f) Conference, ECF No. 37, PageID.1959 ("This Court has jurisdiction over this action

based on the existence of a federal question.").)

B. The Wineries alleged two state law claims arising out of the same facts as their Constitutional claims

The Wineries tried to negotiate with Peninsula Township for changes to the Winery Ordinances. (ECF No. 29, PageID.1113, ¶ 220; *see also* Peninsula Township's Answer to First Amended Complaint, ECF No. 35, PageID.1928, ¶ 220 (admitting that the Township "engaged in negotiations regarding the ordinances at issue"). During these negotiations, the Wineries raised both Constitutional and state law issues with the Winery Ordinances to the Township. (ECF No. 29, PageID.1113–1115, ¶¶ 221–229.) The Township's attorney issued a memorandum conceding that there were both Constitutional and state law issues with the ordinances and that "the Township will be taking prompt action" to "ensure compliance." (*Id.*, PageID.1113–1115, ¶¶ 226–229; *see also* ECF No. 29-16, PageID.1383.) These issues were never resolved; instead, Peninsula Township published a proposed redraft that was even more restrictive and would have restricted the ability of the Wineries to host wine tasting, winery tours, political rallies, and free entertainment. (*Id.*, PageID.1116, ¶¶ 233–234.)

Therefore, the Wineries raised two state-law claims to the existing Winery Ordinances. Count VIII alleged that the Winery Ordinances were preempted by three sections of the Michigan Liquor Control Code. (ECF No. 29, PageID.1125–1126.) Count IX alleged that the Township exceeded its authority under the Michigan Zoning Enabling Act ("MZEA") by enacting ordinances that were unconstitutional and/or did not promote public health, safety, and welfare. (*Id.*, PageID.1126–1127.)[1]

[1] In Count X the Wineries asked this Court to enjoin the sections of the Winery Ordinances that are unconstitutional and in violation of Michigan law. (*Id.*, PageID.1127–1128.)

C. This Court ruled on the state law issues twice.

The Wineries moved for partial summary judgment on Count VIII because it was a facial challenge and invited questions of law that the Court could decide without the need for discovery. (ECF No. 53, 54, 70.) The Township responded and filed a cross-motion for summary judgment, arguing the motion on the merits and never once contesting this Court's supplemental jurisdiction to decide the issue. (ECF No. 63.) The Township later sought summary judgment on the Wineries' MZEA claim arguing that the ordinances "are not unconstitutional nor are they contrary to the law." (ECF No. 142, PageID.4998.) This Court issued an opinion on those motions, concluding that the Wineries' motion was granted in part and denied in part. (ECF No. 162, PageID.5985–5995.) Notably to the MZEA claim, this Court recognized that the MZEA claim "rises and falls with [the Wineries'] constitutional/preemption arguments." *Id*. at PageID.6028.

Peninsula Township subsequently filed a motion to alter or amend the Court's opinion regarding summary judgment motions. (ECF No. 173, 174.) Again, the Township made no argument regarding the Court's supplemental jurisdiction. (*See id.*) This Court denied the motion to alter or amend. (ECF No. 211, PageID.7807-7809.)

D. The Sixth Circuit allowed PTP to intervene.

On July 27, 2022, the Sixth Circuit reversed this Court's decision denying PTP's motion to intervene as a defendant. *Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula, Michigan*, 41 F.4th 767 (6th Cir. 2022). The Sixth Circuit gave limited guidance for PTP's role on remand, stating only that "Protect the Peninsula is free to raise its argument regarding supplemental jurisdiction to the district court, which should decide it in the first instance." *Id.* at 777, n.4. Consistent with that guidance, this Court accepted PTP's previously filed motion to dismiss. (ECF No. 250.)

III. ANALYSIS

A. This Court correctly exercised supplemental jurisdiction over the Wineries' state law preemption claims.

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In cases where they have original jurisdiction, "the district courts shall have 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 under Article III of the United States Constitution." 28 U.S.C. § 1367. "In other words, if there is some basis for original jurisdiction, the default assumption is that the court will exercise supplemental jurisdiction over all related claims." *Blakely v. United States*, 276 F.3d 853, 861 (6th Cir. 2002) (citation omitted).

Claims "form part of the same case or controversy" when they "derive from a common nucleus of operative fact." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725 (1966). "A loose factual connection between the claims is generally sufficient." *Ammerman v. Sween*, 54 F.3d 423, 424 (7th Cir. 1995) (citing 13B Charles A. Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 3567.1, at 117 (2d ed. 1984)); *Blakely*, 276 F.3d 862 (same). The decision to exercise supplemental jurisdiction is wholly within this Court's discretion. *See Gibbs*, 383 U.S. at 726 ("It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right.").

There is no dispute that this Court has original jurisdiction under 28 U.S.C. § 1331 because the Wineries' claims for violations of freedom of speech, freedom of expression, and free exercise of religion (Counts I–III), due process (Count IV), the dormant Commerce Clause (Counts V and VI), regulatory taking (Count VII), and injunctive relief (Count X) arise "under the Constitution, laws, or treaties of the United States." (*See* First Amended Complaint, ECF No. 29, PageID.1116–

1125; *see also* Joint Report of the Parties' Rule 26(f) Conference, ECF No. 37, PageID.1959 ("This Court has jurisdiction over this action based on the existence of a federal question.").)

The preemption and MZEA claims "form part of the same case or controversy" as the Wineries' constitutional claims. The claims arise from the Wineries' longstanding efforts to amend the Winery Ordinances to no avail. (ECF No. 29, PageID.1113–1116, ¶¶ 221–234; *see also* ECF No. 29-16, PageID.1383.) The Wineries seek permanent injunctive relief for the same sections of the Winery Ordinance as the constitutional claims. (ECF No. 29, PageID.1127–1128.) That certainly forms a "loose factual connection between the claims." *Ammerman*, 54 F.3d at 424; *Blakely*, 276 F.3d at 862. Therefore, the Court is well within its discretion to exercise supplemental jurisdiction over the state law claims.

Ignoring this factual connection, PTP asks this Court to decline supplemental jurisdiction. "[D]istrict courts [should] deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 172–73 (1997). Again, this Court has absolute discretion to keep these claims in federal court. Prudence and efficiency weigh heavily in favor of supplemental jurisdiction. However, if the Court is inclined to refuse supplemental jurisdiction, it must evaluate four considerations.[2] "The district courts **may** decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining

[2] If the Court exercises its supplemental jurisdiction, it need not evaluate these factors.

jurisdiction."

28 U.S.C. § 1367(c) (emphasis added).

1. The state law claims are neither novel nor complex.

In their MZEA claim, the Wineries are alleging that the Winery Ordinances violate the MZEA because they are unconstitutional or otherwise contrary to law. That is a straightforward application of a municipality's authority under the MZEA. *See Adams Outdoor Advert., Inc. v. City of Holland*, 600 N.W.2d 339, 344 (Mich. App. 1999), *aff'd*, 625 N.W.2d 377 (Mich. 2001) (explaining that the MZEA does not give a municipality authority to enact something that is "unconstitutional or contrary to law"). The Court recognized this law in its summary judgment opinion. (ECF No. 162, PageID.6028.)

In their preemption claims, the Wineries ask the Court to apply well-established principles of conflict preemption under Michigan law. This analysis has been set forth in several Michigan Supreme Court cases, including *DeRuiter v. Township of Byron*, 949 N.W.2d 91 (Mich. 2020), *People v. Llewellyn*, 257 N.W.2d 902 (Mich. 1977), and *National Amusement Co. v. Johnson*, 259 N.W. 342 (Mich. 1935). The Court applied these principles when it ruled on the Wineries' motion for partial summary judgment. (*See* ECF No. 162, PageID.5987-5988.)

PTP argues for a much more specific application of Michigan law, suggesting that this Court decline supplemental jurisdiction because "[t]here is no Michigan precedent preordaining the outcome Plaintiffs seek through their preemption claim." (ECF No. 250, PageID.8929.) That view of "novel" issues is too narrow. In effect, PTP is suggesting that a federal court could never apply state law preemption principles unless a state court had already applied them to the statute or ordinance at issue. "[S]uch a reading of 'novel' under 28 U.S.C. § 1367(c) would mean that, even where a state's highest court had established a legal standard, any new set of facts involving the application of that standard in federal court would present a 'novel' issue." *ESI/Emp. Sols.,*

L.P. v. City of Dallas, 450 F. Supp. 3d 700, 730 (E.D. Tex. 2020). "The Court is unaware of any precedent supporting the City's unusual interpretation and rejects such a strained and unworkable construction of the statute." *Id.*

Federal courts regularly apply state law preemption principles because those claims are inherently just matters of statutory interpretation. For example, a party arguing against removal asserted that a claim alleging Michigan law preempted a Genesee County ordinance should be handled in state court. *Swartz Ambulance Serv., Inc. v. Genesee Cnty.*, 2008 WL 2914981, at *4 (E.D. Mich. July 25, 2008). "According to Plaintiffs, these are matters in which State law predominates, and they also can be deemed novel in the issues raised have not been specifically decided by any state court." *Id.* The court did not find that questions about state law preemption were too "novel or complex;" to the contrary, "federal courts frequently interpret statutory provision[s]. Case law provides the rules of interpretation. To the extent that these claims are novel or complex, the Court, in its discretion, finds the relationship between all claims arising out of the enactment of the Ordinance outweighs any factor favoring remand." *Id.*

Other cases follow the same analysis. *See, e.g.*, *LHR Farms, Inc. v. White Cnty., Georgia*, 2012 WL 12932609, at *11 (N.D. Ga. Mar. 22, 2012) (exercising supplemental jurisdiction over claim that Georgia law preempted county ordinance); *Claridge House One, Inc. v. Borough of Verona*, 490 F. Supp. 706, 710 (D.N.J.), *aff'd*, 633 F.2d 209 (3d Cir. 1980) (exercising supplemental jurisdiction over a claim that New Jersey law preempted borough's ordinance). The Wineries are asking this Court to do what it does on a daily basis—interpret the law according to well-established principles. There is nothing more "novel or complex" here than in any other case.

PTP also picks up the tired refrain from Peninsula Township that a municipal ordinance is somehow immunized from judicial scrutiny because it was enacted locally. (ECF No. 250,

PageID.8926-8929.) PTP even goes so far as to say that "[i]t is not appropriate for a federal court" to rule on these state law issues. (*Id.*, PageID.8928.) Its attitude towards the role of the federal judiciary in "local matters" is exemplified by its members, who have submitted affidavits casually referring to this Court's fifty-page summary judgment opinion as a "flick of the pen" and derogatorily referred to this Court as "a federal court in Kalamazoo…." See ECF No. 237-2, PageID.8596 ("I find it crushing that with one flick of a pen a federal court in Kalamazoo could undermine so much of the work and the collective policy direction of the community.").

This "municipal destiny" argument should be put to rest for good. The United States Constitution is the supreme law of the land. U.S. Const., art. VI, § 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."). The Michigan State Constitution is subordinate to the United States Constitution, and ordinances enacted by municipal corporations, such as Peninsula Township, are at the bottom of the food chain. "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them." *Midland Twp. v. Michigan State Boundary Comm'n*, 259 N.W.2d 326, 338 (Mich. 1977). "The state, therefore, at its pleasure, may modify or withdraw all such powers, may . . . repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme[.]" *Id.*

Therefore, a local ordinance is subservient to the Constitution. *American Airlines, Inc. v. City of Audubon Park, Ky.*, 297 F. Supp. 207, 211-212 (W.D. Ky. 1968) ("Under the Supremacy

Clause (Art. VI, § 2) of the United States Constitution, such statutes and regulations are the supreme law of the land, and are binding on this Court, anything in the ordinances of the City of Audubon Park to the contrary notwithstanding.") This is true even where a local ordinance is purportedly popular. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (anti-immigrant sentiment led to unconstitutional public laundry ordinance which was struck down). Applying these principles, Peninsula Township's ordinances are subordinate to both the United States Constitution and the Constitution and the laws of the State of Michigan, no matter how popular an ordinance may be—if it is unconstitutional or contrary to law, it is unenforceable. This "municipal destiny" argument is simply wrong and a waste of time.

2. The single preemption claim does not "substantially predominate" over the Wineries' Constitutional claims under the Commerce Clause, Due Process Clause, First Amendment, and Fourteenth Amendment.

The preemption claim does not "substantially predominate" over the Wineries' Constitutional claims. The state law claims are evaluated against the Constitutional claims "in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought[.]" *Gibbs*, 383 U.S. at 726. These factors all weigh in favor of exercising supplemental jurisdiction. First, a state law preemption claim is "predominantly legal in nature" and it is "unlikely that [the preemption claim] will require substantially more evidentiary proof than another." *ESI/Emp. Sols.*, 450 F. Supp. 3d at 730.

Second, the Wineries asserted seven constitutional claims and two state law claims, so the "scope of the issues raised" weighs in favor of the constitutional claims. The state law claims also depend on the constitutional ones. As this Court already recognized, the MZEA claim "rises and falls with [the Wineries'] constitutional/preemption arguments." (ECF No. 162, PageID.6028.)

Finally, the remedy sought is a permanent injunction against enforcement of certain provisions of the Winery Ordinances through both constitutional and state law means. This Court

applied multiple analyses to the sections of the Winery Ordinances the Wineries challenged as preempted:

- Section 8.7.3(10)(u)(5)(b) ("Hours of operation for Guest Activity Uses shall be determined by the Town Board, but no later than 9:30 PM daily.") analyzed under preemption standards against Mich. Comp. Laws § 436.2114(1) and R. 436.1503 of the Michigan Administrative Code **and** is unconstitutionally vague. (*See* ECF No. 162, PageID.5988, .6019.)
- Section 8.7.3(10)(u)(5)(g) (During Guest Activity Uses, "No amplified instrumental music is allowed, however amplified voice and background music is allowed, provided the amplification level is no greater than normal conversation at the edge of the area designated within the building for guest purposes.") is preempted by Mich. Comp. Laws § 436.1916(11) **and** is unconstitutionally vague **and** an unlawful restriction on the Wineries' commercial speech. (*See* ECF No. 162, PageID.5989, .6008, .6019.)
- Section 8.7.3(10)(u)(5)(i) (During Guest Activity Uses, "Kitchen facilities may be used for on-site food service related to Guest Activity Uses but not for off site catering.") is preempted by Mich. Comp. Laws § 436.1916(11) **and** is unconstitutionally vague. (*See* ECF No. 162, PageID.5989, .6019.)

Similarly, this Court held that because the Wineries prevailed on their constitutional challenges, they also would prevail on their claims under the Michigan Zoning Enabling Act. (ECF No. 162, PageID.6028.) The Wineries' state law claims seek identical relief to the constitutional claims and often overlap. Therefore, the state law claims do not "substantially predominate." *See ESI/Emp. Sols.*, 450 F. Supp. 3d at 730 ("Lastly, the remedy sought for the

federal Fourth Amendment claim and the state law claim is the same—an order enjoining the entire Ordinance. Although the remedy for the federal claim may be narrowed later, this factor asks about the remedy sought. Because the remedy sought for the remaining federal claim and the state law claim is the same, the state law claim does not substantially predominate over the federal claim.").

PTP's cursory arguments do not change this conclusion. PTP claims that the Wineries' attorneys "invented novel constitutional theories" to accompany their preemption arguments. (ECF No. 250, PageID.8931.) PTP claimed—without support—that the Wineries' constitutional claims "will likely be dismissed." (*Id.*) That contention is wrong on many fronts. The Township's attorney admitted that the Wineries' constitutional claims merited "prompt action" by the Township Board. (ECF No. 29-16, PageID.1383.) And, ultimately, the Wineries proved liability on a host of their constitutional claims. (*See* ECF No. 162; ECF No. 211.)

3. This Court has not dismissed all claims over which it has original jurisdiction.

This factor favors exercising supplemental jurisdiction. This Court already has ruled on most of the Wineries' constitutional claims and determined that the Winery Ordinances violate the dormant Commerce Clause, the Due Process Clause, and the First Amendment to the United States Constitution. (*See* ECF No. 162.) This Court has not dismissed any claim to date.

4. There are no "other compelling reasons" for declining jurisdiction.

Finally, PTP claims that the preemption claims should go back to state court to "allow[] Michigan courts to interpret recent statutes and historic precedent, apply appropriate weight to state agency rules and declarations, and maintain the balance between state and local interests in liquor traffic and local interests in land use controls." (ECF No. 250, PageID.8931-8932.) This Court is entirely capable of doing each and every one of those things and did so when it already decided the preemption claims and MZEA claims. (*See* ECF No. 162, PageID.5987-5993, 6028.)

This Court did the analysis again when it denied the Township's motion to alter or amend. (ECF No. 211, PageID.7807-7809.) There is no sense in sending this case back to state court to do the analysis for a third time.

PTP also claims that "there is no urgency or time sensitivity for this Court to resolve these issues now, as opposed to dismissing them without prejudice for a state court to consider them forthwith." (ECF No. 250, PageID.8932.) That argument has changed as time passed. The Wineries filed their initial complaint on October 21, 2020. (ECF No. 1.) Nearly two years have passed. Forcing the Wineries to go back to state court, to a judge less familiar with the facts of this case than this Court, would set the Wineries back several years based on the pace of this litigation and the Township and PTP's efforts to drag this process out to keep the Winery Ordinances on the books as long as possible. As this Court recently rhetorically observed, "How many of the lawyers in the courtroom are going to be retired by the time I can get this case done?" (ECF No. 239, PageID.8678.) Keeping supplemental jurisdiction, especially because this Court has already performed the legal analysis required for the preemption issue, "best serves the principles of economy, convenience, fairness, and comity which underlie the pendent jurisdiction doctrine." *City of Chicago*, 522 U.S. at 172–73. *See also Blakely*, 276 F.3d at 863 ("The parties had already argued the merits of the claims to the district court. It would make little sense to require Defendant Oxford Bank to expend additional resources making the same arguments in state court. Under these circumstances, the interests of judicial economy overcame the presumption against retention of pendent state law claims."); *LHR Farms*, 2012 WL 12932609, at *12 ("[T]he court spent an extensive amount of time researching the issue. Dismissing the preemption claim at this stage would waste judicial resources, an outcome that supplemental jurisdiction was meant to avoid.").

B. The Wineries stated valid claims for state law preemption.

PTP also moves to dismiss the Wineries' preemption claims under Federal Rule of Civil Procedure 12(b)(6). (ECF No. 250, PageID.8932.) This Court already evaluated these claims on the merits and made a ruling, (ECF No. 162, PageID.5985–5995), and the Sixth Circuit said nothing about a motion under Rule 12(b)(6).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation omitted). This Court cannot grant a motion to dismiss unless "the defendants are entitled to judgment as a matter of law." *Chelf v. Prudential Ins. Co. of Am.*, 31 F.4th 459, 464 (6th Cir. 2022).

This Court has already correctly identified the appropriate analysis to use on the preemption claims:

> In the context of conflict preemption, a direct conflict exists when "the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *DeRuiter v. Township of Byron*, 949 N.W.2d 91, 96 (Mich. 2020) (quoting *People v. Llewellyn*, 257 N.W.2d 902, 904 n. 4 (Mich. 1977); *see also Walsh v. City of River Rouge*, 189 N.W.2d 318, 324 (Mich. 1971) ("Assuming the city may add to the conditions, nevertheless the ordinance attempts to prohibit what the statute permits. Both statute and ordinance cannot stand. Therefore, the ordinance is void.") However, a local unit of government may add conditions to rights granted in a state statute because "additional regulation to that of a state law does not constitute a conflict therewith." *Nat'l Amusement Co. v. Johnson*, 259 N.W. 342, 343 (Mich. 1935). But where a statute allows certain conduct and a local ordinance forbids it, "the ordinance is void." *Id*.

(ECF No. 162, PageID.5987-5988.) PTP argues for a standard more deferential to the Township, claiming that because the Michigan Liquor Control Commission rules require licensees to comply with local zoning ordinances, Peninsula Township is allowed to regulate commercial activities. (ECF No. 250, PageID.8935-8936 (citing Mich. Admin. Code. R. 436.1003 and 436.1105(3)).) This Court has already rejected "this argument because only zoning rules that are not contrary to

law are enforceable. Because the Court ruled that numerous sections of these zoning ordinances are unconstitutional or contrary to law, they are preempted." (ECF No. 211, PageID.7809.) The cases PTP cites to on this issue should not change this Court's the analysis.

In *Oppenhuizen v. Zeeland*, 300 N.W.2d 445 (Mich. App. 1980), the City of Zeeland enacted an ordinance which prohibited the sale of alcoholic beverages within the city. The City relied upon a regulation adopted by the Liquor Control Commission which required the denial of a liquor license if the licensee did not meet all "appropriate state and local building, plumbing, zoning, fire, sanitation, and health laws and ordinances as certified to the commission by the appropriate law enforcement officials." *Id*. at 448-449 (citing R. 436.1105(3)). Like PTP, the city also argued that *Mutchall v. Kalamazoo*, 35 N.W.2d 245 (Mich. 1948) and *Mallach v. Mt. Morris*, 284 N.W. 600 (Mich. 1939) recognized the authority the city sought to exercise. *Id*. at 45. The *Oppenhuizen* court disagreed. While the *Mutchall* and *Mallach* courts "recognize[] the authority of the municipality over those areas of local control which involve all commercial activity," that authority it not boundless. *Id*. at 449. Instead, a "[municipality] has the power to regulate the traffic within its own bounds through the exercise of its police powers, subject to the authority of the Liquor Control Commission only when a conflict arises." *Id.* (quoting *Tally v. Detroit*, 220 N.W.2d 778 (Mich. App. 1974)). Because the liquor control code allowed for the sale "of any alcoholic liquor subject to the terms, conditions, limitations and restrictions of the statute," the ability of a local government to restrict the same is very limited.

> The Michigan Constitution is quite clear that once the Legislature acts to create a Liquor Control Commission, that commission shall have complete control of the alcoholic beverage traffic within the state, including the retail sales thereof. Only if a majority of the electors in a county prohibit manufacture or sale is the commission prohibited from authorizing manufacture or sale therein.

Id. Thus, the court concluded that the City of Zeeland's ordinance prohibiting the sale of alcohol was preempted. *Id*.

Allen v. Liquor Control Comm., 333 N.W.2d 20 (Mich. App. 1982) is similar. In that case a potential licensee was denied a liquor license and the question was whether Rule 436.1105(3), which required local approval of a license application, was an unconstitutional delegation of the commission's power to a local government. *Id*. at 21. But the court determined it need not decide that issue and noted that the "decision is not to be construed as an expression of opinion on the merits of the applicants' challenge of the validity of the Heath Township ordinance at issue." *Id.* at 22. At most, the decision in *Allen* is limited to whether the commission's requirement that a potential licensee obtain local approval is allowable. Here, that is not an issue as each Winery has already obtained local approval from Peninsula Township.

Finally, in *Maple BPA, Inc v. Bloomfield Charter Twp.*, 838 N.W.2d 915 (Mich. App. 2013), Bloomfield Township amended its ordinances to allow automobile service stations to sell alcohol as long as:

> (1) alcohol is not sold less than 50 feet from where vehicles are fueled, (2) no drive-thru operations are conducted in the same building, (3) the store meets minimum floor area and lot size requirements, (4) the store has frontage on a major thoroughfare and is not adjacent to a residentially zoned area, (5) the store does not perform any vehicle service operations that would require customers to wait on the premises, and (6) the store is either located in a shopping center or maintains a minimum amount of inventory.

Id. at 919. These restrictions were not conflict preempted because "the Legislature has not expressly spoken concerning the sale of alcohol in buildings with drive-thru windows, the minimum building area of buildings at which alcohol is sold, or the number of parking spaces required for a building from which alcohol is sold." *Id.* at 922. But even where the Legislature did speak to the issue, "Bloomfield Township's zoning ordinance is not more restrictive. The ordinance mirrors the statutory language—it does not provide any further constraint, or prohibit what the statute permits." *Id.*

None of the cases cited by PTP stand for the broad proposition that a local government may enact ordinances which regulate all commercial activity of a liquor licensee. Instead, each decision recognizes that the conflict preemption analysis applies.

1. Peninsula Township's Regulation of Winery Hours of Operation is Preempted by Michigan Law.

The Wineries alleged that Section 8.7.3(10)(u)(5)(b) is preempted by Mich. Comp. Laws § 436.2114(1), Mich. Admin Code R. 436.1403, and Mich. Admin. Code R. 436.1503. This Court has already concluded that

> [T]he Township Ordinances do not conflict with Michigan law regarding hours of operation. Rather, they place a further limitation on the hours that MLCC licensees may sell alcohol. Had Michigan law *expressly permitted* license holders to sell alcohol between the hours of 7:00 a.m. and 2:00 a.m. the following day on Monday-Saturday, and between the hours of noon on Sunday and 2:00 a.m. the following Monday morning, then the Township Ordinance's prohibition on furnishing alcohol after 9:30 p.m. would be preempted.

(ECF No. 162, PageID.5990.) Respectfully, this Court reached the wrong conclusion on this issue. The Liquor Control Code explicitly states that a municipality's ability to restrict the hours that alcohol may be served is very limited. First, a municipality may regulate the hours of sales on Sunday by referendum, but that regulation does not extend to other days of the week. Mich. Comp. Laws § 436.2114(1) states:

> (1) Notwithstanding R 436.1403 and R 436.1503 of the Michigan administrative code and except as otherwise provided under this act or rule of the commission, an on-premises and an off-premises licensee shall not sell, give away, or furnish alcoholic liquor between the hours of 2 a.m. and 7 a.m. on any day.

Then, in § 436.2114(2) the Legislature provided four exceptions which would allow a local government to amend the standard alcohol service times:

> (2) Subsection (1) does not prevent any local governmental unit from prohibiting the sale of beer and wine between the hours of 7 a.m. and 12 noon on Sunday or between the hours of 7 a.m. on Sunday and 2 a.m. on Monday under section 1111 and does not prevent any local governmental unit from prohibiting the sale of spirits and mixed spirit drink between the hours of 7 a.m. and 12 noon on Sunday or

> between the hours of 7 a.m. on Sunday and 2 a.m. on Monday under section 1113. A licensee selling alcoholic liquor between 7 a.m. and 12 noon on Sunday shall obtain a permit and pay to the commission an annual fee of $160.00.

These sections work in tandem. The Michigan Supreme Court and the Sixth Circuit have interpreted Mich. Comp. Laws § 436.2114(1) to grant a licensee the right to sell alcohol from 7:00 a.m. until 2:00 a.m. the next day, seven-days a week. *See Noey v. City of Saginaw*, 261 N.W. 88 (Mich. 1935) and *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005). Mich. Comp. Laws § 436.2114(2) places a limit on those sales hours by giving a municipality the right to restrict sales on Sundays only.

The Wineries relied on *Noey* and *Keego Harbor* in their summary judgment briefing. In its Opinion Regarding Summary Judgment Motions, this Court cited to certain language in *Keego Harbor* when it determined that "nowhere did the Sixth Circuit hold that the city's 11:00 p.m. closing rule conflicted with Michigan law." (ECF No. 162, PageID.5990.) That language read, "[o]n its face, the rule does not grant licensees a right to remain open until 2:00 a.m. but merely provides that licensees cannot sell liquor after 2:00 a.m." *Keego Harbor*, 397 F.3d at 435. But in the very next sentence in *Keego Harbor*, the Sixth Circuit noted that the Michigan Supreme Court has held that a local government cannot fix an earlier closing time:

> Nevertheless, in *Noey v. City of Saginaw*, 271 Mich. 595, 261 N.W. 88 (1935), the Supreme Court of Michigan determined that a Michigan city ordinance cannot fix closing hours to a period shorter than that specified in the state rule. Thus … there is a written regulation that both confers the benefit at issue (serving alcohol until 2:00 a.m.) and prohibits city officials from rescinding the benefit.

Id. at 435-436. Presumably, this Court did not cite to this determination from *Keego Harbor* because it distinguished *Noey* on the grounds that the Michigan Constitution no longer states that the MLCC "shall exercise complete control over the alcoholic beverage traffic within the state." (ECF No. 162, PageID.5990, n.13.) Respectfully, that conclusion was incorrect. When *Noey* was decided, the 1908 Michigan Constitution was in effect. The relevant language at issue said:

> The legislature may by law establish a liquor control commission, who, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof; and the legislature may also provide for an excise tax on such sales: Providing, however, that neither the legislature nor such commission may authorize the manufacture or sale of alcoholic beverages in any county in which the electors thereof, by a majority vote, shall prohibit the same.

(**Exhibit 1**.) Const. 1908, art. 16, § 11. After *Noey*, the 1963 Constitution maintained this language, where it was moved to Article 4, § 40, which reads:

> The legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof. The legislature may provide for an excise tax on such sales. Neither the legislature nor the commission may authorize the manufacture or sale of alcoholic beverages in any county in which a majority of the electors voting thereon shall prohibit the same.

(**Exhibit 2**.) Except for slight grammatical changes, the 1908 Constitution and 1963 Constitution contain the identical provision regarding the liquor control commission's "complete control of the alcoholic beverage traffic within this state." *See also Oppenhuizen*, 300 N.W.2d at 447 (recognizing that "[w]ithout change except for improvement in phraseology, the 1963 Michigan Constitution contains the same provisions as contained in the 1908 Constitution for control of the sale of liquor in Michigan."). Thus, the Michigan Supreme Court's conclusion in *Noey* that "[u]nder the broad power thus conferred upon the liquor control commission by the Constitution and the statute, it must be held that its regulations relative to the hours of closing are binding upon all licensees, and are not affected by the provision in the ordinance relating thereto" is still binding as the provision cited to is contained within the current version of the Michigan Constitution. *Noey*, 261 N.W. 88, 89-90. This Court's contrary conclusion was in error.[3]

[3] Other post-*Mutchall* cases have reiterated *Noey*'s holding. *See Fuller Cent. Park Properties v. City of Birmingham*, 296 N.W.2d 88, 92 (Mich. App. 1980) (In *Noey*, "the Court held that the City of Saginaw could not fix the closing hours of places licensed to sell liquor to a period shorter than that specified by the Michigan Liquor Control Commission. The Court found that the commission

This Court also cited to *Mutchall v. City of Kalamazoo*, 35 N.W.2d 245 (Mich. 1948) in finding *Noey* inapplicable and specifically stating that "the MLCC was adopted to 'meet the objections raised in *Noey*, so as to permit local authorities to control the closing time of licenses establishments.'" (ECF No. 162, PageID.5990, n.13.)[4] In *Mutchall*, the City of Kalamazoo enacted an ordinance that precluded bottle clubs—which are not regulated by the liquor control commission or liquor code—from allowing persons to consume alcohol between 2:00am and midnight on Sundays. *Mutchall*, 35 N.W.2d at 222. While the court in *Mutchall* did state that "[t]he act was amended so as to meet the objections raised in *Noey v. City of Saginaw* … so as to permit local authorities to control the closing time of licenses establishments", *id*. at 223, *Mutchall* does not state what changes were made between the 1933 version of the liquor control code and the 1948 version to allow it to reach this conclusion. *Mutchall* does cite to Section 1 of the liquor control code, *id*. at 223, but that section did not change between 1933 and 1948. The 1933 version of Section 1 reads:

Except as by this act otherwise provided, the commission shall have the sole right, power and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within the state of Michigan, including the manufacture, importation, possession, transportation and sale thereof.

(**Exhibit 3**.) The 1948 version of Section 1 is unchanged:

---

was granted the exclusive power to regulate and control alcohol beverage traffic subject only to specified statutory exclusions, and that no statutory exclusion was applicable."); *Maple BPA*, 838 N.W.2d at 921–22 ("In *Noey*, the local ordinance prohibited selling alcoholic beverages during a time that the Legislature had expressly permitted alcoholic beverages to be sold.").

[4] PTP claims that *Mutchall* was referencing Section 52 of the 1933 Liquor Control Code. But that section related to statutes and local ordinances enforcing Prohibition-era restrictions on the sale of alcohol. Those statutes and ordinance had to be explicitly repealed when Prohibition ended. There was no reference to hours of service and the *Mutchall* decision does not cite to this Section of the code. Further, because the statutes and ordinances had been repealed, there was no need to continue the provision in the 1948 version of the Liquor Control Code.

> **Except as by this act otherwise provided, the commission shall have the sole right, power and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within the state of Michigan, including the manufacture, importation, possession, transportation and sale thereof.**

(**Exhibit 4**.) Where a change did occur between 1933 and 1948 related to closing times for licensed establishments was in Section 19. The 1933 version of Section 19(19) reads:

> **19. No licensee enumerated in this section or any other person shall sell at retail, give away or furnish any spirits on any Sunday, primary election day, general election day or municipal election day. Any violation of this subsection shall constitute a misdemeanor: *Provided*, That this subsection shall not apply to spirits served to bona fide guests in the residence of any person or sold or furnished for medicinal purposes as provided for in this act. The legislative body of any city, village or township may, by resolution or ordinance, prohibit the sale of alcoholic liquor for consumption on the premises on any Sunday, legal holiday, primary election day, general election day or municipal election day.**

(**Exhibit 3**.) The 1948 version of Section 19(18)[5] reads:

> **18. No licensee enumerated in this section or any other person shall sell at retail, give away or furnish and no person shall knowingly and wilfully buy any spirits between the hours of 2 a. m. and 12 midnight on any Sunday, nor on any primary election day, general election day or municipal election day until after the polls are closed. Any violation of this subsection shall constitute a misdemeanor: Provided, That this subsection shall not apply to spirits served to bona fide guests in the residence of any person or sold or furnished for medicinal purposes as provided for in this act. The legislative body of any city, village or township may, by resolution or ordinance, prohibit the sale of alcoholic liquor on any Sunday, legal holiday, primary election day, general election day or municipal election day.**

(**Exhibit 4**.) The change from 1933 to 1948 was slight. The 1933 version allowed a local government to pass an ordinance prohibiting the sale of alcoholic beverages "for on premises" consumption (bars, restaurants, etc.) on Sundays. The 1948 revision broadened the power of local governments slightly to allow a local government to pass an ordinance to "prohibit the sale of alcoholic liquor on any Sunday…" This power was broader as it allowed a local government to restrict the sale at both locations for on premises consumption but also at locations for off premises

[5] The numbering of Section 19 changed with the deletion of one subsection.

consumption, i.e. "Specially designated merchants" and "State liquor stores." (*See* **Exhibit 4** at Section 436.2.) Given this comparison, a more accurate reading of *Mutchall* is that the liquor control code was amended to allow local governments to "control the closing of licensed establishments on Sundays." Regardless, the power of a local government to control closing time by ordinance is no longer contained in the liquor control code. Instead, the current liquor control code provides a municipality, or citizens by referendum, may regulate the sale of alcohol on Sundays. *See* Mich. Comp. Laws § 436.2114(2), referencing § 436.2111 and § 436.2113. Notably, there is no provision in the liquor control code which provides that a local government, by referendum, ordinance, or otherwise, may limit the sales of alcohol on any other day of the week.

The referendum power was added in the 1948 version of the liquor control code and provided local municipalities with referendum power to prohibit the sale of beer and wine between the hours of 2:00 a.m. and midnight on Sundays. (**Exhibit 4: Section 18a**.) This referendum right on Sunday sales is still in place in the current version of the Code. *See* Mich. Comp. Laws § 436.2111. Notably, the very first sentence of this statute reads: "[t]he sale of beer and wine between the hours of 7 a.m. on Sunday and 2 a.m. on Monday **is allowed**." Thus, the starting point for any analysis of Sunday sales of beer and wine is that it is allowed.[6]

Finally, if there were any question that § 436.2114(1) gives the Wineries the right to stay open until 2:00 a.m., the interpretive canon *expressio unius est exclusio alterius* resolves any doubt. The interpretive canon means that "expressing one item of an associated group or series excludes another left unmentioned." *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288 (2017) (cleaned up).

[6] Mich. Comp. Laws § 436.2113 is a referendum statute related to the Sunday sales of spirits. Again, as stated in that statute, the starting point of any analysis is that "a licensee…may sell at retail, and a person may buy, spirits or mixed drink between the hours of 7 a.m. on Sunday and 2 a.m. on Monday."

While § 436.2114(1)[7] sets the general hours of sales between 7:00 a.m. and 2:00 a.m. the following day, § 436.2114(2) provides what the local government may regulate with respect to hours. The Liquor Control Code gives local governments the authority to limit or even prohibit sales on Sundays. However, it says nothing about other days of the week. The Michigan Legislature clearly knew how to give local governments, and citizens by referendum, the authority to regulate sales hours, as evidenced by § 436.2114(2).[8] Because § 436.2114(2) mentions specific times when local governments may restrict sales hours, the other times left unmentioned are necessarily excluded from the scope of its authority when applying *expressio unius*.

This Court should revisit its decision related to preemption and hours of service as its prior determination is inconsistent with Michigan law.

2. Mich. Comp. Laws § 436.1547 preempts Peninsula Township's regulation of Winery catering operations.

This Court has already determined that Mich. Comp. Laws § 436.1547 preempts Section 8.7.3(10)(u)(5)(i) of the Winery Ordinances. (ECF No. 162, PageID.5992.) Nothing in PTP's argument should change that conclusion.

The Wineries regulated as Winery Chateaus would like to use their kitchens for off-site catering. Under the Liquor Control Code, a "catering permit" is "a permit issued by the commission to a . . . holder of a public on-premises license for the sale of beer, wine, or spirits . . . that is also licensed as a food service establishment or retail food establishment under the food

[7] Hours and days of operations are also included in Liquor Control Rule 436.1403 and 436.1503.

[8] Where the Legislature sought to give local governments authority, it explicitly did so. For example, the Liquor Control Code also gives local governments the ability to approve specialty designated merchants to install motor vehicle fuel pumps, prohibit consumption of alcohol in parks and public places, prohibit topless activity and nudity, prohibit wine auctions, inspect records of third party carriers, and approve social districts. See Mich. Comp. Laws §§ 436.1541(2)(a)-(c), 436.1915(3), 436.1916(3), 436.2031(3), 436.1203(21), and 436.1551(1).

law of 2000, 2000 PA 92, MCL 289.1101 to 289.8111." Mich. Comp. Laws § 436.1547(1)(b). The catering permit "authorizes the permit holder to sell and deliver beer, wine, and spirits in the original sealed container to a person for off-premises consumption but only if the sale is not by the glass or drink and the permit holder serves the beer, wine, or spirits." *Id.* However, "[t]he permit does not allow the permit holder to deliver, but not serve, the beer, wine, or spirits." *Id.* The Liquor Control Commission has the exclusive authority to issue a catering permit. Mich. Comp. Laws § 436.1547(3). There is no cap on how many permits the MLCC may issue "within any local unit of government." Mich. Comp. Laws § 436.1547(4).

The MLCC's FAQ sheet states that a Catering Permit issued by MLCC "[a]uthorizes a holder of a Wine Maker or Small Wine Maker license to sell, deliver, and serve wine in the original containers at private events." (ECF No. 54-12, PageID.2349.) "No local legislative approval [is] required." (ECF No. 54-13, PageID.2363.)

Under the Ordinance, Winery Chateaus are prohibited from using their facilities for off-site catering. "Kitchen facilities may be used for on-site food service related to Guest Activity Uses *but not for off site catering*." Section 8.7.3(10)(u)(5)(i) (emphasis added). The outright prohibition on catering directly conflicts with the Liquor Control Code. Therefore, Mich. Comp. Laws § 436.1547 preempts Section 8.7.3(10)(u)(5)(i).

In ruling on the Township's Motion to Alter or Amend, this Court rejected a similar argument to the argument made by PTP: that "MLCC only addresses catering of alcohol, not catering of food." (ECF No. 211, PageID.7808.) This Court held:

> This argument is rejected because a catering license under MLCC can only be issued to a licensee 'that is also licensed as a food serve establishment or retail food establishment' (ECF No. 187 at PageID.7055.) When an entity is issued a catering permit under the MLCC, that entity is inherently allowed to operate its 'food serve establishment.' (which includes a 'catering kitchen' under Mich. Comp. Laws §

> 288.573(e)), while the Township Ordinances expressly prohibit the use of kitchens for off-site catering."

(*Id.*) Another subsection of the catering authorization specifically mentions food. *See* Mich. Comp. Laws § 436.1547(11) ("A catering permit holder who prepares **food or drink** for direct consumption through service on the premises or elsewhere shall comply with the requirements for food service establishments under the food law of 2000, 2000 PA 92, MCL 289.1101 to 289.8111." (emphasis added)). PTP's argument that catering does not include food is simply wrong.

Finally, PTP's argument that if this Court finds the catering prohibition preempted it would "invalidate local zoning of all activities that MLCC allows licenses to engage in" should be ignored. Nothing could be further from the truth. First, as this Court recognized, Mich. Admin. Code. R. 436.1003 requires licensees to comply with "zoning rules that are not contrary to law." (ECF No. 211, PageID.7808.) Further, the Michigan Legislature has determined that there are certain areas where local governments can restrict the activities of licensees where those activities may be allowed by state law. For example, Mich. Comp. Laws § 436.1916 allows for a licensee to obtain a permit to allow for a topless activity. But Mich. Comp. Laws § 436.1916(3) specifically states that "[T]his section is not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premise located within that local unit of government." [9] Mich. Comp. Laws § 436.1915(3) allows a local government to enact an ordinance prohibiting the consumption of alcohol in public parks and on public land. Mich. Comp. Laws § 436.2031 allows for wine auctions subject to any "local law or ordinance." Under Mich.

[9] The cases PTP relies upon are all cases involving topless activity. Thus, they are clearly distinguishable given that the Legislature gave local governments the ability to restrict topless activities. Mich. Comp. Laws § 436.1916(3)

Comp. Laws § 436.1531, if a licensee wishes to upgrade an issued license under that section, the request is "subject to approval by the local governmental unit having jurisdiction."

Clearly, where the Legislature desired to allow a local unit of government to enact an ordinance to prohibit what the Liquor Control Code would otherwise allow, it explicitly said so.

3. Mich. Comp. Laws § 436.1916(11) preempts Peninsula Township's prohibition of amplified music.

This Court has already determined that Mich. Comp. Laws § 436.1916(11) preempts the complete prohibition of amplified music in Section 8.7.3(10)(u)(5)(g) of the Winery Ordinances. (ECF No. 162, PageID.5991-5992.) However, this Court ruled that the Township could limit the amplification level of music. (*Id.*)

The Liquor Control Code allows on-premises licensees to play music without any prior approval from any entity. "The following activities are allowed without the granting of a permit under this section: The performance or playing of an orchestra, piano, or other types of musical instruments, or singing." Mich. Comp. Laws § 436.1916(a). Thus, the Legislature did not leave an option for local units of government to alter this right. As the Sixth Circuit phrased it in *Keego Harbor*, "there is a written regulation that both confers the benefit at issue [playing music with no restriction] and prohibits city officials from rescinding the benefit." 397 F.3d at 435–36.

Contrary to this plain authorization, the Township does not allow amplified music during a Winery Chateau Guest Activity.[10] "No amplified instrumental music is allowed, however amplified voice and recorded background music is allowed, provided the amplification level is no greater than normal conversation at the edge of the area designated within the building for guest

[10] The Winery Ordinances do not prohibit Farm Processing Facilities and Remote Winery Tasting Rooms from playing amplified music. Similarly, the Winery Ordinances do not prohibit Winery Chateaus from playing amplified music at any other times but during a Guest Activity.

purposes." Section 8.7.3(10)(u)(5)(g). This conflicts with the Wineries' unlimited right to play music without this issuance of a permit under Mich. Comp. Laws § 436.1916(a). Therefore, Mich. Comp. Laws § 436.1916(a) preempts Section 8.7.3(10)(u)(5)(g).

PTP, like the Township, argues that "the MLCC is silent on amplification" as justification for upholding the ordinance. Compare ECF No. 250, PageID.8940, ECF No. 63, PageID.2769: "MLCC does not even address amplification at all" and ECF No. 174, PageID.6573: "MLCC does not address amplified music at all." This Court previously held that "establishments that hold an 'on premise consumption' license under the MLCC are not required to receive a permit to" play music. (ECF No. 162, PageID.5991.) During the hearing on the motions for summary judgment, this Court noted that the ordinance contains "an absolute prohibition on amplified music" and questioned how that was "consistent with the state statute." (ECF No. 159, PageID.5894-5895.) Ultimately, this Court concluded that the Township's total prohibition on amplified music was preempted. (ECF No. 162, PageID.5991.) Nothing in PTP's motion should change this conclusion.

C. This Court should address all ordinances the Wineries allege are preempted.

In ruling on the Wineries' Motion for Partial Summary Judgment related to its preemption claims, this Court noted that the First Amended Complaint only challenged the three specific sections of the Winery Ordinance discussed above. (ECF No. 162, PageID.5986.) As such, this Court only ruled on whether those three ordinances were preempted and that "there remains a genuine issue of material fact as to whether any section of the Township Ordinances other than the three specifically named sections in the first amended complaint are preempted by Michigan law." (*Id.* at PageID.5986-5987.) Pursuant to Fed. R. Civ. P. 15(b) and 54(c), this Court should grant the Wineries summary judgment on the Wineries' claim that Sections 6.7.2(19)(a) and 8.7.3(10)(u)(2)(e) are preempted by Michigan law.

Under Rule 15(b), an issue not raised in the pleadings but tried by express or implied

consent of the parties "shall be treated" as having been raised in the pleadings. Fed. R. Civ. P. 15(b). Thus, "[s]uch amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment." *Id.* Sections 6.7.2(19)(a) and 8.7.3(10)(u)(2)(e) restrict the ability of farm processing and chateau wineries to operate a restaurant. Both PTP and the Township have addressed whether these ordinances are preempted in their summary judgment briefing.

The Township fully briefed this issue more than a year ago. (ECF No. 63, PageID.2765-2769.) PTP fully briefed this issue. (ECF No. 250, Page.ID 8936-8940.) The Township also addressed this issue during oral argument on the parties' cross motions for summary judgment. (See ECF No. 159, PageID.5898-5904.) During that hearing, this Court recognized that the ordinances operate as a complete prohibition on restaurants and asked, "why isn't that fatal" (*Id.*, PageID.5901.) Despite the Wineries not including these ordinance sections specifically in their First Amended Complaint, the issue has been litigated with the consent of the parties and whether the ordinance is contained within the First Amended Complaint is irrelevant. *See In re Berger*, 2007 WL 2462646, *5 (N.D. Oh. Bankr., Aug. 27, 2007) (citing *Torry v. Northrop Grumman Corp.*, 399 F.3d 876, 878 (7th Cir. 2005) ("When issues not mentioned in the complaint ... are nevertheless litigated with the consent of the parties, the complaint is not 'constructively amended;' it is simply an irrelevance so far as those issues are concerned."). "[P]arties may constructively amend the complaint by agreeing, even implicitly, to litigate fully an issue not raised in the original pleadings." *Stemler v. City of Florence*, 126 F.3d 856, 872 (6th Cir.1997). Because all parties addressed whether Michigan law preempts Sections 6.7.2(19)(a) and 8.7.3(10)(u)(2)(e), the First Amended Complaint has been constructively amended. *See Whitaker v. T.J. Snow Co*., 151 F.3d 661 (7th Cir. 1998) (finding complaint had been constructively amended because both

parties addressed non-pled issue in summary judgment briefing).[11]

Further, under Fed. R. Civ. P. 54(c), a final judgment "should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings."[12] *See also Schumann v. Levi*, 728 F.2d 1141, 1143 (8th Cir. 1984) ("[A] trial court must grant the relief to which a prevailing party is entitled ... even though the party has not demanded it."). "[T]he federal rules, and the decisions construing them, evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage . . . provided that such a shift in the thrust of the case does not work to the prejudice of the opposing party." *Bluegrass Ctr.*, 49 Fed. App'x. at 31; *see also Colonial Refrigerated Transp., Inc. v. Worsham*, 705 F.2d 821, 824–25 (6th Cir. 1983) (affirming judgment on an implied indemnity theory when the complaint alleged a claim under the express indemnity provisions of a lease); *Fasano/Harriss Pie Co. v. Food Mktg. Assocs., Ltd*., 1988 WL 44738 (6th Cir., May 9, 1988) (holding district court properly granted judgment under Rule 54(c) on equitable theory of quasi-contract or unjust enrichment where plaintiff pleaded breach of contract).

The application of Rule 54(c) is limited and "[a] party will not be given relief not specified in its complaint where the 'failure to ask for particular relief so prejudiced the opposing party that it would be unjust to grant such relief.'" *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc*., 705 F.2d 712, 716 (4th Cir. 1983) (quoting *United States v. Marin*, 651 F.2d 24, 31 (1st Cir. 1981)). Courts have held that where a theory raised a purely legal issue and has been thoroughly briefed by the parties, there can be no prejudice. *Ogala Sioux Tribe of Indians v. Andrus*, 603 F.2d. 707, 714 (8th

[11] A formal application for leave to amend to conform the pleadings to the proof is not necessary. See Wright & Miller, Federal Practice and Procedure, Section 1493.

[12] "Rule 54(c) does not require the consent of the parties as does Rule 15(b)." *Bluegrass Ctr., LLC v. U.S. Intec, Inc.*, 49 Fed. App'x. 25, 31 (6th Cir. 2002) (per curiam).

Cir. 1979) (citing *Armstrong v. Collier*, 536 F.2d 72, 77 (5th Cir. 1976) and *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 212 n. 16 (8th Cir. 1974)).

Here, granting such relief to the Wineries would not be unjust and would not prejudice PTP or the Township. As discussed above, Sections 6.7.2(19)(a) and 8.7.3(10)(u)(2)(e) restrict the ability of farm processing and chateau wineries to operate a restaurant. Both PTP and the Township have addressed whether these ordinances are preempted in their summary judgment briefing and addressed at oral argument on the cross motions for summary judgment. (*See* ECF No. 63, PageID.2765-2769, ECF No. 250, Page.ID 8936-8940, ECF No. 159, PageID.5898-5904.)

D. Mich. Comp. Laws § 436.1536(7)(h) preempts Peninsula Township's prohibition of Winery restaurant operations.

The Liquor Control Code defines the term "Restaurant" as "a food service establishment defined and licensed under the food law, 200 PA 92, MCL 289.1101 to 289.8111." Mich. Comp. Laws § 436.1111(5). The Food Law defines a "food service establishment" as a:

> fixed or mobile restaurant, coffee shop, cafeteria, short order cafe, luncheonette, grill, tearoom, sandwich shop, soda fountain, tavern, bar, cocktail lounge, nightclub, drive-in, industrial feeding establishment, private organization *serving the public*, rental hall, catering kitchen, delicatessen, theater, commissary, food concession, or similar place in which food or drink is prepared for direct consumption through service on the premises or elsewhere, and any other eating or drinking establishment or operation *where food is served or provided for the public*.

Mich. Comp. Laws § 289.1107(t) (emphasis added).

Stated simply, a restaurant under the Liquor Control Code is one that serves food to the public. It is a responsible alcohol service practice to serve food with alcohol. Enforcement of the Food Law is specifically delegated to the local health department, not Peninsula Township. Mich. Comp. Laws § 289.3105.

The Liquor Control Code is unequivocal that tasting rooms may have restaurants. "A brewer, micro brewer, wine maker, small wine maker, distiller, small distiller, brandy

manufacturer, or mixed spirit drink manufacturer may own and operate a restaurant or allow another person to operate a restaurant as part of the on-premises tasting room on the manufacturing premises." Mich. Comp. Laws § 436.1536(7)(h). And although there is a reference to approval from the local legislative body in § 436.1536(7)(c) ("The manufacturer or manufacturers must be approved for the on-premises tasting room permit by the local legislative body in which the proposed licensed premises will be located, except in a city having a population of 600,000 or more or as provided in subsection (17)."), that requirement does not apply here. The Wineries are exempt from local approval pursuant to § 436.1536(17), which states that "Local approval under subsection (7)(c), (8)(c), or (9)(c) is not required for a tasting room that was in existence before December 19, 2018." There is no dispute that each of the Wineries held an MLCC tasting room permit prior to December 19, 2018. Thus, the Liquor Control Code gives the Wineries the absolute right to operate a restaurant as part of their tasting rooms.

Other authority confirms this point. For example, the Sixth Circuit recognized "Michigan laws and regulations permit liquor licensees to serve food and alcohol until 2:00 a.m." *Keego Harbor*, 397 F.3d at 431. And MLCC's Winery FAQ sheet states a winery "[m]ay serve food or have a restaurant in conjunction with the On-Premises Tasting Room Permit." (ECF No. 54-12, PageID.2348.)

Despite this clear statutory authority, restaurants at Farm Processing Facilities are outright prohibited. "The Farm Processing Facility use includes retail and wholesale sales of fresh and processed agricultural produce but is not intended to allow a bar or restaurant on agricultural properties and the Township shall not approve such a license." Section 6.7.2(19)(a). While the Winery Ordinances do not contain a clear ban on restaurants at Winery Chateaus like they do for a Farm Processing Facility, Peninsula Township interprets the Winery Ordinances to ban

restaurants at Winery Chateaus. This is despite Section 8.7.3(10)(c)(2) stating that sale of food for on-premise consumption is allowed pursuant to Michigan Department of Agriculture permitting. The Township and PTP ignore this section and instead point to the Guest Activity Use sections which limit food service during Guest Activities. "No food service other than as allowed above or as allowed for wine tasting may be provided by the Winery-Chateau. If wine is served, it shall only be served with food and shall be limited to Old Mission Peninsula appellation wine produced at the Winery, except as allowed by Section 6. below." Section 8.7.3(10)(u)(2)(e).

During oral argument on the cross motions for summary judgment, this Court questioned how the restrictions were "consistent with State law?" (ECF No. 159, PageID.5901.) This Court continued, "[i]f it's a prohibition and not a limitation, why isn't it fatal to that portion of the ordinance." (*Id*.) This Court was correct. These ordinances do not place conditions on the operation of a restaurant; Sections 6.7.2(19)(a) and 8.7.3(10)(u)(2)(e) are an outright ban. This ban on restaurants is conflict preempted. "A local ordinance is preempted when it bans an activity that is authorized and regulated by state law." *DeRuiter*, 949 N.W.2d at 98. For example, when Byron Township attempted to impose civil fines for medical marijuana usage despite the Michigan Medical Marijuana Act's allowance of such use, Byron Township's ordinance was preempted. *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 541 (Mich. 2014). Moreover, it did not matter that Byron Township was attempting to act under its authority granted by the Michigan Zoning Enabling Act. *Id.* at 542–43. In another example, a local ordinance banning walkathons completely was preempted by a state statute banning walkathons unless certain conditions had been met. *Nat'l Amusement*, 259 N.W. at 343. Because the state statute would allow walkathons if certain conditions were met, the local government could not ban them completely.

The same analysis applies here. Mich. Comp. Laws § 436.1536(7)(h) allows liquor licensees to operate a restaurant as part of their tasting room. The Township's Ordinance completely bans Farm Processing facilities from operating a restaurant as part of their tasting and restricts when and for what purpose a Winery Chateau may operate a restaurant. Therefore, Sections 6.7.2(19)(a) and 8.7.3(10)(u)(2)(e) are preempted by 436.1536(7)(h).[13]

IV. CONCLUSION

The Wineries request that this Court deny PTP's motion to dismiss for lack of supplemental jurisdiction. The Wineries further request that this Court deny PTP's motion to dismiss for failure to state a claim and confirm its prior opinions that Sections 8.7.3(10)(u)(5)(g) and 8.7.3(10)(u)(5)(i) are preempted. Finally, the Wineries request that this Court amend its prior Opinion Regarding Summary Judgment Motions and declare that Sections 6.7.2(19)(a), 8.7.3(10)(u)(2)(e), and 8.7.3(10)(u)(5)(b) of the Winery Ordinances are preempted by the Michigan Liquor Control Code.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante

Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: September 9, 2022

[13] The Winery Ordinances do not prohibit a Remote Tasting Room winery from operating a restaurant.

Exhibit 1

CONSTITUTION OF THE STATE OF MICHIGAN OF 1908

[Effective January 1, 1909]

PREAMBLE

Preamble.

We, the people of the State of Michigan, grateful to Almighty God for the blessings of freedom, and earnestly desiring to secure these blessings undiminished to ourselves and our posterity, do ordain and establish this constitution.

ARTICLE 1

BOUNDARIES AND SEAT OF GOVERNMENT

Boundaries.

Sec. 1. The State of Michigan consists of and has jurisdiction over the territory embraced within the following boundaries, to wit: Commencing at a point on the eastern boundary line of the state of Indiana, where a direct line drawn from the southern extremity of Lake Michigan to the most northerly cape of Maumee Bay shall intersect the same--said point being the northwest point of the state of Ohio, as established by act of congress, entitled "An act to establish the northern boundary line of the state of Ohio, and to provide for the admission of the state of Michigan into the Union upon the conditions therein expressed," approved June fifteenth, 1836; thence with the said boundary line of the state of Ohio, until it intersects the boundary line between the United States and Canada through the Detroit River, Lake Huron and Lake Superior to a point where the said line last touches Lake Superior; thence in a direct line through Lake Superior to the mouth of the Montreal River; thence through the middle of the main channel of the westerly branch of the Montreal River to Island Lake, the head waters thereof; thence in a direct line to the center of the channel between Middle and South Island in the Lake of The Desert; thence in a direct line to the southern shore and down the River Brule to the main channel of the Menominee River; thence down the center of the main channel of the same to the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the middle of Lake Michigan to the northern boundary of the state of Indiana to the northeast corner thereof; and thence south with the eastern boundary line of Indiana to the place of beginning.

Seat of government.

Sec. 2. The seat of government shall be at Lansing, where it is now established.

ARTICLE II

DECLARATION OF RIGHTS

Political power.

Sec. 1. All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.

Right of assembly and petition.

Sec. 2. The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the legislature for redress of grievances.

Freedom of worship; disabilities.

Sec. 3. Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion No money shall be

Sec. 1. The militia shall be composed of all able-bodied male citizens between the ages of 18 and 45 years, except such as are exempted by the laws of the United States or of this state; but all such citizens of any religious denomination, who, from scruples of conscience, may be averse to bearing arms, shall be excused therefrom upon such conditions as shall be prescribed by law.

Same; organization.

Sec. 2. The legislature shall provide by law for organizing, equipping and disciplining the militia in such manner as it shall deem expedient, not incompatible with the laws of the United States.

Same; officers.

Sec. 3. Officers of the militia shall be elected or appointed and be commissioned in such manner as may be prescribed by law.

ARTICLE XVI

MISCELLANEOUS PROVISIONS

Terms of public officers; commencement.

Sec. 1. The terms of office of all elective state officers and of all judges of courts of record shall begin on the first day of January next succeeding their election, except as otherwise prescribed in this constitution. The terms of office of all county officers shall begin on the first day of January next succeeding their election, except as otherwise prescribed by law.

Oath of office.

Sec. 2. Members of the legislature and all officers, executive and judicial, except such officers as may by law be exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability." No other oath, declaration or test shall be required as a qualification for any office or public trust.

Extra compensation; increase or decrease of salaries.

Sec. 3. Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employee or contractor after the service has been rendered or the contract entered into. Salaries of public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased after election or appointment.

The vote.

Sec. 4. In all cases of tie vote or contested election for any state office, except member of the legislature, any recount or other determination thereof may be conducted by the board of state canvassers under such laws as the legislature may prescribe.

Vacancies in office; continuity of government in emergencies.

Sec. 5. The legislature may provide by law the cases in which any office shall be deemed vacant and the manner of filling vacancies, where no provision is made in the constitution.

The legislature, in addition to and not in the derogation of the power heretofore conferred in section 5 of this article XVL, in order to insure continuity of state and local governmental operations in periods of emergency only resulting from disasters occurring in this state caused by enemy attack on the United States shall have the power for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, proper for insuring the continuity of governmental operations. Notwithstanding the power conferred by this amendment elections shall always be called as soon as possible to fill any elective vacancies in any office temporarily occupied by operation of any legislation enacted pursuant to the provision of this paragraph.

Laws, records, and proceedings; use of English language.

Sec. 6. The laws, public records and the written judicial and legislative proceedings of the state shall be conducted, promulgated and preserved in the English language.

Courts of conciliation.

Sec. 7. The legislature may establish courts of conciliation with such powers and duties as shall be prescribed by law.

Estates of married women.

Sec. 8. The real and personal estate of every woman, acquired before marriage, and all property to which she may afterwards become entitled by gift, grant, inheritance or devise shall be and remain the estate and property of such woman, and shall not be liable for the debts, obligations, or engagements of her husband, and may be devised or bequeathed by her as if she were unmarried.

Aliens; property rights.

Sec. 9. Aliens, who are or who may hereafter become bona fide residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native born citizens.

Agricultural land leases.

Sec. 10. No lease or grant of agricultural land for agricultural purposes for a longer period than 12 years, reserving any rent or service of any kind, shall be valid.

Liquor control; excise tax.

Sec. 11. The legislature may by law establish a liquor control commission, who, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof; and the legislature may also provide for an excise tax on such sales: Providing, however, that neither the legislature nor such commission may authorize the manufacture or sale of alcoholic beverages in any county in which the electors thereof, by a majority vote, shall prohibit the same.

ARTICLE XVII

AMENDMENT AND REVISION

Amendment to constitution; proposal by legislature; submission to electors.

Sec. 1. Any amendment or amendments to this constitution may be proposed in the senate or house of representatives. If the same shall be agreed to by 2/3 of the members elected to each house, such amendment or amendments shall be entered on the journals, respectively, with the yeas and nays taken thereon; and the same shall be submitted to the electors at the next spring or autumn election thereafter, as the legislature shall direct; and, if a majority of electors qualified to vote for members of the legislature voting thereon shall ratify and approve such amendment or amendments, the same shall become part of the constitution.

Same; initiative; referendum.

Sec. 2. Amendments may also be proposed to this constitution by petition of the qualified and registered electors of this state. Every such petition shall include the full text of the amendment so proposed, and be signed by qualified and registered electors of the state equal in number to not less than ten per cent of the total vote cast for all candidates for governor at the last preceding general election, at which a governor was elected. Petitions of qualified and registered electors proposing an amendment to this constitution shall be filled with the secretary of state or such other person or persons hereafter authorized by law to receive same at least 4 months before the election at which such proposed amendment is to be voted upon. The legislature may prescribe penalties for causing or aiding and abetting in causing any fictitious or forged name to be affixed to any petition, or for knowingly causing petitions bearing fictitious or forged names to be circulated. Upon receipt of said petition the secretary of state or other person or persons hereafter authorized by law shall canvass the same to ascertain if such a petition has been signed by the requisite number of qualified and registered electors, and may in determining the validity thereof, cause any doubtful signatures to be

Exhibit 2

STATE CONSTITUTION
CONSTITUTION OF MICHIGAN OF 1963

We, the people of the State of Michigan, grateful to Almighty God for the blessings of freedom, and earnestly desiring to secure these blessings undiminished to ourselves and our posterity, do ordain and establish this constitution.

ARTICLE I
DECLARATION OF RIGHTS

§ 1 Political power.

Sec. 1. All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.

History: Const. 1963, Art. I, § 1, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 1.

§ 2 Equal protection; discrimination.

Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

History: Const. 1963, Art. I, § 2, Eff. Jan. 1, 1964.

§ 3 Assembly, consultation, instruction, petition.

Sec. 3. The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances.

History: Const. 1963, Art. I, § 3, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 2.

§ 4 Freedom of worship and religious belief; appropriations.

Sec. 4. Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.

History: Const. 1963, Art. I, § 4, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 3.

§ 5 Freedom of speech and of press.

Sec. 5. Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

History: Const. 1963, Art. I, § 5, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 4.

§ 6 Bearing of arms.

Sec. 6. Every person has a right to keep and bear arms for the defense of himself and the state.

History: Const. 1963, Art. I, § 6, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 5.

§ 7 Military power subordinate to civil power.

Sec. 7. The military shall in all cases and at all times be in strict subordination to the civil power.

History: Const. 1963, Art. I, § 7, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. II, § 6.

§ 8 Quartering of soldiers.

Sec. 8. No soldier shall, in time of peace, be quartered in any house without the consent of the owner or occupant, nor in time of war, except in a manner prescribed by law.

legislature may provide by law for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices; and enact other laws necessary and proper for insuring the continuity of governmental operations. Notwithstanding the power conferred by this section, elections shall always be called as soon as possible to fill any vacancies in elective offices temporarily occupied by operation of any legislation enacted pursuant to the provisions of this section.

History: Const. 1963, Art. IV, § 39, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. XVI, § 5.

§ 40 Alcoholic beverages; age requirement; liquor control commission; excise tax; local option.

Sec. 40. A person shall not sell or give any alcoholic beverage to any person who has not reached the age of 21 years. A person who has not reached the age of 21 years shall not possess any alcoholic beverage for the purpose of personal consumption. An alcoholic beverage is any beverage containing one-half of one percent or more alcohol by volume.

Except as prohibited by this section, (t)he legislature may by law establish a liquor control commission which, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof. The legislature may provide for an excise tax on such sales. Neither the legislature nor the commission may authorize the manufacture or sale of alcoholic beverages in any county in which a majority of the electors voting thereon shall prohibit the same.

History: Const. 1963, Art. IV, § 40, Eff. Jan. 1, 1964; Am. Initiated Law, approved Nov. 7, 1978, Eff. Dec. 23, 1978.

Former constitution: See Const. 1908, Art. XVI, § 11.

§ 41 Lotteries.

Sec. 41. The legislature may authorize lotteries and permit the sale of lottery tickets in the manner provided by law. No law enacted after January 1, 2004, that authorizes any form of gambling shall be effective, nor after January 1, 2004, shall any new state lottery games utilizing table games or player operated mechanical or electronic devices be established, without the approval of a majority of electors voting in a statewide general election and a majority of electors voting in the township or city where gambling will take place. This section shall not apply to gambling in up to three casinos in the City of Detroit or to Indian tribal gaming.

History: Const. 1963, Art. IV, § 41, Eff. Jan. 1, 1964; Am. H.J.R. V, approved May 16, 1972, Eff. July 1, 1972; Am. Init., approved Nov. 2, 2004, Eff. Dec. 18, 2004.

Former constitution: See Const. 1908, Art. V, § 33.

§ 42 Ports and port districts; incorporation, internal.

Sec. 42. The legislature may provide for the incorporation of ports and port districts, and confer power and authority upon them to engage in work of internal improvements in connection therewith.

History: Const. 1963, Art. IV, § 42, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. VIII, § 30.

§ 43 Bank and trust company laws.

Sec. 43. No general law providing for the incorporation of trust companies or corporations for banking purposes, or regulating the business thereof, shall be enacted, amended or repealed except by a vote of two-thirds of the members elected to and serving in each house.

History: Const. 1963, Art. IV, § 43, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. XII, § 9.

§ 44 Trial by jury in civil cases.

Sec. 44. The legislature may authorize a trial by a jury of less than 12 jurors in civil cases.

History: Const. 1963, Art. IV, § 44, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. V, § 27.

§ 45 Indeterminate sentences.

Sec. 45. The legislature may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences.

History: Const. 1963, Art. IV, § 45, Eff. Jan. 1, 1964.

Former constitution: See Const. 1908, Art. V, § 28.

Exhibit 3

or for any individuals or association of individuals, not incorporated or authorized by the laws of this state, to effect insurance against fire, inland, marine, life, casualty, or other risks, or which shall have been received by any person for such company or agent, or shall have been agreed to be paid for any insurance effected, or agreed to be effected or procured by such company or agent, or against fire, inland, marine, life, casualty, or other risks, although such companies, associations, or individuals may be incorporated or authorized for that purpose by the laws of any other state of the United States, or of any foreign government. The state treasurer, on receiving such tax from any company shall issue therefor duplicate receipts, one of which he shall deliver to the company, and the other shall be filed with said commissioner.

This act is ordered to take immediate effect.

Approved December 13, 1933.

[No. 8.]

AN ACT to create a liquor control commission for the control of the alcoholic beverage traffic within the state of Michigan, and to prescribe its powers, duties and limitations; to provide for the control of the alcoholic liquor traffic within the state of Michigan and the establishment of state liquor stores; to provide for the licensing and taxation thereof, and the disposition of the moneys received under this act; to provide for the enforcement and to prescribe penalties for violations of this act; to provide for the confiscation and disposition of property seized under the provisions of this act; to provide a referendum in certain cases; and to repeal certain acts and parts of acts, general, local and special, and certain ordinances and parts of ordinances.

The People of the State of Michigan enact:

Alcoholic liquors; regulation of traffic, penalty for intentional nonenforcement.

Section 1. Scope of act. On and after the effective date of this act, it shall be lawful to manufacture for sale, sell, offer for sale, keep for sale, possess and/or transport any alcoholic liquor, as hereinafter defined, including alcoholic liquor used for medicinal, mechanical, chemical or scientific purposes and wine for sacramental purposes, subject to the terms, conditions, limitations and restrictions contained herein, and only as provided for in this act.

Except as by this act otherwise provided, the commission shall have the sole right, power and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within the state of Michigan, including the manufacture, importation, possession, transportation and sale thereof.

No rule, regulation and/or order made by the commission shall unreasonably discriminate against Michigan manufacturers of alcoholic liquor.

The sheriffs of the several counties and their deputies and the village marshals, constables, officers or members of the village or city police and members of the department of state police, and inspectors of the commission, are hereby empowered and it is hereby made their duty to see that the provisions of this act and the rules and regulations made or authorized by said commission are enforced within their respective jurisdictions. It shall be their special duty to use their utmost efforts to repress and prevent crime and the violation of any of the provisions of this act. Any officer within the above enumeration who shall wilfully neglect or refuse to perform the duties imposed upon him by this section shall be guilty of a misdemeanor and upon convic-

tion shall be fined not to exceed five hundred dollars or imprisoned in the county jail not more than ninety days, or both.

Construction of terms.

Sec. 2. Definitions. The words and phrases used in this act shall be construed as follows, unless the context shall otherwise require:

"Alcoholic liquor" to include any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether or not medicated, proprietary, patented, and by whatever name called, containing one-half of one per cent or more of alcohol by volume which are fit for use for beverage purposes. The commission shall define and classify alcoholic liquor according to their alcoholic content as belonging to one of the varieties hereinafter defined.

"Beer" to mean any beverage obtained by alcoholic fermentation of an infusion or decoction of barley, malt, hops and/or other cereal in potable water.

"Wine" to mean the product made by the normal alcoholic fermentation of the juice of sound, ripe grapes, or any other fruit with the usual cellar treatment, and containing not more than sixteen per cent of alcohol by volume. The term "wine" shall include fermented fruit juices other than grapes.

"Spirits" to mean any beverage which contains alcohol obtained by distillation, mixed with potable water and other substances in solution and includes, among other things, wine containing an alcoholic content of over sixteen per cent by volume.

"Alcohol" to mean the product of distillation of fermented liquid, whether rectified or diluted with water or not, whatever may be the origin thereof. It does not mean ethyl and/or industrial alcohol, diluted or not, that has been denatured or otherwise rendered unfit for beverage purposes.

"Bar" to mean a barrier or counter over which any alcoholic liquor may be passed or served directly to customers.

"Beer garden" to mean a place enclosed and shall be either without or in whole or in part within a building, which enclosure shall have an area on a single level of not less than three thousand square feet. A "garden" may or may not sell food habitually to persons, but all food or beer sold therein shall be served only to persons seated at tables.

"Brewer" to mean any person duly licensed to manufacture and sell beer.

"Citizen" to mean any person not less than twenty-one years of age who is a citizen of the United States of America.

"Club" to mean an association whether incorporated or unincorporated, the majority of whose members shall be citizens, for the promotion of some common object, (not including associations organized for any commercial or business purpose, the object of which is money profit) owning, hiring or leasing a building, or space in a building, of such extent and character as in the judgment of the commission may be suitable and adequate for the reasonable and comfortable use and accommodation of its members and their guests. Such club shall file with the commission annually, within ten days of February first of each year, a list of the names and residences of its members, and similarly file, within ten days of the election of any additional member, his name and address, and that its aggregate annual membership fees or dues and other income, exclusive of any proceeds of the sale of alcoholic liquor, are sufficient to defray the annual rental of its leased or rented premises, or, if such premises are owned by the club, are sufficient to meet the taxes, insurance, repairs, and the interest on any mortgage thereon. The affairs and management of the club shall be conducted by a board of directors, executive committee, or similar body chosen by the members. No member or any officer, agent or employe of the club shall be paid, or directly or indirectly receive in the form of salary or other compensation, any profits from

the disposition or sale of alcoholic liquor to the club or to the members of the club, beyond the amount of such salary as may be fixed and voted at meetings by the members or by its directors or other governing body and as reported by the club to the commission, within three months after such meeting.

"Commission" to mean the liquor control commission herein provided for.

"Distiller" to mean any person duly licensed to manufacture and sell spirits and/or alcohol of any kind.

"Hotel" to mean a building which in the judgment of the commission has been regularly used and kept open as such in a bona fide manner for the feeding and lodging of guests, where all who conduct themselves properly and who are able and ready to pay for such services are received if there be accommodations for them. Said hotel must be prepared to show that the major portion of its receipts is derived from the renting of rooms and the sale of food. The commission may require that said hotel shall have been maintained as such for a period of one year prior to the issuance of the license. For license purposes "hotels" in cities of fifty thousand population and less than one hundred seventy-five thousand population shall contain not less than twenty-five permanent bedrooms and in cities of one hundred seventy-five thousand population or over shall contain not less than fifty permanent bedrooms within one structure for lease to persons, and shall be adequately equipped to serve meals to not less than one hundred persons at one time, in a cafeteria and/or dining room provided for that purpose. Any hotel in a city, village or township of less than one hundred thousand population which does not contain at least twenty-five permanent bedrooms, but shall be adequately equipped to serve meals to not less than twenty-five persons at one time in a public cafeteria and/or dining room provided for that purpose, may apply to the commission setting forth the special facts and circumstances, and the commission may make an exception and grant such petitioner a hotel license. Class "A" hotels are those hotels, licensed under this act to sell beer and wine. Class "B" hotels are those hotels, licensed under this act to sell beer, wine and spirits.

"License" to mean a contract between the commission and the licensee granting authority to said licensee to manufacture and sell, or sell, or warehouse any alcoholic liquor in the manner provided by this act.

"Manufacturer" to mean any person engaged in the manufacture of any alcoholic liquor, and among others, includes a distiller, a rectifier, a wine maker and a brewer.

"Person" to mean any person, firm, partnership, association or corporation.

"Residence" to mean the premises where a person resides, permanently or temporarily.

"Restaurant" to mean a place located in a permanent building or on a passenger train or passenger vessel or aircraft, provided with space and accommodations wherein, in consideration of the payment of money, hot meals are habitually prepared, sold and served to persons at noon and at evening as the principal business of the place, except as hereinafter provided: *Provided, however,* That this section shall not be construed to include drug, candy and/or confectionery stores. Class "A" restaurants are those restaurants that elect to take out a tavern license, governed by tavern restrictions, but not limited by square feet area, and which serve either a noon or evening meal. Class "B" restaurants are those restaurants where both beer and wine are sold, and which serve hot meals at noon and evening. Class "C" restaurants are those restaurants where beer, wine and spirits may be sold under this act for consumption on the premises, and which in the judgment of the commission shall have been regularly and in a bona fide manner used and

kept open for the serving of meals to guests for compensation. Said restaurant must show that the major portion of its receipts is derived from the sale of food. Such restaurant shall have suitable kitchen facilities connected therewith, containing conveniences for cooking an assortment of foods which may be required for ordinary meals. "Meals" shall mean the usual assortment of foods commonly ordered at various hours of the day; the service of such food and victuals as sandwiches, salads, etc., shall not be regarded as compliance with this requirement.

"Retailer" to mean any person who customarily sells in small quantities to the consumer.

"Sale" to include exchange, barter or traffic, furnishing or giving away any alcoholic liquor. In case of a sale in which a shipment or delivery of any alcoholic liquor is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employe, and the prosecution for such sale may be had in the county or city where the seller resides, or from which the shipment is made or at the place of delivery.

"Special license" to mean a contract between the commission and the special licensee granting authority to said licensee to sell beer and/or wine: *Provided, however,* That such license shall be granted only to such persons and such organizations and for such period of time as the commission shall determine.

"Specially designated distributor" to mean a person engaged in an established business licensed and paid by the commission to distribute alcoholic liquor other than beer in the original package for the commission for consumption off the premises.

"Specially designated merchant" to mean any person to whom the commission grants a license to sell beer and/or wine at retail for consumption off the premises of such licensed place.

"State liquor store" to mean a store established by the liquor control commission under this act for the sale of alcoholic liquor in the original package for consumption off the premises.

"Tavern" to mean any place licensed to sell at retail beer for consumption on the premises only, in any place of less than three thousand square feet in area.

"Vendor" to mean a person licensed by the commission under this act to sell alcoholic liquor.

"Vehicle" to mean any means of transportation by land, by water, or by air.

"Warehouse" to mean any premises or place primarily constructed or used or provided with facilities for the storage in transit or other temporary storage of perishable goods and/or for the conduct of a warehousing business.

"Wholesaler" to mean any person who customarily sells to retailers or jobbers rather than to the consumer.

"Wine maker" to mean any person duly licensed to manufacture and sell at wholesale wine, with no restriction as to the alcoholic content.

Alcoholic liquor; purchase, sale and delivery by commission; beer in case lots.

Sec. 3. Alcoholic liquor; delivery and sale by commission. Excepting as otherwise provided in this act, no sale and/or delivery of alcoholic liquor, other than beer, shall be made in this state unless such sale and/or delivery be made by the commission, or its authorized agent or distributor. All alcoholic liquor other than beer, for distribution in this state, shall originally be purchased by and/or imported into the state by the commission: *Provided,* That nothing in this act shall prohibit any natural person, not a minor, from purchasing beer in not less than case lots directly from the manufacturer,

to be delivered to him by the manufacturer at the plant or at his home, subject to the reasonable regulation of the commission.

Fruit juices, preparations and other exceptions to act.

Sec. 4. Exceptions to act. The provisions of this act shall not be construed to prevent the manufacture of cider from fruit, for the purpose of making vinegar, and non-intoxicating cider and fruit juice for use and sale, and cider and fruit juice shall be deemed non-intoxicating within the meaning of this act when used and/or sold within thirty days after the manufacture thereof; and this act shall not apply to wine or cider of any alcoholic content made on the premises by the owner or lessee of such premises provided such premises are used and occupied by such owner or lessee as a dwelling and such wine or cider is made for family use and home consumption; or to prevent the sale or gift, or keeping and storing for sale by druggists and general merchants and others of any of the medicinal preparations manufactured in accordance with the formulas prescribed by the United States pharmacopoeia and national formulary, patent or proprietary preparations, and other bona fide medicinal and technical preparations, which contain no more alcohol than is necessary to extract the medicinal properties of the drugs contained in such preparations; and no more alcohol than is necessary to hold the medicinal agents in solution and to preserve the same, which are manufactured and sold as medicine and not as beverages, are unfit for use for beverage purposes, and the sale of which does not now require the payment of a United States liquor dealer's tax; or to prevent the manufacture and sale of tinctures or of toilet, medicinal and antiseptic preparations and solutions not intended for internal human use nor to be sold as beverages, and which are unfit for beverage purposes, and upon the outside of each bottle, box or package of which is printed in the English language, conspicuously and legibly, the quantity by volume of alcohol in such preparations; or to prevent the manufacture and keeping for sale of the food product known as flavoring extracts which shall be so manufactured and sold for cooking, culinary or flavoring purposes, and are unfit for use as a beverage or for beverage purposes: *Provided,* That it shall not be lawful to manufacture or sell any toilet, medicinal or antiseptic preparations or solutions, or any flavoring extracts or patent or proprietary medicines or preparations, the manufacture and sale of which now requires the payment of a United States liquor dealer's tax, except as herein provided: *Provided further,* That nothing in this act shall apply to the manufacture and/or sale of ethyl, mechanical or industrial alcohol, not used for or made unfit for beverage purposes: And *provided further,* That this act shall not apply to the purchase of alcoholic liquor as defined in this act, for use in the manufacture of toilet, medicinal or antiseptic preparations or solutions, or any flavoring extract or patent or proprietary medicines or preparations, by a manufacturer using such alcoholic liquor exclusively for such manufacturing purposes and duly licensed therefor by the commission; said license to expire on May first following the date of issuance, issued on the payment of an annual fee of ten dollars and the furnishing of such bond or bonds as the commission may require running to the people of the state of Michigan, for the faithful performance of the conditions of the license and compliance with the provisions of this act.

Liquor control commission; organization, compensation, disqualification.

Sec. 5. Commission; creation. A commission to be known and designated as the liquor control commission of the state of Michigan is hereby created. The commission shall consist of five members, three members, not more than two of whom shall be members of the same political party, to be appointed by the governor with the advice and consent of the senate, and the governor and secretary of state as ex-officio members. Each appointed member of the commission shall devote his entire time in the performance of the duties of

his office. The term of the several appointed commissioners shall be three years each, except the members first appointed. In appointing the first commissioners the governor shall designate one commissioner for the term of one year, one commissioner for the term of two years and one commissioner for the term of three years. Each appointed member of said commission shall qualify by taking and filing the constitutional oath of office and shall hold office until the appointment and qualification of his successor. The appointed members of the commission shall not be removed from office by the governor except for malfeasance, misfeasance or neglect in office.

In the event of a vacancy or vacancies in the appointed membership of the commission the governor shall appoint in like manner a successor or successors to fill the unexpired term.

The governor and secretary of state shall have a vote on the commission. A quorum for the transaction of business shall consist of two or more of the appointed commissioners and the governor or secretary of state.

Each of the appointed commissioners shall receive an annual salary of five thousand dollars each and each member of the commission shall be entitled to actual and necessary expenses while on the business of the commission.

The commission shall annually designate one of its members to act as chairman of the commission.

The soliciting and procuring of an endorsement of any member of the legislature for the appointment to any position under the control of the commission shall disqualify the person receiving such endorsement from holding the position.

Same; assistants and employes, bonds.

Sec. 6. Same; assistants and employes. The commission may employ such assistants, clerks, stenographers and employes and experts as it may deem necessary and fix their compensation, and incur such other expenses as are necessary to carry out the provisions of this act. Such assistants and employes shall be entitled to actual and necessary traveling and other expenses while on the business of the commission, when authorized and approved by the commission.

It shall be the duty of the commission to secure from all members and employes of the commission handling money, and specially designated distributors, a bond or bonds, said bond or bonds to be executed by any surety company or companies authorized to do business in the state of Michigan or in the discretion of the commission by approved personal surety adequate to guarantee to the state the proper handling and accounting of such money.

Same; rules and regulations.

Sec. 7. Same; rules and regulations. The commission shall adopt rules and regulations governing the carrying out of this act and supplemental thereto.

Same; seal, orders, certified copies.

Sec. 8. Same; seal, orders and records. The commission shall adopt a suitable seal of which all courts of the state shall take judicial notice, and all proceedings, orders, licenses and official acts shall be authenticated thereby. Certified copies of the orders and records of said commission shall be prima facie evidence of the acts of said commission in any court of this state.

Same; offices, branches.

Sec. 9. Same; offices. The commission shall be authorized to establish throughout the state of Michigan not to exceed four branch offices. It shall be the duty of the board of state auditors to provide suitable offices, supplies and equipment for the commission in the city of Lansing and at the branch

offices established by the commission under this act. The expense of the same shall be paid by the commission in the manner hereinafter provided.

Same; revolving fund; maximum.

Sec. 10. Same; revolving fund. The commission is hereby authorized to establish and maintain in its own name a special account or accounts in the nature of a revolving fund not to exceed one million dollars at any one time.

Same; interest of members or employes.

Sec. 11. Same; interest of members. No member of the commission or employe thereof shall be pecuniarily, directly or indirectly, interested in the manufacture, warehousing, sale, distribution or transportation, or selling or furnishing of any equipment, furnishings or refrigeration used in the manufacture or sale of any alcoholic liquor within the state of Michigan.

Same; civil liability of commission, members.

Sec. 12. Same; liability of commission. The commission, or any member of the commission, shall not be personally liable for any action at law for damages sustained by any person because of any action performed or done by the commission, or any member of the commission, in the performance of their respective duties in the administration and in the carrying forth of the purposes and provisions of this act.

Same; establishment of state liquor stores.

Sec. 13. The commission may establish state liquor stores throughout the state of Michigan: *Provided,* That in counties under seventy-five thousand population according to the last federal census there shall be no more than one store in any such county: *Provided further,* That in counties of seventy-five thousand population or over according to the last federal census such stores shall not exceed one for each seventy-five thousand population or major fraction thereof according to the last federal census.

Same; specially designated distributors.

Sec. 14. Same; specially designated distributors. The commission may license any hotel or established merchant, who or which shall be if a natural person, a citizen of this state and if a corporation, shall be organized under the laws of the state of Michigan, in such places as it may designate to sell alcoholic liquor for consumption off the premises. Such distributors shall be paid by the commission a sum to be fixed by the commission: *Provided, however,* That in no case shall such payment exceed the sum of twelve hundred dollars per annum. Where alcoholic liquor is sold by specially designated distributors, it shall be sold at a price to be fixed by the commission and without profit to the distributor, and shall be sold in accordance with the rules and regulations of the commission.

Same; handling of liquor, borrowing power.

Sec. 15. Same; handling of liquor, borrowing power. The commission shall have the right and power to buy, have in its possession and sell in its own name all alcoholic liquor for distribution as provided in sections thirteen and fourteen. It shall be the duty of the commission to supply such brand or brands of alcoholic liquors as shall be demanded by the public: *Provided, however,* That if any such brands as are demanded are not manufactured within the borders of the United States or are not readily obtainable within the borders of the United States, then such orders shall be filled by the commission at the entire expense of the person placing such order, plus not more than twenty per cent gross profit. The commission may lease or occupy any building or land required for its operation, and by and with the consent of the state administrative board may borrow, subject to constitutional limitations, money to inaugurate and carry on its work, guaranteeing the payment thereof and the interest thereon from the proceeds derived from this act.

Same; prices, profits, sales for cash.

Sec. 16. Same; cash sales, price. The commission shall establish a uniform price or prices for the sale of alcoholic liquor in state liquor stores and by specially designated distributors. Such price or prices shall not return a gross profit to the commission in excess of forty per cent: *Provided, however,* That wine manufactured in Michigan from the juice of grapes grown in Michigan shall be sold at prices that shall not exceed the cost to the commission of buying and distributing such wine, and shall in no case exceed a gross profit to the commission of ten per cent. On the sale of alcoholic liquors made by state liquor stores or specially designated distributors to establishments licensed to sell for consumption on the premises, there shall be allowed a discount of fifteen per cent deducted from the sale price as established by the commission, but in no case shall such discount reduce the price below the cost to the commission plus a ten per cent gross profit. Every sale of alcoholic liquor made in state liquor stores and by specially designated distributors shall be for cash only.

Licenses; issuance, construction as contract, transfer, local approval and revocation.

Sec. 17. Licenses; contract, transfer. The commission is hereby authorized to issue licenses in its discretion, as provided in this act, upon the payment of the fees provided in section nineteen and the filing of the bonds required in section twenty-two. The commission shall issue licenses to manufacturers only when a majority of the stockholders are citizens and only when twenty-five per cent or more of the capital stock is owned by citizens of the state of Michigan. Such licenses shall expire on May first following the date of issuance. All licenses issued under this act shall be construed to be a contract between the commission and the licensee, and shall be signed by both parties. The commission is authorized to grant part year licenses for a proportionate part of the license fee hereinafter specified. Licenses may be transferred with the consent of the commission: *Provided, however,* That all applications for licenses to sell beer and/or wine and/or spirits for consumption on the premises shall be approved by the local legislative body in which said applicant's place of business is located before being granted a license by the commission: *Provided further,* That upon request of the local legislative body, the commission shall revoke the license of any licensee granted a license to sell beer and/or wine and/or spirits for consumption on the premises: *Provided further,* That these provisos shall not apply in counties having a population of five hundred thousand or over, according to the last federal census.

Same; under beer law.

Sec. 18. Same; licenses under beer law. Any person holding a license under act number sixty-four of the public acts of nineteen hundred thirty-three may continue to operate under such license until May first, nineteen hundred thirty-four; in the event such person desires to manufacture and/or sell wine under the provisions of this act but by virtue of a license heretofore issued for such purposes, he shall pay to the commission such added fee as shall make the total comply with the provisions of this act, prorated over the unexpired term. The commission shall have the same authority in granting any such additional license as is vested in the commission in issuing new licenses under this act.

Same; fees; prohibited furnishing of spirits on Sundays and election days.

Sec. 19. Same; fees. The following license fees shall be paid at the time of filing applications:

1. Manufacturers of spirits, five thousand dollars;

2. Manufacturers of beer, fifty dollars per thousand barrels production annually with a minimum fee of one thousand dollars;

3. Wine makers, blenders and rectifiers of wine, two hundred and fifty dollars;

4. Dining cars or other railroad or pullman cars, twenty-five dollars per car;

5. Wholesale vendors other than manufacturers of beer, one hundred dollars;

6. Watercraft, licensed to carry passengers, a minimum fee of fifty dollars and a maximum fee of five hundred dollars per year computed on the basis of one dollar per person per passenger capacity;

7. Specially designated merchants, for selling beer and/or wine for consumption off the premises only, but not at wholesale, twenty-five dollars for each and every location regardless of the fact that such a location may be a part of any system or chain of merchandising;

8. Hotels of Class "A" selling beer and wine, a minimum fee of one hundred and fifty dollars, and for all bedrooms in excess of twenty, one dollar for each additional bedroom, but not to exceed five hundred dollars;

Hotels of Class "B" selling beer, wine and spirits, a minimum fee of three hundred dollars, and for all bedrooms in excess of twenty, two dollars for each additional bedroom, but not to exceed one thousand dollars;

9. Taverns, one hundred dollars;

10. Restaurants of Class "A" selling beer only, one hundred dollars;

Restaurants of Class "B" selling beer and wine, two hundred dollars;

Restaurants of Class "C" selling beer, wine and spirits, five hundred dollars;

11. Beer gardens selling beer only, two hundred dollars;

12. Clubs selling wine and/or beer, one hundred dollars for clubs having one hundred fifty or less duly accredited members and one dollar for each additional member: *Provided, however,* That the maximum fee shall not exceed five hundred dollars for any one club;

13. Warehouses, to be fixed by the commission with a minimum fee for each warehouse of twenty-five dollars;

14. Special licenses, a fee of not less than two nor more than five dollars per day, in the discretion of the commission.

15. Druggists and registered pharmacists for the sale of alcoholic liquor, other than as specially designated merchants, five dollars;

16. Aircraft selling beer and/or wine, to be fixed by the commission.

17. No license shall be granted to sell spirits in any form at retail for consumption on the premises in excess of one license for each seven hundred fifty of population, or major fraction thereof, according to the last federal census.

18. Any retail vendor licensed under this act to sell for consumption on the premises shall be eligible to be licensed as a specially designated merchant upon the payment of the specially designated merchant's license fee.

19. No licensee enumerated in this section or any other person shall sell at retail, give away or furnish any spirits on any Sunday, primary election day, general election day or municipal election day. Any violation of this subsection shall constitute a misdemeanor: *Provided,* That this subsection shall not apply to spirits served to bona fide guests in the residence of any person or sold or furnished for medicinal purposes as provided for in this act. The legislative body of any city, village or township may, by resolution or ordinance, prohibit the sale of alcoholic liquor for consumption on the premises on any Sunday, legal holiday, primary election day, general election day or municipal election day.

Same; revocation and suspension, procedure.

Sec. 20. Same; revocation and suspension. The commission shall have the right and power to suspend or revoke any and all licenses upon a violation of any of the provisions of this act or any of the rules and regulations adopted by the commission hereunder.

The commission shall provide the procedure by which any licensee feeling aggrieved by any such suspension or revocation may have a hearing for the purpose of laying any facts or reasons before said commission why said suspension or revocation should be modified or rescinded. Such right, however, shall not be interpreted by any court as curtailing, removing or annulling the right in said commission to so suspend or revoke licenses as hereby given it. The licensee shall have no right of appeal from the final determination of the commission, except by writ of certiorari to the proper court. Notice of the order of suspension or revocation of a license shall be given in the manner prescribed by the commission. The suspension or revocation of a license by the commission shall not prohibit the institution of criminal prosecutions for the violations of the provisions of this act. The institution of criminal prosecutions for such violations, or the acquittal or conviction of any person thereunder, shall not prevent the suspension or revocation of licenses by the commission.

Same; forfeiture of privileges upon revocation.

Sec. 21. Same; forfeiture of privileges under. Any and all privileges conferred by a license issued under this act shall be forfeited on the revocation of such license and the commission shall seize any and all alcoholic liquor found in the possession of the licensee. The commission shall remit to such licensee the purchase price less ten per cent, paid by the licensee to the commission for all alcoholic liquor seized. All other alcoholic liquor seized shall be disposed of by order of the commission and no payment shall be made therefor.

Same; bonds.

Sec. 22. Same; bonds. As a condition precedent to the approval and granting of any license, and annually thereafter, the following persons shall make, execute and deliver to the commission a bond or bonds, said bond or bonds to be executed by any surety company or companies authorized to do business in the state of Michigan or in the discretion of the commission by approved personal surety running to the people of the state of Michigan, in the following amounts:

1. Manufacturers, a bond or bonds in the sum of five thousand dollars; wholesalers, a bond or bonds in the sum of two thousand five hundred dollars; warehousemen, a bond or bonds in the sum of two thousand five hundred dollars; specially designated merchants, a bond or bonds in the sum of one thousand dollars, for the faithful performance of the conditions of the license issued and compliance with the provisions of this act;

2. Retailers of beer and/or wine for consumption on the premises, a bond or bonds in the sum of not less than three thousand nor more than five thousand dollars, in the discretion of the commission; retailers of spirits for consumption on the premises, a bond or bonds in the sum of not less than five thousand nor more than ten thousand dollars, in the discretion of the commission, conditioned that any such retailer will not directly or indirectly, by himself, his clerk or agent or servant at any time sell, furnish, give or deliver any alcoholic liquor to a minor except as provided in this act, nor to any adult person whatever who is at the time intoxicated, and that he will pay all damages actual and exemplary that may be adjudged to any person or persons for injuries inflicted upon him or them either in person or property or means of support or otherwise, by reason of his selling, furnishing, giving or delivering any such alcoholic liquor.

Any manufacturer who has given the bond or bonds herein provided for shall not be required to give any additional bond or bonds for any warehouse he may own and/or operate.

Vendors; qualifications.

Sec. 23. Vendors. Vendors shall be, when a corporation, only a corporation authorized to do business under the laws of the state of Michigan; when a firm or partnership, only when the majority of said firm or partnership are American citizens who have resided in the state of Michigan for one year, and when an individual, an American citizen residing in the state of Michigan for at least one year.

Same; classes.

Sec. 24. Same; classes. The following classes of vendors shall have the right to sell the several alcoholic liquors as provided for in this section:

1. Taverns wherein beer may be sold for consumption on the premises only;

2. Restaurants of Class "A" wherein beer may be sold for consumption on the premises only;

Restaurants of Class "B" wherein beer and wine may be sold for consumption on the premises only;

Restaurants of Class "C" wherein beer, wine and spirits may be sold for consumption on the premises only;

3. Beer gardens wherein beer may be sold for consumption on the premises only;

4. Clubs wherein beer and wine may be sold for consumption on the premises only, and spirits may be kept and furnished to bona fide members, who have attained the age of twenty-one years;

5. Hotels of Class "A" wherein beer and wine may be sold for consumption on and off the premises;

Hotels of Class "B" wherein beer, wine and spirits may be sold for consumption on and off the premises;

6. Specially designated merchants, wherein beer and wine may be sold for consumption off the premises only;

7. Specially designated distributors wherein beer, wine and alcoholic liquor may be sold for consumption off the premises only;

8. Manufacturers wherein beer may be sold for consumption off the premises only, and wherein alcoholic liquor other than beer may be sold only to the commission;

9. Special licenses where beer and wine may be sold for consumption on the premises only;

10. Registered pharmacists and registered druggists to sell alcoholic liquor other than beer purchased from the commission for medicinal, mechanical, scientific, chemical or sacramental purposes, for consumption off the premises only;

11. Dining cars or other railroad or pullman cars, watercraft or aircraft, wherein alcoholic liquor may be sold for consumption on the premises only, subject to rules and regulations of the commission.

Printed price list, posting.

Sec. 25. Printed price list. Alcoholic liquor for consumption on the premises shall be sold only in accordance with a printed price list posted conspicuously in a prominent place on the premises.

Table service; room service.

Sec. 26. Table service. No alcoholic liquor shall be served to a person on the premises unless said person is seated at a table; nor served over a bar for consumption thereat: *Provided, however,* That alcoholic liquor may be served by any hotel licensed individually under the provisions of this act in the room of a bona fide guest thereof. No spirits shall be consumed in any place licensed under this act to sell beer and/or wine and not licensed to sell spirits.

Food; purchase, giving away.

Sec. 27. Food; purchase, giving away. No regulation shall be made requiring the purchase or serving of food with the purchase of alcoholic liquor, nor shall any food of any kind be given away in connection with the sale of alcoholic liquor.

Removal of liquor from premises where sold for consumption thereon.

Sec. 28. Removal of liquor from premises. Alcoholic liquor sold by vendors for consumption on the premises shall not be removed therefrom.

Gifts; sales to intoxicated person.

Sec. 29. Gifts; sales to intoxicated person. No vendor shall give away any alcoholic liquor of any kind or description at any time in connection with his business except manufacturers for consumption on the premises only. No vendor shall sell any alcoholic liquor to any person in an intoxicated condition.

Aid to vendor.

Sec. 30. Aid to vendor. No manufacturer, warehouseman or wholesaler shall aid or assist any other vendor by gift or loan of money or property of any description or other valuable thing, or by the giving of premiums or rebates, and it shall be unlawful for any vendor to accept the same.

Interest in business of vendor.

Sec. 31. Interest in business of vendor. No manufacturer, warehouseman or wholesaler shall have any financial interest, directly or indirectly, in the establishment, maintenance, operation or promotion of the business of any other vendor. No manufacturer, warehouseman or wholesaler, nor any stockholder thereof shall have any interest by ownership in fee, leasehold, mortgage or otherwise, directly or indirectly, in the establishment, maintenance, operation or promotion of the business of any other vendor. No manufacturer, warehouseman or wholesaler shall have any interest directly or indirectly by interlocking directors in a corporation or by interlocking stock ownership in a corporation in the establishment, maintenance, operation, or promotion of the business of any other vendor. No person shall buy the stocks of any manufacturer, warehouseman or wholesaler and place such stock or stocks in any portfolio under any arrangement, written trust agreement, or any form of investment trust agreement and issue participating shares based upon such portfolio, trust agreement or investment trust agreement, and sell such participating shares within the state of Michigan.

Traffic in wine, spirits, alcohol and alcoholic liquor by licensees only.

Sec. 32. Compliance with act; necessity. No person, directly or indirectly, himself or by his clerk, agent or employe shall manufacture, manufacture for sale, sell, offer or keep for sale, barter, furnish, or import, import for sale, transport for hire, transport for sale, or possess for sale any wine, spirits, alcohol and/or alcoholic liquor unless such person shall have fully complied with the provisions of this act and shall have been duly licensed by this commission.

Age of purchaser.

Sec. 33. Age of purchaser. No alcoholic liquor, other than beer, shall be sold to any person unless he shall have attained the age of twenty-one years; and no beer shall be sold to any person unless he shall have attained the age of eighteen years.

Consumption of alcoholic liquors; public highways, parks and places of amusement.

Sec. 34. Public highways, public parks and places of amusement. No alcoholic liquor shall be consumed on the public highways. No alcoholic liquor, except beer and/or wine shall be consumed in public parks and places of amusement not licensed to sell for consumption on the premises.

Same; state military reservation.

Sec. 35. The commanding general, Michigan national guard, is hereby authorized to publish by general order such regulations and restrictions as to the transportation, possession, sale and use of liquors of any alcoholic content on the state military reservation during the field training periods of the Michigan national guard, either in state or federal service, as shall in his opinion be for the best interests of the military service.

Druggists and pharmacists; sales of liquor.

Sec. 36. Druggists and pharmacists; sales of liquor. Every registered druggist or pharmacist keeping a drug store, and licensed under this act, may, by himself, or his clerk, who is a registered pharmacist or a registered druggist, sell alcoholic liquor in the following cases:

1. Alcoholic liquor upon the written prescription, as herein provided, of a physician who is lawfully and regularly engaged in the practice of his profession in Michigan;

2. Alcoholic liquor for medicinal, mechanical, chemical or scientific purposes, to any hospital, infirmary, medical or educational institution where such liquors are used only for medicinal, mechanical, chemical and scientific purposes, upon the sworn, written, signed and dated application of the superintendent thereof: *Provided, however,* That the commission shall issue permits to the proper official of any hospital, infirmary, medical or educational institutions for the purchase of such alcoholic liquor direct from the manufacturers or distilling company or government bonded warehouses tax free;

3. Alcoholic liquor to any dentist or physician licensed to practice in the state of Michigan under act number two hundred thirty-seven of the public acts of eighteen hundred ninety-nine or under act number one hundred sixty-two of the public acts of nineteen hundred three as amended, who is lawfully or legally engaged in the practice of his profession, upon the sworn, written, signed and dated application of such dentist or physician, personally presented;

4. Alcohol to any veterinary surgeon who is lawfully or legally engaged in the practice of his profession in Michigan, for the use in the practice of his profession, upon the sworn, written, signed and dated application of such veterinary surgeon, personally presented;

5. Wine for sacramental purposes to any clergyman having charge of a church, or to any recognized official thereof upon the sworn, written, signed, and dated application of such clergyman or official. The commission shall issue a permit upon request to any clergyman or duly designated officer of any established church to purchase wines for sacramental purposes direct from the manufacturer or importer;

6. Ethyl alcohol for mechanical, chemical or scientific purposes, upon the written application of the purchaser, known by such druggist or pharmacist to be a person engaged or employed in such mechanical, chemical or scientific pursuits, which shall be dated, signed and sworn to by the purchaser thereof.

Same; applications and prescriptions.

Sec. 37. Same; applications and prescriptions. All such applications for the purposes above enumerated shall state clearly and specifically the kind and quantity of the alcoholic liquor required and the use to which they are to be put by the person purchasing the same, and that he will not use any of the alcoholic liquor procured thereon for a beverage or for any other use than that stated in the application. All said prescriptions and applications shall be cancelled as soon as filled by the person filling the same, by having the word "cancelled" plainly written or stamped thereon, signed and dated by the person who filled the same, and shall be kept on file by the druggist or

pharmacist for a period of one year and shall be subject to inspection by any officer whose duty it is to enforce the provisions of this act. It shall be unlawful to furnish any liquors more than once upon any such prescription or application.

Same; records, administration of oaths.

Sec. 38. Same; records. It shall be the duty of the druggist to register in an alphabetically arranged book, kept exclusively for the purpose, all prescriptions from physicians mentioned herein, in the following order: The name of the physician, the name of the person prescribed for, the quantity and kind of alcoholic liquor. He shall endorse upon the prescription the date upon which it was filled, the name of the druggist filling the prescription or making the sale. The application mentioned in section thirty-seven shall be filed with the prosecuting attorney, and a record thereof made by such druggist in such record book, showing the date of application, by whom made, the quantity and kind of such alcoholic liquor, and when, where and for what purposes and by whom to be used. The applicant shall certify to the same by signing his name thereto in said record book. Such book shall be open at all times to any officer whose duty it is to enforce the provisions of this act. For the purpose of this act, any registered druggist or pharmacist making such sale shall have authority to administer the oaths herein required.

Same; license.

Sec. 39. Same; license. No druggist shall sell alcoholic liquor on prescription or application, as provided herein, until he shall have procured a license which may be issued by the commission.

Beer; inspection and taxation.

Sec. 40. Beer; inspection and taxation. There shall be levied and collected by the commission on all beer an inspection fee at the rate of twenty-five cents per barrel: *Provided, however,* That any manufacturer of this state who shall have during the current year paid for a manufacturer's license issued under this act or under act number sixty-four of the public acts of nineteen hundred thirty-three shall be exempt from payment of the inspection fee: *Provided further,* That any manufacturer duly licensed as aforesaid and who has paid said license fee shall be exempt from payment of any tax imposed under the provisions of act number one hundred of the public acts of nineteen hundred thirty-one or amendments thereto, commonly known as the malt tax act, for all malt products taxed by said act used in its manufacturing process.

There shall be levied and collected by the commission on all beer manufactured and/or sold in this state a tax at the rate of one dollar and twenty-five cents per barrel if sold in bulk, and in like ratio if sold in smaller quantities: *Provided, however,* That the tax imposed by this act upon beer manufactured in this state shall be rebated to such manufacturer upon satisfactory proof being furnished to the commission by affidavit or otherwise, as the commission may determine, that such beer was shipped out of the state for sale and consumption outside the state of Michigan.

For purposes of taxation a barrel shall be construed to contain thirty-one gallons.

Same; failure to pay tax, penalties, collection.

Sec. 41. Same; failure to pay tax. If any person shall fail or refuse to pay the tax required by this act, the commission shall proceed to assess the tax against such person, and such tax shall become due and payable together with such penalty or penalties as the commission shall add, but such penalty or penalties shall not exceed five thousand dollars, upon demand by the commission or some person designated by it. If such tax remains unpaid for fifteen days after such demand has been made, the commission may issue its

warrant under its official seal, directed to the sheriff of any county or other officer, to levy upon and sell the property, either personal or real, of the taxpayer, used in connection with the business for the privilege of doing which the tax is levied, found within his jurisdiction, for the payment of the amount thereof with the added penalties, interest and cost of executing the warrant. Such warrant shall be returned to the commission, together with the money collected, by virtue thereof, within the time therein specified, which shall not be less than twenty nor more than ninety days from the date of the warrant. The sheriff or other officer to whom such warrant shall be directed shall proceed upon the same in all respects, and with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments by a court of record, and shall be entitled to the same fees for his service in executing the warrant, to be collected in the same manner. The state of Michigan, through the commission or some officer or agent designated by it, is hereby authorized to bid for and purchase any property sold under the provisions hereof.

In addition to the mode of collection provided herein, the commission may bring an action at law in the county in which the business or any part thereof is carried on, to collect and recover the amount of taxes, interest and/or penalties due from any taxpayer.

Search warrant; restoration of seized property.

Sec. 42. Search warrant. A search warrant may be issued in accordance with the provisions of chapter sixteen of act number one hundred seventy-five of the public acts of nineteen hundred twenty-seven as amended, being sections seventeen thousand four hundred ninety-two to seventeen thousand five hundred nine of the compiled laws of nineteen hundred twenty-nine. Under such search warrant the officer may seize any alcoholic liquor, containers, implements or conveyances used in connection with the violation of the provisions of this act or any rule or regulation of the commission. All alcoholic liquor, containers, implements or conveyances seized under any such search warrant shall be turned over to the commission by direction of the court or magistrate and shall be disposed of in accordance with the rules and regulations of the commission, which shall guarantee the return of such property, or payment of moneys received for the sale of the same, to the owner unless the owner shall be charged and convicted of the alleged offense or offenses.

Seizures by execution, bankruptcy, payment.

Sec. 43. Seizures by execution or in bankruptcy. In case of seizure of alcoholic liquor under any judgment rendered against the holder of any license, or in the case of insolvency of such licensee, the officer seizing such alcoholic liquor or the trustee in bankruptcy of such licensee, shall deliver to the commission all alcoholic liquor found in the possession of the judgment debtor or bankrupt, as the case may be. The commission shall, within one month after the date of delivery by said officer or trustee in bankruptcy, as the case may be, pay over to such officer or trustee in bankruptcy the purchase price, less ten per cent, paid by such licensee to the commission for all legal alcoholic liquor seized, and the value, less ten per cent, as established by the commission, of other legally acquired alcoholic liquor so delivered. Any illegally acquired alcoholic liquor so delivered shall be disposed of by order of the commission and no payment shall be made therefor.

Liability of vendor.

Sec. 44. Liability of vendor. Any person engaged in the business of selling or keeping for sale alcoholic liquor in violation of the provisions of this act, whether as owner, clerk, agent, servant or employe, shall be equally liable, as principal, both civilly and criminally, for the violation of the provisions of this act, or any person or principal shall be liable, both civilly and criminally,

for the acts of his clerk, servant, agent or employe, for the violation of the provisions of this act.

False and fraudulent statements.

Sec. 45. False and fraudulent statements. Any person who shall make any statement either orally or in writing to the commission for the purpose of inducing the commission to act or for the purpose of inducing the commission to refrain from taking action, which statement is false or fraudulent, and any person who makes any false or fraudulent statement for the purpose of enabling or assisting any person to evade the provisions of this act, shall be guilty of a violation of this act.

Adulterated and misbranded liquors, definitions.

Sec. 46. Adulterated and misbranded alcoholic liquor. Any person who, by himself or by his agent or servant, shall sell, offer for sale, expose for sale, or have in possession with intent to sell, any alcoholic liquor that is adulterated or misbranded within the meaning of this section shall be guilty of a violation of this act. For the purpose of this section alcoholic liquor shall be deemed to be adulterated if it contains any ingredient prohibited by the rules and regulations of the commission. For the purpose of this section alcoholic liquor shall be deemed to be misbranded when not plainly labeled, marked or otherwise designated as shall be prescribed by the rules and regulations of the commission.

Retailers' license fees, disbursement.

Sec. 47. Retailers' license fees, disbursement. The commission shall disburse the proceeds of the retailers' licenses, paid directly to it, quarterly, after deducting not more than fifteen per cent thereof for commission expense, to the city, village or township in which the licensee is located: *Provided, however,* This section shall not include retail license fees collected for railroad or pullman cars, or for watercraft or for aircraft, which license fees shall be disposed of as provided for manufacturers' license fees.

Handling of moneys, monthly report, audit, depository.

Sec. 48. Handling of moneys. All moneys received by the commission under the provisions of this act, except as herein provided, shall be turned over monthly to the state treasurer, less the actual and necessary expenses of the commission for the preceding month. A monthly report thereof shall be made to the state treasurer which shall contain an itemized account of all moneys received and all expenditures made by the commission during the month covered in the report. The state treasurer shall submit such report to the auditor general for audit, who shall certify on the report as to the audit thereof and return the same to the state treasurer. All moneys received by the commission while under the custody of the commission shall be deposited in a depository designated by the state treasurer.

Appropriations.

Sec. 49. Appropriations. All moneys deposited by the commission with the state treasurer, after the payment of the necessary expenses hereinbefore provided for, shall be credited to an emergency fund and are hereby appropriated therefrom for the following purposes:

1. Two thousand dollars to the legislative council to reimburse the council for the expenditures made in studying and preparing this act;

2. One million dollars for the special revolving fund herein provided for;

2a. One hundred thousand dollars for the department of public safety;

3. The balance, unless otherwise appropriated by the legislature, to be loaned by the state administrative board to such public school districts as the said board shall determine to be in emergency need of the same. The state administrative board shall prescribe the terms and manner of the repayment of any such loan and/or may deduct said loan, or any part thereof,

from any sum or sums to which the respective school districts may be entitled to receive under the provisions of act number two hundred thirty-six of the public acts of nineteen hundred thirty-three or any other act or source.

The balance, if any, and any and all sums repaid hereunder shall be credited to the old age pension fund.

Any moneys collected or due under the provisions of act number sixty-four of the public acts of nineteen hundred thirty-three, and not heretofore incumbered, shall be transferred and credited to the revolving fund provided for under this act, and shall be credited against the appropriation made thereto in this section.

Penalties, intent.

Sec. 50. Penalties. Any person, other than persons required to be licensed under this act, who shall violate any of the provisions of this act shall be guilty of a misdemeanor.

Any licensee who shall violate any of the provisions of this act, or any rule or regulation of the commission promulgated hereunder, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than six months or by a fine of not more than five hundred dollars, or both, in the discretion of the court.

Any person, who shall do any act for which a license is required under this act, without first obtaining said license or any person who shall sell any alcoholic liquor in any county which shall have prohibited the sale of alcoholic liquor under the provisions of section fifty-seven hereof, shall be guilty of a felony, punishable by imprisonment in the state prison not more than one year or by a fine of not more than one thousand dollars, or both, in the discretion of the court.

It is the intent of the legislature that the court, in imposing punishment under the provisions of this section, should discriminate between casual or slight violations and habitual sales of alcoholic liquor or attempts to commercialize violations of this act or any of the rules or regulations of the commission promulgated hereunder.

Revocation of licenses, effect.

Sec. 51. Where for any violation of this act, the license for any premises licensed has been revoked, no license shall be thereafter issued for a period of one year after such revocation, for such licensed premises.

Where for any violation of this act, the license to any person issued under this act or act number sixty-four of the public acts of nineteen hundred thirty-three has been revoked for cause, or who has been convicted of a violation of said act or acts, no license shall be thereafter issued for a period of two years after such revocation, to such person.

Repeal.

Sec. 52. Repeal. Act number three hundred thirty-eight of the public acts of nineteen hundred seventeen, as amended, being sections nine thousand one hundred thirty-eight to nine thousand two hundred nine, inclusive, of the compiled laws of nineteen hundred twenty-nine; act number sixty-four of the public acts of nineteen hundred thirty-three; section twenty-five of act number two hundred eighty-five of the public acts of nineteen hundred nine, being section eight thousand three hundred forty of the compiled laws of nineteen hundred twenty-nine; sections twenty-seven and twenty-eight of act number one hundred thirty-four of the public acts of eighteen hundred eighty-five as added by act number three hundred thirty-two of the public acts of nineteen hundred five, being sections six thousand eight hundred fifty-three and six thousand eight hundred fifty-four of the compiled laws of nineteen hundred twenty-nine; section three of act number one hundred twenty-three of the public acts of nineteen hundred twenty-one, being section five hundred forty-

seven of the compiled laws of nineteen hundred twenty-nine; section eight of act number two hundred sixty-three of the public acts of nineteen hundred seventeen, being section five thousand three hundred ninety-nine of the compiled laws of nineteen hundred twenty-nine; act number three hundred twenty-five of the local acts of nineteen hundred one, and 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.

Saving clause.

Sec. 53. Saving clause. This act shall not impair or affect any act done, offense committed or right accruing, accrued or acquired, or penalty, forfeiture or punishment incurred prior to the time this act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if this act had not been passed.

Construction of act.

Sec. 54. Liberal construction. This act shall be liberally construed to effect the intent and purposes herein set forth.

Severing clause.

Sec. 55. Severing clause. Should any provision or section of this act be held to be invalid for any reason, such holding shall not be construed as affecting the validity of any remaining portion of such section or of this act, it being the legislative intent that this act shall stand, notwithstanding the invalidity of any such provision or section.

Referendum; sale of spirits for consumption on premises.

Sec. 56. Referendum; sale of spirits by the glass. Spirits for consumption on the premises, in addition to beer and wine, may be sold by restaurants and hotels, approved by the commission under this act, in the following cities and villages or townships; when the legislative body of any such city or village or township shall, by resolution of a majority vote of the members elect, within sixty days after the effective date of this act, vote in favor thereof: *Provided, however,* That within one year from any action taken by such legislative body, or, in case such legislative body shall fail to act within said sixty day period, within one year from the expiration of said sixty day period, and every four years thereafter, a petition signed by not less than twenty per cent of the qualified electors of any such city or village or township of the entire vote cast for the office of secretary of state in such city or village or township, as the case may be, at the last general election, may be filed with the city or village or township clerk, as the case may be, requesting the submission of the question of sale of spirits for consumption on the premises, in addition to beer and wine. The city or village or township clerk, as the case may be, shall call a special election in said city or village or township to be held within sixty days of the filing of such petition. The question of the sale of such spirits for consumption on the premises, in addition to beer and wine, shall be submitted by ballot in substantially the following form:

"Shall the sale of spirits in addition to beer and wine be permitted for consumption on the premises within (the city or village or township as the case may be) of ..... under the provisions of the law governing same?

Yes.....

No....."

All votes on the question shall be taken, counted and canvassed in the same manner as votes cast in city or village or township elections, as the case may be, are taken, counted and canvassed. Ballots shall be furnished by the election commission or similar body of the respective cities or villages or townships. In case a majority of the electors voting at any such election shall

vote in favor thereof, spirits may be sold in any such city or village or township, under the provisions of this act, for consumption on the premises, in addition to beer and wine.

Same; county option of prohibition.

Sec. 57. Same; county option. The provisions of this act shall be the law controlling the alcoholic liquor traffic within the state of Michigan, including the manufacture, transportation, possession, wholesale and retail sales thereof, and shall be applicable to and in every county within the state of Michigan: *Provided, however,* That upon the filing with the county clerk of a petition signed by not less than twenty per cent of the qualified electors of any county of the entire vote cast for the office of secretary of state in such county at the last general election, after ninety days and within one year after this act shall take effect, and once within two years after the expiration of said one year period, and not oftener than once in every four years thereafter, requesting the submission to the electors of such county at a special election of the question of the manufacture and/or sale within such county of alcoholic liquor, the county clerk shall call a special election in such county within sixty days of the filing of any such petition in his office. All votes on the question shall be taken, counted and canvassed in the same manner as votes cast for county offices are taken, counted and canvassed. The vote on such question shall be by ballot which shall be substantially in one of the following forms:

"1. Shall the manufacture of alcoholic liquor be prohibited in the county of ..... under the provisions of the law governing the same?

Yes .....

No .....

2. Shall the sale of alcoholic liquor be prohibited in the county of ..... under the provisions of the law governing the same?

Yes .....

No .....

3. Shall the manufacture and sale of alcoholic liquor be prohibited in the county of ..... under the provisions of the law governing the same?

Yes .....

No ....."

Such ballots shall be furnished by the board of election commissioners of the county.

Alcoholic liquor shall not be manufactured and/or sold in any county in this state in which the electors at any such election shall by a majority thereof vote to prohibit the manufacture and/or sale of alcoholic liquor, as the case may be, in such county. The effective date of prohibiting the manufacture and sale of alcoholic liquor, or either manufacture or sale, shall be thirty days after the board of county canvassers has determined that a majority of those voting on said question have voted in the affirmative thereon. It shall be the duty of the county clerk to give notice of the effective date of such prohibition by publishing said date at least once in a newspaper published in said county, or, if there be no newspaper published within the county, in a newspaper published in an adjoining county.

This act is ordered to take immediate effect.

Approved December 15, 1933.

Exhibit 4

CHAPTER 436. LIQUOR

Act 8, 1933 (Ex. Ses.), p. 16; Imd. Eff. Dec. 15.

AN ACT to create a liquor control commission for the control of the alcoholic beverage traffic within the state of Michigan, and to prescribe its powers, duties and limitations; to provide for the control of the alcoholic liquor traffic within the state of Michigan and the establishment of state liquor stores; to provide for the incorporation of farmer cooperative wineries and the granting of certain rights and privileges thereto; to provide for

the licensing and taxation thereof, and the disposition of the moneys received under this act; to provide for the enforcement and to prescribe penalties for violations of this act; to provide for the confiscation and disposition of property seized under the provisions of this act; to provide a referendum in certain cases; and to repeal certain acts and parts of acts, general, local and special, and certain ordinances and parts of ordinances.

The People of the State of Michigan enact:

436.1 Alcoholic liquors; regulation and control; enforcement, penalty.

Sec. 1. Scope of act. On and after the effective date of this act, it shall be lawful to manufacture for sale, sell, offer for sale, keep for sale, possess and/or transport any alcoholic liquor, as hereinafter defined, including alcoholic liquor used for medicinal, mechanical, chemical or scientific purposes and wine for sacramental purposes, subject to the terms, conditions, limitations and restrictions contained herein, and only as provided for in this act.

Except as by this act otherwise provided, the commission shall have the sole right, power and duty to control the alcoholic beverage traffic and traffic in other alcoholic liquor within the state of Michigan, including the manufacture, importation, possession, transportation and sale thereof.

No rule, regulation and/or order made by the commission shall unreasonably discriminate against Michigan manufacturers of alcoholic liquor.

The sheriffs of the several counties and their deputies and the village marshals, constables, officers or members of the village or city police and members of the department of state police, and inspectors of the commission, are hereby empowered and it is hereby made their duty to see that the provisions of this act and the rules and regulations made or authorized by said commission are enforced within their respective jurisdictions. It shall be their special duty to use their utmost efforts to repress and prevent crime and the violation of any of the provisions of this act. Any officer within the above enumeration who shall wilfully neglect or refuse to perform the duties imposed upon him by this section shall be guilty of a misdemeanor and upon conviction shall be fined not to exceed 500 dollars or imprisoned in the county jail not more than 90 days, or both.

HISTORY: Title Am. 1937, p. 509, Act 281, Imd. Eff. July 21.
CONSTITUTION: See Const. XVI, 11.
COMPILERS' NOTE: The catchlines following the act section numbers were incorporated as part of the act as enacted.

436.1a Short title.

Sec. 1a. This act shall be known and may be cited as "the Michigan liquor control act."

HISTORY: Add. 1947, p. 190, Act 140, Eff. Oct. 11.

436.2 Definitions.

Sec. 2. The words and phrases used in this act shall be construed as follows, unless the context shall otherwise require:

"Alcoholic liquor" to include any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether or not medicated, proprietary, patented, and by whatever name called, containing ½ of 1 per cent or more of alcohol by volume which are fit for use for beverage purposes. The commission shall define and classify alcoholic liquor according to their alcoholic content as belonging to 1 of the varieties hereinafter defined.

"Beer" to mean any beverage obtained by alcoholic fermentation of an infusion or decoction of barley, malt, hops and/or other cereal in potable water.

"Wine" to mean the product made by the normal alcoholic fermentation of the juice of sound, ripe grapes, or any other fruit with the usual cellar treatment, and containing not more than 16 per cent of alcohol by volume. The term "wine" shall include fermented fruit juices other than grapes.

"Spirits" to mean any beverage which contains alcohol obtained by distillation, mixed with potable water and other substances in solution and includes, among other things, wine containing an alcoholic content of over 16 per cent by volume.

"Alcohol" to mean the product of distillation of fermented liquid, whether rectified or diluted with water or not, whatever may be the origin thereof. It does not mean ethyl

or industrial alcohol, diluted or not, that has been denatured or otherwise rendered for beverage purposes.

"Bar" to mean a barrier or counter over which any alcoholic liquor may be passed or ed directly to customers.

"Brewer" to mean any person duly licensed to manufacture and sell beer.

"Church" to mean an entire house or structure set apart primarily for use for purposes public worship, in which religious services are held and with which a clergyman is ciated. The entire house or structure is kept for that use and not put to any other use ntially inconsistent therewith.

"Citizen" to mean any person not less than 21 years of age who is a citizen of the ed States of America.

"Club" to mean an association whether incorporated or unincorporated, the majority whose members shall be citizens for the promotion of some common object, (not uding associations organized for any commercial or business purpose, the object of which ney profit) owning, hiring or leasing a building, or space in a building, of such extent character as in the judgment of the commission may be suitable and adequate for the nable and comfortable use and accommodation of its members and their guests, and h shall have been in existence for a period of not less than 2 years prior to application icense under the provisions of this act. Public notice of the intent of the commission ue such club license shall be given by publication in some newspaper published or in eral circulation within the municipality at least 10 days before such license shall issue. e club shall file with the commission annually, within 10 days of February first of each a list of the names and residences of its members, and similarly file, within 10 days e election of any additional member, his name and address, and that its aggregate al membership fees or dues and other income, exclusive of any proceeds from the sale holic liquor, are sufficient to defray the annual rental of its leased or rented premises, such premises are owned by the club, are sufficient to meet the taxes, insurance, , and the interest on any mortgage thereon. The affairs and management of the shall be conducted by a board of directors, executive committee, or similar body by the members. No member or any officer, agent or employee of the club shall id, or directly or indirectly receive in the form of salary or other compensation, any from the disposition or sale of alcoholic liquor to the club or to the members of the beyond the amount of such salary as may be fixed and voted at meetings by the bers or by its directors or other governing body and as reported by the club to the ission, within 3 months after such meeting.

"Commission" to mean the liquor control commission herein provided for.

"Distiller" to mean any person duly licensed to manufacture and sell spirits and/or d of any kind.

"Hotel" to mean a building which in the judgment of the commission has been regu- used and kept open as such in a bona fide manner for the feeding and lodging of where all who conduct themselves properly and who are able and ready to pay for services are received if there be accommodations for them. Said hotel must be ed to show that the major portion of its receipts is derived from the renting of s and the sale of food. The commission may require that said hotel shall have been ained as such for a period of 1 year prior to the issuance of the license. For license oses "hotels" in cities of 50,000 population and less than 175,000 population shall n not less than 25 permanent bedrooms and in cities of 175,000 population or over l contain not less than 50 permanent bedrooms within 1 structure for lease to persons, shall be adequately equipped to serve meals to not less than 100 persons at 1 time, in teria and/or dining room provided for that purpose. Any hotel in a city, village or ship of less than 100,000 population which does not contain at least 25 permanent ms, but shall be adequately equipped to serve meals to not less than 25 persons at e in a public cafeteria and/or dining room provided for that purpose, may apply to commission setting forth the special facts and circumstances, and the commission may an exception and grant such petitioner a hotel license. Class "A" hotels are those

hotels, licensed under this act to sell beer and wine. Class "B" hotels are those hotels, licensed under this act to sell beer, wine and spirits.

"License" to mean a contract between the commission and the licensee granting authority to said licensee to manufacture and sell, or sell, or warehouse any alcoholic liquor in the manner provided by this act.

"Manufacturer" to mean any person engaged in the manufacture of any alcoholic liquor, and among others, includes a distiller, a rectifier, a wine maker and a brewer.

"Person" to mean any person, firm, partnership, association or corporation.

"Residence" to mean the premises where a person resides, permanently or temporarily.

"Retailer" to mean any person who customarily sells in small quantities to the consumer.

"Sale" to include exchange, barter or traffic, furnishing or giving away any alcoholic liquor. In case of a sale in which a shipment or delivery of any alcoholic liquor is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee, and the prosecution for such sale may be had in the county or city where the seller resides, or from which the shipment is made or at the place of delivery.

"Special license" to mean a contract between the commission and the special licensee granting authority to said licensee to sell beer and/or wine: Provided, however, That such license shall be granted only to such persons and such organization and for such period of time as the commission shall determine.

"Specially designated distributor" to mean a person engaged in an established business licensed by the commission to distribute alcoholic liquor other than wine under 16 per cent alcohol by volume and beer in the original package for the commission for consumption off the premises.

"Specially designated merchant" to mean any person to whom the commission grants a license to sell beer and/or wine at retail for consumption off the premises of such licensed place.

"State liquor store" to mean a store established by the liquor control commission under this act for the sale of alcoholic liquor in the original package for consumption off the premises.

"Tavern" to mean any place licensed to sell at retail beer and wine for consumption on the premises only.

"Class C license" to mean any place licensed to sell at retail beer, wine and spirits for consumption on the premises.

"Vendor" to mean a person licensed by the commission under this act to sell alcoholic liquor.

"Vehicle" to mean any means of transportation by land, by water, or by air.

"Warehouse" to mean any premises or place primarily constructed or used or provided with facilities for the storage in transit or other temporary storage of perishable goods and/or for the conduct of a warehousing business.

"Wholesaler" to mean any person who customarily sells to retailers or jobbers rather than to the consumer.

"Wine maker" to mean any person duly licensed to manufacture and sell at wholesale wine, with no restriction as to the alcoholic content.

HISTORY: Am. 1937, p. 510, Act 281, Imd. Eff. July 21;—Am. 1945, p. 139, Act 133, Imd. Eff. April 30;—Am. 1947, p. 652, Act 349, Imd. Eff. July 3.

436.3 Alcoholic liquor; delivery and sale by commission.

Sec. 3. Alcoholic liquor; delivery and sale by commission. Excepting as otherwise provided in this act, no sale and/or delivery of alcoholic liquor, other than beer, or wine, shall be made in this state unless such sale and/or delivery be made by the commission, or its authorized agent or distributor. All alcoholic liquor, other than beer, for sale, use, storage or distribution in this state, shall originally be purchased by and/or imported into the state by the commission, or by authority of the commission: Provided, That nothing in this act shall prohibit any natural person, not a minor, from purchasing beer, or wine, in not less than case lots directly from the manufacturer, to be delivered to him by the

manufacturer at the plant or at his home, subject to the reasonable regulation of the commission.

HISTORY: Am. 1937, p. 512, Act 281, Imd. Eff. July 21;—Am. 1945, p. 142, Act 133, Imd. Eff. April 30.

436.4 Fruit juices, preparations and other exceptions to act.

Sec. 4. Exceptions to act. The provisions of this act shall not be construed to prevent the manufacture of cider from fruit, for the purpose of making vinegar, and non-intoxicating cider and fruit juice for use and sale, and cider and fruit juice shall be deemed non-intoxicating within the meaning of this act when used and/or sold within 30 days after the manufacture thereof; and this act shall not apply to wine or cider of any alcoholic content made on the premises by the owner or lessee of such premises provided such premises are used and occupied by such owner or lessee as a dwelling and such wine or cider is made for family use and home consumption; or to prevent the sale or gift, or keeping and storing for sale by druggists and general merchants and others of any of the medicinal preparations manufactured in accordance with the formulas prescribed by the United States pharmacopoeia and national formulary, patent or proprietary preparations, and other bona fide medicinal and technical preparations, which contain no more alcohol than is necessary to extract the medicinal properties of the drugs contained in such preparations; and no more alcohol than is necessary to hold the medicinal agents in solution and to preserve the same, which are manufactured and sold as medicine and not as beverages, are unfit for use for beverage purposes, and the sale of which does not now require the payment of a United States liquor dealer's tax; or to prevent the manufacture and sale of tinctures or of toilet, medicinal and antiseptic preparations and solutions not intended for internal human use nor to be sold as beverages, and which are unfit for beverage purposes, and upon the outside of each bottle, box or package of which is printed in the English language, conspicuously and legibly, the quantity by volume of alcohol in such preparations; or to prevent the manufacture and keeping for sale of the food product known as flavoring extracts which shall be so manufactured and sold for cooking, culinary or flavoring purposes, and are unfit for use as a beverage or for beverage purposes: Provided, That it shall not be lawful to manufacture or sell any toilet, medicinal or antiseptic preparations or solutions, or any flavoring extracts or patent or proprietary medicines or preparations, the manufacture and sale of which now requires the payment of a United States liquor dealer's tax, except as herein provided: Provided further, That nothing in this act shall apply to the manufacture and/or sale of ethyl, mechanical or industrial alcohol, not used for or made unfit for beverage purposes: And provided further, That this act shall not apply to the purchase of alcoholic liquor as defined in this act, for use in the manufacture of toilet, medicinal or antiseptic preparations or solutions, or any flavoring extract or patent or proprietary medicines or preparations, by a manufacturer using such alcoholic liquor exclusively for such manufacturing purposes and duly licensed therefor by the commission; said license to expire on May first following the date of issuance, issued on the payment of an annual fee of 10 dollars and the furnishing of such bond or bonds as the commission may require running to the people of the state of Michigan, for the faithful performance of the conditions of the license and compliance with the provisions of this act.

436.5 Liquor control commission, creation.

Sec. 5. Commission; creation. A commission to be known and designated as the liquor control commission of the state of Michigan is hereby created. The commission shall consist of 3 members, not more than 2 of whom shall be members of the same political party, to be appointed by the governor with the advice and consent of the senate. Each member of the commission shall devote his entire time to the performance of the duties of his office. The term of the commissioners shall be 3 years each, except the members first appointed. In appointing the first commissioners the governor shall designate 1 commissioner for the term of 1 year, 1 commissioner for the term of 2 years and 1 commissioner for the term of 3 years. Each member of said commission shall qualify by taking and filing the constitutional oath of office and shall hold office until the appointment and qualification of his successor. The members of the commission shall not be

removed from office by the governor except for malfeasance, misfeasance or neglect office.

In the event of a vacancy or vacancies in the membership of the commission governor shall appoint in like manner a successor or successors to fill the unexpired term

A quorum for the transaction of business shall consist of 2 commissioners.

Each of the commissioners shall receive an annual salary of $7,500.00 each and e member of the commission shall be entitled to actual and necessary expenses while on business of the commission.

The commission shall annually designate 1 of its members to act as chairman of commission.

HISTORY: Am. 1937, p. 512, Act 281, Imd. Eff. July 21;—Am. 1945, p. 142, Act 133, Imd. Eff. April

436.5a Board of hearing examiners, creation.

Sec. 5a. Same; board of hearing examiners. There is hereby created a board hearing examiners to consist of 3 members to be appointed by the governor, by and the advice and consent of the senate, for terms of 6 years each: Provided, That of members first appointed 1 shall be appointed for a term of 2 years, 1 for a term of 4 y and 1 for a term of 6 years. Any vacancy shall be filled by the governor for the u pired term in the same manner. Members of the board may be removed by the gove for misfeasance, malfeasance and nonfeasance in office. Members of the board receive an annual compensation of $6,000.00 and shall be entitled to actual and neces expenses incurred in the performance of duties, to be paid in the same manner as sal and expenses of other state officers are paid. Such board of hearing examiners or member thereof shall conduct hearings on questions referred to the board by the mission, under such rules and regulations as the commission may establish. The exami shall report their findings to the commission for decision. Each member of the boar authorized to examine witnesses and administer oaths. The attorney general shall a 3 of his assistants to the commission. In all instances when a license is to be e suspended or revoked the commission shall cause a complaint to be filed with said b whereupon said board shall conduct a hearing limited to the facts and law and rules regulations of the liquor control commission as specified in said complaint. In the ducting of hearings no hearsay testimony shall be admissible and the licensees name the complaint shall have the right to have all witnesses testify in person at the hea The findings of the board shall be based upon the facts and the law and the rules regulations of the liquor control commission. A statement of the facts may be requ by either the commission or the licensee. The complaint filed with the board shall sp the date of the alleged offense, the names of the witnesses, and any other facts that be in issue at the hearing.

HISTORY: Add. 1945, p. 143, Act 133, Imd. Eff. April 30.

436.6 Liquor control commission; assistants and employes, bonds.

Sec. 6. Same; assistants and employes. The commission may employ such assist clerks, stenographers and employes and experts as it may deem necessary and fix compensation, and incur such other expenses as are necessary to carry out the provi of this act subject to appropriations provided by the legislature. Such assistants employes shall be entitled to actual and necessary traveling and other expenses whil the business of the commission, when authorized and approved by the commission.

It shall be the duty of the commission to secure from all members and employ the commission handling money, and specially designated distributors, a bond or b said bond or bonds to be executed by any surety company or companies authorized t business in the state of Michigan or in the discretion of the commission by appr personal surety adequate to guarantee to the state the proper handling and accountin such money.

HISTORY: Am. 1935, p. 409, Act 241, Imd. Eff. June 8.

436.7 Same; rules and regulations; public hearings.

Sec. 7. Same; rules and regulations; public hearings. The commission shall rules and regulations governing the carrying out of this act and the duties and resp

bilities of licensees in the proper conduct and management of their licensed places. The commission shall hold public hearings twice each calendar year for the purpose of hearing complaints and receiving the views of the public with respect to the administration of this act. The hearings shall be kept and transcribed as a part of the records of the commission.

HISTORY: Am. 1937, p. 513, Act 281, Imd. Eff. July 21;—Am. 1945, p. 143, Act 133, Imd. Eff. April 30.

436.7a Same; investigations; inspections; searches, seizures and examinations; witnesses, subpoena.

Sec. 7a. Same; investigations; inspections; searches; seizures and examinations; examination of witnesses; subpoenas; procedure on failure to obey. The commission may make, or cause to be made, such investigations as it shall deem proper in the administration of this act and of any and all other laws and rules and regulations now or which may hereafter be in force and effect concerning alcoholic liquor, or the manufacture, distribution or sale thereof, or the collection of taxes thereon, including the inspection and search of premises for which the license is sought or has been issued, of any building containing the same, of licensed buildings, examination of the books, records, accounts, documents and papers of the licensees or on the licensed premises.

The commission may by itself, or its duly authorized agents, examine or copy the books, records and papers of any person relating to any requirement pertaining to this act. Any member of the commission or its duly authorized agents may issue a subpoena requiring any person to appear before the commission, or its duly authorized agent, at any reasonable time and place, and be examined with reference to any matter within the scope of the inquiry or investigation being conducted by the commission and to produce any books, records or papers pertaining to the question involved. Any member of the commission or its duly authorized agents may administer an oath or affirmation to a witness in any matter before the commission, certify to official acts, and take depositions. In case of disobedience of a subpoena, the commission or its duly authorized agents may invoke the aid of any circuit court of the state of Michigan in requiring the attendance and testimony of witnesses and the production of books, records and papers pertaining to the question involved. Any of the circuit courts of the state within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena, issue an order requiring such person to appear before said commission or its duly authorized agents and to produce books, records and papers if so ordered and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

The fees of witnesses required to appear before the commission shall be the same as those allowed to witnesses in the circuit courts and shall be paid by the commission.

Any sheriff's or police department shall, upon request of the commission, cause to be served any subpoena which may be directed to any person located within the jurisdiction of the sheriff's or police department. No fee shall be charged for this service by such sheriff's or police department. Subpoenas may also be served by any investigator of the commission.

HISTORY: Add. 1945, p. 143, Act 133, Imd. Eff. April 30.
Sec. 7a as added in 1935, relative to rules as to wine, had the following history: Add. 1935, p. 410, Act 241, Imd. Eff. June 8;—Rep. 1937, p. 522, Act 281, Imd. Eff. July 21.

436.8 Same; seal, orders, certified copies.

Sec. 8. Same; seal, orders and records. The commission shall adopt a suitable seal of which all courts of the state shall take judicial notice, and all proceedings, orders, licenses and official acts shall be authenticated thereby. Certified copies of the orders and records of said commission shall be prima facie evidence of the acts of said commission in any court of this state.

436.9 Same; offices, branches.

Sec. 9. Same; offices. The commission shall be authorized to establish throughout the state of Michigan 4 branch offices. The expense of the same shall be paid by the commission in the manner hereinafter provided.

HISTORY: Am. 1937, p. 513, Act 281, Imd. Eff. July 21.

436.10 Same; revolving fund; maximum.

Sec. 10. Same; revolving fund. The commission is hereby authorized to maintain a revolving fund of not to exceed 1,000,000 dollars at any 1 time, which fund is to be derived from the money deposited in the special account or accounts to the credit of the commission throughout the state. In the event that the aggregate of such account or accounts exceeds the sum of 1,000,000 dollars then any amount in excess of 1,000,000 dollars is to be turned over to the state treasurer and credited to the general fund. In the event that the aggregate of such account or accounts does not equal the sum of 1,000,000 dollars then the difference between the aggregate deposits and the sum of 1,000,000 dollars is to be derived from the proceeds realized from the retail sale of the inventory stock carried by the commission as of the effective date of this act. The fund herein provided for is to be exclusively used for the purpose of replenishing and maintaining the liquor stock for the various stores and licensed dispensaries throughout the state. A monthly report thereof shall be made to the state treasurer and to the budget director which shall contain an itemized account of all moneys received and all expenditures made by the commission during the month covered in the report.

HISTORY: Am. 1935, p. 410, Act 241, Imd. Eff. June 8.

436.11 Same; interest of members or employes.

Sec. 11. Same; interest of members. No member of the commission or employe thereof shall be pecuniarily, directly or indirectly, interested in the manufacture, warehousing, sale, distribution or transportation, or selling or furnishing of any equipment, furnishings or refrigeration used in the manufacture or sale of any alcoholic liquor within the state of Michigan.

436.12 Same; civil liability of commission, members.

Sec. 12. Same; liability of commission. The commission, or any member of the commission, shall not be personally liable for any action at law for damages sustained by any person because of any action performed or done by the commission, or any member of the commission, in the performance of their respective duties in the administration and in the carrying forth of the purposes and provisions of this act.

436.13 Same; establishment of state liquor stores, basis.

Sec. 13. The commission may establish state liquor stores throughout the state of Michigan: Provided, That in counties under 40,000 population according to the last federal census there shall be no more than 1 store in any such county, except as hereinafter provided: Provided further, That in counties of 40,000 population or over according to the last federal census such stores shall not exceed 1 for each 40,000 population or major fraction thereof according to the last federal census, except as hereinafter provided: Provided, however, That the commission may in its discretion establish a state liquor store in any village or city of 3,000 population or over according to the last federal census.

HISTORY: Am. 1937, p. 513, Act 281, Imd. Eff. July 21.

436.14 Specially designated distributors.

Sec. 14. Same; specially designated distributors. The commission may license any hotel or established merchant, who or which shall be if a natural person, a citizen of this state and if a corporation, shall be organized under the laws of the state of Michigan, in such places as it may designate to sell alcoholic liquor except wine under 16 per cent alcohol by volume and beer for consumption off the premises. Where alcoholic liquor is sold by specially designated distributors, it shall be sold at a price to be fixed by the commission, and shall be sold in accordance with the rules and regulations of the commission.

HISTORY: Am. 1937, p. 513, Act 281, Imd. Eff. July 21;—Am. 1945, p. 144, Act 133, Imd. Eff. April 30.

436.15 Commission; handling of liquor; leasing power.

Sec. 15. Same; handling of liquor. The commission shall have the right and power to buy, have in its possession and sell in its own name all alcoholic liquor for distribution as provided in sections 13 and 14. It shall be the duty of the commission to supply such

s of alcoholic liquors as shall be demanded by the public: Provided, however, That
y such brands as are demanded are not manufactured within the borders of the United
es or are not readily obtainable within the borders of the United States, then such
rs shall be filled by the commission at the entire expense of the person placing such
r. plus not less than 55 per cent gross profit. The commission may lease or occupy
building or land required for its operation, and may purchase any warehouse required
:s operation, subject to the approval of the state administrative board.

HISTORY: Am. 1935, p. 410, Act 241, Imd. Eff. June 8;—Am. 1937, p. 514, Act 281, Imd. Eff. July 21.

16 **Same; uniform prices, establishment; discounts; cash sales.**

Sec. 16. The commission shall establish a uniform price or prices for the sale
:coholic liquor in state liquor stores, and by specially designated distributors.
) price or prices shall not return a gross profit to the commission in excess of
per cent: Provided, however, That wine manufactured in Michigan from the
: of grapes grown in Michigan shall be sold at prices that shall not exceed the cost
:e commission of buying and distributing such wine, and shall not exceed a
s profit to the commission of 10 per cent: Provided further, In the event such spirits
: not been sold for a period of 1 year the commission may sell such spirits at a price
e approved by the state administrative board.

In the sale of alcoholic liquors made by state liquor stores to specially designated
:butors, there shall be allowed a discount of 10 per cent deducted from the sale price
stablished by the commission, and to establishments licensed to sell for consumption on
premises there shall be allowed a discount of 12½ per cent, deducted from the sale
: as established by the commission. Every sale of alcoholic liquor made in state liquor
s and by specially designated distributors or licensees shall be for cash only, except
mers' charge accounts with specially designated merchants, bona fide registered guests
ls, passengers holding authorized credit cards from railroads or railroad credit bureaus
ales by private clubs to bona fide members thereof.

HISTORY: Am. 1937, p. 514, Act 281, Imd. Eff. July 21;—Am. 1945, p. 144, Act 133, Imd. Eff. April 30;—
947, p. 654, Act 349, Imd. Eff. July 3.

16a **Tax rate on wines; incorporation of farm mutual cooperative wineries; sales.**

Sec. 16a. There shall be levied and collected by the commission on all wines sold in
state and manufactured from grapes or fruits not grown in this state, a tax at the
:e of 50 cents per gallon if sold in bulk and in a like ratio if sold in smaller quantities:
vided, however, That the commission shall reduce the tax 46 cents per gallon on all
s manufactured in Michigan from grapes grown in Michigan, for which the wineries,
lers or rectifiers have paid, in cash, the Michigan grape growers 55 dollars per ton, or
, at the shipping point, the buyer furnishing at his expense, all necessary packages or
:ners and paying transportation charges beyond such shipping point: the tax shall
se be reduced on wines manufactured in Michigan from Michigan grown fruits, other
grapes, and also on such wines when blended with wine or wine spirits manufactured
Michigan and also blended with wine or wine spirits manufactured from grapes and
s not grown in Michigan, when such blend does not use in the finished product over
per cent in volume of wines or wine spirits manufactured outside the state of Michigan.
vines not manufactured and not entitled to tax reduction as provided herein shall be
ject to and shall pay to the commission the full amount of tax as provided herein. Every
igan winery, as a condition precedent to the commission having jurisdiction to grant
cognize any claim for tax reduction, as herein provided, shall, on or before December
nth of each year hereafter, when Michigan grapes are purchased, file with the com-
ion a detailed and sworn statement showing the date, place of delivery and amount of
es purchased of Michigan grape growers, and the name and address of the Michigan
ers from whom such purchases are made, together with a sworn statement that such
es have been paid for at the price and manner provided for in this act, and that such
in all respects has been fully complied with. The commission shall have the power to
blish and put in force such other necessary and proper regulations as in the opinion of

such commission will prevent tax evasion or allow wineries tax reduction on more gallons of wine than would ordinarily be produced and manufactured from the tonnage purchased and on which tax reduction could legally be claimed. In each year, wineries desiring the benefits of this act, shall, on or before September first, file with the commission written notice of its intention, in that season, to operate under and in compliance with the provisions hereof. All sacramental wines shall be non-taxable when used by churches and said wines may be imported and the commission shall not impose restrictions on importations for such purposes but may adopt such rules as may prevent any abuses which in their opinion grow out of said importations.

On approval by the liquor control commission, the Michigan corporation and securities commission shall incorporate such limited number of farm mutual cooperative wineries as, in the judgment of the commission, will be beneficial to the Michigan grape and fruit industry. Such wineries shall be licensed under this act and the payment of 1 license fee annually by such corporation shall authorize wine making on the premises of the corporation and also on the premises of the grape and fruit growing farmers who are members of or stockholders in such corporation and it is herein provided that the stockholders or members, on incorporation of such farmers cooperative corporations herein provided for, shall be certified to be Michigan grape and fruit growing farmers. This act shall authorize manufacture by cooperative corporations on farm premises but all sales must be made by the corporation and from the corporation premises.

HISTORY: Add. 1937, p. 514, Act 281, Imd. Eff. July 21.

436.16b Same; grapes not grown in state imported for blending.

Sec. 16b. There shall be levied and collected by the commission a tax of 10 cents per gallon on wine manufactured from grapes or fruits not grown in this state, and imported or purchased by bonded Michigan wineries, blenders or rectifiers to be used for blending purposes only.

HISTORY: Add. 1937, p. 515, Act 281, Imd. Eff. July 21.

436.17 Licenses; issuance, construction as contract, transfer, resort areas, local approval and revocation.

Sec. 17. Licenses; contract, transfer. The commission is hereby authorized to issue licenses in its discretion, as provided in this act, upon the payment of the fees provided in section 19 and the filing of the bonds required in section 22. The commission shall issue licenses to manufacturers only when a majority of the stockholders are citizens and only when 25 per cent or more of the capital stock is owned by citizens of the state of Michigan. Such licenses shall expire on May first following the date of issuance. All licenses issued under this act shall be construed to be a contract between the commission and the licensee, and shall be signed by both parties. The commission is authorized to grant part year licenses for a proportionate part of the license fee hereinafter specified: Provided, however, That in resort areas the commission shall grant licenses for as short a period of time as 3 months. Licenses may be transferred with the consent of the commission: Provided, however, That all applications for licenses to sell beer and/or wine and/or spirits for consumption on the premises shall be approved by the local legislative body in which said applicant's place of business is located before being granted a license by the commission: Provided further, That upon request of the local legislative body, the commission shall revoke the license of any licensee granted a license to sell beer and/or wine and/or spirits for consumption on the premises: Provided further, That these provisos shall not apply in counties having a population of 500,000 or over, according to the last federal census.

HISTORY: Am. 1937, p. 516, Act 281, Imd. Eff. July 21.

436.17a Same; proximity to church or school.

Sec. 17a. Same; proximity to a church or school. Any new application for a license to sell alcoholic beverages at retail, or any request to transfer location of an existing license, shall be denied in the event the contemplated location is within 500 feet of a church or a school building, by the regularly traveled thoroughfare.

HISTORY: Add. 1945, p. 145, Act 133, Imd. Eff. April 30.

18 Same; enforcement officers, not issued to.

ec. 18. Same; law enforcement officers. No person who holds, either by appointment ection, any public office which involves the duty to enforce any of the penal laws of Inited States of America, or the penal laws of the state of Michigan, or any penal ance or resolution of any municipal subdivision of the state of Michigan, shall be d any license, nor shall such a person have any interest, directly or indirectly, in any license.

ISTORY: Am. 1937, p. 516, Act 281, Imd. Eff. July 21;—Am. 1945, p. 145, Act 133, Imd. Eff. April 30.

18a Beer and wine, referendum on sale of; petition; form of ballot.

ec. 18a. Referendum; sale of beer and wine. The sale of beer and wine between ours of 2:00 a. m. and 12:00 midnight on Sunday may be prohibited in any county, illage, or township, by a majority vote of the electors voting at a regular or special m called for that purpose in the following manner: Not oftener than once in every rs, upon the filing of a petition with the county, city, village, or township clerk, as se may be, requesting the submission of the question of the Sunday sale of beer and the clerk shall call a special election in said county, city, village, or township, to be within 60 days of the filing of such petition, unless a regular election is to be held 90 days of the filing of said petition, in which latter case this question shall be upon in such a regular election: Provided, That said petition is filed 15 days prior d regular election. In case of a county, city or township such petition shall be signed number of the qualified electors thereof which shall be not less than 35 per centum e total number of votes cast for all candidates for the office of secretary of state in county, city or township at the last general election held for such purpose, and in case village such petition shall be signed by a number of the qualified electors thereof shall not be less than 35 per centum of the total number of votes cast for all candi- for the office of president of such village at the last village election held for such se. The question of the Sunday sale of beer and wine shall be submitted by ballot stantially the following form:

Shall the sale of beer and wine within (the county, city, village, or township as the may be) between the hours of 2:00 a. m. and 12:00 midnight on Sunday be pro- ?

Yes .....

No ....."

ll votes on the question shall be taken, counted and canvassed in the same manner as cast in county or city or village or township election, as the case may be, are taken, ed and canvassed. Ballots shall be furnished by the election commission or similar of the respective counties, cities or villages or townships. In case a majority of the s voting at any such election shall vote in favor thereof, the sale of beer and wine in such county, city, village, or township between the hours of 2:00 a. m. and 12:00 ight on Sunday shall be prohibited.

ISTORY: Add. 1945, p. 372, Act 258, Eff. Sept. 6.

19 Same; fees; limitations, issue to veterans; prohibited furnishing of alcoholic iquor on Sundays and election days.

ec. 19. The following license fees shall be paid at the time of filing applications:

- Manufacturers of spirits, $5,000.00;
- Manufacturers of beer, $50.00 per 1,000 barrels production annually with a mini- fee of $1,000.00;
- Wine makers, blenders and rectifiers of wine, $500.00;
- Dining cars or other railroad or pullman cars, $50.00 per train;
- Wholesale vendors other than manufacturers of beer, $100.00 for the first truck, er or semi-trailer and $50.00 for each additional truck, trailer or semi-trailer;
- Watercraft, licensed to carry passengers, a minimum fee of $50.00 and a maximum of $500.00 per year computed on the basis of $1.00 per person per passenger capacity;
- Specially designated merchants, for selling beer and/or wine for consumption off premises only, but not at wholesale, $25.00 for each and every location regardless of fact that such a location may be a part of any system or chain of merchandising;

7a. Specially designated distributors licensed by the commission to distribute alcoholic liquor other than wine under 16 per cent alcohol by volume and beer in the original package for the commission for consumption off the premises, $50.00 per year in cities and villages of 10,000 population or over, and $25.00 per year in cities and villages of less than 10,000 population;

8. Hotels of class "A" selling beer and wine, a minimum fee of $150.00 and for all bedrooms in excess of 20, $1.00 for each additional bedroom, but not to exceed $500.00;

Hotels of class "B" selling beer, wine and spirits, a minimum fee of $300.00, and for all bedrooms in excess of 20, $2.00 for each additional bedroom, but not to exceed $1,000.00: Provided, That in case a hotel of class "B" sells beer, wine and spirits in more than 1 bar or room, such fee shall entitle such hotel to sell in only 1 bar or room, other than a bedroom, and a license must be secured for each additional bar or room, other than a bedroom, the fee for which shall be $250.00;

9. Taverns, selling beer and wine, $150.00;

10. Class "C" license selling beer, wine and spirits, $500.00;

11. Clubs selling beer, wine, and spirits, $100.00 for clubs having 150 or less duly accredited members and $1.00 for each additional member: Provided, however, That the maximum fee shall not exceed $500.00 for any 1 club;

12. Warehouses, to be fixed by the commission with a minimum fee for each warehouse of $25.00;

13. Special licenses, a fee of not more than $25.00 per day, or an annual fee of not more than $250.00, in the discretion of the commission;

14. Aircraft selling beer and/or wine, to be fixed by the commission;

15. No public license shall be granted for the sale of alcoholic liquor for consumption on the premises in excess of 1 license for each 1,500 of population, or major fraction thereof, as determined by the last federal decennial census or by any federal decennial census hereafter taken: Provided, however, That the above quota shall not bar the right of existing licensees to renew their licenses or transfer same, subject to the consent of the commission nor bar the right to a license of an applicant who has applied for such license and is being investigated for the granting or refusing of same by the commission prior to the effective date of this act: Provided further, That in resort areas the commission may in its discretion issue licenses for a period not to exceed 8 consecutive months without regard to any limitations because of population, but not in excess of a total number which were issued in the year of 1941: And provided further, That the limitations and quotas of this subsection shall not be applicable to the issuance of a new license to a veteran of world war II who was honorably discharged or released under honorable conditions from one of the armed forces of the United States and who had by forced sale disposed of a similar license within 90 days before or after entering or while serving in 1 of the armed forces of the United States or service during World War II, and as part of his preparation for such service, in case such application for a new license, in accordance with the terms of this proviso, shall be made for the same governmental unit in which the previous license was issued and within 60 days after the effective date of this act or within 60 days after the discharge of such veteran from the armed forces of the United States, or whichever is the later date;

16. Any retail vendor licensed under this act to sell for consumption on the premises shall be eligible to apply for a license as a specially designated merchant;

17. Any specially designated distributor shall be eligible to apply for a license as a specially designated merchant;

18. No licensee enumerated in this section or any other person shall sell at retail, give away or furnish and no person shall knowingly and wilfully buy any spirits between the hours of 2 a. m. and 12 midnight on any Sunday, nor on any primary election day, general election day or municipal election day until after the polls are closed. Any violation of this subsection shall constitute a misdemeanor: Provided, That this subsection shall not apply to spirits served to bona fide guests in the residence of any person or sold or furnished for medicinal purposes as provided for in this act. The legislative body of any city, village or township may, by resolution or ordinance, prohibit the sale of alcoholic

liquor on any Sunday, legal holiday, primary election day, general election day or municipal election day.

HISTORY: Am. 1937, p. 516, Act 281, Imd. Eff. July 21;—Am. 1941, p. 138, Act 111, Eff. Jan. 10, 1942;—Am. 1945, p. 145, Act 133, Imd. Eff. April 30;—Am. 1947, p. 191, Act 140, Eff. Oct. 11.

436.19a Bartenders, licensing.

Sec. 19a. Same; licensing of bartenders. No person shall act as bartender in any establishment licensed under this act to sell alcoholic liquor for consumption on the premises in any city now or hereafter having a population of 50,000 or more, unless such person shall be licensed by the commission under the provisions of this section: Provided, That the commission may adopt rules and regulations governing the licensing of bartenders in other political subdivisions of the state. Such licenses shall expire on the thirtieth day of April following the issuance thereof. An annual license fee of $2.00 shall be paid by each applicant, which shall be credited to the general fund of the state. Each applicant for license shall be a male person 21 years of age or over, shall submit a certificate from his local board of health or health officer showing that such person is not affected with any infectious or communicable disease, and shall meet the requirements of the commission: Provided, That the wife or daughter of the male owner of any establishment licensed to sell alcoholic liquor for consumption on the premises may be licensed as a bartender by the commission under such rules and regulations as the commission may establish. A license issued under the provisions of this section may be revoked or suspended by the commission in case the licensee shall drink on duty or shall violate the rules and regulations of the commission. In case of the refusal to issue or the revocation or suspension of a license by the commission, the person aggrieved shall be entitled to a hearing before the commission. The findings of the commission at such hearing shall be final as to questions of fact. The commission shall issue to each licensee an identification card to which shall be attached a photograph of the licensee. Such identification card shall be carried by the licensee at all times while on duty and shall be shown by such licensee on request. For the purpose of this act a bartender shall be construed to mean a person who mixes or pours alcoholic liquor behind a bar.

HISTORY: Add. 1945, p. 146, Act 133, Imd. Eff. April 30.

436.20 Licenses, revocation and suspension of; hearings.

Sec. 20. Same; revocation and suspension. The commission shall have the right and power to suspend or revoke and any commissioner designated by the chairman shall, upon due notice and proper hearing, have the right and power to suspend or revoke any license upon a violation of any of the provisions of this act or any of the rules and regulations adopted by the commission hereunder: Provided, however, That the commission, or any member of the commission designated by the chairman may assess a penalty of not more than $300.00 for each violation, in addition to or in lieu of revocation or suspension of the license, which penalty shall be paid to the commission and deposited with the state treasurer and is hereby appropriated to the commission to be expended in carrying out the provisions of this act.

The commission shall provide the procedure by which any licensee feeling aggrieved by any such suspension or revocation and/or penalty ordered by the commission or a commissioner may request a hearing for the purpose of laying any facts or reasons before said commission why said suspension or revocation and/or penalty should be modified or rescinded. The commission after reviewing the record made before the commissioner or examiner may allow or refuse to allow the hearing in accordance with the commission's rules and regulations. Such right, however, shall not be interpreted by any court as curtailing, removing or annulling the right in said commission to so suspend or revoke licenses as hereby given it. A licensee shall have no right of appeal from the final determination of the commission, except by writ of certiorari to the proper court. Notice of the order of suspension or revocation of a license and/or assessment of a penalty shall be given in the manner prescribed by the commission. The suspension or revocation of a license and/or assessment of a penalty by the commission shall not prohibit the institution of criminal prosecutions for the violations of the provisions of this act. The

institution of criminal prosecutions for such violations, or the acquittal or conviction of any person thereunder, shall not prevent the suspension or revocation of licenses and/or assessment of a penalty by the commission.

HISTORY: Am. 1937, p. 518, Act 281, Imd. Eff. July 21;—Am. 1945, p. 147, Act 133, Imd. Eff. April 30.

436.21 Same; forfeiture of privileges upon revocation.

Sec. 21. Same; forfeiture of privileges under. Any and all privileges conferred by a license issued under this act shall be forfeited on the revocation of such license and the commission shall seize any and all alcoholic liquor found in the possession of the licensee. The commission shall remit to such licensee the purchase price less 10 per cent, paid by the licensee to the commission for all alcoholic liquor seized. All other alcoholic liquor seized shall be disposed of by order of the commission and no payment shall be made therefor.

436.22 Same; bonds, form; action of trespass on the case.

Sec. 22. Same; bonds. As a condition precedent to the approval and granting of any license, and annually thereafter, the following persons shall make, execute and deliver to the commission a bond or bonds, said bond or bonds to be executed by any surety company or companies authorized to do business in the state of Michigan or in the discretion of the commission by approved personal surety running to the people of the state of Michigan, in the following amounts:

1. Manufacturers, a bond or bonds in the sum of 5,000 dollars; wholesalers, a bond or bonds in the sum of 2,500 dollars; warehousemen, a bond or bonds in the sum of 2,500 dollars; specially designated merchants, a bond or bonds in the sum of 1,000 dollars, for the faithful performance of the conditions of the license issued and compliance with the provisions of this act; any manufacturer who has given the bond or bonds herein provided for shall not be required to give any additional bond or bonds for any warehouse he may own and/or operate.

2. Retailers of beer and/or wine for consumption on the premises, a bond or bonds in the sum of not less than 3,000 nor more than 5,000 dollars, in the discretion of the commission; retailers of spirits for consumption on the premises, a bond or bonds in the sum of not less than 5,000 nor more than 10,000 dollars, in the discretion of the commission, conditioned that any such retailer or specially designated merchant will not directly or indirectly, by himself, his clerk or agent or servant at any time sell, furnish, give or deliver any alcoholic liquor to a minor except as provided in this act, nor to any adult person whatever who is at the time intoxicated, and that he will pay all damages actual and exemplary that may be adjudged to any person or persons, including those hereinafter mentioned, for injuries inflicted upon him or them either in person or property or means of support or otherwise, by reason of his selling, furnishing, giving or delivering any such alcoholic liquor.

The bond required by this act shall be substantially in the following form:

"Know all men by these presents, that we.....as principal and.....as surety are held and firmly bound unto the people of the state of Michigan in the sum of.....dollars to the payment thereof well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns firmly by these presents.

Sealed with our seals this .....day of .....A. D. 19.....

Whereas, the above named principal proposes to carry on the business of..... .....at .....in the county of....., state of Michigan.

Whereas, the said principal has covenanted and agreed and doth hereby covenant and agree as follows, to-wit: That he will not directly or indirectly, by himself, his clerk, agent or servant at any time sell, furnish, give or deliver any spirituous, malt, brewed, fermented or vinous liquor, any mixed liquor or any mixture or compound a part of which is spirituous, malt, brewed, fermented or vinous liquor to a minor, nor to any adult person whatever who is at the time intoxicated, and that he will pay all damages actual and exemplary that may be adjudged to any person or persons for injuries inflicted upon him

or them either in person or property or means of support or otherwise by reason of his selling, furnishing, giving or delivering any such liquors. Now, the condition of this obligation is such that if the said principal shall well and truly keep and perform all and singular the foregoing covenants and agreements and shall pay any judgment for actual or exemplary damages which may be recovered against him in any court of competent jurisdiction and all fines and costs that may be imposed upon him for violations of this act, then this obligation shall be void and of no effect; otherwise the same shall be in full force and effect.

Signed and sealed in the
presence of

....L.S.
....L.S."

The liquor control commission shall be empowered to embody such other provisions in the bond as it shall deem necessary.

Every wife, husband, child, parent, guardian or other persons who shall be injured in person or property, means of support or otherwise, by an intoxicated person by reason of the unlawful selling, giving or furnishing to any such persons any intoxicating liquor, shall have a right of action in his or her name against the person who shall by such selling or giving of any such liquor have caused or contributed to the intoxication of said person or persons or who shall have caused or contributed to any such injury, and the principal and sureties to any bond given under this law shall be liable, severally and jointly, with the person or persons selling, giving or furnishing any spirituous, intoxicating or malt liquors as aforesaid, and in any action provided for in this section, the plaintiff shall have the right to recover actual and exemplary damages in such sum not less than 50 dollars in each case as the court or jury may determine: Provided, That no surety shall be liable in excess of the amount of the bond required by this act. In case of the death of either party, the action or right of action given in this section shall survive to or against his or her executor or administrator, and in every such action by a husband, wife, child or parent, the general reputation of the relation of husband and wife, parent and child shall be prima facie evidence of such relation, and the amount so recovered by either husband or wife, parent or child, shall be his or her sole and separate property. Such damages together with the costs of suit shall be recovered in an action of trespass on the case before any court of competent jurisdiction and in any case where the parent shall be entitled to any such damages, either the father or mother may sue alone therefor, but recovery by 1 of such parties shall be a bar to suit brought by the other.

HISTORY: Am. 1937, p. 518, Act 281, Imd. Eff. July 21.

436.23 Vendors; qualifications.

Sec. 23. Vendors. Vendors shall be, when a corporation, only a corporation authorized to do business under the laws of the state of Michigan; when a firm or partnership, only when the majority of said firm or partnership are American citizens who have resided in the state of Michigan for 1 year, and when an individual, an American citizen residing in the state of Michigan for at least 1 year.

436.24 Same; classes.

Sec. 24. Same; classes. The following classes of vendors shall have the right to sell the several alcoholic liquors as provided for in this section:

1. Taverns wherein beer and wine may be sold for consumption on the premises only;
2. Class "C" license wherein beer, wine and spirits may be sold for consumption on the premises;
3. Clubs wherein beer, wine and spirits may be sold for consumption on the premises only to bona fide members, who have attained the age of 21 years;
4. Hotels of Class "A" wherein beer and wine may be sold for consumption on the premises and in the rooms of bona fide registered guests;

Hotels of Class "B" wherein beer, wine and spirits may be sold for consumption on the premises and in the rooms of bona fide registered guests;

5. Specially designated merchants, wherein beer and wine may be sold for consumption off the premises only;

6. Specially designated distributors wherein alcoholic liquor, except wine under 16 per cent alcohol by volume and beer, may be sold for consumption off the premises only;

7. Manufacturers wherein beer may be sold for consumption off the premises only, and wherein alcoholic liquor other than beer may be sold only to the commission;

8. Special licenses where beer and wine may be sold for consumption on the premises only;

9. Dining cars or other railroad or pullman cars, watercraft or aircraft, wherein alcoholic liquor may be sold for consumption on the premises only, subject to rules and regulations of the commission.

HISTORY: Am. 1937, p. 520, Act 281, Imd. Eff. July 21;—Am. 1945, p. 147, Act 133, Imd. Eff. April 30.

436.25 Printed price list, posting.

Sec. 25. Printed price list. Alcoholic liquor for consumption on the premises shall be sold only in accordance with a printed price list posted conspicuously in a prominent place on the premises.

Sec. 26.

HISTORY: Rep. 1937, p. 522, Act 281, Imd. Eff. July 21.
This section required table and prohibited bar service, and prohibited sale of spirits in places not licensed therefor.

436.26a Sterilization of glasses.

Sec. 26a. Sterilization of glasses. No alcoholic liquor shall be served to any person for consumption on the premises, unless the glass shall have been sterilized by such method and in such manner as shall be prescribed by the commission.

HISTORY: Add. 1937, p. 520, Act 281, Imd. Eff. July 21.

436.26b Sales in hotel rooms.

Sec. 26b. That alcoholic liquor may be served by any hotel licensed individually under the provisions of this act in the room of a bona fide guest thereof. No spirits shall be consumed in any place licensed under this act to sell beer and/or wine and not licensed to sell spirits.

HISTORY: Add. 1937, p. 520, Act 281, Imd. Eff. July 21.

436.27 Food; purchase, giving away.

Sec. 27. Food; purchase, giving away. No regulation shall be made requiring the purchase or serving of food with the purchase of alcoholic liquor, nor shall any food of any kind be given away in connection with the sale of alcoholic liquor.

436.28 Removal of liquor from premises where sold for consumption thereon.

Sec. 28. Removal of liquor from premises. Alcoholic liquor sold by vendors for consumption on the premises shall not be removed therefrom.

436.29 Gifts; sales to intoxicated person.

Sec. 29. Gifts; sales to intoxicated person. No vendor shall give away any alcoholic liquor of any kind or description at any time in connection with his business except manufacturers for consumption on the premises only. No vendor shall sell any alcoholic liquor to any person in an intoxicated condition.

436.30 Aid to vendor.

Sec. 30. Aid to vendor. No manufacturer, warehouseman or wholesaler shall aid or assist any other vendor by gift or loan of money or property of any description or other valuable thing, or by the giving of premiums or rebates, and it shall be unlawful for any vendor to accept the same.

436.31 Interest in business of vendor.

Sec. 31. Interest in business of vendor. No manufacturer, warehouseman or wholesaler shall have any financial interest, directly or indirectly, in the establishment, maintenance, operation or promotion of the business of any other vendor. No manufacturer, warehouseman or wholesaler, nor any stockholder thereof shall have any interest by

ownership in fee, leasehold, mortgage or otherwise, directly or indirectly, in the establishment, maintenance, operation or promotion of the business of any other vendor. No manufacturer, warehouseman or wholesaler shall have any interest directly or indirectly by interlocking directors in a corporation or by interlocking stock ownership in a corporation in the establishment, maintenance, operation, or promotion of the business of any other vendor. No person shall buy the stocks of any manufacturer, warehouseman or wholesaler and place such stock or stocks in any portfolio under any arrangement, written trust agreement, or any form of investment trust agreement and issue participating shares based upon such portfolio, trust agreement or investment trust agreement, and sell such participating shares within the state of Michigan.

436.32 Traffic in wine, spirits, alcohol and liquor by licensees only.

Sec. 32. Compliance with act; necessity. No person, directly or indirectly, himself or by his clerk, agent or employe shall manufacture, manufacture for sale, sell, offer or keep for sale, barter, furnish, or import, import for sale, transport for hire, or transport, or possess any wine, spirits, alcohol and/or alcoholic liquor unless such person shall have fully complied with the provisions of this act.

HISTORY: Am. 1937, p. 520, Act 281, Imd. Eff. July 21.

436.33 Age of purchaser.

Sec. 33. Age of purchaser. No alcoholic liquor shall be sold to any person unless he shall have attained the age of 21 years. A suitable sign describing the provisions of this section and warning violators thereof, shall be posted in a conspicuous place in each room where any alcoholic liquors are sold. Said signs shall be approved and furnished by the state liquor control commission.

HISTORY: Am. 1937, p. 521, Act 281, Imd. Eff. July 21.

436.34 Consumption of alcoholic liquors; public highways, parks and places of amusement.

Sec. 34. Public highways, public parks and places of amusement. No alcoholic liquor shall be consumed on the public highways. No alcoholic liquor, except beer and/or wine shall be consumed in public parks and places of amusement not licensed to sell for consumption on the premises.

436.35 Same; state military reservation.

Sec. 35. The commanding general, Michigan national guard, is hereby authorized to publish by general order such regulations and restrictions as to the transportation, possession, sale and use of liquors of any alcoholic content on the state military reservation during the field training periods of the Michigan national guard, either in state or federal service, as shall in his opinion be for the best interests of the military service.

Secs. 36-39.

HISTORY: Rep. 1937, p. 522, Act 281, Imd. Eff. July 21.
These sections provided for prescription sales.

436.40 Beer; taxation and discrimination.

Sec. 40. Beer; taxaton and discrimination. There shall be levied and collected by the commission on all beer manufactured and/or sold in this state a tax at the rate of 1 dollar and 25 cents per barrel if sold in bulk, and in like ratio if sold in smaller quantities, the payment of which shall be evidenced by excise tax beer stamps, caps, lids, or crowns as prescribed by the Michigan liquor control commission, affixed to the barrel, keg, case, or other container, as the case may be by the brewer if manufactured in this state, unless otherwise provided by the commission with respect to beer manufactured within this state, or by the wholesaler or the person from whom purchased if manufactured outside this state, whichever shall be designated by the commission, before sale thereof within this state by said wholesaler: Provided, however, That the tax imposed by this act upon beer manufactured in or imported into this state shall be rebated to such manufacturer or wholesaler upon satisfactory proof being furnished to the commission by affidavit or

otherwise, as the commission may determine, that such beer was shipped out of the state for sale and consumption outside the state of Michigan.

For purposes of taxation a barrel shall be construed to contain 31 gallons.

Any manufacturer duly licensed as aforesaid and who has paid said license fee shall be exempt from payment of any tax imposed under the provisions of Act No. 100 of the Public Acts of 1931 or amendments thereto, commonly known as the malt tax act, for all malt products taxed by said act used in its manufacturing process.

The commission shall forthwith adopt a regulation designating the states, the laws, or the rules or regulations of which are found to require a licensed wholesaler of beer therein to pay an additional fee for the right to purchase, import, or sell beer manufactured in this state; or which deny the issuance of a license authorizing the importation of beer to any duly licensed wholesaler of beer therein who may make application for such license; or which prohibit licensed wholesalers of beer therein from possessing or selling beer purchased in this state, unless the one from whom purchased has secured a license and paid a fee therein, when such seller neither transports the beer into said state nor sells the same therein; or which impose any higher taxes or inspection fees upon beer manufactured in this state when transporting into or sold therein, than is imposed upon beer manufactured and sold within said state, the regulation adopted shall prohibit all licensees from purchasing, receiving, possessing, or selling any beer manufactured in any state therein designated, said regulation to become effective 90 days after its adoption. Any licensee or person adversely affected shall be entitled to review by certiorari to the proper court the question as to whether the commission has acted illegally or in excess of authority in making its finding with respect to any state.

HISTORY: Am. 1937, p. 521, Act 281, Imd. Eff. July 21.
NOTE: Act 100, 1931, above referred to, was repealed by Act 102 of 1947.

Sec. 40a.

HISTORY: Add. 1945, p. 212, Act 150, Imd. Eff. May 14.
Sec. 40a as added by amendatory Act 150, 1945, provided for a 10 per cent tax on certain alcoholic liquor and for the distribution of the fund raised thereby. This amendatory act did not amend or add other sections to the act amended and contained a section 2 reading as follows: "Section 2. This amendatory act shall expire 2 years from the effective date thereof."

436.41 Failure to pay tax, penalties, collection.

Sec. 41. Same; failure to pay tax. If any person shall fail or refuse to pay the tax required by this act, the commission shall proceed to assess the tax against such person, and such tax shall become due and payable together with such penalty or penalties as the commission shall add, but such penalty or penalties shall not exceed 5,000 dollars, upon demand by the commission or some person designated by it. If such tax remains unpaid for 15 days after such demand has been made, the commission may issue its warrant under its official seal, directed to the sheriff of any county or other officer, to levy upon and sell the property, either personal or real, of the taxpayer, used in connection with the business for the privilege of doing which the tax is levied, found within his jurisdiction, for the payment of the amount thereof with the added penalties, interest and cost of executing the warrant. Such warrant shall be returned to the commission, together with the money collected, by virtue thereof, within the time therein specified, which shall not be less than 20 nor more than 90 days from the date of the warrant. The sheriff or other officer to whom such warrant shall be directed shall proceed upon the same in all respects, and with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments by a court of record, and shall be entitled to the same fees for his service in executing the warrant, to be collected in the same manner. The state of Michigan, through the commission or some officer or agent designated by it, is hereby authorized to bid for and purchase any property sold under the provisions hereof.

In addition to the mode of collection provided herein, the commission may bring an action at law in the county in which the business or any part thereof is carried on, to collect and recover the amount of taxes, interest and/or penalties due from any taxpayer.

436.42 Search warrants.

Sec. 42. Search warrant. A search warrant may be issued in accordance with the provisions of chapter 16 of Act No. 175 of the Public Acts of 1927 as amended, being

ctions 17492 to 17509 of the Compiled Laws of 1929. Under such search warrant the ficer may seize any alcoholic liquor, containers, implements or conveyances used in nnection with the violation of the provisions of this act or any rule or regulation of the mmission. No property right of any kind shall exist in any alcoholic liquors had, kept, nsported or possessed contrary to law or in or to any receptacle or container of any nd whatever in which said liquors may be found and all such are hereby declared con-band and forfeited to the state and shall be seized. All alcoholic liquor, containers, plements or conveyances seized under any such search warrant shall be turned over to e commission by direction of the court or magistrate and shall be disposed of in accord-ce with the rules and regulations of the commission, which shall guarantee the return of ch property, or payment of moneys received for the sale of the same, to the owner ess the owner shall be charged and convicted of the alleged offense or offenses in con-ction with which the said search and seizure was made.

All alcoholic liquors as defined by this act which shall be manufactured, transported d or sold and/or possessed without the consent of the liquor control commission being n duly obtained, are hereby declared contraband and shall be disposed of by order of the uor control commission.

HISTORY: Am. 1945, p. 148, Act 133, Imd. Eff. April 30.
NOTE: C L 1929, 17492-17509, above referred to, is Compilers' § § 776.1-776.19.

436.43 Seizures by execution, bankruptcy, payment.

Sec. 43. Seizures by execution or in bankruptcy. In case of seizure of alcoholic liquor der any judgment rendered against the holder of any license, or in the case of insolvency f such licensee, the officer seizing such alcoholic liquor or the trustee in bankruptcy of ch licensee, shall deliver to the commission all alcoholic liquor found in the possession f the judgment debtor or bankrupt, as the case may be. The commission shall, within 1 nth after the date of delivery by said officer or trustee in bankruptcy, as the case may e, pay over to such officer or trustee in bankruptcy the purchase price, less 10 per nt. paid by such licensee to the commission for all legal alcoholic liquor seized, nd the value, less 10 per cent, as established by the commission, of other legally quired alcoholic liquor so delivered. Any illegally acquired alcoholic liquor so delivered all be disposed of by order of the commission and no payment shall be made therefor.

436.44 Liability of vendor.

Sec. 44. Liability of vendor. Any person engaged in the business of selling or keeping r sale alcoholic liquor in violation of the provisions of this act, whether as owner, clerk, ent, servant or employe, shall be equally liable, as principal, both civilly and criminally, r the violation of the provisions of this act, or any person or principal shall be liable, both villy and criminally, for the acts of his clerk, servant, agent or employe, for the violation f the provisions of this act.

436.45 False and fraudulent statements.

Sec. 45. False and fraudulent statements. Any person who shall make any statement ther orally or in writing to the commission for the purpose of inducing the commission ct or for the purpose of inducing the commission to refrain from taking action, which tement is false or fraudulent, and any person who makes any false or fraudulent state-nt for the purpose of enabling or assisting any person to evade the provisions of this shall be guilty of a violation of this act.

436.46 Adulterated and misbranded liquors, definitions.

Sec. 46. Adulterated and misbranded alcoholic liquor. Any person who, by himself r by his agent or servant, shall sell, offer for sale, expose for sale, or have in possession ith intent to sell, any alcoholic liquor that is adulterated or misbranded within the eaning of this section shall be guilty of a violation of this act. For the purpose of this ction alcoholic liquor shall be deemed to be adulterated if it contains any ingredient rohibited by the rules and regulations of the commission. For the purpose of this section

alcoholic liquor shall be deemed to be misbranded when not plainly labeled, marked or otherwise designated as shall be prescribed by the rules and regulations of the commission.

436.46a Forging, etc., documents, labels, etc.; penalty.

Sec. 46a. Forging, altering or counterfeiting documents, labels or stamps. Whoever falsely or fraudulently makes, simulates, forges, alters or counterfeits any document, label or stamp prescribed by the commission under the provisions of this act or the rules or regulations of the commission, or causes or procures to be falsely or fraudulently made, simulated, forged, altered, or counterfeited any such document, label or stamp, or knowingly and wilfully utters, publishes, passes or tenders as true, any such false, altered, forged or counterfeited document, label or stamp, or uses more than once any label or stamp prescribed by the commission pursuant to this act or the rules or regulations of the commission, shall be guilty of a felony punishable by imprisonment in the state prison not more than 1 year or by a fine of not more than $1,000.00, or both, in the discretion of the court.

HISTORY: Add. 1945, p. 148, Act 133, Imd. Eff. April 30.

436.47 Retailers' license fees, disbursement.

Sec. 47. Quarterly, upon recommendation of the commission, the state shall pay, in the manner prescribed by law, to the city, village or township in which the licensee is located 85 per cent of the amount of the proceeds of the retailers' licenses collected therein, for the specific purpose of enforcing the provisions of this act and the rules and regulations of the commission. The balance of said license fees shall be turned over to the state treasury and credited to the state general fund: Provided, however, This section shall not include retail license fees collected for railroad or pullman cars, or for watercraft or for aircraft, which license fees shall be disposed of as provided for manufacturers' license fees.

HISTORY: Am. 1935, p. 410, Act 241, Imd. Eff. June 8;—Am. 1945, p. 149, Act 133, Imd. Eff. April 30;—Am. 1948, Ex. Ses., p. 82, Act 29, Imd. Eff. May 11.

436.48 Handling of moneys, payment monthly to state treasurer.

Sec. 48. Handling of moneys. All moneys received by the commission under the provisions of this act, shall be turned over monthly to the state treasurer, and credited to the general fund, to be disbursed according to law.

HISTORY: Am. 1935, p. 410, Act 241, Imd. Eff. June 8.

436.49 Moneys paid to state treasurer credited to general fund.

Sec. 49. Appropriations. All moneys deposited by the commission with the state treasurer, shall be credited to the general fund and shall be available for the purposes for which the general fund is available.

HISTORY: Am. 1935, p. 411, Act 241, Imd. Eff. June 8.

436.50 Penalties, intent.

Sec. 50. Penalties. Any person, other than persons required to be licensed under this act, who shall violate any of the provisions of this act shall be guilty of a misdemeanor.

Any licensee who shall violate any of the provisions of this act, or any rule or regulation of the commission promulgated hereunder, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than 6 months or by a fine of not more than 500 dollars, or both, in the discretion of the court.

Any person, who shall do any act for which a license is required under this act, without first obtaining said license or any person who shall sell any alcoholic liquor in any county which shall have prohibited the sale of alcoholic liquor under the provisions of section 57 hereof, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 1 year or by a fine of not more than 1,000 dollars, or both, in the discretion of the court.

It is the intent of the legislature that the court, in imposing punishment under the provisions of this section, should discriminate between casual or slight violations and habitual sales of alcoholic liquor or attemps to commercialize violations of this act or any of the rules or regulations of the commission promulgated hereunder.

436.51 **Revocation of licenses, effect.**

Sec. 51. Where for any violation of this act, the license for any premises licensed has been revoked, no license shall be thereafter issued for a period of 1 year after such revocation, for such licensed premises.

Where for any violation of this act, the license to any person issued under this act or Act No. 64 of the Public Acts of 1933 has been revoked for cause, or who has been convicted of a violation of said act or acts, no license shall be thereafter issued for a period of 2 years after such revocation, to such person.

Sec. 52. (This was a repeal section.)

HISTORY: Rep. 1947, p. 169, Act 129, Eff. Oct. 11.

ACTS REPEALED: Act 338, 1917, C L 1929, 9138-9209; Act 64, 1933; Sec. 25, Act 285, 1909, C L 1929, 8340; Secs. 27-28, Act 134, 1885, C L 1929, 6853-6854; Sec. 3, Act 123, 1921, C L 1929, 547; Sec. 8, Act 263, 1917, C L 1929, 5399; Act 325, Local Acts 1901.

436.53 **Saving clause.**

Sec. 53. Saving clause. This act shall not impair or affect any act done, offense committed or right accruing, accrued or acquired, or penalty, forfeiture or punishment incurred prior to the time this act takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if this act had not been passed.

436.54 **Construction of act.**

Sec. 54. Liberal construction. This act shall be liberally construed to effect the intent and purposes herein set forth.

Sec. 55. (This was a severing clause section.)

HISTORY: Rep. 1947, p. 170, Act 129, Eff. Oct. 11.

436.56 **Referendum; sale of spirits for consumption on premises.**

Sec. 56. Referendum; sale of spirits by the glass. Spirits for consumption on the premises, in addition to beer and wine, may be sold by restaurants and hotels, approved by the commission under this act, in the following cities and villages or townships; when the legislative body of any such city or village or township shall, by resolution of a majority vote of the members elect, within 60 days after the effective date of this amendatory act, vote in favor thereof: Provided, however, That with respect to any action taken by such legislative body, or, in case such legislative body shall fail to act within said 60 day period, a petition may be filed with the city or village or township clerk, as the case may be, requesting the submission of the question of sale of spirits for consumption on the premises, in addition to beer and wine. In case of a city or township such petition shall be signed by a number of the qualified electors thereof which shall be not less than 20 per centum of the total number of votes cast for all candidates for the office of secretary of state in such city or township at the last general election held for such purpose. In case of a village such petition shall be signed by a number of the qualified electors thereof which shall not be less than 20 per centum of the total number of votes cast for all candidates for the office of president of such village at the last village election held for such purpose: Provided, That such question shall not be submitted to the electors of any such city or village or township more often than once in every 4 years. The city or village or township clerk, as the case may be, shall call a special election in said city or village or township to be held within 60 days of the filing of such petition. The question of the sale of such spirits for consumption on the premises, in addition to beer and wine, shall be submitted by ballot in substantially the following form:

"Shall the sale of spirits in addition to beer and wine be permitted for consumption on the premises within (the city or village or township as the case may be) of .....under the provisions of the law governing same?

Yes.....

No....."

All votes on the question shall be taken, counted and canvassed in the same manner as votes cast in city or village or township elections, as the case may be, are taken, counted and canvassed. Ballots shall be furnished by the election commission or similar body of the respective cities or villages or townships. In case a majority of the electors voting at any such election shall vote in favor thereof, spirits may be sold in any such city or village or township, under the provisions of this act, for consumption on the premises, in addition to beer and wine.

HISTORY: Am. 1937, p. 521, Act 281, Imd. Eff. July 21.
ELECTION LAW: See Compilers' § 145.1 et seq.

436.57 Same; county option of prohibition.

Sec. 57. Same; county option. The provisions of this act shall be the law controlling the alcoholic liquor traffic within the state of Michigan, including the manufacture, transportation, possession, wholesale and retail sales thereof, and shall be applicable to and in every county within the state of Michigan: Provided, however, That upon the filing with the county clerk of a petition signed by not less than 20 per cent of the qualified electors of any county of the entire vote cast for the office of secretary of state in such county at the last general election, after 90 days and within 1 year after this act shall take effect, and once within 2 years after the expiration of said 1 year period, and not oftener than once in every 4 years thereafter, requesting the submission to the electors of such county at a special election of the question of the manufacture and/or sale within such county of alcoholic liquor, the county clerk shall call a special election in such county within 60 days of the filing of any such petition in his office. All votes on the question shall be taken, counted and canvassed in the same manner as votes cast for county offices are taken, counted and canvassed. The vote on such question shall be by ballot which shall be substantially in 1 of the following forms:

"1. Shall the manufacture of alcoholic liquor be prohibited in the county of .....under the provisions of the law governing the same?

Yes .....
No .....

2. Shall the sale of alcoholic liquor be prohibited in the county of..... under the provisions of the law governing the same?

Yes .....
No .....

3. Shall the manufacture and sale of alcoholic liquor be prohibited in the county of.....under the provisions of the law governing the same?

Yes .....
No ....."

Such ballots shall be furnished by the board of election commissioners of the county.

Alcoholic liquor shall not be manufactured and/or sold in any county in this state in which the electors at any such election shall by a majority thereof vote to prohibit the manufacture and/or sale of alcoholic liquor, as the case may be, in such county. The effective date of prohibiting the manufacture and sale of alcoholic liquor, or either manufacture or sale, shall be 30 days after the board of county canvassers has determined that a majority of those voting on said question have voted in the affirmative thereon. It shall be the duty of the county clerk to give notice of the effective date of such prohibition by publishing said date at least once in a newspaper published in said county, or, if there be no newspaper published within the county, in a newspaper published in an adjoining county.

ELECTION LAW: See Compilers' § 145.1 et seq.

436.58 Warehouse receipts for alcoholic liquor; authority of commission.

Sec. 58. The commission shall have complete power to regulate, limit and control the sale, transfer, barter and/or exchange in this state of warehouse receipts for alcoholic liquor wheresoever such alcoholic liquor may be situated.

HISTORY: Add. 1937, p. 522, Act 281, Imd. Eff. July 21.

Act 68, 1913, p. 100; Eff. Aug. 14.

AN ACT relating to drunkenness on railway trains or interurban cars, and prohibiting the drinking of intoxicating liquor thereon as a beverage, and providing for the arrest of offenders, and penalties for violation of this act.

The People of the State of Michigan enact:

436.201 Drunkenness on train prohibited.

Sec. 1. No person shall while in an offensive state of intoxication enter or be on or remain upon any railway train or interurban car as a passenger.

HISTORY: C L 1915, 8443;—C L 1929, 11590.

436.202 Public drinking on train prohibited; exception.

Sec. 2. No person shall publicly drink any intoxicating liquor as a beverage in any railway train or coach, or interurban car, or give, or cause to be given to any other person therein, intoxicating liquor as a beverage, except in a compartment or place where such liquor is sold or served under the authority of a license lawfully issued.

HISTORY: C L 1915, 8444;—C L 1929, 11591.

436.203 Conductor; arrest and arraignment of offender.

Sec. 3. The conductor of any railway train or interurban car, may summarily arrest, with or without warrant, any person violating any of the foregoing provisions, and for such purpose shall have the same power and authority as any peace officer, including the power to summon assistance; and such conductor shall further have power to deliver any such person to any policeman, constable, or other public officer at the next station stop where such public officer can be found, and it shall be the duty of such officer to bring the person charged with such offense before the nearest justice of the peace or municipal court of the county where said offense was committed, and to make a complaint against such person, and such complaint made upon information and belief of said officer, shall be sufficient.

HISTORY: C L 1915, 8445;—C L 1929, 11592.

436.204 Same; seizure of liquor, receipt, return.

Sec. 4. The conductor of any railway train or interurban car may take from any person found violating any of the foregoing provisions, any intoxicating liquor then in possession of such person and deliver the same to the nearest station agent, giving the person from whom it was taken a receipt therefor. Upon the presentation and surrender of such receipt within 10 days thereafter such liquor shall be delivered to the person presenting same, and if not so delivered within such time shall be destroyed by such station agent.

HISTORY: C L 1915, 8446;—C L 1929, 11593.

436.205 Penalty.

Sec. 5. Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than 100 dollars, or by imprisonment in the county jail for not more than 90 days, or by both such fine and imprisonment in the discretion of the court.

HISTORY: C L 1915, 8447;—C L 1929, 11594.

Exhibit 5

2008 WL 2914981
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

SWARTZ AMBULANCE SERVICE, INC., a Michigan corporation and Harry Swartz, individually, Plaintiffs,
v.
GENESEE COUNTY, et al., Defendants.

No. 08–11448.
|
July 25, 2008.

Attorneys and Law Firms

Scott R. Fraim, Henneke, McKone, Flint, MI, for Plaintiffs.

H. William Reising, Plunkett & Cooney, Flint, MI, Darrin F. Fowler, Santiago Rios, Ronald J. Styka, Michigan Department of Attorney General, Lansing, MI, Carol L. Fossee, Payne, Broder, Bingham Farms, MI, Christopher J. Johnson, Farmington Hills, MI, for et al., Defendants.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO REMAND

MARIANNE O. BATTANI, District Judge.

***1** Before the Court is Swartz Ambulance Service, Inc ("Swartz") and Harry Swartz's Motion to Remand to Genesee County Circuit Court (Doc. No. 16). Plaintiffs filed an action in state court challenging the legality of a Genesee County Ordinance. Defendants include Genesee County, its Board of Commissioners, the Genesee County Public Health Department and the County Public Health Officer, the Genesee County Medical Control Authority, its Director, its Executive Director, the Genesee County 9–1–1 Consortium and its Director, as well as the Michigan Department of Community Health and its Director.

The Court heard oral argument on July 2, 2008. At the conclusion of the hearing, the Court took this matter under advisement. For the reasons that follow, the Court **GRANTS in part** and **DENIES in part** the motion.

II. STANDARD OF REVIEW

In reviewing a motion to remand, the court must be mindful of the scope of the federal jurisdictional statutes and the overriding constitutional limits to federal district court jurisdiction. Therefore, courts construe removal statutes narrowly, resolving uncertainties in favor of remand. *Her Majesty the Queen of Right of the Province of Ontario v. City of Detroit,* 874 F.2d 332, 339 (6th Cir.1989).

III. FACTUAL BACKGROUND

Swartz is an ambulance service provider, licensed by the state and operating in Genesee County. *See* Compl. ¶ 6. Harry Swartz is a property owner and pays property taxes in Genesee Co. On March 11, 2008, Plaintiffs filed their Complaint in state court, challenging the Genesee County Ambulance Operations and Emergency Medical Services Ordinance. Plaintiffs' Complaint seeks injunctive relief, declaratory relief, and monetary damages. According to Plaintiffs, the claims alleged stem from 1) the enactment and/or implementation of the Ordinance and 2) improper use of funds collected pursuant to a Genesee County millage in violation of the Michigan General Property Tax Act.

On April 4, 2008, Defendants filed a joint Notice of Removal. Defendants Genesee County, County Commissioners, Public Health Department and its Director, Robert Pestronk [1] assert removal was proper under 42 U.S.C. § 1441(a) and (b). They dispute Plaintiffs' characterization of the bases of the claims and contend that the claims are so interlocked as to form part of the same case or controversy.

IV. ANALYSIS

Plaintiffs ask this Court to remand this case to state court for two reasons. First, the case should be remanded to state court pursuant to 28 U.S.C 1441(c) because a violation of the General Property Tax Act, a completely separate and independent claim from the rest of the claims advanced in their Complaint is pleaded, and state claims predominate the action. Second, Plaintiffs assert the case should be remanded to state court pursuant to 28 U.S.C. § 1367(c)(1)(2) and/or (4), because the state claims raise novel and complex issues of state law.

An overview of the two statutory provisions advanced in support of remand follows. The relationship between

the supplemental jurisdiction statute, 28 U.S.C. § 1367, and the removability provision contained in 28 U.S.C. § 1441(c) warrants consideration. *See* 14C Charles Alan Wright *et al.,* Federal Practice and Procedure § 3724, at 3 (3d ed.1998) (stating that § 1441(c) is an "unusual and complex provision" with "a tortured history," and that it initially seems to be inconsistent, or at least unharmonious, with supplemental jurisdiction under § 1367(a)). Section 1441 allows the removal of an entire case to federal court "[w]henever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action." 28 U.S.C. § 1441(c). On the other hand, § 1367(a) grants the district courts supplemental jurisdiction over state law claims when they are "so related" to the claim supporting federal question jurisdiction "that they form part of the same case or controversy." 28 U.S.C. § 1367(a). With these principles in mind, the Court turns its attention to the parties' arguments.

A. Does 28 U.S.C § 1441(c) Authorize the Court to Remand the State Claims?

***2** Title 28 U.S.C. § 1441(c) reads,

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

In reading the statutory language, it is evident that the first criterion that must be met is the existence of a separate and independent, otherwise nonremovable claim. The United States Supreme Court has held there is no "separate and independent" claim or cause of action under § 1441(c) "where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions." *Am. Fire & Cas. Co. v. Finn,* 341 U.S. 6, 14, 71 S.Ct. 534, 95 L.Ed. 702 (1951); 14C Wright et al., *supra,* § 3724, at 9 (stating that § 1441(c) limits removal "to situations in which a federal question claim is joined with a separate and independent claim of a nonfederal-and otherwise nonremovable-nature").

Here, the property tax claim is not one arising from an interlocked series of transactions, and the Court rejects Defendants' argument to the contrary. According to Defendants, Count XV (Conspiracy) trumps any finding of the existence of a separate and independent claim because it incorporates all previous allegations of the Complaint. It reads, "Defendants have participated as co-conspirators with each other in the violations alleged, and have performed acts and made statements in furtherance thereof." Compl., ¶¶ 187, 188. Based on this language, Defendants conclude that the violation of the General Property Tax Act, Count XI I, is inseparable from Plaintiffs' other claims.

Defendants' argument is undermined by a fair reading of the Complaint and case law interpreting the statutory language. The case upon which Defendants rely, *Jury–Rowe Co. of Lansing v. Teamsters & Chauffeurs Local Union,* 97 F.Supp. 633 (E.D.Mich.1951) (conspiracy was entered into between certain of the defendants to prevent the delivery of goods and merchandise to the plaintiff) is distinguishable. In *Jury–Rowe,* the plaintiff brought one cause of action for conspiracy. It advanced no federal claim. Here, Plaintiffs' Complaint clearly contains two sets of wrongs: the wrongs stemming from the Ordinance, and the wrongs stemming from the improper use of the millage funds. The millage did not predicate the enactment of the Ordinance, and Plaintiffs could have brought the claim about improper use of funds even if the Ordinance was not enacted. Therefore, its conclusion in the overarching claim of conspiracy does not validate Defendants' argument.

Although the Court agrees with Plaintiffs that the claims are separate and independent, it does not construe § 1441(c) to permit remand of an entire case, including unresolved federal claims, when the district court finds that state law predominates. Although some district courts have interpreted the word "matters," in the provision as authorization to remand entire "cases," even those containing federal claims, provided that the state-law claims "predominated" over the federal claim or claims in each case, the Court declines to

adopt such a reading. *See, e.g.,* *Moralez v. Meat Cutters Local 539,* 778 F.Supp. 368, 370–71 n. 4 (E.D.Mich.1991) (relying on the commentary to the 1990 revisions to the Code that suggested that the term could be construed to refer to an entire case, rather than individual claims).

***3** The court reaches its decision in the absence of clear direction from the Sixth Circuit, which has not ruled on the issue. The Court is not without guidance because other federal appellate courts have rejected such reasoning. *See* *Gaming Corp. of America v. Dorsey & Whitney,* 88 F.3d 536, 542 (8th Cir.1996) ("A district court has no discretion to remand a claim that states a federal question."); *Borough of West Mifflin v. Lancaster,* 45 F.3d 780, 787 (3d Cir.1995); *Brockman v. Merabank,* 40 F.3d 1013, 1017 (9th Cir.1994); *Buchner v. F.D.I.C.,* 981 F.2d 816, 819–20 (5th Cir.1993); *cf.* *In re City of Mobile,* 75 F.3d 605, 607–08 (11th Cir.1996) (rejecting similar rationale for remand of federal claims under 28 U .S.C. § 1367). The basis of the rejection is sound. Federal courts must be cognizant of their "unflagging obligation to exercise the jurisdiction conferred upon them by the coordinate branches of government and duly invoked by litigants." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 817, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). The exercise of federal question jurisdiction is not discretionary and is not overridden by the directive to construe removal statutes narrowly. *See generally* Moore's Federal Practice § 107.41[1][e], at 107–203 (Rev.2000) ("Federal question jurisdiction is not discretionary with the court."). In sum, Plaintiffs' argument that remand is called for when state law claims predominate is unpersuasive, and cannot "pry loose from this Court an entire case in which a federal claim has been found." *Majeske v. Bay City Bd. of Educ.,* 177 F.Supp.2d 666 (E.D.Mich.2001) (courts lack "discretionary authority to remand a case and decline federal jurisdiction over a federal-question-based claim merely because state law claims otherwise predominate").

Accordingly, the Court rejects Plaintiffs' request to remand the entire case and turn its attention to whether those matters in which state law predominates should be remanded.[2] It is evident that Count XII, the General Property Tax Act claim, is wholly unrelated to the rest of the matters pleaded in Plaintiffs' Complaint and it is based entirely on state law. Accordingly, the Court finds remand of Count XII prudent. The arguments raised as to the remaining claims in which state law predominates are considered under § 1367.

C. Does § 1367(c)(1)(2) or(4) Authorize Remand?

Pursuant to 28 U.S.C. § 1367(c), the Court has discretion to decline jurisdiction only in cases where certain factors are met. Section 1367 states, in pertinent part:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law;
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> ***4** (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

The Court finds no basis under the statute for remanding those claims that are parallel to the federal claims, including Counts III (inverse condemnation), IV (restraint of trade), V (monopoly), VI (equal protection), VII (due process), VIII (impairment of contract), IX (violation of takings clause) and X (void for vagueness). These are the claims that arise out of the state and federal constitutions or state and/or federal statutes. A remand of these claims wastes judicial resources, forces the parties to litigate virtually the same claims in separate forums, and raises the possibility of inconsistent judgments.

There can be no dispute that Counts XIII (Tortious Interference with Contract), XIV (Tortious Interference with Business Expectancies) and XV (Civil Conspiracy) are run-of-the-mill state claims, which frequently are addressed in federal district court. Even though these claims clearly qualify as matters in which state law predominates, they arise out of the same facts as those claims supporting federal question jurisdiction and form part of the same case or controversy. Consequently, the Court finds judicial resources are better served by retaining jurisdiction over these claims.

Plaintiffs also maintain that the Court should remand the "novel" or complex claims pleaded in Count I (Injunctive

Relief for Ultra Vires Acts–County Board of Commissioners does not have Authority to Eliminate Ambulance Operations from the County), Count II (Injunctive Relief—The Ordinance is Preempted by State Law), and Count XI (Ordinance Violates the Michigan Emergency 9–1–1 Service Enabling Act). According to Plaintiffs, these are matters in which State law predominates, and they also can be deemed novel in the issues raised have not been specifically decided by any state court.

Despite the absence of case law addressing these specific provisions, federal courts frequently interpret statutory provision. Case law provides the rules of interpretation. To the extent that these claims are novel or complex, the Court, in its discretion, finds the relationship between all claims arising out of the enactment of the Ordinance outweighs any factor favoring remand.

IV. CONCLUSION

The Court **GRANTS in part and DENIES in part** Plaintiffs' Motion to Remand. Pursuant to 28 U.S.C 1441(c), the Court **REMANDS** Count XII. The Court will retain jurisdiction over the remaining claims.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 2914981

Footnotes

1 Defendant Medical Control Authority, its Director and Executive Director concur with the Genesee County Defendants and join in opposing remand. Defendants Michigan Department of Community Health and Janet Olszewski also filed a brief which requests that the Court deny the motions to remand.

2 Plaintiffs argue that those claims alleging violations of federal law are subsumed, and therefore predominated, by their state counterparts. *See e.g.* Counts IV, "Combination or Conspiracy in Restraint of Trade or Commerce," and V "The Ordinance Creates a Monopoly in Violation of Section 2 of the Sherman Act," Count VI, entitled "Equal Protection of the Law," Count VII, which advances a due process claim, Count VIII, which alleges impairment of contract, Count IX, Violation of Takings Clause. Compl. at ¶¶ 120, 128, 141, 143, 148, 157. The Court disagrees. The claims clearly invoke federal law; the existence of a state counterpart in no way qualifies the claims as matters in which state law predominates.

2012 WL 12932609
Only the Westlaw citation is currently available.
United States District Court, N.D.
Georgia, Gainesville Division.

LHR FARMS, INC., Plaintiff,
v.
WHITE COUNTY, GEORGIA et al., Defendants.

CIVIL ACTION NO. 2:09-CV-00177-WCO
|
Signed 03/22/2012

Attorneys and Law Firms

Barbara H. Gallo, Zahra S. Karinshak, Kerry F. Nelson, Krevolin & Horst LLC, Atlanta, GA, for Plaintiff.

Gary Kevin Morris, Williams, Morris & Waymire, LLC, Buford, GA, R. David Syfan, Hulsey Oliver & Mahar, Gainesville, GA, for Defendants.

ORDER

WILLIAM C. O'KELLEY, Senior United States District Judge

***1** The captioned case is before the court for consideration of plaintiff's "Renewed Motion for Partial Summary Judgment" [48] and defendants' "Motion for Summary Judgment" [54].

On October 15, 2009, plaintiff filed this action under 42 U.S.C. § 1983, challenging White County's enactment of an ordinance that regulated land disposal and land treatment sites (hereinafter "LAS sites"). The complaint alleged that the ordinance: (1) was preempted by state law; (2) violated plaintiff's procedural and substantive due process rights; (3) violated plaintiff's right to equal protection under the law; (4) constituted an unconstitutional taking without just compensation; and (5) violated a number of state laws. Plaintiff also claimed that defendants had engaged in a conspiracy to violate its constitutional rights. Plaintiff requested punitive damages and an injunction prohibiting White County from enforcing the ordinance. After a preliminary hearing, the court entered on November 9, 2009, a temporary restraining order preventing White County from enforcing Ordinance 2009-12, the initial ordinance, and Ordinance 2009-20, a later amending ordinance that changed several aspects of the first ordinance. [1]

In a comprehensive order dated September 14, 2010, the court dismissed plaintiff's procedural due process, equal protection, and takings claims under Rule 12(b)(6). Additionally, the court dismissed plaintiff's conspiracy claim, dismissed all of plaintiff's federal claims against the White County Commissioners ("the Commissioners") [2] in their official capacities as redundant of the claims against White County, and dismissed all of plaintiff's federal claims against the Commissioners in their individual capacities as barred by legislative immunity. Plaintiff's arbitrary and capricious substantive due process claim survived and the court retained jurisdiction over the state law claims, including the preemption claim. *See* 28 U.S.C. § 1367(a).

***2** On October 8, 2010, defendants filed their answer. Subsequently, plaintiff attempted to obtain interlocutory review of the court's order. On April 18, 2011, the court denied plaintiff's request for an interlocutory appeal and set this case for pretrial conference. Nearly two weeks later, the parties jointly sought a 90-day discovery extension. The court denied this request but stayed the case for 90 days to allow the parties to prepare and file these summary judgment motions. On July 19, 2011, plaintiff filed its motion for summary judgment. Later, on August 24, 2011, defendants filed their cross-motion for summary judgment. These motions have now been submitted and are ready for disposition.

I. Summary Judgment Standard

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The moving party may demonstrate the absence of a genuine dispute as to any material fact by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ... admissions, interrogatory answers, or other materials." FED. R. CIV. P. 56(c)(1)(A). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion," by identifying the evidence "which it believes demonstrate[s] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This initial responsibility is discharged when the movant shows that there is no dispute of material fact or that

the non-moving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Id.* at 322-23. Once the moving party has met its initial burden, the nonmoving party must "go beyond the pleadings," and, utilizing its own evidentiary submissions or those already filed, demonstrate that there is a genuine dispute of material fact such that a trial is required. *Id.* at 324. The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In addition to the materials cited by the parties, the court may also refer to other materials in the record. FED. R. CIV. P. 56(c)(3).

"An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case." *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1259-60 (11th Cir. 2004) (citing *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997)). An issue of fact is considered "genuine" if the "record taken as a whole could lead a rational trier of fact to find for the non-moving party." *Hickson Corp.*, 357 F.3d at 1260. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Allen*, 121 F.3d at 646 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Thus, the moving party is entitled to "judgment as a matter of law" when the non-moving party fails to make a sufficient showing of an essential element of the case on which the non-moving party bears the burden of proof. *Celoxtex Corp.*, 477 U.S. at 322.

II. Factual Background

Plaintiff is a large horse farm in White County, Georgia. The farm raises cattle, maintains hen houses, and grows hay, both to feed its own animals and for sale. Plaintiff fertilizes its hay fields with treated commercial waste and domestic septage. The commercial waste and domestic septage is treated on-site and then sprayed on the hay fields. Plaintiff began using treated waste as a fertilizer in 1996. Originally, the waste was delivered to the fields through a subsurface injection system, but now treated wastewater is sprayed on the hay fields from stationary sprayers.

***3** Throughout its operation, several White County citizens, particularly plaintiff's neighbors, complained that its activities generated excessive odors. Beginning in May 2009, White County adopted several ordinances (as explained in footnote 1) which sought to "provid[e] for the regulation of facilities that engage in the land application of human waste and septage or commercial waste, or both...." White County, Ga. Ordinance, Preamble 1. The court collectively refers to these ordinances as the "ordinance" or the "challenged ordinance." Plaintiff sued White County, claiming that the enactment of the ordinance was unconstitutional.

A. Plaintiff's Treatment Procedure

Plaintiff receives commercial waste and domestic septage from waste transporters. Commercial waste can include: (1) nontoxic, nonhazardous liquid waste water from commercial facilities; (2) the contents of grease interceptor traps including fats, oil, grease, and food scraps; or (3) "oil waste residue" produced from vehicle maintenance or washing. O.C.G.A. §§ 12-15-20(1)(A), (1)(B), and (1)(C). Domestic septage is "the liquid or solid material removed from a septic tank, cesspool, portable toilet, type III marine sanitation device, or a similar system that receives only domestic sewage." Ga. Comp. R. & Regs. 391-3-6-.23(2)(i). Plaintiff receives commercial waste and domestic septage from multiple waste transporter companies. Approximately 15%-20% of the waste is received from Hulsey Environmental Services, while the remainder is received from other transporters. (Dep. of John Hulsey 88-89.) Plaintiff has no transporter capacity of its own. (*Id.* at 88.)

Throughout its history, plaintiff has utilized two different processes for treating and applying the septage and waste. Between 1996 and 2007, plaintiff used a subsurface injection system. The domestic septage and commercial waste were treated with lime and then applied to the fields through subsurface injection lines. (*Id.* 13-14.) This subsurface injection can be referred to as the "land application" of domestic septage and it admittedly "generated a lot of odors, or some odors." (*Id.* at 11, 13.)[3] Plaintiff stopped using this process in late 2007 and switched to a system that sprayed treated domestic septage and commercial waste onto the fields.

This spray procedure is still used. The process begins when a waste transporter truck delivers domestic septage or commercial waste. The waste is unloaded at an on-site

treatment facility. Initially, the septage and waste passes through a tumbler screen to separate solids from the wastewater. The solids are removed and sent to a landfill for disposal. Next, the wastewater is heat-treated to remove fats, oils, and greases. The remaining liquid wastewater flows to a large concrete equalization basin where it is aerated to facilitate mixing. Hydrogen peroxide is injected to reduce pathogens and vectors. [4]

Next, air is dissolved into the wastewater under high pressure and then released at atmospheric pressure, a process called dissolved air flotation. The released air forms tiny bubbles which adhere to any solids remaining in the wastewater. The bubbles and the attached solids float to the surface and are skimmed out. After the pH of the wastewater is raised to kill pathogens, the wastewater again flows to an aeration tank and is treated with hydrogen peroxide a second time. Pumps transport the treated wastewater to the hay fields where sprinklers spray the treated effluent on the fields.

B. Regulation of Plaintiff's Operation

***4** Plaintiff's regulatory history is complicated. It was explained at length in the court's prior order and will not be repeated here. (*See* Sept. 14, 2010 Order 4-6.) When plaintiff switched to a spray application system in 2007, it needed a GEPD-approved LAS permit under Ga. Comp. R. & Regs. 391-3-6-.11 (hereinafter "GEPD Rule 11") to continue operating. The GEPD issued a Consent Order to plaintiff on October 12, 2007, that served as an interim LAS permit. The GEPD issued a final LAS permit on August 13, 2010. (*See* Ex. A. Attach. to Pl.'s Resp. to Defs.' Statement of Material Facts.)

C. The Passage of the Ordinance

The evidence currently before the court regarding the ordinance's passage is the same evidence described in the court's prior opinion and there is no need to repeat it. (*See* Sept. 14, 2010 Order 6-11.) This evidence reveals a contentious relationship between the parties and shows that White County was frustrated by the shifting regulatory requirements applicable to plaintiff. White County hired a private environmental firm to perform water, soil, and air sampling around plaintiff's property to identify health or safety concerns. These test results showed no health threats. Additionally, complaints from plaintiff's neighbors prompted the Agency for Toxic Substances and Disease Registry (ATSDR), a division of the United States Department of Health and Human Services, to initiate an investigation. The Georgia Public Health Department (GPHD), working under contract with ATSDR, prepared a Public Health Assessment investigating plaintiff's facility. In this detailed report the GPHD opined that plaintiff was not creating offensive odors. Instead, the report pinpointed the White County Transfer Station as the source of offensive odors in the area. (Ex. F. to Pl.'s 2d Am. Ver. Compl. 6.)

The ATSDR investigation included a number of environmental and health tests. An epidemiological study concluded that exposure to odors in the vicinity of plaintiff's facility would not cause permanent health problems. (*Id.* at 10.) Samples of soil, ground water, surface water, and sediment from plaintiff's property were analyzed for metals, including arsenic, cadmium, copper, lead, nickel, selenium, zinc, and mercury. Only traces of zinc were found in the samples, but the amount did not exceed regulatory levels and was consistent with normal background levels found in Georgia. (*Id.*) The ATSDR also tested drinking water from wells at two residences near plaintiff's facility for metals, ammonia, nitrate, and fecal bacteria. No contaminants were detected in these samples above health based screening values or federal drinking water standards. (*Id.*) Despite these test results, the Commissioners enacted the ordinance and plaintiff filed this lawsuit.

III. The Parties' Cross-Motions for Summary Judgment

Plaintiff's motion asks for "partial" summary judgment and seeks a declaration that: (1) the challenged ordinance is preempted by state law; (2) that the challenged ordinance deprives plaintiff of substantive due process rights guaranteed by the Fourteenth Amendment; and (3) that the ordinance is not a valid zoning regulation. Plaintiff also asks the court to enjoin White County from enforcing the challenged ordinance. Defendants have filed a cross-motion requesting summary judgment on all counts of plaintiff's complaint. The court will address plaintiff's motion first and then will consider defendants' motion.

IV. The Preemption Issue

Plaintiff claims that the challenged ordinance is preempted by Georgia state law. The ordinance affects "facilities that engage in the land application of human waste and septage or commercial waste, or both" and contains "provisions

regarding land use (zoning), land regulation, and monitoring of such [LAS] facilities." White County, Ga. Ordinance, Preamble 1. State law gives the GEPD power to set the "uniform procedures and practices to be followed relating to the application for and the issuance, modification, amendment, or revocation of permits for the discharge of pollutants into land disposal systems or land treatment systems and then into the waters of the state." O.C.G.A. § 12-5-23(a)(1)(J); *see also id.* § 12-5-30(a) (requiring any person who owns a facility that discharges pollutants into the waters of the state to "obtain from the [GEPD] director a permit to make such discharge"). Since White County is only given limited police powers under the Georgia Constitution and because it is prohibited from acting in a field where state law exists, plaintiff contends that the challenged ordinance is preempted.

***5** A Georgia county has limited legislative power. A county may "adopt clearly reasonable ordinances, resolutions, or regulations relating to its property, affairs, and local government for which no provision has been made by general law and which is not inconsistent with this Constitution or any local law applicable thereto." GA. CONST. art. IX, § 2, ¶ I(a). A county cannot legislate, however, with respect to "matters which the General Assembly by general law has preempted or may hereafter preempt...." *Id.* art. IX, § 2, ¶ I(c). As stated in the Georgia Constitution's uniformity clause:

> [l]aws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws.

Id. art. III, § VI, ¶ IV(a).

The first portion of the uniformity clause preempts "local or special laws when general laws exist on the same subject." *Franklin Cnty. v. Fieldale Farms Corp.*, 507 S.E.2d 460, 463 (Ga. 1998). This preemption may be express or implied. *Id.* The only exception to this preemption is contained in the uniformity clause's second portion. That part "provides for an exception to the general rule of preemption when general law authorizes the local government to act and the local ordinance does not conflict with general law." *Id.*

As explained below, the challenged ordinances are preempted under the uniformity clause's first section, since laws passed by Georgia's General Assembly grant the GEPD the power to permit and regulate LAS facilities. Because general law provides for the regulation of these sites, a county does not have the authority to enact its own regulations. Defendants apparently concede this point, because they only argue that state law authorized White County's passage of the ordinance. In other words, they contend that a "general law authorizes [White County] to act and the local ordinance does not conflict with general law." *Id.* That general law, Ga. Comp. R. & Regs. 391-3-6-.24(14)(a) ("GEPD Rule 24"), provides in pertinent part that "[a] local governing authority may enact and enforce any local ordinance to regulate the removal, transport, and disposal of commercial wastes, as long as such local ordinance is not in conflict with these rules and O.C.G.A. [sic] 12-15-21 thru 12-15-24." *Id.* Since plaintiff disposes of commercial wastes, defendants contend that GEPD Rule 24 explicitly authorizes the challenged ordinance. [5]

This argument is entirely unconvincing for two reasons. First, GEPD Rule 24 does not grant a local government the authority to enact a duplicate permitting scheme for LAS facilities. General law gives sole authority over such permitting to the GEPD. GEPD Rule 24 is part of Georgia's regulatory scheme for waste transporters, which is separate from Georgia's regulatory scheme for LAS facilities.

Second, even if GEPD Rule 24 did grant White County the authority to enact the challenged ordinance, both that rule and the Georgia Constitution provide that a local ordinance cannot conflict with Georgia law. [6] The challenged ordinance conflicts with Georgia law because it creates a duplicate permitting scheme for LAS facilities. A state agency, the GEPD, has been granted exclusive authority to permit and regulate these sites and has enacted a number of regulations for this very purpose. To explain this conclusion, the court will review Georgia's waste transporter permitting scheme (GEPD Rule 24) and its LAS facility permitting scheme (GEPD Rule 11). Then, the court will examine the challenged ordinance. Finally, the court will explain why, in light of these rules, the ordinance is preempted.

A. GEPD Rule 24 and Waste Transporters

***6** Georgia has one permitting process for waste transporters (GEPD Rule 24) and a separate permitting process for LAS facilities (GEPD Rule 11). Under GEPD Rule 24, Georgia regulates the transport of commercial waste from a waste originator to a disposal site. GEPD Rule 11, on the other hand, regulates LAS facilities, which discharge treated pollutants into the waters of the state. Plaintiff is partially covered by both rules, because it receives commercial waste from waste transporters and because it applies treated waste to land and thus discharges pollutants into the waters of the state.

Title 12, Chapter 15, Article 2 of the Georgia Code governs the transport of "commercial waste." "[C]ommercial waste" includes: (1) nontoxic, nonhazardous liquid waste water from commercial facilities; (2) the contents of grease interceptor traps including fats, oil, grease, and food scraps; and (3) "oil waste residue" produced from vehicle maintenance or washing. O.C.G.A. §§ 12-15-20(1)(A), (1)(B), and (1)(C). A transporter of commercial waste is "any person or firm which owns or operates one or more waste tank trucks which receive or dispose of commercial waste in this state." *Id.* § 12-15-20(5).

Both the state and the local governing authority [7] are granted some authority to regulate waste transporters. The substantive provisions of this regulatory scheme are found at O.C.G.A. §§ 12-15-21 through 12-15-24. These sections are briefly summarized as follows:

(1) **Section 12-15-21:** Subsection (a)(1) provides that "[r]emoval of commercial waste from any grease interceptor, sand trap, oil-water separator, or grit trap that is not connected to an on-site sewage management system for the purpose of transporting such waste to a disposal site" must "be accomplished in a clean and sanitary manner by means of a vacuum hose or pump" and must be placed "into a leakproof tank truck approved and permitted for such service." The next two parts of this subsection explain the registration requirements for a waste transporter truck: (1) registration with the GEPD or "the local governing authority," *id.* § 12-15-21(a)(2), and (2) annual inspections by the local governing authority "for purposes of compliance," *id.* § 12-15-21(a)(3). In subsection (b), the statute provides that "tank trucks" carrying commercial waste can dispose of that waste "only at a facility which is authorized by law to receive and process such waste." *Id.* § 12-15-21(b). Each transporter must maintain "a manifest system for [each] load of commercial waste" and must certify on the manifest that each load is disposed of in accordance with the law. The manifests must be maintained at the transporter's principal place of business for at least three years and "shall be made available at any time for inspection by the division or any local governing authority or the designee thereof." *Id.* § 12-15-21(c).

(2) **Section 12-15-22:** This section grants the GEPD the authority to "promulgate such rules and regulations as are reasonable and necessary for purposes of enforcement" of the commercial waste transporter requirements.

(3) **Section 12-15-23:** This section authorizes a local governing authority to "enforce compliance with this article and rules and regulations promulgated and adopted pursuant to this article."

(4) **Section 12-15-24:** This section states that the article does "not prohibit the enactment and enforcement of local ordinances by the governing authority of a county or municipality on this subject which are not in conflict with this article."

***7** Pursuant to O.C.G.A. § 12-15-22, the GEPD enacted GEPD Rule 24. That rule applies to "Commercial Waste Originators, Pumpers, Transporters, Processors, and Disposal Facilities" and establishes regulations for waste transport. It has four purposes: (1) to provide minimum uniform statewide regulations for transporters that collect and/or dispose of commercial waste; (2) to prevent the improper disposal of commercial wastes; (3) to provide a commercial waste transporter permit that is accepted statewide; and (4) to assess permitting and inspection fees for waste transporters. Ga. Comp. R. & Regs. 391-3-6-.24(1). GEPD Rule 24 covers: (1) any facility that generates commercial wastes; (2) any person who removes commercial wastes; (3) any person who processes commercial wastes; and (4) any person who accepts commercial wastes for final disposal. *Id.* 391-3-6-.24(3)(a). Plaintiff arguably falls within the last two provisions, as a processor of commercial wastes and as a receiver of commercial wastes for final disposal.

GEPD Rule 24 primarily provides permitting requirements for waste transporters. Any waste transporter that "receive[s] or dispose[s] of commercial waste" must apply to the GEPD for a registration number. *Id.* 391-3-6-.24(4)(a). This GEPD registration number is then used to obtain a waste transporter

permit from a local governing authority. *Id.* 391-3-6-.24(4)(b). The local governing authority is required to inspect each transporter truck prior to the issuance of a waste transporter permit. *Id.* 391-3-6-.24(5)(b). The local governing authority may "adopt a standard ... defining reasons for declining to issue or reissue a commercial waste transporter permit." *Id.* 391-3-6-.24(5)(j).

Additionally, the rule creates standards for pumping and transporting waste which apply to waste transporters, waste originators, and waste disposal facilities. Transporters cannot pump commercial waste unless they have a valid permit, *id.* 391-3-6-.24(6)(a), must "remove the entire contents of any tank that is serviced," and may dispose of waste "only at a facility authorized to receive and process such waste," *id.* 391-3-6-.24(6)(b). Additionally, transporters must maintain waste manifests that record the amount and type of waste hauled. *Id.* 391-3-6-.24(6)(c). Waste originators (the creators of waste) must also maintain waste manifests and may only have waste removed by a permitted waste transporter. *Id.* 391-3-6-.24(7)(a) and (7)(b).

Only two requirements in GEPD Rule 24 target waste disposal facilities like plaintiff. First, the rule limits the facilities that can accept waste from a waste transporter. A transporter can deliver waste only to: (1) facilities with a GEPD-issued NPDES, LAS, or industrial pretreatment permit, *id.* 391-3-6-.24(8)(a); (2) facilities with a GEPD-issued waste management permit, *id.* 391-3-6-.24(8)(b); and (3) facilities approved by the GEPD on a case-by-case basis, *id.* 391-3-6-.24(8)(c). Second, a disposal facility must maintain copies of all tank pumping manifests for three years and make them available for inspection. *Id.* 391-3-6-.24(8)(e).

The remaining provisions of the rule can be briefly summarized. Subsection 9 governs the creation and maintenance of waste manifests. *Id.* 391-3-6-.24(9). Under Subsection 10, all manifest records must be kept on GEPD approved forms and contain certain required information. *Id.* 391-3-6-.24(10). Subsection 11 grants representatives of the GEPD and the local governing authority the ability to inspect any waste originator, waste transporter, or waste disposal site to "determine compliance with this Paragraph or the commercial waste transporter permit." *Id.* 391-3-6-.24(11)(a). The GEPD and the local governing authority may also review the records of any of these entities. *Id.* 391-3-6-.24(11)(b). Other sections establish the application procedure for a commercial waste transporter permit, *id.* 391-3-6-.24(12), set the duration and transferability of the transporter permit, *id.* 391-3-6-.24(13), give the local governing authority power "to enforce these rules," *id.* 391-3-6-.24(15)(a), create civil penalties for any person who violates these rules, *id.* 391-3-6-.24(15)(b) and (c), and provide the effective date of the regulation, *id.* 391-3-6-.24(16). Subsection 14, which is the centerpiece of defendants' argument, has been previously discussed. Next, the court will review the regulatory scheme for a LAS permit.

B. GEPD Rule 11 and the Regulation of LAS Facilities

***8** Plaintiff possesses a GEPD permit authorizing spray-application of treated commercial waste and septage. This permit was granted pursuant to O.C.G.A. §§ 12-5-23(a)(1)(J) and 12-5-30(a) and GEPD Rule 11. It is generally referred to as a "land application system" (LAS) permit.

The purpose of GEPD Rule 11 "is to provide the degree of pollutant treatment required and the uniform procedures and practices to be followed relating to the application for and the issuance or revocation [of] permits for the discharge of pollutants into land disposal or treatment systems and then into the waters of the State." Ga. Comp. R. & Regs. 391-3-6-.11(1). A land disposal system "means any method of disposing of pollutants in which the pollutants are applied to the surface or beneath the surface of a parcel of land and which results in the pollutants percolating, infiltrating, or being absorbed into the soil and then into the waters of the State." *Id.* 391-3-6-.11(2)(b). A land treatment system is "any land disposal system in which vegetation on the site is used to removed [sic] some of the pollutants applied." *Id.* 391-3-6-.11(2)(c). Plaintiff fits both of these definitions, as it applies pollutants to the land surface and uses vegetation to remove some of these pollutants.

Any person who wishes "to discharge domestic, municipal, commercial, or industrial wastes or wastewaters into a land disposal or land treatment system" must "obtain a permit from the [Georgia Environmental Protection] Division to make such discharge." *Id.* 391-3-6-.11(3). To obtain a permit, an application must be made on a GEPD form. The application includes a variety of information, such as a facility's pollutant treatment methods. *Id.* 391-3-6-.11(5)(a). When the GEPD is satisfied an application is complete, it makes a "tentative determination" to either issue or deny the requested permit. *Id.* 391-3-6-.11(6)(a)(1). If the permit is approved, a draft permit is prepared and public notice is issued. *Id.* If the

permit is denied, the GEPD provides written notification and suggests revisions. *Id.*

Once a draft permit has been prepared, the GEPD circulates public notice "in a manner designed to inform interested and potentially interested persons of the proposed pollutant discharge and of the proposed determination to issue a permit for the proposed pollutant discharge into a land disposal system and then into waters of the State." *Id.* 391-3-6-.11(6)(b)(1). Any applicant, affected state or interstate agency, or person or group of persons may request a public hearing. The GEPD Director must hold a hearing in the geographical area of the proposed LAS facility if he determines there is sufficient public interest. *Id.* 391-3-6-.11(6)(c)(1).

The rule sets pollutant treatment and monitoring standards. The GEPD must "establish the degree of treatment required before [a] pollutant is discharged to a land disposal or a land treatment system and then into waters of the State." *Id.* 391-3-6-.11(4)(a). At a minimum, all groundwater "leaving the land disposal systems [sic] boundaries must not exceed maximum contaminant levels for drinking water." *Id.* 391-3-6-.11(4)(e). Any pollutants discharged from a LAS facility "shall receive such treatment or corrective action so as to insure compliance with the terms and conditions of the issued land disposal system permit." *Id.* 391-3-6-.11(4)(a). The GEPD sets the "hydraulic loading rate"[8] based on an analysis of the soils in the application area. *Id.* 391-3-6-.11(4)(c).

***9** To ensure compliance with these treatment standards, the GEPD can establish "monitoring, recording and reporting requirements as may be reasonably required." *Id.* 391-3-6-.11(8)(a). These requirements include: (1) installation, use, and maintenance of monitoring equipment; (2) recording of monitoring results; and (3) periodic reporting of these results to the GEPD. *Id.* The Director may require additional monitoring, recording, and reporting at any time. *Id.* A permittee must maintain records of monitoring results for three years. *Id.* 391-3-6-.11(8)(b). Reports must be made to the GEPD at least once per year, but more frequent reports may be required by the terms of a permit. *Id.* at 391-3-6-.11(8)(c).

The GEPD can "modify, suspend or terminate an issued land disposal system permit in whole or in part during its term for cause, including, but not limited to, failure or refusal of the permittee to carry out the requirements of the Act or regulations promulgated pursuant thereto...." *Id.* 391-3-6-.11(9)(b). The GEPD can institute enforcement proceedings when a permittee violates the terms of its permit or any provision of Georgia's Water Quality Control Act. *Id.* 391-3-6-.11(12).

Plaintiff's GEPD-issued LAS permit imposes multiple monitoring and reporting requirements.[9] Plaintiff must install a flow-measuring device to measure the discharge of pollutants and submit quarterly monitoring report forms to the GEPD. (Ex. A Attach. to Pl.'s Resp. to Defs.' Statement of Material Facts 3-4.) Plaintiff cannot spray during rain or when "the conditions are such that sprayed wastewater will not be absorbed into the soil." (*Id.* at 5.) Additionally, it can apply a maximum of 1.5 inches of treated effluent per week. (*Id.* at 13.) Now that the state's regulatory schemes have been explained, the court turns to an examination of the challenged ordinance.

C. The Challenged Ordinance

The ordinance is purportedly an exercise of White County's police power to prevent public nuisance, promote citizen health, and prevent the spread of disease. It expresses concern about "offensive odors," "pollution to drinking water wells," and "possible pollution into the rivers, creeks and streams" of White County. White County, Ga. Ordinance, Preamble 2. The ordinance affects facilities engaging in the land application of human waste and septage, commercial waste or both ("LAS facilities"). This encompasses "any structure and application area for the disposal of liquids or solids containing human excrement, septage, wastewater, fats, oils, grease, septic tank contents, industrial wastewater, sewage sludge, sludge, commercial waste or any combination thereof, other than a publicly owned landfill or a publicly owned sewage treatment facility." *Id.* at ch. 50, art. 2, § 50-6. Additionally, the ordinance applies to any facility that requires a LAS permit from the GEPD. *Id.* Before beginning or expanding operations, every LAS facility must obtain a special-use permit and land compliance letter from White County. *Id.* at ch. 50, art. 2, § 50-7(a). To obtain a special-use permit and land compliance letter, a LAS facility must meet certain requirements.

The ordinance "adopts a land use and zoning map for the unincorporated areas of White County, Georgia" which includes a general use district, a structures protection district, and seven prohibited districts. General use districts include all areas not covered under the other districts. *Id.* at ch. 50, art. 2,

§ 50-7(a)(2)(b) and (a)(2)(c). The seven prohibited districts, where no LAS facility can be situated, include: (1) a mountain protection district; (2) a river corridor protection district; (3) a water supply protection district; (4) a groundwater recharge protection district; (5) a wetlands protection district; (6) a district containing habitats of endangered or threatened species; and (7) a district containing historic or archeological areas and structures. *Id.* at ch. 50, art. 2, § 50-7(a)(2)(a).

***10** In addition to district restrictions, the ordinance creates border requirements. Among other requirements, a LAS facility must be located on a tract of at least 100 acres. *Id.* at ch. 50, art. 2 § 50-7(a)(1). The site's treatment area must be located at least 1,000 feet from: (1) any exterior property line; (2) any stream, creek, or river; and (3) the geographical boundaries of any governmental entity. *Id.* at ch. 50, art. 2, § 50-7(a)(5). Additionally, the LAS facility must create a 300 foot "natural undisturbed buffer between all active waste treatment areas and exterior property lines...." *Id.* at ch. 50, art. 2, § 50-7(a)(6).

A LAS facility must have a minimum of 200 feet of frontage on either a state highway or a minor arterial roadway. *Id.* at ch. 50, art. 2, § 50-7(a)(3). A traffic impact study prepared by a professional engineer analyzing the estimated amount of truck traffic and any necessary road improvements must be submitted to White County. White County can hire an independent expert to evaluate the study and the county may then require the applicant to construct "any road improvements recommended by the independent expert." *Id.* at ch. 50, art. 2, § 50-7(a)(4). All active waste treatment areas at the LAS facility must be fenced "with a minimum six-foot high chain-link security fence." *Id.* at ch. 50, art. 2, § 50-7(a)(8).

The ordinance attempts to mitigate offensive odors. All active waste treatment areas, except spray fields, must be fully enclosed. Septage unloading must occur in a structure "equipped with a ventilator system and odor neutralizer system sufficient to neutralize the offensive odors of human waste and septage, or commercial waste, or both." *Id.* at ch. 50, art. 2, § 50-7(a)(9). A LAS facility cannot operate on Saturday or Sunday and can only operate on other days during daylight. *Id.* at ch. 50, art. 2, § 50-7(a)(16).

An applicant must submit a summary of the proposed LAS system to White County's Director of Planning and Development. This official reviews the plan to ensure that "the system design and components [are] consistent with the system design and components submitted to and/or approved by the [GEPD]." *Id.* at ch. 50, art. 2, § 50-7(a)(10). Essentially, White County "verif[ies] that the system design and components is or has been as [sic] submitted to and/or approved by [the GEPD]." *Id.* [10]

Every LAS facility "must demonstrate the existence of an adequate financial responsibility mechanism" such that "sufficient funds will be available to meet [the] specific environmental protection needs of said land application system site." *Id.* at ch. 50, art. 2, § 50-7(a)(11). The adequacy of the financial responsibility mechanism is reviewed by the White County Director of Planning and Development in consultation "with a professional engineering firm knowledgeable in the field of brownfield [sic] reclamation." *Id.* at ch. 50, art. 2, § 50-7(a)(12). The Director can then recommend a financial responsibility amount to impose as a permit condition.

An applicant must submit "a pretesting plan" to "provide for the testing of waste accepted for treatment at the facility." *Id.* at ch. 50, art. 2, § 50-7(a)(13). The testing plan must ensure that the waste is of a type that the facility is permitted by the GEPD to treat and that the waste does not contain hazardous or toxic materials. The facility must test *all* of the waste it treats, *id.*, and must give White County "a copy of all reports and documents provided ... to [G]EPD, including permit applications, renewals of applications, correspondence with [G]EPD regarding the facility in White County, tests and reports provided ... to [G]EPD regarding said facility, and any and all records provided ... to [G]EPD regarding said facility." *Id.* at ch. 50, art. 2, § 50-7(a)(14).

***11** The ordinance establishes a public hearing process for permit approval. *See id.* at ch. 50, art. 2, § 50-7(a)(17). After this hearing, the Commissioners have the sole discretion to grant or deny a permit "based upon whether [they] determine[ ] that the proposed facility is consistent with the policies and objectives of the Comprehensive Plan, particularly in relationship to the proposed site and surrounding area." *Id.* at ch. 50, art. 2, § 50-7(a)(18). The ordinance lists 14 factors the Commissioners should also consider. Their decision can be challenged "by way of a writ of certiorari granted by the Superior Court [of White County]." *Id.* at ch. 50, art. 2, § 50-7(a)(19). If a permit is issued, it is valid for one year and is subject to annual renewal. *Id.* at ch. 50, art. 2, § 50-7(a)(20).

All LAS facilities in operation prior to the enactment of the ordinance must obtain a non-conforming use permit within 30 days of its passage to continue operations. The requirements for such a permit are slightly less onerous. A pre-existing LAS facility is exempt from: (1) the parcel-size, location, and set-back rules; (2) the highway frontage and traffic impact requirements; (3) the fencing and enclosure rules; (4) the "hours of operation" requirement; and (5) the public hearing requirement. *Id.* at ch. 50, art. 2, § 50-7(a)(23)(a). An application for a pre-existing use permit must include: (1) the GEPD system design plans for approval by White County; (2) an adequate financial responsibility mechanism; (3) a waste testing plan to ensure that all waste treated at the facility is the type of waste that the facility is permitted by GEPD to treat; (4) copies of all reports and documents the applicant has provided to the GEPD; and (5) copies of all GEPD waste manifests. These requirements are the same as those described in subsections (10), (11), (12), (13), (14), and (15) of the ordinance. *Id.* at ch. 50, art. 2, § 50-7(a)(23)(b). A non-conforming use permit applicant must also pay a $2,500.00 regulatory and monitoring fee. *Id.* If a permit is granted, it is valid for one year and must be renewed annually. *Id.* at ch. 50, art. 2, § 50-7(a)(23)(c). A facility operating under a non-conforming use permit that ceases operation for more than a month or that is destroyed loses the right to continue as a non-conforming use and must meet the more stringent requirements of the special-use permit to continue operations. *Id.*

D. Analysis [11]

The preemption issue is purely a state law claim, but the court has retained supplemental jurisdiction over it because it is closely related to plaintiff's substantive due process claim. *See* 28 U.S.C. § 1367(a). Jurisdiction over that substantive due process claim is proper under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The court views the preemption claim and the substantive due process claim as intertwined, since one reason plaintiff claimed the ordinance's enactment was a substantive due process violation was that the ordinance was so clearly preempted by state law. (*See* Pl.'s Br. In Supp. of Mot. for Summ. J. 20 (arguing that because "LHR is fully regulated at the state level by EPD, and the ordinances clearly duplicate existing requirements of state law ... [t]he Ordinances therefore clearly represent an arbitrary and capricious effort by White County to assert authority over LHR....").) The preemption issue was therefore injected into the substantive due process inquiry, even though the question of preemption involved only state law. To fully address plaintiff's substantive due process challenge, it was necessary to examine whether the challenged ordinance was in fact preempted. Accordingly, the court extensively researched and reviewed plaintiff's preemption claim.

***12** Even though the court ultimately concluded that there was no substantive due process violation, it decided to retain jurisdiction over the state-law preemption claim for two reasons. First, as explained, the parties addressed this claim as somewhat intertwined with the substantive due process inquiry. Second, the court spent an extensive amount of time researching the issue. Dismissing the preemption claim at this stage would waste judicial resources, an outcome that supplemental jurisdiction was meant to avoid. *See* *Lewis v. City of St. Petersburg*, 260 F.3d 1260, 1267 (11th Cir. 2001) (noting that where all the federal claims have been decided, the court should "take into account concerns of comity, *judicial economy*, convenience, fairness, and the like" when deciding whether to retain supplemental jurisdiction (emphasis added)). Thus, the court has retained supplemental jurisdiction over the preemption claim.

In addition to contesting the exercise of supplemental jurisdiction, defendants ask the court to abstain from deciding the preemption issue. (Defs.' Br. in Supp. of Summ. J. 20.) "Under the *Pullman* abstention doctrine, a federal district court is vested with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law." *Rindley v. Gallagher*, 929 F.2d 1552, 1554 (11th Cir. 1991) (quotation marks omitted). The doctrine applies where: (1) a case presents an unsettled question of state law; and (2) the state law question is either dispositive of the case or would avoid the constitutional issue presented. *Id.* at 1554-55. *Pullman* abstention is not necessary here because the preemption issue does not present an unsettled question of state law. It is quite clear from Georgia Supreme Court precedent that the ordinance is preempted.

On the merits of the preemption issue, defendants argue that the ordinance was authorized by GEPD Rule 24(14)(a). According to defendants, that rule allows a county to enact any ordinance regulating the disposal of commercial wastes. Since plaintiff receives commercial wastes for disposal, defendants argue that it is a proper object of regulation under GEPD Rule 24. (Defs.' Br. in Supp. of Motion for

Summ. J. 12-14.) Unfortunately, this analysis is simplistic and vague. [12]

Preemption operates in two ways. General laws preempt "local or special laws when general laws exist on the same subject." *Franklin Cnty*, 507 S.E.2d at 463. Additionally, although a general law may authorize the enactment of local or special laws on subjects where general laws already exist, such specially-authorized laws are still preempted when they "conflict with general law." *Id.*

In *Franklin County*, the Georgia Supreme Court applied this preemption analysis to a county ordinance that also regulated the discharge of pollutants. [13] Franklin County enacted a "land disposal ordinance" that required any person disposing of "industrial, hazardous, radioactive, or biomedical waste" on county land to obtain a county permit. *Id.* The ordinance's requirements were similar, although less arduous, to the requirements of White County's ordinance. A Franklin County permit application had to be prepared by a professional engineer and needed to include proposed disposal procedures, an environmental impact assessment, and a disposal schedule. The ordinance also required "an application fee, the hiring of expert consultants, an annual monitoring fee, and the right of inspection." *Id.*

***13** State law granted the GEPD, and not the county, the authority to permit sludge application facilities. Anyone "operating a sludge land application system [must] obtain the [G]EPD director's approval." *Id.* However, the county argued that O.C.G.A. § 12-5-30.3(d) had an explicit provision authorizing county control over sludge application sites: a local governing authority could "assess reasonable monitoring fees from both the generator of the sludge and the owner of the site on which the sludge is to be applied." *Id.* Franklin County seized on this "monitoring fees" provision to argue that its ordinance was not preempted.

Initially, the Georgia Supreme Court examined whether general state law gave local governments "broad authority to regulate the application of sludge to land." *Id.* After an extensive review of state law, the court concluded that it did not grant such authority. The Georgia Water Quality Control Act gave "the state the responsibility for both water quality and water supplies without mentioning the role of local governments, unlike the statutes in some states." *Id.* at 463-64. Georgia gave the GEPD, and not counties, the authority to "adopt technical and procedural regulations" for permitting the application of sludge to land and required "the state EPD director to approve permits to apply sludge to land." *Id.* at 464. Thus, preemption could be "inferred generally from the comprehensive nature of O.C.G.A. § 12-5-30.3 and its implementing regulations." *Id.* at 463.

Moreover, the monitoring provision in § 12-5-30.3(d) did not authorize Franklin County's ordinance because that provision only allowed the assessment of reasonable monitoring fees. "By explicitly granting this narrow power to local governments, the statute by implication precludes counties from exercising broader powers." *Id.* Moreover, even if § 12-5-30.3(d) could be viewed as an exception to general preemption that authorized local laws, any local law passed pursuant to this authority could not conflict with state law. Franklin County's ordinance interfered with state law because the Georgia General Assembly "assign[ed] the task of developing permit requirements directly to the state," implying "that the General Assembly did not intend to give counties concurrent jurisdiction to regulate through a permit system." *Id.* at 464. Franklin County could not "establish a duplicate permit system that is not authorized by general law," and the ordinance was preempted. *Id.*

This case is similar to *Franklin County* in several respects. Both White County's ordinance, which regulates the application of commercial waste, septage, and human waste to land, and Franklin County's ordinance, which regulated the application of industrial, hazardous, radioactive, or biomedical waste to land, conflict with state law. State law gives the GEPD the responsibility to regulate the discharge of pollutants into the waters of the state. Any exception authorized by state law to this general preemption, which White County claims is contained in GEPD Rule 24 and which Franklin County claimed was found in O.C.G.A. § 12-5-30.3(d), does not grant a county the authority "to establish a duplicate permit system that is not authorized by general law." *Franklin Cnty.*, 507 S.E.2d at 464.

State law does not give White County broad authority to regulate the application of commercial waste, domestic septage, or human waste to land. The Georgia Water Quality Control Act gives "the state the responsibility for both water quality and water supplies without mentioning the role of local governments, unlike the statutes in some states." *Id.* at 463-64. The GEPD is expressly authorized to create the "uniform procedures and practices to be followed relating to the application for and the issuance, modification, amendment, or revocation of permits for the discharge of pollutants into land disposal or land treatment systems and

then into the waters of the state." O.C.G.A. § 12-5-23(a)(1)(J). Likewise, O.C.G.A. § 12-5-30(a) provides that "[a]ny person who owns or operates a facility of any type" that "discharge[s] ... pollutants from a point source into the waters of the state shall obtain from the [GEPD] director a permit to make such discharge." As the Georgia Supreme Court noted, the GEPD has adopted extensive regulations "dealing with land disposal and permit requirements under the Georgia Water Quality Control Act," including GEPD Rule 11. *Franklin Cnty.*, 507 S.E.2d at 464; *see also id.* at 464 n.23 (noting that GEPD Rule 11 is an example of these state-promulgated water quality regulations).

***14** Preemption may be inferred generally from the comprehensive nature of O.C.G.A. §§ 12-5-23 and 12-5-30(a) and GEPD Rule 11. *Cf. Franklin Cnty.*, 507 S.E.2d at 463 ("Preemption may be inferred generally from the comprehensive nature of OCGA § 12-5-30.3 and its implementing regulations."). The GEPD Director is authorized to create regulations for permitting LAS facilities and to set standards for pollutant treatment. "[B]y assigning the task of developing permit requirements directly to the state, the statute implies that the General Assembly did not intend to give counties concurrent jurisdiction to regulate through a permit system." *Id.* at 464. Indeed, the provisions of GEPD Rule 11 show that the state has expansively exercised this regulatory authority. The fact that Georgia has established the GEPD to regulate LAS facilities also favors preemption. "Where the State has established an agency of its own with plenary power to regulate utilities, it is universally recognized that municipalities cannot properly interpose their local restrictions unless and only to the extent any power to do is *expressly* reserved to them by statute." *City of Buford v. Ga. Power Co.*, 581 S.E.2d 16, 17 (Ga. 2003) (emphasis added and quotation marks omitted). Thus, the challenged ordinance is generally preempted by state law. [14]

Nevertheless, defendants blithely contend that the sweeping ordinance was authorized by GEPD Rule 24(14)(a). Viewing that provision against the state's broad grant of regulatory authority to the GEPD reveals the absurdity of this assertion. The rule does not grant a county the authority to permit LAS facilities. Moreover, even if GEPD Rule 24(14)(a) grants White County some power to regulate LAS facilities, the ordinance is still preempted because it plainly conflicts with state law.

GEPD Rule 24(14)(a) does not give White County power to regulate pollutant discharge. Instead, it is part of a separate regulatory scheme for the transport, rather than the treatment or disposal, of waste. The rule's grant of authority to "regulate the removal, transport, and disposal of commercial wastes," Ga. Comp. R. & Regs. 391-3-6-.24(14)(a), cannot be read as broadly as defendants contend.

The rule never defines what constitutes the "disposal of commercial wastes," nor does it specify whether "disposal" encompasses merely the transfer of waste from a transporter to a facility, or something more comprehensive. Viewing GEPD Rule 24 as a whole, its primary focus is the regulation of waste transporters and its regulation of waste "disposal" sites is only tangential. GEPD Rule 24 uses the word "disposal" only four times prior to subsection 8, and none of these uses argue in favor of a particularly broad reading of the term. *See id.* 391-3-6-.24(1) (noting that the purpose of GEPD Rule 24 is, in part, "to prevent the improper disposal of commercial wastes"); *id.* 391-3-6-.24(3)(a) (indicating that GEPD Rule 24 applies "to any person who accepts commercial wastes for final disposal"); *id.* 391-3-6-.24(3)(b) (stating that any "disposal site operator within the State of Georgia, who receives commercial wastes ... must still comply with the registration, permitting, and manifest requirements"); *id.* 391-3-6-.24(5)(c) (requiring all waste transporters to "include the location of the disposal site(s) [of a load of waste] on the commercial waste transporter permit application"). Subsection 8 states that certain "processing and disposal operations are approved to accept commercial wastes." *Id.* 391-3-6-11.24(8).

Notably, GEPD Rule 24 imposes only two requirements on waste disposal sites. First, the disposal site must be permitted by the GEPD. *Id.* 391-3-6-.24(8)(a), (8)(b), and (8)(c). Approved facilities include: (1) facilities "that have been issued an NPDES, LAS, or industrial pretreatment permit" by the GEPD, *id.* 391-3-6-.24(8)(a); (2) facilities permitted under the GEPD's Solid Waste Management Rules, *id.* 391-3-6-.24(8)(b); and (3) any facility approved by the GEPD "on a case-by-case basis," *id.* 391-3-6-.24(8)(c). Second, the disposal site must maintain proper waste manifest documentation. *Id.* 391-3-6-.24(9).

***15** The rule does not provide any standards for pollutant treatment. The only explicit regulatory standards it establishes are for waste pumping or transport. *See id.* 391-3-6-.24(6)(b) (indicating that a waste transporter must remove the "entire contents of any tank that is serviced" and must dispose of this waste "only at a facility authorized to receive and process such waste"); *id.* 391-3-6-.24(7)(a) (indicating that a waste

originator can only have waste removed by a permitted waste transporter). Since the rule does not expressly apply any pollutant treatment requirements to waste disposal sites and never mentions a county's authority to "permit" such sites, it is absurd to claim that this rule nonetheless grants White County extensive regulatory power over LAS facilities.

This conclusion is further buttressed by a careful review of GEPD Rule 11. This rule, rather than GEPD Rule 24, provides pollutant treatment and permit requirements for LAS facilities. Notably, GEPD Rule 24 explicitly requires waste disposal sites to be authorized by GEPD permits, most of which must be obtained via GEPD Rule 11. In essence, defendants claim that GEPD Rule 24 gives White County the same permitting authority that the GEPD exercises in GEPD Rule 11. This is an absurd contention, because if White County was actually given this power it is inconceivable that the power would be bestowed in GEPD Rule 24 instead of GEPD Rule 11. The grant of such authority would logically be included in GEPD Rule 11. Moreover, the fact that GEPD Rule 24 *does* provide for at least some county control over waste transporter permits, while GEPD Rule 11 does not provide for *any* county control over LAS facilities, implies that GEPD Rule 11 grants no such power and that White County had no power to enact the ordinance. *See United States v. Perez*, 366 F.3d 1178, 1182(11th Cir. 2004) (noting that a court must generally presume that the inclusion or exclusion of terms in a statute is purposeful and intentional).

Moreover, even if GEPD Rule 24 did grant White County regulatory authority over LAS facilities, the rule itself contains an explicit limitation that the challenged ordinance exceeds. Any local ordinance enacted under GEPD Rule 24(14)(a) cannot "conflict with" the GEPD's administrative rules or Georgia statutes. Ga. Comp. R. & Regs. 391-3-6-.24(14)(a). Creating an extensive and supplementary permitting scheme for LAS facilities conflicts with state law and GEPD Rule 11.

White County's permitting process usurps the GEPD's authority. To obtain a special-use permit, an applicant must give White County a copy of all documents it has provided to the GEPD, including the application for a GEPD permit. White County, Ga. Ordinance, ch. 50, art. 2, § 50-7(a)(14). Additionally, an applicant must submit a summary of his site's pollutant treatment system so that White County can confirm "that the system design and components is or as has been [sic] submitted to and/or approved by [G]EPD." *Id.* ch. 50, art. 2, § 50-7(a)(10). Thus, White County must confirm that an applicant's facility is being operated in accordance with the terms of that facility's GEPD-issued permit. However, state law gives the GEPD Director, not White County, the authority to determine compliance with the terms of a GEPD permit. *See* Ga. Comp. R. & Regs. 391-3-6-.11(9)(b) (stating that the GEPD Director has authority to "modify, suspend or terminate an issued LAS permit" whenever the permittee fails to comply with its terms); *see also id.* 391-3-6-.11(7)(c) (noting that a permittee "may be deemed by the Director to be in violation of the permit and may be subject to enforcement action pursuant to the act").

The challenged ordinance interferes with the GEPD's power to establish pollutant treatment standards for LAS facilities. The GEPD "has the authority to establish the degree of treatment required before [any] pollutant is discharged to a land disposal or land treatment system and then into waters of the State." *Id.* 391-3-6-.11(4)(a). White County's permitting scheme also has pollution treatment requirements: an applicant must "submit a pretesting plan that shall provide for the testing of waste accepted for treatment at the facility." White County, Ga. Ordinance, ch. 50, art. 2, § 50-7(a)(13). In other words, even though the GEPD has the authority to establish the required testing for a LAS facility, White County must also approve the pollutant treatment methods.

***16** The ordinance requires a LAS facility to test "all waste ... to determine that the waste proposed to be treated is waste that the facility is permitted by [G]EPD to treat, and does not contain any hazardous or toxic materials that would disrupt the treatment process of the land application facility or which the facility is not permitted to treat." *Id.* In this provision, the challenged ordinance interferes with the GEPD's authority in two ways. First, it assumes the power to monitor a facility's compliance with the terms of its GEPD permit. *See id.* (requiring facility to test all waste to ensure that "the waste proposed to be treated is waste that the facility is permitted by [G]EPD to treat"). Second, the challenged ordinance requires a facility to test all of the waste that it treats. *See id.* (noting that it is a "continuing condition of the permit for the facility to test all waste"). The GEPD does not require a facility to test all the waste that it treats. *See* Ga. Comp. R. & Regs. 391-3-6-.11(8)(a) (noting that pollutant discharge "may be subject to such monitoring, recording and reporting requirements as may be reasonably required by the [GEPD] Director"). [15] Indeed, plaintiff's GEPD permit only requires the testing of "representative" samples of waste, not all waste. (Ex. A Attach. to Pl.'s Resp. to Defs.' Statement of Material Facts 5.)

The ordinance also creates requirements not mandated by GEPD Rule 11. It imposes unique fencing and enclosure rules. *Id.*, ch. 50, art. 2, § 50-7(a)(8) and (a)(9). It requires an applicant to demonstrate "an adequate financial mechanism" in all cases, *id.* ch. 50, art. 2, § 50-7(a)(12), whereas GEPD Rule 11 does not. *See* Ga. Comp. R. & Regs. 391-3-6-.11(10) (providing that the GEPD "may" require a trust indenture to be "filed with the application for a permit"). Lastly, the challenged ordinance includes an operating hours restriction. White County, Ga. Ordinance, ch. 50, art. 2, § 50-7(a)(16).

Most importantly, the ordinance interferes with the use of a GEPD-issued LAS permit. A GEPD-permitted facility has authorization to operate from the state. Despite this approval, such a facility cannot operate in White County without a supplementary permit. Even if a White County permit is obtained, a failure to comply with the terms of that permit could trigger a stop work order or a permit revocation that would interfere with a facility's ability to utilize its GEPD permit. Indeed, because many of White County's requirements are more strenuous than GEPD regulations, a stop-work order could be issued even though a facility was in full compliance with its GEPD permit. For example, a permittee who fails to maintain a sufficient financial responsibility mechanism would be subject to permit suspension or revocation, even though the GEPD does not require such a mechanism in all cases.

Moreover, a determination by White County that a facility does not meet its GEPD-approved waste-treatment plan, *id.* ch. 50, art. 2, § 50-7(a)(10), or that a facility is not treating waste as required by its GEPD permit, *id.* ch. 50, art. 2., § 50-7(a)(13), can result in the termination or suspension of a White County permit. In other words, White County can revoke a special-use permit because it determines that a permittee is not complying with the terms of its GEPD-issued permit. [16] A permittee's compliance with its GEPD permit, however, should be evaluated by the GEPD, not White County.

In essence, the challenged ordinance renders a GEPD permit superfluous. Every facility that requires a GEPD permit to operate will also require a White County permit. And, regardless of the validity of a facility's GEPD permit, White County can revoke a special-use permit or non-conforming use permit on any number of grounds, which would then prevent a GEPD-permitted facility from operating in White County. For all of these reasons, the challenged ordinance conflicts with GEPD Rule 11 and with state law granting the GEPD the power to permit and regulate LAS facilities.

***17** In sum, White County "sought to establish a duplicate permit system that is not authorized by general law...." *Franklin Cnty.*, 507 S.E.2d at 464; *see also City of Atlanta v. S.W.A.N. Consulting & Sec. Servs.*, 553 S.E.2d 594, 596 (Ga. 2001) (holding that a municipal law was preempted by state law "[b]ecause the City sought to establish a duplicate regulatory system which was not authorized by the comprehensive general law applicable to those engaged in the private detective and security business...."). This duplicate permitting system, like the scheme challenged in *Franklin County*, is clearly preempted by general state law. *See* O.C.G.A. §§ 12-5-23(a)(1)(J) and 12-5-30(a). [17] The court will therefore permanently enjoin White County from enforcing the ordinance. [18] *Cf. City of Buford v. Ga. Power Co.*, 581 S.E.2d 16, 17 (Ga. 2003) (affirming trial court's order enjoining city from enforcing a preempted ordinance).

V. Substantive Due Process Violation Analysis

***18** Next, plaintiff seeks a declaration that the enactment of the ordinance violated its substantive due process rights. [19] Substantive due process protects the fundamental rights listed in the Bill of Rights and certain un-enumerated rights such as the right to privacy. *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc). "[A]reas in which substantive rights are created only by state law ... are not subject to substantive due process protection under the Due Process Clause because substantive due process rights are created only by the Constitution." *Id.*

Accordingly, the first requirement of a substantive due process claim is the deprivation of a "federal constitutionally protected interest." *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1374 (11th Cir. 1993). Second, a plaintiff must show that the deprivation resulted from "an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation." *Id.* [20]

Instead of asserting the deprivation of a federal constitutional right, plaintiff argues that the enactment of the ordinance violated its state-created land use rights. Such state law "[p]roperty interests ... are created and their dimensions are defined by existing rules or understandings that stem from ... state law." *Greenbriar Village, LLC v. Mountain Brook,*

345 F.3d 1258, 1262 (11th Cir. 2003) (per curiam). Such state law rights are typically not protected by substantive due process.

One exception exists. "Where an individual's state-created rights are infringed by 'legislative act,' the substantive component of the Due Process Clause generally protects him from arbitrary and irrational action by the government." *Lewis v. Brown*, 409 F.3d 1271, 1273 (11th Cir. 2005) (citing *McKinney*, 20 F.3d at 1557 n.9). Thus, when a landowner is deprived of state-created rights by a legislative action, those "rights created by state law may indeed constitute property subject to the arbitrary and capricious substantive due process protections under the federal Constitution." *Villas of Lake Jackson, Ltd. v. Leon Cnty.*, 121 F.3d 610, 614 (11th Cir. 1997).

***19** Plaintiff contends that the enactment of the ordinance was a legislative act and that, consequently, the federal Constitution protects its property from White County's arbitrary and capricious action. The Eleventh Circuit distinguishes between legislative acts, which implicate substantive due process protection, and executive acts, which do not. Determining whether an act is legislative or executive can be difficult, especially when dealing with "county commissioners who act in both a legislative and executive capacity." *Lewis*, 409 F.3d at 1273. But, there is little difficulty in concluding that White County's enactment of the ordinance was a legislative action.

An executive act typically arises "from the ministerial or administrative activities of members of the executive branch" and usually applies only "to a limited number of persons." *McKinney*, 20 F.3d at 1557 n.9. For example, a decision by a zoning board to deny an application for re-zoning is an executive act. *Lewis*, 409 F.3d at 1272-73. "Acts of zoning *enforcement* rather than *rulemaking* are not legislative." *Crymes v. Dekalb Cnty.*, 923 F.2d 1482, 1485 (11th Cir. 1991) (emphasis added). The promulgation of "laws and broad-ranging executive regulations," on the other hand, are legislative acts. *McKinney*, 20 F.3d at 1557 n.9. Since the challenged ordinance creates a new permitting scheme for *all* persons wishing to operate a LAS facility, the ordinance's passage was a legislative act. Thus, plaintiff's substantive due process claim can survive to the second step of the analysis. [21]

This second step asks whether the governmental action rose to the stature of a constitutional violation. The purpose of extending substantive due process protection to legislative deprivations of state-created rights is to guard against arbitrary and capricious government action. *See Lewis*, 409 F.3d at 1273 (noting that "the substantive component of the Due Process clause generally protects [individuals] from arbitrary and irrational action by the government"). To determine whether government action is arbitrary and capricious, courts apply the rational basis test. *See Leib v. Hillsborough Cnty. Public Trans. Comm'n*, 558 F.3d 1301, 1308 (11th Cir. 2009) ("[S]ubstantive due process claims are subject to rational basis review, so long as they do not infringe fundamental rights and are not discriminatory."); *Greenbriar Village*, 345 F.3d at 1263 ("Even if we were to find that [the defendant city's actions] implicate[d] constitutional substantive due process protections, [its] actions were not so arbitrary or irrational as to compel us to find for [the plaintiff]."). This test is not a rigorous one; it asks only whether the ordinance is "rationally related to a legitimate government purpose." *Ga. Mfgd. Hous. Ass'n. v. Spalding Cnty.*, 148 F.3d 1304, 1307 (11th Cir. 1998).

***20** The rational basis test also has two parts. First, a court must identify "a legitimate government purpose–a goal–which the enacting government body *could* have been pursuing." *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995) (emphasis original and quotation marks omitted). "The *actual* motivations of the enacting governmental body are entirely irrelevant." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) (emphasis original). Second, the court "asks whether a rational basis exists for the enacting government body to believe that the legislation would further [this] hypothesized purpose." *Restigouche*, 59 F.3d at 1214 (quotation marks omitted). What matters is whether a "conceivably rational basis" existed, "not whether that basis was actually considered by the legislative body." *Id.* "As long as reasons for the legislative classification may have been considered to be true, and the relationship between the classification and the goal is not so attenuated as to render the distinction arbitrary or irrational, the legislation survives rational-basis scrutiny." *Spalding Cnty.*, 148 F.3d at 1307.

According to plaintiff, defendants' enactment of the challenged ordinance was arbitrary and capricious. The ordinance exceeds the reach of White County's police power since it is preempted by state law and directly targets

plaintiff. Indeed, defendants knew they had no authority to regulate plaintiff's operations, yet they enacted the ordinance anyway. White County and the other defendants felt personal animosity towards plaintiff and this animosity infected the onerous requirements of the ordinance. Moreover, there was no legitimate reason for the enactment of the ordinance. Testing showed that plaintiff did not emit offensive odors or contaminate the soil or water. For all of these reasons, plaintiff contends that the ordinance has no rational basis.

Surprisingly, plaintiff does not cite a single decision with even remotely similar facts where a court found a substantive due process violation. Indeed, plaintiff's brief does not attempt to factually analogize a prior case to this one. The cases plaintiff cites are either factually distinguishable, *see* *Bickerstaff Clay Prods. Co. v. Harris Cnty.*, 89 F.3d 1481, 1489 (11th Cir. 1996) (reversing the district court's judgment that the enactment of a zoning ordinance constituted a substantive due process violation), or filled with dicta of questionable precedential value, *see* *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1579 n.18 (11th Cir. 1989) (opining that where government officials "make decisions for 'personal reasons' ... their actions may rise to the point of unconstitutional arbitrariness" (quotation marks omitted)).

To rectify this omission, the court has conducted its own research and found several relevant opinions. Before reviewing them, however, the court notes an important caveat. The analysis of substantive due process claims in this circuit was drastically changed by the decision in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc). In *McKinney*, the Eleventh Circuit held that a non-legislative governmental action, specifically the firing of a public employee, could not support a substantive due process claim. *Id.* at 1553. This holding has been extended to non-legislative governmental decisions related to land-use. *See* *Greenbriar Village*, 345 F.3d at 1262 (holding that under *McKinney* the plaintiff's substantive due process claim based on a permit denial was not viable). The court has been unable to find a post-*McKinney* case that directly addresses a substantive due process challenge to a land-use ordinance. Thus, the only guidance available is two pre-*McKinney* decisions of questionable precedential value and a third post-*McKinney* case that discusses a substantive due process claim in dicta.

In the first pre-*McKinney* case, *Greenbriar, Ltd.*, 881 F.2d at 1571-72, the City of Alabaster adopted a zoning ordinance that re-zoned the landowner's property from a multi-family classification to a single-family classification. The City's zoning commission then denied the landowner's request to re-zone the property. The landowner sued claiming, *inter alia*, that the City's rejection of the re-zoning request was arbitrary and capricious.[22] At trial, the jury found for the plaintiff on the substantive due process claim, but on appeal the Eleventh Circuit decided that "the ultimate issue of whether a zoning decision is arbitrary and capricious is a question of law to be determined by the court." *Id.* at 1578.

***21** The court applied the rational basis test to decide if the City acted arbitrarily and capriciously. The mere fact that the City gave great weight to citizen complaints, which may have been hyperbolic, did not deprive the re-zoning decision of a rational basis. The court noted that "where local officials make decisions for 'personal reasons' which 'can have no relationship to any legitimate governmental objective,' their actions may rise to the point of unconstitutional arbitrariness." *Id.* at 1579 n.18 (quotation marks omitted). But, because "[t]here was no evidence in this case of personal animosity or other illegitimate motivation," the City's decision passed rational basis scrutiny. *Id.* There was a legitimate governmental concern that placing a multi-family apartment complex next to single-family subdivisions would lower property values and cause traffic problems. *Id.* at 1580. Moreover, representatives of neighborhood associations who spoke at the public hearing were opposed to the landowner's zoning request. "The fact that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws ... does not state a claim of denial of substantive due process." *Id.* at 1579 (quotation marks omitted).

The second relevant pre-*McKinney* decision is *Corn*, 997 F.2d at 1374, which contains one of the Eleventh Circuit's most complete discussions of the arbitrary and capricious substantive due process analysis. In *Corn*, the Eleventh Circuit reversed a district court's determination that a city's enactment of a land use ordinance violated a landowner's substantive due process rights. The plaintiff landowner owned a parcel of land, located next to a residential area, that was zoned as commercial property. The landowner proposed a development plan to create a strip shopping center and mini-warehouse on the property. The City's Zoning Board reviewed the plan, recommended that it be approved, and forwarded the proposal to the City Council for final approval. The City

Council held public hearings about the proposal and, after strong public opposition, unanimously denied the proposal and contemporaneously adopted two ordinances affecting the property. The first ordinance eliminated mini-warehouses as a permitted use within the commercial zoning classification and the second ordinance changed the zoning of the plaintiff's property to a more restrictive business classification. *Id.* at 1371. Later in July, the City passed a third ordinance establishing a 150-day city-wide construction moratorium on sites with a business zoning classification.

The Eleventh Circuit found that the City did not act arbitrarily and capriciously when it denied the landowner's permit request and enacted the ordinance.[23] The ordinances had a rational basis because the landowner sought to build a 900-unit mini-warehouse in a residential area. The ordinance was substantially related to "general welfare concerns about congestion, noise, traffic, aesthetics, safety, property values, and the like." *Id.* at 1386.

Several factors from *Corn* are particularly relevant. First, "[t]here [was] no evidence that the City had [a] bad motive" when it enacted the ordinances. *Id.* at 1386. Second, the circuit court chastised the district court for determining that the City acted arbitrarily and capriciously because the ordinances "targeted only the mini-warehouse use for elimination" and left undisturbed "a number of uses that arguably cause more traffic, noise, and air pollution...." *Id.* at 1388 (quotation marks omitted). The district court applied the wrong legal standard, one "that [was] far too strict": the municipality could legally pass legislation targeted at the plaintiff landowner because "[m]unicipal governments have the power to deal independently with the problems of their cities on an as-needed basis; the Constitution does not require that they address in one all-encompassing action every conceivable problem that could arise." *Id.* at 1389. Third, the court placed particular emphasis on the fact that, like the citizen opposition in *Greenbriar, Ltd.*, the City's residents had almost uniformly opposed the landowner's development plans. "[T]he fact that municipal officials are motivated by parochial views of local interest does not state a claim of denial of substantive due process, even if those parochial views contravene *state* laws." *Id.* at 1391 (citing *Greenbriar, Ltd.*, 881 F.2d at 1579) (emphasis added).

***22** The relevant *post-McKinney* case is *Greenbriar Village*, 345 F.3d at 1259. The plaintiff landowner in *Greenbriar Village* unsuccessfully attempted to change the zoning on his property several times. Eventually, for unknown reasons, the City granted the plaintiff a land disturbance permit, which allowed the property to be cleared, apparently in preparation for re-zoning the property to a commercial use. Realizing its mistake and cognizant of the fact that a land disturbance permit had no expiration date, the City passed an ordinance which provided that all land disturbance permits would automatically expire 30 days after the effective date of the ordinance. *Id.* at 1260-61. The City admitted that its difficulties with the plaintiff "were part of the impetus towards the passage of [the challenged] Ordinance...." *Id.* at 1261.

The court rejected the landowner's argument that the ordinance and its revocation of his land disturbance permit deprived him of substantive due process. The permit bestowed a state-created right; it thus was not eligible for federal substantive due process protection. *Id.* at 1263.[24] Moreover, the court opined that even if the ordinance did implicate federally-protected substantive due process rights, the City's actions were not arbitrary or capricious. It was true that the ordinance "affect[ed] [the plaintiff landowner] more than any of the other permit holders in the [C]ity" and that disagreements between the landowner and the City "were most contentious." *Id.* at 1264. But, even considering these facts, "which bear towards the conclusion that the City targeted Greenbriar specifically by enacting this ordinance" and that "the City targeted Greenbriar out of animosity," the court still found that there was no constitutional violation. *Id.* Because "the City was also motivated in part by a legitimate desire to enact a comprehensive and internally consistent land use system," the ordinance's passage facilitated a legitimate governmental objective. *Id.*

Applying these decisions to the facts of this case, the court finds that the passage of the ordinance did not violate plaintiff's federal constitutional rights because the ordinance satisfies rational basis review. Defendants have identified a legitimate governmental purpose which they could have been pursuing when they enacted the ordinance, namely the enactment of a land-use ordinance promoting the health and welfare of White County's citizens.

White County's citizens repeatedly raised health and safety concerns about plaintiff's operations. Public records of the Commissioner's meetings, which defendants have tendered without objection, reveal a number of complaints: (1) on

July 7, 2008, citizens expressed worries about odors from plaintiff's property and health risks associated with those odors, (Ex. G1 Attach. to Defs.' Mot. for Summ. J. 48-49); (2) on April 6, 2009, numerous citizens complained about the prospect of a second LAS facility beginning operation in White County's Paradise Valley, (Ex. G2 Attach. to Defs.' Mot. for Summ. J. 10-12); (3) on May 4, 2009, during the first public reading of the ordinance, many citizens, including some of plaintiff's neighbors, expressed support for the ordinance and concern about plaintiff's operations and the prospect of other LAS facilities in White County, (*id.* at 15-16); (4) on May 28, 2009, during the second public reading of the ordinance, the Commissioners again received public comments about the ordinance and the overwhelming majority of citizens expressed support for the ordinance and concerns about plaintiff's operations, including air pollution. (*Id.* at 34-35.) Citizens also made public complaints to GEPD officials about excessive odors coming from plaintiff's land. (Ex. C. Attach. to Defs.' Mot. for Summ. J. 4.) Testing performed in January 2008 revealed that at least one of plaintiff's monitoring wells contained more than the permissible amount of fecal coliform bacteria. (Ex. F Attach. to Defs.' Mot. for Summ. J. 1.) Additionally, GEPD investigators noted that the septage fields where plaintiff had previously applied septage via subsurface injection "had minimal vegetative cover and were littered with domestic inorganic material (applicators, pads, contraceptives etc)." (*Id.* at 6.)

***23** The Commissioners also expressed concern about plaintiff's operations. They noted health issues with possible "fecal chloroform in the creeks." (Ex. G1 Attach. to Defs.' Mot. for Summ. J. 49.) The Commissioners considered various avenues to address citizen concern. They proposed recommendations to the Georgia legislature regarding amendments to the Clean Water Act in order to better regulate waste transporter testing and spray field operation. (*Id.* at 55-56.) They met with the GEPD to discuss problems with plaintiff's facility. (*Id.* at 48.) They also discussed a variety of regulatory avenues with the county attorney. (Ex. G2 Attach. to Defs.' Mot. for Summ. J. 9-10.)

In sum, the Commissioners expressed concern about general welfare interests, including the health and safety of White County citizens, and the potential adverse effects plaintiff's operation would have upon those interests. *Cf.* *Corn*, 997 F.2d at 1387 (noting that the "City Council had expressed concern for general welfare interests and the adverse effects that a 900-unit mini-warehouse project would have upon those interests"). It is undisputed that there was widespread citizen concern about the negative health effects of plaintiff's facility. This case is very similar to both *Corn* and *Greenbriar, Ltd.*, because in both cases the Eleventh Circuit found that a governmental body did not act arbitrarily or capriciously when it reacted to political pressure levied by concerned citizens. *See* *Corn*, 997 F.2d at 1386 (reviewing evidence in "the minutes of official meetings" that showed "overwhelming" public opposition to the plaintiff's proposed development); *Greenbriar, Ltd.*, 881 F.2d at 1580 ("[T]he record indicates that neighborhood representatives offered several reasons for their opposition to the proposed development, and that Council members properly took those views into account in undertaking their own evaluations of the proposal.")

The Eleventh Circuit has noted that "[i]n most cases" such citizen input is a sufficient basis for a rational government land use decision. *Corn*, 997 F.2d at 1387. The citizen concerns in this case may not have been based on a full understanding of the facts or a rational assessment of plaintiff's operations, but "[n]othing is more common in zoning disputes than selfish opposition to zoning changes [and] [t]he Constitution does not forbid government to yield to such opposition...." *Greenbriar, Ltd.*, 881 F.2d at 1579 (quotation marks omitted); *see also* *Corn*, 997 F.2d at 1387 (noting that at the public meetings concerning the disposition of the plaintiff's zoning request "[a]s often occurs, some misinformation was presented, some information was corrected, and some was contradicted and disputed; but that is the nature of democratic decisionmaking"). The fact that testing never definitively revealed any health risks, aside from contaminated water in plaintiff's monitoring wells to which the public is not exposed, did not render the ordinance irrational. Where "citizens consistently come before their city council in public meetings on a number of occasions and present their individual, fact-based concerns that are rationally related to legitimate welfare concerns, it is not arbitrary and capricious for a city council to decide without a more formal investigation that those concerns are valid...." *Corn*, 997 F.2d at 1387. The information presented by the citizens related to "permissible bases for land use restrictions: noise, traffic, congestion, safety, aesthetics, valuation of adjoining land, and effect on city services." *Id.*

Thus, the challenged ordinance aimed at a legitimate government purpose. The ordinance was rationally related to

citizen safety, *see* White County, Ga. Ordinance, Preamble 1 (noting that the challenged ordinance sought to "promot[e] ... [the] health of the citizens and prevent[ ] the spread of disease"), aesthetics, *see id.* at 2 (noting complaints about operation of plaintiff's "facility at night"), and effects on county services, *see id.* (noting that LAS facilities must "be accessible by an adjoining state highway or a major arterial roadway in order to allow access by emergency vehicles of White County including but not limited to fire trucks and pumper trucks ...").

***24** The court also finds that there was a rational basis "for the enacting government body to believe that the legislation would further [these] hypothesized purpose[s]." *Restigouche*, 59 F.3d at 1214 (quotation marks omitted). Assuming that defendants believed plaintiff and other LAS facilities posed a health risk, the ordinance would reduce this risk by extensively regulating all LAS facilities. Indeed, the requirements of the ordinance are so onerous that they make White County a very unattractive site for any LAS facility. The ordinance would improve the aesthetic quality of a LAS facility by limiting its operating hours and increase its accessibility to county emergency equipment by requiring road improvements.

It is true that the ordinance's requirements, particularly the health-related restrictions, seem unduly strict. This is especially so in light of the fact that no testing ever revealed that plaintiff contaminated the surrounding groundwater or soil. Nevertheless, the court is not evaluating the ordinance under strict scrutiny. This is rational basis review and "the relationship between the classification and the goal [of the ordinance] is not so attenuated as to render the distinction arbitrary or irrational." *Spalding Cnty.*, 148 F.3d at 1307. The ordinance survives rational basis scrutiny because plaintiff has not met its "burden to negative every conceivable basis which might support [it]." *F.C.C. v. Beach Comm's, Inc.*, 508 U.S. 307, 315 (1992) (quotation marks omitted).

Consequently, the fact that the ordinance almost certainly targets plaintiff is irrelevant. In *Greenbriar Village*, the facts suggested "that the City targeted [the plaintiff landowner] specifically by enacting [the challenged] ordinance." 345 F.3d at 1264. Nevertheless, because there was a legitimate governmental purpose behind the legislation in *Greenbriar Village*, it did not violate substantive due process. *See id.* ("[T]he City was also motivated in part by a legitimate desire to enact a comprehensive and internally consistent land use system."); *see also* *Corn*, 997 F.2d at 1388-89 (noting that the defendant city's "targeting" of the plaintiff did not violate rational basis review). In other words, so long as there is a possible legitimate basis behind a piece of legislation, "[t]he *actual* motivations of the enacting governmental body are entirely irrelevant." *Haves*, 52 F.3d at 921 (emphasis original).

The same conclusion applies to the claim that the Commissioners harbored personal animosity towards plaintiff and that these bad motives contributed to the passage of the ordinance, which was designed to force plaintiff out of business. All of the evidence adduced on this point is irrelevant if there was a possible legitimate basis for the ordinance's enactment. Since there was such a legitimate basis, White County's animosity toward plaintiff does not create a constitutional violation. *See* *Greenbriar Village*, 345 F.3d at 1264 (holding that even though "the City targeted [the plaintiff landowner] out of animosity" there was no substantive due process violation).

Plaintiff's contention that the enactment of the ordinance violated its substantive due process rights because defendants knew that the ordinance was preempted prior to its passage is simply a restatement of this bad motive argument. Certainly, there is evidence to support the assertion that defendants knew they did not have authority to regulate LAS facilities. [25] For example, the minutes from the Commissioners' April 6, 2009 meeting show that county attorney David Syfan stated that the GEPD and not White County had authority to regulate LAS facilities and that county laws on this topic would be preempted. (Ex. G2 Attach. to Defs.' Mot. for Summ. J. 9.) Mr. Syfan opined that there were "[p]otential legal issues of preemption since the state [already] is requiring a testing plan as a condition of a [LAS] permit...." (*Id.*); (*see also id.* at 10 (noting that Mr. Syfan stated that "the County is limited due to the preemption of the state regulations for these types of [LAS] facilities ...").) At a later meeting on May 4, 2009, Mr. Syfan clearly understood the difference between the regulation of waste transporters (in GEPD Rule 24) and the regulation of LAS sites (in GEPD Rule 11). (*See id.* at 15 (noting that Mr. Syfan explained that "a separate ordinance" would need to be drafted to "regulat[e] the transporters of the waste as opposed to the actually [sic] [LAS] treatment facilities" and that "EPD and DNR regulations would allow White County to require a condition of receiving a transporter's permit be that the haulers have

no reports of spillage").)[26] At least one Commissioner was apparently aware that the Georgia legislature had removed White County's power to regulate LAS facilities, because he urged citizens to vote those state legislators out of office. (*See id.* at 11 (indicating that Commissioner Campbell asked the county manager "to make public the records of which legislators voted in support of local control being taken away in the operation of land application systems").);(*see also id.* at 36 (noting that Commissioner Campbell "encouraged the public to become aware of State legislators who vote for measures to limit local control over land application facilities and to express their dissatisfaction with them by not re-electing them to office").)

***25** Perhaps most disturbingly, on March 2, 2009, the Commissioners enacted a resolution addressed to the Georgia state legislature that recommended several amendments to Georgia's Clean Water Act. Among other things, the Commissioners recommended: (1) requiring the treatment areas of LAS facilities to be "enclosed and equipped with reasonable air scrubbers and purifiers," (Ex. G1 Attach. to Defs.' Mot. for Summ. J. 55); (2) adding a buffer requirement of at least 500 feet for all LAS facility spray fields, (*id.*); (3) mandating the testing of all waste entering a LAS facility, (*id.*); (4) requiring LAS facilities to make monthly reports to the local governing authority, in addition to the GEPD, (*id.* at 56); (5) requiring LAS facilities to provide a soil analysis to GEPD and the local governing authority, (*id.*); (6) requiring LAS facilities to provide a copy of all GEPD documentation, applications, reports, consent orders, and testing results to the local governing authority, (*id.*); (7) restricting the days and hours during which LAS facilities can operate, (*id.*); (8) mandating street improvements to prevent damage from heavy truck traffic around LAS facilities, (*id.*); and (9) allowing the local governing authority to have at least some control over the GEPD permitting process. (*Id.*) The substance of each of these "recommendations" was incorporated into the challenged ordinance's requirements. For example, the ordinance imposed buffer requirements, restricted hours of operation, required monthly reporting to White County, and mandated the installation of air purification systems. The fact that defendants previously *recommended* all of these changes to the Georgia legislature suggests that they knew that White County did not have authority to pass an ordinance containing these requirements.

Nevertheless, legislative "bad motive," including personal animosity and knowledge that a proposed ordinance is preempted by state law, cannot create a substantive due process violation unless the ordinance fails rational basis review. There are stray suggestions otherwise in the two pre-*McKinney* cases, but these suggestions are no longer binding law. In *Greenbriar, Ltd.*, the Eleventh Circuit suggested that "where local officials make decisions for 'personal reasons' which 'can have no relationship to any legitimate governmental objective,' their actions may rise to the point of unconstitutional arbitrariness." 881 F.2d at 1579 n.18 (quoting *Bello v. Walker*, 840 F.2d 1124, 1129-30 (3d Cir. 1988)). Similarly, in *Corn*, the court noted that "[t]here is no evidence that the City had any bad motive...." 997 F.2d at 1386; *see also id.* at 1376 (stating that substantive due process provides protection against government action based on "illegitimate motivation"). Arguably, these statements imply that the presence of bad motive in a land-use decision can deprive that decision of a rational basis.

However, although the Eleventh Circuit has mentioned this bad motive theory, the theory has never actually been applied in this circuit and changes in the law make it unlikely that it ever will. The statement in *Greenbriar, Ltd.* is based on a Third Circuit decision, *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988), that has been overruled. As then-Circuit Judge Alito noted, the Supreme Court "superceded prior decisions of [the Third Circuit] holding that a plaintiff asserting that a municipal land-use decision violated substantive due process need only show that the municipal officials acted with an 'improper motive.' " *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 394 (3d Cir. 2003) (Alito, J.). "Thus, *Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988), and its progeny are no longer good law." *Id.* By implication, the statement in *Greenbriar, Ltd.* is also no longer valid.

Moreover, in recent years, the Eleventh Circuit has expressed skepticism about the validity of an arbitrary and capricious due process claim. *Greenbriar Village* seems to suggest that there no longer is such a claim. *See* 345 F.3d at 1263 n.4 ("[T]he claim that the government acted arbitrar[ily] and irrationally can be easily subsumed and, indeed, is more properly considered a part of a claim that improper procedures were used in the deprivation. Claiming that the interest was deprived arbitrarily or irrationally is equivalent to claiming that no fair, unbiased, and meaningful procedures were used for the deprivation."). The Eleventh Circuit has also noted

the "uncertain doctrinal basis" of substantive due process challenges to legislative acts. *Leib*, 558 F.3d at 1308.

This skepticism makes sense because inquiry into legislative bad motives undercuts the premise of rational basis review. Under the rational basis test, "a zoning ordinance violates substantive due process if the zoning authority could not have had a rational basis for adopting it." *Phillips*, 107 F.3d at 186 (Alito, J., concurring in part and dissenting in part). This is an objective test; actual legislative intent is irrelevant. Ascertaining legislative motive, on the other hand, is more akin to "a subjective test of good faith, i.e. whether municipal officials' actions in connection with land use matters were taken for partisan political or personal reasons unrelated to the merits of the application...." *Id.* (quotation marks omitted). [27]

***26** Accordingly, plaintiff's substantive due process rights were not violated even if the ordinance was enacted in bad-faith or its passage violated state law. The substantive rights at issue in this case are created by state property law. Such rights are entitled to federal substantive due process protection only when they are infringed by legislative action that lacks a rational basis. When the legislative action has a rational basis, the substantive due process arbitrary and capricious analysis ends.

Here, plaintiff claims that defendants violated its federal constitutional rights because they enacted an ordinance that they knew was preempted by *state* law. Since the ordinance passes rational basis review, however, this argument only amounts to an assertion that defendants violated state law. Such a claim is not actionable in a federal court. *See* *Corn* 997 F.2d at 1391 ("[T]he fact that municipal officials are motivated by parochial views of local interest does not state a claim of denial of substantive due process, even if those parochial views contravene state laws."); *see also Energy Man. Corp. v. City of Shreveport*, 467 F.3d 471, 481-82 (5th Cir. 2006) ("The fact that the ordinance is deemed preempted by state law does not convert [the defendant city's] actions into a violation of [the plaintiff's substantive] due process rights."); *see also* *Phillips*, 107 F.3d at 187 (Alito, J., concurring in part and dissenting in part) ("[M]undane land-use disputes that belong in state court [should not be] transformed into substantive due process claims cognizable under 42 U.S.C. § 1983."); *PFZ Props. Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1991) ("Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation."). [28] After all, "[a] bad-faith violation of state law remains only a violation of state law." *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992).

This conclusion accords well with principles of federalism. The rights of a land owner "are defined in relation to the rights of the constituents of a municipal government to regulate and control the development of land in the community for the greater good as defined by the majority." *Corn*, 997 F.2d at 1373. "[T]he minority's rights are protected from majority encroachment by state law enforced through the state court system." *Id.* When a landowner resorts to the federal courts and not the state courts to vindicate these rights, a federal court must be cautious of expanding the reach of federal substantive due process rights. *See* *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998) ("[W]e have always been reluctant to expand the concept of substantive due process." (quotation marks omitted)); *Dacosta v. Nwachukwa*, 304 F.3d 1045, 1048 (11th Cir. 2002) (noting that the Supreme Court "has cautioned against the open-ended judicial expansion of other unenumerated rights" under the Due Process Clause). To the extent White County's action was unlawful or unwise, plaintiff may seek redress in both the state courts of Georgia and the electoral process. The substantive due process claim asserted here is simply not cognizable under the federal Constitution. Plaintiff's motion for summary judgment on its substantive due process claim is denied and defendants' motion for summary judgment on this claim is granted.

VI. Remaining Claims

***27** After determining that the challenged ordinance is preempted, that it accordingly must be enjoined, and that the enactment of the challenged ordinance did not violate plaintiff's substantive due process rights, the court has addressed all of the relief plaintiff requested, except for the claim that the ordinance is not a valid zoning ordinance. Since defendants concede this point, such a declaration is no longer necessary. Thus, plaintiff's motion for summary judgment has been fully addressed.

Defendants' motion for summary judgment asked for judgment on all of plaintiff's claims. In addition to the claims the court has already addressed, plaintiff's complaint sets forth two state-law "claims" which are really little more than

references to two separate Georgia statutes. The first state law claim is for monetary damages pursuant to O.C.G.A. § 51-1-6 for "the loss of profits and business opportunities and from the interference with its business activities caused by [d]efendants' actions, including" the enactment of the challenged ordinance. (Second Am. Compl. 29.) The second state law claim seeks damages plus attorney's fees against the individual defendants pursuant to O.C.G.A. § 36-33-4 for official acts taken without authority of law. (Second Am. Compl. 30.)

The briefing on each of these issues is extremely cursory. Defendants did not directly address the merits of plaintiff's claim for monetary damages under O.C.G.A. § 51-1-6. Instead, they argued only that plaintiff could not recover damages under O.C.G.A. § 36-33-4, because they did not act willfully or wantonly. To support their argument, defendants mis-cited a Georgia statute and did not cite any evidence. For these reasons, if the court were to rule on these claims, it would be forced either to deny summary judgment and proceed to trial or to deny summary judgment and order supplementary briefing.

However, the court has determined that at this point in the proceeding it is appropriate to decline supplemental jurisdiction over these state law claims and dismiss them without prejudice. The dismissal of plaintiff's substantive due process claim has disposed of the last remaining federal claim prior to trial. If the court retained jurisdiction over the state-law claims, they would potentially proceed to trial. Holding a trial on purely state-law claims would make little sense. Indeed, the Eleventh Circuit has "encouraged district courts to dismiss any remaining state claims when, as here, the federal claims have been dismissed prior to trial." *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1089 (11th Cir. 2004). Thus, it is proper to dismiss the remaining state-law claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3).

The decision to decline jurisdiction over the remaining state-law claims is not inconsistent with the decision to retain jurisdiction over the state-law preemption claim. The preemption claim was closely related to the substantive due process claim because plaintiff argued that defendants' knowledge that the ordinance was preempted made the ordinance's enactment arbitrary and capricious. Additionally, the parties extensively briefed and argued the preemption issue. Although the court ultimately concluded that the preemption issue was not dispositive of the substantive due process claim, the extensive time that both the court and the parties spent addressing the issue warranted the retention of jurisdiction over that claim.

Unlike the preemption claim, the remaining state law claims are not intimately intertwined with the substantive due process claim, even though they arise from the same general facts. The parties have spent little, if any, time researching and briefing these claims. Additionally, the remaining state law claims involve new and different evidence. To recover damages under O.C.G.A. § 51-1-6, plaintiff would need to prove that defendants' actions caused a loss of profit and business opportunities. It was unnecessary to review such evidence to resolve the federal claim. Similarly, to prove its case under O.C.G.A. § 36-33-4, plaintiff must show that defendants acted willfully and wantonly. Although the court has noted that defendants *may* have acted with a bad motive, it did not need to conclusively determine that issue because the ultimate question of defendants' motivation was irrelevant so long as the ordinance had a rational basis.

***28** Thus, deciding these state claims would require additional fact finding, research, and briefing. At this stage of the proceedings, it would be a waste of federal judicial resources to spend additional time evaluating purely state-law claims. It is therefore appropriate to dismiss all remaining state-law claims without prejudice.

VII. Conclusion

For the foregoing reasons, plaintiff's"Renewed Motion for Partial Summary Judgment" [48] is hereby **GRANTED** in part and **DENIED** in part. Plaintiff's motion is hereby **GRANTED** with respect to plaintiff's claim that the challenged ordinances are preempted by state law. Defendants are hereby permanently **ENJOINED** from enforcing White County Ordinance 2009-12, White County Ordinance 2009-20, and the amending ordinance passed on February 8, 2010. Plaintiff's motion is hereby **DENIED** with respect to plaintiff's claim that the enactment of the challenged ordinance violated its substantive due process rights. Defendants' "Motion for Summary Judgment" [54] is hereby **GRANTED** in part, **DENIED** in part, and **DENIED** as moot in part. Defendants' motion is hereby **GRANTED** with respect to plaintiff's substantive due process claim. Defendants' motion is hereby **DENIED** with respect to the preemption claim and hereby **DENIED** as moot with respect to the remaining state law claims, which are hereby **DISMISSED** without prejudice pursuant to 28 U.S.C. §

1367(c)(3). The clerk is hereby **DIRECTED** to close this case.

IT IS SO ORDERED, this 22nd day of March, 2012.

All Citations

Not Reported in Fed. Supp., 2012 WL 12932609

Footnotes

1 Ordinance 2009-12 was enacted on May 28, 2009, in order to "provid[e] for the regulation of facilities that engage in the land application of human waste and septage or commercial waste, or both...." White County, Ga. Ordinance, Preamble, 2. Ordinance 2009-20, enacted on August 3, 2009, modified Ordinance 2009-12 so that it also applied to any expansion of a LAS facility. A third ordinance was passed on February 8, 2010. This last ordinance made grammatical and numbering corrections to the two prior ordinances and also added a mechanism to appeal the denial of a permit.

Attached to this last ordinance is a modified and corrected version of the full ordinance. Henceforth in this order, the court will refer to this final version of the ordinance, which incorporates all three ordinances, as either "the challenged ordinance" or "the ordinance." This ordinance can be found in the record beginning on page 39 of Exhibit N to plaintiff's second amended complaint. When citing the preamble of the ordinance, the court uses the following citation: White County, Ga. Ordinance, Preamble page number. The page number in this citation references the page number provided by the court's electronic docketing system. When citing other sections of the ordinance, the court uses the ordinance's own numbering scheme: for example, White County, Ga. Ordinance, ch. 50, art. 2, § 50-4(a).

2 The Commissioners include Chris Nonnemaker, Travis Turner, Joe Campbell, and Craig Bryant.

3 Throughout this order, the court generally refers to the application of treated pollutants to land, whether via subsurface injection or surface spray as "land application." Facilities that perform this application are generally referred to as either land application or land disposal sites or simply as "LAS facilities."

4 Vectors refers to "vector attraction," the characteristic of septage or waste to attract rodents, flies, mosquitos, or other organisms capable of transporting infectious agents. Ga. Comp. R. & Regs. 391-3-6-.17(2)(oo).

5 At this stage of the litigation, defendants concede that the challenged ordinance was not enacted pursuant to White County's zoning authority under the Zoning Procedures Law, O.C.G.A. § 36-66-1, *et seq.* (*See* Defs.' Br. in Supp. of Mot. for Summ. J. 21-22.)

6 For preemption purposes, Georgia law includes both statutes passed by the General Assembly and regulations enacted by state agencies. *See, e.g., Franklin Cnty.*, 507 S.E.2d at 463 ("Preemption may be inferred generally from the comprehensive nature of O.C.G.A. § 12-5-30.3 and its implementing *regulations.*" (emphasis added)).

7 The local governing authority is the governing authority of a county or municipality. O.C.G.A. § 12-15-20(4). White County is a "local governing authority."

8 The "hydraulic loading rate" is "the rate at which wastes or wastewaters are discharged to a land disposal or land treatment system, expressed in volume per unit area per unit time or depth of water per unit area per unit." Ga. Comp. R. & Regs. 391-3-6-.11(2)(g).

9 Although a final permit was not issued until August 13, 2010, GEPD authorized plaintiff's current spray operation since October 12, 2007, under a consent order that served as an interim LAS permit.

10 This portion of the statute is not well drafted and is difficult to understand.

11 In its preemption analysis, the court focuses on whether the special-use permitting process is preempted, even though plaintiff, as a pre-existing LAS facility, is currently eligible to apply for a non-conforming use permit and would not be subject to the more stringent special-use process. Nevertheless, it was appropriate to examine whether the special-use permitting process was preempted for two reasons. First, many of the requirements of the special-use permitting process are the same as the non-conforming use permitting process. Second, because plaintiff would be forced to obtain a special-use permit if it wanted to expand its operations, it is likely that plaintiff will eventually need to obtain a special-use permit. *See* White County, Ga. Ordinance, ch. 50, art. 2, § 50-7(a) ("Prior to any expansion of any active waste treatment area of a facility ... operating as a legal non-conforming use without a special use permit ... [the facility] must receive a special use permit and land compliance letter ..."). The statute does not provide a definition of what constitutes the "expansion" of a facility. Hence, even the smallest change in plaintiff's operations could be termed an expansion.

12 The briefing by both parties in this action has been less than adequate. Many issues and facts are either barely mentioned or only tangentially referenced. Moreover, both parties often misstate the law or cite cases that are factually and legally inapposite. As a result, the court has spent a great deal of time conducting its own research, which greatly delayed the resolution of this matter.

13 Defendants attempt to distinguish *Franklin County* by noting that it implicated "a different statutory scheme." (Defs.' Br. in Supp. of Motion for Summ. J. 16.) This point is not well taken. There are some factual differences between this case and *Franklin County* and the two statutory schemes involved are not identical. Even if the statutory schemes are not exactly the same, however, they are quite similar, and the Georgia Supreme Court's analysis is instructive despite the differences. Defendants never explain *why* the factual differences in *Franklin County* distinguish it from this case.

14 Defendants apparently concede this point, as they never argue that White County has broad authority under state law to regulate the disposal of commercial waste and septage. Indeed, such an argument would be easily defeated by reference to *Franklin County*, which held that Franklin County's ordinance, which attempted to regulate, among other things, the disposal of industrial waste, was not authorized by general law.

15 The ordinance states this monitoring is authorized by O.C.G.A. § 12-5-30.3(d). However, that provision applies only to"sludge land application sites." Plaintiff does not apply sludge to land. It applies treated effluent and septage to its fields. *See* O.C.G.A. § 12-5-30.3(a)(1) (noting that the definition of sludge "specifically excludes treated effluent [and] septage ...").

16 Throughout this discussion the court has referred to a "special-use" permit, but the same analysis applies to any facility that could operate under a non-conforming use permit.

17 The court is mindful that the challenged ordinance indicates that it should "be construed not to be in conflict with State law," White County, Ga. Ordinance, ch. 50, art. 2, § 50-4(b), and should be viewed as "in accordance with those areas under State law that are capable of regulation by a local governing authority," *id.*, ch. 50, art. 2, § 50-4(c). Unfortunately, there simply is no logical way to construe this ordinance to prevent its preemption by state law.

Additionally, the statute contains a severability provision, instructing a court to "uphold and enforce all remaining provisions of this ordinance notwithstanding the invalidation of one or more provisions contained herein." White County, Ga. Ordinance, ch. 50, art. 2, § 50-5. Defendants have not raised this severability

clause at any point and only contend that the entire ordinance is valid. Nevertheless, because the court is essentially invalidating White County's ordinance, it must apply Georgia law to determine what part of the ordinance, if any, "survives due to a severability clause, when a portion of that [ordinance] is judicially invalidated." *Artistic Entm't, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1204 (11th Cir. 2003) (per curiam). A severability clause in an invalidated county ordinance creates "a presumption that the county intended for invalid provisions not mutually dependent on other provisions to be severed, leaving the remainder of the ordinance intact." *Chambers v. Peach Cnty.*, 492 S.E.2d 191, 193 (Ga. 1997).

The challenged ordinance is designed to license and regulate LAS facilities that apply commercial waste, domestic septage, or human waste to land. Like the ordinance in *Artistic Entertainment*, which attempted to license and regulate adult entertainment businesses, the challenged ordinance's "substantive requirements are closely intertwined with the licensing procedure and the two cannot be separated without disrupting the obvious purpose of the ordinance." *Artistic Entm't, Inc.*, 331 F.3d at 1204. Since the licensing scheme contained in White County's ordinance is invalid and because the entire ordinance depends on this licensing scheme, the entire ordinance must fall. *Id.*

18 The decision in this case is very similar to the decisions of two federal district courts in other states that addressed similar attempts by counties to regulate waste disposal sites in violation of state law. *See O'Brien v. Appomattox Cnty.*, 293 F. Supp. 2d 660, 662-668 (W.D. Va. 2003) (invalidating county ordinance that conflicted with state law regulating land application of sewage sludge); *Triple G Landfills, Inc. v. Bd. of Commr's of Fountain Cnty.*, 774 F. Supp. 528, 530-32 (S.D. Ind. 1991) (invalidating county ordinance that conflicted with state law regulating landfills).

19 Throughout this litigation, the parties have failed to adequately distinguish between substantive and procedural due process. "Substantive due process bars certain government actions irrespective of the fairness of the procedures used to implement them." *Phillips v. Borough of Keyport*, 107 F.3d 164, 185 (3d Cir. 1997) (en banc) (Alito, J., concurring in part and dissenting in part). Procedural due process, on the other hand, focuses "on whether governments can take away property [or other protected rights] without affording its owner an adequate notice and opportunity to be heard." *Greenbriar Village, LLC v. Mountain Brook*, 345 F.3d 1258, 1264 (11th Cir. 2003) (per curiam).

20 Where a zoning classification renders property worthless, an inverse condemnation claim under the Takings Clause and the substantive protection of the Due Process Clause are identical. *Bickerstaff Clay Prods. Co. v. Harris Cnty.*, 89 F.3d 1481, 1490 n.16 (11th Cir. 1996). A substantive due process claim asserting that "a regulatory measure exceeds the government's police power" can therefore be asserted independently only where the government action has *not* effected a taking. *Id.* In other words, a substantive due process claim is available only so long as "the regulatory measure has not rendered the property worthless...." *Id.* Although plaintiff claims in several places that the ordinance has rendered its property worthless this is not so; the ordinance may prevent plaintiff from operating its treatment facility, but it does not effectively condemn the property. Therefore, *Bickerstaff* does not preclude plaintiff's substantive due process claim.

21 This case is distinguishable from *Greenbriar Village, LLC v. Mountain Brook*, 345 F.3d 1258, 1262 (11th Cir. 2003) (per curiam), where the Eleventh Circuit held that a landowner's substantive due process rights were not violated when a city revoked his land disturbance permit via the passage of a municipal ordinance. Although *Greenbriar Village* involved a legislative act (the passage of an ordinance), the Eleventh Circuit conceptualized the city's decision as an executive action (the revocation of a permit). *See id.* ("[T]o the extent that [the plaintiff] predicates its substantive due process claim directly on the denial of its state-granted and-defined property right in the permit, no substantive due process claim is viable."). Thus, in *Greenbriar Village*,

the legislative acts exception was not applicable. In this case, however, defendants' actions must be viewed as legislative. The challenged ordinance did not revoke plaintiff's state-issued GEPD permit. Instead, it required all LAS facilities in White County to submit to a new permitting scheme.

22 The precedential value of *Greenbriar, Ltd.* is questionable post-*McKinney* because the denial of the plaintiff's re-zoning request was an executive, rather than legislative action. Thus, it would no longer be possible to advance a substantive due process claim based on this denial. Nevertheless, the opinion's reasoning may still be applicable to a legislative substantive due process claim.

23 *Corn* is also a pre-*McKinney* case and thus it did not explicitly differentiate between the passage of the ordinance (an arguably legislative act) and the denial of the plaintiff's development plan (an arguably executive act). The court believes that *Corn's* substantive due process analysis is still relevant, however, because that analysis addresses both the passage of the ordinance and the denial of the plaintiff's development plan.

24 As noted previously, the *Greenbriar Village* court conceptualized the permit revocation as an executive act implicating procedural due process rights. *See* 345 F.3d 1258 n.4. It seems reasonable, however, to view the City's action as legislative, because the permit's revocation was effected through the passage of an ordinance that conceivably applied to *all* land disturbance permits, not just the one issued to the plaintiff.

25 Most of the following facts were assembled from the court's independent review of the record.

26 Mr. Syfan's vague declaration, which is included with defendants' motion for summary judgment, does not actually dispute that he made these statements. Instead, he claims only that he never advised the Commissioners “that they were absolutely precluded from enacting ordinances regulating waste processors, but did indicate that the County's ordinances had to be consistent with the State regulations.” (Ex. K Attach. to Defs.' Mot. for Summ. J. 3.)

27 The difficulty of ascertaining legislative motives also dooms the bad motive theory. Determining whether a defendant “knew” that an ordinance was preempted prior to its passage would require searching inquiry of legislative intent and motive. This result is simply untenable, both because it would give a federal court the responsibility of divining ambiguous or unclear legislative intent and because such an inquiry would exceed the bounds of rational basis review.

28 To the extent that the bad motives involve “invidious discrimination [based on race or other constitutionally protected categories], [they] can be redressed by other means, in either federal or state court or both.” *Phillips*, 187 F.3d at 186-87 (Alito, J. concurring in part and dissenting in part); *see also Leib*, 558 F.3d at 1308 (“[S]ubstantive due process claims are subject to rational basis review *so long as* they do not infringe fundamental rights and are not discriminatory.” (emphasis added)).

End of Document

2007 WL 2462646
Only the Westlaw citation is currently available.
United States Bankruptcy Court,
N.D. Ohio,
Western Division.

In re Kermit W. BERGER, Jr.,
and Linda L. Berger, Debtors.
Patricia A. Kovacs, Trustee, Plaintiff,
v.
Kenneth W. Berger, Defendant.

Bankruptcy No. 05–34196.
|
Adversary No. 05–3214.
|
Aug. 27, 2007.

Attorneys and Law Firms

Kenneth W. Wenninger, Law Offices of Kenneth W. Wenninger, LLC, Sylvania, OH, for Defendant.

MEMORANDUM OF DECISION

MARY ANN WHIPPLE, United States Bankruptcy Judge.

***1** This adversary proceeding is before the court for decision after trial on a complaint to avoid a transfer of a Honda motorcycle filed by the Chapter 7 Trustee ("Trustee"). In her complaint, the Trustee alleges that Debtor Kermit Berger's ("Debtor") prepetition transfer of a Honda motorcycle to his son, Defendant Kenneth Berger, was either a preferential transfer under 11 U.S.C. § 547 or a fraudulent conveyance under 11 U.S.C. § 548. In addition, in her trial brief, the Trustee raised the issue of avoidance of the motorcycle transfer under 11 U.S.C. § 544(b)(1) and the Ohio Uniform Fraudulent Transfer Act.

The court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b) and the general order of reference entered in this district. Proceedings to determine, avoid or recover fraudulent transfers and preferences are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(F) and (H). This Memorandum of Decision constitutes the court's findings of fact and conclusions of law under Fed.R.Civ.P. 52, applicable to this adversary proceeding under Fed. R. Bankr.P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, the court finds that Plaintiff is entitled to judgment on her claim brought under § 544(b)(1).

FINDINGS OF FACT

In April 2004, Defendant Kenneth Berger, son of Debtors Kermit and Linda Berger, transferred to his father the title to a 1996 Honda motorcycle that he had purchased in 2002. Both Defendant and his wife, Dana Berger, testified that the reason for the transfer was that Dana had safety concerns and did not want him to have a motorcycle. Debtor, on the other hand, testified that his son told him in 2004 that the reason for the transfer was that his son was contemplating bankruptcy. Dana Berger confirmed that their financial circumstances "were tight" in 2004 and that they had previously spoken with an attorney regarding filing a bankruptcy petition but testified that they ultimately did not pursue that course of action.

It is undisputed that the motorcycle title transfer occurred for no consideration and that, after the transfer, the motorcycle remained in Defendant's possession at all times. Although Defendant previously rode and insured the motorcycle, it is also undisputed that he neither rode nor insured it while titled in Debtor's name. He did, however, pay for the registration and license plates during that time. It is also undisputed that Debtor never rode or insured the motorcycle during the time that it was titled in his name. On or about April 11, 2005, Debtor transferred title to the motorcycle back to Defendant for no consideration. Debtor testified that he never believed the motorcycle belonged to him and that he transferred title back to his son because Debtor was going to file for bankruptcy relief.

***2** On April 28, 2005, Debtors filed a petition for relief under Chapter 7 of the Bankruptcy Code. Debtor testified that they were not able to pay all of their debts at the time they filed their bankruptcy petition. Linda Berger testified that they had consulted counsel one week before filing, the appointment for which was made approximately two weeks before filing. At the time of filing, Debtors scheduled personal property owned by them that included two vehicles—a 1973 GMC pick-up

truck and a 1992 Geo Prism. In their Statement of Financial Affairs, they disclosed that the title to the motorcycle had been transferred to their son.

LAW AND ANALYSIS

The Trustee's seeks to avoid Debtor's prepetition transfer of the motorcycle to Defendant as a preference under § 547 or as a fraudulent conveyance under § 548 or § 544(b).[1] For the reasons that follow, the court finds that the Trustee has met her burden of proof only under § 544(b).

I. 11 U.S.C. § 547

In order to prevail on her preference claim, the Trustee must prove, among other things, that the transfer was "to or for the benefit of a creditor" and that the transfer was "for or on account of an antecedent debt owed by the debtor before such transfer was made." 11 U.S.C. § 547(b)(1) and (2). The Trustee presented no evidence or argument at trial that Defendant was a creditor of Debtor or that the transfer was on account of an antecedent debt. Defendant is, therefore, entitled to judgment on this claim.

II. 11 U.S.C. § 548

The Trustee also alleges that Debtor's transfer of the motorcycle was a fraudulent transfer under § 548. That section provides in relevant part as follows:

> (a)(1) The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property ... that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
>
> (A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
>
> (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
>
> (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
>
> (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

***3** 11 U.S.C. § 548(a)(1).

In order to prevail on her fraudulent transfer claim, the Trustee must show that (1) Debtor had an interest in the property transferred; (2) the transfer occurred within two years of the date the petition was filed; and (3) the transfer was made with actual intent to hinder, delay, or defraud a creditor; or (4) the transfer was constructively fraudulent in that the transfer was made for less than a reasonably equivalent value *and* one of the four circumstances set forth in § 548(a)(1)(B)(ii) applies. The Trustee bears the burden of proving the elements of a fraudulent transfer by a preponderance of the evidence. *Shapiro v. Matouk (In re Hayes),* 322 B.R. 644, 646 (Bankr.E.D.Mich.2005).

In this case, there is no dispute that Debtor had at least a legal interest in the motorcycle as it was titled in his name and that he transferred title to the motorcycle within two years before the date of his petition. However, the court credits Debtor's testimony that he never believed he owned the motorcycle and that he transferred the motorcycle before he filed his bankruptcy petition because he believed it belonged to Defendant. Debtor never had possession of the motorcycle, never rode it, never insured it, and never took any other steps to exercise ownership of the motorcycle. His testimony is also buttressed by the fact that Debtor did not attempt to hide the transfer; the transfer was fully disclosed in Debtors' Statement of Financial Affairs. The court finds that the Trustee failed to prove that Debtor transferred the motorcycle with actual intent to hinder, delay, or defraud a creditor.

The court next considers whether the transfer was constructively fraudulent under § 548(a)(1)(B). There is no dispute that Debtor received no consideration in exchange for the transfer. The court rejects Defendant's argument that Debtor held only bare legal title and that Defendant retained at all times the beneficial interest in the motorcycle and, thus, presumably that Debtor had no cognizable interest in the property and was entitled to no consideration for the transfer. Defendant neither rode the motorcycle nor insured it during the period of time it was titled in Debtor's name. Notwithstanding Debtor's belief that the motorcycle belonged to Defendant, Defendant's stated purpose in transferring the motorcycle, either to address his wife's safety concerns or because he was contemplating bankruptcy, as well as his actions or inaction during the period of time the motorcycle was titled in Debtor's name, demonstrate Defendant's intent to relinquish ownership rather than to maintain an equitable interest in the motorcycle.

Having demonstrated that Debtor received less than reasonably equivalent value for the transfer of title, in order to prove that the transfer was constructively fraudulent, the Trustee must also prove the existence of any one of the four circumstances set forth in § 548(a)(1)(B)(ii). The Trustee failed to present any evidence of such circumstances.

***4** The first circumstance set forth in § 548(a)(1)(B)(ii)(I) requires the Trustee to prove that Debtor was insolvent on the date the transfer was made or became insolvent as a result of the transfer. The Bankruptcy Code defines insolvency with respect to an individual in pertinent part as follows: "financial condition such that the sum of such entity's debts is greater than the sum of such entity's property, at a fair valuation, exclusive of ... property that may be exempted from property of the estate under section 522 of this title [providing exemptions for individual debtors]." 11 U.S.C. § 101(32)(A). The Trustee presented no evidence of insolvency as defined in § 101(32)(A). Debtors' testimony that they were unable to pay all of their debts at the time of filing their petition is insufficient evidence under §§ 548 and 101(32)(A) that they were insolvent on the date of the transfer. The Trustee incorrectly argues in her trial brief that because Debtor transferred the motorcycle within ninety days of filing his petition there is a presumption of insolvency. Although § 547 provides that a debtor is presumed to be insolvent during the ninety days before filing his petition, that provision applies only "for the purposes of this section." 11 U.S.C. § 547(f). There is no similar provision applicable to § 548.

The Trustee also presented no evidence that Debtor was engaged in, or about to engage in, business or a transaction for which his remaining property was an unreasonably small capital as set forth in § 548(a)(1)(B)(ii)(II). Nor did the Trustee present any evidence that Debtor intended to incur, or believed he would incur, debts that would be beyond his ability to pay as they matured as set forth in § 548(a)(1)(B)(ii)(III). Debtors' testimony that they were unable to pay all of their debts at the time of filing their petition is insufficient as it addresses only their existing debt rather than debt Debtor intended to incur or believed he would incur after he transferred the motorcycle.

Finally, the Trustee argues in her trial brief that because the transfer was made to an "insider," § 548(a)(1)(B)(ii)(IV) is satisfied. While Defendant is an insider, *see* § 101(31)(A)(i), the Trustee must prove that the debtor made the transfer "to or for the benefit of an insider ... *under an employment contract* ...." 11 U.S.C. § 548(a)(1)(B)(ii)(IV). There is no allegation or proof that the transfer was made under an employment contract.

Having failed to show the existence of any of the circumstances set forth in § 548(a)(1)(B)(ii), the Trustee has not met her burden of proving that the transfer of the motorcycle was constructively fraudulent under § 548. Defendant is, therefore, entitled to judgment on this claim.

III. 11 U.S.C. § 544(b)

The Trustee's complaint specifically states that her fraudulent transfer claim is brought under 11 U.S.C. § 548. Nevertheless, in her trial brief filed several months before trial, the Trustee argues that she may also avoid the transfer of the motorcycle under § 544(b). Although not expressly raised in the complaint by Bankruptcy Code section number,[2] the court may decide this claim to the extent it was tried by express or implied consent of the parties. *See* Fed.R.Civ.P. 15(b); Fed. R. Bankr.7015. Rule 15(b) provides in relevant part as follows:

***5** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Fed.R.Civ.P. 15(b).

Interpreting the mandatory language of the first sentence of Rule 15(b), one court explained that "[w]hen issues not mentioned in the complaint ... are nevertheless litigated with the consent of the parties, the complaint is not 'constructively amended;' it is simply an irrelevance so far as those issues are concerned." *Torry v. Northrop Grumman Corp.,* 399 F.3d 876, 878 (7th Cir.2005). The second sentence of Rule 15(b) is permissive and simply allows any party at any time, even after judgment, to move to amend the pleadings to conform to the evidence; however, it does not require that the complaint actually be amended or that a party move to do so in order for the issue to be decided by the court as if it had been raised in the pleadings. *Id.* at 878–79. The Sixth Circuit has cautioned, however, that

> a trial court ... may not base its decision upon an issue the parties tried inadvertently. Implied consent is not established merely because one party introduced evidence relevant to an unpleaded issue and the opposing party failed to object to its introduction. It must appear that the parties understood the evidence to be aimed at the unpleaded issue. Also, evidence introduced at a hearing that is relevant to a pleaded issue as well as an unpleaded issue cannot serve to give the opposing party fair notice that the new, unpleaded issue is entering the case.

Yellow Freight Sys., Inc. v. Martin, 954 F.2d 353, 358 (6th Cir.1992). The test is "whether the [opposing party] knew what conduct was in issue and had an opportunity to present his defense." *Id.;* *Sasse v. U.S. Dept. of Labor,* 409 F.3d 773, 781 (6th Cir.2005).

In *Yellow Freight,* a discharged employee of a motor freight carrier filed a complaint with the Secretary of Labor alleging that his employer violated § 405(b) of the Surface Transportation Assistance Act. After reviewing the record of the administrative hearing, the Secretary of Labor concluded that although the employer had not violated § 405(b), it had violated § 405(a) of the Act, a claim that had not been pled by the employee. *Id.* at 355–56. On appeal, the Secretary argued that evidence relating to the unpled claim was introduced at an administrative hearing and that when the employer failed to object, under Rule 15(b) and 29 C.F.R. § 18.43(c), which contains similar language to Rule 15(b), the employer impliedly consented to litigate the unpled claim. *Id.* at 358. However, the employer had no notice of the unpled claim before the hearing and the evidence introduced in support of the § 405(a) claim was also relevant to the § 405(b) claim. *Id.* at 358–59. The Sixth Circuit, therefore, refused to find implied consent. *Id.* at 359.

***6** In this case, although Defendant did not expressly consent to litigate the Trustee's § 544(b) claim, applying the principles set forth in *Yellow Freight,* the court finds that the claim was tried by implied consent of the parties. The Trustee clearly raised the issue in her trial brief filed several months before trial. Thus, unlike the facts in *Yellow Freight,* Defendant had notice well before trial that the Trustee was pursuing an avoidance claim under § 544(b). At trial, the Trustee introduced testimony by Debtors that they filed bankruptcy because, at that time, they were not able to pay their debts. As discussed earlier, this testimony is not relevant in proving any of the circumstances under § 548(a)(1)(B)(ii) that would support the Trustee's § 548 claim. It also has no relevance to the Trustee's preference claim. However, as discussed below, it clearly has relevance to a claim under § 544(b) and the Ohio Fraudulent Transfer Act in proving Debtor's insolvency. While Defendant's failure to object to testimony relevant only to that claim does not by itself establish Defendant's implied consent, his failure to object together with his prior notice of the claim leads this court to conclude that the § 544(b) claim was tried by implied consent of Defendant. Defendant knew what conduct was in issue and had an opportunity to present a defense. The court will therefore address the merits of the Trustee's claim.

Under § 544 of the Bankruptcy Code, "the trustee may avoid any transfer of an interest of the debtor in property ... that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title...." 11 U.S.C. § 544(b)(1). Under § 544(b), the Trustee must show (1) the existence of a creditor holding an allowable unsecured claim, (2) a transfer of an interest of the debtor in property, and (3) the transfer is voidable under applicable law, in this case, Ohio law. *Belfance v. Bushey (In re Bushey),* 210 B.R. 95, 100 (B.A.P. 6th Cir.1997).

The Trustee alleged in her complaint that "[t]here are creditors of the debtor who have allowable claims against the Debtor, which claims were in existence at the time of said transfer." [Doc. # 1, Complaint, ¶ 7]. Defendant did not deny this allegation. [*See* Doc. # 7, Answer, ¶ 7]. Averments in a complaint, other than those as to the amount of damage, are admitted when not denied in the answer. Fed.R.Civ.P. 8(d); Fed. R. Bankr.P. 7008. Thus, the first element under § 544(b) is satisfied.

The second element under § 544(b) is also satisfied. There is no dispute that Debtor transferred title to the motorcycle to Defendant. As discussed above, Defendant did not have an equitable interest in the motorcycle. Thus, the transfer was a transfer of Debtor's interest in the property.

The third element requires the Trustee to prove that the transfer is voidable under Ohio law. Although the Trustee relies on both Ohio Revised Code § 1336.04(A) and § 1336.05, the provisions of § 1336.04(A) are substantially the same as the provisions of § 548(a)(1)(A), § 548(a)(1)(B)(i) and (B)(ii)(II) and (III). As the court has already determined that the Trustee failed to meet her burden of proving such claims, it will confine its discussion to the Trustee's claim that the transfer is voidable under § 1336.05.

***7** Section 1336.05 provides in relevant part as follows:

> A transfer made ... by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer ... without receiving a reasonably equivalent value in exchange for the transfer ... and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer....

Ohio Rev.Code 1336.05(A). In order to prevail on this claim, the Trustee must prove (1) a transfer of property by Debtor; (2) the existence of a creditor whose claim arose before the transfer; (3) Debtor received less than a reasonably equivalent value; and (4) Debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer. As already discussed, the Trustee has met her burden of proving the first three elements. She has also met her burden of proving that debtor was insolvent, as defined by Ohio law, at the time of the transfer.

Under Ohio law, "[a] debtor who generally is not paying his debts as they become due is presumed to be insolvent." Ohio Rev.Code § 1336.02(A)(2). In this case, both Debtors testified that they were unable to pay their debts at the time they filed their bankruptcy petition. Insolvency on the date of filing is, therefore, presumed and Defendant offered no evidence to rebut this presumption. Debtors also testified that they had consulted counsel one week before filing, the appointment for which was made approximately two weeks before filing, or just three days after the motorcycle was transferred to Defendant. On these facts, the court finds that insolvency on the date of Debtor's transfer of title to the motorcycle may properly be inferred from evidence of Debtors' insolvency just seventeen days later on the date they filed their petition. As such, the Trustee has met her burden of showing that the transfer at issue was constructively fraudulent under Ohio law. The Trustee is, therefore, entitled to avoid the transfer under § 544(b).

Under § 550, where a transfer is avoided under § 544, the Trustee is entitled to recover, for the benefit of the bankruptcy estate, the property transferred, or if the court so orders, the value of such property, from the initial transferee. 11 U.S.C. § 550(a)(1). While the Trustee offered no evidence at trial of the value of the motorcycle, she is entitled to recover the motorcycle from Defendant, the initial transferee.

CONCLUSION

For the reasons discussed above, the Trustee is entitled to judgment on her claim brought under 11 U.S.C. § 544(b) to avoid Debtor's transfer of title to the motorcycle, and Defendant is entitled to judgment on the Trustee's claims

brought under 11 U.S.C. §§ 547 and 548. A separate judgment in accordance with this Memorandum of Decision will be entered by the court.

All Citations

Not Reported in B.R., 2007 WL 2462646

Footnotes

1 Sections 547 and 548 were amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA" or "the Act"), which was signed into law on April 20, 2005. BAPCPA specifically made amendments to § 547 applicable to cases pending or commenced on or after the date of enactment and amendments to § 548 effective as of the date of enactment for cases filed on or after that date. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, sec. 1213(b) and sec. 1406, Pub.L. No. 109–8, 119 Stat. 23, 195, 215–16. The amendments to these sections are therefore applicable in this case, which was filed on April 28, 2005, after the date of enactment.

2 However, as discussed below, one of the factual averments of the complaint, specifically that there were creditors of the Debtor with allowable claims in existence at the time of the transfer, is relevant only to a § 544(b) claim incorporating Ohio fraudulent transfer law. There was no motion brought under Rule 12(f) of the Federal Rules of Civil Procedure, applicable under Rule 7012 of the Federal Rules of Bankruptcy Procedure, to strike this averment as immaterial.

End of Document

848 F.2d 190
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Sixth Circuit.

In re FASANO/HARRISS PIE CO., Debtor.
WALTER E. HELLER & CO., and Richard C. Remes, Trustee, Plaintiffs–Appellees,
v.
FOOD MARKETING ASSOCIATES, LTD., Defendant–Appellant.

No. 87–1257.
|
May 9, 1988.

Synopsis
W.D.Mich.

AFFIRMED.

Procedural Posture(s): On Appeal.

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

Before MILBURN and BOGGS, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

Opinion

PER CURIAM.

***1** Defendant Food Marketing Associates, Ltd. ("FMA") appeals the district court decision in favor of plaintiffs Walter E. Heller & Co. ("Heller & Co."), and Richard C. Remes, Trustee. *See* 70 Bankr. 285 (W.D.Mich.1987). The district court, in its appellate capacity, affirmed the decision of a bankruptcy court, which had found FMA liable to debtor Fasano/Harriss Pie Co. ("Fasano/Harriss") for a debt arising out of FMA's acceptance of two shipments of Fasano/Harriss frozen pies. *See* 43 Bankr. 864 (Bankr.W.D.Mich.1984). We affirm.

The underlying facts are more fully set forth in the bankruptcy court's opinion and will only be briefly recapped here. FMA is an institutional food broker located in St. Louis, Missouri. In that role, FMA had ordered frozen pies on behalf of its clients from a Chicago producer named Fasano Pie Co. ("Fasano of Chicago"). Prior to the events giving rise to this action, FMA had not dealt with Fasano/Harriss, a Michigan corporation. No evidence in this record suggests any corporate affiliation between Fasano/Harriss and Fasano of Chicago.

In April of 1982, a customer of FMA received two shipments of frozen pies from Fasano/Harriss. The customer rejected both shipments and referred the carrier to its broker, FMA. FMA's president, Paul Phillips, instructed the carrier to place the pies in cold storage, and he then attempted to contact Fasano of Chicago, from which he claimed the pies had been ordered. Mr. Phillips received no reply from Fasano of Chicago and subsequently transferred the pies to another company that he owned, Food Products International, Inc. ("Food Products"). The transfer to Food Products was evidenced by two FMA invoices, which were dated April 22 and bore an invoice price of $26,088.41. Food Products sold the pies over the course of the next two months for $18,718.16 and remitted that amount to FMA. No money was paid to Fasano/Harriss.

After Fasano/Harriss entered bankruptcy proceedings, Heller & Co. and the Trustee brought this action against FMA on a breach of contract theory. The bankruptcy court concluded that no express contract existed between Fasano/Harriss and FMA, but nonetheless held FMA liable on the equitable theory of quasi-contract or unjust enrichment. The court found FMA unjustly enriched in the amount of $26,088.41, the amount reflected on FMA's April 22 invoices to Food Products, thus rejecting both Fasano/Harriss' contention that $36,340.04 was owed (the amount at which Fasano/Harriss invoiced the pies), and FMA's claim that it should be held liable, if at all, only for $18,718.16 (the sum actually received upon resale of the pies). The bankruptcy court also rejected FMA's argument that the amount of recovery should be offset by a debt allegedly owed to FMA by Fasano of Chicago. The district court on appeal affirmed the bankruptcy court in all respects. This timely appeal ensued.

On appeal FMA renews the arguments that the district court rejected. FMA contends that it should not be held liable because: (1) plaintiff Heller & Co. is without standing to recover from FMA; (2) the unjust enrichment theory was not pleaded; and (3) the unjust enrichment theory has no

application where an express contract exists. In addition, FMA claims that the bankruptcy court clearly erred in setting the amount of recovery, and that an offset should have been allowed under 11 U.S.C. § 553(a) (1982).

***2** Initially, we note that we must accept the bankruptcy court's findings of fact unless "clearly erroneous." *See In re Calhoun,* 715 F.2d 1103, 1110 (6th Cir.1983); *In re Albert–Harris, Inc.,* 313 F.2d 447 (6th Cir.1963); Bankr.R. 7052 (incorporating Fed.R.Civ.P. 52). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948); *see Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 573–76 (1985). The lower courts' conclusions of law, on the other hand, are subject to plenary review by this court. *See Ragsdale v. Haller,* 780 F.2d 794, 795 (9th Cir.1986); *Roth Steel Prods. v. Sharon Steel Corp.,* 705 F.2d 134, 143 (6th Cir.1983).

We first address FMA's contention that it should not have been held liable because plaintiff Heller & Co. is without standing to pursue this claim on behalf of the debtor. Heller & Co., which is the holder of a perfected security interest in Fasano/Harriss' accounts receivable, was granted relief from the automatic stay by the bankruptcy court and was authorized to collect those accounts. *See* 43 Bankr. at 865 n. 1. FMA concedes these facts, but nonetheless contends that this authorization did not empower Heller & Co. to collect the alleged debt in the instant case, since no contract existed between FMA and Fasano/Harriss creating an account receivable that was subject to Heller & Co.'s security interest. The district court correctly pointed out, however, that because the Trustee in bankruptcy has, at all times, also been a party to this lawsuit, the plaintiffs' right to recover from FMA is not solely dependent upon Heller & Co.'s authorization to collect the debtor's accounts receivable. As the district court stated:

Whether Heller is the proper party to receive the money awarded is irrelevant to a determination of [FMA's] liability. Any objections to Heller's receipt of the funds awarded is an issue between the creditors of Fasano/Harriss whose interests are presumed to be adequately represented by the trustee.

70 Bankr. at 284 n. 2. We agree with the district court's analysis of this issue. In addition, we note that the presence of the Trustee as a party to this suit precludes any threat of a double recovery against FMA. FMA's objection to Heller & Co.'s status as a plaintiff, therefore, does not provide a basis to avoid liability.

FMA next argues that it should not have been held liable under the equitable doctrine of unjust enrichment because the theory was not pleaded by plaintiffs. Rather, plaintiffs brought an action at law alleging that FMA had breached an express contract. Rule 54(c), however, supports the granting of equitable relief in such circumstances: "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." Fed.R.Civ.P. 54(c); *see* Bankr.R. 7054(a) (incorporating Fed.R.Civ.P. 54(c)). Rule 54(c) "makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both." Fed.R.Civ.P. 54(c) advisory committee's note; *see also* 10 C. Wright, A. Miller & M. Kay, Federal Practice and Procedure §§ 2662, 2664 (2d ed. 1983). According to Wright & Miller, "a recovery based on quantum meruit [or on] a theory of unjust enrichment ... may be allowed in an action instituted for breach of contract." *Id.* § 2664 at 166–67 & nn. 28–29 (collecting cases). Thus, so long as the plaintiffs' proof justifies the relief which is ultimately granted, *see id.* § 2662 at 132, and the defendant is not thereby prejudiced, *see id.* § 2664 at 146–51, Rule 54(c) permits the court to grant relief not specifically requested.

***3** Upon a careful review of the record and the arguments on appeal, we conclude that these prerequisites have been fully satisfied in the instant case. FMA has clearly received a benefit from Fasano/Harriss, and it would be inequitable to permit FMA to retain the benefit. *See Estate of McCallum,* 153 Mich.App. 328, 395 N.W.2d 258, 261 (1986) (per curiam); Restatement of Restitution § 1 (1937). In addition, FMA has made no showing of prejudice. Accordingly, we hold that the bankruptcy court properly held FMA liable under the theory of unjust enrichment.

In its final argument aimed at avoiding liability, FMA contends that the bankruptcy court erred in granting equitable relief when it first found an express contract between Fasano/Harriss and Fasano of Chicago. FMA thus seeks to invoke the rule that a plaintiff may not recover upon a contract implied in equity "where an alleged express contract, in substance, covers the same subject-matter." *Superior Ambulance Serv. v. City of Lincoln Park,* 19 Mich.App. 655, 173 N.W.2d

236, 240 (1970); *see also* *Sullivan v. Detroit, Y. & A.A. R.R.*, 135 Mich. 661, 98 N.W. 756 (1904). As the district court found, however, the bankruptcy court merely assumed that an independent contract existed between Fasano of Chicago and Fasano/Harriss for the purpose of servicing the pie order in the instant case. This assumption was intended only to explain, as best the court could on the limited factual record before it, how Fasano/Harriss came to deliver the pies when Mr. Phillips testified that he had dealt solely with Fasano of Chicago. The record is devoid of any evidence, however, suggesting that the contract between the pie companies provided that Fasano/Harriss would look to Fasano of Chicago for payment for the pies. Under these circumstances, it cannot be said that the arrangement between the two pie companies "covers the same subject-matter" as the contract that the bankruptcy court implied between FMA and Fasano/Harriss. Recovery under the quasi-contract theory, therefore, is not objectionable on this ground. We accordingly affirm the bankruptcy court's decision finding FMA liable to plaintiffs under the equitable theory of unjust enrichment.

We next turn to FMA's challenges to the calculation of damages. FMA contends that the bankruptcy court clearly erred in setting damages at $26,088.41 because FMA received only $18,718.16 when the pies were sold. The bankruptcy court rejected the resale price as the basis of damages, however, on the ground that the resale of the pies during the two months after receipt did not necessarily reflect the market value of the pies upon receipt, especially since there had been no showing by FMA that it had tried to find a buyer upon receipt of the goods. The bankruptcy court held that a more reliable indication of the amount of unjust enrichment was found in FMA's two April 22 invoices to Food Products, which totaled $26,088.41.

***4** FMA objects to this holding on the ground that the bankruptcy court had insufficient reason to conclude that *both* FMA invoices represented the transfer of the pies in question from FMA to Food Products. FMA concedes that Invoice No. 1418, in the amount of $17,207.57, was part of the transaction at issue. Mr. Phillips, in an interrogatory answer, stated that the value ascribed to Invoice No. 1418 was based on fair market value as of April 22. Since the amount of Invoice No. 1418 ($17,207.57) was close to the amount actually received ($18,718.16), FMA contends that $18,718.16 must be considered the value of the pies on April 22. On the other hand, the second invoice, No. 1424 in the amount of $8,880.84, was not introduced into evidence in the bankruptcy court. *See* 43 Bankr. at 869 n. 10. Given the lack of specific information concerning the goods represented by Invoice No. 1424, FMA further argues that the bankruptcy court was not justified in concluding that No. 1424 also was part of the instant transaction.

We conclude that the bankruptcy court was entirely justified in holding that both invoices were part of the pie transfer to Food Products. In the previous three years, FMA had not invoiced any goods to Food Products. Yet on April 22, a short time after FMA took possession of the two pie shipments, it invoiced two sets of goods to Food Products. A comparison of the contents of Invoice No. 1418 with the original Fasano/Harriss invoices, however, discloses that No. 1418 did not include all the pies that FMA received. In addition, FMA offered no alternative explanation for the contents of Invoice No. 1424. Under these circumstances, even though No. 1424 was not entered into evidence, the court's conclusion that No. 1424 was also a part of this transaction was quite reasonable. Since Mr. Phillips had testified that the invoice price for No. 1418 was derived from fair market value as of April 22, it was also reasonable to infer that the invoice price in No. 1424 was similarly based on fair market value. The court's conclusion that the value of the pies on April 22 was $26,088.41, therefore, is not clearly erroneous.

Moreover, for some unexplained reason a copy of Invoice No. 1424 has found its way into the record on appeal, and a review of it only confirms the bankruptcy court's decision. The invoice clearly shows that it represents a transfer of pies from FMA to Food Products. In addition, a comparison of both Nos. 1418 and 1424 with the original Fasano/Harriss invoices reveals that there is almost a one-to-one correspondence: the same types of pies, including product codes, appear without variation on both sets of invoices; and the quantities listed are almost exactly the same, with FMA's invoices missing only four out of an original 4,000 units. It cannot be doubted, therefore, that No. 1424 also evidenced the transfer of Fasano/Harriss pies by FMA. The bankruptcy court's conclusion that FMA was unjustly enriched in the amount of $26,088.41 is affirmed.

Finally, FMA contends that the bankruptcy court erred in refusing to allow an offset under 11 U.S.C. § 553(a) (1982) for a debt allegedly owed to FMA by Fasano of Chicago. By the terms of section 553, however, an offset is permitted only for a "mutual debt." *Id.; see* 4 Collier on Bankruptcy ¶ 553.04 (15th ed. 1980). Since the bankruptcy court found no agency relationship, either express or implied, between Fasano of

Chicago and Fasano/Harriss, it further concluded that the debt allegedly owed to FMA by Fasano of Chicago was not "mutual" as between FMA and Fasano/Harriss. We agree. The bankruptcy court's conclusion that FMA failed to establish the requisite agency relationship is not clearly erroneous. In such circumstances, the alleged debt between FMA and Fasano of Chicago is not "in the same right and between the same parties, standing in the same capacity," as the debt between FMA and Fasano/Harriss. *See id.* ¶ 553.04[2] at 553–18 & n. 10. Accordingly, since the requirement of mutuality was not satisfied, the courts below properly held that an offset was not permissible under section 553(a).

***5** For the foregoing reasons, the decision of the district court is AFFIRMED.

All Citations

848 F.2d 190 (Table), 1988 WL 44738

End of Document