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 PTP'S MOTION AND REVISED BRIEF FOR RECONSIDERATION OF TWO ASPECTS OF ORDER ECF 301

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I. INTRODUCTION

PTP's motion is functionally its second motion to reconsider this Court's June 3 Order, of which Peninsula Township has also twice sought reconsideration. Reconsideration "is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *In re E. I. du Pont de Nemours & Co. C-8 Personal Injury Litig.*, 2019 WL 7606132, *2 (S.D. Ohio, Aug. 6, 2019) (citations omitted).[1] PTP and the Township treat reconsideration motions as routine. Declining reconsideration "protects the parties from the expense and vexation attendant to multiple, repetitive briefing of the same issue and fosters reliance on judicial action." *Id*.

PTP's brief simply rehashes the Township's earlier motion for reconsideration. *Compare* ECF No. 174. On reconsideration, the Township argued that this Court should have applied the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *Id*. at PageID.6576-6579. PTP makes the same argument. *Compare* ECF No. 308, PageID.11206-11209. The Township also argued that this Court improperly relied on deposition testimony when it found the term "guest activities" vague and that the Court did not understand that phrase. *Compare* ECF No. 174, PageID.6597-6598. Here, PTP also argues this Court again does not understand that phrase. *See* ECF No. 308, PageID.11209-11214.

Even if the arguments were not a rehash, PTP makes no effort to demonstrate "palpable error" but mostly makes assertions which this Court has already determined are "totally irrelevant." *See* ECF No. 307, PageID.11197. PTP has not come close to meeting its burden.

[1] Unpublished cases attached as **Exhibit 1**.

II. ARGUMENT

A. Standard of Review.

In this Court, "the party moving for reconsideration bears a 'heavy' burden to not only demonstrate a palpable defect by which the Court and the parties have been misled, but also show that a different disposition of the case must result from a correction thereof." *Magna Electronics, Inc. v. TRW Automotive Holdings Corp.*, 2016 WL 4239184, at *1 (W.D Mich. Jan. 6, 2016) (citing W.D. Mich. LCivR 7.4(a)). "A defect is palpable if it is easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct or manifest." *Witherspoon v. Howes*, 2008 WL 4155350, at *1 (W.D. Mich. Sep. 5, 2008) (citation omitted). "[A]s a matter of law, 'it cannot be a palpable defect in this court's original opinion that it did not follow an interpretation which has no precedential weight.'" *White v. N. Mich. Reg'l Hosp.*, 698 F. Supp. 2d 950, 963 (W.D. Mich. 2010) (quoting *Aslani v. Sparrow Health Sys.*, 2009 WL 3711602, *13 (W.D. Mich. Nov. 3, 2009)) (Maloney, C.J).

A motion for reconsideration is appropriate only if it raises "an argument or controlling authority that was overlooked or disregarded in the original ruling, presents manifest evidence or argument that could not previously have been submitted, or successfully points out a manifest error of fact or law." *Davie v. Mitchell*, 291 F. Supp. 2d 573, 634 (N.D. Ohio 2003). "A Rule 59(e) motion 'may not be used to argue a new legal theory,'" or raise arguments for the first time. *Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 395 (6th Cir. 2007) (citation omitted); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998).

In the same vein, motions to amend judgments are granted only "if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice." *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). Such

motions should be "granted sparingly because of the interests in finality and conservation of scarce judicial resources." *In re J&M Salupo Dev. Co.*, 388 B.R. 795, 805 (B.A.P. 6th Cir. 2008).

III. ANALYSIS

At its core, PTP simply disagrees with how this Court applied the law, but "[d]isagreement with the Court's interpretations of facts, or applications of the correct law, rarely provide a sound basis for a motion for reconsideration." *Favors v. Leach*, 2017 WL 4083882, *1 (W.D. Mich. Feb. 17, 2017.)

A. PTP Waived Its Arguments.

This Court ordered PTP to brief the role it seeks to play in this litigation. PTP responded by arguing this Court should vacate the entire Summary Judgment Order. ECF No. 285. This Court rejected PTP's argument, finding that the Summary Judgment Order must be set aside only where the "Wineries' claims . . . could potentially affect PTP members' property interests" and where the Township failed to defend. ECF No. 301, PageID.10696-10697. PTP did not make the arguments it now makes that this Court's Commerce Clause or Vagueness determinations in that Order were incorrect. The current motion is the first time PTP has made these arguments and PTP waived them by failing to make them in its earlier briefing. Motions to reconsider are not the time for new argument. *Ellis v. Kaye–Kibbey*, 581 F. Supp. 2d 861, 884, n.19 (W.D. Mich. 2008) (quoting *PolyVision Corp. v. Smart Techs.*, Inc., 2007 WL 2683516, *1 (W.D. Mich. Sept. 7, 2007)) (citations omitted)). "[W]e have found issues to be waived when they are raised for the first time in motions requesting reconsideration…." *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008).

B. PTP Does Not Meet the Standard for a Rule 54(b) Motion.

A motion under Rule 54(b) may be granted when there is an intervening change of controlling law, new evidence, or a need to correct a clear error or prevent manifest justice.

Rodriguez v. Tennessee Laborers Health & Welfare Fund, 89 F. App'x 949, 959 (6th Cir. 2004). PTP does not argue there is new law or new evidence.

1. This Court Applied the Correct Legal Precedent in its Commerce Clause Analysis.

The Township's failure to argue *Pike* balancing was irrelevant. If an ordinance discriminates against interstate commerce, it is "*per se* invalid." ECF No. 162, PageID.5996 (citing *Granholm v. Heald*, 544 U.S. 460, 476 (2005). Only if "the Court determines that the challenged law is *not* discriminatory must it proceed to the second tier of the analysis" applying *Pike*. *Id.* This Court found that "[b]ecause the Township Ordinances, on their face, discriminate against all out-of-state farmers, they are *per se* invalid unless these challenged sections pass strict scrutiny." *Id.*, PageID.5999. It was immaterial whether the Township raised *Pike* because it was not applicable. Moreover, PTP does not argue that the Ordinances are not *per se* invalid, or that the ordinances survive strict scrutiny. *Pike* has no role to play here. "Clear error of law" means "application of incorrect law to the facts." *Kelley v. Apria Healthcare, LLC*, 232 F. Supp. 3d 983, 997 (E.D. Tenn. 2017) (citing *Kelso v. City of Toledo*, 77 Fed. App'x. 826 (6th Cir. 2003)). This Court did not commit a clear error of law by applying established precedent.

Regardless, *Pike* would not change the outcome. *Pike* requires that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. This Court found that the Township's stated interests "likely are not [legitimate] considering such protection of a local industry is exactly what the dormant Commerce Clause seeks to prohibit[.]" ECF No. 162, PageID.6000. The Court also found that even if the Township's interests were legitimate, "it does

not appear that the Township Ordinances actually help the Township achieve this interest." *Id.* The ordinances would not survive *Pike*.

PTP's citation to *Eastern Ky. Resources v. Fiscal Court*, 127 F.3d 532 (6th Cir. 1997), does not help it. At issue there was a requirement that solid waste operators identify capacity to accept out-of-state waste. *Id.* at 541. That case followed long-standing Commerce Clause precedent and determined that the requirement did not discriminate on its face and was not intended as protectionism. *Eastern Kentucky* is a far cry from the Ordinance here that protects Township farmers by facially discriminating against out-of-Township grapes.

PTP's other assorted arguments are similarly faulty.

a. The ordinance is not constitutional because it also discriminates against grapes from other Michigan municipalities.

PTP argues that "an ordinance may distinguish between in- and out-of-peninsula grapes. ECF No. 308, PageID.11207. The Township similarly argued that discrimination is acceptable when reduced to the local level. *Compare* ECF No. 308, PageID.11207-11208 *to* ECF No. 174, PageID.6576. This argument is frivolous. "The central rationale for the rule against discrimination is to prohibit state or **municipal** laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C&A Carbone, Inc. v. Town of Clarkston, N.Y.*, 511 U.S. 383, 390 (1994) (emphasis added). The Supreme Court has rejected PTP's argument for the past 130 years.[2] When the City of Madison enacted an ordinance making it "unlawful to sell any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison," the Supreme Court struck it down for violating the dormant Commerce

[2] This Court described these cases as "very persuasive Supreme Court precedent." ECF No. 211, PageID.7809.

Clause. *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 350 (1951). The Court stated "[i]t is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." *Id.* at 354 n.4.

Similarly, "a Michigan law that prohibits private landfill operators from accepting solid waste that originates outside the county in which their facilities are located" was facially discriminatory. *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res.*, 504 U.S. 353, 355 (1992). It did not matter that the law discriminated against out-of-state and out-of-county solid waste originators equally:

> We disagree, for our prior cases teach that a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself.

Id. at 361. *See also Carbone*, 511 U.S. at 391[3] ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); *Brimmer v. Rebman*, 138 U.S. 78, 83 (1891) ("It is, for all practical ends, a statute to prevent the citizens of distant states…from coming into competition, upon terms of equality, with local dealers…its repugnancy to the constitution is manifest.").

PTP argues that the Township failed to "effectively distinguish" the above cases, yet PTP fares no better, except to argue those cases did not involve zoning. ECF No. 308, PageID.11208. But hiding facially discriminatory restrictions in a zoning ordinance does not save them.

PTP cites to other cases but does not explain how they override Supreme Court precedent. *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 33, 34 (1st Cir. 2007), involved a challenge to a law which allowed small wineries—both in Maine and out-of-state—to sell directly to

[3] *Carbone* was referenced at the summary judgment hearing. ECF No. 159, PageID.5933, 5972.

consumers. Although the law likely favored in-state wineries, the First Circuit concluded that the plaintiff had not shown the law was discriminatory in effect. PTP also cites *Wood Marine Serv., Inc. v. City of Harahan*, 858 F.2d 1061, 1065 (5th Cir. 1988), but that case involved an ordinance regarding a marina building which had no impact on interstate commerce.

b. PTP's own witness testified about economic protectionism.

PTP asserts that there was no evidence that the local grape requirement "both burdens the flow of interstate grape commerce and benefits local grape farmers." ECF No. 308, PageID.11027 (citing *Eastern Ky.*, 127 F.3d at 541). PTP is wrong on both.

Winery witnesses testified that, but for the local requirements, they would buy additional grapes through interstate commerce. 2Lads owner Chris Baldyga testified that he needs more fruit to grow his business, and that he would like to get it from Washington, Oregon, or California. ECF No. 136-12, PageID.4878-4879. Tabone owner Mario Tabone testified that his bargaining power for rosé grapes was severely limited by the in-township requirements. ECF No. 146-5, PageID.5786.

Township and PTP witnesses conceded that the purpose of the local grape requirement was to protect local agriculture. PTP member Grant Parsons testified "Well, it's promoting local ag, obviously, and it is promoting production on the property you own or lease as opposed to just some alternative, I don't know." ECF No. 136-10, PageID.4865. Similarly, former Supervisor Rob Manigold testified that there is a harm to Peninsula Township if a farm processing facility buys grapes outside of Peninsula Township because "[i]t takes away from the farming component on Peninsula Township." ECF No. 136-1, pageID.4768. That is economic protectionism. There is no legal error here.

c. Tabone, Chateau Grand Traverse, and Bonobo have standing.

PTP claims that Tabone does not have standing because it operates a Food Processing Plant, not a Farm Processing Facility. ECF No. 308, PageID.11209, n. 5. This Court already determined that Tabone has a license to operate a Farm Processing Facility. ECF No. 162, PageID.5984 n.4. The document attached to PTP's brief is addressed to the father of Tabone's owner, also Mario Tabone, and relates to a different business. At the time of the letter, February 24, 2004, Tabone (the winery) had not even been started given that the owner of Tabone was nineteen years old and in school.

PTP avers that Chateau Grand Traverse and Bonobo lack standing because their SUPs are not approved for guest activities. Chateau Grand Traverse's SUP, dated before the guest activity ordinance, allows for "parties, festival, etc." ECF No. 308-8, PageID.11326. Bonobo's SUP states that the guest activities "standard has been met." ECF No. 32-6, PageID.1769.

d. Continuing constitutional violations are not time-barred.

The Sixth Circuit has held that in a Section 1983 context, a "law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment" because "the continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations.'" *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F. 3d 516, 522 (6th Cir. 1997) (citation omitted). "[E]ach day that the invalid resolution remained in effect, it inflicted 'continuing and accumulating harm.'" *Id.* This analysis applies to claims under the dormant Commerce Clause. *See Flynt v. Shimazu*, 940 F.3d 457, 462 (9th Cir. 2019) (holding California law that violated dormant Commerce Clause "demonstrated a continuing violation"). PTP cites only out-of-Circuit cases declining to apply the continuing violation doctrine. There was no clear error. *See White*, 698 F.

Supp. 2d at 963 (explaining "it cannot be a palpable defect in this court's original opinion that it did not follow an interpretation which has no precedential weight").

2. This Court Applied the Correct Legal Precedent in its Vagueness Analysis.

This Court determined that the term "Guest Activity Use" was vague. ECF No. 162, PageID.6016-6019. After the Township moved for reconsideration, this Court clarified that while deposition testimony supported that conclusion, the term was vague on its face. ECF No. 211, PageID.7812-7813. PTP's arguments are without merit.

a. The term "Guest Activity Use" is vague on its face.

PTP asserts that this Court erred by maintaining "the June Order vagueness decision on the basis the ordinances are vague 'on their face,' when the Court found them vague based on evidence and briefing that PTP had no opportunity to counter." ECF No. 308, PageID.11210. PTP is recycling an argument this Court already rejected.

In defending against summary judgment, the Township did not argue that this Court's analysis was limited to the face of the Ordinances. Instead, the Township argued that the term "guest activity" was not vague because "Plaintiffs are the only ones who are confused by this term" and "Plaintiffs Ignore Record Evidence." ECF No. 147, PageID.5843; *see also* ECF No. 143, PageID.5377-5378. The Township then pivoted in its first motion for reconsideration and argued that the Court should not have reviewed record evidence and should have analyzed the Ordinances on their face. ECF No. 174, PageID.6597-6598.

In denying the Township's motion, this Court stated: "First, the Court finds that it correctly reviewed the deposition testimony of the Township representatives as a tool of statutory interpretation because their testimony established the Township's varying interpretations of the definition of 'Guest Activity Uses.' Moreover, even if the Court only reviewed the text of the

Ordinance on its face, the term is clearly vague." ECF No. 211, PageID.7812. This Court stated, in interpreting Guest Activity Uses, "[i]t is not necessary for the Court to utilize tools of statutory interpretation to find that this definition, which encompasses quite literally all activities (activities that do involve registered guests as well as activities that do not involve registered guests), is vague." *Id.* at PageID.7812-7813.

PTP ignores this Court's Order (ECF No. 211) to assert that this Court improperly interpreted deposition testimony: "The Court relied on misleading briefing and quoted irrelevant exhibits in support of its conclusion." ECF No. 308, PageID.11213. This Court has settled this issue.

b. PTP's attempt to provide its own definition of "Guest Activity Use" is further evidence that the term is vague.

Even if "Guest Activity Use" is not vague on its face, PTP's argument that it should be allowed to provide its own interpretation and put deposition testimony of Township officials "in context," only confirms the term is vague. "The void-for-vagueness doctrine . . . protects citizens against the impermissible delegation of basic policy matters 'for resolution on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application.'" *Miller v. City of Cincinnati*, 622 F.3d 524, 539 (6th Cir. 2010) (citation omitted). "A statute that fails to constrain 'an official's decision to limit speech' with 'objective criteria' is unconstitutionally vague." *Id.* According to PTP, everyone who testified regarding the term "guest activity" was incorrect or confused. It cannot be that only PTP knows the secret definition. This ambiguity has resulted in "resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application." *UFCW Union, Loc. 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 358-59 (6th Cir. 1998).

Further, PTP does not argue that this Court applied the wrong legal standard. Instead, PTP argues that this Court erred in not applying the testimony PTP believes is relevant. "Clear error of law" means "application of incorrect law to the facts." *Kelley*, 232 F. Supp. 3d at 997 (E.D. Tenn. 2017) (citing *Kelso*, 77 Fed. App'x. 826). Under this standard, there was no "clear error."

c. Vagueness can be a facial challenge.

PTP argues that the Wineries cannot bring a facial challenge to a zoning ordinance and can only bring an as-applied challenge. ECF No. 308, PageID.11210. That is wrong. The Wineries have challenged the Ordinances as improperly restricting their First Amendment rights, including the vague definition of "guest activities," which has limited the Wineries' speech in numerous ways. The case PTP relies upon, *Belle Maer Harbor v. Charter Township. of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999), holds that when the First Amendment is implicated, a facial challenge is proper.

d. This Court already resolved PTP's argument regarding SUPs.

PTP argues that the SUPs are a mish-mash of allowances and restrictions. This argument is a variation of the Township's argument that the SUPs are contracts. This Court has already disposed of this argument and PTP has stated it is not challenging this decision. *See* ECF No. 162, PageID.5993-5994, ECF. No. 302, PageID.10777 ("whether the SUPs are contract…is not an argument that PTP is making.") What is important in is the face of the Ordinance itself, not varying language contained within different SUPs.

C. PTP Has Not Established That Manifest Injustice Will Occur.

To demonstrate manifest injustice, the Summary Judgment Opinion must be "dead wrong," not "just maybe or probably wrong; it must ... strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish." *TFWS*, 572 F.3d at 194 (4th Cir. 2009) (quoting *Bellsouth Telesensor v. Info Sys. & Networks Corp.*, 1995 WL 520978, *5 n. 6 (4th Cir. 1995)).

There is nothing "dead wrong" about limiting the role of an intervenor. "Federal courts have the authority to apply appropriate conditions or restrictions on an intervention as of right." *Friends of Tims Ford v. Tennessee Valley Authority*, 585 F.3d 955, 963 n.1 (6th Cir. 2009). An intervenor "may have a sufficient interest for some issues in a case but not others, and the court may limit intervention accordingly." *United States v. S. Fla. Water Mgmt. Dist.*, 922 F.2d 704, 707 (11th Cir. 1991). The Sixth Circuit has even restricted an intervenor's participation "for the limited purpose of presenting evidence" on a single issue. *Bradley v. Milliken*, 620 F.2d 1141, 1142 (6th Cir. 1980). This Court's decision is squarely in line with this precedent.

PTP relies on the "unique" case of *Sanguine, Ltd. v. U.S. Dep't of Interior*, 798 F.2d 389 (10th Cir. 1986) (*Sanguine II*). There, the intervenors were members of Indian tribes who owned land leased to Sanguine for oil drilling. *Sanguine, Ltd v. U.S. Dept. of Interior*, 736 F.2d 1416, 1417 (10th Cir. 1984) (*Sanguine I*). The Bureau of Indian Affairs ("BIA") oversaw the leases with the tribal members receiving the lease proceeds. *Id*. At issue was a BIA change in leasing policy. *Id*. at 1420.

The Tenth Circuit was concerned when the BIA "essentially consented" to an injunction and consent decree reversing the new policy, which directly harmed the intervenors economically. *Sanguine II*, 798 F.2d at 390. Intervention was allowed because "the government not only inadequately represented the Indian lessors whose interests were entrusted to it but also in effect conceded the case at the outset." *Id.* (internal quotations omitted). The Indian landowners were allowed to protect their interests in their land. *Id.* at 391–92. The ruling was limited to "the circumstances of this case … [s]ince … the issues essential to the intervenors were resolved by consent decree and not adversary litigation, this case presents a **unique situation** in which prejudice to the intervenors can be avoided only by setting aside the prior judgment and allowing

the opportunity to litigate the merits of the case." *Id.* at 390-1 (emphasis added).[4] The *Sanguine II* court also stated that "[i]t must be noted that these issues have not been 'litigated' in the true sense" as "the issues essential to the intervenors were resolved by consent decree and not adversary litigation." *Id*. at 391-392.

In contrast, the Summary Judgment Order was "litigated in the true sense" and the product of "adversary litigation"—there was no consent decree. Also, the "unique situation" in *Sanguine II* is not present because PTP became a party before a final judgment. Finally, PTP does not have a direct economic interest as the intervenors in *Sanguine II*, as PTP does not own any land and is not regulated by the Ordinances.

This Court has already allowed PTP to file its own motion to dismiss. ECF No. 301. In addition, PTP will be permitted to file a motion for summary judgment and participate in trial on certain issues. This is in line with applicable precedent.

D. PTP Members Have No Interest in "Ensuring Compatible Land Uses" and "Agriculture."

PTP complains that it was not given "a reasonable opportunity to demonstrate [its] interest" in the Commerce Clause and Vagueness claims. ECF No. 308, PageID.11205. But PTP argued these issues during the November 17, 2022, hearing. *See* ECF 302, PageID.10746-10748. PTP argued that its interest in the Commerce Clause claim related to "ensuring compatible land uses" and "a connection to agriculture." *Id*. at PageID.10747, 10774-10775. Of course, PTP argued this same interest to the Sixth Circuit, and it was rejected. *See Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula, Michigan*, 41 F.4th 767, 772 (6th Cir. 2022) (limiting interests to

[4] The Tenth Circuit later reiterated that *Sanguine II* was a "unique situation" and inapplicable where a party intervenes before final judgment. *Johnson v. Lodge #93 of Fraternal Ord. of Police*, 393 F.3d 1096, 1108-1109 (10th Cir. 2004).

property values, quiet enjoyment traffic, and transportation costs); *id.* at 775 ("[T]hese members are primarily concerned with safeguarding their land values, ensuring the quiet enjoyment of their homes, and preserving the viability of their farms."). As for the Vagueness claim, counsel for the Wineries argued at the hearing that vagueness doesn't affect "PTP's interests here." *Id.* at PageID.10760. PTP did not respond that its members had an interest in the vagueness claim. Instead, PTP argued that PTP had an interest "in the zoning ordinances as a whole and all of the zoning provisions." *Id.* at PageID.10774.

Now, PTP pivots to a new argument that its members have an interest in "keep[ing] Farm Processors agricultural." ECF 308, PageID.11205. But PTP makes this argument for the first time on reconsideration,[5] so it has been waived. *Scottsdale*, 513 F.3d at 553.

On the merits, PTP's argument still fails. According to PTP, if the Wineries are required to use only local fruit, their businesses will be capped (due to lack of fruit) and this will limit visitors. In turn, PTP's five members benefit because there will be less people using their roads. PTP's claims always come back to traffic, in which PTP cannot allege a substantial interest. *See* ECF No. 310, PageID.11442-11448.

IV. CONCLUSION

For the foregoing reasons, PTP's motion should be denied.

[5] In its motion to intervene, PTP alleged interests in "protecting its purpose and mission," "maintain the uses that are currently allowable on neighboring winery property," "preventing zoning ordinance changes," "protecting provisions it helped to draft," and "participating in the process to change zoning ordinances." ECF No. 41, PageID.1972-1979.

Respectfully submitted,

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

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Dated: January 23, 2023

CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.3(B)(I)

1. This Brief complies with the type-volume limitation of L. Civ. R. 7.3(b)(i) because this Brief contains 4,298 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2023, I filed the foregoing Plaintiffs' Response to PTP's Motion and Revised Brief for Reconsideration on Two Aspects of Order ECF 301 via the Court's CM/ECF System, which will automatically provide notice of the filing to all registered participants in this matter.

/s/ Joseph M. Infante
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