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,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

Case No: 1:20-cv-01008

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

ORAL ARGUMENT REQUESTED

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON PREEMPTION CLAIMS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Court Rules

I. INTRODUCTION

Approximately one year ago, this Court determined that numerous sections of Peninsula Township's ordinances related to wineries were preempted by Michigan law. That decision was later vacated after Defendant-Intervenor Protect the Peninsula ("PTP") was allowed to intervene. As discussed below, this Court should reinstate its prior decision finding certain ordinance sections preempted by Michigan law while also determining that other sections challenged by the Wineries are also preempted.

II. FACTS

A. The Michigan Liquor Control Code Comprehensively Regulates the Sale of Alcohol.

To operate a winery in Michigan, a license from the Michigan Liquor Control Commission ("MLCC") is required and Michigan has adopted a comprehensive set of laws and regulations governing winery operations: the Michigan Liquor Control Code. Each of the Wineries have active licenses and permits issued by the MLCC:

Winery	**Licenses**	**Permits**	**Exhibit**
Bowers Harbor	Small Wine Maker (1992)	On-Premises Tasting Room Outdoor Service Area Sunday Sales (AM) Living Quarters	**A**
Brys Winery	Small Wine Maker (2005)	On-Premises Tasting Room Sunday Sales (AM) Outdoor Service Area	**B**
Chateau Grand Traverse	Wine Maker (1976) Small Distiller	On-Premises Tasting Room Outdoor Service Area Sunday Sales (AM)	**C**
Chateau Operations	Small Wine Maker (1993) Brandy Manufacturer Small Distiller Micro Brewer	On-Premises Tasting Room Outdoor Service Area Sunday Sales (AM) Living Quarters Dance-Entertainment Sunday Sales (PM) Beer & Wine Tasting	**D**

Grape Harbor	Small Wine Maker (1994)	Off-Premises Tasting Room Outdoor Service Area Sunday Sales (AM)	**E**
Montague Development (licenses held by Chateau Operations via joint venture)	Small Wine Maker (2012)	On-Premises Tasting Room Outdoor Service Area Sunday Sales (AM) Beer & Wine Tasting	**F**
OV the Farm	Small Wine Maker (2014) Small Distiller	On-Premises Tasting Room Outdoor Service Area Sunday Sales (AM) Sunday Sales (PM) Catering	**G**
Tabone Vineyards	Small Wine Maker (2018)	On-Premises Tasting Room Outdoor Service Area Sunday Sales (AM)	**H**
Two Lads	Small Wine Maker (2008)	On-Premises Tasting Room Outdoor Service Area Sunday Sales (AM) Entertainment	**I**
Villa Mari	Small Wine Maker (2016)	On-Premises Tasting Room Outdoor Service Area Sunday Sales (AM)	**J**
Winery at Black Star Farms	Small Wine Maker (2007) Small Distiller	On-Premises Tasting Room Outdoor Service Area x2 Sunday Sales (AM)	**K**

Each of the Wineries is licensed as a Small Wine Maker or Wine Maker and each has a tasting room permitted by MLCC at their premises. A tasting room permit allows a winery to "provide samples of or sell at retail for consumption on or off the premises . . . wine it manufactured . . . [or] bottled." MCL 436.1113(1)(b). While a new winery tasting room must be approved by the local legislative body, *see* MCL 436.1536(7)(c), local approval "is not required for a tasting room that was in existence before December 19, 2018." MCL 436.1536(17).[1] Once the MLCC issues a tasting room permit, the winery may also receive from MLCC "a Sunday sales permit,

[1] It is undisputed that each Wineries' tasting room was in existence before December 19, 2018.

catering permit, dance permit, entertainment permit, specific purpose permit, extended hours permit, [and] authorization for outdoor service." MCL 436.1536(7)(g).[2]

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." (**Exhibit L: FAQ Sheet**.)[3] "No local legislative approval [is] required." (**Exhibit M: Brief Description of All Michigan Liquor Licenses and Permits by Licensing Tiers**.)[4] An Entertainment and Dance Permit issued by MLCC permits wineries to "allow dancing by patrons" and allow "certain types of live entertainment." (**Exhibit L: FAQ Sheet**.) "No local legislative approval [is] required." (**Exhibit M**.) For purposes of allowing dancing, entertainment, or dance-entertainment, a winery can obtain an Extended Hours Permit from MLCC which allows the winery to "remain open past the normal legal hours of sale between 7:00am to 2:00am" for these activities. (***Id.***). "No local legislative approval [is] required." (***Id.***) An Outdoor Service Area permit allows for the consumption of wine and food outdoors and the boundaries of an outdoor service area are subject to MLCC approval. *See* Rule 436.1419. Local approval of an outdoor service area is not required. (**Exhibit M**.)

The only MLCC permit which requires local government approval is a banquet facility permit. *See also* MCL 436.1522(5) ("The commission shall not issue a banquet facility permit unless issuance is approved through adoption of a resolution of the legislative body of the local unit of government within which the permitted facility is located."); **Exhibit N: MLCC Local Approval Form** ("You must obtain a recommendation from the local legislative body for a new

[2] As noted above, the Wineries each currently have several types of permits issued by MLCC and are considering additional permits if the ordinance restrictions are lifted.

[3] https://www.michigan.gov/documents/lara/Winemaker-rev-11-11_368820_7.pdf

[4] https://www.michigan.gov/documents/lara/licensetypes_666205_7.pdf

on-premises license application, certain types of license classification transfers, and/or a new banquet facility permit.)[5]

With the tasting room permit alone, a winery may also "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." MCL 436.1536(7)(h). This ability is confirmed by MLCC in its Winery FAQ sheet where it states a winery "May serve food or have a restaurant in conjunction with the On-Premises Tasting Room Permit." (**Exhibit L**.) MCL 436.1111, part of the Michigan Liquor Control Code, states that the term "'Restaurant' means a food service establishment defined and licensed under the food law, 200 PA 92, MCL 289.1101 to 289.8111." The Food Law, MCL 289.1107(t), 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.

Enforcement of the Food Law is specifically delegated to the local health department, not Peninsula Township. *See* MCL 289.3105.

Finally, without the need for an additional permit, the Wineries' tasting room permits allow the performance or playing of any type of musical instrument and singing. MCL 436.1916(11).

[5] MLCC also maintains a resource page for local governments, https://www.michigan.gov/lara/0,4601,7-154-89334_10570_74006-366372--,00.html, and as part of that resource is a chart informing local governments which types of licenses and permits require local approval. (**Exhibit O**.)

B. The Winery Ordinances.

On June 5, 1972, Peninsula Township adopted its Zoning Ordinance. (**Peninsula Township's Answer to First Amended Complaint, ECF No. 35, PageID.1888, ¶ 42**.)[6] The Zoning Ordinance has been amended over time to add various provisions related to wineries. (***Id.* ¶ 43**.) Three specific provisions related to the licenses are at issue here: Section 6.2.7(19) Use by Right – Farm Processing Facility; Section 8.7.3(10) Winery-Chateau; and Section 8.7.3(12) Remote Winery Tasting Room. Collectively, the Wineries refer to these as the "Winery Ordinances." As discussed below, the Winery Ordinances regulate areas already regulated by Michigan law and preclude what Michigan law specifically allows.

1. Section 6.2.7(19) Use by Right – Farm Processing Facility

The Winery Ordinances prohibit a farm processing facility from operating a restaurant. Section 6.2.7(19)(a). Food is limited to "the sale of limited food items for on-premises consumption." Section 6.7.2(19)(b)1(iv). Farm processing facilities are also precluded from "[a]ctivities such as weddings, receptions and other social functions for hire…" *Id*. Unlike Winery Chateaus, as discussed below, the Winery Ordinances do not place restrictions on live music, seminars, meetings, hours of operation, outdoor service and similar activities. However, Peninsula Township enforced such restrictions on farm processing wineries.

2. Section 8.7.3(10) Winery-Chateau

The Winery Ordinances contain certain restrictions on winery operations to force the Wineries to purchase fruit from within Peninsula Township. Peninsula Township calls these

[6] A copy of Peninsula Township's Zoning Ordinance is found at https://www.peninsulatownship.com/uploads/1/0/4/3/10438394/zoning_ordinance_with_amendments_through_august_31_2009__through_amendment_184_.pdf.

"Guest Activity Uses."[7] The Winery Ordinances carve out a few common winery offerings as being outside of Guest Activity Uses which winery chateaus can offer without prior approval of Peninsula Township. These include wine tasting, sale of wine by the glass, political rallies, weddings, wedding receptions, family reunions and entertainment. For example, "Guest Activity Uses do not include wine tasting and such related promotional activities as political rallies, winery tours and free entertainment." *See* Section 8.7.3(10)(u)(1)(d) and Section 8.7.3(10)(u)(2)(d).

While these limited operations are allowed for winery chateaus, if a winery chateau wishes to make full use of the rights allowed under Michigan law and enjoyed by other wineries in Michigan, it must get prior approval from Peninsula Township. Section 8.7.3(10)(u). These include wine and food seminars and cooking classes, Section 8.7.3(10)(u)(2)(a); hosting a meeting of a 501(c)(3), Section 8.7.3(10)(u)(2)(b); and hosting a meeting of an agricultural group, Section 8.7.3(10)(u)(2)(c). Peninsula Township also includes items like book club meetings as a Guest Activity Use. (**Exhibit P: WOMP1378**.)[8] A benefit for Big Brothers and Big Sisters also needed pre-approval from the Township. (**Exhibit Q: WOMP506**.) According to Peninsula Township, the reason this event was a Guest Activity Use and not "a normal Winery-Chateau Tasting Room activity" was because there was 1) a fixed price for entry, 2) the tasting room would be closed and 3) it was a meeting of a non-profit group where a full course meal would not be served." *Id.*

Guest Activity Uses are subject to increased restrictions as opposed to normal Winery-

[7] This Court already ruled that the term "Guest Activity Uses" is unconstitutionally vague. (ECF No. 162; ECF No. 211, ECF No. 301, ECF No. 303.) Nevertheless, the Wineries raise preemption claims related to Guest Activity Uses as a belt and suspenders approach in the event these issues get appealed.

[8] Note that the Township draws a distinction between a book club and other forms of free entertainment. Apparently, a book club is the primary reason a person might come to the winery such that is a Guest Activity Use. But if the primary reason a person comes to the winery is to taste wine, the entertainment is secondary, so it is not a Guest Activity.

Chateau Tasting Room activities. Guest Activity Uses cannot occur past 9:30 PM. Section 8.7.3(10)(u)(5)(b). Alcohol sales for Guest Activities are limited to alcohol produced on-site. Guest Activity Uses cannot include amplified music. Section 8.7.3(10)(u)5(g).

Section 8.7.3(10)(m) limits "[a]accessory uses such as facilities, meeting rooms, and food and beverage services [to] registered guests only." Supervisor Manigold admitted that this provision has been preempted by the Michigan Liquor Control Code "because, as you said, the law has changed." (**Exhibit R: Manigold Dep. at p. 113**.)

Section 8.7.3(10)(u)(5)(d) states that sale of wine by the glass and by the bottle for on-premises consumption is not allowed. Supervisor Manigold testified that the Township is not enforcing this provision because "the State overruled this one" and it is preempted. (***Id.* at p. 113**.) Section 8.7.3(10)(u)(5)(e) precludes the sale of beverages outdoors. Supervisor Manigold testified that Peninsula Township is not enforcing this provision because it has been preempted by the Liquor Control Code. (***Id.* at p. 182-183**.)

3. Section 8.7.3(12) Remote Winery Tasting Rooms

The portions of the Winery Ordinances which regulate Remote Winery Tasting Rooms are sparse. Unlike the section of the Winery Ordinances regulating to Winery Chateaus and Farm Processing Facilities, the section of the Winery Ordinances regulating Remote Winery Tasting Rooms do not contain any explicit restrictions on operations. However, the lack of written ordinances has not prohibited Peninsula Township from attempting to restrict the services these wineries can offer. In short, Peninsula Township takes the position that these wineries cannot offer any of the following services or activities: restaurants; food for on-premises consumption; music; entertainment; catering; and sales of wine by the bottle for on-premises consumption. Unlike the restrictions on Winery-Chateau Guest Activities, the Ordinances do not place any restriction on the hours of operation for a Remote Winery Tasting Room, though Peninsula Township has

regulated Remote Winery Tasting Rooms as if such a restriction is found within the Winery Ordinances. In essence, Peninsula Township has taken the position that the Winery Ordinances limit Remote Winery Tasting rooms to wine tastings, sale of wine by the glass, and the sale of wine by the bottle to go.

Section 8.7.3(12)(h) prohibits a Remote Winery Tasting Room from selling wine for on-premises consumption. Supervisor Manigold testified that Peninsula Township was no longer enforcing that ordinance because it was "preempted" by the "liquor control law." (**Exhibit R: Manigold Dep. at p. 72**.)

III. ANALYSIS

The Wineries may move for summary judgment by "identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). The Court "must grant summary judgment when 'there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Hartman v. Thompson*, 931 F.3d 471, 478 (6th Cir. 2019) (quoting Fed. R. Civ. P. 56(a)). Whether a state statute preempts a local zoning ordinance is a question of law. *DeRuiter v. Twp. of Byron*, 949 N.W.2d 91, 96 (Mich. 2020). The Township agreed that the question of preemption is a matter of law. (ECF No. 63, PageID.2758.) PTP also agreed that the preemption claims "are questions of law that do not require further fact development." (ECF No. 250, PageID.8918.)

"Under the Michigan Constitution, the City's 'power to adopt resolutions and ordinances relating to its municipal concerns' is 'subject to the constitution and the law.'" *Ter Beek v. City of Wyoming (Ter Beek II)*, 846 N.W.2d 531, 541 (Mich. 2014) (quoting Mich. Const. 1963, art. 7, § 22). Thus, a local ordinance may be preempted by state law. *AFSCME v. City of Detroit*, 662 N.W.2d 695, 707 (Mich. 2003). State law "may preempt a local regulation either expressly or by implication." *DeRuiter*, 949 N.W.2d at 96 (citing *Mich. Gun Owners Inc. v. Ann Arbor Pub. Sch.*,

918 N.W.2d 756 (Mich. 2018)). Put another way, "[i]t would be unconstitutional for a township to attempt to regulate an issue preempted by state law." *J.A. Bloch & Company and Sun ACQ, LLC v. Ann Arbor Twp*, 2022 WL 17876842, *13 (Mich. App. Dec. 22, 2022) (citing *Walsh v River Rouge*, 385 Mich. 623, 639 (1971)). Implied preemption occurs when a local ordinance "is in direct conflict with the state statutory scheme" or if state statutory scheme occupies "the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance." *People v. Llewellyn*, 257 N.W.2d 902, 904 (Mich. 1977).

For the Court's reference, attached as **Exhibit S** is a table of the Ordinance Sections the Wineries allege are preempted along with the applicable Michigan statute/rule.

A. Conflict Preemption Standards

"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*, 949 N.W.2d at 96 (quoting *Llewellyn*, 257 N.W.2d 902, n. 4). *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 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 state statute allows certain conduct and a local ordinance forbids it, "the ordinance is void." *Id.* Thus, a local municipality may not forbid activity allowed by state law "simply by characterizing the conduct as a zoning violation." *Ter Beek II*, 846 N.W.2d at 542. As the Michigan Supreme Court explained, that "a local zoning regulation [was] enacted pursuant to the [Michigan Zoning Enabling Act] does not save it from preemption." *Id.*

For example, a Grand Rapids ordinance prohibiting walkathons conflicted with a state

statute which allowed walkathons where the contestants received physician approval. *Nat'l Amusement*, 259 N.W. at 343. Because state law allowed walkathons, Grand Rapids could not ban them. In another case, the City of Wyoming imposed criminal penalties for the use of medical marijuana, even though the Michigan Medical Marijuana Act ("MMMA") granted immunity from prosecution for the use of medical marijuana. *Ter Beek II*, 846 N.W.2d at 544. Because the MMMA granted immunity from prosecution, the city could not prosecute offenders.

In an example from the alcohol context, Bloomfield Township amended its ordinance 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.

Maple BPA, Inc v. Bloomfield Charter Twp., 838 N.W.2d 915, 919 (Mich. App. 2013). 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.*

These examples lead to some basic principles. *National Amusement* and *Ter Beek* show that when a state law grants a right, a local government may not take it away. *DeRuiter* and *Maple BPA* show that a local government can add conditions to a state statute, if those conditions do not prohibit what the state statute allows.

1. Mich. Comp. Laws § 436.2114(1), Mich. Admin. Code R. 436.1403, and Mich. Admin. Code R. 436.1503 preempt Peninsula Township's Restriction of Winery Hours.

The Wineries allege that Section 8.7.3(10)(u)(5)(b) is preempted by Mich. Comp. Laws § 436.2114(1), Mich. Comp. Laws § 436.2111(1) and Mich. Admin Code R. 436.1403. While Section 8.7.3(10)(u)(5)(b) is the only Winery Ordinance section regulating hours and only applies to Guest Activity Uses, the Township enforces a 9:30 p.m. closing time on all Wineries and all winery business. (**See Exhibit R: Mangold Dep. Tran. at p. 178-80**.) This Court previously determined 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. By legislating when it is unlawful to serve alcohol, the Michigan Legislature also legislated when it is lawful to serve alcohol. "This is merely a common legislative manner of saying that it is lawful to conduct it if the regulations are observed." *National Amusement*, 259 N.W. at 343 (citing *Schneiderman v. Sesanstein*, 167 N.E. 158 (Ohio 1929)). That reasoning is consistent with the Michigan Supreme Court's decision in *Noey v. City of Saginaw*, 261 N.W. 88 (Mich. 1935), which invalidated the City of Saginaw's ordinance setting an earlier closing time for alcohol sales.

The reasoning from *Noey* is supported by the Liquor Control Code, which states, in Mich. Comp. Laws § 436.2114(1), that alcohol may not be sold between 2:00 a.m. and 7:00 a.m. daily:

> 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.

Consistent with *National Amusement*, 259 N.W. at 343, the prohibition on alcohol sales between 2:00 a.m. and 7:00 a.m. means that alcohol *may* be sold between 7:00 a.m. and 2:00 a.m.

Additionally, the Liquor Control Code further confirms that a municipality may regulate the hours of sales on Sunday by referendum, but that regulation does not extend to other days of the week. Specifically, in Mich. Comp. Laws § 436.2114(2), the Legislature provided four exceptions which would allow a local government to amend the standard alcohol service times:

> 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. Alcohol may be sold between 7:00 a.m. and 2:00 a.m. every day. Municipalities retain limited authority to limit alcohol sales on Sundays. However, municipal authority to regulate hours of operation ends there—the Liquor Control Code is silent about municipal authority on any other day. Therefore, the Liquor Control Code provides an absolute right to sell alcohol from 7:00 a.m. to 2:00 a.m. unless the municipality has regulated Sunday sales.

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*, 261 N.W. 88 and *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005). Respectfully, this Court is bound by the decisions in *Noey* and *Keego Harbor* and must apply the same analysis here.

The decisions in *Noey* and *Keego Harbor* are not outliers. The Ohio Supreme Court faced a nearly identical situation in *Neil House Hotel Co. v. City of Columbus*, 58 N.E.2d 665 (Ohio 1944). There, the City of Columbus enacted an ordinance prohibiting the sale of alcohol after

midnight. *Id*. at 248-249. But, "the [State of Ohio] promulgated its regulation No. 30, prohibiting the sale and consumption of beer and intoxicating liquors…between the hours of 2:30 a.m. and 5:30 a.m." The Ohio Supreme Court determined the ordinance to be invalid: "When the statutes and a valid regulation of the Board of Liquor Control say that the sale of intoxicants may not be made after a designated hour, it is equivalent to saying that sales up to that time are lawful, and an ordinance which attempts to restrict sales beyond an earlier hour is in conflict therewith and must yield." *Id*. at 253 (citing *Schneiderman*, 121 Ohio St. at 86).

The Ohio Supreme Court also determined that "it is difficult to escape the conclusion that plaintiff, under state authorization, may lawfully sell beer and intoxicants to its customers after the hour of midnight and that a municipal ordinance fixing midnight as the time when the sale of such beverages must cease, is invalid." *Id*. at 252-253 (citing *Village of Struthers v. Sokol*, 108 Ohio St. 263 (1923); *Noey*, 271 Mich. 595)). A later Ohio case reached this same conclusion. *See Williams v. City of Jackson*, 164 N.E. 2d 195, 199 (Ohio Ct. of Common Pleas 1959) ("[T]he laws and regulations of the Liquor Department allows the sale of beer after 5:00 a. m. on Sunday, and therefore, Ordinance No. 2–59 of the City of Jackson is plainly in conflict therewith, and is declared null and void.") Likewise, in *J.L. Spoons, Inc. v. City of Brunswick*, 49 F. Supp. 2d 1032, 1042 (N.D. Ohio. 1999), the Northern District of Ohio held that a statute restricting the sale of alcohol between certain hours preempted a local ordinance which set different hours. "This permit authorizes Tiffany's Cabaret to sell alcoholic beverages until 2:30 a.m., in accordance with general state law. It is readily apparent that the ordinance's prohibition on remaining open past 1:00 a.m. conflicts with the license given to the plaintiff by the state." *Id*.[9]

[9] Courts have ruled similarly in the context of railroad speed limits. *See CSX Transp. Inc. v. City of Tullohoma, Tenn.*, 705 F. Supp. 385, 387 (E.D. Tenn. 1988) (local ordinance setting maximum train speed limit of 25 m.p.h. preempted by federal statute setting maximum speed limit of 60

The Wineries relied on *Noey* and *Keego Harbor* in their prior 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.) Respectfully, this is incorrect. While *Keego Harbor* was an unconstitutional conditions case, it also must stand for the proposition that Michigan law allows alcohol licensees to serve food and alcohol until 2:00 a.m., otherwise there would be no unconstitutional condition, because a property right is required to prove an unconstitutional condition. As *Keego Harbor* noted, "[i]n order to assert a valid due process claim, however, a plaintiff must establish that the interest asserted is a liberty or property interest protected under the Fourteenth Amendment. *Keego Harbor*, 397 F.3d at 434-435 (citing *Wojcik v. City of Romulus*, 257 F.3d 600, 609 (6th Cir. 2001)). The *Keego Harbor* case turned on "whether Goose Island had a property interest in certain hours of operation." *Id*. In answering this question, *Keego Harbor* had to determine whether Michigan law allowed for the service of food and alcohol until 2:00 a.m. The court noted that "[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 the Sixth Circuit stated 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

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m.p.h.); *City of Covington, Ky. V. Chesapeake & Ohio Ry. Co.*, 708 F. Supp. 806, 808 (E.D. Ky. 1989) (city may not set train speed limit less than speed limit allowed by federal law). In *Grand Trunk Western R. Co. v. City of Fenton*, 439 Mich. 240, 247 (1992) the Michigan Supreme Court determined that a local ordinance setting train speed limit at 25 m.p.h. was preempted by federal law which set the speed limit at 50 m.p.h. In so holding, the court noted that "[w]hile it is possible for trains to obey both the federal and local limits, it is clear that enforcement of the much lower local limit would substantially interfere with the carefully wrought federal scheme." *Id*.

2:00 a.m.) and prohibits city officials from rescinding the benefit.

Id. at 435-436.[10] Contrary to this Court's prior opinion, the Sixth Circuit in *Keego Harbor* explicitly held that "Michigan laws and regulations permit liquor licensees to serve food and alcohol until 2:00 a.m" and "[u]nder Michigan law, a liquor license is property which includes the right to serve alcohol until 2:00 a.m." *Id.* at 430, 436.

Presumably, this Court did not cite to this determination from *Keego Harbor* because it distinguished *Noey* when it determined 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 T**.) Mich. Const. 1908, art. 16, § 11. After *Noey*, the 1963 Constitution maintained this language, but 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 U**.) 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

[10] That interpretation is consistent with *National Amusement* and *Neil House*.

alcoholic beverage traffic within this state." *See also Oppenhuizen v. City of Zeeland*, 300 N.W.2d 445, 447 (Mich. Ct. App. 1980) (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. at 89-90. This Court's contrary, now vacated, conclusion was in error.[11]

This Court also cited *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.) This reading of *Mutchall* is too broad. 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.*

[11] 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) (explaining that 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 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.").

City of Saginaw … so as to permit local authorities to control the closing time of licensed 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 states:

> **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 V**.) The 1948 version of Section 1 is unchanged:

> **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 W**.) 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 V**.) The 1948 version of Section 19(18)[12] reads:

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

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 W**.) 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 consumption, *i.e.*, "Specially designated merchants" and "State liquor stores." (*See* **Exhibit W** 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 that 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 that allows a local government, by referendum, ordinance, or otherwise, to limit the sales of alcohol on any other day of the week.

The referendum power was added in the 1948 version 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 W: 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.

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). While Section 436.2114(1)[13] sets the general hours of sales between 7:00 a.m. and 2:00 a.m. the following day, Section 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 Section 436.2114(2).[14] Because Section 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*.

Finally, the Township has conceded that for both Remote Tasting Rooms and Farm Processing Facilities, the Ordinances do not contain any restriction on their hours of operation. (*See* ECF No. 159, PageID.5884.) The Township also conceded that for Chateau Wineries "[t]here

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

[14] 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).

is no restriction for hours of operation of that tasting room" and that the hours "restriction is for … guest activities only." (*Id*. at PageID.5885.) "There is no restriction, other than as it relates to guest activities at the chateaus." According to the Township, "guest activities, you're limited to 9:30. Okay. Got that. However, all other activities, if you are not a guest, you are not limited to those hours." (*Id*. at PageID.5886.) While the concession is helpful moving forward, the Wineries have still been damaged by the Township enforcing an earlier closing time regardless of the fact that the Winery Ordinances did not contain such a restriction.

Noey v. Saginaw is still the law of the State of Michigan and nothing in *Mutchall* changed this. See *e.g.*, **Exhibit X: 1990 Michigan A.G. Opinion No. 6609** ("In *Noey v City of Saginaw*, 271 Mich 595; 261 NW 88 (1935), for example, the Supreme Court held that a regulation promulgated by the Liquor Control Commission which prohibited the sale of alcoholic beverages between the hours of 2:00 a.m. and 7:00 a.m. could not be superseded by a city ordinance which prohibited sales from midnight to 7:00 a.m."). Any ordinance or policy of Peninsula Township imposing an earlier closing time is, therefore, preempted.

2. Mich. Comp. Laws § 436.1916(11) preempts Section 8.7.3(10)(u)(5)(g)'s Prohibition on Amplified Music.

This Court previously 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.) That ruling should be reinstated.

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(11). 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.[15] "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 purposes." Section 8.7.3(10)(u)(5)(g). This conflicts with the Wineries' right to play music without issuance of a permit under Mich. Comp. Laws § 436.1916(11). Therefore, Mich. Comp. Laws § 436.1916(11) preempts Section 8.7.3(10)(u)(5)(g).

PTP and the Township have argued that the MLCC is silent on amplification. (ECF No. 250, PageID.8940; ECF No. 63, PageID.2769; ECF No. 174, PageID.6573.) 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 a May 2, 2022, hearing this Court asked counsel for the Township "you do have an absolute prohibition on amplified music, correct?" (ECF No. 159, PageID.5894.) Counsel responded, "We do, your honor." *Id*. Ultimately, this Court concluded that the Township's total prohibition on amplified music was preempted. (ECF No. 162, PageID.5991.) This was the correct determination.

3. Mich. Comp. Laws § 436.1547 preempts Section 8.7.3(10)(u)(5)(i)'s Prohibition on Catering.

This Court previously 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.) That decision should

[15] 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.

be reinstated. In addition, the Township has argued, related to catering, "[w]e have an outright prohibition with regarding to the farm processing ordinance." (ECF No. 159, PageID.5892.) The Farm Processing section of the Winery Ordinances do not actually contain language prohibiting catering but, if by its actions Peninsula Township also bans catering, then that prohibition is also preempted.

The Wineries 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 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." (**Exhibit L: FAQ Sheet**.) "No local legislative approval [is] required." (**Exhibit M**.)

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 the argument 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 service establishment.' (which includes a 'catering kitchen' under Mich. Comp. Laws § 288.573I), 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). The argument that MLCC-allowed catering does not include food is simply wrong.

Mich. Comp. Laws § 436.1547 explicitly allowed for a Winery to obtain a catering permit and cater food and beverages offsite from its licensed premises. Any ordinance or policy of Peninsula Township which restricts this right is preempted.

4. 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 ordIafe, 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). The Township has argued to this Court that the Wineries do not have licenses from the State of Michigan to operate restaurants. (ECF No. 159, PageID.5903.) But there is no such thing as a restaurant license from the State of Michigan. To operate a restaurant, the Wineries are only required to obtain either a Retail or Extended Retail Food Establishment license from the Michigan Department of Agriculture which the Wineries already possess because these same licenses are required to operate a winery. MCL 289.1111(c) defines a "Retail food establishment" as "an operation that sells or offers to sell food directly to a consumer. Retail food establishment includes both a retail grocery and a food service establishment, but does not include a food processor."[16] An "'Extended retail food establishment' means a retail grocery that does both of the following: (i) Serves or provides an unpackaged food for immediate consumption. (ii) Provides customer seating in the food service area."[17] MCL 289.1107(f).

Stated simply, a restaurant under the Liquor Control Code is one that serves food to the public and holds either a Retail or Extended Retail Food Establishment license issued by the Michigan Department of Agriculture. Enforcement of the Food Law is specifically delegated to the local health department, not Peninsula Township. *See* Mich. Comp. Laws § 289.3105. Further,

[16] Pursuant to MCL 289.8107(b)(2), "[a] retail food establishment may sell or offer for sale a prepackaged nonperishable food with or without a label that bears a date."

[17] A "'Retail grocery' means an operation that sells or offers to sell food to consumers for off-premises consumption. Food for off-premises consumption does not include take-out food intended for immediate consumption." MCL 289.1111(d).

"Except as otherwise provided in [the Food Law], a city, county, or other local unit of government shall not adopt or enforce licensing ordinances or regulations for persons regulated under this act." MCL 289.4101.

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). Thus, the Liquor Control Code gives the Wineries the 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 prohibited outright under the Winery Ordinances. "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). And 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-premises 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). Section 8.7.3(12)(j) restricts the food that may be sold at a Remote Tasting Room to only "packaged food items … which contain wine or fruit produced in Peninsula Township…. Such food items shall be intended for off premise consumption. Such allowed packaged food items may include mustard, vinegar, non-carbonated beverages, etc."

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;[18] Sections 6.7.2(19)(a), 8.7.3(10)(u)(2)(e), and 8.7.3(12)(j) are an outright ban which 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 MMMA's allowance of such use, Byron Township's ordinance was preempted. *Ter Beek*, 846 N.W.2d at 541. 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 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

[18] Even a limitation is problematic given that MCL 289.4101 states that a municipality "shall not adopt or enforce licensing ordinances or regulations for persons regulated under this act."

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 room and restricts when and for what purpose a Winery Chateau may operate a restaurant. It also restricts a Remote Tasting Room to only packaged food for off-premises consumption. Therefore, Sections 6.7.2(19)(a), 8.7.3(10)(u)(2)(e) and 8.7.3(12)(j) are preempted by 436.1536(7)(h).[19]

5. The Wineries Amended Complaint Pleaded Preemption Challenges to All Ordinances Addressed by this Motion and Brief.

This Court previously ruled that the First Amended Complaint did not challenge provisions of the Winery Ordinances which restricted Wineries from operating restaurants. This was incorrect. Paragraphs 290 and 291 of Plaintiffs' First Amended Complaint allege that specific sections of the Ordinances are preempted by specific Michigan statutes. However, because the Ordinances contain numerous sections which regulate restaurants and the service of food by the Wineries (Sections 6.7.2(19)(a) (no restaurant), 6.7.2(19)(b)(1)(iv) (limited food), 8.7.3(10)(u)(2)(b) (no full course meals), 8.7.3(10)(u)(2)(e) (no food service), 8.7.3(12)(j) (packaged food for off-premise consumption, only)), the First Amended Complaint, in Paragraph 292, uses broader terms by stating "The Winery Ordinance, including Section 8.7.3(10)(u)5(i), conflict with [Michigan law]." In Paragraph 44, the Wineries had defined "Winery Ordinance" to include all sections of 6.7.2(19), 8.7.3(10) and 8.7.3(12). Thus, in Paragraph 292, the Wineries challenged any portion of the Winery Ordinances which regulates the service of food as being

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

preempted by Michigan law. The Wineries also alleged in Paragraph 226(a) that the Township had conceded that "The portions of the Winery Ordinances which prohibit wineries from operating a restaurant should be revised to comply with MCL 436.1536 which expressly preempts the Winery Ordinances on this issue." (ECF No. 29, PageID.1114.) In Paragraph 190, the Wineries also alleged that "[u]nder Michigan law, a winery tasting room is allowed to operate a restaurant with a full menu." (*Id.* at PageID.1109.) These paragraphs were incorporated into Count VIII of the Amended Complaint. (*Id.* at PageID.1125.) Under applicable law, the Wineries' allegations were sufficient.

Complaints related to "municipal liability under [Section 1983] … must satisfy only the simple requirements of Rule 8(a)." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002). "Rule 8(a)(2) requires only that claims for relief set forth 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *New Hampshire Ins. Co. v. Marinemax of Ohio, Inc.*, 408 F. Supp. 2d 526, 528 (S.D. Ohio 2006) (quoting. Fed. R. Civ. P. 8(a)(2)). "In other words, the plaintiff must merely 'give the defendant fair notice of what the plaintiff's claim is and the grounds on which is rests.'" *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz*, 534 U.S. at 512. "Essentially, then, the plaintiff must provide enough information to allow the defendant to know what issues to delve into during discovery." *New Hampshire Ins.*, 408 F. Supp. at 528.[20] "Pleading under the Federal Rules is not a 'game of skill in which one misstep by counsel

[20] The Township relies on this same legal proposition in defending its affirmative defense that alleged "[s]ome or all of Plaintiffs claims are preempted by applicable state or federal law." In discovery, the Wineries asked the Township to describe the factual and legal basis for the affirmative defense. Instead, the Township replied: "Discovery in this matter is just beginning and ongoing such that this interrogatory is premature. Subject to and without waiving the same, the

may be decisive to the outcome....'" *Id.* (quoting *Conley*, 355 U.S. at 48). "No technical forms of pleading ... are required." Fed. R. Civ. P. 8(e)(1).

In *New Hampshire Insurance*, the plaintiff challenged the sufficiency of the defendant's counterclaim for breach of contract because the defendant had simply alleged the plaintiff breached the contract without specifying what the plaintiff did to breach the contract or what specific provisions of the contract were breached. 408 F. Supp. at 529. The court held that "MarineMax is not required to litigate its claims in the pleadings. NHIC is on notice that MarineMax claims some provision of the policy entitles it to coverage. In discovery, NHIC is free to ask MarineMax what those provisions are." *Id*. Similarly, the plaintiff sought to strike defendant's affirmative defense which simply alleged the claims were preempted. *Id*. at 530. The plaintiff argued that it "has no idea which claims are preempted and by which provisions of the Policy." *Id*. Again, the court disagreed that the defense was inadequately pled finding that "NHIC should ask MarineMax in discovery … how preemption [] applies." *Id*.

Similarly, in *Webb v. Chase Manhattan Mortgage. Corp.*, 2007 WL 709335, *6 (S.D. Ohio, Mar. 5, 2007), the defendant alleged the plaintiffs did not comply with Rule 8(a) because they did not "allege what specific provisions of what contract(s) Defendant allegedly breached." Instead, the plaintiffs "refer generally to all of the contractual documents relevant to this case, such as the mortgages, deeds of trust, and the standard form notes." The *Webb* court found that the complaint complied with Rule 8 and that "[d]uring the discovery phase, Plaintiffs will be required to disclose the specific contractual provisions they claim Defendant has violated and if nothing more specific is provided, this will most likely be an issue for summary judgment." *Id. See also Residential*

Defendant provisionally pled this Affirmative Defense in accordance with Fed. R. Civ. P. 8 and if discovery does not support said defense, Defendant will waive the same." (**Exhibit Y: Def. Supp. Resp. to First Interrogatories at #12**.)

Funding Co. LLC, v. Terrace Mortg. Co., 2014 WL 3952291, *7 (D. Minn. Aug. 13, 2014) ("[F]ederal pleading standards simply do not demand that level of detail.").

This Court reached a similar conclusion, through in a different context, in *Razmus v. American Signature, Inc.*, 2020 WL 3429829 (W.D. Mich. May 11, 2020). There, the defendant challenged that the plaintiff's case did not include a claim for unjust enrichment because "Plaintiff specifically identified his claims in the Amended Complaint—the five 'counts' clearly identified in bold, underlined sections—and he did not include unjust enrichment among his five counts." *Id*. at *2. This Court disagreed and noted that "[t]he Court is unaware of any binding authority, and Defendant has not identified any, that requires a plaintiff to set forth each claim for relief in capital letters, bolded, underlined and enumerated." *Id*. Instead, this Court reviewed all the paragraphs of the amended complaint and determined that the defendant could not be "surprised to learn that Plaintiff made a claim for unjust enrichment." *Id*. at *3.

"The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." *Swierkiewicz*, 534 U.S. at 512-513 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202, p. 76 (2d ed. 1990)). "If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding." *Id*. at 514. "The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." *Id*.

Here, it is no surprise to the Township or PTP that the Wineries allege that any section of the Winery Ordinances which restrict the Wineries from operating a restaurant are preempted by

Michigan law. Both PTP and the Township have addressed whether these ordinances are preempted in their summary judgment briefing. The Township fully briefed this issue nearly two years ago. (ECF No. 63, PageID.2765-2769.) PTP fully briefed this issue. (ECF No. 250, Page.ID 8936-8940; ECF No. 273, PageID.9955-9956.) 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.)

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." *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 25, 31 (6th Cir. 2002); *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 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)).

As discussed above, Sections 6.7.2(19)(a), 6.7.2(19)(b)(1)(iv), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(e) and 8.7.3(12)(j) restrict the ability of the Wineries to operate a restaurant. The Amended Complaint put the Township and PTP on notice of these claims as required by Rule 8(a). In addition, both PTP and the Township have addressed whether these ordinances are preempted in their summary judgment briefing and 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.) Thus, the claims are properly before this Court for adjudication.

B. Because the Township has Deprived the Wineries of Their Constitutional Rights and Enacted Preempted Ordinances, it has Violated the Michigan Zoning Enabling Act.

Any zoning ordinance that exceeds or conflicts with the powers conferred under the MZEA is void and unenforceable. "The power of the [Township] to enact ordinances is not absolute . . . the State cannot confer upon the [Township] that which it does not have." *Kropf v. Sterling Heights*, 391 Mich. 139, 157 (1974). Thus, this Court's decision on the Wineries' constitutional and preemption claims determines whether the Township has violated the MZEA: "In other words, whatever sections that the Court ultimately determines are unconstitutional will also violate the MZEA, and vice versa." (ECF No. 162, PageID.6028 (citing *Crossroads Outdoor LLC v. Green Oak Charter Township*, 2019 WL 1326641 (E.D. Mich. Mar. 25, 2019))). This Court has already determined that numerous sections of the Winery Ordinances are unconstitutional. (ECF No. 319, PageID.11883-11889.) Thus, the Court must also determine that Peninsula Township violated the

MZEA with regarding to the enactment of those ordinance sections. And, should the Court determine that additional sections of the Winery Ordinance are preempted or unconstitutional, then it must also determine that Peninsula Township violated the MZEA with the enactment of those sections. Thus, this Court should grant the Wineries summary judgment on Count IX of their Amended Complaint.

C. Peninsula Township is Bound by its Concessions.

As discussed above, Peninsula Township has conceded that it has been enforcing its Ordinances beyond the scope of their facial prohibitions. This Court must accept these concessions and determine that the Wineries are free to operate based on those concessions. *See Geller v. Prudential Ins. Co. of America*, 237 F.Supp.2d 210, 220 (E.D.N.Y. 2002) (awarding partial summary judgment based on counsel's concessions at oral argument); *In re Lefkas General Partners*, 153 B.R. 804, 807 (N.D.III. 1993) ("Judicial admissions, however, are not limited to statements made in the particular motion or application pending. Any 'deliberate, clear and unequivocal' statement, either written or oral, made in the course of judicial proceedings qualifies as a judicial admission."); *McCaskill v. SCI Management Corp.*, 298 F.3d 677, 680 (7th Cir.2001) ("The verbal admission by [defendant's] counsel at [appellate] oral argument is a binding judicial admission, the same as any other formal concession made during the course of proceedings."); *Whitney Bros. Co. v. Sprafkin*, 3 F.3d 530, 534 n. 4 (1st Cir. 1993) (parties are bound by the positions they take in their briefs and at oral argument); *U.S. Trust Co. of New York v. Shapiro*, 835 F.2d 1007 (2nd Cir. 1987) (holding plaintiff bound by concessions made by counsel at oral argument).

IV. CONCLUSION

Plaintiffs respectfully request that this Court enter a judgment in their favor and find Sections 6.7.2(19)(a) (no restaurant), 6.7.2(19)(b)(1)(iv) (limited food), 8.7.3(10)(u)(2)(b) (no full course meals), 8.7.3(10)(u)(2)(e) (no food service), 8.7.3(12)(j) (packaged food for off-premise consumption, only), 8.7.3(10)(u)(5)(b) (limited hours), 8.7.3(10)(u)(5)(g) (no amplified instrumental music) and 8.7.3(10)(u)(5)(i) (no catering) preempted by Michigan law. Plaintiffs also request judgment in their favor on Count IX alleging that Peninsula Township violated the Michigan Zoning Enabling Act. Plaintiffs further request that this Court award them their cost and attorneys' fees incurred in this action pursuant to 28 U.S.C. § 1988 as well as the damages they have incurred due to the Township's conduct in an amount to be determined at trial.

Respectfully submitted,

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

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Dated: April 18, 2023

CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.2(B)(I)

1. This Brief complies with the type-volume limitation of L. Civ. R. 7.2(b)(i) because this Brief contains 10,797 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2023, I filed the foregoing 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
Joseph M. Infante