UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal Corporation,

Defendant,

And

PROTECT THE PENINSULA,

Intervenor-Defendant.

/

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

PENINSULA TOWNSHIP'S AMENDED RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PREEMPTION

****ORAL ARGUMENT REQUESTED****

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DEFENDANT PENINSULA TOWNSHIP'S AMENDED RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PREEMPTION CLAIMS

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I. INTRODUCTION

The Court should deny Plaintiffs' motion for partial summary judgment on the preemption and Michigan Zoning Enabling Act ("MZEA") claims. While Plaintiffs claim the Michigan Liquor Control Code ("MLCC") preempts the Peninsula Township Zoning Ordinance ("PTZO"), such claims are legally unsupported. The MLCC, which through licensing governs the sale of liquor in Michigan, does not preempt the PTZO (a zoning ordinance enacted pursuant to the MZEA) but rather requires license holders to comply with all local zoning. The MLCC contemplates the co-existence between local zoning and statewide regulation – the Liquor Control Commission (the "Commission") requires all licensees to comply with local zoning requirements. *See* Mich. Admin. Code R. 436.1003.

This co-existence is logical as the MLCC governs licensing of the sale of liquor, while the PTZO governs land use (e.g., when and where the use of land is permissible). Pursuant to binding Michigan precedent, the Township is permitted, through its zoning ordinance passed pursuant to the MZEA, to place further restrictions on liquor-related activities, so long as those restrictions do not amount to a complete prohibition of the activity. Here, the PTZO does not ban Plaintiffs from engaging in any of the activities they propose. To the contrary, Plaintiffs must simply comply with land-use requirements. All of Plaintiffs operate in the A-1 Agricultural District ("A-1 District"), which is limited to agricultural uses and permitted accessory uses. However, Plaintiffs propose using their agriculturally-zoned land to engage in commercial uses. Plaintiffs are not prohibited from engaging in commercial use of their property in the Township. If that is what they seek, they are free to engage in those activities in the C-1 Commercial District ("C-1 District").

II. COUNTER-STATEMENT OF FACTS

A. Statutory Grant of Authority for the PTZO

Pursuant to the powers granted by successor state laws to the MZEA, MCL 125.3101, *et seq.*, and the Michigan Planning and Enabling Act, MCL 125.3801, *et seq*. ("MPEA"), in 1972 the Township adopted a comprehensive municipal zoning ordinance based on its plan to preserve farmland and open space, which has been amended at various points since. (ECF No. 29-1, Exhibit 1 to Plaintiffs' First Amended Complaint). The PTZO has the express purpose of, among other things: (1) protecting "the public health, safety, morals and general welfare" of the Township's inhabitants; (2) encouraging "the use of lands and resources of the Township in accordance with their character and adaptability"; (3) "to provide for safety in traffic, adequacy of parking and reduce hazards to life and property; and (4) "to conserve life, property, natural resources and the use of public funds to public services and improvements to conform with the most advantageous use of lands, resources and properties." (ECF No. 29-1, PageID.1142, § 2.1 of the PTZO).

The MZEA expressly permits the Township's purposes in enacting the Ordinances:

> A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare.

MCL § 125.3291 (emphasis added).

Plaintiffs operate on land planned under the Township land use plan and zoned by the PTZO as A-1 agricultural land. Some of Plaintiffs, consistent with other farmland and open space within the Township, are further subject to development rights agreements and the Township's

related regulations of the same.[1] Pursuant to authority granted to the Township under the MZEA and MPEA, the intent and purpose of creation of the A-1 District is:

> This District is intended to recognize the unique ecological character of the Peninsula and to preserve, enhance, and stabilizing existing areas within the Township which are presently being used predominately for farming purposes, yet recognize that there are lands within the district which are not suited to agriculture, therefore allowing other limited uses which are deemed to be compatible with agricultural and open space uses.

(ECF No. 29-1, PageID.1180, § 6.7.1 of the PTZO; Exhibit 1, Township Master Plan).

B. Winery Operations Under the PTZO

Plaintiffs, except for organizational Plaintiff Wineries of Old Mission Peninsula, are subject to compliance with the PTZO, including, but not limited to, general regulations, definitions, supplemental regulations, site plan approvals, and the terms of each of their Special Use Permits. Plaintiffs broadly challenge winery operations under three sections of the PTZO: Section 6.7.2(19) (farm processing facilities), Section 8.7.3(10) (winery-chateaus), and Section 8.7.3(12) (remote tasting rooms).[2]

1. Section 6.7.2(19) – Farm Processing Facility.

Farm Processing Facilities are permitted as a use by right under the PTZO. As such, so long as the use is in compliance with the conditions and regulations of the PTZO (for example, general regulations, site plans and land use permits for structures) and the specific limitations contained in Section 6.7.2(19), no Special Use Permit is required for a winery to operate as a Farm Processes sing Facility. The Plaintiffs operating as a Farm Processing Facility allegedly include:

- Winery at Black Star Farms, L.L.C.
- Two Lads, LLC

[1] See Township Ordinance No. 23, as amended: https://www.peninsulatownship.com/uploads/1/0/4/3/10438394/ordinance_23_-_3rd_ammendment_purchase_of_development_rights.pdf .

[2] Plaintiffs only challenge specific sections of the PTZO, but their operations are further subject to the general police power ordinances adopted by the Township, which have not been the subject of this litigation.

- Tabone Vineyards, LLC

2. Section 8.7.3(10) – Winery-Chateau.

Winery-Chateaus are permitted only pursuant to a Special Use Permit. *See* Section 8.7.2 Special Uses that May be Permitted. The Plaintiffs operating as a Winery-Chateau allegedly include:

- Bowers Harbor Vineyard & Winery, Inc.
- Brys Winery, LC
- Chateau Grand Traverse, Ltd.
- Chateau Operations, LTD
- OV the Farm, LLC
- Villa Mari, LLC
- Montague Development, LLC

3. Section 8.7.3(12) – Remote Winery Tasting Room.

Remote Winery Tasting Rooms are permitted only pursuant to a Special Use Permit. *See* Section 8.7.2 Special Uses that May be Permitted. The Plaintiff operating as a Remote Winery Tasting Room is allegedly:

- Grape Harbor, Inc.

Plaintiffs allege they commenced operations at their wineries at different times.

C. Plaintiffs Claim Preemption of Winery-Related Ordinances.

Plaintiffs assert that various portions of the PTZO are preempted by the MLCC. However, the portions of the PTZO Plaintiffs assert are preempted continue to morph over time. The sections Plaintiffs assert are preempted have changed from Plaintiffs' First Amended Complaint (ECF No. 29) and Plaintiffs' Motion for Partial Summary Judgment (ECF No. 334).

In Plaintiffs' First Amended Complaint, they assert only three sections of the PTZO are preempted:

- "Section 8.7.3(10)(u)(5)(b) conflicts with Mich. Admin Code R. 436.1403(1), which allows wineries to serve alcohol until 2:00 AM every night." (ECF No. 29, PageID.1125, ¶290 of Plaintiffs' First Amended Complaint).

* * *

- "Section 8.7.3(10)(u)5(g) conflicts with MCL 436.1916(11), which grants wineries the right to hose [sic] "[t]he performance or playing of an orchestra, piano, or other types of musical instruments, or singing" without a permit." (*Id.* at PageID.1126, ¶291 of Plaintiffs' First Amended Complaint).

* * *

- "The Winery Ordinances, including Section 8.7.3(10)(u)5(i), conflict with MCL 436.1536, which states a "wine maker [or] small wine maker . . . may own and operate a restaurant . . . as part of the on-premises tasting room . . .," and with MCL 436.1547, which allows Plaintiffs to [sic] a restaurant to cater private events off their premises where they may serve food and alcohol they manufacture."

(*Id.* at PageID.1126, ¶292 of Plaintiffs' First Amended Complaint).

In Plaintiffs' Motion for Partial Summary Judgment (ECF No. 333), they assert that eight sections of the PTZO are preempted:

> 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) of Peninsula Township's Ordinances are preempted by Michigan law.

(ECF No. 333, PageID.12013).

As such, Plaintiffs now seek summary judgment regarding sections of the PTZO that were not alleged in Count VIII of Plaintiffs' First Amended Complaint. The Court has previously recognized this discrepancy. (ECF No. 162, PageID.5986, "However, because the first amended complaint only challenges three specific sections of the Township Ordinances, the Court will only determine whether those three sections – §§ 8.7.3(10)(u)(5)(b), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(i) – are preempted by Michigan law."). Nevertheless, to avoid a waiver argument,

the Township will address preemption for each PTZO section despite Plaintiffs not alleging five of the challenged section in their First Amended Complaint.[3]

Activity Regulated	**Type of Facility Regulated**	**Ordinance Text**
Restaurants	Farm Processing Facility	**6.7.2(19)(a)** – 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.
Restaurants	Farm Processing Facility	**6.7.2(19)(b)(1)(iv)** – Sales of wine by the glass in a tasting room is allowed pursuant to the minimum requirements of the Michigan Liquor Control Commission rules and related Michigan Department of Agriculture permits regarding the sales of limited food items for on-premises consumption
Restaurants	Winery-Chateau	**8.7.3(10)(u)(2)(b)** – Meetings of 501-(C)(3) non-profit groups within Grand Traverse County. These activities are not intended to be or resemble a bar or restaurant and therefore full course meals are not allowed, however light lunch or buffet may be served.
Restaurants	Winery-Chateau	**8.7.3(10)(u)(2)(e)** – No food service other than as allowed above or as allowed for wine tasting may be provided by the Winery-Chateau. If

[3] By making this argument, the Township does not agree to litigate the unasserted claims by consent. Plaintiffs are not entitled to summary judgment on purported claims of preemption not pleaded in their First Amended Complaint. The Township is merely preserving its arguments.

		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.
Restaurants	Remote Tasting Room	**8.7.3(12)(j)** – Retail sale of packaged food items allowed in addition to bottled wine are those which contain wine or fruit produced in Peninsula Township. Such food items shall be produced in a licensed food establishment and properly labeled including the winery logo as the dominant logo. Such food items shall be intended for off premise consumption. Such allowed packaged food items may include mustard, vinegar, non-carbonated beverages, etc.
Hours of Operation	Winery-Chateau	**8.7.3(10)(u)(5)(b)** – Hours of operation for Guest Activity Uses shall be as determined by the Town Board, but no later than 9:30 PM daily.
Music	Winery-Chateau	**8.7.3(10)(u)(5)(g)** - 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.
Catering	Winery-Chateau	**8.7.3(10)(u)(5)(i)** – Kitchen facilities may be used for on-site food service related to Guest Activity Uses but not for off site catering.

D. The Township Amended the "Winery Ordinances" Through Amendment 201 in December, 2022.

On December 13, 2022, the Township passed Zoning Ordinance Amendment No. 201. (Exhibit 2). Amendment 201 makes comprehensive changes to the PTZO and moots a significant number of Plaintiffs' claims. Amendment 201 was passed to address many of the concerns raised and addressed in this litigation. For example, Amendment 201 addressed the Court's previous ruling that struck the term "Guest Activity" from the PTZO as being unconstitutionally vague. (ECF No. 162, PageID.6019). This ruling was not altered by the Court's opinion and order setting aside a substantial portion of its previous June 3, 2022 Opinion and Order. (ECF No. 301, PageID.10698, "[T]he Court will not set aside Subsection V.A.6 (vagueness/due process; PageID.6016-19) because although this claim may implicate PTP members' property interests, PTP's intervention does not change the Wineries' entitlement to summary judgment on this issue.").

Every provision of the PTZO that Plaintiffs challenge as preempted by the MLCC has been removed from the PTZO via Amendment 201.

First, Farm Processing Facilities have been eliminated from the PTZO. Section 6.7.2(19) – Farm Processing Facility has been replaced with Section 6.7.2(19) – Wholesale Farm Processing Facility. (Exhibit 2 at 3-9). As such, Section 6.7.2(19)(a) and Section 6.7.2(19)(b)(1)(iv) no longer exist in the form challenged in Plaintiffs' Complaint. (*Id.*). Moving forward, pursuant to Section 6.7.3(22), the Township will recognize Retail Farm Processing Facilities as a subordinate, accessory use permitted by Special Use Permit subject to the requirements of Section 8.7.3(10) and (11) which have been repealed and replaced. (*Id.* at 9). Now, pursuant to Section 8.7.3(10), Retail Farm Processing Facility (Indoors Only), and Section 8.7.3(11), Retail Farm Processing

Facility (with Outdoor Seating), are permitted only as subordinate, accessory uses by Special Use Permit. (*Id.* at 10-22).

Further, Winery-Chateaus have been eliminated from the PTZO through the repeal of Section 8.7.3(10) – Winery-Chateau. A winery-chateau use is no longer is permitted under the PTZO. As such, prior provisions affecting Winery-Chateaus—Sections 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(e), 8.7.3(10)(u)(5)(b), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(i)—no longer exist in the PTZO. They have been completely eliminated.

Finally, Section 8.7.3(12) – Remote Tasting Rooms has been amended. As such, Section 8.7.3(12)(j) no longer exists in the form challenged by Plaintiffs. Instead, under the PTZO, Section 8.7.3(12)(h) provides:

> Those Remote Tasting Rooms that hold a liquor license may serve limited food items indoors to offset the effects of consuming alcohol. Food items are limited to snacks that require minimal preparation such as cheese and crackers, dried fruit and nuts, and chocolates. No restaurants, cafes or off-site catering shall be permitted as part of a Remote Tasting Room.

(*Id.* at 23).

LAW AND ARGUMENT

III. STANDARD OF REVIEW

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009), which "may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325; 106 S. Ct. 2548, 2552 (1986).

Once the moving party meets this burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56(e); *Alexander*, 576 F.3d at

558. The nonmoving party cannot rest on its pleadings but must present significant probative evidence in support of the complaint to defeat the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248–49, 106 S.Ct. 2505, 2510–11, 91 L.Ed.2d 202 (1986). Irrelevant factual disputes do not create a genuine issue of material fact. *St. Francis Health Care Centre v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000). The opposing party must present a jury question as to each element of the claim. *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000). The failure to prove an essential element renders all other facts immaterial. *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 895 (6th Cir. 1991).

IV. PLAINTIFFS HAVE FAILED TO DEMONSTRATE A CASE OR CONTROVERSY ON THE PREEMPTION CLAIM.

Plaintiffs have been operating their wineries for, in some cases, more than 30 years. Presently, there exists no attempt to revoke Plaintiffs SUPs and no enforcement actions are underway. Plaintiffs have presented no requests for amendments to the SUPs, no requests for variances, no requests for rezoning, or any other request for interpretation of the ordinance that has been denied. Nevertheless, Plaintiffs file what amounts to a declaratory action seeking a judicial determination that the PTZO is preempted. Preemption can be asserted in a declaratory action; however, a case or controversy must exist. No plaintiff can litigate a case in federal court without establishing standing, which requires a showing the plaintiff has suffered (1) an injury that is (2) "fairly traceable to the defendant's alleged unlawful conduct" and that is (3) "likely to be redressed by the requested relief." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560; 112 S.Ct. 2130 (1992). These factors constitute "the irreducible constitutional minimum of standing." *Id. See also Fieger v. Ferry*, 471 F.3d 637, 643 (6th Cir. 2006) ("to establish standing to bring suit, a plaintiff must show that (1) he or she has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly

traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision" (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181; 120 S.Ct. 693 (2000)).

However, the burden to prove standing increases as the case progresses and moves from the pleading phase to dispositive motion practice. The *Lujan* Court recognized that "[i]n response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' . . . which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts, (if controverted) must be 'supported adequately by the evidence adduced at trial.'" *Lujan*, 504 U.S. at 561. Here, Plaintiffs have produced no evidence or affidavits, specific facts, argument, or case law establishing a protected interest or an imminent invasion of that interest, any causal connection between the invasion and the allegedly preempted ordinance, or that a ruling on preemption will have any effect on Plaintiffs' position. Plaintiffs' failure to even remotely address these standing requirements is fatal to this dispositive motion and Plaintiffs' preemption argument.

Even if Plaintiffs asserted they sought amendments to their SUPs that were denied, that is insufficient to allege a protected property interest. *See Mettler Walloon, L.L.C. v. Melrose Twp.*, 281 Mich. App. 184, 209; 761 N.W.2d 293 (2008) (finding no property interest in the granting of a conditional use permit); *see also Tuscola Wind III, LLC v. Almer Charter Twp.*, 327 F.Supp.3d 1028 (E.D. Mich. 2018) (engaging in thorough discussion of the lack of property interest in building permits and SUPs).

The Township intends to file its own dispositive motion on preemption and will address this issue more fully at that time. However, the Township wanted to apprise the Court of this issue at the earliest opportunity.

V. THE MLCC DOES NOT PREEMPT THE PTZO.[4]

Contrary to Plaintiffs' implicit position, the Township has not taken steps to wholly prohibit the wineries' activities, including the operation of restaurants, the playing of amplified music, and operations past 9:30pm. The Township has instead done nothing more than enforce its universally applicable zoning regulations. Plaintiffs have never been prohibited from operating restaurants, the playing of amplified music, and operating past 9:30pm in compliance with the zoning regulations. Rather, pursuant to the Township's authority under the MZEA and police powers, the Township merely restricts the location of those activities. Therefore, the MLCC does not preempt the PTZO.

A. Discussion of Statutory Underpinnings of the MZEA and MLCC.

Because preemption is a question of law concerning statutory interpretation and legislative intent, *DeRuiter v. Twp. of Byron*, 505 Mich. 130; 949 N.W.2d 91, 96 (2020), the first step is always to examine the plain language of the statute, *City of Grand Rapids v. Brookstone Capital, LLC*, 334 Mich. App. 452, 458 (2020).

Public Act 58 of 1998, the Michigan Liquor Control Code of 1998, as codified at MCL § 436.1101, *et seq.*, is:

> AN ACT to create a commission for the control of the alcoholic beverage traffic within this state, and to prescribe its powers, duties, and limitations; to provide for powers and duties for certain state departments and agencies . . . to provide for the incorporation of farmer cooperative wineries and the granting of certain rights and

[4] While not addressed in Plaintiffs' motion, the Township adopted comprehensive changes to the PTZO in December, 2022. Amendment 201 effectively moots Plaintiffs' preemption claims. The Township intends to address this in its own cross-motion for summary judgment on the preemption claims. "In determining which version of a zoning ordinance a court should apply, 'the general rule is that the law to be applied is that which was in effect at the time of decision.'" *Landon Holdings, Inc. v. Grattan Twp.*, 257 Mich. App. 154, 161; 667 N.W.2d 93 (2003) (quoting *MacDonald Advertising Co. v. McIntyre*, 211 Mich. App. 406; 536 N.W.2d 249, 251 (1995)). As discussed above, Amendment 201 eliminates all of the ordinance sections Plaintiffs assert are preempted. Plaintiffs' challenges to the subject ordinance provisions are moot.

> privileges to those cooperatives; to provide for the licensing and taxation of activities regulated under this act . . . .

Plaintiffs aver they are each licensed as a Small Wine Maker or Wine Maker under the MLCC, each possessing a tasting room permit. The MLCC defines a "tasting room" as, among other things: "[a] location on or off the manufacturing premises of a wine maker or small wine maker where the wine maker or small wine maker may provide samples of or sell at retail for consumption on or off the premises, or both, shiners, wine it manufactured, or, for a small wine maker only, wine it bottled." MCL § 436.1113(1)(b).

Plaintiffs contend, once they have obtained a tasting room permit, they may also receive from the MLCC "'a Sunday sales permit, catering permit, dance permit, entertainment permit, specific purpose permit, extended hours permit, [and] authorization for outdoor service.'" (ECF No. 334, PageID.12022-12023, quoting MCL 436.1536(7)(g)).

Plaintiffs contend that by mere possession of a tasting room permit they may operate a restaurant. Plaintiffs point to MCL 436.1536(7)(h), which provides that a small wine maker or wine maker may "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."

Plaintiffs finally contend they are entitled to the performance or playing of any type of musical instrument or singing without any further permit. MCL 436.1916(11) provides, "[t]he following activities are allowed without the granting of a permit under this section: [t]he performance or playing of an orchestra, piano, or other types of musical instruments, or singing."

Plaintiffs contend possessing licenses and permits to sell liquor and engage in accessory uses immunizes them from local zoning. The MLCC, the Commission, and Michigan courts disagree. Throughout their brief, Plaintiffs ignore binding regulations that resolve this dispute. The Commission issued Mich. Admin. Code R. 436.1003(1) which provides that: "**A licensee shall**

comply with all state and local building, plumbing, **zoning**, sanitation, and health **laws, rules, and ordinances** as determined by the state and local law enforcement officials who have jurisdiction over the licensee." (emphasis added). This requirement is explained to each applicant:

> If the applicant intends to sell wine it manufactures under its Wine Maker or Small Wine Maker license in an approved tasting room located on the manufacturing premises under an On-Premises Tasting Room Permit, it must obtain the approval of the local legislative body of the local governmental unit where it will be licensed. The Manufacturer License & Permit Application (Form LCC-150) contains a Local Governmental Approval form (LCC-106a) that can be used by the local governmental unit to approve or disapprove the request for the On-Premises Tasting Room Permit. Local approval in not necessary for the Commission to consider approval and issuance of a Wine Maker or Small Wine Maker license when the applicant does not intend to sell its wine to customers on the premises where it manufactures the wine and has not applied for an On-Premises Tasting Room Permit; however, applicants will still need to comply with any local ordinances specific to manufacturing operations.

(Exhibit 3, Wine Maker or Small Wine Maker Licensing Requirements and General Information). After a license is issued, the Commission warns all license holders that the license is granted "with the stipulation that the licensee is in compliance with Commission Rule R 436.1003." (Exhibit 4). The license then restates the rule and warns, "[i]ssuance of this license by the Michigan Liquor Control Commission **does not waive this requirement**." (*Id.* (emphasis added)). Not only do Plaintiffs ignore R. 436.1003 throughout their brief, but more insidiously they merely attach a screenshot from the Commission showing what licenses and permits they have, without apprising the Court that the Commission warns every licensee – at the top of the license – that they ***shall*** comply with local zoning requirements.

This should not be a surprise. The Commission previously ruled that Plaintiff Chateau Grand Traverse must comply with local zoning or its ability to sell wine will be considered null and void. In other words, the Commission has declared the licenses must yield to local zoning:

> The Commission is compelled to advise Chateau that it must comply with the requirements of R. 436.1003; MAC; supra, in meeting any standards

> imposed on its business operation through applicable local ordinances. If the ultimate resolution of any litigation or dispute between Chateau and Peninsula Township results in the inability of Chateau to meet the standards imposed through this ruling, any permission expressed or implied in this ruling relative to the Licensee's ability to sell wine it manufactures for on-premises consumption shall be considered null and void.

(Exhibit 5, 1998 Declaratory Ruling). While the statutory underpinning of the 1998 ruling has evolved over time, the requirement to comply with local zoning has not. *See Allen v. Liquor Control Comm.*, 122 Mich. App. 718; 333 N.W.2d 20 (1982) (holding that license applicants must comply with local zoning ordinances and that local control of liquor businesses is permissible under police powers);

Finally, Michigan courts consistently recognize municipalities power to regulate MLCC licensees' operations through zoning. *See Maple BPA, Inc. v. Bloomfield Charter Twp.*, 302 Mich. App. 505, 513; 838 N.W.2d 915 (2013) (recognizing that Rule 436.1003 "indicates that the Legislature did not intend to preempt every local zoning statute that concerns alcoholic beverage sales"); *Jott, Inc. v. Clinton Charter Twp.*, 224 Mich. App. 513, 541-543; 569 N.W.2d 841 (1997) (concluding that "this grant of authority [to the MLCC] does not preclude local communities from controlling alcoholic beverage traffic within their boundaries in the proper exercise of their police powers."); *Oppenhuizen v. Zeeland*, 101 Mich. App. 40, 48; 300 N.W.2d 445 (1980) ("the MLCC regulation [now R. 436.1003] recognizes the authority of the municipality over those areas of local control which involve all commercial activity.").

B. Preemption Standards

In *People v. Llewellyn*, 401 Mich. 314, 322; 257 N.W.2d 902, 904 (1977), the Michigan Supreme Court outlined the contours of preemption generally describing three types of preemption: (1) express preemption, (2) field preemption, and (3) direct conflict preemption.

First, "express" preemption exists "where the state law expressly provides that the state's authority to regulate a specified area of the law is to be exclusive." *Id*. Express preemption is not at issue. Plaintiffs through their briefing address only conflict preemption and there is nothing in the MLCC that expressly prohibits local zoning regulation.

Second, field preemption applies if "the state statutory scheme pre-empts the ordinance by occupying the field of regulation which the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation." *Llewellyn*, 401 Mich. at 322. Field preemption is similarly inapplicable as Plaintiffs concede and has been previously decided in *Maple BPA*. 838 N.W.2d at 921 ("[T]he Commission's decision to recognize local zoning authority indicates that the Legislature did not intend to preempt every local zoning statute that concerns alcoholic beverage sales. Thus, we conclude that the state has not expressly provided that its authority to regulate the field of liquor control is exclusive.").

This leaves conflict preemption. "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*, 505 Mich. at 140 (internal citations omitted). **"**If either is silent where the other speaks, there can be no conflict between them. Where no conflict exists, both laws stand." *Walsh v. City of River Rouge*, 385 Mich. 623, 635-36; 189 N.W.2d 318 (1971). As such, so long as the PTZO is not more restrictive than the state statute on the particular issue being regulated, there is no conflict preemption. *Maple BPA*, 838 N.W.2d at 922. The PTZO may add to the conditions of state law "as long as its additional requirements do not contradict the requirements set forth in the statute." *DeRuiter*, 505 Mich. at 147 (citing *Llewellyn*, 401 Mich. at 322).

Michigan law has long recognized the importance of allowing local governments to exercise zoning power as a way to plan development, preserve security and economic structure,

stabilize property values, attract and retain citizenship, *Cady v. City of Detroit*, 289 Mich. 499, 513; 286 N.W. 805, 810 (1939), and to "protect that sometimes difficult to define concept of quality of life." *Vill of Belle Terre v. Boraas*, 416 US 1, 13; 94 S Ct 1536, 1543; 39 L Ed 2d 797 (1974). Accordingly, the MZEA, MCL 125.3101 *et seq*., comprehensively addresses local land use regulation, codifying the general power of local governmental units to regulate land use.

Section 201 of the MZEA specifically provides that local government units may establish zoning districts within its zoning jurisdiction:

> A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of one or more districts within its zoning jurisdiction which regulate the use of land and structures…

MCL 125.3201. This authority is to be "liberally construed" in favor of the Township. CONST Art. 7, § 34. Therefore, the MZEA authorizes a municipality's zoning regulations so long as those regulations are not "inconsistent and irreconcilable with" the Act. *Walsh*, 385 Mich. at 635-36.

The MLCC contemplates the coexistence between state-level regulation of liquor and local zoning. Again, the Commission has adopted obligating licensees to comply with local zoning. Mich. Admin. Code R. 436.1003(1). Moreover, if an applicant for a license does not meet all zoning requirements, the MLCC requires the denial of the application. Mich. Admin. Code R. 436.1105(3).

This issue has been addressed by the Michigan Supreme Court in *DeRuiter* which held that a zoning ordinance that added restrictions on medical marijuana, but did not completely prohibit the activity, was not in conflict with the Michigan Medical Marijuana Act ("MMMA"). In *DeRuiter*, Byron Township enacted an ordinance regulating the location of medical marijuana growing facilities, prohibiting growing facilities in the commercial district but permitting them in

residential districts. Plaintiff DeRuiter argued the MMMA preempted the zoning ordinance because the MMMA expressly addressed where growing facilities could be located.

The Michigan Supreme Court rejected DeRuiter's arguments. The Michigan Supreme Court held the township's zoning ordinance was not preempted by the MMMA, which prohibited any penalty for the medical use of marijuana, because the zoning ordinance did not conflict with the MMMA's conditions on cultivation of marijuana or penalize that activity, but simply proscribed a location for lawful land uses.

Ter Beek II, *Ter Beek v. City of Wyoming,* 495 Mich. 1; 846 N.W.2d 531 (2014), cited favorably by Plaintiffs, was different. In *Ter Beek II*, the City of Wyoming's zoning ordinance "prohibited land uses that were contrary to federal law and subjected such land uses to civil sanctions." *DeRuiter*, 505 Mich. at 142. As such, because the manufacture and possession of marijuana is prohibited under federal law, the City of Wyoming's ordinance "had the effect of an outright ban on the medical use of marijuana in the city." The Michigan Supreme Court in *DeRuiter* distilled the plaintiff's argument:

> The Byron Township ordinance is different than the ordinance we considered in *Ter Beek II*. It allows for the medical use of marijuana by a registered primary caregiver but places limitations on where the caregiver may cultivate marijuana within the township (i.e., in the caregiver's "dwelling or attached garage" as part of a regulated "home occupation"). See Byron Township Zoning Ordinance, § 3.2.H.1 and § 3.2.H.2.d. But despite the differences, DeRuiter argues that the Byron Township ordinance is in direct conflict with the MMMA because the act protects a registered caregiver from "penalty in any manner" for "assisting a qualifying patient ... with the medical use of marihuana" so long as the caregiver abides by the MMMA's volume limitations and restricts the cultivation to an "enclosed, locked facility." See MCL 333.26424(b). The Court of Appeals agreed.

DeRuiter, 505 Mich. at 142-143 (emphasis added).

Initially, the *DeRuiter* Court recognized that its ruling in *Ter Beek II* addressed the MMMA's prohibition on the imposition of a "'penalty in any manner'", *DeRuiter*, 505 Mich. at

143 (quoting *Ter Beek II*, 495 Mich. at 24), but then immediately reiterated the warning it issued in *Ter Beek II* that "'Ter Beek does not argue and we do not hold, that the MMMA forecloses all local regulation of marijuana[.]'" *DeRuiter*, 505 Mich. at 143 (quoting *Ter Beek II*, 495 Mich. at 24 n.9). The *DeRuiter* Court rejected DeRuiter's argument that the only limitation permissible under the MMMA was that the caregiver restrict cultivation to an enclosed, locked facility:

> Were we to accept DeRuiter's argument, the only allowable restriction on where medical marijuana could be cultivated would be an "enclosed, locked facility" as that term is defined by the MMMA. MCL 333.26423(d). Because the MMMA does not otherwise limit cultivation, the argument goes, any other limitation or restriction on cultivation imposed by a local unit of government would be in conflict with the state law. We disagree. The "enclosed, locked facility" requirement in the MMMA concerns what type of structure marijuana plants must be kept and grown in for a patient or caregiver to be entitled to the protections offered by MCL 333.26424(a) and (b); the requirement does not speak to where marijuana may be grown. In other words, because an enclosed, locked facility could be found in various locations on various types of property, regardless of zoning, this requirement is not in conflict with a local regulation that limits where medical marijuana must be cultivated.

DeRuiter, 505 Mich. at 143-144 (emphasis added).

The *DeRuiter* Court noted that it "presumed that 'the city may add to the conditions' in the statute but found it impermissible that 'the ordinance attempt[ed] to prohibit was the statute had permit[ted].' *DeRuiter*, 505 Mich. at 144 (quoting *Nat'l Amusement Co. v. Johnson*, 270 Mich. 613, 617; 259 N.W.2d 342 (1935)). The ordinance in *Ter Beek II*, similar to the ordinance in *Nat'l Amusement*, "had the effect of wholly prohibiting an activity" that the MMMA allowed. But, as the Supreme Court cautioned, "does not mean that the local law cannot 'add to the conditions' in the MMMA. *DeRuiter*, 505 Mich. at 145. Critically, "DeRuiter's argument would result in an interpretation of the MMMA that forecloses all local regulation of marijuana—the exact outcome we cautioned against in *Ter Beek II*." *DeRuiter*, 505 Mich. at 145 (citing *Ter Beek II*, 495 Mich. at 24 n. 9).

Pointing to longstanding precedent, the *DeRuiter* Court noted that it has "quoted favorably to the following proposition":

> The mere fact that the State, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal bylaw are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith, unless the statute limits the requirement for all cases to its own prescription. Thus, where both an ordinance and a statute are prohibitory and the only difference between them is that the ordinance goes further in its prohibition, but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.

DeRuiter, 505 Mich. at 146-147 (quoting *Miller v. Fabius Twp.*, 366 Mich. 250, 256-257; 114 N.W.2d 205 (1962); *Detroit v. Qualls*, 434 Mich. 340, 362; 454 N.W.2d 374 (1990)). "Under this rule, an ordinance is not conflict preempted as long as its additional requirements do not contradict the requirements set forth in the statute." *DeRuiter*, 505 Mich. at 147.

Ultimately, the Michigan Supreme Court ruled:

> The geographical restriction imposed by Byron Township's zoning ordinance adds to and complements the limitations imposed by the MMMA; we therefore do not believe there is a contradiction between the state law and the local ordinance. As in *Qualls* and *Miller*, the local ordinance goes further in its regulation but not in a way that is counter to the MMMA's conditional allowance on the medical use of marijuana. We therefore hold that the MMMA does not nullify a municipality's inherent authority to regulate land use under the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq.*, so long as the municipality does not prohibit or penalize all medical marijuana cultivation, like the city of Wyoming's zoning ordinance did in *Ter Beek II*, and so long as the municipality does not impose regulations that are "unreasonable and inconsistent with regulations established by state law." *Qualls*, 434 Mich. at 363, 454 N.W.2d 374. In this case, Byron Township appropriately used its authority under the MZEA to craft a zoning ordinance that does not directly conflict with the MMMA's provision requiring that marijuana be cultivated in an enclosed, locked facility.

DeRuiter, 505 Mich. at 147-148. *See also Padecky v. Muskegon Charter Township*, ___ N.W.2d ___, 2022 WL 4112075 (2022) (Exhibit 6) (holding that licensee under peddler's statute had the right to sell goods in the township, but he remained subject to where the use was permitted under the zoning ordinance). Importantly, in *DeRuiter*, *Ter Beek II*, and *Padecky* the statutes involved contained no language explicitly requiring the licensee to comply with local zoning. Here, however, through Rule 436.1403, the MLCC explicitly requires licensees to comply with local zoning.

In light of this discussion, it is clear that under Michigan law the Township has the right to zone the wineries as both an inherent right and as expressly authorized by the Commission's administrative rules. The PTZO does not preclude Plaintiffs from operating a restaurant, having amplified music, or extended hours at every location in the Township. To the contrary, Plaintiffs are free to operate a restaurant, have amplified music, or extended hours – just not in the A-1 District. But that is not what Plaintiffs want. Instead, they want to operate unlimited commercial establishments in the A-1 District. The MLCC, by recognizing the power of municipalities to zone, does not support such a broad finding. Instead, such a finding requires the Court to ignore clear regulations and decades of caselaw that creates a delicate balance between zoning, which regulates **where** land uses are permissible, and the MLCC which regulates **how** the business is conducted.

The Township will address each category of ordinances in turn.

C. None of the ordinances challenged constitute a complete prohibition on the conduct in Peninsula Township, but rather limit the conduct based on the Township's authority to zone.

1. *The PTZO can regulate Plaintiffs' hours of operation.*

Plaintiffs asserts Section 8.7.3(10)(u)(5)(b) of the previous version of the PTZO is preempted by MCL 436.2114 and Mich. Admin. Code R 436.1403. The Court previously correctly

determined that it does not and should reach the same conclusion this time as well. The MLCC provides:

> (1) Notwithstanding R 436.1403 and R 436.1503 of the Michigan administrative code and except as otherwise provided under this act or rule of the commission, an on-premises and an off-premises licensee shall not sell, give away, or furnish alcoholic liquor between the hours of 2 a.m. and 7 a.m. on any day.
>
> (2) Subsection (1) does not prevent any local governmental unit from prohibiting the sale of beer and wine between the hours of 7 a.m. and 12 noon on Sunday or between the hours of 7 a.m. on Sunday and 2 a.m. on Monday under section 1111 and does not prevent any local governmental unit from prohibiting the sale of spirits and mixed spirit drink between the hours of 7 a.m. and 12 noon on Sunday or between the hours of 7 a.m. on Sunday and 2 a.m. on Monday under section 1113. A licensee selling alcoholic liquor between 7 a.m. and 12 noon on Sunday shall obtain a permit and pay to the commission an annual fee of $160.00. [MCL 426.2114].

The MLCC *prohibits* the sale of liquor between 2 a.m. and 7 a.m. The statute does not provide that licensees shall be allowed to sell alcohol from 7 a.m. to 2 a.m. as the Plaintiffs demand. (ECF No. 334, PageID.12032 "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.").

Moreover, the statute expressly recognizes that the time limitations on liquor sales are subject to the control of Commission Rules. MCL 436.2114 ("except as otherwise provided under this act or rule of the commission . . .). Again, it bears repeating because Plaintiffs want to selectively cite to the Commission Rules (i.e., Plaintiffs assert Mich. Admin. Code R 436.1403 preempts the PTZO, *see* ECF No. 334, PageID.12031), the Commission has enacted a rule that compels licensees to comply with local zoning requirements: "**A licensee shall comply with all** state and **local** building, plumbing, **zoning**, sanitation, and health **laws, rules, and ordinances** as determined by the state and local law enforcement officials who have jurisdiction over the licensee." Mich. Admin. Code R. 436.1003(1).

The PTZO provides that in the A-1 Agriculture district, Winery-Chateaus, which are only permitted as a special use pursuant to a Special Use Permit, are limited in the hours they can operate. The PTZO does not prohibit what is otherwise permitted by the MLCC. To the contrary, the PTZO has simply added further restrictions or limitations on the wineries conduct. The PZTO (which must be read in its entirety as a zoning ordinance, not in a piecemeal fashion reviewing each ordinance individually) expressly allows for taverns and restaurants in the C-1 commercial zone. Plaintiffs, however, have not sought to operate in the commercial zone; they want to engage in commercial activities in the agricultural zone. The C-1 commercial zone does not contain any limit restrictions on hours of operation. As such, if Plaintiffs want to operate from 7:00 a.m. until 2:00 am, they are free to do so in the commercial zone. The PTZO, therefore, is not a prohibition on the hours of operation as Plaintiffs can operate at extended hours elsewhere in the Township. This is the exact result contemplated in *DeRuiter* and *Padecky* – the Township has not prohibited the activity, it has merely placed limitations on when and where the activities can occur.

In support of their position, Plaintiffs rely on inapplicable and distinguishable cases. First, Plaintiffs point to *Noey v. Saginaw*, 271 Mich. 595; 261 N.W. 88 (1935). *Noey* is distinguishable for several reasons. First, the City of Saginaw adopted a generally-applicable ordinance – not a zoning ordinance that applies only to the A-1 district – which forced all places that were licensed to sell liquor to close at 12:00pm. *Id.* at 597. The ordinance at issue here is a zoning ordinance that is not a blanket prohibition on the sale of liquor in the entire municipality. Section 8.7.1(10)(u)(5)(b) applies only to licensees that choose to operate in the A-1 district. Moreover, the Supreme Court rather quickly distanced itself from *Noey*. In *Mutchall v. City of Kalamazoo*, 323 Mich. 215, 223; 35 N.W.2d 245 (1948), the Michigan Supreme Court recognized that the MLCC "was amended so as to meet the objections raised in [*Noey*], so as to permit local authorities

to control the closing time of licensed establishments." Since 1935, Michigan courts have distanced themselves from the proposition in *Noey* that the MLCC field preempts all local regulation of liquor and have expressly permitted local municipalities to regulate liquor through police power ordinances. *See Jott*, *supra*, 224 Mich. App. at 541 (concluding that "this grant of authority [to the MLCC] does not preclude communities from controlling alcoholic beverage traffic within their boundaries in the proper exercise of their police powers."; *see also Maple BPA*, *supra*, 302 Mich. App. at 513 ("We conclude that the Commission's decision to recognize local zoning authority indicates that the Legislature did not intend to preempt every local zoning statute that concerns alcoholic beverage sales. Thus, we conclude that the state has not expressly provided that its authority to regulate the field of liquor control is exclusive."); *Bundo v. Walled Lake*, 395 Mich. 679, 700-701; 238 N.W.2d 154 (1976) (reaffirming the principal that "the power of local communities to control alcoholic beverage traffic is extremely broad" but that municipalities may not act arbitrarily or capriciously); *Van Buren Twp. v. Garter Belt Inc.*, 258 Mich. App. 594, 608; 673 N.W.2d 111 (2003) (noting the continuation of the "longstanding broad authority of a local government to regulate liquor traffic within its jurisdiction" in finding that state law does not preempt local regulation of nudity at establishments licensed to sell alcohol).

Next, Plaintiffs point to the Sixth Circuit's decision in *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005) for the proposition that they have the unquestionable right to sell liquor from 7:00 a.m. to 2:00 a.m. in the A-1 agricultural zone. *Keego Harbor* does not grant Plaintiffs this right. The Court previously rejected Plaintiffs' reliance on *Keego Harbor* and should do so again. *Keego Harbor* is an unconstitutional conditions case, not a preemption case. There is no discussion of preemption in *Keego Harbor*, let alone discussion that the MLCC preempts local zoning. This makes perfect sense, as the municipal action disputed in *Keego Harbor* had nothing

to do with zoning. In *Keego Harbor*, the city unlawfully harassed Goose Island, the plaintiff brewery, in an attempt to force them to close at 11:00 p.m. *Id.* at 431. The Sixth Circuit held that the city could not force the brewery to close at 11:00 p.m., but in reaching that conclusion, the Sixth Circuit reasoned that the city was withholding governmental benefits from the brewery unless it closed by 11:00 p.m., in violation of the unconstitutional conditions doctrine. *Id.* at 436. *Keego Harbor* is neither a preemption nor zoning case. As such, it is not persuasive. In fact, the Sixth Circuit notes that the MLCC does not grant licensees the right to remain open until 2:00 a.m., but rather licensees cannot sell liquor after 2:00 a.m. *Id.* at 435 ("On 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."). This is the correct conclusion that shows the PTZO is not preempted – as explained in *DeRuiter*, it is permissible for the Township to place further limitations on the activity. Plaintiffs likely cite to *Keego Harbor* because it contains favorable discussion of *Noey*. But the Sixth Circuit's reliance on *Noey* is misplaced, as discussed *supra*, and not binding given that *Keego Harbor* is not a preemption case.

In further avoidance of the plain language of the statute and a clear history of Michigan Courts enforcing municipalities rights to zone liquor-related establishments despite the MLCC, *see Maple BPA*, *Jott*, Plaintiffs direct this Court to non-binding cases from Ohio that interpret Ohio liquor regulations, not MLCC regulations. There is no reason of basis for this Court offer to ignore Michigan precedent in favor of Ohio law.

Finally, Plaintiffs argue the Township's prior Supervisor made concessions during his deposition regarding using facilities for registered guests and operating hours. (ECF No. 334, PageID.12027, 12039-12040). The Township Supervisor is not empowered to interpret or enforce the PTZO. Like all other townships, the Township adopts and amends the PTZO by majority vote

of the board of trustees at an open meeting. *See* MCL 125.3401(5). Under the PTZO, zoning enforcement is up to the Zoning Administrator and Ordinance Enforcement Officers. (ECF No. 29-1, PageID.1160, PTZO Sections 4.1.1, 4.1.2). The former Supervisor's thoughts about what an ordinance means does not bind the Township or alter the ordinance.

2. *The PTZO can regulate amplified music.*

Next, Plaintiffs assert that MCL 436.1916(11) preempts Section 8.7.3(10)(u)(5)(g) of the PTZO that regulates amplified music in the A-1 agricultural district only. Plaintiffs assert this Court previously found the entirety of Section 8.7.3(10)(u)(5)(g) was preempted. (ECF No. 334, PageID.12040). This is false. The Court previously held that "complete prohibition of amplified instrumental music is preempted by Michigan law . . . [h]owever, the limitation on the amplification level of music is merely a limitation and not a prohibition" and was therefore not preempted. (ECF No. 162, PageID.5991-5992). Respectfully, the Court was only halfway correct in its conclusion. The PTZO is not preempted by the MLCC.

Section of 8.7.3(10)(u)(5)(g) of the PTZO – again, which no longer exists – provided: "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." Plaintiffs assert they have an unconditional right to amplification of music in the A-1 agricultural zone, relying on MCL 436.1916(11) which provides: "The following activities are allowed without the granting of a permit under this section: (a) The performance or playing of an orchestra, piano, or other types of musical instruments, or singing." Plaintiffs claim the "Legislature did not leave an option for local units of government to alter this right." (ECF No. 334, PageID.12040). This is incorrect.

The Township, through the PTZO, does not prohibit the sound amplification in the entire Township, rather it only restricts sound amplification in the A-1 agricultural zone. The Township is merely regulating land use through zoning. Like the zoning ordinance upheld in *DeRuiter*, the Township limits sound amplification in the A-1 District, where the Winery-Chateau Plaintiffs are operating. This is not preempted by the MLCC. The MLCC, at MCL 436.1916(11), provides: "The following activities are allowed without the granting of a permit under this section: (a) The performance or playing of an orchestra, piano, or other types of musical instruments, or singing." Section 1916(11) of the MLCC deals with permitting and licensing. It does not address the subject of the Township's zoning ordinance: land use. However, yet again, the Commission expressly recognizes the right of local municipalities to zone and requires that all licensees comply with local zoning. Mich. Admin. Code R. 436.1003(1).

Section 1916(11) does nothing more than allow a licensee, without an additional permit from the Commission, to have musical performances, subject to local zoning regulations, Mich. Admin. Code R. 436.1003(1). Nowhere in §1916(11) does the MLCC require that the Plaintiffs be permitted to host entertainment or amplified music.

> The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. … The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription.

DeRuiter, 505 Mich. at 146 (quoting *Rental Prop Owners Ass'n of Kent Cty v. City of Grand Rapids*, 455 Mich. 246, 262; 566 N.W.2d 514 (1997)).

Ultimately, the Township has not prohibited Plaintiffs from playing amplified music; it has prohibited property from being used for commercial activity where not permitted. Plaintiffs remain free to play amplified music *in an otherwise lawful manner*. It cannot be said the PTZO prohibits

the amplification of music. Plaintiffs can play amplified music as a special land use in the C-1 District, and they can also play amplified music in any other manner traditionally permitted by the PTZO and local regulation. This is the exact result contemplated by *DeRuiter*. The PTZO is not preempted by the MLCC on this issue.

3. *The PTZO can regulate catering*.

Plaintiffs contend they have an unequivocal right to cater in the A-1 District. Specifically, Plaintiffs assert Section 8.7.3(10)(u)(5)(i) of the PTZO is preempted by MCL 436.1547. The Court previously held the PTZO was preempted by the MLCC. Respectfully, the Court reached the incorrect conclusion on this issue.

Section of 8.7.3(10)(u)(5)(i) of the PTZO – again, which no longer exists – provided: "Kitchen facilities may be used for on-site food service related to Guest Activity Uses but not for off site catering.". Plaintiffs contend they have the unconditional right to use their kitchens in the A-1 agricultural zone for off-site catering (a commercial use), relying on MCL 436.1547(1)(b) which provides:

> "Catering permit" means a permit issued by the commission to a . . . holder of a public on-premises license for the sale of beer, wine, or spirits, or any combination thereof, that is also licensed as a food service establishment or retail food establishment under the food law of 2000 . . . which 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. The permit does not allow the permit holder to deliver, but not serve, the beer, wine, or spirits.

The analysis of this issue follows directly from the limitation on sound amplification. Plaintiffs assert the "prohibition on catering directly conflicts with the Liquor Control Code" and is therefore preempted. This is incorrect.

As above, the PTZO does not prohibit the use of a licensee's kitchen for catering, rather it restricts the use of the kitchen for catering purposes – a commercial use – in the A-1 District.

Again, the Township is regulating land use through zoning. *DeRuiter* offers the road map. The PTZO limits restricts the use of kitchens for commercial purposes in the A-1 District, where the Winery-Chateau Plaintiffs are operating. This is not preempted by the MLCC. Section 1547 of the MLCC deals with permitting and licensing – it allows for the granting of a permit to a license holder to cater. It does not address land use. The Commission leaves local regulation of land uses in place, recognizing the power of municipalities to zone. Mich. Admin. Code R. 436.1003(1).

Section 1547 allows the Commission to grant a catering permit to a licensee. As with sound amplification, this is still subject to local zoning regulations. Mich. Admin. Code R. 436.1003(1). Nowhere in §1547 does the MLCC require that local municipalities grant the Plaintiffs the right to engage in commercial uses of their property without any respect to local zoning. Again, *DeRuiter* explains that local municipalities may enact additional requirements beyond what the statute requires, so long as the Township has not prohibited the use. *DeRuiter*, 505 Mich. at 146.

Ultimately, the Township has not prohibited Plaintiffs from using their kitchens for catering purposes; it has prohibited property from being used for commercial activity where not permitted. Plaintiffs remain free to use their kitchens for catering *in an otherwise lawful manner*. The PTZO does not prohibit the use. Plaintiffs can use their kitchens for catering as a special land use in the C-1 District, and they can also do so in any other manner traditionally permitted by the PTZO and local regulation. This is the exact result contemplated by *DeRuiter*. The PTZO is not preempted by the MLCC on this issue.

Plaintiffs also ask that the Court find the Township's prior attorney made concessions regarding "an outright prohibition" on catering for farm processing facilities at oral argument. (ECF No. 334, PageID.12042). The law does not support this request. Prior counsel's statements do not have the effect of nullifying or amending a zoning ordinance. The statements relate to issues

of law not fact. Judicial admissions typically only relate to matters of fact and courts are reluctant to treat an attorney's statements regarding opinions and legal conclusions as binding judicial admissions. *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007) (concluding that "legal conclusions are rarely considered to be binding judicial admissions."). Plaintiffs' citations address judicial admissions of fact not attorney's opinions regarding the meaning or effect of lawfully adopted ordinances – let alone opinions that would completely change the law.

4. *The PTZO can regulate restaurants.*

Finally, while Plaintiffs did not challenge any sections in the PTZO regarding the operation of restaurants in their First Amended Complaint, Plaintiffs now assert that the PTZO is preempted to the extent it limits the operation of restaurants in the A-1 District. The Court previously determined there was a genuine issue of material fact regarding whether sections not alleged in the First Amended Complaint were preempted. (ECF No. 162, PageID.5986-5987). Specifically, Plaintiffs challenge the following sections of the PTZO:

- Section 6.7.2(19)(a)
- Section 6.7.2(19)(b)(1)(iv)
- Section 8.7.3(10)(u)(2)(b)
- Section 8.7.3(10)(u)(2)(e)
- Section 8.7.3(12)(j)

Plaintiffs contend they have an unequivocal right to operate restaurants – yet another commercial use – in the A-1 District. In support of this position, Plaintiffs point to MCL 436.1547(1)(b) which provides: "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."

The analysis regarding restaurants is substantially similar to the previous sections on sound amplification and catering. Plaintiffs assert the "Liquor Control Code is unequivocal that tasting rooms may have restaurants" and that the MLCC "gives the Wineries the right to operate a restaurant as part of their tasting rooms." (ECF No. 334, PageID.12045). While the MLCC does permit licensees to operate a restaurant, it does not preclude local regulation of the land use through zoning. *See* Mich. Admin. Code R. 436.1003(1). The PTZO does not prohibit the restaurants as a land use in the entire Township, rather it restricts restaurants – a commercial use – in the A-1 District. This is a land use regulation permitted under the MZEA. Plaintiffs seek to engage in a commercial land use in an agricultural zone. There is no prohibition of this use in the C-1 District. To the contrary, restaurants are a specifically contemplated use in the C-1 District. The PTZO's limitation on the location of this commercial use is not preempted by the MLCC.

Section 1547 of the MLCC is a permitting statute, it allows a licensee to operate a restaurant – a "wine maker . . . may own and operate a restaurant . . . as part of the on-premises tasting room on the manufacturing premises." MCL 436.1536(7)(h). It does not address land use nor does it restrict a municipality from imposing further restrictions on the activity. The Commission leaves local regulation of land uses in place, recognizing the power of municipalities to zone. *See* Mich. Admin. Code R. 436.1003(1).

Curiously, Plaintiffs assert *DeRuiter* actually supports their position on this issue. However, Plaintiffs appear to confuse – and in the process misquote and misappropriate – *DeRuiter* and *Ter Beek II*. (ECF No. 334, PageID.12046). The Township will endeavor to clarify. Plaintiffs, citing to *Ter Beek II* assert that the Michigan Supreme Court preempted Byron Township's ordinance that "attempted to impose civil fines for medical marijuana use despite the MMMA's allowance of such use . . . ." (ECF No. 334, PageID.12046). However, Byron Township was the

municipality in *DeRuiter* and the Michigan Supreme Court held Byron Township's ordinance was not preempted by the MMMA. Plaintiffs' error is timely in that it again allows the Township to pause and reiterate that the distinction between *DeRuiter* and *Ter Beek II* is dispositive in this case. In *Ter Beek II* the City of Wyoming statute in dispute "prohibited land uses that were contrary to federal law and subjected such land uses to civil sanctions." *DeRuiter*, 505 Mich. at 142. As such, because the manufacture and possession of marijuana is prohibited under federal law, the City of Wyoming's ordinance "had the effect of an outright ban on the medical use of marijuana in the city." *Id.* The Michigan Supreme Court found the MMMA preempted the City of Wyoming's ordinance. *DeRuiter* followed and the Michigan Supreme Court held that a zoning ordinance that added restrictions on medical marijuana, but did not completely prohibit the activity, was not in conflict with the MMMA.

DeRuiter and *Ter Beek II* are dispositive. The PTZO does not completely prohibit restaurants, but rather adds restrictions that restaurants are permitted in the commercial but not agricultural zoning district. Plaintiffs' use of their land is subject to zoning. *See* Mich. Admin. Code R. 436.1003(1). The MLCC does not *require* that local municipalities grant Plaintiffs the right to engage in commercial uses of their property without any respect to local zoning. The PTZO is not preempted.

VI. THE TOWNSHIP HAS NOT VIOLATED THE MZEA.

Plaintiffs argue that if any section of the PTZO is found to be preempted or unconstitutional, it violates the MZEA. As such, Plaintiffs seek summary judgment, in the form of a declaration, on Count IX of the First Amended Complaint. (ECF No. 334, PageID.12053). Plaintiffs offer essentially no support for their proposition. In general, zoning ordinances are presumed to be valid. *Landon Holdings, Inc. v. Grattan Twp.*, 257 Mich. App. 154, 174; 667

N.W.2d 93 (2003). There can be no serious question that the chapters challenged are within the Township's general zoning authority.

The only legal support Plaintiffs can muster for their position is a citation to *Crossroads Outdoor LLC v. Green Oak Charter Twp.*, 2019 WL 1326641 (E.D. Mich., Mar. 25, 2019). This case does not support Plaintiffs' proposition, which was in turn taken from this Court's conclusion that any sections of the PTZO deems to be unconstitutional "will also violate the MZEA, and vice versa." (ECF No. 162, PageID.6028). Respectfully, this conclusion is not supported by the language in *Crossroads*. In *Crossroads*, the eastern district declined to dismiss the plaintiff's MZEA claim for lack of supplemental jurisdiction because constitutional claims remained. *Id.* at *12 ("Defendants argue that if the Court dismisses Counts I-III, Counts IV and V [MZEA] should be dismissed under 28 U.S.C. § 1367(c)(3). But in this case, because Count I is not dismissed in full, the Court has no occasion to dismiss Counts IV and V [MZEA] at this time."). The *Crossroads* Court did not conclude that if the plaintiff was successful on a constitutional claim, it would also be successful on a MZEA claim or "vice versa".

The Court should deny Plaintiffs' motion as the Township has not violated the MZEA.

VII. PLAINTIFFS' REQUEST FOR ATTORNEY'S FEES PURSUANT TO "28 U.S.C. § 1988" IS FRIVOLOUS.

Plaintiffs claim entitlement to attorney's fees for their state-law preemption and MZEA claims. In doing so, they cite "28 U.S.C. § 1988" which does not exist. If the Court were to assume that Plaintiffs meant to cite to 42 U.S.C. § 1988, Plaintiffs have failed to provide any argument or citation to any case law supporting their claim of entitlement to attorney's fees on a preemption claim. This is not a federal constitutional claim that fits within the parameters of 42 U.S.C. § 1983, thereby potentially leading to attorney's fees for the prevailing party under 42 U.S.C. § 1988.

"Section 1983 does not provide a remedy for a violation of the Michigan Constitution; rather, there must be an underlying violation of the federal constitution or federal law." *Mettler Walloon, L.L.C. v. Melrose Twp.*, 281 Mich. App. 184, 196; 761 N.W.2d 293 (2008). "'By the terms of the statute itself, a section 1983 claim must be based upon a federal right.'" *Id.* (quoting *Ahern v. O'Donnell*, 109 F.3d 809, 815 (1st Cir. 1997)). Plaintiffs have cited no authority, statutory or otherwise, supporting their claim for attorney's fees. There is no legal support for an assertion that attorney's fees are recoverable for a state-law preemption claim.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, Defendant Peninsula Township respectfully requests that this Honorable Court deny Plaintiffs' Motion for Partial Summary Judgment.

Respectfully Submitted,

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