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' REPLY TO PTP'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON PREEMPTION CLAIMS AND RESPONSE TO PTP'S CROSS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Contrary to Protect the Peninsula's ("PTP") belief, "[t]he power of the [Township] to enact ordinances is not absolute." *Kropf v. Sterling Heights*, 215 N.W.2d 179, 188 (Mich. 1974). Peninsula Township exceeded its power by enacting ordinances that directly conflict with Michigan law.

II. ANALYSIS

A. Wineries Are Only Permitted In The A-1 Zone.

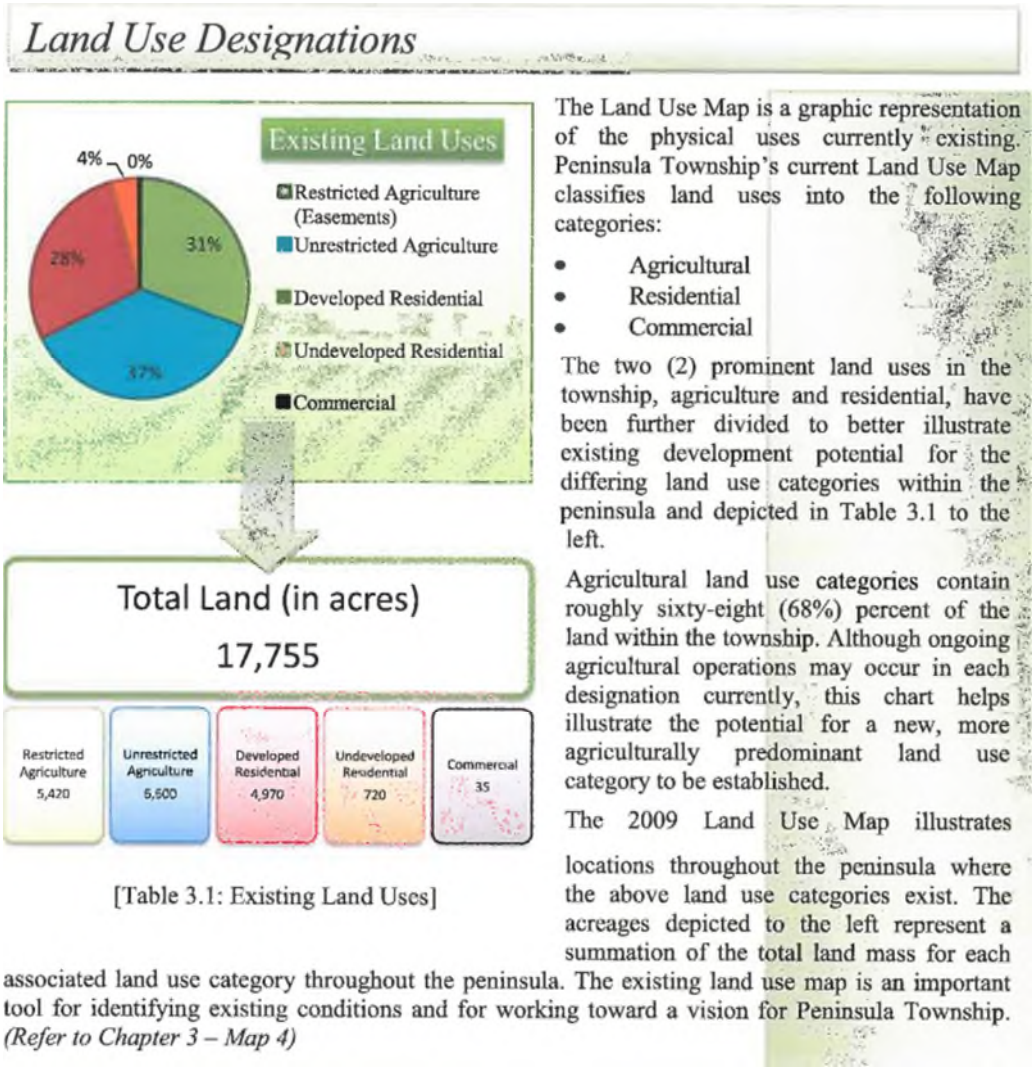
PTP argues that late hours, amplified music, restaurants and catering are allowed, just not in the A-1 Zone. (ECF No. 356, PageID.12957.) But wineries are only allowed in the A-1 Zone. (*See* ECF No. 29-1, Page ID.1183, 1261-1262, Section 6.7.2(19)(b), 8.7.2(11) and 8.7.2(13).) The Ordinances do not permit wineries or winery tasting rooms in the C-1 Zone. (*Id*. at PageID.1178, Section 6.6.2.) In fact, last week Peninsula Township refused to allow an applicant to open a winery in the C-1 Zone because "our zoning ordinance does not allow a wine making/wine tasting operation … in the C zone."[1]

Even if wineries were allowed in the C-1 Zone,[2] that Zone covers just 35 acres across the entire Township and the Wineries would be unable to satisfy the Township's acreage requirements. A Farm Processing Facility must have 40 acres. 6.7.2(19)(b)(4). A Winery-Chateau must have 50 acres. 8.7.3(10)(c) and (g). A Remote Tasting Room only requires a 5-acre parcel, but also requires the ownership of 150 acres somewhere else in the Township. 8.7.3(12)(b), (e). But, of

[1] See https://www.youtube.com/watch?v=fv5PPY613Ak. at 31:00-33:00. The Township Board was also concerned with how approving a winery license in the C-1 Zone might affect this litigation. See video at 34:00.

[2] PTP's assertion that all restaurants in Peninsula Township are in the C-1 Zone is incorrect. The Mission Table Restaurant, Old Mission Inn, and American Legion post are all in Zones other than C-1. (**Exhibit 1**.)

the 17,755 acres in Peninsula Township, only 35 acres (0.002%) is C-1.



Land Use Designations

[Table 3.1: Existing Land Uses]

The Land Use Map is a graphic representation of the physical uses currently existing. Peninsula Township's current Land Use Map classifies land uses into the following categories:

- Agricultural
- Residential
- Commercial

The two (2) prominent land uses in the township, agriculture and residential, have been further divided to better illustrate existing development potential for the differing land use categories within the peninsula and depicted in Table 3.1 to the left.

Agricultural land use categories contain roughly sixty-eight (68%) percent of the land within the township. Although ongoing agricultural operations may occur in each designation currently, this chart helps illustrate the potential for a new, more agriculturally predominant land use category to be established.

The 2009 Land Use Map illustrates locations throughout the peninsula where the above land use categories exist. The acreages depicted to the left represent a summation of the total land mass for each associated land use category throughout the peninsula. The existing land use map is an important tool for identifying existing conditions and for working toward a vision for Peninsula Township. *(Refer to Chapter 3 – Map 4)*

(**Exhibit 2: Master Plan at 14, 17-18; *see also* Exhibit 3**.)

Courts elsewhere have held less restrictive ordinance unlawfully excluded a use. *See McKown v. Board of Supervisors of East Fallowfield Tp.*, 522 A.2d 159 (Pa. Cmwlth. 1987) (calling a mobilehome use permitted in only 0.02% of township area a "a token allowance which has the practical effect of unlawfully excluding mobilehome park development."); *Township of Willistown v. Chesterdale Farms*, 341 A.2d 466 (Pa. 1975) (ordinance permitting 0.7% of township area for apartments was exclusionary)). The Township has functionally prohibited the Wineries from exercising their rights anywhere.

B. Peninsula Township Approved the Winery Tasting Rooms.

Peninsula Township recommended that the Michigan Liquor Control Commission ("MLCC") grant each Winery a license to manufacture and sell wine through a tasting room. *See* MCL 436.1501(2) ("[a]n application for a license to sell alcoholic liquor for consumption on the premises…must be approved by the local legislative body in which the applicant's place of business is located….") This fact distinguishes every case PTP relies upon.

PTP relies on *Morgan v. U.S. Department of Justice*, 473 F. Supp. 2d 756 (E.D. Mich. 2007), for its argument that Peninsula Township can regulate where a winery can operate. But *Morgan*, as well as *Yenson v. U.S. Department of Treasury*, No. 98–70262 (E.D. Mich. Jan. 26, 1999), upon which it relies, are field preemption cases involving generally applicable ordinances. The court "distinguished between a municipality's direct attempt to enter into a field of regulation occupied by a state statutory scheme and a municipal enactment that has only an indirect effect upon the subject matter addressed in a state regulatory scheme." *Id*. at 769. The *Morgan* court noted that a "municipality's attempt to enter a field occupied by a broad state statutory scheme" runs afoul of the preemption test set out in *People v. Llewellyn*, 257 N.W.29 902 (Mich. 1977). *Id*.

Here, the issue is conflict preemption. The Michigan Liquor Control Code ("the Code") gives the Wineries certain rights, while the Ordinances take them away—a direct conflict under Michigan law.[3]

[3] *Gackler Land Co. v. Yankee Springs*, 398 N.W.2d 393 (Mich. 1986), is similarly distinguishable because the federal regulation only pertained to construction standards of mobile homes and the local ordinance did not seek to regulate that area. *Frens Orchards, Inc. v. Dayton Twp*, 654 N.W.2d 346 (Mich. App. 2002), is similar in that MIOSHA regulated health and safety standards but did not regulate the location of migrant camps. Finally, *Jott, Inc. v. Clinton Charter Twp.*, 569 N.W.2d 841, 854 (Mich. App. 1997), is inapplicable because the Liquor Control Code explicitly granted authority to local governments to "prohibit different types of nudity in establishments holding liquor licenses."

PTP also cites *Padecky v. Muskegon Charter Township*, 2022 WL 4112075 (Mich. App. Sept 8, 2022). At most, *Padecky* stands for the proposition that the Township may restrict certain activities to a single Zone. *Id*. at *3. Peninsula Township already restricts wineries to the A-1 Zone. Further, *Padecky* undercuts PTP's argument that the Wineries should relocate to the 35-acre C-1 Zone, as the court concluded that "*if* there is no M zoned property within the Township that could be practically suitable for plaintiff's mobile food stand, then the Township's zoning ordinance would indeed conflict with—and be preempted by—the Act." *Id*. at *4.

C. PTP Asks This Court to Apply the Wrong Preemption Standard.

This Court has already identified the appropriate analysis:

> In the context of conflict preemption, a direct conflict exists when "the ordinance permits what the statute prohibits or the ordinance prohibits what the statute permits." *DeRuiter v. Township of Byron*, 949 N.W.2d 91, 96 (Mich. 2020) [] However, a local unit of government may add conditions to rights granted in a state statute because "additional regulation to that of a state law does not constitute a conflict therewith." *Nat'l Amusement Co. v. Johnson*, 259 N.W. 342, 343 (Mich. 1935). But where a statute allows certain conduct and a local ordinance forbids it, "the ordinance is void." *Id*.

(ECF No. 162, PageID.5987-5988.)

This Court has already rejected PTP's argument[4] that the Code requires compliance with local zoning "because only zoning rules that are not contrary to law are enforceable. Because the Court ruled that numerous sections of these zoning ordinances are unconstitutional or contrary to law, they are preempted." (ECF No. 211, PageID.7809.) PTP's cited cases do not warrant a different result.

In *Oppenhuizen v. Zeeland*, 300 N.W.2d 445 (Mich. App. 1980), the City of Zeeland argued that *Mutchall v. Kalamazoo*, 35 N.W.2d 245 (Mich. 1948), and *Mallach v. Mt. Morris*, 284

[4] ECF No. 356, PageID.12958-12960.

N.W. 600 (Mich. 1939), recognized the authority of a municipality to control alcohol sales through zoning. The court disagreed. While *Mutchall* and *Mallach* "recognize[] the authority of the municipality over those areas of local control which involve all commercial activity," that authority was not boundless. *Id*. at 449. Instead, a "[municipality] has the power to regulate the traffic within its own bounds through the exercise of its police powers, subject to the authority of [MLCC] only when a conflict arises." *Id.* (quoting *Tally v. Detroit*, 220 N.W.2d 778 (Mich. App. 1974)). Because the Code allowed for the sale "of any alcoholic liquor subject to the terms, conditions, limitations and restrictions of the statute," the ability of a local government to restrict the same was very limited:

> The Michigan Constitution is quite clear that once the Legislature acts to create a Liquor Control Commission, that commission shall have complete control of the alcoholic beverage traffic within the state, including the retail sales thereof.

Id. Thus, the court concluded that the City's ordinance was preempted. *Id*.

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

Finally, in *Maple BPA, Inc v. Bloomfield Charter Township*, 838 N.W.2d 915 (Mich. App. 2013), Bloomfield Township amended its ordinances to allow automobile service stations to sell alcohol if they met certain restrictions. *Id.* at 919. These restrictions were not conflict preempted because "the Legislature has not expressly spoken concerning the sale of alcohol in buildings with drive-thru windows, the minimum building area of buildings at which alcohol is sold, or the

number of parking spaces required for a building from which alcohol is sold." *Id.* at 922. But even where the Legislature did speak to the issue, "Bloomfield Township's zoning ordinance is not more restrictive. The ordinance mirrors the statutory language—it does not provide any further constraint, or prohibit what the statute permits." *Id.*

None of the cases stand for the broad proposition that a local government may freely regulate all commercial activity of a liquor licensee. Unlike the Legislature, local authorities only have that authority "expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant." *City of Taylor v. Detroit Edison Co.*, 715 N.W.2d 28, 31-32 (Mich. 2006) (quoting *City of Kalamazoo v. Titus*, 175 N.W. 480 (Mich. 1919)). The Michigan Constitution, Article 4, Section 40, provides that the MLCC "shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof." Mich. Comp. Laws § 436.1201(2) provides similar statutory authority. "Because of the constitutional power granted to it, the commission is said to have plenary power over the liquor traffic in the state." *Semaan v. Liquor Control Comm'n,* 387 N.W.2d 786, 788 (Mich. 1986) (citing *Terre Haute Brewing Co., Inc. v. Liquor Control Comm'n.*, 288 N.W. 338 (Mich. 1939)).

Thus, for a local government to have any "right, power, and duty to control the alcoholic beverage traffic," it must be explicitly delegated in the Code. The Code contains certain delegations:

- Mich. Comp. Laws § 436.1915: "The governing body of a local governmental unit may prohibit by ordinance" the possession or consumption of alcohol in a public park;

- Mich. Comp. Laws § 436.1916: "This section is not intended to prevent a local unit of government from enacting an ordinance prohibiting topless activity or nudity on a licensed premise located within that local unit of government."

- Mich. Comp. Laws § 436.2031: "The license restrictions prescribed under

> this section [for wine auction] and under this act are in addition to those requirements and prescriptions imposed by any local law or ordinance, or resolution of the local unit of government."
>
> - Mich. Comp. Laws § 436.2109(1): "Notwithstanding section 1101, a city, village, or township in which there are no retail licenses for the sale of alcoholic liquor may, by ordinance, prohibit the retail sale of alcoholic liquor within its borders."
>
> - Mich. Comp. Laws § 436.2113(5): "The legislative body of a city, village, or township, by resolution or ordinance, may prohibit the sale of alcoholic liquor on a legal holiday, primary election day, general election day, municipal election day, 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."

Otherwise, a local government does not have the authority to restrict the sale and consumption of alcohol. PTP's interpretation would render these statutory provisions superfluous.

D. Michigan Law Preempts Peninsula Township's Restriction of Winery Hours.

PTP argues that the Ordinances "limit activities in the A-1 District, irrespective of alcohol sales." (ECF No. 356, PageID.12962.) This is not true; the Ordinances only regulate activities at wineries. For example, the only restriction on hours of operation within the Ordinances relates to wineries. The Township's noise ordinance does not prohibit amplified music, but regulates its volume—the only restriction on amplified music relates to wineries. (**Exhibit 4**.)

PTP asserts that by repealing Section 52 of the 1933 Code, the Legislature intended to eradicate conflict preemption therein. But Section 52 related to statutes and local ordinances enforcing Prohibition-era restrictions. Those had to be explicitly repealed when Prohibition ended. There was no reference to hours of service and the *Mutchall* decision does not cite to Section 52. Further, because the statutes and ordinances had been repealed, there was no need to continue the provision in the 1948 version of the Code. PTP's argument, taken to its logical conclusion, would require this Court to overrule *Llewelyn*. Such a result would be absurd. As discussed, MLCC has plenary power over alcohol, subject to very limited exceptions, such as permitting local legislative

bodies the right to approve an application for a liquor license. *See, e.g., Stafford's Restaurant, Inc. v. City of Oak Park,* 341 N.W.2d 235 (Mich. App. 1983). (noting Code includes limited "exception[s]" to MLCC's plenary power.) In the Code, the only exception to MLCC's plenary power over hours relate to Sundays, holidays and election days. See Mich. Comp. Laws § 436.2113. Otherwise, MLCC has "the sole right, power, and duty to control the alcoholic beverage traffic."

Legislation after *Mutchall* demonstrates that the Legislature intended for the control of alcoholic beverage traffic to remain with MLCC. *Mutchall* involved a bottle club which the Code did not regulate; but in 1949, the Legislature enacted legislation bringing bottle clubs within MLCC's control. *Gardner v. Wood*, 414 N.W.2d 706, 708 (Mich. 1987). "The bottle club statute's purpose [was] to maintain complete and exclusive control of liquor traffic in a Liquor Control Commission established by the Legislature." *Id*. at 710.

Finally, PTP's representation that in *Keego Harbor* the district court "found no due process violation in city determinations requiring the brew-pub to close at 11:00 p.m." is inaccurate as neither party was granted summary judgment: "Whether the city's delay in approving Plaintiffs' sign change request was a result of Defendants' alleged attempt to force Goose Island to close early or Defendants' prior dealing with Plaintiffs is an issue of fact material to Plaintiffs' claim. Therefore, it is inappropriate for summary judgment, and the Court will deny both Plaintiffs' and Defendants' motion on this issue." *R.S.W.W., Inc. v. City of Keego Harbor,* 2006 WL 1155228, *3 (E.D. Mich. May 1, 2006).

PTP concedes that the Ordinances do not contain any restriction on Winery Chateau hours, except for guest activities, or on the hours of operation for Farm Processing Wineries and Remote Tasting Rooms. (ECF No. 356, PageID.12966.) This is consistent with the Township's

concessions. (See ECF No. 159, PageID.5884-5885.) But PTP then asks this Court to ignore the testimony from Supervisor Manigold that Peninsula Township was nonetheless enforcing an hours restriction. PTP apparently is arguing that while ordinances can be preempted, local policies cannot be: "Plaintiffs cite no caselaw applying conflict preemption to a practice not codified in any ordinance." (ECF No. 356, PageID.12968.) This is nonsensical and opens a loophole for local authorities to evade liability by enforcing unwritten laws.

Noey is still the law in Michigan and *Mutchall* did not change this. *See, e.g.*, 1990 Michigan A.G. Opinion No. 6609, ECF No. 334-12, PageID.12198 ("In *Noey v City of Saginaw* … 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 preempted.

E. Michigan Law Preempts the Prohibition on Amplified Music.

PTP argues the "MLCC is silent on amplification," but avoids citing MCL 436.1916(1) and, instead, generally asserts that it allows "live orchestral music and singing." (*Id*. at PageID.12969.)) PTP leaves out that the statue allows for the playing of "other types of musical instruments," such as, for example, an amplified guitar.

This Court 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 2022, hearing this Court asked 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.

F. Michigan Law Preempts the Prohibition on Catering.

PTP argues that the "MLCC does not regulate kitchens or food *at all*." (ECF No. 356, PageID.12972.) But the Code regulates food at businesses with MLCC licenses. The word "food" appears in the Code at least 115 times, including:

- Rule 436.1123: A resort licensee must have a "full service restaurant that is open to the public and prepares food on the premises" and not less than 50% of its gross receipts must come from the sale of food or non-alcoholic beverages.

- Rule 436.1433: Entitled "Food Operations", prohibits a licensee, like the Wineries, from contracting with a third party to "operate the food portion of the licensed business without the prior written approval of the Commission."

- Mich. Comp. Laws § 436.1407: A brewpub is required to serve food.

- Mich. Comp. Laws § 436.1521: The holder of a tavern license must be "open for food service not less than 10 hours per day, 5 days a week" and 50% of its gross receipts must come from food sales for on-premise consumption.

- Mich. Comp. Laws § 436.1522: The holder of a banquet facility permit must derive 50% of its gross receipts from the sale of food for on-premises consumption.

PTP's argument is based on the false premise that the MLCC does not regulate the sale of food at licensed businesses. Mich. Comp. Laws § 436.1547 explicitly allows a Winery to obtain a catering permit and cater food and beverages offsite. Any ordinance or policy of Peninsula Township restricting this right is preempted.

G. Michigan Law Preempts the Prohibition of Restaurants.

PTP argues the Code states Wineries "may" have a restaurant, but does not require a restaurant. This distinction is irrelevant; the Code says a winery may have a restaurant and PTZO says a winery may not have a restaurant—a direct conflict.

PTP argues that the Ordinances allow "limited food service in [] tasting rooms" and this should be enough. (ECF No. 356, PageID.12974.) But Michigan has defined the term restaurant broadly to include a host of different food types. *See* Mich. Comp. Laws § 289.1107(t). The Code does not provide the Township the ability to control the types of food a restaurant may serve. Taken to its extreme, the Township could as easily limit the Wineries to selling only certain wines.

Finally, PTP's fear that all restaurants would be exempt from zoning if they hold a liquor license is not well founded. The Code's allowance for restaurants only applies to alcohol manufacturers who have a tasting room. Mich. Comp. Laws § 436.1536(7)(h). Local governments have been granted the authority to approve or not approve a tasting room license. Mich. Comp. Laws § 436.1536. Here, Peninsula Township either approved each of the tasting rooms or that approval was grandfathered in when the law changed on December 19, 2018. *Id*. at 436.1536(18).

The 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. Ordinance 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).

H. The Wineries' Amended Complaint Encompasses Restaurant Preemption.

The Wineries did not wait until the last minute to spring a new legal theory. Counsel for Peninsula Township addressed preemption by MCL 436.1536 in a May 2019 letter attached to the First Amended Complaint. (ECF No. 29-14.) Counsel for the Wineries addressed it in a July 2019 letter attached to the First Amended Complaint. (ECF No. 29-15.) Counsel for the Township then wrote an August 2019 memorandum attached to the First Amended Complaint. (ECF No. 29-16.) Whether the Winery Ordinances were preempted by § 436.1536 was specifically addressed in paragraphs 226 and 292 of the First Amended Complaint.

With its Motion to Intervene, PTP filed a proposed answer denying that portions of the Winery Ordinances were preempted by MCL 436.1536. (ECF 41-1, PageID.2040.) Finally, the Wineries argued in their April 2021 motion for summary judgment that the Ordinances were preempted by MCL 436.1536. (See ECF 54, PageID.2295.) PTP even cited to the statute and restaurant issue in its supplemental filing in support of its Motion to Intervene: "Plaintiffs raise a novel argument that a state statute effective December 19, 2018, grants then-existing wineries 'the absolute right to operate a restaurant as part of their tasting rooms,' effectively inoculating these wineries from township zoning. (ECF No. 54, PageID.2278-2279, 2296.) *See* MCL 436.1536." (ECF No. 56, PageID.2561.) In responding to the Wineries first motion for summary judgment, Peninsula Township fully briefed the restaurant issue. (ECF No. 63, PageID.2765-2769.) That argument included reference to MCL 436.1536, Section 8.7.3(10)(u)(2)(e) and Section 6.7.2(19)(a). (*Id*.) PTP cannot be surprised by an issue which was raised in the First Amended Complaint and litigated for more than two years.[5]

The First Amended Complaint "provide[d] enough information to allow the defendant[s] to know what issues to delve into during discovery." *New Hampshire Ins. Co. v. Marinemax of Ohio, Inc.*, 408 F. Supp. 2d 526, 528 (N.D. Ohio 2006). The Wineries cited several cases where courts found that a complaint provided the defendant with enough information to identify the issues: *New Hampshire Ins.*, 408 F. Supp. 2d at 528, *Webb v. Chase Manhattan Mortgage. Corp.*, 2007 WL 709335, *6 (S.D. Ohio, Mar. 5, 2007) and *Residential Funding Co. LLC, v. Terrace Mortg. Co.*, 2014 WL 3952291, *7 (D. Minn. Aug. 13, 2014). PTP made no effort to distinguish

[5] The cases cited by PTP are not helpful. *Tucker v. Union of Needletrades, Indus. & Textile Emps.*, 407 F.3d 784, 788 (6th Cir. 2005), involved a new argument raised in response to a motion for summary judgement. In *Green Country Food Market, Inc. v. Bottling Group, LLC*, 371 F.3d 1275, 1279-1280 (10th Cir. 2004), the complaint was silent on the relied upon statute.

these cases. Oddly, PTP argues that "Plaintiffs cite no law supporting summary judgment on unpled claims" but then admits that *Razmus v. American Signature, Inc.*, 2020 WL 3429829 (W.D. Mich. May 11, 2020)—a case cited by the Wineries—"was a summary judgment case." (ECF No. 356, PageID.12977.)

Finally, PTP has not addressed the Wineries' argument that 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." By not responding, PTP has conceded that this Court can grant the Wineries relief in the form of determining 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) of the Ordinances preempted by Mich. Comp. Laws § 436.1536.

I. The Township Violated the MZEA.

PTP cites Article 7, Section 34 for the proposition that the "authority granted to local governments must be liberally construed in their favor." (ECF No. 356, PageID.12979.) But Section 34 goes on to state "[t]he powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution." "Municipalities hold no inherent authority to regulate land use. Rather, that authority is derived from the [MZEA]." *Stafa v. City of Troy*, 2023 WL 2938542, *2 (Mich. App. April 13, 2023.) And "[t]he power of the [Township] to enact ordinances is not absolute…." *Kropf*, 391 Mich. at 157 (1974). While an ordinance is typically presumed to be valid, this is "unless [it is] unconstitutional or contrary to law." *Adams Outdoor Advertising, Inc. v. City of Holland*, 600 N.W.2d 339, 344 (Mich. App. 1999.)

This Court has already determined that numerous sections of the Winery Ordinances are unconstitutional, (ECF No. 319, PageID.11883-11889), thus the MZEA was violated.

J. Peninsula Township is Bound by its Concessions.

PTP's argument is confusing, but seemingly everyone agrees that the Winery Ordinances do not contain hours restrictions on Farm Processing and Remote Tasting Rooms, or Chateau Wineries outside of guest activities. (ECF No. 356, PageID.12966; ECF No. 159, PageID.5884-5886.) Despite this, Supervisor Manigold testified that Peninsula Township enforced an hours restriction that the Ordinances did not contain. (ECF No. 334-18, PageID.12142). PTP seems to argue that the Township did not enforce the restriction despite the concessions.

In support of its strange argument, PTP cites *Moskovic v. City of New Buffalo*, 2023 WL 179680, *3 (W.D. Mich. Jan. 13, 2023), but the statements at issue there were different. The city attorney did not make his statement during a court hearing, and the city manager offered only his own interpretation of an ordinance, rather than explaining how it was being enforced. Further, the court recognized that evidence of past practice of enforcing an ordinance are relevant. *Id.* at *8 (citing *Tuscola Wind III, LLC v. Almer Charter Township*, 2018 WL 1250476 (E.D. Mich. Mar. 12, 2018)); *accord Macenas v. Vill. of Michiana*, 446 N.W.2d 102, 110 (Mich. 1989).

That leaves Township counsel's statement to this Court that the Township has an absolute prohibition on amplified music. (ECF No. 159, PageID.5984.) The Wineries contend that the prohibition on amplified music is clear on the face of the ordinance. Peninsula Township does not argue that Section 8.7.3(10)(u)(g) is not a complete prohibition or attempt walk back its counsel's statements. (*See* ECF No. 353, PageID.12928-12930.)

III. CONCLUSION

The Ordinances restrictions at issue here are preempted and also thereby violate the MZEA. Plaintiffs are entitled to an award of their cost and attorneys' fees pursuant to 42 U.S.C. § 1988, against both Peninsula Township and PTP, as well as damages in an amount to be proven at trial.

Respectfully submitted,

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

By: /s/ Joseph M. Infante

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Dated: May 30, 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 4,299 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 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