UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

v.

PENINSULA TOWNSHIP, Michigan Municipal Corporation,

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

Case No: 1:20-cv-01008

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

ORAL ARGUMENT REQUESTED

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON INTERVENOR-DEFENDANT PROTECT THE PENINSULA'S AFFIRMATIVE DEFENSES

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 1

A. Standard of Review 1

B. PTP Impermissibly Enlarges the Scope of This Case by Pleading 38 Affirmative Defenses That Peninsula Township Did Not Plead 1

C. PTP Impermissibly Pleads 3 Affirmative Defenses Respecting Damages for Which PTP Cannot Be Liable 6

D. The Statute of Limitations, Affirmative Defense B, Only Limits the Wineries' Damages, for Which PTP Cannot Be Liable 7

E. PTP Impermissibly Pleads Laches, or Similar Equitable Time-Based Theories, in 6 Affirmative Defenses 8

F. PTP Impermissibly Attempts to Plead Standing In 3 Affirmative Defenses, But Standing is Not an Affirmative Defense 9

G. The Wineries Are Entitled to Summary Judgment on PTP's Affirmative Defenses D and YY, Exhaustion of Administrative Remedies and Ripeness 11

H. PTP Cannot assert Immunity Conferred by Law as Affirmative Defense QQ 15

I. This Court has Already Determined That the SUPs Are Not Contracts, so PTP Affirmative Defenses JJ and KK Fail 16

J. The Wineries Did Not and Could Not Have Waived Their Right to Challenge Unconstitutional Restrictions as Asserted in Affirmative Defense NN 17

K. PTP Cannot Allege a Vested Interest in an Unlawful Ordinances as Pleaded in Affirmative Defenses BBB and DDD 18

L. PTP's Assertions That the Wineries are Public or Private Nuisances in Affirmative Defenses III and JJJ Fail 19

M. PTP Affirmative Defense HH Applies to Employment-Related Actions 19

N. PTP Improperly Asserts Unjust Enrichment as Affirmative Defense KKK 20

O. PTP Improperly Asserts Evidentiary Objections as Affirmative Defenses I, J, K and L 21

P. PTP Asserts 3 "Preliminary Injunction" Issues as Affirmative Defenses O, OO and PP 22

Q. PTP Has Abandoned Affirmative Defenses E and QQ 23

TABLE OF CONTENTS
(continued)

R. PTP's Pleads At Least 22 Affirmative Defenses that Are Not Affirmative Defenses Because They Do Not Admit the Wineries' Allegations 24

S. PTP Affirmative Defenses GGG (Res Judicata) and HHH (Collateral or Judicial Estoppel) are Inapplicable 27

1. The Chateau Chantal consent judgment does not apply 28

2. The Black Star Farms variance was granted for a term not at issue in this lawsuit 29

3. Bonobo's misdemeanor tickets and subsequent consent judgment did not amount to a knowing and intelligent waiver of the right to challenge the constitutionality of the Winery Ordinances 30

T. The Wineries Are Not Seeking to "Amend" or "Modify" the Ordinances and PTP Affirmative Defenses H, N and BBB are Inapplicable 31

U. This Court Should Not Abstain From Hearing the Merits of This Dispute and, so, Judgment Should be Entered on Affirmative Defense LL 32

V. Affirmative Defense LLL Is Not an Affirmative Defense 32

III. CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

Cases

ABC Distributing, Inc. v. Living Essentials LLC,
2016 WL. 8114206 (N.D. Cal. April 26, 2016) 9, 24

ACLU of Kentucky v. McCreary Cnty., Ky.,
607 F.3d 439 (6th Cir. 2010) 23

Adair v. Michigan,
680 N.W.2d 386 (Mich. 2004) 27

Adkins v. Thomas Solvent Co.,
487 N.W.2d 715 (Mich. 1992) 19

Audi AG v. D'Amato,
469 F.3d 534 (6th Cir. 2006) 25

Barr v. Am. Ass'n of Pol. Consultants, Inc.,
140 S. Ct. 2335 (2020) 31

Bd. of Regents of Univ. of Wisconsin Sys. V. Phoenix Int'l Software, Inc.,
653 F.3d 448 (7th Cir. 2011) 15

Bittinger v. Tecumseh Products Co.,
123 F.3d 877 (6th Cir. 1997) 27

Bragg v. Flint Bd. of Educ.,
570 F.3d 775 (6th Cir. 2009) 27, 28, 29

Brodetsky v. Sync Brokerage, Inc.,
2020 WL 8993117 (C.D. Cal. Dec. 22, 2020) 21

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 20

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York,
447 U.S. 557 (1980) 26

Champion Lab'ys, Inc. v. Cent. Illinois Mfg. Co.,
157 F. Supp. 3d 759 (N.D. Ill. 2016) 21

Chateau Operations, Ltd. v. Peninsula Township,
Case No. 98-17195-CZ (Grand Traverse County Circuit Court) 28

TABLE OF AUTHORITIES
(continued)

Clark v. Barnard,
108 U.S. 436 (1883) 16

Dahl v. Bd. of Trustees of W. Michigan Univ.,
558 F. Supp. 3d 561 (W.D. Mich. 2021) 22

DeLage Landen Fin. Servs. v. M.D.M. Leasing Corp.,
2007 WL 4355037 (N.D. Ill. Dec. 10, 2007) 9

Denhollander v. Aquilina,
2017 WL 11776422 23

Detroit Police Officers Ass'n v. Young,
824 F.2d 512 (6th Cir. 1987) 28

Dodds v. U.S. Dep't of Educ.,
845 F.3d 217 (6th Cir. 2016) 25

eBay, Inc. v. MercExchange, LLC,
547 U.S. 388 (2006) 25

EEOC v. SBS Transit, Inc.,
172 F.3d 872 (6th Cir. 1998) 19

EmCyte Corp. v. XLMedica, Inc.,
2022 WL 20287967 (M.D. Fla. Nov. 23, 2022) 20

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 20

Ford Motor Co. v. Trans. Indem. Co.,
795 F.2d 538 (6th Cir. 1986) 24

Forest Serv. v. Emps. For Env't Ethics v. U.S. Forest Serv.,
689 F. Supp. 2d 891 (W.D. Ky. 2010) 16

Gaudiello v. Allied-Signal, Inc.,
1990 WL 304271 (N.D. Ill. Nov. 15, 1990) 24

Heck v. Humphrey,
512 U.S. 477 (1994) 11

Hochman v. Bd. of Ed. of City of Newark,
534 F.2d 1094 (3d Cir. 1976) 12

TABLE OF AUTHORITIES
(continued)

Hugler v. Michigan Dep't of Health & Human Servs.,
2017 WL 9883346 (W.D. Mich. May 26, 2017) 11

Illinois Bell Tel. Co. v. FCC,
911 F.2d 776 (D.C. Cir. 1990) 2

Independent Elec. Contractors of Houston, Inc. v. N.L.R.B.,
720 F.3d 543 (5th Cir. 2013) 2

J.A. Bloch and Co. v. Ann Arbor Twp.,
2022 WL 17876842 (Mich. Ct. App. Dec. 22, 2022) 13, 31

Johnson v. City of Saginaw,
2018 WL 6168036 (E.D. Mich. Aug. 30, 2018) 9, 17

Johnson v. Zerbst,
204 U.S. 458 17

Kelley v. Thomas Solvent Co.,
714 F. Supp. 1439 (W.D. Mich. 1989) 32

Kentucky Press Ass'n, Inc. v. Kentucky,
454 F.3d 505 (6th Cir. 2006) 11

KH Outdoor, LLC v. City of Trussville,
458 F.3d 1261 (11th Cir. 2006) 18

Knick v. Twp. of Scott, Pennsylvania,
139 S. Ct. 2162 (2019) 11, 15

Koontz v. St. Johns River Water Mgmt. Dist.,
570 U.S. 595 (2013) 17

Kuhnle Brothers, Inc. v. County of Geauga,
103 F.3d 516 (6th Cir. 1997) 7

Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency,
24 F. Supp. 2d 1062 (E.D. Cal. 1998) 2

Lawson v. Shelby Cnty., TN,
211 F.3d 331 (6th Cir. 2000) 15

Molotky v. Wells Fargo Bank, N.A.,
2017 WL 9342354 (W.D. Mich. Jan. 4, 2017) 27

TABLE OF AUTHORITIES
(continued)

Monell v. Dep't of Soc. Servs. of City of New York,
436 U.S. 658 (1978) 15

Narton Corp. v. STMicroelectronics, Inc.,
204 F.3d 397 (6th Cir. 2002) 8

Nat'l Ass'n of Regulatory Util. Comm'rs v. Interstate Commerce Comm'n,
41 F.3d 721 (D.C. Cir. 1994) 2

Nat'l Rifle Ass'n of Am. v. Magaw,
132 F.3d 272 (6th Cir. 1997) 11

Nelson v. City of Pontiac,
2007 WL 284333 (Mich. Ct. App. Feb. 1, 2007) 13

Ohio Bell Tel. Co. v. Public Utilities Comm'n,
301 U.S. 292 (1937) 17

Oscar W. Larson Co. v. United Capitol Ins. Co.,
845 F. Supp. 445 (W.D. Mich. 1993) 1

Overstreet v. Lexington-Fayette Urban Cty. Gov't,
305 F.3d 566 (6th Cir. 2002) 23

Paducah River Painting, Inc. v. McNational Inc.,
2011 WL 5525938 (W.D. Ky. Nov. 14, 2011) 32

Paragon Properties Co. v. City of Novi,
550 N.W.2d 772 (Mich. 1996) 12

Patsy v. Bd. of Regents of State of Fla.,
457 U.S. 496 (1982) 11

Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati,
822 F.2d 1390 (6th Cir. 1987) 18

Radio Corp. of America v. Radio Station KYFM, Inc.,
424 F.2d 14 (10th Cir. 1970) 22

Raquet v. Allstate Corp.,
348 F. Supp. 3d 775 (N.D. Ill. 2018) 21

In re Rawson Food Serv., Inc.,
846 F.2d 1343 (11th Cir. 1988) 24

TABLE OF AUTHORITIES
(continued)

Service Source, Inc. v. Office Depot, Inc.,
259 Fed. Appx. 768 (6th Cir. 2008) 22

Smith v. S.E.C.,
129 F.3d 356 (6th Cir. 1997) 28, 29, 30

Steffel v. Thompson,
415 U.S. 452 (1974) 12, 13

Sullivan v. City of Augusta,
310 F. Supp. 2d 348 (D. Me. 2004) 12

Tini Bikinis-Saginaw, LLC v. Saginaw Charter Twp.,
836 F. Supp. 2d 504 (E.D. Mich. 2011) 12

Trevino & Gonzalez Co. v. R.F. Muller Co.,
949 S.W.2d 39 (Tex. Ct. App. 1997) 16

Trojan v. Taylor Twp,
91 N.W.2d 9 (Mich. 1958) 13

Turner v Lansing Tp,
310 N.W.2d 287 (Mich. App. 1981) 13

U.S. v. Royster,
204 F. Supp. 750 (N.D. Ohio 1961) 17, 30

United Pet Supply, Inc. v. City of Chattanooga, Tenn.,
768 F.3d 464 (6th Cir. 2014) 15

United States v. Metropolitan St. Louis Sewer Dist.,
952 F.2d 1040 (8th Cir. 1992) 2

Univ. of Texas v. Camenisch,
451 U.S. 390 (1981) 23

Vinson v. Washington Gas Light Co.,
321 U.S. 489 (1944) 1

Walsh v. River Rouge,
189 N.W.2d 318 (Mich. 1971) 13

Weinberger v. Salfi,
422 U.S. 749 (1975) 12

TABLE OF AUTHORITIES
(continued)

Wilkicki v. Brady,
882 F. Supp. 1227 (D.R.I. 1995).....17, 30

Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985).....14

Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula, Michigan,
41 F.4th 767 (6th Cir. 2022) 6

Winget v. JP Morgan Chase Bank, N.A.,
537 F.3d 565 (6th Cir. 2008) 19

Zivkovic v. S. California Edison Co.,
302 F.3d 1080 (9th Cir. 2002) 24

Statutes

28 U.S.C.....12

42 U.S.C..... *passim*

Mich. Comp. Laws § 125.3606.....30

Michigan Zoning Enabling Act, MCL 125.3042.....3

Court Rules

Fed. R. Civ. P. 16.....32

Fed. R. Civ. P. 19.....4

Fed. R. Civ. P. 56.....1

I. INTRODUCTION

In its First Amended Answer to Plaintiff's First Amended Complaint (ECF No. 291), Intervenor-Defendant Protect the Peninsula ("PTP") asserts a staggering 64 Affirmative Defenses. The Wineries are entitled to summary judgment on these for the reasons set forth below. For some defenses, summary judgment is warranted for multiple reasons. This motion presents either purely legal disputes or permits this Court to make legal rulings on issues for which the facts are truly undisputed, the early resolution of which will narrow the issues at trial.

II. ARGUMENT

A. Standard of Review.

Parties may seek summary judgment of "each claim or defense – or the part of each claim or defense on which summary judgment is sought." Fed. R. Civ. P. 56(a). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories and admissions, together with any affidavits, show there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Courts may enter summary judgment on insufficient defenses. *See, e.g.*, *Oscar W. Larson Co. v. United Capitol Ins. Co.*, 845 F. Supp. 445, 449 (W.D. Mich. 1993) (finding defense legally insufficient and granting summary judgment).

B. PTP Impermissibly Enlarges the Scope of This Case by Pleading 38 Affirmative Defenses That Peninsula Township Did Not Plead.

PTP's Affirmative Defenses J-N, Q-S, W-Y, BB, FF-GG, MM and OO-KKK were not asserted by Peninsula Township, so PTP may not now assert them. The Supreme Court has instructed that "an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944). Thus,

"[i]ntervenors…simply lack standing to expand the scope of the case to matters not [otherwise] addressed." *Nat'l Ass'n of Regulatory Util. Comm'rs v. Interstate Commerce Comm'n*, 41 F.3d 721, 729 (D.C. Cir. 1994) (citing *Illinois Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990)).

Accordingly, courts have held that an intervening defendant may not assert an affirmative defense that the original defendant did not assert. *See, e.g.*, *Independent Elec. Contractors of Houston, Inc. v. N.L.R.B.*, 720 F.3d 543, 551 (5th Cir. 2013) (an intervenor may not raise the affirmative defense of exhaustion of remedies when the original defendant failed to do so); *United States v. Metropolitan St. Louis Sewer Dist.*, 952 F.2d 1040, 1043 (8th Cir. 1992) ("the intervenors have no standing to raise the defense of res judicata to the federal consent decree. This defense, if it is available at all, may be raised only by [the original defendant]. [The original defendant]'s decision not to assert this defense does not give the intervenors standing to raise it, as a party may assert a third party's rights only if, inter alia, the third party is unable to assert its own rights, a condition not present here."); *Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency*, 24 F. Supp. 2d 1062, 1067 (E.D. Cal. 1998) ("The [intervenor] is prohibited from raising a statute of limitations defense. An intervenor is limited to the field of litigation open to the original parties; it cannot enlarge the issues tendered by or arising [from] plaintiff's bill.");

The Wineries are entitled to judgment on the following of PTP's defenses, none of which Peninsula Township pleaded:

- J. Defendant Peninsula Township's attorney lacked authority from the Township Board to negotiate with Plaintiffs for zoning ordinance amendments.

- K. Defendant Peninsula Township's attorney lacked authority under Michigan law to negotiate with Plaintiffs for zoning ordinance amendments.

- L. Defendant Peninsula Township has not made any binding or admissible admissions, nor has the Township otherwise adopted its attorney's pre-litigation legal opinions upon which Plaintiffs' claims rely.

- M. Plaintiff seeks relief in this case that neither Defendant Peninsula Township nor this court can provide under Michigan zoning law.

- N. Modifications to the Peninsula Township zoning ordinance sought by Plaintiffs would be subject to the voters' right of referendum guaranteed by the Michigan Zoning Enabling Act, MCL 125.3042.

- Q. Granting injunctive relief as sought by Plaintiffs would cause immediate irreparable harm to PTP and its members, including neighbors who live near existing wineries.

- R. Granting injunctive relief as sought by Plaintiffs would cause substantial harm to the public interest, as well as to cognizable interests of PTP members and Township residents and voters.

- S. Granting injunctive relief as sought by Plaintiffs would undermine reasonable investment-backed expectations that the zoning ordinance provisions would remain in place subject to a process to amend the zoning ordinance established in the Michigan Zoning Enabling Act, including public hearings, compliance with the standards to amend an ordinance, approvals by the Planning Commission and Township Board, and the right of voter referendum.

- W. The Peninsula Township zoning ordinance winery provisions appliable to Plaintiffs' logo placements and limited products for retail sales directly and narrowly advance substantial local governmental interests in preserving agricultural activities in agricultural zoning districts.

- X. The Peninsula Township zoning ordinance winery provisions that limit weddings and other events at wineries located in the agricultural district directly and narrowly advance substantial local governmental interests in preserving agricultural activities in agricultural zoning districts.

- Y. The Peninsula Township zoning ordinance winery provisions appliable to Plaintiffs' commercial events do not burden Plaintiffs' religious practices.

- BB. The Peninsula Township zoning ordinance winery provisions advance strong and legitimate local interests.

- FF. The Michigan Liquor Control Commission rules require liquor- license-holders, including Plaintiff wineries, to comply with local zoning, Mich Admin Code R. 436.1003, 436.1105(3).

- GG. Plaintiffs are legally required to comply with both liquor laws and their liquor licenses, and also with the zoning ordinance and their special use permits.

- MM. Plaintiffs' claims may be barred by the doctrine of unclean hands, given potential violations by one or more Plaintiff wineries of the terms of their special use permits and zoning requirements.

- OO. This Court has preliminarily determined that the Plaintiffs have not suffered irreparable harm.

- PP. This Court has preliminarily determined that the Plaintiffs have not established a strong likelihood of success on the merits of their claims in the First Amended Complaint.

- QQ. All or some of Plaintiffs' claims are barred by immunity conferred by law.

- RR. The Court lacks subject matter jurisdiction over Plaintiffs' state law claims for preemption and for alleged violation of the Michigan Zoning Enabling Act.

- SS. Plaintiffs have failed to join a party required by Fed. R. Civ. P. 19, namely the owners of the land upon which Plaintiff wineries sit and/or the holders of the Special Use Permits (SUPs) authorizing and establishing the terms and conditions of Plaintiff winery uses.

- TT. Winery land owners and winery SUP holders are necessary because this Court cannot accord complete relief without them. For example, even if successful, the Township and PTP could be subject to a substantially similar future challenge by a winery land owner or SUP holder not a party to this litigation.

- UU. The winery land owners and SUP holders are necessary because disposing of this action in their absence may leave them subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. For example, if Plaintiffs are successful, a winery land owner or SUP holder may face inconsistent obligations between terms of a conservation easement, land use restrictions, SUP, or otherwise.

- VV. All or some Plaintiffs lack standing because they have not alleged an injury that can be fairly traced to the Township's conduct and/or be redressed by the courts because they do not own the land upon which their wineries sit and/or do not hold the SUPs for the winery uses upon that land.

- WW. All or some Plaintiffs lack standing because they have not alleged an injury that can be fairly traced to the Township's conduct and/or be redressed by the courts because the activities they seek to conduct are located upon land under conservation easements and other restrictions that prohibit them from engaging in activities to the same or greater extent as the challenged Zoning Ordinance provisions.

- XX. Plaintiffs who are not winery land owners or SUP holders lack standing to assert the constitutional rights of third parties through facial challenges to the

Zoning Ordinances where they themselves have not been injured by conduct fairly traceable to the Township and redressable by the courts.

- YY. Plaintiffs' claims are unripe to the extent they have failed to apply for SUPs, site plan review, variances, and/or zoning permits for the land uses they seek to undertake or pursue through their Complaint.

- ZZ. Plaintiffs' claims are barred by laches because they unreasonably delayed, failed, refused, and/or neglected to challenge or contest the validity of the zoning provisions for decades after their enactment or after applied to the Plaintiff, and long after they and/or their predecessors in interest knew or should have known about any actual or threatened injury, resulting in prejudice to PTP and its members.

- AAA. Plaintiffs' delay in bringing these claims prejudiced PTP and its members because records and witnesses of legislative history regarding the governmental interests advanced by the zoning provisions and the Township's consideration of less restrictive alternatives are no longer available, impairing PTP's ability to defend the challenged zoning provisions.

- BBB. Plaintiffs' delay in bringing these claims prejudiced PTP and its members because PTP's members have relied for decades on reasonable investment-backed expectations that the zoning provisions would remain in place subject to a process to amend the Zoning Ordinance established in the Michigan Zoning Enabling Act, including public hearings, compliance with the standards to amend an ordinance, recommendations by the Planning Commission, approval by the Township Board, and the right of voter referendum.

- CCC. Plaintiffs' delay in bringing these claims prejudiced PTP and its members because, had Plaintiffs raised or challenged the zoning provisions and SUPs promptly, then Plaintiffs, PTP and the Township could have effectively sought amendments or solutions when there were fewer existing wineries operating under the challenged winery provisions.

- DDD. Plaintiffs' own actions, including by requesting, promoting, drafting, supporting, advocating, accepting, and failing to bring timely challenges to the very zoning provisions they challenge in this case have prejudiced PTP and its members by inducing PTP and its members to rely on the zoning provisions and invest in accordance with them.

- EEE. All or some of Plaintiffs' claims are barred by equitable estoppel and/or waiver because Plaintiffs and/or their predecessors and/or representatives requested, proposed, negotiated, drafted, promoted, supported, and advocated for the adoption of the zoning provisions they now challenge.

- FFF. All or some of Plaintiffs' claims are barred by equitable estoppel, waiver, and/or failure to exhaust administrative and/or judicial remedies because Plaintiffs

voluntarily requested, applied for, accepted, and engaged in winery uses authorized by zoning, SUPs and/or land use permits containing or incorporating the standards of the Zoning Ordinances and/or agreeing to other terms and conditions that prevent or limit commercial uses of Plaintiffs' properties, and Plaintiffs did not object or appeal the Township's decisions regarding their applications in the manner or within the time required by law.

- GGG. All or some of Plaintiffs' claims are barred by collateral estoppel and/or res judicata, due to prior litigation, prior adjudications, and prior resolutions involving one or more of Plaintiffs. This includes, without limit, 1998 litigation by Chateau Operations Ltd and Bob Begin against Peninsula Township in Michigan 13th Circuit Court; 2007 litigation by Old Mission Peninsula Winery Growers against Peninsula Township and Winery at Black Star Farms in Michigan 13th Circuit Court; and violations alleged by Peninsula Township against Oosterhouse Vineyards in 2016 and 2017. There may be others.

- HHH. All or some of Plaintiffs' claims are barred by estoppel or judicial estoppel, due to their taking positions in prior litigation and proceedings inconsistent with their positions in this litigation. This may include, without limit, 2007 proceedings and litigation by Plaintiffs involving a variance and activities by Winery at Black Star Farms;

- III. Plaintiffs' intended engagement in commercial activity in the A-1 Agricultural district without the limitations established by the challenged zoning provisions would be injurious to the public and the surrounding land uses, and therefore would constitute public nuisances in fact and per se.

- JJJ. Plaintiffs' intended engagement in commercial activity near the homes and farms of PTP members without the limitations established by the challenged zoning provisions would be injurious to PTP and its members, and therefore would constitute private nuisances.

- KKK. Plaintiffs' claims may be barred by the doctrine of unjust enrichment, given that they profited from land uses and activities otherwise prohibited in the A-1 Agricultural District except as the benefit/privilege of challenged provisions, where such authorized uses and activities otherwise were limited to the commercial district.

(ECF No. 291, PageID.10329-36.)

C. PTP Impermissibly Pleads 3 Affirmative Defenses Respecting Damages for Which PTP Cannot Be Liable.

"[PTP] is not subject to money damages." *Wineries of the Old Mission Peninsula Ass'n v. Twp. of Peninsula, Michigan*, 41 F.4th 767, 775 (6th Cir. 2022). As this Court explained: "How

much the Wineries are seeking in damages, and what sections of the Ordinance those damages arise from, is simply not relevant to PTP's protection of its property interests." (ECF No. 345, PageID.12558.) Despite this, PTP has pleaded 3 defenses directed to damages:

- C. Plaintiffs have failed, neglected and/or refused to properly and adequately mitigate the damages they claim to have suffered.

- G. Plaintiffs have prayed for damages that are not awardable under controlling law.

- T. Plaintiffs have failed to identify the damage claims for violation of the First and Fourteenth Amendment in which they state zoning ordinance provisions were unconstitutional.

(ECF No. 291, PageID.10328, 10330.)

These damage-based defenses are not relevant to PTP's involvement in this case, so PTP should not be permitted to maintain them and the Wineries are entitled to judgment in their favor.

D. The Statute of Limitations, Affirmative Defense B, Only Limits the Wineries' Damages, for Which PTP Cannot Be Liable.

PTP Affirmative Defense B is that the "[Wineries'] claims are barred in whole or in part as a result of the expiration of the applicable statute of limitations." (ECF No. 291, PageID.10328.) Where a law works a continuing violation, as here, the statute of limitations does not insulate the law from challenge but rather only limits the timeframe of recoverable damages. *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997). This Court addressed this issue in its Order Regarding PTP's Interests and Denying PTP's Motion to Reconsideration:

> PTP's assertion that the Wineries' Commerce Clause claims are time-barred ignores the fact that, for claims brought via § 1983 for alleged "ongoing" constitutional violations from an unconstitutional statute, a new claim arises and a new statute of limitations period commences with each new injury. *See Kuhnle Bros. Inc. v. Cty. of Geauga*, 103 F.3d 516, 522-23 (6th Cir. 1997).

(ECF No. 319, PageID.11888.) The effect of the limitations period here is only to provide a date before which the Wineries may not recover damages. This defense has no applicability to PTP,

however, since PTP cannot be liable for damages. Accordingly, as to PTP's assertion of this defense, the Wineries are entitled to judgment in their favor.

E. PTP Impermissibly Pleads Laches, or Similar Equitable Time-Based Theories, in 6 Affirmative Defenses.

PTP pleads in six Affirmative Defenses that the Wineries' claims are barred by the passage of time, whether using the word "laches" or similar phrasing. The Wineries are entitled to judgment in their favor on these defenses for two reasons. First, they are not a defense to the Wineries' request to enjoin an unlawful ordinance. As this Court has explained:

> the Township intends on asserting its laches defense at trial, which [it argues] may dispose of the entire case (*see* ECF No. 174 at PageID.6568-72). This argument is rejected because laches is not an absolute defense, nor is it a defense to injunctive relief. *See Narton Corp. v. STMicroelectronics, Inc.*, 204 F.3d 397, 412 (6th Cir. 2002) ("Laches only bars damages that occurred before the filing date of the lawsuit . . . It does not prevent plaintiff from obtaining injunctive relief or post-filing damages.").

(ECF No. 211, PageID.7807.)

Second, to the extent laches is a defense to *pre*-filing damages, this defense has no applicability to PTP because PTP cannot be liable for such damages. The Wineries are entitled to judgment in their favor on the following of PTP's defenses:

- II. Plaintiffs' claims may be barred by the doctrine of laches.

- ZZ. Plaintiff's claims are barred by laches because they unreasonably delayed, failed, refused, and/or neglected to challenge or contest the validity of the zoning ordinances for decades after their enactment or after applied to the Plaintiff, and long after they and/or their predecessors in interest knew or should have known about any actual or threatened injury, resulting in prejudice to PTP and its members.

- AAA. Plaintiff's delay in bringing these claims prejudiced PTP and its members because records and witnesses of legislative history regarding the governmental interests advanced by the zoning provisions and the Township's consideration of less restrictive alternatives are no longer available, impairing PTP's ability to defend the challenged zoning provisions.

- BBB. Plaintiffs' delay in bringing these claims prejudiced PTP and its members because PTP's members have relied for decades on reasonable investment-backed expectations that the zoning provisions would remain in place subject to a process to amend the Zoning Ordinance established in the Michigan Zoning Enabling Act, including public hearings, compliance with the standards to amend an ordinance, recommendations by the Planning Commission, approval by the Township Board, and the right of voter referendum.

- CCC. Plaintiffs' delay in bringing these claims prejudiced PTP and its members because, had Plaintiffs raised or challenged the zoning provisions and SUPs promptly, then Plaintiffs, PTP and the Township could have effectively sought amendments or solutions when there were fewer existing wineries operating under the challenged winery provisions.

- DDD. Plaintiffs' own actions, including by requesting, promoting, drafting, supporting, advocating, accepting, and failing to bring timely challenges to the very zoning provisions they challenge in this case have prejudiced PTP and its members by inducing PTP and its members to rely on the zoning provisions and invest in accordance with them.

(ECF No. 291, PageID.10331, 10334.)

F. PTP Impermissibly Attempts to Plead Standing In 3 Affirmative Defenses, But Standing is Not an Affirmative Defense.

PTP pleads three Affirmative Defenses asserting the Wineries lack standing for various reasons. But "lack of standing is not an affirmative defense under federal law." *Johnson v. City of Saginaw*, 2018 WL 6168036, *3 (E.D. Mich. Aug. 30, 2018) (quoting *DeLage Landen Fin. Servs. v. M.D.M. Leasing Corp*., 2007 WL 4355037, at *3 (N.D. Ill. Dec. 10, 2007)); *see also ABC Distributing, Inc. v. Living Essentials LLC*, 2016 WL. 8114206, *2 (N.D. Cal. April 26, 2016) (standing "is not an affirmative defense.") Accordingly, the Wineries are entitled to judgment in their favor on the following of PTP's defenses:

- VV. All or some Plaintiffs lack standing because they have not alleged an injury that can be fairly traced to the Township's conduct and/or be redressed by the courts because they do not own the land upon which their wineries sit and/or do not hold the SUPs for the winery uses upon that land.

- WW. All or some Plaintiffs lack standing because they have not alleged an injury that can be fairly traced to the Township's conduct and/or be redressed by the courts

because the activities they seek to conduct are located upon land under conservation easements and other restrictions that prohibit them from engaging in activities to the same or greater extent as the challenged Zoning Ordinance provisions.

- XX. Plaintiffs who are not winery land owners or SUP holders lack standing to assert the constitutional rights of third parties through facial challenges to the Zoning Ordinances where they themselves have not been injured by conduct fairly traceable to the Township and redressable by the courts.

(ECF No. 291, PageID. 10333.)

Even if standing were an affirmative defense, however, this Court has already determined that each of the Wineries have standing to bring their claims. (*See* ECF No. 319, PageID.11888 ("Tabone, Chateau Grand Traverse, and Bonobo have standing to pursue their claims[.]"); ECF No. 162, PageID.5985 ("[T]he Court will note which Plaintiffs have standing to raise each argument in a footnote after each heading."), PageID.5988 n.12 (finding all Winery-Chateaus "have standing to raise" preemption claims.), PageID.5995 n.16 (concluding all Wineries except Peninsula Cellars may raise Dormant Commerce Clause claims), PageID.6001 n.18 ("Sections of the Township Ordinances applicable to all Plaintiffs are challenged as unlawful regulations of commercial speech; all Plaintiffs have standing to raise the following arguments."), PageID.6008 n.20 (finding all Winery-Chateaus can challenge content-based restrictions), PageID.6011 n.21 (finding all Wineries except Peninsula Cellars can challenge prior restraints), PageID.6014 n.23 (finding all Winery-Chateaus can challenge compelled speech), PageID.6016 n.24 (finding all Winery-Chateaus can raise Due Process vagueness challenge), PageID.6019 n.26 (finding all Winery-Chateaus can challenge wedding prohibition in § 8.7.3(10)(u)(2)(d) and hours restriction in § 8.7.3(10)(u)(5)(b) and all Farm Processing Facilities can challenge wedding prohibition under § 6.7.2(19)(a))).

G. The Wineries Are Entitled to Summary Judgment on PTP's Affirmative Defenses D and YY, Exhaustion of Administrative Remedies and Ripeness.

PTP's Affirmative Defense D is that the Wineries' claims "are barred because of their failure to exhaust administrative or other remedies or to satisfy jurisdictional requirements." (ECF No. 291, PageID.10328.) Similarly, PTP's Affirmative Defense YY asserts that the Wineries' claims "are unripe to the extent they have failed to apply for SUPs, site plan review, variances, and/or zoning permits for the land uses they seek to undertake or pursue through their Complaint." (ECF No. 291, PageID.10333.) "Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Kentucky Press Ass'n, Inc. v. Kentucky*, 454 F.3d 505, 509 (6th Cir. 2006) (quoting *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997)) (internal quotations omitted). Where a claim is "rooted in Defendant's past actions" the claim is "indisputably ripe." *Hugler v. Michigan Dep't of Health & Human Servs.*, 2017 WL 9883346, *1 (W.D. Mich. May 26, 2017). Here, the Wineries' claims are rooted Peninsula Township's passing and enforcement of the Ordinances.

Further, the Wineries are not required to exhaust administrative remedies before bringing Constitutional challenges under § 1983. "[T]he settled rule is that 'exhaustion of state remedies is not a prerequisite to an action under 42 U.S.C. § 1983.'" *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2167 (2019) (quoting *Heck v. Humphrey*, 512 U.S. 477, 480 (1994)) (cleaned up). *See also Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 500 (1982) ("[W]e have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies."); 500-501 ("Nevertheless, this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese* [*v. Board of Education*, 373 U.S. 668 (1963)]).

This is true for facial challenges. *See, e.g.*, *Tini Bikinis-Saginaw, LLC v. Saginaw Charter Twp.*, 836 F. Supp. 2d 504, 518 (E.D. Mich. 2011) ("[B]ecause the facial challenge is premised on the idea that regardless of how the statute is applied, it will be unconstitutional, no final decision of the local government applying the particular ordinance to a specific set of facts is necessary to evaluate its constitutionality."); *Paragon Properties Co. v. City of Novi*, 550 N.W.2d 772, 775 (Mich. 1996) ("Finality is not required for facial challenges because such challenges attack the very existence or enactment of an ordinance.").

It is also true for as-applied challenges. "[W]here the attack on the statute or regulation is purely constitutional, as it is here, the exhaustion of administrative remedies is not required" because the municipality "would not be in a position to rule on the constitutionality of its own ordinance." *Sullivan v. City of Augusta*, 310 F. Supp. 2d 348, 353 (D. Me. 2004) (citing *Weinberger v. Salfi*, 422 U.S. 749, 761–62 (1975)). *See also Hochman v. Bd. of Ed. of City of Newark*, 534 F.2d 1094, 1097 (3d Cir. 1976) ("When appropriate federal jurisdiction is invoked alleging violation of First Amendment rights, . . . we may not insist that he first seek his remedies elsewhere no matter how adequate those remedies may be. Consequently, we hold that the district court erred in dismissing Hochman's action for failure to exhaust administrative remedies.").

A good example is *Steffel v. Thompson*, 415 U.S. 452 (1974). There, the plaintiff sought relief that a Georgia criminal trespass law was unconstitutional as applied. *Id.* at 454-56. The Court rejected that exhaustion was required:

> Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head. When federal claims are premised on 42 U.S.C. [§] 1983 and 28 U.S.C. [§] 1343(3)—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.

Id. at 472–73.

The Court further explicitly rejected that as-applied challenges require exhaustion: "Respondents . . . argue that, although it may be appropriate to issue a declaratory judgment when . . . the attack is upon the facial validity of a state criminal statute, such a step would be improper where, as here, the attack is merely upon the constitutionality of the statute as applied . . . . We reject the argument." *Id.* at 473.

Similarly, exhaustion is not required for preemption challenges under Michigan law because those challenges are rooted in the Constitutionality of the municipality's actions. "It would be unconstitutional for a township to attempt to regulate an issue preempted by state law." *J.A. Bloch and Co. v. Ann Arbor Twp.*, 2022 WL 17876842, at *13 (Mich. Ct. App. Dec. 22, 2022) (citing *Walsh v. River Rouge*, 189 N.W.2d 318 (Mich. 1971)). A challenge alleging an ordinance conflicts with, and is therefore preempted by, state law "is a constitutional attack to the facial validity of the township's ordinances." *Id.* (*See also* ECF No. 162, PageID.5992-5993, n.14 (noting there is no exhaustion requirement for preemption claims)).

Even if exhaustion were required, it may be excused when an administrative appeal would be futile. *Trojan v. Taylor Twp*, 91 N.W.2d 9 (Mich. 1958); *Nelson v. City of Pontiac*, 2007 WL 284333, *2 (Mich. Ct. App. Feb. 1, 2007) ("[W]hile plaintiff was technically required to exhaust all administrative remedies with respect to his 'as applied challenges, such remedies would not have provided meaningful recourse under the specific facts of this case. Plaintiff's only effective avenue of relief was circuit court review.") *See also Turner v Lansing Tp*, 310 N.W.2d 287, 290 (Mich. App. 1981) ("Where it is clear that appeal to an administrative body is an exercise in futility and nothing more than a formal step on the way to the courthouse, resort to the administrative body is not required.").

Here, the Township's attorney agreed that the ordinances were unconstitutional in the summer of 2019 and the Township stated that it would work with the Wineries to revise the ordinances. (*See* ECF No. 29-16, PageID.1392 (conceding Commerce Clause issues); PageID.1396-1397 (conceding First Amendment issues); PageID.1399 (suggesting Township revise ordinances)). Despite this, four years later the ordinances were not amended, and, in fact, Peninsula Township passed a new ordinance which is much stricter than the prior ordinance and also contains many of the provisions this Court has already determined are unconstitutional. Any effort by the Wineries to seek variances or amendments to the Ordinances by petitioning the Township would have been futile.

Finally, with respect to that part of Affirmative Defense D that vaguely asserts the Wineries have failed to satisfy jurisdictional requirements, there is no dispute that the Wineries' Constitutional claims are properly before, and this Court has already found it appropriate to exercise supplemental jurisdiction over the state law claims, denying PTP's motion to dismiss on that issue. (*See* ECF No. 301.[1]) To the extent PTP is relying on the old rule that a property owner whose property has been taken by a local government cannot bring a federal takings claim in federal court until a state court has denied compensation under state law,[2] the Supreme Court recently overruled that requirement and held "a government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under § 1983 at that time…. [B]ecause the violation is complete at the time of the taking,

[1] This Court's decision to exercise supplemental jurisdiction over the Wineries' state law claims is an additional basis for granting summary judgment in the Wineries favor on PTP Affirmative Defense RR, which asserts "[t]he Court lack subject matter jurisdiction over Plaintiffs' state law claims for preemption and for alleged violation of the Michigan Zoning Enabling Act." (ECF No. 291, PageID.10332.)

[2] *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

pursuit of a remedy in federal court need not await any subsequent state action." *Knick*, 139 S. Ct. at 2177. Therefore, Plaintiffs may pursue their takings claim without exhaustion.

Accordingly, the Wineries are entitled to judgment in their favor on PTP Affirmative Defenses D and YY.

H. PTP Cannot assert Immunity Conferred by Law as Affirmative Defense QQ.

PTP forced itself into this lawsuit as a defendant only to turn around and assert that it is immune from the Wineries' claims in this lawsuit—an odd position—alleging in Affirmative Defense QQ that "[a]ll or some of [the Wineries'] claims are barred by immunity conferred by law." (ECF No. 291, PageID.10332.) It is not clear under what legal theory PTP believes it is immune from suit.

The Wineries have not sued any Township official in their individual capacity, so qualified immunity is inapplicable. *See, e.g., United Pet Supply, Inc. v. City of Chattanooga, Tenn.*, 768 F.3d 464, 484 (6th Cir. 2014) ("We have always understood qualified immunity to be a defense available only to individual government officials sued in their personal capacity."). And Peninsula Township, as a subordinate unit of government, is not entitled to Eleventh Amendment immunity from suit. *Lawson v. Shelby Cnty., TN*, 211 F.3d 331, 335 (6th Cir. 2000). Further, the Supreme Court is clear that local bodies are liable for constitutional violations under § 1983. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978) ("Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." (emphasis in original)).

Regardless, none of the above would apply to PTP, which is not a governmental body, and PTP certainly seems to have waived any purported immunity by forcing its own intervention. *See, e.g., Bd. of Regents of Univ. of Wisconsin Sys. V. Phoenix Int'l Software, Inc.*, 653 F.3d 448, 463-64 (7th Cir. 2011) ("When a state chooses to intervene in a federal case, it waives its immunity for

purposes of those proceedings.") (Citing *Clark v. Barnard*, 108 U.S. 436 (1883)). The Wineries are entitled to judgment in their favor on PTP Affirmative Defense QQ.

I. This Court has Already Determined That the SUPs Are Not Contracts, so PTP Affirmative Defenses JJ and KK Fail.

PTP alleges in Affirmative Defenses JJ and KK that the Wineries' claims are barred because any special use permits ("SUPs") are contracts:

- JJ. Plaintiffs' claims are barred by their own voluntary acknowledgement and agreement to the terms of special use permits issued by Peninsula Township.
- KK. Plaintiffs' claims are barred by basic principles of contract law.

(ECF No. 291, PageID.10331.)

This Court has already determined that the SUPs are not contracts: "The Court finds that the SUPs that Plaintiffs are subject to are not contractual agreements." (ECF No. 162, PageID.5994.) This was because "[t]here does not appear to be any bargained-for exchange that would meet the consideration requirement of a valid contract." *Id*. (citing *Trevino & Gonzalez Co. v. R.F. Muller Co.*, 949 S.W.2d 39, 42 (Tex. Ct. App. 1997) ("[W]hen a building permit is issued, none of the elements of a contract are present. There is no offer, no acceptance, and no consideration."); *Forest Serv. v. Emps. For Env't Ethics v. U.S. Forest Serv.*, 689 F. Supp. 2d 891, 903 (W.D. Ky. 2010) (holding that despite the parties classifying their agreements as "contracts," "the plain meaning of the documents [is] that these 'contracts' were intended to be special-use permits," and identifying the difference between permits and contracts)).

While PTP Affirmative Defense KK does not expressly refer to the SUPs, from context it could be referring to nothing else and the Wineries do not assert any contract claims that might otherwise make the defense applicable. The Wineries are entitled to judgment in their favor on defenses JJ and KK.

J. The Wineries Did Not and Could Not Have Waived Their Right to Challenge Unconstitutional Restrictions as Asserted in Affirmative Defense NN.

PTP Affirmative Defense NN is that the Wineries "have waived their ability to challenge the zoning conditions placed upon their [SUPs]." (ECF No. 291, PageID.10332.) This defense is misplaced because, first, PTP is not a party to the SUPs and it is not clear how PTP, a private entity, would have standing to enforce the SUPs. Second, courts are loath to find that parties have waived their constitutional rights. *See U.S. v. Royster*, 204 F. Supp. 750, 753 (N.D. Ohio 1961) ("While a person may waive rights guaranteed by the Constitution the Supreme Court has said that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and do not presume acquiescence in the loss of such rights." (quoting *Johnson v. Zerbst*, 204 U.S. 458) (1938))). *See also Wilkicki v. Brady*, 882 F. Supp. 1227, 1231 (D.R.I. 1995) ("because of the pivotal importance of one's constitutional rights, courts do not presume acquiescence in the loss of fundamental rights…but rather indulge every reasonable presumption against waiver of fundamental rights.") (quoting *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937) and *Johnson*, 304 U.S. at 464 (1938)) (cleaned up).

The SUPs do not purport to contain a waiver of any constitutional rights. (*See* ECF Nos. 32-5 (Brys), 32-6 (Bonobo), 32-7 (Bowers Harbor), 32-8 (Chateau Grand Traverse), 32-9 (Peninsula Cellars) 32-10 (Hawthorne), 32-11 (Chateau Chantal), 63-10 (Mari).)[3] Further, it would be impermissible for the Township to have conditioned the SUPs upon the Wineries agreeing to waive their rights. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013) ("Those cases reflect an overreaching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the

[3] As uses by right, Two Lads, Black Star, and Tabone do not have special use permits.

government from coercing people into giving them up."). There is simply no evidence that the Wineries did, or could have, waived their right to challenge the Ordinances as violating the Constitution and Michigan law. (*See also* ECF No. 145, PageID.5638-5639; ECF No. 146, PageID.5731-5732.)

K. PTP Cannot Allege a Vested Interest in an Unlawful Ordinances as Pleaded in Affirmative Defenses BBB and DDD.

In Affirmative Defenses BBB and DDD, PTP asserts that it has a vested interest in the unlawful ordinance regulating the zoning of the Wineries' properties. PTP alleges:

- BBB. Plaintiffs' delay in bringing these claims prejudiced PTP and its members because PTP's members have relied for decades on reasonable investment-back expectations that the zoning provisions would remain in place subject to a process to amend the Zoning Ordinance established in the Michigan Zoning Enabling Act, including public hearings, compliance with the standards to amend an ordinance, recommendations by the Planning Commission, approval by the Township Board, and the right of voter referendum.

- DDD. Plaintiff's own actions, including by requesting, promoting, drafting, supporting, advocating, accepting, and failing to bring timely challenges to the very zoning provisions they challenge in this case have prejudiced PTP and its members by inducing PTP and its members to rely on the zoning provisions and invest in accordance with them.

(ECF No. 291, PageID.10334.)

PTP is not claiming that its members have a vested interest in the zoning designations of their own property, *but rather of the property on which the Wineries are located.* PTP cannot have an interest in the enforcement of an unlawful ordinance. *See KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261 (11th Cir. 2006) ("The public has no interest in enforcing an unconstitutional ordinance."); *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (finding that the public interest is in "prevention of enforcement of ordinances which may be unconstitutional"). The Wineries are entitled to summary judgment on PTP Affirmative Defense BBB and DDD.

L. PTP's Assertions That the Wineries are Public or Private Nuisances in Affirmative Defenses III and JJJ Fail.

PTP Affirmative Defenses III and JJJ asserted that the Wineries' "intended engagement in commercial activity" would constitute public and private nuisances, respectively. (ECF No. 291, PageID.10335-26.) The Wineries' counsel have been unable to locate any case law where a nuisance was permitted to be asserted as an affirmative defense and Michigan law historically treats private and public nuisances as causes of action. *See Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 719-23 (Mich. 1992) (explaining evolution of nuisance actions).

Further, that the Wineries might engage in future activities that might constitute a nuisance has nothing to do with whether the Ordinances are lawful. Such speculation also renders any theory of nuisance not ripe. *See Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 581-82 (6th Cir. 2008) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (cleaned up and citations omitted)). Even if the Wineries were certain to engage in future activities, such as hosting a wedding, the issue of whether that activity would constitute an actionable nuisance upon which PTP could file suit would not be ripe. For these reasons, the Wineries are entitled to entry of judgment in their favor on defenses III and JJJ.

M. PTP Affirmative Defense HH Applies to Employment-Related Actions.

In Affirmative Defense HH, PTP alleges that the Wineries "unreasonably failed to take advantage of preventative and corrective opportunities provided." (ECF No. 291, PageID.10331.) This is an affirmative defense applicable in response to a claim of harassment or discrimination. *See, e.g., EEOC v. SBS Transit, Inc.*, 172 F.3d 872, at *1 (6th Cir. 1998) (Table) ("[A] defending employer may raise an affirmative defense [comprising] two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing

behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative and corrective opportunities provided by the employer to avoid harm…." (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 777–78 (1998)). Counsel for the Wineries did not find any non-employment contexts where this defense was applicable. To the extent that PTP intended this defense to equate to a failure to mitigate damages, because PTP cannot be liable for damages, PTP is not entitled to assert any defenses to damages. To the extent that PTP intended this defense to equate to a failure to exhaust administrative remedies, such defense likewise fails for the reasons set forth above. The Wineries are entitled to judgment in their favor on defense HH.

N. PTP Improperly Asserts Unjust Enrichment as Affirmative Defense KKK.

PTP Affirmative Defense KKK is that the Wineries' claims "may be barred by the doctrine of unjust enrichment, given that they profited from land uses and activities otherwise prohibited in the A-1 Agricultural District except as the benefit/privilege of challenged provisions, where such authorized uses and activities otherwise were limited to the commercial district." (ECF No. 291, PageID.10336.) PTP appears to be asserting that because the Wineries made some money operating in the A-1 Agricultural District, the Wineries cannot now complain. But PTP overlooks that the Wineries have operated in compliance with unlawful ordinances, which have *cost* the Wineries a substantial amount of money. The Wineries were not unjustly enriched. Further, this defense could not apply to PTP. PTP alleges that the Wineries received a benefit—money—but has not alleged that the Wineries' retention of that benefit impacts PTP. The Wineries did not retain any of PTP's funds.

Moreover, courts view unjust enrichment as a theory of recover and not as an affirmative defense. *See, e.g.*, *EmCyte Corp. v. XLMedica, Inc.*, 2022 WL 20287967, at *2 (M.D. Fla. Nov. 23, 2022) ("Unjust enrichment is a theory of recovery. The court finds no authority recognizing

unjust enrichment as an affirmative defense."); *Brodetsky v. Sync Brokerage, Inc.*, 2020 WL 8993117, at *3 (C.D. Cal. Dec. 22, 2020) (striking affirmative defense of unjust enrichment to a TCPA action); *Raquet v. Allstate Corp.*, 348 F. Supp. 3d 775, 787 (N.D. Ill. 2018) ("[T]his Court notes that unjust enrichment is not an affirmative defense under Illinois law…"). Counsel for the Wineries have been unable to find any cases where unjust enrichment was found to be an affirmative defense to a claim that an ordinance was unlawful. The Wineries are entitled to summary judgment on defense KKK.

O. PTP Improperly Asserts Evidentiary Objections as Affirmative Defenses I, J, K and L.

PTP Affirmative Defenses I and L are facially evidentiary objections:

- I. Plaintiff's reliance of the legal opinions rendered by Defendant Peninsula Township's attorney during pre-litigation negotiations in this matter is inadmissible evidence.

- L. Defendant Peninsula Township has not made any binding or admissible admissions, nor has the Township otherwise adopted its attorneys' pre-litigation legal opinions upon which Plaintiffs' claims rely.

(ECF No. 291, PageID.10329.)

Evidentiary objections are not affirmative defenses. *See, e.g., Champion Lab'ys, Inc. v. Cent. Illinois Mfg. Co.*, 157 F. Supp. 3d 759, 768 (N.D. Ill. 2016) ("the Eleventh Affirmative Defense (Federal Rules of Evidence 404(b) and 408(a))—is not an affirmative defense but rather a claim that certain evidence should not be admitted in later motion practice, at a hearing or at trial. CIMCO can raise such claims if necessary in this litigation, and does not require the assertion of an affirmative defense to preserve these evidentiary objections."). PTP Affirmative Defenses I and L expressly allege that certain evidence is not admissible. The Wineries are entitled to entry of judgment in their favor on these two defenses.

Although not using the words "inadmissible" or "admissible," PTP Affirmative Defenses J and K are functionally the same:

- J. Defendant Peninsula Township's attorney lacked authority from the Township Board to negotiate with Plaintiffs for zoning ordinance amendments.

- K. Defendant Peninsula Township's attorney lacked authority under Michigan law to negotiate with Plaintiffs for zoning ordinance amendments.

(ECF No. 291, PageID.10329.)

An agent's purported lack of authority to contract on behalf of a principal is, perhaps, an affirmative defense to a contract action. *Compare Radio Corp. of America v. Radio Station KYFM, Inc.*, 424 F.2d 14, 17 (10th Cir. 1970) (lack of authority to contract is an affirmative defense) *with Service Source, Inc. v. Office Depot, Inc.*, 259 Fed. Appx. 768, 773 (6th Cir. 2008) (lack of authority is not an affirmative defense under Michigan law). But even if lack of authority were an affirmative defense to a contract action, the Wineries are not asserting a contract action.

The Wineries intend to use admissions made by the Township's agents, including its attorneys' concessions on the invalidity of the Ordinances, against the Township. In such instance, however, an assertion that an agent lacked authority to speak for the Township is merely a hearsay objection subject to the rules of evidence. Because evidentiary objections are not affirmative defenses, the Wineries are entitled to judgment in their favor on defenses I, J, K and L.

P. PTP Asserts 3 "Preliminary Injunction" Issues as Affirmative Defenses O, OO and PP.

PTP asserts three defenses that address whether a preliminary injunction should issue. PTP Affirmative Defense O is that the Wineries "do not have a strong likelihood of success on the merits of their claims such that injunctive relief is improper. (ECF No. 291, PageID.10329.) The "likelihood of success" standard is considered by courts only when issuing temporary restraining orders or preliminary injunctions. *Dahl v. Bd. of Trustees of W. Michigan Univ.*, 558 F. Supp. 3d

561, 563 (W.D. Mich. 2021). This standard is inapplicable to permanent injunctive relief, as permanent injunctions require "actual success on the merits." *ACLU of Kentucky v. McCreary Cnty., Ky.*, 607 F.3d 439, 445 (6th Cir. 2010). If the Wineries establish actual success on summary judgment or at trial, they will be entitled to a permanent injunction. Whether they have a "likelihood" of success is not a relevant issue.

Similarly, PTP Affirmative Defenses OO and PP each state that this Court "has preliminarily determined" that the Wineries did not suffer irreparable harm, or establish a likelihood of success on the merits, respectively. (ECF No. 291, PageID.10332.) These defenses are also inapplicable. In enjoining those sections of the Ordinances that this Court found unconstitutional or contrary to state law, this Court explained that "findings of fact and conclusions of law made by a court [at the] preliminary injunction [phase] are not binding at trial on the merits." (ECF No 162, PageID.6029 (citing *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981))). Although this Court's injunction has been vacated, the rationale remains—this Court's determinations made at the preliminary injunction phase are *preliminary*. Further, "[i]n cases concerning the deprivation of constitutional rights, the deprivation of the constitutional right itself constitutes an irreparable harm." *Denhollander v. Aquilina*, 2017 WL 11776422, at *4 (citing *Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566 (6th Cir. 2002)). For these reasons, the Wineries are also entitled to judgment in their favor on defenses OO and PP.

Q. PTP Has Abandoned Affirmative Defenses E and QQ.

PTP Affirmative Defenses E and QQ are:

- E. Some or all of Plaintiffs' claims are preempted by applicable state or federal law.
- QQ. Some or all of Plaintiff's claims are barred by immunity conferred by law.

(ECF No. 291, PageID.10328, 10332.)

In discovery, the Wineries asked PTP to elaborate on these defenses, and PTP responded that: "PTP does not presently intend to pursue this defense [*i.e.*, each of E and QQ]," and further stated that if PTP changed its mind, PTP would supplement its discovery responses. (**Exhibit 1: PTP Ver. Second. Supp. Resp., Nos. 1 and 4**.) Discovery has now closed and PTP has not supplemented either answer. Accordingly, the Wineries are entitled to judgment in their favor on PTP Affirmative Defenses E and QQ.

R. PTP's Pleads At Least 22 Affirmative Defenses that Are Not Affirmative Defenses Because They Do Not Admit the Wineries' Allegations.

PTP Affirmative Defenses A, F-G, M, O-R, T-EE, and OO-PP are not affirmative defenses because they do not admit the Wineries allegations and then raise new matter to overcome the legal effect of those allegations. Rather, they merely assert that the Wineries will be unable to prove an element of the Wineries' case.

For example, PTP Affirmative Defense A asserts that the Wineries have failed to state a claim. (ECF No. 291, PageID.10328.) "This is not an affirmative defense." *ABC Distributing, Inc. v. Living Essentials LLC*, 2016 WL. 8114206, *2 (N.D. Cal. April 26, 2016). An affirmative defense "raises matter extraneous to the plaintiff's *prima facie* case…." *Ford Motor Co. v. Trans. Indem. Co.*, 795 F.2d 538, 546 (6th Cir. 1986). A "defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense." *Zivkovic v. S. California Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002). *See also In re Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988) ("[a] defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense"); *Gaudiello v. Allied-Signal, Inc.*, 1990 WL 304271, at *1 (N.D. Ill. Nov. 15, 1990) (an affirmative defense must admit the allegations of the complaint and not attack their sufficiency).

Each of the following PTP Affirmative Defenses suffer from the same defect—they fail to cede that the Wineries are entitled to prevail except for some new, affirmative matter. Rather, they do nothing more than assert that the Wineries cannot prove their case.

- A. Plaintiffs have failed to state a claim upon which relief can be granted.
- F. Plaintiffs have failed to identify any Michigan or federal law in which zoning ordinance provisions were invalidated for restrictions placed on liquor-license holders.
- G. Plaintiffs have prayed for damages that are not awardable under controlling law.
- M. Plaintiffs seek relief in this case that neither Defendant Peninsula Township nor this court can provide under Michigan zoning law.
- O. Plaintiffs do not have a strong likelihood of success on the merits of their claims such that injunctive relief is improper.
- P. Plaintiffs have failed to identify irreparable injury such that their claim for injunctive relief is improper.
- Q. Granting injunctive relief as sought by Plaintiffs would case immediate harm to PRP and its members, including neighbors who live near existing wineries.[4]
- R. Granting injunctive relief as sought by Plaintiffs would case substantial harm to the public interest, as well as to cognizable interests of PTP members and Township residents and voters.
- T. Plaintiffs have failed to identify the damage claims for violation of the First and Fourteenth Amendment in which they state zoning ordinance provisions were unconstitutional.
- U. Plaintiffs have failed to identify any provision of Peninsula Township's zoning ordinances that compel or suppress their speech in violation of the First our Fourteenth Amendment.

[4] With respect to Affirmative Defenses Q and R, courts "balance the harms" when deciding to grant injunctive relief in the first instance. *Audi AG v. D'Amato*, 469 F.3d 534, 500 (6th Cir. 2006) (citing *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006)). As such, any "balancing" would not be considered an affirmative defense, as it does not avoid a plaintiff's claim. Regardless, enjoining laws that violate the Constitution is "always in the public interest." *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016).

- V. Plaintiffs have failed to identify any provision of Peninsula Township's zoning ordinances that constitute prior restraints or are unconstitutionally vague.[5]

- W. The Peninsula Township zoning ordinance winery provisions applicable to Plaintiffs' logo placement and limited products for retail sales directly and narrowly advance substantial local governmental interests in preserving agricultural activities in agricultural zoning districts.[6]

- X. The Peninsula Township zoning ordinance winery provisions that limit weddings and other events at wineries located in the agricultural district directly and narrowly advance substantial local governmental interests in preserving agricultural activities in agricultural zoning districts.

- Y. The Peninsula Township zoning ordinance winery provisions appliable to Plaintiff's commercial events do not burden Plaintiffs' religious practices.

- Z. Plaintiffs have received adequate due process with respect to the claims made in this matter.

- AA. Plaintiffs have failed to identify any provision of the Peninsula Township zoning ordinances that violate the dormant Commerce Clause.[7]

- BB. The Peninsula Township zoning ordinance winery provisions advance strong and legitimate local interests.

- CC. The Peninsula Township zoning ordinances have nor resulted in any regulatory taking as to the Plaintiffs.

- DD. The Michigan Liquor Control Code does not expressly preempt any portion of the Peninsula Township zoning ordinances.

- EE. The Peninsula Township zoning ordinances are not subject to field preemption by the Michigan Liquor Control Code.

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[5] This Court has already determined that the Winery Ordinances are unconstitutionally vague. (ECF No. 162, PageID.6016-6019.)

[6] Similarly, with respect to PTP Affirmative Defenses W, X and BB, PTP asserts the Ordinances advance "substantial" or "strong and legitimate" interests. In a constitutional challenge, the government must assert the interests it seeks to further. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980). This does not mean, however, that the government's assertion of an interest is an affirmative defense.

[7] This Court has already determined that the Winery Ordinances violated the dormant Commerce Clause. (ECF No. 162, PageID.5995-6001.)

- OO. This Court has preliminarily determined that the Plaintiffs have not suffered irreparable harm.

- PP. This Court has preliminarily determined that the Plaintiffs have not established a strong likelihood of success on the merits of their claims in the First Amended Complaint.

(ECF No. 291, PageID.10328-32.)

Because each of the above Affirmative Defenses functionally denies that the Wineries can prove their case, they are not affirmative defenses, and the Wineries are entitled to judgment in their favor on each of PTP Affirmative Defenses A, F-G, M, O-R, T-EE, and OO-PP.

S. PTP Affirmative Defenses GGG (Res Judicata) and HHH (Collateral or Judicial Estoppel) are Inapplicable.

PTP Affirmative Defenses GGG and HHH assert that the Wineries' claims are barred by res judicata, collateral estoppel and/or judicial estoppel due to prior litigation: the 1998 Chateau Chantal litigation; 2007 Black Star Farm litigation; and 2016-17 violations alleged by Peninsula Township against OV the Farm (Bonobo). (ECF No. 291, PageID.10335.)

"Res judicata prevents parties from filing multiple lawsuits to litigate the same cause of action." *Molotky v. Wells Fargo Bank, N.A.*, 2017 WL 9342354, *6 (W.D. Mich. Jan. 4, 2017) (citing *Adair v. Michigan*, 680 N.W.2d 386, 396 (Mich. 2004)). "For res judicata to apply, the following elements must be present: '(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their privies; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.]" *Bragg v. Flint Bd. of Educ.*, 570 F.3d 775, 776 (6th Cir. 2009) (quoting *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877 (6th Cir. 1997)).

Similarly, collateral estoppel requires "(1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must

have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding." *Smith v. S.E.C.*, 129 F.3d 356, 362 (6th Cir. 1997) (quoting *Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 515 (6th Cir. 1987)).

1. The Chateau Chantal consent judgment does not apply.

The Chateau Chantal consent judgment comes from *Chateau Operations, Ltd. v. Peninsula Township*, Case No. 98-17195-CZ (Grand Traverse County Circuit Court). A copy of the consent judgment, entered on November 5, 1998, is attached as **Exhibit 2** (previously submitted as ECF No. 32-11, PageID.1839-1841.) The consent judgment defines "registered guests" in §§ 8.7.3(10)(m) and (r) as "guests that are registered to stay overnight in the guest rooms provided on the winery-chateau premises." (***Id.*, ¶ 1**.) It prohibits Chateau Chantal from selling wine by the glass to anyone, and limited to serving "food or other beverages to persons who are not 'registered guests'" unless approved by the Township Board. (***Id.*, ¶ 2**.) It required the Township Board to establish guidelines for serving food and beverages to persons who are not "registered guests" at Chateau Chantal and for issuing special use permits for outdoor functions at Chateau Chantal. (***Id.*, ¶ 3**.) It limited food at wine tastings to include "only cheese, fruit, bread, or crackers provided at no cost to the person tasting wine." (***Id.*, ¶ 4**.) And it set an end date to the "Jazz at Sunset" series as October 31, 1998. (***Id.*, ¶ 5**.)

The Chateau Chantal consent judgment is not relevant here for several reasons. First, PTP was not a party to the consent judgment and so res judicata does not apply.[8] *Bragg*, 570 F.3d at

[8] PTP presumably is not asserting that it is a "privy" of Peninsula Township. If PTP does assert it is a privy of the Township, its intervention should be revoked.

776. Second, the prohibition on selling wine by the glass was subsequently removed from the PTZO on August 11, 2009, in Amendment 181. *See* § 8.7.3(10)(d)(2); *see also* ECF No. 29-1, PageID.1290 (listing amendment date). And if there were any doubt, on June 20, 2017, the MLCC rescinded the order at the heart of the consent judgment and confirmed that wine by the glass may be served to all guests and that food could be served at a restaurant. (**Exhibit 3: MLCC Order**.) Third, the consent judgment required Peninsula Township to develop guidelines for food and beverage service. Those guidelines, added in 2004 via Amendment 141 (see ECF No. 29-1, PageID.1288 (listing amendment date)), created the "Guest Activity Use" section in § 8.7.3(10)(u) at issue in this lawsuit. Necessarily, Chateau Chantal could not have challenged the "Guest Activity Use" section when it was created nearly five years after the consent judgment was entered. Additionally, the consent judgment did not involve any First Amendment, Dormant Commerce Clause, regulatory taking, preemption, or MZEA challenges. Therefore, collateral estoppel would not apply. *See Bragg*, 570 F.3d at 776 (the issue "was litigated or which should have been litigated in the prior action"); *Smith*, 129 F.3d at 362 ("the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding").

2. The Black Star Farms variance was granted for a term not at issue in this lawsuit.

The Black Star litigation involved a narrow issue. Section 6.7.2(19)(b)(2)(III) requires wine to be "produced and bottled in the winery." When Black Star first opened its Old Mission Peninsula location, it did not have the equipment necessary to bottle its wine. Therefore, it sought and received a two-year variance from the Peninsula Township Zoning Board of Appeals to sell wine bottled at Black Star's Suttons Bay location. (**Exhibit 4: BSF Variance Request and Approval**.) The 85% local fruit requirement was not part of the variance request. (*See id.*) After Black Star received the variance, WOMP's predecessor filed suit in the Grand Traverse County

Circuit Court under Mich. Comp. Laws § 125.3606, which allows a "party aggrieved by a decision of the zoning board of appeals [to] appeal to the circuit court for the county in which the property is located." (**Exhibit 5: Complaint, ¶ 18**.) The appeal was eventually dismissed. Therefore, the lawsuit was limited solely to the decision of the ZBA on this narrow issue, was not adjudicated on the merits, and has no relevance here.

Collateral estoppel does not apply because "the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding," but it was not. *Smith*, 129 F.3d at 362. Res judicata does not apply because PTP was not a party to the Black Star Farms litigation.

3. Bonobo's misdemeanor tickets and subsequent consent judgment did not amount to a knowing and intelligent waiver of the right to challenge the constitutionality of the Winery Ordinances.

Finally, in 2016 Peninsula Township commenced three misdemeanor enforcement actions against Bonobo related to whether pumpkins grown by Bonobo satisfied its crop coverage requirements and whether a luncheon it hosted violated the PTZO. These actions resulted in a fine and consent judgment in which Bonobo agreed it "will henceforth comply with the Peninsula Township Zoning Ordinance as a whole." (**Exhibit 6**.) Bonobo did not agree that it would not challenge the constitutionality of the PTZO and any suggestion that through this language Bonobo waived its rights to challenge the lawfulness of the PTZO is inane. *See Royster*, 204 F. Supp. at 753 ("courts indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of such rights." *See also Wilkicki* 882 F. Supp. at 1231 ("because of the pivotal importance of one's constitutional rights, courts do not presume acquiescence in the loss of fundamental rights…but rather indulge every reasonable presumption against waiver of fundamental rights.") (Citations omitted and cleaned up.) Bonobo agreed to comply with a *lawful* PTZO. These consent judgments did not strip Bonobo of the right to challenge the constitutionality of the Ordinance itself, so they are irrelevant here.

T. The Wineries Are Not Seeking to "Amend" or "Modify" the Ordinances and PTP Affirmative Defenses H, N and BBB are Inapplicable.

PTP Affirmative Defenses H, N and BBB all suggest that this Court does not have the authority to declare the Ordinances unlawful. In each, PTP asserts:

- H. Plaintiffs have failed to follow the statutorily prescribed process for amending a zoning ordinance under the Michigan Zoning Enabling Act.

- N. Modifications to the Peninsula Township zoning ordinance sought by Plaintiffs would be subject to the voters right of referendum guaranteed by the Michigan Zoning Enabling Act, MCL 125.3042.

- BBB. Plaintiffs' delay in bringing these claims prejudiced PTP and its members because PTP's members have relied for decades on reasonable investment-backed expectations that the zoning provisions would remain in place subject to a process to amend the Zoning Ordinance established in the Michigan Zoning Enabling Act, including public hearings, compliance with the standards to amend an ordinance, recommendations by the Planning Commission, approval by the Township Board, and the right of voter referendum.

(ECF No. 291, PageID.10328-29, 10334.)

PTP's defenses miss the point. The Wineries are not looking to "amend" or "modify" the Ordinances. Rather, they are looking to have the Ordinances found violative of the Constitution and/or preempted by Michigan law and thereby invalidated. This is something entirely within this Court's authority. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2351 n. 8 (2020) (explaining power of federal judiciary to find laws unconstitutional); *J.A. Bloch*, 2022 WL 17876842, *13 ("It would be unconstitutional for a township to attempt to regulate an issue preempted by state law.") Because the Wineries are not looking to amend or modify the Ordinances, and because unconstitutional statutes are not subject the right of referendum, the Wineries are entitled to judgment in their favor on defenses H, N and BB.

U. This Court Should Not Abstain From Hearing the Merits of This Dispute and, so, Judgment Should be Entered on Affirmative Defense LL.

In Affirmative Defense LL, PTP vaguely asserts that the Wineries' claims "may be barred by the doctrine of abstention." (ECF No. 291, PageID.10332.) There are several abstention doctrines, but none would warrant this Court declining to hear the merits of this dispute. This Court has already found it appropriate to exercise supplemental jurisdiction over the Wineries' state law claims, denying PTP's motion to dismiss on that issue. (*See* ECF No. 301.) This Court rejected the argument that it should abstain from adjudicating local zoning issues or purported "novel and complex" state law claims. (*Id.*, PageID.10690-93.) This Court recognized that if there were truly a state-law issue on which it required guidance, it could certify a question of law to the Michigan Supreme Court. (*Id.*, PageID.10692.) Ultimately, this Court determined it would be "grossly inefficient" to adjudicate the claims here piecemeal. (*Id.*, PageID.10689.)

This same rationale applies to any argument PTP may make supporting its theory that this Court should decline to address the merits of this dispute under PTP's unidentified theory of abstention. This Court is in position to conclude this now three-year old case and waiting for the development of some state-court proceeding—that has yet to be filed— is not supportable.

V. Affirmative Defense LLL Is Not an Affirmative Defense.

PTP's Affirmative Defense LLL states that PTP "reserves the right to file further affirmative defenses and to amend its affirmative defenses upon the completion of discovery." (ECF No. 291, PageID.10336.) This is not a proper affirmative defense and if PTP wishes to plead additional affirmative defenses it must move to amend its answer under Fed. R. Civ. P. 16. *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1452 (W.D. Mich. 1989). *See also Paducah River Painting, Inc. v. McNational Inc.*, 2011 WL 5525938, at *5 (W.D. Ky. Nov. 14, 2011) ("a reservation of rights seeking to preserve unknown affirmative defenses subverts Federal Rule of

Procedure 15, which allows a party to move for leave to amend a responsive pleading.").

III. CONCLUSION

Plaintiffs respectfully requests that this Court enter summary judgment in their favor on Protect the Peninsula's Affirmative Defenses. Plaintiffs further request that this Court award them their cost and attorneys' fees incurred in this action pursuant to 42 U.S.C. § 1988 as well as the damages they have incurred due to the Township's conduct in an amount to be determined at trial.

Respectfully submitted,

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

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Dated: September 8, 2023

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

1. This Brief complies with the type-volume limitation of L. Civ. R. 7.2(b)(i) because this Brief contains 10,793 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 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