UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal Corporation,

Defendant,

And

PROTECT THE PENINSULA,

Intervenor-Defendant.

/

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

REPLY BRIEF IN SUPPORT OF PENINSULA TOWNSHIP'S MOTION FOR SUMMARY JUDGMENT ON PREEMPTION CLAIMS

****ORAL ARGUMENT REQUESTED****

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REPLY BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION FOR SUMMARY JUDGMENT ON PREEMPTION CLAIMS

**** ORAL ARGUMENT REQUESTED****

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I. PLAINTIFFS MISUNDERSTAND THE APPLICATION OF AMENDMENT 201 TO THE PTZO AS IT RELATES TO NON-CONFORMING USES AND MOOTNESS.[1]

A. Sections 8.7.3(10) and 6.7.2(19) of the PTZO that Were Challenged in This Lawsuit No Longer Exist and New Sections in the PTZO that Permit Farm Processing Facilities Do Not Apply to Plaintiffs.

Plaintiffs claim Amendment 201 "reinstates ordinance sections this Court already ruled to be unconstitutional or preempted". (ECF No. 473, PageID.17989). This is incorrect and demonstrates a failure to understand Amendment 201. Amendment 201 is a complete re-write of the winery uses within the PTZO. Under Amendment 201, Winery-Chateaus no longer exist as a use permitted by an SUP. (ECF No. 444-2, PageID.15928, "Section 8. Deletion of former Subsection 8.7.3(10), Winery-Chateaus: The Peninsula Township Zoning Ordinance, former Subsection 8.7.3(10), is hereby deleted and repealed."). In its place, the Township now permits Retail Farm Processing Facilities (Indoors Only) (Section 8.7.3(10)) and Retail Farm Processing Facility (with Outdoor Seating) (Section 8.7.3(11)). Further, Section 6.7.2(19) no longer provides for Farm Processing Facilities as a use by right. Instead, this section now permits Wholesale Farm Processing Facilities as a use by right under the PTZO. (ECF No. 444-2, PageID.15909).

Accordingly, the challenged sections of the PTZO with the same substantive effect identified in Plaintiffs' First-Amended Complaint no longer exist. Farm Process Facilities have been replaced with Wholesale and Retail Farm Processing Facilities. A revised set of provisions apply to Remote Winery Tasting Rooms, and Winery-Chateaus have been removed from the PTZO, meaning that such uses are not allowed under the PTZO.

[1] In this reply, the Township is focused on responding to significant erroneous arguments set forth by Plaintiffs in their response to the Township's Motion for Summary Judgment. The Township is not conceding any issues not addressed in this reply due to word-count limitations. The Township incorporates by reference the arguments addressed in its previously-filed principal briefs, ECF Nos. 353 and 444.

Plaintiffs that obtained their SUPs to operate as a Winery-Chateau (Bonobo, Bowers Harbor, Brys, Chateau Chantal, Chateau Grand Traverse, Hawthorne, and Villa Mari) pursuant to the former Section 8.7.3(10) are not regulated by Section 8.7.3(10) under Amendment 201. That section applies to Farm Processing Facilities as a new use pursuant to the PTZO pursuant to an SUP. Therefore, Plaintiffs' arguments regarding sections 8.7.3(10)(b)(1)(vi); 8.7.3(11)(b)(1)(vi); 8.7.3(10)(b)(1)(x); 8.7.3(11)(b)(1)(x); 8.7.3(10)(b)(1)(v); and 8.7.3(11)(b)(1)(v) are misleading. They have no application to Plaintiffs Bonobo, Bowers Harbor, Brys, Chateau Chantal, Chateau Grand Traverse, Hawthorne, and Villa Mari because they all operate under Winery-Chateau SUPs, not Farm Processing Facilities.

Further, Plaintiffs Two Lads and Black Star operate as Farm Processing Facilities under the previous version of the PTZO. Again, Section 6.7.2 of the PTZO – that used to permit Farm Processing Facilities as a use by right – no longer exists. Therefore, Sections 6.7.2(19)(a) and 6.7.2(19)(b)(1)(iv) no longer exist as challenged in this lawsuit.

B. Amendment 201 Moots the Preemption Claims.

Plaintiffs have not filed suit challenging Amendment 201.[2] Instead, their lawsuit alleges that sections of the PTZO – which no longer exist – should be declared preempted by the MLCC.[3] Because Plaintiffs have not challenged Amendment 201, the Court should consider whether the

[2] There is no vested property right in the zoning ordinance itself. *See Lamb v. City of Monroe*, 358 Mich. 136, 147; 99 N.W.2d 566 (1959) ("No owner has a right it the continuance of a zoning once established.").

[3] Plaintiffs assert the Township has failed to provide argument regarding how Amendment 201 applies to the Wineries. This argument, again, misses the point. The Township is not arguing *how* Amendment 201 applies to Plaintiffs, nor is that the point of the mootness argument. Instead, the point of the mootness argument is the challenged sections of the PTZO *no longer exist*. As discussed *supra*, Plaintiffs have failed to show that Amendment 201 applies to their operations. Simply put, Plaintiffs have neither received land use approvals nor are they operating under Amendment 201. They are operating under land use approvals obtained under a prior version of the PTZO.

issues asserted by Plaintiffs in the preemption claims constitute a live case or controversy. Generally speaking, the repeal or amendment of an ordinance moots a challenge to that ordinance because a court "can neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect." *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 836 (6th Cir. 2004); *Nat'l Advertising Co. v. City of Miami*, 402 F.3d 1329, 1332 (11th Cir. 2005) ("A change in the law, such as amending a zoning ordinance as here, or a change in other circumstances can give rise to mootness."). *See also*, *e.g.*, *Tini Bikinis-Saginaw, LLC v. Saginaw Charter Twp.*, 836 F. Supp 2d 504 (E.D. Mich. 2011) (mooting out claims for declaratory and injunctive relief in light of amendment to zoning ordinance).

In *Moskovic v. City of New Buffalo*, No. 1:21-cv-144, 2022 WL 325402, *4 (W.D. Mich., Feb. 3, 2022), Judge Jarbou rejected an argument that the Court could issue declaratory relief and an injunction regarding a repealed moratorium:

> In response to the Court's order to clarify what relief is still available under Counts I and II, Plaintiffs argue that the Court can declare the Moratorium invalid and enjoin its enforcement. However, a declaration would serve no purpose at this point. It would have no practical effect. Moreover, this Court cannot enjoin the enforcement of something that no longer exists. *See Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 836 (6th Cir. 2004) ("We can neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect."); *accord Ostergren v. Governor of Mich.*, No. 353732, 2021 WL 1050367, at *2-3 (Mich. Ct. App. Mar. 18, 2021) ("Plaintiffs seek declaratory and injunctive relief with respect to EO 2020-38. But EO 2020-38 no longer exists.... There is thus no meaningful relief that this Court can grant plaintiffs.").

Judge Jarbou then correctly moved on to the question of which version of the ordinance applies. *See id*. Under Michigan law, "[I]f a zoning ordinance has been amended [after suit was filed] . . . a court will give effect to the amendment[.]'" *Grand/Sakwa of Northfield, LLC v. Northfield Twp.*, 304 Mich. App. 137, 142; 851 N.W.2d 574 (2014) (quoting *Klyman v. City of Troy*, 40 Mich. App. 273, 277-278; 198 N.W.2d 822 (1972)). *See also Tuscola Wind III, LLC v.*

Ellington Twp., 2018 WL 3609550 (E.D. Mich., July 27, 2018) (applying *Grand/Sakwa* holding that ordinance in effect at time of the decision should be given effect unless a *Grand/Sakwa* exception applies).

Plaintiffs have not satisfied either exception. First, while Plaintiffs assert they have a "vested property interest – their permits issued by the Michigan Liquor Control Commission" they have not alleged in this suit their property interest has been *destroyed* by Amendment 201. (ECF No. 473, PageID.18002). As such, Plaintiffs have not met their burden under the first *Grand/Sakwa* exception.

Plaintiffs next argue the Township's enactment of Amendment 201 following this Court's 2022 decision finding sections of the PTZO unconstitutional is evidence of bad faith. (*See* ECF No. 162). This is false. Through this lawsuit Plaintiffs have erroneously sought to have the PTZO changed and now that the Township has done so to comply with the Court's decision, Plaintiffs feign surprise. Amendment 201 was not passed to manufacture a defense. "'[T]he test to determine bad faith is whether the amendment was enacted for the purpose of manufacturing a defense to plaintiff's suit.'" *Landon Holdings, Inc. Grattan Twp.*, 257 Mich. App. 154; 667 N.W.2d 93, 98 (internal citation omitted). A court should apply a new ordinance even if "it serve[s] to strengthen [the municipality's] litigating position." *Grand/Sakwa*, 851 N.W.2d at 579. "The factual determination that must control is whether the *predominant* motivation for the ordinance change was improvement of the municipality's litigation position." *Id.* (emphasis in original).

Plaintiffs' own citations to the Township's minutes reflect the Township was not manufacturing a defense: "These recommendations, or proposed amendments, have developed as a result of what we have learned from the WOMP lawsuit. **I have been working very closely with our legal counsel, Bill Fahey, and his team on what the decisions that Judge Maloney brought**

forward mean for us and our zoning ordinance." (ECF No. 473-1, PageID.18023-18024). The Township was acting to clarify sections of the PTZO this Court declared unconstitutionally vague in June, 2022.

The Michigan Court of Appeals reached that exact conclusion in *Rodney Lockwood & Co. v. City of Southfield*, 93 Mich. App. 206; 286 N.W.2d 87 (1979), finding the bad faith exception does not apply when the municipality is clarifying an ambiguity alleged in the litigation. In *Rodney Lockwood*, the city enacted an amendment to a challenged section of an ordinance after litigation was commenced to clarify an ambiguity alleged in the suit. The Court of Appeals found this did not constitute bad faith:

> There is evidence to indicate that the amendment was intended to clarify an ambiguous ordinance. There is also evidence that it had always been the intent of the city council to prohibit persons from living on three levels within the zoning classification. The amendment did not simply rezone plaintiffs' property, but applied equally to all apartment structures throughout the city.

Rodney Lockwood, 286 N.W.2d at 89.

Even if Amendment 201 results in a strengthening of the Township's litigation position, in the absence of bad faith, the amended ordinance should be applied by the Court in reaching its conclusion. *Grand/Sakwa*, 851 N.W.2d at 579.

Nevertheless, the Township was not manufacturing a defense when it passed Amendment 201. The motivation was to enact an ordinance that complied with this Court's ruling that the PTZO was unconstitutionally vague. Plaintiffs' citation to the Township's minutes does not demonstrate that an improvement of the Township's litigation position was the predominant motivation for the amendment.

The Court should apply Amendment 201 when reaching its decision in this matter. In doing so, Plaintiffs' preemption challenges are rendered moot.

Finally, Plaintiffs assert that because certain SUPs (it is unclear which SUPs Plaintiffs are referencing as they are not cited in Plaintiffs' brief) "parrot" terms from the PTZO, the preemption claims are not moot. This argument is curious as Plaintiffs' First Amended Complaint does not ask the Court to declare Plaintiffs' SUPs preempted by Michigan law and request that enforcement of the SUPs be enjoined. To the contrary, Plaintiffs demand that the Court, "Enter a judgment declaring that certain portions of the Township's Winery Ordinances are preempted by Michigan law" and that the Court "Enjoin Peninsula Township, its employees, officers, and agents, from enforcing the preempted Winery Ordinances permanently and preliminarily while this litigation is pending". (ECF No. 29, PageID.1126).

Plaintiffs cite to an Eleventh Circuit case applying Georgia law and reasoning that if, "the 1990 ordinance is unconstitutional and if . . . the restrictions in Crown Media's sign and building permits stem from and depend on that 1990 ordinance, ***under Georgia law*** the restrictions in Crown Media's permits would be void and unenforceable as well." *Crown Media, LLC v. Gwinnett Cty., Ga.,* 380 F.3d 1317, 1330 (11th Cir. 2004) (emphasis added). However, this case is not applying Georgia law and unlike *Crown Media,* which challenged the zoning ordinance, Plaintiffs have not challenged Amendment 201 in this lawsuit and have, instead, ignored it. Plaintiffs adduce no support that counters the general rule reiterated by the Michigan Court of Appeals in *Grand/Sakwa*.

II. PLAINTIFFS CONFLATE STANDING WITH DEMONSTRATING THAT A CASE OR CONTROVERSY EXISTS.

Plaintiffs misapprehend the gravamen of the Township's argument regarding their failure to demonstrate a case or controversy. The Township is not arguing standing but rather whether these is a justiciable case or controversy regarding preemption. These are distinct legal concepts. "Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the

wisdom of their doing so." *Renne v. Geary*, 501 U.S. 312, 315; 111 S.Ct. 2331 (1991). Justiciability has led to the development of several different categories, including advisory opinion, ripeness, mootness, standing, and political questions. "But whether courts speak in terms of 'justiciability,' 'standing,' or 'ripeness,' they all are asking the same question: does a case or controversy exist?" *Oldham v. Am. Civ. Liberties Union Found. of Tenn., Inc.*, 849 F.Supp. 611, 614 (M.D. Tenn. 1994).

While Plaintiffs attempt to discount the value of the Sixth Circuit's opinion in *Sankyo Corp. v. Nakamura Trading Corp.*, 139 F. App'x 648, 651 (6th Cir. 2005), the case is important because it has cautioned that to satisfy the case or controversy requirement in a declaratory judgment context, the dispute "'must be definite and concrete' and must allow for 'specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts.'" (internal citation omitted). The concern from an Article III standpoint is avoiding an advisory opinion that is based on hypothetical facts. *Fialka-Feldman v. Oakland Univ. Bd. of Trustees*, 639 F.3d 711, 715 (6th Cir. 2001). Again, in the context of a request for declaratory judgment, the Sixth Circuit has cautioned:

> [W]hen we face the "difficult task of distinguishing between actual controversies and attempts to obtain advisory opinions on the basis of hypothetical controversies," *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 458 (6th Cir.2004) (internal quotation marks omitted), we ask "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden*, 394 U.S. at 108, 89 S.Ct. 956 (internal quotation marks omitted).

Commodities Export Co. v. Detroit Intern. Bridge Co., 695 F.3d 518, 525 (6th Cir. 2012).

Plaintiffs' response does nothing to demonstrate the existence of a live case or controversy regarding the interplay between the MLCC, MZEA, and PTZO. Instead, in their discussion regarding "injury" for the standing analysis, Plaintiffs only highlights the lack of controversy.

Plaintiffs assert "a violation of these provisions *could result* in criminal penalties, or the revocation of the Wineries' permits," and that "[t]he Wineries have *every reason to believe* that the Township would enforce laws on its books." (ECF No. 473, PageID.17992-17993) (emphasis added). Plaintiffs' entire argument is based on conjecture and speculation of enforcement – hypotheticals that are not based in reality. This is not sufficient to create a case or controversy.

Plaintiffs first argue that the Township is "enforcing" a closing time of 9:30 pm for Winery-Chateaus. (ECF No. 473, PageID.17993 (discussing Section 8.7.3(10)(u)(5)(b)). To the contrary, the evidence supports that Plaintiffs voluntarily close their doors far earlier than 9:30 pm:

- Chateau Grand Traverse closes at 7:00 pm in the summer and earlier at other times of the year.
- Chateau Chantal closes at 6:00 pm on weekdays and 8:00 pm on weekends but does stay open until 9:30 pm for certain events.
- Bowers Harbor closes at 7:00 pm.
- Peninsula Cellars closes at 7:00 pm but will stay open until 8:00 pm to accommodate customers.
- Brys closes at 6:30 pm during peak season and reduces its hours to 5:00 pm in the winter.
- Black Star closes at 6:00 pm.
- Two Lads closes at 6:00 pm.
- Hawthorne closes at 7:00 pm in the summer and earlier in the winter.
- Mari is open until 7:00 pm during regular seasonal operations but reduces the hours during the winter.
- Tabone is generally open until 6:00 or 7:00 pm during peak season but closes earlier during the winter. [Exhibit 1, Closing Time Documents]

Simply speaking, Plaintiffs have not produced evidence that the Township is "enforcing" a 9:30 pm closing time when Plaintiffs voluntarily close their doors far in advance of that time.

With respect to Section 6.7.2(19)(a), which addresses restaurants, Plaintiffs similarly present no evidence of actual enforcement. Instead, Plaintiffs adduce testimony that the Township has not "enforced anything on anybody that I'm aware of, on that." (ECF No. 473, PageID.17993). At best, Plaintiffs muster a slim hypothetical that the Township would enforce this section, "If they opened a Burger King." (*Id.*). In support of their claim of enforcement of Section

6.7.2(19)(b)(1)(iv), Plaintiffs offer no evidence of enforcement whatsoever. Instead, they offer Mr. Manigold's speculation regarding what "'[t]he sales of limited food items for on-premises consumption'" means. (ECF No. 473, PageID.17994-17995).

Regarding "kitchen facilities" under Section 8.7.3(10)(u)(5)(i) the evidence Plaintiffs submit of enforcement is another hypothetical: "If we find out that somebody's been doing off-site catering, obviously we would inquire and investigate and then enforce this rule." (ECF No. 473, PageID.17994). Similarly, regarding Sections 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(e), and 8.7.3(12)(j), Plaintiffs again fail to produce any evidence of past or ongoing enforcement against any of the Wineries. Instead, Plaintiffs present speculative testimony that "if" a violation was found, the Township would investigate and determine whether a violation had occurred. (ECF No. 473, PageID.17995-17996).

The present case does not present a justiciable case or controversy for purposes of Article III. Again, Plaintiffs have not produced any evidence of attempts to revoke Plaintiffs' SUPs or that any enforcement actions are underway. Plaintiffs have presented no requests for amendments to the SUPs, no requests for variances, no requests for rezoning, or any other request for interpretation of the ordinance that have been denied. Nevertheless, Plaintiffs file a declaratory action seeking a judicial determination that the PTZO is preempted. Preemption can be asserted in a declaratory action; however, a case or controversy must exist. Here, there is none.

Plaintiffs essentially seek an advisory opinion from this Court that, in the chance the Township does take some action against Plaintiffs, the MLCC preempts the PTZO. This preemptive action, however, does not create a live case or controversy that grants this Court jurisdiction under Article III to adjudicate Plaintiffs' preemption claims.

III. THE MLCC DOES NOT PREEMPT THE PTZO.

The issues of preemption have been briefed extensively through the parties' cross-motions on this issue. However, most importantly, under the Michigan Supreme Court's guidance in *DeRuiter v. Twp. of Byron*, 505 Mich. 130, 145; 949 N.W.2d 91 (2020), Michigan recognizes that a local ordinance is not preempted when it adds conditions regarding how a business is conducted. Compare *DeRuiter*, 505 Mich. at 145 (permitting additional regulation on marijuana operations under the MMMA via local zoning) *with Ter Beek v. City of Wyoming*, 495 Mich. 1; 846 N.W.2d 531 (2015) (*Ter Beek II*) (finding a local ordinance preempted by the MMMA when the ordinance wholly prohibited what was permitted by the MMMA). Ultimately, an ordinance is not conflict preempted as long as its additional requirements do not contradict the requirements set forth in the statute." *DeRuiter*, 505 Mich. at 147.

Here, the Township has not taken steps to wholly prohibit Plaintiffs' uses, including the operation of restaurants, the playing of amplified music, and operations past 9:30 pm. The Township has instead done nothing more than curtail the intensity and scope of Plaintiffs' uses to conform to applicable agricultural zoning regulations. The Township's actions are permitted by the authority granted under the MZEA, MCL 125.3201, authorizing the Township to regulate land use. The Township merely restricts the location and intensity of liquor uses depending upon the land use district where it is located. It has not, however, prohibited the uses.

Finally, the MLCC recognizes the importance of local zoning and licensee compliance with the same. The Commission recognizes that: "**A licensee shall comply with all state and local** building, plumbing, **zoning**, sanitation, and health **laws, rules, and ordinances** as determined by the state and local law enforcement officials who have jurisdiction over the licensee." Mich. Admin. Code R. 436.1003(1) (emphasis added); *see also Maple BPA, Inc. v. Bloomfield Charter Twp.*, 302 Mich. App. 505, 513; 838 N.W.2d 915 (2013) (recognizing that Rule 436.1003

"indicates that the Legislature did not intend to preempt every local zoning statute that concerns alcoholic beverage sales"); *Oppenhuizen v. Zeeland*, 101 Mich. App. 40, 48; 300 N.W.2d 445 (1980) ("the MLCC regulation [now R. 436.1003] recognizes the authority of the municipality over those areas of local control which involve all commercial activity."). A former commissioner of the MLCC who is not offering testimony in an official capacity recognized by the State of Michigan (*see* ECF No. 473-7) cannot override that legal requirement nor the numerous permits approved the Commission ratifying that zoning approval is necessary.[4]

IV. PLAINTIFFS ARE NOT ENTITLED TO MONEY DAMAGES FOR A PREEMPTION CLAIM AND, IF THEY ARE, PENINSULA TOWNSHIP IS IMMUNE UNDER THE MICHIGAN GOVERNMENTAL TORT LIABILITY ACT.

First, Plaintiffs have not presented any viable argument demonstrating an entitlement to monetary damages for their preemption claim. Plaintiffs have still failed to present any Michigan authority authorizing damages for a state-law preemption claim.

As addressed in the Township's principal brief, no Michigan appellate supports an award of damages for a state-law claim of preemption. Again, recognizing money damages as an available remedy under a state-law preemption claim would result in this Court substantially expanding state-law remedies which no Michigan court has done. The Court should decline to expand principles of Michigan law to create new or expanded theories of liability. *See Grubb v. W.A. Foote Memorial Hosp. Inc.*, 741 F.2d 1486, 1500 (6th Cir. 1984) ("Our respect for the role of the state courts as the principal expositors of state law counsels restraint by the federal court in announcing new state-law principles . . . .") (vacated on other grounds, 759 F.2d 546 (1985));

[4] The Township will be filing a motion to strike Teri Quimby's expert "report" because, among other reasons, it exceeds the scope of experts permitted by this Court to land-use experts only following PTP's intervention. *See* ECF No. 385, PageID.14146-14149 (ultimately ordering that "As far as naming land use experts, PTP June 19th . . . Plaintiff July 3rd.).

Harris Corp. v. Comair, Inc., 712 F.2d 1069, 1071 (6th Cir. 1983) ("We deem it inappropriate for a federal court sitting in diversity to add a new cause of action to state law."). As a matter of law, money damages are not contemplated as a remedy for a preemption claim.

The best Plaintiffs can muster is that in a declaratory judgment action damages could be a proper remedy. However, this misses the Township's point. Damages are not a remedy for a **preemption** claim. Neither case cited by Plaintiffs supports their proposition as they do not involve preemption claims. *See Durant v. State*, 456 Mich. 175; 566 N.W.2d 272 (1997) (involving reduction in state funding for special education services); *Hoffman v. Auto Club Ins. Ass'n*, 211 Mich. App. 55; 535 N.W.2d 529 (1995) (determining what expenses were permitted under the Michigan No-Fault Act).

Assuming Plaintiffs were entitled to money damages for a preemption claim, the Township is immune from the damages claim under the GTLA. The Township is immune from all "tort" liability. MCL 691.1407(1). Specifically, MCL 691.1407(1) provides in relevant part, "Except as otherwise provided in this Act, a governmental agency is immune from tort liability if the government agency is engaged in the exercise or discharge of a governmental function." This immunity is expressed and construed in the broadest possible fashion. *In re Bradley Estate*, 494 Mich. 367; 835 N.W.2d 545 (2013). Governmental immunity is not an affirmative defense, but is rather a characteristic of government that the plaintiff must overcome to state a valid claim. *Mack v. City of Detroit,* 467 Mich. 186, 201-201; 649 N.W.2d 47 (2002). Under Michigan law, it is well settled that unless one of the six statutory exceptions applies, a governmental entity is immune.

Plaintiffs errantly claim that in passing a zoning ordinance that is allegedly preempted by the MLCC the Township has engaged in ultra vires activity which is not covered by the GTLA. Plaintiffs misapprehend the nature of the ultra vires argument. Passing a zoning ordinance is not

ultra vires activity. In *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989), the Michigan Supreme Court held that ultra vires activities are those activities that are "*not* expressly or impliedly mandated or authorized by law." As a matter of law, the Township is statutorily authorized to pass a zoning ordinance to regulate land use. *See* MCL 125.3201, *et seq*. There is no dispute that the PTZO is a zoning ordinance. (*See* ECF No. 29-1). "[U]ltra vires activity is not activity that a governmental agency performs in an unauthorized manner. Instead, it is activity that the governmental agency lacks legal authority to perform in any manner." *Id.* at 387.

Finally, Plaintiffs assert that preemption is a constitutional tort for which they are entitled to damages. However, their only support for this position is an unpublished Michigan Court of Appeals decision that indicates preemption is a constitutional *attack* – not that preemption is a constitutional *tort*. (*See* ECF No. 473, PageID.18018). Plaintiffs rely on *Bauserman v. Unemployment Ins. Agency*, 509 Mich. 673; 983 N.W.2d 855 (2022), for the proposition that damages are available for all constitutional torts. But preemption under the MLCC is not a constitutional *tort* and *Bauserman* was restricted to its facts. In *Bauserman*, the Michigan Supreme Court addressed whether monetary damages could be a remedy for a procedural due process violation when the Unemployment Insurance Agency seized plaintiff's tax returns, garnished his wages, and imposed penalties without notice or the right to be heard. Under these limited facts, the Michigan Supreme Court found liability against the *state* for a due process claim: "[O]ur holding is that the state is liable for harms it commits in violation of the Constitution; whether other entities, such as municipal governments or individual government actors, can be liable for constitutional torts is not before us, and we decline to address that question in what would be dictum." *Id.* at 708 n.13 (emphasis added).

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, Defendant Peninsula Township respectfully requests that this Honorable Court grant it summary judgment on Plaintiffs' preemption claim.

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Dated: October 24, 2023 BY: */s/ Bogomir Rajsic, III*

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