

No. 25-1705 / 25-1703 / 25-1754

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WINERIES OF THE OLD MISSION PENINSULA (WOMP) ASSOCIATION,
BOWERS HARBOR VINEYARD & WINERY, INC., BRY'S WINERY, LC,
CHATEAU GRAND TRAVERSE, LTD., CHATEAU OPERATIONS, LTD,
GRAPE HARBOR, INC., MONTAGUE DEVELOPMENT, LLC, OV THE
FARM, LLC, TABONE VINEYARDS, LLC, TWO LADS, LLC, VILLA MARI,
LLC, WINERY AT BLACK STAR FARMS, LLC

Plaintiffs – Appellees [25-1703/25-1705]/Cross-Appellants [25-1754]

v.

PENINSULA TOWNSHIP

Defendant – Appellant [25-1703]/Cross-Appellee [25-1754]

and

PROTECT THE PENINSULA

Intervenor – Appellant. [25-1705]/Cross-Appellee [25-1754]

Appeal from the United States Trial Court
For the Eastern District of Michigan
Case No. 20-cv-01008

AMICUS CURIAE BRIEF OF
THE GOVERNMENTAL LAW SECTION OF THE STATE BAR OF
MICHIGAN IN SUPPORT OF PENINSULA TOWNSHIP AND
PROTECT THE PENINSULA
REQUESTING REVERSAL OF THE TRIAL COURT'S DECISION

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STATEMENT OF THE BASIS OF APPELLATE JURISDICTION

Amicus adopts the Statement of Appellate Jurisdiction as set forth by Defendant/Appellant Peninsula Township.

STATEMENT OF ISSUES

- I. DID THE TRIAL COURT ERR: (1) IN FAILING TO AFFORD THE TOWNSHIP ORDINANCES THE PRESUMPTION OF VALIDITY AS REQUIRED UNDER STATE LAW; (2) IN FAILING TO REQUIRE PLAINTIFFS TO SEEK AVAILABLE VARIANCE OR OTHER RELIEF FROM THE TOWNSHIP ZONING BOARD OF APPEALS, OR AMENDMENT OF THEIR APPROVED SPECIAL LAND USES, WHICH WOULD THEN BE REVIEWED ON THE ADMINISTRATIVE RECORD TO DETERMINE IF THE TOWNSHIP'S DECISIONS WERE BASED ON SUBSTANTIAL EVIDENCE; AND (3) IN FAILING TO REQUIRE PLAINTIFFS TO SEEK FINAL DECISIONS FROM THE TOWNSHIP?**

Plaintiffs answer: No

Defendant answers: Yes

The US Trial Court answered: No

This Court should answer: Yes

- II. DID THE COURT ERR WHEN IT FOUND THE GUEST ACTIVITIES USE PROVISION TO BE UNCONSTITUTIONALLY VAGUE?**

Plaintiffs answer: No

Defendant answers: Yes

The US Trial Court answered: No

This Court should answer: Yes

STATEMENT OF INTEREST

The Government Law Section of the State Bar of Michigan (GLS) is a voluntary membership section of the State Bar of Michigan, comprising approximately 860 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special authorities. Although the Section is open to all members of the State Bar, its focus is on the laws, regulations, and procedures relating to public law. The Government Law Section provides education, information, and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs, and publications. In furtherance of this purpose, the Government Section participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous *amicus curiae* briefs in state and federal courts. The position expressed in this *amicus curiae* Brief is that of the Government Law Section only and is not the position of the State Bar of Michigan. The governing body of the Section has authorized and directed this office to file an *amicus curiae* brief in support of Peninsula Township.¹

¹ No counsel for a party authored this Brief in whole or in part. No counsel or party made a monetary contribution to the preparation of this Brief.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amicus adopts the Statement of Material Proceedings and Facts as set forth by Defendant/Appellant Township.

INTRODUCTION AND SUMMARY OF ARGUMENT

By early 2024, when it was issuing opinions leading up to trial that summer, the Trial Court had honed its view of the case down to a pretty tight descriptive paragraph (versions of which it used in at least four different opinions) (ECF 518, PageID.20726, ECF 525 PageID.21120, ECF 528 PageID.21250 and ECF 559 PageID.21896):

Plaintiffs sued Peninsula Township for several restrictions and regulations in the Peninsula Township Zoning Ordinance (“PTZO”). Some of the restrictions in the PTZO that Plaintiffs challenge include regulations of advertising, regulations of bar and restaurant operations, vagueness of the term “Guest Activity,” limitations on hours of operation, prohibition of hosting events such as weddings and family reunions, prohibition of amplified music, and regulations requiring the wineries to use a certain percentage of Old-Mission-Peninsula-grown grapes and ingredients in producing wine, among numerous other restrictions.

That is a reasonably accurate description of what the case ended up about. But it is also a description of the sorts of issues that could be involved in a pretty run of the mill zoning case. With the exception of the last item—which is unique to the kind of land use at issue—these are recognizable areas of potential dispute between any local zoning authority and some of its property owners.

So how is it possible that such a case ends up in a \$50 million judgment (astonishing even if split 11 ways) following a determination that ordinance sections and special land uses—clearly authorized land use regulation tools that have shaped the use of land for decades—are suddenly deemed to be unconstitutional and that permits and approvals under which Plaintiffs have operated without objection for years are abruptly made unenforceable? The short answer is that this case took a different path from the typical zoning case.

It is certainly not the usual takings/substantive due process/equal protection analysis, since those constitutional stalwarts are not likely to be available to challenge regulations and approvals under which Plaintiffs have accepted benefits and to which they have long acquiesced. All of the Plaintiffs (to varying degrees) have been in business and operating under the PTZO, and their own individual use permits, for years.

This case involves instead some less conventional (some might say “fallback”) claims: vagueness, preemption, compelled speech, freedom of association, freedom of religion, and others. Even a Dormant Commerce Clause claim. This alternative path appears to have led the Trial Court around and away from—instead of through—the sort of analysis that a court typically applies, and indeed must apply, under Michigan law when evaluating a local zoning authority’s land use decisions.

In large part the case ended up the way it did because so little evidence that a zoning authority would typically introduce to detail and defend its zoning decisions was permitted into the conversation, either in the pretrial motion process or at trial. There is only the most limited legislative history of the PTZO, no full discussion of the Townships overall land use plans, and only a grudging allowance of minimal expert testimony about how and why the PTZO is the way it is.

More importantly, there is no appreciation for whether the Plaintiff businesses have done all they needed to do obtain proper relief before heading to court. While the Trial Court ends its thumbnail paragraph quoted above with the phrase “The PTZO has sparked controversy among the parties for years,” rarely did that controversy ever find its way into any sort of typical state-based process for seeking administrative relief, or litigation of the kind that would typically be required in order to resolve a zoning issue.

The Trial Court resisted all efforts by the Township and PTP to get this litigation back on proper footing, and in doing so ended up depriving the Township of a fair opportunity to defend its decisions in a manner recognizable under Michigan law, basing its immense damages award on just a few pages of analysis finding impermissible vagueness after only the most offhand analysis. The Trial Court’s judgment in this case should be reversed.

ARGUMENT

- I. **The PTZO is presumed to be valid, and the administrative special land use permits applied for and granted to Plaintiffs by the Township are subject to petition for variance relief or amendment, to be reviewed based on the administrative record made at the Township under the “substantial evidence test.” The right to invoke the Court’s jurisdiction to challenge the constitutionality of the Township’s actions requires that Plaintiffs first seek a “final decision” from the Township. The Trial Court erred: (1) in failing to afford the ordinances the presumption of validity as required under state law; (2) in failing to require Plaintiffs to seek available variance relief from the Township Zoning Board of Appeals, or amendment of their approved special land uses, which would then be reviewed on the administrative record to determine whether the Township’s decisions were based on substantial evidence on the record; and (3) in failing to require Plaintiffs to seek final decisions from the Township.**

A reading of the Trial Court’s various opinions and findings in this land use dispute results in a striking realization: they are entirely foreign to state and federal legal review standards pronounced over decades of litigation. The Trial Court’s rulings in this case are specifically notable for:

- The absence of a serious review (more than mere lip service) of the presumption of zoning ordinance validity or the requirement that the party challenging legislative enactments demonstrate that they are the product of arbitrary fiat.
- For administrative approvals, the absence of a requirement for Plaintiffs to seek relief, whether in the form of a zoning variance from the Township Zoning Board of Appeals or otherwise, from the strict requirements of the zoning requirements. Relatedly, the absence of a requirement for Plaintiffs to seek amendments of the special land use permits, calling for the application of the “substantial evidence test,” under which the court must **review the administrative record** made at the Township to ascertain whether the challenged action was supported

by competent, material, and substantial evidence. This would include a review to determine whether property owners accepted the benefits of zoning authorizations by developing and using property in accordance with zoning approvals, and a review of whether equitable considerations preclude a later challenge of those zoning approvals.

- The absence of the application of a “final decision” from the local unit of government as a condition to having the right to invoke the jurisdiction of the courts.

The entire program of zoning regulation in Peninsula Township—established decades ago and resulting in the successful preservation of agricultural resources and character on the Peninsula—was dismissed by the Trial Court without a review consistent with long-established precedent, and on the basis of speculative and arbitrary feelings of the Court resting on extra-legal considerations like the finding that the zoning on the Peninsula “was never about preserving farmland or rural character. These provisions were designed to keep land prices lower so the Township could purchase more development rights, which would again, protect NIMBY landowners.” Bench Opinion, ECF No. 623 at PageID.31463.

A. The Presumption of Validity Applicable to Local Legislative Enactments.

The zoning ordinance provisions governing the use of Plaintiffs’ properties were duly enacted as prescribed in the Michigan Zoning Enabling Act, as amended, MCL 125.3101, *et seq.* (“MZEA”). Some of these provisions were enacted many years ago, and some have been amended. All of them are **presumed valid**. Zoning, which aims to protect and promote the public health, safety, and general welfare, is

premised on the exercise of state law. The MZEA, in broad terms, enables zoning for the legitimate purposes couched in the following terms:

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

MCL 125.3201(1).

This enabling authority can be traced back through a hundred years of federal and state jurisprudence, beginning with the conclusion of the Supreme Court of the United States in 1926, that “it must be said before the [zoning] ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” *Village of Euclid vs Ambler Realty*, 272 U.S. 365, 373 (1926).

Michigan has given legislatively-enacted zoning ordinance regulations the same respect and deference. It has been the law in Michigan for more than a half-century that the burden of proof is on the party challenging the validity of an ordinance. To overcome this presumption, the challenger must prove that the contested restrictions are the product of **arbitrary fiat**, that they represent a

whimsical ipse dixit, and that there is **no room for a legitimate difference of opinion concerning their reasonableness**. *Brae Burn, Inc. v. Bloomfield Hills*, 350 Mich. 425; 86 N.W.2d 166 (1957); *Kropf v. City of Sterling Heights*, 391 Mich. 139; 215 N.W.2d 179 (1974), cited by *Kirk v. Tyrone Township*, 398 Mich. 429; 247 N.W.2d 848 (1976); and *Kyser v. Kasson Township*, 486 Mich. 514; 786 N.W.2d 543 (2010).²

Other than a superficial acknowledgment of it, the Trial Court failed to apply the presumption of validity, critiquing the Township’s zoning ordinance while never really reviewing whether Plaintiffs demonstrated that there was a whimsical arbitrariness of the provisions applicable to Plaintiffs—including the disparaged provisions that seek to preserve agricultural resources and character.

B. Review of Administrative Zoning Approvals Under the Michigan Constitution.

In addition to this foundational rule applicable to **legislative** enactments under MZEA, many of the Plaintiff wineries on agriculturally-zoned land sought, and were approved for, **special land use** authorization to enable the operation of a Winery-Chateau. The grant of a special land use requires **administrative** approval. In MCL

² In the context of challenges based on state laws other than MZEA, the Court is bound by the Michigan Constitutional review standard that “The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.” Mich Const, Art. 7, § 34.

125.3502, the Michigan Legislature has granted local governments the **authority to define, and then administratively approve, special land uses on a discretionary basis**. With such approval, the local unit of government may include **reasonable conditions**, such as provisions “to insure that public services and facilities affected by a proposed land use or activity will be capable of accommodating increased service and facility loads, **protect the natural environment and conserve natural resources** and energy, insure compatibility with adjacent uses of land, and promote the use of land in a socially and economically desirable manner.” *Id.*

The Winery-Chateau authorization, as amended over time, was intended to “permit construction and use of a winery, guest rooms, and single-family residences as a part of a single site subject to the provisions of this ordinance. The developed site **must maintain the agricultural environment**, be harmonious with the character of the surrounding land and uses, and shall not create undue traffic congestion, noise, or other conflict with the surrounding properties.” (ECF No. 29-1, PageID.1268, §8.7.3[10][a]). This does not create full non-agricultural use authorizations for approval. Rather, it establishes a unique hybrid use authorization under which the non-farm uses were intended to be accessory or secondary to the principal agricultural use. See ECF No. 29-1, PageID.1268-1269, §8.7.3(10)(c)-(e).

A party is authorized to seek zoning “variance” relief from the strict terms of the zoning requirements upon a showing of practical difficulty to the Township’s

Zoning Board of Appeals.³ In addition, a party is permitted, as of right, to appeal the Board of Appeals decision to the circuit court. MCL 125.3606.

A party may also seek an amendment of a special land use, with the decision made by the Township on the proposed amendment being subject to challenge by initiating an appeal in the state circuit court. MCR 7.122. Very critical to the outcome in this case, where an appeal is properly litigated, as prescribed by state law, in order to prevail on appeal, the party must meet the “substantial evidence” test, which is provided under Art. 6, § 28 of the Michigan Constitution. Under this test, the terms and conditions of an approved special land use are reviewed based on the administrative record made at the local unit of government. The decision of the local government is to be upheld by the court unless the challenger demonstrates that the approval was not authorized by law, or not supported by competent, material and substantial evidence on the whole record. *Carleton Sportsman’s Club v. Exeter Township.*, 217 Mich.App. 195; 550 N.W.2d 867 (1996).

³ MCL 125.3604(7), which provides: “If there are practical difficulties for nonuse variances as provided in subsection (8) or unnecessary hardship for use variances as provided in subsection (9) in the way of carrying out the strict letter of the zoning ordinance, the zoning board of appeals may grant a variance in accordance with this section, so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done. The ordinance shall establish procedures for the review and standards for approval of all types of variances. The zoning board of appeals may impose conditions as otherwise allowed under this act.” This relief is expressly authorized under the Township Zoning Ordinance. ECF No. 29-1, PageID.1164-1166, PTZO § 5.7.3.

Crucially, the reviewing court does not consider the “weight” of evidence and rule on the basis of the “preponderance” standard. Rather, under the substantial evidence test, “in examining into the evidence the appellate court does so not to determine whether the probabilities preponderate one way or the other but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved.” *In re Payne*, 444 Mich. 679, 690; 514 N.W.2d 121 (1994). “A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record.” *Id.*, at 692. ‘Substantial evidence’ has a classic definition: the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance.” *Id.*

The point is that application of the substantial evidence test should have been required, which would have precluded the Trial Court’s extensive scrutiny of evidence, essentially substituting his judgment for that of the Township officials. By allowing Plaintiffs to attack the zoning ordinance and special use approvals in federal court under essentially a different set of standards than are normally applied to a zoning decision, the Trial Court permitted these parties to collaterally challenge ordinances that had been duly enacted, and special land uses duly granted, without an authorized appeal.

The properties of nearly all of the Plaintiffs were approved for special land uses.⁴ With rare exception⁵, the validity of the respective special use regulations now being attacked were not challenged by Plaintiffs before they **accepted the benefits of the zoning enactments, accepted and acquiesced to the restrictions and conditions** associated with their approved special land uses, and then **improved and used their properties consistent with the accepted approvals.**

In a play on an old adage, Plaintiffs had their “cake,” ate it, and then demanded more. In *Holzbaugh v. Detroit Bank & Trust Co.*, 371 Mich. 432; 124 N.W.2d 267 (1963), the Court cited earlier Supreme Court case law that “reaffirmed what has always been the rule in this State, that is, that ‘A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in any other part as the doctrine of election, an extension of the law of equitable estoppel, prevents the assertion of repugnant rights.’” See also, *Thorin v. Bloomfield Hills School Dist.*, 179 Mich.App. 1; 445 N.W.2d 448 (1989) (petitioner accepted the benefits of a contract for 15 years without complaint, and could no longer challenge its validity based on the Board's failure to formally approve it); *Petition of Board of Trustees of Samaritan Hospital Ass'n*, 49 Mich.App. 106; 211 N.W.2d 561 (1973) (one who retains the benefits of a transaction which he has the right to accept

⁴ Only the properties of Black star and Two Lads, have no special land use approvals.

⁵ Chateau Chantal did challenge the meaning of “registered guest” under their special land use and the zoning ordinance. (RE 463-20), resulting in a consent judgment.

or reject cannot avoid its obligations); *AtriCure, Inc. v. Meng*, 12 F.4th 516 (6th Cir, 2021). Whether framed as laches, or election, or estoppel, equity prevents Plaintiffs’ years-too-late challenge to permits and approvals whose benefits they long-ago accepted.

Unfortunately, the Trial Court was receptive to Plaintiffs’ challenge without regard to the inequity, and was more than willing to sit as a “superzoning commission” to preside over zoning ordinance administration and affording the retail business interests of Plaintiffs with priority treatment over agricultural resource preservation. The Michigan Supreme Court in *Kyser, supra*, at 520-521, explained why that wasn’t appropriate:

Zoning constitutes a legislative function. *Schwartz v. City of Flint*, 426 Mich. 295, 309, 395 N.W.2d 678 (1986). The Legislature has empowered local governments to zone for the broad purposes identified in MCL 125.3201(1).¹ This Court has recognized zoning as a reasonable exercise of the police power that not only protects the integrity of a community's current structure, but also plans and controls a community's future development. *Austin v. Older*, 283 Mich. 667, 674–675, 278 N.W. 727 (1938). Because local governments have been invested with a broad grant of power to zone, “it should not be artificially limited.” *Delta Charter Twp. v. Dinolfo*, 419 Mich. 253, 260 n. 2, 351 N.W.2d 831 (1984). Recognizing that zoning is a legislative function, this Court has repeatedly stated that it “ ‘does not sit as a superzoning commission.’” *Macenas v. Village of Michiana*, 433 Mich. 380, 392, 446 N.W.2d 102 (1989) (citation and emphasis omitted); *Brae Burn, Inc. v. Bloomfield Hills*, 350 Mich. 425, 430–431, 86 N.W.2d 166 (1957). Instead, “[t]he people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life.” *Brae Burn*, 350 Mich. at 431, 86 N.W.2d 166. We reaffirm these propositions.

The Trial Court refused to defer to local legislators who were elected to establish land use policy for the Township or to make Plaintiffs pursue the usual avenues of relief detailed above. Instead, the Trial Court took upon itself the determination of values and policy, concluding that the Peninsula Township Zoning Ordinance “was never about preserving farmland or rural character. These provisions were designed to keep land prices lower so the Township could purchase more development rights, which would again, protect NIMBY landowners.” Bench Opinion, ECF No. 623 at PageID.31463.

For the Trial Court to insert itself in this manner—to express this nakedly cynical opinion about Township and citizen preservation efforts that had successfully transpired over the course of decades—is not merely or just pejorative. In expressing this value judgment with so little personal background and experience in the zoning process that unfolded over so many years, the Trial Court demeans Township and citizen efforts that have achieved a preservation of a resource-rich environment so desirable that Plaintiffs themselves wanted to make greater investments in the area.

All of this was in spite of solid expert testimony describing a unique history of property owners being willing to approve and pay a millage—literally taxing themselves—that allowed the Township to purchase development rights from farmers in order to maintain the agricultural resources of the Peninsula, and of

farmers being willing to permanently give up their promising non-agricultural development rights.⁶ The Trial Court’s derogatory words about a process effectively promoted by the Michigan Legislature, leveled against the exemplary efforts made by many people to preserve the natural resources on the Peninsula from destruction, sound very much like the statements of emotionally-driven citizens attending a late-night planning commission meeting.

C. The Rule Requiring a Party to Seek Available Administrative Relief in Order to Achieve a “Final Decision” Before Invoking the Jurisdiction of the Court.

The Trial Court’s unusually favorable treatment of Plaintiffs’ business interests not only ignores the Michigan Constitutional mandate in Art. 4, § 52,⁷ it also ignores another important doctrine applicable when constitutional claims are asserted in court by a party who has not taken the opportunity to seek available administrative remedies: **the doctrine of finality**. Very simply, Plaintiffs filed suit before seeking or obtaining a **final decision** from the Township. As a jurisdictional

⁶ The Michigan Legislature authorized the purchase of development rights to preserve agricultural land. “Under a PDR program, the local unit of government purchases development rights, but only from a willing landowner.” MCL 125.3508(1). In addition, “The PDR program may be used only to protect agricultural land and other eligible land.” MCL 125.3507(2).

⁷ Art. 4, §52 of the Michigan Constitution, read together with *Hess v West Bloomfield Township*, 439 Mich. 550; 486 N.W.2d 628 (1992), declares that the preservation of natural resources are of paramount public concern in the interest of the health, safety and general welfare of the people.

matter, their case was not ripe for review by the Court. *River City Capital, LP. v. Board of County Comm'rs*, 491 F.3d 301, 309 (6th Cir., 2007).⁸

The finality doctrine has been extensively applied to takings claims under the Fifth and Fourteenth Amendments, *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the applicability of the regulations to the property at issue),⁹ and has been recognized as being applicable to other constitutional claims, including those asserted under the Due Process Clause, the First Amendment, and Equal Protection clause. *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533, 537 (6th Cir., 2010).

The Michigan Supreme Court, following the *Hamilton Bank* case, applied this finality requirement in *Paragon Properties Co. v. City of Novi*, 452 Mich. 568, 576-577; 550 N.W.2d 772 (1996): “A challenge to the validity of a zoning ordinance ‘as

⁸ On the strength of *Catholic Healthcare International, Inc. v. Genoa Charter Township*, 82 F.4th 442 (2023), the Trial Court dispensed with the finality requirement. However, in the *Catholic Healthcare* case, the Court concluded that *the obligation to secure a final decision had actually been met*, *Id.* at 448, thereby clearly distinguishing that case from the case at bar.

⁹ *Hamilton Bank* was later modified in *Knick v. Township of Scott, Pa.*, 588 U.S. 180; 139 S.Ct. 2162; 204 L.Ed.2d 558 (2019), but the modification did not undermine the fundamental requirement of finality.

applied,’ whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality.” *Id.* at 576. “[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.” *Id.* at 577 (citation omitted). “[W]here the possibility exists that a municipality may have granted a variance—or some other form of relief—from the challenged provision of the ordinance, the extent of the alleged injury is unascertainable unless these alternative forms of potential relief are pursued to a final conclusion.” *Conlin v Scio Township*, 262 Mich App 379, 382; 686 NW2d 16 (2004).

Plaintiffs had administrative remedies available, as identified above. Having failed to seek relief based on these available administrative remedies, Plaintiffs never received a final decision from the Township, and their constitutional challenges leveled against the Township must be dismissed as unripe.

D. Summary.

The Trial Court erred by creating its own zoning review process and ignoring settled law providing the applicable rules of engagement. The Trial Court’s methodology is immeasurably unfair to the Township and its residents, and its judgment should be overturned.

II. The “Guest Activities Use” provision of the PTZO is not unconstitutionally vague. The Trial Court’s finding to the contrary—the basis for its entire award of damages—is astonishingly conclusory and entirely insufficient as a discussion of such an important issue.

The most jarring thing about this case is the fact that every penny of the \$50 million judgment against the Township resulting from its application of long-standing ordinance provisions, under long-standing special use permits that had never been objected to—for years for most Plaintiffs—comes from a single finding by the Trial Court that the term “Guest Activity Uses” applicable to Winery-Chateaus is unconstitutionally vague. Leave aside for the moment that the Trial Court’s primary consideration of this issue—the one resulting in its finding of unconstitutionality—comes in a 3-page analysis found in an early Summary Judgment opinion, issued on June 3, 2022 (ECF 162 PageID.6016)¹⁰. And further leave aside for now the fact that the Trial Court did not actually find that the term “Guest Use Activity” was vague so much as it found that the Township officials were not particularly consistent in applying it.

Focus instead, to start, on that actual provision in the PTZO—quoted here almost in its entirety, even at the cost of precious words:

- (u) Guest Activity Uses. The Township Board may approve Guest Activity Uses (Activities by persons who may or may not be

¹⁰ The Trial Court later made an additional minor comment in response to a motion by the Township (ECF 211 PageID.7813), but never really added to its initial finding.

registered guests) as an additional Support Use, subject to the following:

1. Intent

- (a) The current Winery-Chateau section of the ordinance requires 75% of the site to be used for the active production of crops that can be used for wine production such as fruit growing on vines or trees, but does not require that any of the wine produced on the site be made from wine fruit grown on Old Mission Peninsula. To assure that, in addition to the minimum parcel size required for a Winery-Chateau, there is additional farm land in wine fruit production in Peninsula Township if Guest Activity Uses are allowed to take place at a Winery-Chateau facility.
- (b) Guest Activity Uses are intended to help in the promotion of Peninsula agriculture by: a) identifying "Peninsula Produced" food or beverage for consumption by the attendees; b) providing "Peninsula Agriculture" promotional brochures, maps and awards; and/or c) including tours through the winery and/or other Peninsula agriculture locations.
- (c) Guest Activity Uses are limited to (2) below.
- (d) Guest Activity Uses do not include wine tasting and such related promotional activities as political rallies, winery tours and free entertainment (Example - "Jazz at Sunset") which are limited to the tasting room and for which no fee or donation of any kind is received.
- (e) Guest Activity Uses are in addition to accessory uses for registered guests that are otherwise allowed.

* * *

2. Uses Allowed Notwithstanding Section 8.7.3 (10) (m); The following Guest Activity Uses may be approved with a Special Use Permit by the Township Board:

- (a) Wine and food seminars and cooking classes that are scheduled at least thirty days in advance with notice provided to the Zoning Administrator. Attendees may consume food prepared in the class.
- (b) Meetings of 501- (C)(3) non-profit groups within Grand Traverse County. These activities are not intended to be or resemble a bar or restaurant use and therefore full course meals are not allowed, however light lunch or buffet may be served.
- (c) Meetings of Agricultural Related Groups that have a direct relationship to agricultural production, provided that:
 - i. The meetings are scheduled at least one month in advance with the Zoning Administrator given adequate advance notice of the scheduling so that the Zoning Administrator can give prior approval;
 - ii. The Zoning Administrator shall use the following types of Agricultural Related Groups as a guide for determining "direct relationship to agricultural production";
 - (a) Food/wine educational demonstrations;
 - (b) Cooking show showcasing Peninsula produce and wine;
 - (c) Farmer's conferences;
 - (d) Regional farm producers;
 - (e) Cherry Marketing Institute and Wine Industry Conference
 - (f) Farm Bureau Conference
 - (g) Future Farmers of America and 4-H;
 - (h) Michigan State University/agricultural industry seminars.
 - iii. These meetings may include full course meals to demonstrate connections between wine and other foods.
 - iv. An appeal of the Zoning Administrator's determination can be made to the Township Board.

- (d) Guest Activity Uses do not include entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass.
- (e) No food service other than as allowed above or as allowed for wine tasting may be provided by the Winery-Chateau. If wine is served, it shall only be served with food and shall be limited to Old Mission Peninsula appellation wine produced at the Winery, except as allowed by Section 6. below.

From the perspective of an *amicus* group made up of practicing municipal lawyers, this ordinance provision might be a lot of things, but “vague” is not one of them. In fact, when compared to other definitions and standards that regularly appear in municipal ordinances—particularly zoning ordinances—the obvious effort that the drafters of this language put in **precisely to avoid a finding of vagueness** is positively heroic.

Compare it, for example, to the general zoning standards that are regularly upheld in both state and federal courts all over the country—phrases like “in the public interest,” or “in harmony with.” *See, e.g., Shepherd Montessori Ctr. Milan v Ann Arbor*, 259 Mich App 315; 675 N.W.2d 271 (2003) (rejecting a void-for-vagueness challenge to: “as will not be contrary to the public interest”). Better yet, compare it to the provisions in the only two cases to which the Trial Court briefly cites before getting to the Township ordinance’s shortcomings. *Coates v Cincinnati*, 402 US 611 (1971), found lacking an ordinance that prohibited “conduct...annoying to persons passing by....” And *Grayned v City of Rockford*, 408 U.S. 104 (1972),

upheld a standard that prohibited “...any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof....”

This ordinance is not like any of those. To start, it has an entire intent provision explaining what it is attempting to accomplish—and, helpfully, what it is not about. Its substantive regulatory language then describes both what is allowed as a special use under it (subsections 2[a] thru [c]) and what is not (subsection 2[d]). Recognizing that subsection 2(c), relating to meetings of groups with a “direct relationship to agricultural production,” might require some evaluation by the Zoning Administrator to apply, the drafters spent some extra time in that area to give some guidance. There is even a direct appeal to the Township Board baked in at subsection 2(c)(iv).

From that careful assembly of the Guest Activity Use regulation **as a whole** it should be painfully obvious to anyone with experience in ordinance writing (or, frankly, ordinance reading) that the drafters were trying to satisfy both primary requirements of the *Grayned* case: to give “fair warning” to those property owners who want to take advantage of this special use permit as to what they are and are not getting **and** to make sure that where the ordinance requires some interpretation the Zoning Administrator is not completely unrestrained in making a decision. This is not an ordinance that provides “uncabined discretion,” *LC&S Inc. v Warren County Plan Comm’n*, 244 F 3rd 601, 605 (2001), to enforcement officials.

Which is probably why the Trial Court devotes very little time—honestly, no real time at all—talking about the actual language of the ordinance. Instead, what little time the Trial Court spends at all on substantive discussion on summary judgment (about a single page) is in cataloguing instances of difficulty or inconsistency on the part of the Township in **applying** the ordinance language. And at the conclusion of that perfunctory effort, the Trial Court simply announces “Given the Township’s understanding (or lack thereof) of the term, it is entirely ambiguous.” (ECF 162, PageID.6019)

That is an entirely insufficient hook upon which to hang a \$50 million constitutional violation. Ambiguity is not the same thing as unconstitutional vagueness, especially given the deference that is to be paid to the decisions and determinations of zoning authority by courts as explained immediately above. This is a zoning ordinance. It is an economic regulation, and the Court’s review of it is supposed to be the least searching possible. “[T]he degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment.” *Ass’n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 551 (6th Cir. 2007) (cleaned up) (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982)). Civil laws not implicating the First Amendment are reviewed less stringently than criminal laws “because the consequences of imprecision are qualitatively less severe.” *Flipside*, 455 U.S. at 499.

As for the Trial Court’s real issue with the Guest Activity Use provision—the perceived inconsistency in the application of the terms of the ordinance—that inconsistency is not the fault of the ordinance language, nor is it a basis for a void-for-vagueness constitutional claim. A certain amount of condescension about inconsistent testimony between Township witnesses is probably fair. But too much is too much. Different people will rotate through different positions throughout a community on a regular basis. And over the course of time, and after the enactment of regulations with varying degrees of complexity, various people will be elected or appointed to positions of authority. These new officials will all have varying degrees of understanding of what the previously adopted rules are and how they apply. That can all be messy, but it is our form of self-government and constitutional concepts like void-for-vagueness must take that into consideration.

So, it might be the third “prong” of the *Grayned* test that best helps explain why the Trial Court’s clearly irritated discussion of mere ambiguity is so wholly inadequate here:

Third, but related, where a vague statute ‘abut(s) upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of (those) freedoms.’ Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.

The astonishing damages award in this case arises entirely from the Plaintiffs’ allegations that the Winery-Chateaus were uncertain about what sorts of events they

were allowed to have, so they simply didn't have those events and therefore lost money. See generally ECF 623, PageID.31474-475. There is no way to square that alleged self-deprivation with the fact that there are zoning ordinance processes available to every one of the Plaintiffs to remove any uncertainty as to each and every potential event. In this case, that is at a minimum an appeal to the Township Board under subsection 2(c)(iv) above, but also potentially the interpretation or variance process before the Zoning Board of Appeals described in Argument I above.

Which leads back, again, to the “finality” issue that threads its way through all aspects of this case. The zoning ordinance process addressing ambiguity eventually ends up in the state court system, where the remedy is not at all likely to be the one the Trial Court so gleefully dropped on the Township here: a declaration that all of the Winery-Chateau properties are hereinafter immune from the Guest Activities Use regulations. *That* is a windfall to Plaintiffs that a local circuit court would in all probability have avoided by settling the uncertainty or lack of clarity one way or the other—by declaring a particular event or use or user or activity to be permitted or prohibited under the ordinance. Taking, in other words, the path of “clearly mark[ing]” a proper “boundary” described in *Grayned* instead of wholesale invalidation of the ordinance provision. The Township shouldn't have been deprived of that opportunity.

Could the ordinance have been better written to be clearer, or more expansive in its list of examples? Of course. There are very few written things about which that cannot be said—even court opinions. But the Township’s ordinance is certainly well more than “no rule or standard at all.” *Flipside, supra* at 495 n.7.

CONCLUSION AND RELIEF REQUESTED

Amicus respectfully requests that this Court reverse the judgment of the District Court and find in favor of the Appellants.

Respectfully submitted,

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PROOF OF SERVICE

I certify that on February 11, 2026, the foregoing document was served on all parties or their counsel of record through the Court's e-file system.

/s/ Thomas R. Schultz

CERTIFICATION OF COMPLIANCE

I certify that this *Amicus Curiae* Brief complies with the type-volume limitation in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. The brief contains 6,453 words, excluding the content exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. I further certify that this Brief complies with the type face requirements in Rule 32(a)(5) of the Federal Rules of Appellate Procedure. I prepared the brief in Microsoft® Word and used Times New Roman, a proportionally-spaced, 14-point font.

/s/ Thomas R. Schultz