No. 12-563

In the Supreme Court of the United States

RONALD LOESEL, ARTHUR LOESEL, GAYLE LOESEL, ELAINE LOESEL, VALERIAN NOWAK, AND VALERIAN NOWAK AND ALICE B. NOWAK TRUST BY VALERIAN NOWAK,

Petitioners,

v.

CITY OF FRANKENMUTH, MICHIGAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

MARY MASSARON ROSS
Counsel of Record
HILARY A. BALLENTINE
PLUNKETT COONEY, P.C.
38505 Woodward Ave.
Suite 2000
Bloomfield Hills, MI 48304
mmassaron@plunkettcooney.com
(313) 983-4801

Counsel for Respondent

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

In *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907), this Court held that a new trial is required when at least one, but not every, factual basis for a general civil verdict is unsupported by the evidence. *Wilmington Star* expressly recognized that the outcome would be different in a criminal case, and over eighty years later, in *Griffin v. United States*, 502 U.S. 46 (1991), this Court affirmed the longstanding rule that a general criminal verdict is valid so long as at least one of the submitted grounds is supported by the evidence. In so holding, the *Griffin* Court did not call into question *Wilmington Star* or even remotely suggest that the longstanding rule in the criminal context should replace the equally longstanding rule in the civil context.

The question presented is: whether this Court should overrule *Wilmington Star* and apply *Griffin* in the civil context.

PARTIES TO THE PROCEEDINGS

Petitioners Ronald Loesel, Arthur Loesel, Gayle Loesel, Elaine Loesel, Valerian Nowak, and the Valerian Nowak and Alice B. Nowak Trust by Valerian Nowak, were plaintiffs-appellees in the court below. Respondent City of Frankenmuth, Michigan, was defendant-appellant in the court below.

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JURISDICTION

The Sixth Circuit rendered its decision on August 20, 2012. A timely petition for certiorari was filed on November 6, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> [N]or shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Relevant Facts

Located in Saginaw County, Michigan, the City of Frankenmuth is widely known and promoted as "Michigan's Little Bavaria." The Bavarian character of this small town is in large part due to the German heritage of many of Frankenmuth's 5,000 residents. The town's distinct character is central to its civic identity and local economy. Tourists flock to Frankenmuth to experience its unique retail establishments, such as the world's largest year-round Christmas store, Bronner's Christmas Wonderland, and to indulge in chicken dinners served by numerous Bavarian-themed restaurant establishments. Br. in Opp. App. 3a. Accordingly, the town actively seeks to develop and maintain its German heritage and a tourist industry based on that heritage. *Id*. at 4a-5a. Reflecting this special tradition and the City's consequent need for carefully planned development, the City and the adjoining Township of Frankenmuth entered into a joint growth management plan in 1985, which was revised and reaffirmed in 2005. Pet. App. 3a-4a. Pursuant to additional agreements, the City maintained zoning control over certain portions of the Township, including all land at issue in this case. Br. in Opp. App. 5a.

In 2005, the town's residents and elected officials learned that Wal-Mart had expressed interest in building a megastore in the Township of Frankenmuth. Br. in Opp. App. 3a-6a. Opposition arose from residents and officials concerned about the effect that a Wal-Mart megastore would have on the town's distinctive

local character and local businesses. *Id*. at 6a-9a. The town's longtime city manager expressed his opposition to a Wal-Mart megastore. *Id*. at 6a. Similarly, a citizen group against Wal-Mart—"Citizens for Frankenmuth First"—was formed, which became actively involved in the effort to stop the construction of a Wal-Mart. *Id*. at 9a. Among the group's efforts included sponsoring a local anti-Wal-Mart rally. *Id*. at 10a.

The town held multiple public hearings on the issue. At those hearings, local residents expressed their grave concerns about, and their strong opposition to, the development of a Wal-Mart megastore. One resident, for example, stated that the megastore "would prove financially ruinous to many, many small locally-owned businesses"—businesses "which have provided service with a smile in Frankenmuth for generations, businesses which have a vested interest in this community, businesses which give back, and businesses which care." *Id.* at 49a. Residents were apprehensive that a big-box store such as Wal-Mart would be driven solely by "the bottom line." A local drug store owner stated "if Wal-Mart comes to Frankenmuth … I'll be out of business, and my son will be out of business." *Id*.

Reflecting this significant opposition, following the public hearings, the town's City Planning Commission approved, and the City Council enacted, Ordinance No. 2005-10, which set a size cap of 65,000 square feet for all buildings in the zone where Wal-Mart intended to build its megastore, the "Commercial Local—Planned Unit Development" (CL-PUD) zone. *See* Br. in Opp. App. 17a, 61a-67a. The ordinance did so by establishing the "Commercial Local—Planned Unit Development

Overlay Zone," which applied neutrally and generally to all CL-PUD zoned property within the City. *Id*. at 63a. The town enacted the ordinance pursuant to Michigan's zoning enabling act, Mich. Comp. Laws § 125.81 *et seq.*, which establishes procedures for the enactment, amendment, and administration of zoning ordinances and gives a municipality's legislature broad "discretionary authority" to enact such ordinances. Br. in Opp. App. 29a-30a.

In the ordinance, the City made factual findings specifically noting Frankenmuth's "unique character." *Id.* at 61a. It found that the City has "traditionally fostered small and locally owned business enterprises," including "numerous one-of-a-kind businesses in small scale storefronts reflecting the Community's ethnic and lifestyle characteristics[.]" *Id*. These characteristics made it "renowned throughout Michigan and the Mid-West" and "one of the most popular tourist destinations in Michigan." *Id*. at 61a-62a. The town further found that this "unique character" would be "threatened by the proposed large scale uses that are incompatible in size and character with the historic old world character of Frankenmuth and would irreversibly alter its character." *Id*. at 62a. And it noted that City residents had expressed concerns that, absent City action, it could not protect the "unique" characteristics of the community. *Id*. The ordinance would "promote … a safe and comfortable pedestrian scale environment," "preserve and enhance" the town's "pristine nighttime environment," and "preserve the wholeness of Frankenmuth's economic base." *Id*. It was designed to ensure that retail development "enhances the character of the Frankenmuth Community" and "protects and

contributes to the health, safety, and welfare of the Community." *Id*. at 64a.

The CL-PUD zone to which the ordinance applies predated, by a number of years, Wal-Mart's expressed interest in building a store in Frankenmuth. *Id*. at 4a. The CL-PUD zone includes numerous properties, including property owned by petitioners as well as property owned by other individuals. R.E. 159, Tr Vol 2., pp. 60-61, 130-31.[1] The ordinance applies equally and generally to all property in the CL-PUD zone; no property, including that of petitioners or any other resident, is specifically referenced in the ordinance. Br. in Opp. App. 63a.

At the time the City passed the ordinance, Wal-Mart had not even completed an initial application for City officials to consider; Wal-Mart had only entered into an option agreement to purchase petitioners' land contingent upon numerous other conditions. *Id*. at 5a-6a. Following passage of the ordinance, Wal-Mart elected not to proceed with its plans for a megastore in Frankenmuth. Pet. App. 15a.

B. Proceedings Below

Petitioners brought suit against the City alleging violations of the Due Process, Commerce, Privileges or Immunities, and Equal Protection Clauses. Petitioners did not allege any violations of state law, including Michigan's zoning enabling act. The district court dismissed as unripe all of petitioners' as-applied

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[1] "R.E." refers to the record excerpts filed in the District Court.

challenges, since the City never actually applied the ordinance to deny Wal-Mart's application. Br. in Opp. App. 25a-28a. It also granted summary judgment to the City on petitioners' claims that the ordinance facially violates the Due Process, Commerce, and Privileges or Immunities Clauses. *Id*. at 37a-47a.

The district court nevertheless denied summary judgment to the City on petitioners' claim that the ordinance facially violates the Equal Protection Clause. The district court noted that petitioners did not claim to be members of a protected class but proceeded under a "class of one" equal protection theory. It acknowledged that under such a claim, the City need only satisfy rational-basis review, and that to prevail, petitioners had to negative every conceivable basis that might support the City's action. However, the district court concluded that while the City had articulated multiple legitimate reasons for enacting the ordinance, including preservation of its unique character, the ordinance did not "serve these interests in a rational manner" because it was "impossible to conceive" why the ordinance applied only to the CL-PUD zone and not to other zones within the City. *Id*. at 30a-36a.

The City moved for reconsideration of the district court's denial of summary judgment on petitioners' facial "class-of-one" equal protection claim. The district court denied the motion to reconsider, stating that while "the concerns that motivated the passage of the ordinance were legitimate," it was not "apparent" that the ordinance "serves the legitimate interests … in a rational manner," since the ordinance applied to certain zones but not to others. Accordingly, in the court's view, the City "did not demonstrate that

[petitioners] could not negative every conceivable basis supporting the enactment of the ordinance." Br. in Opp. App. 54a-56a; *see also* 2010 WL 374167, at *1 (E.D. Mich. Jan. 25, 2010) (stating that in denying the City's motion for summary judgment, the Court found that "a genuine issue of material fact exists as to whether [the City] has advanced any conceivable, rational reason for application of the ordinance to only the particular portion of [the City] to which it applies"). After additional discovery, the City renewed its motion for summary judgment, which the district court again denied. *See* R.E. 56, Order Denying Defendant's Renewed Motion for Summary Judgment, 12/21/09.

Petitioners' facial "class-of-one" equal protection claim proceeded to a jury trial. The jury was instructed that it could find the City liable for a violation of equal protection only if it concluded that the City "had no rational explanation for applying the size limitation ordinance to the properties it did[.]" The jury was instructed that it could so find by concluding that petitioners had "disprov[ed] all rational explanations for the difference" (the "no conceivable basis" theory) or had "demonstrat[ed] that the [ordinance] is not explainable by anything except an intention to harm" petitioners (the "animus" theory). R.E. 162, Tr Vol 5, pp. 145-146. The jury returned a general verdict that petitioners "prove[d] their equal protection claim." R.E. 163, Jury Verdict Tr, p. 3. The City moved for judgment as a matter of law, arguing *inter alia* that petitioners did not advance sufficient evidence to negative every conceivable basis for its enacting the ordinance or to demonstrate that the City acted with animus toward petitioners. The district court denied the motion. Pet. App. 47a-48a.

The Sixth Circuit vacated and remanded for a new trial. Pet. App. 33a. It held that petitioners had presented sufficient evidence "to refute every possible nondiscriminatory reason for enacting" the ordinance, thereby satisfying the "no conceivable basis" theory of its facial class-of-one claim. According to the court, a "genuine dispute exists as to whether the ordinance lacked a rational basis." *Id.* at 28a. But the court also held that petitioners had failed to present sufficient evidence to satisfy the "animus" theory of their claim. *Id.* at 28a-30a. The Sixth Circuit then held that because "nothing on the [general] verdict form indicated which theory formed the basis for the jury's decision," it was required to vacate the verdict and remand for a new trial. *Id.* at 30a-33a. In so holding, the Sixth Circuit relied on its prior decision in *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993), which had held that *Griffin v. United States*, 502 U.S. 46 (1991), did not "alter the longstanding civil general verdict rule" set forth in *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907), requiring a new trial under the circumstances. Pet. App. 31a-33a.

REASONS FOR DENYING THE PETITION

This case does not warrant the Court's review. Above all, it is an exceptionally poor vehicle for addressing the question petitioners present because the only remaining "factual basis" for the City's liability should never have reached the jury. The City's enactment of a facially neutral, generally applicable zoning ordinance adopted to preserve local character eminently satisfied rational-basis review and thus did not facially violate the Equal Protection Clause. It was

manifestly erroneous for the district court and Sixth Circuit to have concluded otherwise, and in light of that error, it would be exceedingly unwise for this Court to address petitioners' question of appellate procedure premised upon that incorrect and anomalous determination – at least not without also addressing the rational-basis question the City presents in its cross-petition. The better course, however, is to deny both this petition and the City's cross-petition.

Regardless, there is no independent basis for the Court's intervention. The Sixth Circuit in this case applied the long-established rule set forth in *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60 (1907), requiring a new trial where at least one, but not every, factual basis for a general civil verdict is unsupported by the evidence. This Court has never called into question *Wilmington Star* or suggested that its subsequent decision in *Griffin v. United States*, 502 U.S. 46 (1991), somehow undercuts it or the longstanding criminal-civil distinction that petitioners now wish to eradicate. Almost no circuits, moreover, have even addressed whether *Griffin* altered the longstanding general civil verdict rule; most hold that, consistent with *Wilmington Star*, a new trial is required, and the rest are internally inconsistent, warranting further percolation rather than this Court's review.

Finally, petitioners' question of appellate procedure is not a recurring issue that demands a uniform answer. It only infrequently arises in a limited subclass of cases, and petitioners' claims of importance are undercut by the absence of any calls by the Rules Committees for this Court's intervention and

petitioners' own concession that the law within numerous circuits has been inconsistent for years. Any inconsistencies among the circuits, moreover, do not affect the primary conduct of parties, attorneys, or trial courts, nor do they encourage forum-shopping or impose undue burdens.

A. This Case is an Exceptionally Poor Vehicle for Addressing the Question Presented Because the Only Remaining Basis for Liability Should Have Never Reached the Jury.

1. Petitioners claim that the courts of appeals are in disarray as to the proper approach when "one factual basis" for a general civil verdict "is supported by sufficient evidence but another is not." Pet. i. But even if that were true, this case is a terrible vehicle for resolving that disarray, because the only "factual basis" that remains should have never reached the jury at all. The Sixth Circuit having held that there was insufficient evidence to support petitioners' "animus" theory, Pet. App. 28a-30a, the remaining basis for the City's liability is that there was no conceivable basis for the City's enactment of the zoning ordinance. But the Sixth Circuit's conclusion that petitioners "present[ed] evidence sufficient to refute every possible nondiscriminatory reason" for the enactment of the ordinance, and that, accordingly, "a genuine dispute exists as to whether the ordinance lacked a rational basis," *Id.* at 25a-28a, is profoundly incorrect on both the facts and the law and squarely conflicts with the decisions of this Court and the courts of appeals. Because petitioners' question presented is necessarily

premised on the Sixth Circuit's manifestly erroneous determination, the Court should deny review.

2. a. As explained in the City's conditional cross-petition for certiorari, this Court has long recognized that municipalities have broad latitude to enact zoning laws. So long as the law does not implicate a fundamental right or a protected class, such laws must simply satisfy rational-basis review. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *see also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) ("The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.").

This expansive power given to local legislative bodies to zone as they deem fit finds its roots in *Euclid*, the Court's seminal zoning decision. The Village of Euclid, Ohio, had adopted a comprehensive zoning ordinance dividing the small town into use, height, and lot-area districts. 272 U.S. at 379-80. Amber Realty owned a sixty-eight acre tract of land at the westerly end of the village, "immediately in the path o[f] progressive industrial development[.]" *Id.* at 384. Amber Realty's hopes to sell the land for industrial use were thwarted through the Village's enactment of the ordinance, which prohibited industrial use on most of the tract and caused the land's value to decrease by seventy-five percent. *Id*. Rejecting Amber Realty's constitutional challenge and upholding the ordinance,

the Court noted that zoning ordinances "find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation." *Id*. at 389. The Court then held that "before [an] ordinance can be declared unconstitutional," it must be said "that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id*. at 395. The Court was unable to make that pronouncement where the Village's zoning regulations were arguably related to the public welfare because reports showing "every evidence of painstaking consideration" concluded that the ordinances would decrease traffic, accidents, and noise, and also facilitate fire prevention. *Id*. at 394. But, the Court observed, even if "the validity of the legislative classification" was only "fairly debatable," the "legislative judgment must be allowed to control." *Id*. at 388.

The Court reaffirmed the wide latitude afforded to zoning laws nearly fifty years later in *Village of Belle Terre*, where it upheld the constitutionality of a village zoning ordinance restricting land use to one-family dwellings. In so doing, the Court noted that while "every line drawn by a legislature leaves some out that might well have been included[,]" the "exercise of discretion … is a legislative, not a judicial, function." 416 U.S. at 8. The Court also adopted a broad understanding of the "public welfare" supporting zoning laws, holding that a municipality's zoning power "is not confined to the elimination of filth, stench, and unhealthy places[,]" but extends to "lay[ing] out zones where family values, youth values, and the blessings of

quiet seclusion and clean air make the area a sanctuary for people." *Id*. at 9.

The Court has likewise recognized that rational-basis review, the standard applied to zoning laws that do not affect fundamental rights or a protected class, is a "paradigm of judicial restraint." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). That is because the Equal Protection Clause does not provide "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id*. at 313. So long as there is a "rational relationship between the disparity of treatment and some legitimate governmental purpose," a classification subject to rational-basis review "cannot run afoul of the Equal Protection Clause." *Heller v. Doe*, 509 U.S. 312, 320 (1993). This is not a high bar. A governmental choice can be "based on rational speculation unsupported by evidence or empirical data." *Id.* at 320. Such a law is "accorded a strong presumption of validity," and the burden is on the "one attacking the legislation" to "negative every conceivable basis which might support it." *Id.* at 319-20. With these concerns in mind, the Court has stated that "judicial intervention is generally unwarranted" for "even improvident decisions[,]" regardless of "how unwisely we may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

The deferential nature of this judicial review exists by design and in order to "preserve to the legislative branch its rightful independence and its ability to function." *Lehnhausen v. Lake Shore Auto Parts Co*., 410 U.S. 356, 365 (1973) (quoting *Carmichael v. S. Coal & Coke Co*., 301 U.S. 495, 510 (1937) (internal quotation markes omitted). This basic principle of

deference stems from separation of powers notions that ensure that the judiciary decides cases or controversies without attempting to second-guess and then overturn legislative or executive decisions with which it disagrees on policy grounds. *City of Cleburne,* 473 U.S. at 441-42.

Nowhere is the deferential nature of rational-basis review more evident or critical than where the government "engage[s] in a process of line-drawing." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). Therefore, the fact that a zoning classification "is not made with mathematical nicety" or in practice "results in some inequality" will not cause the classification to fail rational-basis review. *Linsdley v. Natural Carbonic Gas Co*., 220 U.S. 61, 78 (1911). Stated more simply, "'perfection is by no means required'" in legislative line-drawing decisions. *Vance*, 440 U.S. at 108 (quoting *Phillips Chem. Co. v. Dumas Sch. Dist*., 361 U.S. 376, 385 (1960)). The "fact that the line might have been drawn differently is a matter for legislative, rather than judicial, consideration." *Beach Commc'ns*, 508 U.S. at 316 (quoting *Fritz*, 449 U.S. at 179) (brackets and internal quotation marks omitted). Judicial interference is appropriate only where the governmental body could have no legitimate reason for its decision. *Minnesota v. Clover Leaf Creamery Co*., 449 U.S. 456, 464 (1981).

b. The Sixth Circuit's conclusion that the City's zoning ordinance did not, as a matter of law, satisfy rational-basis review cannot be squared with these fundamental, well-established principles. The zoning ordinance that the City enacted was eminently rational. The City could have conceivably believed that

a Wal-Mart megastore would damage the town's distinctive charm and character, which was a source of local pride and a significant driver of tourism and the local economy. Br. in Opp. App. 3a. It could thus have conceivably believed that it did not view a Wal-Mart megastore as appropriate for the town and, as such, concluded that an ordinance setting size limits in the zone that Wal-Mart intended to build would accomplish that legitimate end.

Indeed, while the City need not have even articulated any of these rationales in order to satisfy rational-basis review, *Armour v. City of Indianapolis*, 132 S.Ct. 2073, 2082 (2012), the record is replete with statements by residents and city officials illustrating their deep concern over the arrival of the Wal-Mart megastore and other "big box" retailers as injurious to the City. Factual findings set forth in the Ordinance indicate that the "unique character of Frankenmuth would be threatened by the proposed large scale uses that are incompatible in size and character with the historic old world character of Frankenmuth and would irreversibly alter its character." Br. in Opp. App. 62a. Furthermore, a Wal-Mart megastore would "adversely impact the existing small businesses" in the town that "reflect the Community's ethnic and lifestyle characteristics, building scale, architectural style and historical development." *Id*. at 61a-62a. At public hearings, local residents expressed similar fears that a "big box development would prove financially ruinous to many, many small locally-owned businesses" and that development of a Wal-Mart in the town would undoubtedly destroy many family-owned businesses which have served the town for generations and "give

back" to the community in a variety of ways. *Id*. at 48a-49a.

Nevertheless, the district court repeatedly denied the City's motion for judgment as a matter of law as to whether the ordinance satisfied rational-basis review, Pet. App. 47a-48a, and the Sixth Circuit likewise concluded that a "genuine dispute exists as to whether the ordinance lacked a rational basis." *Id.* at 28a. But that determination is detached from the record and, even more significant, does not accord with basic principles of rational-basis review. Rational-basis review does not require the government to proffer *any* evidence or articulate *any* reasoning; it is enough that a court conceives of a rational basis for government action. *Armour*, 132 S.Ct. at 2080 (noting that "any reasonably conceivable state of facts that could provide a rational basis for the classification" will satisfy rational-basis review). Thus it makes no sense to conclude that there exists a factual "dispute" that requires jury resolution. *See Beach Commc'ns*, 508 U.S. at 315 ("a legislative choice is not subject to courtroom fact-finding[.]").

Similarly, it makes no sense to require the government, in order to prevail as a matter of law, to show that the plaintiff "did not present evidence sufficient to refute every possible nondiscriminatory reason" for the government action, as the Sixth Circuit stated. Pet. App. 26a. That head-scratching formulation misses the forest for the trees; the appropriate inquiry, as in all rational-basis cases, is whether the government's action furthers a legitimate interest. That was the case here, and as such, there was no basis to allow a jury to make that essentially

legal determination. *See*, *e.g.*, *Haves v. City of Miami*, 52 F.3d 918, 923 (11th Cir. 1995) (affirming the district court's grant of summary judgment to municipality accused of violating the Equal Protection Clause by enacting ordinance banning residential use of houseboats, because a rational basis existed and disagreement on the "ultimate wisdom of the City's zoning decisions…does not create a material issue of fact for purposes of surviving a summary judgment motion."); *Brown v. City of Lake Geneva*, 919 F.2d 1299,1302-1303 (7th Cir. 1990) (existence of rational basis for ordinance defining eligible institutions for liquor license applicants was a question for the court properly decided on summary judgment motion).

That petitioners advanced a "class of one" equal protection claim does not alter the analysis. If anything, the "class of one" theory only underscores the errors below. Having dismissed petitioners' as-applied equal protection claim on ripeness grounds, the district court, and subsequently the Sixth Circuit, treated petitioners' claim as a *facial* "class of one" claim, which is practically a contradiction in terms, particularly in the zoning context. Indeed, petitioners' claim calls to mind Justice Breyer's observation in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), cautioning against using the class-of-one device to "transform[] run-of-the-mill zoning cases into cases of constitutional right." *Id.* at 566 (Breyer, J., concurring in the judgment). A facial challenge, moreover, is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists" under which the government action would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Petitioners' burden was thus doubly

extraordinary: a facial challenge under rational-basis review.

Nor can petitioners point to supposed distinctions between properties covered by the ordinance. To begin with, the ordinance applied equally to *all* properties within the CL-PUD zone, not just petitioners' property; furthermore, the CL-PUD zone predated the passage of the ordinance. Br. in Opp. App. 4a, 63a. In addition, that the City used the ordinance to cover one preexisting zone rather than others does not violate the federal Equal Protection Clause. Rather, it is fully consistent with a government's freedom and need to draw lines when determining how best to balance numerous concerns—such as, here, the desire to deter Wal-Mart while allowing for continued growth by local businesses that contribute to the City's local character and charm. *See Beach Commc'ns*, 508 U.S. at 316 (noting that "the precise coordinates of the resulting legislative judgment [are] virtually unreviewable, since the legislature must be allowed leeway to approach a perceived problem incrementally.").

c. In addition to violating fundamental principles of zoning law and rational-basis review, the Sixth Circuit's determination that the ordinance does not satisfy rational-basis review as a matter of law squarely conflicts with the holdings of this Court and the federal courts of appeals. This Court, for example, has flatly rejected property owners' facial challenges to zoning ordinances that, they claimed, violated their constitutional rights by adversely affecting the value of their land—precisely the claim petitioners brought. *See, e.g.*, *Village of Euclid*, 272 U.S. at 379-80. Furthermore, in reviewing the constitutionality of

zoning ordinances, this Court has also recognized that preservation and stability of local values and character are legitimate government interests. *See, e.g.*, *Belle Terre*, 416 U.S. at 6 ("The concept of the public welfare is broad and inclusive… It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."); *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) ("[T]he State has a legitimate interest in local neighborhood preservation, continuity, and stability."); *see also Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 433 (1989) (Stevens, J., concurring in the judgment) ("Zoning is the process whereby a community defines its essential character."); *Belle Terre*, 416 U.S. at 13 (Marshall, J., dissenting) (noting that zoning "may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life"). The Sixth Circuit's determination regarding the ordinance at issue here cannot be reconciled with these precedents.

Nor can the Sixth Circuit's determination be reconciled with the courts of appeals' recognition that preservation of local character and charm is a legitimate state interest. *See, e.g.*, *Constr. Indus. Ass'n of Sonoma Cnty. v. City of Petaluma*, 522 F.2d 897, 909-10 (9th Cir. 1975) (finding legitimate, in the zoning context, a municipality's "desire to preserve its small town character"); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070, 1078 (5th Cir. 1989) ("Certainly the protection of residential integrity is a legitimate objective of a zoning regulation."). And numerous decisions of the courts of appeals have

rejected claims where, as here, a landowner challenges as unconstitutional the enactment of a land-use law that deters or prohibits development and accordingly reduces the value of his land. *See, e.g.*, *Flying J Inc. v. City of New Haven*, 549 F.3d 538 (7th Cir. 2008); *South Cnty. Sand & Gravel Co., Inc. v. Town of South Kingstown*, 160 F.3d 834 (1st Cir. 1998); *Dodd v. Hood River Cnty.*, 59 F.3d 852, 864 (9th Cir. 1995); *Bass River Assocs. v. Mayor, Twp. Comm'r, Planning Bd. of Bass River Twp.*, 743 F.2d 159 (3d Cir. 1984); *Scott v. City of Sioux City, Iowa*, 736 F.2d 1207 (8th Cir. 1984). As the Ninth Circuit noted in an observation squarely applicable to this case, "[t]here is, of course, no federal Constitutional right to be free from changes in the land use laws." *Dodd*, *supra,* at 864.

Thus the Eighth Circuit in *Scott* flatly rejected the landowners' argument that the city's enactment of zoning ordinances limiting commercial development of outlying areas deprived them of the right to use their property under the zoning classification in effect when they made initial plans to commercially develop their land. According to the court, the city's concern that its "substantial investment in revitalizing its downtown commercial district…would fail if competing regional shopping centers siphoned off the market" was well-founded and provided a rational basis for passing the challenged ordinances. 736 F.2d at 1216. Even if "the city's proffered rationale" was not the "real reason for the government action," the court added, the existence of any rational basis is enough to defeat an equal protection challenge. *Id*. at n. 11 (citing *Williamson v. Lee Optical Co*., 348 U.S. 483, 490 (1955)). The Seventh Circuit's decision in *Flying J* further illustrates the error of the decision below. There, the Seventh Circuit

explained that an "example of irrational government action in a class of one equal protection case" is a zoning ordinance "saying that any corporation whose name begins with 'F' may not construct any development larger than a half-acre in size." 549 F.3d at 547. Plainly that is not the case here, where in an effort to preserve its unique characteristics, the City enacted a facially neutral zoning ordinance that applied to *all* properties and *all* parties within *all* areas of a preexisting zone within the City.[2]

3. In light of the Sixth Circuit's error on the rational-basis inquiry, it would be exceedingly unwise for this Court to address the question of appellate procedure that petitioners present without also addressing the antecedent question, presented in the City's conditional cross-petition, of whether enactment of a facially neutral, generally applicable zoning ordinance adopted to preserve local character fails rational-basis review. The better course is for the Court simply to deny both the petition and the conditional cross-petition and let proceedings continue in the district court and, potentially, the Sixth Circuit. But if the Court is inclined to review petitioner's question, it must address the logically antecedent question presented by the City. Failure to do so will give implicit approval to the Sixth Circuit's grievously erroneous decision on an important recurring issue

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[2] *Flying J* does note that irrationality may also be shown by facts "demonstrating that the action was also motivated by animus." *Id.* at 547 n.2. The Sixth Circuit recognized this as well, but it concluded that there was insufficient evidence to support petitioners' "animus" theory, a conclusion petitioners do not challenge before this Court. Pet. App. 28a-30a.

that conflicts with decisions by this Court and the courts of appeals. That issue goes to the heart of whether municipalities will retain the necessary flexibility to enact zoning ordinances that further legitimate interests such as preservation of local charm, promotion of local tourism, and other salutary municipal benefits.

Municipalities around the country are currently grappling with the question of big-box retailers like Wal-Mart, whether to welcome them or deter them, and if the latter, what to do when the retailers seek to buy municipal property to engage in unwanted development. *See generally* Frona M. Powell, *Economic Regulation And The Power To Zone*, 38 REAL. EST. L. J. 421 (Spring 2010) (discussing zoning ordinances banning Wal-Mart megastores in states around the country). Future parties debating the merits of zoning ordinances, especially those contemplated in response to big-box retailers, will undoubtedly look to the Court's acceptance of the premise upon which this case comes to the Court as implicitly endorsing one side of this debate. But that endorsement would be based on a holding that not only is flatly inconsistent with nearly one hundred years of rational-basis review and land-use laws, but significantly restricts municipalities' long-held flexibility to act in what they believe are their citizens' best interests, exposes them to potentially massive liability, and deters them from acting in the first place, depriving citizens of the benefits of land-use laws that this Court and the courts of appeals have long recognized. In short, the Court can either deny both the petition for certiorari and the conditional cross-petition for certiorari, or it can grant both; but it cannot grant one and deny the other without injecting

massive uncertainty and disruption into long-established law.

In addition, while petitioners' question presented concerns what happens when one "factual basis" is supported by sufficient evidence but another is not, it is far from clear that the remaining basis for the City's liability is even a "factual basis." At this point, given that the evidence to support an "animus" theory has been found insufficient, Pet. App. 28a-30a, the City can only be liable for a facial violation of the Equal Protection Clause if there was no conceivable basis for its enactment of the ordinance and the ordinance thereby fails rational-basis review. But that is far from a "factual" inquiry; it is a legal inquiry. Indeed, given that a government satisfies rational-basis review even if it does not proffer *any* evidence for its action—so long as a court later finds a conceivable basis for it—the very notion that the remaining basis for the City's liability is a "factual" one subject to jury determination is incongruous to say the least.

By petitioners' own argument, there is no need to review this case in particular. Petitioners contend that the issue of appellate procedure they present "comes up again and again." Pet. 4, 27. Thus if the issue is as truly recurring as petitioners argue, other cases raising the question presented will surely soon present themselves. If the Court were at all inclined to review this question, it is much better served by doing so in a case that does not implicate logically antecedent errors by the lower court or an alternative theory of liability that is not a "factual basis" at all.

B. Petitioners Vastly Overstate the Conflict Among the Circuits.

1. In all events, there are no independent bases for reviewing the question presented. The Sixth Circuit's remand for a new trial rests squarely within the settled principles this Court set forth in *Wilmington Star*, which confirmed the criminal-civil distinction petitioners now wish to eradicate. In that case, plaintiff alleged wrongful death due to negligence, specifying in her declaration eight counts of negligence caused by a particular negligent act. 205 U.S. at 64-66. Ultimately, the jury returned a general verdict for her. *Id*. at 66. The Court concluded that three of the eight acts were unsupported by the evidence and thus should not have been submitted to the jury. *Id*. at 77-78. The Court then held that because "it is impossible from the record to say upon which of the counts of the declaration the verdict was based," a new trial was necessary. *Id*. at 79. Significantly, the Court observed that "of course, in a case like the one we are considering, we cannot maintain the verdict, as might be done in a criminal case, upon a general verdict of guilty upon all the counts of an indictment." *Id*. at 78.

Over eighty years later, in *Griffin*, the Court affirmed that a general verdict for criminal conspiracy is valid so long as a jury finds that a defendant participated in at least one of several objects of a conspiracy. The Court looked to a long history of common law to conclude that no "historical practice" supported vacating a general criminal verdict if one object of a conspiracy was found not to be supported by the evidence. 502 U.S. at 51. But nothing in *Griffin* remotely suggests that the Court intended for its

holding to apply in the civil context; indeed, the Court's analysis is focused exclusively on the criminal context, and almost all of the precedents upon which it relies are criminal decisions. And certainly nothing in that decision *sub silentio* undercuts *Wilmington Star* or the traditional criminal-civil divide. In fact, in noting that a different rule would apply in the criminal context, *Wilmington Star* cited *Goode v. United States*, 159 U.S. 663 (1895), which cited *Claasen v. United States*, 142 U.S. 140 (1891)—a decision prominently quoted in *Griffin*. In short, *Wilmington Star* and *Griffin* both looked to the same "historical practice," which consistently distinguished between criminal and civil cases. The Court has never come close to suggesting that this distinction should be eliminated.

2. In the decision below, the Sixth Circuit relied on its decision in *Virtual Maintenance, Inc. v. Prime Computer*, 11 F.3d 660 (6th Cir. 1993), where it cited *Wilmington Star* and expressly held that "*Griffin*, a criminal case, does not alter the longstanding civil general verdict rule" set forth in *Wilmington Star*. *Id.* at 667. Petitioners concede that at least four other circuits have "the same rule" as the Sixth Circuit. Pet. 11. Petitioners claim that the other circuits are "starkly divided," *id*. at 10, but that is a vast overstatement. Only two circuits have even addressed whether *Griffin* altered the longstanding general civil verdict rule. One of them, the Federal Circuit, does not maintain its own circuit law on the question; rather, as noted in a case cited by petitioners, because the right to a new trial is a "procedural issue not unique to patent law," the Federal Circuit borrows "the law of the regional circuit to which an appeal would lie in a non-patent case." *Northpoint Tech., Ltd. v. MDS Am., Inc.*,

413 F.3d 1301, 1311 (Fed. Cir. 2005). The only circuit that has considered whether to adopt its *own* rule applying *Griffin* in the civil context is the Fifth Circuit, in *Walther v. Lone Star Gas Co.*, 952 F.2d 119 (5th Cir. 1992), and the court devoted but a paragraph of analysis to the issue. In a subsequent decision, moreover, the Fifth Circuit reiterated the *Wilmington Star* rule, noting that a "general verdict cannot stand" if one of multiple "theories of recovery" is "not supported by evidence." *See Crist v. Dickson Welding, Inc.*, 957 F.2d 1281, 1286 (5th Cir. 1992). Thus, even Fifth Circuit law on the subject is not settled. And even if it were, a single outlier decision from over twenty years ago does not warrant this Court's review.

The remaining cases cited by petitioners do not demonstrate an intractable divide among the circuits that warrants this Court's intervention. The single Fourth Circuit case petitioners cite predates *Griffin* and relies in passing on a nearly 40-year-old Ninth Circuit case that is not even consistent with the approach petitioners subsequently ascribe to the Ninth Circuit. *See Sandberg v. Va. Bankshares, Inc.*, 891 F.2d 1112, 1122 (4th Cir. 1989) (citing *Baumler v. State Farm Mut. Auto. Ins.*, 493 F.2d 130, 134 (9th Cir. 1974)). Other Fourth Circuit cases predating *Griffin*, moreover, take the approach consistent with *Wilmington Star* and adopted by the Sixth Circuit. *See, e.g.*, *Ely v. Blevins*, 706 F.2d 479, 480 (4th Cir. 1983); *Krizak v. W.C. Brooks & Sons, Inc.*, 320 F.2d 37, 41 (4th Cir. 1963). The Fourth Circuit is thus aligned with the other circuits or, at the most, is also unsettled on the issue, demonstrating a need for additional percolation rather than intervention by this Court.

The First Circuit's approach is also fully consistent with *Wilmington Star*; indeed, both First Circuit cases cited by petitioners cite *Wilmington Star* with approval and observe that the circuit's "practice" is in "accord with the Supreme Court precedents." *Gillespie v. Sears, Roebuck & Co.*, 386 F.3d 21, 30 (1st Cir. 2004). The Second Circuit's decision in *Bruneau ex rel. Schofield v. South Kortright Central School District*, 164 F.3d 749 (2d Cir. 1998), is wholly inapposite, for there the jury returned a general verdict in favor of the *defendant*, and thus on appeal there was no challenge to the sufficiency of evidence to support the verdict; indeed, the Second Circuit did not even find any error below. *See id.* at 759-60. In cases actually addressing the particular circumstances here, the Second Circuit, citing *Wilmington Star*, has squarely held that when "an issue was submitted to the jury on which there was no evidence," there is "reversible error." *Mandel v. Penn. Ry. Co.*, 291 F.2d 433, 435 (2d Cir. 1961). Finally, petitioners concede that the Seventh and Eighth Circuits are unsettled on the issue; they further admit that the Ninth Circuit's approach "varies" under the circumstances, relying on not one, not two, but three pre-*Griffin* decisions. Pet. 15-16.

In short, the circuits are far from "starkly divided" on the issue of whether, after *Griffin*, a general civil verdict must be vacated when one of at least two factual bases for a claim is found to be unsupported by the evidence. To the contrary, almost no circuits have even addressed the issue; most circuits hold that, consistent with *Wilmington Star*, a new trial is required; and the law of several other circuits is internally inconsistent, warranting further percolation rather than this Court's review.

C. This Question of Appellate Procedure Does Not Merit This Court's Attention.

Petitioners contend that their case warrants the Court's review because "[m]ost jury-tried civil cases in federal courts are resolved … by a general verdict." Pet. 24. But their question of appellate procedure only arises in the limited subclass of (1) civil cases (2) that are tried before a jury, (3) involving multiple factual bases for liability on a particular claim, (4) in which the jury returns a general verdict on that claim, (5) without the use of special verdicts or answers to written questions as expressly permitted by Federal Rule of Civil Procedure 49, and (6) an appellate court concludes that one—but not all—of the factual bases for liability on that claim was not supported by the evidence. That the issue does not often arise is demonstrated by petitioners' citation of circuit cases stretching back several decades and the relative paucity of cases in the twenty years since *Griffin* addressing whether that decision applies in the civil context. By way of comparison, *Hanna v. Plumer*, 380 U.S. 460 (1965), which petitioners repeatedly cite, addressed whether service of process should be effected according to state or federal rules—an issue that arises in every single civil case filed in the federal system.

The relative scarcity of cases addressing the question also illustrates that even if there were an intractable divide among the circuits, this is not a question that demands a uniform answer. Petitioners' purported circuit split reaches back decades, and yet during that time, the federal judiciary has not ground to a stop, and there have been no calls by the Rules Committees for this Court's intervention. Were the

issue as important as petitioners claim, and as critical and confounding to litigants and courts as petitioners suggest, one would expect more than a handful of cases in the twenty years since *Griffin* to have addressed the matter or some indication of interest by the Rules Committees. One would also expect that there would not be inconsistencies *within* numerous circuits, which petitioners concede is the case. *See* Pet. 27 (describing law within circuits as "unclear and self-contradictory").

As a narrow issue regarding appellate procedure, the question presented does not affect the primary conduct of parties, attorneys, or trial courts. No lawyer or party will conduct litigation, and no district court will oversee litigation, in a different manner depending on what the rule is when an appellate court finds insufficient evidence on one but not all factual bases underlying a claim. No lawyer will conduct discovery or present evidence any less zealously because she is litigating in a circuit that upholds a general verdict even if one of the factual bases for a claim is later found not to be supported by the evidence. There is no danger of forum-shopping based on different rules in different circuits; no lawyer would select a forum based on what might happen years later, on appeal, under an extremely limited set of circumstances.

Petitioners' suggestion that adherence to *Wilmington Star* "produces both absurd results and heavy burdens" is an exaggeration. Pet. 25. Petitioners can only point to two cases, thirty-five years apart, as evidence of purportedly "absurd results." And the "heavy burdens" they identify—including "new legal fees" and "crowding the court's docket"—occur any time an appellate court orders a new trial, whether due to

an improper jury instruction, erroneous evidentiary determination, or the numerous other bases that require retrial. Petitioners claim that lawyers and judges will be "compelled to ascertain the applicable regional law," but there is nothing particularly "time-consuming and costly" about researching a single point of law that will not even arise absent a confluence of numerous circumstances. Finally, petitioners' opaque suggestion that any purported problems "may be even greater" in "multi-jurisdictional disputes" is a red herring. Regardless of where the events giving rise to it take place, a trial and its appeal take place in a single jurisdiction. Even when cases from multiple jurisdictions are consolidated before a single judge for coordinated pretrial proceedings, each case is remanded to its respective jurisdiction prior to each individual trial, where the case rises or falls on the particular evidence in that case. *See* 28 U.S.C. § 1407(a). Thus the question presented has no greater importance in "multi-jurisdictional disputes" than in the ordinary course—which is to say, very little.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARY MASSARON ROSS
Counsel of Record
HILARY A. BALLENTINE
PLUNKETT COONEY, P.C.
38505 Woodward Ave.
Suite 2000
Bloomfield Hills, MI 48304
mmassaron@plunkettcooney.com
(313) 983-4801

Counsel for Respondent

December 7, 2012

APPENDIX

APPENDIX

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APPENDIX 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case Number 08-11131-BC
Honorable Thomas L. Ludington

[Filed March 27, 2009]

RONALD LOESEL, ARTHUR LOESEL,	)
Plaintiffs,	)
v.	)
CITY OF FRANKENMUTH,	)
Defendant.	)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR TO DISMISS

Plaintiffs Ronald and Arthur Loesel filed a complaint against Defendant City of Frankenmuth on March 17, 2008. Plaintiffs are owners of a tract of land on the outskirts of Frankenmuth. They entered into an option agreement with Wal-Mart for Wal-Mart to

purchase the land for four-million dollars if it could build one of its stores on the land. Defendant learned of the contract, became concerned about the impact that a Wal-Mart and other similar stores would have on Defendant, and eventually adopted a zoning ordinance, which may have precluded Wal-Mart from building one of its stores on Plaintiffs' property. Wal-Mart abandoned its application to build a store on Plaintiffs' property and terminated the option contract with Plaintiffs. Plaintiffs' complaint alleges claims against Defendant City of Frankenmuth based on equal protection, due process, the Privilege and Immunities Clause of the Fourteenth Amendment, and the Commerce Clause. Plaintiff seeks both monetary damages and an order declaring that Defendant's zoning ordinance is unconstitutional.

Now before the Court is Defendant's motion to dismiss and for summary judgment [Dkt. # 13], filed August 28, 2008. Plaintiff filed a response [Dkt. # 18] on October 14, 2008, and Defendant filed a reply [Dkt. # 21] on November 26, 2008. The Court held a hearing on December 10, 2008. Defendant first contends that the Court should dismiss all of Plaintiffs' claims for lack of jurisdiction because Plaintiffs lack standing. Second, Defendant contends that the Court should dismiss Plaintiffs' equal protection and due process claims for lack of jurisdiction because those claims are not ripe. Third, Defendant argues that it is entitled to summary judgment on all of Plaintiffs' claims based on the merits. Plaintiffs argue that they have standing and that their claims are ripe. To the extent that Defendant moves for summary judgment on the merits of Plaintiffs' claims, Plaintiffs oppose the motion

because more discovery is necessary under Federal Rule of Civil Procedure 56(f).

I

The following facts are as alleged by Plaintiffs, unless otherwise noted:

Plaintiffs at all relevant times were and continue to be tenants in common in approximately thirty-seven acres of land located in the Township of Frankenmuth, Saginaw County, Michigan. Plaintiffs' property is located in the Township of Frankenmuth, contiguous with Defendant. Many of Defendant's citizens have a German heritage, and Defendant has promoted itself as "Michigan's Little Bavaria." Defendant profits from an influx of day and overnight tourists to Main Street, which emphasizes retail and restaurant establishments with a Bavarian theme. One of these establishments, Bronner's, is a retail store specializing in Christmas ornaments and other merchandise, is approximately 400,000 square feet, and has over one-hundred employees. Nearby, other establishments serve fried-chicken dinners and sell souvenirs to tourists. All of the Bavarian-themed establishments are located in the southern end of Defendant, generally south of Genesee Street.

The northern part of Defendant abuts the Township of Frankenmuth. The north end of town contains the non-tourist retail properties used by Defendant's residents, including banks, car dealerships, and grocers. A prominent shopping center, the Bavarian Mall, contains a number of retail stores and is located just north of Genesee Street. The northern part of

Defendant is described in its Master Growth Plan as follows:

> Serving as the center of local commerce for an area much larger than the township, the North Main Street local shopping area is also the gateway to the South Main tourist business district in Frankenmuth. Main Street is multifunctional and services a combination of pedestrian and automobile traffic. Main Street is also state trunkline —83 and serves as the main point of ingress from the Birch Run exit at I-75.

According to Defendant, its Zoning and Planning Code designates two commercial planned unit development districts, consisting of only undeveloped land: Commercial Local-Planned Use Development ("CL-PUD") and Commercial Tourist Planned Use Development ("CT-PUD"). Plaintiffs' property is zoned CL-PUD. The CL-PUD districts provide for the sale of goods and services to meet the general needs of the residents of Defendant. The CT-PUD districts are those which provide for the sale of goods and services to meet the general needs of visitors. According to Defendant's Master Growth Plan, the zoning was designed to encourage innovation in land use and variety in design, layout, and type of structures constructed. Prior to the adoption of the ordinance at issue in this case, Defendant did not have any zoning ordinances imposing a size limit on structures. Defendant did, however, have minimum lot size restrictions in order to discourage structures being placed too close to one another.

The commercial establishments north of Main Street typically do not incorporate the Bavarian look. The north end of town is typically a mixed-zone of commercial and residential use properties. As zoned prior to the events that led to this lawsuit, Plaintiffs' property was contiguous to other commercially-zoned properties. Defendant had planned that commercial expansion would likely occur in the direction of Plaintiffs' property, that is, northward of the north-south commercial corridor.

At least as early as in 1996, the Township of Frankenmuth and Defendant, through resolutions and agreements, agreed that Defendant would furnish water and sewer services to, among others, Plaintiffs' property, with the tract to be annexed by Defendant if requested by a developer. As a result of these resolutions and agreements, at all times relevant to this lawsuit, the future development of Plaintiffs' property has been under the actual zoning control of Defendant.

On May 26, 2005, Plaintiffs and third-party Wal-Mart Real Estate Business Trust entered into an option agreement for Plaintiffs to sell and Wal-Mart to purchase a portion of Plaintiffs' land. The option agreement was later amended to expand the original purchase of the land from approximately 23.55 acres to approximately 37 acres. The amended option agreement between Wal-Mart and Plaintiffs called for Wal-Mart to pay Plaintiffs $4,000,000.00 for the property, contingent on Wal-Mart's ability to actually build the store.

A review of the agreement also reveals that Wal-Mart maintained "sole and absolute discretion" to cancel the agreement within 180 days of the date of the agreement based on "the feasibility of Wal-Mart's planned development of the Property." The purchase was also contingent on the outcome of an environmental investigation conducted by Wal-Mart, which it had 270 days to complete. Finally, the agreement expressly conditioned the agreement on "zoning of the Property for business retail usage."

On March 29, 2005, upon hearing a rumor that Plaintiffs were talking to Wal-Mart, Defendant's City Manager Charles Graham emailed a planner acquaintance at the Michigan Department of Transportation ("MDOT") stating that "[City Clerk] Phil Kerns has now confirmed there will be a meeting here on April 7th pertaining to the Loesel property on North Main." The next day, Graham emailed the planner at MDOT and said, "We have heard rumors that the proposed project is a Walmart which I am totally opposed to, and I think most people in Frankenmuth will be opposed to." However, Graham acknowledged that Plaintiffs' property was properly commercially zoned and that as a consequence, absent action by Defendant, Plaintiffs had a right to sell the property to Wal-Mart for a store to be built in the northern end of town.

At a point after Plaintiffs had signed the agreement with Wal-Mart, Graham began to solicit information concerning other communities' efforts to exclude Wal-Mart from their towns. On June 22, 2005, in response to an email he sent requesting assistance on how to oppose the Wal-Mart, Graham was told that Defendant

could, "[a]dd a provision to the zoning ordinance that limits the size of any commercial building. That will stop them from enlarging and may stop them from beginning if they know they cannot enlarge." In the same email, Graham was advised: "Be sure to do a good internet search first because WalMart has challenged some of those provisions and won when they were poorly drafted, but lost when they weren't, if I recall correctly." Graham was further advised: "It is definitely better for citizens to fight it instead of the city and township."

On July 14, 2005, Graham attended a meeting of the Frankenmuth Economic Development Corporation ("EDC"). At the meeting Graham acknowledged that he had reviewed the proposed site plan submitted by Wal-Mart's engineers, and admitted that, as shown, it appeared that the zoning allowed the proposed project. The EDC estimated that the Wal-Mart store would generate between $40,000 and $50,000 in annual tax revenue for Defendant, which would have added an additional two-percent to Defendant's annual property tax revenue, with total tax revenue for the county and schools amounting to between $200,000 and $250,000.

The Frankenmuth Downtown Development Authority ("DDA") was established by Defendant in 1983 to promote economic growth. Its board is appointed by the Mayor of Frankenmuth, and the DDA is a city organization. On July 15, 2005, Sheila Stamiris, Executive Director of the DDA, sent a memorandum to the Frankenmuth Mayor and City Council. She advised Defendant's Mayor and the City Council that Plaintiffs had been offered a large sum of money by Wal-Mart for their land. She said:

> Tuesday we awkwardly discussed the proposed Walmart project. As I already suggested, we have not brought the discussion to the public agenda. If there is anything good to say about the project, we can say that we have been given a heads up by the owner and perhaps we have been given a gift of time to adequately plan for this controversial project. I feel strongly that the City should remain neutral while fact finding is completed.

Stamiris expressly advised Defendant that the proposed store was a 104,000 square-foot super-center including sundry and drygoods, a grocery, a pharmacy, and a tire center. Stamiris identified the precise location of the proposed store. Shortly after writing the memorandum, Stamiris advised Graham and other of Defendant's officials that other Michigan towns had not experienced problems with Wal-Mart stores. She forwarded an email from the Downtown Development Authority of DeWitt, Michigan, a town roughly the same size as Defendant, that said in response to her inquiry:

> We have three Wal-Marts within a twenty mile radius. To this point we have not noticed that specifically, Wal-Mart has negatively impacted our downtown. We recently lost a dollar store, but am not sure it could be contributed to the opening of a Wal-Mart. It seems that folks in this area are of the opinion that shoppers will go where they can get the best deal and Wal-Mart has good deals. We feel that the Big Box stores offering one stop shopping appeal to younger shoppers with convenience as their goal.

Stamiris also forwarded to Defendant an Economic Impact Report that estimated the new Wal-Mart store would generate between three- and five-hundred jobs and contribute $70,000 in taxes in the first year of operation. After receiving the report, Graham again solicited an MDOT planner for help in opposing the proposed store. In an email that acknowledged that Wal-Mart itself advised that it would create three-hundred jobs paying nearly ten dollars per hour, he asked MDOT, "Do you know of any localities that have ordinances that prohibit 24 hour operation?"

On July 20, 2005, Defendant was advised by Tom Johnston, a local businessman, that an anti-Wal-Mart group called Citizens for Frankenmuth First had been set up, and that Johnston was involved in the group as a Vice-President. Johnston had operated an IGA store for several years until it was purchased by the Kroger Company, which operates over three-thousand stores in the United States, in 2003. The Kroger is located on North Main Street, several blocks north of Genesee Street within the Bavarian Mall, which is zoned B-3, highway commercial.

Citizens for Frankenmuth First retained attorney Robert LaBelle to assist in its anti-Wal-Mart efforts. Its website featured LaBelle's name. In August 2005, the Frankenmuth City Planning Commission suggested a moratorium on construction of certain new large commercial buildings. An official moratorium, Resolution No. 2005-92, was passed and adopted by Defendant shortly after that meeting, halting the approval process related to the development of any retail facility of at least 70,000 square feet, for a period of 120 days.

On August 25, 2005, Graham attended an anti-Wal-Mart rally sponsored by Citizens for Frankenmuth First. Even though the moratorium was in effect, Defendant knew from Wal-Mart's Ann Arbor-based engineering firm that Wal-Mart still wanted to purchase Plaintiffs' property to build a 100,000 square-foot store. In early September 2005, Graham and several City Council members met with attorney LaBelle.

An individual who was known for his anti-Wal-Mart views, transmitted to Graham and Kerns the text of a Maryland ordinance that limited retail establishments to 65,000 square feet. Later, Graham and Kerns obtained an article from the American Planning Association entitled "Practice Big Box Regulation," which explained some methods by which towns could zone away stores like Wal-Mart. On September 14, Graham sent an email to Kerns that suggested how such an ordinance could be formulated.

In the days that followed, but before any public hearing on the issue, Graham continued to pursue "size-cap" ordinances as the means of blocking Wal-Mart. On September 14, 2005, he contacted the Institute for Local Self-Reliance, an anti-Wal-Mart website that sells books entitled, "Big Box Swindle," among others. He inquired about anti-Wal-Mart ordinances as follows:

> I read your article on store size caps. My question is: Have any of these communities been sued for establishing these store size caps and if so what were the results? If we adopt this type of ordinance, does it have a chance of

> withstanding potential litigation? Our recently updated community master plan does provide a good foundation for adoption of this type of ordinance. Our City Council is interested in pursuing this type of ordinance, but there is some hesitancy about it because of the fear of law suits.

The following day, Graham sent an email to Kerns and Johnston concerning the legality of size-cap ordinances. On September 16, 2005, Graham sent a memorandum to the City Council and others requesting that Defendant not take a public position on the Wal-Mart development in response to a Citizens for Frankenmuth First survey. On September 27, 2005, Graham first internally introduced the idea of an ordinance capping the size of a retail establishment. Two days later, Graham introduced LaBelle to the Frankenmuth Ordinance Review Committee ("ORC") and invited LaBelle to attend the meeting with the ORC, scheduled for October 5, 2005.

At the time this occurred, Defendant's only economic development report concerning a Wal-Mart in Frankenmuth was the positive assessment Defendant obtained during the summer of 2005. On October 5, 2005, Graham sought an opinion from the City's insurer about liability coverage in the event of a lawsuit. On October 11, 2005, Graham forwarded to members of the ORC committee a proposed ordinance that would limit store size. The proposed ordinance was drafted by LaBelle, and his services were paid for by Citizens for Frankenmuth First. The zoning ordinance would establish a Neighborhood Commercial Overlay Zone, set standards and regulations within the zone,

and limit the size of retail establishments to 65,000 square feet. On October 18, 2005, Wal-Mart made a presentation to Defendant indicating that it was willing to design its store to fit in architecturally with the Bavarian appearance maintained in the historic part of town.

After the first draft of the ordinance was circulated, Graham continued to communicate with LaBelle about the potential Wal-Mart store. In an email dated October 21, 2005, Graham expressed concern to LaBelle that having the ordinance apply only to the northern end of town was discriminatory and Graham expressed further concern that were the ordinance to be applied city-wide, the established, local businesses on the southern end would object to having a limitation that stopped them from building in the future. In his email to LaBelle, Graham said:

> The Planning Commission will also have to decide which of the two versions of the 65,000 square foot store ordinance they want to adopt. As our Ordinance Review Committee was reviewing the findings section at the beginning of the ordinance, we could not see how those findings justified only allowing a building of less than 65,000 square feet north of Genesee Street. We also felt that in a court of law a judge would view this approach as more even handed because it will be applicable to the entire City. Having the ordinance only apply north of Genesee is discriminatory to that area of town. That s why the one version of the ordinance would have to apply to the entire City.

In the same email to LaBelle, Graham said:

> However, the Committee also recognizes that the local businesses who are in the tourist business may object to having this limitation apply to their area of town, i.e., the area south of Genesee. The example we keep hearing is, What if Cabella s wants to locate a store here? That s the reason for drafting the ordinance version that applies to the area north of Genesee. I think this version of the ordinance would be fine if we could all feel comfortable with the justification of why it would only apply to the area north of Genesee. Up to this point, I don't think we have adequate justification for restricting it to that area.

Graham then created two new drafts of the ordinance, with one draft limiting the store cap size only to an area north of Genesee Street, and one draft establishing a Commercial Overlay Zone encompassing all properties within Defendant.

On the same day, Graham received an email from Stamiris, which included information that she had received from Professor Kenneth Stone. Dr. Stone is a professor of economics of Iowa State University, and the author of a 1988 study entitled "The Effect of Wal-Mart Stores on Business In Host Towns and Surrounding Towns in Iowa." Dr. Stone was asked by Stamiris for his view on the proposed zoning ordinance. His email response was that store cap restrictions such as those proposed by Graham are very narrow-minded, and that a Wal-Mart in a town like Frankenmuth usually draws a few other national chains such as an

office supply store, a chain restaurant, an apparel store, or a short-line furniture store.

The first formal step towards passing the ordinance was to secure its approval by the Planning Commission, a body with nine voting members. Within days of the new language and in advance of the Planning Commission's next scheduled meeting concerning the ordinance, the Frankenmuth DDA and the EDC advised the Planning Commission that they had no position for or against the proposed zoning ordinance.

Graham edited the language for the size cap draft, sent it to LaBelle for comment, and then revised the proposed ordinance again before submitting it to the Planning Council. The following day, Graham incorporated the definition of a building suggested by LaBelle to make it impossible for Wal-Mart to build two 65,000 square foot stores joined by a walkway. Shortly before it was set for a vote by the Planning Commission, Graham explicitly noted that the proposed zoning ordinance should not be written to affect Bronner's:

> We can't restrict this Special Use Permit to CT-PUD districts because we may have a proposed project in another commercial zone such as B-3. The property where Bronners is located is zoned B-3 and I don't want to have to tell them they can't qualify for a 70,000 square foot addition.

After making edits, Graham consulted with attorneys officially retained by Defendant. Following the attorneys' advice to hire a professional planner,

Graham retained Larry Nix, a planner from Grand Rapids. A few days later, Graham again consulted with LaBelle, and expressed concern that the zoning ordinance that would soon come to a Planning Commission vote would affect Bronner's. He said:

> If this ordinance is adopted, what will it mean for existing buildings? Bronner's Christmas Wonderland is currently about 400,000 square feet. If this ordinance is adopted it obviously doesn't have any impact on the existing building, but what if they want to add a 50,000 square foot building addition? Would the new ordinance only apply to the addition or would it apply to the entire building?

On November 16, 2005, Stamiris sent Graham an e-mail notifying him that Johnston was concerned that the zoning ordinance could affect the ability of Kroger to expand its operation. After being assured that Johnston was fine with the ordinance, Graham formally submitted it to the Planning Commission and for public hearing.

The Planning Commission public hearing concerning the size-cap zoning ordinance was scheduled for November 22, 2005. On November 16, 2005, Graham arranged for Nix to meet with two or three of the Planning Commission members in advance of the scheduled public meeting. In an email to Nix, Graham said:

> If you are able to come here for the Planning Commission meeting on Tuesday, would it be possible for you to come an hour early for the

> purpose of meeting with two or three City Council members so they could hear some of your comments and thoughts about the appropriateness of adopting the 65,000 sq. ft. ordinance and what your thoughts are on potential litigation? There are three Council members that would be well served to hear your comments in a separate meeting so that you could discuss this more freely than you will be able to do at the public hearing. It's quite probable that Wal-Mart will have one or two or three representatives at the public hearing, including a Saginaw attorney they hired to represent them.

A few days before the Planning Commission meeting, to be attended by the public, and in response to concern that the ordinance could affect Bronner's and other businesses in the south end of town, Graham and Kerns, with the input of Nix, decided to shrink the size of the proposed zone to simply exclude the part of the town immediately south of Plaintiffs' property. By this action, Bronner's, the fried chicken restaurants, and the rest of Little Bavaria visited by tourists, continued to be free to add commercial structures or additions of any size.

Graham asked Nix to write a letter to him that would justify, from the planner's perspective, the restrictive ordinance about to be proposed for public hearing. Nix delivered a two-page letter to Graham on November 21, 2005. No economic studies of any kind were performed by Defendant concerning the Wal-Mart, with the exception of the report forwarded by the DDA, which estimated the Wal-Mart would bring

between three- and five-hundred jobs to the area. The overlay zone, referred to as CL-PUDOZ, was enacted on December 6, 2005, as Ordinance 2005-10. It exclusively applies to areas that are zoned CL-PUD.

According to Defendant, on January 13, 2006, representatives of Defendant and the Township of Frankenmuth conducted a pre-application meeting under the PUD approval ordinance with Atwell Hicks, a Wal-Mart representative. Following that meeting, on January 27, 2006, Graham wrote a letter to Hicks indicating the deficiencies in their submission and identifying those additional requirements and items that would need to be submitted to Defendant to proceed with the approval process, including a traffic impact study, economic impact study, landscaping plans and compliance with storm water drainage regulations. Hicks was instructed that following submission of the requested items, a second pre-application conference would follow in preparation for formal proceedings of the Planning Commission and City Council. Following the transmittal of the letter, Defendant received no further communication from Wal-Mart and Defendant took no formal action with regard to any regulatory approval necessary for a Wal-Mart store on Plaintiffs' property.

II

Defendant moves to dismiss various of Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction based on standing and ripeness requirements. Rule 12(b)(1) motions can be raised at any time, even after trial and the entry of judgment. Fed. R. Civ. P. 12(h)(3); *Arbaugh*

v. Y&H Corp., 546 U.S. 500, 506 (2006). When the defendant challenges subject matter jurisdiction through a motion to dismiss, the plaintiff bears the burden of establishing jurisdiction. *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002). In reviewing a 12(b)(1) motion, the court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction, and both parties are free to supplement the record by affidavits.

Motions to dismiss for lack of subject matter jurisdiction can fall into two general categories: facial attacks and factual attacks. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). A facial attack is a challenge to the sufficiency of the pleading itself; in such an attack, the court takes the material allegations of the complaint as true, and construes them in the light most favorable to the nonmoving party. *Id.* (internal citation omitted.) A factual attack challenges the factual existence of the subject matter jurisdiction. On such a motion, "no presumptive truthfulness applies to the factual allegations, and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Id.* (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)). In reviewing a factual attack on jurisdiction, the court has "wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts." *Ohio Nat'l Life*, 922 F.2d at 325 (internal citations omitted).

Defendant also moves for summary judgment on the merits of Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 56(c). Under Rule 56(c), a court must review "pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any," to conclude that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence and draw all reason able inferences in favor of the non-moving party and determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). A fact is "material" if its resolution affects the outcome of the case. *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001). "Materiality" is determined by the substantive law claim. *Boyd v. Baeppler*, 215 F.3d 594, 599 (6th Cir. 2000). An issue is "genuine" if a "reasonable jury could return a verdict for the nonmoving party." *Henson v. Nat'l Aeronautics and Space Admin.*, 14 F.3d 1143, 1148 (6th Cir. 1994) (quoting *Anderson*, 477 U.S. at 248). When the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," there is no genuine issue of material fact. *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 534 (6th Cir. 2002).

The party bringing the summary judgment motion has the initial burden of informing the court of the basis for its motion and identifying portions of the record which demonstrate the absence of a genuine dispute over material facts. *Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002). The party opposing the motion then may not "rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact," but must make an affirmative showing with proper

evidence in order to defeat the motion. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). A party opposing a motion for summary judgment must designate specific facts in affidavits, depositions, or other factual material showing "evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. The party who bears the burden of proof must present a jury question as to each element of the claim, *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000), rather than raise only "metaphysical doubt as to the material facts." *Highland Capital, Inc. v. Franklin Nat'l Bank*, 350 F.3d 558, 564 (6th Cir. 2003) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Failure to prove an essential element of a claim renders all other facts immaterial for summary judgment purposes. *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 895 (6th Cir. 1991).

Under Rule 56(f) of the Federal Rules of Civil Procedure, if a party opposing a motion for summary judgment "shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition," a district court has discretion to deny the motion, order a continuance, or issue any other just order. A court should not grant summary judgment "absent *any* opportunity for discovery." *White's Landing Fisheries, Inc. v. Buchholzer*, 29 F.3d 229, 231 (6th Cir. 1994). However, a court is not required to allow time for further discovery "if the party does not explain how such discovery would rebut the movant's showing of the absence of a genuine issue of material fact." *Singleton v. United States*, 277 F.3d 864 (6th Cir. 2002). Relevant factors include when the party "learned of the issue that is the subject of the desired discovery," the

potential impact of the desired discovery on the summary judgment ruling, "how long the discovery period lasted," whether the party was "dilatory in its discovery efforts," and whether the party was "responsive to discovery requests." *Plott v. Gen. Motors Corp.*, 71 F.3d 1190, 1196-1197 (6th Cir. 1995) (internal citations omitted).

III

Standing is "the threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). A plaintiff must satisfy three constitutional requirements:

> First, the plaintiff must have suffered an 'injury in fact'- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted).

In addition to the constitutional requirements, a plaintiff must also satisfy three prudential standing restrictions. *See Coal Operators and Assocs., Inc. v.*

Babbitt, 291 F.3d 912, 915-16 (6th Cir. 2002). First, a plaintiff must "assert his own legal rights and interests, and cannot rest his claim for relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499 (internal citations omitted). Second, a plaintiff's claim must be more than a "generalized grievance" that is pervasively shared by a large class of citizens. *Coal Operators*, 291 F.3d at 916 (citing *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75 (1982)). Third, in statutory cases, the plaintiff's claim must fall within the "zone of interests" regulated by the statute in question. *Ibid.* "These additional restrictions enforce the principle that, 'as a prudential matter, the plaintiff must be a proper proponent, and the action a proper vehicle, to vindicate the rights asserted.' " *Coal Operators*, 291 F.3d at 916 (quoting *Pestrak v. Ohio Elections Comm'n*, 926 F.2d 573, 576 (6th Cir. 1991)). "A plaintiff bears the burden of demonstrating standing and must plead its components with specificity." *Id.* at 916.

Whether a plaintiff's claims are ripe also affects a federal court's subject matter jurisdiction. "Ripeness is a mixture of Article III concerns about actual cases or controversies and prudential concerns about the appropriate time for a court to make a decision." *Seiler v. Charter Twp. of Northville*, 53 F. Supp. 2d 957, 961 (E.D. Mich. 1999) (quoting *Cmty. Treatment Ctrs., Inc. v. City of Westland*, 970 F.Supp. 1197, 1209 (E.D. Mich. 1997)). "Ripeness is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed." *Id.* (quoting

Bigelow v. Mich. Dep't of Natural Res., 970 F.2d 154, 157 (6th Cir. 1992)).

Relevant to both standing and ripeness is the distinction between "as-applied" and "facial" constitutional challenges to a zoning ordinance. "An 'as applied' challenge alleges a present infringement or denial of a specific right or of a particular injury in process of actual application of the rule to a particular parcel of land or landowner." *V. Jacobs & Sons v. Saginaw County Dep't of Pub. Health*, 284 F. Supp. 2d 711, 718 (E.D. Mich. 2003) (internal citations omitted). "A challenge to the validity of an ordinance 'as applied' . . . is subject to the rule of finality, which is concerned with whether the government entity charged with implementing the ordinance has reached a final decision regarding the application of the ordinance to the property at issue." *Id.* (internal citations omitted). In contrast, a facial challenge alleges that the mere existence and threatened enforcement of the ordinance materially and adversely affects values and curtails opportunities of all property regulated in the market. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Facial challenges are not subject to the finality requirement. *Seiler v. Charter Twp. of Northville*, 53 F. Supp. 2d 957, 963 (E.D. Mich. 1999).

Defendant contends that the Court lacks subject matter jurisdiction over Plaintiffs' claims for several reasons. First, Defendant contends that all of Plaintiffs' claims are premised on the effect of the ordinance on Wal-Mart rather than on Plaintiffs, contrary to prudential standing requirements. While Plaintiffs do not have standing to bring claims on behalf of Wal-

Mart, Defendant aptly concedes that Plaintiffs have standing to raise claims as property owners.

Second, Defendant contends that Plaintiffs do not have standing because they cannot show that there is as a substantial likelihood that their claimed injury, which Defendant characterizes as "the termination of an option agreement to purchase the property as a result of the adoption of Ordinance 2005-10 limiting the size of retail stores in the CL-PUD classification to 65,000 square feet," would be redressed if Plaintiffs prevail. According to Defendant, "it is most likely that Wal-Mart has now focused its efforts on a new location where there is no 65,000 square foot limitation on the size of a retail building." Moreover, Defendant suggests that Plaintiffs cannot obtain redress in the form of monetary damages because they have not alleged a takings claim.

Contrary to Defendant's position, in *Club Italia Soccer & Sports Org., Inc. v. Charter Township of Shelby*, 470 F.3d 286, 294 (6th Cir. 2006), the Sixth Circuit found that "economic injury is sufficient to confer standing upon a party," with respect to equal protection and due process claims. Plaintiff is not required to bring a takings claims to challenge the zoning ordinance because the zoning ordinance could offend principles of due process and equal protection, without necessarily amounting to a taking. *See, e.g.*, *JGA Dev., LLC v. Charter Twp. of Fenton*, No. 05-70984, 2006 WL 618881, at *6 (E.D. Mich. Mar. 9, 2006) (noting that "[i]t would be possible for Defendant to rezone Plaintiff's property in a way that would violate Plaintiff's due process rights, but not sufficiently decrease the value of the property to

support a takings claim"). Plaintiffs could potentially recover, for example, the difference between the value of their property had it remained eligible for development by Wal-Mart ($4,000,000), less its present fair market value. Finally, Plaintiff seeks a declaratory judgment holding the ordinance unconstitutional, which would redress Plaintiffs' injury by eliminating the effect of the ordinance on Plaintiffs' land.

Third, Defendant argues that Plaintiffs' as-applied equal protection and due process claims are not ripe because Defendant has not made a final decision on Wal-Mart's proposed PUD application, since Wal-Mart abandoned its application.[1] Defendant relies on *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 200 (1985), in which the U.S. Supreme Court found that the plaintiff's due process claim was not ripe because the effect of the zoning ordinance on the plaintiff's property "cannot be measured until a final decision is made as to how the regulations will be applied to [the plaintiff's] property." In contrast, Plaintiffs rely on *Nasierowski Bros. Investment Co. v. City of Sterling Heights*, 949 F.2d 890, 894 (6th Cir. 1991), in which the Sixth Circuit found that "a procedural due process claim is instantly cognizable in federal court without requiring a final decision on a proposed development from the responsible municipal agency." Plaintiffs also contend that *Williamson* only applies to due process or equal

[1] Defendant's motion also states that Plaintiffs' privilege and immunities clause claim is not ripe, however, Defendant did not specifically address the ripeness of that claim in its motion.

protection claims when they arise from or are ancillary to a takings claim, which Plaintiffs do not allege.

Plaintiffs are correct that "the type of claim is crucial to determining whether finality is required." *Williamson*, 473 U.S. at 194. Ultimately, "if the [claimed] injury is the infirmity of the process, neither a final judgment nor exhaustion [of administrative remedies] is required." *Hammond v. Baldwin*, 866 F.2d 172, 176 (6th Cir. 1989) (internal citations omitted); *JGA*, 2006 WL 618881 (E.D. Mich. Mar. 9, 2006). To the extent that Plaintiffs' claims challenge "the infirmity of the process," *Hammond*, 866 F.2d at 176, or facially challenge the zoning ordinance, Plaintiffs' claims are ripe. However, to the extent that Plaintiffs' equal protection and due process claims challenge the zoning ordinance only as it applies to their property, their claims do not meet the finality requirement. Thus, those claims are not ripe and the Court lacks subject matter jurisdiction over them.

Although Plaintiffs concede that Wal-Mart did not exhaust its remedies because it never completed the necessary application, nor was Wal-Mart contractually obligated to do so, Plaintiffs contend that the finality requirement is met. Plaintiffs are correct that there is a difference between a finality requirement and an exhaustion requirement:

> The question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable . . . . While the policies underlying the two concepts often overlap, the finality

> requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson, 473 U.S. at 192-93; *Bannum v. City of Louisville*, 958 F.2d 1354, 1362 (6th Cir. 1992) (stating that "finality" means that "the actions of the city were such that further administrative action by [the plaintiff] would not be productive").

Plaintiffs argue that the finality requirement is met because the record shows that Defendant set out in a series of deliberate and purposeful steps to block the Wal-Mart from being built; had Wal-Mart applied for a variance, the parties' positions would not be better clarified. However, the City Council and Planning Commission consist of several members and absent any definitive action taken by them as a group, evidence of the strength of a single person's point of view (i.e. Graham's) does not adequately show that Defendant would have rejected Wal-Mart's proposal or request for a variance. Moreover, even if the evidence showed that each individual city official opposed the building of a Wal-Mart, Wal-Mart never even completed an initial application for them to consider as a group. To determine that Defendant would have rejected an application that was never completed, based on the result of only a preliminary meeting, would be entirely speculative. Thus, Plaintiffs' claims do not meet the

finality requirement, and they may not advance their challenge to the ordinance as applied to their property.

IV

Generally, the zoning of land is a reasonable exercise of government police power. *Euclid*, 272 U.S. at 386-90. In *Euclid*, the U.S. Supreme Court held that a zoning ordinance is unconstitutional only when it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 395. The Court considered a zoning ordinance that divided Euclid into six classes of use districts, three classes of height districts, and four classes of area districts. *Id.* at 380. The ordinance regulated and restricted "the location of trades, industries, apartment houses, two-family houses, single family houses, etc., the lot area to be built upon, the size and height of buildings, etc." *Id.* at 379-80. The plaintiff owned sixty-eight acres of property, portions of which were located in the various zones. *Id.* at 379, 382. The plaintiff challenged the zoning ordinance on the ground that it violated his equal protection and due process rights under the Fourteenth Amendment. *Id.* at 384. He alleged that the zoning ordinance restricted and controlled the use of its land "so as to confiscate and destroy a great part of its value." *Id.* The Supreme Court upheld the zoning ordinance as a valid exercise of the police power and explained:

> Building zone laws are of modern origin. They began in this country about 25 years ago. Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have

> developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable.

Id. at 386-87. Many types of zoning restrictions are typically permissible, including "fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances." *Id.* at 388.

The Michigan zoning enabling act, Mich. Comp. Laws § 125.581, et seq., establishes procedures for the enactment, amendment, and administration of zoning ordinances. The zoning act places discretionary authority to enact a zoning ordinance and to adopt a zoning map with the legislative body of a city or village. Mich. Comp. Laws § 125.584(4). Under the zoning act, the legislative body may amend a zoning ordinance by

a text change or alter a zoning map through a rezoning. *Id.* The legislative body of a city or village may also have the discretionary authority to temper the effect of a zoning ordinance through special land use permits, *Id.* § 125.584a, or planned unit development, *Id.* § 125.584b. Further, the zoning board of appeals may grant administrative relief from the strict application of the ordinance in the form of land use variances. *Id.* § 125.585(9).

To the extent that the Court has jurisdiction over Plaintiffs' claims, the Court will now address the merits of Plaintiffs' equal protection, due process, privilege and immunities clause, and commerce clause challenges to the zoning ordinance enacted by Defendant.

A

Traditionally, to establish an equal protection claim, a plaintiff "must show that [he or] she is a member of a protected class and that [he or] she was intentionally and purposefully discriminated against because of [his or] her membership in that protected class." *Jones v. Union County*, 296 F.3d 417, 426 (6th Cir. 2002) (citing *Boger v. Wayne County*, 950 F.2d 316, 325 (6th Cir. 1991)). In this case, Plaintiffs have not alleged that they are members of a protected class.

Rather, Plaintiffs attempt to establish a "class of one" equal protection claim. A plaintiff who brings a "class of one" equal protection claim must show that (1) it was treated differently from others who are similarly situated and (2) there is no rational basis for the difference in treatment. *Vill. of Willowbrook v.*

Olech, 528 U.S. 562, 564 (2000); *Engquist v. Or. Dep't of Agriculture*, - - - U.S. - - - - , 28 S. Ct. 2146, 2153 (2008). "A 'class of one' plaintiff may demonstrate that a government action lacks a rational basis in one of two ways: either by negativing every conceivable basis which might support the government action or by demonstrating that the challenged government action was motivated by animus or ill-will." *Warren v. City of Athens*, 411 F.3d 697 (6th Cir. 2005) (internal quotations omitted); *Trihealth, Inc. v. Bd. of Comm'rs, Hamilton County, Ohio*, 430 F.3d 783, 788 (6th Cir. 2005) ("To prevail, [plaintiffs] must demonstrate that the differential treatment they were subjected to is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the County's actions were irrational."). *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (finding that a state constitutional amendment lacked a rational basis because the amendment " seems inexplicable by anything but animus toward the class it affects"). By definition, a "conceivable" basis does not even have to have been articulated by the decisionmaker at the time of the decision. *Nordlinger v. Hahn*, 505 U.S. 1, 9 (1992).

Plaintiffs argue that Defendant violated their equal protection rights when it intentionally crafted the reach of the ordinance to treat Bronner's and Johnston's interest in Kroger, as well as other similar properties, more favorably than their interest in their property. Neither Bronner's nor Kroger is subject to the overlay zone because it applies only to properties zoned CL-PUD, like the Loesels' property. Kroger and Bronner's are zoned B-3. Plaintiff contends that it is significant that before the overlay ordinance was

passed, Defendant not only chose the draft of the ordinance that would except the CT-PUD, but also checked with Johnston to determine whether the 65,000 square-foot limitation would affect his business. Additionally, Plaintiff emphasizes the similarities between Wal-Mart and Bronner's:

> Bronner's is a large retailer much like Wal-Mart . . . . Both stores were located at similar ends of the town, one in the south, the other in the north. Had the Wal-Mart been built, it would have been the second largest retailer in town, right behind Bronner's. Both stores had and planned to have large parking lots. Both would have used the same main street for primary ingress and egress. The claim that the CL-PUD and overlay ordinance promotes pedestrian traffic in the CT-PUD district, for example, is incompatible with Bronner's boasts that its parking lot 'accommodates 1,250 cars and 50 busses.'

Finally, Plaintiff contends that the 65,000 square-foot limit is an arbitrary limit that was elected solely to exclude Wal-Mart and cites the following email exchange from Graham, the drafter of the ordinance, to LaBelle, as evidence of that fact:

> [H]ow do we justify a specific number? Why does our draft ordinance use the number of 65,000? Why doesn't it say 70,000 or 80,000 or 90,000 or 73,496? In other words, what basis do we have for whatever number we use?

In contrast, Defendant contends that Plaintiffs' property is not similarly situated to the properties on which Bronner's and other tourist-related businesses are located because those businesses are not part of a PUD district. Moreover, Bronner's and the Kroger store had already been operating for many years, in B-3 zones, without any detrimental effect on Defendant.

The fact that the Bronner's and Kroger are zoned B-3, rather than CL-PUD does not mean that they are not similarly situated to Plaintiffs property. Both Kroger and the Loesels' property are located north of Genesee Street, next to North Main Street, in an area primarily zoned B-3, highway commercial. This area is north of the tourist zone, which is primarily zoned B-2, local business. Similarly, Bronner's is located south of East Curtis Road (also known as East and West Jefferson), next to South Main Street, in an area primarily zoned B-3, highway commercial. This area is south of the main tourist zone, although a CT-PUD zone is located nearby. In sum, all three properties are located outside the main tourist area, next to Main street, in areas primarily zoned B-3.

The more difficult question is whether Plaintiff can prove that "there is no rational basis for the difference in treatment." *Olech*, 528 U.S. at 564. Plaintiffs must prove that enactment of the overlay zone, "is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that [Defendant's] actions were irrational." Defendant proffers that the overlay zone serves the legitimate purposes of maintaining land use stability and the character of the community. Indeed, the substance of the ordinance, a size-cap limitation, is a permissible

zoning criterion and is consistent with the "findings of fact and concerns" supporting the ordinance. Support for the ordinance includes:

> (1) Frankenmuth has traditionally fostered small and locally owned business enterprises and entrepreneurship providing local employment opportunities and revenue expansion. Frankenmuth also is identified by numerous one-of-a-kind businesses in small scale storefronts, which reflect the Community's ethnic and lifestyle characteristics, building scale, architectural style and historical development.
>
> (2) Because of its unique character, Frankenmuth is renowned throughout Michigan and the Mid-West, and is one of the most popular tourist destinations in Michigan, thereby contributing to the economic benefits of the Frankenmuth Community's visitor trade.
>
> (3) The unique character of Frankenmuth would be threatened by proposed large scale uses that are incompatible in size and scale with the historic old world character of Frankenmuth and would irreversibly alter its character. These uses would also adversely impact the existing small scale businesses located in Frankenmuth.
>
> (4) Consistent with the City of Frankenmuth and Frankenmuth Township Joint Growth Management Plan, new commercial development should be encouraged in the so called "town center" settings, where small shops

> are gathered about a central area, with landscaped center features, where walking is encouraged rather than auto traffic, and strip mall developments with large unattractive parking fields are discouraged. Such town center developments are more consistent with the character and tourism goals of Frankenmuth. They promote efficient use of land, promote a safe and comfortable pedestrian scale environment, preserve and enhance the night sky for the enjoyment of a pristine nighttime environment, and encourage excellence in urban design, improvement in the overall Frankenmuth appearance and preserve the wholeness of Frankenmuth's economic base.
>
> (5) Frankenmuth area residents have expressed concerns that current zoning controls are inadequate to: (a) control the size and scale of commercial uses and (b) protect against adverse changes to the unique physical characteristics of the Community, including building and architectural styles.

Compl. Ex. A.

Although the articulated justifications for the ordinance are legitimate, the overlay zone does not appear to serve these interests in a rational manner. In applying the overlay zone exclusively to the CL-PUD zone, Defendant intentionally excluded the main tourist area and the CT-PUD zone, which is intended to cater to tourists, from the size-cap restriction. If the purpose is to maintain land use stability and the character of the community, the main tourist area, that

is, the area roughly bounded on the north by Genesee Street and bounded on the south by East Curtis Street, is precisely where the overlay zone would be expected to apply. Similarly, there is no conceivably rational basis for applying the overlay zone to the CL-PUD zone, but not the CT-PUD zone. Both areas are zoned for development, are substantially surrounded by B-3 zoning, and are located beyond the rough bounds of the main tourist area. In sum, it is impossible to conceive of any rational basis to apply the overlay zone exclusively to the CL-PUD zone, yet not the main tourist zone or the CT-PUD zone.

In certain situations, a government enactment that is "underinclusive," or "do[es] not include all who are similarly situated with respect to a rule, and thereby burden less than would be logical to achieve the intended government end," may be invalidated on equal protection grounds. *See generally* Laurence A. Tribe, *American Constitutional Law*, § 16-4, 1446-49 (2d ed. 1988). As the Supreme Court has noted, "nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949). Ultimately, however, the government enactment must be "clearly wrong, a display of arbitrary power, not an exercise of judgment." *Mathews v. DeCastro*, 429 U.S. 181, 185 (1976). On the record advanced, Defendant is not entitled to summary judgment on Plaintiffs' equal protection claim.

B

The Due Process Clause of the Fourteenth Amendment provides that a person may not be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV. Plaintiff claims that enactment of the overlay zone violated both his procedural and substantive due process rights. "Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest." *Warren*, 411 F.3d at 708. In contrast, substantive due process is the doctrine that "governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed." *Bowers v. City of Flint*, 325 F.3d 758, 763 (6th Cir. 2003) (internal citation omitted). Generally, "[c]itizens have a substantive due process right 'not to be subjected to arbitrary or irrational zoning decisions.' " *Braun*, 519 F.3d at 573 (quoting *Pearson v. Grand Blanc*, 961 F.2d at 1217).

Both procedural and substantive due process require a constitutionally-protected property or liberty interest. *See Club Italia*, 470 F.3d at 296 ("Importantly, procedural due process rights are only violated when a *protected* liberty or property interest is denied without adequate hearing.") (emphasis in original); *Braun*, 519 F.3d at 573 ("To state a substantive due process claim in the context of zoning regulations, a plaintiff must establish that [] a constitutionally protected property or liberty interest exists . . .); *Taylor Acquisitions, L.L.C., v. City of Taylor*, No. 07-2242, 2009 WL 415993, at *6 (stating that "insofar as Plaintiff has failed to assert a property interest for purposes of procedural

due process, its substantive due process claim also fails"). While the Constitution protects certain property and liberty interests, the Constitution does not actually create or define those property interests. *Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002). Rather, whether a plaintiff holds a protected property interest depends on "existing rules or on understandings that stem from an independent source, such as state law. . . ." *Seguin v. City of Sterling Heights*, 968 F.2d 584, 590 (6th Cir. 1992) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)). Generally, to create a constitutionally-protected interest, a person must have a "legitimate claim of entitlement." *Roth*, 408 U.S. at 577.

Defendant contends that Plaintiffs do not have a vested interest in the CL-PUD zoning classification without the subsequently enacted overlay zone because they did not obtain a building permit or commence substantial construction before enactment of the overlay zone. Indeed, "[u]nder Michigan law, a landowner does not possess a vested property interest in a particular zoning classification unless the landowner holds a valid building permit and has completed substantial construction." *Seguin*, 968 F.2d at 590 (citing *City of Lansing v. Dawley*, 225 N.W. 500 (Mich. 1929) and *Schubiner v. W. Bloomfield Twp.*, 351 N.W.2d 214, 219 (Mich. Ct. App. 1984)); *Dorman v. Twp. of Clinton*, 714 N.W.2d 350, 358-59 (Mich. Ct. App. 2006); *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 573 (6th Cir. 2008) (stating that "[a] property owner arguably has a property right where the government *rezones* an existing property") (emphasis in original) (citing *Nasierowski*, 949 F.2d at 896).

In response, Plaintiffs generally contend that their protected interest arises from their contract with Wal-Mart because Michigan contract law defines and grants them the power to privately contract to sell their land. Thus, they contend that they have a pre-existing, enforceable contractual right to convey the CL-PUD zoned land to a third party without a subsequent zoning overlay. It is notable, however, that Wal-Mart did not really have any obligations under the contract, and Wal-Mart's purchase of the land was contingent on several factors, including Wal-Mart's ability to build. Thus, Plaintiffs' interest in the contract was merely a contingent interest, rather than a vested one. Plaintiffs cannot establish a constitutionally-protected property interest, thus, their due process claims fail as a matter of law.

Even if Plaintiffs could establish a protected interest, Plaintiffs' procedural due process claim fails for another reason. Plaintiffs contend that their procedural due process claim arises from "Defendant's decision to proceed with the ordinance without a public hearing and to engage in secret meetings before the opportunity for public comment occurred." Indeed, a plaintiff can "prevail on a procedural due process claim by demonstrating that the property deprivation resulted from . . . an established state procedure that itself violates due process rights." *Warren*, 411 F.3d at 709. In *Nasierowski*, the court explained:

> Governmental determinations of a general nature that affect all equally do not give rise to a due process right to be heard. But, when a relatively small number of persons are affected on individual grounds, the right to a hearing is

> triggered. Falling into that latter category is the situation where, during the amendment process, a governmental unit singles out and specifically targets an individual's property for a zoning change after notice of a general plan of amendment has been published.

949 F.2d at 896 (citing *Harris v. County of Riverside*, 904 F.2d 497, 501-02 (9th Cir. 1990)).

According to Plaintiffs, there was no public hearing because the result of the "public" hearing was pre-determined when there was at least one meeting between Graham, Nix and several Planning Commission members that was allegedly held in violation of the Michigan Open Meetings Act, Mich. Comp. Laws, § 15.261, et seq. The analysis of *JGA Development* is applicable to the facts of this case. In *JGA Development*, the plaintiff argued that the "public" hearing was meaningless because the zoning board was biased against it when five of the seven board members were known to oppose its PUD and one board member had also served on the planning commission and voted to recommend rezoning the property at issue. 2006 WL 618881, at *9. The Court rejected the plaintiff's due process claim based on:

> . . . the reality that there are fundamental differences between the rights of a criminal defendant, which are guaranteed by the Constitution, and property rights, which are to some extent subject to the political process. State and local governments have broad authority to regulate an owner's property rights through the political process . . . . Due Process

> does not require officials to operate in an objective vacuum, i.e., to disregard either their prior political stances or the views of their constituents.

Id. at 9-10. Ultimately, the court determined that because the plaintiff "received notice and an opportunity to be heard, its procedural due process claim fails as a matter of law." *Id.* Similarly, in this case Defendant provided Plaintiffs with notice and an opportunity to be heard, regardless of Graham's apparent opposition to Wal-Mart. Accordingly, Defendant is entitled to summary judgment on Plaintiffs' procedural due process claim.

C

The Privileges and Immunities Clause of the Fourteenth Amendment states that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." The clause "prevents a state from discriminating against citizens of other states in favor of its own." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 511 (1939). Plaintiffs' claim that the ordinance "interferes with Plaintiffs' rights to engage in a common occupation." Plaintiffs rely primarily on *Wilkerson v. Johnson*, in which the court found that the "freedom to choose and pursue a career, to engage in any of the common occupations of life, qualifies as a liberty interest which may not be arbitrarily denied by the State." 699 F.2d 325, 328 (6th Cir. 1983) (internal citation omitted).

However, *Wilkerson* did not address privilege and immunities clause claims. Moreover, in the *Slaughter-House Cases*, 83 U.S. 36, 78 (1872), the Supreme Court rejected the application of the privileges and immunities clause to the ability to participate in a specific occupation because the right to exercise a trade is a privilege and immunity of the citizens of the State, and therefore left to the state government for security and protection. Thus, Plaintiffs have not identified a right protected by the Privileges and Immunities Clause of the Fourteenth Amendment, and the Court will grant Defendant's motion for summary judgment on this claim.

D

Pursuant to the United States Constitution, Congress has the power to "regulate Commerce . . . among the several States." U.S. Const. art. 1, 8, cl. 3. The Commerce Clause "encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. The Beer Inst. Inc.*, 491 U.S. 324, 326 n. 1, (1989) (internal citations omitted). Under a dormant Commerce Clause analysis, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994).

In analyzing the constitutionality of a law under the dormant Commerce Clause, a court engages in a two-step inquiry:

> (1) The court asks whether the law directly burdens interstate commerce or discriminates against out-of-state interests? *E. Ky. Res. v. Fiscal Court of Magoffin County*, 127 F.3d 532, 540 (6th Cir. 1997).
>
> (2) If the statute directly discriminates the court must apply the strictest scrutiny. But, if the statute does not directly discriminate, then the court applies a lower level of scrutiny and asks whether the burdens on interstate commerce are clearly excessive in relation to the putative local benefits. This is known as the Pike balancing test. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

In the first step of the inquiry, a statute can discriminate against out-of-state interests in three different ways: (1) facially, (2) purposefully, or (3) in practical effect. *E. Ky. Res.*, 127 F.3d at 540 (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454-55 (1992)).

State laws that discriminate on their face against interstate commerce are presumptively invalid. *Id.* at 99-100. State laws that purposefully discriminate against out-of-state commerce are also presumptively unconstitutional. *Chem. Waste Mgmt. Inc. v. Hunt*, 504 U.S. 334, 344 & n. 6 (1992). However, the burden of establishing that a challenged statute has a discriminatory purpose under the Commerce Clause falls on the party challenging the provision. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). "[W]here other sources, other than the state's own self-serving statement of its legislative intent, indicate the presence of actual and discriminatory purposes, a state's

discriminatory purpose can be ascertained from [those] sources." *E. Ky. Res.*, 127 F.3d at 542 (citing *Chambers Med. Techs. of S. C., Inc. v. Bryant*, 52 F.3d 1252, 1259, 1259 n. 10 (4th Cir.1995)).

Lastly, "[a] statute which has a discriminatory effect, for Commerce Clause purposes, is a statute which favors in-state economic interests while burdening out-of-state interests." *E. Ky. Res.*, 127 F.3d at 543 (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)). In other words, "there are two complementary components to a claim that a statute has a discriminatory effect on interstate commerce: the claimant must show both how local economic acts are favored by the legislation, and how out-of-state actors are burdened by the legislation." *E. Ky. Res.*, 127 F.3d at 542. As the United States Supreme Court has noted, "any notion of discrimination assumes a comparison of substantially similar entities." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) (discussing the similarly situated requirement in Commerce Clause cases).

If the provision is discriminatory on its face, in purpose, or in effect, the provision is subject to strict scrutiny under which it is the state's burden to show that the discrimination is narrowly tailored to further a legitimate interest. *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982); *Lenscrafters, Inc. v. Robinson*, 403 F.3d 798, 802 (6th Cir. 2005) ("If the statute is found to be discriminatory, it is virtually per se invalid and the Court applies the 'strictest scrutiny.' "). For a law to survive strict scrutiny, it must be "demonstrably justified by a valid factor unrelated to economic protectionism," *New Energy Co.*, 486 U.S. at 274

(internal citation omitted), and there must be no "nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977).

If the provision is not discriminatory on its face, in purpose, or in effect, the question becomes whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142 (1970). "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.* As the Sixth Circuit has noted, "[t]he party challenging the statute bears the burden of proving that the burdens placed on interstate commerce outweigh the benefits that accrue to intrastate commerce." *E. Ky. Res.*, 127 F.3d at 545 (citing *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1282 (2d Cir. 1995)).

First, Plaintiff argues that the ordinance has a discriminatory purpose because the evidence shows that the purpose of the ordinance was to insulate local retailers from Wal-Mart, which in practical effect, limits all interstate retailers from competing against local interests. Plaintiff emphasizes reports that were considered by Defendant indicated that the building of a big-box store such as Wal-Mart would result in the loss and downsizing of local businesses. Plaintiff also argues that "local protectionism" is plain from the findings of fact related to the ordinance which include: "(1) Frankenmuth has traditionally fostered small and

locally owned business enterprises and entrepreneurship providing local employment opportunities and revenue expansion. Frankenmuth is also identified by numerous one-of-a kind businesses . . . which reflect the Community's ethnic and lifestyle characteristics . . . (2) The unique character of Frankenmuth would be threatened by proposed large scale uses [that] would also adversely impact the existing small scale businesses located in Frankenmuth."

Even if Defendant's purpose was to discriminate against Wal-Mart and "large scale uses," such a purpose cannot be characterized as a purpose to discriminate against all interstate retailers. Thus, Plaintiff cannot show that the ordinance has a discriminatory purpose. Plaintiff also argues that the ordinance has a discriminatory effect because it discriminates against out-of-state commerce in favor of in-state interests (i.e. Bronner's and the Kroger store) as a result of the 65,000 square foot size cap. However, according to a report, the size cap would still allow at least sixteen of fifty-six national retailers to build a typical store on Plaintiffs' property. Pl.'s Resp. Ex. OO. Thus, Plaintiff has not carried the burden of showing that the law directly burdens interstate commerce facially, purposefully, or in practical effect. *E. Ky. Res.*, 127 F.3d at 540.

Thus, a lower level of scrutiny applies to the ordinance and the question becomes whether "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142 (1970). Here, Plaintiffs "bear[] the burden of proving that the burdens placed on interstate

commerce outweigh the benefits that accrue to intrastate commerce." *E. Ky. Res.*, 127 F.3d at 545 (internal citation omitted). Plaintiffs have not met that burden. Accordingly, Defendant is entitled to summary judgment on Plaintiffs' commerce clause claim.

V

In a Rule 56(f) affidavit attached to Plaintiffs' response as Exhibit K, Plaintiffs indicate that they seek to depose the following witnesses: Defendant's City Manager Charles Graham, Defendant's City Clerk Philip Kerns, Wal-Mart personnel, DDA Director Sheila Stamiris, Tom Johnston, Wally Bronner, Larry Nix, and "certain members of the Planning Commission and City Council who voted in favor of the subject ordinance." Plaintiffs expect that "the depositions will support the extensive documentary trail left by the Defendant - - a trail clearly indicating that the subject ordinance was drafted to improperly protect the economic interests of [certain] businesses . . . ." Plaintiffs expect to obtain discovery setting forth "the negative economic effects on interstate commerce prompted by the discriminatory impact of the ordinance (under both the equal protection and dormant commerce clause claims) and a comparison of the local retail and wage market in Frankenmuth." The affidavit further indicates that more proof will be forthcoming with respect to the "similarly-situated prong of Plaintiffs' equal protection claim" and "disproving the City's defense of having a rational basis for the subject ordinance."

Plaintiffs also submitted two declarations from their attorneys and a declaration from a "professional

economist." The declaration of attorney David J. Szymanski [Dkt. # 23] discusses the relationships between Johnston, who was the leader of Citizens for Frankenmuth First, the Bavarian Mall, where Kroger is located, Defendant, and its officials. The attorney states that further discovery is expected to show that Plaintiffs were treated differently than Johnston, who had an interest that would have been affected by Wal-Mart.

The declaration of attorney Andrew Kochanowski [Dkt. # 20] highlights portions of transcripts of meetings of the Frankenmuth City Planning Commission on November 22, 2005, and the Frankenmuth City Council on December 6, 2005. In the highlighted portion of the November planning commission discussion, participant Art Loeffler states:

> Greg, you got, I think a listing from Sheila or somebody that talked about the size of stores. That listed and went through the whole gamut of the Wal-Mart, the Meijer, and the K-Mart in regard to the square foot, so yeah you would be eliminating those, I guess, cookie cutter retailers that are out there, and yet there's a whole massive list under 65,000 that would fit and probably be welcomed into this community, so the fact is, yeah, there is some limitation on it, but I think as the master plan stated, somewhere along there we decided what we want and what we don't want as far as the size of a facility.

In the highlighted portion of the December meeting, a member of the public stated:

> We understand that big box development would prove financially ruinous to many, many small locally-owned businesses. Drug stores, appliance stores, photographers, jewelers, eye doctors, car repair shops. These are businesses which have provided service with a smile in Frankenmuth for generations, businesses which have a vested interest in this community, businesses which give back, and businesses which care. We understand that big box retailers, while they spin and smile, smile and spin, to make in-roads in a community in the end care only about the bottom line.

In another highlighted portion, another member of the public stated:

> Honorable Mayor, at one of our town meetings I addressed Mr. Scott (ph) from Wal-Mart. I told him if we –if Wal-Mart comes to Frankenmuth, we have four drug stores in Frankenmuth, I'll be out of business, and my son will be out of business.

Plaintiffs contend that the above excerpts support the dormant commerce clause analysis. The declaration further states that Plaintiffs expect to prove that part of the response to Wal-Mart by the citizens of Frankenmuth was predicated on the fear that minority residents of Saginaw or Buena Vista, Michigan, would work at and frequent the Wal-Mart, in support of their equal protection claim.

The declaration of Patrick L. Anderson, a "professional economist," [Dkt. # 22] does not describe

any additional discovery sought by Plaintiffs, but indicates that Anderson expects to prepare a report addressing, inter alia, the valid economic factors for local land use restrictions, how such restrictions apply to the subject ordinance, what is the likely affect of the ordinance on inter- and intrastate commerce, and what information was available to Defendant at the time of the adoption of the ordinance about the likely effects on inter- and intrastate commerce.

First, with respect to Plaintiffs' equal protection claim, there is no justification to delay ruling on Defendant's motion based on Plaintiffs' 56(f) request because the Court has determined that Defendant is not entitled to summary judgment on that claim. Thus, additional discovery relevant to that claim is not necessary for Plaintiff to defend against Defendant's motion.

Second, the discovery that Plaintiffs seek is not material to their due process claims because Defendant is entitled to summary judgment on those claims based on Plaintiffs' inability to establish a constitutionally-protected interest. Third, the discovery that Plaintiffs seek is not relevant to their privileges and immunities clause claim because Defendant is entitled to summary judgment on that claim due to Plaintiffs lack of a protected right. Indeed, Plaintiffs do not indicate that any of the discovery that they seek would be relevant to those claims.

Fourth, and finally, the discovery that Plaintiffs seek is not material to the Court's analysis of their dormant commerce clause claim. While Plaintiffs appear to seek additional time to prepare an expert

report plausibly relevant to their dormant commerce clause claim, Plaintiffs do not identify any discovery from Defendant, or even a third-party, that is necessary to preparation of the report. Additionally, the information that Plaintiffs propose that the report would contain is essentially information that was already advanced at hearing- namely, that a 65,000 square foot size cap effectively excludes both a certain number of inter- and intrastate retailers. Based on the above, the Court will deny Plaintiff's Rule 56(f) request.

VI

Accordingly, it is **ORDERED** that Defendant's motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART**.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: March 27, 2009

[*Proof of Service Omitted in Printing of this Appendix*]

* * *

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

Case Number 08-11131-BC
Honorable Thomas L. Ludington

[Filed May 22, 2009]

RONALD LOESEL, ARTHUR LOESEL, GAYLE LOESEL, ELAINE LOESEL, VALERIAN NOWAK, VALERIAN NOWAK AND ALICE B. NOWAK TRUST BY VALERIAN NOWAK,	)
Plaintiffs,	)
v.	)
CITY OF FRANKENMUTH,	)
Defendant.	)

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION AND PLAINTIFFS' MOTION FOR RECONSIDERATION, GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR NEW

SCHEDULING ORDER AND TO SET STATUS CONFERENCE, AND AMENDING CASE MANAGEMENT AND SCHEDULING ORDER

Plaintiffs Ronald and Arthur Loesel filed a complaint [Dkt. # 1] against Defendant City of Frankenmuth on March 17, 2008. Plaintiffs' complaint alleged claims against Defendant based on equal protection, due process, the Privilege and Immunities Clause of the Fourteenth Amendment, and the Commerce Clause. Generally, Plaintiffs' claims arose from Defendant's enactment of a zoning ordinance that affected Plaintiffs' property, which Plaintiffs had entered into an arrangement to sell to Wal-Mart.

On March 27, 2009, the Court entered an order granting in part Defendant's motion for summary judgment. *See* [Dkt. # 29]. Based on that order, Plaintiffs continue to maintain only an equal protection claim. In that order, the Court determined that Plaintiffs' as applied due process and equal protection claims, as opposed to facial due process and equal protection claims, were not ripe and therefore not within the Court's jurisdiction. The Court also determined that Defendant was entitled to summary judgment on Plaintiffs' due process claims because Plaintiffs could not establish a constitutionally-protected interest, on Plaintiffs' privilege and immunities clause claims because Plaintiffs did not identify a protected right, and on Plaintiffs' dormant commerce clause claims because Plaintiff could not demonstrate that the ordinance discriminated against interstate commerce or that the burdens on interstate commerce are clearly excessive in relation to the putative local benefits.

Now before the Court are both Plaintiffs' and Defendant's motions for reconsideration [Dkt. # 30, 31], filed on April 6, 2009. In its motion, Defendant contends that there are palpable defects with respect to the Court's consideration of Plaintiffs' equal protection claim, and that Defendant is entitled to summary judgment on that claim. In contrast, Plaintiffs contend in their motion that the Court's analysis of their dormant commerce clause claim is palpably flawed, and that Defendant is not entitled to summary judgment on that claim. Each motion will be discussed separately below, but the Court will deny both motions.

I

Defendant raises what it considers to be four defects in the Court's analysis of Plaintiffs' equal protection claim. First, Defendant contends that the Court should not have addressed Plaintiffs' equal protection claim on the merits because the Court determined that it was not ripe, and therefore the Court lacked subject matter jurisdiction. Notably, however, the Court determined that Plaintiffs' as-applied claim was not ripe, but that a facial claim was ripe. Thus, the Court will deny Defendant's motion on this ground.

Second, Defendant contends that the Court failed to accord deference to the City's decision to enact the ordinance, as it contends is required by *Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). Defendant begins with the premise that, in its order, the Court found that "the size-cap limitation is a permissible zoning criterion and concerns justifying the ordinance are legitimate." Thus, Defendant contends that the ordinance cannot possibly violate Plaintiffs' equal

protection rights. While the Court did generally state that size-cap limitations can be permissible zoning criteria, and that, in this case, the concerns that motivated the passage of the ordinance were legitimate, that does not necessarily mean that Defendant's size-cap limitations cannot violate Plaintiffs' equal protection rights. As addressed in the order, a zoning ordinance that is intentionally crafted to apply to but a subset of the landowners that the ordinance's purpose would justify raises a legitimate question about the equal application of the ordinance. An underinclusive ordinance may violate equal protection rights. On the record advanced prior to entry of the Court's order, it is not apparent that the challenged ordinance serves the legitimate interests sought to be advanced in a rational manner. Thus, the Court denied Defendant's motion for summary judgment and will deny Defendant's motion for reconsideration as to this issue.

Third, Defendant contends that the Court erred in determining that Plaintiffs can maintain a "class of one" equal protection claim because Bronner's and Kroger are not similarly situated to Plaintiffs in relevant, material aspects. Defendants contend that Plaintiffs are not similarly situated to Bronner's and Kroger because the stores sell different products than Wal-Mart and because the properties are zoned differently. Defendant has not explained how any differences between the products to be sold by Wal-Mart and those sold by either Bronner's or Kroger is relevant and material to the enactment of a size-cap and the equal protection analysis. Additionally, as the Court explained in its order, the fact that the properties are zoned differently and that the

requirements and goals of the different classifications are not identical does not mean that the properties cannot be similarly situated. Defendant has not explained how any differences in requirements and goals are material to the analysis. Thus, Defendant's motion will be denied on this ground.

Fourth, and finally, Defendant contends that Plaintiffs cannot maintain a "class of one" equal protection claim because there is no evidence that the planning commission or city council "acting as a group would have acted out of ill-will towards Wal-Mart." Notably, for a "class of one" claim to succeed, a plaintiff need not demonstrate that "the challenged government action was motivated by animus or ill-will," if the plaintiff can "negativ[e] every conceivable basis which might support the government action." *See Warren v. City of Athens*, 411 F.3d 697, 711 (6th Cir. 2005) (internal quotations omitted). Defendant's motion for summary judgment did not demonstrate that Plaintiff could not negative every conceivable basis supporting the enactment of the ordinance. On the record advanced, a rational basis for the application of the ordinance to certain property or zones and not to others was not apparent. Thus, the Court denied Defendant's motion for summary judgment and Defendant's motion for reconsideration will be denied on this ground.

Based on the above, Defendant's motion for reconsideration will be denied in its entirety.

II

Plaintiffs' motion for reconsideration contends that the Court's analysis of the dormant commerce clause

claim was flawed because the Court ignored evidence concerning whether the ordinance has a discriminatory effect against out-of-state commerce and evidence that the burden imposed on interstate commerce is clearly excessive in relation to putative local benefits. Essentially, Plaintiffs contend that the Court ignored "a report commissioned by Frankenmuth's Economic Development Corporation ("ECD") by The Strategic Edge Company to conduct a market study of economic development opportunities including the impact of the opening of a Wal-Mart or another Big Box retailer in the Frankenmuth area on the local business and local economy."

Plaintiffs contend that the report creates a jury question as to whether the ordinance has a discriminatory effect. However, Plaintiffs do not explain how the statute "favors in-state economic interests while burdening out-of-state interests," *E. Ky. Res. v. Fiscal Court of Magoffin County*, 127 F.3d 532, 543 (6th Cir. 1997) (internal citation omitted), when the size cap affects equally both in-state and out of state businesses that seek to operate in a building larger than 65,000 square feet. Moreover, Plaintiffs have not met the burden of proving that "the burdens placed on interstate commerce outweigh the benefits that accrue to intrastate commerce." *E. Ky. Res.*, 127 F.3d at 545 (internal citation omitted). While the report emphasized by Plaintiffs may suggest that a Wal-Mart located on Plaintiffs' property would financially benefit Defendant in certain ways, Plaintiffs do not explain how this demonstrates that "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Based on the above, Plaintiffs' motion for reconsideration will be denied.

III

Also before the Court is Plaintiffs' motion for a new scheduling order and to set status conference [Dkt. # 34]. Since entry of the Court's order granting in part Defendant's motion for summary judgment, additional Plaintiffs have joined the case, pursuant to the Court's order. Additionally, Plaintiffs emphasize that Defendant's motion for summary judgment was brought prior to the completion of discovery. Thus, Plaintiffs effectively seek adjournment of the remaining dates in the case management and scheduling order and additional time for discovery. Such relief is justified and the Court will amend the case management and scheduling order to allow for an additional three months of discovery. In light of the amendment, however, a justification for a status conference is not apparent, and the Court will deny that request.

IV

Accordingly, it is **ORDERED** that Defendant's motion for reconsideration [Dkt. # 30] is **DENIED**, and that Plaintiffs' motion for reconsideration [Dkt. # 31] is **DENIED**.

It is further **ORDERED** that Plaintiffs' motion for new scheduling order and to set status conference [Dkt. # 34] is **GRANTED IN PART** and **DENIED IN PART**.

It is further **ORDERED** that the case management and scheduling order is **AMENDED** as follows:

• Expert disclosures - Plaintiffs:	June 26, 2009
• Expert disclosures - Defendant:	July 24, 2009
• Discovery cutoff:	August 31, 2009
• Deadline for motions challenging experts:	October 2, 2009
• Dispositive motions:	October 2, 2009
• Pretrial disclosures:	December 18, 2009
• Deadline for motions in limine:	January 5, 2010
• Joint final pre-trial order & draft joint jury instructions:	January 26, 2010
• Final pre-trial conference:	February 4, 2010 at 3:30 p.m.
• Trial:	February 16, 2010 at 8:30 a.m.

The balance of the case management and scheduling order remains in full force and effect.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: May 22, 2009

[*Proof of Service Omitted in Printing of this Appendix*]

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APPENDIX 3

ORDINANCE NO. 2005-10

AN ORDINANCE TO AMEND THE CODE OF THE CITY OF FRANKENMUTH BY ADDING A NEW ARTICLE 29 WHICH NEW ARTICLE SHALL BE DESIGNATED AS ARTICLE 29 OF CHAPTER 51 OF TITLE V OF SAID CODE

THE CITY OF FRANKENMUTH ORDAINS:

ARTICLE 29. COMMERCIAL LOCAL PLANNED UNIT DEVELOPMENT OVERLAY ZONE (CL-PUDOZ)

5.246.1. Findings of Fact and Concerns.

(1) Frankenmuth has traditionally fostered small and locally owned business enterprises and entrepreneurship providing local employment opportunities and revenue expansion. Frankenmuth also is identified by numerous one-of-a-kind businesses in small scale storefronts, which reflect the Community's ethnic and lifestyle characteristics, building scale, architectural style and historical development.

(2) Because of its unique character, Frankenmuth is renowned throughout Michigan and the Mid-West, and is one of the most popular tourist destinations in

Michigan, thereby contributing to the economic benefits of the Frankenmuth Community's visitor trade.

(3) The unique character of Frankenmuth would be threatened by proposed large scale uses that are incompatible in size and scale with the historic old world character of Frankenmuth and would irreversibly alter its character. These uses would also adversely impact the existing small scale businesses located in Frankenmuth.

(4) Consistent with the City of Frankenmuth and Frankenmuth Township Joint Growth Management Plan, new commercial development should be encouraged in the so called "town center" settings, where small shops are gathered about a central area, with landscaped center features, where walking is encouraged rather than auto traffic, and strip mall developments with large unattractive parking fields are discouraged. Such town center developments are more consistent with the character and tourism goals of Frankenmuth. They promote efficient use of land, promote a safe and comfortable pedestrian scale environment, preserve and enhance the night sky for the enjoyment of a pristine nighttime environment, and encourage excellence in urban design, improvement in the overall Frankenmuth appearance and preserve the wholeness of Frankenmuth's economic base.

(5) Frankenmuth area residents have expressed concerns that current zoning controls are inadequate to: (a) control the size and scale of commercial uses and (b) protect against adverse changes to the unique physical characteristics of the Community, including building and architectural styles.

5.246.2. Commercial Local Planned Unit Development Overlay Zone.

(1) There is hereby established a Commercial Local Planned Unit Development Overlay Zone (CL-PUDOZ) encompassing all CL-PUD (Commercial Local Planned Unit Development) zoning districts in the City of Frankenmuth . The CL-PUDOZ is established in furtherance of the Frankenmuth Joint Growth Management Plan and the purposes and goals set forth therein.

(2) The CL-PUDOZ does not replace or negate the zoning district designation of the underlying CL-PUD zoning district established in this Chapter but rather is intended to establish limitations, standards and regulations for properties located within the CL-PUDOZ, in addition to those established in the applicable district. In the event of any inconsistency between the provisions set forth in this Article and the provisions set forth in the underlying CL-PUD zoning district, the more restrictive provisions shall supersede and control or, if not determinable which provision is more restrictive, the provisions of this CL-PUDOZ shall supersede and control.

5.246.3. Limitation on Size of Individual Retail Building Developments.

(1) For purposes of this Article 29, the following terms shall have the following meanings:

(a) "Building" shall mean any building operated in whole or in part for retail sales and/or services. For purposes of this section, all buildings within two hundred (200) feet of one another, measured

from the outside of the closest adjacent walls, which: (i) are operated by the same or related company or individuals, or (ii) are operated under the same or similar trade names, or (iii) share checkstands, storage areas or distribution facilities, shall constitute a single "building" and the square footage of each building shall be combined.

(b) The measurement of "square feet" shall include all of the area within a building or buildings, measured from the outside of exterior walls and the middle of party walls shared with another unrelated building. Square footage measurements shall also include all mezzanines, entryways and all floors, and outside areas, if such areas are used for the purpose of sales and are covered or enclosed.

(2) For all properties in the CL-PUDOZ the floor area of a retail building, whether located in a single building, combination of buildings, single tenant space and/or combination of tenant spaces, shall not exceed sixty-five thousand (65,000) square feet. This space limitation shall apply to the combined area of all building levels, both above and below grade.

5.246.4. Retail Development Standards.

(1) The intent of the preceding Sections 5.246.2 and 5.246.3 is to insure that all retail development is of a quality that enhances the character of the Frankenmuth Community, and does not overwhelm its surroundings, and protects and contributes to the health, safety and welfare of the Community. Unregulated retail development can result in substantial impacts to the Community, such as, but not

limited to, noise, traffic, community character, environment and the local economy.

(2) All Retail Developments in the CL-PUDOZ shall be designed in order, as near as practicable, to emulate small town centers, such that retail buildings will be located around a central public area, with landscaping, open space and other features encouraging walking rather than auto traffic.

(3) All Retail Developments in the CL-PUDOZ shall, at a minimum, include the following:

(a) The buildings shall be designed in a way that will reduce the massive scale, uniformity and impersonal appearance and will provide visual interest consistent with the community's identity, character, and scale.

(b) If a building facade exceeds sixty (60) feet in length, it shall be broken down into smaller elements by jogging the wall in or out a minimum of four (4) feet for at least ten (10) feet in length, or by adding an element such as a porch, recessed entry, bay window, projecting trellis or similar substantial architectural feature at intervals so that no continuous wall plane is more than sixty (60) feet in length.

(c) The portion of the building within public view shall incorporate human scale elements such as windows, arcades, lower roof overhangs, awnings or architectural features.

(d) The roof design shall provide variations in roof lines and heights to add interest to each building.

Parapet walls shall be architecturally treated to avoid a plain monotonous style.

(e) Entryways shall be designed to orient customers and add aesthetically pleasing character to buildings by providing inviting customer entrances that are protected from the weather. Each entrance shall be clearly defined and highly visible.

(f) Special design features such as towers, arcades, porticos, accent lighting, planter walls, seating areas, fountains and other architectural features that define circulation paths and outdoor spaces shall anchor pedestrian ways. Examples are outdoor plazas, patios, courtyards and window shopping areas.

(g) All site lighting shall be full cut-off fixtures and downward facing and no direct light shall bleed onto adjacent properties. The applicant must provide a lighting report which provides information on how site lighting will be accomplished to minimize impacts on adjacent properties and roadways.

(h) Mechanical equipment shall be screened to mitigate noise and views in all directions. If roof mounted, the screen shall be designed to conform architecturally to the design of the building either with varying roof planes or with parapet walls. A wood fence or similar treatment is not acceptable.

We, the undersigned, Mayor and Clerk of the City of Frankenmuth, Michigan do hereby certify that the above Ordinance No. 2005-10 of the City of Frankenmuth was introduced at a regular meeting of the City Council held on November 1, 2005, and was

thereafter approved at a regular session of the City Council held on December 6, 2005.

Dated this 6th day of December, 2005.

/s/ Gary C. Rupprecht
GARY C. RUPPRECHT, MAYOR

/s/ Phillip W. Kerns
PHILLIP W. KERNS, CLERK