STATE OF MICHIGAN
IN THE 46th CIRCUIT COURT
OTSEGO COUNTY

MOORE MURPHY HOSPITALITY, LLC
D/B/A IRON PIG SMOKEHOUSE,
Plaintiff,

Case No.: 23-19393-CZ
Hon. Colin G. Hunter

v

HEALTH DEPARTMENT OF NORTHWEST
MICHIGAN,
Defendant.

OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Background Facts

Plaintiff Moore Murphy Hospitality, LLC which operates as the Iron Pig Smokehouse in Gaylord, Michigan, (Iron Pig) filed its complaint in this case seeking a declaratory judgment that five statutes within the Michigan Public Health Code are unconstitutional. The parties agreed that no trial would be needed, and each have now before the Court motions for dispositive relief: a motion for declaratory judgment filed by Iron Pig and a motion for summary disposition field by Defendant

Health Department of Northwest Michigan (HDNW). After receiving those motions and responses the Court heard detailed arguments regarding both matters.

In its motion for declaratory relief, Iron Pig places reliance on the Michigan Supreme Court case of ***In re Certified Questions From United States District Court, Western District of Michigan, Southern Division***, 506 Mich 332 (2020) (***In Re Certified Questions***), this Court's opinion and order in a prior action between Iron Pig and the Michigan Department of Health and Human Services (MDHHS) in Otsego County case number 21-18522-AE (the prior Iron Pig case), and the case of ***T & V Associates, Inc., d/b/a River Crest Catering v Director of Health and Human Services,*** Michigan Court of Appeals No. 361727 (2023), among various other Michigan and out of state cases, treatises and other secondary sources. Both this Court's opinion in the prior Iron Pig case and the ***T & V Associates, supra*** case involved consideration of MCL 333.2253 and both Courts determined that the statute was unconstitutional. However, as it relates to the instant challenges, Iron Pig posits that while MCL 333.2253 (which related to the state health department) has now been ruled unconstitutional, HDNW can and still will rely upon other statutes that provide authority to local health departments but which suffer from the same flaws that made MCL 333.2253 an impermissible delegation of authority.

Alternatively, HDNW argues in its motion for summary disposition that despite any Court determination regarding MCL 333.2253, the portfolio of a local health officer is necessarily far more limited in terms of geography, scope, and duration than the ambit of the MDHHS Director or the Governor, and as a result, the basis for MCL 333.2253 being ruled unconstitutional does not apply to any of the five statutes at issue in this controversy. With respect to MCL 333.2451, HDNW argues that the statute easily passes constitutional muster because the standards in the statute are defined and the statute provides other protections. In addition, though HDNW concedes that the Michigan Court of Appeals case in ***T & V Associates, supra***, may provide persuasive reasoning to this Court to find that there is an actual case or controversy between Iron Pig and HDNW as it pertains to MCL 333.2451 and MCL 333.2453 since those statutes were directly cited in notices and orders requiring Iron Pig to cease previous operations, HDNW remains steadfast that concerning the other statutes—MCL 333.2455, MCL 333.5201 and MCL 333.5203—and whether or not couched in terms of a lack of actual controversy, mootness, or ripeness, Iron Pig's claims are not justiciable and must be dismissed because there is no present actual controversy between the parties concerning those statutes.

Actual controversy, mootness and ripeness

MCR 2.605(A)(1) provides that in a case of actual controversy in its jurisdiction a Michigan court of record may declare the rights and other legal relations of an interested party in seeking a declaratory judgment. That actual controversy requirement incorporates the doctrines of standing, ripeness, and mootness. ***Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Michigan University Trustees,*** 295 Mich App 486, 495 (2012). However, the mootness doctrine is not inflexible, and Courts will address the issue regardless of mootness if the issue is one of public significance and is likely to recur yet may evade judicial review. ***In re Midland Publishing Co., Inc.,*** 420 Mich 148 (1984). In the case of ***T & V Associates, supra***, our Michigan Court of Appeals noted that the order of the defendant in that case directly restricted plaintiff's ability to operate its business and plaintiff's complaint alleged that the defendant's action exceeded the authority provided under MCL 333.2253. Further, because the plaintiff continued to be a banquet and catering company and since the amended statute continued to authorize the defendant to issue emergency orders even if none were currently in place, the ***T & V Associates, supra*** Court held that the issue in that case was not moot and the mere fact that a party had ceased the activity that is challenged as illegal does not necessarily render a case moot.

Separation of powers/non-delegation

The Michigan Constitution of 1963 provides for the separation of powers among the three branches of state government in article 3, section 2:

> The powers of government are divided into three branches: legislative, executive, and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch.

The principal function of the separation of powers...is to...protect individual liberty. ***Clinton v City of New York***, 524 US 417 (1998) (Breyer, J., dissenting). The Legislative power has been defined as the power to regulate public concerns, and to make law for the benefit and welfare of the state. ***46th Circuit Trial Court v Crawford Co.,*** 476 Mich 131, 141 (2006). As noted in the Michigan Supreme Court case of ***In re Certified Questions, supra***:

> Strictly speaking, there is *no* acceptable delegation of legislative power. The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made. A certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action. The focus of controversy has been whether *the degree* of generality contained in the authorization for exercise of executive or judicial powers in a particular field is so unacceptably high as to *amount* to a delegation of legislative powers. (internal citations omitted; cleaned up)

However, despite the constitutional requirement of separation of powers, Michigan Courts have still interpreted the provision to allow for some overlap of

functions between the branches, and the Michigan Supreme Court has even recognized that despite the separation of powers principle—and the non-delegation doctrine in particular—branches of government are not prohibited from obtaining the assistance of coordinate branches. ***Taylor v Smithkline Beecham Corp***, 468 Mich 1 (2003). Further, if sufficient standards and safeguards direct and check the exercise of delegated power, the Legislature can safely avail itself of the resources and expertise of agencies and individuals to assist the formulation and execution of legislative policy. For example, Chief Justice Taft wrote in the case of ***JW Hampton, Jr. & Co. v United States***, 276 US 394 (1928) that "in determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government coordination." So long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized is directed to conform, such legislative action is not a forbidden delegation of legislative power. ***Id.*** Accordingly, the United States Supreme Court has deemed it constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. ***American Power and Light Co. v SEC***, 329 US 90 (1946).

Challenges of unconstitutional delegation of legislative power, therefore, are generally framed in terms of the adequacy of the standards fashioned by the Legislature to channel the agency's or individual's exercise of the delegated power. The Michigan Supreme Court has held, for example, in ***Dep't of Natural Resources v Seaman***, 396 Mich 299 (1976), that the criteria utilized in evaluating the legislative standards is 1) the act must be read as a whole; 2) the act carries a presumption of constitutionality, and 3) the standards must be as reasonably precise as the subject matter requires or permits. Other Michigan Courts have held that the preciseness required of the standards will depend on the complexity of the subject and that due process requirements must be satisfied for the statute to pass constitutional muster. ***Argo Oil Corp v Atwood***, 274 Mich 47 (1935). In making the determination whether the statute contains sufficient limits or standards, Courts must be mindful of the fact that such standards must be sufficiently broad to permit efficient administration in order to properly carry out the policy of the Legislature but not so broad as to leave the people unprotected from uncontrolled, arbitrary power in the hands of administrative officials. In other words, the standards prescribed for guidance must be as reasonably precise as the subject-matter requires or permits. ***Osius v St. Clair Shores***, 344 Mich 693 (1956). Ultimately, the constitutional question becomes whether the Legislature has supplied intelligible

principles to guide the delegee's exercise of discretion. The answer requires construing the challenged statute to figure out what task it delegates and what instructions it provides. ***Gundy v United States***, 139 S.Ct. 2116 (2019).

Other courts have held that the scope of the delegation is also relevant when assessing the sufficiency of the standards, and that the degree of agency discretion that is acceptable varies according to the scope of the power conferred. Consequently, the ultimate judgment regarding the constitutionality of any delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope *plus* the specificity of the standards governing its exercise. When the scope increases to immense proportions the standards must be correspondingly more precise. See ***Schechter Poultry Corp. v United States***, 295 US 495 (1935). In other words, it is one thing if a statute confers a great degree of discretion, i.e., power, over a narrow subject; it is quite another if that power can be brought to bear on something as "immense" as an entire economy. ***Id.*** As concluded by the Michigan Supreme Court in ***In re Certified Questions, supra***:

> as the scope of powers conferred upon the Governor by the Legislature becomes increasingly broad, in regard to both the *subject matter* and their *duration*, the *standards* imposed upon the Governor's discretion by the Legislature must correspondingly become more detailed and precise. (emphasis in original)

Of course, Michigan law is also abundantly clear that statutes are presumed to be constitutional, and courts have a duty to construe statutes as constitutional unless their unconstitutionality is clearly apparent. Accordingly, assuming that there are two reasonable ways of interpreting a statute—one that renders the statute unconstitutional and one that renders it constitutional—courts should choose the interpretation that renders the statute constitutional. ***People v Skinner,*** 502 Mich 89, 110-111 (2018).

Actual controversy, mootness or ripeness:
MCL 333.2451 and MCL 333.2453

As noted above, while HDNW argues in its motion for summary disposition that none of the five statutes that are cited in Iron Pig's motion for declaratory relief are justiciable because of a combination of lack of actual case or controversy, mootness, or ripeness, HDNW also concedes that the ***T & V Associates, supra*** case provides authority for the proposition that when considering a challenge to Covid-19 related restrictions and where the moving party remains in business, was subject to emergency orders or restrictions by the entity named as a defendant, and could face those same or similar restrictions in the future, there may be a case of actual controversy.

Regardless of whether HDNW has conceded the issue of standing and/or a case of actual controversy, however, the Court finds that as it relates to MCL 333.2451 and MCL 333.2453, there is a case of actual controversy existing between Iron Pig and HDNW. In particular, it is noteworthy that HDNW made a determination previously and issued an "ORDER TO CEASE AND DESIST FOOD SERVICE OPERATIONS" directed to Iron Pig indicating that the Iron Pig had violated a prior MDHHS Emergency Order, and HDNW directly cited and relied upon MCL 333.2451 and MCL 333.2453 in issuing the Order:

> "Matters of concern to the health of Otsego County citizens have been brought to the attention of the Administrative Health Officer of the Health Department of Northwest Michigan, and the Administrative Health Officer having made the following determinations, issues this Order *pursuant to the Michigan Public Health Code, MCL 333.2451 and 333.2453…*" (emphasis added).

Similar to the facts in ***T & V Associates, supra***, it is without question that in this case, Iron Pig remains in operation as a restaurant business in Otsego County, Michigan, which is within the geographic territory of HDNW. It is also without question that MCL 333.2451 and MCL 333.2453 both remain in effect and subject to determinations at any time which could have a significant effect on Iron Pig's restaurant business. Thus, even though it is also unquestionable that HDNW is not currently relying upon either statute to impact Iron Pig presently, the mootness

doctrine is not inflexible. Here, the Court finds it clear that this present controversy is one of public significance, and similar to the facts in ***T & V Associates, supra***, the Court finds that questions surrounding the constitutionality of the exercise of authority under both MCL 333.2451 and MCL 333.2453 are not moot as the exercise of authority under those statutes is likely to recur, yet may evade judicial review.

As a result, whether dismissal is sought by HDNW under a theory of ripeness, mootness, or lack of actual case or controversy, the Court finds instead that it has the duty to resolve this legal dispute on the merits because an actual case and controversy exists between these parties.

Actual controversy, mootness or ripeness:
MCL 333.2455, MCL 333.5201 and MCL 333.5203

Unlike its claims related to MCL 333.2451 and MCL 333.2453 where Iron Pig was directly impacted under the exercise of those statutory powers, however, Iron Pig does not point to any regulation, emergency order or other restriction that is now or ever has been implemented against it by HDNW under the authority in MCL 333.2455, MCL 333.5201, or MCL 333.5203. That is, despite the fact that all five of the challenged statutes are contained within the Michigan Public Health Code in general, only two of those five statutes were cited or relied upon by HDNW in its order to cease and desist issued to Iron Pig that served as the flashpoint to the

instant case and controversy. Further, and even though Iron Pig expresses serious concerns about what HDNW and/or the State Department of Health and Human Services *may do* in the future under MCL 333.2455, MCL 333.5201, or MCL 333.5203 and asserts various reasons why this Court should find those statutes unconstitutional, there does not appear to be any *actual ongoing controversy* between the parties regarding those statutes.

Instead, while the Court again reiterates that the mootness doctrine is flexible, and that a matters which are of public significance and concern a wrong that will recur, yet likely evade judicial review are reasons *not* to dismiss a case based upon the doctrine, the Court is additionally mindful of the fact that the question of mootness is a threshold issue that the Court must take up before it reaches the substantive issues of a case. And while the Court is not precluded from reaching issues before actual injuries or losses have occurred, there still must be a *present legal controversy* as opposed to one that is merely hypothetical or anticipated in the future.

As it relates to MCL 333.2455, MCL 333.5201, or MCL 333.5203, the Court finds that there is no present dispute or actual controversy between the parties concerning any authority derived from these statutes. Since none of those statutes have been relied upon against Iron Pig previously or currently, any potential harm

relating to exercise of power under the statutes is only hypothetical or anticipated in the future, and not present. Moreover, the Court finds that Iron Pig has not met its burden of demonstrating that with respect to the authority under MCL 333.2455, MCL 333.5201, or MCL 333.5203, that any hypothetical wrong is likely to recur yet evade judicial review. In the future, if Iron Pig is effected negatively by authority exercised under any of those subparts of the Michigan Public Health Code, Iron Pig would then be entitled to request relief from this or other Courts and in that situation neither mootness, ripeness nor lack of present actual controversy would likely stand in the way of relief; it is not enough, however, to point to a possible or anticipated use of authority in the future to create a *present* case or controversy.

As it relates to any authority under MCL 333.2455, MCL 333.5201, or MCL 333.5203, therefore, and because none of those statutes have been utilized by HDNW against Iron Pig, the Court finds that there is not a present case or controversy and therefore grants HDNW's motion for summary disposition under MCR 2.116(C)(8) for failure to state a complaint upon which relief may be granted.

Iron Pig's vesting argument

A significant portion of Iron Pig's motion for declaratory relief and its oral argument centered on the legal position that delegation of *any* power from one branch of government to another should be abandoned because the Michigan

Constitution speaks of vesting rather than delegation. Iron Pig argues that this Court should abandon the non-delegation doctrine because the power assigned to each branch must remain with that branch and the argument continues so far as to claim that every act of delegated authority is void. Counsel for Iron Pig also suggested that the Court should consider ruling in the alternative, first taking up the question of whether these particular statutes violate the non-delegation doctrine, but then also determine that the vesting clauses in the Michigan Constitution control and clarify a ruling in that regard.

After significant consideration, however, the Court disagrees with such suggestion. Though Iron Pig offers some argument as to why this Court could follow the requirements from ***In Re Certified Questions, supra*** yet still make a legal determination that the vesting clauses within the Michigan Constitution dictate that no delegation of any authority is permissible between the various branches of state government, the Court is not ultimately convinced. In ***In Re Certified Questions, supra*** our high Court laid out not only the various legal frameworks that need to be applied when examining a non-delegation claim, but in addition clearly noted that there indeed may be some delegation of power between our various branches of government. For example, while our high Court held that "strictly speaking, there is *no* acceptable delegation of legislative power", the Court then

noted directly after that the "true distinction ... is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." ***Id.*, at 358.** Further, the Court explained that "The United States Supreme Court has explained that so long as Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." ***Id.***

Examination of those quotations and the balance of the opinion from the Michigan Supreme Court in ***In Re Certified Questions, supra***, reveals that contrary to Iron Pig's argument, this Court cannot declare that every delegation of authority between the various branches is void under the vesting clauses of the Michigan Constitution. Instead, the Michigan Supreme Court has examined the issue of delegation and has consistently determined that challenges of unconstitutional delegation of legislative power are generally framed in terms of the adequacy of the standards fashioned by the legislature to channel the agency's or individual's exercise of the delegated power. Thus, the Michigan Supreme Court has been clear and unambiguous, even if implicit: not all delegations are unconstitutional, but

rather, Courts must look to the specific delegation at issue as well as the adequacy of the standards fashioned. Such clarity from the Michigan Supreme Court cannot, in this Court's view, be simply set aside by ruling as Iron Pig contends, that every delegation of authority between branches of government is unconstitutional. As a result, the Court declines to adopt Iron Pig's arguments regarding vesting.

HDNW's separation of powers argument

In its motion for summary disposition, HDNW cites the Michigan Supreme Court case of ***Rental Prop Owners Ass'n of Kent County v City of Grand Rapids***, 455 Mich 246 (1997) for the proposition that separation of powers only applies to state level of government and not to local government units. In that case, the Michigan Supreme Court determined that a local city ordinance which allowed the city commission to declare rental property to be a public nuisance and therefore to require the property to be padlocked for one year was not precluded under the doctrine of separation of powers because that provision applies only to state government. Our high Court noted as well in ***Rental Prop Owners, supra*** that ordinances exercising police powers are presumed to be constitutional and the burden is on the challenger to prove otherwise.

However, other than clarifying that separation of powers does not apply to local government units, the Michigan Supreme Court did not otherwise declare

anything with respect to the public health code as a whole or to statutes which pertain more specifically to provisions within the local health code, but which were enacted by our state Legislature. And, most importantly, MCL 333.2451 and MCL 333.2453 *are not* statutes which concern executive or legislative powers being utilized by a city commission or city manager. Instead, they are clearly state statutes passed by the state Legislature which authorize the use of power by local health departments and/or the state health department. The Court therefore finds that any argument that the separation of powers doctrine does not apply to the delegation of power under MCL 333.2451 or MCL 333.2453 based upon ***Rental Prop Owners, supra,*** or any other cited authority is legally misplaced. As state statutes passed by our state Legislature, both MCL 333.2451 and MCL 333.2453 are subject to analysis under the ***In Re Certified Questions, supra*** and ***T & V Associates, supra*** cases and the separation of powers doctrine in general.

Analysis of MCL 333.2453

As both parties are aware, neither ***In Re Certified Questions, supra*** or ***T & V Associates, supra*** involved analysis of MCL 333.2451 or MCL 333.2453. Instead, the focus of disagreement in the former was the Emergency Powers of the Governor Act and in the latter was MCL 333.2253. However, notwithstanding that distinction, each of those appellate cases provided clear principles for this Court to follow in

this non-delegation challenge. As noted above, that outline begins with analysis of these criteria: 1) the act must be read as a whole; 2) the act carries a presumption of constitutionality, and 3) the standards must be as reasonably precise as the subject matter requires or permits.

First, reading the public health code as a whole does convince the Court that the first factor weighs in favor of the constitutionality of MCL 333.2453 because the overall purpose of the public health code is clear: the intent of the code is that it shall be liberally construed for the protection of the health, safety and welfare of the people of this state, and the statute clearly allows that intent to be furthered. The second criteria obviously speaks for itself and weighs in favor of a finding of constitutionality: all statutes are presumed constitutional. Next, the Court must analyze whether the standards are as reasonably precise as the subject matter requires in addition to the other considerations in ***In Re Certified Questions, supra*** and ***T & V Associates, supra***. With respect to MCL 333.2453, the Court notes that Iron Pig has offered clear argument and reasoning within its motion for directed verdict which challenges MCL 333.2453 on the same basis that MCL 333.2253 has been challenged—that is, a combination of this Court's analysis in the prior Iron Pig case and/or the Michigan Court of Appeals analysis in ***T & V Associates, supra*** and the Michigan Supreme Court reasoning in ***In Re Certified Questions, supra***. In other

words, in the challenge to MCL 333.2453, Iron Pig has cited authority applicable to the statute and provided specific analysis of why it believes the statute cannot withstand a constitutional challenge.

MCL 333.2453 provides the following, in relevant part concerning the instant constitutional challenge:

> (1) Subject to subsections (3) and (4), if a local health officer determines that control of an epidemic is necessary to protect the public health, the local health officer by emergency order may make a declaration of that determination and may within that emergency order prohibit the gathering of people for any purpose and establish procedures to be followed by persons, including a local governmental entity, during the epidemic to ensure continuation of essential public health services and enforcement of health laws. Emergency procedures are not limited to this code.

The Court notes that it is obvious when reading the entire statutory text, above, including the so called "standards" within the statute, the standards are indistinguishable from the "standards" contained in the now-deemed-unconstitutional statute of MCL 333.2253. For example, the totality of relevant standards in MCL 333.2253 which was ruled unconstitutional both by this Court in the prior Iron Pig case and by the Michigan Court of Appeals in ***T & V Associates, supra***, was the following at the time of the underlying challenges:

> (1) If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public

health services and enforcement of health laws. Emergency procedures shall not be limited to this code.

A simple comparison between those two statutes reveals that the *only* substantive difference between the two is that MCL 333.2253 concerned the state department of public health's exercise of authority and MCL 333.2453 concerns the local health department's exercise of authority. The standards under each statute, however, are identical: if [the relevant person] determines that "control of an epidemic" is "necessary" to protect the public health, an emergency order may be implemented which prohibits the gathering of people for any purpose and which may establish procedures to be followed during the epidemic to ensure continuation of essential public health services and enforcement of health laws.

HDNW urges the Court to focus not on the plainly identical language between the one statute (MCL 333.2253) already deemed unconstitutional and the other (MCL 333.2453) still in effect, but to instead focus on the distinction between *the scope of authority* that can be exercised under the latter. HDNW asserts that the statutes at issue here are materially different in scope and function than MCL 333.2253 and therefore a different outcome is warranted. Further, HDNW asserts that since MCL 333.2453 only provides the authority to impose emergency orders in a certain locality, that authority is nowhere as broad as the statewide authority challenged in ***In re Certified Questions, supra*** and/or ***T & V Associates, supra***.

While the Court acknowledges that the local health department statute can reasonably be argued to be lesser in scope or degree than a statewide statute based upon the facial language of the statutes, a closer examination of the other parts of the local health code continues to reveal a different conceivable conclusion about the scope of authority delegated. For example, MCL 333.2437 provides that the department (i.e., the state department of health), in addition to any other power vested in it by law, may exercise any power vested in a local health department in an area where the local health department does not meet the requirements of this part. While each of the attorneys offered reasonable oral arguments as to what that statute could be intended to mean, that statute appears clear and unambiguous to the Court: the state health department may exercise any power vested in a local health department. In other words, where the state department of health may not be able to rely upon MCL 333.2253 because of the Michigan Court of Appeals determination in ***T & V Associates, supra***, it can still rely upon the local health department statute, MCL 333.2453, *and exercise all identical powers* under the same exact "standards" which existed in the now defunct statute, but under a separate statutory part which (before today) has not been challenged. Thus, under such an interpretation, there is no meaningful difference between the authority that the state department of health possessed under MCL 333.2253 and that

authority which can be utilized by the state department of health vis-à-vis MCL 333.2437 based upon the power delegated to local health departments under MCL 333.2453.

Regardless, however, and even if the Court sets aside potential application of MCL 333.2437, the Court notes that when examining the standards within MCL 333.2453, it still appears that when considering the scope of the authority delegated and the duration of such delegation, the standards within MCL 333.2453 contain no reasonable channeling of any specific discretion, but instead provide only broad directives.

As determined by the Court in ***T & V Associates, supra*** at page 55, when examining the statutory words that "control of an epidemic" is "necessary" in MCL 333.2253, the statute contained *no temporal restriction* on the use of the power, and the statute did not define the terms "epidemic" or "necessary". The Court pointed next to the determination from the Michigan Supreme Court in ***In Re Certified Questions, supra***, where it was noted that even the standards "reasonable" and "necessary" did not supply any meaningful limitation upon the exercise of the delegated power, and the "standards" in MCL 333.2253 provide even less direction. Applying that holding to the state health code under MCL 333.2253, the ***T & V Associates*** Court found that the standard that the director need only

determine that control of an epidemic is "necessary" is likewise a "non-standard" that does not supply any meaningful guidance to the Director as to how the authority permitted is to be exercised, nor does it constrain the actions of the Director in any meaningful manner. Also problematic, according to the ***T & V Associates*** Court, was that the statute further did not even require that the measures ordered by the director need to be rationally related to controlling the epidemic. As summarized by the Court in ***T & V Associates, supra***:

> "The indefinite duration of the director's powers under MCL 333.2253 is comparable to the indefinite duration of the Governor's powers under the EPGA, MCL 10.31 et seq., which our Supreme Court determined to be so broad as to support the conclusion that the EPGA was an unconstitutional delegation of legislative power. See In re Certified Questions, 506 Mich. at 337-338, 958 N.W.2d 1, at 11. We conclude in this case that MCL 333.2253 similarly is an unconstitutional delegation of legislative power to the executive branch, calling to mind the many sound reasons our system of government, at both the state and federal levels, is built upon a foundation of collective law-making in a system divided among three branches of government designed to protect against government overreach and the invasion of rights guaranteed under our fundamental laws."

When comparing the findings of the ***T & V Associates*** Court under MCL 333.2253 to the instant statute, MCL 333.2453, which as noted above contains indistinguishable if not identical standards, and even adopting HDNW's argument that because the statute in question relates only to a local health department and is more narrow in scope than powers that can be utilized across an entire state, the

Court nonetheless determines that even with that narrowed scope, MCL 333.2453 fails to pass constitutional muster.

Under the statute, the local health director possesses free rein to exercise a substantial part of our state and local Legislative authority by prohibiting the gathering of people for any purpose and establishing procedures to be followed during an epidemic for an indefinite period of time, limited only by the local health director's determination that an epidemic exists and that the actions are necessary. Like the words used in the comparable state statute of MCL 333.2253, nothing within the sole standards provided in the local health statute of MCL 333.2453, "necessary" or "epidemic", serve in any realistic way to guide the local health director's exercise of discretion under the statute or to channel or check that power. It is instead up to the local director of health, standing alone, to decide when an epidemic exists and what is necessary to control it, all without any meaningful oversight by the Legislature within the delegation of significant authority.

After thorough review and comparison to the Michigan Court of Appeals' analysis of the state counterpart, MCL 333.2253, the Court finds that when considering the delegation in MCL 333.2453 and because there are no standards which control the exercise of discretion in any specific manner, no presumption of constitutionality can continue. That is, even where the Act offers a clear picture of

the intent when read as a whole and even where the statute is presumed constitutional, the delegation of authority from the Legislature under MCL 333.2453 remains exceedingly broad and without any real check on the exercise of such authority. This lack of channeling of the exercise of discretion under MCL 333.2453 allows the Legislature to pass off its responsibility for legislating, thereby endangering the liberty of the people, and it allows a delegation of authority so broad as to leave the people unprotected from uncontrolled, arbitrary power in the hands of administrative officials.

MCL 333.2453 is therefore found by this Court to violate the non-delegation doctrine and as a result, is deemed unconstitutional.

Analysis of MCL 333.2451

Again, the Court begins by reading the public health code as a whole and doing so convinces the Court that the first factor is in favor of the constitutionality of MCL 333.2451. This is because the Court need not guess regarding legislative intent: the intent of the code is that it shall be liberally construed for the protection of the health, safety and welfare of the people of this state, and the statute clearly allows this intent to be furthered. Plainly, the second criteria requires that all statutes must be presumed constitutional. Again, however, the Court must still analyze whether the standards within the challenged statute are as reasonably

precise as the subject matter requires, in addition to the framework from ***In Re Certified Questions, supra*** and ***T & V Associates, supra***. MCL 333.2451 provides the following, in full:

> (1) Upon a determination that an imminent danger to the health or lives of individuals exists in the area served by the local health department, the local health officer immediately shall inform the individuals affected by the imminent danger and issue an order which shall be delivered to a person authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. The order shall incorporate the findings of the local health department and require immediate action necessary to avoid, correct, or remove the imminent danger. The order may specify action to be taken or prohibit the presence of individuals in locations or under conditions where the imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove the imminent danger.
>
> (2) Upon the failure of a person to comply promptly with an order issued under this section, the local health department may petition a circuit or district court having jurisdiction to restrain a condition or practice which the local health officer determines causes the imminent danger or to require action to avoid, correct, or remove the imminent danger.
> (3) As used in this section:
> (a) "Imminent danger" means a condition or practice which could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided.
> (b) "Person" means a person as defined in section 11061 or a governmental entity.

Within MCL 333.2451, rather than using the words "control of an epidemic" and "necessary" as was the case with MCL 333.2453, this statute reads that if a determination that an imminent danger to the health or lives of individuals exists is

made in the area served by the local health department, an order can be issued to avoid, correct, or remove the imminent danger, and the order may specify action to be taken or may prohibit the presence of individuals where the imminent danger exists. Facially distinct from MCL 333.2453, however, which contains no definition of epidemic or necessary, the standard "imminent danger" is explicitly defined within the statute:

> Imminent danger means a condition or practice which could reasonably be expected to cause death, disease, or serious physical harm immediately or before the imminence of the danger can be eliminated through enforcement procedures otherwise provided.

To utilize authority delegated under MCL 333.2451, therefore, the local health director must determine the existence of an imminent danger, which is limited by the definition as a condition or practice which reasonably could be expected to cause death, disease, or serious physical harm immediately before the imminence of the danger can be eliminated. If such a determination is made, the order can specify action to be taken or may prohibit the presence of individuals. Further, if a person fails to comply promptly, the local health department may petition a circuit or district court having jurisdiction to restrain a condition or practice. Under that last provision, and as conceded by Iron Pig during oral argument, an additional layer of due process is provided in MCL 333.2451 as compared to MCL 333.2453 because

in the former statute, the department may petition a Court if it determines that a person subject to an order fails to promptly comply, and the latter statute provides no such mechanism. Functionally, this means that while HDNW may claim a violation of MCL 333.2451 and issue an Order, it must seek Court assistance to enforce compliance with any Order issued.

The Court notes additionally that while Iron Pig offered specific and concrete arguments in its written briefs and during oral argument regarding why MCL 333.2453 must be found unconstitutional based upon the same reasons that MCL 333.2253 was ruled unconstitutional and the cases analyzed above, Iron Pig has not offered such a comparison or any such detail to any of its argument regarding MCL 333.2451. For example, Iron Pig's motion for declaratory relief contains a citation to the statute itself but zero actual analysis of any word, part, or phrase of MCL 333.2451. The reply brief by Iron Pig to HDNW's motion for summary disposition similarly contains no direct analysis of MCL 333.2451 *at all,* let alone detailed analysis of the standards within the statute or how those standards are so lax as to constitute no real check on the exercise of delegated power. Further, Iron Pig has not cited a single appellate case which has analyzed either the scope or duration of the authority delegated under MCL 333.2451 and has not offered a single appellate case which has examined whether the standards within the statute are as

reasonably precise as the subject matter requires. Iron Pig has not even clarified for the Court in any written briefing its argument as to why it believes those standards—the defined "imminent danger" standard and the allowance for an application for Court enforcement of Orders the local health department believes have been violated—are insufficient to guide the exercise of the local health department's discretion.

In short, while it is true that Iron Pig challenges, in general, the broad constitutionality the five separate statutes listed in its motion for declaratory judgment, the Court finds that as it relates specifically to MCL 333.2451, Iron Pig has not offered any factual or legal argument at all directed at the statute itself, let alone convincing argument which could overcome the presumption of constitutionality with respect to that statute. Stated another way, because Michigan law is clear that the parties have a duty to fully present their legal arguments to the Court for resolution of their dispute, failure to do so may result in a claim being abandoned. More importantly, such lack of legal and factual analysis cannot result in a finding that the presumption of constitutionality of this statute has been overcome. With respect to the challenge to MCL 333.2451, the Court notes that other than offering argument concerning broad principles and citations to cases regarding non-delegation in general, Iron Pig has failed articulate the

specific legal or factual concern with the statute in question, which necessarily means that Iron Pig has not overcome the presumption that the statute is constitutional.

The Court does not reach this conclusion lightly, just like the Court did not reach the above conclusion regarding MCL 333.2453 lightly. However, the Court is bound by the presumption that all statutes are constitutional, and here, analysis of the public health code as a whole reveals a clear intent behind MCL 333.2451—to protect the health, safety and welfare of the people of this state. Regarding the standards contained within MCL 333.2451, the Court is compelled to find that in the absence of specific and detailed briefing or argument by Iron Pig, and in the absence of citation to caselaw which has examined that statute or other statutes with similar language, the standards in this statute have not been demonstrated to be so loose or so broad as to contain no channeling of the exercise of the local health department's discretion.

Even if Iron Pig had supported its request for declaratory relief regarding MCL 333.2451 with detailed legal analysis and authority which supported its claims that the statute's delegation violates separation of powers, the Court must repeat that the standard "imminent danger" is defined within the statutory part and in addition, if a person is deemed to have violated or failed to comply with any

emergency order issued under authority of the statute, the local health director may apply to the Circuit or District Court for compliance.

In comparing the two challenged statutes to each other it is clear that MCL 333.2453 fails to define the broad standards used in addition to the fact that persuasive caselaw from our appellate Court has examined nearly identical language used in the statute and found it to be in violation of the non-delegation doctrine. Contrasting that statute, however, MCL 333.2451 adds a defined standard *and* the requirement that for forced compliance with any order that the health department believes has been violated, the local health director may seek court assistance, and a person claimed to be in violation will be able to contest that claim in a courtroom. Those two safeguards which exist within MCL 333.2451, but not within MCL 333.2453, make the exercise of broad and uncontrolled power by an administrative official significantly less likely under MCL 333.2451.

As a result, the Court finds that Iron Pig's challenge to MCL 333.2451 fails, and instead, the presumption of constitutionality of the statute must continue because Iron Pig has not met the heavy burden of demonstrating that the statute violates the non-delegation clause or any other constitutional principle.

Conclusion & Order

In light of all the above, the Court reiterates that Iron Pig's challenges to MCL 333.2455, MCL 333.5201, and/or MCL 333.5203 fail to survive HDNW's motion for summary disposition because there is not a present case or controversy.

However, with respect MCL 333.2451 and MCL 333.2453, the Court repeats that the challenges are not moot as the exercise of authority under those statutes is likely to recur, yet may evade judicial review, and moreover, the statutes at issue were cited directly in HDNW's cease and desist Order issued to Iron Pig.

For all of the reasons noted above, the Court finds that MCL 333.2453 violates the non-delegation clause and is therefore deemed unconstitutional.

However, the Court finds that MCL 333.2451 has a presumption of constitutionality that has not been overcome by any of Iron Pig's legal or factual arguments and as a result, the presumption of constitutionality must continue.

IT IS SO ORDERED.

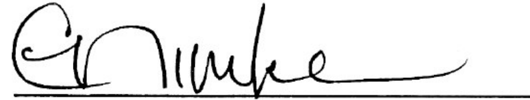
Date: 5-2-24

Hon. Colin G. Hunter
Circuit Court Judge
Otsego County

PROOF OF SERVICE

I certify that copies of this Opinion and Order were mailed to the parties and/or their attorneys by first class mail on this date.

Date mailed: 5/2/24



Clerk