

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

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

Plaintiffs,

v

PENINSULA TOWNSHIP,

Defendant.

Case No.: 1:20-cv-01008-PLM-RSK  
Honorable Paul L. Maloney  
Magistrate Ray S. Kent

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Joseph M. Infante (P68719)  
Stephen M. Ragatzki (P81952)  
Christopher J. Gartman (P83286)  
Miller, Canfield, Paddock and Stone, PLC  
*Attorneys for Plaintiffs*  
99 Monroe Avenue NW, Suite 1200  
Grand Rapids, MI 49503  
(616) 776-6333  
[infante@millercanfield.com](mailto:infante@millercanfield.com)  
[gartman@millercanfield.com](mailto:gartman@millercanfield.com)

Gregory M. Meihn (P38939)  
Matthew T. Wise (P76794)  
Foley & Mansfield, P.L.L.P.  
*Attorneys for Defendant*  
130 E. 9 Mile Rd.  
Ferndale, MI 48220-3728  
(248) 721-4200 / Fax: (248) 721-4201  
[gmeihn@foleymansfield.com](mailto:gmeihn@foleymansfield.com)  
[mwise@foleymansfield.com](mailto:mwise@foleymansfield.com)

Tracy J. Andrews (P67467)  
Law Office of Tracy Jane Andrews, PLLC  
*Attorney for Intervening Defendant*  
420 E. Front Street  
Traverse City, MI 49686  
(231) 714-9402  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

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**PROTECT THE PENINSULA, INC.'S**  
**MOTION TO INTERVENE PURSUANT TO FED. R. CIV. P. 24**

**PROTECT THE PENINSULA, INC.'S**  
**MOTION TO INTERVENE PURSUANT TO FED. R. CIV. P. 24**

1. Protect the Peninsula, Inc. (PTP) moves to intervene as a party-defendant pursuant to Fed. R. Civ. P. 24.
2. Plaintiffs desire to substantially modify zoning provisions applicable to wineries operating in the Agricultural District in Peninsula Township.
3. This motion is timely because this lawsuit is in its early stages.
4. As supported by the testimony of PTP directors and members (**Exhibit B to F**), PTP and its members have substantial interests in the maintenance of the zoning provisions applicable to wineries in the Agricultural District.
5. PTP's ability to protect its interests may be impaired unless granted intervention.
6. Defendant Peninsula Township does not adequately represent PTP's interests.
7. For these reasons, PTP meets the standards for intervention by right.
8. Alternatively, PTP should be granted permissive intervention.
9. PTP submits the accompanying Brief and **Exhibits A to H** in support of this motion. **Exhibit A** is its proposed *Answer and Affirmative Defenses*.

WHEREFORE, PTP respectfully requests that this Court enter an order for PTP to intervene as a defendant and authorizing its Answer and Affirmative Defenses to be filed.

Date: February 16, 2021

By:   
\_\_\_\_\_  
Tracy Jane Andrews (P67467)  
Attorney for PTP  
LAW OFFICE OF TRACY JANE ANDREWS, PLLC  
420 E. Front Street  
Traverse City, MI 49686  
(231) 946-0044  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

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Miller, Canfield, Paddock and Stone, PLC  
*Attorneys for Plaintiffs*  
99 Monroe Avenue NW, Suite 1200  
Grand Rapids, MI 49503  
(616) 776-6333  
[infante@millercanfield.com](mailto:infante@millercanfield.com)  
[gartman@millercanfield.com](mailto:gartman@millercanfield.com)

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Matthew T. Wise (P76794)  
Foley & Mansfield, P.L.L.P.  
*Attorneys for Defendant*  
130 E. 9 Mile Rd.  
Ferndale, MI 48220-3728  
(248) 721-4200 / Fax: (248) 721-4201  
[gmeihn@foleymansfield.com](mailto:gmeihn@foleymansfield.com)  
[mwise@foleymansfield.com](mailto:mwise@foleymansfield.com)

Tracy J. Andrews (P67467)  
Law Office of Tracy Jane Andrews, PLLC  
*Attorney for Intervening Defendant*  
420 E. Front Street  
Traverse City, MI 49686  
(231) 714-9402  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

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**BRIEF IN SUPPORT OF MOTION TO INTERVENE**  
**FILED BY PROTECT THE PENINSULA, INC. (PTP)**

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**BRIEF IN SUPPORT OF MOTION TO INTERVENE**  
**FILED BY PROTECT THE PENINSULA, INC. (PTP)**

**I. INTRODUCTION**

Protect the Peninsula, Inc. (PTP) seeks to intervene as a defendant in this case to protect its and its members' interests related to zoning ordinance provisions that Plaintiffs' action seeks to nullify. Federal Rule of Civil Procedure 24 governs intervention by right and permissive intervention. Fed. R. Civ. P. 24(a)(2) and 24(b)(1).

Peninsula Township's geography is uniquely well-suited for agriculture; it's also a desirable place to live and visit. Balancing these attributes can make land use decision-making contentious. Against this backdrop, a citizens group organized decades ago to amplify the voices of farmers and residents in land use decision-making. Since 1979, PTP has been at the table when ordinances were amended, permits issued, and plans developed, whenever those decisions involve the interplay among agricultural preservation, residential interests, and commercial growth.

Plaintiffs seek to nullify zoning provisions that carefully balance agricultural, residential, and commercial interests. PTP has substantial interest in preserving that balance, as demonstrated by its engagement in litigation and referendums to overturn similar past efforts by wineries to expand activities. Some PTP members live close to wineries and will suffer increased traffic, noise and other disturbances from expanded commercial winery activities. Plaintiffs' litigation also threatens PTP's and its members' participation in decision-making through the traditional zoning process. There is reason to find the township will not adequately represent PTP's interests.

These concerns and more are supported in affidavits filed in support of this motion, and are discussed in more detail below. PTP meets requirements under federal rules for intervention by right and by permission, and respectfully requests that the Court issue an order allowing PTP to intervene.

## **II. ARGUMENT**

PTP seeks to intervene in this action by right or by permission under Fed. R. Civ. P. 24, which is broadly construed in favor of intervenors. *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991) (citations omitted).

### **A. PTP may Intervene as a Matter of Right**

Under Fed. R. Civ. P. 24(a)(2), an intervenor must establish four elements to intervene by right: (1) timeliness; (2) substantial legal interest in the case subject matter; (3) its ability to protect that interest may be impaired, absent intervention; and (4) the existing parties may not adequately represent its interest. *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). PTP meets each element.

#### **1. This Motion is Timely.**

Timeliness is evaluated in the context of all relevant circumstances in a case. *See Bradley v. Milliken*, 828 F.2d 1186, 1191 (6th Cir. 1987). This case is in its initial stages. While Plaintiffs filed its original complaint on October 21, 2020, it filed an amended complaint on January 4, 2021, responding to the Township's motion for partial dismissal. The amended complaint expounds on each wineries' perceived harms and WOMP's associational standing. Defendant answered the amended complaint on January 19. Plaintiff sought preliminary injunction, which the court denied on January 15. That order did not dispositively resolve any issues threatening PTP's interests. On January 25, the parties filed their Rule 26(f) conference report, which sets February 24 as the date to file motions for joinder of parties and to amend pleadings. Initial disclosures will be exchanged by March 17. According to the docket report, discovery so far consists of a one set of written requests filed by Plaintiffs on January 27. Thus, discovery is in its early stages. *See Mountain Top Condo. Ass'n. v Dave Stabbert Master Builder, Inc.*, 72 F3d 361, 370 (3rd Cir. 1995) (intervention

timely where limited progress in depositions and dispositive motions). There will be no prejudice to existing parties by allowing intervention at this point. *Jansen v. Cincinnati*, 904 F.2d 336, 340 (6th Cir. 1990) (allowing intervention half-way through twelve-month discovery period). This motion is thus timely.

**2. PTP has Substantial Legal Interests in the Subject Matter of this Litigation.**

The Sixth Circuit “subscribe[s] to a ‘rather expansive notion of the interest sufficient to invoke intervention of right.’” *Grutter v. Bollinger*, 188 F.3d 394, 398 (6th Cir. 1999) (quoting *Mich. State AFL-CIO*, 103 F.3d at 1245). Whether an intervenor has a substantial interest under Rule 24(a)(2) is a fact-specific inquiry. *Id.* The Rule does not require the proposed intervenor to have “a specific legal or equitable interest” or “the same standing necessary to initiate a lawsuit.” *Id.* Close cases “should be resolved in favor of recognizing an interest under Rule 24(a).” *Id.* at 399 (quoting *Mich. State AFL-CIO*, 103 F.3d at 1247). The court in *United States v. Rutherford County Tenn.* explained the standard thus:

[I]t is not necessary that the intervenor advance the exact same legal theory presented by the parties already in the litigation; they need only have an interest relating to the property or transaction. The interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process, and, if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene. Thus, although the intervenor cannot rely on an interest that is wholly remote and speculative, the intervention may be based on an interest that is contingent upon the outcome of the litigation.

No. 238890, 2012 U.S. Dist. LEXIS 122546 at \*11, 2012 WL 3762442 (M.D.Tenn. Aug. 29, 2012) (internal citations and quotation omitted) (**Ex G**).

PTP and its members have substantial legal interests in the subject matter of this litigation. Plaintiffs request a judgment permanently enjoining the Township from enforcing several winery provisions in the zoning ordinance. (ECF 29, PageID.1118-1128). PTP’s organizational interests,

its members' use and enjoyment of property, and PTP's and its members' interests in the zoning process, would be adversely impacted if Plaintiffs obtain the relief sought. That PTP's interests are contingent on the disposition of this suit does not minimize those interests. *See St. Paul Fire & Marine Ins. Co. v Summit-Warren Indus. Co.*, 143 F.R.D. 129, 134 (N.D. Ohio 1992).

(a) PTP has an interest in protecting its purpose and mission.

PTP was formally organized in 1988 for the purposes of fostering and promoting the benefits of life on Old Mission; for communicating with members and the community about local government actions that address development, growth and environment; and to respond to local governmental actions. (Ex B, Nadolski Aff., p. 3). PTP is a volunteer organization supported by the donations and volunteer efforts of peninsula residents. (*Id.*) PTP has been involved in various ways in numerous land use matters posing threats to its organizational interests, particularly in maintaining the rural and agricultural character of the peninsula. (*Id.*, pp. 4-6.)

This lawsuit seeks to rescind zoning provisions and expand the scope and intensity of wineries' commercial activities, thus invoking the interests that PTP was organized to foster. Specifically, this litigation seeks to significantly modify township law that regulates development and growth on the peninsula. Absent participation in this lawsuit, PTP is limited in its ability to communicate with the community and respond to local government actions that may directly impact residential life and the agricultural character of the peninsula. PTP thus has substantial legal interest in the subject matter of this case.

(b) PTP and its members have an interest in maintaining the uses that are currently allowable on neighboring winery property.

Plaintiffs seek to eliminate reasonable regulations of wineries to allow additional and expanded activities unconnected to agriculture, such as restaurants, weddings, retail shops, and sales of alcohol not produced onsite. These changes would result in significantly more intense use



of agricultural land than currently allowed and compared to other land uses authorized in the district. If successful, the relief Plaintiffs seek will directly impact PTP and its members.

The attached affidavits from PTP members (**Exhibits B to F**) document the impacts to nearby residential and agricultural land resulting from modifying the wineries' provisions:

- More guests resulting from restaurant services, events, and longer hours of operation, also bringing more traffic;
- Increasing intensity of non-agricultural activities, such as bigger parking lots, new restaurant facilities, new catering facilities, and bigger facilities;
- Increasing traffic on Center Road leading to and from wineries;
- Increasing noise levels from music and outdoor events;
- Longer hours of operations, inconsistent with residential and agricultural activities.

Plaintiffs also seek to eliminate the requirements for minimum 50-acre parcel sizes and that 75% of the site be in active crop production. (ECF 29, PageID.1089.) This may result in new wineries, bigger existing wineries, and reduced crop-growing, exacerbating the harms to nearby neighbors.

PTP represents its members who, via their proximity to existing wineries, vineyards, and orchards, have stake in maintaining the existing provisions regulating neighbors' activities. Such an interest is sufficient to demonstrate substantial legal interest under Rule 24. *See, Joseph Skillken & Co. v. Toledo*, 528 F.2d 867 (6th Cir. 1975), *vacated on other grounds sub nom. Joseph Skillken & Co. v. Toledo*, 429 U.S. 1068 (1977). Like this case, *Skillken* was an attempt to federalize a zoning dispute as a 42 U.S.C. § 1983 action. The neighbors' Rule 24 interest arose out of their standing to bring suit to challenge zoning decisions under state law. The court ruled that, under

Ohio law, the neighbors' interest in the existing zoning of nearby property, and the potential that a change in zoning may affect their property values, sufficiently demonstrated the neighbors' Rule 24 intervention interest relating to the property subject of the action. 528 F.2d at 873-74.

In Michigan, these rights of neighboring property owners have long afforded standing to file suit or intervene in zoning cases. In *Brown v. East Lansing Zoning Board of Appeals*, 311 N.W.2d 828, 833 (Mich. App. 1981), the court held that plaintiff neighbors challenging the granting of a variance allowing a duplex construction had “in fact pleaded ‘special damages’ in that the construction of duplexes in their immediate vicinity has at least a potential for interfering with the beneficial use and enjoyment of their own land.”<sup>1</sup> In *Vestevich v. West Bloomfield Twp.*, 630 N.W.2d 646, 649 (Mich. App. 2001), the court held that adverse impacts from a change in the use of a parcel from residential to commercial affected the entire neighborhood, such that it conferred a right to residents to intervene. More recently, in *Kallman v. Sunseekers Property Owners Ass’n, L.L.C.*, 745 N.W.2d 122 (Mich. 2008), the Michigan Supreme Court reversed the appellate court’s holding that a lake association did not demonstrate special damages regarding a nuisance dock sufficient to have standing, stating that, “Standing may be proven by showing that the ‘defendant’s activities directly affected the plaintiff[s]’ recreational, aesthetic, or economic interests.” *Id.* at 122 (quoting *Mich. Citizens for Water Conservation v. Nestlé Waters N. Am. Inc.*, 737 N.W.2d 447, 455 (Mich. 2007)).<sup>2</sup> See also *D’Agostini v. Roseville*, 396 Mich. 185, 189-90

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<sup>1</sup> The Michigan Court of recently applied a more rigorous “aggrieved person” threshold to standing and noted that *Brown* was “unpersuasive here because it involved the application of a more permissive threshold for standing under a previous enabling statute that a person have ‘an interest affected by the zoning ordinance.’” *Olsen v. Chikaming Twp.*, 924 N.W.2d 889, 901 (Mich. App. 2018), *appeal denied sub nom. Olsen v. Jude & Reed, LLC*, 925 N.W.2d 850 (Mich. 2019). *Olsen* does not limit *Brown*’s persuasive power here because Rule 24 requires does not require intervenors to have “the same standing necessary to initiate a lawsuit.” *Grutter*, 188 F.3d at 398.

<sup>2</sup> The *Nestlé* Court held that an environmental organization and property owners lacked standing to bring certain claims against Nestlé, but was overruled by *Lansing Schools Education Ass’n v. Lansing Board of*

(1976) (adjacent landowners should be permitted intervention in zoning case because municipality-defendant is primarily concerned with zoning pattern and cannot be guided solely by consideration of individual hardships to adjoining landowner) (citation omitted).

Moreover, intervention may be the only effective way for neighbors to protect their interests. In *Green Oak Twp. v. Green Oak MHC*, the court noted that the appropriate way for neighbors to protect their interests in neighboring land use decisions is not to seek to overturn a consent decree by referendum, but rather to intervene in litigation between the developer and township before consent judgment. 661 N.W. 2d 243, 247 (2003). The other appropriate recourse for neighbors is to recall offending township officials. *Id.* at n. 7.

*Skillken* established that state law is relevant for establishing the interest of neighbors in the existing zoning of nearby property. *See also Purnell*, 925 F.2d at 948 (analyzing state paternity law in determining that alleged children of decedent “claim a sufficient interest for intervention as a matter of right.”). PTP and its members have substantial interests cognizable under Michigan law in the maintenance of current zoning that ensure their winery neighbors’ activities remain agricultural. Because PTP members have such an interest, PTP has standing to intervene. Representational standing is well recognized in state and federal law. *See Speech First, Inc. v. Schlissel*, 939 F.3d 756, 763 (6th Cir. 2019) (association has standing to bring suit on behalf of members when members otherwise have standing in their own right, the interests it seeks to protect are germane to its purpose, and the claim does not require participation of individual members); *Karrip v. Cannon Twp.*, 321 N.W.2d 690, 693 (Mich. App. 1982) (“non-profit organizations representing injured members have standing and a right to intervene.”).

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*Education*, 792 N.W.2d 686 (Mich. 2010), which reestablished the prudential standing test in Michigan and held that teachers had standing to bring action against school board to compel expulsion of students.

(c) PTP has an interest in preventing zoning ordinance changes similar to changes it previously successfully prevented.

PTP was formed informally in 1979 by residents from the farming and residential communities who shared interests in preserving and supporting the pastoral quality of life on the unique peninsula. (Ex B, Nadolski Aff., p. 3) Since then, PTP has served as a watchdog over the township government, policies, and decisions related to land use inconsistent with the community's agricultural and residential character.

In 1998, PTP intervened in Chateau Chantal's lawsuit against the township, which sought zoning allowances for more food and guest services. (Ex B, Nadolski Aff., pp. 4-5) PTP intervened to represent its and its members' interests in preserving the agricultural character of the district against the threat of increasing commercial activities at the winery. (*Id.*; Ex C, Wunsch Aff., pp. 2-3) That suit ended in a settlement allowing limited expansion of the winery. (Ex B, Nadolski Aff., p. 5; Ex C, Wunsch Aff., p. 4)

In 1999, local wineries sought zoning changes (Amendment No. 128) similar to those in this case – expanded retail and operations, smaller minimum parcel sizes, no requirement for locally sourced grapes, and others – which the township approved. (Ex B, Nadolski Aff., p. 5; Ex C, Wunsch Aff., pp. 4-5). In response, PTP helped organize a successful referendum by circulating petitions and newsletters, arranging meetings, knocking on doors, and more. (*Id.*) Following the referendum reversing the township and an unsuccessful lawsuit by WOMP's predecessor, PTP leaders negotiated with WOMP's predecessor to develop a more moderate ordinance allowing wineries on smaller acreage, ensuring use of grapes primarily grown locally, and with limited wine-related retail. (*Id.*) A version of that negotiated effort was adopted by the board and is reflected in the Winery-Chateau provisions of the ordinance at issue in this case.

Given this history, PTP has a continuing interest in preserving its favorable litigation and referendum outcomes against similar modifications. *See Rutherford County Tenn.*, 2012 U.S. Dist. LEXIS 122546 at \*12 (**Ex G**) (neighbors who had succeeded on some claims in chancery court challenging construction of mosque had substantial legal interest in preserving favorable court ruling) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 110 (1968) (“if the plaintiff has won, he has a strong . . . interest in preserving his judgment”)).

In *Benalcazar v. Genoa Twp.*, township residents owning property adjoining a parcel proposed for rezoning formed an organization following a successful referendum overturning the zoning decision. 2020 U.S. Dist. LEXIS 63756 (S.D. Ohio, 2020) (**Ex H**). The organization sought to intervene in litigation between the developer and township that proposed approving the rezoning through consent decree, notwithstanding the successful referendum. The court found the organization had a substantial legal intervention interest to preserve their referendum. *Id.* at \*11. The court distinguished *Providence Baptist Church v. Hilldale Comm., Ltd.* 425 F.d 309 (6th Cir. 2005), where the organization was formed specifically to circulate referendum petitions and its interest became moot once the referendum was on the ballot. *Id.* at \*14.

PTP’s interests did not become moot after it organized a successful referendum that overturned Amendment 128. (**Ex C**, Wunsch Aff.p. 5-7; **Ex B**, Nadolski Aff., pp. 5-6) To the contrary, for 2 decades before the 1999 referendum and for 2 decades following, PTP participated in litigation, zoning rewrites, master plan updates, resident surveys, purchase of development rights millage, and more to protect agricultural and residential interests. (*Id.*) PTP has continuing interest in preserving its historic litigation and referendum successes rejecting outcomes comparable to what Plaintiffs seek in this case (increased commercial-type retail, food service, and other activities at wineries in the agricultural district).

(d) PTP has an interest in protecting provisions it helped to draft.

Between 1999 and 2001, PTP leaders helped develop the wineries provisions in the zoning ordinance after overturning Amendment 128, the wineries' last effort to increase allowable commercial activities. (**Ex B**, Nadolski Aff., pp. 5-6; **Ex C**, Wunsch Aff., pp. 4-6) PTP has repeatedly engaged in litigation, referendums, and decision-making over the appropriate scope of wineries' activities and the balance between agricultural, residential, and commercial land uses. Given the scope of activities and investment (principally volunteer time) over its 40-year history, PTP is a significant party in Peninsula Township advocating for agricultural and residential interests, which at times run contrary to wineries' interests. (*Id.*) Given these circumstances, PTP has substantial interest in challenging the legality of some wineries' provisions.

In *Mich. State AFL-CIO*, the court recognized that "a public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that legislation." 103 F.3d at 1245. The court allowed the Michigan Chamber of Commerce to intervene in a suit challenging amendment to state campaign finance laws, whose enactment the chamber had supported. Moreover, courts have recognized that where the group or its members are affected by the challenged law, they may have an ongoing legal interest in its enforcement. *See Grutter*, 188 F.3d at 401 (intervenors who were applicants to University of Michigan had substantial legal interest in school admissions process).

PTP helped develop and protect the provisions that Plaintiffs challenge here. As documented in the attached affidavits (**Exhibits B to F**), PTP members are residents and farm operators in the agricultural district, who remain subject to the zoning ordinance and will be directly impacted if Plaintiffs obtain the relief they seek. PTP, on its own behalf and on behalf of its members, has established a specific interest in this case subject matter.

- (e) PTP and its members have an interest in participating in the process to change zoning ordinances.

Pursuant to MCL § 125.3306(1), PTP and residents have the right to participate in a public hearing before the Planning Commission, which PTP has done consistently through the development, modification, and enforcement of the zoning ordinance. (**Ex B**, Nadolski Aff., p. 5). Neighboring residents may require a second public hearing prior to zoning approval. MCL § 125.3401(4). Michigan law permits any registered voter living in the township to file for referendum to overturn a zoning amendment. MCL § 125.3402(1). These statutes grant PTP and its members the right to participate in local zoning decision-making. Were the township to address Plaintiffs’ requested ordinance changes through the zoning process, PTP and its members would participate via public hearings, making presentations at public meetings, discussing modifications with planning commissioners and board members, and potentially organizing a referendum. (**Ex B**, Nadolski Aff. p. 8; **Ex D**, Jacobs Aff., p. 4; **Ex C**, Wunsch Aff., p. 9; **Ex E**, Phillips Aff., p. 4) Michigan law thus grants PTP and its members a legal interest to participate in processes leading to zoning changes, which is sufficient for intervention in a zoning lawsuit. *See Skillken*, 528 F.2d at 875-76 (absent intervention, affected neighbors would be denied their protected right to be heard on zoning changes); *Brown*, 109 Mich. App. at 701 (concurring that “[it] is important that persons who have an interest in preserving an established plan have an opportunity to be heard when use changes are contemplated.”) (citation omitted).

**3. This Lawsuit Threatens to Impair PTP’s Ability to Protect its Interests.**

A proposed intervenor “must show only that impairment of its substantial legal interest is possible if intervention is denied.” *Mich. State AFL-CIO*, 103 F.3d at 1247 (citing *Purnell*, 925 F.2d at 948). The Sixth Circuit has noted that this is a minimal burden. *Id.*

As discussed in the preceding section, the disposition of this case may impair PTP's ability to protect its interests by effectively nullifying the zoning ordinance that PTP supported and which PTP's member rely on in investing in this community. (Ex B, Nadolski Aff., pp. 7-9; Ex C, Wunsch Aff., pp. 8-10; Ex E, Phillips Aff., pp. 3-5; Ex D, Jacobs Aff., pp. 4-5) In *Skillken*, the Sixth Circuit held that the judicial vacation of a zoning order would impair neighboring residents' ability to protect their property from the adverse effects of a change in the zoning classification of the plaintiff's property. 528 F.2d at 875 ("It seems clear that a judgment which declares a zoning order to be void would bind adjoining property owners to the extent of taking away their statutory right to an independent action based on the order.") (quoting *Wolpe v. Poretsky*, 144 F.2d 505, 507 (D.C. Cir. 1944)). See also *Fleming v. Citizens for Abermarle, Inc.*, 577 F.2d 236, 238 (4th Cir. 1978) (granting intervention to non-profit corporations comprised of local residents to protect members' interest in potability of reservoir).

#### **4. PTP's Interests are Inadequately Represented.**

The burden of establishing inadequate representation is also "minimal because it is sufficient that the movant[ ] prove that representation may be inadequate." *Mich. State AFL-CIO*, 103 F.3d at 1247 (quoting *Linton v Comm'r of Health & Env't*, 973 F.2d 1311, 1319 (6th Cir. 1992)). This standard applies even when the existing party is a governmental entity. *Grutter*, 188 F.3d at 400. "Among other things, the possible failure of existing parties to make all of the prospective intervenor's arguments may be sufficient to show inadequate representation." *City of St. Louis v. Velsicol Chem. Corp.*, 708 F. Supp. 2d 632, 667 (E.D. Mich. 2010) (citing *Michigan State AFL-CIO*, 103 F.3d at 1247). Even when an organization and a governmental entity share common ground, their interests do not inherently overlap. See *Sierra Club v. Espy*, 18 F.3d 1202,



1208 (5th Cir. 1994) (“The government must represent the broad public interests, not just the economic concerns of the timber industry.”).

In *Skillken*, the Sixth Circuit found that the City of Toledo would not adequately represent neighboring property owners, thereby entitling them to intervene. 528 F.2d at 876. There, the plaintiff developer accused the city of violating its constitutional rights. The court noted that “[t]he municipal defendants had enough to do to defend themselves against the charges leveled against them by the plaintiffs. They do not have the same interest in protecting the values of the homeowners’ properties as do the homeowners themselves.” 528 F.2d at 876. *See also Vestevich*, 245 Mich. App. at 762 (township representation of neighbors was inadequate where township was willing to allow commercial development in residential area, where neighbors had obtained homes with reasonable expectation of continued zoning).

PTP’s interests overlap but are not identical to the Township’s. Where PTP has an interest in preserving agricultural and residential interest, the Township may have an interest in balancing those interests against the economic benefits from increasing winery commercial operations. Additional considerations indicate the Township may not adequately represent PTP interests:

- The Township’s general governmental interests are not as acute as those of the PTP members residing close to wineries.
- The Township does not have an interest in protecting the right to referendum, which belongs to registered voters, including PTP members.
- PTP may seek to preserve the rights of referendum or appeal if this case resolved by consent, even if the Township did not. *See Green Oak Twp.*, 661 N.W.2d at 247 n. 7.

- The Township has been sued for monetary damages, so its interests and priorities may diverge from PTP's in preserving zoning provisions.
- Plaintiffs rely on statements from the township attorney indicating that some of Plaintiffs' claims may be valid. (ECF 29, PageID.1113-1116). While the Township has renounced this position, this context raises the potential that PTP may view the facts and law differently than the township. (ECF 24, PageID.960-62.)
- The Township may value resolving the litigation for reasons unrelated to the validity of Plaintiffs' claims. Prior to Plaintiffs' litigation, a township subcommittee was tasked with finding a suitable resolution to claims that some wineries' provisions were invalid. (*See* ECF 24, PageID.948-50, 960-62.)

In sum, the existing parties may not adequately represent PTP's interests.

**B. PTP Meets the Requirements for Permissive Intervention**

PTP meets the standards for permissive intervention in this case. "Rule 24(b) grants the district court discretionary power to permit intervention if the motion is timely, and if the applicant's claim or defense and the main action have a question of law or fact in common." *Purnell*, 925 F.2d at 950 (internal citation and quotation marks omitted).


PTP seeks to intervene to defend positions it advocated for through the Township's zoning process, to maintain current zoning to the full extent of the law, to prevent adverse impacts to the agricultural district essential to local quality of life, and to protect the interests of neighboring residents whose use and enjoyment of their property would be adversely impacted by expanded commercial operations at wineries. These interests are at risk if Plaintiffs are successful in efforts to unleash commercial operations at wineries in the agricultural district to the extent Plaintiffs

seek. This motion is timely and PTP's intervention will not delay or alter case management nor unduly prejudice the adjudication of the original parties' rights. Therefore, PTP should be granted permissive intervention in this case.

### **III. CONCLUSION**

PTP respectfully requests that the Court grant its motion to intervene, by right or by permission, and to file the attached **Exhibit A**, PTP Answer and Affirmative Defenses. PTP requests all other relief that is appropriate under the circumstances.

Date: February 16, 2021

By:   
Tracy Jane Andrews (P67467)  
Attorney for PTP  
LAW OFFICE OF TRACY JANE ANDREWS, PLLC  
420 E. Front Street  
Traverse City, MI 49686  
(231) 946-0044  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

### **INDEX OF EXHIBITS**

Exhibit A – Answer and Affirmative Defenses  
Exhibit B – Affidavit of Mark Nadolksi  
Exhibit C – Affidavit of John Wunsch  
Exhibit D – Affidavit of John Jacobs  
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Exhibit F – Affidavit of Michele Zebell  
Exhibit G – *United States v. Rutherford County Tenn.*  
Exhibit H – *Benalcazar v. Genoa Twp.*

# **EXHIBIT A**

**Proposed Answer and Affirmative Defenses**

**Proposed Intervenor Protect the Peninsula, Inc. (PTP)**

**Brief in Support of Motion to Intervene**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

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

Plaintiffs,

v

PENINSULA TOWNSHIP,

Defendant.

Case No.: 1:20-cv-01008-PLM-RSK  
Honorable Paul L. Maloney  
Magistrate Ray S. Kent

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Joseph M. Infante (P68719)  
Stephen M. Ragatzki (P81952)  
Christopher J. Gartman (P83286)  
Miller, Canfield, Paddock and Stone, PLC  
*Attorneys for Plaintiffs*  
99 Monroe Avenue NW, Suite 1200  
Grand Rapids, MI 49503  
(616) 776-6333  
[infante@millercanfield.com](mailto:infante@millercanfield.com)  
[gartman@millercanfield.com](mailto:gartman@millercanfield.com)

Gregory M. Meihn (P38939)  
Matthew T. Wise (P76794)  
Foley & Mansfield, P.L.L.P.  
*Attorneys for Defendant*  
130 E. 9 Mile Rd.  
Ferndale, MI 48220-3728  
(248) 721-4200 / Fax: (248) 721-4201  
[gmeihn@foleymansfield.com](mailto:gmeihn@foleymansfield.com)  
[mwise@foleymansfield.com](mailto:mwise@foleymansfield.com)

Tracy J. Andrews (P67467)  
Law Office of Tracy Jane Andrews, PLLC  
*Attorney for Intervening Defendant*  
420 E. Front Street  
Traverse City, MI 49686  
(231) 946-0044  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

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**INTERVENING DEFENDANT PROTECT THE PENINSULA INC'S  
ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT  
AND AFFIRMATIVE DEFENSES**

**INTERVENING DEFENDANT PROTECT THE PENINSULA INC'S ANSWER TO  
PLAINTIFFS' FIRST AMENDED COMPLAINT**

Intervening Defendant, PROTECT THE PENINSULA INC (Intervening Defendant), by it attorney, Law Office of Tracy Jane Andrews, PLLC, and in Answer to the First Amended Complaint filed by Plaintiffs, WINERIES OF THE OLD MISSION PENINSULA (WOMP) ASSOC; BOWERS HARBOR VINEYARD & WINERY, INC; BRY'S WINERY, LC; CHATEAU GRAND TRAVERSE, LTD; CHATEAU OPERATIONS, LTD; GRAPE HARBOR, INC; MONTAGUE DEVELOPMENT, LLC; OV THE FARM, LLC; TABONE VINEYARDS, LLC; TWO LADS LLC; VILLA MARI, LLC; and WINERY AT BLACK STAR FARMS, LLC (collectively, Plaintiffs), states as follows:

**INTRODUCTION**

**1. This matter relates to a set of ordinances governing the operation of wineries enacted by Peninsula Township which violate Plaintiffs' Federal constitutional rights and violate Michigan law.**

RESPONSE: Intervening Defendant admits that Peninsula Township has adopted zoning ordinances that include provisions applicable to, among other activities, the location and operation of wineries, but denies that the provisions violate Plaintiffs' Federal constitutional rights or violate Michigan law for the reason that it is untrue.

**2. For more than a year, Plaintiffs and their counsel have attempted to work with Peninsula Township on these issues and Peninsula Township has admitted that the ordinances discussed below violate Plaintiffs' constitutional rights and are preempted by Michigan law.**

RESPONSE: Intervening Defendant neither admit nor deny whether Plaintiffs and their counsel attempted to work with Peninsula Township regarding the subject ordinances nor whether

counsel for Peninsula Township admitted that the ordinances violate Plaintiffs' constitutional rights or are preempted by Michigan law for the reason that Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations. Intervening Defendant further denies that the zoning ordinances violate Plaintiffs' Federal constitutional rights or violate Michigan law for the reason that it is untrue.

**3. In the words of Defendant Peninsula Township's attorney, the portions of the ordinances at issue "should be revised as it is, under the First Amendment standards, an invalid suppression of the Wineries' First Amendment rights."**

RESPONSE: Intervening Defendant neither admits nor denies the content of Peninsula Township's attorney's opinions for the reason that Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations. Intervening Defendant further denies that the zoning ordinances violate the First Amendment standards or constitute an invalid suppression of Plaintiffs' First Amendment Rights because these assertions are vague, untrue, and constitute legal conclusions that are unsupported and contrary to law. Intervening Defendants further deny that the ordinances should be revised accordingly.

**4. He also concluded that portions of the ordinances "violate[] the Commerce Clause."**

RESPONSE: Intervening Defendant neither admits nor denies the content of Peninsula Township's attorney's opinions for the reason that Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations. Intervening Defendant further denies that the zoning ordinances violate the Commerce Clause for the reason that this assertion is vague, untrue, and further constitutes a legal conclusion that is unsupported and contrary to law.

**5. Finally, he concluded that portions of the ordinance are preempted by Michigan law.**

RESPONSE: Intervening Defendant neither admits nor denies the content of Peninsula Township's attorney's opinions for the reason that Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations. Intervening Defendant further denies that portion of the zoning ordinances are preempted by Michigan law for the reason that this assertion is vague, untrue, and further constitute a legal conclusion that is unsupported and contrary to law.

**6. More than a year after this opinion was given, the illegal ordinances are still on the books and being enforced by Peninsula Township.**

RESPONSE: Intervening Defendant neither admits nor denies the content of Peninsula Township's attorney's opinions for the reason that Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations. Intervening Defendant further denies that the ordinances are illegal for the reason that this assertion is vague, untrue, and constitutes a legal conclusion that is unsupported and contrary to law. Intervening Defendant admits that the ordinances are still effective and applicable to the Plaintiff wineries. Intervening Defendant neither admits nor denies whether the ordinances are being enforced by Peninsula Township because this assertion is vague, unclear, calls for a legal conclusion, and Intervening Defendants lack information or knowledge sufficient to form a belief as to the truth of the allegations.

#### **JURISDICTION AND VENUE**

**7. This action arises under the United States Constitution and 42 U.S.C. § 1983.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a



belief as to the truth of the allegations in Paragraph 7.

**8. The Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8.

**9. This Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 9.

**10. This Court has the authority to grant declaratory relief under 28 U.S.C. §§ 2201 and 2202.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10.

**11. This Court has the authority to grant injunctive relief by Federal Rules of Civil Procedure 57 and 65.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 11.

**12. Venue is proper in this Court under 28 U.S.C. § 1391(b) because (i) Peninsula Township is located in Grand Traverse County which is in this judicial district, and (ii) the events or omissions giving rise to Plaintiffs' claims occurred in this judicial district.**

RESPONSE: Intervening Defendant admits that Peninsula Township is located in Grand Traverse County but lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 12.

**13. Plaintiffs' claim for attorneys' fees and costs is authorized by 42 U.S.C. §**

**1988.**

RESPONSE: Intervening Defendant denies as untrue the allegations in paragraph 13 and leaves the Plaintiffs' to their proofs.

**THE PARTIES**

**14. Wineries of Old Mission Peninsula (WOMP) Assoc. ("WOMP") is a Michigan non-profit corporation with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 14.

**15. Bowers Harbor Vineyard & Winery, Inc. ("Bowers Harbor") is a Michigan Corporation with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 15.

**16. Brys Winery, LC ("Brys") is a Michigan Corporation with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 16.

**17. Chateau Grand Traverse, LTD, ("Grand Traverse") is a Michigan Corporation with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a

belief as to the truth of the allegations in paragraph 17.

**18. Chateau Operations, LTD, is a Michigan Corporation which operates a winery under the trade name Chateau Chantal (“Chateau Chantal”) with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18.

**19. Grape Harbor, Inc. is a Michigan Corporation which operates a winery under the trade name Peninsula Cellars (“Peninsula Cellars”) with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 19.

**20. Montague Development, LLC is a Michigan Limited Liability Company, operating under the trade name Hawthorne Vineyards (“Hawthorne”) with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 20.

**21. OV the Farm, LLC is a Michigan limited liability company which operates a winery under the trade name Bonobo Winery (“Bonobo”) with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21.

**22. Tabone Vineyards, LLC (“Tabone”) is a Michigan Limited Liability Company with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 22.

**23. Two Lads, LLC, (“Two Lads”) is a Michigan Limited Liability company with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 23.

**24. Winery at Black Star Farms, L.L.C. (“Black Star”) is a Michigan Limited Liability Company with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 24.

**25. Villa Mari LLC is a Michigan Limited Liability Company which operates a winery under the trade name Mari Vineyard (“Mari”) with its principal place of business in Peninsula Township, Grand Traverse County, located in the Western District of Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 25.

**26. Peninsula Township is located in Grand Traverse County, Michigan, with its offices located at 13235 Center Rd., Traverse City, MI 49686.**

RESPONSE: Intervening Defendant admits the allegations in paragraph 26.

## **FACTUAL ALLEGATIONS**

**27. Peninsula Township is located near Traverse City, Michigan, and comprises Old Mission Peninsula.**

RESPONSE: Intervening Defendant admits that Peninsula Township is located near Traverse City, Michigan, and that Peninsula Township comprises part of Old Mission Peninsula, but denies the allegation to the extent that part of the Old Mission Peninsula may be considered to be located in the City of Traverse City.

**28. Peninsula Township has adopted various ordinances directed at wineries located within the township which control all aspects of the business including the content of commercial speech, restrictions on the free exercise of religion, groups and organizations that may use winery facilities, hours of operation, dictating that wineries use in-township suppliers, requiring commercial speech to favor local businesses and requiring pre-approval of commercial speech.**

RESPONSE: Intervening Defendant admits that Peninsula Township has adopted zoning ordinances, which include provisions that regulate the location and some aspects of the operations of wineries that are located within agricultural districts within the township. Intervening Defendant denies the ordinances control all aspects of the businesses for the reason this assertion is untrue. Intervening Defendant neither admit nor deny the remainder of the allegations in paragraph 28 for the reasons that these assertions constitute conclusions of law and further because the language of the ordinances speak for themselves.

**29. The Peninsula Township ordinances also arbitrarily dictate the maximum number of guests a winery may have not based on objective criteria like fire code considerations or acreage, but based on the size of one local winery's dining room.**

RESPONSE: Intervening Defendant admits that Peninsula Township has adopted zoning ordinances, which include provisions that regulate the location and some aspects of the operations of wineries that are located within agricultural districts within the township. Intervening Defendant denies the ordinances are arbitrary in any regard, including in number of guests, for the reason this assertion is untrue. Intervening Defendant neither admit nor deny the remainder of the allegations in paragraph 29 for the reasons that these assertions constitute conclusions of law and further because the language of the ordinances speak for themselves.

**30. The Peninsula Township ordinances also have placed an arbitrary financial barrier to operating a winery in the township.**

RESPONSE: Intervening Defendant admits that Peninsula Township has adopted zoning ordinances, which include provisions that regulate the location and some aspects of the operations of wineries that are located within agricultural districts within the township. Intervening Defendant denies the ordinances are arbitrary in any regard, and also that the ordinances have placed a financial barrier to operating a winery in the township, for the reason these assertions are untrue.

**31. As noted above, over the past year, Peninsula Township has admitted that many provisions of its winery ordinances violate the First Amendment to the United States Constitution, violate the Commerce Clause and are preempted by Michigan law, yet the ordinances are still in effect.**

RESPONSE: Intervening Defendant neither admits nor denies the content of Peninsula Township's attorney's opinions for the reason that Intervening Defendant lacks information or knowledge sufficient to form a belief as to the truth of the allegations. Intervening Defendant further denies that portion of the zoning ordinances violate the First Amendment or the Commerce Clause, or are preempted by Michigan law for the reason that these assertions are vague, untrue,

and constitute legal conclusions that are unsupported and contrary to law. Intervening Defendant admits that the ordinances are still effective and applicable to Plaintiffs. Intervening Defendant neither admits nor denies whether the ordinances are being enforced by Peninsula Township because this assertion is vague, unclear, calls for a legal conclusion, and Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegation.

**WOMP's Membership, Purpose and Mission.**

**32. WOMP is voluntary membership trade association of licensed winery operations located on Peninsula Township's Old Mission Peninsula.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 32.

**33. Old Mission Peninsula's wine industry is a specialized segment of Michigan's larger economic community.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 33.

**34. WOMP represents the unique interests of its Winery-Chateau members Bowers Harbor, Grand Traverse, Chateau Chantal, Hawthorne and Mari; its Farm Processing Facility members Black Star, Two Lads and Tabone and its Remote Winery Tasting Room member, Peninsula Cellars.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 34.

**35. WOMP's officers must be a WOMP member representative and officers are voted upon by WOMP members.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a

belief as to the truth of the allegations in paragraph 35.

**36. WOMP's current President is Chris Baldyga who is also the owner of WOMP member Two Lads.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 36.

**37. Every WOMP members is suffering immediate injury and will continue to suffer losses as a result of Peninsula Township's Winery Ordinance enforcement.**

RESPONSE: Intervening Defendant denies as untrue the allegations in paragraph 37 and leaves the Plaintiffs' to their proofs.

**38. Of the named plaintiffs, only Bonobo is not a WOMP member.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 38.

**39. WOMP's purpose is to protect and promote the Old Mission Peninsula wine industry.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39.

**40. To that end, WOMP provides services to its members including advertising its members' services and products and organizing events at its members' locations all to increase tourist traffic for its members and for Old Mission Peninsula as a whole.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 40.

**41. WOMP also exists to harmonize and advocate for its members' interests related to Peninsula Township's insistence on continued enforcement of the illegal Winery**



**Ordinances.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 41.

**The Peninsula Township Zoning Ordinance.**

**42. Peninsula Township adopted its Zoning Ordinance on June 5, 1972.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 42.

**43. The Zoning Ordinance has been amended since that time with various winery related ordinances added.**

RESPONSE: Intervening Defendant admits the allegations of paragraph 43.

**44. Currently, Peninsula Township's regulation of wineries is found in three section of the Zoning Ordinance: Section 6.7.2(19) Use by Right – Farm Processing Facility; Section 8.7.3(10) Winery-Chateau; Section 8.7.3(12) Remote Winery Tasting Room. (collectively the “Winery Ordinances”). (Exhibit 1.)**

RESPONSE: Intervening Defendant admits that the cited ordinances are some of the zoning ordinance provisions applicable to wineries located within the agricultural districts in the township, provided that not all wineries located in the agricultural districts are subject to all of the listed provisions.

**Section 6.7.2(19): Use by Right – Farm Processing Facility**

**45. Black Star, Two Lads and Tabone have licenses to operate Farm Processing Facilities.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 45. Intervening Defendant further states that

the meaning of the term license as used in this context is unclear and vague.

**46. Black Star, Two Lads and Tabone’s operations are affected by the restrictive Winery Ordinances as they relate to Farm Processing Facilities.**

RESPONSE: Intervening Defendant admits that these wineries are subject to Farm Processing Facilities provisions in the zoning ordinance but denies as untrue the remaining allegations in paragraph 46 and leaves Plaintiffs to their proofs.

**47. Peninsula Township’s intent in enacting the Farm Processing Facility ordinance was “to promote a thriving local agricultural production industry and preservation of rural character by allowing construction and use of a Farm Processing Facility.” Section 6.7.2(19)(a).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(a) of its Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**48. Under this ordinance, “[t]he majority of the produce sold fresh or processed has to be grown on the specific farm operation (land owned or leased for the specific farm operation) of the party owning and operating the Specific Farm Processing Facility.” *Id.***

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**49. Further, “[e]ighty-five (85) percent of the produce sold fresh or processed has to be grown on Old Mission Peninsula.” *Id.***

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**50..... Activities such as weddings, receptions and other social functions for hire are not allowed....” *Id.***

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**51.....A Farm Processing Facility is allowed to sell grape wine, but “[g]rape wine that is processed, tasted and sold in a Farm Processing Facility under this section is limited to ‘Old Mission Peninsula’ appellation wine meaning 85% of the juice will be from fruit grown on Old Mission Peninsula.” Section 6.7.2(19)(b)(1)(ii).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(1)(ii) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**52.....For other types of wine, “wine, that is processed, tasted and sold in a Farm Processing Facility under this section is limited to wine bearing a label identifying that 85% of the juice is from fruit grown on Old Mission Peninsula.” Section 6.7.2(19)(b)(1)(iii).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(1)(iii) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**53.....Thus, a winery operating under the Farm Processing Facility ordinance cannot purchase more than 15% of the fruit it uses to produce wine from anyone outside of Peninsula Township.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 53.

**54. A Farm Processing Facility may only sell merchandise which “is directly related to the consumption and use of the fresh and/or processed agricultural produce.” Section 6.7.2(19)(b)(1)(v)(1).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(1)(v)(1) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**55. Examples of merchandise which is not allowed are “a) Clothing; b) Coffee Cups; c) Bumper Stickers.” Section 6.7.2(19)(b)(1)(v)(4).**

RESPONSE: Intervening Defendant admits that Plaintiff have quoted, in part, Section 6.7.2(19)(b)(1)(v)(4) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**56. Thus, a winery operating under the Farm Processing Facility ordinance cannot sell a t-shirt bearing its logo.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 56.

**57. But, a Farm Processing Facility could sell a wine glass so long as it bore the logo of the winery.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 57.

**58. In addition to dictating that 85% of the fruit used in wine sold come from Old Mission Peninsula, the Farm Processing Facility ordinance mandates that 85% of all agricultural produce sold, whether fresh or processed, must have been grown on Old Mission Peninsula and only land owned or leased by the facility owner. Section 6.7.2(19)(b)(2)(I).**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 6.7.2(19)(b)(2)(I) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself

**59. Thus, a winery operating under the Farm Processing Facility ordinance cannot purchase more than 15% of produce it uses in its products from anyone outside of Peninsula Township.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 59.

**60. If a Farm Processing Facility sells dried fruit, “a minimum of 85% by weight which is grown on Old Mission Peninsula and a minimum of 50% by weight which is grown on the farm, may be dried off premises and sold in the Farm Processing Facility retail room, provided, no more than the amount of fruit sent out for this processing is returned for retail sale.” Section 6.7.2(19)(b)(2)(V).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(2)(V) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**61. A Farm Processing Facility must annually provide data and records to Peninsula Township to substantiate compliance with the requirement that produce used has been grown on land in Peninsula Township. Section 6.7.2(19)(b)(13).**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 6.7.2(19)(b)(13) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**62. The Farm Processing Facility ordinance also dictates parcel size and use in the following ways:**

**(a) “A total of forty (40) acres of land are required to be devoted to the operation of a farm processing facility.”**

**(b) “The parcel containing the specific Farm Processing Facility shall have a minimum area of 20 acres and a minimum parcel width of 330 feet.”**

**(c) “There shall be no more than one house on the 20 acre parcel containing the Farm Processing Facility and no more than one house on the remaining required 20 acres.”**

**(d) “If property is leased, the lease shall be for a minimum of one year.”**

**(e) “There shall be a minimum of 5 acres of crops grown on the same parcel as the Farm Processing Facility.” Section 6.7.2(19)(b)(4).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(2)(I) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**63. The retail space at a Farm Processing Facility cannot be more than 6,000 square feet or one-half of the parcel size, whichever is less. Section 6.7.2(19)(b)(6).**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 6.7.2(19)(b)(6) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**64. Any violation of these ordinances “serve[s] as grounds for closing the retail operations, including tasting, portions of the use by the Township Board.” Section 6.7.2(19)(b)(15).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(15) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**65. A person who violates the Farm Processing Facility is also subject to “a civil fine for each violation to be determined by the Court, along with costs which may include all expenses, direct and indirect, to which the Township has been put in connection with municipal infraction. Costs of not more than \$500.00 shall be ordered.” Section 4.2.1 Violations and Penalties.**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 6.7.2(19)(b)(2)(I) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**66. Each of Black Star, 2 Lads and Tabone have been harmed by the restrictions in the Ordinances. Some, but not all, of those harms are described in the following paragraphs.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 66.

**Some of the Harms Experienced by Black Star.**

**67. Black Star routinely receives requests from individuals seeking to use its facilities to hold weddings and other social events. See Exhibit 2.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 67.

**68. Black Star has been prohibited by Peninsula Township from hosting weddings, having live music, having temporary structures and hosting corporate events. *Id.* at ¶5.**

RESPONSE: Intervening Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

**69. Often, Black Star has refrained from expanding their service offerings to include after-hours tastings, educational experiences, private dinner events, tours and business meetings and must direct the potential customers elsewhere. *Id.* at ¶6.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 69.

**70. The Winery Ordinances also prevent Black Star from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise**

**harms Black Star's ability to grow and promote its business. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 70.

**71. Often, and especially in the summertime, customers wish to engage Black Star tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Black Star is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶10.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 71.

**72. Further, the Winery Ordinances have prevented Black Star from expanding its wine production facility. This inability to streamline its operations has resulted in increased trucking of product into and out of its facility and has cost Black Star thousands of dollars due to inefficiencies and lost opportunities. *Id.* at ¶8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 72.

**73. Collectively, the restrictive Winery Ordinances have caused tens of thousands of dollars in lost revenue to Black Star. *Id.* at ¶7.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 73.

**Some of the Harms Experienced by Two Lads.**

**74. Two Lads routinely receives requests from individuals seeking to use its facilities to hold weddings and other social events. See Exhibit 3.**

RESPONSE: Defendant lacks knowledge or information sufficient to form a belief



as to the truth of the allegations in paragraph 74.

**75. Two Lads has been prohibited by Peninsula Township from hosting weddings, having live music, having temporary structures and hosting corporate events. *Id.* at ¶5.**

RESPONSE: Intervening Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

**76. Often, Two Lads declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 76.

**77. When Two Lads turns customers away, Two Lads suffers injury to its goodwill and reputation. *Id.* at ¶9.**

RESPONSE: Intervening Defendants lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 77.

**78. When Two Lads has planned events, it has received numerous phone calls and letters form Peninsula Township demanding that events be cancelled or subject to penalties. *Id.* at ¶ 6.**

RESPONSE: Intervening Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

**79. The Winery Ordinances also prevent Two Lads from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise harms Two Lads' ability to grow and promote its business. *Id.* at ¶10.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 79.

**80. Often, and especially in the summertime, customers wish to engage Two Lads tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Two Lads is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶11.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 80.

**81. Collectively, the restrictive Winery Ordinances have caused hundreds of thousands of dollars in lost revenue to Two Lads. *Id.* at ¶7.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 81.

**Some of the Harms Experienced by Tabone.**

**82. Tabone routinely receives requests from individuals seeking to use its facilities to hold weddings, provide food truck services and other social events. See Exhibit 4.**

RESPONSE: Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 82.

**83. Tabone has been prohibited by Peninsula Township from hosting weddings, having live music, hosting food trucks, selling bottled wine for on-premises consumption, hosing wine-themed dinners and ticketed events, having temporary structures and hosting corporate events. *Id.* at ¶5.**

RESPONSE: Intervening Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

**84. Tabone receives frequent requests from individuals seeking to use its facilities**

**to hold weddings and other private social events. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 84.

**85. Often, Tabone declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 85.

**86. When Tabone turns customers away, Tabone suffers injury to its reputation and goodwill. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 86.

**87. The Winery Ordinances also restrict Tabone's ability to process, sell and offer tastings of any wine that does not contain at least 85% of juice from fruit grown on Old Mission Peninsula. *Id.* at ¶6.**

RESPONSE: Intervening Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

**88. Tabone is also prevented from selling merchandise bearing its logo, including clothing, coffee cups and bumper stickers. *Id.* at ¶7.**

RESPONSE: Intervening Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

**89. Collectively, the restrictive Winery Ordinances have caused tens of thousands of dollars in lost revenue to Tabone. *Id.* at ¶8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a

belief as to the truth of the allegations in paragraph 89.

**Section 8.7.3(10): Winery-Chateau**

**90. Bowers Harbor, Brys, Grand Traverse, Chateau Chantal, Bonobo and Mari have licenses to operate Winery-Chateaus.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 90. Intervening Defendant further states that the meaning of the term license as used in this context is unclear and vague.

**91. Peninsula Township's intent in enacting its Winery-Chateau ordinance was to "permit construction and use of a winery, guest rooms, and single-family residences as a part of a single site subject to the provisions of this ordinance." Section 8.7.3(10)(a).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**92. The Winery-Chateau ordinance mandates that the minimum parcel size under the ordinance is fifty (50) acres. Section 8.7.3(10)(c).**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(c) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**93. The principal use of the property under the ordinance must be a winery. Section 8.7.3(10)(d).**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(d) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**94. In addition to a minimum lot size of fifty acres, the Winery-Chateau ordinance**

**mandates that at least “seventy-five (75%) percent of the site shall be used for the active production of crops that can be used for wine production, such as fruit growing on vines or trees.” Section 8.7.3(10)(h).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(h) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**95. While the Winery-Chateau ordinance allows for accessory uses in addition to the principal winery use, “[a]ccessory uses such as facilities, meeting rooms, and food and beverage services shall be for registered guests only.” Section 8.7.3(10)(m).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(m) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**96. Upon prior approval of the Peninsula Township Board, use of the Winery-Chateau by persons other than registered occupants, defined at “Guest Activity Uses”, may be allowed. Section 8.7.3(10)(m).**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(m) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**97. In limiting Guest Activity Uses and requiring prior Peninsula Township Board approval of such activities, Peninsula Township specifically states in its ordinance that its intent was to “assure that, in addition to the minimum parcel size required for a Winery-Chateau, there is additional farm land in wine fruit production in Peninsula Township if Guest Activity Uses are allowed to take place at a Winery-Chateau facility.” Section 8.7.3(10)(u)1(a).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section

8.7.3(10)(u)(1)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**98. As the ordinance further explains, this is because “[t]he current Winery-Chateau section of the ordinance requires 75% of the site to be used for the active production of crops that can be used for wine production such as fruit growing on vines or trees, but does not require that any of the wine produced on the site be made from wine fruit grown on Old Mission Peninsula.” *Id.***

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(u)(1)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**99. Thus, for the right to have Guest Activities at their winery, Plaintiffs are required to either grow on acreage other than the winery acreage or purchase from a grape grower in Peninsula Township 1.25 tons of grapes for each person participating in a Guest Activity. Section 8.7.3(10)(u)3.**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(3) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**100. The Winery-Chateau ordinance also states that “Guest Activity Uses are intended to help in the promotion of Peninsula agriculture by: a) identifying ‘Peninsula Produced’ food or beverage for consumption by the attendees; b) providing ‘Peninsula Agriculture’ promotional brochures, maps and awards; and/or c) including tours through the winery and/or other Peninsula agriculture locations. Section 8.7.3(10)(u)1(b).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section

8.7.3(10)(u)(1)(b) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**101. Plaintiffs are required under the Winery Ordinances to advertise in support of Peninsula Township agriculture.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 101.

**102. In order to have a Guest Activity, the ordinance requires prior approval of the Peninsula Township Board. Section 8.7.3(10)(u)2.**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(2) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**103. These Guest Activities are limited to the following:**

- (a) **“Wine and food seminars and cooking classes that are scheduled at least thirty days in advance with notice provided to the Zoning Administrator.” Section 8.7.3(10)(u)2(a);**
- (b) **Meetings of 501- (C)(3) non-profit groups within Grand Traverse County but full course meals are not allowed. Section 8.7.3(10)(u)2(b);**
- (c) **Meetings of Agricultural related groups that have a direct relationship to agricultural production provided that one month notice is given and the zoning administrator pre-approves the meeting after determining that the group has a “direct relationship to agricultural production.” Section 8.7.3(10)(u)2(c)**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased and quoted, in part, Section 8.7.3(10)(u)(2) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**104. Plaintiffs are prohibited under the ordinance, for example, from hosting a**

**meeting of the United Way, Specials Olympics, American Heart Association, etc.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 104.

**105. Guest Activities also “do not include entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass.” Section 8.7.3(10)(u)2(d). This places a burden on the free exercise of religion.**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(u)(2)(d) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**106. At a Guest Activity, if wine is served “it must be served with food and shall be limited to Old Mission Peninsula appellation wine produced at the Winery.” Section 8.7.3(10)(u)2(e).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(u)(2)(e) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**107. The above appellation requirement, given federal law governing wine appellations, limits service of wine at Guest Activities only to wine where not less than 75% of the wine was produced from grapes grown in Peninsula Township.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 107.

**108. The purchase of grapes from places like California or other states is incredibly common in the wine industry.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 108.



**109. Plaintiffs cannot serve wine made from California or other states' grapes at Guest Activities.**

RESPONSE: I Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 109.

**110. The number of persons each Plaintiff may have at a Guest Activity is limited to one person per 15 square feet of rooms for Guest Activities. But in no case may the number of persons exceed 111 or the Fire Marshall maximum occupancy, whichever is less. Section 8.7.3(10)(u)4.**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(4) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**111. Upon information and belief, the 111 number contained in Section 8.7.3(10)(u)4 was decided upon in the ordinance as it is the occupancy of Plaintiff Chateau Chantal's dining room.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 111.

**112. At all Guest Activities, Plaintiffs are required to promote agricultural production and, specifically, must:**

- (a) "Identify 'Peninsula Produced' food or beverage that is consumed by the attendees;**
- (b) "Provide 'Peninsula Agriculture' promotional materials; and**
- (c) "Include tours through the winery and/or other Peninsula agricultural locations." Section 8.7.3(10)(u)5**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased and quoted, in

part, Section 8.7.3(10)(u)(5) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**113. The Winery-Chateau requirements dictate with whom Winery-Chateau Plaintiffs may freely associate and also compels their advertising and promotional content and directly restrains their ability to engage in interstate and intrastate trade of food and fruit.**

RESPONSE: Intervening Defendant denies as untrue the allegations of Paragraph 113.

**114. Hours of operation for Guest Activities are left to the discretion of the Town Board, but can be no later than 9:30 p.m. Section 8.7.3(10)(u)5(b).**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(5)(b) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**115. Section 8.7.3(10)(u)5(b) is inapposite to and conflicts with Michigan law which explicitly allows Michigan wineries to serve food and alcohol until 2:00 a.m., daily. MCL 436.2113.**

RESPONSE: Intervening Defendant neither admit nor deny the allegations in Paragraph 115 to the extent the paragraph recites state law, so no response is required. Moreover, the allegations in this paragraph form conclusions of law for which no response is required. To the extent a response is required, Intervening Defendant admits that MCL 436.2113 speaks for itself. Intervening Defendant denies the applicable Zoning Ordinances are preempted by that statute for this reason this assertion is untrue.

**116. The Winery Ordinances limit alcohol sales to only those that are produced on site. Section 8.7.3(10)(u)5(c).**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(5)(c) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**117. Under Michigan law, an entity with a catering permit is allowed to serve alcohol on the winery premises, with certain escrow requirements, regardless of where the alcohol is produced.**

RESPONSE: Intervening Defendant neither admit nor deny the allegations in Paragraph 116 to the extent the paragraph paraphrases state law without legal citation, so no response is required. Moreover, this paragraph contains interpretations of law for which no response is required. Intervening Defendant further denies as untrue the assertion Michigan law allows an entity with a catering permit to serve alcohol on winery premises without regard to zoning restrictions. To the extent a response is required, Intervening Defendant admits that state law speaks for itself. Intervening Defendant further lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

**118. The Winery Ordinances prohibits amplified music and allows only amplified voice and recorded background noise so long as the amplification level is no greater than normal conversation levels. Section 8.7.3(10)(u)5(g).**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(5)(g) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself

**119. However, MCL 436.1916(11) explicitly allows Michigan licensed wineries to have music and singing.**

RESPONSE: Intervening Defendant neither admit nor deny the allegations in Paragraph

119 to the extent the paragraph recites and characterizes state law, so no response is required. Moreover, the allegations in this paragraph form conclusions of law for which no response is required. To the extent a response is required, Intervening Defendant admits that MCL 436.1916(11) speaks for itself.

**120. The Winery Ordinances prohibit the Plaintiffs from using their kitchen facilities for off-site catering. Section 8.7.3(10)(u)5(i).**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 8.7.3(10)(u)(5)(i) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself. Intervening Defendant further denies as untrue the assertion that, but for the wineries provisions in the zoning ordinances, Plaintiffs otherwise would have the right to use their facilities for catering.

**121. MCL 436.1547 explicitly allows a winery to obtain a catering permit which allows it to serve food and drinks off its premises.**

RESPONSE: Intervening Defendant neither admit nor deny the allegations in Paragraph 121 to the extent the paragraph recites and characterizes state law, so no response is required. Moreover, the allegations in this paragraph form conclusions of law for which no response is required. Intervening Defendant further denies as untrue the assertion that the cited statute allows an entity to obtain a catering permit without regard to zoning restrictions. To the extent a response is required, Intervening Defendant admits that MCL 436.1547 speaks for itself.

**122. Any violation of these ordinances “serve[s] as grounds for closing the Guest Activity Uses by the Township Board.” Section 8.7.3(10)(u)8(d).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(10)(u)(8)(d) of its Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**123. A person who violates the Winery Chateau Ordinance is also subject to “a civil fine for each violation to be determined by the Court, along with costs which may include all expenses, direct and indirect, to which the Township has been put in connection with municipal infraction. Costs of not more than \$500.00 shall be ordered.” Section 4.2.1 Violations and Penalties.**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased, in part, Section 4.2.1 of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**124. Each of Bowers Harbor, Brys, Grand Traverse, Chateau Chantal, Bonobo, Mari and Hawthorne have been harmed by the restriction in the Ordinances. Some, but not all, of those harms are described in the following paragraphs.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 124.

**Some of the Harms Experienced by Bowers Harbor.**

**125. Peninsula Township has prohibited Bowers Harbor hosting weddings, having live music, having temporary structures, hosting corporate and other social events. See Exhibit 5.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 125.

**126. Bowers Harbor has received letters and telephone calls from Peninsula Township demanding that it cancel planned events or be subject to penalties. *Id.* at ¶6.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 126.

**127. Bowers Harbor has received violations and fines from Peninsula Township**

**after events have occurred. *Id.* at ¶7.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 127.

**128. Often, Bowers Harbor declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 128.

**129. When Bowers Harbor turns customers away it suffers injury to its goodwill and reputation. *Id.* at ¶10.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 129.

**130. The Winery Ordinances also prevent Bowers Harbor from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise harms Bowers Harbor's ability to grow and promote its business. *Id.* at ¶13.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 130.

**131. Often, and especially in the summertime, customers wish to engage the Bowers Harbor tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Bowers Harbor is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶14.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 131.

**132. In addition to lost revenue, the Winery Ordinances force Bowers Harbor**

**to spend money for the few events it can to have. *Id.* at ¶11.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 132.

**133. Specifically, Bowers Harbor is forced to purchase fruit from farmers in Peninsula Township to comply with the tonnage requirement in the Winery Ordinances. *Id.* at ¶12.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 133.

**134. Collectively, the restrictive Winery Ordinances have caused at least several hundred thousand dollars in lost revenue to Bowers Harbor. *Id.* at ¶8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 134.

**Some of the Harms Experienced by Brys.**

**135. Peninsula Township has prohibited Brys hosting weddings, having live music, having temporary structures, hosting corporate and other social events. See Exhibit 6.**

RESPONSE: Defendant admits that its Zoning Ordinances speak for themselves and otherwise leave Plaintiffs to their proofs.

**136. Brys has received letters and telephone calls from Peninsula Township demanding that it cancel planned events or be subject to penalties. *Id.* at ¶6.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 136.

**137. Often, Brys declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 137.

**138. When Brys turns customers away, these customers are typically unhappy and Brys suffers injury to its goodwill and reputation. *Id.* at ¶8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 138.

**139. The Winery Ordinances also prevent Brys from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise harms Brys's ability to grow and promote its business. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 139.

**140. Often, and especially in the summertime, customers wish to engage the Brys tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Brys is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶10.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 140.

**141. Collectively, the restrictive Winery Ordinances have caused at least several hundred thousand dollars in lost revenue to Brys. *Id.* at ¶7.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 141.

**Some of the Harms Experienced by Grand Traverse.**

**142. Grand Traverse has been subjected to Peninsula Township's enforcement of**



**the Winery Ordinances. See Exhibit 7.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 142.

**143. These enforcement efforts have caused Grand Traverse to forego business opportunities for fear of violating the Winery Ordinances even where the business opportunity is constitutional. *Id.* at ¶5-6.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 143.

**144. Peninsula Township has prohibited Grand Traverse hosting weddings, having live music for over seventy customers, having temporary structures, hosting corporate and other social events. *Id.* at ¶6-7.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 144.

**145. Grand Traverse has received letters and telephone calls from Peninsula Township regarding the size of planned guests and threatening penalties. *Id.* at ¶8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 145.

**146. The Winery Ordinances and Peninsula Township's enforcement of those ordinances has cost Grand Traverse customers over the years. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 146.

**147. Often, Grand Traverse declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 147.

**Some of the Harm Experienced by Chateau Chantal.**

**148. Peninsula Township has prohibited Chateau Chantal from hosting weddings over a certain size, having live music, having temporary structures, hosting corporate and other social events. See Exhibit 8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 148.

**149. Often, Chateau Chantal has abided by the Winery Ordinances and declined wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶6, 9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 149.

**150. When Chateau Chantal turns customers away, these customers are typically unhappy and Chateau Chantal suffers injury to its goodwill and reputation. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 150.

**151. Other times, Chateau Chantal has received violations from Peninsula Township after erecting temporary structures. *Id.* at ¶7.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 151.

**152. The Winery Ordinances also prevent Chateau Chantal from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise harms Chateau Chantal's ability to grow and promote its business. *Id.* at ¶12.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 152.

**153. Often, and especially in the summertime, customers wish to engage the Chateau Chantal tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Chateau Chantal is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶13.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 153.

**154. In addition to lost revenue, the Winery Ordinances force Chateau Chantal to spend money for the few events it can to have. *Id.* at ¶10.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 154.

**155. Specifically, Chateau Chantal is forced to purchase fruit from farmers in Peninsula Township to comply with the tonnage requirement in the Winery Ordinances. *Id.* at ¶11.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 155.

**156. Collectively, the restrictive Winery Ordinances have caused at least several hundred thousand dollars in lost revenue to Chateau Chantal. *Id.* at ¶8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 156.

**Some of the Harms Experienced by Bonobo.**

**157. Peninsula Township has prohibited Bonobo hosting weddings, having live**

**music, having temporary structures, hosting corporate and other social events. See Exhibit 9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 157.

**158. Bonobo has received letters and telephone calls from Peninsula Township demanding that it cancel planned events or be subject to penalties. *Id.* at ¶6.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 158.

**159. Bonobo has received violations and fines from Peninsula Township after events have occurred. *Id.* at ¶7.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 159.

**160. Often, Bonobo declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 160.

**161. When Bonobo turns customers away, these customers are typically unhappy, and Bonobo suffers injury to its goodwill and reputation. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 161.

**162. The Winery Ordinances also prevent Bonobo from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise harms Bonobo's ability to grow and promote its business. *Id.* at ¶12.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 162.

**163. Often, and especially in the summertime, customers wish to engage the Bonobo tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Bonobo is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶13.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 163.

**164. In addition to lost revenue, the Winery Ordinances force Bonobo to spend money for the few events it can to have. *Id.* at ¶11.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 164.

**165. Specifically, Bonobo is forced to purchase fruit from farmers in Peninsula Township to comply with the tonnage requirement in the Winery Ordinances. *Id.* at ¶10, 11.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 165.

**166. Collectively, the restrictive Winery Ordinances have caused at least several hundred thousand dollars in lost revenue to Bonobo. *Id.* at ¶8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 166.

**Some of the Harms Experienced by Mari**

**167. Peninsula Township has prohibited Mari from hosting weddings, having live music, having temporary structures, hosting corporate and other social events. See**

**Exhibit 10.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 167.

**168. Mari has received letters, emails and telephone calls from Peninsula Township demanding that it cancel planned events or be subject to penalties. *Id.* at ¶6.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 168.

**169. Often, Mari declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 169.

**170. When Mari turns customers away, these customers are typically unhappy, and Mari suffers injury to its goodwill and reputation. *Id.* at ¶8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 170.

**171. Often, and especially in the summertime, customers wish to engage the Mari tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Mari is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶11.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 171.

**172. In addition to lost revenue, Mari is forced to spend money by purchasing a certain amount of fruit grown on Old Mission Peninsula in order to qualify for the events**

**that Mari is allowed to have. *Id.* at ¶9, 10.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 172.

**173. Collectively, the restrictive Winery Ordinances have caused at least several hundred thousand dollars in lost revenue to Mari. *Id.* at ¶7.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 173.

**Some of the Harms Experienced by Hawthorne.**

**174. Hawthorne owns real estate, buildings and wine making equipment located at 1000 Camino Maria in Traverse City, Michigan, which is located within Peninsula Township.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 174.

**175. Pursuant to a Joint Venture and Lease Agreements between Hawthorne and Chateau Chantal, Chateau Chantal conducts licensed Winery-Chateau operations under the Winery Ordinances on Hawthorne's property. See Exhibit 11.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 175. Intervening Defendant further states that the meaning of the term license as used in this context is unclear and vague.

**176. This joint-venture Winery-Chateau operation is branded as Hawthorne Winery. *Id.* at ¶6, 7.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 176.

**177. Pursuant to the Joint Venture Agreement, Hawthorne is entitled to a certain percentage of the revenue generated from the Winery-Chateau operations on an annual basis. *Id.* at ¶4.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 177.

**178. Hawthorne's revenue entitlement is directly impacted by the restrictions placed upon the joint-venture Winery-Chateau operation on its property by the Winery Ordinances as detailed in paragraphs 88-112, above.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 178.

**179. The restrictions also inhibit the growth of the Hawthorne brand.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 179.

**180. Peninsula Township has prohibited Hawthorne/Chateau Chantal from hosting weddings, having live music, having temporary structures, hosting corporate and other social events. *Id.* at ¶8.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 180.

**181. Often, Hawthorne/Chateau Chantal declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 181.

**182. When Hawthorne/Chateau Chantal turns customers away, these customers**



**are typically unhappy, and Hawthorne/Chateau Chantal suffers injury to its goodwill and reputation. *Id.* at ¶9.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 182.

**183. The Winery Ordinances also prevent Hawthorne/Chateau Chantal from taking advantage of its marketing creativity because of the advertising restrictions, this limited ability to advertise harms Hawthorne/Chateau Chantal's ability to grow and promote its business. *Id.* at ¶10.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 183..

**184. Often, and especially in the summertime, customers wish to engage the Hawthorne/Chateau Chantal tasting room and property into the evening. But, because the Winery Ordinances force the business to close at 9:30 p.m., Hawthorne/Chateau Chantal is forced to ask these customers to leave and lose additional revenue for the evening. *Id.* at ¶11.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 184.

**Section 8.7.3(12): Remote Winery Tasting Room**

**185. Peninsula Cellars has a license to operate a Remote Winery Tasting Room.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 185. Intervening Defendant further states that the meaning of the term license as used in this context is unclear and vague.

**186. Peninsula Township's intent in passing the Remote Winery Tasting Room Ordinance was to "allow wine tasting in a tasting room that is not on the same property as**

**the winery with which is associated.”**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased and quoted, in part, Section 8.7.3(12)(a) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**187. At a Remote Winery Tasting Room, sales by the bottle for consumption on the premises is not allowed. Section 8.7.3(12)(g).**

RESPONSE: Intervening Defendant denies the allegations of paragraph 187 because Section 8.7.3(12)(g) states that “Tasting of wine produced at the winery shall be the only wine tasted in the Tasting Room.”

**188. Michigan law explicitly allows sales by the bottle for consumption on the premises.**

RESPONSE: Intervening Defendant neither admit nor deny the allegations in Paragraph 188 to the extent the paragraph paraphrases and characterizes state law, without citation, so no response is required. Moreover, the allegations in this paragraph form conclusions of law for which no response is required. Intervening Defendant further denies as untrue the assertion Michigan law allows sales by the bottle for on-premises consumption without regard to zoning restrictions. To the extent a response is required, Intervening Defendant admits that state law speaks for itself.

**189. Remote Winery Tasting Room is not allowed to offer a full food menu. Section 8.7.3(12)(h).**

RESPONSE: Intervening Defendant admits that Section 8.7.3(12)(h) permits the sales of limited food items in accordance with applicable Michigan laws.

**190. Under Michigan law, a winery tasting room is allowed to operate a restaurant with a full menu.**

RESPONSE: Intervening Defendant neither admit nor deny the allegations in Paragraph 190 to the extent the paragraph paraphrases and characterizes state law, without citation, so no response is required. Moreover, the allegations in this paragraph form conclusions of law for which no response is required. Intervening Defendant further denies as untrue the assertion Michigan law allows a winery tasting room to operate a restaurant with a full menu without regard to zoning restrictions. Intervening Defendant further denies as untrue the assertion Michigan law addresses the extent of menu offerings at winery tasting rooms. To the extent a response is required, Intervening Defendant admits that state law speaks for itself.

**191. A Remote Winery Tasting Room may only sell non-food items which promote the winery of Peninsula Township agriculture and has the logo of the winery permanently affixed to the product. Non-logoed products are not allowed to be sold. Promotional items are limited to “corkscrews, wine glasses, gifts boxes, t-shirts, bumper stickers, etc.” Section 8.7.3(12)(i).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(12)(i) and otherwise state the ordinance speaks for itself. Defendant admits any obligations imposed upon it by law, and specifically denies as untrue all other allegations.

**192. A Remote Winery Tasting Room is not allowed to sell packaged food items unless the food item contains wine or fruit produced in Peninsula Township and bears the winery logo. The food can only be for off-premises consumption and includes, as examples, “mustard, vinegar, non-carbonated beverages, etc.” Section 8.7.3(12)(j).**

RESPONSE: Intervening Defendant admits that Plaintiffs have paraphrased and quoted, in part, Section 8.7.3(12)(j) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**193. A Remote Winery Tasting Room’s “signs and other advertising may not promote, list or in any way identify any of the food or non food items allowed for sale in the tasting room.” Section 8.7.3(12)(k).**

RESPONSE: Intervening Defendant admits that Plaintiffs have quoted, in part, Section 8.7.3(12)(k) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself.

**194. Peninsula Cellars has been harmed by the restriction in the Ordinances. Some, but not all, of those harms are described in the following paragraphs.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 194.

**195. Peninsula Township has prohibited Peninsula Cellars from hosting weddings, having live music, having temporary structures, hosting corporate and other social events. See Exhibit 12.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 195.

**196. Often, Peninsula Cellars declines wedding and event inquiries and must direct the potential customers elsewhere. *Id.* at ¶7.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 196.

**197. When Peninsula Cellars turns customers away, these customers are typically unhappy and Peninsula Cellars suffers injury to its goodwill and reputation. *Id.* at ¶7.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 197.

**198. Collectively, the restrictive Winery Ordinances have caused tens of thousands**

of dollars in lost revenue to Peninsula Cellars. *Id.* at ¶6.

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 198.

**Peninsula Township Ordinance Enforcement**

**199. To enforce its ordinances, Peninsula Township employs an Ordinance Enforcement Officer.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 199.

**200. This person is empowered with the authority to determine, based on his subjective opinion, what activities are and are not allowed at wineries in Peninsula Township.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 200.

**201. Over the years, this has included:**

- (a) Refusing to allow weddings;**
- (b) Refusing to allow political fundraisers;**
- (c) Refusing to allow meetings of books clubs;**
- (d) Refusing to allow a wine tasting and painting events (See Exhibit 17);**
- (e) Prohibiting a winery from hosting a corporate Holiday party because the company was not a non-profit nor an agricultural entity.**
- (f) Threatened an ordinance violation if a winery held a wine tasting event with local health and wellness companies as they did not promote local agriculture.**
- (g) Allowed some temporary structures deemed acceptable to the enforcement official but not allowing other temporary structures;**

- (h) **Allowed food trucks for events deemed acceptable to the enforcement official but not allowing food trucks at other events;**
- (i) **Refusing to allow live music;**
- (j) **Refusing to allow activities such as yoga, painting and flower arranging outside in the grape vines. (See e.g. Exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.)**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 201.

**202. Peninsula Township's Winery Ordinances and subjective enforcement activities have caused substantial harm to Plaintiffs.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 202

**203. Plaintiffs are routinely approached to host weddings, corporate events, political events and similar activities which they either must turn down or, if they attempt to hold such events, are forced to cancel the events.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 203.

**204. Each of these events could mean tens of thousands of dollars in revenue to Plaintiffs.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 204.

**205. In addition to lost revenue, Plaintiffs lose customer good will when they regularly have to turn down these events.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 205.

**206. Plaintiffs receives calls almost daily about hosting weddings. When the brides and grooms are turned away, their business goes to other wineries outside of Peninsula Township who are glad to receive this much needed revenue.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 206.

**207. Each of the Plaintiffs, each year, loses hundreds of thousands of dollars in revenue because of the limitations in the Winery Ordinances.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 207.

**208. In total, the Plaintiffs own or lease more than 1,400 acres of land in Peninsula Township with more than 900 of those acres in active agriculture production.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 208.

**209. Plaintiffs are forced to own and lease this property because of Peninsula Township's illegal ordinances which damage the Plaintiffs.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are illegal because this assertion is untrue. Intervening Defendants further state that this paragraph contains legal conclusions for which no responses are required. Intervening Defendant otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 209.

**210. In addition, to comply with the Winery Ordinances' requirements to purchase fruit from other property owners in Peninsula Township, Plaintiffs purchase fruit from Peninsula Township landowners covering more than 220 acres.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 210.

**211. These monies that Plaintiffs are forced to spend on fruit from local farmers could be spent in other areas of the businesses or to purchase fruit from farmers outside of Peninsula Township, or Michigan.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 211.

**WOMP's Associational Interests and Exposure to Unconstitutional Winery Ordinances Restrictions.**

**212. WOMP's advertising efforts are always subject to the unconstitutionally suppressive and compelling restrictions on free speech levied by the Winery Ordinances.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are unconstitutional because this assertion is untrue. Intervening Defendants further state that this paragraph contains legal conclusions for which no responses are required. Intervening Defendant otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 212.

**213. The messaging and free associations of WOMP's organized events held at the various member properties are equally restricted, suppressed and compelled. Each and every event's ability to effectively promote its members' products are restricted by the Winery Ordinances.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are in any way unconstitutional because this assertion is untrue. Intervening Defendants further state that this paragraph contains legal conclusions for which no response is required. Intervening Defendant otherwise lacks knowledge or information sufficient to form a belief as to



the truth of the remaining allegations in paragraph 213.

**214. WOMP's claims and request for injunctive relief do not require individualized proofs and WOMP could assert these claims with or without its membership's involvement as co-plaintiffs.**

RESPONSE: Intervening Defendant denies the allegations of Paragraph 214 as untrue as written, but otherwise respond that this Court has already denied Plaintiffs' request for a preliminary injunction.

**215. Only the amount of damages sustained by each plaintiff will require individualized proofs.**

RESPONSE: Intervening Defendant admits that any damages sustained by each Plaintiff will require individualized proofs. Intervening Defendant denies as untrue that the only element of Plaintiffs' claims requiring individualized proofs is the amount of damages.

**216. WOMP's existence depends on the members' continued viability and profitability and faces an existential threat from the continued enforcement of Peninsula Township's facially unconstitutional Winery Ordinances.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are in any way unconstitutional because this assertion is untrue. Intervening Defendants further state that this paragraph contains legal conclusions for which no response is required. Intervening Defendant otherwise lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 216.

**217. The Winery Ordinances not only have the practical effect of burdening interstate sales of fruit, wine and merchandise, but also discriminates against WOMP's members because of their chosen industry.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 217.

**218. These burdens and discrimination take various forms, as outlined in this Amended Complaint.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 218.

**219. As an advocate for its members' interests, WOMP has coordinated an extensive back and forth with Peninsula Township to privately resolve its members' concerns and the injuries sustained by the Winery Ordinances.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 219.

**Plaintiffs Attempt to Prompt Change.**

**220. In early 2019, and after years of restrictions, a group of the Plaintiffs attempted to work with Peninsula Township to re-write the Winery Ordinances.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 220.

**221. During a Township meeting, the winery owners advised Peninsula Township that much of its Winery Ordinances were preempted by Michigan law, and specifically the Michigan Liquor Control Code, which completely regulated the areas Peninsula Township attempted to regulate.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are preempted by Michigan Law, specifically the Michigan Liquor Control Code, because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal

conclusions for which no response is required. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 221.

**222. In response, on May 30, 2019, Peninsula Township's attorney provided a memorandum to Peninsula Township, which was provided to the winery owners, wherein he concluded that the Michigan Liquor Control Code did not preempt the Peninsula Township Zoning Ordinance. See Exhibit 14.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are preempted by the Michigan Liquor Control Code because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 222.

**223. In response, a group of the Plaintiffs had the Winery Ordinances reviewed by an attorney and, on July 9, 2019, presented Peninsula Township with a detailed letter and memorandum which included a line by line review of the Winery Ordinances and outlined how the Winery Ordinances violated the First Amendment to the United States Constitution, the Commerce Clause and were also preempted by Michigan law. See Exhibit 15.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue violate the constitution or are unconstitutional or preempted by Michigan law because these assertions are untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 223.

**224. The letter and memorandum were detailed to the point of including case**

**law which was directly on point and dealt with similar issues.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 224.

**225. On August 23, 2019, Peninsula Township's attorney responded to the July 9, 2019, letter and conceded that the majority of the legal points were accurate and that his prior memorandum was incorrect. See Exhibit 16.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 225.

**226. While in his May 30, 2019, letter, the Peninsula Township attorney dismissed the concerns of the winery owners and concluded there were no issues with the Winery Ordinances related to preemption, his tune changes and the following admissions were made:**

- (a) The portions of the Winery Ordinances which prohibit wineries from operating a restaurant should be revised to comply with MCL 436.1536 which expressly preempts the Winery Ordinances on this issue;**
- (b) The portions of the Winery Ordinances which prohibit wineries from using their kitchen facilities to engage in off-site catering should be revised to comply with MCL 436.1547 which expressly preempts the Winery Ordinances on this issue;**
- (c) The restriction on amplified music should be revisited;**
- (d) The portion of the Winery Ordinances which require wineries to close at 9:30 p.m. should be revisited as it is expressly preempted by MCL 436.1403, a Michigan Supreme Court case and a Sixth Circuit Court of Appeals case directly on point. See Exhibit 16.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are preempted by Michigan law because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required.

Intervening Defendant further denies as untrue the assertion that the township attorney's opinion is legally binding on the Township nor constitutes an admission in this litigation. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 226.

**227. As for the Commerce Clause, the Peninsula Township attorney admitted that “[t]here are issues with the Commerce Clause that should be considered in the future revisions to the Township’s winery ordinances.” He admitted that these issues included:**

- (a) The portion of the Winery Ordinances which prohibit meetings of organizations other than Grand Traverse County non-profits should be amended to allow out-of-county non-profits to hold meeting as otherwise the ordinance violates the Commerce Clause;**
- (b) The portion of the Winery Ordinances which allow only meetings of agricultural related groups that have a direct relationship to agricultural production should be revised to allow other groups to hold meetings as otherwise the ordinance violates the Commerce Clause.**
- (c) The portion of the Winery Ordinances which limit wine served to only Old Mission Peninsula appellation wine “violates the Commerce Clause unless the Township can demonstrate that it has no impact on out-of-state interest and that the Township has no other reasonable means in which to advance its local interest of wine sales”;**
- (d) The portion of the Winery Ordinances which require a winery to grow or purchase 1.25 tons of grapes from another farm in Peninsula Township for each person at a Guest Activity “violates the Commerce Clause unless the Township can demonstrate that it has no impact on out-of-state interest and that the Township has no other reasonable means in which to advance its local interest of wine sales”;**
- (e) The portion of the Winery Ordinances which restrict the use of out-of- states grapes “is, arguably, a restriction on interstate commerce”. See Exhibit 16.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions

at issue violate the constitution because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant further denies as untrue the assertion that the township attorney's opinion is legally binding on the Township nor constitutes an admission in this litigation. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 227.

**228. As for the First Amendment, the Peninsula Township attorney was clear in his conclusion that “[t]hese ordinances should be also be revised as they would most likely be viewed as constitutionally invalid suppressions of First Amendment rights.” His conclusions included the following:**

- (a) The Township Ordinances which require winery logos on products, restrict the products that may be sold specifically does not allow the sale of clothing, coffee cups, bumper stickers, etc, “should be revised as it is, under the First Amendment standards, an invalid suppression of the Wineries’ First Amendment rights”;**
- (b) The Township Ordinances which restrict the sale of non-food items, require certain logos, restrict others, restrict the sale of certain items and which prohibit the advertising and promotion of food and non-food items “should be revised as they would most likely be viewed as constitutionally invalid suppression of First Amendment rights”;**
- (c) As for the section of the Township Ordinance which limits capacity to 111 persons based on the capacity of one winery’s dining room, the Peninsula Township attorney concluded that it was “arguably not unconstitutionally vague.” See Exhibit 16.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue violate the constitution because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant further denies as untrue the assertion that the township attorney's opinion is legally binding on the Township nor constitutes an admission in this litigation. Intervening Defendant

lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 228.

**229. The Peninsula Township attorney concluded his letter by stating that at the next Township Board meeting “the Township will be taking prompt action” “regarding some of the items I mention on my opinion letter to ensure compliance.” Exhibit 16.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 229.

**230. Given that the Peninsula Township attorney admitted that the Winery Ordinances violate the First Amendment, violate the Commerce Clause and are preempted by Michigan law, one would expect that this “prompt action” would be to rescind these illegal ordinances. Exhibit 16.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue violate the constitution or are preempted by Michigan law because these assertions are untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant further denies that the township attorney’s opinion is legally binding on the Township in this litigation because this assertion is untrue. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 230.

**231. Instead, more than a year later, these illegal ordinances are still in effect in Peninsula Township and still causing damage to Plaintiffs.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are illegal because these assertions are untrue. Intervening Defendant admits the zoning ordinances provisions at issue are still in effect. Intervening Defendant lacks knowledge or

information sufficient to form a belief as to the truth of the allegations in paragraph 231.

**232. In fact, Peninsula Township, on September 21, 2020, published a proposed redraft of its Zoning Ordinances which contain the same Winery Ordinances their attorney stated were illegal. (Exhibit 17).**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are illegal because these assertions are untrue. Intervening Defendant further denies as untrue the assertion that the township attorney's opinion is legally binding on the Township in this litigation. Intervening Defendant admits the zoning ordinances winery provisions at issue are still in effect. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 232.

**233. While the majority of the redraft only made grammatical changes, Peninsula Township actually used the redraft to take away additional rights from the Wineries.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 233.

**234. In the redraft, Peninsula Township stated that wine tastings, winery tours, political rallies and free entertainment without fee are now Guest Activities subject to the restrictions discussed above when the current ordinances state these are not Guest Activities. *Id.* at 6-32.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 234.

**235. The United States Constitution and Michigan law explicitly allows these types of activities in the Michigan Liquor Control Code which preempts this revision.**

RESPONSE: Intervening Defendant denies that the adopted township zoning ordinance



nor the draft proposed amended zoning ordinance are preempted by the Michigan Liquor Control Code because this assertion is untrue. Intervening Defendant further states that this paragraph contains legal conclusions for which no response is required. Intervening Defendant further denies as untrue the assertion that the constitution and Michigan law authorize activities to take place without regard to local zoning. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 235.

**236. Presumably, Peninsula Township seeks to punish the Wineries for challenging the Winery Ordinances.**

RESPONSE: Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 235.

**237. Thus, this lawsuit is necessary.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 237 as untrue.

**238. The letters and memorandums from counsel for Plaintiffs and Peninsula Township's own attorney put Peninsula Township on notice in the summer of 2019 that its Winery Ordinances were, in part, illegal.**

RESPONSE: Intervening Defendant denies that the township zoning ordinance provisions at issue are illegal because these assertions are untrue. Intervening Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 238.

**COUNT I**  
**FACIAL CHALLENGE TO VIOLATION OF FREEDOM OF SPEECH, FREEDOM OF**  
**EXPRESSION AND FREE EXERCISE OF RELIGION UNDER THE FIRST AND**  
**FOURTEENTH AMENDMENTS (42 U.S.C. § 1983)**

**239. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.**

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if

fully stated herein.

**240. The First Amendment to the United States Constitution prohibits the abridgement of the freedom of speech.**

RESPONSE: Paragraph 240 is an attempt to cite federal law to which no response is required. To the extent a response is required, Intervening Defendant admits that the First Amendment protects some forms of speech.

**241. Political, religious, commercial, and artistic speech are the highest and most important forms of speech protected by the First Amendment to the United States Constitution.**

RESPONSE: Paragraph 241 is an attempt to cite federal law for which no response is required. To the extent a response is required, Intervening Defendant admits the First Amendment provides for protections of some forms of speech.

**242. Charitable and political events are forms of speech protected by the First Amendment to the United States Constitution.**

RESPONSE: Paragraph 242 is an attempt to cite federal law for which no response is required. To the extent a response is required, Intervening Defendant admits that the First Amendment provides for protection of some forms of speech.

**243. The protections of the First Amendment have been extended through the Fourteenth Amendment to prohibit the abridgement of the freedom of speech, freedom of expression and of the free exercise of religion by state and local governments.**

RESPONSE: Paragraph 243 is an attempt to cite federal law for which no response is required. To the extent a response is required, Intervening Defendant admits that the First Amendment provides for some protections of speech and the exercise of religion.

**244. Persons violating the First and Fourteenth Amendments under color of state law are liable under 42 U.S.C. § 1983.**

RESPONSE: Paragraph 244 is an attempt to cite federal law for which no response is required. To the extent a response is required, Intervening Defendant admits that the First Amendment provides for some protections of speech.

**245. Peninsula Township's Winery Ordinances are a content-based restriction on speech.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 245 as untrue.

**246. Peninsula Township's Winery Ordinances are not narrowly tailored to advance any compelling government interest.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 246 as untrue.

**247. In addition, Peninsula Township's Winery Ordinances are a prior restraint on speech and the exercise of religion because they require a winery to receive prior approval from the government before certain types of speech or religious ceremonies are allowed.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 247 as untrue.

**248. Peninsula Township has unfettered discretion in interpreting the meaning of the definition of Event and in limiting the number of times that a winery can use its land to engage in certain types of protected speech, including religious and political speech.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 248 as untrue.

**249. Even if the Winery Ordinances were a content-neutral restriction on speech, they would still be unconstitutionally overbroad because (i) the rationales explicitly provided for the Winery Ordinance provisions do not advance a substantial government interest and (ii) the Winery Ordinances are not narrowly tailored to meet those rationales.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 249 as untrue.

**250. Through the Winery Ordinances, Peninsula Township is acting under color of law to deprive Plaintiffs of their constitutional rights, in violation of 42 U.S.C. § 1983.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 250 as untrue.

**251. Through the Winery Ordinances, Peninsula Township further deprives the general public of their constitutional rights to engage in protected speech and the free exercise of religion, also in violation of 42 U.S.C. § 1983.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 251 as untrue.

**252. Peninsula Township's violations of the First Amendment are even more egregious given that its own attorney concluded more than a year ago that portions of the Winery Ordinances are unconstitutional.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 252 as untrue.

**253. Plaintiffs have suffered damages due to the unconstitutional Winery Ordinances.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 253 as untrue.

**WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.**

## **COUNT II**

### **AS-APPLIED CHALLENGE TO VIOLATION OF PLAINTIFF'S FREEDOM OF SPEECH UNDER THE FIRST AND FOURTEENTH AMENDMENTS (42 U.S.C. § 1983)**

**254. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.**

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if

fully stated herein.

**255. The Winery Ordinances restrict Plaintiffs' speech based on its content, specifically by disallowing Plaintiffs from certain political, religious and commercial speech.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 255 as untrue.

**256. For example, the Winery Ordinances prohibit Plaintiffs from hosting a campaign event for a United State President candidate, prohibit Plaintiffs from hosting a religious service such as a wedding, funeral or Sunday service, and prohibit Plaintiffs from advertising their nonagricultural products.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 256 as untrue.

**257. The Winery Ordinances are unconstitutional as applied to Plaintiffs because they face the imminent threat of being fined if they engage in constitutionally protected speech, because Plaintiffs' speech has been chilled, and because they has been forced to incur significant expense to undertake the Peninsula Township Guest Activity application process pursuant to the unconstitutional Winery Ordinances.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 257 as untrue.

**258. Peninsula Township's violations of the First Amendment are even more egregious given that its own attorney concluded more than a year ago that portions of the Winery Ordinances are unconstitutional.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 258 as untrue.

**259. Plaintiffs have suffered damages due to the unconstitutional Winery Ordinances.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 148 as untrue as written.

**WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.**

**COUNT III  
VIOLATION OF FREEDOM OF ASSOCIATION UNDER THE FIRST AND  
FOURTEENTH AMENDMENTS (42 U.S.C. § 1983)**

**260. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.**

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

**261. The First Amendment to the United States Constitution protects the right to peaceably assemble and associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.**

RESPONSE: Paragraph 261 is an attempt to cite federal law for which no response is required. To the extent a response is required, Intervening Defendant admits that the First Amendment provides for some rights to peaceably assemble and associate with others.

**262. The right to peaceably assemble and the freedom of expressive association applies to state and local governments through the Fourteenth Amendment.**

RESPONSE: Paragraph 262 is an attempt to cite federal law for which no response is required. To the extent a response is required, Intervening Defendant admits Defendant admits that the First Amendment provides for some rights to peaceably assemble and associate with others.

**263. The constitutional right to peaceably assemble and to the freedom of expressive association is directly and substantially burdened by the Winery Ordinances. Plaintiffs cannot gather or host gatherings on their property which express a political,**

**religious or commercial view and the limited ability to host Guest Activities on their property are subject to prior approval of Peninsula Township.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 263 as untrue.

**264. The Winery Ordinances are unconstitutional because, among other things, the burdens imposed by the Winery Ordinances are not narrowly tailored, necessary, or even substantially related to any compelling government interest.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 264 as untrue.

**265. The Winery Ordinances are unconstitutionally overbroad because the total ban on Guest Activity uses outside of the targeted allowance for local non-profit organizations and agricultural organizations is not narrowly tailored to achieve any purportedly compelling state interests.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 265 as untrue.

**266. The Winery Ordinances burden substantially more constitutionally protected activities than necessary to achieve the government's interests in the Winery Ordinances.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 266 as untrue.

**267. Plaintiffs have suffered damages due to the unconstitutional Winery Ordinances.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 267 as untrue as written.

**WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.**

**COUNT IV  
VIOLATION OF DUE PROCESS (42 U.S.C. § 1983)**

**268. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.**

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

**269. The Winery Ordinances proscribe constitutionally protected speech and expressive association.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 269 as untrue.

**270. The Winery Ordinances are unconstitutionally vague because the person of average intelligence cannot tell from the face of the Winery Ordinances what constitutes a “Guest Activity” prohibited under the Winery Ordinances and cannot govern his or her behavior to comply with the Winery Ordinances.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 270 as untrue.

**271. This vagueness will chill, and is currently chilling, the speech and expressive association of the residents of Peninsula Township, including Plaintiffs.**

RESPONSE: Defendant denies the allegations of paragraph 271 as untrue.

**272. The facial unconstitutionality of the Winery Ordinances entitles Plaintiffs to declaratory relief as to their unconstitutionality and injunctive relief against their enforcement by Peninsula Township.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 272 as untrue.

**273. Plaintiffs have suffered damages due to the unconstitutional Winery Ordinances.**

RESPONSE: Defendant denies the allegations of paragraph 273 as untrue as written.

**WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss**



**Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.**

**COUNT V  
DORMANT COMMERCE CLAUSE  
(Discrimination Against Interstate Commerce)**

**274. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.**

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

**275. As discussed above, the Winery Ordinances discriminate against interstate commerce in violation of the Commerce Clause, Article I, § 8, Clause 3, of the United States Constitution, by favoring, and mandating in Township products and persons over out-of-township products and persons.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 275 as untrue.

**276. Plaintiffs are therefore entitled to a declaratory judgment that the Winery Ordinances discriminate against out-of-Township products and persons are unconstitutional under the Commerce Clause.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 276 as untrue.

**277. Plaintiffs will suffer irreparable harm if Peninsula Township is allowed to enforce the unconstitutional Winery Ordinances.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 277 as untrue.

**WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.**

**COUNT VI**  
**DORMANT COMMERCE CLAUSE**  
**(Excessive Burden on Interstate Commerce)**

**278. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.**

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

**279. As discussed above, the Winery Ordinances place an excessive burden on interstate commerce in excess of the putative benefit to Peninsula Township in violation of the Commerce Clause, Article I, § 8, Clause 3, of the United States Constitution, by favoring, and mandating in Township products and persons over out-of-township products and persons.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 279 as untrue.

**280. Plaintiffs are therefore entitled to a declaratory judgment that the Winery Ordinances discriminate against out-of-Township products and persons are unconstitutional under the Commerce Clause.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 280 as untrue.

**281. Plaintiffs will suffer irreparable harm if Peninsula Township is allowed to enforce the unconstitutional Winery Ordinances.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 281 as untrue.

**WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.**

**COUNT VII**  
**REGULATOR TAKING**

**(Fifth and Fourteenth Amendment)**

**282. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.**

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

**283. As discussed above, Peninsula Township has enacted a series of Winery Ordinances which deprive Plaintiffs of the full use of their property.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 283 as untrue.

**284. The Winery Ordinances are “not reasonably necessary to the effectuation of a substantial public purpose.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978.)**

RESPONSE: Intervening Defendant denies the allegations of paragraph 284 as untrue.

**285. As discussed above, the stated purposes for the Winery Ordinances are themselves violations of Plaintiffs’ First Amendment rights and the Commerce Clause.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 285 as untrue.

**286. Plaintiffs will suffer irreparable harm if Peninsula Township is allowed to enforce the unconstitutional Winery Ordinances.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 286 as untrue.

**WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs’ First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.**

**COUNT VIII  
STATE LAW PREEMPTION**

**287. Plaintiffs incorporate and reallege the preceding paragraphs as if fully**

**restated herein.**

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

**288. The Michigan Liquor Control Code, MCL 436.110, et sec, is a comprehensive set of statutes which regulate the sale of alcohol in this State.**

RESPONSE: Paragraph 288 is an apparent statement of law for which no response is required. To the extent a response is required, Intervening Defendant admits that the Michigan Liquor Control Code regulates the sale of alcohol in Michigan, but denies as untrue the assertion that the Code is comprehensive to the exclusion of any other regulations and ordinances, including local zoning.

**289. The Winery Ordinances prohibit conduct which is expressly allowed by the Michigan Liquor Control Code.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 289 as untrue.

**290. Section 8.7.3(10)(u)(5)(b) conflicts with Mich. Admin Code R. 436.1403(1), which allows wineries to serve alcohol until 2:00 AM every night.**

RESPONSE: Intervening Defendant admits that Plaintiffs have cited, in part, Section 8.7.3(10)(u)(5)(b) of the Zoning Ordinances and otherwise states that the ordinance speaks for itself. To the extent a response is required, Intervening Defendant admits that Mich. Admin Code R. 436.1403(1) speaks for itself and permits that certain liquor licensees may sell alcohol during the hours proscribed therein. Intervening Defendant denies that the township zoning ordinance provisions at issue are preempted by the same as untrue.

**291. Section 8.7.3(10)(u)5(g) conflicts with MCL 436.1916(11), which grants wineries the right to hose “[t]he performance or playing of an orchestra, piano, or other**

**types of musical instruments, or singing” without a permit.**

RESPONSE: Intervening Defendant admits that MCL 436.1916(11) speaks for itself and permits “the performance or playing of an orchestra, piano or other types of musical instruments, or singing.” Intervening Defendant denies as untrue the assertion that the cited township zoning ordinance provision conflicts with the cited statute.

**292. The Winery Ordinances, including Section 8.7.3(10)(u)5(i), conflict with MCL 436.1536, which states a “wine maker [or] small wine maker . . . may own and operate a restaurant . . . as part of the on-premises tasting room . . .,” and with MCL 436.1547, which allows Plaintiffs to a restaurant to cater private events off their premises where they may serve food and alcohol they manufacture.**

RESPONSE: Intervening Defendant admits that MCL 436.1536 and MCL 436.1547 speak for themselves and denies as untrue that the cited township zoning ordinance provision conflicts with the cited statutes.

**293. The Winery Ordinances conflict with, and are preempted by, Michigan law.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 293 as untrue.

**294. Plaintiffs have suffered damages due the Peninsula Township’s enforcement of ordinances which are preempted by Michigan law.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 294 as untrue as written.

**WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs’ First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.**

**COUNT IX  
VIOLATION OF MICHIGAN ZONING ENABLING ACT**

**295. Plaintiffs incorporate and reallege the preceding paragraphs as if fully restated herein.**

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

**296. Under Michigan’s Zoning Enabling Act, MCL 125.3101 et seq, local units of government are authorized to enact zoning ordinances “to promote public health, safety, and welfare.”**

RESPONSE: Paragraph 296 is an apparent statement of law for which no response is required. To the extent a response is required, Intervening Defendant admits Plaintiffs have partially quoted Michigan’s Zoning Enabling Act and that this statute speaks for itself.

**297. Peninsula Township’s Winery Ordinances do not promote public health, safety, and welfare.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 297 as untrue.

**298. Therefore, Peninsula Township has exceeded its authority under Michigan’s Zoning Enabling Act which renders the Winery Ordinances void.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 298 as untrue.

**WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs’ First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.**

**COUNT X  
INJUNCTIVE RELIEF**

**299. Plaintiffs incorporate and reallege the preceding paragraphs as if fully**

**restated herein.**

RESPONSE: Intervening Defendant reincorporates each and every previous answer as if fully stated herein.

**300. Plaintiffs are likely to succeed on the merits of their lawsuit.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 300 as untrue.

**301. Plaintiffs will be irreparably harmed if an injunction does not issue preventing Peninsula Township from continuing to enforce the Winery Ordinance.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 301 as untrue.

**302. Peninsula Township will not be harmed if it is prohibited from enforcing its illegal Winery Ordinances.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 302 as untrue.

**303. Issuance of a preliminary injunction preventing Peninsula Township from continuing to enforce its illegal Winery Ordinances will serve the public interest.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 303 as untrue and the Court has already denied this request. (ECF No. 34).

**304. Plaintiffs have no adequate remedy at law.**

RESPONSE: Intervening Defendant denies the allegations of paragraph 304 as untrue.

**305. On October 21, 2020, Plaintiffs filed an attendant Motion for Preliminary Injunction. (ECF No. 2 PageID.435-437). Plaintiff's Motion for Preliminary Injunction is fully briefed and this First Amended Complaint does nothing to change the merits of Plaintiffs' claims and requests for relief. Plaintiffs hereby expressly adopt and incorporate its Motion for Preliminary Injunction with the claims and requests in this First Amended**

**Complaint.**

RESPONSE: Intervening Defendant admits Plaintiffs filed a Motion for Preliminary Injunction and that the Motion was denied by this Court (See ECF No. 34). Intervening Defendant denies as untrue that Plaintiffs are entitled to preliminary injunctive relief.

**306. Also, on October 21, 2020, Plaintiffs filed a Brief in Support of their Motion for Preliminary Injunction. (ECF No. 3 PageID.438-884). Plaintiffs hereby expressly adopt and incorporate their Brief in Support of their Motion for Preliminary injunction with the claims and requests in this First Amended Complaint.**

RESPONSE: Intervening Defendant admits Plaintiffs filed a Brief in Support of its Motion for Preliminary Injunction and that the Motion was denied by this Court (See ECF No. 34). Intervening Defendant denies as untrue that Plaintiffs are entitled to preliminary injunctive relief.

**307. On December 28, 2020, Plaintiffs filed a Reply Brief in Support of their Motion for Preliminary Injunction (ECF No 28, Page ID.1065-1085). Plaintiffs hereby expressly adopt and incorporate their Reply Brief in Support of their Motion for Preliminary Injunction with the claims and requests in this First Amended Complaint.**

RESPONSE: Intervening Defendant admits Plaintiffs has filed a Reply Brief in Support of Motion for Preliminary Injunction and that the Motion was denied by this Court (See ECF No. 34). Intervening Defendant denies as untrue that Plaintiffs are entitled to preliminary injunctive relief.

**WHEREFORE, Defendant respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Defendant such other relief as this Court deems just and proper.**



### **INTERVENING DEFENDANT PTP'S AFFIRMATIVE DEFENSES**

Intervening Defendant, Protect the Peninsula (PTP), by and through its attorney, states the following Affirmative Defenses to Plaintiffs' First Amended Complaint:

- A. Plaintiffs have failed to state a claim upon which relief can be granted.
- B. Plaintiffs' claims are barred in whole or in part as a result of the expiration of the applicable statute of limitations.
- C. Plaintiffs have failed, neglected and/or refused to properly and adequately mitigate the damages they claim to have suffered.
- D. Some or all of Plaintiffs' claims are barred because of their failure to exhaust administrative or other remedies or to satisfy jurisdictional requirements.
- E. Some or all of Plaintiffs' claims are preempted by applicable state or federal law.
- F. Plaintiffs have failed to identify any Michigan or federal law in which zoning ordinance provisions were invalidated for restrictions placed on liquor-license holders.
- G. Plaintiffs have prayed for damages that are not awardable under controlling law.
- H. Plaintiffs have failed to follow the statutorily prescribed process for amending a zoning ordinance under the Michigan Zoning Enabling Act.
- I. Plaintiffs' reliance on the legal opinions rendered by Defendant Peninsula Township's attorney during pre-litigation negotiations in this matter is inadmissible evidence.
- J. Defendant Peninsula Township's attorney lacked authority from the Township Board to negotiate with Plaintiffs for zoning ordinance amendments.
- K. Defendant Peninsula Township's attorney lacked authority under Michigan law to negotiate with Plaintiffs for zoning ordinance amendments.

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

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

N. Modifications to the Peninsula Township zoning ordinance sought by Plaintiffs would be subject to the voters' right of referendum guaranteed by the Michigan Zoning Enabling Act, MCL 125.3402.

O. Plaintiffs do not have a strong likelihood of success on the merits of their claims such that injunctive relief is improper.

P. Plaintiffs have failed to identify irreparable injury such that their claim for injunctive relief is improper.

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

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

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

T. Plaintiffs have failed to identify the damage claims for violation of the First and

Fourteenth Amendments in which they state zoning ordinance provisions were unconstitutional.

U. Plaintiffs have failed to identify any provision of Peninsula Township's zoning ordinances that compel or suppress their speech in violation of the First or Fourteenth Amendments.

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

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

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

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

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

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

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

CC. The Peninsula Township zoning ordinances have not resulted in any regulatory

taking as to the Plaintiffs.

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

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

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

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

AA. Plaintiffs unreasonably failed to take advantage of preventative and corrective opportunities provided.

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

CC. Plaintiffs' claims are barred by their own voluntary acknowledgement and agreement to the terms of special use permits issued by Peninsula Township.

DD. Plaintiffs' claims are barred by basic principles of contract law.

EE. Plaintiffs' claims may be barred by the doctrine of abstention.

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

GG. Plaintiffs have waived their ability to challenge the zoning conditions placed upon their special use permits.

HH. This Court has preliminarily determined that the Plaintiffs have not suffered


irreparable harm.

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

GG. Intervening Defendant reserves the right to file further affirmative defenses and to amend its affirmative defenses upon the completion of discovery.

WHEREFORE, Intervening Defendant PTP respectfully requests that this Honorable Court dismiss Plaintiffs' First Amended Complaint with prejudice and grant Intervening Defendant such other and further relief as this Court deems just and proper.

Date: February 16, 2021

By:   
Tracy Jane Andrews (P67467)  
Attorney for Protect the Peninsula, Inc.  
LAW OFFICE OF TRACY JANE ANDREWS, PLLC  
420 E. Front Street  
Traverse City, MI 49686  
(231) 946-0044  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

# **EXHIBIT B**

**Affidavit of Mark Nadolksi**

**Proposed Intervenor Protect the Peninsula, Inc. (PTP)**

**Brief in Support of Motion to Intervene**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

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

Plaintiffs,

v

PENINSULA TOWNSHIP,

Defendant.

Case No.: 1:20-cv-01008-PLM-RSK

Honorable Paul L. Maloney

Magistrate Ray S. Kent

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Joseph M. Infante (P68719)  
Stephen M. Ragatzki (P81952)  
Christopher J. Gartman (P83286)  
Miller, Canfield, Paddock and Stone, PLC  
*Attorneys for Plaintiffs*  
99 Monroe Avenue NW, Suite 1200  
Grand Rapids, MI 49503  
(616) 776-6333  
[infante@millercanfield.com](mailto:infante@millercanfield.com)  
[gartman@millercanfield.com](mailto:gartman@millercanfield.com)

Gregory M. Meihn (P38939)  
Matthew T. Wise (P76794)  
Foley & Mansfield, P.L.L.P.  
*Attorneys for Defendant*  
130 E. 9 Mile Rd.  
Ferndale, MI 48220-3728  
(248) 721-4200 / Fax: (248) 721-4201  
[gmeihn@foleymansfield.com](mailto:gmeihn@foleymansfield.com)  
[mwise@foleymansfield.com](mailto:mwise@foleymansfield.com)

Tracy J. Andrews (P67467)  
Law Office of Tracy Jane Andrews, PLLC  
*Attorney for Intervening Defendant*  
420 E. Front Street  
Traverse City, MI 49686  
(231) 714-9402  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

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**AFFIDAVIT OF MARK NADOLSKI IN SUPPORT OF  
MOTION TO INTERVENE FILED BY PROTECT THE PENINSULA, INC.**

Mark Nadolski, being sworn, says:

1. I am a member, director, and president of Protect the Peninsula, Inc. (PTP), a Michigan non-profit corporation. I am also a director of Preserve Old Mission Peninsula, a Michigan non-profit corporation and IRS 501(c)(3) entity.

2. I own property and reside with my spouse, Joan Nadolski, at 10 McKinley Road West, at the corner of M-37 (Center Road), which is in Peninsula Township, Grand Traverse County, Michigan. We have lived at this location for about 48 years.

3. Our home is the Old McKinley schoolhouse that was built in 1901.

4. We also own property next door at 82 McKinley West.

5. We own property in the Harbor Reach subdivision, which is approximately 400 yards from Mission Table restaurant near Bowers Harbor.

6. Our home, 10 West McKinley, is located on the west side of M-37, directly across the road from Black Star Farm Winery's vineyards and orchards. The tasting room of Blackstar Farms is located on the east side of McKinley road, approximately 1/3 mile from our residency.

7. My home and property, and Blackstar Farms, are located in the A-1 Agricultural District.

8. I am an active real estate agent and have been involved in sales and listing of property on Old Mission Peninsula, including PDR farms. I also sold 555 acres at the north tip of the peninsula to the Michigan Land Trust, who turned it over to the Michigan DNR, who in turn leased it as a park to Peninsula Township.



9. PTP began as an informal association in 1979, and I have been a member, director, and/or officer of PTP since the organization's inception. PTP was formed by residents from the farming and residential communities of Old Mission Peninsula, who shared interests in preserving and supporting the rural, pastoral quality of life on the unique peninsula.

10. PTP officially incorporated as a Michigan non-profit corporation on July 26, 1988. I have been president of PTP since approximately 1995.

11. For the last 40 or so years, PTP directors, members, supporters, and myself personally, have served in the role as watchdogs over the Peninsula Township government, policies, and decisions related to land use issues.

12. The purpose and mission of PTP as stated in our Articles of Incorporation is:

To foster and promote the benefits of life on Old Mission Peninsula to the members of PTP and the Old Mission Peninsula. To communicate to the membership and the community through whatever source, the actions being taken by local government in response to issues of development, growth, and the environment on the Old Mission Peninsula. Further, to prepare responses to local government actions as they impact life on Old Mission Peninsula and Peninsula Township.

13. PTP is exclusively supported by donations from individuals, mostly individuals who live on or own a home in Peninsula Township. Our donors include residents who live close to wineries and also residents who live along access roads to wineries.

14. Over the last four decades, PTP has occasionally retained consultants and legal counsel, but PTP is primarily a volunteer organization.

15. Residents have supported and volunteered to lead PTP and support PTP activities because they share PTP's vision for the community and PTP's concerns about threats to the community.

16. PTP became organized informally in 1979 in response to a significant development project (termed the Bluffs) that would have resulted in one thousand acres of agricultural property being converted into a mix of housing, commercial, and golf operations. In response, PTP organized a citizen campaign that resulted in a referendum with 76% of voters rejecting the township board's decision to rezone for the development.

17. In 1986, in response to a second proposal to amend the zoning ordinance for a substantial development (again, the Bluffs), PTP organized and led a second voter referendum, with 75% of voters opposed to the township's decision.

18. In terms of PTP's work organizing campaigns, this refers to efforts that include attending township meetings, doing research, drafting petition language, circulating petitions, printing newsletters, speaking at community forums, speaking at township meetings, knocking on doors, making phone calls, and more. PTP's efforts reflect the entire spectrum of grassroots community organizing and engagement.

19. In response to township approval of a third proposal for intense residential, commercial, and golfing facilities at the Bluffs location, PTP filed a lawsuit in Grand Traverse County against Peninsula Township in October 1988 challenging the township decision (Case No. 88-6390 NZ). The trial ended with a decision favorable to PTP.

20. In 1998, Chateau Chantal, a winery and tasting room in the township, filed a lawsuit against the township in Grand Traverse County seeking modifications of its special use permit (SUP) to allow convention and banquet type functions, overnight guest accommodation, a swimming pool, expanded warehouse facilities and parking (Case No. 98-17195-CZ). PTP was granted the right to intervene in the litigation. In late 1998, a satisfactory resolution for PTP and

the citizens of the township was reached through a negotiated Consent Judgment, which limited expansion of the winery.

21. In 1999, the wineries of that era again sought changes in the Peninsula Township winery zoning ordinance known as Amendments 128 a, b & c. Those amendments, if adopted, would have allowed expanded winery operations, wine processing buildings, public wine tasting buildings, retailing, packaged foods, and commercial products on a 15-acre parcel, with only 5 acres in actual vineyards, and with no guarantee of locally sourced grapes. Amendment 128 was passed by a vote of 3-2 by the township board. Township voters, supported by PTP members attempted to negotiate a resolution, the wineries refused, and then PTP filed a petition for a referendum. After a litigation delay, PTP again helped organize and lead the referendum effort by circulating petitions and newsletters, arranging meetings, knocking on doors, and so on. In the end, the citizens voted to overturn Amendments 128 a, b & c.

22. Over the last 40 years, I and other volunteers have participated on behalf of PTP at hundreds of township meetings, collectively investing many thousands of volunteer hours. Over these years, PTP's participation in the public processes has included, among other activities, commenting on specific applications, including winery SUP applications; drafting and inputting zoning ordinance provisions and amendments; speaking in public comment at planning commission, zoning appeals board, and township board meetings regarding numerous land use policies, decisions and issues; participating in the process to develop and update the township's Master Plans; initiating and intervening in land use litigation; leading referendums regarding land use decisions; discussing zoning and land use issues with elected officials, candidates for elected offices, and our neighbors.

23. PTP's efforts, through my and other member participation in township meetings, has resulted in PTP contributing to other important community issues. A partial list of PTP contributions on other township matters follows:

- Fought to avoid the construction of a standard and highly-visible cell tower at a high point on the south-end of the township, instead achieving a more aesthetically-pleasing and largely disguised design. Most are unaware that the "large tree" is a cell tower.
- Supported parks creation and enhancement efforts including what is now known as Pelizzari Natural Area.
- Advocated for development of the popular scenic view turnout above the vineyards at Chateau Grand Traverse.
- Administered resident surveys to gather necessary information that subsequently influenced township policy priorities.
- Active participation in each master plan update.
- Engaged in all ordinance creation and rewrites.
- Advocated for sensible infrastructure projects -- e.g. sewer and water districts, roadway designs.
- Promoted the single-waste hauler contract to help minimize the volume of heavy and slow-moving trucks on our roadways to limit traffic and minimize road degradation.

24. I have volunteered thousands of hours to support PTP and engage in Peninsula Township planning and zoning (and other) decision-making because I have a strong personal interest and substantial investment in the uniqueness of the Old Mission Peninsula.

25. This peninsula is unique due in part to its physical geographic formation – a 25-mile long and 1-to-3 mile wide peninsula extending into Grand Traverse Bay of Lake Michigan. This formation limits physical (vehicular) accessibility on the Peninsula, with a majority of traffic collecting on Center Road (M-37) to reach destinations north and south on the peninsula. This

same geographic formation also supports the unique, rich and significant agricultural heritage on this peninsula.

26. I have reviewed the documents filed by the wineries in their October 2020 lawsuit against Peninsula Township, including their original complaint and exhibits, amended complaint and exhibits, and the briefs filed so far. From those materials, I understand that the wineries seek to prevent the township temporarily and permanently from enforcing the winery provisions in the zoning ordinance, which apply to all types of wineries in the agricultural districts – Farm Processing Facilities, Winery-Chateaus, and Remote Winery Tasting Rooms. The wineries have challenged in these filings the winery provisions in the zoning ordinance that restrict food service, hours of operation, hosting of wedding and other events, retail sales, parcel sizes, ratio of crop growing requirements relative to other land uses, sales of wine produced off-site, and other provisions.

27. Eliminating the winery provisions in the zoning ordinance that the wineries have challenged would result in increasing commercial activities in the agricultural district, including: increasing hours of operations for existing wineries; increasing the numbers and types of events offered by current wineries; increased retail, restaurant, bar, and catering services by current wineries; and reduced connection to crop growing and agricultural uses in the agricultural district by current wineries. In addition, eliminating the provisions in the zoning ordinance that the wineries have challenged would be exacerbated by potentially increasing the number of wineries in the agricultural district as a result of smaller parcel sizes and increased independence from agricultural activities (crop growing) in the agricultural district.

28. I am concerned that resolving the wineries' lawsuit in court may result in changes to the zoning ordinance, which I personally and PTP organizationally have worked to develop and protect for many years.

29. I am also concerned that the process of changing the zoning ordinance as a result of litigation may impair my and PTP's ability to participate in the zoning process through the traditional methods provided for public participation – *i.e.*, public hearings, presentations at public meetings, discussions with planning commissioners and township board members, and potentially voter referendum.

30. Increasing commercialization as a result of more visitors, more events, bigger events, and more services offered, will necessarily lead to more traffic. Traffic necessarily concentrates on Center Road (M-37), due to the geographic formation of the peninsula and the location of the wineries on the peninsula. (See Exhibit A – wineries map).

31. From my observations living on Center Road, the winery traffic -- both private vehicles and chartered buses and vans – already dominates Center Road/M-37 in the spring, summer, and fall. From my lay neighbor perspective, the number of near accidents (and occasional accidents) involving vehicles turning off of Center Road/M-37 onto McKinley traveling to Blackstar Farms tasting room increases yearly and has become a serious traffic hazard.

32. I am concerned that increasing traffic on Center Road will result in significant adverse impacts to the value of my home and to my use and enjoyment of my home. Our home faces east onto the corner of M-37 and McKinley. From our location we are able to view and hear M-37 traffic traveling north and south on Old Mission Peninsula.

33. I am also concerned about the potential for increasing commercial activities at Black Star Farm, such as restaurants, later hours, more and bigger events including outdoor events,

and more retail space. At the same time, increasing the relative proportion of commercial space to crop-growing acreage may lead to bigger or more wineries. I am concerned about noise, traffic, and reduced agriculture immediately adjacent to my home, which threaten my use and enjoyment of my home.

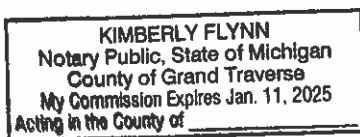
34. Based on my 40 years of experience with residents on the peninsula in my capacity of a founder, member and leader of PTP, I believe that the zoning ordinance changes that the wineries seek in this litigation would have a significant negative impact on PTP's and the township's ongoing efforts to preserve and protect the unique agricultural character of the township. The agricultural and rural nature of the peninsula is the main reasons why I bought my home and invested my time resources in this community.

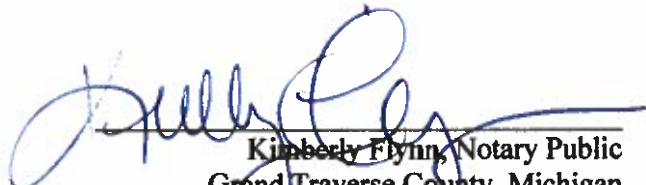
Date: February 11, 2021

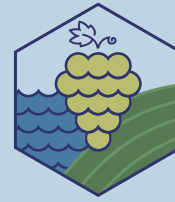
By:   
Mark Nadolski

STATE OF MICHIGAN  
COUNTY OF GRAND TRAVERSE

Subscribed to and sworn before me on this 11th day of February, 2021, by Mark  
Nadolski



  
Kimberly Flynn, Notary Public  
Grand Traverse County, Michigan  
Acting in Grand Traverse County  
My commission expires: January 11, 2025



# OLD MISSION PENINSULA

*Wine trail*

- 1** Black Star Farms  
360 McKinley Road East
- 2** Mari Vineyards  
8175 Center Road
- 3** Hawthorne Vineyards  
(April–Nov.)  
1000 Camino Maria  
new entrance at Montague Road
- 4** Peninsula Cellars  
11480 Center Road
- 5** Chateau Grand Traverse  
12239 Center Road
- 6** Brys Estate Vineyard & Winery  
3309 Blue Water Road
- 7** Bowers Harbor Vineyards  
2896 Bowers Harbor Road
- 8** Tabone Vineyards  
14916 Peninsula Drive
- 9** Chateau Chantal  
15900 Rue de Vin
- 10** 2 Lads Winery  
16985 Smokey Hollow Road





# **EXHIBIT C**

**Affidavit of John Wunsch**

**Proposed Intervenor Protect the Peninsula, Inc. (PTP)**

**Brief in Support of Motion to Intervene**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

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

Plaintiffs,

v

PENINSULA TOWNSHIP,

Defendant.

Case No.: 1:20-cv-01008-PLM-RSK  
Honorable Paul L. Maloney  
Magistrate Ray S. Kent

---

Joseph M. Infante (P68719)  
Stephen M. Ragatzki (P81952)  
Christopher J. Gartman (P83286)  
Miller, Canfield, Paddock and Stone, PLC  
*Attorneys for Plaintiffs*  
99 Monroe Avenue NW, Suite 1200  
Grand Rapids, MI 49503  
(616) 776-6333  
[infante@millercanfield.com](mailto:infante@millercanfield.com)  
[gartman@millercanfield.com](mailto:gartman@millercanfield.com)

Gregory M. Meihn (P38939)  
Matthew T. Wise (P76794)  
Foley & Mansfield, P.L.L.P.  
*Attorneys for Defendant*  
130 E. 9 Mile Rd.  
Ferndale, MI 48220-3728  
(248) 721-4200 / Fax: (248) 721-4201  
[gmeihn@foleymansfield.com](mailto:gmeihn@foleymansfield.com)  
[mwise@foleymansfield.com](mailto:mwise@foleymansfield.com)

Tracy J. Andrews (P67467)  
Law Office of Tracy Jane Andrews, PLLC  
*Attorney for Intervening Defendant*  
420 E. Front Street  
Traverse City, MI 49686  
(231) 714-9402  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

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**AFFIDAVIT OF JOHN WUNSCH IN SUPPORT OF MOTION TO INTERVENE**  
**FILED BY PROTECT THE PENINSULA, INC.**

JOHN WUNSCH, being sworn, says:

1. I am a member and board director of Protect the Peninsula, Inc., a Michigan non-profit entity.
2. I own property and reside at 17881 Center Road, which is in Peninsula Township, Grand Traverse County, Michigan.

3. I have lived in Peninsula Township all of my life except for time away in college and when I was working as a musician in New York, New York during the years 1978 to 1990. Even during those years, I returned to Peninsula Township in the summers to assist my family with their farming operations.

4. In 1990, I returned to the township as a full time resident, after purchasing my own farm, which became a part of the family farm operation.

5. When I moved back in 1990, I shifted my primary farm involvement to farmland preservation and continued my work as a musician.

6. In 2009, I purchased and continue to run an online music business, selling strings and related products for string musical instruments, via Stringsbyemail.com, retiring from working as a musician 2010.

7. In 1997, there was a growing issue in the township regarding wineries operations. I was extensively involved in attempts at non-litigated resolution at the township board level.

8. Subsequently, in 1998, I fully supported and assisted the opposition to a lawsuit filed by the winery, Chateau Chantal, Inc. against Peninsula Township (Grand Traverse Circuit Court Case No. 98-17195).

9. In my role as a township resident, and also as a collaborating supporter of the non-profit Protect The Peninsula (PTP), I was very concerned that the township government was not protecting the agricultural interests of the community and my family's multiple farms. I felt that the winery, Chateau Chantal, was attempting through the lawsuit to circumvent its zoning mandates by moving from its agricultural/vineyard zoning requirements to a commercial/events business operation and model.

10. One of the reasons I was involved in the issue and supported the 1988 lawsuit (above) is because I believed that Chateau Chantal was consistently violating its Special Use Permit (SUP) # 21 issued by the township. In particular, it was my understanding that Chateau Chantal was attempting to serve wine by the glass and serve food to people who were not registered guests, which at the time such activities were also in violation of Michigan liquor control regulations.

11. In addition, I believed that Chateau Chantal's requests (and others following its precedent) would result in increasing commercial uses on agricultural land that threatened the essential character of the community, which so many of us had worked to preserve through both our activism and our establishment of our Purchase of Development Rights program.

12. I was also concerned about traffic impacts to our farm activities resulting from increasing the number of visitors and volume of commercial traffic associated with the activities proposed by Chateau Chantal.

13. I was further concerned that increasing commercial activities on agricultural lands may lead to increasing land values, making traditional agriculture less sustainable.

14. Because of my concerns and the concerns of the membership of PTP, PTP filed a motion to intervene in the litigation on October 23, 1998.

15. After filing said motion and prior to an order of intervention being issued, the parties, in communication with myself, met on multiple occasions to find a compromised resolution to the litigation, which resulted in a consent judgment issued in November 1988.

16. PTP and I considered the outcome a victory in preserving the spirit and intent of the township's winery ordinance and the SUP #21 that had been issued to Chateau Chantal to operate its winery within the township's agricultural history and master plan.

17. The history of the wineries provisions in the Zoning Ordinance dates back to 1972, with numerous amendments and changes since then. The local wineries, farmers, and residents have all had a seat at the table as the Township Board has crafted and modified the ordinance to reflect what in my opinion is an appropriate balance between sometimes competing interests, goals and priorities.

18. In 1999, the Town Board passed the 5 Acre Small Winery Ordinance Amendment No. 128. I and other members of PTP had very clearly and strongly opposed the passage because it was not well structured to support agriculture in Peninsula township.

19. Amendment No. 128 would have allowed retail on small acreage parcels that could sell wine made from grapes not grown in the township and other unrelated items. I was very concerned that this new commercial activity under the guise of agriculture posed another threat to the community and agriculture.

20. With the passage of Amendment 128, I believed that the township government was not protecting the agricultural interests of my and my family's multiple farms, the continuation of legitimate winery operations, and the character of the community.

21. Additionally, Amendment 128 unfairly kept PDR-preserved agricultural land from competing effectively against more commercial winery operations.

22. I led Township residents, with support by PTP, in successfully filing a petition for a referendum.

23. That Amendment 128 referendum was stalled by litigation filed by WOMP's predecessor, The Agricultural Preservation League (APL) on behalf of one of the wineries.

24. After APL's defeat in court, the referendum vote proceeded and citizens voted to overturn amendment 128.

25. In the fall of 2001, I urged and jointly led a negotiation by myself representing PTP, along with a representative of the APL, to create a new small winery ordinance that would allow new winery operators with smaller parcels to be permitted and operate without the damaging potential of Amendment 128.

26. This negotiation, which I jointly led, took over 6 months of sustained effort and resulted in Amendment 139, a replacement that ensured use of grapes primarily grown in Peninsula Township, limited retail to winery-related products, and allowed PDR preserved land to participate in this use by right winery on smaller acreage than previously required for a winery in the township.

27. On July 9, 2002 the Township Board passed Amendment 139.

28. In 1994, I started and was chairperson of the group called Concerned Citizens In Support of Development Rights (PDR). This effort was fully supported by PTP.

29. The mission of this PDR effort was to establish in Peninsula Township the State's first program to pass a property tax millage (1.25 mills for 15 years) on each property owner in order to purchase development rights preserving the rural character of the peninsula, especially critical viewshed and agricultural areas. It was the first in the nation to be created on a township level

30. With the support of PTP, I led an initial effort of research and education over a period of 11 months, which was necessary both to assure ourselves the proposal was worthy and to persuade the township board to pass the necessary ordinance and approve a vote of the community on the question of whether to impose the underlying tax.

31. I then formed a campaign committee and led a three-month public campaign in support of the proposed millage for PDR.

32. This sophisticated PDR campaign included extensive public speaking, TV & radio appearances, impactful newspaper advertisements, and a comprehensive set of four mailers to the entire township introducing the concept and explaining the basics of PDR along with the potential benefits.

33. One particular important portion of the campaign was a personal effort on my part to meet with each of 50 farmers in the community to gain their support and get their signatures for a newspaper ad stating they supported the PDR program as a positive step towards the continuation of agriculture in Peninsula Township.

34. The residents of Peninsula Township passed this PDR millage on August 4, 1994.

35. In 2002, the PDR ordinance was amended and a second renewal of the PDR millage for 20 years at 2 mills was approved by the township voters.

36. Again, I led this PDR millage effort with the support of PTP.

37. This millage is again up for renewal in 2022.

38. I along with PTP intend to make every effort to seek voter renewal of the millage.

39. I chaired a 12 month process in 2019 to improve the PDR program and prepare for a potential renewal campaign.

40. To date, it is estimated that the property owners in Peninsula Township have expended in excess to \$22,000,000.00 to protect over 6000 acres of scenic view, vistas, and farmland. The full intent of the PDR efforts is to protect the rural character of the peninsula which, geographically encompasses the entirety of Peninsula Township and ensure the resource of open agricultural land remains available into the future.

41. From my perspective, the wineries of Old Mission Peninsula have been a substantial beneficiary of the taxpayer's protection of the rural character and scenic views of the township as it increases the tourism value of the peninsula.

42. It is my opinion that the changes WOMP seeks to the winery zoning ordinance through their preliminary negotiations with the Township in 2019 and now in this lawsuit will destroy the township's scenic and rural character that the taxpayers have fought and paid to preserve and will undermine the potential for traditional agriculture to continue and remain sustainable into the future.

43. I have worked to improve both the viability of wineries and clarify the appropriate protections of the community's character and the future of traditional agriculture, and I continue that effort still.

44. From 2017 to 2019, I engaged township officials to urge clarification of how Winery Chateau SUP permissions relate to PDR lands, which after I participated in multiple meetings with the Planning Commission, that effort resulted in a successful clarification through legal opinion of the need for a Winery Chateau to comply with PDR development rights concepts.

45. In 2017 to 2018, with support from PTP, I proposed new language to allow larger and therefore more viable production facilities for Farm Processing operations, which was successfully passed as Amendment 197 on January 8th 2018.

46. From my perspective, wine-tasting rooms to showcase a product produced in the district with products grown in the district is an agricultural enterprise. But operations at a winery move from primarily agricultural (showcasing wine) towards more commercial when the enterprise does things like: opens a store with unlimited retail merchandise; offers restaurant service (food service independent of wine-tasting); offers catering services independent of wine-



tasting; hosts events with no relationship or connection to viniculture or agriculture – *e.g.*, weddings; and offers bar service, including particularly sales of alcohol not produced on-site.

47. The current zoning ordinance seeks to strike a fair balance by allowing limited commercial agri-tourism when it is directly and substantially related to active agriculture (*i.e.*, growing crops and vineyards).

48. I have reviewed the documents filed by the wineries in their October 2020 lawsuit against Peninsula Township, including their original complaint and exhibits, amended complaint and exhibits, and the briefs filed so far.

49. From those materials, I understand that the wineries seek to prevent the township temporarily and permanently from enforcing the winery provisions in the zoning ordinance, which apply to all types of wineries in the agricultural districts – Farm Processing Facilities, Winery-Chateaus, Food Processing and Remote Winery Tasting Rooms.

50. The wineries have challenged in these filings the winery provisions in the zoning ordinance that restrict food service, hours of operation, hosting of wedding and other events, retail sales, parcel sizes, ratio of crop growing requirements relative to other land uses, sales of wine produced off-site, and other provisions.

51. Eliminating the winery provisions in the zoning ordinance that the wineries have challenged would result in increasing commercial activities in the agricultural district, including: increasing hours of operations for existing wineries; increasing the numbers and types of events offered by current wineries; increased retail, restaurant, bar, and catering services by current wineries; and reduced connection to crop growing and agricultural uses in the agricultural district by current wineries.

52. In addition, the negative impacts of eliminating the provisions in the zoning ordinance that the wineries have challenged would be exacerbated by potentially increasing the number of wineries in the agricultural district as a result of smaller parcel sizes and increased independence from agricultural activities (crop growing) in the agricultural district.

53. I am concerned that resolving the wineries' lawsuit in court may result in changes to the zoning ordinance, which I personally and PTP organizationally have worked to develop and protect for many years.

54. I am also concerned that the process of changing the zoning ordinance as a result of litigation may impair my and PTP's ability to participate in the zoning process through the traditional methods provided for public participation – *i.e.*, public hearings, presentations at public meetings, discussions with planning commissioners and township board members, and potentially voter referendum.

55. Allowing wineries to move into functioning as high traffic commercial businesses would impact me as a resident, my family's farming, and the entire community.

56. One impact is the increase in traffic and noise, which will dramatically change the rural character of the township. This problem is concerning for access to the homes in the setting of our peninsula, with essentially one primary point of vehicular access which breaks into only two spurs.

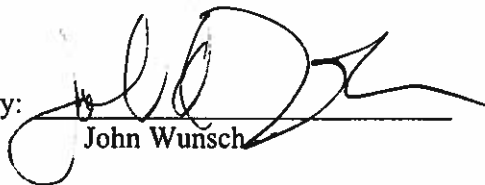
57. The traffic problems also impact traditional farming due to the importance of moving fruit off the peninsula to distributors and retailers during harvest quickly to maintain freshness and minimize transportation costs. High volumes of traffic additionally impact traditional harvest operations, many of which operate on numerous parcels scattered across the peninsula.

58. Our family in a given season operates on 16 to 20 parcels covering approximately 1000 to 1600 acres at distances of up to 11 miles apart. It is essential for us to move harvest equipment and crews quickly between these parcels in order to harvest fruit without spoilage or loss during the short windows of ripening.

59. I am concerned about longer term impact caused by increasing commercial and non-agricultural activities at wineries, which have the potential to result in adverse economic consequence for traditional agricultural enterprises like ours, which lack similar rights and opportunities to commercialize. This is an inequitable result and may lead to the additional long-term consequence of driving out more traditional agricultural (growing) activities.

Date: February 12, 2021

By:

  
John Wunsch

STATE OF MICHIGAN  
COUNTY OF GRAND TRAVERSE

Subscribed to and sworn before me via remote notarization on this 12th day of February, 2021, by John Wunsch.

\_\_\_\_\_  
Kimberly Flynn, Notary Public  
Grand Traverse County, Michigan  
Acting in Grand Traverse County  
My commission expires: January 11, 2025  
Notarized using electronic remote technology

58. Our family in a given season operates on 16 to 20 parcels covering approximately 1000 to 1600 acres at distances of up to 11 miles apart. It is essential for us to move harvest equipment and crews quickly between these parcels in order to harvest fruit without spoilage or loss during the short windows of ripening.


59. I am concerned about longer term impact caused by increasing commercial and non-agricultural activities at wineries, which have the potential to result in adverse economic consequence for traditional agricultural enterprises like ours, which lack similar rights and opportunities to commercialize. This is an inequitable result and may lead to the additional long-term consequence of driving out more traditional agricultural (growing) activities.

Date: February 12, 2021

By: \_\_\_\_\_  
John Wunsch

STATE OF MICHIGAN  
COUNTY OF GRAND TRAVERSE

Subscribed to and sworn before me via remote notarization on this 12th day of February, 2021, by John Wunsch.

  
\_\_\_\_\_  
Kimberly Flynn, Notary Public  
Grand Traverse County, Michigan  
Acting in Grand Traverse County  
My commission expires: January 11, 2025  
Notarized using electronic remote technology

# **EXHIBIT D**

**Affidavit of John Jacobs**

**Proposed Intervenor Protect the Peninsula, Inc. (PTP)**

**Brief in Support of Motion to Intervene**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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

Plaintiffs,

v

PENINSULA TOWNSHIP,

Defendant.

Case No.: 1:20-cv-01008-PLM-RSK  
Honorable Paul L. Maloney  
Magistrate Ray S. Kent

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Joseph M. Infante (P68719)  
Stephen M. Ragatzki (P81952)  
Christopher J. Gartman (P83286)  
Miller, Canfield, Paddock and Stone, PLC  
*Attorneys for Plaintiffs*  
99 Monroe Avenue NW, Suite 1200  
Grand Rapids, MI 49503  
(616) 776-6333  
[infante@millercanfield.com](mailto:infante@millercanfield.com)  
[gartman@millercanfield.com](mailto:gartman@millercanfield.com)

Gregory M. Meihn (P38939)  
Matthew T. Wise (P76794)  
Foley & Mansfield, P.L.L.P.  
*Attorneys for Defendant*  
130 E. 9 Mile Rd.  
Ferndale, MI 48220-3728  
(248) 721-4200 / Fax: (248) 721-4201  
[gmeihn@foleymansfield.com](mailto:gmeihn@foleymansfield.com)  
[mwise@foleymansfield.com](mailto:mwise@foleymansfield.com)

Tracy J. Andrews (P67467)  
Law Office of Tracy Jane Andrews, PLLC  
*Attorney for Intervening Defendant*  
420 E. Front Street  
Traverse City, MI 49686  
(231) 714-9402  
[tjandrews@enviaw.com](mailto:tjandrews@enviaw.com)

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**AFFIDAVIT OF JOHN S. JACOBS IN SUPPORT OF MOTION TO INTERVENE**  
**FILED BY PROTECT THE PENINSULA, INC.**

JOHN S. JACOBS, being sworn, says:

1. I am a member and director of Protect the Peninsula, Inc.
2. I own property and reside at 5290 Forest Avenue, which is located in Peninsula Township.
3. I have lived at this location for about 16 years.
4. My home is located on the shore of Lake Michigan. Peninsula Township, although roughly 20 miles long, is only 1-3 miles wide in most places, and is surrounded entirely by Lake Michigan except for a small connection to the mainland, serviced by one primary road (Center Road, also known as M-37). My home is near the far end from that mainland connection.
5. Peninsula Township, by virtue of its unique geography that juts out into Lake Michigan, is nearby water at all points, and is blessed with a microclimate ideally suited for farming of numerous fruit varieties. For many years, this gift of nature has inspired the Township residents, PTP, and other organizations such as the Grand Traverse Regional Land Conservancy to protect agricultural land and the peninsula's farming heritage.
6. I bought my home because it is the quietest and most peaceful place I know. Its location allows escape from noise and from the hustle and bustle of urban life. My home, and the other homes in Peninsula Township, are in high demand and derive their high property values largely from these qualities.
7. The pastoral nature of where my home is located, and in turn its value, is the result of a long history of careful planning and protective stewardship of local agriculture generally, and more specifically the agricultural zoning districts in the Township. For decades, through zoning

as well as our Purchase of Development Rights (PDR) program, the Township residents have preserved agricultural land and, in turn, the value of homeowners' properties such as mine. Commercial activities in the Township, such as those conducted by wineries, retail establishments, and restaurants, are limited to specific locations, specific activities, and specific hours of operation. This careful zoning of commercial and agricultural districts has created a substantial and positive impact on property values.

8. When I purchased my home, I was aware of and placed a high value on the protection of agricultural land through the PDR program and the thoughtful zoning that had occurred over the years. Those measures and my expectation of their continuance factored significantly in my desire to purchase my home and my willingness to pay a premium price for it.

9. Surveys of homeowners in Peninsula Township have consistently and overwhelmingly supported maintaining the Township's rural and agricultural qualities, as well as the limitation of commercial activities that could negatively impact those qualities. A 2019 Township-sponsored survey of residents showed 68% of those surveyed would vote to renew the PDR program, and 59% supported current restrictions on wineries.<sup>1</sup> A similar 2006 survey showed 76% to support continuance of the PDR program.<sup>2</sup>

10. Peninsula Township taxpayers have consistently voted to support millages to fund the Township PDR program, which is aimed at preserving agricultural properties and heritage.

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<sup>1</sup> See *Peninsula Township Survey on Citizen Satisfaction and Policy Preferences* (Nov. 2019), available at (last checked February 10, 2021).

<sup>2</sup> See *Report to Peninsula Township for Resident Survey* (Oct. 2006), available at <https://www.protectthepeninsula.com/news/resources> (last checked February 10, 2021).



11. Any change in the Township zoning ordinance that would allow increases in commercial events, extended hours, or other commercial activities in the agricultural district would have an immediate negative impact on me and other residents and homeowners. Property values and quality of life would suffer.

12. Litigation initiated by WOMP to terminate the status quo zoning rules has created uncertainty for me and confusion in the community and among potential property buyers who are now uncertain whether we can rely on the normal process for establishing and changing zoning rules versus changes resulting from court action.

13. If a winery or association of wineries proposed modifications to the wineries provisions in the zoning ordinance or in their Special Use Permits through the traditional zoning process – at the Planning Commission and subject to approval by the Township Board -- then I would participate in public hearings to raise my concerns. I am concerned that seeking zoning changes through the courts may limit or prevent me and my neighbors from participating in the ways that we would otherwise be entitled to participate in zoning changes.

14. Two wineries, Chateau Chantal and Two Lads, are visible from my home, and separated from my home almost entirely by water.

15. Due to sound traveling unobstructed over the water, I am able to hear from my property cars, motorcycles, and even voices from both wineries.

16. As I understand the filings in this litigation, both Two Lads and Chateau Chantal (and other wineries) are seeking from this lawsuit the ability to host weddings and corporate and other social events, have live music, erect temporary structures (likely tents for outdoor weddings and events), and extend their tasting room and property hours beyond 9:30 p.m..

17. I am very concerned that an increase in serving hours, types and numbers of events hosted, particularly outdoor events, together with more live music and other commercial activities at these wineries, if allowed, would negatively impact the peacefulness of my property that I so highly value, as well as the economic value of my home.

18. I am additionally very concerned that expansion of these activities would also increase noise, traffic, the need for bigger parking lots or road-side parking, impaired driving, demand for emergency services, and overall hustle and bustle in the heart of the agricultural districts in the Township, thereby destroying my enjoyment of my home and its economic value.

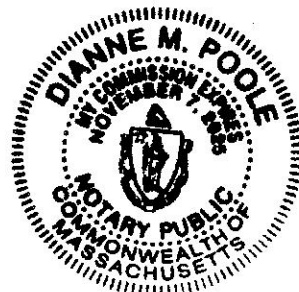
Date: February 11, 2021

By: John S. Jacobs  
John S. Jacobs

STATE OF MASSACHUSETTS  
COUNTY OF Middlesex

Subscribed to and sworn before me via remote notarization on this 11th day of February, 2021, by John S. Jacobs.

Dianne M. Poole  
\_\_\_\_\_, Notary Public  
Middlesex County, MA  
Acting in Middlesex County  
My commission expires: November 7, 2025  
Notarized using electronic remote technology



# **EXHIBIT E**

**Affidavit of Scott Phillips**

**Proposed Intervenor Protect the Peninsula, Inc. (PTP)**

**Brief in Support of Motion to Intervene**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

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

Plaintiffs,

v

PENINSULA TOWNSHIP,

Defendant.

Case No.: 1:20-cv-01008-PLM-RSK  
Honorable Paul L. Maloney  
Magistrate Ray S. Kent

---

Joseph M. Infante (P68719)  
Stephen M. Ragatzki (P81952)  
Christopher J. Gartman (P83286)  
Miller, Canfield, Paddock and Stone, PLC  
*Attorneys for Plaintiffs*  
99 Monroe Avenue NW, Suite 1200  
Grand Rapids, MI 49503  
(616) 776-6333  
[infante@millercanfield.com](mailto:infante@millercanfield.com)  
[gartman@millercanfield.com](mailto:gartman@millercanfield.com)

Gregory M. Meihn (P38939)  
Matthew T. Wise (P76794)  
Foley & Mansfield, P.L.L.P.  
*Attorneys for Defendant*  
130 E. 9 Mile Rd.  
Ferndale, MI 48220-3728  
(248) 721-4200 / Fax: (248) 721-4201  
[gmeihn@foleymansfield.com](mailto:gmeihn@foleymansfield.com)  
[mwise@foleymansfield.com](mailto:mwise@foleymansfield.com)

Tracy J. Andrews (P67467)  
Law Office of Tracy Jane Andrews, PLLC  
*Attorney for Intervening Defendant*  
420 E. Front Street  
Traverse City, MI 49686  
(231) 714-9402  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

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**AFFIDAVIT OF SCOTT D. PHILLIPS IN SUPPORT OF  
MOTION TO INTERVENE FILED BY PROTECT THE PENINSULA, INC**

**SCOTT D. PHILLIPS**, being sworn, says:

1. My name is Scott Phillips, and I am a member and donor of Protect the Peninsula, Inc.

2. My wife, Pamela Phillips, and I own property and reside at 8348 East Shore Road, which is in Peninsula Township.

3. We have owned our home at this location for over 20 years and I have occupied this home for an additional period during the years 1986-1988.

4. I am very familiar with the areas immediately adjacent to and around my home.

5. My home is located approximately two-tenths of a mile from the Mari Vineyard winery (Mari), which is located at 8175 Center Road in Peninsula Township.

6. Well before Mari opened its wine tasting room in about 2016, the land around it was a cherry farm, known to me informally as Underwood Farms. From the road, it looked solely as rolling hills of cherry trees. I do not recall any structures being visible to me other than perhaps a roadside farmer's fruit and vegetable stand.

7. In subsequent years, much of the Underwood Farms cherry orchards were developed as residential properties. Today, the area comprised of these residential properties is known informally, if not formally, as Underwood Farms.

8. My home, the Underwood Farms homes, and Mari are all located in the A-1 Agricultural District.

9. There are also recreational opportunities in the area immediately adjacent to both my home and Mari. These include a boat launch for the waters of East Grand Traverse Bay, and roads and trails used daily by walkers, runners, and bicyclists.

10. Except for the Mari and the Peninsula Township fire station, this part of Peninsula Township is an area characterized by grape-vineyards, orchards, residences, and recreation.

11. In 2016, after extensive land clearing and excavations of the natural topography, Mari constructed and opened a 31,000 square foot facility that includes a tasting room, production

facility, and wine caves. In addition to individual visitors, these facilities are patronized by organized groups traveling in buses and vans.

12. Based on my experience and observations driving along Center Road for 20 years, the volume of both noise and traffic has increased substantially because of the winery tasting rooms operating in Peninsula Township.

13. Since Mari's wine tasting room became operational, I have experienced disruptions resulting from increased traffic by visitors and tour groups. Examples of such disruptions include vehicles trespassing and turning-around in my driveway because they missed the entry to Mari; coming to a complete stop as I travel north-bound in the two-lane 55 mile-per-hour zone as north-bound vehicles turn left into Mari; increased wait times for traffic to clear and permit entry to Center Road from East Shore Road; and substantially greater noise from increased traffic volume.

14. It is my understanding that Mari, in its WOMP lawsuit, claims that it is prohibited by Peninsula Township from hosting weddings and other events, having live music, having temporary structures, and having to close at 9:30 pm. Thus, through this lawsuit, it appears Mari seeks opportunities to host weddings and other events, live music, temporary structures, and to operate after 9:30 pm. These would significantly expand its presently permitted operations.

15. Far from promoting agriculture, such expansion of permitted uses and operations of the Mari Vineyard Winery property describes a thriving commercial operation unlike anything remotely in its adjacent residential and agricultural vicinity.

16. I am very concerned that the expansions in commercial activities and operations sought by the wineries in general, and Mari in particular, will further disrupt the enjoyment of our residential and recreational properties. Such disruptions would include significantly unchecked boundaries on noise from weddings and other parties during all hours of the day and well into the

night, as well as further increased traffic impacts borne by residents for the economic benefit of the wineries.

17. In addition, the relief that the wineries' lawsuit requests, by reducing minimum parcel sizes and reducing the portion of land for active crop production, may lead to the further removal of land presently used for agriculture, to be converted to parking lots and events space, and potentially restaurants and other commercial activities.

18. I am concerned that the expanded uses sought by the wineries will have a detrimental effect on my quality of life and on the use and enjoyment of my property, as well as possibly lower surrounding residential property values due to their proximity to increasingly commercial oriented uses of nearby property.

19. I and my fellow Peninsula Township residents have over many years expressed significant and material interest in preserving the recreational, residential, and agricultural character of Peninsula Township. This includes voting for a special millage to acquire land now known as the Pelizzari Natural Area located not far from Mari; and another millage for the purpose of acquiring development rights from Peninsula Township landowners.

20. As the saying goes, in our community, "we have put money where our mouth is." In my view, these are clear and strong expressions of our desire to limit the further expansion of commercial operations which benefit few at the expense of many.

21. As a resident of Peninsula Township, I seek assurance that the wineries' land use going forward is consistent with the zoning ordinance, that any changes to zoning fully consider the impacts to neighboring interests, and that the zoning map is preserved in such fashion that keeps commercial uses in commercial districts.

22. If there were proposals to amend the zoning ordinance to increase or expand commercial activities at wineries, I would participate in public hearings by the Planning Commission and Township Board to support maintaining the pastoral and recreational uses and character currently reflected in our ordinance and limiting more intense commercial activities at the wineries.

23. I am concerned that a potential outcome of this lawsuit may include modifications to the winery's provisions in the Peninsula Township zoning ordinance through a process that does not allow for direct public participation.

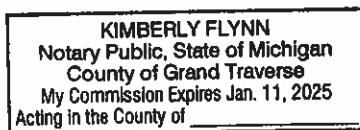
Date: February 11, 2021


By:

  
Scott D. Phillips

STATE OF MICHIGAN  
COUNTY OF GRAND TRAVERSE

Subscribed to and sworn before me on this 11th day of February, 2021, by Scott D.  
Phillips.





Kimberly Flynn, Notary Public  
Grand Traverse County, Michigan  
Acting in Grand Traverse County  
My commission expires: January 11, 2025



# **EXHIBIT F**

**Affidavit of Michele Zebell**

**Proposed Intervenor Protect the Peninsula, Inc. (PTP)**

**Brief in Support of Motion to Intervene**

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

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

Plaintiffs,

v

PENINSULA TOWNSHIP,

Defendant.

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Honorable Paul L. Maloney  
Magistrate Ray S. Kent

---

Joseph M. Infante (P68719)  
Stephen M. Ragatzki (P81952)  
Christopher J. Gartman (P83286)  
Miller, Canfield, Paddock and Stone, PLC  
*Attorneys for Plaintiffs*  
99 Monroe Avenue NW, Suite 1200  
Grand Rapids, MI 49503  
(616) 776-6333  
[infante@millercanfield.com](mailto:infante@millercanfield.com)  
[gartman@millercanfield.com](mailto:gartman@millercanfield.com)

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Gregory M. Meihn (P38939)  
Matthew T. Wise (P76794)  
Foley & Mansfield, P.L.L.P.  
*Attorneys for Defendant*  
130 E. 9 Mile Rd.  
Ferndale, MI 48220-3728  
(248) 721-4200 / Fax: (248) 721-4201  
[gmeihn@foleymansfield.com](mailto:gmeihn@foleymansfield.com)  
[mwise@foleymansfield.com](mailto:mwise@foleymansfield.com)

Tracy J. Andrews (P67467)  
Law Office of Tracy Jane Andrews, PLLC  
*Attorney for Intervening Defendant*  
420 E. Front Street  
Traverse City, MI 49686  
(231) 714-9402  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

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**AFFIDAVIT OF MICHELE ZEBELL IN SUPPORT OF  
MOTION TO INTERVENE FILED BY PROTECT THE PENINSULA, INC**

MICHELE ZEBELL, being sworn, says:

1. My name is Michele Zebell, and I am a member and donor of Protect the Peninsula, Inc.
2. My husband (Allan Jankowski) and I own property and reside at 2616 Bowers Harbor Road, which is in Peninsula Township.

3. We have lived in our home at this location for 24 years and owned the property for more than 30 years. This is and has been our full time residence; we know the areas around our home well.

4. Our residence and the Bowers Harbor Winery (2896 Bowers Harbor Road) border a Peninsula Township park; our home is adjacent to the park's west border and the Bowers Harbor Winery is adjacent on the east and south borders. In recent years, the township park was expanded; the additional park land borders my home to the south and the winery to the west. A portion of the winery's vineyards, driveway and tasting room are visible from our front yard.

5. The park is a wonderful asset for my family, for our neighborhood, as well as for the township. Rural in character, it is expansive with informal and formal walking paths and utilized by residents, including my family and guests, on a regular basis. There are also recreational areas, play structures, picnic areas and a Little League baseball field.

6. In addition to the park and residences in the area of my home and Bowers Harbor Winery, there is a private marina, a small restaurant and a boat launch providing access to West Grand Traverse Bay. The roads throughout this area are used by bikers, walkers and runners.

7. I truly appreciate and value the agricultural and residential character of Old Mission Peninsula. I and other residents have actively taken measures to preserve natural spaces, agricultural land and recreational areas. Multiple millage proposals for the purchase of land and development rights have been approved by voters, a clear indication that just as I do, peninsula residents want to maintain the rural character of the peninsula and their quality of life.

8. Over the years, I have experienced and observed an increase in traffic as Bowers Harbor Winery went from a residence and farm with cattle and horses to vineyards and now, a winery with a tasting room, gift shop, and other facilities. In addition to cars, there are regular tour

vans and large buses on roads that are already in use by park goers, boaters and residents. I am very concerned that an increase in the allowable uses for the winery will increase noise, safety issues and in turn, adversely impact recreational use of the park by residents as well as my own use and enjoyment of my property and the park.

9. I am concerned that an increase in permitted uses by wineries, uses that go beyond those outlined in the Peninsula Township ordinances, such as extended hours, unlimited events, restaurant services, and additional temporary and permanent structures, will increase noise, traffic, vehicular and pedestrian safety concerns and degrade my quality of life and my enjoyment of the place we live.

10. Agriculture is a valued use of land on the peninsula. I am very concerned with what appears to be an effort by WOMP to minimize or even eliminate active agricultural production (crop growing) requirements for Bowers Harbor Winery and all peninsula wineries, winery-chateaus and wine tasting rooms.

11. By seeking extended hours, the opportunity to serve drinks not produced onsite and offer restaurant and catering services independent of produce grown onsite, outdoor events with live music, reduced crop production, and smaller minimum parcel sizes, among other changes, I am concerned that the activity of visiting a wine tasting room to learn about, taste and purchase wine moves from an agricultural activity to that of a commercial bar or restaurant.

12. The sought-after changes would substantially undermine my expectation that activities at Bowers Harbor Winery will remain agricultural in nature, consistent with current plans, zoning and permits.

13. Additional noise, cars and buses, and inebriated drivers in close proximity to my and my neighbors' residences into the early hours of the morning would be disruptive to my use

and enjoyment of my property, my property values, and potentially also the safety of me and my neighbors.

Date: February 12, 2021

By: Michele Zebell  
Michele Zebell

STATE OF MICHIGAN  
COUNTY OF GRAND TRAVERSE

Subscribed to and sworn before me via remote notarization on this 12th day of February,  
2021, by Michele Zebell.

\_\_\_\_\_  
Kimberly Flynn, Notary Public  
Grand Traverse County, Michigan  
Acting in Grand Traverse County  
My commission expires: January 11, 2025  
Notarized using electronic remote technology

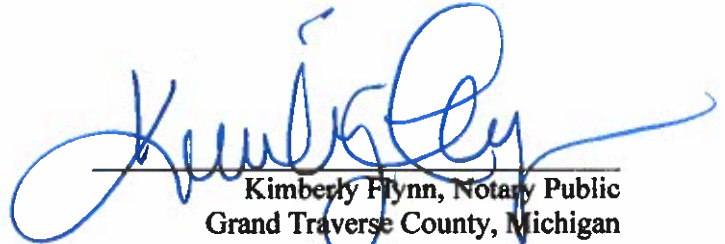
and enjoyment of my property, my property values, and potentially also the safety of me and my neighbors.

Date: February 12, 2021

By: \_\_\_\_\_  
*Michele Zebell*

STATE OF MICHIGAN  
COUNTY OF GRAND TRAVERSE

Subscribed to and sworn before me via remote notarization on this 12th day of February,  
2021, by Michele Zebell.

  
\_\_\_\_\_  
Kimberly Flynn, Notary Public  
Grand Traverse County, Michigan  
Acting in Grand Traverse County  
My commission expires: January 11, 2025  
Notarized using electronic remote technology

# **EXHIBIT G**

***United States v. Rutherford County Tenn.***

**Proposed Intervenor Protect the Peninsula, Inc. (PTP)**

**Brief in Support of Motion to Intervene**



Neutral

As of: February 13, 2021 12:59 PM Z

## **United States v. Rutherford County Tenn.**

United States District Court for the Middle District of Tennessee, Nashville Division

August 29, 2012, Filed

No. 3:12-0737

### **Reporter**

2012 U.S. Dist. LEXIS 122546 \*; 2012 WL 3762442

UNITED STATES OF AMERICA, Plaintiff, v.  
RUTHERFORD COUNTY TENNESSEE, Defendant.

**Judges:** KEVIN H. SHARP, UNITED STATES  
DISTRICT JUDGE.

**Prior History:** [United States v. Rutherford County, 2012  
U.S. Dist. LEXIS 99710 \(M.D. Tenn., July 18, 2012\)](#)

**Opinion by:** KEVIN H. SHARP

## **Core Terms**

interveners, mosque, Orders, religious, parties,  
intervenor, site, injunctive, regulation, restraining order

**Counsel:** [\*1] For United States of America, Plaintiff:  
Eric W. Treene, U.S. Department of Justice, Housing &  
Civil Enforcement Section, Washington, DC; Jerry E.  
Martin, Matthew M. Curley, Office of the United States  
Attorney (MDTN), Nashville, TN; Sean Richard  
Keveney, U. S. Department of Justice, Civil Rights  
Division, Educational Opportunities Section,  
Washington, DC.

For Rutherford County, Tennessee, Defendant: Josh A.  
McCreary, LEAD ATTORNEY, Edward Evan Cope,  
James C. Cope, Cope, Hudson, Reed & McCreary,  
PLLC, Murfreesboro, TN.

For Rutherford Interveners, Intervenor Plaintiff: J  
Thomas Smith, Jr., LEAD ATTORNEY, Law Office of J.  
Thomas Smith, Jr., Franklin, TN; Joe M. Brandon, Jr.,  
Murfreesboro, TN.

## **Opinion**

### **MEMORANDUM**

Pending before the Court is an Amended Motion to Intervene (Docket No. 23) filed by putative Cross-Plaintiffs Henry Golcynski, Lisa Moore, Kevin Fisher, John Lilley, Marlena Gregory, Caleb Gregory, Brian Gregory, Jim Holt, June Lilley Holt, Jim McCormack III, Annmarie Shannon, Shane Davis, and Ronald Todd. The Government has filed a response in opposition to the Motion (Docket No. 26), while Defendant Rutherford County has filed a [\*2] response, taking "no position on whether this Court should allow the putative Plaintiffs to intervene[.]" (Docket No. 27 at 13).

On August 24, 2012, the Court heard oral argument on the Amended Motion to Intervene. For the reasons that follow, the Amended Motion to Intervene will be granted subject to certain limitations.

### **I.FACTUAL BACKGROUND AND PROCEDURAL POSTURE**

This is an action for injunctive and equitable relief brought by the United States against Rutherford County, Tennessee under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), [42 U.S.C. §§ 2000cc-2000cc-5](#). On July 18, 2012, Judge



Campbell issued a Temporary Restraining Order, requiring Rutherford County to (1) process the Islamic Center of Murfreesboro's ("ICM's" or "the Center's") request for a certificate of occupancy for the mosque on Veals Road by performing a final building inspection; and (2) issue, on or before July 19, 2012, a certificate of occupancy for the mosque if the building complied with applicable codes and regulations, and, if the building did not comply with applicable codes and regulations, to notify the Center of the specific deficiencies, and to promptly re-inspect the building [\*3] after the Islamic Center informed the County that it had corrected the deficiencies. (Docket No. 7 at 4). The Temporary Restraining Order was subsequently extended in accordance with the agreement of the parties by Order of the Court dated July 26, 2012 (Docket 14). On August 24, 2012 when the extended Temporary Restraining Order was scheduled to expire, the Government withdrew its request for a preliminary injunction because a final certificate of occupancy had been issued the previous day.

Nine days after the issuance of the initial Temporary Restraining Order, adjacent landowners, all of whom had been Plaintiffs in Rutherford County Chancery Court actions involving issues surrounding construction of the mosque, filed a Motion to Intervene (Docket No. 15). After briefing, the Court denied the Motion for failure to comply with the requirement that a Motion to Intervene "be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). The Amended Motion to Intervene followed.

The record reflects that the putative interveners prevailed on some of their claims in the Chancery Court actions. Those cases arose after Rutherford County [\*4] Regional Planning Commission approved the Center's site plan on May 24, 2010, and construction of the mosque began in August of 2010.

On September 16, 2010, the putative interveners in this case sued Rutherford County in state Chancery Court in an effort to halt construction of the mosque. Estes, et al. v. Rutherford County Regional Planning Commission, et al., No. 10-cv-1443 (Ch. Ct. 2010). Among other things, Plaintiffs alleged that Rutherford County failed "to provide a hearing to examine the multiple uses of the ICM site and the risk of actions promoting Jihad and terrorism," and neglected to consider "evidence of elevated risks to the public safety of citizens of Rutherford County from the proposed ICM compound," in light of "evidence" purportedly suggesting that two

ICM Board Members supported, or were affiliated with, "Hamis – an entity designated by the United States as [a] terrorist organization[.]" (Docket No. 4-1 at 16 & 19). In Count I and II of the Complaint, they claimed the May 24, 2010 meeting, during which the site plan was approved, violated the Tennessee Open Meeting Act, Tenn. Code Ann. § 8-44-101, et seq., and in Count III claimed they were denied the due process [\*5] protections afforded under the Tennessee Constitution. (Id. at 20). Plaintiffs sought a restraining order that would prohibit Rutherford County from "taking any further steps to advance approval" for the construction of the mosque, and an order declaring the site plan approval for the mosque void. (Id. at 20-21).

The Chancery Court held a lengthy evidentiary hearing over the course of eight days on Plaintiffs' request for injunctive relief. Even though the Government was not a party to the proceedings, it filed an *amicus curiae* brief because Plaintiffs had allegedly "put into controversy whether Islam is a religion and whether a mosque is entitled to treatment as a place of religious assembly for legal purposes." (Docket No. 4-9 at 1). In its brief, the Government pointed out that the Department of Justice is charged with enforcing RLUIPA, and then argued:

RLUIPA codified First Amendment protections for places of worship and other religious uses of real property with regard to local land use laws, and provided a mechanism for enforcement. . . . RLUIPA provides, among other things, that a local government may not use land-use regulations to impose a substantial burden on religious exercise, [\*6] unless that burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc(a). It also provides that a local government may not impose a land use regulation in a way that discriminates against a religious assembly or institution based on religion or religious denomination, or treats a religious assembly or institution on less than equal terms than a nonreligious one. Id. at §2000cc (b)(1), (2). In enacting RLUIPA, Congress intended to provide religious institutions the maximum amount of free-exercise protection permitted by the Constitution. See id. at § 2000cc-3(g).

(Id. at 2-3).

On November 23, 2010, the Chancery Court denied Plaintiffs' request for preliminary injunctive relief. Thereafter, on May 17, 2011, the Chancery Court entered an Order granting Rutherford County's motion

to dismiss all claims, except Plaintiffs' claims under the Tennessee Open Meetings Act.

After another hearing, the Chancery Court issued an opinion on May 29, 2012, holding that the notice given in advance of the Planning Commission's May 24, 2010 meeting was inadequate under Tennessee law and, as a consequence, the Center's site plan approval was void. Nevertheless, [\*7] the court declined to enter an injunction "directing the County officials and third parties to cease construction" at the mosque site, and noted that the request for such relief should be in the form of a mandamus action. (Docket No. 4-13 at 3 n.1).

Days later, the Plaintiffs in the underlying action, now joined by several others, filed a Verified Petition for Writ of Mandamus or, in the Alternative, Injunctive Relief in a case styled Fisher, et al. v. Rutherford County, et al., No. 12-cv-853 (Ch. Ct. 2012). In that case, Plaintiffs requested that Rutherford County (1) be compelled to enforce the local zoning resolution, and (2) be enjoined from taking further action, or permitting the Center from taking further action in relation to development of the site and construction of the mosque. (Docket No 4-14 at 4-5). Acting on the Verified Petition, the Chancery Court, on June 13, 2012, enjoined Rutherford County from issuing a certificate of occupancy that would allow the Center to occupy and use the mosque which, by now, was almost, if not entirely, completed.

It was against this backdrop that the Government filed the present suit seeking injunctive relief. Even though the putative interveners [\*8] in this case prevailed on a claim in the Chancery Court which halted further activity at the mosque site, even though the Government participated in the underlying state court litigation as an amicus, and even though the relief requested by the Government in this case would render the Chancery Court's ruling a nullity, neither the putative interveners, nor their counsel, were informed of the filing of this action.

## **II. LEGAL DISCUSSION**

Motions to intervene are governed by Rule 24 of the Federal Rules of Civil Procedure. Rule 24(a) provides:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is

so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a). The Sixth Circuit "has interpreted the language of the Rule to require an applicant to show that: 1) the application was timely filed; 2) the applicant possesses a substantial legal [\*9] interest in the case; 3) the applicant's ability to protect its interest will be impaired without intervention; and 4) the existing parties will not adequately represent the applicant's interest." Blount-Hill v. Zelman 636 F.3d 278, 283 (6th Cir. 2011). Grutter v. Bollinger, 188 F.3d 394, 397-98 (6th Cir.1999). "Each of these elements is mandatory, and therefore failure to satisfy any one of the elements will defeat intervention under the Rule." Id.

In this case, the Amended Motion to Intervene is timely. The original Motion to Intervene was filed a mere nine days after the Complaint, and the Court granted leave until August 10, 2012 within which to file an Amended Motion to Intervene. See, Jansen v. City of Cincinnati, 904 F.2d 336, 340 (6th Cir. 1990) (listing factors to be considered in determining timeliness, including how far the case has progressed, how long the proposed intervenor knew of their interest in the case, and the prejudice to the original parties resulting from the proposed intervenor's failure to timely assert an interest in the case).

The second factor under Rule 24(a), and the only one the Government contests, is whether the putative interveners possess a substantial [\*10] legal interest in the case. The putative interveners assert that they "are victims of the ICM and Defendant Rutherford County's violation of the Rutherford County Zoning Resolution and the County['s] violation of the Tennessee Open Meetings Act and have particularized injury to their rights to seek remedies for violations of law as neighboring and adjacent landowners." (Docket No. 23 at 10).

In response, the Government begins by noting that the only claim it brings is one under RLUIPA, and argues that the Act provides a cause of action only to those who have a property interest in the regulated land, or a contract or option to acquire that land. It cites several cases for that proposition, including Prater v. Burnside, 289 F.3d 417, 434 (6th Cir. 2002), Taylor v. City of Gary, 233 Fed. App'x 561 (7th Cir. 2007), and Omnipoint Comm'n, Inc. v. City of White Plains, 202 F.R.D.402, 403 (S.D.N.Y. 2001).

Those cases are inapposite. While the church in Prater had no RLUIPA interest in how the city used city-owned land, while the minister in Taylor could not state a RLUIPA claim based on the city's decision to demolish a church in which he had no interest, and while the synagogue in Omnipoint [\*11] had no basis under RLUIPA to challenge the construction of a monopoly on someone else's land, none of those cases involved a situation where a potential intervenor sought to preserve a state court's ruling in its favor.

Additionally, for purposes of intervention, it is not necessary that the intervenor advance the exact same legal theory presented by the parties already in the litigation; they need only have an interest relating to the property or transaction. See Liberte Capital Group LLC v. Capwill, 126 Fed. Appx. 214, 219 (6th Cir. 2005). "[T]he interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process," and, "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene[.]" San Juan County v. United States, 503 F.3d 1163, 1203 (10th Cir.2007). Thus, "[a]lthough the intervenor cannot rely on an interest that is wholly remote and speculative, the intervention may be based on an interest that is contingent upon the outcome of the litigation." United States v. Union Elec. Co., 64 F.3d 1152, 1162 (8th Cir. 1995). [\*12] Certainly a litigant has at least some interest in preserving a favorable ruling it receives from a court of competent jurisdiction. See, Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968) ("if the plaintiff has won, he has a strong . . . interest in preserving his judgment").

The Government's observation that "Rule 24(a) has most commonly been applied to permit intervention where the intervenor, in fact, claims an interest in property" (Docket No. 26 at 6), while true, does little to persuade the Court that intervention is unwarranted simply because the putative interveners do not have a stake in the real property upon which the mosque sits. Rule 24(a), by its own terms, is not so self-limiting. Moreover, the Sixth Circuit "has opted for a rather expansive notion of the interest sufficient to invoke intervention of right," Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997), and has held that "Rule 24 should be 'broadly construed in favor of potential intervenors.'" Stupak-Thrall v. Glickman, 226

F.3d 467, 472 (6th Cir. 2000) (citation omitted).<sup>1</sup>

At the hearing on August 24, 2012, the Court asked Government's counsel how the issue of following the Chancery Court's Orders could be separated from the Government's underlying RLUIPA claim, and [\*14] Rutherford County's actions in relation thereto. The Government was unable to provide a satisfactory answer to this inquiry, and it appears the two issues are inextricably intertwined. Indeed, in its Memorandum in support of its request for a Temporary Restraining Order, the Government asserted:

The United States does not allege that the County has intentionally discriminated on the basis of religion. The County has consistently treated the mosque as it would a church or other place of worship, as a government body should under our laws and Constitution. The actions of the County challenged here are those that they are required to do pursuant to the orders of the Chancery Court.

(Docket No. 3 at 10, n. 4).

The third factor considered under Rule 24(a) also supports intervention. "To satisfy this element, 'a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied[.]' a 'burden [that] is minimal.'" Coalition to Defend Affirmative Action v. Granholm, 501 F.3d 775, 787 (6th Cir. 2007) (quoting, Michigan State AFL-CIO, 103 F.3d at 1247). An adverse determination in this case could conceivably hinder the putative intervenor's [\*15] interests in the finality of the Chancery Court's Orders finding that that Rutherford County failed to

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<sup>1</sup>It may be, as the Government argues, the putative interveners will be unable to prevail on [\*13] any of their claims. For example, the Government argues that the putative interveners' claim that this litigation violates the Rooker-Feldman doctrine fails as a matter of law because the Supreme Court has held that the doctrine is confined to "cases brought by state-court losers," Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005), and the Government was not a party, let alone the loser, in the Chancery Court proceedings. But Exxon Mobil also holds that "Rooker-Feldman does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions," nor does it abrogate the Full Faith and Credit Act. Id. at 292-93. None of this is to say that issue preclusion is appropriate in this case, but it is to say that the Rooker-Feldman doctrine goes to the power of the court to hear a case while "[p]reclusion, of course, is not a jurisdictional matter." Id. at 293.

comply with the Tennessee Open Meeting Act and the Zoning Resolution.

Finally, the fourth factor under [Rule 24\(a\)](#) – whether the existing parties will adequately represent the putative intervenor's interests – clearly favors intervention. "This burden has been described as minimal because it need only be shown 'that there is a potential for inadequate representation.'" [United States v. Michigan, 424 F.3d 438, 443 \(6th Cir. 2005\)](#).

Certainly the Government, which filed an *amicus* brief in state court, which did not notice the putative interveners of the filing of this action, and which actively opposes the Amended Motion to Intervene will not protect their interest. Nor is it likely that their interest will be protected by Rutherford County since its position all along has been that it complied with the Tennessee Open Meetings Act and the Zoning Resolution, and since it takes no position as to whether intervention should be allowed.

Alternatively, intervention is warranted under [Rule 24\(b\)](#), which allows for permissive intervention. So far as relevant, that Rule provides that, "[o]n timely [\*16] motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." [Fed.R.Civ.P. 24\(b\)\(1\)\(B\)](#).

Whether to allow permissive intervention rests in the sound discretion of the Court. [Blount-Hill, 636 F.3d at 287](#).<sup>2</sup> In this case, and as already explained, there exists a common question of law or fact, specifically, the interplay between the Chancery Court's Orders and the Government's claim that Rutherford County's following of those Orders led to a RLUIPA violation.

Having concluded that intervention is appropriate, it does not necessarily follow that the interveners can present any and all issues they desire. "Federal courts have the authority to apply appropriate [\*17] conditions or restrictions on an intervention as of right," and this may include "conditions or restrictions responsive . . . to

the requirements of efficient conduct of proceedings." [Friends of Tims Ford v. Tennessee Valley Authority, 585 F.3d 955, 963 \(6th Cir. 2009\)](#) (citation omitted). Likewise, "[t]he district court's discretion . . . under [Rule 24\(b\)](#), to grant or deny an application for permissive intervention includes discretion to limit intervention to particular issues." [Dep't of Fair Employment and Housing v. Lucent Techs., Inc. 642 F.3d 728, 741 \(9th Cir. 2011\)](#) (citation omitted); see, [Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co., 974 F.2d 450, 469 \(4th Cir. 1992\)](#) ("[w]hen granting an application for permissive intervention, a federal district court is able to impose almost any condition"). Thus, "[i]f the applicant is granted intervention because of an interest that may be injured by the litigation, it does not follow that the intervention must extend to matters not affecting that interest." [San Juan County, 503 F.3d at 1189](#).

In this case, and after due consideration of the arguments raised in the briefs and at oral argument, the Court finds that the putative interveners [\*18] will be allowed to present their position on (1) whether the Chancery Court Orders constitute a land use regulation for purposes of RLUIPA; and, if so, (2) whether Rutherford County's following of the Orders place a substantial burden on the Islamic Center of Murfreesboro within the meaning of the RLUIPA.

The proposed intervenor's Complaint is directed at an additional forty-five putative Defendants. However, those parties are unnecessary to resolve the question of the continued efficacy of the Chancery Court's Orders in light of the Government's filing the Complaint in this action. This is a determination that can be made based upon the arguments raised by the parties presently in the suit, as well as by the putative interveners. For this reason, while the Court will allow the filing of the interveners' Complaint, service will not issue on that Complaint, nor will the named Defendants be required to answer or otherwise plead unless otherwise directed by the Court. Further, because of the limitations placed on the issues to be addressed by the putative interveners, the Court will not entertain evidence and/or arguments on tangential and non-germane contentions, including, but not limited to, [\*19] purported concerns about terrorism, and concerns about the alleged affiliations of some of the mosque's members.

### III. CONCLUSION

On the basis of the foregoing, the Amended Motion to Intervene (Docket No. 23) will be granted and the

<sup>2</sup> The Court recognizes that, "[i]n exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights, [Fed. R. Civ. P. 24\(b\)\(3\)](#), and the Government's concern that the addition of dozens of new parties will prove burdensome. As explained immediately below, however, this concern is lessened, if not eliminated, by the Court's limitation on the scope of intervention.



putative interveners will be permitted to intervene in this action, subject to the limitations set forth above.

An appropriate Order will be entered.

/s/ Kevin H. Sharp

KEVIN H. SHARP

UNITED STATES DISTRICT JUDGE

### **ORDER**

For the reasons explained in the accompanying Memorandum, the Amended Motion to Intervene (Docket No. 23) filed by Henry Golcynski, Lisa Moore, Kevin Fisher, John Lilley, Marlena Gregory, Caleb Gregory, Brian Gregory, Jim Holt, June Lilley Holt, Jim McCormack III, Annmarie Shannon, Shane Davis, and Ronald Todd is hereby GRANTED, and those individuals are permitted to intervene to present their position as to (1) whether the Chancery Court Orders constitute a land use regulation for purposes of the Religious Land Use and Institutionalized Act; and, if so, (2) whether Rutherford County's following of the Orders place a substantial burden on the Islamic Center of Murfreesboro within the meaning of the Act.

The Clerk is directed to file the Interveners' [\*20] Cross-Complaint (Docket No. 23-5) under a separate docket number. Service of process shall not issue on that Complaint, and the Cross-Defendants identified in that Complaint need not Answer or otherwise respond unless directed to do so by further Order of the Court.

It is SO ORDERED.

/s/ Kevin H. Sharp

KEVIN H. SHARP

UNITED STATES DISTRICT JUDGE

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# **EXHIBIT H**

***Benalcazar v. Genoa Twp.***

**Proposed Intervenor Protect the Peninsula, Inc. (PTP)**

**Brief in Support of Motion to Intervene**



Neutral

As of: February 13, 2021 1:24 PM Z

## **Benalcazar v. Genoa Twp.**

United States District Court for the Southern District of Ohio, Eastern Division

April 13, 2020, Decided; April 13, 2020, Filed

Case No. 2:18-cv-01805

### **Reporter**

2020 U.S. Dist. LEXIS 63756 \*

BENTON BENALCAZAR, et al., Plaintiffs, v. GENOA TOWNSHIP, OHIO, Defendant.

**Judges:** ALGENON L. MARBLEY, CHIEF UNITED STATES DISTRICT JUDGE. Magistrate Judge Deavers.

**Subsequent History:** Dismissed by, in part, Motion denied by, in part, Motion granted by, Motion denied by, As moot [Benalcazar v. Genoa Twp., 2020 U.S. Dist. LEXIS 152718 \(S.D. Ohio, Aug. 24, 2020\)](#)

**Opinion by:** ALGENON L. MARBLEY

## **Core Terms**

Movants, parties, intervene, Zoning, legal interest, settlement, motion to intervene, consent decree, referendum, re-zoning, timeliness, Residential, intervenor, zoning map, weigh, matter of right, own property, rights, amend, unusual circumstances, negotiations, neighboring, residents, notice

**Counsel:** [\*1] For Benton Benalcazar, Katherine Benalcazar, Plaintiffs: Joseph R Miller, LEAD ATTORNEY, Vorys Sater Seymour & Pease - 2, Columbus, OH; Christopher Logan Ingram, Columbus, OH; Elizabeth S. Alexander, Vorys, Sater, Seymour and Pease LLP, Columbus, OH.

For Genoa Township, Ohio, Defendant: David Alan Riepenhoff, LEAD ATTORNEY, Fishel Hass Kim Albrecht Downey LLP, New Albany, OH; Stephanie Leigh Schoolcraft, Fishel Downey Albrecht Riepenhoff LLP, New Albany, OH.

For GTRRD, INC., Luke Schroeder, Janine Schroeder, Movants: Peggy S. Guzzo, LEAD ATTORNEY, Guzzo Law Office, LLC, Dublin, OH.

## **Opinion**

### **OPINION & ORDER**

#### **I. INTRODUCTION**

This matter is before the Court on Movants GTRRD, Inc. and Luke and Janine Schroeder's Motions to Intervene. Docs. 22 & 24. All three Movants assert an identical legal interest for intervening in this action and will thus be treated as a single intervenor for purposes of this Opinion and Order. For the reasons set forth below, the Court **GRANTS** Movants' Motions [#22, #24].

#### **II. BACKGROUND**

##### **A. Underlying Lawsuit**

Plaintiffs Benton and Katherine Benalcazar own property located in Genoa Township, [\*2] Ohio. On April 9, 2018, the Genoa Township Board of Trustees approved Plaintiffs' application to re-zone their property

from a Rural Residential property to a Planned Residential Development. Doc. 1 at 12. The Board also approved Plaintiffs' preliminary development plan. *Id.* After the Trustees approved Plaintiffs' application, members of the public circulated a petition, seeking a referendum to restore Plaintiffs' property to its original zoning designation. *Id.* at 14. That referendum made its way onto the November 2018 ballot and passed by a majority vote. *Id.* at 14-15. Consequently, Plaintiffs' property was returned to its Rural Residential designation. *Id.*

Following the November 2018 vote, Plaintiffs filed this action against Defendant Genoa Township, Ohio, asserting two causes of action: (1) Deprivation of Property and Liberty Interests Without Due Process of Law, in violation of [42 U.S.C. § 1983](#); and (2) Unequal Protection of the Law, in violation of [42 U.S.C. § 1983](#). *Id.* at 15-17. Plaintiffs also sought a Declaratory Judgment that subjecting their property to a Rural Residential zoning designation was unconstitutional. *Id.* at 17-18. On June 7, 2019, the parties participated in a lengthy mediation, with settlement discussions continuing for several months [\*3] thereafter. Doc. 38 at 2. Finally, on January 17, 2020, the parties filed a Proposed Consent Decree pursuant to [Ohio Revised Code § 505.07](#),<sup>1</sup> which, pending Court approval, would re-zone Plaintiffs' property to a Planned Residential Development. Doc. 38-7.

## B. Motion to Intervene

Movant GTRRD, Inc. is an association of residents in Genoa Township, Ohio that neighbor Plaintiffs' property. Movants Luke and Janine Schroeder are members of GTRRD, Inc. and own property that abuts Plaintiffs' property.<sup>2</sup> In 2003, Genoa Township adopted a Zoning Resolution, whereby any owner desiring to have their

property designated as a Planned Residential District was required to apply for a zoning map amendment per [Ohio Revised Code § 519.12](#). Doc. 22 at 4. Any application for amendment was then subject to the right of neighboring residents to file a referendum, reserving for themselves the final decision to vote on the rezoning application, such as what happened during the November 2018 election. *Id.* Movants seek to intervene in this action, claiming the parties' Proposed Consent Decree violates the Genoa Township Zoning Resolution, as it arbitrarily overturns their vote and takes away their right [\*4] to decide whether to amend the zoning map. Doc. 22 at 5.

## III. ANALYSIS

### A. Whether Movants may Intervene as a Matter of Right

Movants seek to intervene in this action as a matter of right under [Federal Rule of Civil Procedure 24\(a\)](#). Movants maintain that they have a legal interest in ensuring that the development of property in Genoa Township is consistent with the Township's Zoning Resolution. Movants also assert an interest in preserving their right under the Resolution to decide -- via vote -- whether to amend the Township's zoning map.

[Federal Rule of Civil Procedure 24\(a\)\(2\)](#) provides that, on timely motion, the Court must permit anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." [Fed. R. Civ. P. 24\(a\)\(2\)](#). More plainly, the Sixth Circuit has identified four factors a movant must satisfy before intervention as of right will be granted:

- (1) timeliness of the application to intervene; (2) the applicant's substantial legal interest in the case; (3) impairment of the applicant's ability to protect that interest in the absence of [\*5] intervention; and (4) inadequate representation of that interest by parties already before the court.

[Michigan State AFL-CIO v. Miller](#), 103 F.3d 1240, 1245 (6th Cir. 1997). A "failure to meet one of the criteria will require that the motion to intervene be denied." [Grubbs](#)

<sup>1</sup> [O.R.C. § 505.07](#) **Settlement of Court Action — Zoning Issue Subject to Referendum**. "Notwithstanding any contrary provision in another section of the Revised Code, [section 519.12](#) of the Revised Code, or any vote of the electors on a petition for zoning referendum, a township may settle any court action by a consent decree or court-approved settlement agreement which may include an agreement to rezone any property involved in the action as provided in the decree or court-approved settlement without following the procedures in [section 519.12](#)["]

<sup>2</sup> Hereinafter, except where specified, all three Movants will be referred to collectively as the "Movants."



[\*v. Norris\*, 870 F.2d 343, 345 \(6th Cir. 1989\)](#).

## 1. Whether Movants' Motion is Timely

The determination of whether a motion to intervene is timely must "be evaluated in the context of all relevant circumstances." [\*Jansen v. City of Cincinnati\*, 904 F.2d 336, 340 \(6th Cir. 1990\)](#). Five factors guide the Court's analysis:

- (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

*Id.* The Court will analyze each of these five factors, in turn, below.

### i. Stage of the Proceeding

The first timeliness factor requires the Court to look at the point to which the lawsuit has progressed. Importantly, "the time between the filing of the complaint and the motion to intervene, [\*6] in itself, is among the least important circumstances. What is more critical is the progress made in discovery and the motion practice during the course of the litigation." [\*Midwest Realty Mgmt. Co. v. City of Beavercreek\*, 93 F. App'x 782, 786 \(6th Cir. 2004\)](#) (internal citation omitted).

Here, although roughly a year has elapsed between the filing of the underlying Complaint and the Motions to Intervene, the parties have engaged in very limited motion practice during this time. In fact, the only Motion filed was a Joint Motion for Protective Order. See Doc. 11. Moreover, while the parties assert that they have engaged in extensive written discovery -- exchanging over 25,000 documents -- this case was stayed nearly three months before the discovery deadline passed, so the parties could finalize settlement discussions. See Doc. 16. It thus appears that the energy devoted towards discovery was minimal. Accordingly, this first factor will weigh in favor of timeliness. See [\*Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.\*, 72 F.3d 361, 370, 33 V.I. 311 \(3d Cir. 1995\)](#) (finding intervention four years after complaint was filed timely

where "there were no depositions taken, dispositive motions filed, or decrees entered during the four year period in question").

### ii. Purpose of Intervention

The second timeliness factor is the purpose for which intervention is sought. Here, [\*7] Movants seek to intervene in this case to file a motion to dismiss Plaintiffs' Complaint, arguing no actual controversy exists, such that it would permit the parties to use [\*Ohio Revised Code § 505.07\*](#) to circumvent Movants' right to decide whether to amend the Genoa Township zoning map. While [\*O.R.C. § 505.07\*](#) gives the parties a statutory right to resolve -- via consent decree -- court actions involving zoning disputes, this does not strip Movants of the ability to challenge whether an actual case or controversy exists between the parties. As such, the Court finds the proffered reason for seeking intervention legitimate and, therefore, this second factor weighs in favor of timeliness.

### iii. Time Preceding Application to Intervene

The third factor concerns "the length of time preceding the [Movants'] motion to intervene, during which they knew, or should have known, of their interest in the case." [\*Stupak-Thrall v. Glickman\*, 226 F.3d 467, 477 \(6th Cir. 2000\)](#). The Sixth Circuit has instructed that "[t]he mere pendency of settlement negotiations" is not sufficient to put prospective intervenors on notice that their interests might be impaired. [\*Midwest Realty Mgmt. Co.\*, 93 F. App'x at 788](#). Rather, "[o]nly notice of objectionable terms in a proposed settlement will ordinarily suffice." *Id.*

Here, Movants filed their Motions to intervene [\*8] on December 12, 2019 and December 27, 2019 respectively. See Doc. 22 & 24. Undoubtedly, they were aware prior to December 2019 that this litigation could affect their legal interests. Indeed, according to Defendant, its counsel received a call on March 12, 2019 from Jim Carter -- an incorporator of Movant GTRRD, Inc. -- requesting a meeting to discuss the case and to encourage Defendant not to settle with Plaintiffs. See Doc. 27 at 6. Nevertheless, the record suggests that Movants did not have actual notice of the terms of the settlement agreement until November 23, 2019, the date on which the parties' Proposed Consent Decree was first published to the public. See Doc. 26 at 5. Given that Movants acted within weeks of receiving this notice, the Court finds that the Motions to Intervene were filed without undue delay. See [\*Midwest Realty Mgmt. Co.\*, 93 F. App'x at 788](#) ("[E]ven if publication of

the proposed terms of settlement at the meeting was deemed to put the proposed intervenors on notice of the need to intervene, the passing of four months before they filed their motion, during which apparently no progress was made in the litigation, does not constitute the sort of undue delay or reflect the sort of unexcused dilatoriness [\*9] that would disqualify them from intervention[.]"). As such, this third factor weighs in favor of timeliness.

#### iv. Prejudice to Original Parties

The fourth timeliness factor looks to the prejudice caused by Movants' failure promptly to intervene after they knew or reasonably should have known of their interest in the case. The appropriate focus is "the prejudice caused by the *untimeliness*, not the intervention itself." [\*United States v. City of Detroit\*, 712 F.3d 925, 933 \(6th Cir. 2013\)](#).

Here, the Court finds that the parties would not be prejudiced by Movants intervening at this stage of the proceedings. Though the parties have reached a settlement, the Court has yet to approve of the Proposed Consent Decree or enter Judgment. Moreover, Movants do not seek to rewrite the provisions of the Consent Decree, which would necessarily require the parties to restart their settlement negotiations. Instead, Movants seek to dispose of all claims in Plaintiffs' Complaint by way of a motion to dismiss. Because permitting Movants to intervene in this action for a limited purpose would not overtly prejudice the parties, this factor will weigh in favor of timeliness. Cf. [\*United States v. BASF-Inmont Corp.\*, 1995 U.S. App. LEXIS 9158, 1995 WL 234648, at \\*4 \(6th Cir. Apr. 18, 1995\)](#) ("Where intervention would require renewal of negotiations and a delay [\*10] in implementing CERCLA remediation, the intervention would prejudice the parties' interests.").

#### v. Unusual Circumstances

The final factor concerns whether there are any unusual circumstances that weigh in favor of or against granting a motion to intervene. Plaintiffs argue that two unusual circumstances militate against intervention: (1) Movant GTRRD, Inc. is an entity created specifically for the purpose of intervention; and (2) members of the public already had the opportunity to voice their concerns about the Proposed Consent Decree during a public hearing held on December 16, 2019.

With respect to the first argument raised, Plaintiffs provide no case law to support the notion that an entity

should be precluded from intervening in an action merely because it was created for that specific purpose. Similarly, Plaintiffs' second argument carries little weight. Even if Movants had the opportunity to voice their concerns about the Proposed Consent Decree at the December 2019 public hearing, this was not a forum in which Movants could seek to dismiss Plaintiffs' lawsuit in its entirety. Accordingly, there are no unusual circumstances that factor into the Court's decision.

In short, four of [\*11] the five factors discussed above weigh in favor of a finding of timeliness. On balance, the Court finds that Movants' Motions to Intervene were timely filed.

## 2. Whether Movants have a Substantial Legal Interest in this Case

To intervene as a matter of right, Movants must show that they have a substantial legal interest in the subject matter of this litigation. In the Sixth Circuit, "we subscribe to a rather expansive notion of the interest sufficient to invoke intervention of right." [\*Grutter v. Bollinger\*, 188 F.3d 394, 398 \(6th Cir. 1999\)](#) (internal quotations and citation omitted). It follows that "[t]he inquiry into the substantiality of the claimed interest is necessarily fact-specific." *Id.*

Here, Movants assert that they have a substantial legal interest in ensuring that the development of property in Genoa Township is consistent with both the Township's Zoning Resolution and Ohio law, and that their right to decide whether to amend the Township's zoning map is preserved. The Sixth Circuit has already recognized such as a legitimate legal interest. See [\*Midwest Realty Mgmt. Co.\*, 93 F. App'x at 788](#) ("Where the City's first rezoning of this property to allow residential development was overturned by referendum, the City's second attempt to accomplish the same re-zoning, arguably in [\*12] derogation of both local and state law, through settlement of litigation under the imprimatur of federal court order, certainly poses conflicts of legitimate interests that bear further scrutiny.").<sup>3</sup>

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<sup>3</sup> The parties note that [\*Midwest Realty Management Company\*](#) was decided prior to the passage of [\*O.R.C. § 505.07\*](#), which expressly permits litigants to resolve -- via consent decree -- court actions involving zoning disputes. As such, they argue that *Midwest Realty Management Company* is distinguishable from this case because the Proposed Consent Decree here does not violate state or local law. Movants' position, however, is that no actual case or controversy exists between Plaintiffs

Notwithstanding the above, the parties raise several arguments for why they believe Movants have no cognizable legal interest in this case. First, the parties argue that there is no evidence establishing that Movant GTRRD, Inc. is what it purports to be: an organization of residents of Genoa Township, Ohio. For example, the parties assert that Movant GTRRD, Inc. has not identified any of its members. As such, the parties maintain that Movant GTRRD, Inc. is nothing more than a public interest group representing the "generic interest" of Township residents in the enforcement of the Township's Zoning Resolution.

Contrary to the parties' position, Movant GTRRD, Inc. has put forth evidence establishing itself as an organization of residents of Genoa Township, Ohio. James Carter -- one of GTRRD, Inc.'s incorporators -- submitted an affidavit identifying each of the founding and managing members of [\*13] the organization. See Doc. 35-1 at 2. Amongst these members are five individuals who own property abutting Plaintiffs' property and one individual who owns property within five-hundred feet of Plaintiffs' property. See *id.* Further, Mr. Carter's affidavit attests that Movant GTRRD, Inc. was formed specifically to protect the rights of Plaintiffs' neighbors who voted against the rezoning of Plaintiffs' property, but who had that vote nullified by the Proposed Consent Decree. See *id.* The parties' first argument is, therefore, without merit.

Second, the parties argue that Movants' interest in the negotiated settlement is too generalized to support a claim for intervention as a matter of right. Citing to the Sixth Circuit's opinion in [\*Providence Baptist Church v. Hillandale Committee, Ltd.\*, 425 F.3d 309, 317 \(6th Cir. 2005\)](#), the parties contend that Movants' "advocacy in getting the zoning ordinance on the November . . . ballot does not suffice to make it a real party in interest in the transaction which is the subject of the proceeding" -- the Proposed Consent Decree between Plaintiffs and Defendant. The parties' reliance on *Providence Baptist Church*, however, is misplaced.

Unlike in *Providence Baptist Church*, Movants are not merely a committee that was created to circulate zoning [\*14] referendum petitions for the November 2018 election. See *id.* at 317 ("We will assume for this issue that Hillandale Committee is what it claims to be: the duly authorized committee which circulated the

referendum petitions.") (internal quotations omitted). Rather, as discussed above, Movants were formed specifically to protect the rights of Plaintiffs' neighbors who voted against the rezoning of Plaintiffs' property, but who had that vote nullified by the Proposed Consent Decree. Hence, Movants' interest in this case did not become moot when their referendum found its way onto the November 2018 ballot. See *id.* ("The referendum petition took no position on the merits of the referendum; rather, it simply asked that the ordinance rezoning Providence's land be submitted to the electors for their approval or rejection. As such, Hillandale Committee had no interest in the outcome of the election or in any negotiations between Euclid and Providence after the election was held."). For this reason, *Providence Baptist Church* is distinguishable, and the parties' second argument falls flat.

Finally, the parties argue that Movants -- as neighboring property owners -- do not have a substantial legal interest [\*15] in the enforcement of zoning laws. But the cases that the parties cite in support stand only for the proposition that a proposed intervenor must present more than an economic interest involving their own property or a general interest in the enforcement of zoning laws to establish a substantial legal interest. See, e.g., [\*Nextel W. Corp. v. Twp. of Scio\*, 2007 U.S. Dist. LEXIS 58863, 2007 WL 2331871, at \\*2 \(E.D. Mich. Aug. 13, 2007\)](#) ("Applicants allege they are local property owners who have a legally protectable interest in this litigation because the construction of the tower will lower their property values, destroy wooded areas, and adversely affect the environment in the surrounding area. These allegations are economic interests involving their own properties in the Township and do not rise to a legally protectable interest to justify intervention."); [\*North Shore-Chicago Rehab. Inc. v. Vill. of Skokie\*, 1993 U.S. Dist. LEXIS 12626, 1993 WL 356928, at \\*3 \(N.D. Ill. Sept. 13, 1993\)](#) ("Certainly, the residents' general interest in the enforcement of the [zoning] laws is insufficient for intervention as of right."). Here, however, Movants are seeking to intervene to preserve their right under Genoa Township's Zoning Resolution to decide whether to amend Genoa Township's zoning map. The Sixth Circuit recognized this as a substantial legal interest in *Midwest Realty Management Company*, and this Court will follow suit. See [\*16] [\*93 F. App'x at 788\*](#) ("Where the City's first re-zoning of this property to allow residential development was overturned by referendum, the City's second attempt to accomplish the same rezoning, arguably in derogation of both local and state law, through settlement of litigation under the imprimatur of federal court order, certainly poses conflicts of

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and Defendant and, therefore, [\*§ 505.07\*](#) cannot be invoked. Stated differently, Movants argue that the Proposed Consent Decree violates state and local law. For this reason, the Court finds *Midwest Realty Management Company* instructive.

legitimate interests that bear further scrutiny.").

### 3. Whether Movants can Protect their Substantial Legal Interest Absent Intervention

To satisfy the third element of the intervention test, "a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied." Grutter, 188 F.3d at 399. This burden is minimal. *Id.*

The Court has already found that Movants have a substantial legal interest in preserving their right under Genoa Township's Zoning Resolution to decide whether to amend Genoa Township's zoning map. To that end, Movants seek to file a motion to dismiss the claims in Plaintiffs' Complaint, arguing no actual controversy exists, such that it would permit the parties to use Ohio Revised Code § 505.07 to circumvent Movants' rights under the Zoning Resolution. Because intervening in this action is the only avenue for Movants to file a motion to dismiss, [\*17] this third factor weighs in favor of intervention.

### 4. Whether the Existing Parties Adequately Represent Movants' Legal Interest

Finally, Movants must show that the existing Defendant -- Genoa Township, Ohio -- may not adequately represent their interests. Importantly, Movants are "not required to show that the representation will in fact be inadequate." *Id. at 400*. Rather, "[i]t may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Id.*

Here, the parties maintain that Defendant adequately represents Movants' interests because the arguments raised in Movants' proposed motion to dismiss are the same defenses raised in Defendant's answer. See Doc. 8 at 13 ("**Second Defense:** Plaintiffs' Complaint fails to state a claim upon which relief may be granted."). But even accepting this as true, Defendant did not follow through by filing a motion to dismiss Plaintiffs' Complaint. Instead, Defendant entered into a settlement with Plaintiffs. Movants have thus shown that Defendant will not advance all of their arguments and, therefore, will not adequately represent their interests in this action. Accordingly, the Court [\*18] will permit Movants to intervene in this action as a matter of right.

### B. Whether Permissive Intervention is Appropriate

Even if intervention as a matter of right were not appropriate in this case, the Court would permit Movants to intervene permissively pursuant to Federal Rule of Civil Procedure 24(b). See Fed. R. Civ. P. 24(b)(1)(B) ("On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact."). "Rule 24(b) grants the district court discretionary power to permit intervention if the motion is timely, and if the applicant's claim or defense and the main action have a common question of law or fact in common." Purnell v. City of Akron, 925 F.2d 941, 950 (6th Cir. 1991). The Court must also "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id. at 951*.

Here, the Court has already found that Movants' motion was timely filed and that intervention would not unduly prejudice the rights of the original parties. Given that Movants' claim/defense surrounds protecting their rights under the Township's Zoning Resolution, and because the Resolution is directly at issue in this action, the Court would have permitted Movants to intervene pursuant Rule 24(b).

## IV. CONCLUSION

For the [\*19] reasons stated herein, the Court **GRANTS** Movants GTRRD, Inc. and Luke and Janine Schroeder's Motions to Intervene [#22, #24]. Movants will be permitted to intervene in this action for the limited purpose of challenging the sufficiency of Plaintiffs' Complaint.

### IT IS SO ORDERED.

/s/ Algenon L. Marbley

**ALGENON L. MARBLEY**

**CHIEF UNITED STATES DISTRICT JUDGE**

**DATED: April 13, 2020**

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