

March 17, 2023

Sent Via Email to:

Joseph Infante	infante@millercanfield.com
Christopher Gartman	Gartman@millercanfield.com
Barry Kaltenbach	Kaltenbach@millercanfield.com
Stephen Ragatzki	Ragatzki@millercanfield.com
William Fahey	wfahey@fsbriaw.com
Christopher Patterson	cpatterson@fsbriaw.com
John Brennan	jbrennan@fsbriaw.com
Steven Baker	sbaker@fsbriaw.com
Tom McGraw	tmcgraw@mcgrawmorris.com
Beau Rajsic	brajsic@mcgrawmorris.com

Re: Request for Discussion Regarding Various Issues – *Wineries of Old Mission Peninsula et al v. Peninsula Township*, Case No.: 1:20-cv-1008

Gentlemen,

This letter seeks to initiate discussion with counsel regarding issues that Intervening Defendant Protect the Peninsula (PTP) seeks to address with you prior to the joint conference discussion that Judge Maloney ordered the parties to convene before April 14, 2023. (ECF 320) We believe it would be efficient to discuss these before discussing discovery, experts, schedules, and other joint report issues as their resolution may have a material impact on our conference.

1. Parties Required to be Joined. PTP believes there are people and entities whose absence from this lawsuit renders the court unable to provide complete relief, and/or leaves PTP and others at risk of incurring multiple and/or inconsistent obligations. In particular, some landowners and/or Special Use Permit (SUP) applicants are absent, and this case may impact their property and/or SUPs. The following is a list of absent landowners and SUP holders:

Named Plaintiff	Landowner	Special Use Permit
Bowers Harbor Vineyard & Winery, Inc.	Langley Vineyards, LLC Schoenherr Vineyards, LLC	Linda Stegenga, for Langley Vineyards, LLC Joan Schoenherr, Trustee Langley Vineyards, LLC Entity DBA Bowers Harbor Vineyard
Brys Winery, LC	Brys Realty, LLC	Walter & Eileen Brys
Grape Harbor, Inc., operating a winery under the trade name "Peninsula Cellars"	Kroupa Enterprises, LLC	Grape Harbor, Inc.

OV the Farm, LLC, which operates a winery under the trade name “Bonobo”	Oosterhouse Vineyards, LLC	Carter Oosterhouse Todd Oosterhouse Bonobo Winery
Tabone Vineyards, LLC	Mario & Mary Ann Tabone	Tabone Orchards Tabone Vineyards
Two Lads, LLC	BOQ, LLC	(not applicable)
Winery at Black Star Farms, L.L.C	Robert N. Mampe Trust	(not applicable)
Villa Mari, LLC	(same)	Mari Vineyards, LLC

Landowners are necessary parties to assert proper claims and afford complete relief under Plaintiffs’ regulatory takings claim. Also, if tenant Plaintiffs prevail on claims and are granted relief, non-party landowners and/or SUP holders may bring subsequent claims, resulting in the potential for additional litigation. If PTP prevails, PTP and others may face successive litigation since absent landowners and/or SUP holders may claim not to be bound by the outcome of challenges to the zoning ordinance. Without landowners and SUP holders, the court cannot afford Plaintiffs full injunctive relief if successful in their claims regarding the lawfulness of zoning provisions because effectuating full relief would require SUP amendments. Injunctive relief may only bind parties, so non-party landowners and/or SUP holders may face inconsistent obligations and/or nuisance actions from PTP and others, particularly given the terms of conservation easements, land use restrictions, SUPs, and others that apply to the properties. Absent landowners and/or SUP holders, this litigation may not redress some Plaintiffs’ injuries.

I raise this to initiate discussion with Plaintiffs about consent or permission to amend the complaint to add necessary parties and/or to avoid unnecessary motions, including to dismiss Plaintiffs who lack injury or interest in some or all claims. Furthermore, if Plaintiffs believe that PTP misunderstands the identity of landowners or SUP-holders, please advise.

2. Abandoned Claims. Our review of discovery materials, depositions, motions for summary judgment, and orders preceding the Sixth Circuit mandate recognizing PTP as an Intervening Defendant indicate Plaintiffs have abandoned some pleaded claims. In particular, it appears Plaintiffs have abandoned the four Counts from the First Amended Complaint, as described below.

- *Count I: Facial Challenge to Free Exercise of Religion under the First and Fourteenth Amendments (42 USC § 1983)*: Plaintiffs have not specified ordinance provisions that violate Plaintiffs’ freedom of religion. Plaintiffs have not identified any Plaintiffs whose freedom of region has been violated. Nor have Plaintiffs provided any evidence through disclosures or discovery to support claims that any zoning provisions violate any Plaintiff’s right to freedom of religion. Plaintiffs failed to pursue this claim through motions. We understand Plaintiffs fail to assert damages resulting from this claim, a required element of any claim under 42 USC § 1983. (ECF 190, PageID.7400) For these reasons and more, it appears Plaintiffs have abandoned this claim.

- *Count II: As-Applied Challenge to Violation of Plaintiffs' Freedom of Speech under the First and Fourteenth Amendments (42 USC § 1983)*: Plaintiffs have indicated in this litigation that this case asserts facial, not as-applied, challenges to the constitutionality of the zoning ordinance. (E.g., ECF 28, PageID.1071; ECF 239, PageID.8698; ECF 274, PageID.100043) Moreover, exhaustion of administrative remedies is a prerequisite to assert as-applied challenges to zoning provisions, typically requiring a plaintiff to pursue a variance. It is indisputable that no Plaintiff here pursued a variance from application of the challenged zoning provisions. For these reasons and more, it appears Plaintiffs have abandoned all “as applied” challenges.
- *Count III: Violation of Freedom of Association under the First and Fourteenth Amendments (42 USC § 1983)*: PTP does not believe Plaintiffs have articulated in any public document in this litigation how any challenged zoning provision violates any Plaintiff’s protected right of association. Plaintiffs have not provided disclosures or discovery supporting this claim, nor have Plaintiffs pursued this claim through motions. Plaintiffs appear to abandon this claim in their Proposed Final Pre-trial Order. (ECF 190, PageID.7390). For these reasons and more, it appears Plaintiffs have abandoned their “freedom of association” claim.
- *Count VII: Regulatory Takings*: Plaintiffs have not pursued this claim through motions, nor supported the claim with disclosures nor discovery responses. In addition, among other failures, Plaintiffs failed to allege that zoning deprives them of the full use of their property, have not identified zoning provisions that constitute takings, have not joined necessary property owners as plaintiffs, and have not produced evidence that the zoning ordinance has destroyed any distinct investment-backed expectations nor left no reasonable uses of their property as a whole. Moreover, these claims are unripe as Plaintiffs have not exhausted available state remedies. It seems Plaintiffs do not assert any damages resulting from any purported takings. (ECF 190, PageID.7400) For these and other reasons, PTP believes Plaintiffs have abandoned this claim.

PTP would like to discuss Plaintiffs’ willingness to confirm their intent to abandon each of these claims. If Plaintiffs fail to do so, forcing PTP to incur unnecessary costs to bring motion(s) to dismiss these unsupported claims, then please be on notice that PTP will seek sanctions.

3. Non-Pleaded Claims. The summary judgment order addressed claims that Plaintiffs did not plead in the First Amended Complaint. Specifically, Judge Maloney granted summary judgment to Plaintiffs on their argument that “admissions” by some Defendant Peninsula Township deponents related to hosting weddings and receptions and related to closing time prevented the Township from enforcing such restrictions on any Plaintiff. (ECF 162, PageID.6019-6021) After PTP intervention, Judge Maloney vacated that part of the order. (ECF 301, PageID.10697) These “admissions” claims were never pleaded by Plaintiffs, and PTP will not litigate these claims by implied consent. PTP would like to discuss whether Plaintiffs intend to pursue these claims. If so, then Plaintiffs should seek consent or permission to amend their complaint to provide adequate notice of the legal and factual bases for such claims. Please be advised that PTP will seek sanctions if Plaintiffs raise these issues anew in motions or responses or otherwise pursue them absent proper amendment of the complaint.

4. Inadequately Pleaded Claims. PTP maintains that Plaintiffs’ First Amended Complaint does not adequately plead several claims by failing to identify specific zoning provisions that are supposedly infirm.

- *Preemption Claim:* Judge Maloney recognized that Plaintiffs’ operative complaint alleges that only three zoning provisions are conflict-preempted by state law, sections 8.7.3(10)(u)(5)(b), 8.7.3(10)(8)(5)(g), and 8.7.3(10)(u)(5)(i). (ECF 162, PageID.5985-5987) Plaintiffs previously attempted through motions to invalidate additional zoning provisions as allegedly preempted by state law. If Plaintiffs intend to argue that any zoning provision other than the three alleged in the operative complaint conflicts with state law, then Plaintiffs must make proper allegations in the complaint, identifying specifically both the zoning section and the state law with which they allegedly conflict.
- *Constitutional Claims:* Plaintiffs sought summary judgment on commercial speech grounds for the following provisions, none of which Plaintiffs specifically identified in Counts I and II of their operative complaint: §§ 6.7.2(19)(a), 6.7.2(19)(b)(1)(v), 6.7.2(19)(b)(6), 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), 8.7.3(10)(u)(5)(g), 8.7.3(10)(u)(5)(h), 8.7.3(12)(i), and 8.7.3(12)(k). (ECF 162, PageID.6008) If Plaintiffs intend to pursue arguments that any of these provisions unlawfully restrict commercial speech, they must properly allege as much in the complaint by specifically identifying each challenged provision, the speech or expressive conduct it allegedly unlawfully restricts, and how it caused Plaintiffs’ alleged injuries.

Similar to the “admissions” claims, PTP would like to discuss whether Plaintiffs intend to pursue these inadequately-pleaded claims, and if so, then an appropriate process to amend the complaint accordingly. Please be advised that PTP will seek sanctions if Plaintiffs pursue these claims in motions or trial absent proper amendment of the complaint to identify each particular zoning provision and the theories under which Plaintiffs seek to invalidate it.

5. Information about Plaintiffs' Injuries. PTP is entitled to information about the nature, cause, and timing of Plaintiffs' alleged injuries. PTP has been unable to ascertain from any public source (complaint, Plaintiffs' initial disclosures, discovery documents, depositions, motions) which Plaintiffs claim to be injured as a result of each challenged zoning provision under each count in their complaint, and when each injury is alleged to have occurred. I understand this information was likely compiled in appendices or schedules to Mr. Larson's report, and may have been discussed in his depositions, which are presently marked as Confidential or "Attorneys' Eyes Only." I believe those documents would illuminate the scope of Plaintiffs' claimed injuries, potentially injured parties, and the time of alleged injuries, leading to more efficient discovery and motion practice with respect to PTP defenses related to standing, statute of limitations, laches, and others. We would like to discuss whether Plaintiffs will voluntarily provide PTP the schedules and appendices, deposition transcript(s), any deposition exhibits, and any documents produced in discovery beyond WOMP008487 subject to the protective order in this case.

6. Standing. PTP has identified at least four Wineries that appear to lack standing. Based on the allegations in the complaint and the partial record PTP has received, these four wineries do not appear to have established any injury traceable to the challenged ordinance provisions or that a favorable decision of the court could redress:

- The wineries at *Black Star Farms* and *Bonobo* sit on land protected by conservation easements that prohibit them from engaging in the kind of commercial activity they accuse the Township of unlawfully prohibiting through the challenged provisions. Even if successful, these wineries would not be entitled to relief.
- *Chateau Grand Traverse*'s special use permit (SUP) does not include Guest Activity Uses, so 8.7.3(10)(u) has never applied to it. Any relief in this case would not apply to this winery.
- None of the challenged provisions apply to *Tabone* because it is neither a Farm Processing Facility nor a Winery-Chateau and is at best operating as a Food Processor under 8.5, which is not challenged in this litigation. As such, it will not be entitled to any relief in this litigation.

PTP would like to discuss whether these Plaintiffs will voluntarily dismiss their claims and withdraw from the litigation.

Thank you for your consideration, I look forward to discussing these issues with you forthwith.

Respectfully,



Tracy J. Andrews

Cc: Holly Hillyer, Protect the Peninsula (via email: holly@envlaw.com)