

**Case No. 22-1534**

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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

Plaintiffs - Appellees

v.

TOWNSHIP OF PENINSULA, MI, a Michigan Municipal Corporation

Defendant - Appellant

**Protect The Peninsula's Response in Support of Appellant Peninsula  
Township's Motion to Stay Injunction Pending Appeal**

## TABLE OF CONTENTS

<b>Introduction .....</b>	<b>1</b>
<b>Timeline of Key Filings and Orders .....</b>	<b>1</b>
<b>Argument .....</b>	<b>4</b>
1. The injunction lacks legal foundation. ....	5
2. The injunction is premature under Rule 65 before PTP is heard on it.	12
3. The injunction creates confusion and uncertainty contrary to Rule 65(d)(1). ....	13
4. The injunction fails the traditional test for granting injunctive relief.	17
<b>Conclusion.....</b>	<b>24</b>

## TABLE OF AUTHORITIES

### Cases

<i>Brae Burn, Inc. v. City of Bloomfield Hills</i> , 350 Mich. 425 (1957) .....	15
<i>In re DeLorean Motor Co.</i> , 755 F.2d 1223 (6th Cir. 1985).....	17
<i>Kyser v. Kasson Twp.</i> , 486 Mich 514 (2010).....	16
<i>Maryland v. King</i> , 567 U.S. 1301 (2012) .....	21
<i>Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog</i> , 945 F.2d 150 (6th Cir. 1991) .....	17
<i>Penning v. Owens</i> , 340 Mich 355 (1954) .....	24
<i>Raabe v. Walker</i> , 383 Mich. 165 (1970).....	16
<i>Roger Miller Music, Inc. v. Sony/ATV Publ’g, LLC</i> , 477 F.3d 383 (6th Cir. 2007) .....	7
<i>Sanguine, Ltd. v. United States Dept. of Interior</i> , 798 F.2d 389 (10th Cir. 1986) .....	12, 22
<i>Schmidt v. Lessard</i> , 414 U.S. 473 (1974) .....	14
<i>Schwartz v City of Flint</i> , 426 Mich. 295; 395 N.W.2d 678 (Mich. 1986)....	15
<i>Union Home Mortg. Corp. v. Cromer</i> , 31 F.4th 356 (6th Cir. 2022).....	14
<i>Union Home Mortg. Corp.</i> , 31 F.4 <sup>th</sup> 362 .....	16

### Other Authorities

Peninsula Township Zoning Ordinance §6.2.7(19).....	14
Peninsula Township Zoning Ordinance §8.7.3(12).....	14
Peninsula Township Zoning Ordinance § 8.7.3(10)(u)(5)(g).....	6, 14

### Rules

Fed. R. Civ. P. 60 .....	17
Fed. R. Civ. P. 65(a).....	13
Fed. R. Civ. P 65(d) .....	14
Fed. R. Civ. P 65(d)(1)(C) .....	14
Fed. R. Civ. P. 65(d)(1).....	14
Fed. R. Civ. P. 8 .....	17

**Statutes**

MCL § 125.3203 .....	24
----------------------	----

## **Introduction**

This Court should stay the District Court order enjoining swaths of the zoning ordinance and undermining decades of well-established, carefully-crafted zoning provisions. The District Court invalidated these provisions not because the Wineries presented a convincing case that they are invalid, but because it found the Township defaulted or conceded critical arguments to the contrary. These provisions might be imperfect, but they are not invalid. This Court recently recognized Protect the Peninsula (PTP) is an intervening defendant who is entitled to defend the validity of these provisions. To give meaning to that Opinion, and because the injunction is confusing, facially unlawful, and improper, this Court should immediately stay its effectiveness.

### **Timeline of Key Filings and Orders**

- The Wineries filed their complaint and a motion for preliminary injunction October 21, 2020, and their first amended complaint January 4, 2021. (R. 1, PageID#1-30; 2, Page ID#435-437; 29, PageID#1086-1129.)
- The District Court denied the Wineries' motion for preliminary injunction January 15, 2021, concluding the constitutional claims appeared baseless and reserving judgment on the preemption claim. (R. 34, PageID#1864-1877.)
- PTP moved to intervene February 16, 2021. (R. 41, PageID#1967-1983.)

- The Wineries moved for partial summary judgment on preemption April 14, 2021. (R. 53, PageID#2270-2271.)
- PTP sought leave to supplement its intervention motion with a proposed response to the Wineries' preemption summary judgment motion April 27, 2021. (R. 56, PageID#2553-2627.)
- The District Court denied PTP's motion to intervene October 21, 2021, (R. 108, PageID#4167-4175), and PTP timely appealed. (R. 121, PageID#4343.)
- In the winter/spring of 2021/2022, the Wineries and Township engaged in discovery, then filed and responded to summary judgment motions. Notably, the Wineries did not move for summary judgment nor relief on their injunction claim, which was reserved for trial. (R. 135, PageID#4710-4711; 136, Page ID#4712-4753; 142, Page ID#4961-5004; 143, PageID#5343-5382; 145, PageID#5627-5647; 146, Page ID#5709-5752; 147, Page ID#5833-5846.)
- The District Court heard the summary judgment motions April 22, 2022.
- The District Court issued an Order on the summary judgment motions invalidating nearly all challenged provisions under various theories and expressing its intent to enjoin them June 3, 2022. (R. 162, PageID#5981-6030.)
- Interpreting the June 3 Order as granting injunctive relief, the Township filed a Notice of Appeal of the injunction July 17, 2022, and a Motion for Stay of

Injunction Pending Appeal June 24, 2022. (R. 164, PageID#6032-6034; 169, PageID#6218-6242.)

- The Township filed in the District Court July 1, 2022, motions to alter or certify for appeal the June 3 Order, which that Court denied July 21, 2022. (R. 173, PageID#6555-657; 174, PageID#6558-6600; 211, PageID#7805-7817.)
- The District Court, acknowledging Fed. R. Civ. P. 58 requires an injunction separate from the June 3 Order, issued a Preliminary Injunction enjoining the Township “from enforcing any section of 6.2.7(19), 8.7.8(10), and 8.7.3(12) of the Court found to be unconstitutional or contrary to law” July 19, 2022, and denied the Township’s motion to stay the injunction. (R. 206, PageID#7795; 207, PageID#7796-7801.)
- This Court reversed the District Court’s denial of PTP’s motion to intervene July 27, 2022. (R. 214, PageID#8012-8030.)
- The Township filed a Motion for Stay of Injunction Pending Appeal in this Court August 3, 2022.
- On August 4, 2022, PTP sought leave to file a motion for relief from the District Court’s scheduling order, including stay of the trial scheduled to begin August 16, 2022. (R. 229, PageID#8430-8435.)
- On August 5, 2022, this Court requested responses to the Township’s Motion for Stay of Injunction Pending Appeal from the Wineries and PTP. (Doc. 38)

- At the final pretrial conference held August 5, 2022, the District Court adjourned the August 16 trial. (R. 236, PageID#8538.)

### **Argument**

PTP joins the Township's Motion for Stay of Injunction Pending Appeal. A stay would give PTP and its members deserved relief while this Court's mandate enters and District Court amends the case management order to effectuate intervention. The District Court's injunction has already harmed PTP, as this Court has acknowledged. (R. 215, PageID#8177-8193. ("By enjoining some of the zoning ordinances as either unconstitutional or preempted by state law, the district court has already limited the abilities of [PTP]'s members to protect their property interests through nuisance per se claims against the vineyards.")) The injunction also lacks legal foundation, is premature before PTP presents meritorious defenses to the District Court, creates immediate confusion by upsetting long-established zoning, and fails the traditional balancing test for injunctive relief.

PTP has not yet been heard on the merits of the Wineries' claims. Maintaining an injunction grounded in the adjudication of dispositive motions that were defended so far only by a party deemed inadequate to represent PTP's interests is contrary to PTP's right to intervene. Upon consideration of PTP's defenses, evidence, and arguments, any basis for injunction will evaporate.



### **1. The injunction lacks legal foundation.**

The District Court ordered this injunction without being asked and without considering the traditional factors for doing so. In their preemption summary judgment motion, the Wineries sought declaratory relief, costs, and attorneys' fees. (R. 54, PageID#2272-2303). In their constitutional summary judgment motion, they sought declaratory relief, damages, costs, and attorneys' fees. (R. 136, PageID#4712-4754.) Neither motion requested a ruling on their injunctive relief count in their First Amended Complaint. The District Court denied their only request for preliminary injunction January 15, 2021. (R. 34, PageID#1864-1877.)

Nonetheless, in its June 3 Order, the District Court noted the injunctive relief count in the Wineries' First Amended Complaint, found their arguments on the merits stronger than when it denied their early preliminary injunction motion, and said it would enjoin the Township from enforcing all provisions found "unconstitutional or contrary to law." (R. 162, PageID#6029.) It offered no further reasoning in its July 19 order reissuing the injunction. (R. 206, PageID#7795.)

Of particular importance to PTP and its members, the District Court enjoined key provisions without examining zoning ordinance language or citing law. In opening Peninsula Township's agricultural district to weddings, large events, and late hours that have never before been permitted, the District Court relied principally on Township responses to Wineries' assertions that it "conceded" those activities

were permitted. (R. 211, PageID#7811 (“Whether or not Director Deeren intended to testify that the Wineries are permitted to host weddings, the Court granted summary judgment to the Wineries on their claim regarding the restriction of the hosting of weddings because the Township failed to respond to this argument in the Wineries’ motion for summary judgment.”); PageID#7812 (“[T]he Township also failed to respond to the Wineries’ closing time argument. As such, the Court correctly found that the Township had conceded this issue.”))

The Wineries never pleaded that the Township actually permitted weddings, large events, and unlimited hours.<sup>1</sup> Rather, they claimed that a provision allowing Guest Activity Uses no later than 9:30 p.m. was preempted by state law allowing liquor license holders to serve alcohol until 2:00 a.m., and that prohibiting weddings and events restricted free speech in violation of the First Amendment. Those aspects of the zoning ordinance *survived* summary judgment on the Wineries’ stated claims. (R. 162, PageID#5990-91 (“The Court holds that the Township Ordinances do not conflict with Michigan law regarding hours of operation.” “[T]he Court holds that § 8.7.3(10)(u)(5)(g) is not preempted.”); PageID#6010 (“[P]laintiffs’ motion for summary judgment as to their content-based regulation of speech claim will be denied.”); PageID#6004 (“As for whether weddings and other similar activities

---

<sup>1</sup> In fact, as cited in the footnotes below, the Winery owner affidavits acknowledged weddings and events are prohibited and the Township imposes a 9:30 p.m. closing time.

constitute commercial speech, the Court agrees . . . that the prohibition of these types of events does not constitute a regulation of commercial speech under the First Amendment . . .”) Inexplicably, citing grossly mischaracterized deposition testimony, the District Court enjoined them anyway. (R. 162, PageID#6005, 6021.)

This is no legitimate basis to enjoin longstanding local regulation of land use that is neither unconstitutional nor preempted. The District Court essentially treated Township officials’ testimony as judicial admissions, which must be made by a party and can be used only to resolve questions of fact, not law. *See Roger Miller Music, Inc. v. Sony/ATV Publ’g, LLC*, 477 F.3d 383, 394–95 (6th Cir. 2007). Whatever Supervisor Robert Manigold<sup>2</sup> (one of seven board members who enact ordinances) and Ms. Dereen<sup>3</sup> (zoning administrator) said in deposition, the Wineries provided

---

<sup>2</sup> Mr. Manigold agreed with the Wineries’ attorney that the zoning ordinance requires Winery-Chateau Guest Activity Uses to end by 9:30 p.m., and when asked whether this also requires a winery to close all business by 9:30 p.m., Mr. Manigold testified, “I think that’s inferred.” (R. No.R. 136-1, PageID.4779.) When pressed, he confirmed that whatever the ordinance states, the township interprets a 9:30 closing time. This is not a novel interpretation. The Wineries provided an affidavit supporting the First Amended Complaint lamenting that the ordinance “force[s] my business to close at 9:30 p.m.” (R.R. 29-2, PageID.1298; 29-3, PageID.1302; R.R. 29-5, PageID.1310; 29-6, PageID.1314; 29-8, PageID.1322; No. 29-9, PageID.1326; 29-10, PageID.1331; 29-11, PageID.1335). They claimed this provision is preempted (it is not), but never pretended not to know it was the rule. It is unclear why this well-known, albeit not necessarily well-drafted, closing time should be enjoined by the District Court.

<sup>3</sup> Ms. Deeren’s testimony was really the testimony of the Wineries’ attorney. Ms. Deeren simply said “Yes” after being asked, “[B]ecause they are not guest activity

no legal basis for the District Court to perfunctorily invalidate duly-enacted longstanding otherwise legal prohibitions on weddings, large events, and unlimited hours. The District Court erred in relying on the Wineries' characterization of Township officials' testimony to invalidate then enjoin these reasonable, decades-old zoning provisions.

The restrictions on weddings, events, and late hours in the A-1 Agricultural District are critical to preserving Old Mission Peninsula's agricultural character and PTP's members' property rights. This Court recognized that Township residents rely on the zoning ordinance and that striking its provisions could result in increased commercial activity that diminishes their property values, ruins the quiet enjoyment of their property, and increases traffic to a degree that could impair their access to their properties and farming activities. (Case No. 21-1744, Opinion, p. 7.)

---

uses, winery-chateaus do not need your approval, as the director of zoning, to engage in entertainment, wedding receptions, family reunions, or sale of wine by the glass, correct?" That is true as far as it goes, but does compel the conclusion the Wineries misled the District Court into making. Weddings and events are not, and have never been, Guest Activity Uses subject to Zoning Administrator approval and *cannot be approved* because they are not allowed. (R.R. 136-6, PageID.4819) The Wineries know weddings and events are not allowed in the A-1 District and never have been – it is why they filed this lawsuit. R. 29-2, PageID.1297; R. 29-3, PageID.1301; R. 29-4, PageID.1306; R. 29-5, PageID.1309; R. 29-6, PageID.1313; R. 29-7, PageID.1317; R. 29-7, PageID.1317; R. 29-8, PageID.1321; R. 29-9, PageID.1325; R. 29-10, PageID.1330; R. 29-11, PageID.1334; R. 29-12, PageID.1338.

The following image shows why PTP members are so harmed by this sudden, unlimited grant of permission for expansion of the Wineries' commercial activity, and why the balance the Township has struck in its zoning ordinance is so delicate:



<sup>4</sup> R. 41-2, PageID#2076.

Old Mission Peninsula is just three miles across at its widest point. The Wineries' presence affects all residents, some more than others. Where John Jacobs lives, sound from both Chateau Chantal and Two Lads easily carries across a small bay to reach him. He testified by affidavit that increase in activity, especially outdoor events like weddings, would diminish the "peacefulness" and value of his property. (R. 41-4, Page ID#2094.) Michelle Zebell lives by Bowers Harbor Winery and averred that expanded winery hours and activity will further increase traffic to unsafe levels, and "undermine [her] expectation that activities at Bowers Harbor Winery will remain agricultural in nature, consistent with" Township zoning. (R. 41-6, Page ID#2103-2104.)

Whatever the testimony of two Township officials, the District Court lacked authority and a legal basis for upsetting the generally understood, longstanding, and important protections Township residents had against nuisance. If this Court stays no other aspect of the injunction, it should at least allow the Township to continue enforcing its restrictions against weddings, large events, and hours pending a full review of the merits of the Wineries' claims in light of PTP's defenses, evidence, and arguments.

**2. The injunction is premature under Rule 65 before PTP is heard on it.**

This Court held PTP has the right to intervene to defend its substantial interests in this case. PTP will expeditiously seek an opportunity to be heard on the merits of the Wineries' claims in accordance with an amended Case Management Order, but that will not happen until the District Court provides an amended Case Management Order, which will not happen until after this Court's mandate and a subsequent pretrial hearing.

(R. 229-1, PageID#8452; R. 236, PageID#8538.)

As an intervener, PTP must be heard on the issues it intervened to protect. *See Sanguine, Ltd. v. United States Dept. of Interior*, 798 F.2d 389 (10th Cir. 1986). In *Sanguine*, the Tenth Circuit had previously reversed a denial of intervention, and then upheld the district court's subsequent decision to vacate orders entered before intervention so the intervener could be heard. *Id.* at 390-91. The Tenth Circuit summed the situation:

We held in *Sanguine I* intervention should have been granted as a matter of right. The only issue now is what effect that intervention has on the pendency of the case. To state the question in a different form: **if the district court did not vacate its prior orders, of what value is the right of intervention we held exists in this case?** Left unaffected, the prior orders resolved the validity and enforceability of the rule. Yet, these precise issues, we stated in *Sanguine I*, were of sufficient interest to warrant intervention.

*Id.* at 391 (emphasis added).



Here, PTP is a party and will have the opportunity to vindicate the zoning ordinance. Until PTP is heard on the merits of the Wineries' claims, and then on the propriety of injunctive relief, it is premature to maintain this injunction. *See* Fed. R. Civ. P. 65(a) (preliminary injunction requires notice to adverse parties and hearing), (d)(2) (injunction binds parties).

**3. The injunction creates confusion and uncertainty contrary to Rule 65(d)(1).**

The injunction does exactly what the District Court predicted in its January 2021 denial of the Wineries' motion for a preliminary injunction – it “simply eliminate[s] the Ordinances [the Wineries] view as offensive” and “completely upset[s] the regulatory system that presently exists in Peninsula Township.” (R. No. 34, Page ID#1867.) The injunction hacks away important pieces of a complex, interconnected whole, leaving behind a confusing mess. It now requires a law degree to try to understand what can and cannot be done at wineries in Peninsula Township – an ironic result considering the Wineries' vagueness argument that a person of ordinary intelligence could not understand the pre-injunction ordinance. For example, the injunction invalidated provisions explicitly prohibiting large wedding events, but these are not otherwise allowable uses in District A-1. Does the absence of this prohibition mean such events are now allowable in A-1? Does the injunction mean the Township may not prevent weddings, even though they are not otherwise

allowed in the A-1 District? Some Wineries apparently interpret the injunction to mean they can immediately start booking weddings.<sup>5</sup>

It is precisely to avoid such confusion that Fed. R. Civ. P. 65(d)(1) mandates specificity and detail in every injunction. *See Union Home Mortg. Corp. v. Cromer*, 31 F.4th 356, 362 (6th Cir. 2022) (“[T]he specificity provisions of Rule 65(d) are no mere technical requirements.”) (quoting *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam)). The contents requirements for injunctions prevent confusion. *Id.* (citations omitted). On its face, the injunction violates Rule 65(d)(1)(C) because it requires the reader to consult two different documents. The Order says the Township is “ENJOINED from enforcing any subsection of 6.2.7(19), 8.7.3(10), and 8.7.3(12) of the Township Winery Ordinances that the Court found to be unconstitutional or contrary to law.” (R. No.206, PageID#7795). This requires the reader to consult *both* the zoning ordinance *and* the unidentified 50-page order invalidating some of its provisions. (R.162, Page ID#5981-6030.) This injunction is the opposite of clear.

PTP members, especially winery neighbors, who have long relied on the zoning ordinance to protect their property interests are now left without a clear legal

---

<sup>5</sup> Ex B, Wedding Ceremonies, Wine Wagon Tours and Cider at Brys Estate! June 21, 2022, email from Brys Estates. (“A recent change in local regulations allows us to host wedding ceremonies on our property! We are so excited to be able to share our beautiful landscape with couples and their families on their special day! For information and availability please contact [email].”).

basis for the injunctive relief under Michigan nuisance law, which this Court recognized. (Case No. 21-1744, Opinion, p. 7.) They are left without basis to request Township enforcement of ordinances plainly intended to protect their quiet enjoyment of property. (R. 89, PageID#89, 176 (allegation of violation in writing to Township as basis for enforcement action.)) Confusion over what aspects of the ordinance survived and what is left will almost certainly chill neighbors' attempts to secure enforcement of valid provisions.

“Zoning is a legislative function that cannot constitutionally be performed by a court, either directly or indirectly. *Schwartz v City of Flint*, 426 Mich. 295; 395 N.W.2d 678 (Mich. 1986) (internal quotation omitted). It is a “fundamental principle” of Michigan law that a court “does not sit as a super-zoning commission.” *Brae Burn, Inc. v. City of Bloomfield Hills*, 350 Mich. 425, 430-31 (1957).

Our laws have wisely committed to the people of a community themselves the determination of their municipal destiny, the degree to which the industrial may have precedence over the residential, and the areas carved out of each to be devoted to commercial pursuits. With the wisdom or lack of wisdom of the determination we are not concerned. The people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life. *Id.* At 431. 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 (*e.g.*, growing grapes). (R. 41-3, PageID#2085.) Invalidating all the challenged provisions throws this community's carefully albeit imperfectly crafted balance between agri-tourism and commercial activities into turmoil.

The Michigan Supreme Court “has recognized zoning as a reasonable exercise of the police power that not only protects the integrity of a community’s current structure, but also plans and controls a community’s future development.” *Kyser v. Kasson Twp.*, 486 Mich. 514, 520 (2010) (citations omitted). The injunction’s indiscriminate redlining essentially rewrites the Township’s zoning ordinance, which is inextricably intertwined with its Master Plan and groundbreaking purchase of development rights (PDR) program, and renders it incoherent. (R. 41-3, 2082-2087.) This injunction results in the opposite of stability and orderliness, which are the foundational principles of zoning underlying PTP and its members’ interests in this case. *See Raabe v. Walker*, 383 Mich. 165, 177 (1970) (recognizing manifest desirability of zoning stability “once it has been ordained and relied upon for any fair period of repose by home builders and homeowners.”).

This injunction is confusing and it is nearly impossible for neighbors who depend on zoning to know what the law now is. This alone is ample basis to stay it. *See Union Home Mortg. Corp.*, 31 F.4th at 362-64 (injunction violating Rule 65(d)(1) must be vacated).

#### **4. The injunction fails the traditional test for granting injunctive relief.**

There are four factors a court must balance when deciding whether to issue a stay under Fed. R. Civ. P. 8. They are “the same four factors that are traditionally considered in evaluating the granting of a preliminary injunction.” *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (citing *Frisch’s Restaurant, Inc. v. Shoney’s Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985) and *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985)).

These well-known factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.

*Id.* (citations omitted). The factors “are not prerequisites” but “interrelated considerations that must be balanced together.” *Id.* (citing *DeLorean*, 755 F.2d at 1229). All four weigh in favor of staying this injunction.

##### **a. The Township will likely prevail on the merits of its appeal.**

The Township will likely succeed on appeal for the reasons stated in its brief in support of its motion, including its expectation that PTP may seek relief from the June 3 Order under Fed. R. Civ. P. 60. PTP expects the District Court will permit PTP to be fully heard on the merits of the Wineries’ claims, consistent with this Court’s judgment on intervention. That some of those merits were decided without

comprehensive briefing and also without PTP's participation, which raises serious questions about their validity and finality. PTP understands it may participate in this case as a party and intends to address the Wineries' summary judgment arguments through motions per an amended Case Management Order. (*See* R. 229-1, PageID#8442-55, briefing PTP requests for District Court guidance on next steps.)

PTP is likely to succeed on the merits of most, if not all, issues. The District Court invalidated many provisions based not on the merits of the Wineries' arguments, but on the Township's apparent failure to raise certain defenses and arguments. (R. 162, PageID#6004-6005 (on Wineries' commercial speech theory, "[t]he Township has not argued that the Central Hudson test does not apply to any of the other [11] sections listed above" and that the Township ignored the Central Hudson test); PageID#6013-6014 (on Wineries' prior restraint theory, Township's "meager argument is not enough to carry the Township's burden under strict scrutiny"); PageID#6016 (on Wineries' compelling speech theory, "the Township failed altogether to raise an argument that these sections do not compel speech"); PageID#6019-6021 (on Wineries' theory the Township conceded weddings and late hour are allowed, "[t]he Township failed to respond to this argument altogether.")). When the District Court subsequently rejected the Township's motion to alter or amend the summary judgment order, it again declared the Township's failure to raise certain issues as precluding relief under Rule 59. (R. 211, PageID#7809-7812.

(rejecting Township arguments on Wineries’ dormant commerce clause, commercial speech, permissible weddings, large events and late hours theories because they were “effectively waived”)). Thus, the orders invalidating zoning provisions are based substantially on default by the Township – a party this Court confirmed does not adequately represent PTP’s interests. (Opinion, pp. 9-14.)

Before it mattered whether the Township had raised certain arguments or not, the District Court found the Wineries were unlikely to succeed on their claims. Among other things, it said that:

- “Nothing about” provisions 6.7.2(19)(b)(1)(v), 8.7.3(12)(i), or 8.7.3(12)(k) “appears to be related to the contents of Plaintiffs’ speech.” (R. 34, PageID#1869.)
- The Township’s interest in the “preservation of Township lands, promotion of local interests, and promotion of the local economy” was compelling, at least for purposes of the motion for preliminary injunction; 6.7.2(19)(b)(1)(v), 8.7.3(12)(i), or 8.7.3(12)(k) “directly advance those interests,” and, “on their faces, they do not appear to reach further than necessary.” (R. 34, PageID#1869-1870 (preliminarily applying the test for commercial speech).)
- The Township’s interest in “promoting the local economy and preserving types of land” is “at least substantial and does not appear

related to suppression of ideas.” (R. 34, PageID#1871 (considering the Wineries’ claim that 8.7.3(10)(u) restricted freedom of association).)

- The zoning ordinance applies to all weddings and events, “secular and religious”; and, “at this stage, the Court cannot even find a facial non-neutrality,” “therefore, the Court finds no violation of the First Amendment.” (R. 34, PageID#1872 (considering the Wineries’ claim that disallowing weddings restricted freedom of religion).)
- The Wineries were unlikely to succeed on their takings claim. (R. 34, PageID#1875.)
- “In sum: none of Plaintiffs’ constitutional arguments carry the day.” (R. 34, PageID#1875.)

The District Court got it right the first time – the Wineries’ claims have little merit. PTP, given the opportunity to address them, will demonstrate as much.

PTP also agrees that, on appeal, the Township is likely to succeed on the merits of the arguments it raised in its motion for stay, in part because this Court will review legal issues *de novo*. Laches and preemption are questions of law, as is whether the District Court erred in applying strict scrutiny to the Wineries’ Dormant Commerce Clause claims and intermediate scrutiny to provisions that do not regulate speech, let alone commercial speech.



**b. PTP will be irreparably harmed without a stay.**

This Court recognized PTP has already been harmed by the District Court’s injunction. (R. 215, PageID#8187.) The harm is ongoing so long as the injunction remains in place, and it is irreparable. The Wineries apparently think the Old Mission Peninsula is now open to weddings and large events, loud music, late hours, and commercial activity amounting to unlawful commercial spot zoning in the agricultural district.<sup>6</sup> PTP and its members have lost the ability to protect their property interests through complaints to the Township and nuisance per se claims against any winery that expands its use in a manner that violates the pre-injunction zoning ordinance.

As explained above, PTP is likely to prevail on its defenses and arguments that the zoning ordinance is neither unconstitutional nor preempted. Even the District Court found the limits on weddings, events, and late hours are not unconstitutional nor preempted, but it enjoined them anyway based on its erroneous conclusion that the Township “conceded” they were unlawful.

Irreparable harm is presumed where a law is enjoined. *Maryland v. King*, 567 U.S. 1301 (2012). Even if this presumption applies only to constitutional laws, the

---

<sup>6</sup> Ex A (Judge Blocks Peninsula Wineries Ordinance, Record Eagle, June 5, 2022) (“Wineries in Peninsula Township no longer have to follow numerous zoning restrictions a U.S. District Court judge ruled to be illegal or unconstitutional.”); Ex B, Wedding Ceremonies, Wine Wagon Tours and Cider at Brys Estate!

injunction causes irreparable harm insofar as it prevents the Township from enforcing its restrictions against weddings, events, and late hours, which are not unconstitutional. Once the District Court has the opportunity to evaluate the Wineries' other constitutional claims in light of PTP's defenses, evidence, and arguments, it is likely other provisions will be found constitutional as well.

In previously finding no irreparable harm to the Wineries in its Order denying their preliminary injunction motion, the District Court recognized that the Wineries sought to "completely upset the status quo in Peninsula Township" by enjoining provisions "without implementing any replacements." (R. 34, PageID#1867.) It acknowledged its inability to draft new ordinances and that to "simply eliminate the Ordinances [the Wineries] view as offensive" would "completely upset the regulatory system that presently exists in Peninsula Township." (R. 34, PageID#1867.) "This is the opposite of the purpose of a preliminary injunction, which is to maintain the status quo until a decision on the merits can be reached." (R. 34, PageID#1867-1868.)

A final decision on the merits of the Wineries' claims has not been reached because PTP has not yet had the opportunity to address them. *See Sanguine*, 798 F.2d at 392 (challenged injunction "had not been 'litigated' in the true sense" without participation of interveners). Before the first winery amendment was enacted approximately 30 years ago, the status quo was no wineries in the agricultural

district. Since then, the status quo has been defined by provisions the Wineries now seek to eliminate after decades of profiting from them. The Court should grant a stay to restore the status quo to what it has been for the past 30 years, and what it was when PTP filed its motion to intervene.

**c. A stay would not cause substantial harm to others.**

Any harm to the Wineries resulting from a stay pales in comparison to the ongoing and irreparable harm the injunction causes PTP and its members, residents and landowners of the Old Mission Peninsula. As the Township explains in its motion, any harm to the Wineries can be remedied with damages.

**d. A stay is in the public interest**

The Wineries are attempting to force changes through litigation after not getting their way through the democratic process of public participation in the development of local zoning. The public interest weighs heavily in favor of preserving the balance the Township, PTP members, and the Wineries and their predecessors achieved.

The Michigan Legislature, through the Michigan Zoning Enabling Act, authorizes the Township to create and enact its zoning ordinance to promote the public health, safety, and general welfare; to encourage land use according to its character; to limit the improper land uses; to ensure land uses are appropriately located; to lessen

road congestion, and more. MCL § 125.3203. The Township did so, with a consistent focus on preserving agriculture on Old Mission Peninsula. It enabled wine production and sales without opening the agricultural district to unfettered commercial activity. The injunction would create commercial spot zoning throughout the agricultural district, wherever there is a winery. *Penning v. Owens*, 340 Mich 355, 367 (1954) (“creating a small zone of inconsistent use within a larger zone is commonly designated as ‘spot zoning’” and should not be sustained) (citations omitted). It is not in the public interest to allow a District Court to order changes to a zoning ordinance that result in an unlawful zoning scheme.

The public interest further supports a stay to give effect to this Court’s opinion granting PTP the right to intervene by ensuring that right is meaningful, not ephemeral.

### **Conclusion**

For the reasons discussed above, PTP supports the Township’s motion to stay the injunction issued by the District Court.

Respectfully submitted,

Date: August 9, 2022

By: /s/ Tracy Jane Andrews

Tracy Jane Andrews (P67467)  
Law Office of Tracy Jane Andrews,  
PLLC  
Attorneys for Intervenor  
420 East Front Street  
Traverse City, MI 49686  
(231) 946-0044  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

Date: August 9, 2022

By: /s/ Holly L. Hillyer

Holly L. Hillyer (P85318)  
Olson, Bzdok & Howard, P.C.  
Co-Counsel for Intervenor  
420 East Front Street  
Traverse City, MI 49686  
(231) 946-0044  
[holly@envlaw.com](mailto:holly@envlaw.com)

**CERTIFICATE OF COMPLIANCE FOR WORD COUNT**

This Brief complies with the word count limit of FRAP 27(d)(2)(A).

This brief was written using Microsoft Word version 2016 and has a word count of 4,990 words.

Date: August 9, 2022

By: /s/ Tracy Jane Andrews

Tracy Jane Andrews (P67467)  
Law Office of Tracy Jane  
Andrews, PLLC  
Attorneys for Intervenor  
420 East Front Street  
Traverse City, MI 49686  
(231) 946-0044  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

Date: August 9, 2022

By: /s/ Holly L. Hillyer

Holly L. Hillyer (P85318)  
Olson, Bzdok & Howard, P.C.  
Co-Counsel for Intervenor  
420 East Front Street  
Traverse City, MI 49686  
(231) 946-0044  
[holly@envlaw.com](mailto:holly@envlaw.com)

**CERTIFICATE OF SERVICE**

I, Tracy Jane Andrews, hereby certify that on the 9th day of August, 2022, I electronically filed the foregoing document with the ECF system which will send a notification of such to all parties of record.

Date: August 9, 2022

By: /s/ Tracy Jane Andrews

Tracy Jane Andrews (P67467)  
Law Office of Tracy Jane  
Andrews, PLLC  
Attorneys for Intervenor  
420 East Front Street  
Traverse City, MI 49686  
(231) 946-0044  
[tjandrews@envlaw.com](mailto:tjandrews@envlaw.com)

8/8/22, 3:30 PM

Judge blocks Peninsula wineries ordinances | Local News | record-eagle.com

[https://www.record-eagle.com/news/local\\_news/judge-blocks-peninsula-wineries-ordinances/article\\_02a80016-e34f-11ec-9a59-bb2cd7cdf2ab.html](https://www.record-eagle.com/news/local_news/judge-blocks-peninsula-wineries-ordinances/article_02a80016-e34f-11ec-9a59-bb2cd7cdf2ab.html)

ALERT TOP STORY

## Judge blocks Peninsula wineries ordinances

By Jordan Travis [jtravis@record-eagle.com](mailto:jtravis@record-eagle.com)  
Jun 5, 2022

---



8/8/22, 3:30 PM

Judge blocks Peninsula wineries ordinances | Local News | record-eagle.com



A harvesting machine in thick morning fog in a vineyard on Old Mission Peninsula in 2016.

Record-Eagle file photo

8/8/22, 3:30 PM

Judge blocks Peninsula wineries ordinances | Local News | record-eagle.com



MAPLETON — Wineries in Peninsula Township no longer have to follow numerous zoning restrictions a U.S. District Court judge ruled to be illegal or unconstitutional.

Judge Paul Maloney of the court's Michigan Western District blocked the township from enforcing limits barring wineries from hosting weddings and other social gatherings, among several other rules. The vagueness of "guest activity" within the township ordinance, and township officials' confusion in their statements to the court over what that actually includes, means numerous restrictions that limit the activities are unconstitutional, Maloney wrote.

Among them are zoning limits setting a 9:30 p.m. closing time. Maloney wrote that the township had been applying it to all wineries, despite it only appearing in winery chateau rules.

The ruling doesn't totally settle a lawsuit that's taken since 2020 to reach this far. Joseph Infante, an attorney for the plaintiffs, said it comes pretty close while leaving other arguments to be decided in trial.

"Really in our mind this was a near-total victory for the wineries, because what some of those arguments challenge, the court already ruled in our favor on other arguments," he said.

Chris Baldyga co-owns Two Lads Winery, one of the plaintiffs in the lawsuit. He said he planned on celebrating Friday with a bottle of Old Mission Peninsula "bubbly," and his wife and winery co-owner Angie.

That statement of origin is something people should still expect to see at his winery, even though the ruling also struck down zoning requirements that farm processing facilities buy and sell at least 85 percent of produce from peninsula farms, he said — American Viticultural Area requirements that wines labeled Old Mission Peninsula contain at least that much Peninsula-grown fruit remain.

8/8/22, 3:30 PM

Judge blocks Peninsula wineries ordinances | Local News | record-eagle.com

Township zoning rules for fruit content didn't apply to winery chateaus, and while they included an exception for federally declared crop disasters, it wasn't uncommon for Two Lads to squeeze by on years when its vineyards and contracted growers couldn't meet demand for some varietals, Baldyga said.

Maloney's ruling means farm processing facilities can buy grapes and juice from elsewhere, but Baldyga said he's not alone in wanting to stick as close to the peninsula as possible in seasons with tight supplies on the peninsula, even possibly sourcing grapes from Antrim, Benzie and Leelanau counties.

"I don't know of any wineries that started on Old Mission (Peninsula) because they're excited about buying juice from somewhere else," he said.

While Baldyga was looking forward to hosting events soon that he had turned away before, he wasn't ready to expand hours, at least not in the short-term, he said.

Blocked also are rules limiting what kind of events wineries could host to include agriculturally linked promotions — the judge found them to be government-compelled speech, a First Amendment violation.

Other rules barring the sales of certain kinds of branded merchandise are included in the injunction as well because the township didn't argue how they advanced a government interest, Maloney wrote.

Township Attorney Greg Meihn, reached Friday, said he had not yet read the opinion. Messages left with him later that day weren't returned.

Township Supervisor Rob Manigold declined to comment, adding the board of trustees has a special meeting Monday to talk about the ruling in closed session — it's at 8 a.m. in the township hall, 13235 Center Rd., the meeting agenda shows. He expected the township would look to appeal the decision.

8/8/22, 3:30 PM

Judge blocks Peninsula wineries ordinances | Local News | record-eagle.com

Township residents had argued over several public meetings that the rules aimed to stop the peninsula's over-commercialization and curb other issues like noise and traffic.

Members of Protect the Peninsula, a nonprofit that's appealing the court's past decision blocking it from joining the suit to defend the ordinances, previously raised several arguments about the impacts that allowing food service, late closings and more could have on Peninsula residents. Members supported the township's ongoing rewrite of the zoning rules in question.

Protect the Peninsula President Mark Nadolski declined to comment Friday, and T. J. Andrews, the nonprofit's attorney, said she hadn't reviewed Maloney's ruling so couldn't comment yet.

The court's decision didn't settle some issues, including whether the township's ordinances amounted to a regulatory taking. While he agreed the wineries weren't completely shut off from running a profitable business, the question remained as to whether they could exercise their full rights, he wrote.

Estimates from a forensic accountant previously placed the wineries' damages at roughly \$203 million over five years, as previously reported — Infante said Friday he didn't believe Maloney's rulings would impact that estimate.

The judge rejected Peninsula Township's motions to find in the township's favor for various reasons, including an argument to toss what the township contended was a suit filed too late over ordinances that are 20 years old or more.

Five of the last wineries were established in the last eight years and others recently were passed to a second generation, Maloney wrote.

Plus, the wineries claimed they were trying for years to amend the ordinances, and any delay in filing the suit didn't unfairly prejudice the township.

8/8/22, 3:30 PM

Judge blocks Peninsula wineries ordinances | Local News | record-eagle.com

Other wineries in the suit are Bowers Harbor Vineyard & Winery Inc., Brys Winery LLC, Chateau Grand Traverse LTD, Tabone Vineyards LLC, Winery at Black Star Farms LLC and Villa Mari LLC.

Companies doing business as Bonobo Winery, Chateau Chantal, Hawthorne Vineyards and Peninsula Cellars also are plaintiffs. All except Bonobo Winery are members of Wineries of the Old Mission Peninsula — also known as the Old Mission Peninsula Wine Trail.



[Wineries of the Old Mission Peninsula injunction](#)  
 U.S. District Court Judge Paul Maloney Jun 3, 2022

Case 22-1534 Document 41-2 Filed 08/09/22 Page 6 of 9

INJUNCTION GRANTED IN PART AND DENIED IN PART REGARDING PENINSULA TOWNSHIP'S REGULATION OF WINE SALES

RECEIVED BY THE COURT: JUDGE PAUL MALONEY  
 PENINSULA TOWNSHIP, Plaintiff,  
 vs.  
 BOWERS HARBOR VINEYARD & WINERY INC.,  
 BRY'S WINERY LLC,  
 CHATEAU GRAND TRAVERSE LTD,  
 TABONE VINEYARDS LLC,  
 WINERY AT BLACK STAR FARMS LLC,  
 VILLA MARI LLC,  
 HAWTHORNE VINEYARDS LLC,  
 CHATEAU CHANTAL LLC,  
 PENINSULA CELLARS LLC,  
 BONOBO WINERY LLC,  
 Defendants.

MEMORANDUM DECISION

On June 3, 2022, the Court granted in part and denied in part Peninsula Township's motion for a preliminary injunction. The Court granted the Township's motion for a preliminary injunction in part, finding that the Township's ordinance regulating wine sales is likely to cause irreparable harm to the Township and its residents. The Court denied the Township's motion for a preliminary injunction in part, finding that the Township's ordinance regulating wine sales is not likely to cause irreparable harm to the Township and its residents. The Court's decision is based on the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

1. The Township's ordinance regulating wine sales is a regulation of wine sales that is likely to cause irreparable harm to the Township and its residents. The ordinance regulates wine sales by requiring that wine be sold in a sealed container and that the container be labeled with the name of the winery. The ordinance also requires that the wine be sold at a price that is no more than 10% above the cost of the wine. The ordinance is a regulation of wine sales that is likely to cause irreparable harm to the Township and its residents.

2. The Township's ordinance regulating wine sales is not likely to cause irreparable harm to the Township and its residents. The ordinance regulates wine sales by requiring that wine be sold in a sealed container and that the container be labeled with the name of the winery. The ordinance also requires that the wine be sold at a price that is no more than 10% above the cost of the wine. The ordinance is not likely to cause irreparable harm to the Township and its residents.

**CONCLUSIONS OF LAW**

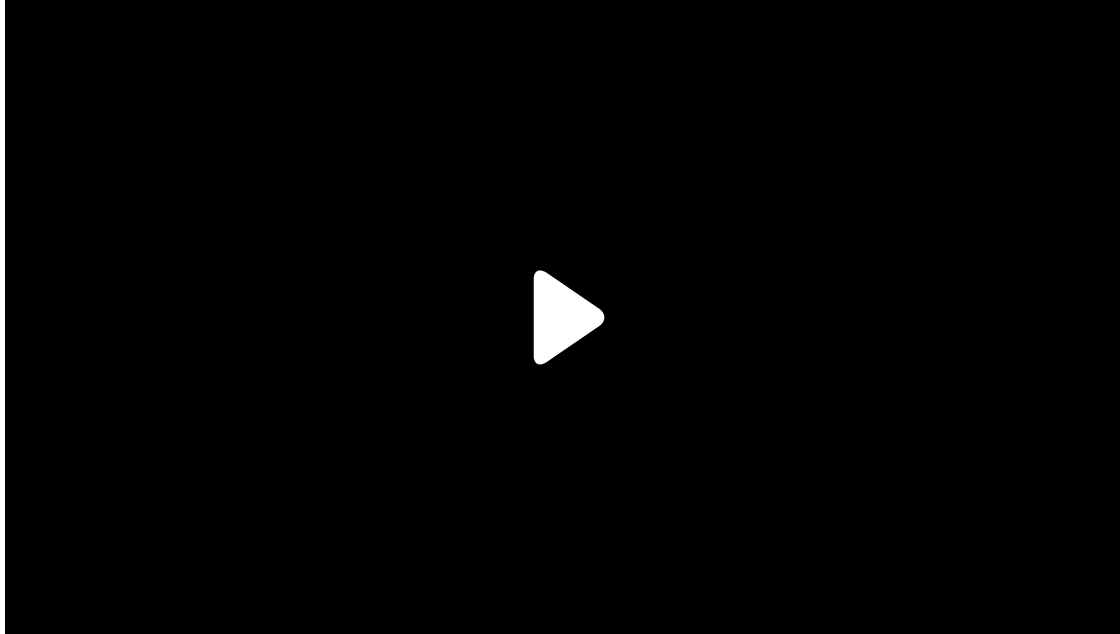
1. The Township's ordinance regulating wine sales is a regulation of wine sales that is likely to cause irreparable harm to the Township and its residents. The ordinance regulates wine sales by requiring that wine be sold in a sealed container and that the container be labeled with the name of the winery. The ordinance also requires that the wine be sold at a price that is no more than 10% above the cost of the wine. The ordinance is a regulation of wine sales that is likely to cause irreparable harm to the Township and its residents.

2. The Township's ordinance regulating wine sales is not likely to cause irreparable harm to the Township and its residents. The ordinance regulates wine sales by requiring that wine be sold in a sealed container and that the container be labeled with the name of the winery. The ordinance also requires that the wine be sold at a price that is no more than 10% above the cost of the wine. The ordinance is not likely to cause irreparable harm to the Township and its residents.

Trending Video

8/8/22, 3:30 PM

Judge blocks Peninsula wineries ordinances | Local News | record-eagle.com





8/8/22, 3:30 PM

Judge blocks Peninsula wineries ordinances | Local News | record-eagle.com



SPONSORED CONTENT

[This 7-Day Savings Challenge Is Going Viral By Making...](#)

By The Penny Hoarder

8/8/22, 3:30 PM

Judge blocks Peninsula wineries ordinances | Local News | record-eagle.com

## Record-Eagle Events

Thu, Sep 15

Mon, Aug 08

Tue, Aug 09

Tue, Aug 09

Tue, Aug 09

[📅 See All Events](#)
[+ Add your event](#)

Tue, Aug 09

Wed, Aug



**MBSR - Mindfulness  
Based Stress Reductio...**  
 Mindfulness Center of...

**Dolla Java Monday @  
HG**  
 The Village at Grande...

**Live Jazz @ Stella**  
 The Village at Grande...

**Tavern Tuesday at The  
Riverside Inn**  
 Riverside Inn

**Wine Pairing Dinners**  
 Traverse City, MI

**Summer Wine Pairing  
Dinners**  
 Traverse City, MI

**Evening**  
 Downtov

MON  
8TUE  
9WED  
10THU  
11FRI  
12SAT  
13SUN  
14MON  
15TUE  
16WED  
17THU  
18FRI  
19SAT  
20SUN  
21MON  
22TUE  
23WED  
24THU  
25FRI  
26
[Click Here for More Infor](#)

Ad by Sponsor

[Jordan Travis](#)

City Government Reporter



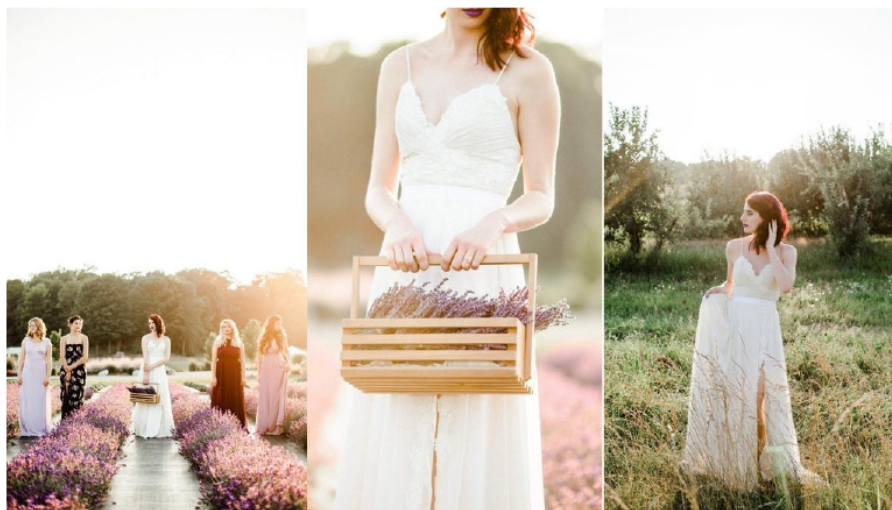
**From:** Secret Garden at Brys Estate <[messages+fm0kvdakpzkye@squaremtg.com](mailto:messages+fm0kvdakpzkye@squaremtg.com)>  
**Date:** June 21, 2022 at 10:43:01 AM CDT  
**To:** [REDACTED]  
**Subject:** Wedding Ceremonies, Wine Wagon Tours and Cider at Brys Estate!  
**Reply-To:** Secret Garden at Brys Estate  
<CAESPxIAGjFvX2t6d3V1dmt0a3JidGVxM25tdmZzMjZsbW5qc2h1bWRqa3JxdW81MjlvNob3Z5IghkaW  
Fsb2d1ZSIg4FLIURFbzbqHywbtxhzRPteZjhHBYtLWDVBdBGvosTM=@reply2.squareup.com>

Have questions? Reply to this email and we'll respond as soon as possible.

## Wedding Ceremonies at the Secret Garden!

A recent change in local regulations allows us to host wedding ceremonies on our property! We are so excited to be able to share our beautiful land with couples and their families on their special day!

For information and availability please contact [taylor@brysestate.com](mailto:taylor@brysestate.com).



WEDDING

## Experience the Wine Wagon Tour & Tasting!

Avoid the bustle of the busy tasting room and experience the beauty of Brys Estate up-close! During this approximately 2-hour immersive tour and tasting, guests will explore 5 unique locations throughout our 155-acre estate via open-sided electric shuttle. Wine tastings will be offered at each stop along the way and a light picnic will be served at the Secret Garden. Tour includes wine samples, souvenir logo glass, wine glass holder lanyard, bottled water and light picnic.

\$65 per person

\$60 Wine Club Members

Advance reservation required

Max. 7 guests; Must be 21+

(gratuity not included)



[BOOK YOUR  
TASTE](#)

## Introducing...Brys Estate Cider!

Made from estate-grown apples, Brys Estate's NEW hard cider is now available at the tasting room! Try them in your Tasting Tower, order a can on the Upper Deck or Lawn Bar, or purchase to-go packs!



– Brut Cider –

soft · bartlett pears · golden delicious  
apple

– Rosé Cider –

semi-sweet · cherries · strawberries

– Lavender Cider –

creamy · blueberry · floral

ENJOY AT THE TASTING ROOM  
Available to enjoy on the Upper Deck  
or at the Lawn Bar - \$7 each

CIDER TO-GO / MIX & MATCH  
4-pack \$18 | 6-pack \$24

To-go cans are available for in-person purchase or order pick-up at the tasting room in quantities of 4 or 6 cans only. To place an order for pick-up at the tasting room, call us at (231) 223-9303 ext 2. Cans of cider are not for sale individually unless served on the Upper Deck or at the Lawn Bar. Wine Club membership discounts apply.

PLAN YOUR  
VISIT

SHOP FOR  
PRODUCTS



Secret Garden at Brys Estate  
3309 Blue Water Road, Traverse City, MI, 49686

[Unsubscribe or Manage Preferences](#)

© 2022 BLOCK, INC.

