

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

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

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal corporation,

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

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Case No. 1:20-cv-01008

HON. PAUL L. MALONEY  
MAG. JUDGE RAY S. KENT

**PROTECT THE PENINSULA'S  
BRIEF ON ITS INTERESTS IN  
COMMERCIAL SPEECH, CONTENT-  
BASED RESTRICTIONS, AND  
COMPELLING SPEECH ISSUES**

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**PROTECT THE PENINSULA'S BRIEF ON ITS INTERESTS IN COMMERCIAL  
SPEECH, CONTENT-BASED RESTRICTIONS, AND COMPELLING SPEECH ISSUES**

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## INTRODUCTION

Protect the Peninsula, Inc. (PTP) files this brief articulating its interest in commercial speech, content-based restrictions, and compelling speech issues pursuant to the Court’s December 2, 2022 Opinion and Order. (ECF No. 301, PageID.10705)

In its December 2 Order, the Court recognized PTP’s right to “defend against the Wineries’ claims that could potentially affect PTP members’ property interests” and that its previous “analyses and conclusions . . . regarding such claims must be set aside.” (ECF No. 301, PageID.10702-10703) It set aside the sections of its June 3 order on preemption, prior restraints, weddings and hours of operation, the Michigan Zoning Enabling Act (MZEA), injunctive relief, as well as regarding commercial speech and compelling speech. (ECF No. 301, PageID.10697-10698) The Court declined to set aside the sections where no party received summary judgment and on the Wineries’ dormant Commerce Clause and due process (vagueness) claims. PTP addresses the latter decisions in a motion for reconsideration also filed today.

The Court said PTP “may participate in defending against” claims that are “still live” “if it has an interest in the claim, or in other words, if the adjudication of the claim would affect PTP members’ property interests.” (ECF 301, PageID.10701) Interpreting the Sixth Circuit’s decision granting PTP intervention, the Court stated that “only those claims that could affect PTP members’ land values, quiet enjoyment of their properties, and the viability of their farms will be the claims that PTP may participate in.” (ECF No. 301, PageID.10702) It recognized PTP’s “unquestionable interest” in preemption, prior restraints, weddings, hours of operation, freedom of religion, regulatory taking, injunctive relief, the MZEA, and laches, but found PTP’s interest in “commercial speech, content-based restrictions, and compelling speech” less apparent and offered PTP the opportunity to brief its interest in those issues. (ECF 301, PageID.10705)

PTP respectfully disagrees that a piecemeal approach to setting aside the June 3 Order is appropriate, logical, or legally sound. Notwithstanding its disagreement, PTP here and in the attached affidavits of PTP members John Jacobs (Ex. 1), Mark Nadolski (Ex. 2), Scott Philips (Ex. 3), Barbara Wunsch (Ex. 4), and Michele Zebell (Ex. 5), explains its interest in commercial speech, content-based restrictions, and compelling speech issues.

**I. PTP has an interest in defending all challenged zoning provisions irrespective of the legal basis for the challenge because their invalidation would adversely affect the interests that PTP intervened to protect.**

The Wineries seek to invalidate every part of the Peninsula Township Zoning Ordinance (Ordinance or ZO)<sup>1</sup> standing in their way of operating commercial bars, restaurants, event centers, and retail shops in the agricultural A-1 District. Should the Wineries succeed, PTP's members who live and farm in the A-1 District will lose the protection of the Ordinance they have long relied on to preserve the agricultural character of the area and ensure the compatibility of the land uses around them.

The purpose of the A-1 District is to “preserve, enhance, and stabiliz[e]” areas used for farming while allowing land unsuited to agriculture to be used in ways that are “compatible with agricultural and open space uses.” ZO § 6.7.1. The Ordinance provides that single family dwellings, like those where PTP's members live, are one such compatible use. ZO § 6.7.2(1). Wineries, which are facilities “where agricultural fruit production is maintained, [and] juice is processed into wine, stored in bulk, packaged, and sold,” are another. ZO §§ 6.7.2(19), 8.7.3(10), 8.7.3(12). Bars, restaurants, convenience stores, and event centers are not. *See Pittsfield v.*

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<sup>1</sup> A version of the Ordinance is at ECF 1-1. That version excludes amendments since August 2009. <https://www.peninsulatownship.com/ordinance.html>

*Malcolm*, 375 Mich. 135, 142; 134 N.W.2d 166 (1965) (absence of specifically stated use in zoning ordinance must be regarded as excluding use).

The Ordinance establishes three express winery land uses that may be located in the A-1 District:<sup>2</sup> Farm Processing Facilities under Section 6.7.2(19), Winery-Chateaus under Section 8.7.3(10), and Remote Winery Tasting Rooms under Section 8.7.3(12). Each contains at least a dozen subparts balancing, among other things, the agricultural and commercial aspects of the use and their impacts on neighbors and the community.

Of these dozens of subparts, the Wineries challenge only those on the agricultural side of the equation. They seek to expand their commercial privileges while eliminating countervailing agricultural obligations. Selectively invalidating provisions to increase commercial activity while weakening that activity's connection to agriculture would unbalance the carefully crafted and decades-old winery land uses in the A-1 District to the detriment of PTP members and their property interests.

The effect of invalidating any provision protecting PTP members from incompatible land uses involving nonagricultural commercial activity in the A-1 District will be the same irrespective of whether the Wineries challenge the provision on First Amendment, Commerce Clause, due process, preemption, or other grounds. As the Sixth Circuit acknowledged, PTP's interest lies in the validity of the "zoning ordinances." *WOMP v. Peninsula Township*, 41 F.4th 767, 773 (6th Cir. 2022) (*WOMP I*) (internal citations omitted). As articulated below and in the attached affidavits, PTP members have distinct, protected property interests in challenged provisions, which

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<sup>2</sup> Wineries have also operated as Food Processing Plants and at least one previously operated as a Special Open Space Use. ZO §§ 8.5, 8.7.2(3).

limit commercialization of agricultural areas, avoid nuisance, reduce traffic, minimize noise, limit events, maintain reciprocal compatibility of land uses, and prevent spot zoning.

The Sixth Circuit also recognized PTP's interest in avoiding the deprivation of PTP members' rights to enforce the challenged provisions under Michigan nuisance law. *Id.* The Ordinance expressly protects PTP members irrespective of their properties' proximity to any given winery by providing for the revocation of commercial retail privileges for Farm Processing Facilities that violate their Land Use Permits (LUPs) and revocation of Guest Use Activity privileges for Winery-Chateaus that violate their Special Use Permits (SUPs), which require compliance with all challenged provisions. ZO §§ 6.7.2(19)(b)(15), 8.7.3(10)(u)(8)(d). Invalidation of any challenged provision would deprive PTP members of their enforcement rights.

**II. PTP has an interest in commercial speech, content-based restrictions, and compelling speech issues.**

PTP has an interest in commercial speech, content-based, and compelling speech issues because its members have an interest in preserving the provisions the Wineries claim improperly restrict commercial speech, are content-based restrictions on speech, or unlawfully compel speech. These provisions protect PTP members against incompatible land uses like bars, restaurants, convenience stores, and event centers nearby, drawing more visitors and traffic, limiting their access to property, generating noise and commercial activity, and more. This Court's decision-making to "establish the validity or invalidity" of each provision challenged on commercial, content-based, and commercial speech grounds "necessarily bears directly on the property interests" of PTP members. *Id.*

The Wineries seek to invalidate 16 subsections of Sections 6.7.2(19), 8.7.3(10), and 8.7.3(12) on commercial, content-based, or compelling speech grounds, and some on multiple

grounds. In some instances, the Court recognized PTP's interest in one legal theory challenging a provision but not another. For example, the Wineries challenge Section 6.7.2(19)(b)(6), which establishes maximum floor areas for Farm Processing Facilities, on prior restraint and commercial speech grounds. Where the same provision is at stake, it is unclear how PTP's interest in prior restraint is "unquestionable" but in commercial speech is "attenuated." (ECF No. 301, PageID.10702-10703) PTP has an interest in defending Section 6.7.2(19)(b)(6) irrespective of the Wineries' choice of legal theory.

The Court also recognized PTP's interest in certain counts in the Wineries' complaint (ECF No. 29) and one of PTP's affirmative defenses. PTP has an interest in three Counts that implicate all provisions at issue in this case – VII (regulatory taking), IX (MZEA) and X (injunctive relief) – and its laches defense, which also applies to all claims. (ECF No. 301, PageID 10702-10703) The Court accepted PTP's First Amended Answer and Affirmative Defenses, which asserts additional defenses applicable to various claims. (ECF No. 291) The Court's recognition of PTP's interests in these overarching counts and defenses further supports the conclusion that PTP has an interest in the commercial speech, content-based restrictions, and compelling speech issues related to those same provisions.

#### **A. Commercial Speech**

The Wineries challenge, or the Court has previously invalidated, 13 subsections of the Ordinance as impermissibly restricting commercial speech.<sup>3</sup> Three relate to Farm Processing Facilities, eight to Winery-Chateaus, and two to Remote Winery Tasting Rooms.

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<sup>3</sup> The Wineries identified no specific provisions as impermissibly restricting commercial speech in their First Amended Complaint (ECF No. 29) and did so only in their summary judgment motion (ECF No. 136).



## 1. Farm Processing Facilities

The Township added Section 6.7.2(19) to the Ordinance by Amendment 139 in 2002 to establish the Farm Processing Facility as a use by right in the A-1 District. Its intent was “to promote a thriving local agricultural production industry and preservation of rural character by allowing construction and use” of a facility where a farm operation could process and package its agricultural produce for sale. ZO §§ 3.2, 6.7.2(19)(a). Retail space and wine tasting rooms are optional. ZO § 3.2. The Wineries challenge three subsections of 6.7.2(19) as impermissibly restricting commercial speech:

- 6.7.2(19)(a) – states that Farm Processing Facilities are not intended to allow activities like “weddings, receptions and other social functions for hire.”
- 6.7.2(19)(b)(1)(v) – a subsection of 6.7.2(19)(b), which allows sales of fresh or processed agricultural produce at Farm Processing Facilities, that allows Farm Processing Facilities to also sell logo merchandise related to the consumption of the produce they sell.
- 6.7.2(19)(b)(6) – a subsection of 6.7.2(19)(b) that establishes above-grade floor area maximums for Farm Processing Facilities and their retail spaces and allows unlimited underground buildings with limited loading dock exposure.<sup>4</sup>

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<sup>4</sup> The Wineries presented and the Court considered language from a prior version of this provision that limited above-grade floor area to 6,000 square feet; in January 2019, the Township enacted Amendment 197, expanding that limit to 30,000 square feet. Amendment 197, available [https://www.peninsulatownship.com/uploads/1/0/4/3/10438394/ordinance\\_amendments\\_185\\_-\\_200\\_-\\_for\\_website.pdf](https://www.peninsulatownship.com/uploads/1/0/4/3/10438394/ordinance_amendments_185_-_200_-_for_website.pdf), p. 25. Last visited Dec. 30, 2022.

Because a Farm Processing Facility is a use by right, any property owner in the A-1 District who satisfies the criteria in 6.7.2(19) may receive approval for this use without a public hearing or individually tailored conditions. Section 6.7.2(19) defines the contours of this use, which presently exclude industrial-scale facilities and nonagricultural commercial uses like bars, restaurants, convenience stores, and weddings and similar events for hire. The invalidation of 6.7.2(19)(a), 6.7.2(19)(b)(1)(v), or 6.7.2(19)(b)(6) and any resulting expansion of these contours will harm PTP's members. If their invalidation leads to weddings and events for hire, or unlimited retail, or larger retail and processing spaces, then Farm Processing Facilities will become far more intense commercial land uses. Undoing limits on events, retail activity, and facility size will result in more visitors, more deliveries, earlier starts and later ends to the commercial day, and more. (Ex. 1, ¶¶ 10-11, 13-16; Ex. 2, ¶¶ 9-10, 16-17; Ex. 4, ¶¶ 15-16, 19-20)

PTP maintains that none of these three subsections regulates speech, commercial or otherwise. The two the Court invalidated on commercial speech grounds – 6.7.2(19)(b)(1)(v) and 6.7.2(19)(b)(6) – were invalidated because the Township did not argue that they did not involve commercial speech; the Court presumed they did and applied the *Central Hudson* test to them, but they should have been subject to no higher level of scrutiny than rational basis review. *See Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 694, 697 (6th Cir. 2014). The Court rejected the Wineries' position that the third – one sentence of 6.7.2(19)(a) concerning weddings and similar events – involved commercial speech and declined to invalidate it as such. (ECF 162, PageID.6008). Regardless, the affidavits of PTP members demonstrate property interests in all three provisions, and PTP should have the opportunity to defend them.

## 2. Winery-Chateaus

The Township added Section 8.7.3(10) to the Ordinance by Amendment 79 in 1989 to establish the special land use of a Winery-Chateau, which is a facility where wine may be processed, sold, and tasted, and where “a limited number of guest rooms with meals are offered to the public.” ZO § 3.2. A Winery-Chateau’s principal use is a winery, where wine is produced and sold and may be tasted; residences and guest rooms are optional support uses. ZO § 8.7.3(10)(d).

The Wineries challenge eight subsections of 8.7.3(10) as impermissibly restricting commercial speech. The first is 8.7.3(10)(m), which PTP maintains does not regulate speech, commercial or otherwise. Section 8.7.3(10)(m) clarifies that accessory uses at Winery-Chateaus are allowed only for registered guests, requires that they be located on the same site as the winery, and limits facilities for them to what is “reasonably required” for registered guests. Not all Winery-Chateaus’ Special Use Permits (SUPs) allow them to host overnight guests, but Section 8.7.3(10)(m) allows those that do to offer their overnight guests meals and other amenities not open to the general public.

Section 8.7.3(10)(m) limits accessory uses to certain activities for overnight guests, and invalidating it may result in unlimited activities or activities open to the general public rather than the limited number of overnight guests. Invalidation of this provision resulting in the removal of those limitations and the expansion of events at Winery-Chateaus would harm PTP’s members by bringing more visitors, traffic, noise, and activity to the wineries for reasons other than to buy or taste wine, and during times activity levels at wineries would otherwise be low. For example, wineries have few morning visitors when it is too early to taste wine, but renting space for morning business meetings or yoga classes would change that. (Ex. 3, ¶ 10; Ex. 5, ¶ 9) Wineries may also become indistinguishable from bars and restaurants if allowed to offer unlimited food and beverage

services to anyone, which would mean more traffic, noise, and activity related to increased numbers of patrons, food and other deliveries, and staff. (Ex. 3 ¶ 8-9; Ex. 4, ¶¶ 21-23; Ex. 5 ¶¶ 7, 8)

The remaining seven provisions are subsections of 8.7.3(10)(u), which authorizes the Township to approve Guest Activity Uses (GAUs) as additional limited uses in a Winery-Chateau's SUP. The Township added 8.7.3(10)(u) to the Ordinance by Amendment 141 in 2004 to give Winery-Chateaus opportunities to offer activities promoting local agriculture to people beyond just registered guests. The Wineries challenge:

- 8.7.3(10)(u)(1)(b) – States that the Township's intent in allowing GAUs is to help promote local agriculture through introducing participants to locally-produced food and beverages, distributing promotional materials, and offering winery tours.
- 8.7.3(10)(u)(1)(d) – Excludes wine tasting and free promotional activities in the tasting room from the scope of GAUs.
- 8.7.3(10)(u)(2)(a) – Describes one type of activity that may be allowed as a GAU: wine and food seminars or cooking classes, which may include consuming food from the class, with advance notice to the Zoning Administrator.
- 8.7.3(10)(u)(2)(d) – Excludes entertainment, weddings, wedding receptions, family reunions and the sale of wine by the glass from the scope of GAUs.
- 8.7.3(10)(u)(5)(c) – Limits alcoholic beverages at GAUs to those produced onsite.
- 8.7.3(10)(u)(5)(g) – Allows amplified voice and background music during GAUs, subject to volume limits; does not allow amplified instrumental music.
- 8.7.3(10)(u)(5)(h) – Prohibits outdoor displays, including advertising, during GAUs.

Only the last of these – 8.7.3(10)(u)(5)(h)– appears to invoke commercial speech, albeit PTP maintains not unconstitutionally.

PTP has an interest in each of these seven provisions. Invalidation of any one of them resulting in increased commercial activity at Winery-Chateaus for reasons unrelated to agriculture and the principal winery uses of wine production, sales, and tasting, would harm PTP’s members. For example, invalidating the amplified music provision will likely result in amplified music at events and activities; this will undoubtedly interfere with the property interests of nearby residents like Scott Phillips, who lives right by Mari. (Ex. 3, ¶¶ 10-13, 16-17, 19-20) Because of how sound carries across the water separating John Jacobs from Chateau Chantal, amplified music there would interfere with his peace and quiet, and the desirability and value of his property. (Ex. 1, ¶¶ 4-7, 14, 17-18)

Increased traffic from additional events is a particular concern for Michele Zebell, who can only access her home via a small, congested road shared with Bowers Harbor. (Ex. 5, ¶¶ 8-12, 15-16, 18-19) Traffic is a significant concern to farmers like Barb Wunsch because of how it impairs her ability to move produce around and off the peninsula efficiently during harvests. Events and activities also invite conflict between winery guests and farm operations, with chemical spray applications drifting from farms into winery guest areas and guests trespassing from wineries onto farms. (Ex. 4, ¶ 16)

### **3. Remote Winery Tasting Rooms**

The Wineries challenge two subsections of 8.7.3(12), which establishes the land use of a Remote Winery Tasting Room. The Township added 8.7.3(12) to the Ordinance by Amendment 120 in 1998 “to allow wine tasting in a tasting room that is not on the same property as the winery

with which is associated.” ZO § 8.7.3(12)(a). They challenge Section 8.7.3(12)(i), which allows Remote Winery Tasting Rooms to sell promotional merchandise but not generic items; it appears not to involve commercial speech at all. They also challenge Section 8.7.3(12)(k), which prohibits advertising items for sale besides wine.

Limiting merchandise sales to items promoting local agriculture or the winery keeps Remote Winery Tasting Rooms from becoming general convenience stores or souvenir shops. Without the merchandise limits, if Peninsula Cellars (the only Remote Winery Tasting Room) can sell whatever it likes, it functions just as a convenient shopping stop right off Center Road, drawing people in for quick trips to grab supplies on their way to and from Traverse City. Limiting advertising to wine alone means Peninsula Cellars is drawing people to taste and buy wine, not to buy knick-knacks. Invalidation of these provisions resulting in the removal of these limitations would harm PTP’s members by bringing more visitors and adding to traffic congestion. (Ex. 2, ¶¶ 18-20; Ex. 4, ¶¶ 27-29]

Because of the effect the invalidation of these provisions would have on PTP’s members, PTP should have the opportunity to defend them.

### **B. Content-based restrictions**

The Wineries challenge four subsections of 8.7.3(10)(u) (allowing GAUs for Winery-Chateaus) as content-based restrictions on speech:

- 8.7.3(10)(u)(1)(b) – PTP’s interests were previously discussed above under Commercial Speech.
- 8.7.3(10)(u)(2)(b) – Describes one type of activity that may be allowed as a GAU: local nonprofit meetings with limited food service.

- 8.7.3(10)(u)(2)(c) – Describes one type of activity that may be allowed as a GAU: meetings of agricultural groups with a “direct relationship to agricultural production” under certain conditions, including advance notice to and approval of Zoning Administrator; provides for appeal of denials to Zoning Board of Appeals
- 8.7.3(10)(u)(5)(a) – Requires inclusion at GAUs of local agriculture promotion through identifying locally-produced food and beverages, distributing promotional materials, and offering winery tours.

The Court correctly found these provisions do not regulate speech based on its content. (ECF 162, PageID.6010) Still, PTP has an interest in the content-based speech claim because of its interest in 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(2)(b), and 8.7.3(10)(u)(2)(c). These limits on GAUs reasonably balance the harmful aspects of commercial events and activities by limiting their scope – if GAUs are unlimited as a result of the invalidation of any one of them, that would likely lead to more commercial activities and more visitors, traffic, deliveries, staff, and activity taking place Winery-Chateaus. These impacts in turn adversely affect PTP members’ property values and use and enjoyment of property. (Ex. 1, ¶¶ 17-18; Ex. 3, 11, ¶¶ 14-15; Ex. 5, ¶¶ 10, 13-14) More visitors participating in activities and events also increase the potential for nuisance and conflict with nearby farming activities. (Ex. 4, ¶ 24) PTP does not assert that its members have a specific property interest in 8.7.3(10)(u)(5)(a).

Because of the effect the invalidation of three of these provisions would have on PTP’s members, PTP should have the opportunity to defend them.

### C. Compelling speech

The Wineries challenge two subsections of 8.7.3(10)(u) (allowing GAUs for Winery-Chateaus) as compelling speech: 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a). PTP maintains that it has an interest in 8.7.3(10)(u)(1)(b) as previously discussed above. As discussed below, PTP maintains it is inappropriate to analyze individual subsections in isolation from their context, but PTP does not assert that its members have a distinct property interest in 8.7.3(10)(u)(5)(a). Because of the effect the invalidation of 8.7.3(10)(u)(1)(b) would have on PTP’s members, PTP should have the opportunity to defend it. (Ex. 1, ¶¶ 17-18; Ex. 3, ¶ 11; Ex. 5, ¶ 10)

### III. Dissecting PTP’s interest in this case by legal theory is contrary to the Sixth Circuit’s mandate granting PTP intervention and unsupported by law.

The Sixth Circuit recognized, for purposes of determining PTP’s interest to intervene by right in this litigation, that PTP’s interests are not in discrete subsections but in the whole section of the Ordinance establishing a winery-related land use. It described the “zoning ordinances” at issue as follows:

**[Section] 6.7.2(19)** \* \* \* provides that a winery with at least forty acres may host a tasting room, but only with limited retail sales, \* \* \* and prohibits the hosting of “weddings, receptions, and other social functions for hire” at these venues. \* \* \* **Section 8.7.3(10)** of the zoning ordinances allows a winery situated on at least fifty acres to host a tasting room, maintain limited guest rooms and residences, and provide other guest activities by special permit, \* \* \* with the intent that such a facility “maintain the agricultural environment, be harmonious with the character of the surrounding land and uses, and ... not create undue traffic congestion, noise, or other conflict with the surrounding properties.” \* \* \* **Section 8.7.3(12)** meanwhile provides that a winery may, by special permit, sell limited amounts of wine produced at one location at the tasting room of another location.

*WOMP I*, 41 F.4th 767, 769-770 (internal citations omitted) (emphasis added). In finding that PTP has a substantial interest in this case, the Sixth Circuit was “guid[ed]” by a case in which property owners who “had bought and developed their properties in reliance on” existing zoning sought intervention to defend against the possibility of court-ordered zoning changes. *Id.* at 772



(citing *Joseph Skillken & Co. v. City of Toledo*, 528 F.2d 867, 873–75 (6th Cir. 1975), vacated on other grounds, 429 U.S. 1068 (1977)). It acknowledged PTP members’ concerns regarding the increased commercial activity that could follow invalidation of the “zoning ordinances,” noting in particular how increased traffic could affect them. *Id.* at 769-770, 772-773. It recognized the potential deprivation of PTP members’ rights to enforce the challenged provisions under Michigan nuisance law. *Id.* at 773. The possibility that those provisions “might not survive” was enough to establish PTP’s interest for intervention purposes because “[t]his litigation, which will establish the validity or invalidity of the [zoning] ordinance[s], necessarily bears directly on the property interests [Protect the Peninsula’s members] seek to preserve.” *Id.* (quoting *Planned Parenthood of Minnesota, Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 869 (8th Cir. 1977)).

Those property interests do not change depending on the legal theories used to challenge the zoning ordinances that protect them. Parsing PTP’s interest in this case by legal theory is contrary to the Sixth Circuit’s mandate in its decision granting PTP intervention, which is broad and contains no limiting language. *See U.S. v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999) (remands are presumptively general; limited remand requires “unmistakable” limiting language and specific instructions to trial court).

PTP maintains that it is not appropriate to evaluate PTP’s interests based on the legal theory invoked nor the discrete subsections challenged. Zoning ordinances effectuate a community land use plan. MCL § 125.3203 (“[a] zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare, to encourage the use of lands in accordance with their character and adaptability, to limit the improper use of land”); *see also City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1968) (“essence of zoning” is to make some area of the community available for certain uses “while at the same time preserving the quality of life in the

community at large by preventing those [uses] from locating in other areas.”). The overarching rule in construing a zoning ordinance is to give effect to its plain text and the legislators’ intent. *Macenas v. Michiana*, 433 Mich. 380, 396; 446 N.W.2d 102 (1989); *Fremont Twp. v. McGarvie*, 164 Mich. App. 611, 614; 417 N.W.2d 560 (1987). To give effect to the intent of the drafters of the zoning ordinance, “the entire ordinance must be read together,” effectuating ordinances that create “homogeneous use areas by confining each district to a limited number of compatible uses.” *Prevost v. Macomb Twp.* 6 Mich. App. 462, 467; 149 N.W.2d 453 (1967); *Executive Art Studio, Inc. v. Kalamazoo*, 674 F. Supp. 1288 (W.D. Mich. 1987) (“In determining legislative intent, the Court has read the language of the [zoning] ordinance in the context of the problems the statute seeks to address, in this case, land use, parking and traffic problems associated with certain types of commercial as well as noncommercial enterprises.”). These guidelines are particularly instructive in a challenge to legislative acts adopted nearly 20 years (or more) ago, where a whole community has developed and numerous landowners have made investments in reliance on its validity.

Here, the Wineries challenge subsections and sub-subsections of a comprehensive zoning ordinance that are inextricably intertwined with one another and the Ordinance as a whole, and grammatically, logically, and structurally dependent on context. Evaluating discrete subsections of the Ordinance in isolation, divorced from the land uses, districts, and zoning plan as a whole, is misplaced both in evaluating the merits of the Wineries’ constitutional claims and in evaluating whether PTP has sufficient interest to defend against a claim seeking to invalidate subsections of a complex, integral zoning ordinance.

For the reasons discussed above and in the attached affidavits of its members, PTP respectfully requests that the Court permit PTP to participate in defending the Ordinance against the Wineries' commercial speech, content-based speech, and compelled speech claims.

Respectfully submitted,

Date: December 30, 2022

By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

I, Holly L. Hillyer, hereby certify that on the 30th day of December, 2022, I electronically filed the foregoing document with the ECF system which will send a notification of such to all parties of record.

By: \_\_\_\_\_

Holly L. Hillyer (P85318)

**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.3(b)(i)**

This Brief complies with the word count limit of L. Ci. R. 7.3(b)(i). This brief was written using Microsoft Word version 2016 and has a word count of 4,296 words.

Respectfully submitted,

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