

Expert Witness Report

Submitted in Support of Plaintiffs

**WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION (“WOMP”),
A Michigan Non-Profit Corporation and 11 Wineries**

V.

PENINSULA TOWNSHIP, a Michigan municipal corporation, Defendant

And

PROTECT THE PENINSULA, Inc., Intervenor-Defendant

Case No. 1 20-CV-01008

Peninsula Township Zoning Ordinance

A Land Use Code

Grand Traverse County

Traverse City, MI 49686

Effective Date June 5, 1972, and Amendments

In Accordance With:

Second Amended Case Management Order (ECF 343) and

Fed R. Civ. P. 26 (a)(2)(B)

Prepared by:

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Area of Expertise:

I am Dr. David E. Moss, an expert on land use planning and zoning regulations. A copy of my curriculum vitae is part of the Plaintiff's Expert Witness Disclosures pursuant to Rule (a)(2)(A).

Short Summary of Expected Testimony:

I expect to testify as a rebuttal expert to Protect the Peninsula's ("PTP") named expert, Dr. Thomas L. Daniels, regarding land use planning and the commonly available types of zoning regulations to promote and preserve agricultural land use and rural character. I further expect to testify as follows:

(i) There are less restrictive and feasible alternative regulations the Peninsula Township could have enacted to further its governmental interests in the Peninsula Township Zoning Ordinance, specifically those sections applicable to Plaintiffs.

(ii) How the Peninsula Township Zoning Ordinance, and specifically those sections applicable to Plaintiffs, do not promote and therefore detract from (a) agricultural and farmland preservation, (b) regenerative agricultural practices, and (c) agritourism.

Because discovery is ongoing and I am testifying as a rebuttal expert, it is expected that I will issue a supplemental report after reviewing the report prepared by Dr. Thomas L. Daniels.

Qualifications:

My qualifications include:

- Academic Achievements: BA, Biology, (Univ. of Delaware), MA in Coastal Management and Marine Policy (College of Marine Studies, Univ. of Delaware, D. Env Environmental Science and Engineering (UCLA), and business (UCLA Anderson School of Management, MDE Certificate).
- Management of a Municipal Land Use Regulatory Agency: Boston Conservation Commission - whose mission is writing, updating, and administering land use regulations affecting the coastal and near coastal areas.
- Author: Of the first codified version of the oil spill contingency plan covering the entire length of Delaware Bay for the Delaware Natural Resources and Environmental Control (Department). Forty percent of the entire state is defined as rural agriculture.
- Ground-Breaking Environmental Documents and Assessments: Including the EIR/EIS for the Pactex Project – a 125 ac offshore island for oil transshipment into pipelines transiting 1004 miles across four states from Los Angeles, CA to Midland, TX including offsite design and implementation of restoration of the Batiquitos Lagoon in San Diego – 90 miles away – to offset impacts to the marine environment of Los Angeles Harbor.
- Creation and Management of David E. Moss & Associates, Inc: A land use and environmental consulting firm that has successfully analyzed, filed, and processed land use entitlement and environmental compliance documents and applications in close to 100 municipalities in CA and several western states for industrial, housing, agricultural and commercial development projects in rural, suburban, and urban areas.

Introduction and Background of Assignment:

Retention as an Expert: I have been retained by the Plaintiff to provide opinions on land use regulations and zoning codes specifically related to the operation of Wineries in the Peninsula Township, Traverse County, MI. There are 10 wineries bound together as the association known as Wineries of the Old Michigan Peninsula (“WOMP”) and an eleventh winery, Bonobo Winery. WOMP is also referred to as the Old Michigan Peninsula Wine Trail.

Regulatory Control – 1972: Many of these 11 wineries started growing and processing operations under the Peninsula Township Zoning Ordinance with an effective date of 1972, and amendment(s). It is the land use controls that have been reviewed and considered below in formulating multiple opinions. Recent codified changes to the code in December 2022 are not the subject of the expert opinions set forth below. The 2022 changes focus on percentage and size of acreage required for the different components of a winery land use – particularly the minimum size or percentage of land that can be devoted to processing compared with growing fruit – including wine grapes.

Definitions of Four Codified Agricultural Land Uses: These are as follows:

Farm Processing Facility: A building or buildings containing an area for processing equipment where agricultural produce is processed or packaged and prepared for wholesale and/or retail sales. In addition to processing, the building(s) may also include a retail sales area for direct sales to customers and a tasting room for the tasting of fresh or processed agricultural produce including wine. The facility also includes necessary parking, lighting, and access to a public road. (ADDED BY AMENDMENT NO 139A).

Winery-Chateau: A state licensed facility whereat (1) commercial fruit production is maintained, juice is processed into wine, stored in bulk, packaged, and sold at retail or wholesale to the public with or without the use of a wine tasting facility and (2) a limited number of guest rooms with meals offered to the public.

Winery: A state licensed facility where agricultural fruit production is maintained, juice is processed into wine, stored in bulk, packaged, and sold at retail or wholesale to the public with or without the use of a wine tasting facility. The site and buildings are used principally for the production of wine. (Added By Amendment No 139a; Revised By Amendment 181).

Remote Winery Tasting Rooms: A wine tasting room that is not on the same property as the winery with which it is associated. (S.2.02.140). This land use was codified in a 1998 ordinance to accommodate Peninsula Cellars. The Michigan Liquor Control Commission definition is co-location on or off the manufacturing premises of a wine maker or small wine maker where the wine maker or small wine maker may provide samples of or sell at retail for consumption on or off the premises, or both, shiners, wine it manufactured, or, for a small wine maker only, wine it bottled. (MLCC S.436.1109)

Peninsula Township Environmental Setting:

Peninsula Township (“PT” or, “the Township”) is the northernmost township in Grand Traverse County, and comprises nearly all of the Old Mission Peninsula, a narrow strip of land extending 18 miles into Grand Traverse Bay. PT varies from one to three miles in width and encompasses approximately 42 miles of Great Lakes shoreline.

Topography consists of rolling hills, valleys, and wetlands, with steep slopes located primarily along the shoreline. The combination of the Peninsula’s rolling hills, a microclimate arising from the tempering presence of the two bays, and the wide presence of loamy sands, result in ideal circumstances for fruit production, primarily cherries and grapes.

Residential uses are located at a fairly higher density in the southern portion of the Peninsula, with over half the Township’s population residing south of Wilson Rd due to availability of public sewer and water – unlike north of Wilson Rd which is arguably more rural and development is limited by availability of private septic and water only.

The northern two-thirds of the Peninsula is made up of significant areas of orchard, vineyard, forest, and open land, with residential, agricultural, and commercial uses scattered throughout the Peninsula.

The Township Road network consists of some county-maintained roads, along with some private roads and M37 – the only State Highway – also designated as a Scenic Heritage Route.

Peninsula Township Lands and Applicable Socio-Economic Data:

- a. The Township comprises 17,755 ac.
- b. The Agricultural Protection Zone identified in the PT Master Plan comprises 9,861 ac (53%) of the total PT – which has increased from either 9,200 or 9,500 ac in 2008 (Daniels, T. An Evaluation of the Peninsula Township Farmland Preservation Program; Pg 5 states 9,200 ac and Pg 6 states 9,500 ac., 2008).
- c. The land area under permanent conservation easements or other mechanisms that limit development potential is 6,470 ac (36%) of the total Township area.
- d. The 2022 estimated population is 6,116, with 13.9% under 18, 46.3% between 18-65, and 36.3% over 65.
- e. Owner-occupied housing is 88.3% of total units.

Opinions are Based on Three Sections of the Township Zoning Ordinance

- a. Plaintiffs have sued the Township for several restrictions and regulations in the Ordinance. Specific restrictions addressed in the Opinions below include limitations on hours, prohibition of amplified music, restrictions on bar and restaurant operations, prohibition of hosting events such as weddings, and other family-oriented events.
- b. Opinions set forth below apply in part to Section 6.7.2(19) which governs Farm Processing Facilities, Section 8.7.3(10) which governs Wineries-Chateaus and 8.7.3(12) which governs Remote Tasting Rooms.
- c. The opinions do not relate to the Land Use Code changes enacted in December 2022.

1. Opinion: The Land Use Code's Prohibition on Agritourism Is Outdated and Hinders Agricultural Preservation.

- a. The Township Land Use Code ("LUC") codified in 1972 has three winery-related definitions stated above, and two LUC sections that specifically apply to winery operations (Winery-Chateau in Agricultural District S. 8.7.2 (11); Farm Processing Facility S. 6.7.2(19)).
- b. The LUC sections that apply to wineries have been amended multiple times since 1972. The result is the two LUC sections cited above (i) include arbitrary restrictions that lack clearly articulated legislative intent, (ii) are not supported by many agribusiness operators, (iii) have not been proven to promote a thriving local agricultural production industry, or preservation of rural character (S. 8.7.2(11) and the restrictions do not actually further the predominantly emphasized intent to preserve rural character.
- c. I reviewed the LUC sections pertaining to wineries and I find that (i) these do not promote or protect rural character, and (ii) the restrictions on accessory agricultural uses, or sizes or types of limits for certain allowed events relating to Chateau-Winery guests were created without any master planning analysis for carrying capacity, road capacity, parking, hours of operation, or noise limits. The LUC establishes restrictions without any basis for how such restrictions were deemed necessary to promote and preserve rural character – the most clearly stated governmental intent of the winery-related LUC sections. The Township did not look at less restrictive means to promote that and other stated interests.
- d. The economics of crop production including wine grapes are a significant and ever-changing challenge to the viability of agricultural operations in rural areas. Climate change is an additional fast-moving and unpredictable force working against the economics and the viability of traditional crops. Preservation of the rural agricultural environment is directly dependent on the ability of winery owners to grow, process and engage in customarily associated accessory agricultural land uses that for no specific

reasons have been disallowed by the LUC. The inability of wineries to have by-right or discretionary permit processes to seek entitlements for accessory uses such as weddings, banquets, non-wine events, or enhanced food services is due to the outdated and piecemealed approach since 1972 of the formulation and changes to the LUC.

- e. Wineries have been a vibrant part of Old Mission agriculture since 1972. The PTP website states “When wineries first opened on the Peninsula, the owners saw themselves as farmers preserving the rural and agricultural use of land. Zoning regulations, originally supported and substantially crafted by wineries, were put into place to ensure wineries would operate harmoniously with residents” (Protect The Peninsula, Website; protectthepeninsula.com). As the expert opinions herein show, there is nothing to support the PTP’s claim that “... over time, wineries’ perception of their role in the community has changed – to the detriment of their neighbors.”
- f. Agritourism has been recognized nationwide as a business model that is growing in popularity (Indiana State Dept of Agriculture, Planning for Agritourism, ND). Farmers and growers recognize a need to diversify operations and supplement farm/grower incomes. This has clearly been troubling and impactful to the Plaintiffs – enough to file and process a protracted lawsuit. By combining agriculture and tourism, events, and food service, agritourism offers rural experiences to urban and suburban residents, and economic diversification needed by wineries and farmers. Nowhere in the LUC is there mention of agritourism or reference to legislative intent of the importance of enabling wineries to have substantial economic diversification for such routinely-found accessory uses in other areas of the nation for weddings, banquets, or food service. There is no evidence that such diversification in the Peninsula Township would impact the rural character. And there is no evidence that the controls on size of gatherings or food service related to guest of Winery-Chateaus, types of gatherings (industry only), or overall limits would have created unmitigated impacts on rural agricultural quality of life, road capacity, noise, light and glare had the limits not been so restrictive.
- g. There have been many ordinance updates to the LUC since 1972. None of the updates acknowledge or promote clearly articulated goals of the wineries nor some of the added goals of farmers to have use by right or discretionary entitlement pathways for accessory agricultural land uses. In December 2022, the Township amended the LUC pertaining to all wineries. At that time, the PT did not listen to the fervent requests of wineries and farmers to enhance Special Use Permit entitlements to foster agritourism. And, the PT ignored the statewide policy directive of Governor Whitmer to promote Michigan’s unparalleled agritourism opportunities including farm weddings (Governor Whitmer Proclaims October as MI Agritourism Month, Agriculture and Rural Development, 1/4/2022).
- h. Eight of the Plaintiffs operate under restrictive LUC entitlements (Examples include SUP No. 24, Chateau Grand Traverse, 7-10-90; SUP 118, Osterhouse Winery-Chateau, 5/4/2013; SUP 126, Mari Vineyards, 3/15/16). The prohibition in the LUC against weddings and other accessory agricultural land uses has and continues to be contrary to the fact that discretionary and use by right (often abbreviated as “UBR”) entitlements can be sought in other rural agricultural areas nationwide (Including Sonoma County, CA, Loudon County, VA, Walla Walla, WA, Willamette, OR, Finger Lakes, NY, Texas Hill Country, TX). Plaintiffs operating under either legal, non-conforming rights or outdated and overly restrictive SUPs results in extreme pressure on PT wineries to remain financially viable, to have competitive wine pricing, and be a deterrent to wider distribution in and out of state for the sweet white wines the area is famous for.
- i. In order to amend existing SUPs to entitle minor expansions of processing facilities and decks Plaintiffs must seek discretionary permits at significant expense of time and cost. But they cannot use such discretionary processing to seek approval of financially important accessory uses for which there is no proof of causing unmitigated impacts to the rural community if entitled.

2. Opinion: The LUC is Inconsistent with the Township Master Plan Which Promotes Agritourism as a Mechanism to Preserve Agriculture.

- a. The Township Master Plan includes one or more goals or actions to promote agritourism (Peninsula Township Masterplan. Traverse County, MI, 1/17/2011, at Page 27). This is a clearly articulated policy to promote agritourism – which translates to accessory agricultural land uses such as weddings, events, food service, restaurants, and sale of merchandise that further promotes a winery or Chateau-Winery brand.
- b. This lack of consistency between the LUC and the Master Plan deprives winery operators of ability to seek entitlements for financially-important and customary accessory agricultural land uses allowed by right or discretionary SUP entitlement in rural agricultural areas nationwide. The LUC should have been amended long ago, or be amended now to be consistent with the Master Plan. Fears of unmitigated environmental impacts are currently unfounded. Concern regarding the occurrence of unmitigated impacts can be offset by conducting site-specific and area-wide environmental analyses rather than arbitrarily-set limits or outright prohibition.

3. Opinion: Preservation of Agriculture in Wine Regions Requires Accessory Use Rights

- a. Wineries nationwide are characterized not just for the wines they produce, but for the experiences they provide. Wine is more than just about taste, or food pairing. Wine is an experience centered around the use of scarce viable agricultural land, often rural and isolated, and the synergy of a wide-range of activities and manufactured improvements – including beautifully designed tasting rooms, food service and weddings/banquets facilities – often just tents out in the open. These are defined in every zoning code as accessory uses. Such accessory uses are routinely associated in wine producing areas nationwide – for one simple reason – a recognition and willingness by zoning authorities to have entitlement be either by right or by discretionary approval to promote all things wine. This includes weddings, banquets, service of food, restaurants, wine-and brand-related retail sales; all of which enable growers to share the excitement, culture, and history of the Township with locals and visitors.
- b. Agritourism is not a new concept. But it is important enough to areas like the Township so that Governor Whitmer proclaimed October 2022 as Agritourism month, and the American Planning Association has written extensively about agritourism (Lewis-Parisio, Governor Whitmer Proclaims October as Michigan Agritourism Month, MDARD, 10-4-2022; Mccue, Introducing the New Tourism Economy, American Planning Association Planning Magazine, 5-18-2022). When it comes to agritourism – the winery industry nationwide has embraced the concept and practices. Largely, because there is no better financially viable means of promoting wines than having the public enjoy more than the usual point of purchase experience in a retail wine store. Agritourism is a financial driver. Hallstedt Homestead Cherries in Michigan’s Leelanau Peninsula promoted local cherries to combat foreign competition by encouraging self-picking, and bringing folks onsite that would otherwise have just bought cherries in supermarkets (Manning, Embracing agritourism in the cherry capital of the world, Feast and Field, 8-2-2021). As a result, this otherwise local- serving family farm has become a regional asset by increasing demand for local hotels and restaurants.
- c. The Peninsula Township and Protect the Peninsula are far behind other local and nationwide agricultural area municipalities by impeding the ability of the plaintiffs to offer accessory uses. Whether accessory uses are allowed should be based on site- and area-wide data to mitigate the potential impacts that so far, the Township has said cannot be mitigated if the flood gates are opened. But that is certainly not true. If the issue is potentially impactful noise – then noise levels can be set. For traffic and parking impact mitigation - shared rides are routinely used for weddings and banquets. Sonoma and Santa Barbara Counties in CA and Loudoun County in VA have thriving tour and travel industries for transporting wedding guests, tasting parties, and those

merely interested in being able to drink wine and not be concerned with impaired driving. This mimics the summer high season restrictions in national parks like Zion – that precludes individual passenger cars during peak season months. A requirement to use shared rides for larger events would immediately mitigate the concern that there should be limits on how many events can occur at one time coupled with size limits that can be established on a winery-by-winery basis depending on the gross acreage, parking availability, frontage length, and fact-based setback requirements from crop areas.

- d. The Township can choose from municipal code examples from other states and municipalities as a starting point. Wine-oriented municipalities have updated ordinances in the past 10 years to achieve a balance between economic and environmental/quality of rural life character interests including Sonoma County. Events are defined by type, size, and regulated to limit the intensity and impacts such as noise, traffic, parking, and required land areas to be maintained for growing, production and accessory uses.
- e. Ability to entitle accessory agricultural land uses by right or by discretionary entitlement will enable Township growers to implement regenerative and sustainable farming techniques – many still in the testing stage. California’s Tablas Creek Vineyards and Oregon’s Troon Vineyards conducted research and development that led to certification for dry farming and improved the biodynamic of the agricultural properties (Purper, In the Vines: How regenerative farming could help the Paso Robles wine industry reach sustainability, KCBX, 10-12-2022; Cision PR Newswire, Troon Vineyard Announces Regenerative Organic Certification, 6-25-2021). Township wine grape growers need relatively consistent cash flow to be able to experiment and implement sustainable grape production practices, to modify grapevine performance, identify organic amendments to improve soil aggregate stability, and consider rotation to other crops during periods when the market doesn’t support increased levels of wine production, or due to impacts of climate change.

4. Opinion: Competitive Markets Require Multiple Revenue Streams to Ensure Preservation of Agricultural Land

- a. Apples, pears, tart cherries, and grapes are the dominant crops in the Township. Michigan crop yields in general fluctuate due to market forces and climate change. Erratic and unpredictable temperature changes alter seasons and impact soil conditions, insect pollination cycles, and promote pest infestation and diseases. (United States Department of Agriculture, Fresh Apples, Grapes, Pears: World Markets, 2021; Michigan Department Of Agriculture, Michigan Department Of Agriculture Annual Report 2003; Michigan Department Of Agriculture Annual Report 2008; Michigan Department Of Agriculture Annual Report 2013; Michigan Department Of Agriculture Annual Report 2021).
- b. The known demise of the tart cherry industry in the Township is largely due to cheaper harvest methods and import pricing from Turkey resulting in a need for Township growers to enhance and increase wine grape production. Climate – not just market forces - has played been equally impactful and has forced and enabled Township growers to rotate and rely more heavily on wine grapes. The pivot to wine grapes necessitates the ability of growers to process and promote wines on site. The unwillingness of the Township to update the LUC (See Paragraph 7 below) has unreasonably burdened growers by excluding weddings, banquets and food service as allowed uses, including arbitrary limits of Winery-Chateau events to 75 or 111 persons. Such limits were assigned randomly without any quantitative-impact analysis.
- c. Growers in the Township over the past 20 years were forced to adapt to climate and financial changes in the marketplace by rotating or changing crops to diversify income and stabilize financial returns. (Mahaliyanaarachchi, R.P. et. al, Agritourism as a sustainable adaptation option for climate change, 2019.) Year 2002 yields of tart cherries were the lowest since 1945 and signaled a need for Township growers to consider potential demise of the industry. Such demise was confirmed further by being

unable to compete with Turkish imports. After 2002 Township growers focused on replacement with wine grapes and sought to enhance accessory agricultural land uses on their agricultural A-1 zoned lands. Such enhancement has been curtailed and limited by the prohibition of financially viable and customarily associated promotional accessory uses even by discretionary Special Use Permit processing. SUP entitlement processes are routinely available in other wine growing areas nationwide. And, in many wine growing areas accessory agricultural land uses such as weddings, events, and Chateau-Winery food services and restaurants are uses by right. Wineries in the Township are deprived options to seek zoning entitlements for similar accessory uses.

- d. A noted expert on farmland preservation remarked “The economics of farming will continue to challenge the viability of farming.” (Daniels, *The Fragmenting Countryside and the Challenge of Retaining Agricultural Land: The Vermont Case*, 2022). Such an astute remark should be or have been a significant incentive for the Township to update the LUC and enable wineries to have rights for accessory agricultural land uses that residents and non-residents alike can be proud to be associated with in this magnificent rural area of Michigan.
- e. Michigan growers have adapted to environmental and market forces by planting more reds alongside white vinifera grapes (McWhirter, Sheri, *Turning red: Michigan’s wine industry adapts to warming temperatures, changing tastes*, Michigan Live, 2023.). Township growers may be interested in a similar pivot away from their narrow orientation towards sweet white grapes. The incentive to take chances, experiment with new varieties, and process and promote new wines is entirely dependent on having onsite, localized accessory agricultural land uses including weddings, events – not just industry events, enhanced food service and larger Chateau-Winery gatherings with a focus on wine, food without impacting the rural agricultural environment. Without options for reasonable entitlement processes, the market and brand promotion needs cannot be accomplished by an otherwise slow, word of mouth or point of purchase approach to promoting new wines. Truly a financial risk not worth taking.
- f. The Michigan wine industry generates \$6.33 billion related to farming, crop processing, and tourism. (Wine America, *Michigan Economic Impact Study*, 2022). The Township has an unfulfilled obligation to the pioneering as well as newest farming families to significantly revise the LUC to allow entitlement of accessory winery land uses that are the proven optimal means to significantly increase the local economics of the Township’s winery industry and maintain the rural character. Recognition of wineries as an essential part of the long-term economic growth and stability of the Township is long overdue and necessitates timely change to the LUC to have reasonable zoning entitlement processes for accessory agricultural land uses.
- g. Agritourism – (see Opinion No. 1, a-I above) is a relatively recent catchall buzzword for promoting what the Township has or should desire to achieve – a robust and financially viable local grow/process economy and preservation of rural character. Agritourism is more than just about money and character. It is the result of a generational shift regarding local, regional, nationwide, and international goals. It is far reaching – and includes creating and implementing climate-resistant crops, organic farming, regenerative practices for maintaining quality of soils through less chemicals and more rotations/fallow periods. Enabling people to experience farming communities – the lifestyle, the freshness of the produce, the joy of eating, celebrating, gathering in the uniquely breathtaking Township rural areas – these are the drivers behind why the Township should not deprive wineries to have pathways to entitle accessory uses. The demise of the Michigan tart cherry industry is a warning of economic demise when focusing solely on one avenue to market. The price of Michigan tart cherries price dropped \$209 per ton in recent years (Michigan Department Of Agriculture, *Annual Report 2013*). Township tart cherry growers have had to

rethink the economic viability of this crop due to the competitive advantage of lower prices for imports from Turkey. (Campbell, Bob, Michigan Cherry Industry Still Trying to Absorb Tarriff Loss to Turkey, Fruit Growers News, 2020.)

- h. Wine grape growers need assurances that potential financial instability and insecurity of being a one-crop, one product industry can be mitigated by ability to entitle accessory land uses customarily associated onsite with crop production and processing. That is a particular reason wineries in Virginia, New York, Oregon, Washington, and California recognize the local-serving legislative intent of winery-area ordinances fosters by right or discretionary zoning entitlement processes for accessory agricultural land uses. Preservation of the rural character of the Peninsula Township can be better enabled by implementation of changes to the LUC to allow accessory uses. Potential impacts of accessory agricultural land uses are both feasible and available – as stated in other sections herein. Continuation of prohibitions against entitlement processing of and LUC codes promoting accessory uses – creates year-to-year instability for wine grape growers/winemakers, and Chateau-Winery operators.
- i. Accessory use entitlement options should be included in the Township LUC, to assure that wine grape growers can remain financially competitive with trends like tart cherry production becoming less financially viable. Ignoring trends presents a significant threat to rural character and should result in pressure on the Township to look to ways to maintain the tax base. Perhaps by giving in to demand for more housing – which ultimately may be a more economically sustainable and needed use – but one that is far more impactful to rural character at the density developers will need. Stemming demand for changes of use to housing, industrial or standalone uses can be slowed or stopped completely by enabling the wine and farm landowners to have use by right and discretionary zoning processes to entitle accessory agricultural land uses.
- j. A farm [winery] business only has long-term viability when the cycle of prices and profitability are currently favorable and the winery has flexibility to withstand and mitigate future changes of climate, product demand, competition, changing tastes and other market factors (Bernhardt, Kevin; Professor and Farm Management Specialist at UW-Platteville, UW-Extension). A land use code based on an informed understanding of the risks that wineries operate under must allow for accessory agricultural land use entitlement as uses by right or by discretionary SUP. The economics of farming will continue to challenge the viability of agricultural operations (Daniels, The Fragmenting Countryside and the Challenge of Retaining Agricultural Land: The Vermont Case, 2022). An exception to this need for diverse operations pertains to EJ Gallo – which grows 93,000 ac of grapes on 19 locations nationwide. Not a single PT winery has anywhere near the potential to not pursue revenue streams besides the growing of grapes. None compares in size to gigantic- scaled growers like Gallo – hence they have limited long-term viability without options to entitle accessory agricultural land uses.

5. Opinion: Wineries Increase Agricultural Preservation

- a. The size of fruit cultivation in Michigan in 2020 was 4,297 ac of apples and 4,628 ac of sweet and tart cherries – almost 9,000 ac total. In 2023 there were 3,050 ac of wine grapes with an estimated production increase from 2011 to 2020 of 1,750 to 2,300 tons in Grand Traverse County. (Michigan State University Extension; Annual Report for Grand Traverse County (MSU, 2021). There are several drivers for increased acreage of wine grapes under cultivation including climate change, agritourism, market pricing and changed demand and pricing for other fruit crops.
- b. The Township has a responsibility for stewardship of the Peninsula– not just retiring land and promoting rural character. Township planners have the opportunity to implement an effective hybrid approach for preserving rural character and promoting and enhancing wine grape production, processing, and accessory uses.
- c. The PT has only once amended its LUC to enable a winery to obtain a discretionary SUP entitlement for an otherwise prohibited accessory agricultural land use of an off-premise tasting room. The Peninsula Cellars SUP entitles a tasting room distant from its vineyard and processing operations. The Peninsula Cellars winery is too remote to attract clientele for tasting and thereby has no opportunity for effective onsite marketing. The Planning Commission was able to “make” the ordinance “findings” for the offsite tasting room because the ability of Peninsula Cellars was impaired by distance to effectively market its product. And, the entitlement enabled Peninsula to stand the cost of preservation and adaptive reuse of an historic schoolhouse. The ordinance change and SUP process furthered the governmental interest to preserve agricultural land and promote farming and processing. The PT has purposely thwarted options available to the Plaintiffs of entitling accessory agricultural land uses that are known as added value opportunities routinely associated with farming and processing nationwide.
- d. Accessory agricultural land uses should be allowed by right and/or by discretionary SUP processing. Limits and restrictions must be based on local and area-wide technical studies. Not on an “all or nothing” narrowly crafted legislative intent of preserving rural character. Such studies have never been produced and therefore were used as part of the LUC planning process. The studies will identify feasible and reasonable carrying capacity limits. The setting of these limits will eliminate the current myopic focus on maintaining rural character at the expense of a more financially viable and agritourism-serving winery industry on the Peninsula. Enhancing services and experiences directly tied to wineries should be a primary goal of the Township because this is compatible with maintaining rural character.

6. Opinion: The Township had Less Restrictive Means at its Disposal to Preserve Agriculture.


- a. The Michigan Department of Environment, Great Lakes, and Energy (“EGLE”) administers regulations and ordinances for the protection of the environment, including farmland (The Natural Resources and Environmental Protection Act (“NREPA”); 1994 PA 451, as amended; Michigan Guide to Environmental Regulations, ND (“MGER”). These and other state-codified laws and policies assist Michigan’s local governments, business, and industry in navigating the maze of environmental regulations and policies they should consider regarding the development and operation of land uses on real property including farmland. Similar state laws and policies are routinely codified and administered as state environmental quality and policy ordinances nationwide. (Examples include the California Environmental Quality Act, Georgia Environmental Policy Act, Oregon Environmental Policy Act).
- b. The NREPA provides local townships with routinely applied state-level assessment criteria for the use of agricultural lands (NREPA, Section 324.36104a). These clearly articulated criteria do not appear to have been followed in whole or in part or

considered as a good analysis template by the Township each time the LUC was amended. Review of three SUPs cited above indicates that limitations placed on accessory uses are arbitrarily established without the benefit of noise, traffic, land use or other environmental analyses.

- c. LUC restrictions severely limiting wineries are not based on substantial evidence of necessity to protect rural character or prevent unmitigated farmland acreage loss due to change from agricultural to housing, industrial or commercial development. Plaintiffs have sued in order to gain by-right or discretionary permit processes to operate reasonable and customarily-associated accessory uses to stabilize the finances of operating wineries. This has included farmers (and will include more farmers in the future) whose crops did not previously include wine grapes to change crops to combat climate change and external market forces.
- d. The LUC is exclusionary for many accessory uses. The LUC code should eliminate the outright prohibition on certain uses or size limits. This would correct the unfairness that the wine/farming industry and Chateau Wineries can have limited types and sizes of events, but that weddings, banquets, reunions, gatherings with food and wine are not allowed. The numbers of Chateau-Winery guests at an event are arbitrarily set as 75 or 111. Equally arbitrary are the prohibitions against types and sizes of food service and no restaurants even when directly associated with winery operations.
- e. Arbitrarily entitled limits of 75 or 111 people at Chateau-Winery events are not set based on empirical data or baseline studies. There are no studies that show weddings create unmitigated impacts for noise, traffic, or parking demand compared with a non-profit company or farm industry banquet event. If the limit is set for 111 guests based on the need to mitigate a potential impact like noise, traffic, parking then it should be the same for a wedding. Generation of traffic trips or parking demand is not based on the type of event – a wedding is the same as any other banquet event; a noise study is based on the number of participants, time of day, distance from sensitive receptors; water and sewer demand is based on occupancy, not event type. Nothing supports that a 5013C company gathering or a wedding increases potential for future conversion of A-1 zoned lands to commercial or industrial zoned categories or cause differing levels of impact.

- f. There is no substantial evidence in SUP administrative records of previously approved SUPs that ties land use restrictions to potential impacts if the restrictions had not been put in place. Such restrictions have never been proven necessary because there are no baseline studies. There are ample numbers and types of feasible measures to mitigate alleged impacts to a level of insignificance. The requirement to conform to multiple “Standards” in each SUP cannot be used as the basis to deny the applicants from seeking accessory uses that were arbitrarily excluded from the LUC.
- g. There are routinely applied and available measures based on technical reports that are used to enable wineries to apply for and gain approval of accessory uses not otherwise allowed by right by mitigating the potential impact. If the concern is noise beyond the property line from a wedding, then a noise study can establish the maximum levels at the quietest times of day or night that cannot impact adjacent uses and owners beyond the property lines. Traffic circulation and intersection studies can identify and mitigate peak hour capacity or circulation impacts and be mitigated by conditions to use shared van, buses, or limit event sizes if such shared transportation is not feasible or available. Evacuation studies can be prepared by the Township to verify the cumulative number of special events like weddings that may be able to take place along specific lengths of the main road so as not to allow more events than evacuation routes can accommodate safely. Mitigation for overuse of capacity is easily achievable with conditions to require shared bus/van rides and limit single vehicle passenger trips.
- h. Land use mitigation measures can also be used synergistically with conservation easement or development rights transfer programs to mitigate loss of farmland to non-agricultural commercial, residential, or industrial uses. The arbitrary manner in which the Township has established outright prohibition against weddings, events, restaurants, or food services – is financially and socially impactful to the farmers/growers/winery operators and the public who seek use of Township agricultural areas for more than just watching crops grow or buying produce at roadside stands. Deprivation of the rights of landowners to utilize their agricultural lands fully and responsibly is the result of poorly and arbitrarily established and administered land use regulations. Deprivation of the public’s right to participate in public and private events on agricultural lands is a direct and contrary affront to the policies of past and current governors to promote agritourism. Recent 2022 amendments to the LUC have not satisfied vested agricultural sector stakeholders. Their long-term well-articulated concerns call for a top-down LUC rewrite to promote financial stability, and pivot towards non-impactful accessory agricultural land uses.

I am the author of this Plaintiff’s expert witness report.

By: 

Date: August 28, 2023

David E. Moss

Summary of qualifications

- David Moss manages a consulting firm specializing in zoning and building permits, site acquisition, architecture and engineering, and constraints analyses for the real estate, insurance, and telecommunications industries. The firm employs planners, architects, engineers, brokers, graphics-simulators, construction managers, and permitting specialists skilled in all areas of project planning, land use entitlements, environmental compliance (Federal, State, Local) and agency approvals of discretionary and ministerial entitlements.
- Dr. Moss has 40+ years of hands-on experience, is formally trained in natural sciences, engineering, and business, and manages projects from feasibility analyses to construction. The firm has participated in due diligence, planning and development of hundreds of projects in rural and urban areas on public and private lands.
- The firm has on-going assignments with the real estate developers, the telecom/EV site management industry, TV - radio broadcasters, and wireless carriers. Projects range from urban infill to rural green-field development and adaptive reuse.
- Dr. Moss takes on a limited number of projects as an expert witness – either by direct request or referral from companies like TASA. The projects tend to require a diverse set of practical technical and research skills for which no one scientific, environmental or land planning/zoning-land use planning discipline will suffice.

Professional experience

1987 – present - David Moss & Associates, Inc., Santa Monica, CA

President

- Planning zoning, building permit entitlements for real estate development and telecommunications/broadcast projects
- Senior Consultant and expert witness for the real estate, broadcast, telecommunications, and insurance industries

1984 – 1987 Engineering Science/Parsons Pasadena, CA

Senior Scientist/EIS-EIR Compliance

- Manage large-scale planning and environmental permit entitlements including offsite mitigation outside the region where projects are proposed, and multi-state pipelines across four states in rural, ultra rural and populated public and private lands.

Education

- BA, Biological Sciences, Univ. of Delaware, 1976**
- MA, Marine Studies, Univ. of Delaware, 1979**
- D. Env., Env. Science and Engineering, UCLA, 1989**
- MDE Certificate, UCLA Anderson School of Management, 1996**

Conference speaking

- Guest Speaker, PCS Conferences – 1996 – 1999
- Shorecliff – PCIA Telecommunications Conferences
- Law Seminar International
- SCANPH Affordable Housing Moderator
- USC Infill Housing Seminar Series
- San Gabriel Council of Governments, Implementing Telecom Regulatory Controls

Publications

- Oil Spill Contingency Plan, Delaware Department of Natural Resources, State of Delaware, 1979
- Administration of Delaware's Wetlands Act, College of Marine Studies, Univ. of Delaware Morris Library, 1979
- Historic Changes in Terminology for Wetlands, Coastal Zone Management Journal, Vol 8, No. 3, 1980.
- Environmental and Regulatory Aspects of Port Development in LA Harbor: the Pactex Example, UCLA, 1989
- Biologic, Traffic, Land Use, Cultural Resource, Air Quality, Environmental Editor, Ministerial-Discretionary Land Use and Environmental Entitlements, Associated with 36 years as principal, David Moss & Associates, Inc. 1987-Present.