

**Rebuttal to the Expert Report by  
Thomas L. Daniels, PhD.**

**September 11, 2023**

**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)**

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## Introduction

This document provides opinions rebutting the Expert Report dated August 28, 2023, by Thomas L. Daniels, PhD.

Dr. Daniels presents many unsupported thesis statements and opinions regarding main and accessory agricultural land uses. These include but are not limited to the following:

1. That the growing and processing of grapes is an industrial and not an agricultural main land use.
2. That local- and agritourism-serving roadside farm stands are “defacto rezoning” because it is an inappropriate commercial land use in the A-1 zone.
3. The Township zoning code should not be amended to enable applications to be submitted and processed for accessory agricultural land uses because this would “constitute rezoning of agricultural land”.
4. Conditions of approval are either not feasible to implement or not available to mitigate potential impacts of reasonably sized accessory agricultural land uses even if technical land use and environmental studies are part of the entitlement process.
5. That none of the following accessory agricultural land uses should be allowed even with an SUP entitlement process in the Township’s A-1 zone because they are commercial and not agricultural: weddings, non-industry events/banquets, food service, appropriately sized tasting rooms, and retail sales as a branding opportunity side by side with the on-site tasting and sale of wine by the bottle.
6. That approval by right or by SUP of accessory agricultural land uses will impact the rural agricultural character and be contrary to the Township Master Plan and certain State regulations.
7. It is not possible to have accessory agricultural land uses operating in the Township without causing irreparable impacts to road capacity and farm vehicles during harvest and non-harvest periods of time.

## 1. Rebuttal Opinion: Introduction Section (Pg 4)

- a. **Statement:** Plaintiffs' claims isolate a handful of provisions that limit their ability to engage in "unfettered commercial activity" in an agricultural zone.
- i. **Rebuttal:** The Township has been non-responsive to the reasonable requests of Plaintiffs over decades to amend the zoning code to enable by-right or discretionary entitlement processing for a limited number of types of accessory uses - weddings, banquets, food service and associated – or branding-related retail sales.
  - ii. **Rebuttal:** Prior to filing the lawsuit Plaintiffs never argued or claimed they should be provided by-right entitlement for unfettered commercial accessory land uses in the A-1 zone. They were amenable to entitlement processing based on the use of technical environmental and land use studies to identify site- and regional-specific measures to mitigation potential impacts like noise or traffic to a level of insignificance.
  - iii. **Rebuttal:** Use of the term "unfettered commercial activity" is a flawed starting point for expert's report. Up until the filing of the lawsuit Plaintiffs were seeking narrowly focused zoning code changes. Code changes that would have enabled the Township to process either administrative site plan or discretionary zoning entitlement requests based on site-specific implications of clearly defined types and sizes of accessory uses. The Township historically refused to allow customarily-associated accessory agricultural uses to have options for entitlement processing despite willingness of Plaintiffs to support such requests with technical environmental and land use studies and agree to available measures to mitigate potential impacts to a level of insignificance.
- b. **Statement:** "I further explain the importance of farmland land preservation, its relationship to public health, safety and welfare ... ."
- i. **Rebuttal:** A second flawed starting point for expert's report is that retirement and/or transfer of development rights (PDR programs) is the only viable means of preventing the unrestricted implementation of accessory land uses that the Plaintiffs are seeking.
  - ii. **Rebuttal:** Plaintiffs do not oppose and no part of the lawsuit questions the right of the Township or the potential viability to use and promote retirement/transfer of development rights or other preservation program methods. Dr. Daniels is recognized for contributions to such programs in Lancaster County, PA. The necessity to rely on those types of preservation programs doesn't negate the viability or utility of the Township also having a zoning code that enables review of accessory agricultural uses and setting site-specific conditions of approval to mitigate potential impacts to traffic safety, road capacity, road safety, parking, noise, or minimum land areas for growing vs maximum areas for ancillary agricultural uses. Such entitlement programs are routinely available even the handful of other jurisdictions that Dr. Daniels has considered.
  - iii. **Rebuttal:** The Township's zoning code is out of sync with clearly stated goals in the Master Plan - to promote non-impactful use of A-1 zoned parcels, providing options to enhance the financial viability of a main agricultural use (grape growing and processing) while maintaining the quality of life and carrying capacity of the Township. There is no viable argument that there cannot be side by side use of preservation programs that retire or transfer development rights with zoning entitlement processes that promote the Master Plan goals and well documented demand for agritourism. It is not an either-or proposition.

## 2. Rebuttal Opinion: Background B – Land Use Planning and Zoning in General (Pg 7)

- a. **Statement:** The farm stand may also de facto rezone its location from agricultural to commercial without government approval by creating a primary commercial use in an agricultural zone. This would also create spot zoning ... .
- i. **Rebuttal:** This is a preposterous opinion considering how routinely there are associated farm stands along roadsides or onsite of agricultural lands and in rural areas. This is like an opinion that garage sales in residential areas are defacto rezoning to retail commercial. The opinion that a roadside farm stand usurps and becomes the main use on parcels with tens of acres of crops is ludicrous at best. This is especially true considering Michigan’s Right to Farm Act explicitly allows roadside stands and preempts any local governmental attempt to preclude them.
  - ii. Farm stands are commonly associated uses in agricultural areas nationwide and local – they have not been perceived by the Township as a defacto rezone that must be stopped at all costs. Instead, farm stands are “use by right” to sell local and regional produce and should, if they want, include non-alcoholic beverages, locally made sandwiches and salads for locals and tourists to enjoy – whether going to the beach or to work. If Dr. Daniels were on the Township Board, he would disallow them – on the same misplaced basis that he considers farm stands and accessory agricultural land uses as inappropriate.

## 3. Rebuttal Opinion: Background C – Farmland Preservation (Pg 7)

- a. **Statement:** Farmland preservation can help to retain land in agricultural use ... .  
When an agricultural area loses farms, the volume of agricultural production falls putting financial pressure on both the farm support businesses and the remaining farm operations.
- i. **Rebuttal:** Dr. Daniels does not and cannot provide evidentiary metrics to support that grape-growing and processing wineries cause the loss of farms. Nor that entitling wineries to implement the four or so desired categories of accessory agricultural land uses will reduce land in agricultural production.
  - ii. **Rebuttal:** Advances in efficiency of crop growth, coupled with proven need to lay growing areas fallow and change crop types from time to time is well documented and the PTP’s expert has ignored these facts. Add climate change impacts that force farmers out of business and market changes for local crops like the tart cherry, and then wineries would be credited for maintaining Township areas that would otherwise have lost farm growing acreage and would no longer be farmed.
  - iii. Dr. Daniels inadvertently makes an excellent case for promoting accessory agricultural land uses. A financially viable winery depends on the ability to have options to entitle accessory uses. Operation of successful grape growing, processing and accessory uses takes away the financial pressure on both the farm support businesses and the remaining farm operations that Dr. Daniels is concerned with.
    - iv. **Rebuttal:** Wineries are farms and are directly responsible for retaining land in agricultural use .
- b. **Statement:** Payment for Development Rights (“PDR”) programs and agricultural zoning are important and complementary tools ....”.
- i. **Rebuttal:** Among the Townships’ most frequently quoted goals is preserving rural character. The wineries do not oppose the local PDR program and accept zoning as a complementary tool. They do oppose the complete shutdown supported by the PTP’s expert of codified options to apply and process entitlements for a relatively small list of accessory agricultural land uses.

- ii. **Rebuttal:** The township has 17,755 acres and 6,616 residents or 2.9 residents per acre. Michigan overall has 3.6 residents per acre and there are 30 states that have lower density than Michigan. The Agricultural Protection Zone identified in the PT Master Plan comprises 9,861 ac (53%) of the Township – 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). The land area under permanent conservation easements or other mechanisms that limit development potential is 6,470 ac (36%) of the total Township area. Dr: Daniels has not provided any statistical land use metric applicable to the Township to support outright prohibition of accessory agricultural land uses on mere speculation that entitlement of such uses will lead to unfettered commercialization of A-1 zoned property or impact the rural character of the Township.
  - iii. **Rebuttal:** Wineries are farms and are directly responsible for retaining land in agricultural use.
- c. **Statement:** “...Local PDR programs help stabilize the state’s farmland base to limit non-farm development... .”
  - i. **Rebuttal:** Dr. Daniels cannot provide proof that the size of the Township farmland base is endangered by current or proposed operations of grape growers, processors, or wineries even if accessory agricultural land uses can be entitled through an amended zoning code. The Plaintiff’s goal is to farm, process, sell and fully utilize their parcels for agricultural and accessory agricultural land uses. They do not seek to build housing, large hotels, factories or out of scale or environmentally impactful facilities for food service, banquets, and weddings.
  - ii. **Rebuttal:** The Township has a narrowly focused goal of maintaining rural character. Dr. Daniels offers nothing concrete to back up his opinions that rural character would be irreversibly altered towards more dense development or higher density residential if wineries are allowed to seek site-specific accessory uses – even if appropriately conditioned to prevent the loss of such character.
    - iii. **Rebuttal:** Wineries are farms and are directly responsible for retaining land in agricultural land use.

#### 4. Rebuttal Opinion: Background C – Farmland Preservation (Pg 8)

- a. **Statement:** The PDR programs enabled farmers to enhance farming operations... .
  - i. **Rebuttal:** Enhancement of farming operations includes increased crop production, varying crop types, utilizing more sustainable and regenerative methods; therefore, contrary to Dr. Daniels opinion that only PDR programs are effective, wineries nationwide achieve the same end goal and have more stability into the future when they are allowed to have appropriately sized and conditioned accessory agricultural land uses.
  - ii. **Rebuttal:** Wineries promote and enhance farming operations. Higher housing density, or free-standing restaurants or hotels that are not associated with agricultural land use are not proposed by wineries and do not achieve the same goal. The Plaintiffs have sought only to collocate and simultaneously operate uses that enhance farming operations.
  - iii. **Rebuttal:** Wineries are farms and are directly responsible for retaining land in agricultural land use.

#### 5. Rebuttal Opinion: Background C – Farmland Preservation (Pg 9)

- a. **Statement:** PDR alone keeps land from being developed.... . Agriculture as practiced today is essentially an industrial land use involving heavy machinery and chemical sprays and fertilizer to produce food and fiber.

- i. **Rebuttal:** This opinion by Dr. Daniels reflects a bias towards PDR programs, against accessory uses, and a narrowly focused and unrealistic goal to have the Township and other rural areas retire and severely limit by-right uses in rural agricultural lands. Even to the extreme of barring agriculture from A-1 zoned parcels. And without any recognition of the need of property owners to have rights to utilize their lands consistent with the applicable agricultural zoning designation.
- ii. **Rebuttal:** There is no basis to support the opinion that wineries and winery/grape production/processing on A-1 zoned property is inconsistent with the A-1 zone.
- iii. **Rebuttal:** Dr. Daniel's opinion that land should be retired hinders agricultural preservation.

#### 6. **Rebuttal Opinion: Background C – Farmland Preservation (Pg 9)**

- a. **Statement:** A key distinction in an agricultural zoning ordinance is what constitutes an agricultural use as opposed to a commercial use of the property ... .
  - i. **Rebuttal:** The Township zoning code is silent that the legislative intent includes that Plaintiff's proposed accessory uses are commercial. The ordinance restricts, precludes, and eliminates potential for any of the desired uses based only on the goal to maintain rural character.
  - ii. **Rebuttal:** There is an internal conflict between Dr. Daniels's opinions presented in the report. He states that agricultural land use or processing is an industrial land use but doesn't explain on what basis an industrial use is by right in the A-1 zone. He also reasons that [seasonal] operation of a farm stand selling produce from on-site or regional sources – is commercial and a defacto rezoning of the land. Dr. Daniels has a significant bias against winery-based land uses in A-1 zoned Township property except the imposition of PDR or open space easement programs.

#### 7. **Rebuttal Opinion: Background C – Farmland Preservation Table 1 (Pg 9)**

- a. **Statement:** The Township Preservation Program since 1994 has set aside 3,347 ac by preservation.
  - i. **Rebuttal:** This fact needs to be examined in regard to unintended reduction of revenues to the Township from local taxes, from agritourism, and for the opportunity cost of decreased future use based on the extent of restriction associated with each PDR agreement.
  - ii. **Rebuttal:** Plaintiff and Township goals should be but are not aligned. Retirement of development rights is not the only way to assure preservation of farmland. This divide is not mutually exclusive and need not be supported by Dr. Daniels by claiming that the only acceptable preservation mechanism is a PDR program coupled with impossibly restrictive codes preventing wineries from entitling reasonably sized accessory agricultural uses in the A-1 zone.

#### 8. **Rebuttal Opinion: Background D – Agricultural Zoning in Major Wine Producing Regions (Pg 10 et seq)**

- a. **Plaintiff Expert's Opinion:** This section has many flawed statements and the following rebuttals are presented:
  - i. **Rebuttal:** The growing, harvesting and processing of grapes is an undifferentiated activity from other crops. Dr. Daniels cannot support his opinion that wine grape agriculture is completely different from other types of farming. Wine grapes – like all agricultural crops require storage areas, staging areas, vehicles, sprays, and use of public roadways. And all lands under agricultural use are contiguous or close to completely different uses - residential, commercial, and industrial.

- ii. **Rebuttal:** A winery operating in compliance with the zoning code is not impacting offsite nonagricultural land uses. Every agricultural use must comply with noise regulations, setbacks, maximum structure heights, and lighting limitations for glare and shadow. Dr. Daniels is unwilling to agree that measures are routinely identified in land use and environmental studies to mitigate site-and regional impacts as part of the discretionary permit process.
- iii. **Rebuttal:** The growing, harvesting and processing of grapes is not an “industrial process”. The growing and harvesting is undifferentiated from any other crop.
- iv. **Rebuttal:** Dr. Daniels states more than once that the Plaintiffs operate industrial land uses in the A-1 zone. The wineries in the Township are much smaller than large-scale growers/processors whose acreage is in the tens of thousands – not the hundreds or less in the Township. And even large scale grow and process operations like EJ Gallow on 92,000 acres are not defined as industrial.

## 9. Rebuttal Opinion: Background D – Summary (Pg 14)

- a. **Statement:** “[A]gricultural zoning in these four major wine-producing jurisdictions promote agricultural preservation. The ordinances that provide for special uses recognize the potential for additional site-specific considerations and conditions. Further they restrict agricultural land uses that otherwise turn agricultural processing facilities (wineries) into primarily commercial retail stores . . . . Finally, they ensure agricultural focus through limited production capacity through requirements for the use of local grapes and size of wineries which further supports the local distinctive AVAs”
  - i. **Rebuttal:** Narrowly selecting only four wine-producing and winery-centric areas leads to incomplete and faulty opinions. None of the jurisdictions mentioned regulate grape-growing/processing in agricultural areas as being needed prevent defacto conversion into retail stores. A more thorough examination of zoning codes in other areas supports that accessory agricultural land uses such as weddings, banquets, family events, food service, tasting rooms and retail sales are either entitled by right or by special use discretionary permits. There are many wineries in Napa Valley and Sonoma County that host weddings and non-industry banquets. Some operated under prior SUPs, and some by vested rights. On behalf of the Plaintiffs I verified by code research, personal discussions with municipality zoning staff, and through online review of the dozens of companies that arrange and coordinate weddings in winery areas, that Township is in the minority of wine growing/processing and winery-centric areas by having a zoning code that has no pathway to promote local- and regional serving accessory agricultural land uses. Example municipalities whose zoning codes have use by right and discretionary entitlement options for the accessory uses that the Township excludes are Louden County, VA, Ithaca, in the Finger Lakes area of NY, Walla Walla County, WA, Willamette Valley, OR, Douglas County, OR, Santa Ynez, CA, Napa, CA and the Santa Monica Mountains, Los Angeles County, CA.
  - ii. **Rebuttal:** In addition to reviewing codes and speaking directly to municipal zoning staff in multiple areas, I also review onsite companies that specialize in coordinating weddings and non-industry events – reunions, banquets, and celebrations. This additional type of review solidified and supported the opinion that many wineries host these events – particularly in Napa/Sonoma County where Dr. Daniels claims otherwise (theknot.com; asavvyevent.com)
  - iii. **Rebuttal:** SUP entitlement processes – both by right and discretionary approval are routinely part of local zoning codes nationwide for the exact short list of accessory agricultural land uses that Plaintiffs were forced to file a lawsuit to have opportunities to permit on A-1 zoned lands where growing and processing are already by right. (see Rebuttal Par. 9 a I above).

- iv. **Rebuttal:** Many wine-centric areas of the nation allow use by right or by SUP entitlement the narrow list of users that Plaintiffs sued for. Dr. Daniels incorrectly summarizes the results of alleged research in four jurisdictions. These jurisdictions do not prohibit entitlement requests and processing of the uses Plaintiffs seek. And in allowing use by right or discretionary entitlement, the cited four jurisdictions do not support Dr. Daniels' findings that if entitlement options are implemented this will (a) lead to unfettered and unregulated proliferation of commercial uses, (b) constitute spot rezoning, (c) reduce the acreage of A-1 zoned land under cultivation, (d) reduce production per acreage of farmland, and (e) alter and impact rural character.

**10. Rebuttal Opinion: Background E - Brief History of Land Use Planning, Agricultural Zoning, and Farmland Preservation in the Peninsula Township (Pgs. 14-15.)**

- a. **Statement:** The first zoning ordinance [was] in 1972. In the late 1970s with the pending sale of 500 ac at the northern end of the Township residents became concerned about the threats of large housing developments and scattered homes that could rapidly change the rural character... .”
  - i. **Rebuttal:** The legislative intent in the 1972 ordinance was to establish the Township's first codified land use regulations. The growing/processing of grapes and operations of wineries were not the main impetus nor were wineries yet targeted to curtail and prevent accessory uses because such accessory uses were not yet demanded by the grape growing/winery-operating landowners.
  - ii. **Rebuttal:** Plaintiff's lawsuit doesn't seek rights to densify and obtain zone changes to entitle residential development. Plaintiffs are aligned with the 1983 Township Master Plan, and subsequent amendments to promote open agricultural lands, agriculture as the main land use, preserve agricultural lands, and preserve and protect the unique and scenic character of Old Mission Peninsula.
- b. **Statement:** The Peninsula Township drafted an Agricultural Preservation Plan (“APP”) ... in 1994”. In 1994 Township voters passed Michigan's first PDR program ...and have twice renewed the APP in 2003 and 2022 reflecting the popularity of the .... Township's policies to maintain farmland and agriculture.... .”
  - i. **Rebuttal:** Plaintiff's support the PDR program and have the right to participate or not. Not all find it necessary or prefer not to transfer or diminish land use rights that would reduce the amount of their lands under active agricultural and processing uses, reduce the size of their surface rights, nor increase the amount of covenanted open space.
  - ii. **Rebuttal:** There is no conflict between the Township operating and promoting the PDR program, and Plaintiff's clearly articulated desire and need to have entitlement options for accessory agricultural land uses. And, Plaintiffs agree that entitlement should be based on technical land use and environmental studies and the imposition of reasonably applicable measures to mitigate impacts to or from amplified sound, noise in general, visual resources, parking ratios, frontage requirements, driveway/circulation dimensions, numbers and sizes of wedding and other events, numbers of guest allowed to attend a winery event, size of roadside produce stands, appropriately sized restaurants and food service facilities, and hours of operation and cumulative impacts of simultaneous accessory agricultural land uses in close of distant proximity.
  - iii. **Rebuttal:** The Township is characterized by its rural character. A handful of facts support this. The Agricultural Protection Zone identified in the Township Master Plan comprises 9,861 ac (53-56%) of the total Township – 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). The land area under permanent conservation easements or other



mechanisms that limit development potential is 6,470 ac (36%) of the total Township area. The residential density of the Township is a mere 2.9 persons/ac.

- iv. **Rebuttal:** None of the grape-growing/processing and winery operators are seeking to develop or sell land for non-main agricultural uses. The Plaintiffs goals are aligned with the Township Masterplan, the Township PDR program, and the stated policies to “protect, preserve and enhance farmland and agriculture in the Old Mission Peninsula”.
- v. **Rebuttal:** Unfortunately, Plaintiffs were unable over the course of decades through countless committee meetings, to have the Township amend its zoning code to be consistent with its Master Plan and PDR policies. Leaving no option but to file a lawsuit. This lawsuit is the only potential for relief from poorly conceived exclusion of an entitlement pathway to review and reasonably condition accessory agricultural land uses. The PTP’s expert has presented nothing in this section of his report to support any allegation that the Plaintiffs have been or will be responsible for undermining Township goals and policies. In fact, they are staunchly seeking remedies that further their goals to enhance and protect farmland, promote agritourism, and prevent residential densification.
- vi. **Rebuttal:** PTP members favor PDR programs and found an expert aligned with their thinking. However, a PDR program is not the only way to preserve agricultural land and does not preempt all other uses of land.

#### **11. Rebuttal Opinion: Background E - Brief History of Land Use Planning, Agricultural Zoning, and Farmland Preservation in the Peninsula Township (Pgs. 18-19.)**

- a. **Statement:** Properties on which the Township has purchased the development rights should remain substantially undeveloped in order to protect the agricultural use. ”
  - i. **Rebuttal:** This opinion indicates that Dr. Daniels believes that all development is harmful to the rural character and is misaligned with the Township Master Plan. This opinion is absolutely unsupported and untrue. The Township has readily available means to implement a local-serving zoning code amendment to protect rural character, enhance and preserve agricultural land use and maintain or increase the acreage of lands under active cultivation. Such amendment is desirable to give Plaintiffs and independent farmers the opportunity to add accessory uses that do align with stated goals and policies, enable agricultural main uses to pivot to other crops, implement regenerative and more sustainable methods, and enhance the financial viability of operations well into the future.
  - ii. **Rebuttal:** The PTP’s expert wrongly believes that the only approach that the Plaintiffs and other farmers should have is to get in line and agree to sell development rights as if the highest and best use of their lands is open space minimally altered by crop growth. Dr. Daniels has dedicated a large part of his non-teaching career to promoting PDR programs. These programs and his opinions stated in his report indicate that he does not believe that wine growing and processing is a main agricultural land use that must have entitlement options to stay current with demand for agritourism, experiment and implement with more sustainable methods, and not have to sell development rights or consolidate their holdings.
- b. **Statement:** The strategy of the Township PDR program has featured the preservation of farmland with scenic views of Grand Traverse Bay. The strategy has attempted to accomplish two goals at one time: 1) preserve the scenic views ..., and 2) preserve agricultural land in order to keep the fruit industry alive and thriving on the Peninsula.
  - i. **Rebuttal:** Preservation of scenic views can also be accomplished with mitigated impact on future land use by entitlement review processes that requires an expert’s analysis of the scope of “development” proposed – whether brick and mortar or organic improvements. There is proven capability nationwide for designing brick and mortar or organic improvements with no unmitigated impact on scenic

resources. Simply closing out the potential to apply for such development rights is unacceptable to those in the farming community that do not want to retire lands with the PDR program or curtail future opportunity to alter what they do and how they do it. Most importantly, those wineries that own land with scenic views know that this site-specific resource enhances potential for implementing compatible and therefore lucrative accessory uses. They do not and would not choose to impact views that along with their product and rural character – are the reasons why a third party would want to utilize accessory uses on those properties.

- ii. **Rebuttal:** The absolute prohibition in the Township zoning code against the accessory land uses sought by Plaintiffs is contrary to Dr. Daniels' reiteration of the goal "to keep the fruit industry alive and thriving". This goal cannot be met by the PDR program. The single-oriented land use goal of only growing crops is not financially viable in the short or long-term for the Peninsula's wine grape growers. They will always need some structures and infrastructure even for that narrowly oriented use. The market and climate impacts – well known in general for affecting the Peninsula – and well documented in Plaintiff's expert's report – cannot be mitigated by the PDR program. The Plaintiffs need entitlement wiggle room to promote agritourism, hold events, serve food. They cannot be expected to utilize monies paid now discounted to present value that tie their hands forever to not be able to pivot with new methods or crops, nor to additional surface-dependent accessory uses.

## 12. Rebuttal Opinion: II – Analysis of Challenged Zoning Provisions (Pgs. 21-22)

- a. **Statement:** The A-1 Agricultural Zoning district is intended to ... stabilize existing areas within the Township which are presently being used predominantly for farming purposes yet recognize there are lands within the district which are not suited to agriculture ... ."
  - i. **Rebuttal:** Stability for owners includes financial viability. Grape growers/processors cannot rely on current climate and market conditions and forego options to pivot crops, adapt and embrace updated farming techniques, and enhance use underutilized areas with accessory agricultural land uses.
  - ii. **Rebuttal:** The Plaintiffs are not seeking rights to develop non agriculture or accessory agriculture land uses on lands unsuited for agriculture. If there are lands unsuitable for agriculture zoned A-1 then there should be non-PDR entitlement options for the community and Township to consider other uses that are not impactful to the adjacent owners, do not reduce the per acre crop production, nor reduce the acreage of land suitable for agriculture.
- b. **Statement:** Peninsula Township's roadside stand provisions are an example of how it seeks to allow some degree of retail activity. It .... provides for the limited seasonal sale of agricultural and related products but not to encourage the size of investment in equipment that would require a commercial zone."
  - i. **Rebuttal:** The limited control on this appropriate accessory land use – which arguably is not accessory but part of the main land crop production use – is absurdly narrowly defined and akin to allowing residents to have lemonade stands or a table out front where they sell produce from their gardens. It is an excellent example of how the Township has gone out of its way to dictate and control what farmers may do on their land. If there is a bumper crop a grower is not allowed to use a forklift to move heavy boxes, nor install commercial-sized scales to promote some wholesale transfers to local restaurants or hotels.
  - ii. Michigan is the largest asparagus grower nationwide. The Township has crafted its code to prevent a roadside stand from selling asparagus that has been deemed to be from outside a "region".

### 13. Rebuttal Opinion: Use By Right – Farm Processing Facility (Pg 23)

- a. **Statement:** A Farm Processing Facility is intended to include retail and wholesale sales of fresh and processed agricultural produce but is not intended to allow a bar, or restaurant ...and does not include permission to hold "weddings, receptions and other social functions for hire".
- b. **Statement:** A Winery Chateau is a special use.... [that] requires a 50-ac minimum, ... but at least 75% of the site must be used for active production of crops that can be used to make wine. "...[S]upport uses and accessory uses are permitted so long as they are no greater than reasonably necessary to serve the principal use .... for the registered guests only... not greater in size or number than those reasonably required for the use of registered guests. Guest Activity Uses include ... meetings of local non-profit groups and agriculture-related meetings. Weddings, wedding receptions, family reunions are excluded. A discretionary [permit] decision whether to approve a special land use requires a statement of findings and conclusions ... which specifies the basis of the decision and any conditions imposed".
  - i. **Rebuttal:** Prior to filing the lawsuit Plaintiffs supported implementation of a SUP entitlement process where findings and conclusions based on technical site-specific land use and environmental studies would determine appropriate limits. Such an approach was never embraced by the Township after years of unsuccessful participation in meetings for the community and stakeholders to come together.
  - ii. **Rebuttal:** There should never have been or continue to be arbitrarily established limits on what kind of gathering is permissible. The PTP cannot defend that a wine industry event is less impactful than any other type of gathering. If the concern is noise, or sound, or parking – then there is no credible argument that industry events are less impactful. When a planning board anywhere considers an SUP for a hotel, restaurant, or nightclub – they don't have authority to require a specific hotel brand (Marriott vs Choice), restaurant (Thai vs. Mexican), or nightclub (Latin vs. line dancing). The authority is limited to considering potential impacts – the same ones that are associated with any gathering – parking, noise, traffic, visual impacts, and the numerous others stated in other rebuttal statements herein by Plaintiff's land use expert.
- c. **Statement:** Limiting accessory uses like food service, marketing, and retail sales; and limiting production capacity, including through building size and grape source requirements are common practice in the zoning ordinances of the leading grape and wine producing regions ...."
  - i. **Rebuttal:** The Township has turned a blind eye towards the reasonable requests of the Plaintiffs as farming stakeholders to have entitlement options to seek accessory uses by right or by discretionary review. The filing of the lawsuit was unavoidable after decades of being unable able to convince the Township and at that time individual community members that later joined together to form the PTP – to update the zoning code.
  - ii. Dr. Daniels opinion regarding common practice is not supported if one undertakes a thorough review of a larger number of zoning ordinances in grape and wine producing regions (See Par. 9 a I above). He has arbitrarily chosen only four jurisdictions and misinterpreted their codes. The Township has had 51 years to review, research and adapt regulations that promote rural character and reflect the need for Farm Processing Facilities and farms to thrive into the 21<sup>st</sup> century.

- d. **Statement: B: How the Peninsula Township Zoning Ordinance Promotes Agricultural Preservation - Numerous Opinions (Pg 25)**
- i. **Rebuttal:** The governmental interests in enacting the zoning ordinance have not kept pace with the reality that market and climate change requires that wineries and farms in general must have the opportunity to implement appropriately sized, non-impactful accessory agricultural uses. The handful of such uses that stakeholders have fought unsuccessfully for – may have been unneeded and even inappropriate to consider back in the period of the 1970s when the financial, practical, and branding difficulties of operations were less in flux and more able to withstand prohibitions against the uses that are identified as necessary today in the lawsuit. The sophistication of crafting and administering zoning codes to protect, preserve and enhance land uses in general and in ecologically sensitive areas like the township has become way more sophisticated in the past 51 years and the Township can pick and choose from many templates and work with recognized experts to have their code come up to the 21<sup>st</sup> century (use of ecologically sensitive refers not to environmentalism but to the holistic approach to protecting and enhancing the synergistic occurrence of land uses in a particular geographic area).
  - ii. **Rebuttal:** It has been five decades since the birth of environmental movements and enactment of sweeping federal, state, and local regulations. The PTP's expert has not and cannot prove that there would be irreversible impact to the amount of A-1 zoned land in crop production, the production per acre, or to rural character if the Townships' arbitrarily selected accessory land use prohibitions were overturned in whole or in part and that such uses were able to seek use by right or discretionary SUP entitlements.
  - iii. **Rebuttal:** The Plaintiffs are precluded from seeking entitlements for accessory uses identified in the lawsuit regardless of how large a winery parcel is, and no matter how isolated or distant such parcels are from offsite sensitive receptors. Dr. Daniels recognizes that the larger the size of the parcel in other wine growing municipalities enables use of ratios for entitlement of accessory uses, number, kind, and size.
- e. **Statement: Limits on Food and Beverage Service (Pg. 26)"**
- i. **Rebuttal:** There should never have been or continue to be arbitrarily established limits on what kinds of gatherings are permissible. The PTP's expert knows better than to accept the PTP or township's rhetoric that a wine industry event is less impactful than any other type of gathering.
  - ii. **Rebuttal:** If the concern is noise, or sound, or parking – then there is no credible argument that industry events are less impactful. When a planning board considers an SUP for a hotel, restaurant, or nightclub – they don't have authority to require a specific hotel brand (Marriott vs Choice), restaurant (Thai vs. Mexican), or nightclub (Latin vs. line dancing). The authority is limited to considering potential impacts – the same ones that are associated with any gathering – parking, noise, traffic, visual impacts, and the numerous others stated in other rebuttal statements herein by Plaintiff's land use expert.
- f. **Statement:** Bars, restaurants and catering are commercial uses typically separated from other uses and limited to being located in a commercial zoning district. Exclusion of weddings, wedding receptions, and other private events.... " (Pg. 27)"
- i. **Rebuttal:** The Plaintiffs have been unsuccessful in seeking by right or discretionary entitlements for food-related accessory agricultural land uses customarily allowed by right or by SUP in many wine-growing regions and therefore had to file the lawsuit (See Par 9 a I above).

- ii. **Rebuttal:** Conducting a service to marry people on an A-1 property doesn't require a zone change to ordain and thereby entitle the use as a church – a land use that is clearly not by right or by discretionary entitlement in the A-1 zone.
  - iii. **Rebuttal:** Dr. Daniels doesn't provide data to support his client's position that there are more unmitigated impacts from non-industry events including noise, traffic/road capacity-circulation impacts, parking demand, visual impact, dust, reduction of land under cultivation or production per acre.
- g. Statement: C: The Harm if the Provisions of the Peninsula Township Zoning Ordinance Are Invalidated –** The likely negative effects that adversely impact agricultural operations .... Include the following (**Pg 30**)
- i. **Rebuttal:** “More traffic and greater difficulty in moving farm machinery along roads”: The heaviest farm traffic including those that grow grapes generally takes place in a narrow window during harvesting. Conditions can be implemented to reduce the number, size and types of accessory uses taking place during peak seasonal and farm-related traffic. Mennonites and Amish community folks are out in force in four wheeled horse-driven buggies in Lancaster County all during their narrow harvest periods. Dr. Daniels is well aware of this as am I – given I lived in Lancaster county, and also spent five years at the Univ of Delaware where I often traveled by bike and cars along the Lancaster roads during harvest and non-harvest times. Farm vehicle drivers learn to accommodate locals and tourists.
  - ii. **Rebuttal:** “:The removal of onsite and local grape source limits will allow wineries in the A-1 zone to increase the bottling, labeling and retail sales of wine ... or grapes produced elsewhere to the detriment of local agriculture”: Plaintiffs strive to have financially viable product lines and they do not endeavor to sell and promote non Township wines any more than is financially necessary during times of low production due to climate or other factors outside their control. They are not interested in becoming defacto liquor stores because they have tremendous pride of branding their own product to the extent feasible.
  - iii. **Rebuttal:** “Adverse impacts on traditional farming through higher land prices brought about by the elevation of accessory uses for the sale of goods and services not related to agriculture above principal use of properties for agricultural production”. This opinion is another sales pitch for increasing funding sources for PDR programs. The Plaintiffs are not looking to increase land value except for the purpose of having longer term financial stability. They have every right though to increase the value of the land for the main agricultural use buyer. If they were duplicitous they would be seeking much easier means to increase value – by rezoning to residential.
  - iv. **Rebuttal:** “Undoing the Township's agricultural zoning to allow the sale of goods and services related to agriculture and removing production requirements would likely open up agricultural lands to commercial development. If wineries are allowed to sell a variety of foods and generic items then people on their way to the beaches would start visiting wineries for sandwiches and supplies, not wine tasting.” If commercial land use were the aim of the Plaintiffs, they would be seeking zone changes for hotels and housing, and the sizing of restaurants would be at a scale way beyond what they articulated to provide food for non-industry events.
  - v. **Rebuttal:** “This commercialization of agricultural land would likely push up land prices, posing a threat to active agriculture including some fruit and apple production on the Peninsula”. The financial viability of table grape, fruit and apple production may already be less than wine grape production and processing at times when crop yield per acre and price per ton doesn't support the operating and overhead costs. Dr. Daniels cannot support that the Plaintiffs sole reason for seeking accessory agricultural land uses is for the purpose of increasing land

values nor seeking to upset the balance of land under production of non-wine grapes.

- vi. **Rebuttal:** “This opportunity for conversion from traditional farming to more lucrative land uses like family rentals for private events, and/or residential development will especially become a problem when the current generation of farmers retires because the next generation will be priced out of new entry or expansion due to higher land prices”. . Several wineries have already transitioned to the next and/or have original owners with no interest in exiting by selling to third parties. . Plaintiffs seek only one goal – to have the right to implement accessory uses – never has the goal been to stop the main use of crop production and exit the business of agriculture.


**h. Statement: D: Conclusions – Opinion Paragraphs 1-8 - (Pgs. 31-32)**

- i. **Rebuttal Par. 1:** What are the “considerable resources” that have been invested by the Township. There is no indication they hired local or nationwide experts to craft and amend the ordinances and plans – but rather relied on just a small percentage of their 2.9 residents per acre to set policy. Such ordinances and plans have not kept up with the financial and branding needs of agricultural stakeholders but instead resulted in overly restrictive policies that prevent by right or discretionary review and entitlement of accessory agricultural land uses that are vitally necessary to promote agritourism, branding, local market share of a nationwide wine market, and unreasonably preclude non-industry gatherings and events even though weddings, banquets, and family-oriented gatherings with food service and branding related retail sales are no more impactful.
- ii. **Rebuttal Par. 2:** Entitlement based on site-specific and appropriately sized accessory uses doesn’t correspond to defacto commercial spot zoning nor undermine agricultural production as the primary land use. The primary land use is Farm Processing which by code must have a sizable percentage of the land devoted to crop production with limitations on the sizes of processing operations. The very essence of zoning regulations is to separate incompatible land uses and create buffering that enables quiet enjoyment of differing uses across property lines. The PTP expert is correct there would be irreversible impacts on rural character and on quiet enjoyment on neighboring properties ***if and only if*** the wineries were seeking residential densification of single or multifamily zones, and industrial or commercial land uses unrelated to the main wine grape and wine processing main uses. There is nothing to suggest that the efforts of the wineries in the past decades or the lawsuit scope is for the purpose of hijacking the A-1 zoning regulations. Prior efforts sought the opportunity to propose and entitle accessory agricultural land uses for which measures could be required to mitigate potential land use and environmental impacts to a level of insignificance.
- iii. **Rebuttal Par. 3:** The Plaintiffs are in the primary business of maintaining farmland in active agricultural production. The PTP’s expert has no basis to claim that the Plaintiffs are allowed reasonable economic use of their properties because some wineries operate “principally agricultural businesses for decades.” The Plaintiffs must always plan for the future to avoid impactful market and now climate changes. They must be allowed to have accessory uses to brand, market effectively, and compete locally and regionally. Every state in the union now has wineries and wine production. Competition for agribusiness is steep and the Township has somewhat of an advantage but partially only seasonally to attract nonresidents seeking the “Township/Northern Michigan experience”. It is unreasonable for a land use expert to claim without a basis that things are fine the way they are and any change will have disastrous environmental and land use consequences.

- iv. **Rebuttal Par. 4:** There is nothing haphazard in appearance or methodology about the way that other wine producing areas have able to entitle and allow operation of accessory agricultural uses. A well-crafted zoning code amendment would have mitigated this unfounded concern long ago and enable the Township to experience the reality that the current excluded accessory uses could have been implemented without unmitigated impacts and without altering rural character. The opinion regarding a push-up in land prices is unfounded and unsupported. Land prices historically increased dramatically during the pandemic as did demand for residential housing. There has always been an opportunity to solidify the financial security of agricultural growers and wineries by entitling accessory uses. Such an opportunity is even more important post-pandemic to enable farmers of all crops to have the stamina and determination to not sell lands for nonagricultural development. Promote the wineries to have accessory uses you promote the preservation of agriculture, open space, and rural character.
- v. **Rebuttal Par. 5:** Concerns regarding traffic impacts are purely speculative and without basis. Conditions on individual or cumulative traffic impacts from the operation of accessory uses during harvest times can be mitigated to a level of insignificance by engaging traffic engineers to analyze both the individual and cumulative impacts associated with discretionary review of currently prohibited accessory uses. There is no proof that harvest-related traffic will occur at times or days of the week when accessory use traffic occurs. In areas with limited road capacity or increased parking demand, operators of accessory uses can be conditioned required to utilize shared rides to reduce individual vehicle trips to avoid impacts to intersections and road capacity. If a public school can use ride shares, carpools and buses to pickup and drop-off 1,200 students in 15-30 time periods in residential communities, the same must be true for wineries operating in the Township with much lower land use densities and thereby can be allowed to have banquets, weddings, food service, industry, and non-industry events as long as there are studies in advance that identify peak hour impacts and require effective conditions of approval.
- vi. **Rebuttal Par. 6:** Entitlement of accessory uses is in no way synonymous with upzoning. Upzoning is a technical land use term that relates only to change from say R1 to R3 to allow much greater height and density, or M1 to M3 to allow much heavier and noisier equipment and processes. Using the term upzoning is just another way of demonizing the effort of Plaintiffs to have a process for the Township to consider the potential merits and impacts of accessory uses and utilize findings and conditions – identified and referenced as the mechanism by the PTP expert in his report, as the means to stabilize and enhance the potential that owners will continue their agricultural main land use.
- vii. **Rebuttal Par. 7:** The entitlement of accessory agricultural land uses on A-1 zoned properties is wholly inconsistent with denotation of “upzoning” or “re-zoning”. There is no merit to the PTP expert’s argument that the wineries seek to put the camel’s nose under the tent and promote accessory agricultural land uses side by side with main uses of production and processing as a means of defacto zone changes. They have always understood that the size, hours, noise and traffic generation, and types of non-industry events would depend on site specific analyses on- and off-site impacts and acceptance of reasonably resultant conditions to mitigate land use and environmental impacts. The plaintiffs don’t appreciate the arbitrary limits already in the code, and never expected even more arbitrary limits for accessory uses without use-specific entitlement review.

viii. **Rebuttal Par. 8:** Dr. Daniel's report seeks to promote and speculate that that PDR and other development retirement programs are the only effective means of preserving rural character, farms, and agricultural production. The opinions provided throughout this rebuttal document are based on less academic, more practical, and zoning options that would have enabled wineries to enhance their operations, maintain peaceful coexistence with neighbors, and avoid irreversible impacts to rural character. The filing of the lawsuit was the only way to do an end run around the prohibitively restrictive and poorly crafted codified limitations to consider the viability of well-conceived accessory agricultural uses which are in higher demand today and into the future than when the Township wrote and subsequently amended its zoning code starting in 1972.

I am the author of this Plaintiff's expert rebuttal report.

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

Date: September 11, 2023