

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
PENINSULA, *et al.*,

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney

Plaintiffs,

Magistrate Judge Ray S. Kent

v.

PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

**DEFENDANT PENINSULA
TOWNSHIP'S BRIEF IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS'
CLAIMS PURSUANT TO RULES
12(b)(1) & 12(h)(3) LACK OF SUBJECT
MATTER JURISDICTION**

Defendant,

And

PROTECT THE PENINSULA,

Intervenor-Defendant.

****ORAL ARGUMENT REQUESTED****

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**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
DISMISS PLAINTIFFS' BOWERS HARBOR & VINEYARD, INC., BRY'S WINERY,
LC, CHATEAU OPERATIONS, LTD., GRAPE HARBOR, INC., MONTAGUE
DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

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I. INTRODUCTION

Plaintiffs, Bowers Harbor Vineyard & Winery, Inc., Brys Winery, LC, Chateau Operations, Ltd., Grape Harbor, Inc., Montague Development, LLC, OV The Farm, LLC, and Villa Mari, LLC (collectively “Plaintiffs”) operate wineries in Peninsula Township (the “Township”) pursuant to Special Use Permits (“SUP”) under the Peninsula Township Zoning Ordinance (“PTZO”). All of the Plaintiffs, except for Grape Harbor, Inc. (which operates a “Remote Winery Tasting Room”), are “Winery-Chateaus” under the PTZO.

For many of Plaintiffs’ claims, this case does not belong in federal court – at least not yet or not in their current form. Federal suits like this one are centered on “matters of local concern more aptly suited for local resolution.” *Murphy v. New Milford Zoning Comm’n*, 402 F.3d 342, 347 (2nd Cir. 2005); *Insomnia, Inc. v. City of Memphis, Tenn.*, 278 Fed. Appx. 609 (6th Cir. 2008); *Grace Comm. Church v. Lenox Twp.*, 544 F.3d 609 (6th Cir. 2008). Federal suits in the land-use context are generally not ripe for adjudication until a land owner receives a final definitive decision on a land use application. *Williamson Cnty. Reg. Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *See also Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992). This is generally referred to as achieving finality. Here, Plaintiffs have not received – and, indeed not even attempted to obtain – a final decision regarding the application of the PTZO to their properties.

As entities operating pursuant to SUPs, to obtain a final decision regarding the application of the PTZO to their properties Plaintiffs must, depending on the circumstance and what they seek to achieve: (1) seek an amendment to their SUP from the Township Board; (2) seek a non-use variance from the application of the PTZO to the ZBA or request an interpretation of the PTZO from the ZBA; or (3) appeal a determination of the Zoning Administrator to the ZBA. Under any

of these scenarios, if a plaintiff is aggrieved by a decision of the Township Board (on an SUP application) or ZBA (on a non-use variance, request for interpretation, or appeal of the Zoning Administrator's decision), it has the right to appeal that decision to the Circuit Court. *See Mich. Ct. R. 7.122; MCL 125.3605. See also Carleton Sportsman's Club v. Exeter Twp.*, 217 Mich. App. 195; 550 N.W.2d 867 (1996).

As it relates to the claims alleged in this case, none of the Plaintiffs have received a final decision regarding the application of the PTZO to their properties before filing suit. This failure is significant because it deprives this Court of subject matter jurisdiction over Plaintiffs' claims where finality has not been achieved. Plaintiffs' Fifth Amendment regulatory taking claims and as-applied constitutional claims (Count II and Count III) are not ripe for judicial review until they prove they have received "a final decision regarding the application of the regulations to the property at issue." *Grace Cmty Church v. Lenox Twp.*, 544 F.3d 609, 615 (6th Cir. 2008) ("*Grace I*") (quoting *Insomnia Inc. v. City of Memphis, Tenn.*, 278 Fed. Appx. 609, 612 (6th Cir. 2008)).

Further, in December, 2022, the Township approved Amendment 201 to the PTZO, which makes comprehensive changes to the PTZO and moots a significant number of Plaintiffs' claims. As such, Section 8.7.3(10) and Section 8.7.3(12) no longer exist in the substantive form challenged in Plaintiffs' First Amended Complaint. Like finality, mootness affects this Court's subject matter jurisdiction. "A federal court 'lacks jurisdiction to consider any case or issue that has lost its character as a present, live controversy and thereby becomes moot.'" *Kerr for Kerr v. Comm'r of Soc. Sec.*, 874 F.3d 926, 930 (6th Cir. 2017). "Mootness results when events occur during the pendency of the litigation which render the court unable to grant the requested relief." *Burger v. Cuyahoga Cnty. Bar Ass'n*, 983 F.2d 718, 724 (6th Cir. 1993). Because of these comprehensive

changes to the PTZO through Amendment 201, Plaintiffs' claims for declaratory and injunctive relief in Counts I, II, III, IV, V, VI, VII, and X are moot.

The Court should, therefore, grant the Township's motion to dismiss Plaintiffs' regulatory takings claims (Count VII) and as-applied challenges (Counts II and III) based on lack of subject matter jurisdiction because Plaintiffs have failed to achieve finality. Further, to the extent Plaintiffs seek declaratory and injunctive relief in Counts I, II, III, IV, V, VI, VII, and X, that relief is moot based on the passage of Amendment 201.¹

II. STATEMENT OF FACTS

A. Zoning Authorization for Winery-Chateaus

On December 16, 1989, the Township approved Amendment 79 to the PTZO, permitting agriculturally-zoned landowners to obtain an SUP to operate a Winery-Chateau provided it agreed to abide by the Township's Ordinances, specifically §8.7.3(10) and any conditions contained in the applicable SUP. (ECF No. 142-5, PageID.5136).

Winery-Chateaus are permitted only pursuant to an SUP. (ECF No. 29-1, PageID.1261, §8.7.2 ("Special Uses that May be Permitted")). An SUP is "an approval that is ultimately approved by the township board, and it would authorize someone to conduct any special uses of the land beyond those uses that are allowed by right." (**Exhibit 1**, Dep. of Peninsula Township at 14). The Township's intent in enacting its Winery-Chateau ordinance was to:

[P]ermit construction and use of a winery, guest rooms, and single-family residences as a part of a single site subject to the provisions of this ordinance. The developed site must maintain the agricultural environment, be harmonious with the character of the surrounding land and uses, and shall not create undue traffic congestion, noise, or other conflict with the surrounding properties.

¹ If the Court deems proper, it can consider the Township's Motion under Fed. R. Civ. P. 56. However, the Township submits that is not necessary.

(ECF No. 29-1, PageID.1268, §8.7.3(10)(a)). The Winery-Chateau ordinance allows for accessory uses such as facilities, meeting rooms, and food and beverage services for registered guests in addition to the principal winery use. (*Id.* at PageID.1270, §8.7.3(10)(m)).

On August 10, 2004, the Township adopted Amendment 141 to the PTZO, permitting “Guest Activities” in accordance with the previous structures of the Winery-Chateau operation under §8.7.3(10). (ECF No. 142-10, PageID.5172- 5177). For the right to have Guest Activities, a winery is required to either grow or purchase, from a grape grower in Peninsula Township, 1.25 tons of grapes for each person participating in a Guest Activity. (ECF No. 29-1, PageID.1272, §8.7.3(10)(u)(3)). The Winery-Chateau ordinance also states that “Guest Activity Uses are intended to help in the promotion of Peninsula agriculture by: a) identifying ‘Peninsula Produced’ food or beverage for consumption by the attendees; b) providing ‘Peninsula Agriculture’ promotional brochures, maps and awards; and/or c) including tours through the winery and/or other Peninsula agriculture locations.” (*Id.* at PageID.1271, §8.7.3(10)(u)(1)(b)). Any Winery-Chateau that has Guest Activities Uses (“GAU”) may only host wine and food seminars and cooking classes, meetings of a 501(c)(3) group, and meetings of agricultural groups, for persons other than registered occupants. (*Id.* at PageID.1271-1272, §8.7.3(10)(u)(2)(a)-(c)).

On August 11, 2009, the Township added Amendment 181 to the PTZO, adding sales of wine by the glass for wineries. (ECF No. 142-11, PageID.5179-5182).

B. PTZO Authorization for Remote Tasting Rooms.

On May 12, 1998 the Township added Amendment 120 to the PTZO, permitting agriculturally-zoned landowners to operate Remote Tasting Rooms associated with the wineries pursuant to an SUP and under §8.7.3(12). (ECF No. 142-7, PageID.5162-5166). Remote Tasting Rooms are permitted only pursuant to an SUP. (ECF No. 29-1, PageID.1262; §8.7.2 of the PTZO

(Special Uses that May be Permitted)). The Township’s intent in enacting the Remote Tasting Room was to: “[A]llow wine tasting in a tasting room that is not on the same property as the winery with which [sic] is associated and to establish reasonable standards for the use.” (ECF No. 29-1, PageID.1278; §8.7.3(12)(a) of PTZO).

The Remote Tasting Room Ordinance allows for wine tasting, sale of wine by the glass and sales of wine by the bottle. (ECF No. 29-1, PageID.1278; §8.7.3(12)(h) of PTZO).

C. Challenging Zoning Decisions for Wineries that Operate by Special Use Permit

If a Plaintiff seeks a new SUP or an amendment to its pre-existing SUP, that process is administered by the Planning Commission, who provides a recommendation to the Township Board, who has ultimate authority to grant or deny an SUP. Should an applicant be aggrieved by the decision of the Township Board, the applicant has a right to appeal that decision to the Circuit Court. *See* Mich. Ct. R. 7.122; MCL 125.3605. *See also Carleton Sportsman’s Club v. Exeter Twp.*, 217 Mich. App. 195; 550 N.W.2d 867 (1996).

However, if a Plaintiff is not seeking an SUP, but rather a variance, interpretation of the PTZO, or appeal of a Zoning Administrator determination, that process is handled by the ZBA. Section V of PTZO details the duties and powers of the ZBA which was established to safeguard the objectives of the PTZO and provide “a means for competent interpretation and controlled flexibility in the application of this Ordinance.” (ECF No. 29-1, PageID 1162; Section 5.1.1). To the extent a plaintiff seeks an interpretation of the PTZO, under §5.7.2 the ZBA has the power to interpret, upon request “the provisions of this Ordinance in such a way as to carry out the intent and purpose of this Ordinance” (*Id.*). Finally, if a plaintiff seeks a variance, under §5.7.3 the ZBA has the power to authorize specific variance requests provided that all basic conditions under §5.7.3(1) and any one special condition under §5.7.3(2) can be satisfied.

If an applicant is seeking a variance or an interpretation of the PTZO, the request would originate with the Zoning Administrator. “[T]he zoning administrator would then guide them through the application process, what needs to be submitted to have a complete application and help them to understand what the process looks like.” (**Exhibit 1**, at 36). A completed application must be submitted to the Zoning Administrator four weeks prior to meeting with the ZBA, during which, staff will complete a “package of materials that goes to the zoning board of appeals, which includes all of the application materials as well as a staff report.” (*Id.* at 37).

“The Board of Appeals may reverse or affirm wholly or partly, or may modify the order, requirement, decision or determination as in its opinion ought to be made in the premises.” (ECF No. 29-1 PageID 1163; §5.6). The ZBA shall have the “power in passing upon appeals to vary or modify any of its rules, regulations, or provisions so that the spirit of the ordinance shall be observed, public safety secured and substantial justice done.” (*Id.*).

Anyone having an interest affected by the PTZO who is aggrieved by a decision of the ZBA has the right to appeal any decision by the board of Appeals to the Circuit Court. *See Mich. Ct. R. 7.122* (“This rule governs appeals to the circuit court from a determination under a zoning ordinance by any . . . zoning board of appeals . . .”). Appeals governed by Mich. Ct. R. 7.122 are appeals of right. Mich. Ct. R. 7.122(A)(3).

D. History of Land Use Approvals for Plaintiffs Operating Pursuant to SUPs

1. Winery-Chateaus

a. Bonobo

Plaintiff, OV The Farm, LLC, (“Bonobo”) first obtained its SUP to operate as a Winery-Chateau in May, 2013. The Township Board approved SUP No. 118 on May 14, 2013. (ECF No. 32-6, PageID.1755-1771). On November 20, 2014, the Township Board approved a first

amendment to SUP No. 118 to reflect modifications made during construction. The amendment did not change any uses allowed on the property. (**Exhibit 2**, PTP Deposition Exhibit 1; **Exhibit 1**, at 63).

Bonobo has never appealed any issues related to its SUP or the “Winery-Chateau” ordinance provisions. (*Id.* at 64). Moreover, Bonobo has not applied for an application or request for a variance or an interpretation from the Zoning Board of Appeals. (*Id.* at 64; **Exhibit 3** Dep. of Bonobo at 140-141). At most, in April of 2019, Bonobo emailed the Township Zoning Enforcement Officer requesting a definition of “Guest Activity”, “Entertainment”, and “Accessory Use”. (**Exhibit 4**, April 2019 e-mail chain). However, nothing was submitted to the ZBA.

b. Bowers Harbor

Plaintiff, Bowers Harbor Vineyard & Winery, Inc. (“Bowers Harbor”), has been operating in the Township, in one form or another, since 1992. Initially, Bowers Harbor was approved to operate pursuant to SUP No. 32, which approved the operation of a Food Processing Plant pursuant to §8.5 of the PTZO. Bowers Harbor also operated a Roadside Stand, a use permitted by right under §6.7.2 of the PTZO. (ECF No. 63-6, PageID.2825-2838). SUP No. 32 permitted Bowers Harbor to operate a winery with wine tasting and limited retail sales on property zoned Agricultural A-1. (*Id.*). On August 10, 2010 Bowers Harbor amended its SUP to allow Open Space Uses consisting of up to 20 outdoor events annually with catered dinners, addition of a bathroom facility and extension of the tasting room to include an outdoor portion. (**Exhibit 5**, SUP No. 32 Open Space Use Amendment).

SUP No. 32 has been subsequently replaced by SUP No. 132 in July, 2019, when Bowers Harbor transitioned to a Winery-Chateau. (ECF No. 63-6, PageID.2839-2855). Upon completion of certain “Immediate Action Items” identified in SUP No. 132, SUP No. 32 would be rescinded.

Bowers Harbor does not know whether all Immediate Action Items have been completed such that SUP No. 32 would be rescinded. (**Exhibit 6**, Dep. of Bowers Harbor at 74-77). Bowers Harbor has not sought to amend SUP No. 132 since it was issued. (**Exhibit 1**, at 66).

Bowers Harbor has not asked the ZBA to review the Township Board's decision to issue SUP No. 132. (**Exhibit 6**, at 79:8-20). Bowers Harbor has never appealed or judicially challenged SUP No. 132 to the ZBA or any other court. (*Id.*, at 79).

Bowers Harbor had been previously granted a variance related to its application for SUP No. 132. On April 11, 2019, the ZBA approved Bowers Harbor's request for a variance from the required 50 acre minimum for a Winery-Chateau to 45.77 acres. (**Exhibit 7**, ZBA approval; **Exhibit 1**, at 66). On April 11, 2019, Bowers Harbor's second variance request was removed from consideration. (**Exhibit 8**, Variance Request Withdrawn). The request was for a variance from the required 75% active productive to 26.8 active production for a Winery-Chateau. (*Id.*). The Winery and the Township agreed the 75% requirement could be met with Bowers Harbor's commitment to adding additional acres of plantings. (ECF No. 63-6, PageID.2839-2855).

c. Brys

Plaintiff, Brys Estate Vineyard & Winery ("Brys"), applied for and received SUP No. 115 on February 8, 2011, to operate as a Winery-Chateau. (**Exhibit 9**, SUP No. 115). Since initially receiving its SUP, Brys has sought and obtained four different amendments to SUP No. 115:

- On April 10, 2012, SUP No. 115 1st Amendment was approved permitting physical additions to the principal structure including expansion of the processing facility, additional production capacity and outdoor space for visitors. (**Exhibit 10**, SUP No. 115 1st Amendment). Under Amendment #1, Brys constructed an outdoor elevated deck and increased the restroom capacity. (*Id.*). Additionally, the 1st Amended permitted Brys to engage in Guest Activity Uses. (*Id.*)
- On April 8, 2014, SUP No. 115 2nd Amendment was approved permitting an addition to the tasting room to sufficiently serve the previously approved outdoor deck. (**Exhibit 11**, SUP No. 115 2nd Amendment).

- On September 25, 2018, SUP No. 115 3rd Amendment was approved permitting Brys to convert the original Manager's Residence into 5 additional guest rooms and in addition, construct a new Manager's residence. (**Exhibit 12**, SUP No. 115 3rd Amendment). Brys did not proceed with this proposed conversion. (**Exhibit 13**, Dep of Brys 55-56).
- On December 19, 2018 SUP No. 115 4th Amendment was approved permitting Brys to expand the outdoor deck, add a viewing platform and remove grape vines to accommodate the expansion. (**Exhibit 14**, SUP No. 115 4th Amendment).

Since the last amendment in December, 2018, no additional amendments to SUP No. 115 have been approved. (**Exhibit 1**, at 69-70). While Brys applied for a fifth amendment to SUP No. 115, it withdrew the application. (*Id.* at 69). Brys has never appealed or judicially challenged SUP No. 115. (*Id.* at 70).

The only variance Brys requested was granted was not in any way related to the operation of a winery or the sections of the PTZO challenged in this case. On April 3, 2000, Brys was approved for a temporary structure during reconstruction of a residence on the property. (**Exhibit 15**, Brys Variance Request). This variance approval came more than 20 years before this case was filed. Brys has not requested a variance or an interpretation from the ZBA.

d. Chateau Chantal

Plaintiff, Chateau Operations, Ltd. ("Chateau Chantal"), obtained SUP No. 21 on January 9, 1990. (**Exhibit 16**, SUP No. 21). In the 31 years prior to filing the First Amended Complaint, Chateau Chantal sought and obtained several amendments to its various SUPs. On December 14, 2004, Chateau Chantal obtained SUP No. 95, which replaced SUP No. 21, by adding guest activities as an allowed use on the property pursuant to Amendment No. 141 of the PTZO. (**Exhibit 17**, SUP No. 95). SUP No. 95 is the operative SUP for Chateau Chantal.

On January 12, 2010, SUP No. 95 was supplemented by SUP No. 114, which permitted Chateau Chantal an expansion to the existing cellar structure, a revised driveway and an addition to the tasting room and outdoor patio. (**Exhibit 18**, SUP No. 114).

Finally, on November 20, 2014, SUP No. 114 was amended to permit Chateau Chantal to install solar power generation equipment, plant additional acreage of vineyard, design an outdoor wine consumption area and relocate a previously approved location for a future warehouse structure. (**Exhibit 19**, SUP No. 114 1st Amendment).

Since 2014, no permits have been issued that change the use allowed under SUP No. 95. (**Exhibit 1**, at 74). In 1998, Chateau Chantal and the Township engaged in litigation over the term “registered guest” in SUP No. 21. (**Exhibit 20**, Consent Judgment). Pursuant to the Consent Judgement, Chateau Chantal stipulated to the phrase “registered guests” as used in the winery-chateau provisions of the PTZO and in Special Use Permit No. 21. (*Id.*). Since 1998 there have been no applications or requests for variances or interpretations from the ZBA with respect to Chateau Chantal’s permits. (**Exhibit 1**, at 74; **Exhibit 21**, Dep of Chateau Chantal at. 80-81).

e. Chateau Grand Traverse

Plaintiff, Chateau Grand Traverse, LTD, (“CGT”) transitioned to a Winery-Chateau on July 10, 1990, under SUP No. 24. Since 1990, Chateau Grand Traverse has sought and obtained multiple new and amended SUPs:

- On June 25, 1998, the Township approved SUP No. 59 which replaced SUP No. 24. (**Exhibit 22**, SUP No. 59). Chateau Grand Traverse was approved to convert an existing single-family structure into the Chateau Building. (*Id.*). Plans for the Chateau included the owner/manager residence and 6 rental rooms with up to three guests per room; SUP No. 59 did not permit occupancy of the Chateau. (*Id.*). Brandy making within the structure was also approved. (*Id.*).
- On July 13, 1999, SUP No. 66 was approved replacing SUP No. 59. (**Exhibit 23**, SUP No. 66). SUP No. 66 approved three additional rental rooms with a maximum of five guests per room. (*Id.*). The findings approved by the Township Board on June 25, 1998 related to SUP No. 59 were incorporated by reference. (*Id.*). SUP No. 66 is Chateau Grand Traverse’s operative SUP.
- On September 14, 2004 SUP No. 94 was approved amending SUP No. 66 and allowing two building additions. (**Exhibit 24**, SUP No. 94 Approval). There was no change in use and the new SUP number was created only to track the change. (*Id.*).

Since Chateau Grand Traverse obtained SUP No. 66 in 1999, it has not sought any further amendments to its SUP, requested a variance or submitted a request for interpretation to the Zoning Board of Appeals. (**Exhibit 1**, at 77). Chateau Grand Traverse has never appealed the issuance or terms contained in SUP No. 66 to the Circuit Court.

f. Hawthorne

Plaintiff, Montague Development, LLC (“Hawthorne”), originally operated as a Farm Processing Facility. The Final Farm Processing Permit was issued to Hawthorne on October 30, 2013. (**Exhibit 25**, Final Farm Processing Permit). After operating as a Farm Processing Facility for several years, Hawthorne transitioned to a Winery-Chateau in 2020. On June 15, 2020, SUP No. 135 was issued to Hawthorne Vineyards. (**Exhibit 26**, SUP No. 135).

Hawthorne has not sought an amendment to its SUP, requested a variance or submitted a request for interpretation to the Zoning Board of Appeals. (**Exhibit 1**, at 79). Hawthorne has not appealed SUP No. 135 since its approval in 2020. (*Id.*).

g. Villa Mari

Plaintiff, Villa Mari, LLC (“Villa Mari”), obtained its SUP on March 15, 2016. (ECF No. 63-10, PageID.2994.) No permits have been issued that change the use allowed under SUP No. 126. (**Exhibit 1**, at 80). Since Villa Mari obtained its SUP, there have been no applications or requests for variances or interpretations from the ZBA with respect to Villa Mari’s SUP. (*Id.*). Villa Mari has not appealed or challenged the issuance of SUP No. 126.²

2. Remote Tasting Room – Grape Harbor

² After this suit was filed, Villa Mari filed an original action in the Circuit Court for Grand Traverse County, *Villa Mari, LLC v. Peninsula Township and the Peninsula Township Board of Trustees*, Case No. 23-36537-CZ, seeking authority to build guest houses pursuant to SUP No. 126.

Plaintiff, Grape Harbor, Inc. (“Peninsula Cellars”) obtained SUP No. 62 on November 10, 1998. (**Exhibit 27**, SUP No. 62). Since 1998, there have been no amendments to SUP No. 62. (**Exhibit 28**, Dep of Grape Harbor at 15; **Exhibit 1**, at 82-83).

Since receiving its SUP in 1998, Peninsula Cellars has not appealed to the Township Board, requested a variance or submitted a request for interpretation to the ZBA. (*Id.* at 83). At most, Peninsula Cellars claims they appealed Township action related to unauthorized igloos on the property. (**Exhibit 28**, at 47-48). On October 13, 2020, the Township Board approved igloos to be allowed as temporary structures; land use permits were required prior to the placement of an igloo. (**Exhibit 29**, Town Board Igloo Approval). Peninsula Cellars placed two igloos on its property without first obtaining a Land Use Permit to do so. (**Exhibit 30**, Non-permitted Igloos). Peninsula Cellars eventually applied for, and received, a Land Use Permit for the placement of two igloos. (**Exhibit 31**, Land Use Permit).

E. The Township Amended the “Winery Ordinances” Through Amendment 201 in December, 2022, Which Resulted in Wholesale Changes to the PTZO.

After completing the public process required by the MZEA, on December 13, 2022, the Township passed Zoning Ordinance Amendment No. 201. (ECF NO. 444-2, PageID.15907-15930). Amendment 201 makes comprehensive changes to the PTZO and moots a significant number of Plaintiffs’ claims.

Winery-Chateaus have been eliminated from the PTZO through the repeal of Section 8.7.3(10) – Winery-Chateau. As such, all sections of the PTZO regarding Winery-Chateau’s, all of Section 8.7.3(1) have been completely eliminated.

Finally, Section 8.7.3(12) – Remote Tasting Rooms has been amended. As such, Section 8.7.3(12)(j) no longer exists in the form challenged by Plaintiffs. Instead, under Amendment 201 PTZO, restrictions regarding the sale of logoed merchandise and promotional items that were

previously affected by Section 8.7.3(12)(i) have been removed. (*Id.*, Section 8.7.12(12) of Amendment 201). Further, limitations regarding signs that were previously contained in Section 8.7.3(12)(k) are similarly not contained in Amendment 201. (*Id.*).

LAW AND ARGUMENT

III. STANDARD OF REVIEW

The Township moves to dismiss Plaintiffs' takings and as-applied claims pursuant to Federal Rule of Civil Procedure 12(b)(1) and through Federal Rule of Civil Procedure 12(h)(3) which provides that "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." A motion to dismiss under Rule 12(h)(3) is analyzed in the same manner as a motion to dismiss under Rule 12(b)(1). *Cohan v. LVJ, Inc.*, No. 20-cv-10979, 2021 WL 4552247, at *1 (E.D. Mich., Oct. 5, 2021) (citing *Gates v. Black Hills Health Care Sys. (BHHCS)*, 997 F.Supp.2d 1024, 1029 (D.S.D. 2014) and *Berkshire Fashions, Inc. v. M.V. Hakusan II*, 954 F.3d 874, 879 n.3 (3d Cir. 1992)). Rule 12(b)(1) permits dismissal for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Subject matter jurisdiction is a threshold determination for a district court. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 82, 101; 118 S.Ct. 1003 (1998); *Am. Telecom Co., L.L.C. v. Republic of Lebanon*, 501 F.3d 534 (6th Cir. 2007).

The Township's challenge to subject matter jurisdiction is factual in nature. A Rule 12(b)(1) motion based on lack of subject matter jurisdiction can come in two varieties: a facial attack or a factual attack. *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014). "A facial attack on the subject-matter jurisdiction alleged in the complaint questions merely the sufficiency of the pleading." *Gentek Bldg. Prods. V. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). "When reviewing a facial attack, a district court takes the allegations in the complaint as true," and construes them in the light most favorable to the nonmoving party, a procedure like that utilized

under Rule 12(b)(6). *Id.*; see also *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). “If those allegations establish federal claims, jurisdiction exists.” *Gentek Bldg. Prods.*, 491 F.3d at 330.

On the other hand, “[a] factual attack challenges the existence of subject matter jurisdiction.” *Cartwright*, 751 F.3d at 759. “When a Rule 12(b)(1) motion attacks the factual basis for jurisdiction, the district court must weigh the evidence and the plaintiff has the burden of proving that the court has jurisdiction over the subject matter.” *Golden v. Gorno Bros., Inc.*, 410 F.3d 879, 881 (6th Cir. 2005). When considering a factual attack to subject matter jurisdiction, “a court has broad discretion with respect to what evidence to consider in deciding whether subject matter jurisdiction exists, including evidence outside of the pleadings, and has the power to weigh the evidence and determine the effect of that evidence on the court's authority to hear the case.” *Cartwright*, 751 F.3d at 759-760 (citing *Ritchie*, 15 F.3d at 598). The Court may consider documentary evidence and may even hold a limited evidentiary hearing to resolve disputed jurisdictional facts. *Ohio Nat’l Life Ind. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990).

The United States Supreme Court has consistently cautioned that “‘subject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived.’” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514; 126 S.Ct. 1235 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630; 122 S.Ct. 1781 (2002)); see also *Gonzalez v. Thaler*, 565 U.S. 134, 141; 132 S.Ct. 641 (2012) (“Subject-matter jurisdiction can never be waived or forfeited.”). Subject-matter jurisdiction can be addressed at any time, “objections [to subject-matter jurisdiction] may be resurrected at any point in the litigation, and a valid objection may lead a court midway through briefing to dismiss a complaint in its entirety.” *Gonzalez*, 565 U.S. at 141. The Supreme Court has consistently held that courts “have an independent obligation to determine whether subject-

matter jurisdiction exists, even in the absence of a challenge of any party.” *Arbaugh*, 546 U.S. at 514 (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583; 119 S.Ct. 1563 (1999)).

IV. PLAINTIFFS HAVE FAILED TO ACHIEVE FINALITY RENDERING THEIR TAKINGS AND AS-APPLIED CHALLENGES UNRIPE AND LEAVING THIS COURT WITHOUT SUBJECT MATTER JURISDICTION OVER THOSE CLAIMS.

Plaintiffs filed the present lawsuit in federal court asserting takings and as-applied challenges to the PTZO. However, before filing the instant litigation, Plaintiffs failed to obtain a final decision from the Township regarding the application of the PTZO to their respective properties regarding the claims alleged in the lawsuit. In order for constitutional claims to be ripe, the municipality must be presented with an opportunity to address the issues for which Plaintiffs seek judicial review and arrive at a final decision regarding the land use regulations application to the subject property. This ensures the municipality is given an opportunity to make a final decision on the matter and render the case ripe for adjudication.

Plaintiffs have not applied for an amendment to their respective SUPs regarding the application of the sections of the PTZO challenged in this case, and that such SUP or amendment was denied. Rather, the record demonstrates that when Plaintiffs sought a new or amendment to their SUP, the Township granted that request. Moreover, none of the Plaintiffs have been denied a variance request or interpretation regarding the application of the sections of the PTZO challenged in this case. Finally, even if any of the Plaintiffs had received an adverse decision from the ZBA – which none of them did – they never appealed the hypothetical decision to the circuit court, which is available as a matter of right under the Michigan Court Rules.

Simply speaking, Plaintiffs have been operating for years before filing this lawsuit and failed to obtain a final decision from the Township regarding the application of the PTZO to their properties.

Plaintiffs have failed to achieve finality and, as such, their takings and as-applied claims are not ripe.

The requirement of finality emanates from the ripeness requirements of Article III of the United States Constitution. Article III, among other things, limits the jurisdiction of federal courts to actual cases and controversies, and precludes federal courts from providing advisory opinions. *Arnett v. Myers*, 281 F.3d 552, 562 (6th Cir. 2002) (citing *Adcock v. Firestone Tire and Rubber Co.*, 822 F.2d 623, 627 (6th Cir. 1987)). The doctrine of ripeness “focuses on the timing of the action.” *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 330 F.3d 747, 751 (6th Cir. 2003). Ripeness encompasses “Article III limitations on judicial power” as well as “prudential reasons for refusing to exercise jurisdiction.” *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808; 123 S.Ct. 2026 (2003) (internal citation and quotation marks omitted). Through enforcement of ripeness requirements, courts discourage “premature adjudication” of legal questions and avoid judicial entanglement in abstract controversies. *Warshak v. United States*, 532 F.3d 521, 525 (6th Cir. 2008) (en banc). Ripeness “is more than a mere procedural question; it is determinative of jurisdiction. If a claim is unripe, federal courts lack subject matter jurisdiction and the complaint must be dismissed.” *River City Capital, LP. v. Bd. of Cty. Comm'rs*, 491 F.3d 301, 309 (6th Cir. 2007) (internal citation and quotation marks omitted).

The Sixth Circuit in *Miles Christi Religious Order v. Township of Northville*, 629 F.3d 533 (6th Cir. 2010), explained how the ripeness doctrine has evolved into a “finality” requirement in the land-use context. The “insistence on finality” is a foundational prerequisite for any federal land-use claim:

To decide whether a dispute has ripened into an action amenable to and appropriate for judicial resolution, we ask two questions: (1) is the dispute “fit” for a court decision in the sense that it arises in “a concrete factual context” and involves “a dispute that is likely to come to pass”? and (2) what are the risks to the claimant if

the federal courts stay their hand? *Warshak*, 532 F.3d at 525; *see Abbott Labs.*, 387 U.S. at 149, 87 S.Ct. 1507. In the land-use context, the demands of “a concrete factual context” and “a dispute that is likely to come to pass” converge in an insistence on “finality,” an insistence that the relevant administrative agency resolve the appropriate application of the zoning ordinance to the property in dispute. In the related context of takings claims under the Fifth and Fourteenth Amendments, courts likewise insist that a claimant “obtain[] a final decision regarding the application of the zoning ordinance[s] ... to its property,” *Williamson Cnty. Reg.'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), a requirement rooted in ripeness considerations, *see id.* at 186–94, 105 S.Ct. 3108; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012–13, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In addition to takings claims, we have applied the finality requirement to other constitutional and statutory challenges to local land-use requirements. *See Grace Cmty. Church*, 544 F.3d at 615 (RLUIPA); *Insomnia Inc. v. City of Memphis*, 278 Fed. Appx. 609, 613 (6th Cir. 2008) (Free Speech Clause); *Bannum, Inc. v. City of Louisville*, 958 F.2d 1354, 1362 (6th Cir. 1992) (Equal Protection Clause).

Miles Christi, 629 F.3d at 537.

The State of Michigan and its municipalities have adopted procedures designed to keep building and land use issues at a local level subject to appropriate judicial review. The process provides a mechanism for resolving disputes. The seminal case of *Williamson County Reg. Planning Com. v. Hamilton Bank of Johnson County*, 473 U.S. 172 (1985) and its progeny highlight the importance of this process and have cautioned federal courts not to interfere with this process. As set forth by the Court in *Williamson County*, 473 U.S. at 187: “[A] claim that the application of government regulations affects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the applicability of the regulations to the property at issue.” Local regulatory decisions are generally not ripe for constitutional attack until all of the state law processes have been exhausted. *Braun v. Ann Arbor Charter Township*, 519 F.3d 564 (6th Cir. 2008); *Bigelow v. Michigan Department of Natural Resources*, 970 F.2d 154 (6th Cir. 1992). The Michigan Supreme Court has echoed this requirement in *Paragon Properties Co. v. City of Novi*, 452 Mich. 568, 576-

577; 550 N.W.2d 772 (1996), holding that an as-applied challenge to the constitutionality of a zoning ordinance is not ripe until the plaintiff has obtained a final decision regarding the permitted use of the land. The Michigan Supreme Court quoted favorable to *Williamson County*, “[T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury’” *Id.* at 577 (quoting *Williamson*, 473 U.S. at 186).

Plaintiffs’ Fifth Amendment regulatory taking claims and as-applied constitutional claims (Count II and Count III) are not ripe for judicial review until Plaintiffs prove they have received “a final decision regarding the application of the regulations to the property at issue.” *Grace Cmty Church v. Lenox Twp.*, 544 F.3d 609, 615 (6th Cir. 2008) (“*Grace I*”) (quoting *Insomnia Inc. v. City of Memphis, Tenn.*, 278 Fed. Appx. 609, 612 (6th Cir. 2008)). *See also*, *Dubuc v. Green Oak Twp.*, 406 Fed. Appx. 983, 989-991 (6th Cir. 2011); *Beacon Hill Farm Associates II, Ltd. Partnership v. Loudoun Cty. Bd. of Sup’rs*, 875 F.2d 1081 (4th Cir. 1989) (discussing distinctions between facial and as-applied challenges in relationship to finality requirements).

A. Plaintiffs’ Fifth Amendment Takings Claims are Not Ripe.

Until recently, a plaintiff was required to prove two requirements before pursuing a takings claim in federal court: (1) the government entity charged with implementing the regulations had reached a final decision regarding the applications of the regulations to the property at issue; and (2) the property owner has exhausted the proper state procedures (i.e., the property owner filed and pursued a case in state court). *See, e.g.*, *Crosby v. Pickaway Cnty. Gen. Health Dist.*, 303 Fed. Appx. 251, 259 (6th Cir. 2008) (citing *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)). But relatively recently the Supreme Court eliminated the second

requirement, meaning that filing a state court action is no longer a prerequisite to pursuing a Fifth Amendment takings claim. *See Knick v. Twp. of Scott, Pa.*, ___ U.S. ____; 139 S.Ct. 2162 (2019).

Nevertheless, the *Knick* Court explicitly left the “finality” requirement intact, meaning that there must still be a “final” decision before a takings claim is ripe for judicial review in federal court. *Id.* at 2169 (“*Knick* does not question the validity of this finality requirement, which is not at issue here.”); *see also, Oberer Land Dev. Ltd. v. Sugarcreek Twp., Ohio*, No. 21-3834, 2022 WL 1773722, at *4, n.1 (6th Cir., June 1, 2022) (“The Supreme Court recently overruled *Williamson County* in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), but left in place *Williamson County*’s finality requirement: that a takings claim ‘is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.’ *Williamson Cnty.*, 473 U.S. at 186; *Knick*, 139 S.Ct. at 2169”); *Delta Business Center, LLC v. City of Taylor*, No. 2:19-CV-13618, 2020 WL 4284054, at *2 (E.D. Mich., July 27, 2020) (“The finality requirement, which was not at issue in *Knick*, was left intact. This means that there still must be a ‘final’ decision before a takings claim is ripe for judicial review in federal court.”). Accordingly, Plaintiffs are still obligated to meet the “final decision” requirement to establish that its Fifth Amendment regulatory takings claim is ripe for judicial review.

A “final decision” under *Williamson County* exists when: “(1) a decision has been made “about how a plaintiff’s own land may be used” and (2) the local land-use board has exercised its judgment regarding a particular use of a specific parcel of land, eliminating the possibility that it may “soften[] the strictures of the general regulations [it] administer[s].” *Adam Bros. Farming, Inc. v. Cnty. Of Santa Barbara*, 604 F.3d 1142, 1147 (9th Cir. 2010) (quoting *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725, 738-739 (1997)). In other words, a decision relating to

Hawthorne’s land use is not “final” until the local “land-use board” – here, the Peninsula Township Board – is presented with the issues and has had an opportunity to render a decision. The Sixth Circuit has explained, “[i]n the land-use context, the demands of ‘a concrete factual context’ and ‘a dispute that is likely to come to pass’ converge in an insistence on ‘finality,’ an insistence that the relevant administrative agency resolve the appropriate application of the zoning ordinance to the property in dispute.” *Miles Christi*, 629 F.3d at 537. Therefore, the Sixth Circuit has cautioned, “courts . . . insist that a claimant ‘obtain[] a final decision regarding the application of the zoning ordinance[s] . . . to its property,’ a requirement rooted in ripeness consideration[.]” *Id.* (internal citations omitted). *See also Shaw v. City of Riverview*, No. 16-11693, 2017 WL 914245, at *7-8 (E.D. Mich., Mar. 8, 2017) (“Finality requires the plaintiff to demonstrate that the decision-making body has reached a final decision regarding the application of the regulation at issue.”) (citing *Lilly Investments v. City of Rochester*, 674 Fed. Appx. 523, 526 (6th Cir. 2017)).

The requirement for finality is well-founded in the ripeness doctrine, as “a final, definitive decision from local zoning authorities ensures that federal review – should the occasion eventually arise – is premised on concrete and established facts and that all non-constitutional avenues of resolution have been explored first, perhaps obviating the need for judicial entanglement in constitutional disputes.” *Insomnia Inc. v. City of Memphis, Tenn.*, 278 Fed. Appx. 609, 615 (6th Cir. 2008) (internal citation and quotation marks omitted).

In its most distilled form, in order to achieve finality, Plaintiffs – wineries operating pursuant to an SUP – must first submit an application to amend their SUPs and obtain a final decision from the Township Board. If one of the Plaintiffs does not want to amend its SUP, but instead seeks a variance or interpretation of the PTZO, it must seek the review of the ZBA and obtain a final decision from the ZBA. This is an absolute requirement, because “[f]inality is a

prerequisite to litigation.” *Grace Community Church v. Lenox Twp.*, 544 F.3d 609, 617 (6th Cir. 2008).

In this case, Plaintiffs’ First Amended Complaint is devoid of sufficient facts to establish that Plaintiffs satisfied the finality requirements. Indeed, beyond the allegations contained in the First Amended Complaint, discovery in this case proves the same:

- Bonobo obtained its operative SUP in November, 2014. Prior to filing this lawsuit, Bonobo has not sought an amendment of that SUP, or appealed any issues related to the SUP to the Circuit Court, seeking authority to engage in the activities it seeks as relief in this case. Bonobo has not applied for a variance or sought an interpretation from the ZBA regarding the application of the sections of the PTZO challenged in this case.
- Bowers Harbor’s operative SUP was approved in 2019 when it transitioned to a Winery-Chateau. Prior to filing this lawsuit, Bowers Harbor has not sought an amendment to SUP No. 132, or appealed any issues related to SUP No. 132 to the Circuit Court, seeking authority to engage in the activities it seeks as relief in this case. Bowers Harbor has never requested an interpretation from the ZBA nor had a variance request denied regarding the application of the sections of the PTZO challenged in this case.
- Brys obtained its most recent SUP amendment, SUP No. 115 – 4th Amendment, in December, 2018. While Brys applied for a 5th Amendment to its SUP, that was withdrawn from consideration. Otherwise, prior to filing this lawsuit, Brys has not sought an amendment of that SUP, or appealed any issues related to the SUP to the Circuit Court, seeking authority to engage in the activities it seeks as relief in this case. Brys has never requested an interpretation from the ZBA nor had a variance request denied regarding the application of the sections of the PTZO challenged in this case.
- Chateau Chantal has two operative SUPs, SUP No. 95, which was approved in 2004 and allowed guest activities, and SUP No. 114 (supplementing SUP No. 95), which was most recently amended in November, 2014 and allowed design modifications to the facility. Before filing this lawsuit, Chateau Chantal did not seek an amendment of either SUP No. 95 or 114, or appeal any issues related to either of the SUPs to the Circuit Court, seeking authority to engage in the activities it seeks as relief in this case. While there was litigation resolved between Chateau Chantal and the Township in 1998 regarding the term “registered guest”, Chateau Chantal has otherwise never requested an interpretation from the ZBA nor had a variance request denied regarding the application of the sections of the PTZO challenged in this case.
- Chateau Grand Traverse obtained its operative SUP, SUP No. 66, in July, 1999. In 2004, Chateau Grand Traverse applied for and received SUP No. 94, which amended

SUP No. 66. Since SUP No. 94 was approved in 2004, Chateau Grand Traverse has not sought any further amendments to its SUP, or appeal any issues related to either of the SUPs to the Circuit Court, seeking authority to engage in the activities it seeks as relief in this case. Chateau Grand Traverse has never requested an interpretation from the ZBA nor had a variance request denied regarding the application of the sections of the PTZO challenged in this case.

- Hawthorne obtained its operative SUP in 2020, and prior to filing this lawsuit, had not sought any amendment to its SUP seeking authority to engage in the activities it seeks as relief in this case. Moreover, Hawthorne has never requested an interpretation from the ZBA nor had a variance request denied regarding the application of the sections of the PTZO challenged in this case.
- Villa Mari obtained SUP No. 126 in March, 2016. Prior to filing this lawsuit, Villa Mari did not seek an amendment to its SUP seeking authority to engage in the activities it seeks as relief in this case. Moreover, Villa Mari has never requested an interpretation from the ZBA nor had a variance request denied regarding the application of the sections of the PTZO challenged in this case.
- Peninsula Cellars obtained its SUP in November, 1998. Prior to filing this lawsuit, Peninsula Cellars has not sought an amendment to its SUP, or appealed any issues related to its SUP to the Circuit Court, seeking authority to engage in the activities it seeks as relief in this case. Peninsula Cellars has never requested an interpretation from the ZBA nor had a variance request denied regarding the application of the sections of the PTZO challenged in this case. At most, Peninsula Cellars alleges it “appealed” Township action regarding unauthorized igloos on its property, which were ultimately permitted by the Township after Peninsula Cellars applied for and received a Land Use Permit.

None of the Plaintiffs ever sought or obtained a final decision from the Township Board or ZBA regarding the application of the challenged sections of the PTZO to their properties. Therefore, as a matter of law, Plaintiffs have not sought “a final, definitive decision from local zoning authorities” before filing this federal lawsuit that “ensures that federal review – should the occasion eventually arise – is premised on concrete and established facts” that should “obviate[] the need for judicial entanglement in constitutional disputes.” *Insomnia, Inc.*, 278 Fed. Appx. at 617.

Plaintiffs’ avoidance of both the Township Board (if seeking a new or amended SUP) or the ZBA (if seeking a variance or interpretation of the PTZO) confirms that its takings claim is not

ripe for judicial review. The Sixth Circuit’s decision in *Miles Christi* is demonstrative of the issue. In *Miles Christi*, the Sixth Circuit reasoned that a land-use decision was not final where the local zoning authority was neither presented with nor ruled upon the interpretation of the regulations at issue:

This position, however, does not square with the relevant regulations. At the time the complaint was filed, the Northville Code provided that “[t]he Zoning Board of Appeals shall be responsible for interpretations to the text of [the zoning ordinances]” and shall be responsible for “interpret[ing] the provisions or meaning of standards of [the ordinances].”

* * *

An administrative appeal to the zoning board thus will resolve at least three questions, all of which lie within the zoning board’s plenary interpretive jurisdiction, about *Miles Christi*’s obligations or indeed whether it has any obligations at all: (1) Has *Miles Christi* put its house to a “more intensive use” within the meaning of § 170–33.2 of the Northville Code? (2) Is the *Miles Christi* house a “church” within the meaning of § 170–26.2 of the Code? and (3) Does *Miles Christi* have an obligation to submit a site plan in the first instance in view of the meaning of these ordinances and its request for a variance? Finality requires the input of the zoning board on these unresolved questions.

629 F.3d at 538 (internal citations omitted). The Sixth Circuit has also explained that:

An appeal to the zoning board not only will ground this dispute in a concrete legal setting—by permitting the zoning board to clarify the township’s application of its land-use laws to this property—but it also may help *Miles Christi*. The zoning board may grant a variance to the religious order, or it may provide a different intensive-use determination. Both forms of relief will considerably narrow the grounds of dispute between the parties if not end the dispute altogether.

Id. Consistent with the analysis of the Sixth Circuit in *Miles Christi*, the takings claim in this case is not ripe for judicial review.

Here, in order to achieve finality, Plaintiffs should have either: (1) sought an amendment to their SUP (or a new SUP) from the Township Board and obtained a final ruling from the Township Board; or (2) sought a variance or interpretation from the ZBA. The PTZO places authority in the Township Board to consider and rule upon SUP applications. (§8.1.2). If it is a

variance or interpretation the Plaintiffs seek, the PTZO places authority to interpret, apply, or vary from the PTZO within the jurisdiction of the ZBA. (§5.7.3). Finally, if a plaintiff received an adverse decision from the Township Board on an SUP application or from the ZBA on a variance or interpretation, they are entitled to an appeal as a matter of right to the circuit court for Grand Traverse County. *See* MCR 7.122; *see also Carleton Sportsman's Club v. Exeter Twp.*, 217 Mich. App. 195; 550 N.W.2d 867 (1996). Just as in *Miles Christi*, finality requires that the Township Board (on an SUP application) or the ZBA (on a variance application or request for interpretation) reach a final decision prior to achieving finality.

Plaintiffs have not alleged they *sought* a decision from the Township Board of ZBA on the issues raised in the Complaint prior to filing suit, let alone proving they *obtained* a final decision. Plaintiffs' taking claim is therefore subject to dismissal because it is not ripe for judicial review. *See, e.g., Delta Business Center, LLC*, 2020 WL 4284054, at *3 (holding that takings claim was not ripe because "Plaintiff has not satisfied the well-settled finality requirement, which is a prerequisite to litigation."); *Asmar v. City of Walled Lake*, 2017 WL 4585706, at *4 (E.D. Mich., Oct. 16, 2017) ("Here, to demonstrate ripeness, Plaintiffs would need to allege that Walled Lake made a final decision creating an impasse between the parties; Plaintiffs utilized remedial procedures such as zoning variance applications; Walled Lake provided inadequate procedures; or that remedial procedures were unavailable. Plaintiffs do not allege any of these facts. And so, the claim is not ripe on its face.").

This Court lacks subject matter jurisdiction over Plaintiffs' Fifth Amendment taking claim, and should therefore dismiss Count VII.

B. Plaintiffs' As-Applied Challenges are Similarly Not Ripe for Review.

The finality requirement applies not only to Plaintiffs' regulatory takings claim, but also to their as-applied constitutional claims (Counts II and III) as well. *See Miles Christi*, 629 F.3d at 537 ("In addition to takings claim, we have applied the finality requirement to other constitutional and statutory challenges to local land-use requirements."). Here, the same finality requirements as discussed *supra* regarding the takings claim applies to Plaintiffs' as-applied First Amendment claims in Counts II and III.

The Sixth Circuit's decision in *Insomnia, Inc.* leads the analysis. In *Insomnia, Inc.*, the trial court dismissed the plaintiffs' First Amendment claim for lack of ripeness. In affirming the trial court, the Sixth Circuit rejected the plaintiffs' argument, "that, in the First Amendment context, there is no finality requirement; rather, an injury to land use becomes legally cognizable as soon as the adverse governmental decision is made." *Insomnia, Inc.*, 278 Fed. Appx. at 612. In reaching its conclusion, the Sixth Circuit noted that the Second Circuit in *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342 (2nd Cir. 2005) departed from its decision in *Dougherty v. Town of North Hempstead Bd. of Zoning Appeals*, 282 F.83 (2nd Cir. 2002) and required finality in the First Amendment context. *Insomnia, Inc.*, 278 Fed. Appx. at 614-615.

In *Insomnia, Inc.*, the Sixth Circuit noted that the Second Circuit utilizes a two-part analysis to determine whether a plaintiff is subject to finality. *Id.* at 615. The Court asks "whether the [plaintiffs] experienced an immediate injury as a result of [the defendant's] actions and (2) whether requiring the [plaintiffs] to pursue additional administrative remedies would further define their alleged injuries." *Id.* (quoting *Murphy*, 402 F.3d at 351). The Sixth Circuit applied the Second Circuit's two-part test in *Insomnia, Inc.*, and concluded that the plaintiffs had "not suffered an immediate injury as a result of the Defendant's actions." *Id.* at 615. To the contrary, had the plaintiffs followed the available administrative options, "there is a chance that their proposal

[would] be approved” and they would have obtained the result their sought. *Id.* As the Sixth Circuit noted, “[s]uch an outcome would discharge any claim of First Amendment retaliation and obviate the need for federal review. If, however, Plaintiffs’ renewed plan . . . is rejected, this outcome [would] further define the contours of Plaintiffs’ claim of First Amendment retaliation.” *Id.* at 615-616. The *Insomnia, Inc.* court concluded: “Taken together, these two prongs indicate that the district court acted properly in dismissing Plaintiffs’ claim as premature.” *Id.* at 616. Finally, the Sixth Circuit also observed that this result comports with policy considerations that underlie the finality requirement, including ensuring “the development of a full record,” providing the plaintiffs a chance to obtain the relief requested without judicial entanglement in constitutional disputes, and showing “respect for federalism principles by recognizing that land use disputes are uniquely matters of local concern more aptly suited for local resolution.” *Id.*

Here, the analysis from *Insomnia, Inc.* is instructive. Had Plaintiffs worked through the administrative options available to them, “there is a chance” they would have been successful in obtaining the approvals they seek to compel through this lawsuit without the need for federal review or that the outcome in obtaining finality would “further define the contours” of the claim. *Id.* at 615-616. *See also Miles Christi*, 629 F.3d 533 (analyzing application of finality requirement in First Amendment context); *Grace Community Church v. Lenox Twp.*, 544 F.3d 609 (6th Cir. 2008); *Tini Bikinis-Saginaw, LLC v. Saginaw Charter Twp.*, 836 F.Supp.2d 504 (E.D. Mich. 2011) (finding as applied First Amendment claim not ripe because plaintiff failed to achieve finality).

Because Plaintiffs failed to achieve finality on the as-applied First Amendment claims, Counts II and III, the Court lacks subject matter jurisdiction over those counts and they should be dismissed.

V. AMENDMENT 201 MOOTS PLAINTIFFS’ CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF IN COUNTS I, II, III, IV, V, VI, VII, AND X THEREBY

DEPRIVING THIS COURT OF SUBJECT MATTER JURISDICTION OVER THOSE CLAIMS FOR RELIEF.³

In Counts I (Facial Challenge to Violation of Freedom of Speech, Freedom of Expression and Free Exercise of Religion Under the First and Fourteenth Amendments), II (As-Applied Challenge to Violation of Plaintiffs’ Freedom of Speech Under the First and Fourteenth Amendments), III (Violation of Freedom of Association Under the First and Fourteenth Amendments), IV (Violation of Due Process), V (Dormant Commerce Clause – Discrimination Against Interstate Commerce), VI (Dormant Commerce Clause – Excessive Burden on Interstate Commerce), VII (Regulatory Taking), and X (Injunctive Relief), Plaintiffs seek injunctive and declaratory relief regarding sections of the PTZO which were completely removed via Amendment 201. Because the challenged sections of the PTZO related to Farm Processing Facilities have been removed from the ordinance, the Court no longer has subject matter jurisdiction over the requests for declaratory and injunctive relief. This does not apply to Plaintiffs’ claims for damages.

“‘Mootness results when events occur during the pendency of the litigation which render the court unable to grant the requested relief.’” *Burger v. Cuyahoga Cnty. Bar Ass’n*, 983 F.2d 718, 724 (6th Cir. 1993) (quoting *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986)). Similar to finality (which deals with ripeness), mootness affects whether the Court has subject matter jurisdiction. “A federal court ‘lacks jurisdiction to consider any case or issue that has lost its character as a present, live controversy and thereby becomes moot.’” *Kerr for Kerr v. Comm’r of Soc. Sec.*, 874 F.3d 926, 930 (6th Cir. 2017) (quoting *Demis v. Snizek*, 558 F.3d 508, 512 (6th Cir. 2009)). “[I]f in the course of litigation a court finds that it can no longer provide a plaintiff

³ The Township has previously addressed mootness as it relates to Count VIII (Preemption) in its Motion for Summary Judgment (ECF No. 444). It will not readdress that argument here.

with any effectual relief, the case generally is moot.” *Uzuegbunam v. Preczewski*, ___ U.S. ___, 141 S. Ct. 792, 796 (2021).

“Generally, when an ordinance is repealed any challenges to the constitutionality of that ordinance become moot.” *Tini-Bikinis*, 836 F.Supp.2d at 519 (quoting *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir.2000)). While this generally does not apply to claims for damages, it does moot claims for declaratory and injunctive relief. See *Tini-Bikinis*, 836 F.Supp.2d at 520 (citing *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 836 (“We can neither declare unconstitutional nor enjoin the enforcement of a provision that is no longer in effect.”)). See also *Intl. Outdoor, Inc. v. City of Troy*, 361 F.Supp.3d 713 (E.D. Mich. 2019) (rejecting claims for declaratory and injunctive relief as moot given amendment to challenged ordinance). As the Eastern District of Michigan in *Tini-Bikinis* reasoned, declaring a repealed ordinance void and/or enjoining its enforcement would be an empty act:

In this case, as in *Brandywine*, Plaintiffs' First Amendment claim for injunctive and declaratory relief regarding the 2010 Ordinance is moot. Indeed, declaring a repealed ordinance void and enjoining its enforcement—particularly when the current ordinance is also before the Court—would be an empty act. In the vernacular, declaring it void would be as meaningful as shooting a dead horse. And enjoining its enforcement, moreover, would be shooting the horse once again.

836 F.Supp.2d at 520.

The same analysis applies in this case. Every section of the PTZO that Plaintiffs challenge as unconstitutional has been removed through Amendment 201. Entering an order declaring that sections of an ordinance that no longer exist would be tantamount to an advisory opinion. As the *Tini-Bikinis* court concluded, it “would be an empty act.” *Id.* at 520. Further, enjoining the enforcement of the PTZO, given that it has been completely rewritten to remove each and every one of the challenged sections, would be shooting a dead horse not once, but twice.

The claims for declaratory and injunctive relief in Counts I, II, III, IV, V, VI, VII, and X are moot and should be dismissed for lack of subject matter jurisdiction. Again, this does not apply to Plaintiffs' request for damages.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, Defendant Peninsula Township respectfully requests that this Honorable Court grant its motion to dismiss and dismiss Plaintiffs', Bowers Harbor Vineyard & Winery, Inc., Brys Winery, LC, Chateau Operations, Ltd., Grape Harbor, Inc., Montague Development, LLC, OV The Farm, LLC, and Villa Mari, LLC's regulatory takings claim (Count VII) and as-applied claims (Counts II and III) in the First Amended Complaint for lack of subject matter jurisdiction because they have failed to achieve finality.

Moreover, Defendant Peninsula Township respectfully requests that this Honorable Court grant its motion to dismiss and dismiss Plaintiffs', Bowers Harbor Vineyard & Winery, Inc., Brys Winery, LC, Chateau Operations, Ltd., Grape Harbor, Inc., Montague Development, LLC, OV The Farm, LLC, and Villa Mari, LLC's claims to the extent they seek declaratory and injunctive relief in Counts I, II, III, IV, V, VI, VII, and X because the requested relief is moot, depriving the Court of subject matter jurisdiction over those claims for relief.

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Attorneys for Defendant Peninsula Township

Dated: October 6, 2023

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

Defendant,

And

PROTECT THE PENINSULA,
Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
DISMISS PLAINTIFFS' BOWERS HARBOR & VINEYARD, INC., BRY'S WINERY,
LC, CHATEAU OPERATIONS, LTD., GRAPE HARBOR, INC., MONTAGUE
DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 1

JENNIFER CRAM
Wineries of the Old Mission vs Peninsula Township

July 21, 2023

1

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF MICHIGAN

3 SOUTHERN DIVISION

4 WINERIES OF THE OLD MISSION
5 PENINSULA ASSOC. (WOMP), a Michigan
6 nonprofit corporation; BOWERS HARBOR
7 VINEYARD & WINERY, INC., a Michigan
8 corporation; BRY'S WINERY, LC, a
9 Michigan corporation; CHATEAU GRAND
10 TRAVERSE, LTD, a Michigan corporation;
11 CHATEAU OPERATIONS, LTD, a Michigan
12 corporation; GRAPE HARBOR, INC, a Michigan
13 corporation; MONTAGUE DEVELOPMENT, LLC, a
14 Michigan limited liability company; OV
15 THE FARM, LLC, a Michigan limited liability
16 company; TABONE VINEYARDS, LLC, a
17 Michigan limited liability company; TWO
18 LADS, LLC, a Michigan limited liability
19 company; VILLA MARI, LLC, a Michigan limited
20 liability company; WINERY AT BLACK STAR FARMS,
21 LLC, a Michigan limited liability company,

22 Plaintiffs,

23 v

File No. 1:20-cv-01008

24 PENINSULA TOWNSHIP, a Michigan
25 municipal corporation,

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

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervener-Defendant.

/

JENNIFER CRAM
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July 21, 2023

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DEPOSITION OF JENNIFER CRAM

Taken by the Intervener-Defendant on the 21st day of July,
2023, at 15900 Rue de Vin, Traverse City, Michigan, at
10:00 a.m.

RECORDED BY: Stacey M. Seals, CER 7908
Certified Electronic Recorder
Esquire Deposition Solutions
Firm Registration Number 8035

JENNIFER CRAM
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1 APPEARANCES:

2 For the Plaintiffs: MR. JOSEPH MIKHAIL INFANTE (P68719)
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5 For the Defendant: MR. BOGOMIR RAJSIC III (P79191)
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8 For the MS. TRACY JANE ANDREWS (P67467)
9 Intervener-Defendant: Law Office of Tracy Jane Andrews, PLLC
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11 And

12 MS. HOLLY LYNN HILLYER (P85318)
13 Olson Bzdok & Howard, PC
420 East Front Street
14 Traverse City, Michigan 49686
(231) 946-0044

15 Also Present: Jessie Williams
16 Bruce Hawthorne
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25

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1 well as a structure because I'm using the land for a single
2 family residence where I live. But then a single family
3 residence can also be referred to as a structure. And then
4 I might also use that single family residence for a bed and
5 breakfast, because that is a use that is allowed within a
6 single family residence with the approval of a special use
7 permit.

8 Q So a person needs a land use permit for either a structure
9 or a new use; is that correct?

10 A Correct.

11 Q And how about a special use permit?

12 A So a special use permit is an approval that is ultimately
13 approved by the township board, and it would authorize
14 someone to conduct any special uses of the land beyond those
15 uses that are allowed by right. And so Peninsula Township
16 zoning ordinance clearly defines those uses that are allowed
17 by right and uses that are allowed with the approval of a
18 special use permit.

19 Q Okay. So if a use is allowed by right, is the township
20 board involved in those decisions?

21 A Not generally.

22 Q Who makes those decisions?

23 A They are made administratively by the zoning administrator

24 Q So would that be you today if someone were they apply?

25 A Yes.

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1 Q Officials or staff; elected officials or staff.

2 A Okay. Ultimately the township board is charged to enforce
3 the zoning ordinance, and so if a complaint comes forward or
4 if they have a concern they may authorize staff; either the
5 zoning administrator, planner or ordinance enforcement
6 officer; to administer and enforce the zoning ordinance.
7 They have the ultimately authority over staff.

8 Q Okay. I think we can cover one more short topic before we
9 take a break. We talked a little bit about what the zoning
10 board of appeals can do. What is the process for seeking a
11 variance?

12 A Similar to what we discussed before. If an applicant is
13 seeking a variance or an interpretation they would come and
14 speak to the zoning administrator and -- because they are
15 the staff that staffs the board when the position is filled.
16 I've been doing both. But so they would come and speak to
17 the zoning administrator about the request, the zoning
18 administrator would then guide them through the application
19 process, what needs to be submitted to have a complete
20 application and help them to understand what the process
21 looks like. And so then following the -- and so because
22 variances are run with the land, it is important to make
23 sure that there is time to review those materials and get
24 input and so a complete application has to be submitted to
25 the zoning administrator four weeks prior to the meeting

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1 that they want to be heard at a public hearing with the
2 zoning board of appeals. And so then prior to going to the
3 zoning board of appeals staff as the same requirements to do
4 the 15 days public notice to neighbors within 300 feet, a
5 legal notice in the Traverse City Record Eagle newspaper of
6 record, and then staff is responsible to complete a package
7 of materials that goes to the zoning board of appeals, which
8 includes all of the application materials as well as a staff
9 report that, you know, covers the findings of facts and
10 conditions for the request.

11 Q Okay. What is the process for appealing some kind of a
12 zoning decision to the board of appeals?

13 MR. INFANTE: Objection; form.

14 A So if I could ask for clarification. This is assuming that
15 the zoning board of appeals has taken action? You're asking
16 what the appeal process is?

17 Q Sorry. My understanding is -- we just talked about the
18 zoning board of appeals process for considering an
19 application for a variance or an interpretation --

20 A Uh-huh (affirmative).

21 Q -- but I understand the board of appeals also hears appeals;
22 would that be accurate?

23 MR. RAJSIC: Objection; from. Go ahead if you
24 can.

25 MR. INFANTE: I'll join it.

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1 MR. RAJSIC: I'll join the objection to form and
2 foundation. Go ahead if you can.

3 A Having looked at this document, under one, permitted
4 activity, it notes that, "The petitioner is hereby permitted
5 to amend a previously approved special use permit to reflect
6 the changes in the footprint of the as-built structure and
7 impervious surfaces on the site." So they were asking to
8 increase the size of the building. And further -- it looks
9 like that was the request that was brought forward based on
10 the document that I'm reviewing.

11 Q And are there any changes to the permitted use in this
12 document?

13 MR. INFANTE: Objection; form, foundation,
14 document speaks for itself.

15 MR. RAJSIC: I'll join in form and foundation. If
16 you can.

17 A Based again on the document that I'm reviewing, it does not
18 appear that this amendment request changed any uses allowed
19 on the property and only allowed the footprint of the
20 building to change and impervi- -- you know, the building's
21 impervious surface.

22 Q Okay.

23 MS. HILLYER: If we could take a quick break.

24 (Off the record)

25 (Ms. Andrews leaves the deposition)

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1 "Bowers Harbor Vineyard may continue wine tasting
2 and related activities allowed under SUP number 32 and
3 township board action allowing dining in the vines
4 until immediate action items listed above are
5 completed, at which time Bowers Harbor Vineyard may
6 conduct guest activity uses pursuant to section
7 8.7.3(10)(u) and SUP number 32 is rescinded."

8 Q To your knowledge has that SUP been rescinded?

9 MR. INFANTE: Objection; foundation.

10 A I know that immediate action items one through four have
11 been completed.

12 Q Okay. And have there been any applications for amendments
13 since this SUP was issued?

14 A No.

15 MR. INFANTE: I'm sorry, was that "no"?

16 MS. HILLYER: (Nodding head in affirmative)

17 Q And to your knowledge have there been any applications or
18 requests for variance in connection with Bowers Harbor
19 Vineyard's permits?

20 A Yes, I am aware of one variance related to this special use
21 permit application, the applicant requested a variance to
22 allow for a winery chateau use on the property with less
23 than the required 50 acres.

24 Q Do you know if that was granted?

25 A It was approved.

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1 A Yes.

2 MR. INFANTE: Objection; foundation.

3 Q And do you see some crossed out dates and handwritten dates
4 on this page?

5 A I do.

6 MS. HILLYER: I think we're all looking at the
7 same document.

8 Q So can you describe what this document is for?

9 MR. INFANTE: Objection; form, foundation,
10 document speaks for itself.

11 A As discussed previously, this document is the staff report,
12 the findings of facts and conclusions or conditions for a
13 4th amendment to SUP number 115 for Brys Estates.

14 Q Are you aware of any applications for additional amendments
15 to SUP 115?

16 A I am.

17 Q And what is the status of that application?

18 A That application was withdrawn.

19 Q Okay.

20 A It would have been amendment number 5 and it was submitted
21 late -- either November or December of 2021.

22 Q Do you remember what that was for?

23 A Yes, they were requesting to expand their patio and deck.

24 Q Okay. And so to your knowledge have any further amendments
25 been approved by the board?

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1 A None that I'm aware of.

2 Q Okay. And have there been any applications or requests for
3 variances or interpretations from the zoning board of
4 appeals with respect to special use permit 115 or its
5 amendments?

6 MR. INFANTE: Objection; form, foundation, vague.

7 A To my knowledge Brys requested one variance from the zoning
8 board of appeals relating to a sign.

9 Q Do you know the status of that variance request?

10 A I cannot remember and I don't want to guess.

11 Q Do you know about how long ago that was?

12 A I do not.

13 (Ms. Andrews reenters the deposition)

14 Q And do you know about any judicial challenges or appeals
15 that Brys has pursued with respect to these permits in
16 court?

17 MR. INFANTE: Objection; form, foundation, vague.

18 A I am not aware of any, no.

19 Q So this will be Exhibit 106.

20 (Deposition Exhibit 106 marked)

21 Q And are you familiar with Chateau Chantal's winery in
22 Peninsula Township?

23 A I am.

24 MS. HILLYER: So this was previously marked as PTP
25 Deposition Exhibit 14 for Dalese, and this is -- at the top

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1 document amend any of the uses in SUP 95?

2 MR. INFANTE: Objection; form, foundation,
3 document speaks for itself.

4 A Yes, it would allow some changes to the uses, it allows them
5 to use the property to generate solar power, it would also
6 expand an outdoor use because of the -- so it designates an
7 outdoor wine consumption area, so that would be a new use
8 introduced. So those would be the two new uses on the
9 property as a result of the approval of this amendment.

10 Q Okay. And is the township aware of any subsequent
11 amendments to Chateau Chantal's special use permits?

12 MR. INFANTE: Objection; form, foundation.

13 A I am not aware of any.

14 Q And are you aware of any applications or requests for
15 variances or interpretations from the zoning board of
16 appeals with respect to these permits?

17 MR. INFANTE: Objection; form, foundation.

18 A Yes, I am aware that Chateau Chantal went before the zoning
19 board of appeals for an interpretation.

20 Q Do you know when that was?

21 A I don't. It was 90's, as an estimate.

22 Q Do you know the outcome of that?

23 A I do not.

24 Q And is the township aware of any appeals or challenges that
25 Chateau Chantal has pursued in court with respect to these

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1 floor adding a conference and two offices along with the
2 walkway and they gave the totals of the square footages
3 there.

4 Q And are those the only additions or amendments to special
5 use permit 66 that the township is aware of?

6 MR. INFANTE: Objection; form, foundation.

7 A This references special use permit 94, so based on, again,
8 the documents that I've looked at this -- SUP 94 would have
9 come after 66 that we referenced previously so I can change
10 my original response to say, yes, there was an amendment to
11 SUP 66, not certain about the order but this amendment
12 allowed for building additions per the current SUP at the
13 time, which would be SUP number 94.

14 Q Okay. Do you recall reviewing SUP 94?

15 A I may have if it was a document that was produced as part of
16 the public record.

17 Q Is the township aware of any applications or requests for a
18 variance or interpretation from the zoning board of appeals
19 with respect with these permits?

20 MR. INFANTE: Objection; form, foundation.

21 A I am not aware of any.

22 Q And is the township aware of any appeals or challenges that
23 Chateau Grand Traverse has pursued in court with respect to
24 these permits?

25 MR. INFANTE: Objection; form, foundation, vague.

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1 document speaks for itself.

2 A Yes, it is my understanding looking at page 10 that it was
3 approved by the Peninsula Township board of trustees on July
4 14, 2020.

5 Q Okay. And has Hawthorne, to your knowledge, ever applied
6 for a variance or interpretation from the zoning board of
7 appeals with respect so this special use permit?

8 MR. INFANTE: Objection; form, foundation, vague.

9 A None that I'm aware of.

10 Q And are you aware of any judicial challenges or appeals to a
11 court with respect to this permit?

12 MR. INFANTE: Objection; form, foundation, vague.

13 A There have been none that I'm aware of.

14 Q Okay. This will be Exhibit 111.

15 (Deposition Exhibit 111 marked)

16 MS. HILLYER: And so this document, Exhibit 111,
17 was previously marked as PTP Deposition Exhibit 44 for
18 Lagina, and it's also bates stamped WOMP0001722 through
19 -1750.

20 Q Have you had a chance to look at this?

21 A Yes.

22 Q And can you describe this document for me?

23 MR. INFANTE: Objection; form, foundation,
24 document speaks for itself.

25 A These are the findings of facts and conclusions or

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1 conditions for special use permit number 126 for Mari
2 Vineyards.

3 Q And are you aware of any applications for amendments to this
4 special use permit?

5 MR. INFANTE: Objection; form, foundation.

6 A There are none that I'm aware of.

7 Q And are you aware of any applications or requests for a
8 variance or interpretations from the zoning board of appeals
9 with respect to these permits -- or this permit?

10 MR. INFANTE: Objection; form, foundation, vague.

11 A There are none that I'm aware of.

12 Q And is the township aware of any appeal or judicial
13 challenge that Mari has pursued with respect to this special
14 use permit in court?

15 MR. INFANTE: Objection; form, foundation, vague.

16 A There is currently litigation that is going on related to
17 this SUP.

18 Q Do you know if that litigation originated as an appeal to
19 the terms and conditions in this SUP?

20 MR. RAJSIC: Object to form, foundation. Go ahead
21 if you can.

22 A I am not clear as to how that litigation came about. I know
23 generally what it is about but I don't want to speculate.

24 Q Okay. What is your understanding of how long this SUP has
25 been in effect for Mari?

JENNIFER CRAM
Wineries of the Old Mission vs Peninsula Township

July 21, 2023
82

1 THE WITNESS: Meaning that it's --

2 MR. INFANTE: The layout?

3 THE WITNESS: Yes, the layout. So since -- I
4 apologize. Since I have been acting as the director of
5 planning and zoning I'm familiar with the findings of facts
6 and condition, the formatting, that you see in Mari
7 Vineyards. And so this, you know, with the typed face and
8 how it's formatted is a different version.

9 MR. INFANTE: Okay.

10 THE WITNESS: But I recognize it as accomplishing
11 the same thing. It documents the findings of fact and
12 conditions for this specific approval.

13 MR. INFANTE: When you say "version," the lawyers
14 go --

15 THE WITNESS: I know. I'm sorry.

16 MR. INFANTE: There's another one as opposed to
17 just the layout change, that's why we're asking.

18 Q Yes. And so are you aware of any amendments or other
19 versions of this that would have different permissions in
20 them?

21 MR. INFANTE: Objection; form, foundation.

22 A I am not aware of any subsequent amendments to this SUP.

23 Q Okay. Are you aware of any applications for amendments that
24 have not been approved?

25 MR. INFANTE: Objection; form, foundation.

JENNIFER CRAM
Wineries of the Old Mission vs Peninsula Township

July 21, 2023

83

1 A No, there are no amendments that I'm aware of for special
2 use permit number 62 for a remote wine tasting room.

3 Q And are you aware of any applications or requests for a
4 special -- for a variance or an interpretation from the
5 zoning board of appeals with respect to SUP 62?

6 MR. INFANTE: Objection; form, foundation.

7 A None that I'm aware of.

8 Q And are you aware of any appeal or judicial challenge that
9 Peninsula Cellars has pursued in court with respect to SUP
10 62?

11 MR. INFANTE: Objection; form, foundation, vague.

12 A None that I'm aware of.

13 Q One more.

14 MS. HILLYER: This I don't think we need to mark
15 this because this is already in the record. This is ECF
16 number 32-2, page ID is 1635 through 1638.

17 Q And once you've had a chance to take a look at it can you
18 describe this document, please?

19 MR. INFANTE: Objection; form, foundation,
20 document speaks for itself.

21 A So this, again, is the findings of facts and conditions for
22 special use permit issued to -- also it's special use permit
23 number 73 for 14998 Peninsula Drive is the location. Again
24 this is a format that I'm not accustomed to so I'm trying to
25 figure out who it's for and what they're asking. So I mind

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

Defendant,

And

PROTECT THE PENINSULA,
Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
DISMISS PLAINTIFFS' BOWERS HARBOR & VINEYARD, INC., BRY'S WINERY,
LC, CHATEAU OPERATIONS, LTD., GRAPE HARBOR, INC., MONTAGUE
DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 2

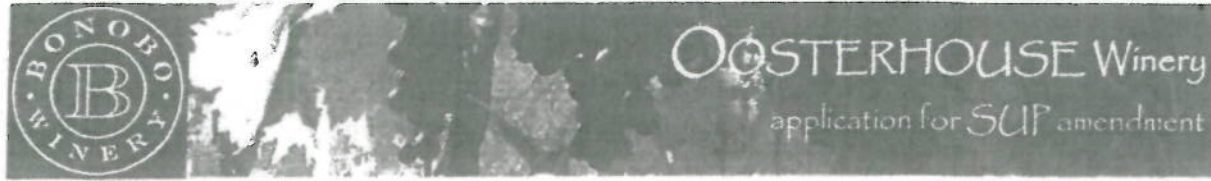
Peninsula Township
Application for Amendment of an existing
Special Use Permit



OOSTERHOUSE
Vineyard and Winery

Winery-Chateau
is a
Special Use
in the Agricultural District





10-6-2014

Attention: Michelle Reardon, Director of Planning and Zoning
& Peninsula Township Planning Commissioners

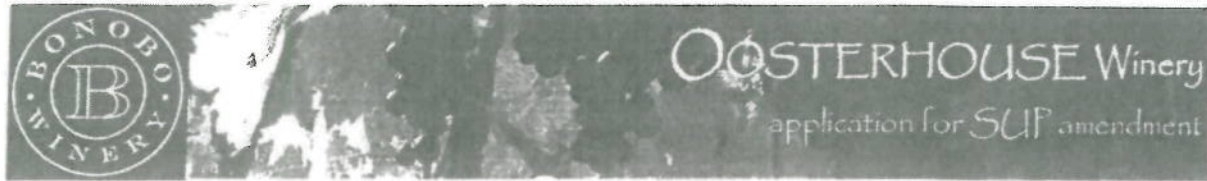
Things at Bonobo Winery have come a long way since receiving Peninsula Township Land Use permit approval in June of 2013. We've endured the great polar vortex of 2013-14 bookended by torrential fall, spring and again fall rainstorms. Needless to say, it hasn't been ideal construction or wine growing weather. But construction is booming now, and in the frenzy to keep things moving along, it was brought to our attention that the Township was not aware of some minor architectural modifications that occurred as final architectural construction drawings were completed and permitted through the Grand Traverse County Construction Codes office. Therefore, we are respectfully requesting an amendment to the existing Special Use Permit to accommodate the minor building and site modifications that occurred.

As stated above, the changes presented here for your consideration are minor dimensional changes to the building and parking lot area. The overall intent of the original Oosterhouse Winery-Chateau submittal remains unchanged. The 50-acre winery-chateau site includes the combined wine processing and tasting room in one structure along Center Road, and an on-site managers residence located in an existing farmhouse at the northwest corner of the site along Nelson Road. This winery-chateau proposal does not include single family home sites or guest rooms.

A summary of modifications:

- A 765sf outdoor covered crush pad area was added to the northeast end of the building. The crush pad located on the upper elevation will provide sheltered outdoor work area and allow for grapes crushed to juice to gravity flow to the fermentation tanks in the wine processing area on the basement level. This is a desirable feature in the industry.
- The main floor of the building increased in size by 1,000sf to accommodate a second stairwell and additional restrooms at the north end of the building.
- The basement level increased in size by 780sf to accommodate the second stairwell at the north end of the building.
- Construction code required a second set of exterior stairs at the north end of the patio.
- The road to the production level was proposed as gravel, but is now an asphalt surface to better control and direct stormwater runoff.
- Three of the 5 proposed light pole locations were modified.
- Three parking spaces were eliminated. The site still exceeds the minimum parking requirement by more than double.

Thank you for your time and consideration.



10-6-2014

Project Summary

Project Parcel:

Tax ID 28-11-004-002-02 (*primary winery parcel*) 9.75 acres
 Tax ID 28-11-004-010-03 (*adjacent farmed parcel*) 35.98 acres
 Tax ID 28-11-004-010-04 (*adjacent farmed parcel*) 5.11 acres
 50.84 acres total

Zoning:

A-1, Agriculture

Master Plan:

Restricted Agriculture,
 protected through a Purchase of Development Rights Easement

Proposed Land Use:

Château Winery, a special use

Set Backs:

Front =35ft
 Side =50ft
 Rear =50ft
 Residential =200ft

Parking:

		<i>required</i>	<i>provided</i>	<i>amendment</i>
<i>1 per 150sqft of retail</i>	2,000sqft	14 spaces	28 spaces	25 spaces
<i>gravel and grass overflow parking</i>		none	11 spaces	11 spaces
<i>1 per employee</i>	5 employees	5 spaces	6 spaces	6 spaces
<i>3 bus spaces</i>	3 buses	3 buses	3 buses	3 buses
<i>1 per guest room</i>	0 rooms	0 spaces	0 spaces	0 spaces
		22 spaces	48 spaces	45 spaces

Structure:

Proposed Winery
 6,500sqft main level
 9,900sqft lower, walk-out basement level

<i>amendment</i>
6,896sqft main level
9,902sqft lower level

Manager's Residence

an existing farm house at the west end of the site



10-6-2014

Section 8.1.3 Basis for Determinations:

Before making recommendation on a special use permit application, the Town Board shall establish that the following general standards, as well as the specific standards outlined in each section of this Article, shall be satisfied.

(1) General Standards: The Town Board shall review each application for the purpose of determining that each proposed use meets the following standards, and in addition, shall find adequate evidence that each use on the proposed location will:

- a. Be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such a use will not change the essential character of the area in which it is proposed.

The 50-acre project site with an agricultural zoning designation is currently in fruit production consisting of cherries and wine grapes. A small farmhouse and barn are located on the west end of the property. Existing surrounding uses include primarily fruit farming and some residential uses to the north.

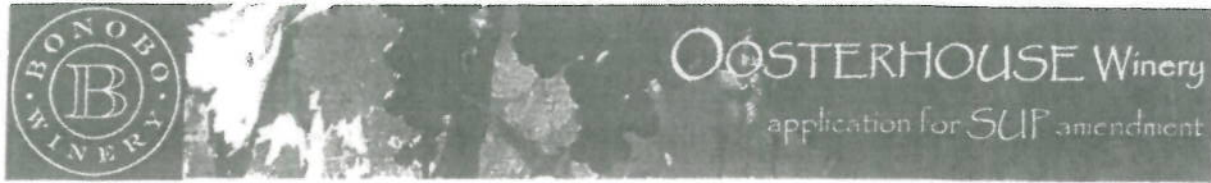
The proposed winery use is allowed as a special use in the Agricultural District. The facility is located on the east end of the property with good access onto Center Road, thus preserving a majority of the site and scenic view area as farmland unencumbered by structures or roadways.

The architecture of the proposed winery facility has elements and materials reminiscent of the local farm vernacular including gable roof forms and board and batten siding. Much of the 9,000 square foot processing facility is located below ground level.

The proposed plan is accordance with the spirit of the zoning district in which it is located as well as the Peninsula Township Master Plan which encourages the further development of agribusiness and agritourism as a means to sustain the beauty and character of the Old Mission Peninsula.

- b. Not be hazardous or disturbing to existing or future uses in the same general vicinity and will be a substantial improvement to property in the immediate vicinity and to the community as a whole.

The proposed plan is accordance with the spirit of the zoning district in which it is located, as well as the Peninsula Township Master Plan which encourages the further development of agribusiness and agritourism as a means to sustain the beauty and character of the Old Mission Peninsula. The proposed winery plan will not be hazardous or disturbing to future uses in the general vicinity.



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- c. Be served adequately by essential facilities and services, such as highways, streets, police, fire protection, drainage structures, refuse disposal, water and sewage facilities, or schools.

Letters of review from the regulating agencies have been provided to the Township.

- d. Not create excessive additional requirements at public cost for public facilities and services.

The proposed winery project will be serviced by a private well and septic system. No new public services are required.

- e. Not involve uses, activities, processes, materials, and equipment or conditions of operation that will be detrimental to any persons, property, or the general welfare by fumes, glare or odors.

The wine making process takes place exclusively in the indoor winery processing facility and does not involve any circumstance that would be detrimental to people or property in the general area.

- (2) Conditions and Safeguards: The Town Board may impose such additional conditions and safeguards deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of this Ordinance will be observed. The breach of any condition, safeguard or requirement shall automatically invalidate the permit granted.

- (3) Specific Requirements: In reviewing an impact assessment and site plan, the Town Board and the Planning Commission shall consider the following standards:

- a. That the applicant may legally apply for site plan review.

The applicant owns two of the three parcels included in this application. The applicant has a purchase agreement in place for the third parcel.

Tax id 28-11-004-002-02 primary project parcel

Tax id 28-11-004-010-03 see attached deed and property tax receipt

Tax id 28-11-004-010-04 see attached deed and property tax receipt

- b. That the proposed development conforms to all regulations of the zoning district in which it is located.

The Château-Winery use is a special use allowed in the Agricultural zoning district. The proposed plan includes the construction of a new winery (processing) and tasting room facility with an on-site manager living in an existing farmhouse. The tasting room will offer wines by the glass, small snack plates of locally sourced foods and some



10-6-2014

merchandising. There are no single-family residential lots or winery guest rooms being proposed as part of this project.

The proposed plan meets both the regulations and intent of the Agricultural zoning district and the Township Master Plan's emphasis on preserving farm land, encouraging agricultural entrepreneurs and developing agritourism.

- c. That the plan meets the requirements of Peninsula Township for fire and police protection, water supply, sewage disposal or treatment, storm drainage and other public facilities and services.

Attached you will find copies of the following approvals and permits:

Grand Traverse County Soil Erosion and Sedimentation Control permit

Michigan Department of Transportation Driveway permit

Storm Water Review by the Township Engineer

Grand Traverse County Health Department Well permit

Michigan Department of Environmental Quality Groundwater Discharge permit

Grand Traverse County health Department Septic permit

- d. That the plan meets the standards of other governmental agencies where applicable, and that the approval of these agencies has been obtained or is assured.

Please refer to the attached permits and approvals.

- e. That natural resources will be preserved to a maximum feasible extent, and that areas to be left undisturbed during construction shall be so located on the site plan and at the site per se.

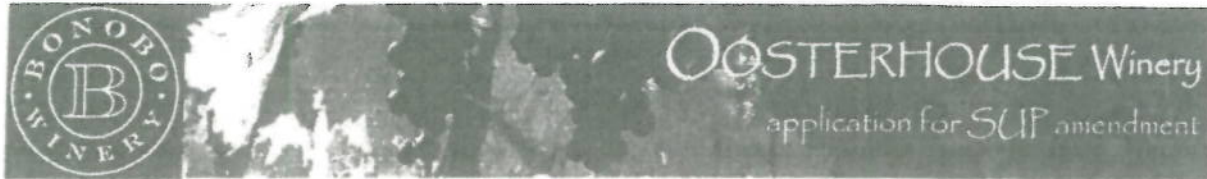
Almost all of the 50-acre project site is currently being farmed. The proposed winery will occupy only about 3.5-acres of the of the total 50 acre project site. The remaining acreage will be preserved through continued farming and by the existing Purchase of Development Rights easements.

- f. That the proposed development property respects flood ways and flood plains on or in the vicinity of the subject property.

There are no flood ways or flood plains in the vicinity of this site.

- g. That the soil conditions are suitable for excavation and site preparation, and that organic, wet or other soils which are not suitable for development will either be undisturbed or modified in an acceptable manner.

The area of the proposed winery and facilities development is made up of sandy loam soils which are ideally suited for construction.



10-6-2014

- h. That the proposed development will not cause soil erosion or sedimentation problems.

Typical standard soil erosion prevention measures have been included in this site design. No graded areas will exceed 1 on 4 slopes, and all disturbed areas will be seeded promptly upon the completion of construction work. The County Building inspectors will review the applicants compliance with standard County soil erosion measures. The current County Soil Erosion Control permit expires on 12-7-2014.

- i. That the drainage plan for the proposed development is adequate to handle anticipated stormwater runoff, and will not cause undue runoff onto neighboring property or overloading of water courses in the area.

The drainage facilities of the site plan maintain the intent of the natural drainage patterns on site. Detention basins are sized to County standards to ensure that neighboring properties will not be impacted by the potential of additional runoff resulting from this development. The township engineer has reviewed the stormwater design for compliance with standard County stormwater drainage measures.

- j. That grading or filling will not destroy the character of the property or the surrounding area, and will not adversely affect the adjacent or neighboring properties.

The proposed grading is what is minimally required in order to meet the following project objectives:

- *provide safe access from Center Road*
- *not impact the existing vineyard*
- *provide for a ground level crush area and tasting room, and a basement (walkout) level production facility*

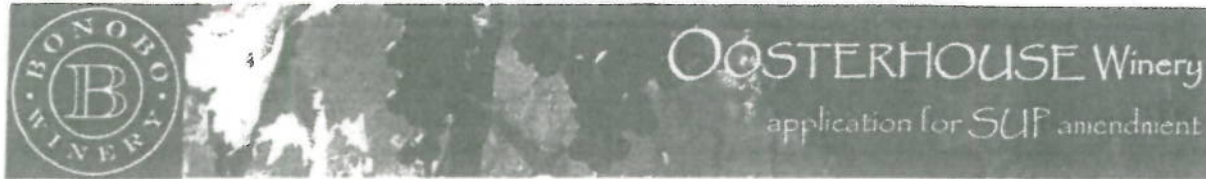
The proposed grading fits in with the existing character of the landscape and has no impact on neighboring properties.

- k. That structures, landscaping, landfills or other land uses will not disrupt air drainage systems necessary for agricultural uses.

Proposed grading maintains the existing north/south swale along Center Road, that then wraps around west of the Kelly home and continues on to the south.

- l. That phases of development are in a logical sequence, so that any one phase will not depend upon a subsequent phase for adequate access, public utility service, drainage or erosion control.

It is intended that the winery and tasting room be completed by Winter of 2014. Additional future improvements include removing existing cherry trees to establish additional vineyards.



10-6-2014

- m. That the plan provides for the proper expansion of existing facilities such as public streets, drainage systems and water sewage facilities.

The new commercial driveway on Center Road is designed, permitted and constructed to State specifications. Drainage systems have been designed, permitted and constructed according to Grand Traverse County standards and regulations. Sewage generated from this project will be treated in a private system that has been designed, permitted and constructed according to Grand Traverse County and State of Michigan standards and regulations. Please see the attached permits.

- n. That landscaping, fences or walls may be required by the Town Board and Planning Commission in pursuance of the objectives of this Ordinance.

The proposed winery plan provides for a hedge and other general landscaping for the intended purpose of screening the parking lot area from the adjacent residence to the south and eliminating potential glare caused by headlights.

- o. That parking layout will not adversely affect the flow of traffic within the site, or to and from the adjacent streets.

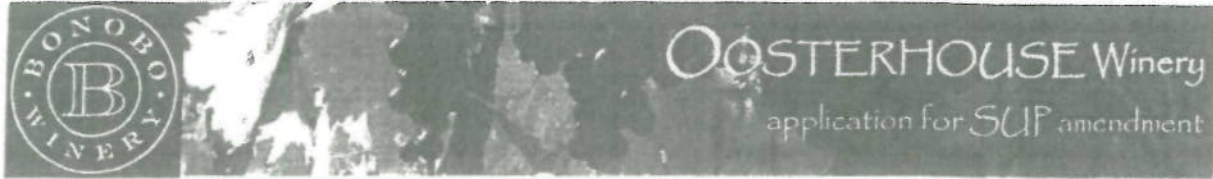
The proposed parking lot features drive lanes and a cul-de-sac turnaround at the tasting room entrance meeting the standard dimensional requirements of emergency response vehicles including fire trucks and therefore will provide generous and comfortable turning movements for standard passenger vehicles and tour buses. Parking spaces are located along the entrance drive and along a separate parking 'eyebrow'. Designated bus parking is provided, along with an L shaped turn around, again meeting the dimensional requirements of large vehicles. There are no dead ends or areas without ample room for maneuvering within this site.

- p. That vehicular and pedestrian traffic within the site, and in relation to streets and sidewalks serving the site, shall be safe and convenient.

The proposed winery is located along Center Road (a State Highway) approximately 500 feet from the nearest other intersection (Nelson Road). The proposed commercial driveway location meets and exceeds the State requirements for sight distance onto a State highway and has considerably better lines of sight distance than the conditions existing at Nelson Road to the north. Vehicle and pedestrian movement within the site will be safe and convenient.

- q. That outdoor storage of garbage and refuse is contained, screened from view and located so as not to be a nuisance to the subject property or neighboring properties.

Garbage dumpsters are located out of the public view, behind the winery at the production/basement level loading area. The dumpster pad area is fully enclosed with wooden screen fencing.



10-6-2014

- r. That the proposed site is in accord with the spirit and purpose of this Ordinance and not inconsistent with, or contrary to, the objectives sought to be accomplished by this Ordinance and the principles of sound planning.

The proposed winery development is in accordance with the intent of both the Agricultural zoning of the site and the Peninsula Township Master Plan. The intent of the Agricultural zoning district is to maintain, preserve and enhance the agricultural character of the area in a viable and sustainable way. The Master Plan states that encouraging agribusinesses such as wineries will ensure the sustainability of the peninsula.

Mansfield
Land Use Consultants

[illegible]

Oosterhouse Vineyards, LLC
 Proposed Winery
 Site Plan Comparison
 Section 4, Town 28 North, Range 10 West
 Perinula Township, Grand Traverse County, Michigan

CONSTRUCTION
DLM
12118
SHT5A OF 10

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

Defendant,

And

PROTECT THE PENINSULA,
Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
DISMISS PLAINTIFFS' BOWERS HARBOR & VINEYARD, INC., BRY'S WINERY,
LC, CHATEAU OPERATIONS, LTD., GRAPE HARBOR, INC., MONTAGUE
DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

File No. 1:20-cv-01008

PENINSULA TOWNSHIP, a Michigan
municipal corporation,

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

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervener-Defendant.

/

1 DEPOSITION OF TODD OOSTERHOUSE

2 Taken by the Intervener-Defendant on the 10th day of July,
3 2023, at 15900 Rue de Vin, Traverse City, Michigan, at 8:00
4 a.m.

5 APPEARANCES:

6 For the Plaintiffs: MR. JOSEPH MIKHAIL INFANTE (P68719)
And
7 MR. CHRISTOPHER J. GARTMAN (P83286)
Miller Canfield Paddock & Stone, PLC
8 99 Monroe Avenue, NW, Suite 1200
Grand Rapids, Michigan 49503
9 (616) 776-6333

10 For the Defendant: MR. BOGOMIR RAJSIC III (P79191)
McGraw Morris, PC
11 300 Ottawa Avenue, NW, Suite 800
Grand Rapids, Michigan 49503
12 (616) 288-2700

13 For the MS. TRACY JANE ANDREWS (P67467)
Intervener-Defendant: Law Office of Tracy Jane Andrews, PLLC
14 619 Webster Street
Traverse City, Michigan 49686
15 (231) 714-9402

16 And

17 MS. HOLLY LYNN HILLYER (P85318)
Olson Bzdok & Howard, PC
18 420 East Front Street
Traverse City, Michigan 49686
19 (231) 946-0044

20 Also Present: Karla Gerds
Jenn Cram
21 Edward O'Keefe
Marie-Chantal Dalese
22

23 RECORDED BY: Stacey M. Seals, CER 7908
24 Certified Electronic Recorder
Network Reporting Corporation
Firm Registration Number 8151
25 1-800-632-2720

1 **A** Christine Deeren. Do you want me to go down the list or --

2 **Q** So we're talking about staff, not the township board;
3 correct?

4 **A** Well, Dave Sanger is on the board.

5 **Q** But a decision of Dave Sanger as the enforcement officer
6 or -- I'm talking about a decision of the board -- the board
7 acts by motions, so are you talking about individual staff
8 or are you talking about the board?

9 **A** Well, board members in different conversations may have
10 given me different interpretations about what is allowed and
11 not allowed.

12 **Q** Did you serve on the planning commission?

13 **A** I did.

14 **Q** Do you know what the zoning board of appeals is?

15 **A** I do.

16 **Q** Did you go to the zoning board of appeals and ask for an
17 interpretation of SUP 118?

18 **A** I requested the planner to find out what was an event and
19 nonevent.

20 **Q** That's not quite the question I asked you. Did you ask --
21 did you go to the zoning board of appeals and ask for an
22 interpretation of SUP 118?

23 **A** I did not go to the board myself.

24 **Q** The zoning board of appeals?

25 **A** I did not go to the zoning board of appeals myself.

1 Q And by yourself do you mean Bonobo and OV The Farm, Todd
2 Oosterhouse? What do you mean by yourself?

3 A All of the above; Todd Oosterhouse or me representing Bonobo
4 Winery or OV The Farm.

5 Q So you did not go to zoning board of appeals to ask for an
6 interpretation, you relied on statements from staff people?

7 A My elected officials and/or --

8 Q Which elected official?

9 A Township board.

10 Q Which -- the board as a whole or individual members of the
11 township board?

12 A I never did it in a public meeting.

13 Q Did you do it at a closed session?

14 A I did it when we were working with the township on talking
15 about the ordinance and having changes.

16 Q So you asked -- so Bonobo asked the township board as a
17 whole --

18 A No.

19 Q Who?

20 A Because the township board can't come to a closed meeting
21 unless they close it for a public meeting to go to a other
22 meeting and have a conference if it's not been labeled. So
23 it has to be -- you probably know this, but it has to be --
24 what is it? -- three members and no more at a closed
25 function or a group meeting, something like that.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
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PENINSULA TOWNSHIP, a Michigan Municipal
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DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 4

Zoning

From: Todd Oosterhouse <todd@bonobowinery.com>
Sent: Thursday, April 18, 2019 1:12 PM
To: David Sanger
Cc: Christina Deeren; Greg Meihn
Subject: Re: paint and sip

Dave,

Please confirm that it is the legal position of the Township that providing winery guests with painting supplies while they drink wine is a guest activity and not entertainment. Given that you have copied the Township attorney on your email I assume that this is a correct assumption on my part but want to confirm. Given this legal conclusion, I am requesting from you a definition for the following: "Guest Activity", "Entertainment" and "Accessory Use." The zoning ordinance does not contain a definition for any of these terms and I cannot run my business without know what is allowed and what is not allowed. Given the Township's determination, I am concerned that providing things as simple as board games or cards for my customers will be considered a guest activity and result in a violation. Please provide me with a definition so that I can ensure that I am acting in compliance with the ordinance. Please also provide me with a list of all "guest activities" the Township has approved in the past three years, all determinations on what is "entertainment" for the past three years and all determination of what is an "accessory use" for the past three years.

Please inform me when a reasonable time for me to expect these questions answered. With the busy season is upon us I need to conduct my business in what I was approved to do 5 years ago with out subjective interpretation.

Thanks

Todd Oosterhouse
Owner/General Manager
Bonobowinery.com
231-383-5118

On Apr 18, 2019, at 10:12 AM, David Sanger <enforcement.peninsulazoning@gmail.com> wrote:

Todd,

You previously reported grape production off of Bonono Winery-Chateau SUP 118 property for the 2018 harvest at 76 tons. Based on the formula in the Winery-Chateau section of the Zoning Ordinance, Bonobo is allowed 61 people in attendance at a Guest Activity during calendar year 2019.

In my letters of February 19, 2019 and March 5, 2019, I stated that the advertised "Sip + Paint" would only be allowed under your SUP if it qualified as a "Guest Activity". To qualify, you must submit to the Zoning Administrator prior to the activity:

1. grape production (off Bonobo property) for 2018; that has been done. A maximum of 61 guests are allowed at any one guest activity in 2019.

2. Qualify the guest activity under one of the allowed uses in the Ordinance (8.7.2. (10). (u). 2. This has not been done.

Thus, "Sip + Wine" advertised activity on April 27 is not allowed.

You have argued the case, both on the telephone and in your email of April 15, that you believe that this advertised and ticketed activity is "entertainment" and is allowed as an "accessory use". I advised you that the "Wine + Sip" activity is not "entertainment" and would only be allowed as a Guest Activity. I have reviewed this decision with the Zoning Administrator and the decision stands.

Please be advised that the advertised "Sip + Paint" will be a Violation of Bonobo's SUP unless you provide to Zoning Administrator, in writing, advance notice and supporting documentation that the planned activity complies with the requirements of the Ordinance. In particular, the activity must have a direct relationship to agricultural production.

I have been trying to work with you since February 19th, Todd, but the time remaining to resolve this matter is nearing an end. I ask for your immediate attention to avoid a Violation.

Dave

On Mon, Apr 15, 2019 at 12:18 PM Oosterhouse, Todd <todd@bonobowinery.com> wrote:

Hi David and Christina,

We at Bonobo Winery are having a paint and sip on 4-27-19. We will have 30 guests. This entertainment is free. The participants pay for the wine they drink and the tour. All other supplies are given to them free of charge. As stated on our facebook invite.

I am writing to let you know what categories it falls under:

Entertainment which is allowed under the ordinance. Entertainment takes on many forms and is subjective and is not defined in the ordinance just an example is given.

Accessory use as this is incidental and subordinate to the principle use which is wine tasting, which they are doing.

Guest activity as we have submitted the tonnage from last year and this is less than the allowable people that can attend an event. We are showcasing the wine and facility. As it states in my SUP they do not need to be registered guests to attend.

The winery is open to the public as well, it is not happening after hours and the winery is not closing down for this. If people wanted to come into the painting and partake in the entertainment that is also acceptable. We are holding this in the tasting room floor area.

Let me know if you have any questions.

Thanks

Enjoy the day!

Todd Oosterhouse
Owner/General Manager
231-383-5118 cell
bonobowinery.com

--
David K. Sanger

Ordinance Enforcement Officer
Peninsula Township Zoning Office
13235 Center Road
Traverse City, MI 49686

231-223-7318
231-216-1212 direct line

Zoning

From: Oosterhouse, Todd <todd@bonobowinery.com>
Sent: Monday, April 15, 2019 12:18 PM
To: David Sanger; Christina Deeren
Subject: paint and sip

Hi David and Christina,

We at Bonobo Winery are having a paint and sip on 4-27-19. We will have 30 guests. This entertainment is free. The participants pay for the wine they drink and the tour. All other supplies are given to them free of charge. As stated on our facebook invite.

I am writing to let you know what categories it falls under:

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Accessory use as this is incidental and subordinate to the principle use which is wine tasting, which they are doing.

Guest activity as we have submitted the tonnage from last year and this is less then the allowable people that can attend an event. We are show casing the wine and facility. As it states in my SUP they do not need to be registered guest to attend.

The winery is open to the public as well, it is not happening after hours and the winery is not closing down for this. If people wanted to come into the painting and partake in the entertainment that is also acceptable. We are holding this in the tasting room floor area.

Let me know if you have any questions.

Thanks
Enjoy the day!

Todd Oosterhouse
Owner/General Manager
231-383-5118 cell
bonobowinery.com

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

Defendant,

And

PROTECT THE PENINSULA,
Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
DISMISS PLAINTIFFS' BOWERS HARBOR & VINEYARD, INC., BRY'S WINERY,
LC, CHATEAU OPERATIONS, LTD., GRAPE HARBOR, INC., MONTAGUE
DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 5



Peninsula Township Planning
13235 Center Rd.
Traverse City, MI 49686

**SPECIAL USE PERMIT AMENDMENT
& FINDINGS OF FACT
SUP #32, STEGENGA (Special Open Space Uses)
August 3rd, 2010**

1. Application

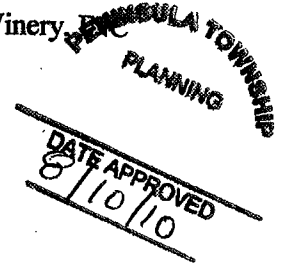
Applicant: Linda Stegenga / Bower's Harbor Vineyard & Winery, INC

Applicant/Owner Address & Contact Information: 2896 Bowers Harbor Road
Traverse City, Michigan 49686
Ph. (231) 218-1171

Proposal Location: 2896 Bowers Harbor Road
Section 121, Peninsula Township
Parcel Id. #: 28-11-121-077-10

Zoning District: A-1, Agriculture

Comprehensive Plan: The current 2003 Future Land Use Map identifies the subject's location as an area designated for continued agricultural usage.



2. General Findings

- 2.1. The Board finds that the subject parcel is located in Section 121 of the Township and claims a total of approximately four hundred-seventy (470') feet of road frontage off of the existing Bowers Harbor Rd. right-of-way.
- 2.2. The Board finds that the petitioned site is zoned A-1, Agricultural and currently is considered a legal and conforming parcel.
- 2.3. The Board finds that the north-eastern boundary of said vineyard is roughly five hundred (500') feet west of the intersection at Bowers Harbor and Seven Hills road.
- 2.4. The Board finds the total acreage utilized for the implementation of the proposal is measured at roughly nine (9)-acres.
- 2.5. The Board finds that the adjacent land uses throughout this portion of the Township are reflected in the following:
 - i) **North-** The land adjacent to the north of the subject properties is zoned R1-A, and is host to existing single-family housing.
 - ii) **South-** The properties adjacent to the south are zoned A-1, Agriculture and are primarily utilized for ongoing agricultural production of additional vineyard.
 - iii) **East-** Property to the east is zoned A-1 and is also utilized as an ongoing agricultural operation.
 - iv) **West-** The property located west of the subject is also zoned A-1 and is host to Bowers Harbor Park which is owned and operated by Peninsula Township.
- 2.6. The Board finds that the Bower's Harbor Vineyard & Winery, INC is an existing operation approved under SUP # 32 and currently meets their previously approved standards as found within said SUP. (Exhibit 6)

SUP #32 – SITE PLAN, SUP AMMENDMENT. FINDINGS OF FACT – STEGENGA
Food Processing Plant – Winery
August 3, 2010

- 2.7. The Board finds that the applicant is seeking site plan approval to allow for a physical addition to an existing tasting room of roughly one hundred- five (105) square feet. (Exhibit 5)
- 2.8. The Board finds that the applicant wishes to improve outdoor seating adjacent to the existing tasting room entrance through the construction of a new thirty-two by eight (32' x 8') foot raised deck area. (Exhibit 5) *Not constructed.*
- 2.9. The Board finds that the applicant wishes to allow the ability to expand the existing tasting area to include an outdoor portion of said vineyard, as described within the attached permit issued by the State of Michigan Liquor Control Commission, for purposes of outdoor tasting. (Exhibit 4)
- 2.10. The Board finds that the proposed allowance of special open space uses upon the subject property is considered an amendment to the existing SUP #32 provisions and is an additional special use pursuant to the ordinance requirements per Section 8.1.3, 8.7.2(3) & Section 8.7.3 (3). (Exhibit 1)
- 2.11. The Board finds that the proposed special open space use shall not utilize amplified measures in an effort toward minimizing sound generated from any such outdoor event.
- 2.12. The Board finds that any proposed lighting implemented onsite shall comply with the existing ordinance found within Section 7.14, Exterior Lighting Regulations. (Exhibit 1)
- 2.13. The Board finds that no greater than fifty (50) guests are permitted to attend any special open space use event. (Exhibit 7)
- 2.14. The Board finds that the proposed special open space use events will not be permitted to occur during the normal business hours of Bowers Harbor Vineyard, Monday – Saturday: 10:30 am – 6:00 pm and Sundays 12:00 pm – 6 pm. Events shall be limited to a length not to exceed three (3) hours and shall occur between the hours of 6:30 pm – 9:30 pm.
- 2.15. The Board finds that the applicant shall host no more than two (2) special open space use events per week and not more than twenty (20) events over the course of a calendar year.
- 2.16. The Board finds that the applicant shall provide Peninsula Township staff with monthly notification indicating the schedule for future planned events.

Other Findings

2.11

2.12

2.13

3. Findings of Fact – Section 8.1.3 (Basis for Determinations)

- 3.1 General Standards: The Town Board shall review each application for the purpose of determining that each proposed use meets the following standards, and in addition, shall find adequate evidence that each use on the proposed location will:

- (a) Be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity

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and that such a use will not change the essential character of the area in which it is proposed.

Due to the relatively short timeframe, frequency and nature of the proposed open space use, staff does not believe that the events or expanded tasting room efforts of the applicant will be injurious to the existing neighborhood.

- (b) Not be hazardous or disturbing to existing or future uses in the same general vicinity and will be a substantial improvement to property in the immediate vicinity and to the community as a whole.

The operation of the special open space use events within the vineyard and winery should not impact adjacent neighbors. The proposed low impact measures to control lighting, sound and traffic conditions should be sufficient during said events. Additionally, the limited physical expansion to the site and SUP #32 is not likely to create negative externalities within the existing neighborhood.

- (c) Be served adequately by essential facilities and services, such as highways, streets, police, fire protection, drainage structures, refuse disposal, water and sewage facilities, or schools.

The current operation and expansion areas should not require additional essential facilities or services and is compliant with all local permitting agencies.

- (d) Not create excessive additional requirements at public cost for public facilities and services.

Again, given the applicant's request it is not anticipated that the existing operation's expansion will require future essential facilities or additional public services.

- (e) Not involve uses, activities, processes, materials, and equipment or conditions of operation that will be detrimental to any persons, property, or the general welfare by fumes, glare or odors.

The proposed use of the site should not involve any uses or activities which produce negative impacts upon the existing neighborhood via fumes, glare, noise or odors.

- 3.2 **Conditions and Safeguards:** The Town Board may impose such additional conditions and safeguards deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of this Ordinance will be observed. The breach of any condition, safeguard or requirement shall automatically invalidate the permit granted.

- (a) **Staff recommends that the Township Board discuss with the applicant the hours of operation, frequency of events and number of events as indicated in the minutes of the July 19, 2010 Planning Commission meeting minutes.**

1. **Hours: 6:30 pm – 9:30 pm**
2. **Number of events / year: twenty (20) events**
3. **Frequency of events: Not more than two (2) event per week**

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Food Processing Plant – Winery
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- 3.3 **Specific Requirements:** In reviewing an impact assessment and site plan, the Town Board and the Planning Board shall consider the following standards:

- (a) That the applicant may legally apply for site plan review.

The Applicant is the owner of the subject property.

- (b) That all required information has been provided.

The applicant has provided all the required information as portrayed within the special use permit amendment application.

- (c) That the proposed development conforms to all regulations of the zoning district in which it is located.

The applicant's proposal meets all setback, parking, lot coverage and size requirements of the ordinance. Applying for the proposed special open space use is considered a special use given the parcel's agricultural zoning classification.

- (d) That the plan meets the requirements of Peninsula Township for fire and police protection, water supply, sewage disposal or treatment, storm drainage and other public facilities and services.

Grand Traverse County Road Commission- It has been noted that Bowers Harbor Rd. meets the standards for primary public road construction standards.

Grand Traverse County Sheriff's Department- In a letter dated July 30, 2010 the department stated that the proposed use would not require the use of additional resources and no additional time would be needed to enforce MLCC laws related to the new request.

Peninsula Township Fire Department- In a letter dated August 3, 2010, the Peninsula Township Fire Department has resolved any issues related with onsite parking after review of the site plan's proposed parking areas.

Additional Comments- All water supply and sewage disposal measures will continue to be handled onsite by the existing systems.

- (e) That the plan meets the standards of other governmental agencies where applicable, and that the approval of these agencies has been obtained or is assured.

The applicant has secured all of the necessary approvals from the State of Michigan's Liquor Control Commission and Grand Traverse County Sheriff's Department for the change of service areas within the existing Small Wine Makers license.

- (f) That natural resources will be preserved to a maximum feasible extent, and that areas to be left undisturbed during construction shall be so located on the site plan and at the site per se.

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As indicated upon the provided site plan, the applicant is not anticipating removing any existing vegetation from the land.

- (g) That the proposed development property respects flood ways and flood plains on or in the vicinity of the subject property.

There is no indication that any existing drains, floodways or flood plains exist on the site.

- (h) That the soil conditions are suitable for excavation and site preparation, and that organic, wet or other soils which are not suitable for development will either be undisturbed or modified in an acceptable manner.

The proposed use should not be detrimental to the existing soils found upon the land.

- (i) That the proposed development will not cause soil erosion or sedimentation problems.

Further improvement to the land should obtain any necessary soil erosion permits through the Grand Traverse County Drain Commission prior to construction.

- (j) That the drainage plan for the proposed development is adequate to handle anticipated storm-water runoff, and will not cause undue runoff onto neighboring property or overloading of water courses in the area.

All drainage from the new construction should be contained upon the subject parcel.

- (k) That grading or filling will not destroy the character of the property or the surrounding area, and will not adversely affect the adjacent or neighboring properties.

There should not be any grading or filling taking place upon the property to accommodate the potential use.

- (l) That structures, landscaping, landfills or other land uses will not disrupt air drainage systems necessary for agricultural uses.

Air drainage is not anticipated to be effected per the increased usage of the site.

- (m) That phases of development are in a logical sequence, so that any one phase will not depend upon a subsequent phase for adequate access, public utility service, drainage or erosion control.

The proposed construction efforts will not be implemented in phases.

- (n) That the plan provides for the proper expansion of existing facilities such as public streets, drainage systems and water sewage facilities.

No additional services or facilities are needed or anticipated on or off site to accommodate the proposed uses.

SUP #32 – SITE PLAN, SUP AMMENDMENT, FINDINGS OF FACT – STEGENGA
Food Processing Plant – Winery
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- (o) That landscaping, fences or walls may be required by the Town Board and Planning Commission in pursuance of the objectives of this Ordinance.

Adequate buffering and screening is in place upon the site given the proposed outdoor service area's location and surrounding uses.

- (p) That parking layout will not adversely affect the flow of traffic within the site, or to and from the adjacent streets.

After revision of the proposed parking layout, the current site plan was developed to accommodate the anticipated usage of the site and not adversely affect the flow of traffic to or from the site.

- (q) That vehicular and pedestrian traffic within the site, and in relation to streets and sidewalks serving the site, shall be safe and convenient.

At this time, staff has not received any complaints from the public concerning the applicant's existing winery operation. Infrastructure servicing onsite pedestrian traffic appears to be functioning well and should be adequate for the proposed future usage.

- (r) That outdoor storage of garbage and refuse is contained, screened from view and located so as not to be a nuisance to the subject property or neighboring properties.

There will be no outdoor storage of garbage or refuse at this time.

- (s) That the proposed site is in accord with the spirit and purpose of this ordinance and not inconsistent with, or contrary to, the objectives sought to be accomplished by this Ordinance and the principles of sound planning.

The proposed usage and expansion of the site appears to be consistent with the requirements of the ordinance and is considered the highest and best utilization of the land.

4. Findings of Fact - Section 8.7 (Miscellaneous Special Uses)

- 4.1. The Board finds that under Section 8.7.3 (3), the presented commencement of specific outdoor functions associated with the existing vineyard meets the conditions associated with said provision as explained within the following. (Exhibit 1, 6)

- (a) The proposed site shall be at least two (2) acres in area.

The proposed site plan indicates that the proposed special open space use will take place upon a roughly nine (9) acre site and remain within the approximate two and a half (2.5) acre area as described by the MLCC. (Exhibit 4)

- (b) The proposed site shall have at least one (1) property line abutting a major or secondary thoroughfare. All ingress and egress to the site shall be directly from said thoroughfare.

The subject property retains frontage off of Bowers Harbor Rd of which is considered a paved primary road per the Grand Traverse County Road Commission. (Exhibit 5)

- (c) All buildings and structures shall be set back at least two hundred (200') feet from any property or street line. Whenever the installation abuts upon property within a residential district, this two hundred (200') foot setback shall be landscaped with trees, grass and

SUP #32 – SITE PLAN, SUP AMMENDMENT, FINDINGS OF FACT – STEGENGA
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structural screens of a type approved by the Township Board to effectively screen the installation from surrounding residential properties.

It appears as if the proposed special open space use area is roughly eighty (80') feet north of the adjacent agriculturally zoned property to the south. The applicant is not proposing any permanent structures to be implemented onsite associated with the special outdoor events. Said property south of the subject is under a lease agreement with the applicant and is properly screened with existing mature vegetation.

- (d) No more than twenty-five (25%) percent of the gross site shall be covered by buildings.

Again, the applicant is not proposing to construct any new buildings for purposes of the special open space uses. The proposed construction additions to the tasting room are in compliance with the required setbacks of the agricultural district.

5. Site Plan Evaluation-

- 5.1. **Layout-** As indicated upon the final site plan, the proposed structural additions are in compliance with all of the necessary setbacks required upon a parcel zoned A-1.
- 5.2. **Vehicular Circulation-** Access to potential outdoor events and the vineyard in general will be retained via the existing driveway off of Bowers Harbor Rd. Additional access points are available upon adjacent leased grounds, however, the primary entrance will remain on Bowers Harbor Rd.
- 5.3. **Parking-** Parking regulations are established and enforced under Section 7.6.3, Parking Space Requirements of the ordinance. Within the existing requirements of SUP #32, the applicant is required to provide one (1) parking space per twenty-five (25) square feet of structure, referring to the tasting room. Currently, the site requires five (5) parking spaces and per the new addition, and according to the parking requirements of the existing SUP, the applicant would need to provide four (4) additional parking spaces to comply.

While considering the proposed outdoor events, it was determined by staff that the existing minimum of one (1) parking space per twenty-five square feet should be sufficient to meet the demands of both the proposed six hundred (600) square feet of seating area for said events and accommodate the proposed maximum fifty (50) guests. The applicant has provided thirty-nine (39) parking spaces upon their proposed site plan. This number is compliant with both the number necessary to cover the proposed physical addition to the tasting room, four (4), and the number to provide for events, twenty-four (24).

It is staff's opinion that there is adequate parking area upon the existing site development to support the minimum requirements of both the ordinance and SUP #32.

- 5.4. **Pedestrian Circulation-** The applicant has provided a concrete pedestrian access area from the existing parking area to both the tasting room and proposed area for outdoor events. Future circulation onsite should not be hindered per the proposed site development or usage.
- 5.5. **Street Lighting-** NA .
- 5.6. **Landscaping, Open Space & Buffering-** The parcels under consideration for the proposed development currently host several areas where mature vegetation exists. The final site plan appears to illustrate that buffering from adjacent streets and neighboring parcels should be adequate as it currently exists.

SUP #32 – SITE PLAN, SUP AMMENDMENT, FINDINGS OF FACT – STEGENGA
Food Processing Plant – Winery
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- 5.7. **Environmental Issues-** Concerns do not exist regarding drainage patterns and existing County drains that lie near the site, however, staff has not received comments back from the Drain Commission at this time.

6. Recommendations

Based upon the review of the submitted materials, including description of improvements and a site plan, I offer the following recommendations for the Planning Commission to consider.

Recommendation of Approval:

The Board should approve the petitioned SUP #32, application for an amendment to SUP # 32 for the inclusion of Special Open Space Uses and final site plan approval for the development of additional tasting room area, located in Section 121 of Peninsula Township, and as legally described, based on the following reasoning, subject to accompanying conditions:

Reasoning:

1. The proposed site plan is in compliance with the required information contained within Section 8.7.3(3), Special Open Space Uses.
2. The proposed use is in compliance with the requirements of General Standards and Specific Requirements of Section 8.1.3.
3. The proposed use appears to be consistent with the goals and objectives of the Master Plan and in compliance with the existing future land use map.
4. Approval was recommended from the Peninsula Township Planning Commission at their regular July 19, 2010 meeting.
5. Any additional reasoning as put forth by the Board.

Conditions:

1. Compliance with the rules and regulations of GTCRC, GTCDC, GTCHD and any other agencies associated with the development of the property for such purposes.
2. All employees parking will be relocated upon the subject property within the specified area designated as the outdoor service area per the Michigan Liquor Control Commission's license for Bower's Harbor Vineyard & Winery.
3. Any additional conditions as put forth by the Planning Commission.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

Defendant,

And

PROTECT THE PENINSULA,
Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
DISMISS PLAINTIFFS' BOWERS HARBOR & VINEYARD, INC., BRY'S WINERY,
LC, CHATEAU OPERATIONS, LTD., GRAPE HARBOR, INC., MONTAGUE
DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 6

SPENCER STEGENGA 30(b)(6)
WOMP v PENINSULA TOWNSHIP

July 17, 2023

1

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF MICHIGAN

3 SOUTHERN DIVISION

4 WINERIES OF THE OLD MISSION
5 PENINSULA ASSOC. (WOMP), a Michigan
6 nonprofit corporation; BOWERS HARBOR
7 VINEYARD & WINERY, INC., a Michigan
8 corporation; BRYS WINERY, LC, a
9 Michigan corporation; CHATEAU GRAND
10 TRAVERSE, LTD, a Michigan corporation;
11 CHATEAU OPERATIONS, LTD, a Michigan
12 corporation; GRAPE HARBOR, INC, a Michigan
13 corporation; MONTAGUE DEVELOPMENT, LLC, a
14 Michigan limited liability company; OV
15 THE FARM, LLC, a Michigan limited liability
16 company; TABONE VINEYARDS, LLC, a
17 Michigan limited liability company; TWO
18 LADS, LLC, a Michigan limited liability
19 company; VILLA MARI, LLC, a Michigan limited
20 liability company; WINERY AT BLACK STAR FARMS,
21 LLC, a Michigan limited liability company,

22 Plaintiffs,

23 v

File No. 1:20-cv-01008

24 PENINSULA TOWNSHIP, a Michigan
25 municipal corporation,

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

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

/

SPENCER STEGENGA 30(b)(6)
WOMP v PENINSULA TOWNSHIP

July 17, 2023

2

1 RULE 30(b)(6) DEPOSITION OF BOWERS HARBOR VINEYARD & WINERY, INC,
2 and SPENCER STEGENGA

3 Taken by the Intervenor-Defendant on the 17th day of July,
4 2023, at 420 East Front Street, Traverse City, Michigan, at
5 1:00 p.m.

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7
8 RECORDED BY: Heidi Peckens, CER 9634
9 Certified Electronic Recorder
Esquire Deposition Solutions
Firm Registration Number 8035
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SPENCER STEGENGA 30(b)(6)
WOMP v PENINSULA TOWNSHIP

July 17, 2023

3

1 APPEARANCES:

2 For the Plaintiffs: JOSEPH MIKHAIL INFANTE, ESQ. (P68719)
3 Miller Canfield Paddock & Stone, PLC
4 99 Monroe Avenue, NW, Suite 1200
5 Grand Rapids, Michigan 49503
6 (616) 776-6333
7 infante@millercanfield.com

8 For the Defendant: BOGOMIR RAJSIC, III, ESQ. (79191)
9 McGraw Morris, PC
10 300 Ottawa Avenue, NW, Suite 800
11 Grand Rapids, Michigan 49503
12 (616) 288-2700
13 brajsic@mcgrawmorris.com

14 For the TRACY JANE ANDREWS (P67467)
15 Intervenor-Defendant: Law Office of Tracy Jane Andrews, PLLC
16 420 East Front Street
17 Traverse City, Michigan 49686
18 (231) 714-9402
19 tandrews@envlaw.com

20 And

21 MS. HOLLY LYNN HILLYER (P85318)
22 Olson Bzdok & Howard, PC
23 420 East Front Street
24 Traverse City, Michigan 49686
25 (231) 946-0044
holly@envlaw.com

Also Present: Dave Sanger, Peninsula Township

SPENCER STEGENGA 30(b)(6)
WOMP v PENINSULA TOWNSHIP

July 17, 2023

74

1 sale -- or it's not for sale because it's gone, but for just
2 pancakes and --

3 Q So it's available for sale in the retail area?

4 A No, because it's gone. I mean --

5 Q Was it available when you -- when you had it?

6 A For a very short period of time.

7 Q It appears that there's a requirement for Bowers Harbor to
8 plant .8 acres in estate grapes and .4 acres in fruit trees,
9 do you see that?

10 A Yes, ma'am.

11 Q Have those grapes been planted?

12 A No.

13 Q How about the fruit trees?

14 A Yeah, one and a half acres of fruit trees. There was some
15 mis-communication. The writing says "grapes," Christina
16 said "trees," and Isaiah, so that's what we did. But I see
17 here it says, "estate grapes." But we had to get that re-
18 surveyed this spring and so we found out it's 1.5 acres.

19 Q Okay. And so when you look at page 16 at the very top,
20 where it says, "Bowers Harbor Vineyard will plant no less
21 than 1.2 acres of grapes or fruit trees to meet the winery
22 chateau requirements." It's your understanding that that
23 has been complied with?

24 A 100 percent.

25 Q Yeah. The ratio of grapes to trees is not necessarily the

SPENCER STEGENGA 30(b)(6)
WOMP v PENINSULA TOWNSHIP

July 17, 2023

75

1 same, but the overall number of acres has been planted?

2 A Correct. And I see "or fruit trees; or" so I would say
3 yeah. And it was 1.5 acres now.

4 Q Okay. When was that planted?

5 A Well, we ordered the trees in '19, they were planted in '20,
6 so as soon as we could. You know, there was delay,
7 obviously, because you don't plan in the fall you plant in
8 the spring, so we planted that that next spring.

9 Q And where on the property -- whose property are the trees
10 planted on?

11 A Those -- sorry for the interruption -- those are on
12 Schoenherr, LLC.

13 Q And what kind of trees?

14 A We have a number of different kinds of obscure apple, like
15 Heirloom apple stuff, and then there's Silver Maples. I
16 think they're Silver Maples.

17 Q Okay. It appears that the township board was concerned
18 about certain actions taking -- actually taking place. I'm
19 looking at the box on page 14 -- on page 16, do you see
20 that?

21 A Uh-huh (affirmative).

22 MR. INFANTE: Object to form.

23 Q "Modify the circle drive to allow for emergency vehicle
24 access," did that take place?

25 A Yes.

SPENCER STEGENGA 30(b)(6)
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1 Q And the "consult to address issues pertaining to grade, with
2 respect to the parking area," did that take place?

3 A Yes.

4 Q How about the "all 153 parking spaces," take --

5 A Yes.

6 Q And then lighting, did that condition get satisfied to your
7 knowledge?

8 A I don't know.

9 Q How about the 1.2 acres of grape or fruit trees, that's
10 been --

11 A 1.5 acres.

12 Q 1.5 was planted.

13 A Yeah.

14 Q And "apply for land use permit to construct deck, tasting
15 room addition, pavilion addition, housing -- house addition
16 and garage," did those take place?

17 A No, because COVID hit and that's -- kind of dealing with
18 that right now.

19 Q Okay. So my question for you is in the paragraph below. It
20 says,

21 "Bowers Harbor vineyard may continue wine tasting
22 and related activities allowed under SUP132 and the
23 township board action allowing Dining in the Vines
24 until items above are completed, in which time they may
25 conduct guest activities."

1 Do you see that?

2 A Yes.

3 Q And is that consistent with your understanding of what the
4 intent was with SUP 132?

5 MR. INFANTE: Objection; calls for legal
6 conclusion.

7 A I don't know what the intent was.

8 Q Did Bowers Harbor continue about dining in the vines in
9 2019?

10 A I'm assuming we did, but I -- I don't know 100 percent.

11 Q Okay.

12 A I know we didn't have them in '20, because it's COVID.

13 Q Okay. So Dining in the Vines -- is it your understanding
14 that Bowers Harbor was permitted to continue Dining in the
15 Vines until the requirements were met?

16 MR. INFANTE: Objection; calls for legal
17 conclusion.

18 A Yes, that was my understanding.

19 Q To continue Dining in the Vines under 32, under the old
20 permit?

21 A Just to continue doing Dining in the Vines. I don't
22 remember hearing anything otherwise.

23 Q Okay. And then once the conditions were satisfied, then
24 Bowers Harbor would have the opportunity to conduct guest
25 activities uses under 132?

SPENCER STEGENGA 30(b)(6)
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1 MR. INFANTE: Objection; vague.

2 A I don't know.

3 Q Did you take the township to court, in your recollection, as
4 a result of receiving SUP 132?

5 MR. INFANTE: Besides this lawsuit?

6 MS. ANDREWS: Besides this lawsuit.

7 A No.

8 Q Did you ask the Board of Zoning Appeals to review the
9 township board's decision to issue SUP 132?

10 A I did not.

11 Q Did Bowers Harbor?

12 A I'm not sure.

13 Q Who would know?

14 A Linda.

15 Q Linda?

16 A Stegenga; my mom.

17 Q So you have no idea whether Bowers Harbor brought a -- an
18 appeal of SUP Number 132 to the Board of Zoning Appeals?

19 A An appeal for the 132? I imagine not after we got the 132.
20 Not that I recall.

21 Q Do you have any document that suggest Bowers Harbor appealed
22 132 to the Board of Zoning Appeals?

23 A I personally don't have one, but I'm -- if a document exists
24 then it would -- we'd certainly have it.

25 Q Okay.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

Defendant,

And

PROTECT THE PENINSULA,
Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
DISMISS PLAINTIFFS' BOWERS HARBOR & VINEYARD, INC., BRY'S WINERY,
LC, CHATEAU OPERATIONS, LTD., GRAPE HARBOR, INC., MONTAGUE
DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 7

**Peninsula Township
Zoning Board of Appeals**

ZBA Case No. 873

Peninsula Township
13235 Center Road
Traverse City, MI 49686

Date of Meeting: April 11, 2019

Request: Variance for Winery Chateau

Applicant: Northview 22, Sarah Kever, P.O. Box 3342, Traverse City, MI 49686

Owner: Langley Vineyards LLC (Bower's Harbor Vineyards) – Linda Stegenga
Schoenherr Vineyards LLC, 13975 Seven Hills and
Schoenherr Vineyards LLC, 13971 Seven Hills – Spencer Stegenga

Site: 2896 Bowers Harbor Rd., Traverse City, MI 49686
13975 Seven Hills Rd., Traverse City, MI 49686
13971 Seven Hills Rd., Traverse City, MI 49686

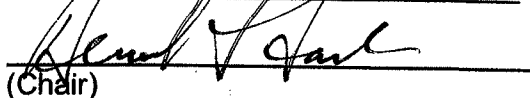
Parcel No.'s: 28-11-121-077-10, 28-11-128-001-11 and 28-11-128-001-12

1. Requesting a variance from the required 50 acre minimum for a Winery Chateau to 45.77 acres

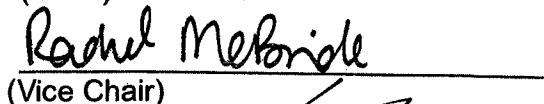
2. Requesting a variance from the required 75% active production to 26.8% of active production for a Winery Chateau.

April 11, 2019 (-email) Request removed by applicant/owner on
Parcel Code: #28-11-121-077-10, 28-11-128-001-11 and 28-11-128-001-12

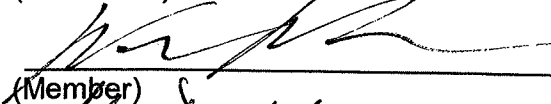
Action by the Zoning Board of Appeals:


(Chair)

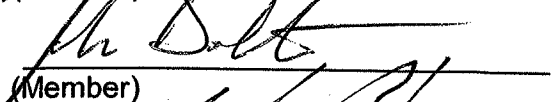
☒ Yes ☐ No


(Vice Chair)

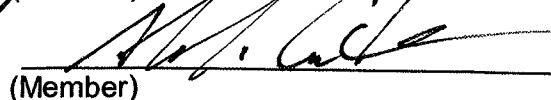
☒ Yes ☐ No


(Member)

☒ Yes ☐ No


(Member)

☒ Yes ☐ No


(Member)

☒ Yes ☐ No

Board Action: _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
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PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

Defendant,

And

PROTECT THE PENINSULA,
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UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 8

planner@peninsulatownship.com

From: Linda Stegenga <linda@bowersharbor.com>
Sent: Thursday, April 11, 2019 7:24 AM
To: Zoning; planner@peninsulatownship.com; sarah@northview22.com; Infante, Joseph M.; Eldridge, Scott R.; Spencer Stegenga; Kristy McClellan; Dave Sanger
Subject: Bowers Harbor Vineyards

Peninsula Township,

I would like to withdraw my request for a variance regarding condition of complying with the 75% growing coverage based on the representations made by Peninsula Township. Bowers Harbor Vineyards will complete a survey of the areas defined as grapes, maples, and cold air drainage by a Professional Surveyor. We will calculate said areas and determine if/how much area is needed to be planted in order to comply with the 75% condition. This will occur in time for the first Planning Commission meeting for our Winery-Chateau request.

Thank you for your time.
Sincerely,

Linda Stegenga
Proprietor
Bowers Harbor Vineyards
231-223-7615

www.bowersharbor.com

 *Bowers Harbor Vineyards*

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
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PENINSULA TOWNSHIP, a Michigan Municipal
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And

PROTECT THE PENINSULA,
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**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
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UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 9

Peninsula Township, Michigan
 13 Y Cc1:tu- Ru.
 Tn-Verse City, MI

*Brys
 Original*

**PENINSULA TOWNSHIP
 SPECIAL LAND USE/ FINAL SITE PLAN
 SUP# 115 BRY'S ESTATE VINEYARD & WINERY
 (WINERY - CHATEAU)**

This Special Land Use is issued and entered into on the 8th day of February, 2011, by and between the Township of Peninsula and Walter & Eileen Brys, 3309 Blue Water Road, Traverse City, Michigan, hereinafter referred to as the petitioners. This Special Land Use is issued pursuant to the authority granted to the Peninsula Township Board of Commissioners by Article 8, of the 1972 Peninsula Township Zoning Ordinance, as amended, and P.A. 110 of 2006, the Michigan Zoning Enabling Act, as amended.

WHEREAS, an application for a Special Land Use has been filed by **Walter & Eileen Brys**, to establish a new Winery - Chateau located upon an existing parcel located in Section 27, Peninsula Township (#11-127-016-01, 11-127-002-00, 11-127-016-02) and is legally described as:

Parcel 1:

The Southwest quarter of the Northeast quarter, Except one rod off the North and East side in Section 27, Town 29 North, Range 10 West.

Parcel 2:

A parcel of land situated in the Township of Peninsula, County of Grand Traverse, State of Michigan, and described as follows to-wit: Part of the North one-half of Section 27, Town 29 North, Range 10 West, more particularly described as: Commencing at the West one-quarter corner of said Section 27; thence North 89°34'28" East, along the East and West one-quarter line of said section, 1314.14 feet to the West one-eighth line of said section; thence North 01°51'50" East, along said West one-eighth line, 788.90 feet to the Point of Beginning; thence continuing North 01°48'58" East, along said West one-eighth line, 567.09 feet to the North one-eighth line of said section; thence North 89°46'18" East, along said North one-eighth line, 1325.93 feet to the North and South one-quarter line of said section; thence South 02°22'09" West, along said one-quarter line, 1351.95 feet, to the East and West one-quarter line of said section; thence South 89°34'28" West, 790.46 feet; thence North 00°14'42" West, 186.96 feet; thence North BB° 44' 44" West, 268.12 feet, thence North 01° 51'50" East, 82.03 feet; thence North 06°41'11" East, 405.37 feet; thence South 88°58'31" West, 112.91 feet; thence 50.73 feet along the arc of a curve to the right, radius of 31.50 feet and long cord of North 44°53'32" West, 45.42 feet; thence North 01°14'26" East, 78.03 feet; thence South 89°34'28" West, 135.81 feet, to the Point of Beginning. Subject to the right-of-way of Bluewater Road over the Southerly 33 feet thereof.

EASEMENT#1

Together with and subject to a variable-width easement for ingress and egress, and the construction and maintenance of a driveway approach, described as: Part of the Southeast one-quarter of the Northwest one-quarter of Section 27, Town 29 North, Range 10 West, more particularly described as: Commencing at the West one-quarter corner of said Section 27; thence North 89°34'28" East, along the East and West one-quarter line of said section, 1812.83 feet to the Point of Beginning of said easement; thence North 01°51'50" East, parallel with the West one-eighth line of said section, 33.05 feet to the Northerly right-of-way line of Bluewater Road; thence North 89°34'28" East, along said Northerly right-of-way line, 16.52 feet; thence North 01° 51'50" East, parallel with said West one-eighth line 154.61 feet; thence South 87°21'46" East, 33.00 feet; thence South 05°56'24" East, 153.17 feet, to said Northerly right-of-way line; thence North 89°34'28" East, along said Northerly right-of-way line, 16.52 feet; thence South 01°51'50" West, parallel with said West one-eighth line, 33.05 feet to said East and West one-quarter line; thence South 89°34'28" West, along said East and West one-quarter line, 83.09 feet to the Point of Beginning of said ingress and egress easement.

EASEMENT#2

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Together with a 33 foot easement for ingress and egress, and the construction and maintenance of a driveway, the centerline of said easement is described as: Part of the Southeast one-quarter of the Northwest one-quarter, of Section 27, Town 29 North, Range 10 West, more particularly described as: Commencing at the West one-quarter of said Section 27; thence North 89°34'28" East, along the East and West one-quarter line of said Section 1314.14 feet; to the West 1/8 line of said section; thence North 01°51'50" East, along said 1/8 line 788.90 feet; thence South 89°34'28" East, 135.81 feet, to the Point of Beginning; thence South 01°51'50" West, along the centerline of said 33 foot wide easement, 78.03 feet; thence 50.73 feet along the arc of a curve to the left, radius of 31.50 feet and long chord of South 44°53'32" East, 45.42 feet; thence North 88°58'31" East, 112.91 feet, to the Point of Ending of said 33 foot wide easement.

Parcel 3:

A parcel of land situated in the Township of Peninsula, County of Grand Traverse, State of Michigan, and described as follows to wit: Part of the Southeast one quarter of the Northwest one quarter of Section 27, Town 29 North, Range 10 West, more particularly described as: Commencing at the West one-quarter corner of said Section 27; thence North 89°34'28" East, along the East and West one-quarter line of said section, 1314.14 feet, to the West one-eighth line of said section and the Point of Beginning; thence North 01°51'50" East, along said West one-eighth line, 788.90 feet; thence North 89°34'28" East, parallel with said East and West one-quarter line, 135.81 feet; thence South 01°14'26" West, 78.03 feet; thence 50.73 feet along the arc of a curve to the left, radius of 31.50 feet and long chord of South 44°53'32" East, 45.42 feet; thence North 88°58'31" East, 112.91 feet; thence South 06°41'11" West, 405.37 feet; thence South 01°51'50" West, 82.03 feet; thence South 88°44'44" East, 268.12 feet; thence South 00°14'42" East, 186.96 feet, to the South line of said section; thence South 89°34'29" West, along said South line, 523.72 feet to the Point of Beginning. Subject to the right-of-way of Bluewater Road over the Southerly 33 feet thereof.

EASEMENT#1

Together with and subject to a variable-width easement for ingress and egress, and the construction and maintenance of a driveway approach, described as: Part of the Southeast one-quarter of the Northwest one-quarter of Section 27, Town 29 North, Range 10 West, more particularly described as: Commencing at the West one-quarter corner of said Section 27; thence North 89°34'28" East, along the East and West one-quarter line of said section, 1812.83 feet to the Point of Beginning of said easement; thence North 01°51'50" East, parallel with the West one-eighth line of said section, 33.05 feet to the Northerly right-of-way line of Bluewater Road; thence North 89°34'28" East, along said Northerly right-of-way line, 16.52 feet; thence North 01°51'50" East, parallel with said West one-eighth line 154.61 feet; thence South 87°21'46" East, 33.00 feet; thence South 05°56'24" East, 153.17 feet, to said Northerly right-of-way line; thence North 89°34'28" East, along said Northerly right-of-way line, 16.52 feet; thence South 01°51'50" West, parallel with said West one-eighth line, 33.05 feet to said East and West one-quarter line; thence South 89°34'28" West, along said East and West one-quarter line, 83.09 feet to the Point of Beginning of said ingress and egress easement.

EASEMENT#2

Together with a 33 foot easement for ingress and egress, and the construction and maintenance of a driveway.

the centerline of said easement is described as: Part of the Southeast one-quarter of the Northwest one-quarter, of Section 27, Town 29 North, Range 10 West, more particularly described as: Commencing at the West one-quarter of said Section 27; thence North 89°34'28" East, along the East and West one-quarter line of said Section 1314.14 feet; to the west 1/8 line of said section; thence North 01°51'50" East, along said 1/8 line 788.90 feet; thence South 89°34'28" East, 135.81 feet, to the Point of Beginning; thence South 01°51'50" West, along the centerline of said 33 foot wide easement, 78.03 feet; thence 50.73 feet along the arc of a curve to the left, radius of 31.50 feet and long chord of South 44°53'32" East, 45.42 feet; thence North 88°58'31" East, 112.91 feet, to the Point of Ending of said 33 foot wide easement.

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WHEREAS, after due notice as required by law, the Peninsula Township Planning Commission held a public hearing on January 17th, 2011 and

WHEREAS, the Peninsula Township Planning Commission reviewed and recommended approval with conditions on January 17th, 2011 considering same, and

THEREFORE, BE IT RESOLVED, after consideration of the request, the following statement of conclusions specifying the basis for decision and conditions imposed and the Special Land Use document outlining standards of development and conditions were adopted by the Peninsula Township Board of Commissioners on February 8th, 2011 permitting said operation:

I. PERMITTED ACTIVITY

The petitioner is hereby permitted to establish a new Winery - Chateau located upon existing parcels (#11-127-016-01, 11-127-002-00, 11-127-016-02), as legally described, in Section 27, Peninsula Township in accordance with Article 6 and Article 8; specifically Section 8.7.3(10) of the 1972 Peninsula Township Zoning Ordinance, as amended, and requirements put forth as part of the Special Land Use, including the final site plan and accompanying documents, as retained in the files of the Peninsula Township Planning Department, located at the Peninsula Township Hall, 13235 Center Rd., Traverse City, Michigan.

II. GENERAL AND SPECIFIC FINDINGS OF FACT

The following conclusions are based on Article 8, Section 8.1.3 of the 1972 Zoning Ordinance, as amended, which outlines the general standards of review to formalize a basis of determination in order to protect the public health, safety and welfare of the community:

General Standards: The Board shall review each application for the purpose of determining that each proposed use meets the following standards, and in addition, shall find adequate evidence that each use on the proposed location will:

- (a) Be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such a use will not change the essential character of the area in which it is proposed.

The Board finds that the existing operation has not been reported for any violations of their current land use permit. At this time the applicant is not proposing any physical alterations to the existing structures onsite and it is not anticipated that the change of operation classification will cause any negative impacts on the character of the surrounding agricultural community.

- (b) Not be hazardous or disturbing to existing or future uses in the same general vicinity and will be a substantial improvement to property in the immediate vicinity and to the community as a whole.

The Board finds that the operation of a vineyard and winery should not impact adjacent neighbors. The proposed low impact measures to control lighting, sound and traffic conditions should be sufficient during normal operating hours and during future guest activity uses. Additionally, with no physical expansion proposed to the site the Board would not anticipate negative externalities occurring given the change of classification.

- (c) Be served adequately by essential facilities and services, such as highways, streets, police, fire protection, drainage structures, refuse disposal, water and sewage facilities, or schools.

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The Board finds that the current operation areas should not require additional essential facilities or services and is compliant with all local permitting agencies.

- (d) Not create excessive additional requirements at public cost for public facilities and services.

The Board finds that again, given the applicant's request it is not anticipated that the existing operation's classification change will require future essential facilities or additional public services

- (e) Not involve uses, activities, processes, materials, and equipment or conditions of operation that will be detrimental to any persons, property, or the general welfare by fumes, glare or odors.

The Board finds that the proposed use of the site should not involve any uses or activities which produce negative impacts upon the existing neighborhood via fumes, glare, noise or odors.

Specific Requirements: In reviewing an impact assessment and site plan, the Planning Commission and the Board shall consider the following standards:

- (a) That the applicant may legally apply for site plan review.

The applicant is the legal owner of the subject properties.

- (b) That all required information has been provided.

The applicant has provided all the required information as portrayed within the special use permit application.

- (c) That the proposed development conforms to all regulations of the zoning district in which it is located.

The applicant's proposal meets all setback, parking, lot coverage and size requirements of the ordinance. Applying for the proposed special open space use is considered a special use given the parcel's agricultural zoning classification.

- (d) That the plan meets the requirements of Peninsula Township for fire and police protection, water supply, sewage disposal or treatment, storm drainage and other public facilities and services.

Grand Traverse County Road Commission- It has been noted that Blue Water Rd. meets the standards for primary public road construction standards. The GTCRC has not issued any official correspondence at this time, however, during conversations with representatives of the department the applicant is in compliance with their initial drive entrance permit.

Grand Traverse County Sheriffs Department- In an email dated January 10, 2011 the department stated that the proposed use would not require the use of additional resources and no additional time would be needed to enforce MLCC laws related to the new request.

Peninsula Township Fire Department- At this time, no official correspondence has been received by the Township's Fire Department.

SPECIAL JURY AND ISSUE # 1E " ERY CHARTER L - Walff & Liken Br
February 1, 201

Grand Traverse County Health Department- At this time no official correspondence has been received, however, the applicant is in compliance with their existing well and septic systems.

Grand Traverse County Drain Commission- In a letter dated January 10, 2011 the GTCDC office stated that no new permits would be required for the applicant's request.

Additional Comments- None at this time

- (e) That the plan meets the standards of other governmental agencies where applicable, and that the approval of these agencies has been obtained or is assured.

The applicant has secured all of the necessary approvals from the State of Michigan's Liquor Control Commission and Grand Traverse County Sheriff's Department Health Department per the existing land use permit governing the site.

- (f) That natural resources will be preserved to a maximum feasible extent, and that areas to be left undisturbed during construction shall be so located on the site plan and at the site per se.

As indicated upon the provided site plan, the applicant is not anticipating removing any existing vegetation from the land.

- (g) That the proposed development property respects flood ways and flood plains on or in the vicinity of the subject property.

There is no indication that any existing drains, floodways or flood plains exist on the site.

- (h.) That the soil conditions are suitable for excavation and site preparation, and that organic, wet or other soils which are not suitable for development will either be undisturbed or modified in an acceptable manner.

Given the existing operation, the proposed classification and special land use should not be detrimental to the soils found upon the land.

- (i) That the proposed development will not cause soil erosion or sedimentation problems.

All necessary soil erosion permits through the Grand Traverse County Drain Commission have been pulled and are in compliance.

- (j) That the drainage plan for the proposed development is adequate to handle anticipated storm-water runoff, and will not cause undue runoff onto neighboring property or overloading of water courses in the area.

All drainage from the new construction should be contained upon the subject parcel.

- (k) That grading or filling will not destroy the character of the property or the surrounding area, and will not adversely affect the adjacent or neighboring properties.

There should not be any grading or filling taking place upon the property to accommodate the potential use.

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- (l) That structures, landscaping, landfills or other land uses will not disrupt air drainage systems necessary for agricultural uses.

Air drainage is not anticipated to be effected per the increased usage of the site.

- (m) That phases of development are in a logical sequence, so that any one phase will not depend upon a subsequent phase for adequate access, public utility service, drainage or erosion control.

No new construction is slated to take place at this time.

- (n) That the plan provides for the proper expansion of existing facilities such as public streets, drainage systems and water sewage facilities.

No additional services or facilities are needed or anticipated on or off site to accommodate the proposed uses.

- (o) That landscaping, fences or walls may be required by the Town Board in pursuance of the objectives of this Ordinance.

Adequate buffering and screening is in place upon the site given the proposed outdoor service area's location and surrounding uses.

- (p) That parking layout will not adversely affect the flow of traffic within the site, or to and from the adjacent streets.

After revision of the proposed parking layout, the current site plan was developed to accommodate the anticipated usage of the site and not adversely affect the flow of traffic to or from the site.

- (q) That vehicular and pedestrian traffic within the site, and in relation to streets and sidewalks serving the site, shall be safe and convenient.

At this time, staff has not received any complaints from the public concerning the applicant's existing winery operation. Infrastructure servicing onsite pedestrian traffic appears to be functioning well and should be adequate for the proposed future usage.

- (r) That outdoor storage of garbage and refuse is contained, screened from view and located so as not to be a nuisance to the subject property or neighboring properties.

There will be no outdoor storage of garbage or refuse at this time.

- (s) That the proposed site is in accord with the spirit and purpose of this ordinance and not inconsistent with, or contrary to, the objectives sought to be accomplished by this Ordinance and the principles of sound planning.

The proposed usage and expansion of the site appears to be consistent with the requirements of the ordinance and is considered the highest and best utilization of the land.

m. **COMPLIANCE WITH GOVERNMENTAL REGULATIONS**

The petitioner shall comply with all State, County, Township, and other governmental regulations relative to the establishment for a parcel zoned A-1, Agricultural, with the above permitted use(s)

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on site, which includes meeting the requirements of the Michigan Department of Transportation (MDOT), the Grand Traverse County Drain Commissioner (GTCDC), the Grand Traverse County Road Commission (GTCRC), Michigan Liquor Control Commission (MLCC), and the Grand Traverse County Health Department (GTCHD). Zoning compliance is based on the governing Special Land Use document, approved site plan, and Articles 6 and 8 of the Peninsula Township Zoning Ordinance.

IV. **SECTION 8.7.3 (10) (WINERY - CHATEAU) REGULATIONS**

The Board finds that under Section 8.7.3 (10), the presented site plan and special use permit request meets the conditions associated with said provision as explained within the following.

- (a) It is the intent of this section to permit construction and use of a winery, guest rooms, and single family residences as a part of a single site subject to the provisions of this ordinance. The developed site must maintain the agricultural environment, be harmonious with the character of the surrounding land and uses, and shall not create undue traffic congestion, noise, or other conflict with the surrounding properties.

The proposed site plan indicates that the special use will take place upon a roughly seventy-five (75) acre site and essentially operate as it has since the winery's inception in 2005.

- (b) The use shall be subject to all requirements of Article VIII, Section 8.5, Food Processing Plants in A-1 Districts and the contents of this subsection. Data specified in Section 8.5.2, Required Information, shall be submitted as a basis for judging the suitability of the proposed plan. Each of the principal uses shall be subject to the terms and conditions of this ordinance except as specifically set forth herein.

The applicant's request is in compliance with the requirements under Section 8.5 and Section 8.5.2.

- (c) The minimum site shall be fifty (50) acres which shall be planned and developed as an integrated whole. All of the principal and accessory uses shall be set forth on the approved site plan.

The applicant's site encompasses a total of seventy-five (75) acres of land under common ownership and operation.

- (d) The principal use permitted upon the site shall be Winery. Guest Rooms, Manager's Residence, and Single Family Residences shall be allowed as support uses on the same property as Winery. In addition to the principal and support uses, accessory uses for each such use shall be permitted provided, that all such accessory uses shall be no greater in extent than those reasonably necessary to serve the principal use.

Again, the applicant is not proposing to construct any new buildings for purposes of the winery-chateau. Those existing structures onsite currently host the proposed Winery, Guest Rooms and Manager's Residence.

- (e) For purposes of computation, the principal and each support use identified in sub-section (d) above shall be assigned an "area equivalent" as set forth herein. The total "area equivalent" assigned to the principal uses shall not exceed the actual area of the site.

Refer to the following assessment below.

- (t) "Area equivalents" shall be calculated as follows:

Winery: five (5) acres or the actual area to be occupied by the winery including parking, whichever is greater;

Manager's Residence: five (5) acres;

The existing homestead of the applicant is considered the manager's residence and measures five (5) acres in size.

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Single Family Residences: five (5) acres;

No additional single family residences have been proposed at this time.

Guest Rooms: five (5) acres for each 3 rooms, not to exceed a total of twelve (12) guest rooms.

The applicant is permitted to host a maximum of two (2) guest rooms given the proposed location.

- (g) The number of single family residences shall not exceed six (6). The manager's residence shall not contain or be used for rental guest rooms. The number of guest rooms shall not exceed twelve (12).

At this time the applicant is not permitted to establish any new residential units.

- (h) Not less than seventy-five (75%) percent of the site shall be used for the active production of crops that can be used for wine production, such as fruit growing on vines or trees.

Per the attached site plan the applicant currently has roughly forty-four (44.89) acres in active production. The total site area is approximately fifty-nine (59) acres, thus the total area utilized for agricultural production is roughly seventy-six (76%) percent.

- (i) The facility shall have at least two hundred (200') feet of frontage on a state or county road.

The applicant's site has roughly twenty-five hundred (2,500') feet of frontage on Blue Water Rd.

- G) The winery chateau shall be the principal building on the site and shall have an on-site resident manager.

The existing winery will remain the principal building onsite. The resident manager does and will remain within the existing homestead located upon the southwest portion of the property.

- (k) All guest rooms shall have floor areas greater than two hundred fifty (250) square feet. Maximum occupancy shall be limited to five (5) persons per unit. No time sharing shall be permitted.

The applicant's existing guest house quarters is permitted two (2) guest rooms of which are in compliance with the ordinance concerning size and layout.

- (l) No exterior lighting shall have a source of illumination or light lenses visible outside the property line of the site and shall in no way impair safe movement of traffic on any street or highway.

Per the current land use permit, the applicant is in compliance with the ordinance and is not permitted any additional lighting.

- (m) Accessory uses such as facilities, meeting rooms, and food and beverage services shall be for registered guests only. These uses shall be located on the same site as the principal use to which they are accessory and are included on the approved Site Plan. Facilities for accessory uses shall not be greater in size or number than those reasonably required for the use of registered guests.

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All uses permitted shall take place onsite within both the principal structure and its surrounding vineyard areas.

- (n) Well and septic system: Proof of evaluation of the well and septic system by the Health Department and conformance to that agency's requirements shall be supplied by the owner.

All necessary permits have been pulled and are in compliance with the appropriate regulating bodies for the existing operation.

- (o) Fire safety:

1. All transient lodging facilities shall conform to the Michigan State Construction Code section regulating fire safety.
2. An on-site water supply shall be available and meet the uniform published standards of the Peninsula Township Fire Department.
3. A floor plan drawn to an architectural scale of not less than 1/8" = 1 foot shall be on file with the Fire Department.
4. Each operator of a transient lodging facility shall keep a guest registry which shall be available for inspection by the Zoning Administrator and police and fire officials at any time.
5. Master keys for all rooms shall be available at all times.

- (p) Fencing or Planting Buffer: In the event that the Township Board determines that noise generation may be disturbing to neighbors or that the establishment is in an area where trespass onto adjacent properties is likely to occur, then the Township Board may require that fencing or a planting buffer be constructed and maintained.

At this time staff does not anticipate the need for any new plantings or vegetative buffering given the physical usage of the principal structure should not alter from that existing under the current land use permit.

- (q) Rental of Recreation Equipment: Rental of snowmobiles, ATVs or similar vehicles, boats and other marine equipment in conjunction with the operation of the establishment shall be prohibited.

Rental of equipment is not permitted onsite.

- (r) Activities and Outdoor Gatherings: Activities made available to registered guests shall be on the site used for the facility or on lands under the direct control of the operator either by ownership or lease. Outdoor activities shall be permitted if conducted at such hours and in such manner as to not be disruptive to neighboring properties.

Activities or outdoor gatherings shall take place after the normal operating hours of the winery-chateau operation and are required to conclude said activities or gatherings no later than 9:30pm per Section 8.7.3(10)(u)5(b)

- (s) Signs shall be in accordance with Section 7.2.2(4) which governs signs in the A-1 Agricultural District.

All existing signs are in compliance with the guidelines of the ordinance.

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- (t) A two hundred (200) foot setback shall be maintained between guest accommodations and facilities and agricultural crops, unless it is demonstrated that a lesser setback can be maintained which will provide for an equal level of protection from agricultural activities to residents, visitors and guests of the winery--chateau. Upon such demonstration, the Township Board may permit a lesser setback.

Given the location of the existing structures and operational facilities in conjunction with the agricultural production held onsite, the Board finds that the current locations of guest access are adequate, safe, and meet the intent of the ordinance.

- u.) Guest Activity Uses. The Township Board may approve Guest Activity Uses (Activities by persons who may or may not be registered guests) as an additional Support Use, subject to the following:

- 1.(a) The current Winery-Chateau section of the ordinance required 75% of the site to be used for the active production of crops that can be used for wine production such as fruit growing on vines or trees, but does not require that any of the wine produced on the site be made from wine fruit grown on Old Mission Peninsula. To assure that, in addition to the minimum parcel size required for a Winery-Chateau, there is additional farm land in wine fruit production in Peninsula Township if Guest Activity Uses are allowed to take place at a Winery-Chateau facility.

At this time the applicant owns and operates their vineyard upon roughly seventy-five (75) acres within the Township. Currently, no additional land is under lease within the Peninsula for purposes of purchasing grapes other than those produced on lands under ownership of the applicant.

- 1.(b) Guest Activity Uses are intended to help in the promotion of Peninsula agriculture by: a) identifying "Peninsula Produced" food or beverage for consumption by the attendees: b) providing "Peninsula Agriculture" promotional brochures, maps and awards: and/or c) including tours through the winery and/or other Peninsula agriculture locations.

The applicant is prepared to continue promoting Peninsula based agriculture throughout their operations. Furthermore, the applicant will be limited to conducting those uses allowed under section 8.7.3(10)(u)2 via wine and food seminars, meetings of non-profit groups and meetings of agriculturally related groups.

If the applicant wishes to utilize guest activity uses, said uses should be conducted at a time after those established normal hours of operation. Section 8.7.3(10)(u)5(b) requires all guest activity uses be concluded no later than 9:30pm.

V. CONDITIONS AND SAFEGUARDS

Compliance with approved site plan as signed by the Peninsula Township Planner, verifying compliance with the 1972 Peninsula Township Zoning Ordinance, and the information requested and conditions of approval as recommended by the Planning Commission and adopted by the Board of Commissioners.

The petitioner shall maintain in compliance with the following conditions put forth in the approval of the Special Land Use or be subject to Section V, below:

Conditions and Safeguards: The Board may suggest such additional conditions and safeguards deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of this Ordinance will be observed. The breach of any condition, safeguard or requirement shall automatically invalidate the permit granted.

Peninsula Township Zoning Ordinance
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- a. The applicant shall provide evidence that the Peninsula Fire Chief has reviewed all structures for compliance.
- b. If future guest activity uses are to be applied upon the property, then the applicant must submit annual grape production and purchase numbers to the Township's staff for review.

VI. COMMENCEMENT AND COMPLETION OF SPECIAL LAND USE

The commencement and completion of Special Land Uses are governed by Section 8.1.2(5) of the Peninsula Township Zoning Ordinance. Violations of the Special Land Use and accompanying Site Plan are enforceable and remedies available under Section 4.2 of the Zoning Ordinance.

VII. EFFECTIVE DATE OF SPECIAL LAND USE

The Special Land Use shall be effective when the application has been approved by the Peninsula Township Board of Commissioners. The Board of Commissioners approves by a vote of:

AYES	_____	7	_____	_____
NAYS	_____	0	_____	_____
ABSTAINING	_____	0	_____	_____
ABSENT	_____	_____	_____	_____

The undersigned hereby certifies that she is the Clerk for the Township of Peninsula, Grand Traverse County, Michigan and that the foregoing Special Use Permit was approved by the Peninsula Township Board on the 8th day of February, 2011.

The undersigned further certifies that a quorum was present at said meeting and that said meeting complied with all applicable laws and regulations.

 Monica Hoffman, Peninsula Township Clerk

Approved by the Board of Commissioners of Peninsula Township, Michigan on the 8th day of February, 2011.

 Rob Manigold, Peninsula Township Supervisor

TIDS PERMIT SHALL BE ATTACHED TO THE SITE PLAN AND BECOME A PART THEREOF.

I hereby acknowledge that I have received a true copy of the Special Land Use and I have been informed of said requirements of this Special Land Use and of the requirements of the Peninsula Township Zoning Ordinance, pertaining to the operation of the approved Winery - Chateau.

 Walter & Eileen Brys

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

Defendant,

And

PROTECT THE PENINSULA,
Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
DISMISS PLAINTIFFS' BOWERS HARBOR & VINEYARD, INC., BRY'S WINERY,
LC, CHATEAU OPERATIONS, LTD., GRAPE HARBOR, INC., MONTAGUE
DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 10

Peninsula Township Planning
13235 Center Road
Traverse City, MI 49686

**SPECIAL USE PERMIT AMMENDMENT
& FINDINGS OF FACT
SUP #115 1st Amendment, Brys (Winery-Chateau)
April 10th, 2012**

This Special Land Use is issued and entered into on April 10, 2012, by and between the Township of Peninsula and Walter & Eileen Brys, 3309 Blue Water Road, Traverse City, Michigan, hereinafter referred to as the petitioners. This Special Land Use is issued pursuant to the authority granted to the Peninsula Township Board of Commissioners by Article 8, of the 1972 Peninsula Township Zoning Ordinance, as amended, and P.A. 110 of 2006, the Michigan Zoning Enabling Act, as amended.

WHEREAS, an application for a Special Land Use has been filed by Walter & Eileen Brys, to establish a new Winery-Chateau located upon an existing parcel located in Section 27, Peninsula Township (11-127-016-01, 11-127-002-00, 11-127-016-02).

WHEREAS, after due notice as required by law, the Peninsula Township Planning Commission held a public hearing on March 19, 2012 and

WHEREAS, the Peninsula Township Planning Commission reviewed and recommended approval with conditions on March 19, 2012 considering same,

THEREFORE, BE IT RESOLVED, after consideration of the request, the following statement of conclusions specifying the basis for decision and conditions imposed and the Special Land Use document outlining standards of development and conditions were adopted by the Peninsula Township Board on April 10, 2012 permitting said operation:

1. Permitted Activity

The petitioner is hereby permitted to establish a Winery-Chateau located upon existing parcels (11-127-016-01, 11-127-002-00, 11-127-016-02), as legally described, in Section 27, Peninsula Township in accordance with Article 6 and Article 8; specifically Section 8.7.3 (10) of the Peninsula Township Zoning Ordinance, as amended, and requirements put forth as part of the Special Land Use, including the final site plan and accompanying documents, as retained in the file of the Peninsula Township Planning Department, located at the Peninsula Township Hall, 13235 Center Rd., Traverse City, Michigan.

2. General and Specific Finding of Fact - Section 8.1.3 (Basis for Determinations)

2.1 General Standards- The Board shall review each application for the purpose of determining that each proposed use meets the following standards, and in addition, shall find adequate evidence that each use on the proposed location will:

- a. Be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such a use will not change the essential character of the area in which it is proposed.

The Board finds that the attached final site plan and proposed development is similar to other existing wineries and site designs throughout the region. The proposed structural additions should

blend well within the surrounding neighborhood and maintain the rural character of this portion of the Township.

- b. Not be hazardous or disturbing to existing or future uses in the same general vicinity and will be a substantial improvement to property in the immediate vicinity and to the community as a whole.
The Board finds that historically the operation of the petitioned winery has not produced negative complaints to date regarding their production operation or services to the general public. The proposed addition to the existing outdoor patio area could increase the potential for noise generated by guests visiting the property.

The Board finds that the winery's positive track record, its physical locations for expansion, and screening efforts should maintain adequate protection of the health, safety, and welfare of the surrounding properties.

- a. Be served adequately by essential facilities and services, such as highways, streets, police, fire protection, drainage structures, refuse disposal, water and sewage facilities, or schools.

The Board finds that current operation areas should not require additional essential facilities or services and is working with all local permitting agencies to achieve compliance.

- b. Not create excessive additional requirements at public cost for public facilities and services.

The Board finds that the applicant's request should not require excessive future essential facilities or additional public services. The winery operation is not introducing any new uses on site which would trigger additional infrastructure, public services, or public costs.

- c. Not involve use, activities, processes, materials, and equipment or conditions of operation that will be detrimental to any persons, property, or the general welfare by fumes, glare or odors.

The Board finds that the proposed use of the site should not involve any uses or activities which produce negative impacts upon the existing neighborhood via fume glare, noise or odors.

2.2 Conditions and Safeguards- The Commission may suggest such additional conditions and safeguards deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of the Ordinance will be observed. The breach of any condition, safeguard or requirement shall automatically invalidate the permit granted.

- a. Staff would recommend discussing hours of operation for the outside patio deck and any additional conditions or safeguards as developed by the Board.
- b. If future activity uses are to be applied upon the property, then the applicant must submit annual grape production and purchase number to the Township's staff for review including parking accommodations for increased onsite traffic generation.

2.3 Specific Requirements- In reviewing an impact assessment and site plan, the Planning commission and the Board shall consider the following standards:

- a. That the applicant may legally apply for site plan review.

The applicant is the owner/operator of the petitioned property and Winery-Chateau operation and my legally apply for said review process.

- b. That all required information has been provided.

The applicant has provided all the required information as portrayed within the special use permit application and upon the provided final site plans.

- c. That the proposed development conforms to all regulations of the zoning district in which it is located.

The applicant's proposal meets all of the lot coverage, signage, landscaping and size requirements of the ordinance.

- c. That the plan meets the requirements of Peninsula Township for fire and police protection, water supply, sewage disposal or treatment, storm drainage and other public facilities and services.

Grand Traverse County Road Commission- Because site access is off of the Blue Water Rd. right-of-way, and has been legally created as of 2004, it is not anticipated that the Road commission will need to review the project.

Grand Traverse County Sheriff's Department-Per an email received on March 16, 2012, the Sheriff's Department is supportive of the proposal and will work with the applicant to amend their MLCC permit post review by the Township Board.

Peninsula Township Fire Department- In a letter dated March 21, 2012, the Fire Chief indicated that the department had no objections with the proposed project; however, the potential future usage of the deck area would be subject to final review of the County construction Code Office for accessibility.

Grand Traverse County Construction Code Office- An email dated March 13, 2012, from the Construction Code Office indicated that the structure may have to receive a change of use, or add additional uses per their review process. Additional review requested that an occupant load should be determined for the outdoor patio to determine the number of exits necessary for said improvement.

Grand Traverse County Health Department- The existing onsite water and septic systems have previously been approved by the Health Department. After a brief conversation with their staff, it is not anticipated that additional facilities will need to be implemented onsite to accommodate the proposed expansion.

Grand Traverse County Drain Commissioner- In a letter dated March 16, 2012, the Drain Commissioner's office reports that they do not anticipate any development of the site that would cause

soil erosion, sedimentation or storm water runoff to adjacent properties. Additionally, the project is considered commercial construction and will require a soil erosion pennit through their office.

- d. That the plan meets the standards of other governmental agencies where applicable, and that the approval of these agencies has been obtained or is assured.

At this time it appears as if the applicant is in cooperation with all of the appropriate governmental entities to complete the project. All fmal permits must be received by the Township prior to any construction taking place onsite.

- e. That natural resources will be preserved to a maximum feasible extent, and that areas to be left undisturbed during construction shall be so located on the site plan and at the site per se.

As indicated upon the provided site plan, the applicant will comply with local permitting agencies, in this case the Grand Traverse County Soil Erosion Department, to ensure that all soil erosion efforts will be maintained onsite and not affect neighboring properties.

- f. That the proposed development property respects flood ways and flood plains on or in the vicinity of the subject property.

There is no indication that any existing drains, floodways or flood plains exist on the site.

- g. That the soil conditions are suitable for excavation and site preparation, and that organic, wet or other soils which are not suitable for development will either be undisturbed or modified in an acceptable manner.

The proposed use should not be detrimental to the existing soils found upon the land.

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- h. That the proposed development will not cause soil erosion or sedimentation problems.

Further improvement to the land should obtain any necessary soil erosion permits through the Grand Traverse County Drain commission prior to construction efforts.

- L. That the drainage plan for the proposed development is adequate to handle anticipated storm-water runoff, and will not cause undue runoff onto neighboring property or overloading of water courses in the area.

All drainage from the new construction should be contained upon the subject parcel and must be reviewed and approved by the Grand Traverse County Drain Commissioner.

- j. That grading or filling will not destroy the character of the property or the surrounding area, and will not adversely affect the adjacent or neighboring properties.

Any drainage measures implemented onsite will need approval from the Grand Traverse County Drain Commissioner prior to implementation.

- k. That structures, landscaping, landfills or other land uses will not disrupt air drainage systems necessary for agricultural uses.

Given the location of both the existing structure and the proposed additions, the applicant's engineer has stated that air drainage should not be impacted.

- l. That phases of development are in a logical sequence, so that any one phase will not depend upon a subsequent phase for adequate access, public utility service, drainage or erosion control.

The proposed schedule of construction efforts has been illustrated upon the final site plan. The applicant anticipates construction in May of 2012 with the intention of finalizing the project in time for the fall of 2012's harvest season.

- m. That the plan provides for the proper expansion of existing facilities such as public streets, drainage systems and water sewage facilities.

At this time, no additional services or facilities are needed or anticipated on or off site to accommodate the proposed additions to the winery.

- n. That landscaping, fences or walls may be required by the Township Board in pursuance of the objectives of this Ordinance.

Again, given the existing mature forest lands separating the Winery-Chateau operation from those surrounding neighbors, additional landscaping should not be necessary.

- o. That parking layout will not adversely affect the flow of traffic within the site, or to and from the adjacent streets.

The current site plan was developed to accommodate the anticipated usage of the site and the proposed additions should not adversely affect the flow of traffic to or from the public roads.

- p. That vehicular and pedestrian traffic within the site, and in relation to streets and sidewalks serving the site, shall be safe and convenient.

At this time, staff has not received any complaints from the public concerning the applicant's existing winery operation. Infrastructure servicing onsite pedestrian traffic appears to be functioning well and should be adequate for the proposed site redesign.

- q. That outdoor storage of garbage and refuse is contained, screened from view and located so as not to be a nuisance to the subject property or neighboring properties.

The applicant has illustrated outdoor refuse storage located upon the northern paved drive. This placement should be appropriate for screening purposes as the dense forest to the west and physical location of the winery to the south should block the receptacle from view of both the adjacent neighbors and general public.

- r. That the proposed site is in accord with the spirit and purpose of this ordinance and not inconsistent with, or contrary to, the objectives sought to be accomplished by this Ordinance and the principles of sound planning.

The proposed usage of the site appears to be consistent with the requirements of the ordinance and is supported with the objectives of the 2011 Master Plan.

3. SECTION 8.7.3 (10) (WINERY -CHATEAU) REGULATIONS-

The Board finds that under Section 8.7.3 (10), the presented site plan and special use permit request meets the conditions associated with said provision as explained within the following:

- a. It is the intent of this section to permit construction and use of a winery, guest rooms, and single family residences as a part of a single site subject to the provisions of this ordinance. The developed site must maintain the agricultural environment, be hannonious with the character of the surrounding land and uses, and shall not create undue traffic congestion, noise, or other conflict with the surrounding properties.

The proposed site plan indicates that the special use will take place upon roughly seventy-five (75) acres of land and will operate as it has since the winery's inception in 2005.

- b. The use shall be subject to all requirements of Article VII, Section 8.5, Food Processing Plants in A-1 Districts and the contents of this subsection. Data specified in Section 8.5.2, Required Information, shall be submitted as a basis for judging the suitability of the proposed plan. Each of the principal uses shall be subject to the terms and conditions of this ordinance except as specifically set forth herein.

The applicant's request is in compliance with the requirements under Section 8.5 and Section 8.5.2.

- c. The minimum site shall be fifty (50) acres which shall be planned and developed as an integrated whole. All of the principal and accessory uses shall be set forth on the approved site plan.

The applicant's site encompasses a total of fifty-nine (59) acres of land under operation which serves as the primary area supporting the winery through grape production. The site is comprised of a combination of vineyard, open areas for air drainage, and navigational lanes for agricultural equipment.

- d. The principal use permitted upon the site shall be Winery, Guest Rooms, Manager's Residence, and Single Family Residences shall be allowed as support uses on the same property as the Winery. In addition to the principal and support uses, accessory uses for each such use shall be permitted provided, that all such accessory uses shall be no greater in extent than those reasonably necessary to serve the principal use.

The applicant's first amendment to their SUP is a proposal to construct physical additions to the principal structure, the Winery-Chateau. Said construction is a means to expand the processing facility for additional production capacity and outdoor space for those visiting the winery.

- e. For purpose of computation, the principal and each support use identified in sub-section (d) above shall be assigned and "area equivalent" as set forth herein. The total "area equivalent" assigned to the principal uses shall not exceed the actual area of the site.

Refer to the following assessment below.

- f. "Area equivalents" shall be calculated as follows:

Winery: five (5) acres or the actual area to be occupied by the winery including parking, whichever is greater;

Manager's Residence: five (5) acres;

The existing homestead of the applicant is considered the manager's residence and measures five (5) acres in size.

Single Family Residences; five (5);

No additional single family residences have been proposed at this time.

Guest Rooms: five (5) acres for each 3 rooms, not to exceed a total of twelve (12) guest rooms;

The applicant is permitted to host a maximum of two (2) guest rooms given the proposed location.

- g. The number of single family residences shall not exceed six (6). The manager's residence shall not contain or be used for rental guest rooms. The number of guest rooms shall not exceed twelve (12).

At this time the applicant is not permitted to establish any new residential units.

- h. Not less than seventy-five percent (75%) of the site shall be used for the active production of crops that can be used for wine production, such as fruit growing on vines or trees.

Per the attached site plan the applicant currently has roughly forty-four (44.89) acres of vineyard in active production. Again, the total site area is approximately fifty-nine (59) acres, thus the total area utilized for agricultural production is roughly seventy-six percent (76%).

- i. The facility shall have at least two hundred feet (200') of frontage on a state or county road.

The applicant's site has roughly twenty-five hundred feet (2,500') of frontage on Blue Water Rd.

- j. The winery chateau shall be the principal building on the site and shall have an onsite resident manager.

The existing winery will remain the principal building onsite. The resident manager does and will remain within the existing homestead located upon the southwest portion of the property.

- k. All guest rooms shall have floor areas greater than two hundred fifty (250) square feet. Maximum occupancy shall be limited to five (5) persons per unit. No time sharing shall be permitted.

The applicant's existing guest house quarters is permitted two (2) guest rooms of which are in compliance with the ordinance concerning size and layout.

1. No exterior lighting shall have a source of illumination or light lenses visible outside the property line of the site and shall in no way impair safe movement of traffic on any street or highway.

Per the current land use permit, and illustrated on the amended final site plan, the applicant is in compliance with the ordinance and is not permitted any additional lighting.

- m. Accessory uses such as facilities, meeting rooms, and food and beverage services shall be for registered guests only. These uses shall be located on the same site as the principal use to which they are accessory and are included on the approved Site Plan. Facilities for accessory uses shall not be greater in size or number than those reasonably required for the use of registered guests.

All uses permitted shall take place onsite within both the principal structure and its surrounding vineyard areas.

- n. Well and septic system- Proof of evaluation of the well and septic system by the Health Department and conformance to that agency's requirements shall be supplied by the owner.

All necessary permits have been pulled and are in compliance with the appropriate regulating bodies for the existing operation.

- o. Fire safety-

- I. All transient lodging facilities shall conform to the Michigan State Construction Code section regulating fire safety.
- II. An onsite water supply shall be available and meet the uniform published standards of the Peninsula Township Fire Department.

-
- III. A floor plan drawn to an architectural scale of not less the 1/8": 1 foot shall be on file with the Fire Department.

- IV. Each operator of a transient lodging facility shall keep a guest registry which shall be available for inspection by the Zoning Administrator and police and fire officials at any time.

- V. Master keys for all rooms shall be available at all times.

- p. Fencing or Planting Buffer- In the event that the Township Board determines that noise generation may be disturbing to the neighbors or that the establishment is in an area where trespass onto adjacent properties is likely to occur, then the Township Board may require that fencing or a planting buffer be constructed and maintained.

At this time staff does not anticipate the need for any new plantings or vegetative buffering. The physical usage of the principal structure should not alter form that existing under the current special land use permit which continues to operate in compliance with the Ordinance.

- q. Rental of Equipment- Rental of snowmobiles, ATVs or similar vehicles, boats and other marine equipment in conjunction with the operation of the establishment shall be prohibited.

Rental of equipment is not permitted onsite.

- r. Activities and Outdoor Gatherings- Activities made available to registered guests shall be on the site used for the facility or on lands under the direct control of the operator either by ownership or lease. Outdoor activities shall be permitted if conducted at such hours, and in such manner, as to not be disruptive to neighboring properties.

Activities or outdoor gatherings shall take place after the normal operating hours of the Winery-Chateau operation and are required to conclude said activities or gatherings no later than 9:30 pm per Section 8.7.3 (10) (u) S (b),

- s. Signs shall be in accordance with Section 7.2.2 (4) which governs signs in the A-1 Agricultural District.

All existing signs are in compliance with the guidelines of the ordinance.

- t. A two hundred foot (200') setback shall be maintained between guest accommodations and facilities and agricultural crops, unless it is demonstrated that a lesser setback can be maintained which will provide for an equal level of protection from agricultural activities to residents, visitors and guests of the Winery-Chateau. Upon such demonstration, the Township Board may permit a lesser setback.

Approval of the existing SUP #115 demonstrated that the original winery structure's setback of one hundred and two feet (102') from the adjacent property has maintained sufficient protection of those residents, visitors, and guests of the Winery-Chateau. Again, the Township has not received any complaints regarding the existing winery operation at its current setback and location. The proposed addition to the structure, specifically upon the western side, would reduce this setback for one hundred and two feet (102') to eighty feet (80'). Staff does not anticipate any negative impact to neighboring parcels as this area is to house processing equipment and wine production storage tanks.

- u. Guest Activities Uses- The Township Board may approve Guest Activity Uses (Activities by persons who may or may not be registered guests) as an additional Support Use, subject to the following:
 - I. The current Winery-Chateau section of the ordinance required seventy-five percent (75%) of the site to be used for the active production of crops that can be used for wine production such as fruit growing on vines or trees, but does not require that any of the wine produced on the site be made from wine fruit grown on Old Mission Peninsula. To assure that, in addition to the minimum parcel size required for a Winery-Chateau, there is additional farm land in wine fruit production in Peninsula Township if Guest Activity Uses are allowed to take place at a Winery-Chateau facility.

At this time the applicant owns and operates their vineyard upon roughly seventy-five (75) acres within the Township. Currently, no additional land is under lease within the Peninsula for purposes of purchasing grapes other than those produced on lands under ownership of applicant.

II. Guest Activity Uses are intended to help in the promotion of Peninsula agriculture by:

1. Identifying "Peninsula Produced" food or beverage for consumption by the attendees.
- ii. Providing "Peninsula Agriculture" promotional brochures, maps and awards.
- m. Including tours through the winery and/or other Peninsula agriculture locations.

The applicant is prepared to continue promoting Peninsula based agriculture throughout their operations. Furthermore, the applicant will be limited to conduction those uses allowed under section 8.7.3 (10) (u) 2 via wine and food seminars, meetings of non-profit groups and meeting of agriculturally related groups.

If the applicant wishes to utilize guest activity uses, said uses should be conducted at a time after those established normal hours of operation. Section 8.7.3 (10) (u) 5 (b) requires all guest activity uses be concluded no later than 9:30 pm.

4. COMPLIANCE WITH GOVERNMENTAL REGULATIONS-

The petitioner shall comply with all State, County, Township and other governmental regulations relative to the establishment for a parcel zoning A-1, Agricultural, with the above permitted use(s) on site, which includes meeting the requirements of the Michigan Department of Transportation (MOOT), the Grand Traverse County Drain Commissioner (GTCDC), the Grand Traverse County Road Commission (GTCRC), and the Grand Traverse County Health Department (GTCHD). Zoning compliance is based on the governing Special Land Use document, approved site plan, and Articles 6 and 8 of the Peninsula Township Zoning Ordinance.

5. CONDITIONS AND SAFEGUARDS-

Compliance with approved site plan as signed by the Peninsula Township Planner, verifying compliance with the 1972 Peninsula Township Zoning Ordinance, and the information requested and conditions of approval as recommended by the Planning Commission and the Peninsula Township Board.

The petitioner shall maintain in compliance with the following conditions put forth in the approval of the Special Land Use or be subject to Section 6 below:

Conditions and Safeguards- the Board may suggest such additional conditions and safeguards deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of the Ordinance will be observed. The breach of any condition, safeguard or requirement shall automatically invalidate the permit granted.

1. Compliance with the rules and regulations of Grand Traverse County Road Commission, Grand Traverse County Drain Commission, Grand Traverse County Health Department and any other agencies associated with the development of the property for such purpose.

2. If future guest activity uses are to be applied upon the property, then the applicant must submit annual grape production and purchase numbers to the Township's staff for review.

6. COMMENCEMENT AND COMPLETION OF SPECIAL LAND USE-

The commencement and completion of Special Land Uses are governed by Section 8.1.2(5) of the Peninsula Township Zoning Ordinance. Violations of the Special Land Use and accompanying Site Plan are enforceable and remedies available under Section 4.2 of the Zoning Ordinance.

7. EFFECTIVE DATE OF SPECIAL LAND USE-

The Special Land Use shall be effective when the application has been approved by the Peninsula Township Board. The Board approves by a vote of:

AYES	<u>0</u>
NAYS	<u>0</u>
ABSTAINING	<u>0</u>
ABSENT	<u>1</u>

The undersigned hereby certifies that she is the Clerk for the Township of Peninsula, Grand Traverse County, Michigan and that the foregoing Special Use Permit was approved by the Peninsula Township Board on April 10, 2012.

The undersigned further certifies that a quorum was present at said meeting and that said meeting complied with all applicable laws and regulations.

Monica A Hoffman, Peninsula Township Clerk

Approved by the Peninsula Township Board on April 10, 2012.

Robert K. Manigold, Peninsula Township Supervisor

THIS PERMIT SHALL BE ATTACHED TO THE SITE PLAN AND BECOME A PART THEREOF

I hereby acknowledge that I have received a true copy of the Special Land Use and I have been informed of said requirements of this Special Land Use Permit and of the requirements of the Peninsula Township Zoning Ordinance pertaining to the operation of the approved Winery-Chateau.

Walter Brys

Eileen Brys

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

Defendant,

And

PROTECT THE PENINSULA,
Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
DISMISS PLAINTIFFS' BOWERS HARBOR & VINEYARD, INC., BRY'S WINERY,
LC, CHATEAU OPERATIONS, LTD., GRAPE HARBOR, INC., MONTAGUE
DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 11

Peninsula Township Planning & Zoning Department
13235 Center Road
Traverse City, MI 49686

**SPECIAL USE PERMIT AMENDMENT
STAFF REPORT & FINDINGS OF FACT
SUP #115 2nd Amendment, Brys Estates (Winery – Chateau)
April 8, 2014**

This 2nd Amendment to SUP #115 is issued and entered into on April 8, 2014, by and between the Township of Peninsula and Walter & Eileen Brys, 3309 Blue Water Road, Traverse City, Michigan, hereinafter referred to as the petitioners. This Amended Special Land Use is issued pursuant to the authority granted to the Peninsula Township Board of Commissioners by Article 8, of the 1972 Peninsula Township Zoning Ordinance, as amended, and P.A. 110 of 2006, the Michigan Zoning Enabling Act, as amended.

WHEREAS, an application for a Special Land Use has been filed by Walter & Eileen Brys, to amend SUP #115 permitting a Winery-Chateau located upon an existing parcel located in Section 27, Peninsula Township (11-127-016-01, 11-127-002-00, 11-127-016-02).

WHEREAS, after due notice as required by law, the Peninsula Township Planning Commission reviewed the application and recommended for approval to the Township Board on March 17, 2014,

THEREFORE, BE IT RESOLVED, after consideration of the request, the following statement of conclusions specifying the basis for decision and conditions imposed and the Special Land Use document outlining standards of development and conditions were adopted by the Peninsula Township Board on April 10, 2012 permitting said operation:

1. Permitted Activity

The petitioner is hereby permitted to build an addition to the existing Winery-Chateau tasting room located upon parcels (11-127-016-01, 11-127-002-00, 11-127-016-02), as legally described, in Section 27, Peninsula Township in accordance with Article 6 and Article 8; specifically Section 8.7.3 (10) of the Peninsula Township Zoning Ordinance, as amended, and requirements put forth as part of the Special Land Use, including the final site plan and accompanying documents, as retained in the file of the Peninsula Township Planning Department, located at the Peninsula Township Hall, 13235 Center Rd., Traverse City, Michigan.

2. General Findings of Fact

2.1 Property Description-

- a. The Board finds that the subject parcels are located in Section 27 of the Township and claims a total of approximately one half mile (2,660') feet of road frontage off of the existing Blue Water Rd. right-of-way.
- b. The Board finds that the south-western boundary of said vineyard is roughly twelve hundred (1,200') feet east of the intersection at Center and Blue Water Roads.
- c. The Board finds the total acreage utilized for the Winery-Chateau site is measured at roughly fifty-nine (59) acres.

2.2 Action Request-

- a. The Board finds that the applicant is seeking site plan and special use approval to allow the winery operation to physically expand the existing Winery-Chateau. This new construction would allow for additional tasting room and storage space. (Exhibit 4)
- b. The Board finds that the amendment to a final site plan and special use permit is subject to the requirements of Sections 8.1.3 Basis of Determination and 8.7.3 (10) Winery-Chateau of the Peninsula Township Zoning Ordinance. (Exhibit 2)

2.3 Zoning/Use-

- a. The Board finds that the proposed site is zoned A-1, Agricultural District encompassing three (3) parcels which are considered conforming to local zoning. (Exhibit 2)
- b. The Board finds that the Brys Estates Vineyard & Winery was approved as a Winery-Chateau under SUP #115 in 2011, 1st Amendment in 2012 and currently is in compliance with their approved special land use permit. (Exhibit 3)
- c. The Board finds that the applicant is working with the local permitting agencies to obtain compliance for the proposed expansion efforts. (Exhibit 5)

2.4 Land Use Pattern- The Board finds the following land uses to be in existence per the date of this report adjacent to the proposed development.

- a. **North-** The land adjacent to the north of the subject properties is zoned A-1, Agriculture and are primarily utilized for ongoing agricultural production.
- b. **South-** The properties adjacent to the south are zoned A-1, Agriculture and are primarily utilized for ongoing agricultural production.
- c. **East-** Property to the east is zoned A-1 and is also utilized as an ongoing agricultural operation.
- d. **West-** The property located west of the subject is also zoned A-1 and is host to both farmland and single family housing.
- e. The Board finds that the future land use plan, in regards to the subject property, suggest that the adjacent and surrounding land will continue to be considered as an agricultural preservation region of the Township.

3. Specific Findings of Fact – Section 8.1.3 (Basis for Determinations)

3.1 General Standards- The Board shall review each application for the purpose of determining that each proposed use meets the following standards, and in addition, shall find adequate evidence that each use on the proposed location will:

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- a. Be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such a use will not change the essential character of the area in which it is proposed.

1) The Board finds that the attached site plan and proposed development is similar to other existing wineries and site designs throughout the region. The proposed structural additions should blend well within the surrounding neighborhood and maintain the rural character of this portion of the Township. (Exhibit 4)

This standard HAS been met.

- b. Not be hazardous or disturbing to existing or future uses in the same general vicinity and will be a substantial improvement to property in the immediate vicinity and to the community as a whole.

1) The Board finds that historically the operation of the petitioned winery has not produced negative complaints to date regarding their production operation or services to the general public.

2) The Board finds that the winery's positive track record, its physical locations for expansion, and screening efforts should maintain adequate protection of the health, safety, and welfare of the surrounding properties.

This standard HAS been met.

- c. Be served adequately by essential facilities and services, such as highways, streets, police, fire protection, drainage structures, refuse disposal, water and sewage facilities, or schools.

1) The Board finds that current operation areas should not require additional essential facilities or services and is working with all local permitting agencies to achieve compliance.

This standard HAS been met.

- d. Not create excessive additional requirements at public cost for public facilities and services.

1) The Board finds that the applicant's request should not require excessive future essential facilities or additional public services. The winery operation is not introducing any new uses on site which would trigger additional infrastructure, public services, or public costs.

This standard HAS been met.

- e. Not involve use, activities, processes, materials, and equipment or conditions of operation that will be detrimental to any persons, property, or the general welfare by fumes, glare or odors.

1) The Board finds that the proposed use of the site should not involve any uses or activities which produce negative impacts upon the existing neighborhood via fumes, glare, noise or odors.

This standard HAS been met.

3.2 Conditions and Safeguards- the Board may suggest such additional conditions and safeguards deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of the Ordinance will be observed. The breach of any condition, safeguard or requirement shall automatically invalidate the permit granted.

- a. If future activity uses are to be applied upon the property, then the applicant must submit annual grape production and purchase number to the Township's staff for review including parking accommodations for increased onsite traffic generation.**

3.3 Specific Requirements- In reviewing an impact assessment and site plan, the Planning Board and the Board shall consider the following standards:

- a. That the applicant may legally apply for site plan review.**

1) The Board finds that the applicant is the owner/operator of the petitioned property and Winery-Chateau operation and may legally apply for said review process.

This standard HAS been met.

- b. That all required information has been provided.**

1) The Board finds that the applicant has provided all the required information as portrayed within the special use permit application and upon the provided final site plans (Exhibit 4).

This standard HAS been met.

- c. That the proposed development conforms to all regulations of the zoning district in which it is located.**

1) The Board finds that the applicant's proposal meets all of the lot coverage, signage, landscaping and size requirements of the ordinance.

This standard HAS been met.

- d. That the plan meets the requirements of Peninsula Township for fire and police protection, water supply, sewage disposal or treatment, storm drainage and other public facilities and services.**

Grand Traverse County Road Board - Because site access is off of the Blue Water Rd. right-of-way, and has been legally created as of 2004, it is not anticipated that the Road Board will need to review the project.

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Grand Traverse County Sheriff's Department- Sheriff's Deputy Suhy has reviewed a copy of the site plan. In a conversation on March 17, 2014 Deputy Suhy indicated the amendment should have no impact on the provision of services by the Sheriff's Department.

Peninsula Township Fire Department- Chief VanderMey has reviewed a copy of the site plan. In an email dated March 15, 2014 Chief VanderMey indicated there are no issues with the proposal (Exhibit 5).

Grand Traverse County Construction Code Office- The applicant will need to apply to and receive a permit from the Construction Code Office prior to beginning construction on this project.

Grand Traverse County Health Department- The applicant's contractor is currently working with the Health Department to ensure compliance with all regulations. A health department permit will be required prior to issuance of the Special Use Permit by Planning & Zoning staff.

Grand Traverse Soil Erosion & Sedimentation Department- The applicant's contractor is currently working with the Soil Erosion & Sedimentation Department to ensure compliance with all regulations. A Soil Erosion permit will be required prior to issuance of the Special Use Permit by Planning & Zoning staff.

1) The Board finds that the applicant is in cooperation with all of the appropriate governmental entities to complete the project. All final permits must be received by the Township prior to any construction taking place onsite.

This standard HAS been met.

- e. That the plan meets the standards of other governmental agencies where applicable, and that the approval of these agencies has been obtained or is assured.

1) The Board finds that the applicant is in cooperation with all of the appropriate governmental entities to complete the project. All appropriate permits shall be received by the Township prior to any construction taking place on the tasting room addition.

This standard HAS been met.

- f. That natural resources will be preserved to a maximum feasible extent, and that areas to be left undisturbed during construction shall be so located on the site plan and at the site per se.

1) The Board finds that the applicant will comply with local permitting agencies, in this case the Grand Traverse County Soil Erosion Department, to ensure that all soil erosion efforts will be maintained onsite and not affect neighboring properties.

2) The Board finds that a Grand Traverse County Soil Erosion permit will need to be submitted the Planning & Zoning Department prior to issuance of this Special Use Permit.

This standard HAS been met.

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- g. That the proposed development property respects flood ways and flood plains on or in the vicinity of the subject property.

1) The Board finds that there is no indication that any existing drains, floodways or flood plains exist on the site.

This standard HAS been met.

- h. That the soil conditions are suitable for excavation and site preparation, and that organic, wet or other soils which are not suitable for development will either be undisturbed or modified in an acceptable manner.

1) The Board finds that the proposed use should not be detrimental to the existing soils found upon the land.

This standard HAS been met.

- i. That the proposed development will not cause soil erosion or sedimentation problems.

1) The Board finds that further improvement to the land shall obtain any necessary soil erosion permits through the Grand Traverse Soil Erosion & Sedimentation Department prior to issuance of this Special Use Permit.

This standard HAS been met.

- j. That the drainage plan for the proposed development is adequate to handle anticipated storm-water runoff, and will not cause undue runoff onto neighboring property or overloading of water courses in the area.

1) The Board finds that the proposed addition will not cause significant increased storm water runoff based on comments from Brian Rowley as provided in the email dated 03/10/2014 .

This standard HAS been met.

- k. That grading or filling will not destroy the character of the property or the surrounding area, and will not adversely affect the adjacent or neighboring properties.

1) The Board finds that grading or filling is not anticipated to destroy the character of the property or the surrounding area and should not adversely affect the adjacent or neighboring properties.

2) The Board finds that further improvement to the land shall obtain any necessary soil erosion permits through the Grand Traverse Soil Erosion & Sedimentation Department prior to issuance of this Special Use Permit.

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This standard HAS been met.

- l. That structures, landscaping, landfills or other land uses will not disrupt air drainage systems necessary for agricultural uses.

1) The Board finds that the proposed addition is not expected to impact air drainage systems.

This standard HAS been met.

- m. That phases of development are in a logical sequence, so that any one phase will not depend upon a subsequent phase for adequate access, public utility service, drainage or erosion control.

1) The Board finds that the proposed addition is to occur in one phase.

This standard HAS been met.

- n. That the plan provides for the proper expansion of existing facilities such as public streets, drainage systems and water sewage facilities.

1) The Board finds that no additional services or facilities are needed or anticipated on or off site to accommodate the proposed additions to the winery.

This standard HAS been met.

- o. That landscaping, fences or walls may be required by the Township Board in pursuance of the objectives of this Ordinance.

1) The Board finds that the existing mature forest lands separate the Winery-Chateau operation from those surrounding neighbors.

This standard HAS been met.

- p. That parking layout will not adversely affect the flow of traffic within the site, or to and from the adjacent streets.

1) The Board finds that the site plan was developed to accommodate the anticipated usage of the site and the proposed additions should not adversely affect the flow of traffic to or from the public roads.

This standard HAS been met.

- q. That vehicular and pedestrian traffic within the site, and in relation to streets and sidewalks serving the site, shall be safe and convenient.

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1) The Board finds that P&Z staff has not received any complaints from the public concerning the applicant's existing winery operation. Infrastructure servicing onsite pedestrian traffic appears to be functioning well and should be adequate for the proposed site redesign.

This standard HAS been met.

- r. That outdoor storage of garbage and refuse is contained, screened from view and located so as not to be a nuisance to the subject property or neighboring properties.

1) The Board finds that there are no changes to the previously approved garbage and refuse storage.

This standard HAS been met.

- s. That the proposed site is in accord with the spirit and purpose of this ordinance and not inconsistent with, or contrary to, the objectives sought to be accomplished by this Ordinance and the principles of sound planning.

1) The Board finds that the proposed usage of the site is consistent with the requirements of the ordinance and is supported with the objectives of the 2011 Master Plan (Exhibit 1 & 2).

This standard HAS been met.

4. SECTION 8.7.3 (10) WINERY – CHATEAU REGULATIONS-

The Board finds that under Section 8.7.3 (10), the presented site plan and special use permit request meets the conditions associated with said provision as explained within the following:

- a. It is the intent of this section to permit construction and use of a winery, guest rooms, and single family residences as a part of a single site subject to the provisions of this ordinance. The developed site must maintain the agricultural environment, be harmonious with the character of the surrounding land and uses, and shall not create undue traffic congestion, noise, or other conflict with the surrounding properties.

1) The Board finds that the special use will take place upon roughly fifty-nine (59) acres of land and will operate as it has since the winery's inception in 2005. (Exhibit 3)

This standard HAS been met.

- b. The use shall be subject to all requirements of Article VII, Section 8.5, Food Processing Plants in A-1 Districts and the contents of this subsection. Data specified in Section 8.5.2, Required Information, shall be submitted as a basis for judging the suitability of the proposed plan. Each of the principal uses shall be subject to the terms and conditions of this ordinance except as specifically set forth herein.

1) The Board finds that the applicant's special use was previously approved in 2011 and amended in 2012 in compliance with the requirements under Section 8.5 and Section 8.5.2.

2) The Board finds that the applicant is in cooperation with all of the appropriate governmental entities to complete the project. Should new permits be required, all appropriate permits must be received by the Township prior to any construction taking place on the tasting room addition.

This standard HAS been met.

- c. The minimum site shall be fifty (50) acres which shall be planned and developed as an integrated whole. All of the principal and accessory uses shall be set forth on the approved site plan.

1) The Board finds that the applicant's site encompasses a total of fifty-nine (59) acres of land under operation which serves as the primary area supporting the winery through grape production. The site is comprised of a combination of vineyard, open areas for air drainage, and navigational lanes for agricultural equipment.

This standard HAS been met.

- d. The principal use permitted upon the site shall be Winery, Guest Rooms, Manager's Residence, and Single Family Residences shall be allowed as support uses on the same property as the Winery. In addition to the principal and support uses, accessory uses for each such use shall be permitted provided, that all such accessory uses shall be no greater in extent than those reasonably necessary to serve the principal use.

1) The Board finds that the applicant's second amendment to their SUP is a proposal to construct a physical addition to the principal structure, the Winery-Chateau. Said construction is a means to expand the tasting area to sufficiently serve the previously approved outdoor deck. (Exhibit 4)

This standard HAS been met.

- e. For purpose of computation, the principal and each support use identified in sub-section (d) above shall be assigned and "area equivalent" as set forth herein. The total "area equivalent" assigned to the principal uses shall not exceed the actual area of the site.

Refer to the following assessment below.

- f. "Area equivalents" shall be calculated as follows:

Winery: five (5) acres or the actual area to be occupied by the winery including parking, whichever is greater;

1) The Board finds the area equivalent for the winery is 5 acres.

This standard HAS been met.

Manager's Residence: five (5) acres;

1) The Board finds that the existing homestead of the applicant is considered the manager's residence and measures five (5) acres in size.

This standard HAS been met.

Single Family Residences: five (5);

1) The Board finds that no additional single family residences have been proposed at this time.

This standard HAS been met.

Guest Rooms: five (5) acres for each 3 rooms, not to exceed a total of twelve (12) guest rooms;

1) The Board finds that the applicant is permitted to host a maximum of two (2) guest rooms given the proposed location.

This standard HAS been met.

- g. The number of single family residences shall not exceed six (6). The manager's residence shall not contain or be used for rental guest rooms. The number of guest rooms shall not exceed twelve (12).

1) The Board finds that the applicant is not applying to establish any additional residential units.

This standard HAS been met.

- h. Not less than seventy-five percent (75%) of the site shall be used for the active production of crops that can be used for wine production, such as fruit growing on vines or trees.

1) The Board finds that the applicant has an excess of fifty (50) acres of the fifty-nine acres planted constituting well over the required 75 percent of the site in active production of crops that can be used for wine production.

This standard HAS been met.

- i. The facility shall have at least two hundred feet (200') of frontage on a state or county road.

1) The Board finds that the applicant's site has roughly twenty-five hundred feet (2,500') of frontage on Blue Water Rd.

This standard HAS been met.

- j. The winery chateau shall be the principal building on the site and shall have an onsite resident manager.

1) The Board finds that the existing winery will remain the principal building onsite.

2) The Board finds that the resident manager does and will remain within the existing homestead located upon the southwest portion of the property.

This standard HAS been met.

- k. All guest rooms shall have floor areas greater than two hundred fifty (250) square feet. Maximum occupancy shall be limited to five (5) persons per unit. No time sharing shall be permitted.

1) The Board finds that the applicant's existing guest house quarters is permitted two (2) guest rooms of which are in compliance with the ordinance concerning size and layout. (Exhibit 3)

This standard HAS been met.

- l. No exterior lighting shall have a source of illumination or light lenses visible outside the property line of the site and shall in no way impair safe movement of traffic on any street or highway.

1) The Board finds that the existing lighting is in compliance with the ordinance and there is no additional lighting proposed as part of this amendment.

This standard HAS been met.

- m. Accessory uses such as facilities, meeting rooms, and food and beverage services shall be for registered guests only. These uses shall be located on the same site as the principal use to which they are accessory and are included on the approved Site Plan. Facilities for accessory uses shall not be greater in size or number than those reasonably required for the use of registered guests.

1) The Board finds that all uses permitted shall take place onsite within both the principal structure and its surrounding vineyard areas.

This standard HAS been met.

- n. Well and septic system- Proof of evaluation of the well and septic system by the Health Department and conformance to that agency's requirements shall be supplied by the owner.

1) The Board finds that the applicant's contractor is currently working with the Health Department to ensure compliance with all regulations. A health department permit will be required prior to issuance of the Special Use Permit by Planning & Zoning staff.

This standard HAS been met.

- o. Fire safety-

- I. All transient lodging facilities shall conform to the Michigan State Construction Code section regulating fire safety.

- II. An onsite water supply shall be available and meet the uniform published standards of the Peninsula Township Fire Department.
- III. A floor plan drawn to an architectural scale of not less the 1/8" = 1 foot shall be on file with the Fire Department.
- IV. Each operator of a transient lodging facility shall keep a guest registry which shall be available for inspection by the Zoning Administrator and police and fire officials at any time.
- V. Master keys for all rooms shall be available at all times.

1) The Board finds that the proposed amendment does not alter the existing approved guest lodging facilities.

This standard HAS been met.

- p. Fencing or Planting Buffer- In the event that the Township Board determines that noise generation may be disturbing to the neighbors or that the establishment is in an area where trespass onto adjacent properties is likely to occur, then the Township Board may require that fencing or a planting buffer be constructed and maintained.

1) The Board finds that the physical usage of the principal structure should not alter from that existing under the current special land use permit which continues to operate in compliance with the Ordinance.

This standard HAS been met.

- q. Rental of Equipment- Rental of snowmobiles, ATVs or similar vehicles, boats and other marine equipment in conjunction with the operation of the establishment shall be prohibited.

1) The Board finds that rental of equipment is not permitted onsite.

This standard HAS been met.

- r. Activities and Outdoor Gatherings- Activities made available to registered guests shall be on the site used for the facility or on lands under the direct control of the operator either by ownership or lease. Outdoor activities shall be permitted if conducted at such hours, and in such manner, as to not be disruptive to neighboring properties.

1) The Board finds that activities or outdoor gatherings shall take place after the normal operating hours of the Winery-Chateau operation and are required to conclude said activities or gatherings no later than 9:30 PM per Section 8.7.3 (10) (u) 5 (b).

This standard HAS been met.

- s. Signs shall be in accordance with Section 7.2.2 (4) which governs signs in the A-1 Agricultural District.

1) The Board finds that there are no additional signs proposed as part of this amendment.

2) The Board finds that all existing signs are in compliance with the guidelines of the ordinance.

This standard HAS been met.

- t. A two hundred foot (200') setback shall be maintained between guest accommodations and facilities and agricultural crops, unless it is demonstrated that a lesser setback can be maintained which will provide for an equal level of protection from agricultural activities to residents, visitors and guests of the Winery-Chateau. Upon such demonstration, the Township Board may permit a lesser setback.

1) The Board finds that approval of the existing SUP #115 1st Amendment demonstrated that the winery structure's setback of eighty feet (80') from the adjacent property has maintained sufficient protection of those residents, visitors, and guests of the Winery-Chateau.

2) The Board finds that the Township has not received any complaints regarding the existing winery operation at its current setback and location.

3) The proposed addition to the east will not reduce this pre-existing setback.

This standard HAS been met.

- u. Guest Activities Uses- The Township Board may approve Guest Activity Uses (Activities by persons who may or may not be registered guests) as an additional Support Use, subject to the following:

- I. The current Winery-Chateau section of the ordinance required seventy-five percent (75%) of the site to be used for the active production of crops that can be used for wine production such as fruit growing on vines or trees, but does not require that any of the wine produced on the site be made from wine fruit grown on Old Mission Peninsula. To assure that, in addition to the minimum parcel size required for a Winery-Chateau, there is additional farm land in wine fruit production in Peninsula Township if Guest Activity Uses are allowed to take place at a Winery-Chateau facility.

1) The Board finds that the applicant owns and operates their vineyard upon roughly seventy-five (75) acres within the Township of which, fifty-nine (59) acres are dedicated to this Winery-Chateau Special Use Permit. Currently, no additional land is under lease within the Peninsula for purposes of purchasing grapes other than those produced on lands under ownership of applicant.

This standard HAS been met.

- II. Guest Activity Uses are intended to help in the promotion of Peninsula agriculture by:

- i. Identifying "Peninsula Produced" food or beverage for consumption by the attendees.

- ii. Providing “Peninsula Agriculture” promotional brochures, maps and awards.
- iii. Including tours through the winery and/or other Peninsula agriculture locations.

1) The Board finds that the applicant is prepared to continue promoting Peninsula based agriculture throughout their operations and that the applicant will be limited to conducting those uses allowed under section 8.7.3 (10) (u) 2 via wine and food seminars, meetings of non-profit groups and meeting of agriculturally related groups.

This standard HAS been met.

5. COMPLIANCE WITH GOVERNMENTAL REGULATIONS-

The petitioner shall comply with all State, County, Township and other governmental regulations relative to the establishment for a parcel zoning A-1, Agricultural, with the above permitted use(s) on site, which includes meeting the requirements of the Michigan Department of Transportation (MDOT), the Grand Traverse County Drain Commissioner (GTCDC), the Grand Traverse County Road Commission (GTCRC), and the Grand Traverse County Health Department (GTCHD). Zoning compliance is based on the governing Special Land Use document, approved site plan, and Articles 6 and 8 of the Peninsula Township Zoning Ordinance.

6. CONDITIONS AND SAFEGUARDS-

Compliance with approved site plan as signed by the Peninsula Township Planner, verifying compliance with the 1972 Peninsula Township Zoning Ordinance, and the information requested and conditions of approval as recommended by the Planning Commission and the Peninsula Township Board.

The petitioner shall maintain in compliance with the following conditions put forth in the approval of the Special Land Use or be subject to Section 7 below:

Conditions and Safeguards- the Board may suggest such additional conditions and safeguards deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of the Ordinance will be observed. The breach of any condition, safeguard or requirement shall automatically invalidate the permit granted.

7. COMMENCEMENT AND COMPLETION OF SPECIAL LAND USE-

The commencement and completion of Special Land Uses are governed by Section 8.1.2(5) of the Peninsula Township Zoning Ordinance. Violations of the Special Land Use and accompanying Site Plan are enforceable and remedies available under Section 3.2 of the Zoning Ordinance.

SUP #115 (2nd Amendment) – APPROVED April 8, 2014

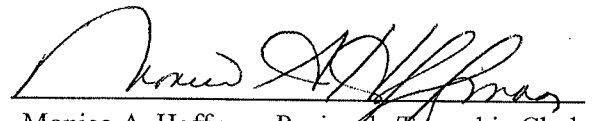
8. EFFECTIVE DATE OF SPECIAL LAND USE-

The Special Land Use shall be effective when the application has been approved by the Peninsula Township Board. The Board approves by a vote of:


AYES	<u>5</u>
NAYS	<u>0</u>
ABSTAINING	<u>0</u>
ABSENT	<u>2</u>

The undersigned hereby certifies that she is the Clerk for the Township of Peninsula, Grand Traverse County, Michigan and that the foregoing Special Use Permit was approved by the Peninsula Township Board on April 8, 2014.

The undersigned further certifies that a quorum was present at said meeting and that said meeting complied with all applicable laws and regulations.

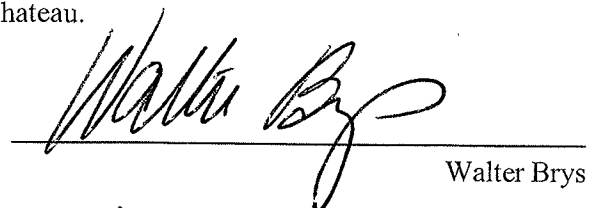

Monica A. Hoffman, Peninsula Township Clerk

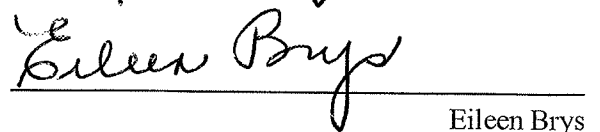
Approved by the Peninsula Township Board on April 8, 2014.


Peter A. Correia, Peninsula Township Supervisor

THIS PERMIT SHALL BE ATTACHED TO THE SITE PLAN AND BECOME A PART THEREOF.

I hereby acknowledge that I have received a true copy of the Special Land Use and I have been informed of said requirements of this Special Land Use Permit and of the requirements of the Peninsula Township Zoning Ordinance pertaining to the operation of the approved Winery-Chateau.


Walter Brys


Eileen Brys

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

Defendant,

And

PROTECT THE PENINSULA,
Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
DISMISS PLAINTIFFS' BOWERS HARBOR & VINEYARD, INC., BRY'S WINERY,
LC, CHATEAU OPERATIONS, LTD., GRAPE HARBOR, INC., MONTAGUE
DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 12

**Peninsula Township Planning & Zoning Department
13235 Center Road
Traverse City, MI 49686**

**SPECIAL USE PERMIT AMENDMENT
STAFF REPORT & FINDINGS OF FACT
SUP #115 3rd Amendment, Brys Estates (Winery – Chateau)**

This 3rd Amendment to SUP #115 is issued and entered into on December 19, 2018, by and between the Township of Peninsula and Walter & Eileen Brys, 3309 Blue Water Road, Traverse City, Michigan, hereinafter referred to as the petitioners. This Amended Special Land Use is issued pursuant to the authority granted to the Peninsula Township Board of Commissioners by Article 8, of the 1972 Peninsula Township Zoning Ordinance, as amended, and P.A. 110 of 2006, the Michigan Zoning Enabling Act, as amended.

WHEREAS, an application for a Special Land Use has been filed by Walter & Eileen Brys, to amend SUP #115 (first approved February 8, 2011, amended April 10, 2012 and April 8, 2014) permitting a Winery-Chateau located upon an existing parcel located in Section 27, Peninsula Township (11-127-016-01, 11-127-002-00, 11-127-016-02),

WHEREAS, after due notice as required by law, the Peninsula Township Planning Commission reviewed the application and recommended approval to the Township Board on 8/20/18,

THEREFORE, BE IT RESOLVED, after consideration of the request, the following statement of conclusions specifying the basis for decision and conditions imposed and the Special Land Use document outlining standards of development and conditions were adopted by the Peninsula Township Board on 9/25/2018 permitting said operation:

1. Permitted Activity

The petitioner is hereby permitted to make the following four changes to SUP 115 (previously amended on April 8, 2014) and as shown on the attached property survey drawing dated 06.13.18 prepared by Mansfield Land Use Consultants.

- a. Revise the area designated as “Chateau Use Boundary”;
- b. Change the current designated resident manager site to a new location within the Chateau Use Boundary;
- c. Increase the approved number of Guest Rooms from two to seven by adding five Guest Rooms in the previously designated “Manager’s Residence”; and
- d. Build a new Manager’s Residence in the location shown on the survey drawing.

All located upon parcels (11-127-016-01, 11-127-002-00, 11-127-016-02), as legally described, in Section 27, Peninsula Township in accordance with Article 6 and Article 8; specifically Section 8.7.3 (10) of the Peninsula Township Zoning Ordinance, as amended, and requirements put forth as part of the Special Land Use, including the final site plan and accompanying documents, as retained in the file of the Peninsula Township Planning Department, located at the Peninsula Township Hall, 13235 Center Rd., Traverse City, Michigan.

2. General Findings of Fact

2.1 Property Description-

- a. The Board finds that the subject parcels are located in Section 27 of the Township and claims a total of approximately one half mile (2,660’) feet of road frontage off of the existing Blue Water Rd. right-of-way. (Exhibit 2)

- b. The Board finds that the south-western boundary of said vineyard is roughly twelve hundred (1,200') feet east of the intersection at Center and Blue Water Roads. (Exhibit 2)
- c. The Board finds the total acreage utilized for the Winery-Chateau site is measured at fifty-six. 61(56.61) acres. (Exhibit 2)

2.2 Action Request-

- a. The Board finds that the applicant is seeking site plan and special use approval to
 1. Revise the area designated as "Chateau Use Boundary;" (Exhibit 1, 2)
 2. Change the current designated resident manager site to a new location within the Chateau Use Boundary; (Exhibit 1, 2)
 3. Increase the approved number of Guest Rooms from two to seven by adding five Guest Rooms in the previously designated "Manager's Residence"; and (Exhibit 1, 2, 8, 9a, 9b)
 4. Build a new Manager's Residence in the location shown on the survey drawing.
- b. The Board finds that the amendment to a final site plan and special use permit is subject to the requirements of Sections 8.1.3 Basis of Determination and 8.7.3 (10) Winery-Chateau of the Peninsula Township Zoning Ordinance. (Exhibit 3 and Exhibit 4)

2.3 Zoning/Use-

- a. The Board finds that the proposed site is zoned A-1, Agricultural District encompassing three (3) parcels which are considered conforming to local zoning. (Exhibit 2)
- b. The Board finds that the Brys Estates Vineyard & Winery was approved as a Winery-Chateau under SUP #115 in 2011, 1st Amendment in 2012, and 2nd Amendment in 2014 and currently is in compliance with their approved special land use permit. (Exhibit 2)
- c. The Board finds that the applicant is working with the local permitting agencies to obtain compliance for the proposed changes. (Exhibits 6 & 7)

2.4 Land Use Pattern- The Board finds the following land uses to be in existence per the date of this report adjacent to the proposed development. (Exhibit 2)

- a. **North-** The land adjacent to the north of the subject properties is zoned A-1, Agriculture and are primarily utilized for ongoing agricultural production.
- b. **South-** The properties adjacent to the south are zoned A-1, Agriculture and are primarily utilized for ongoing agricultural production.
- c. **East-** Property to the east is zoned A-1 and is also utilized as an ongoing agricultural operation.

- d. **West-** The property located west of the subject is also zoned A-1 and is host to both farmland and single family housing.
- e. The Board finds that the future land use plan, in regards to the subject property, suggest that the adjacent and surrounding land will continue to be considered as an agricultural preservation region of the Township. (Exhibit 10)

3. Specific Findings of Fact – Section 8.1.3 (Basis for Determinations)

3.1 General Standards- The Board shall review each application for the purpose of determining that each proposed use meets the following standards, and in addition, shall find adequate evidence that each use on the proposed location will:

- a. Be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such a use will not change the essential character of the area in which it is proposed.

1) The Board finds that the attached site plan does not change the vineyard areas or the winery and tasting room and the Manager's Residence will have the same architectural character as similar residences in the vicinity. (Exhibit 2, 11)

This standard HAS been met.

- b. Not be hazardous or disturbing to existing or future uses in the same general vicinity and will be a substantial improvement to property in the immediate vicinity and to the community as a whole.

1) The Board finds that historically the operation of the petitioned winery has not produced negative complaints regarding their production operation or services to the general public.

2) The Board finds that the Winery Chateau is not asking for additional guest activities and the additional guest rooms will provide additional value added to the operation. (Exhibit 1)

This standard HAS been met.

- a. Be served adequately by essential facilities and services, such as highways, streets, police, fire protection, drainage structures, refuse disposal, water and sewage facilities, or schools.

1) The Board finds that the addition of five guest rooms will not require additional essential facilities or services since there are no public water or public waste facilities on site.

This standard HAS been met.

- b. Not create excessive additional requirements at public cost for public facilities and services.

1) The Board finds that the applicant's request should not require excessive future essential facilities or additional public services. The additional residence and the five additional guest rooms will not require additional infrastructure, public services, or public costs. There are private solid waste and recycling collection services available to the property and the water and sewage disposal systems can be expected to meet project needs. (Exhibit 14)

This standard WILL BE met by Approval Conditions (Exhibit 12)

- c. Not involve use, activities, processes, materials, and equipment or conditions of operation that will be detrimental to any persons, property, or the general welfare by fumes, glare or odors.

1) The Board finds that the proposed use of the site will not involve any change in uses or activities which produce negative impacts upon the existing neighborhood via fumes, glare, noise or odors.

This standard HAS been met.

3.2 Conditions and Safeguards- the Board may suggest such additional conditions and safeguards deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of the Ordinance will be observed. The breach of any condition, safeguard or requirement shall automatically invalidate the permit granted.

1) The Board finds no activity uses are requested or approved by this amendment.

3.3 Specific Requirements- In reviewing an impact assessment and site plan, the Planning Board and the Board shall consider the following standards:

- a. That the applicant may legally apply for site plan review.

1) The Board finds that the applicant is the owner/operator of the petitioned property and Winery-Chateau operation and may legally apply for said review process.

This standard HAS been met.

- b. That all required information has been provided.

1) The Board finds that the applicant has provided all the required information necessary to act on this special use permit application and upon the provided final site plans. Approval conditions are listed in Exhibit 12).

This standard WILL BE met by Approval Conditions (Exhibit 12).

- c. That the proposed development conforms to all regulations of the zoning district in which it is located.

1) The Board finds that the applicant's proposal will require land use permits for the new Manager's residence and conversion of the current manager's residence to five guest rooms. Any

changes to signage, access or parking will be reviewed by the Zoning Administrator prior to making such changes. (Exhibits 3, 4 &5)

This standard WILL BE met by Approval Conditions (Exhibit 12).

- d. That the plan meets the requirements of Peninsula Township for fire and police protection, water supply, sewage disposal or treatment, storm drainage and other public facilities and services.

Grand Traverse County Road Commission - The Board finds that a driveway permit has been received from the Grand Traverse County Road Commission. (Exhibit 6)

Grand Traverse County Sheriff's Department- The Deputy Sheriff has been informed of this proposed project.

Peninsula Township Fire Department- Fire Chief letter provided (Exhibit7) and Approval Condition (Exhibit 12).

Grand Traverse County Construction Code Office- The applicant will need to apply to and receive a permit from the Construction Code Office prior to beginning construction on this project (Exhibit 13). Approval Condition (Exhibit 12)

Grand Traverse County Health Department- The applicant's contractor is currently working with the Health Department to ensure compliance with all regulations. A Health Department permit will be required prior to issuance of the Special Use Permit by Planning & Zoning staff (Exhibit 14). Approval Condition (Exhibit 12)

Grand Traverse Soil Erosion & Sedimentation Department- Appears soil erosion permit is not required as the project will not disturb more than one acre and the site is more than 500 feet from a lake or stream.

1) The Board finds that all final permits will be received by the Township prior to any construction taking place onsite.

Applicable Standards WILL BE met by Approval Conditions (Exhibit 12).

- e. That the plan meets the standards of other governmental agencies where applicable, and that the approval of these agencies has been obtained or is assured.

1) The Board finds that the applicant has obtained a letter from the Peninsula Township Fire Department, and that compliance with Soil Erosion & Sedimentation Regulations is not required. The Board also finds that the applicant has retained an Engineer/Architect to design building improvements necessary to meet the Grand Traverse County Construction Code and the Applicant is working with the Health Department to ensure compliance with all regulations. All appropriate permits from the above departments shall be received by the Township prior to any construction taking place on the Manager's Residence or conversion of the prior manager's residence to five guest rooms.

Applicable Standards WILL BE met by Approval Conditions (Exhibit 12).

- f. That natural resources will be preserved to a maximum feasible extent, and that areas to be left undisturbed during construction shall be so located on the site plan and at the site per se.

1) The Board finds that the applicant will not be moving earth except for the new Manager's Residence. (Exhibit 2 and 8).

2) The Board finds that a Grand Traverse County Soil Erosion permit is not required.

This standard HAS been met.

- g. That the proposed development property respects flood ways and flood plains on or in the vicinity of the subject property.

1) The Board finds that there is no indication that any existing drains, floodways or flood plains on the site. (Exhibit 2)

This standard HAS been met.

- h. That the soil conditions are suitable for excavation and site preparation, and that organic, wet or other soils which are not suitable for development will either be undisturbed or modified in an acceptable manner.

1) The Board finds that a Grand Traverse County Soil Erosion permit is not required.

This standard HAS been met.

- i. That the proposed development will not cause soil erosion or sedimentation problems.

1) The Board finds that a Grand Traverse County Soil Erosion permit is not required.

This standard HAS been met.

- j. That the drainage plan for the proposed development is adequate to handle anticipated storm-water runoff, and will not cause undue runoff onto neighboring property or overloading of water courses in the area.

1) The Board finds that the proposed Manager's Residence does not require a Storm Water Permit pursuant to Peninsula Township's Stormwater Control Ordinance. A Storm Water Permit is required when the project will disturb more than one acre and/or when the site is within 500 feet of a lake or stream.

This standard HAS been met.

- k. That grading or filling will not destroy the character of the property or the surrounding area, and will not adversely affect the adjacent or neighboring properties.

1) The Board finds that only minimal grading or filling is proposed for this Amendment.

This standard HAS been met.

- l. That structures, landscaping, landfills or other land uses will not disrupt air drainage systems necessary for agricultural uses.

1) The Board finds that the proposed Manager's Residence is located on a rise as shown on the topographic contour lines of the Mansfield survey and thus will not affect the air drainage systems. (Exhibit 2)

This standard HAS been met.

- m. That phases of development are in a logical sequence, so that any one phase will not depend upon a subsequent phase for adequate access, public utility service, and drainage or erosion control.

1) The Board finds that the proposed addition is to occur in one phase. (Exhibit 2 & 1)

This standard HAS been met.

- n. That the plan provides for the proper expansion of existing facilities such as public streets, drainage systems and water sewage facilities.

1) The Board finds that no additional services or facilities are needed to accommodate the proposed Manager's Residence. (Exhibit 1 & 2)

This standard HAS been met.

- o. That landscaping, fences or walls may be required by the Township Board in pursuance of the objectives of this Ordinance.

1) The Board finds that the Managers Residence is located in the center of the road frontage along Bluewater Road and no additional landscaping, fences or wall are required. (Exhibit 2)

This standard HAS been met.

- p. That parking layout will not adversely affect the flow of traffic within the site, or to and from the adjacent streets.

1) The Board finds that the parking plan for the five guest rooms was developed to accommodate the anticipated usage and the flow of traffic to and from Bluewater Road. (Exhibit 8)

This standard HAS been met.

- q. That vehicular and pedestrian traffic within the site, and in relation to streets and sidewalks serving the site, shall be safe and convenient.

1) The Board finds that the parking plan for the seven guest rooms was developed to accommodate the anticipated usage and the flow of traffic to and from Bluewater Road. (Exhibit 8)

This standard HAS been met.

- r. That outdoor storage of garbage and refuse is contained, screened from view and located so as not to be a nuisance to the subject property or neighboring properties.

1) The Board finds that there are no changes to the previously approved garbage and refuse storage.

This standard HAS been met.

- s. That the proposed site is in accord with the spirit and purpose of this ordinance and not inconsistent with, or contrary to, the objectives sought to be accomplished by this Ordinance and the principles of sound planning.

1) The Board finds that the proposed changes are consistent with the agricultural A-1 District farmland preservation goals and policies of the 2011 Master Plan (Exhibit 1, 2 & 10).

This standard HAS been met.

4. SECTION 8.7.3 (10) WINERY – CHATEAU REGULATIONS-

The Board finds that under Section 8.7.3 (10), the presented site plan and special use permit request meets the conditions associated with said provision as explained within the following:

- a. It is the intent of this section to permit construction and use of a winery, guest rooms, and single family residences as a part of a single site subject to the provisions of this ordinance. The developed site must maintain the agricultural environment, be harmonious with the character of the surrounding land and uses, and shall not create undue traffic congestion, noise, or other conflict with the surrounding properties.

1) The Board finds that the special use will take place upon fifty-six .61 (56.61) acres of land and will operate as it has since the winery's inception in 2005. (Exhibit 2)

This standard HAS been met.

- b. The use shall be subject to all requirements of Article VII, Section 8.5, Food Processing Plants in A-1 Districts and the contents of this subsection. Data specified in Section 8.5.2, Required Information, shall

be submitted as a basis for judging the suitability of the proposed plan. Each of the principal uses shall be subject to the terms and conditions of this ordinance except as specifically set forth herein.

1) The Board finds that the applicant's special use was previously approved in 2011, amended in 2012 and amended again in 2014 in compliance with the requirements under Section 8.5 and Section 8.5.2.

2) The Board finds that this amendment adds five additional guest rooms to the two previously approved along with the construction of a new Manager's Residence. (Exhibits 1 and 2)

This standard HAS been met.

- c. The minimum site shall be fifty (50) acres which shall be planned and developed as an integrated whole. All of the principal and accessory uses shall be set forth on the approved site plan.

1) The Board finds that the applicant's site encompasses a total of (56.61) acres of land under operation which serves as the primary area supporting the winery through grape production. The site is comprised of a combination of vineyard, open areas for air drainage, and navigational lanes for agricultural equipment. (Exhibit 2)

This standard HAS been met.

- d. The principal use permitted upon the site shall be Winery, Guest Rooms, Manager's Residence, and Single Family Residences shall be allowed as support uses on the same property as the Winery. In addition to the principal and support uses, accessory uses for each such use shall be permitted provided, that all such accessory uses shall be no greater in extent than those reasonably necessary to serve the principal use.

1) The Board finds that the applicant's third amendment to their SUP is a proposal to convert the Manager's residence into five guest rooms and construct a new Manager's Residence. There are no additional accessory uses requested or approved for this amendment. (Exhibits 1, 2, 8, 9a & 9b)

This standard HAS been met.

- e. For purpose of computation, the principal and each support use identified in sub-section (d) above shall be assigned and "area equivalent" as set forth herein. The total "area equivalent" assigned to the principal uses shall not exceed the actual area of the site.

Refer to the following assessment below.

- f. "Area equivalents" shall be calculated as follows:

Winery with tasting room: five (5) acres.

1) The Board finds the area equivalent for the winery is 5 acres.

This standard HAS been met.

Manager's Residence: five (5) acres;

2) The Board finds that a new manager's residence is approved and the area equivalent is 5 acres.

This standard HAS been met.

Single Family Residences: five (5)

3) The Board finds that no additional single family residences have been approved at this time.

This standard HAS been met.

Guest Rooms: five (5) acres for each 3 rooms, not to exceed a total of twelve (12) guest rooms;

4) The Board finds that the applicant is permitted to have seven (7) Guest Rooms with equivalent 11.7 acres.

This standard HAS been met.

5) The Board finds the total equivalents allowed are 11.7 on 56.61 acres (21.7 including winery and managers residence).

This standard HAS been met.

- g. The number of single family residences shall not exceed six (6). The manager's residence shall not contain or be used for rental guest rooms. The number of guest rooms shall not exceed twelve (12).

1) The Board finds that the former Manager's Residence is being converted to five rental rooms and a new Manager's Residence will be built. (Exhibit 1, 2)

No additional single family residences are being requested.

This standard HAS been met.

- h. Not less than seventy-five percent (75%) of the site shall be used for the active production of crops that can be used for wine production, such as fruit growing on vines or trees.

1) The Board finds that the applicant has 56.61 Acres in the Chateau Use Boundary and 42.80 acres in active production of crops that can be used for wine production as shown on the Mansfield survey drawing (exclusive of the Bluewater Road right-of way) which is more than 75% of the Chateau Use Boundary area. (Exhibit 2)

This standard HAS been met.

- i. The facility shall have at least two hundred feet (200') of frontage on a state or county road.

1) The Board finds that the applicant's site has roughly twenty-five hundred feet (2,500') of frontage on Blue Water Rd. (Exhibit 2)

This standard HAS been met.

- j. The winery chateau shall be the principal building on the site and shall have an onsite resident manager.

1) The Board finds that the existing winery will remain the principal building onsite.

2) The Board finds that the resident manager will be located in a new Manager's Residence at the location shown on the attached property survey drawing (06.13.18) prepared by Mansfield Land Use Consultants. (Exhibit 2)

This standard HAS been met.

- k. All guest rooms shall have floor areas greater than two hundred fifty (250) square feet. Maximum occupancy shall be limited to five (5) persons per unit. No time sharing shall be permitted.

1) The Board finds that the applicant's existing guest house quarters is permitted two (2) guest rooms of which are in compliance with the ordinance concerning size and layout.

2) The Board finds the former Manager's Residence is permitted to be converted into 5 guest rooms each guest room has a full on-suite bathroom The five guest rooms has square footages ranging from 305 soft to 416 soft. (Exhibits 9a, 9b)

This standard HAS been met.

- l. No exterior lighting shall have a source of illumination or light lenses visible outside the property line of the site and shall in no way impair safe movement of traffic on any street or highway.

1) The Board finds that the proposed exterior lighting shall be in compliance with Section 7.14 before the land use permit is approved by the Zoning Administrator.

Applicable Standards WILL BE met by Approval Conditions (Exhibit 12).

- m. Accessory uses such as facilities, meeting rooms, and food and beverage services shall be for registered guests only. These uses shall be located on the same site as the principal use to which they are accessory and are included on the approved Site Plan. Facilities for accessory uses shall not be greater in size or number than those reasonably required for the use of registered guests.

1) The Board finds that the applicant has not requested Accessory Uses for registered guests. (Exhibit 1)

This standard HAS been met.

- n. Well and septic system- Proof of evaluation of the well and septic system by the Health Department and conformance to that agency's requirements shall be supplied by the owner.

1) The Board finds that a final health department permit will be required prior to issuance of Land Use Permits by the Zoning Administrator (Exhibit 14).

Applicable Standards WILL BE met by Approval Conditions (Exhibit 12).

- o. Fire safety-

- I. All transient lodging facilities shall conform to the Michigan State Construction Code section regulating fire safety.

1) The Board finds an occupancy permit shall be provided prior to final review by the Zoning Administrator.

Applicable Standards Will BE met by Approval Conditions (Exhibit 12).

- II. An onsite water supply shall be available and meet the uniform published standards of the Peninsula Township Fire Department.

1) The Board finds a Health Department Permit provided to Zoning Administrator prior to a land use permit approval.

Applicable Standards Will BE met by Approval Conditions (Exhibit 12).

- III. A floor plan drawn to an architectural scale of not less than 1/8" = 1 foot shall be on file with the Fire Department.

1) The Board finds the floor plan has been provided to the Zoning Administrator and one is on file with the Fire Department. (Exhibits 9a, 9b)

- IV. Each operator of a transient lodging facility shall keep a guest registry which shall be available for inspection by the Zoning Administrator at reasonable times and police and fire officials at any time.

1) The Board finds the applicant shall provide evidence of a guest registry to the Zoning Administrator prior to final review of the land use permit.

Applicable Standards Will BE met by Approval Conditions (Exhibit 12).

V. Master keys for all rooms shall be available at all times.

1) The Board finds that the applicant shall provide evidence of master keys to the Zoning Administrator prior to final review of the land use permit.

Applicable Standards Will BE met by Approval Conditions (Exhibit 12).

- p. Fencing or Planting Buffer- In the event that the Township Board determines that noise generation may be disturbing to the neighbors or that the establishment is in an area where trespass onto adjacent properties is likely to occur, then the Township Board may require that fencing or a planting buffer be constructed and maintained.

1) The Board finds that the permitted use of five guest rooms and new manager's residence will not generate noise above that existing under the current special land use permit. The five guest rooms do not have guest activities allowed and the new Manager's Residence will not have any activities different than any single family residence. The Area View shows the property is surrounded by farmland and the additional guest rooms and new Manager's Residence are not near adjacent residences. (Exhibit 11)

This standard HAS been met.

- q. Rental of Equipment- Rental of snowmobiles, ATVs or similar vehicles, boats and other marine equipment in conjunction with the operation of the establishment shall be prohibited.

1) The Board finds that rental of equipment is not permitted on site.

This standard HAS been met.

- r. Activities and Outdoor Gatherings- Activities made available to registered guests shall be on the site used for the facility or on lands under the direct control of the operator either by ownership or lease. Outdoor activities shall be permitted if conducted at such hours, and in such manner, as to not be disruptive to neighboring properties.

1) The Board finds that activities or outdoor gatherings are not requested for registered guests. (Exhibit 1)

This standard HAS been met.

- s. Signs shall be in accordance with Section 7.2.2 (4) which governs signs in the A-1 Agricultural District.

1) The Board finds that there are no additional signs proposed as part of this amendment.

2) The Board finds that all existing signs are in compliance with the guidelines of the ordinance.

This standard HAS been met.

- t. A two hundred foot (200') setback shall be maintained between guest accommodations and facilities and agricultural crops, unless it is demonstrated that a lesser setback can be maintained which will provide for an equal level of protection from agricultural activities to residents, visitors and guests of the Winery-Chateau. Upon such demonstration, the Township Board may permit a lesser setback.

1) The Board finds that approval of the existing SUP #115 1st Amendment demonstrated that the winery structure's setback of eighty feet (80') from the adjacent property has maintained sufficient protection of those residents, visitors, and guests of the Winery-Chateau.

2) The Board finds that the Township has not received complaints regarding the existing winery operation at its current setback and location.

3) The proposed new Manager's Residence is located further from any residences than the previous manager's residence. (Exhibit 2)

This standard HAS been met.

- u. Guest Activities Uses- The Township Board may approve Guest Activity Uses (Activities by persons who may or may not be registered guests) as an additional Support Use, subject to the following:

- I. The current Winery-Chateau section of the ordinance required seventy-five percent (75%) of the site to be used for the active production of crops that can be used for wine production such as fruit growing on vines or trees, but does not require that any of the wine produced on the site be made from wine fruit grown on Old Mission Peninsula. To assure that, in addition to the minimum parcel size required for a Winery-Chateau, there is additional farm land in wine fruit production in Peninsula Township if Guest Activity Uses are allowed to take place at a Winery-Chateau facility.

1) The Board finds that the applicant owns and operates their vineyard upon roughly seventy-five (75) acres within the Township of which, (56.61) acres are dedicated to this Winery-Chateau Special Use Permit. Currently, no additional land is under lease within the Peninsula for purposes of purchasing grapes other than those produced on lands under ownership of applicant. (Exhibit 2)

This standard HAS been met.

- II. Guest Activity Uses are intended to help in the promotion of Peninsula agriculture by:

- i. Identifying "Peninsula Produced" food or beverage for consumption by the attendees.
- ii. Providing "Peninsula Agriculture" promotional brochures, maps and awards.
- iii. Including tours through the winery and/or other Peninsula agriculture locations.

1) The Board finds that the applicant is prepared to continue promoting Peninsula based agriculture throughout their operations and that the applicant will be limited to conducting those uses allowed under section 8.7.3 (10) (u) 2 via wine and food seminars, meetings of non-profit groups and meeting of agriculturally related groups.

This standard HAS been met.

5. COMPLIANCE WITH GOVERNMENTAL REGULATIONS-

The petitioner shall comply with all State, County, Township and other governmental regulations relative to the establishment for a parcel zoning A-1, Agricultural, with the above permitted use(s) on site, which includes meeting the requirements of the Michigan Department of Transportation (MDOT), the Grand Traverse County Drain Commissioner (GTCDC), the Grand Traverse County Road Commission (GTCRC), and the Grand Traverse County Health Department (GTCHD). Zoning compliance is based on the governing Special Land Use document, approved site plan, and Articles 6 and 8 of the Peninsula Township Zoning Ordinance.

6. CONDITIONS AND SAFEGUARDS-

Compliance with approved site plan as signed by the Peninsula Township Supervisor verifying compliance with the Peninsula Township Zoning Ordinance, and the information requested and conditions of approval as recommended by the Planning Commission and approved by the Peninsula Township Board.

The petitioner shall maintain in compliance with the following conditions put forth in the approval of the Special Land Use or be subject to Section 7 below:

Conditions and Safeguards- the Board may suggest such additional conditions and safeguards deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of the Ordinance will be observed. The breach of any condition, safeguard or requirement shall automatically invalidate the permit granted.

As stated in Exhibit 12 - compliance with:

1. Fire Chief Letter (Exhibit 7)
2. Compliance with Grand Traverse County Construction Code (Exhibit 13)
3. Compliance with Grand Traverse County Health Department Regulations (Exhibit 14)
4. Obtaining a Land Use Permit from Peninsula Township.

7. COMMENCEMENT AND COMPLETION OF SPECIAL LAND USE-

The commencement and completion of Special Land Uses are governed by Section 8.1.2(5) of the Peninsula Township Zoning Ordinance. Violations of the Special Land Use and accompanying Site Plan are enforceable and remedies available under Section 3.2 of the Zoning Ordinance.

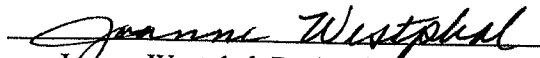
8. EFFECTIVE DATE OF SPECIAL LAND USE-

The Special Land Use shall be effective when the application has been approved by the Peninsula Township Board. The Board approves by a vote of:

AYES	Manigold, Westphal, Bickle, Achorn, Sanger, Wahl, Wunsch
NAYS	None
ABSTAINING	None
ABSENT	None

The undersigned hereby certifies that she is the Clerk for the Township of Peninsula, Grand Traverse County, Michigan and that the foregoing Special Use Permit was approved by the Peninsula Township Board on September 25, 2018.

The undersigned further certifies that a quorum was present at said meeting and that said meeting complied with all applicable laws and regulations.

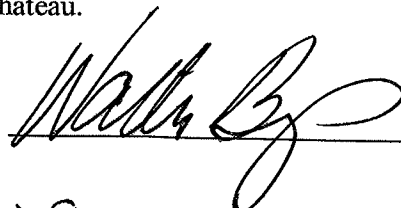

Joanne Westphal, Peninsula Township Clerk

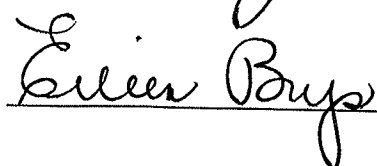
Approved by the Peninsula Township Board on 9/25/2018.


Rob Manigold, Peninsula Township Supervisor

THIS PERMIT SHALL BE ATTACHED TO THE SITE PLAN AND BECOME A PART THEREOF.

I hereby acknowledge that I have received a true copy of the Special Land Use and I have been informed of said requirements of this Special Land Use Permit and of the requirements of the Peninsula Township Zoning Ordinance pertaining to the operation of the approved Winery-Chateau.


Walter Brys


Eileen Brys

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

Defendant,

And

PROTECT THE PENINSULA,
Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
DISMISS PLAINTIFFS' BOWERS HARBOR & VINEYARD, INC., BRY'S WINERY,
LC, CHATEAU OPERATIONS, LTD., GRAPE HARBOR, INC., MONTAGUE
DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 13

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

File No. 1:20-cv-01008

PENINSULA TOWNSHIP, a Michigan
municipal corporation,

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

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervener-Defendant.

/

1 DEPOSITION OF PATRICK BRYs

2 Taken by the Intervener-Defendant on the 14th day of July,
3 2023, at 15900 Rue de Vin, Traverse City, Michigan, at 8:00
4 a.m.

5
6 APPEARANCES:

7 For the Plaintiffs: MR. JOSEPH MIKHAIL INFANTE (P68719)
And
8 MR. STEPHEN MICHAEL RAGATZKI (P81952)
Miller Canfield Paddock & Stone, PLC
9 99 Monroe Avenue, NW, Suite 1200
Grand Rapids, Michigan 49503
10 (616) 776-6333

11 For the Defendant: MR. BOGOMIR RAJSIC III (P79191)
McGraw Morris, PC
12 300 Ottawa Avenue, NW, Suite 800
Grand Rapids, Michigan 49503
13 (616) 288-2700

14 For the MS. TRACY JANE ANDREWS (P67467)
Intervener-Defendant: Law Office of Tracy Jane Andrews, PLLC
15 619 Webster Street
Traverse City, Michigan 49686
16 (231) 714-9402

17 And

18 MS. HOLLY LYNN HILLYER (P85318)
Olson Bzdok & Howard, PC
19 420 East Front Street
Traverse City, Michigan 49686
20 (231) 946-0044

21 Also Present: Colin Miller
Dave Sanger
22

23 RECORDED BY: Stacey M. Seals, CER 7908
Certified Electronic Recorder
24 Network Reporting Corporation
Firm Registration Number 8151
25 1-800-632-2720

1 know if that has since been completed?

2 **A It has not; plans changed. My sister ended up purchasing**
3 **the farmhouse from my parents and has now -- lives there**
4 **with her family.**

5 Q The -- your parents did build the new manager's residence
6 though?

7 **A Yes, that happened.**

8 Q Only the conversion didn't take place?

9 **A Yes.**

10 Q So we know the outdoor -- the elevated platform approved in
11 amendment four has taken -- was constructed?

12 **A Yes.**

13 Q Let's see, what was the other thing I think we talked
14 about -- in the first amendment was the first elevated
15 patio; is that correct?

16 **A I'm not quite sure, I'd have to study the document in more**
17 **detail. But I believe -- I know that it predated amendment**
18 **four so I'm just assuming that it was one of those.**

19 Q Okay. Subject to check. One of the prior ones --
20 everything -- it appears that everything that was sought
21 took place except for the conversion of the five guest
22 rooms, is that generally consistent with your understanding?

23 **A Yes.**

24 Q Okay. So let's look at the latest superior, the fourth
25 amendment, and then lets look at the winery chateau

1 ordinance. So SUP 115, fourth amendment, PTP Exhibit 67
2 appears to permit -- looking at paragraph T on page 13. Do
3 you see guest activity uses?

4 **A Yes.**

5 Q Then let's look at the winery chateau ordinance, which is
6 copy ECF number 1-1, 8.7.3(10) is the winery chateau
7 ordinance. Are you familiar generally with the winery
8 chateau ordinance?

9 **A Yes.**

10 Q Okay. So would you agree that the winery chateau ordinance
11 parts A through T address activities at the winery chateau
12 related to a variety of issues not -- not guest activity
13 uses, guest activity uses starts at "u"; correct?

14 MR. INFANTE: Objection; calls for a legal
15 conclusion. You can answer.

16 **A Yes; it does appear that way, yes.**

17 Q It appears that tasting room activities are permitted
18 under -- or addressed under (d)(2) top of page 128.

19 MR. INFANTE: Objection; calls for a legal
20 conclusion.

21 **A Yes, I see that as (d)(2).**

22 Q It authorizes the sale of wine by the glass in the tasting
23 room per liquor control commission. Do you see that?

24 **A Yes.**

25 Q Okay. And then the zoning ordinance section G allows up to

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
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Plaintiffs,

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Corporation,

Defendant,

And

PROTECT THE PENINSULA,
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DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 14

**Peninsula Township Planning & Zoning Department
13235 Center Road
Traverse City, MI 49686**

**SPECIAL USE PERMIT AMENDMENT
STAFF REPORT & FINDINGS OF FACT
SUP #115 4th Amendment, Brys Estates (Winery – Chateau)**

This 4th Amendment to SUP #115 is issued and entered into on December 19, 2018 by and between the Township of Peninsula and Walter & Eileen Brys, 3309 Blue Water Road, Traverse City, Michigan, hereinafter referred to as the petitioners. This Amended Special Land Use is issued pursuant to the authority granted to the Peninsula Township Board of Trustees by Article 8, of the 1972 Peninsula Township Zoning Ordinance, as amended, and P.A. 110 of 2006, the Michigan Zoning Enabling Act, as amended.

WHEREAS, an application for a Special Land Use has been filed by Walter & Eileen Brys, to amend SUP #115 (first approved February 8, 2011, amended April 10, 2012, April 8, 2014 and September 25, 2018) permitting a Winery-Chateau located upon existing parcels, located in Section 27, Peninsula Township (11-127-016-01, 11-127-002-00, 11-127-016-02),

WHEREAS, after due notice as required by law, the Peninsula Township Planning Commission reviewed the application and recommended approval to the Township Board on 11/19/18,

THEREFORE, BE IT RESOLVED, after consideration of the request, the following statement of conclusions specifying the basis for decision, conditions imposed, and this Special Land Use document outlining standards of development and conditions, were adopted by the Peninsula Township Board on 9/25/2018 permitting said operation:

1. Permitted Activity

The petitioner is hereby permitted to make the following changes to SUP 115 (previously amended on September 25, 2018) and as described in the application dated October 29, 2018 (Exhibit 1) and illustrated on a drawing received on 11/1/2018, prepared by Mansfield Land Use Consultants (Exhibit 2). The request involves the following items:

- a. Expand the outdoor deck by 1,005 square feet with a viewing platform.
- b. Remove approximately 36 grape vines to accommodate the expanded deck (while maintaining acreage required for Winery Chateau Zoning).

All located upon parcels (11-127-016-01, 11-127-002-00, 11-127-016-02), as legally described, in Section 27, Peninsula Township in accordance with Article 6 and Article 8; specifically Section 8.7.3 (10) of the Peninsula Township Zoning Ordinance, as amended, and requirements put forth as part of the Special Land Use, including the final site plan and accompanying documents, as retained in the file of the Peninsula Township Planning Department, located at the Peninsula Township Hall, 13235 Center Rd., Traverse City, Michigan.

2. General Findings of Fact

2.1 Property Description-

- a. The Board finds that the subject parcels are located in Section 27 of the Township and claims a total of approximately one-half mile (2,660) feet of road frontage off of the existing Blue Water Rd. right-of-way. (Exhibit 2)
- b. The Board finds that the south-western boundary of said vineyard is roughly twelve hundred (1,200') feet east of the intersection at Center and Blue Water Roads. (Exhibit 2)
- c. The Board finds the total acreage utilized for the Winery-Chateau site is measured at 56.61 acres. (Exhibit 2)

2.2 Action Request-

- a. The Board finds that the applicant is seeking site plan and special use approval to:
 1. Expand the outdoor deck by 1,005 square feet with a viewing platform.
 2. Remove approximately 36 grape vines to accommodate the expanded deck (while maintaining acreage required for Winery Chateau Zoning).
- b. The Board finds that the amendment to a final site plan and special use permit is subject to the requirements of Sections 8.1.3 Basis of Determination and 8.7.3 (10) Winery-Chateau of the Peninsula Township Zoning Ordinance. (Exhibit 3)

2.3 Zoning/Use-

- a. The Board finds that the proposed site is zoned A-1, Agricultural District encompassing three (3) parcels which are considered conforming to local zoning.
- b. The Board finds that the Brys Estates Vineyard & Winery was approved as a Winery-Chateau under SUP #115 in 2011, 1st Amendment in 2012, 2nd Amendment in 2014, 3rd Amendment in 2018 and is currently in compliance with their approved special land use permit.
- c. The Board finds that the applicant is working with the local permitting agencies to obtain compliance with related regulations for the deck expansion. This specifically includes the Grand Traverse County Construction Code Office and Peninsula Township Fire Department.

2.4 Land Use Pattern- The Board finds the following land uses to be in existence per the date of this report adjacent to the proposed development.

- a. **North-** The land adjacent to the north of the subject properties is zoned A-1, Agriculture and are primarily utilized for ongoing agricultural production.

- b. **South-** The properties adjacent to the south are zoned A-1, Agriculture and are primarily utilized for ongoing agricultural production.
- c. **East-** Property to the east is zoned A-1 and is also utilized as an ongoing agricultural operation.
- d. **West-** The property located west of the subject is also zoned A-1 and is host to both farmland and single family housing.
- e. The Board finds that the future land use plan, in regards to the subject property, suggest that the adjacent and surrounding land will continue to be considered as an agricultural preservation region of the Township. (Exhibit 4)

3. Specific Findings of Fact – Section 8.1.3 (Basis for Determinations)

3.1 General Standards- The Board shall review each application for the purpose of determining that each proposed use meets the following standards, and in addition, shall find adequate evidence that each use on the proposed location will:

- a. Be designed, constructed, operated and maintained so as to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and that such a use will not change the essential character of the area in which it is proposed.

1) The Board finds that the attached site plan and drawings illustrate only minimal change to the vineyard area. The proposed deck expansion and viewing platform will have the same architectural character as existing outdoor gathering spaces. The proposed deck expansion and viewing platform is also consistent with the existing or intended character of the general vicinity. (Exhibit 6)

This standard HAS been met.

- b. Not be hazardous or disturbing to existing or future uses in the same general vicinity and will be a substantial improvement to property in the immediate vicinity and to the community as a whole.

1) The Board finds that historically the operation of the petitioned winery has not produced negative complaints regarding their production, operation or services to the public.

2) The Board finds that the Winery Chateau is not asking for additional new guest activities and that the proposed outdoor deck expansion and viewing platform will improve the property and provide additional value to the operation. (Exhibit 1 and 2)

This standard HAS been met.

- a. Be served adequately by essential facilities and services, such as highways, streets, police, fire protection, drainage structures, refuse disposal, water and sewage facilities, or schools.

1) The Board finds that the proposed outdoor deck expansion and viewing platform will not require additional essential facilities or services.

This standard HAS been met.

b. Not create excessive additional requirements at public cost for public facilities and services.

1) The Board finds that the proposed outdoor deck expansion and viewing platform will not require additional infrastructure, public services, or public costs.

This standard HAS been met.

c. Not involve use, activities, processes, materials, and equipment or conditions of operation that will be detrimental to any persons, property, or the general welfare by fumes, glare or odors.

1) The Board finds that the proposed use of the site will not involve any change in uses or activities which produce negative impacts upon the existing neighborhood via fumes, glare, noise or odors.

This standard HAS been met.

3.2 Conditions and Safeguards- the Board may suggest such additional conditions and safeguards deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of the Ordinance will be observed. The breach of any condition, safeguard or requirement shall automatically invalidate the permit granted.

1) The Board finds that no additional conditions and safeguards are deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of the Ordinance will be observed.

3.3 Specific Requirements- In reviewing an impact assessment and site plan, the Planning Board and the Board shall consider the following standards:

a. That the applicant may legally apply for site plan review.

1) The Board finds that the applicant is the owner/operator of the petitioned property and Winery-Chateau operation and may legally apply for said review process.

This standard HAS been met.

b. That all required information has been provided.

1) The Board finds that the applicant has provided all the required information necessary to act on this special use permit application and upon the provided final site plans.

This standard WILL BE met by Approval Conditions (See Section 6.1, Page 14).

- c. That the proposed development conforms to all regulations of the zoning district in which it is located.

1) The Board finds that the applicant's proposal requires a Land Use Permit for construction of the proposed deck expansion and viewing platform.

This standard WILL BE met by Approval Conditions (See Section 6.1, Page 14).

- d. That the plan meets the requirements of Peninsula Township for fire and police protection, water supply, sewage disposal or treatment, storm drainage and other public facilities and services.

Grand Traverse County Road Commission

The Board finds that no new driveway is proposed and a new driveway permit from the Grand Traverse County Road Commission is not required.

Grand Traverse County Sheriff's Department

The Board finds that the Deputy Sheriff has been informed of this proposed project, and typically does not offer formal comments.

Peninsula Township Fire Department

The Board finds that the Peninsula Township Fire Chief has reviewed the proposed plans and has provided a letter describing approval conditions (Exhibit 7)

Grand Traverse County Construction Code Office

The Board finds that the applicant has retained an Architect to prepare plans for the proposed deck and viewing platform, and will be required to provide evidence of Compliance with the Grand Traverse Construction Code Office prior to obtaining a Land Use Permit. (Exhibit 6)

Grand Traverse County Health Department

The Board finds that per communications with the Grand Traverse County Health Department (on 11/5/2018) regarding this proposed project, a permit is not required.

Grand Traverse Soil Erosion & Sedimentation Department

A soil erosion permit is not required as the project will not disturb more than one acre and the site is more than 500 feet from a lake or stream.

1) The Board finds that compliance with Fire Department Requirements and Grand Traverse County Construction Code Office permitting will be received by the Township prior to issuance of a Land Use Permit and any construction taking place on the site.

Applicable Standards WILL BE met by Approval Conditions (See Section 6.1, Page 14).

- e. That the plan meets the standards of other governmental agencies where applicable, and that the approval of these agencies has been obtained or is assured.

1) The Board finds that all final permits will be required and received by the Township prior to issuance of a Land Use Permit and any construction taking place on the site.

Applicable Standards WILL BE met by Approval Conditions (See Section 6.1, Page 14).

- f. That natural resources will be preserved to a maximum feasible extent, and that areas to be left undisturbed during construction shall be so located on the site plan and at the site per se.

1) The Board finds that project will involve a minor amount of earth moving or impacts on natural resources.

This standard HAS been met.

- g. That the proposed development property respects flood ways and flood plains on or in the vicinity of the subject property.

1) The Board finds that there is no indication that any flood plains will be impacted.

This standard HAS been met.

- h. That the soil conditions are suitable for excavation and site preparation, and that organic, wet or other soils which are not suitable for development will either be undisturbed or modified in an acceptable manner.

1) The Board finds that soil conditions are suitable for excavation and site preparation related to the proposed project.

This standard HAS been met.

- i. That the proposed development will not cause soil erosion or sedimentation problems.

1) The Board finds that the proposed project will not cause soil erosion or sedimentation problems and a Grand Traverse County Soil Erosion permit is not required.

This standard HAS been met.

- j. That the drainage plan for the proposed development is adequate to handle anticipated storm-water runoff, and will not cause undue runoff onto neighboring property or overloading of water courses in the area.

1) The Board finds that the proposed project will have minimal impacts on stormwater and a Storm Water Permit pursuant to Peninsula Township's Stormwater Control Ordinance is not required.

This standard HAS been met.

- k. That grading or filling will not destroy the character of the property or the surrounding area, and will not adversely affect the adjacent or neighboring properties.

1) The Board finds that only minimal excavation, grading or filling is proposed.

This standard HAS been met.

- l. That structures, landscaping, landfills or other land uses will not disrupt air drainage systems necessary for agricultural uses.

1) The Board finds that the proposed deck expansion and viewing platform will not affect the air drainage systems.

This standard HAS been met.

- m. That phases of development are in a logical sequence, so that any one phase will not depend upon a subsequent phase for adequate access, public utility service, and drainage or erosion control.

1) The Board finds that the proposed addition is to occur in one phase. (Exhibit 1)

This standard HAS been met.

- n. That the plan provides for the proper expansion of existing facilities such as public streets, drainage systems and water sewage facilities.

1) The Board finds that no additional services or facilities are needed to accommodate the proposed deck expansion and viewing platform. (Exhibit 1)

This standard HAS been met.

- o. That landscaping, fences or walls may be required by the Township Board in pursuance of the objectives of this Ordinance.

1) The Board finds that no additional landscaping, fences or wall are required for the proposed deck expansion and viewing platform per the Peninsula Township Zoning Ordinance.

This standard HAS been met.

- p. That parking layout will not adversely affect the flow of traffic within the site, or to and from the adjacent streets.

1) The Board finds that the Peninsula Township Zoning Code does not require additional parking to be associated with the proposed deck expansion and viewing platform. (Exhibit 8)

This standard HAS been met.

- q. That vehicular and pedestrian traffic within the site, and in relation to streets and sidewalks serving the site, shall be safe and convenient.

1) The Board finds that the proposed project will have little or no impact on the flow of vehicular or pedestrian traffic to and from Bluewater Road.

This standard HAS been met.

- r. That outdoor storage of garbage and refuse is contained, screened from view and located so as not to be a nuisance to the subject property or neighboring properties.

1) The Board finds that the proposed project will have little or no impact on previously approved garbage and refuse storage.

This standard HAS been met.

- s. That the proposed site is in accord with the spirit and purpose of this ordinance and not inconsistent with, or contrary to, the objectives sought to be accomplished by this Ordinance and the principles of sound planning.

1) The Board finds that the proposed activities are consistent with the requirements of the Agricultural A-1 District, and the farmland preservation goals and policies of the 2011 Master Plan (Exhibit 4 and 5).

This standard HAS been met.

4. SECTION 8.7.3 (10) WINERY – CHATEAU REGULATIONS-

The Board finds that under Section 8.7.3 (10), the presented site plan and special use permit request meets the conditions associated with said provision as explained within the following:

- a. It is the intent of this section to permit construction and use of a winery, guest rooms, and single family residences as a part of a single site subject to the provisions of this ordinance. The developed site must maintain the agricultural environment, be harmonious with the character of the surrounding land and uses, and shall not create undue traffic congestion, noise, or other conflict with the surrounding properties.

1) The Board finds that the special use will take place upon 56.61 acres of land and will operate as it has since the winery's inception in 2005. (Exhibit 2)

This standard HAS been met.

- b. The use shall be subject to all requirements of Article VII, Section 8.5, Food Processing Plants in A-1 Districts and the contents of this subsection. Data specified in Section 8.5.2, Required Information, shall

be submitted as a basis for judging the suitability of the proposed plan. Each of the principal uses shall be subject to the terms and conditions of this ordinance except as specifically set forth herein.

1) The Board finds that the applicant's special use was previously approved in 2011, amended in 2012, 2014 and 2018 in compliance with the requirements under Section 8.5 and Section 8.5.2.

2) The Board finds that this amendment adds 1,005 square feet of outdoor deck space with a viewing platform, which is appropriate given the function and activities of the site. (Exhibits 1 and 2)

This standard HAS been met.

- c. The minimum site shall be fifty (50) acres which shall be planned and developed as an integrated whole. All of the principal and accessory uses shall be set forth on the approved site plan.

1) The Board finds that the applicant's site encompasses a total of 56.61 acres of land under operation which serves as the primary area supporting the winery through grape production. The site is comprised of a combination of vineyards and open areas for air drainage.

This standard HAS been met.

- d. The principal use permitted upon the site shall be Winery, Guest Rooms, Manager's Residence, and Single Family Residences shall be allowed as support uses on the same property as the Winery. In addition to the principal and support uses, accessory uses for each such use shall be permitted provided, that all such accessory uses shall be no greater in extent than those reasonably necessary to serve the principal use.

1) The Board finds that the construction of an expanded outdoor deck and viewing platform is consistent with existing approved uses. There are no additional accessory uses requested or approved for this amendment.

This standard HAS been met.

- e. For purpose of computation, the principal and each support use identified in sub-section (d) above shall be assigned and "area equivalent" as set forth herein. The total "area equivalent" assigned to the principal uses shall not exceed the actual area of the site.

1) The Board finds that the proposed construction of an expanded outdoor deck and viewing platform does not impact previously assigned and calculated "area equivalents" consistent with the prior SUP approval and amendments thereto. This data was reviewed by the Township Engineer on 11/8/2018. (Exhibit 2)

This standard HAS been met.

- f. The number of single family residences shall not exceed six (6). The manager's residence shall not contain or be used for rental guest rooms. The number of guest rooms shall not exceed twelve (12).

1) The Board finds that no additional single-family residences are being requested.

This standard HAS been met.

- g. Not less than seventy-five percent (75%) of the site shall be used for the active production of crops that can be used for wine production, such as fruit growing on vines or trees.

1) The Board finds that the applicant has 56.61 Acres in the Chateau Use Boundary and 42.77 acres in active production of crops that can be used for wine production as shown on the Mansfield survey drawing received 11-1-18 (exclusive of the Bluewater Road right-of way) which is more than 75% of the Chateau Use Boundary area. This data was reviewed by the Township Engineer on 11/8/2018. (Exhibit 2)

This standard HAS been met.

- h. The facility shall have at least two hundred feet (200') of frontage on a state or county road.

1) The Board finds that the applicant's site has roughly twenty-five hundred feet (2,500') of frontage on Blue Water Rd. (Exhibit 2)

This standard HAS been met.

- i. The winery chateau shall be the principal building on the site and shall have an onsite resident manager.

1) The Board finds that the existing winery will remain the principal building onsite.

2) The Board finds that the resident manager will be located in a new Manager's Residence at the location shown per SUP Amendment 3. (Exhibit 2)

This standard HAS been met.

- j. All guest rooms shall have floor areas greater than two hundred fifty (250) square feet. Maximum occupancy shall be limited to five (5) persons per unit. No time sharing shall be permitted.

1) The Board finds that the applicant's existing guest house quarters is permitted two (2) guest rooms of which are in compliance with the ordinance concerning size and layout.

2) The Board finds that per SUP Amendment 3, the former Manager's Residence is permitted to be converted into 5 guest rooms each guest room has a full on-suite bathroom. The five guest rooms have square footages ranging from 305 sq. ft to 416 sq. ft. (Exhibit 2)

This standard HAS been met.

- k. No exterior lighting shall have a source of illumination or light lenses visible outside the property line of the site and shall in no way impair safe movement of traffic on any street or highway.

1) The Board finds that the proposed exterior lighting shall comply with Section 7.14 of the Peninsula Township Zoning Code before the land use permit is approved by the Zoning Administrator

Applicable Standards WILL BE met by Approval Conditions (See Section 6.1, Page 14).

- l. Accessory uses such as facilities, meeting rooms, and food and beverage services shall be for registered guests only. These uses shall be located on the same site as the principal use to which they are accessory and are included on the approved Site Plan. Facilities for accessory uses shall not be greater in size or number than those reasonably required for the use of registered guests.

1) The Board finds that the applicant has not requested Accessory Uses for registered guests. (Exhibit 1)

This standard HAS been met.

- m. Well and septic system- Proof of evaluation of the well and septic system by the Health Department and conformance to that agency's requirements shall be supplied by the owner.

1) A Grand Traverse County Health Department permit is not required prior to issuance of a Land Use Permit per communication with the Grand Traverse County Health Department (on 11/5/2018)

This standard HAS been met.

- n. Fire safety-

1. All transient lodging facilities shall conform to the Grand Traverse County Construction Code.

1) The Board finds that new lodging facilities are not included in this request. Evidence of compliance with the Grand Traverse County Construction Code associated with the new deck and observation area are to be provided prior to issuance of a Land Use Permit by the Zoning Administrator and are a condition of approval.

Applicable Standards Will BE met by Approval Conditions (See Section 6.1.d on Page 14).

2. An onsite water supply shall be available and meet the uniform published standards of the Peninsula Township Fire Department.

1) The Board finds existing water supply is provided to the site.

3. A floor plan drawn to an architectural scale of not less than 1/8" = 1 foot shall be on file with the Fire Department.

1) The Board finds that a floor plan has been provided to the Fire Department and has been reviewed. (Exhibit 2 and 7)

This standard HAS been met.

4. Each operator of a transient lodging facility shall keep a guest registry which shall be available for inspection by the Zoning Administrator at reasonable times and police and fire officials at any time.

1) The Board finds that lodging is not a part of this SUP amendment, but that applicant is required to provide evidence of a guest registry to the Zoning Administrator pursuant to prior SUP approvals.

This standard HAS been met.

5. Master keys for all rooms shall be available at all times.

1) The Board finds that lodging is not a part of this SUP amendment, but that applicant is required to make master keys for all rooms available at all times pursuant to prior SUP approvals.

This standard HAS been met.

- o. Fencing or Planting Buffer- In the event that the Township Board determines that noise generation may be disturbing to the neighbors or that the establishment is in an area where trespass onto adjacent properties is likely to occur, then the Township Board may require that fencing or a planting buffer be constructed and maintained.

1) The Board finds that the deck expansion will not generate noise above that existing under the current special land use permit. The property is surrounded by farmland.

This standard HAS been met.

- p. Rental of Equipment- Rental of snowmobiles, ATVs or similar vehicles, boats and other marine equipment in conjunction with the operation of the establishment shall be prohibited.

1) The Board finds that rental of equipment is not permitted on site.

This standard HAS been met.

- q. Activities and Outdoor Gatherings- Activities made available to registered guests shall be on the site used for the facility or on lands under the direct control of the operator either by ownership or lease. Outdoor

activities shall be permitted if conducted at such hours, and in such manner, as to not be disruptive to neighboring properties.

1) The Board finds that activities or outdoor gatherings are not requested for registered guests.

This standard HAS been met.

r. Signs shall be in accordance with Section 7.2.2 (4) which governs signs in the A-1 Agricultural District.

1) The Board finds that there are no additional signs proposed as part of this SUP amendment.

2) The Board finds that all existing signs are in compliance with the guidelines of the ordinance.

This standard HAS been met.

s. A two hundred foot (200') setback shall be maintained between guest accommodations and facilities and agricultural crops, unless it is demonstrated that a lesser setback can be maintained which will provide for an equal level of protection from agricultural activities to residents, visitors and guests of the Winery-Chateau. Upon such demonstration, the Township Board may permit a lesser setback.

1) The Board finds that approval of the existing SUP #115 1st Amendment demonstrated that the winery structure's setback of eighty feet (80') from the adjacent property has maintained sufficient protection of those residents, visitors, and guests of the Winery-Chateau.

2) The Board finds that the Township has not received complaints regarding the existing winery operation at its current setback and location.

This standard HAS been met.

t. Guest Activities Uses- The Township Board may approve Guest Activity Uses (Activities by persons who may or may not be registered guests) as an additional Support Use, subject to the following:

I. The current Winery-Chateau section of the ordinance required seventy-five percent (75%) of the site to be used for the active production of crops that can be used for wine production such as fruit growing on vines or trees, but does not require that any of the wine produced on the site be made from wine fruit grown on Old Mission Peninsula. To assure that, in addition to the minimum parcel size required for a Winery-Chateau, there is additional farm land in wine fruit production in Peninsula Township if Guest Activity Uses are allowed to take place at a Winery-Chateau facility.

1) The Board finds that the applicant owns and operates their vineyard upon roughly seventy-five (75) acres within the Township of which, 56.61 acres are dedicated to this Winery-Chateau Special Use Permit. Currently, no additional land is under lease within the Peninsula for purposes of purchasing grapes other than those produced on lands under ownership of applicant. (Exhibit 2)

This standard HAS been met.

II. Guest Activity Uses are intended to help in the promotion of Peninsula agriculture by:

- i. Identifying "Peninsula Produced" food or beverage for consumption by the attendees.
- ii. Providing "Peninsula Agriculture" promotional brochures, maps and awards.
- iii. Including tours through the winery and/or other Peninsula agriculture locations.

1) The Board finds that the applicant is prepared to continue promoting Peninsula based agriculture throughout their operations and that the applicant will be limited to conducting those uses allowed under section 8.7.3 (10) (u) 2 via wine and food seminars, meetings of non-profit groups and meeting of agriculturally related groups.

This standard HAS been met.

5. COMPLIANCE WITH GOVERNMENTAL REGULATIONS-

The petitioner shall comply with all State, County, Township and other governmental regulations relative to the establishment for a parcel zoning A-1, Agricultural, with the above permitted use(s) on site, which includes meeting the requirements of the Michigan Department of Transportation (MDOT), the Grand Traverse County Drain Commissioner (GTCDC), the Grand Traverse County Road Commission (GTCRC), and the Grand Traverse County Health Department (GTCHD). Zoning compliance is based on the governing Special Land Use document, approved site plan, and Articles 6 and 8 of the Peninsula Township Zoning Ordinance.

6. CONDITIONS AND SAFEGUARDS-

Conditions and Safeguards- the Board may suggest such additional conditions and safeguards deemed necessary for the general welfare, for the protection of individual property rights, and for insuring that the intent and objectives of the Ordinance will be observed. The breach of any condition, safeguard or requirement shall automatically invalidate the permit granted. Specific conditions include:

1. Secure a Land Use Permit Pursuant to Section 4.1.3 of the Peninsula Township Zoning Ord. Before such permit is issued, the applicant shall:
 - a. Provide evidence of compliance with recommendations provided by the Peninsula Township Fire Chief.
 - b. Provide evidence that any proposed exterior lighting will comply with Section 7.14 of the Zoning Code.
 - c. Provide evidence of compliance with the Grand Traverse County Construction Code Dept.

7. COMMENCEMENT AND COMPLETION OF SPECIAL LAND USE-

The commencement and completion of Special Land Uses are governed by Section 8.1.2(5) of the Peninsula Township Zoning Ordinance. Violations of the Special Land Use and accompanying Site Plan are enforceable and remedies available under Section 3.2 of the Zoning Ordinance.

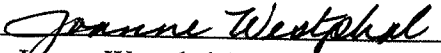
8. EFFECTIVE DATE OF SPECIAL LAND USE-

The Special Land Use shall be effective when the application has been approved by the Peninsula Township Board. The Board approves by a vote of:

AYES	Manigold, Westphal, Bickle, Achorn, Sanger, Wahl, Wunsch
NAYS	None
ABSTAINING	None
ABSENT	None

The undersigned hereby certifies that she is the Clerk for the Township of Peninsula, Grand Traverse County, Michigan and that the foregoing Special Use Permit was approved by the Peninsula Township Board on September 25, 2018. *DECEMBER 11, 2018*

The undersigned further certifies that a quorum was present at said meeting and that said meeting complied with all applicable laws and regulations.

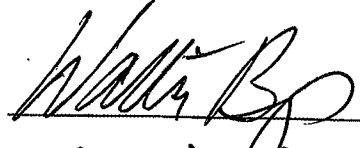
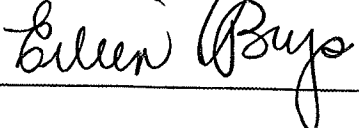

Joanne Westphal, Peninsula Township Clerk

Approved by the Peninsula Township Board on ~~9/25/2018~~.
12/11/18


Rob Manigold, Peninsula Township Supervisor

THIS PERMIT SHALL BE ATTACHED TO THE SITE PLAN AND BECOME A PART THEREOF.

I hereby acknowledge that I have received a true copy of the Special Land Use and I have been informed of said requirements of this Special Land Use Permit and of the requirements of the Peninsula Township Zoning Ordinance pertaining to the operation of the approved Winery-Chateau.


Walter Brys

Eileen Brys

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WINERIES OF THE OLD MISSION
PENINSULA, *et al.*,

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal
Corporation,

Defendant,

And

PROTECT THE PENINSULA,
Intervenor-Defendant.

Case No.: 1:20-cv-1008-PLM
Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S MOTION TO
DISMISS PLAINTIFFS' BOWERS HARBOR & VINEYARD, INC., BRY'S WINERY,
LC, CHATEAU OPERATIONS, LTD., GRAPE HARBOR, INC., MONTAGUE
DEVELOPMENT, LLC, OV THE FARM, LLC, AND VILLA MARI, LLC'S CLAIMS
UNDER RULE 12(b)(1) AND 12(h)(3) BASED ON LACK OF SUBJECT MATTER
JURISDICTION**

EXHIBIT 15

PENINSULA TOWNSHIP
Board of Zoning Appeals
13235 Center Rd.
Traverse City, MI 49686

Parcel Code #28-11-127-016-00
Zoning A-1
From Walter Brys
Owner Add. Houston TX
Address 3309 Blue Water Road
Phone -

Date 4/3/00 Zoned R-1A
Hearing Date 4/13/00 Site Visit 3:30 pm Hearing Date

ZONING ORDINANCE REFERENCE OR ZONING ADMINISTRATOR'S DECISION

Section 5.7.4 Special Exceptions (1) Temporary permits: Provides for consideration of temporary structures by the Zoning Board of Appeals.

Basis for Variance Request

See attached letter dated 4/3/00

Specific Request (Office Use Only)

Request approval of a temporary structure extending to November ~~30~~³⁰, 2000 during reconstruction of a residence on the property.

APPEAL BOARD ACTION

<u>Gray</u>	<u>Yes</u>
<u>Ingold</u>	<u>Yes</u>
<u>Rowlett</u>	<u>Yes</u>
<u>Johnson</u>	<u>Yes</u>
<u>Rosch</u>	<u>Yes</u>

Non-refundable Fee: Regular \$70.00 Special \$600.00

Walter Brys Check No. _____ Date _____
Applicant's Signature

IF YOU DO NOT INDICATE OTHERWISE, THE REQUESTED ITEM WILL BE TABLED UNLESS YOU ARE PRESENT OR REPRESENTED.