

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

**PENINSULA TOWNSHIP'S
RESPONSE TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT
(ECF NO. 468)**

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**DEFENDANT PENINSULA TOWNSHIP'S RESPONSE TO PLAINTIFFS' MOTION
FOR PARTIAL SUMMARY JUDGMENT**

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I. INTRODUCTION

Plaintiffs claim to move for partial summary judgment on Counts I, II, IV¹, and X of the First Amended Complaint. (ECF No. 468). Plaintiffs are not entitled to summary judgment.

The primary thrust of Plaintiffs' motion is that myriad sections of the Peninsula Township Zoning Ordinance ("PTZO") violate the First Amendment. The First Amendment claims are broken down into four arguments: (1) commercial speech; (2) content-based restrictions; (2) prior restraints; and (4) compelled speech. Each of Plaintiffs' claims fail as a matter of law for several reasons.

While there are independent reasons each category of Plaintiffs' claims is legally infirm, one common thread requires denial of summary judgment in Plaintiffs' favor and counsels in favor of dismissal: Plaintiffs are not engaged in protected expressive activity under the First Amendment. The challenged sections of the PTZO regulate conduct, not speech or expressive activity. "The protections of the First Amendment do not generally apply to conduct in and of itself." *Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005).

II. STATEMENT OF FACTS

A. Language of the Challenged Sections of the PTZO – The Basis of Plaintiffs' Facial Challenges.

At various points in their brief, Plaintiffs challenge the following sections of the PTZO.² The enclosed table includes the full text of the challenged section as well as the type of winery to which the ordinance section applies. (Exhibit 1).

¹ Plaintiffs' decision to move for summary judgment on Count IV of the First Amended Complaint is curious given the Court previously granted Plaintiffs summary judgment on this claim. (ECF No. 469, PageID.16949 (citing ECF No. 162)). Moreover, at no point in their brief do Plaintiffs address Count IV.

² Plaintiffs have not moved for summary judgment on Sections 6.7.2(19)(a), 8.7.3(10)(u)(5)(c), or 8.7.3(10)(u)(5)(g). (*See* ECF No. 468, Plaintiffs' Motion for Summary Judgment). Similarly, in the introduction to their brief, Plaintiffs do not claim to be seeking summary judgment on Sections

B. Plaintiffs' Discovery Responses and Testimony Does not Support that the Challenged Sections of the Ordinance have been Applied to Them.

Plaintiffs claim the PTZO impinges on their First Amendment rights as it has been applied to them. However, Plaintiffs' discovery responses confirm they not only misunderstand what ordinance sections apply to them, but that the challenged sections of the PTZO have not actually been applied to the wineries.

In response to PTP's Interrogatories requesting Plaintiffs detail all facts supporting their claim that the PTZO violates their rights to Freedom of Speech under the First Amendment, Plaintiffs Black Star, Tabone, and Two Lads fail to offer any evidence of how the challenged ordinances have been applied to them. Black Star, Tabone and Two Lads responded collectively that Section 6.7.2(19)(b)(1)(v) unconstitutionally restricts their ability to engage in commercial speech. (Exhibits 2 to 4). Additionally, Black Star, Tabone and Two Lads broadly allege that the Winery-Chateau Ordinance, Sections 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(d) and 8.7.3(10)(u)(5)(g), operate as an unconstitutional restriction on their right to engage in commercial speech. (*Id.*) But as Farm Processing Facilities, these sections do not apply to Black Star, Tabone or Two Lads.

Plaintiffs Bonobo³, Bowers Harbor, Brys, Chateau Grand Traverse⁴, Chateau Chantal, Hawthorne, and Villa Mari responded collectively that Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(b) and (d), 8.7.3(10)(u)(2)(a) and (d), and 8.7.3(10)(u)(5)(c),(g) and (h) violate their Freedom of Speech. (Exhibits 5 to 11). Finally, Peninsula Cellars responded that 8.7.3(12)(g), 8.7.3(12)(i) and 8.7.3(12)(k) operate as unconstitutional restrictions on Peninsula Cellars' right to engage in

6.7.2(19)(a) or 8.7.3(10)(u)(5)(g), but in Section III(B)(1) of the brief they assert they are entitled to summary judgment on this claim. (*Compare* ECF No. 469, PageID.16949 *with* ECF No. 469, PageID.16952). Plaintiffs are not entitled to summary judgment when they have not moved for such relief.

³ Bonobo does not have GAUs, so Section 8.7.3(10)(u) in its entirety does not apply.

⁴ Chateau Grand Traverse does not have GAUs, so Section 8.7.3(10)(u) does not apply to Chateau Grand Traverse.

commercial speech. (Exhibit 12). Additionally, Peninsula Cellars broadly alleges Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(b) and (d), 8.7.3(10)(u)(2)(a) and (d), and 8.7.3(10)(u)(5)(c),(g) and (h) violate its right to Freedom of Speech. But Peninsula Cellars is not a Winery-Chateau, so these sections are wholly inapplicable. Even then, Plaintiffs' responses fail to provide any description as to *how* the challenged sections have been applied to them.

Plaintiffs' deposition testimony similarly does not support how the PTZO has been applied in a manner than infringes upon their First Amendment rights. Not surprisingly given Plaintiffs' misunderstandings regarding application of the PTZO, Plaintiffs continuously mistake regulations on conduct for restrictions on expression.

When asked how Two Lads' First Amendment rights have been injured, Two Lads' representative claimed restrictions on site plans, layouts and the square footage of buildings violate Two Lads' First Amendment rights: "Yeah. Commercial speech; right? How I choose to lay out my building and operate my business, the things that I sell, the way that I choose to have a tasting room, the expression of architectural." (Exhibit 13, Dep. of Two Lads at 145). When asked what message Two Lads is trying to convey with the square footage of its tasting room, Two Lads' representative testified:

It is literally the physical and architectural embodiment of a message and a feel and with the square footage I guess you could try to shoehorn something into that space as we have to do the best with it as we can, but more freedom and more space to be able to have events, to plan for different retail things, all things that are examples of commercial speech that are changed or modified by those restrictions is how I think I understand that constitutional thing. [*Id.* at 146]

Similarly in response to how the PTZO has injured its First Amendment rights, Tabone answered "we're injured every day we're prevented from doing things, for example." (Exhibit 14, Dep. of Tabone at 56-57). Tabone claims it wants to be free of the "unconstitutional ordinances" to "expand our agricultural-based businesses. So, I can, you know, make more wine, make good

quality products, and, you know, hopefully serve it with, you know, locally grown produce and have people – you know, more people come and more people stay longer.” (*Id.* at 63). Farm Processing Facilities are allowed to engage in all of those activities under the Section 6.7.2(19).⁵

Chateau Chantal similarly fails to present evidence regarding how the PTZO regulates expressive conduct for purposes of an as-applied challenge. Chateau Chantal testified that being required to only serve Old Mission Peninsula “fruit” at a guest activity and not being able to play amplified music are examples of “commercial speech” that are allegedly “being infringed upon by the regulations in the ordinance.” (Exhibit 15, Dep. of Chateau Chantal at 78). Chateau Chantal consistently fails to identify the speech or message the PTZO prevents it from communicating. For example, Chateau Chantal claims Section 8.7.3(10)(u)(1)(d) operates as an unconstitutional restriction on their right to engage in commercial speech. But Chateau Chantal hosts “Jazz at Sunset” (which is not a Guest Activity Use (“GAU”)), a longstanding event which it promotes through social media, posters, and an advertisement in the “Northern Express”. (*Id.* at 89). Chateau Chantal also promotes wine tasting and has the ability to promote winery tours and political rallies. (*Id.* at 90). When asked again, what Chateau Chantal wants to say that the PTZO prevents it from saying, it testified “Well, free entertainment is not a guest activity use, but at the same time we’re not allowed to do amplified music, so we’re prevented from hosting any number of things that would have amplified music, again opening additional customers to our agricultural products.” (*Id.* at 92). Chateau Chantal’s representative continued, claiming the message that they want to convey is “[w]e’re a business that has products that are for sale, we’d like to tell people about that.” (*Id.* at 92-93). Chateau Chantal can already do that now. Chateau Chantal fails to identify how the PTZO, as it has been applied to it, restricts speech in any manner.

⁵ The Township is not conceding that Tabone is a Farm Processing Facility as Tabone only has an SUP to operate as a Food Processing Plan. (See ECF No. 459, PageID.16330).

Villa Mari's representative also testified that a regulation on conduct is restricting its First Amendment rights, claiming that provisions of the PTZO related to events is unconstitutional: "regulating the why of us doing these events; in other words, saying that we can do events but only for certain reasons is not good." (Exhibit 16, Dep. of Villa Mari at 127).

Hawthorne's representative inexplicably mistakes a regulation on conduct for a restriction on commercial speech: "[i]t is everything from any marketing that we do to our protocol when guests enter the Tasting Room, you know, how our lawn is manicured, you know, it's – it – there's been verbal and nonverbal speech as far as how we present our brand to the community." (Exhibit 17, Dep. of Hawthorne at 39-40). Specifically, Hawthorne claims it wants to communicate "[t]hat we're a agritourism destination that produces and sells a [sic] state-grown wines in arguably one of the most secluded locations on Old Mission Peninsula with panoramic views of both bays." (*Id.*)

Chateau Grand Traverse offers no evidence of the application of the PTZO, but rather relies on only a facial challenge:

The limitations that are put on us by what it states; the groups that you can have, the size you can have, the people that can be there, the items you can sell, the baskets that must be lifted off the floor in order to sell them. [Exhibit 18, Dep. of Chateau Grand Traverse at 47].

Bonobo wants to convey the message that it has great wine, food, it offers a great experience and it is a place where people can enjoy themselves. (Exhibit 19, Dep. of Bonobo at 163). Bonobo is certainly permitted to convey this message. However, Bonobo argues that the Ordinance restricts its right to engage in speech by restricting its ability have more guests which restricts its ability to deliver the message.

Q: Yes. So where is the speech that you're being restricted from making? You can have guests; you can have registered guests, you can have non-registered guests, you can have the public, you can have private guests, you can have people buy bottles, drink glasses and taste. What are you not – we speech are you not being able to provide?

A: The reach. [*Id.* at 160-161]

* * *

Q: So is it the capacity of the tasting room that is restricting your ability to get your message out?

A: No, it's the being restricted as to people that can come.

Q: Which people can't come?

A: People that don't hear the message.

Q: Which people are you not -- what message are you not -- which people?

A: Friends that you're not able to tell because you didn't come to an event that I was going to have so you couldn't go tell your friends to come visit. So as a blanket form of advertising I'm not allowed to do it. [*Id.* at 162].

Bonobo does not want to *say* anything. Bonobo appears to believe its commercial “speech” is being restricted by hypothetical guests not attending a hypothetical event and therefore not being able to share a hypothetical message via word of mouth. This misses the mark and does not contain any identifiable speech Bonobo is restricted from making. (*Id.* at 162).

LAW AND ARGUMENT

III. STANDARD OF REVIEW

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009), which “may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325; 106 S. Ct. 2548, 2552 (1986). “Summary judgment requires that a plaintiff present more than a scintilla of evidence to demonstrate each element of a *prima facie* case.” *Garza v. Norfolk S. Ry. Co.*, 536 Fed. Appx. 517, 519 (6th Cir. 2013) (citing *Van Gorder v. Grand Trunk W. R.R.*, 509 F.3d 265, 268 (6th Cir. 2007)).

Once the moving party meets this burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56(e); *Alexander*, 576 F.3d at 558. The nonmoving party cannot rest on its pleadings but must present significant probative

evidence in support of the complaint to defeat the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49, 106 S.Ct. 2505, 2510–11, 91 L.Ed.2d 202 (1986). Irrelevant factual disputes do not create a genuine issue of material fact. *St. Francis Health Care Centre v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000). The opposing party must present a jury question as to each element of the claim. *Davis v. McCourt*, 226 F.3d 506, 511 (6th Cir. 2000). The failure to prove an essential element renders all other facts immaterial. *Elvis Presley Enters., Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 895 (6th Cir. 1991).

IV. THE FIRST AMENDMENT DOES NOT APPLY TO PLAINTIFFS' CLAIMS BECAUSE THE WINERY ORDINANCES REGULATE CONDUCT NOT SPEECH.

As a threshold matter, the Court must first determine whether the protections of the First Amendment even apply to this case. In *Country Mill Farms, LLC v. City of East Lansing*, 280 F.Supp.3d 1029, 1042-1043 (W.D. Mich. 2017), this Court has previously explained the “three-step inquiry” under which “free-speech claims should be analyzed”:

First, a court must consider whether the speech should be afforded constitutional protection. *Id.* Second, the court must examine the nature of the forum where the speech was made. *Id.* And third, the court must assess the whether the government's action in shutting off the speech was legitimate, in light of the applicable standard of review. *Id.* For the first step in the inquiry, if the court concludes that the government has not regulated speech, or that the speech is not entitled to protection, the inquiry ends.

“The protections of the First Amendment do not generally apply to conduct in and of itself.” *Blau v. Ft. Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005). But the First Amendment's Free Speech Clause does extend to both “symbolic or expressive conduct as well as to actual speech.” *Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536 (2003); *see also Stromberg v. California*, 283 U.S. 359; 51 S.Ct. 532 (1931). However, the First Amendment protects conduct only when it is “inherently expressive.” *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 66; 126 S.Ct. 1297 (2006). Conduct is inherently expressive when the conduct in question

comprehensively communicates its own message without additional speech. *Id.* In other words, would the conduct itself be “understood by those who viewed it” as conveying a message. *Texas v. Johnson*, 491 U.S. 397, 404; 109 S.Ct. 2533 (1989). Without such limitations, “an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” *United States v. O’Brien*, 391 U.S. 367, 376; 88 S.Ct. 1673 (1968).

In *Lichtenstein v. Hargett*, 83 F.4th 575 (6th Cir. 2023), the Sixth Circuit examined the standards for expressive conduct under *O’Brien* and *Rumsfeld*. The Sixth Circuit identified the “two traits” of expressive conduct: (1) “[t]he actor must intend to express a ‘particular message’ by engaging in the action” and; (2) a “high ‘likelihood’ must exist that the audience who sees the action will understand its message.” *Id.* at 594 (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005)). The Sixth Circuit then explained the application:

The first element—that the speaker intends to convey a particularized message—does not pose a high bar. *See Condon v. Wolfe*, 310 F. App’x 807, 819 (6th Cir. 2009). Even a parade that includes groups with “all sorts of messages” triggers this speech protection. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995); *cf. Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 539–40 (6th Cir. 2001). Yet the bar does exist. So a student’s challenge to a school dress code flunked this requirement because she did not intend to express any message by wearing clothes that the dress code prohibited. *Blau*, 401 F.3d at 389.

The second element—that the audience will likely understand the message—has more bite. That is because a viewer must be able to understand the message from the conduct alone without any accompanying speech explaining the reasons behind it. *Rumsfeld*, 547 U.S. at 66, 126 S.Ct. 1297. When a party must include “explanatory speech” for the audience to get the message, the conduct does not warrant protection. *Id.* So a party who refuses to pay taxes cannot invoke the First Amendment merely by proclaiming disdain for the tax laws when committing the crime. *See id.* Likewise, the Court in *Rumsfeld* held that the First Amendment did not protect a law school’s decision to bar military recruiters from campus as an act of protest against the military’s limits on gay and lesbian servicemembers. *See id.* Without speech explaining this restriction, the Court reasoned, nobody would understand that the school meant to convey disapproval of the military’s policy. *See id.*

A. Plaintiffs Fail to Sustain a Facial Challenge to the Challenged Sections of the PTZO under the First Amendment.

The challenged sections of the PTZO do not regulate speech or expressive conduct protected by the First Amendment. The ordinance sections regulate conduct only. As such, on their face, the challenged ordinance sections do not implicate the First Amendment.

“A facial challenge to a law’s constitutionality is an effort ‘to invalidate the law in each of its applications, to take the law off the books completely.’” *Speet v. Schuette*, 726 F.3d 867, 871-872 (6th Cir. 2013) (internal citation omitted). A facial challenge is “a claim that the law is ‘invalid *in toto* – and therefore incapable of any valid application.’” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n. 5 (1982) (internal citation omitted). “Sustaining a facial attack to the constitutionality of a state law . . . is momentous and consequential. It is an ‘exceptional remedy.’” *Speet*, 726 F.3d at 872 (internal citation omitted). “Where a plaintiff makes a facial challenge under the First Amendment to a statute’s constitutionality, the ‘facial challenge’ is an ‘overbreadth challenge.’” *Id.* “[A] plaintiff must show substantial overbreadth: that the statute prohibits “‘a substantial amount of protected speech both in an absolute sense and relative to [the statute’s] plainly legitimate sweep[.]’” *Id.* (quoting *Carey v. Wolnitzek*, 614 F.3d 189, 208 (6th Cir. 2010)). “Only a statute that is substantially overbroad may be invalidated on its face.” *City of Houston, Tex. v. Hill*, 482 U.S. 451, 458; 107 S.Ct. 2502 (1987). “To succeed in an overbreadth challenge, therefore, a plaintiff must “demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [statute] cannot be applied constitutionally.” *Speet*, 726 F.3d at 873 (citation omitted).

“The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers.” *U.S. v. Williams*, 553 U.S. 285, 293; 128 S.Ct. 1830 (2008). In the second stage of an overbreadth

analysis, the Court must then determine whether the challenged ordinance “criminalizes a substantial amount of protected expressive activity.” *Id.* at 297.

The analysis begins with construing the language of the challenged ordinances. Plaintiffs assert facial challenges to the following Sections of the PTZO (*See* ECF No. 469, PageID.16951-16952):

- 6.7.2(19)(a)
- 6.7.2(19)(b)(1)(v)
- 6.7.2(19)(b)(6)
- 8.7.3(10)(m)
- 8.7.3(10)(u)(1)(b)
- 8.7.3(10)(u)(1)(d)
- 8.7.3(10)(u)(2)(a)
- 8.7.3(10)(u)(2)(d)
- 8.7.3(10)(u)(5)(c)
- 8.7.3(10)(u)(5)(g)
- 8.7.3(10)(u)(5)(h)
- 8.7.3(12)(i)
- 8.7.3(12)(k)

With the exception of Section 8.7.3(12)(k), which is addressed *infra* in the discussion of commercial speech, the challenged ordinance sections do not regulate speech or expressive conduct – behavior designed to convey a message that is highly likely to be understood by the intended audience as conveying a message. On their face, the challenged sections do not restrict what a winery may say or the message it may communicate. Instead, the ordinance sections regulate conduct alone, which is not protected in and of itself.

When the language of the ordinances is construed, they do not regulate protected expression. This conclusion is supported by the answer to a simple question: “What constitutionally protected expression would be banned or impacted by the ordinances?” There is none. The challenged sections do not regulate what Plaintiffs can say, but what they can do. What

Plaintiffs propose to do does not convey a message that is highly likely to be understood by the intended audience as conveying a message.

Even if the ordinances did regulate what Plaintiffs can say instead of what they can do, Plaintiffs still fail the second stage of the analysis: the challenged sections do not result in a “substantial number” of unconstitutional applications. *Speet*, 726 F.3d at 873. The challenged sections of the PTZO do not regulate any protected speech or expressive conduct, let alone a substantial amount of protected expression. It is Plaintiffs’ burden to prove substantial overbreadth on a facial challenge. The Sixth Circuit has cautioned that courts are not to “apply the ‘strong medicine’ of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law.” *Id.* at 878 (internal quotation marks and citation omitted). The probable reason Plaintiffs fail to identify how the challenged ordinance sections regulate a substantial amount of protected expressive activity is because the PTZO does not regulate any expressive activity.

Plaintiffs’ facial challenges fail as a matter of law as the ordinance sections do not regulate constitutionally-protected expression.

B. Plaintiffs’ As-Applied Challenges Fail.

Unlike a facial challenge, in an as-applied challenge, a plaintiff challenges the validity of the ordinance as it has been applied to it by focusing on the acts giving rise to the litigation. *See Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 482-483; 109 S.Ct. 3028 (1989). An as-applied challenge argues a “law is unconstitutional as enforced against the plaintiffs before the court”. *Speet*, 726 F.3d at 872. It is Plaintiffs’ burden, not the Township’s, to define their proposed course of conduct and establish it is a protected right. *See Kennedy v. Bremerton Sch. Dist.*, ____ U.S. ____; 142 S.Ct. 2407, 2421 (2022) (holding “a plaintiff bears certain burdens to demonstrate an infringement on [their] rights under the Free Exercise and Free Speech Clauses. If

the plaintiff carries these burdens, the focus then shifts to the defendant to show that its actions were . . . justified[.]”).

Plaintiffs’ motion is devoid of factual support regarding how the challenged sections are unconstitutional as they have been enforced against them. Complicating this effort is Plaintiffs’ failure to explain what they want to *say* – in other words, without knowing the expressive conduct which Plaintiffs have attempted to engage in but have been denied, there is no basis to evaluate the as-applied challenge. Instead, Plaintiffs’ brief offers only vague characterizations of actions they want to engage in: “[o]ther sections also regulate commercial speech regarding the type of products a winery can sell, types of music that can be played, the size of winery retail spaces, who the Wineries may host, types of promotions the Wineries can (or must) offer and other similar restrictions.” (ECF No. 469, PageID.16951-16952). These vague characterizations describe *conduct* not *speech*.

Plaintiffs’ discovery responses and deposition testimony only confirms the challenged sections have not been applied in such a manner that restricts any protected expression. Two Lads, Black Star, Tabone, and Peninsula Cellars’ interrogatory responses claim their First Amendment rights are violated by sections of the PTZO that apply only to Winery-Chateaus. This is patently false. Moreover, Plaintiffs’ vague responses fail to identify how the challenged sections have been applied to infringe upon any protected expression. The deposition testimony confirms the same – Plaintiffs simply want to engage in unlimited commercial activity but offer no evidence regarding how the PTZO has been applied to them to stop them from engaging in any expression of any kind.

Plaintiffs also assert hosting events such as “weddings, receptions, and social events for hire” presents them with “opportunities to get potential customers to their vineyard”. (ECF No. 469, PageID.16953-16954). The Court correctly denied summary judgment on this issue before,

concluding “weddings themselves are not speech intended to promote a commercial transaction.” (ECF No. 162, PageID.6004). This ruling properly noted Plaintiffs are not *speaking*.

Plaintiffs now claim weddings and other events are agritourism. According to Plaintiffs, they are “trying to attract customers to their vineyards to sell wine.” (ECF No. 469, PageID.16954). Plaintiffs assert agritourism in and of itself is commercial speech because it is “bringing customers to the winery property for the purpose of ‘proposing a commercial transaction:’ the same of wine.” (ECF No. 469, PageID.16952). This, however, is conduct not speech and it is certainly not *expressive* conduct.

For example, Plaintiffs cite to the testimony of Sherri Fenton, where she claimed that people “want to be in the vineyard. They want to be right next to the vineyard. You could have a dining in the vines, you could have a wedding reception with tables, right along next to the vineyard They want to experience the beauty of the agriculture around us.” (ECF No. 469-9, PageID.17055). According to Plaintiffs, this amounts to ““experiential advertising””. (ECF No. 469, PageID.16955 (quoting deposition of Ms. Fenton, pages which were not attached to Plaintiffs’ Exhibit 9)). Plaintiffs also cite favorably to the testimony of Marie-Chantal Dalese and Chris Baldyga who claim that hosting events constitutes making a statement to “show people what Chateau Chantal is about” (ECF No. 469-11, PageID.17061) and that by merely existing and hosting events is “commercial speech”. (ECF No. 469-12, PageID.17066). Plaintiffs conclude, “[t]hese winery events are agritourism and, thus, commercial speech.” (ECF No. 469, PageID.16955). However, agritourism as Plaintiffs describe it is nothing more than conduct not protected by the First Amendment. It is not expressive conduct and Plaintiffs do not propose any actual message they want to espouse at an event other than the amorphous idea of come down to our winery and enjoy the view. Even then, this “message” is not highly likely to be understood by the intended audience as conveying a message.

Plaintiffs' as-applied challenges fail.

V. EVEN IF THE FIRST AMENDMENT APPLIES, PLAINTIFFS' CHALLENGES FAIL AS A MATTER OF LAW.

A. Plaintiffs are not Engaged in Commercial Speech or Any Expression Protected by the First Amendment.

Plaintiffs assert the following sections of the PTZO are impermissible regulations on commercial speech:

- 6.7.2(19)(a)
- 6.7.2(19)(b)(1)(v)
- 6.7.2(19)(b)(6)
- 8.7.3(10)(m)
- 8.7.3(10)(u)(1)(b)
- 8.7.3(10)(u)(1)(d)
- 8.7.3(10)(u)(2)(a)
- 8.7.3(10)(u)(2)(d)
- 8.7.3(10)(u)(5)(c)
- 8.7.3(10)(u)(5)(g)
- 8.7.3(10)(u)(5)(h)
- 8.7.3(12)(i)
- 8.7.3(12)(k)

As discussed above, these sections of the PTZO do not regulate speech or conduct and, therefore, are not subject to First Amendment scrutiny. However, in the event the Court determines that the challenged sections of the PTZO implicate the First Amendment, the Township contends that because the challenged sections do not regulate commercial speech, application of the *Central Hudson* test is inappropriate.

“The core definition of ‘commercial speech’ is that speech ‘which does no more than propose a commercial transaction.’” *Semco v. Amcast, Inc.*, 52 F.3d 108, 112 (6th Cir. 1995) (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 762; 96 S.Ct. 1817 (1976)). When the speech constitutes more than merely proposing a commercial transaction, courts generally consider the *Bolger* factors to determine whether the speech is primarily commercial,

including whether the communication: (1) is an advertisement; (2) refers to a specific product; and (3) whether the speaker has an economic motivation for the communication. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67; 103 S.Ct. 2875 (1983). The presence of all three factors provides “strong support” for the conclusion that the speech is commercial and subject to *Central Hudson*. *Id.*

First, as it relates to both their facial and as-applied challenges, Plaintiffs are not engaged in commercial speech. Plaintiffs have wholly failed to demonstrate any alleged speech that simply proposes a commercial transaction or that the challenged sections of the PTZO prevents them from informing the “public of the availability, nature, and prices of products and services . . .” *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 n.17; 113 S.Ct. 1505 (1993). Plaintiffs, instead, seek to engage in commercial events with the hope of spreading good will regarding their business such that people want to return. (See ECF No. 469, PageID.16953-16954). But even then, Plaintiffs do not offer evidence of the proposition of a commercial transaction. The *Bolger* factors further demonstrate the failure of Plaintiffs’ claim. Plaintiffs have not offered any evidence that their amorphous “commercial speech” contains: (1) any advertisements of any kind or (2) references to any specific product. At best, Plaintiffs have an economic motivation. However, only the presence of all three *Bolger* factors counsels in favor of a finding of commercial speech. Moreover, for their facial challenge, as discussed at length *supra*, none of the challenged sections of the PTZO prohibit speech or expressive conduct of any kind on their face.

Plaintiffs cite to *FF Cosmetics FL, Inc. v. City of Miami Beach, FL*, 129 F. Supp. 3d 1316, 1321 (S.D. Fl. 2015), for the notion that simple activities which seek to “have prospects enter their stores and purchase Plaintiffs’ products . . . is commercial speech.” This citation is misleading at best. Simply hoping people come into a store to buy products is not commercial speech as Plaintiffs imply.

The plaintiffs in *FF Cosmetics* did for more than simply seek to have guests enter their stores. The commercial speech in *FF Cosmetics* was “hawking” or “barking” at potential patrons walking by stores in Miami Beach – employees would call out to pedestrians seeking to lure them in. As the court noted, “[w]hatever form the greeters’ speech takes, their engagements with the walking public have one underlying message and one object, albeit often indirectly stated: to have prospects enter their stores and purchase Plaintiffs’ products.” *Id.* Plaintiffs do not claim to have employees standing on the side of the road “hawking” or “barking” at pedestrians to lure them into their wineries.

1. Application of *Central Hudson*.

Contrary to Plaintiffs’ implied position, merely wanting customers to enter your store is not commercial speech. Plaintiffs are not engaged in commercial speech or any protected speech or expression of any kind, *see, supra*. Plaintiffs instead want to engage in commerce and claim that such goal is somehow automatically commercial speech. This is not the case. Plaintiffs’ brief is devoid of citation to any cases applying *Central Hudson* to facts comparable to the present case (e.g., commercial entities in an agriculturally zoning district seeking to engage in limitless commercial activities that do not propose a transaction of any kind). The Township does not agree that *Central Hudson* is applicable to every challenged section for the myriad reasons discussed *supra*. Nevertheless, the Township will endeavor to apply a test that is the equivalent to forcing a square peg into a round hole.

If the speech is found to be commercial speech, a government restriction is permissible if “the statute directly advances a substantial government interest and that the measure is drawn to achieve that interest.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572; 131 S.Ct. 2653 (2011) (internal citations omitted). In *Central Hudson*, the Supreme Court created a four-part test for determining whether a regulation on commercial speech is valid: (1) a court “must determine

whether the expression is protected by the First Amendment”—i.e., the regulated speech at issue must “concern lawful activity and not be misleading;” (2) a court assesses “whether the asserted governmental interest is substantial;” (3) if the speech falls under the First Amendment and the governmental interest is substantial, a court next considers “whether the regulation directly advances the governmental interest asserted;” and (4) the reviewing court must determine whether the regulation “is not more extensive than is necessary to serve that interest.” *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557; 100 S.Ct. 2343 (1980).

a. Criterion One – Plaintiffs Are Not Engaged in Protected Expression.

Plaintiffs fail the first criterion because as discussed *supra* the speech and/or expression involved is not protected by the First Amendment.

b. Criterion Two – The Township Has Compelling, Not Just Substantial Interests.

The Township has substantial interests in protecting the health, safety, morals and general welfare of its residents. The Michigan Supreme Court has concluded that local zoning is not just a substantial interest, but a compelling one. *Greater Bible Way Temple of Jackson v. City of Jackson*, 478 Mich. 373, 403; 733 N.W.2d 734 (2007) (recognizing that “‘local governments have a compelling interest in protecting the health and safety of their communities through the enforcement of the local zoning regulations.’”) (internal citation omitted, collecting cases). Federal courts routinely recognize that a municipality’s interest in regulating land uses is significant. *See, e.g., Renton*, 475 U.S. at 50 (“[A municipality’s] interest in attempting to preserve the quality of urban life is one that must be accorded high respect.”); *Lamar Advertising of Mich. Inc. v City of Utica*, 819 F. Supp. 2d 657, 663 (E.D. Mich. 2011) (A municipality’s interest in enacting a zoning ordinance to protect “the public health, safety, traffic and esthetic [sic] character of the [municipality] are valid on their face.”); *Civil Liberties for Urban Believers v City of Chicago*, 342 F.3d 752, 675 (7th Cir. 2003) (“There is no question that Chicago . . . has a

substantial interest in regulating the use of its land and the [Chicago Zoning Ordinance] promotes that interest.”).

The PTZO has the express purpose of, among other things: (1) protecting “the public health, safety, morals and general welfare” of the Township’s inhabitants; (2) encouraging “the use of lands and resources of the Township in accordance with their character and adaptability”; (3) “to provide for safety in traffic, adequacy of parking and reduce hazards to life and property; and (4) “to conserve life, property, natural resources and the use of public funds to public services and improvements to conform with the most advantageous use of lands, resources and properties.” (ECF No. 29-1, PageID.1142, § 2.1 of the PTZO).

Plaintiffs operate on land planned under the Township land use plan and zoned by the PTZO as A-1 agricultural land. Pursuant to authority granted to the Township under the MZEA and MPEA, the intent and purpose of creation of the A-1 District is:

This District is intended to recognize the unique ecological character of the Peninsula and to preserve, enhance, and stabilizing existing areas within the Township which are presently being used predominately for farming purposes, yet recognize that there are lands within the district which are not suited to agriculture, therefore allowing other limited uses which are deemed to be compatible with agricultural and open space uses.

(ECF No. 29-1, PageID.1180; *See also* ECF No. 444-1, PageID.15846-15860, Township Master Plan). Additionally, the Township has provided interrogatory responses further explaining its substantial government interests. (Exhibit 20).

Throughout their commercial speech analysis, Plaintiffs cite to deposition testimony of individual Township employees/representatives when being questioned not regarding the overarching purpose of the PTZO operating as a complete zoning ordinance, but fragmented sections of the ordinance being taken completely out of context. (ECF No. 469, PageID.16956-16965). However, this testimony is not the appropriate method of determining the intent of the

Township. The appropriate starting point is the language of the PTZO itself. “When construing the provisions of a zoning ordinance, this Court seeks to discover and give effect to the legislative intent.” *High v. Cascade Hills Country Club*, 173 Mich. App. 622, 626; 434 N.W.2d 199 (1988); *see also Macenas v. Michiana*, 433 Mich. 380, 396; 446 N.W.2d 102 (1989). Zoning ordinances are not analyzed in a piecemeal fashion, but rather “must be construed as a whole, with regard to the object sought to be obtained and the general structure of the ordinance as a whole.” *Winchester v. W.A. Foote Memorial Hosp., Inc.*, 153 Mich. App. 489, 501; 396 N.W.2d 456 (1986).

As a general proposition, municipalities – such as the Township – speak only through their official minutes and resolutions and said official documents may not be altered by parol evidence regarding legislative intent. *See Tavener v. Elk Rapids Rural Agr. Sch. Dist.*, 341 Mich. 244, 251; 67 N.W.2d 136 (1954). As such, even if the face of the PTZO is insufficient, the answer to gather additional information would be to look at the Township’s official minutes and resolutions for clarity, not the deposition testimony of individual Township representatives. To the extent Plaintiffs rely on the testimony of Ms. Deeren and Mr. Manigold to override the language of the PTZO and supplant their own theories of its application, such attempts are misplaced.

Local zoning, including zoning ordinances that promote the health, safety, welfare, and morals of Township residents, is not just a substantial government interest, but a compelling one.

c. Criterion 3 – The Ordinances Advance the Township’s Interests.

The PTZO as a whole, and through operation of individual sections of the ordinance, directly advances the Township’s substantial governmental interests. Plaintiffs claim that the Township is required to submit empirical evidence regarding how the PTZO advances its interests. But that is not the case. *See Lamar Co., LLC v. Lexington-Fayette Urban Cnty. Gov.*, ___ F. Supp. 3d ___; 2023 WL 3956149, at *13 (E.D. Ky. 2023) (reasoning that “the government is not required to submit empirical evidence in support of its alleged interests, nor does it need to ‘try to

prove that [its] aesthetic [or safety] judgments are right.’”) (internal citation omitted). To the contrary, the Township’s burden on this front is to “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 625-626; 115 S.Ct. 2371 (1995). The Township “must come forward with some quantum of evidence, beyond its own belief in the necessity of the regulation, that the harms it seeks to remedy are concrete and that its regulatory regime advances the stated goals.” *Pagan v. Fruchey*, 492 F.3d 766, 771 (6th Cir. 2007) (citation omitted). Regulations focused on secondary effects are valid First Amendment regulations. Zoning regulations that affect the location of activity protected by the First Amendment are permitted when those regulations are necessary to further governmental interests. *See Young v. Am. Theatres, Inc.*, 427 U.S. 50, 71-73, 96 (1976); *City of Renton v Playtime Theaters, Inc.*, 475 U.S. 41, 52, 106 (1986).

The PTZO as a whole operates to protect substantial interests, including but not limited to the protection of agricultural land so that it is not converted into commercially-used land. This functions, in part, by permitting certain commercial uses in the A-1 district that are related to agriculture (in this case wineries that support agriculture by cultivating grapes and creating agricultural-related products) while limiting non-agriculturally related commercial uses (such as private rentals for non-agricultural events family reunions, meetings of Fortune 500 companies, etc.). The challenged sections of the PTZO work together to ensure that the limited commercial uses allowed in the winery ordinances are related to agriculture.

Further, to the extent the Court intends to review testimony, Gordon Hayward, the Township’s former Zoning Administrator, who, unlike Mr. Manigold, was responsible for interpreting the PTZO, offered succinct explanations for how the challenged provisions worked to promote the Township’s substantial interests. For example, as it relates to logoed merchandise (e.g., Section 8.7.3(12)(i)), Mr. Hayward testified regarding how that limitation advances the

Township’s interest by ensuring that commercial promotion is related to agriculture through the branding of products sold by the wineries. (Exhibit 21, Dep. of G. Hayward at 24-28). Disallowing the sale of non-logoed merchandise (commercial goods not in any way related to agriculture) operates to prevent “the degradation of the agricultural industry over time, because it will tend to go into a commercial area.” (*Id.* at 28). Mr. Hayward offered a lengthy explanation of how the PTZO was crafted to protect agricultural zoning by limiting commercial activities to those that are directly related to promoting agriculture. (*Id.* at 28-31).

John Wunsch, a community and PTP member who was directly involved in drafting the winery ordinances, testified regarding how the ordinance sections operate to promote the interest of preserving agriculture by balancing the harmful effects of increased visitors due to the wineries, such as infrastructure burdens, with the positive impact of promoting agriculture through what amounts to limited commercial activity. (Exhibit 22, Dep of J. Wunsch at 29-31, 37-39, 43-46, 59-61, 65-67). Finally, Grant Parsons, a community member with substantial personal knowledge of the interests balanced by the winery ordinances offered compelling testimony regarding the advancements of the Township’s substantial interests. (Exhibit 23, Dep. of G. Parsons at 15-17, 26-31, 48-53, 111-113, 129-130, 161, 184-185, 202-204).

The Township has satisfied the third criteria.

d. Criterion 4 – The Challenged Sections Are Not Overly Restrictive.

The final criterion of the *Central Hudson* test is not as difficult to meet as the least-restrictive means standard applied to other restrictions on expression. *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188; 119 S.Ct. 1923 (1999). The government need only “demonstrate narrow tailoring of the challenged regulation to the asserted interest—‘a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.’” *Id.* (quoting *Bd. of Trs. v. Fox*, 492

U.S. 469, 480; 109 S.Ct. 3028 (1989)). Here, the Township has endeavored to achieve “its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.” *Thompson v. W. States. Med. Ctr.*, 535 U.S. 357, 372; 122 S.Ct. 1497 (2002).

The Township’s efforts to achieve its interests such that any alleged restrictions on speech are minimized to the extent possible are supported by contemporaneous meeting minutes. The Planning Commission, when drafting the GAU amendment to the Winery-Chateau ordinance, tailored the language of the ordinance to minimize potential effects. (Exhibit 24).

Further, Mr. Hayward’s testimony made clear, significant consideration was given to tailoring the relationship between the limitation on commercial activities in the A-1 District such that limited commercial activities were permitted while not destroying the Township’s compelling interests in preserving agriculture and promoting the health, safety, and welfare of the Township’s residents. From the outset, it is clear that the “winery ordinances” as a whole are not a complete prohibition on speech or expressive activity. Plaintiffs are fully able to advertise their agricultural products (e.g., wine, wine tasting, their tasting room, etc.). Moreover, Mr. Parsons also offered testimony regarding how the ordinance sections do not restrict more speech than necessary. (Exhibit 23, Dep. of G. Parsons, at 53-56, 113-120, 185, 228-231).

However, the Township tailored the ordinance such that Plaintiffs are able to engage in commercial activities that do not overburden the underlying agricultural purpose of the zoning district. The Township has given wineries under the PTZO significant latitude to promote themselves and propose commercial transactions to their customers. Plaintiffs assert that the Township has not considered any alternatives to the “restrictions” in the PTZO. This is false. The history of agricultural zoning in the Township further bears this out. Since the 1990s, the Township has consistently expanded the permitted commercial-adjacent uses allowed to wineries, starting with the adoption of the Winery-Chateau ordinance, then adoption of Remote Winery Tasting

Rooms and Farm Processing Facilities. In other words, the Township has historically tailored its zoning ordinance to provide more commercial opportunities to wineries. This demonstrates the Township's efforts to ensure its ordinance fits their compelling interests.

The Township has carried its burden on the fourth criterion. Even if *Central Hudson* applies, the Township can meet intermediate scrutiny.

B. The Court Previously Rejected Plaintiffs' Content-Based Restrictions Argument and Plaintiffs are Not Entitled to Another Bite at the Apple.

Plaintiffs assert that four sections of the PTZO – Sections 8.7.3(10)(u)(1)(b) (an intent section of the ordinance that explains the intent of GAUs is to help promote Peninsula agriculture), 8.7.3(10)(u)(2)(b) (this section notes that a GAU can include the meeting of a 501(c)(3) non-profit), 8.7.3(10)(u)(2)(c) (this section notes that a GAU can include meetings of agricultural-related groups), and 8.7.3(10)(u)(5)(a) (encourages promotion of Peninsula agriculture during GAUs) – constitute content-based restrictions on speech. Plaintiffs' argument is without merit.

First, the Court previously ruled that these sections of the PTZO were not content-based restrictions. (ECF No. 162, PageID.6008-6010). When the Court later revisited its ruling in December, 2022, the Court explicitly ruled it was “not setting aside Subsection V.A.3 (content-based restrictions) . . . because no party received summary judgment on these claims, and thus, these issues are still ripe for trial.” (ECF No. 301, PageID.10698) (emphasis in original).⁶

⁶ While the Court has indicated that the issue of content-based restrictions is ripe for trial (*see* ECF No. 301, PageID.10698), it is unclear what portion of the claim remains to be tried. The Court correctly determined that Plaintiffs' content-based restriction claim fails as a matter of law. (*See* ECF No. 162, PageID.6009-6010). The Court's decision to deny Plaintiffs summary judgment was not due to the existence of a genuine issue of material fact. To the contrary, the Court concluded Plaintiffs' claim failed as a matter of law. The Township requests that the Court consider entering summary judgment in favor of Defendants on this claim under Fed. R. Civ. P. 56(f)(1) or (3) as there is no issue that remains to be tried.

Plaintiffs now seek a second bite at the apple on a claim for which they were denied summary judgment before. The Court should reject this request.

Even if the Court decides to reconsider the merits of Plaintiffs' content-based restrictions claim, Plaintiffs are not entitled to summary judgment. "Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163; 135 S.Ct. 2218 (2015) (internal citations omitted). Plaintiffs' argument fails because the text of the ordinances does not prohibit content, but rather regulates Plaintiffs' engagement in certain activities. The ordinance language does not place any restrictions on the content of any speech or message – let alone regulate speech or conduct in any manner as discussed *supra*. While Plaintiffs again assert both facial and as-applied theories, they fail to present any evidence regarding how these ordinance sections were applied to them. Plaintiffs assert the sections (without recognizing which section of the ordinance they are discussing – presumably Section 8.7.3(10)(u)(2)(c) as the argument pertains to agriculturally-related events) are content-based because the Township's Zoning Administrator would have to "make a determination of whether the group is agriculturally related." (ECF No. 469, PageID.16967). But this has nothing to do with the *content* of the speech. The Zoning Administrator is not determining what message the agriculturally-related group will be delivering. Contrary to Plaintiffs' claim, application of Section 8.7.3(10)(u)(2)(c) does not depend on what the speech is about. An agricultural-related group could host an event at a Winery-Chateau to discuss politics, new crop rotations, or whether the College Football Playoff should be expanded to 12 teams. The content of the speech is irrelevant.

Plaintiffs now change gears in their motion for reconsideration repackaged as a new motion for summary judgment. Their new theory is that by allowing non-profits and agricultural-related

groups, the PTZO favors certain speakers. (ECF No. 469, PageID.16967-16968).⁷ Again, Plaintiffs miss the mark because the ordinance still does not favor or disfavor the content of the speech. Plaintiffs are not the ones speaking at these events. Instead, the non-profits and agricultural-related groups are the ones speaking. The PTZO does not favor or disfavor the content of the speech presented by a non-profit or agricultural-related group. Plaintiffs' citation to *www.RicardoPacheco.com v. City of Baldwin Park*, 2017 WL 2692772 (C.D. Cal., July 10, 2017) does not support their position. Plaintiffs assert that the challenged sections prefer commercial speech to non-commercial speech and, as such, are content-based restrictions. *Id.* This is incorrect. The ordinance neither facially nor as applied favors non-commercial speech over commercial speech. Again, an agricultural-related group hosting an event at a Winery-Chateau as a GAU is permitted to discuss anything it so chooses. For example, if a "Wine Grape Growers Association" wanted to host an event to promote a new Sauvignon Blanc grape, Section 8.7.3(10)(u)(2)(c) does not prohibit that.

Finally, while Plaintiffs claim Sections 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), and 8.7.3(10)(u)(5)(a) constitute content-based restrictions, Plaintiffs fail to present *any* argument that Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) regulate content. Instead, they only argue that the sections involving non-profits and agricultural-related groups are content based. Plaintiffs cannot simply announce a position and ask the Court to do their work. *See McPherson v. Kelsey*, 125 F.3d 989, 995-996 (6th Cir. 1997) (reasoning that "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal

⁷ Plaintiffs passingly cite to cases involving viewpoint discrimination, but offer no analysis regarding how the challenged sections of the PTZO discriminate based on viewpoint. There is no discussion regarding what views the Township has rejected. The challenged sections of the PTZO do not draw any distinctions based on content, let alone the viewpoint of the speakers.

way, leave the court to . . . put flesh on its bones.” (internal citations omitted)). Plaintiffs have waived their argument that Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) are content-based restrictions.

C. Sections 8.7.3(10)(u)(2)(a) and 8.7.3(10)(u)(2)(c) of the PTZO are Not Prior Restraints.

The Sixth Circuit has held that “[t]he term ‘prior restraint’ describes administrative and judicial orders that block expressive activity before it can occur.” *Polaris Amphitheater Concerts, Inc. v. City of Westerville*, 267 F.3d 503, 506 (6th Cir. 2001) (citing *Alexander v. United States*, 509 U.S. 544, 550, 113 S.Ct. 2766 (1993)). “Under a system of prior restraint, the lawfulness of speech turns on the advance approval of government officials.” *Id.*; see *McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir. 2012) (“Because an unaffiliated speaker’s exercise of a First Amendment right depends on the prior approval of a public official, the policy imposes a prior restraint.”); *Déjà Vu of Nashville, Inc. v. Metro. Gov’t of Nashville & Davidson Cty.*, 274 F.3d 377, 400 (6th Cir. 2001) (“A ‘prior restraint’ exists when the exercise of a First Amendment right depends on the prior approval of public officials.”). Typically, a prior restraint refers to a licensing or administrative scheme that places “unbridled discretion in the hands of a government official or agency.” *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 757 (1988).

In their motion, Plaintiffs assert that two sections of the PTZO constitute a prior restraint:

- 8.7.3(10)(u)(2)(a) – this section allows for “[w]ine and food seminars and cooking classes” as a GAU at a Winery-Chateau so long as they “are scheduled at least thirty days in advance with notice provided to the Zoning Administrator.”
- 8.7.3(10)(u)(2)(c) – this section allows a Winery-Chateau to host meetings of an agriculture related groups with advance notice given to the Zoning Administrator so that approval can be granted.

Under both Plaintiffs’ facial or as-applied challenges, neither section constitutes a prior restraint. First, the sections do not regulate speech or expressive conduct. Second, the exercise of a First Amendment right does not depend on the prior approval of a public official.

On its face, Section 8.7.3(10)(u)(2)(a) does not regulate expressive conduct in any way. Instead, it allows a Winery-Chateau to host wine and food seminars and cooking classes as a GAU. There is nothing in the language of the statute that regulates any protected speech or expressive conduct. Moreover, the text of the ordinance does nothing to require approval for a Winery-Chateau to host a cooking class as a GAU and discuss political messages, agriculture, or baseball. Simply speaking, there is nothing in the text of the ordinance that places any requirement of township pre-approval of a cooking class or wine and food seminar before a Winery-Chateau can host an event under Section 8.7.3(10)(u)(2)(a). Further, there is nothing in the text of the ordinance that requires prior approval from the Zoning Administrator.

On the face of Section 8.7.3(10)(u)(2)(c), no protected speech or expressive conduct is regulated. This section of the PTZO allows a Winery-Chateau to host meetings of agriculture-related groups. That is the sole regulation. There is no mention of limitations on any expressive conduct or speech. To the contrary, the conduct of the Winery-Chateau is simply hosting the group. The group is then free under the text of the ordinance to speak about whatever it pleases. The agricultural-related group can host its event at a Winery-Chateau and is free to discuss wine, politics, religion, or Michigan football. Nothing in the ordinance regulates the message or expressive conduct of the agricultural-related group. Moreover, the text of Section 8.7.3(10)(u)(2)(c) does not compel pre-approval from the Zoning Administrator. The language of the section simply provides that the Zoning Administrator “can give prior approval” for a meeting of an agricultural-related group but it does not require such approval.

Plaintiffs’ as-applied challenges fare no better. First, Plaintiffs offer no evidence that the “lawfulness” of a wine and food seminar under Section 8.7.3(10)(u)(2)(a) turns on the discretion of the Zoning Administrator. To the contrary, as Ms. Deeren testified, the only thing to “approve” is the number of guests in attendance. (ECF No. 469-2, PageID.16999). The event itself is

approved by simple operation of the ordinance. This testimony does not, however, serve as evidence of the application of Section 8.7.3(10)(u)(2)(a) to any particular Winery-Chateau. Approving the number of people permitted at an event has nothing to do with the prior approval of expression.

Plaintiffs have not produced evidence of the application of Section 8.7.3(10)(u)(2)(c) to any Winery-Chateau. Plaintiffs have offered no evidence of the denial of a request to host an agricultural-related meeting or enforcement of this section. As such, there is no evidence that the Township has ever required pre-approval for an agriculture-related event. Instead, the best Plaintiffs offer is a series of hypotheticals and alleged events having nothing to do with agricultural-related groups or Winery-Chateaus.

First, Plaintiffs cite to questions posed to Ms. Deeren during her deposition about how she might apply Section 8.7.3(10)(u)(2)(c) to a “bankers’ association” or “lawyers’ association” but these hypotheticals are not evidence of actual application of Section 8.7.3(10)(u)(2)(c). Instead, Plaintiffs haphazardly move on from hypotheticals regarding agricultural-related groups – again, that is the ordinance language being discussed – to a strawman that the Township has denied “many requests” related to agricultural-related group. (ECF No. 469, PageID.16970-16971). But what do Plaintiffs actually cite in support of this claim? That events like “Yoga in the Vines” and “Painting in the Vines” – which are not meetings of agricultural-related groups – have been denied by the Township. (ECF No. 469, PageID.16970-16971). This is completely irrelevant to whether the Township has applied Section 8.7.3(10)(u)(2)(c) to any Plaintiff. Denial of events having nothing to do with agricultural-related groups is not supportive of enforcement of Section 8.7.3(10)(u)(2)(c).

Finally, Plaintiffs cite to “examples” of alleged enforcement of Section 8.7.3(10)(u)(2)(c) – a section of the ordinance only applicable to Winery-Chateaus with GAUs – for wineries that

were either not a Winery-Chateau at the time (Bowers Harbor) or never have been a Winery-Chateau (Two Lads). (ECF No. 469, PageID.16971). Plaintiffs claim that a group of car enthusiasts were denied an event at Bowers Harbor in 2017 and that Bowers Harbor was not permitted to host a floral education series and yoga in the vines in 2018. But Bowers Harbor did not become a Winery-Chateau until July, 2019. (ECF No. 63-6, PageID.2839-2855). As such, Section 8.7.3(10)(u)(2)(c) was not applicable to Bowers Harbor until well after these claimed events. Plaintiffs also cite to two events that Two Lads was not permitted to host as a Farm Processing Facility. Section 8.7.3(10)(u)(2)(c) is not applicable to Farm Processing Facilities, so this is also wholly irrelevant. Finally, Plaintiffs cite to the Township's denial of Bonobo's application to engage in GAUs – something Bonobo has never had – as evidence of the denial of the meeting of an agricultural-related group. This is not evidence of “enforcement” of Section 8.7.3(10)(u)(2)(c).

Plaintiffs' prior restraint claim fails as a matter of law.

D. Plaintiffs' Compelled Speech Claim Fails Because They Do Not Claim to Disagree With the Message and There is No Actual Compulsion of Speech Under the PTZO.

Plaintiffs assert Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) of the PTZO constitute compelled speech in violation of the First Amendment. Section 8.7.3(10)(u)(1)(b) is an intent section of the PTZO that indicates the purpose of GAUs as being, “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.” Section 8.7.3(10)(u)(5)(a) implements this intent section: “All Guest Activity Uses shall include Agricultural Production Promotion as part of the activity” and recommends that a Winery Chateau promote agriculture by: (1) identifying “Peninsula Produced” food or beverage that is consumed by attendees at the event; (2) provide promotional materials for “Peninsula

Agriculture”; and/or (3) include tours of the winery and/or any other Peninsula agriculture locations. These sections of the PTZO do not apply to all Plaintiffs. They apply only to Winery-Chateaus that are approved for GAUs.

Plaintiffs’ compelled speech claim fails for two reasons. First, Plaintiffs have not argued or presented any evidence that they have been compelled to convey a message they *disagree* with. Second, neither of the ordinance sections cited actually *compel* speech as that term has been defined by the Sixth Circuit.

The Sixth Circuit has explained the compelled-speech doctrine as follows, “Under the compelled-speech doctrine, “the First Amendment stringently limits a State’s authority to compel a private party to express a view with which the private party disagrees.” *New Doe Child #1 v. Cong. Of United States*, 891 F.3d 578, 593 (6th Cir. 2018) (internal citation omitted). The Supreme Court has found compelled speech in two types of cases: (1) when “an individual is obliged personally to express a message he disagrees with, imposed by the government” and (2) when “an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity.” *Johanns v. Livestock Mktg. Assn.*, 544 U.S. 550, 557; 125 S.Ct. 2055 (2005). In *Janus v. Am. Fed. of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. ____; 138 S.Ct. 2448, 2464 (2018), the Supreme Court explained:

When speech is compelled, however, additional damage is done. In that situation, individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” than a law demanding silence. *Barnette, supra*, at 633, 63 S.Ct. 1178; *see also Riley, supra*, at 796–797, 108 S.Ct. 2667 (rejecting “deferential test” for compelled speech claims).

The Supreme Court in *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 462; 117 S.Ct. 2130 (1997), addressed a compelled speech claim where a number of growers and processors of

California fruits alleged a number of marketing orders set by the Secretary of Agriculture constituted compelled speech in violation of the First Amendment:

The central message of the generic advertising at issue in this case is that “California Summer Fruits” are wholesome, delicious, and attractive to discerning shoppers. See App. 530. All of the relevant advertising, insofar as it is authorized by the statute and the Secretary's regulations, is designed to serve the producers' and handlers' common interest in promoting the sale of a particular product.

The Supreme Court noted that, “since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program.” *Id.* at 471.

In this case, Plaintiffs have not argued that they disagree with the “speech” they claim to be compelled to make. To make such an argument would be curious indeed: Plaintiffs would have to assert they disagree with the notion of promoting peninsula agriculture – in other words, they would disagree with the promotion of their very own products. This runs afoul of Plaintiffs’ very own argument that they are desperate to engage in alleged commercial speech. The PTZO encourages Winery-Chateaus to promote their own products. Plaintiffs are not compelled to convey a message that would betray their convictions. They are encouraged to promote their own products.

Even if Plaintiffs claimed promotion of their own products betrayed their convictions and forced them to espouse ideas they find objectionable and demeaning, they still must show the PTZO “compels” speech in violation of the First Amendment. What does it mean to compel speech? The Sixth Circuit has reasoned that a “‘general principle of compelled speech jurisprudence . . . is that a violation of the First Amendment right against compelled speech occurs only in the context of actual compulsion.’” *Wilkins v. Daniels*, 744 F.3d 409, 415 (6th Cir. 2014) (internal citation omitted).

Here, there is no evidence of actual compulsion. Plaintiffs assert the Township “requires” them to promote Peninsula agriculture and that these sections operate as a “mandate”. (ECF No. 469, PageID.16972). However, Plaintiffs have failed to adduce any evidence of penalties that coerce them “to choose a course of conduct”. *Wilkins*, 744 F.3d at 415. There is no evidence of *any* consequence for a Winery-Chateau’s failure to promote Peninsula agriculture. “‘A discouragement that is ‘minimal’ and ‘wholly subjective’ does not, however, impermissibly deter the exercise of free speech rights.’” *Id.* (internal citation omitted).

VI. PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF, DAMAGES, OR ATTORNEYS’ FEES.

Plaintiffs claim they are entitled to money damages and a declaration that their “proposed use”, in this case “agritourism” is reasonable. (ECF No. 469, PageID.16976). Plaintiffs are not entitled to relief of any kind and, therefore, are not entitled to damages, injunctive relief, or attorneys’ fees. To the extent Plaintiffs prove a viable cause of action, Plaintiffs must still prove their claim for entitlement to damages and the Township intends to challenge the viability of Plaintiffs’ damages claims.

Plaintiffs also assert that if the Court finds the ordinance sections unconstitutional, the Court can declare Plaintiffs’ proposed use – “agritourism” – as “reasonable” such that they can engage in unfettered commercial activities in the agriculturally zoned district. (*Id.*). Such a sweeping remedy is not remotely supported by *Schwartz v. Flint*, 426 Mich. 295; 395 N.W.2d 678 (1986), as Plaintiffs claim. Plaintiffs have not proposed a specific land use that they seek and otherwise support its reasonableness under the PTZO. Instead, Plaintiffs are asking this Court to re-write the Zoning Ordinance—a legislative enactment, which would belie the separation of powers doctrine at which *Schwartz* compelled itself and other courts to follow in zoning cases. *Schwartz* was clear in only fashioning a remedy where a court declared a zoning ordinance

unconstitutional and the property would be left unzoned. *Schwartz* was addressing those situations where plaintiffs would remain without a use to construct and operate on the property for years. 426 Mich. At 327. In those specific circumstances, the “specific reasonable rule” would allow the plaintiff to propose a specific use and carry the burden that it is “reasonable.” *Id.* *Scwhartz* made this clear in pointing out that plaintiff was seeking to still “develop” his property. *Id.* at 344. Here, the Wineries have fully developed their properties under lawfully-issued zoning approvals; and the Wineries have not challenged the PTZO itself as unconstitutional, including the agricultural district regulations and the remaining winery regulations. Their properties remain zoned, subject to a use classification, and applicable zoning approvals. As *Schwartz* warned, this Court should not interject itself “into the legislative realm” and consider declaring Plaintiffs’ ambiguous and unreasonable uses to be allowed. *See id.* at 317. Moreover, Plaintiffs themselves assert this is not a “zoning case” and offer no case law supporting such a radical remedy in this type of case where active operations have operated and continue to do so. (ECF No. 477, PageID.18387).

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, Defendant Peninsula Township respectfully requests that this Honorable Court deny Plaintiffs’ Motion for Partial Summary Judgment.

Dated: November 3, 2023

McGRAW MORRIS, P.C.
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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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 1

Ordinance Section/ Applies To	Ordinance Text
<p>6.7.2(19)(a)</p> <p>Farm Processing Facilities</p>	<p>Statement of Intent: It is the intent of this subsection to promote a thriving local agricultural production industry and preservation of rural character by allowing construction and use of a Farm Processing Facility. The Farm Processing Facility use includes retail and wholesale sales of fresh and processed agricultural produce but is not intended to allow a bar or restaurant on agricultural properties and the Township shall not approve such a license. The majority of the produce sold fresh or processed has to be grown on the specific farm operation (land owned or leased for the specific farm operation) of the party owning and operating the Specific Farm Processing Facility. Eighty-five (85) percent of the produce sold fresh or processed has to be grown on Old Mission Peninsula. Activities such as weddings, receptions and other social functions for hire are not allowed, however, participation in approved township wide events is allowed. It is not the intent to grant any vested interest in non-agricultural uses of any structure built for a Farm Processing Facility. This amendment is not intended to supersede any Conservation Easement.</p>
<p>6.7.2(19)(b)(1)(v)</p> <p>Farm Processing Facilities</p>	<p>Logo merchandise may be sold provided:</p> <ol style="list-style-type: none"> 1. This logo merchandise is directly related to the consumption and use of the fresh and/or processed agricultural produce sold at retail; 2. The logo is prominently displayed and permanently affixed to the merchandise; 3. Specifically allowed are: a) gift boxes/packages containing the approved products for the specific farm operation; b) Wine Glasses; c) Corkscrews; d) Cherry Pitter; and e) Apple Peeler; and 4. Specifically not allowed are unrelated ancillary merchandise such as: a) Clothing; b) Coffee Cups; c) Bumper Stickers.
<p>6.7.2(19)(b)(6)</p> <p>Farm Processing Facilities</p>	<p><u>Farm Processing Facility Size</u>: The total floor area above finished grade (one or two stories) of the Farm Processing Facility including retail space room shall be no larger 6,000 square feet or .5% of the parcel size whichever is less. The retail space shall be a separate room and may be the greater of 500 square feet in area or 25% of the floor area above finished grade. The facility may consist of more than one building, however all buildings shall be located on the 20 acre minimum parcel that contains the Farm Processing Facility. Underground storage buildings are not limited to, and may be in addition to, the 6,000 square feet of floor area provided that it is below pre-existing ground level and has no more than one loading dock exposed.</p>
<p>8.7.3(10)(m)</p> <p>Winery-Chateaus</p>	<p>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.</p>
<p>8.7.3(10)(u)(1)(b)</p> <p>Winery-Chateaus with Guest Activity Uses</p>	<p>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”</p>

	promotional brochures, maps and awards; and/or c) including tours through the winery and/or other Peninsula agriculture locations.
8.7.3(10)(u)(1)(d) Winery-Chateaus with Guest Activity Uses	Guest Activity Uses do not include wine tasting and such related promotional activities as political rallies, winery tours and free entertainment (Example - “Jazz at Sunset”) which are limited to the tasting room and for which no fee or donation of any kind is received.
8.7.3(10)(u)(2)(a) Winery-Chateaus with Guest Activity Uses	Wine and food seminars and cooking classes that are scheduled at least thirty days in advance with notice provided to the Zoning Administrator. Attendees may consume food prepared in the class.
8.7.3(10)(u)(2)(b) Winery-Chateaus with Guest Activity Uses	Meetings of 501- (C)(3) non-profit groups within Grand Traverse County. These activities are not intended to be or resemble a bar or restaurant use and therefore full course meals are not allowed, however light lunch or buffet may be served.
8.7.3(10)(u)(2)(c) Winery-Chateaus with Guest Activity Uses	<p>Meetings of Agricultural Related Groups that have a direct relationship to agricultural production, provided that:</p> <ul style="list-style-type: none"> i. The meetings are scheduled at least one month in advance with the Zoning Administrator given adequate advance notice of the scheduling so that the Zoning Administrator can give prior approval; ii. The Zoning Administrator shall use the following types of Agricultural Related Groups as a guide for determining “direct relationship to agricultural production”; <ul style="list-style-type: none"> (a) Food/wine educational demonstrations; (b) Cooking show showcasing Peninsula produce and wine; (c) Farmer’s conferences; (d) Regional farm producers; (e) Cherry Marketing Institute and Wine Industry Conference (f) Farm Bureau Conference (g) Future Farmers of America and 4-H; (h) Michigan State University/agricultural industry seminars. iii. These meetings may include full course meals to demonstrate connections between wine and other foods. iv. An appeal of the Zoning Administrators determination can be made to the Township Board.

8.7.3(10)(u)(2)(d) Winery-Chateaus with Guest Activity Uses	Guest Activity Uses do not include entertainment, weddings, wedding receptions, family reunions or sale of wine by the glass.
8.7.3(10)(u)(5)(a) Winery-Chateaus with Guest Activity Uses	(a) All Guest Activity Uses shall include Agricultural Production Promotion as part of the activity as follows: i. Identify “Peninsula Produced” food or beverage that is consumed by the attendees; ii. Provide “Peninsula Agriculture” promotional materials; iii. Include tours through the winery and/or other Peninsula agricultural locations.
8.7.3(10)(u)(5)(c) Winery-Chateaus with Guest Activity Uses	No alcoholic beverages, except those produced on the site, are allowed with Guest Activity Uses.
8.7.3(10)(u)(5)(g) Winery-Chateaus with Guest Activity Uses	No amplified instrumental music is allowed, however amplified voice and recorded background music is allowed, provided the amplification level is no greater than normal conversation at the edge of the area designated within the building for guest purposes.
8.7.3(10)(u)(5)(h) Winery-Chateaus with Guest Activity Uses	No outdoor displays of merchandise, equipment or signs are allowed.
8.7.3(12)(i) Remote Winery Tasting Room	Retail sale of non-food items which promote the winery or Peninsula agriculture and has the logo of the winery permanently affixed to the item by silk screening, embroidery, monogramming, decals or other means of permanence. Such logo shall be a least twice as large as any other advertising on the item. No generic or non-logo items may be sold. Promotional items allowed may include corkscrews, wine glasses, gift boxes, t-shirts, bumper stickers, etc.
8.7.3(12)(k) Remote Winery Tasting Room	Signs and other advertising may not promote, list or in any way identify any of the food or non-food items allowed for sale in the tasting room.

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
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Defendant,

And

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

**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

Case No: 1:20-cv-01008

v.

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

**PLAINTIFF WINERY AT BLACK STAR FARMS, LLC'S ANSWERS TO PTP'S THIRD
INTERROGATORIES**

Plaintiff, Winery at Black Star Farms, LLC, ("Black Star") by and through its attorneys, Miller, Canfield, Paddock and Stone, PLC in answering PTP's Third Set of Interrogatories states as follows:

INTERROGATORY #4: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO) violates your right to freedom of association under the First and Fourteenth Amendments, including specifically which PTZO provisions violate your right, and when, how, and by whom your right to freedom of association was violated.

RESPONSE: Black Star objects that this request is overly broad and unduly burdensome. Black Star further objects to this interrogatory as duplicative of Interrogatory #1. Subject to and without waiving those objections, the Peninsula Township Zoning Ordinance ("PTZO"), as challenged in this lawsuit, is facially unconstitutional. Therefore, it has injured Black Star's First and Fourteenth Amendment rights since its enactment and every day that it exists constitutes a new violation.

With specific regard to the Farm Processing Facility sections of the PTZO, Peninsula Township has enforced Section 6.7.2(19)(a) against Black Star which operates as an

unconstitutional restriction on Black Star's ability to freely associate. Peninsula Township has also enforced Section 6.7.2(19)(b)(1)(v) against Black Star which unconstitutionally restricts Black Star's ability to engage in commercial speech. PTZO Section 6.7.2(19)(b)(1)(iii) as enforced by Peninsula Township against Black Star unconstitutionally restricts Black Star's rights to freely associate with non-Peninsula Township winemakers of its choosing and to engage in commercial speech.

Despite being permitted and regulated as a Farm Processing Facility under Section 6.7.2(19) of the PTZO, Peninsula Township has improperly applied, and continues to improperly apply, restrictions applicable to Winery Chateaus against Black Star, many of which also violate Black Star's rights to freedom of association and freedom of speech under the First and Fourteenth Amendments. Peninsula Township has enforced PTZO Sections 8.7.3(10)(u)(2)(a)-(c) against Black Star which operate as an unconstitutional prior restraint on Black Star's ability to host certain events without approval from Peninsula Township. Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(h), also enforced by Peninsula Township against Black Star, operate as unconstitutional restrictions on Black Star's right to engage in commercial speech.

Peninsula Township also enforced Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(g) against Black Star. Each of these sections have prevented, and continue to prevent, Black Star from freely associating with persons or groups of its choosing as allowed by the First and Fourteenth Amendments.

Lastly, Black Star is aware of Peninsula Township enforcing the facially unconstitutional sections of the PTZO against other wineries in Peninsula Township. These enforcement activities

have prevented Black Star from seeking approval for events, activities and other gatherings from Peninsula Township because seeking approval for such things would be futile.

INTERROGATORY #5: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO) constitutes a regulatory taking of your property under the Fifth and Fourteenth Amendments, including specifically which PTZO provisions caused a regulatory taking, and when, how, and by whom the regulatory taking occurred.

ANSWER: Black Star objects to this request as overly broad and unduly burdensome. Subject to and without waiving those objections, Black Star holds a small wine maker license and tasting room license issued by the Michigan Liquor Control Commission. Michigan law recognizes these liquor licenses as property interests. The small wine maker and tasting room licenses gives Black Star a perpetual right to serve alcohol from 7:00 a.m. until 2:00 a.m., daily. The small wine maker and tasting room licenses gives Black Star a perpetual right to operate a restaurant. The small wine maker and off-premises tasting room licenses gives Black Star a perpetual right to cater. And the small wine maker and tasting room licenses gives Black Star a perpetual right to play amplified music.

Because Peninsula Township has improperly applied the Winery Chateau sections of the PTZO against Black Star, the PTZO operates as a regulatory taking of the property rights afforded by the small wine maker and tasting room licenses by preventing Black Star from serving alcohol until 2:00 a.m., *see* Section 8.7.3(10)(u)(5)(b), preventing Black Star from playing amplified music without restrictions, *see* 8.7.3(10)(u)(5)(g), and preventing Black Star from catering, *see* 8.7.3(10)(u)(5)(i). Additionally, Peninsula Township has banned restaurant operations at Wineries. These regulatory takings have existed since the PTZO was enacted and continue each and every day that Peninsula Township enforces its unconstitutional and preempted ordinances against Black Star.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante

Joseph M. Infante (P68719)

Stephen M. Ragatzki (P81952)

Christopher J. Gartman (P83286)

99 Monroe Avenue NW, Suite 1200

Grand Rapids, MI 49503

(616) 776-6333

Dated: July 28, 2023

VERIFICATION

I declare under penalty of perjury that the foregoing answers Winery at Black Star Farms, LLC to PTP's Third Set of Interrogatories to Winery at Black Star Farms, LLC are true and correct.

By: _____

Lee Lutes

Its: _____

Managing Member

Executed on _____

7/23/2023

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

Case No: 1:20-cv-01008

v.

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

**PLAINTIFF TABONE VINEYARDS, LLC'S ANSWERS TO PTP'S SECOND SET OF
INTERROGATORIES**

Plaintiff, Tabone Vineyards, LLC, ("Tabone") by and through its attorneys, Miller, Canfield, Paddock and Stone, PLC in answering PTP's Second Set of Interrogatories states as follows:

INTERROGATORY #2: Describe in detail all facts supporting your claims that the Peninsula Township Zoning Ordinance (PTZO) violates your rights to freedom of association and freedom of speech under the First and Fourteenth Amendments, including specifically which PTZO provisions violate your rights; when, how, and by whom any of those provisions were applied to you; and when, how, and by whom your rights to freedom of association and freedom of speech were violated.

RESPONSE: Tabone objects that this request is overly broad and unduly burdensome. Tabone further objects to this interrogatory as duplicative of Interrogatory #1. Subject to and without waiving those objections, the Peninsula Township Zoning Ordinance ("PTZO"), as challenged in this lawsuit, is facially unconstitutional. Therefore, it has injured Tabone's First and Fourteenth Amendment rights since its enactment and every day that it exists constitutes a new violation.

With specific regard to the Farm Processing Facility sections of the PTZO, Peninsula Township has enforced Section 6.7.2(19)(a) against Tabone which operates as an unconstitutional restriction on Tabone's ability to freely associate. Peninsula Township has also enforced Section 6.7.2(19)(b)(1)(v) against Tabone which unconstitutionally restricts Tabone's ability to engage in commercial speech. PTZO Section 6.7.2(19)(b)(1)(iii) as enforced by Peninsula Township against Tabone unconstitutionally restricts Tabone's rights to freely associate with non-Peninsula Township winemakers of its choosing and to engage in commercial speech.

Despite being permitted and regulated as a Farm Processing Facility by Section 6.7.2(19) of the PTZO, Peninsula Township has improperly applied, and continues to improperly apply, restrictions applicable to Winery Chateaus against Tabone, many of which also violate Tabone's rights to freedom of association and freedom of speech under the First and Fourteenth Amendments. Peninsula Township has enforced PTZO Sections 8.7.3(10)(u)(2)(a)-(c) against Tabone which operate as an unconstitutional prior restraint on Tabone's ability to host certain events without approval from Peninsula Township. Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(h), also enforced by Peninsula Township against Tabone, operate as unconstitutional restrictions on Tabone's right to engage in commercial speech.

Peninsula Township also enforced Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(g) against Tabone. Each of these sections have prevented, and continue to prevent, Tabone from freely associating with persons or groups of its choosing as allowed by the First and Fourteenth Amendments.

Lastly, Tabone is aware of Peninsula Township enforcing the facially unconstitutional sections of the PTZO against other wineries in Peninsula Township. These enforcement activities have prevented Tabone from seeking approval for events, activities and other gatherings from Peninsula Township because seeking approval for such things would be futile.

INTERROGATORY #3: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO) constitutes a regulatory taking of your property under the Fifth and Fourteenth Amendments, including specifically which PTZO provisions caused a regulatory taking, and when, how, and by whom the regulatory taking occurred.

ANSWER: Tabone objects to this request as overly broad and unduly burdensome. Subject to and without waiving those objections, Tabone holds a small wine maker license and tasting room license issued by the Michigan Liquor Control Commission. Michigan law recognizes these liquor licenses as a property interests. The small wine maker and tasting room licenses gives Tabone a perpetual right to serve alcohol from 7:00 a.m. until 2:00 a.m., daily. The small wine maker and tasting room licenses gives Tabone a perpetual right to operate a restaurant in its tasting room. The small wine maker and off-premises tasting room licenses gives Tabone a perpetual right to cater. And the small wine maker and tasting room licenses gives Tabone a perpetual right to play amplified music.

Because Peninsula Township has improperly applied the Winery Chateau sections of the PTZO against Tabone, the PTZO operates as a regulatory taking of the property rights afforded by the small wine maker and tasting room licenses by preventing Tabone from serving alcohol until 2:00 a.m., *see* Section 8.7.3(10)(u)(5)(b), preventing Tabone from playing amplified music without restrictions, *see* 8.7.3(10)(u)(5)(g), and preventing Tabone from catering, *see* 8.7.3(10)(u)(5)(i). Additionally, Peninsula Township has banned restaurant operations at Wineries. These regulatory

takings have existed since the PTZO was enacted and continue each and every day that Peninsula Township enforces its unconstitutional and preempted ordinances against Tabone.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante
Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: July 28, 2023

VERIFICATION

I declare under penalty of perjury that the foregoing answers Tabone Vineyard, LLC to PTP's Second Set of Interrogatories to Tabone Vineyard, LLC are true and correct.

By: _____
Mario A. Tabone

Its: Owner-Member

Executed on July 28, 2023

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

Case No: 1:20-cv-01008

v.

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

**PLAINTIFF TWO LADS, LLC'S ANSWERS TO PTP'S THIRD SET OF
INTERROGATORIES**

Plaintiff, Two Lads, LLC, ("Two Lads") by and through its attorneys, Miller, Canfield, Paddock and Stone, PLC in answering PTP's Third Set of Interrogatories states as follows:

INTERROGATORY #3: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO), as applied to you, violates your freedom of speech under the First and Fourteenth Amendments, including specifically which PTZO provisions were applied to you, and when, how, and by whom they were applied to you, in a way that violated your right to freedom of speech.

RESPONSE: Two Lads objects that this request is overly broad and unduly burdensome. Two Lads further objects to this interrogatory as duplicative of Interrogatory #1. Subject to and without waiving those objections, the Peninsula Township Zoning Ordinance ("PTZO"), as challenged in this lawsuit, is facially unconstitutional. Therefore, it has injured Two Lads' First and Fourteenth Amendment rights since its enactment and every day that it exists constitutes a new violation.

With specific regard to the Farm Processing Facility sections of the PTZO, Peninsula Township has enforced Section 6.7.2(19)(b)(1)(v) against Two Lads which unconstitutionally

restricts Two Lads' ability to engage in commercial speech. PTZO Section 6.7.2(19)(b)(1)(iii) as enforced by Peninsula Township against Two Lads unconstitutionally restricts Two Lads' rights to freely express its relationships with non-Peninsula winemakers and fruit growers.

Despite being permitted and regulated as a Farm Processing Facility under Section 6.7.2(19) of the PTZO, Peninsula Township has improperly applied, and continues to improperly apply, restrictions applicable to Winery Chateaus against Two Lads, many of which also violate Two Lads' rights to freedom of speech under the First and Fourteenth Amendments. Peninsula Township has enforced PTZO Sections 8.7.3(10)(u)(2)(a)-(c) against Two Lads which operate as an unconstitutional prior restraint on Two Lads' ability to host certain events without approval from Peninsula Township. Sections 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(d) and 8.7.3(10)(u)(5)(g), also enforced by Peninsula Township against Two Lads, operate as unconstitutional restrictions on Two Lad's right to engage in commercial speech.

Lastly, Two Lads is aware of Peninsula Township enforcing the facially unconstitutional sections of the PTZO against other wineries in Peninsula Township. These enforcement activities have prevented Two Lads from seeking approval for events, activities and other gatherings from Peninsula Township because seeking approval for such things would be futile.

INTERROGATORY #4: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO) constitutes a regulatory taking of your property under the Fifth and Fourteenth Amendments, including specifically which PTZO provisions caused a regulatory taking, and when, how, and by whom the regulatory taking occurred.

ANSWER: Two Lads objects to this request as overly broad and unduly burdensome. Subject to and without waiving those objections, Two Lads holds a small wine maker license and tasting room license issued by the Michigan Liquor Control Commission. Michigan law recognizes these

liquor licenses as a property interests. The small wine maker and tasting room licenses gives Two Lads a perpetual right to serve alcohol from 7:00 a.m. until 2:00 a.m., daily. The small wine maker and tasting room licenses gives Two Lads a perpetual right to operate a restaurant in its tasting room. The small wine maker and off-premises tasting room licenses gives Two Lads a perpetual right to cater. And the small wine maker and tasting room licenses gives Two Lads a perpetual right to play amplified music.

Because Peninsula Township has improperly applied the Winery Chateau sections of the PTZO against Two Lads, the PTZO operates as a regulatory taking of the property rights afforded by the small wine maker and tasting room licenses by preventing Two Lads from serving alcohol until 2:00 a.m., *see* Section 8.7.3(10)(u)(5)(b), preventing Two Lads from playing amplified music without restrictions, *see* 8.7.3(10)(u)(5)(g), and preventing Two Lads from catering, *see* 8.7.3(10)(u)(5)(i). Additionally, Peninsula Township has banned restaurant operations at Wineries. These regulatory takings have existed since the PTZO was enacted and continue each and every day that Peninsula Township enforces its unconstitutional and preempted ordinances against Two Lads.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante
Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: July 28, 2023

VERIFICATION

I declare under penalty of perjury that the foregoing answers Two Lads, LLC to PTP's
Third Set of Interrogatories to Two Lads, LLC are true and correct.

By: _____
Chris Baldyga

Its: _____

Executed on _____.

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

Case No: 1:20-cv-01008

v.

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

**PLAINTIFF WINERY AT OV THE FARM, LLC'S ANSWERS TO PTP'S SECOND
INTERROGATORIES**

Plaintiff, Winery at OV The Farm, LLC, ("Bonobo") by and through its attorneys, Miller, Canfield, Paddock and Stone, PLC in answering PTP's Second Set of Interrogatories states as follows:

INTERROGATORY #2: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO), as applied to you, violates your freedom of speech under the First and Fourteenth Amendments, including specifically which PTZO provisions were applied to you, and when, how, and by whom they were applied to you, in a way that violated your right to freedom of speech.

ANSWER: Bonobo objects to this request as overly broad and unduly burdensome. Subject to and without waiving these objections, Bonobo answers as follows.

Sections 8.7.3(10)(u)(2)(a)-(d) are unlawful prior restraints on Bonobo's speech.

Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(h) unlawfully restrict Bonobo's commercial speech.

Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) unlawfully compel Bonobo to speak in violation of the First Amendment.

Sections 8.7.3(10)(u)(2)(b) and 8.7.3(10)(u)(2)(c) are unlawful content-based restrictions on Bonobo's speech.

Peninsula Township has also applied an outright ban on weddings against Winery Chateaus like Bonobo. That ban violates Bonobo's rights to commercial speech.

These sections—and the unwritten ban on weddings—have unconstitutionally violated Bonobo's freedom of speech since the PTZO was enacted and continue each and every day that Peninsula Township enforces its unconstitutional and preempted ordinances against Bonobo.

INTERROGATORY #3: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO) constitutes a regulatory taking of your property under the Fifth and Fourteenth Amendments, including specifically which PTZO provisions caused a regulatory taking, and when, how, and by whom the regulatory taking occurred.

ANSWER: Bonobo objects to this request as overly broad and unduly burdensome. Subject to and without waiving those objections, Bonobo holds a small wine maker license and small distiller license issued by the Michigan Liquor Control Commission. Michigan law recognizes these liquor licenses as a property interests. The small wine maker license gives Bonobo a perpetual right to serve alcohol from 7:00 a.m. until 2:00 a.m., daily. The small wine maker license gives Bonobo a perpetual right to operate a restaurant. The small wine maker license gives Bonobo a perpetual right to cater. And the small wine maker license gives Bonobo a perpetual right to play amplified music.

The PTZO operates as a regulatory taking of the property rights afforded by the small wine maker license by preventing Bonobo from serving alcohol until 2:00 a.m., *see* Section 8.7.3(10)(u)(5)(b), preventing Bonobo from playing amplified music, *see* 8.7.3(10)(u)(5)(g), and

preventing Bonobo from preventing Bonobo from catering, *see* 8.7.3(10)(u)(5)(i). Additionally, although there is no express provision in the Peninsula Township Zoning Ordinance barring Winery Chateaus like Bonobo from operating a restaurant in all circumstances, Peninsula Township has adopted an unwritten, outright ban on restaurant operations at Wineries. These regulatory takings have existed since the PTZO was enacted and continue each and every day that Peninsula Township enforces its unconstitutional and preempted ordinances against Bonobo.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

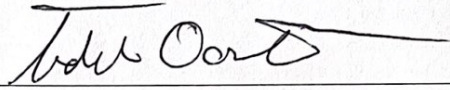
By: /s/ Joseph M. Infante

Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: July 12, 2023

VERIFICATION

I declare under penalty of perjury that the foregoing answers for OV the Farm, LLC to PTP's Second Set of Interrogatories to OV the Farm, LLC are true and correct.

By: 
Todd Oosterhouse

Its: Member

Executed on 7-12-23.

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 6

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

Case No: 1:20-cv-01008

v.

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

**PLAINTIFF BOWERS HARBOR VINEYARD & WINERY, INC.'S ANSWERS TO
PTP'S THIRD INTERROGATORIES**

Plaintiff, Bowers Harbor Vineyard & Winery, Inc., ("Bowers Harbor") by and through its attorneys, Miller, Canfield, Paddock and Stone, PLC in answering PTP's Third Set of Interrogatories states as follows:

INTERROGATORY #3: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO), as applied to you, violates your freedom of speech under the First and Fourteenth Amendments, including specifically which PTZO provisions were applied to you, and when, how, and by whom they were applied to you, in a way that violated your right to freedom of speech.

ANSWER: Bowers Harbor objects that this interrogatory is overly broad and unduly burdensome. Bowers Harbor further objects to this interrogatory because it is duplicative of Interrogatory #1. Subject to and without waiving those objections, Bowers Harbor states as follows.

The Peninsula Township Zoning Ordinance ("PTZO"), as challenged in this lawsuit, is facially unconstitutional. Therefore, it has injured Bowers Harbor's First and Fourteenth

Amendment rights since its enactment and every day that it exists constitutes a new violation. Peninsula Township has enforced PTZO Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(g) against Bowers Harbor. This enforcement has prevented Bowers Harbor from freely associating with persons or groups of its choosing as allowed by the First and Fourteenth Amendments.

Peninsula Township has also enforced PTZO Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) which unconstitutionally compel Bowers Harbor to advertise Peninsula Township agriculture. PTZO Sections 8.7.3(10)(u)(2)(a)-(c), as enforced by Peninsula Township against Bowers Harbor, operate as an unconstitutional prior restraint on Bowers Harbor's ability to host certain types of events without approval from Peninsula Township. Peninsula Township's enforcement of PTZO Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(h) against Bowers Harbor, operate as unconstitutional restrictions on Bowers Harbor's right to engage in commercial speech.

Lastly, Bowers Harbor is aware of Peninsula Township enforcing the facially unconstitutional sections of the PTZO against other wineries in Peninsula Township. These enforcement activities have prevented Bowers Harbor from seeking approval for events, activities and other gatherings from Peninsula Township as seeking approval for such things would be futile.

INTERROGATORY #4: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO) constitutes a regulatory taking of your property under the Fifth and Fourteenth Amendments, including specifically which PTZO provisions caused a regulatory taking, and when, how, and by whom the regulatory taking occurred.

ANSWER: Bowers Harbor objects to this request as overly broad and unduly burdensome. Subject to and without waiving those objections, Bowers Harbor holds a small wine maker license

and tasting room license issued by the Michigan Liquor Control Commission. Michigan law recognizes these liquor licenses as a property interests. The small wine maker license gives Bowers Harbor a perpetual right to serve alcohol from 7:00 a.m. until 2:00 a.m., daily. The small wine maker license gives Bowers Harbor a perpetual right to operate a restaurant in its tasting room. The small wine maker license gives Bowers Harbor a perpetual right to cater. And the small wine maker license gives Bowers Harbor a perpetual right to play amplified music.

The PTZO operates as a regulatory taking of the property rights afforded by the wine maker license by preventing Bowers Harbor from serving alcohol until 2:00 a.m., *see* Section 8.7.3(10)(u)(5)(b), preventing Bowers Harbor from playing amplified music without restrictions, *see* 8.7.3(10)(u)(5)(g), and preventing Bowers Harbor from catering, *see* 8.7.3(10)(u)(5)(i). Additionally, Peninsula Township has banned restaurant operations at Wineries. These regulatory takings have existed since the PTZO was enacted and continue each and every day that Peninsula Township enforces its unconstitutional and preempted ordinances against Bowers Harbor.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante

Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: July 28, 2023

VERIFICATION

I declare under penalty of perjury that the foregoing answers for Bowers Harbor Vineyard & Winery, Inc. to PTP's Third Set of Interrogatories to Bowers Harbor Vineyard & Winery, Inc. are true and correct.

By: 

Its: Chief Financial Officer

Executed on July 28, 2023.

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 7

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

Case No: 1:20-cv-01008

v.

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

**PLAINTIFF BRY'S WINERY, LC.'S ANSWERS TO PTP'S SECOND
INTERROGATORIES**

Plaintiff, Bry's Winery, LC, ("Bry's") by and through its attorneys, Miller, Canfield, Paddock and Stone, PLC in answering PTP's Second Set of Interrogatories states as follows:

INTERROGATORY #2: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO) violates your right to freedom of association under the First and Fourth Amendments, including specifically which PTZO provisions violate your right, and when, how, and by whom your right to freedom of association was violated.

ANSWER: Bry's objects that this request is overly broad and unduly burdensome. Bry's further objects that it has never alleged that its rights under the Fourth Amendment have been violated. Subject to and without waiving those objections, Bry's states as follows.

Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(g). Peninsula Township has enforced these sections against Bry's and prevented Bry's from freely associating with persons or groups of its choosing as allowed by the First Amendment.

In June of 2022, Brys requested permission from Peninsula Township to host a private, 90-minute gathering to raise funds for Governor Gretchen Whitmer which would involve approximately 100-125 guests and a temporary tent. In July of 2022, Christina Deeren informed Brys that Brys was not allowed to conduct the requested gathering. Peninsula Township's prohibition of the requested gathering violated Brys' right to freedom of association by preventing Brys from associating with the Democratic Party, Governor Gretchen Whitmer and other individuals desiring to support Governor Gretchen Whitmer's campaign for re-election.

INTERROGATORY #3: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO), as applied to you, violates your freedom of speech under the First and Fourteenth Amendments, including specifically which PTZO provisions were applied to you, and when, how, and by whom they were applied to you, in a way that violated your right to freedom of speech.

ANSWER: Brys objects to this request as overly broad and unduly burdensome. Subject to and without waiving these objections, Brys answers as follows.

Sections 8.7.3(10)(u)(2)(a)-(d) are unlawful prior restraints on Brys' speech.

Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(h) unlawfully restrict Brys' commercial speech.

Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) unlawfully compel Brys to speak in violation of the First Amendment.

Sections 8.7.3(10)(u)(2)(b) and 8.7.3(10)(u)(2)(c) are unlawful content-based restrictions on Brys' speech.

Peninsula Township has also applied an outright ban on weddings against Winery Chateaus like Brys. That ban violates Brys' rights to commercial speech.

These sections—and the unwritten ban on weddings—have unconstitutionally violated Brys’ freedom of speech since the PTZO was enacted and continue each and every day that Peninsula Township enforces its unconstitutional and preempted ordinances against Brys.

In June of 2022, Brys requested permission from Peninsula Township to host a private, 90-minute gathering to raise funds for Governor Gretchen Whitmer which would involve approximately 100-125 guests and a temporary tent. In July of 2022, Christina Deeren informed Brys that Brys was not allowed to conduct the requested gathering. Peninsula Township’s prohibition of the requested gathering violated Brys’ right to freedom of speech by suppressing Brys’ desired message of supporting Governor Gretchen Whitmer and her campaign for re-election.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante
Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: July 12, 2023

VERIFICATION

I declare under penalty of perjury that the foregoing answers for Brys Winery, LC to PTP's Second Set of Interrogatories to Brys Winery, LC are true and correct.

By: Patry

Its: President/CEO

Executed on 7/12/2023.

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 8

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

Case No: 1:20-cv-01008

v.

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

**PLAINTIFF CHATEAU OPERATIONS, LTD'S ANSWERS TO PTP'S THIRD
INTERROGATORIES**

Plaintiff, Chateau Operations LTD, ("Chateau Chantal") by and through its attorneys,
Miller, Canfield, Paddock and Stone, PLC in answering PTP's Third Set of Interrogatories states
as follows:

INTERROGATORY #3: Describe in detail all facts supporting your claims that the Peninsula Township Zoning Ordinance (PTZO) violates your rights to freedom of association and freedom of speech under the First and Fourteenth Amendments, including specifically which PTZO provisions violate your rights; when, how, and by whom any of those provisions were applied to you; and when, how, and by whom your rights to freedom of association and freedom of speech were violated.

ANSWER: Chateau Chantal objects that this interrogatory is overly broad and unduly burdensome. Chateau Chantal further objects to this interrogatory because it is duplicative of Interrogatory #1. Subject to and without waiving those objections, Chateau Chantal states as follows.

The Peninsula Township Zoning Ordinance ("PTZO"), as challenged in this lawsuit, is facially unconstitutional. Therefore, it has injured Chateau Chantal's First and Fourteenth

Amendment rights since its enactment and every day that it exists constitutes a new violation. Peninsula Township has enforced PTZO Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(g) against Chateau Chantal. This enforcement has prevented Chateau Chantal from freely associating with persons or groups of its choosing as allowed by the First and Fourteenth Amendments.

Peninsula Township has also enforced PTZO Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) which unconstitutionally compel Chateau Chantal to advertise Peninsula Township agriculture. PTZO Sections 8.7.3(10)(u)(2)(a)-(c), as enforced by Peninsula Township against Chateau Chantal, operate as an unconstitutional prior restraint on Chateau Chantal's ability to host certain types of events without approval from Peninsula Township. Peninsula Township's enforcement of PTZO Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(h) against Chateau Chantal, operate as unconstitutional restrictions on Chateau Chantal's right to engage in commercial speech.

Lastly, Chateau Chantal is aware of Peninsula Township enforcing the facially unconstitutional sections of the PTZO against other wineries in Peninsula Township. These enforcement activities have prevented Chateau Chantal from seeking approval for events, activities and other gatherings from Peninsula Township as seeking approval for such things would be futile.

INTERROGATORY #4: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO) constitutes a regulatory taking of your property under the Fifth and Fourteenth Amendments, including specifically which PTZO provisions caused a regulatory taking, and when, how, and by whom the regulatory taking occurred.

ANSWER: Chateau Chantal objects to this request as overly broad and unduly burdensome. Subject to and without waiving those objections, Chateau Chantal holds a small wine maker license

and tasting room license issued by the Michigan Liquor Control Commission. Michigan law recognizes these liquor licenses as a property interests. The small wine maker license gives Chateau Chantal a perpetual right to serve alcohol from 7:00 a.m. until 2:00 a.m., daily. The small wine maker gives Chateau Chantal a perpetual right to operate a restaurant in its tasting room. The small wine maker license gives Chateau Chantal a perpetual right to cater. And the small wine maker license gives Chateau Chantal a perpetual right to play amplified music.

The PTZO operates as a regulatory taking of the property rights afforded by the wine maker license by preventing Chateau Chantal from serving alcohol until 2:00 a.m., *see* Section 8.7.3(10)(u)(5)(b), preventing Chateau Chantal from playing amplified music without restrictions, *see* 8.7.3(10)(u)(5)(g), and preventing Chateau Chantal from catering, *see* 8.7.3(10)(u)(5)(i). Additionally, Peninsula Township has banned restaurant operations at Wineries. These regulatory takings have existed since the PTZO was enacted and continue each and every day that Peninsula Township enforces its unconstitutional and preempted ordinances against Chateau Chantal.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante

Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: July 28, 2023

VERIFICATION

I declare under penalty of perjury that the foregoing answers for Chateau Operations, LTD to PTP's Third Set of Interrogatories to Chateau Operations, LTD are true and correct.

By: Mari-chantal Dalseg

Its: President + CEO

Executed on 7/27/23.

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 9

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

Case No: 1:20-cv-01008

v.

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

**PLAINTIFF CHATEAU GRAND TRAVERSE, LTD'S ANSWERS TO PTP'S THIRD
INTERROGATORIES**

Plaintiff, Chateau Grand Traverse LTD, ("Chateau Grand Traverse") by and through its attorneys, Miller, Canfield, Paddock and Stone, PLC in answering PTP's Third Set of Interrogatories states as follows:

INTERROGATORY #3: Describe in detail all facts supporting your claims that the Peninsula Township Zoning Ordinance (PTZO) violates your rights to freedom of association and freedom of speech under the First and Fourteenth Amendments, including specifically which PTZO provisions violate your rights; when, how, and by whom any of those provisions were applied to you; and when, how, and by whom your rights to freedom of association and freedom of speech were violated.

ANSWER: Chateau Grand Traverse objects that this interrogatory is overly broad and unduly burdensome. Chateau Grand Traverse further objects to this interrogatory because it is duplicative of Interrogatory #1. Subject to and without waiving those objections, Chateau Grand Traverse states as follows.

The Peninsula Township Zoning Ordinance ("PTZO"), as challenged in this lawsuit, is facially unconstitutional. Therefore, it has injured Chateau Grand Traverse's First and Fourteenth

Amendment rights since its enactment and every day that it exists constitutes a new violation. Peninsula Township has enforced PTZO Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(g) against Chateau Grand Traverse. This enforcement has prevented Chateau Grand Traverse from freely associating with persons or groups of its choosing as allowed by the First and Fourteenth Amendments.

Peninsula Township has also enforced PTZO Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) which unconstitutionally compel Chateau Grand Traverse to advertise Peninsula Township agriculture. PTZO Sections 8.7.3(10)(u)(2)(a)-(c), as enforced by Peninsula Township against Chateau Grand Traverse, operate as an unconstitutional prior restraint on Chateau Grand Traverse's ability to host certain types of events without approval from Peninsula Township. Peninsula Township's enforcement of PTZO Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(h) against Chateau Grand Traverse, operate as unconstitutional restrictions on Chateau Grand Traverse's right to engage in commercial speech.

Lastly, Chateau Grand Traverse is aware of Peninsula Township enforcing the facially unconstitutional sections of the PTZO against other wineries in Peninsula Township. These enforcement activities have prevented Chateau Grand Traverse from seeking approval for events, activities and other gatherings from Peninsula Township as seeking approval for such things would be futile.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante

Joseph M. Infante (P68719)

Stephen M. Ragatzki (P81952)

Christopher J. Gartman (P83286)

99 Monroe Avenue NW, Suite 1200

Grand Rapids, MI 49503

(616) 776-6333

Dated: July 28, 2023

VERIFICATION

I declare under penalty of perjury that the foregoing answers for Chateau Grand Traverse LTD to PTP's Third Set of Interrogatories to Chateau Grand Traverse LTD are true and correct.

By: 

Eddie O'Keefe

Its: President

Executed on July 28, 2023.

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 10

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

Case No: 1:20-cv-01008

v.

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

**PLAINTIFF WINERY AT MONTAGUE DEVELOPMENT, LLC'S ANSWERS TO
PTP'S SECOND SET OF INTERROGATORIES**

Plaintiff, Montague Development, LLC, ("Hawthorne") by and through its attorneys, Miller, Canfield, Paddock and Stone, PLC in answering PTP's Second Set of Interrogatories states as follows:

INTERROGATORY #2: Describe in detail all facts supporting your claims that the Peninsula Township Zoning Ordinance (PTZO) violates your rights to freedom of association and freedom of speech under the First and Fourteenth Amendments, including specifically which PTZO provisions violate your rights; when, how, and by whom any of those provisions were applied to you; and when, how, and by whom your rights to freedom of association and freedom of speech were violated.

ANSWER: Hawthorne objects that this interrogatory is overly broad and unduly burdensome.

Hawthorne further objects to this interrogatory because it is duplicative of Interrogatory #1.

Subject to and without waiving those objections, Hawthorne states as follows.

The Peninsula Township Zoning Ordinance ("PTZO"), as challenged in this lawsuit, is facially unconstitutional. Therefore, it has injured Hawthorne's First and Fourteenth Amendment rights since its enactment and every day that it exists constitutes a new violation. Peninsula

Township has enforced PTZO Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(g) against Hawthorne. This enforcement has prevented Hawthorne from freely associating with persons or groups of its choosing as allowed by the First and Fourteenth Amendments.

Peninsula Township has also enforced PTZO Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) which unconstitutionally compel Hawthorne to advertise Peninsula Township agriculture. PTZO Sections 8.7.3(10)(u)(2)(a)-(c), as enforced by Peninsula Township against Hawthorne, operate as an unconstitutional prior restraint on Hawthorne's ability to host certain types of events without approval from Peninsula Township. Peninsula Township's enforcement of PTZO Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(h) against Hawthorne, operate as unconstitutional restrictions on Hawthorne's right to engage in commercial speech.

Lastly, Hawthorne is aware of Peninsula Township enforcing the facially unconstitutional sections of the PTZO against other wineries in Peninsula Township. These enforcement activities have prevented Hawthorne from seeking approval for events, activities and other gatherings from Peninsula Township seeking approval for such things would be futile.

INTERROGATORY #3: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO) constitutes a regulatory taking of your property under the Fifth and Fourteenth Amendments, including specifically which PTZO provisions caused a regulatory taking, and when, how, and by whom the regulatory taking occurred.

ANSWER: Hawthorne objects to this request as overly broad and unduly burdensome. Subject to and without waiving those objections, Hawthorne holds a small wine maker license and tasting room license issued by the Michigan Liquor Control Commission. Michigan law recognizes these

liquor licenses as a property interests. The small wine maker license gives Hawthorne a perpetual right to serve alcohol from 7:00 a.m. until 2:00 a.m., daily. The small wine maker gives Hawthorne a perpetual right to operate a restaurant in its tasting room. The small wine maker license gives Hawthorne a perpetual right to cater. And the small wine maker license gives Hawthorne a perpetual right to play amplified music.

The PTZO operates as a regulatory taking of the property rights afforded by the wine maker license by preventing Hawthorne from serving alcohol until 2:00 a.m., *see* Section 8.7.3(10)(u)(5)(b), preventing Hawthorne from playing amplified music without restrictions, *see* 8.7.3(10)(u)(5)(g), and preventing Hawthorne from catering, *see* 8.7.3(10)(u)(5)(i). Additionally, Peninsula Township has banned restaurant operations at Wineries. These regulatory takings have existed since the PTZO was enacted and continue each and every day that Peninsula Township enforces its unconstitutional and preempted ordinances against Hawthorne.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante

Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: July 28, 2023

VERIFICATION

I declare under penalty of perjury that the foregoing answers for Montague Development, LLC to PTP's Second Set of Interrogatories to Montague Development, LLC are true and correct.

By: 

Its: Chief Operating Officer

Executed on July 28th, 2023.

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 11

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

Case No: 1:20-cv-01008

v.

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

**PLAINTIFF VILLA MARI, LLC'S ANSWERS TO PTP'S THIRD SET OF
INTERROGATORIES**

Plaintiff, Villa Mari, LLC, ("Mari") by and through its attorneys, Miller, Canfield, Paddock
and Stone, PLC in answering PTP's Third Set of Interrogatories states as follows:

INTERROGATORY #3: Describe in detail all facts supporting your claims that the Peninsula Township Zoning Ordinance (PTZO) violates your rights to freedom of association and freedom of speech under the First and Fourteenth Amendments, including specifically which PTZO provisions violate your rights; when, how, and by whom any of those provisions were applied to you; and when, how, and by whom your rights to freedom of association and freedom of speech were violated.

ANSWER: Mari objects that this interrogatory is overly broad and unduly burdensome. Mari further objects to this interrogatory because it is duplicative of Interrogatory #1. Subject to and without waiving those objections, Mari states as follows.

The Peninsula Township Zoning Ordinance ("PTZO"), as challenged in this lawsuit, is facially unconstitutional. Therefore, it has injured Mari's First and Fourteenth Amendment rights since its enactment and every day that it exists constitutes a new violation. Peninsula Township has enforced PTZO Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a),

8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(g) against Mari. This enforcement has prevented Mari from freely associating with persons or groups of its choosing as allowed by the First and Fourteenth Amendments.

Peninsula Township has also enforced PTZO Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) which unconstitutionally compel Mari to advertise Peninsula Township agriculture. PTZO Sections 8.7.3(10)(u)(2)(a)-(c), as enforced by Peninsula Township against Mari, operate as an unconstitutional prior restraint on Mari's ability to host certain types of events without approval from Peninsula Township. Peninsula Township's enforcement of PTZO Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(h) against Mari, operate as unconstitutional restrictions on Mari's right to engage in commercial speech.

Lastly, Mari is aware of Peninsula Township enforcing the facially unconstitutional sections of the PTZO against other wineries in Peninsula Township. These enforcement activities have prevented Mari from seeking approval for events, activities and other gatherings from Peninsula Township as seeking approval for such things would be futile.

INTERROGATORY #4: Describe in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO) constitutes a regulatory taking of your property under the Fifth and Fourteenth Amendments, including specifically which PTZO provisions caused a regulatory taking, and when, how, and by whom the regulatory taking occurred.

ANSWER: Mari objects to this request as overly broad and unduly burdensome. Subject to and without waiving those objections, Mari holds small wine maker and tasting room licenses issued by the Michigan Liquor Control Commission. Michigan law recognizes these licenses as property interests. The small wine maker license gives Mari a perpetual right to serve alcohol from 7:00 a.m. until 2:00 a.m., daily. The small wine maker gives Mari a perpetual right to operate a

restaurant in its tasting room. The small wine maker license gives Mari a perpetual right to cater. And the small wine maker license gives Mari a perpetual right to play amplified music.

The PTZO operates as a regulatory taking of the property rights afforded by the wine maker license by preventing Mari from serving alcohol until 2:00 a.m., *see* Section 8.7.3(10)(u)(5)(b), preventing Mari from playing amplified music without restrictions, *see* 8.7.3(10)(u)(5)(g), and preventing Mari from catering, *see* 8.7.3(10)(u)(5)(i). Additionally, Peninsula Township has banned restaurant operations at Wineries. These regulatory takings have existed since the PTZO was enacted and continue each and every day that Peninsula Township enforces its unconstitutional and preempted ordinances against Mari.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By: /s/ Joseph M. Infante
Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: July 28, 2023

VERIFICATION

I declare under penalty of perjury that the foregoing answers for Villa Mari, LLC to PTP's Third Set of Interrogatories to Villa Mari, LLC are true and correct.

By: _____

Alex Lagina

Its: _____

VP of OPERATIONS

Executed on 7/28/23.

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 12

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

Case No: 1:20-cv-01008

v.

PENINSULA TOWNSHIP, Michigan Municipal
Corporation,

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

**PLAINTIFF GRAPE HARBOR, INC.'S ANSWERS TO PTP'S SECOND SET OF
INTERROGATORIES**

Plaintiff, Grape Harbor Inc., ("Peninsula Cellars") by and through its attorneys, Miller, Canfield, Paddock and Stone, PLC in answering PTP's Second Set of Interrogatories states as follows:

INTERROGATORY #2: Describe in detail all facts supporting your claims that the Peninsula Township Zoning Ordinance (PTZO) violates your rights to freedom of association and freedom of speech under the First and Fourteenth Amendments, including specifically which PTZO provisions violate your rights; when, how and by whom any of those provisions were applied to you; and when, how, and by whom your rights to freedom of association and freedom of speech were violated.

RESPONSE: Peninsula Cellars objects that this interrogatory is overly broad and unduly burdensome. Peninsula further objects to this interrogatory as duplicative of Interrogatory #1. Subject to and without waiving those objections, the Peninsula Township Zoning Ordinance ("PTZO"), as challenged in this lawsuit, is facially unconstitutional. Therefore, it has injured

Peninsula Cellars' First and Fourteenth Amendment rights since its enactment and every day that it exists constitutes a new violation.

With specific regard to the Remote Winery Tasting Room, Sections 8.7.3(12)(g), 8.7.3(12)(i) and 8.7.3(12)(k) operate as unconstitutional restrictions on Peninsula Cellars' right to engage in commercial speech.

Despite being permitted and regulated as a Remote Winery Tasting Room under Section 8.7.3(12) of the PTZO, Peninsula Township has improperly applied, and continues to improperly apply, restrictions applicable to Winery Chateaus against Peninsula Cellars, many of which also violate Peninsula Cellars' rights to freedom of association and freedom of speech under the First and Fourteenth Amendments. Peninsula Township has enforced PTZO Sections 8.7.3(10)(u)(2)(a)-(c) against Peninsula Cellars which operate as an unconstitutional prior restraint on Peninsula Cellars' ability to host certain events without approval from Peninsula Township. Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), 8.7.3(10)(u)(5)(g), and 8.7.3(10)(u)(5)(h), also enforced by Peninsula Township against Peninsula Cellars, operate as unconstitutional restrictions on Peninsula Cellars' right to engage in commercial speech.

Peninsula Township also enforced Sections 8.7.3(10)(m), 8.7.3(10)(u)(1)(d), 8.7.3(10)(u)(2)(a), 8.7.3(10)(u)(2)(b), 8.7.3(10)(u)(2)(c), 8.7.3(10)(u)(2)(d), 8.7.3(10)(u)(5)(c), and 8.7.3(10)(u)(5)(g) against Peninsula Cellars. Each of these sections have prevented, and continue to prevent, Peninsula Cellars from freely associating with persons or groups of its choosing as allowed by the First and Fourteenth Amendments.

Lastly, Peninsula Cellars is aware of Peninsula Township enforcing the facially unconstitutional sections of the PTZO against other wineries in Peninsula Township. These

enforcement activities have prevented Peninsula Cellars from seeking approval for events, activities and other gatherings from Peninsula Township seeking approval for such things would be futile.

INTERROGATORY #3: Described in detail all facts supporting your claim that the Peninsula Township Zoning Ordinance (PTZO) constitutes a regulatory taking of your property under the Fifth and Fourteenth Amendments, including specifically which PTZO provisions caused a regulatory taking, and when, how and by whom the regulatory taking occurred.

ANSWER: Peninsula Cellars objects to this request as overly broad and unduly burdensome. Subject to and without waiving those objections, Peninsula Cellars holds a small wine maker license and off-premises tasting room license issued by the Michigan Liquor Control Commission. Michigan law recognizes these liquor licenses as a property interests. The small wine maker and off-premises tasting room licenses gives Peninsula Cellars a perpetual right to serve alcohol from 7:00 a.m. until 2:00 a.m., daily. The small wine maker and off-premises tasting room licenses gives Peninsula Cellars a perpetual right to operate a restaurant in its tasting room. The small wine maker and off-premises tasting room licenses gives Peninsula Cellars a perpetual right to cater. And the small wine maker and off-premises tasting room licenses gives Peninsula Cellars a perpetual right to play amplified music.

The PTZO operates as a regulatory taking of the property rights afforded by the small wine maker and off-premises tasting room licenses by preventing Peninsula Cellars from serving alcohol until 2:00 a.m., *see* Section 8.7.3(10)(u)(5)(b), preventing Peninsula Cellars from playing amplified music without restrictions, *see* 8.7.3(10)(u)(5)(g), and preventing Peninsula Cellars from catering, *see* 8.7.3(10)(u)(5)(i). Additionally, Peninsula Township has banned restaurant operations at Wineries. These regulatory takings have existed since the PTZO was enacted and

continue each and every day that Peninsula Township enforces its unconstitutional and preempted ordinances against Peninsula Cellars.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

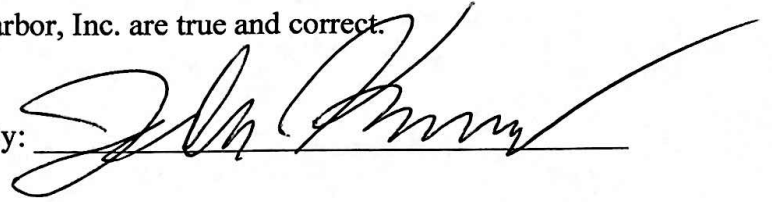
By: /s/ Joseph M. Infante
Joseph M. Infante (P68719)
Stephen M. Ragatzki (P81952)
Christopher J. Gartman (P83286)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333

Dated: July 28, 2023

VERIFICATION

I declare under penalty of perjury that the foregoing answers for Grape Harbor, Inc. to PTP's Second Set of Interrogatories to Grape Harbor, Inc. are true and correct.

By: _____

A handwritten signature in black ink, appearing to read "John Phumy", is written over a horizontal line.

Its: _____

President

Executed on _____

7-28-23

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
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EXHIBIT 13

1 like to go under and what parcels were available on the
2 Peninsula that would potentially be able to be used for us.
3 And then, you know, once we found some how do you lay out
4 the building, how do you try to accommodate the minimum
5 acreages, all those square footage requirements and all
6 that.

7 Q And those are restrictions on the site plans and the layouts
8 and the square footage of buildings?

9 A Right; all the restrictions that are in there, right.

10 Q And is it your understanding that those violate your First
11 Amendment rights?

12 A Yeah. Commercial speech; right? How I choose to lay out my
13 building and operate my business, the things I sell, the way
14 I that I choose to have a tasting room, the expression of
15 architectural. I mean, a lot of those things while public
16 health, safety and welfare are definitely things that I
17 happily comply with and am courteous to the township. Some
18 of those other things I don't think should be under their
19 purview, and in fact are out of their purview.

20 Q How big your building is?

21 A No, like having to layout requiring minimum square footages
22 for the tasting room and a maximum of, you know, the layout
23 itself. They define how I have to operate within my space
24 and the choices that I have to make are examples of
25 commercial speech that I wanted more freedom with and wasn't

1 **allowed.**

2 **Q** So the square footage of your tasting room, is that one of
3 your concerns?

4 **A** **Yeah.**

5 **Q** What message are you trying to convey with the square
6 footage of your tasting room?

7 MR. INFANTE: Objection; calls for a legal
8 conclusion.

9 **A** **It's everything; right? It's the face of the company. When**
10 **they visit they don't see me, I'm in an office dying behind**
11 **piles of emails. They come in and they see the wow of the**
12 **tasting room that expresses who we are. It is literally the**
13 **physical and architectural embodiment of a message and a**
14 **feel and with the square footage I guess you could try to**
15 **shoehorn something into that space as we have to do the best**
16 **with it as we can, but more freedom and more space to be**
17 **able to have events, to plan for different retail things,**
18 **all things that are examples of commercial speech that are**
19 **changed or modified by those restrictions is how I think I**
20 **understand that unconstitutional thing.**

21 **Q** So the township doesn't tell you what you can put up on the
22 walls or color of paint or anything like that; is that
23 right?

24 **A** **Well, they do restrict the things I can sell, so if I wanted**
25 **to have other things -- but, no, if I wanted to have**

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EXHIBIT 14

TABONE VINEYARDS 30(b)(6)
WOMP v PENINSULA TOWNSHIP

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1 MR. RAGATZKI: Objection.

2 Q -- is it Tabone's position that the entire Peninsula
3 Township Zoning Ordinance has injured its First Amendment
4 rights or just some part of it?

5 A I call out specific sections that, you know, affect me
6 below. For example, 6.7.2-19(A) and 6.7.2-19(B)(1)(B). I
7 guess I'm not quite sure what you're asking.

8 Q Is it Tabone's position that these sections of the ordinance
9 injured Tabone the day they were enacted or a some point
10 after that?

11 MR. RAGATZKI: Same objection.

12 A Yeah, I'm not sure how to answer that, other than I know
13 I've been injured by these ordinances.

14 Q When did that injury occur?

15 MR. RAGATZKI: Same objection.

16 A Since at least opening of the winery and continuing every
17 day since.

18 Q Okay. And when you say "continuing every day since," is it
19 your understanding that Tabone is injured every day that the
20 ordinances are on the books or are you referring to some
21 sort of specific enforcement action that the township has
22 taken against Tabone?

23 MR. RAGATZKI: Same objection.

24 A I guess it would be both. The fact that they're -- they're
25 on the books, we're injured every day we're prevented from

TABONE VINEYARDS 30(b)(6)
WOMP v PENINSULA TOWNSHIP

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1 doing things, for example. It wouldn't be limited to them
2 specifically -- to the township specifically taking direct
3 action against us.

4 Q Has the township taken direct action against Tabone?

5 A Yes.

6 Q And can you tell me about the first time that happened.

7 A I don't recall the first time, necessarily. I can mention,
8 you know, times that I recall. For example, they filed the
9 lawsuit against me in, I believe, local Michigan court,
10 which they later withdrew, without prejudice. They've also
11 sent me cease and desist letters.

12 Q So what was the lawsuit about?

13 A I believe it was about having igloos in the winter, and they
14 filed it in the summer, if I record correctly so -- so that
15 was strange.

16 Q Okay. Do you remember what year that was?

17 A I believe it was during this lawsuit, but I don't
18 specifically remember, other than it was attorney Greg Mean
19 who filed that, is my understanding.

20 Q Okay. So sometime after October 2020?

21 A I believe so.

22 Q Okay. And you said that they withdrew it. Did Tabone pay a
23 fine or --

24 A No.

25 Q -- how was it resolved?

TABONE VINEYARDS 30(b)(6)
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1 the township leading up to the lawsuit, is one thing I can
2 think of.

3 Q And what changes in particular has Tabone been seeking?

4 A There's a lot.

5 MR. RAGATZKI: Objection; calls for a legal
6 conclusion.

7 Q Can you think of any?

8 MR. RAGATZKI: Same objection.

9 A Yeah, there's many. I believe our Complaint speaks for
10 itself. We went over a few of them today, but, you know,
11 effectively we -- we want these unconstitutional ordinances
12 to no longer apply to us, so that we can freely, you know,
13 expand our agricultural-based businesses, so I can, you
14 know, make more wine, make good quality products and, you
15 know, hopefully serve it with, you know, locally grown
16 produce and have people -- you know, more people come and
17 more people stay longer. That's basically the nutshell of
18 what I'm looking for.

19 MS. HILLYER: Okay. Let me take notes -- it
20 hasn't been long since our last break, but let me take about
21 five minutes to look over my notes and see if I have
22 anything else for you.

23 THE WITNESS : Okay.

24 MS. HILLYER: We'll go off the record for a
25 second.

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PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 15

1 **A** **Being required to only serve Old Mission Peninsula fruit at**
2 **a guest wine -- from Old Mission Peninsula fruit at a guest**
3 **activity is a piece of that, not being able to play**
4 **amplified music.**

5 **Q** Those things are commercial speech or those things infringe
6 or your right to engage in commercial speech?

7 **A** **They are commercial speech and are being infringed upon by**
8 **the regulations in the ordinance.**

9 **Q** So let's take an example. In fact, let's do -- let's go
10 back to (10)(m), which we've talked about; 8.7.3(10)(m),
11 which says, "Accessory uses such as facilities, meeting
12 rooms and food and beverage services shall be for registered
13 guests only." And that was the provision that was the
14 subject of a 1998 lawsuit that we talked about. Was it
15 Chateau Chantal's position in that lawsuit that that
16 provision restricted its commercial speech?

17 MR. INFANTE: Objection; calls for a legal
18 conclusion.

19 **A** **I am unaware of what the 1998 lawsuit -- what caused it or**
20 **what provisions were being offended.**

21 **Q** So what part of this provision restricts Chateau Chantal's
22 commercial speech? If you were to look at the whole thing,
23 and maybe it's easier to reference the zoning ordinance.

24 **A** **What number are we talking -- are we still on (m)?**

25 MR. INFANTE: Yes, so read (m).

1 and promotional activities; like rallies, winery tours and
2 free entertainment in the tasting room; are not guest
3 activity uses?

4 MR. INFANTE: Objection; calls for a legal
5 conclusion.

6 **A As I'm not 100 percent clear on what a guest activity use**
7 **is, I will accept that verbatim this says they do not**
8 **include wine tasting, et cetera.**

9 Q Okay. And would you agree that one of those listed
10 promotional activities is Jazz at Sunset?

11 **A I would agree that they listed Jazz at Sunset as an example.**

12 Q Okay. And that is a longstanding event at Chateau Chantal;
13 right?

14 **A It is.**

15 Q And so would you agree that Jazz at Sunset is not a guest
16 activity use?

17 MR. INFANTE: Objection; calls for a legal
18 conclusion.

19 **A We have always understood it per this provision that it is**
20 **not a guest activity use.**

21 Q And does Chateau Chantal promote Jazz at Sunset?

22 **A It does.**

23 Q How does it do that?

24 **A Social media, posters around town, an add in the Northern**
25 **Express.**

1 Q There's still weddings; right?

2 A **It's a wedding.**

3 Q In this provision though -- I'm not asking about what it
4 implies in combination with other provisions that you can
5 and can't do, I'm asking what these words, just the words
6 that are in this provision, how do those prevent Chateau
7 Chantal from saying something that it wants to say?

8 MR. INFANTE: Objection; calls for a legal
9 conclusion and the document speaks for itself.

10 A **Well, free entertainment is not a guest activity use, but at**
11 **the same time we're not allowed to do amplified music, so**
12 **we're prevented from hosting any number of things that would**
13 **have amplified music, again opening additional customers to**
14 **our agricultural products.**

15 Q I don't see anything in this provision that says you can't
16 have amplified music, am I missing something?

17 MR. INFANTE: Just in that section; correct?

18 A **Just this section doesn't talk about amplified music.**

19 Q Okay. So is there anything in this section that restricts
20 your ability to say something that you want to say?

21 MR. INFANTE: Objection; calls for a legal
22 conclusion.

23 A **It also prevents us from charging for these.**

24 Q Is that a message that you want to convey to someone?

25 A **Sure. We're a business that has products that are for sale,**

1 **we'd like to tell people about that.**

2 Q By charging them?

3 A **By charging them.**

4 Q So charging for entertainment would tell people that Chateau
5 Chantal has products for sale?

6 A **Charging for winery tours and wine tasting.**

7 Q Do you charge for wine tasting?

8 A **We do.**

9 Q So how does this provision tell you that you can't charge
10 for wine tasting?

11 A **I presume, "Which are limited to the tasting room and for
12 which no fee or donation of any kind is received is meant to
13 encompass all of the items listed in this paragraph, but
14 since this occurred we have new MLCC laws that allow us to
15 charge for wine tasting.**

16 Q And do you sell merchandise? I think we talked earlier
17 about your retail shops.

18 A **We do.**

19 Q And you charge for those items?

20 A **We do.**

21 Q Are you able to advertise that you charge for those items?

22 A **I presume so. I don't believe I've done so.**

23 Q So is there any other message that Chateau Chantal wants to
24 convey other than that it has products for sale?

25 MR. INFANTE: Objection; calls for legal

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EXHIBIT 16

1 Q Okay. Tell me -- well, then, let's -- let's just talk about
2 the scope. Types of things -- when did -- types of things
3 Villa Mari has tried to work with the township to change?

4 A Well, this is -- this is one of the questions that's maybe
5 better asked to my dad because he's had a lot of
6 interactions with them. I will answer the best that I can.
7 And the question was types of things we've tried to change?

8 Q Yes. The categories of things in the zoning ordinance.

9 A We sat in -- and I'm going to estimate dates here, you know,
10 2017, '18, something like that, maybe even '19 -- we sat in
11 with meetings about the ordinance rewrite that the Peninsula
12 Township was talking about doing. And they invited us
13 winery owners, I was part of this -- these meetings, went to
14 several, discussing potential changes to the ordinance that
15 Randy, who was the planner at the time, was evaluating,
16 trying to incorporate in the ordinance. So, I mean, I -- I
17 went up there and I said, you know, guys, this -- regulating
18 the why of us doing these events; in other words, saying
19 that we can do events but only for certain reasons is not
20 good. Like, that's -- I don't know that I used the word
21 "unconstitutional" at the time, but it -- it didn't make
22 sense to me why they were regulating specifically what we
23 can and can't do instead of just the impact of such an
24 event. So I went up there and I said why don't you just
25 tell us an acceptable noise level, all the other impacts to

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EXHIBIT 17

1 THE WITNESS: Again, I would -- I would say -- I
2 would say yes just based on how the township has interacted
3 with all the members of WOMP over the last several years.

4 BY MS. HILLYER:

5 Q And what do you know about how the township has interacted
6 with WOMP over the last several years?

7 A Very heavy handed. If -- if it's not spelled out we can't
8 do it. Things are subject to interpretation and it depends
9 on who you talk to the answer that you get. You'll get two
10 different answers on two different days or by talking to do
11 two different people. And, historically, trying to get
12 feedback from the township in writing was almost impossible.

13 Q Has this been Hawthorne's experience?

14 A I -- now I'm speaking more broadly to my knowledge of the
15 relationship in terms of my employment with Bowers Harbor
16 Vineyards.

17 Q So on the second page of the interrogatory response, again,
18 looking at Exhibit 58. What is Hawthorne's understanding of
19 what commercial speech is?

20 MR. INFANTE: Objection, it calls for a legal
21 conclusion.

22 THE WITNESS: Commercial speech is every facet of
23 our business. It is everything from any marketing that we
24 do to our protocol when guests enter the Tasting Room, you
25 know, how our lawn is manicured, you know, it's -- it --

1 there's been verbal and nonverbal speech as far as how we
2 present our brand to the community.

3 BY MS. HILLYER:

4 Q And -- and what is Hawthorne's brand? What -- what are you
5 trying to communicate to the community?

6 A That we're a agritourism destination that produces and sells
7 a (sic) state-grown wines in arguably one of the most
8 secluded locations on Old Mission Peninsula with panoramic
9 views of both bays.

10 Q And what is Hawthorne's understanding of what it means to
11 freely associate? What -- what does Hawthorne mean by that?

12 MR. INFANTE: Objection, it calls for a legal
13 conclusion, compound.

14 THE WITNESS: Again, the restrictive nature as far
15 as what groups could potentially use our space.

16 BY MS. HILLYER:

17 Q When you say "use your space," what do you mean by use your
18 space? Is there -- are there restrictions on who can visit
19 your Tasting Room or?

20 A There -- well, there are very specific guidelines with
21 regards to -- within the Uses Allowed section, you know,
22 maybe a 501(C)(3)'s from the Grand Traverse County area, so
23 an agricultural related groups. I'm not -- I'm not free to
24 allow other groups other than the specified groups that are
25 outlined here to make use of that space.

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EXHIBIT 18

1 Q I would agree that the original Peninsula Township zoning
2 ordinance was enacted in 1972. Do you remember when the
3 provision that created the winery chateau use was created?

4 **A I believe it's '89.**

5 Q I would agree with that. And do you remember when Chateau
6 Grand Traverse received its first special use permit under
7 the winery chateau ordinance?

8 **A I would only have to speculate that it would be after 1989.**
9 **I was not active in that role at that time.**

10 Q Would it be Grand Traverse's position that its First
11 Amendment rights were first injured when that ordinance was
12 enacted in 1989, or sometime after that?

13 MR. INFANTE: Objection; calls for a legal
14 conclusion. You can answer if you know.

15 **A I would suspect we did knowingly or unknowingly.**

16 Q So how were Chateau Grand Traverse's First Amendment rights
17 first injured?

18 MR. INFANTE: Same objection.

19 **A The limitations that are put on us by what it states; the**
20 **groups that you can have, the size you can have, the people**
21 **that can be there, the items you can sell, the requirements**
22 **of items, the space percentage requirements of items, the**
23 **display of baskets that must be lifted off the floor in**
24 **order to sell them. That's some -- many onerous**
25 **requirements I guess I would say.**

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EXHIBIT 19

1 **is. Yes.**

2 Q We have registered or non-registered, but either way Bonobo
3 invites the public onto its property?

4 A **There's not an open invitation, it's just I open my doors**
5 **and I hope people come. Which is a very scary feeling when**
6 **you wake up in the morning not knowing if anyone is going to**
7 **show up at your place.**

8 Q So there are guests that come to tasting room and there are
9 guests that come to events; correct?

10 A **There's people.**

11 Q There are people. And so Bonobo does invite and engage,
12 like you just described, with guests on it's property;
13 correct? It has people come and have nice experiences?

14 A **At times.**

15 Q At times. And then people do come and have a bottle of wine
16 or a glass of -- buy a bottle or have a glass of wine;
17 correct?

18 A **They do at times, yes.**

19 Q So all of the things you just described are things that
20 Bonobo does do, does provide?

21 A **We do provide those.**

22 Q Yes. So where is the speech that you're being restricted
23 from making? You can have guests; you can have registered
24 guests, you can have non-registered guests, you can have the
25 public, you can have private guests, you can have people buy

1 bottles, drink glasses and taste. What are you not -- we
2 speech are you not being able to provide?

3 **A The reach.**

4 MR. INFANTE: Objection; calls for a legal
5 conclusion, asked and answered.

6 **A The reach.**

7 **Q** The reach?

8 **A Yeah.**

9 **Q** What do you mean by that?

10 **A** I mean, if I -- if ten people come through my door --
11 okay? -- and those ten people don't -- I mean, we've all
12 seen the old commercial tells two people and they tell two
13 people and they tell two people and they tell two people and
14 so on and so on. But by restricting me to do different
15 things I don't have the ability to reach everybody.

16 **Q** So the restriction to do different things, what different
17 things? Other than inviting guests to private events or
18 tasting room and to buy and drink wine, what different
19 things are you not?

20 **A** I'm not in my ability to stretch those out further.

21 **Q** So more guests?

22 **A** More guests and/or if I have a wine and food pairing and
23 people just want to come for that.

24 **Q** And you do have wine and food pairings; right?

25 **A** Right.

1 Q And so more wine and food pairing?

2 A More wine and food pairings -- or more people to attend. If
3 I have ten people come I miss the opportunity to have ten
4 more.

5 Q So is it the capacity of the tasting room that is
6 restricting your ability to get your message out?

7 A No, it's the being restricted as to people that can come.

8 Q Which people can't come?

9 A People that don't hear the message.

10 Q Which people are you not -- what message are you not --
11 which people?

12 A Friends that you're not able to tell because you didn't come
13 to an event that I was going to have so you couldn't go tell
14 your friends to come visit. So as a blanket form of
15 advertising I'm not allowed to do it.

16 Q So having more guests come is a form of advertising; is that
17 your -- is that what you're saying?

18 A Yeah, that's one way.

19 Q Having more guests is advertising and because you can't have
20 more guests you're being restricted?

21 A Yeah, my message is being restricted.

22 Q And you can't have more guests because you can't have more
23 events? Why can't you have more guests? What is keeping
24 you from having more guests?

25 A Because I'm not allowed to do certain things under the rules

1 as they're interpreted by the township to let me do things,
2 but I don't know what can be done and what can't be done and
3 I can't sit here and put those together. So then my message
4 isn't carried out further to other people. Why would you
5 come to a facility and/or buy online if you've never heard
6 about it?

7 Q And your message is what?

8 A My message?

9 Q Yeah.

10 A Well, it varies to the audience, it varies -- obviously we
11 have great wine, we have -- we're offering a great
12 experience.

13 Q Okay.

14 A A place where someone can enjoy themselves.

15 Q That's your message, a great place?

16 A Yes.

17 Q Anything else?

18 A We talk about the food.

19 Q Okay. And when you have a wedding do you share this message
20 with people at the wedding?

21 A Oh, yeah.

22 Q And when you -- in your tasting room, do you share this
23 message in your tasting room?

24 A Uh-huh (affirmative).

25 Q "Yes"?

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 20

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

vs.

PENINSULA TOWNSHIP, a Michigan
Municipal Corporation,

Defendant.

Case № 1:20-cv-01008
Hon. Paul L. Maloney
Magistrate Judge Ray S. Kent

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**DEFENDANT PENINSULA TOWNSHIP'S SUPPLEMENTAL ANSWERS
TO PLAINTIFFS' FIRST SET OF INTERROGATORIES**

Defendant, Peninsula Township (the "Township"), through their attorneys, Foley & Mansfield, PLLP, and in supplemental response to Plaintiffs' First Set of Interrogatories¹, states as follows:

General Objections

1. The Township objects to Plaintiffs' Interrogatories to the extent they seek to impose obligations on it that exceed those allowed under the Federal Rules of Civil Procedure, any applicable law or regulation, or Order of this Court.

2. The Township objects to each and every Interrogatory to the extent it seeks information or documents that are (i) not in the Township's possession, custody or control, (ii) publicly or otherwise available to Plaintiffs, (iii) more appropriately obtained from other sources, and/or (iv) the information or documents are already in Plaintiffs' possession, custody or control, including but not limited to information or documents any other party to this action produced or will produce in response to discovery requests.

¹ These responses are provided in accordance with the Court's May 25, 2021 Order. (ECF No. 69). Prior interrogatories and answers to the same are not included in these supplemental responses.

3. The Township objects to each and every Interrogatory to the extent it seeks to impose discovery obligations on it greater than the discovery obligations of the Plaintiffs.

4. The Township objects to each and every Interrogatory to the extent that it contains erroneous or contentious factual allegations or legal assertions, or assumes facts not in evidence. By responding and objecting to such Request for Admission, the Township does not admit the correctness of such allegations or assertions.

5. The Township objects to each and every Interrogatory to the extent that it seeks a legal conclusion, opinion and/or argument in response.

6. The Township objects to each and ever Interrogatory to the extent that it is vague, ambiguous, unreasonable, overbroad, unduly burdensome or seeks irrelevant information and/or information not reasonably calculated to lead to the discovery of admissible evidence.

7. The Township objects to each and every Interrogatory to the extent that it seeks the discovery of information protected by the attorney-client privilege, the attorney work-product doctrine or any other privilege, doctrine or immunity.

8. By responding to the Interrogatory, the Township does not waive, intentionally or otherwise, any attorney-client privilege, attorney work-product or any other privilege, doctrine or immunity protecting any information from

disclosure. The Township will not disclose any such privileged information and does not waive any privilege through an inadvertent disclosure. Accordingly, any response inconsistent with the foregoing is wholly inadvertent and shall not constitute a waiver of any such privilege or protection.

Responses to Interrogatories

Interrogatory #2: Identify and describe in detail all instances of Peninsula Township's Enforcement Activity related to Ordinance Section 8.7.3(10), including all subparts. Identify all documents relating hereto.

ANSWER: Objection. Interrogatory #2 is premature as discovery is ongoing and to the extent it calls for a legal conclusion. Subject to and without waiving the same, the Township identifies the following such instances:

- Plaintiff Bowers Harbor Vineyard & Winery, Inc. received two citations in 2018 for activities not permitted. Any responsive documents were included in the original production to Plaintiffs and are identified in response to Request to Produce #1, Request to Produce #3, Request to Produce # 7 and/or Request to Produce #10.
- Plaintiff OV the Farm, LLC advertised activities that potentially violated this Ordinance. Any responsive documents were included in the original production to Plaintiffs and are identified in response to Request to Produce

#1, Request to Produce #3, Request to Produce #7 and/or Request to Produce #10.

- Plaintiff Chateau Operations, LTD regarding grape tonnage reports by growers to permit guest activities. Any responsive documents were included in the original production to Plaintiffs and are identified in response to Request to Produce #1, Request to Produce #3, Request to Produce #7 and/or Request to Produce #10.
- Plaintiff Brys Winery, LC regarding proposed events that were approved. Any responsive documents were included in the original production to Plaintiffs and are identified in response to Request to Produce #1, Request to Produce #3, Request to Produce #4, Request to Produce #7 and/or Request to Produce #10.

The Township reserves the right to supplement this answer as discovery continues.

Interrogatory #3: Identify and describe in detail all instances of Peninsula Township's Enforcement Activity related to Ordinance Section 6.7.2(19), including all subparts. Identify all documents relating hereto.

ANSWER: Objection. Interrogatory #3 is premature as discovery is ongoing and to the extent it calls for a legal conclusion. Subject to and without waiving the same, the Township has not located any record of any such activities and has no

response or responsive documents related to any such instances. The Township reserves the right to supplement this answer as discovery continues.

Interrogatory #4: Identify and describe in detail all instances of Peninsula Township's Enforcement Activity related to Ordinance Section 8.7.3(12)(a) through (k). Identify all documents relating hereto.

ANSWER: Objection. Interrogatory #4 is premature as discovery is ongoing and to the extent it calls for a legal conclusion. Subject to and without waiving the same, the Township identifies a Violation Notice from its Zoning Administrator for failure to obtain a permit for a temporary structure for which no citation was issued. Any responsive documents were included in the original production to Plaintiffs and are identified in response to Request to Produce #1, Request to Produce #3, Request to Produce #7 and/or Request to Produce #12.

Interrogatory #5: Identify and describe in detail all instances of Peninsula Township's Enforcement Activity related to any other property owner in Peninsula Township over the past five years. Identify all documents relating hereto.

ANSWER: Objection. Interrogatory #5 requests information and identification of documents that do not meet the standards of Fed. R. Civ. P. 26(b)(1) as a request for all Enforcement Activity for "any other property owner" is not proportional to the needs of this case and is not relevant to any of the Plaintiffs' claims. Defendant has already provided its Code Enforcement Log to the Plaintiffs. Any additional

responsive documents were included in the original production to Plaintiffs and are identified in response to Request to Produce #1, Request to Produce #3, Request to Produce #7, Request to Produce #10 and/or Request to Produce #12.

Interrogatory #6: Regarding Ordinance Section 6.7.2(19), identify the following:

- 1) All harms the Township was seeking to remedy in enacting the ordinance (specifically by sub-paragraph);
- 2) All government interests in enacting the ordinance (specifically by sub-paragraph);
- 3) All ways in which the ordinance section (specifically by sub-paragraph) fulfills the government interest(s);
- 4) All less restrictive means (specifically by sub-paragraph) the Township considered in fulfilling the governmental interest(s);
- 5) Identify all documents relating hereto.

ANSWER: Objection. Interrogatory #6 calls for legal conclusions. Subject to and without waiving the same, the Township's Ordinances, including Section 6.7.2(19), and the intent of the same speaks for themselves and the Township further responds as follows:

- 1) The Township sought to prevent deterioration of the agricultural district and character of the Township's lands and to the agricultural production industry and farming as well as promote the government interests outlined below.

- 2) The government interests in enacting this Ordinance were, including but not limited to: preserving the agricultural production industry and providing permanent land for the same; maintaining the Township's character; providing economically feasible public sewer and water systems to serve a future population; establishing a complete buildout population scenario and permitting the vertical integration of agricultural production without changing the agriculturally zoned lands of the Township to commercial property inconsistent with the use of those respective districts.
- 3) The intent of the Ordinance at issue speaks for itself and the Township relies upon the language of the Ordinances, the amendments and the documents previously produced by it and/or that are publicly available in support of how the Ordinance accomplishes the government interests noted above.
- 4) The documents previously produced by the Township demonstrate the extensive efforts of the Township's Planning Commission and Township Board to seek input, advice and opinions from relevant agencies and organizations and legal opinions regarding the sustainability and enforceability of the amendments to the Ordinance at issue.
- 5) All documents relating hereto have been previously produced to Plaintiffs and are identified as responsive to Request to Produce #1, Request to Produce #3, Request to Produce #19, Request to Produce #20 and/or Request

to Produce #21. Additionally the Ordinances and their amendments are publicly available to Plaintiffs if not already in their possession and clearly state the value added and purposes behind the enactment of the Ordinance at issue.

Interrogatory #7: Regarding Ordinance Section 8.7.3(10), identify the following:

- 1) All harms the Township was seeking to remedy in enacting the ordinance (specifically by sub-paragraph);
- 2) All government interests in enacting the ordinance (specifically by sub-paragraph);
- 3) All ways in which the ordinance section (specifically by sub-paragraph) fulfills the government interest(s);
- 4) All less restrictive means (specifically by sub-paragraph) the Township considered in fulfilling the governmental interest(s);
- 5) Identify all documents relating hereto.

ANSWER: Objection. Interrogatory #7 calls for legal conclusions. Subject to and without waiving the same, the Township's Ordinances, including Section 8.7.3(10), and the intent of the same speaks for themselves and the Township further responds as follows:

- 1) The Township sought to prevent deterioration of the agricultural district and character of the Township's land and to the agricultural production industry and farming as well as promote the government interests outlined below.
- 2) The government interests in enacting this Ordinance were, including but not limited to: preserving the agricultural production industry and providing permanent land for the same; maintaining the Township's character; providing economically feasible public sewer and water systems to serve a future population; establishing a complete buildout population scenario and permitting the vertical integration of agricultural production without changing the agriculturally zoned lands of the Township to commercial property inconsistent with the use of those respective districts while permitting some commercial uses related to agricultural production after some of the Wineries had already engaged in the same.
- 3) The intent of the Ordinance at issue speaks for itself and the Township relies upon the language of the Ordinances, the amendments and the documents previously produced by it and/or that are publicly available in support of how the Ordinance accomplishes the government interests noted above.
- 4) The documents previously produced by the Township demonstrate the extensive efforts of the Township's Planning Commission and Township Board to seek input, advice and opinions from relevant agencies and

organizations and legal opinions regarding the sustainability and enforceability of the amendments to the Ordinance at issue.

- 5) All documents relating hereto have been previously produced to Plaintiffs and are identified as responsive to Request to Produce #1, Request to Produce #3, Request to Produce #19, Request to Produce #20 and/or Request to Produce #21. Additionally the Ordinances and their amendments are publicly available to Plaintiffs if not already in their possession and clearly state the value added and purposes behind the enactment of the Ordinance at issue.

Interrogatory #8: Regarding Ordinance Section 8.7.3(12), identify the following:

- 1) All harms the Township was seeking to remedy in enacting the ordinance (specifically by sub-paragraph);
- 2) All government interests in enacting the ordinance (specifically by sub-paragraph);
- 3) All ways in which the ordinance section (specifically by sub-paragraph) fulfills the government interest(s);
- 4) All less restrictive means (specifically by sub-paragraph) the Township considered in fulfilling the governmental interest(s);
- 5) Identify all documents relating hereto.

ANSWER: Objection. Interrogatory #8 calls for legal conclusions. Subject to and without waiving the same, the Township's Ordinances, including Section 8.7.3(12), and the intent of the same speaks for themselves and the Township further responds as follows:

- 1) The Township sought to prevent deterioration of the agricultural district and character of the Township's land and to the agricultural production industry and farming as well as promote the government interests outlined below.
- 2) The government interests in enacting this Ordinance were, including but not limited to: preserving the agricultural production industry and providing permanent land for the same; maintaining the Township's character; providing economically feasible public sewer and water systems to serve a future population; establishing a complete buildout population scenario and permitting the vertical integration of agricultural production without changing the agriculturally zoned lands of the Township to commercial property inconsistent with the use of those respective districts.
- 3) The intent of the Ordinance at issue speaks for itself and the Township relies upon the language of the Ordinances, the amendments and the documents previously produced by it and/or that are publicly available in support of how the Ordinance accomplishes the government interests noted above.

- 4) The documents previously produced by the Township demonstrate the extensive efforts of the Township's Planning Commission and Township Board to seek input, advice and opinions from relevant agencies and organizations and legal opinions regarding the sustainability and enforceability of the amendments to the Ordinance at issue.
- 5) All documents relating hereto have been previously produced to Plaintiffs and are identified as responsive to Request to Produce #1, Request to Produce #3, Request to Produce #19, Request to Produce #20 and/or Request to Produce #21. Additionally the Ordinances and their amendments are publicly available to Plaintiffs if not already in their possession and clearly state the value added and purposes behind the enactment of the Ordinance at issue.

Interrogatory #9: Identify all current and previous Peninsula Township employees and/or elected official who grow grapes, produce, or other fruit within Peninsula Township or who have an interest in an entity that grows grapes, produce, or other fruit within Peninsula Township. For each Peninsula Township employee and/or elected official so identified, identify and describe any and all instances of a sale of grapes, produce or other fruit to any Peninsula Township winery by invoice number, purchasing winery, the date of the sale, grape

varietal(s) or type of other produce or fruit sold and total weight of grapes, produce or other fruit sold. Identify all documents related hereto.

ANSWER: Objection. Interrogatory #9 requests information and identification of documents that do not meet the standards of Fed. R. Civ. P. 26(b)(1) as this request for additional information is not proportional to the needs of this case and is not relevant to any of the Plaintiffs' claims. Subject to and without waiving the same, the Township identifies Rob Manigold, Brad Bickle and Isaiah Wunsch as individuals who have sold grapes and/or other produce/fruit in the past five years.

Interrogatory #11: Identify and describe all standards by which Peninsula Township applies when considering whether to approve or not approve a request for Guest Activity.

ANSWER: Objection. Interrogatory #11 does not specify whether Plaintiffs are asking about when they or any other entity apply for a Special Use Permit for a Guest Activity or whether they are asking about when they ask if a Guest Activity could or would be permitted under the Ordinances. Without waiving said objection and subject to the same, the Township would consider either such request in accordance with its Ordinances and applicable laws, specifically including Ordinance Section 4.2.1, Code Enforcement Ordinance No. 35 and the Code Enforcement Officer job duties. Answering further, if an entity applies for a Special Use Permit for a Guest Activity, the application is accepted by the

Township Planner, sends it to the Planning Commission and the Township Board and evaluates the same in accordance with the Township's Ordinances. If an entity asks whether the Guest Activity complies with the Ordinances, the Zoning Administrator reviews the request for compliance and responds. All Guest Activity uses, whether pursuant to Special Use Permit or evaluated in terms of compliance, are considered in accordance with the Ordinances in existence at that time.

Interrogatory #12: Describe in detail the factual and legal bases for Defendants' allegation in Paragraph E of its Affirmative Defenses that "Some or all of Plaintiffs' claims are preempted by applicable state or federal law." Identify all documents relating hereto.

ANSWER: Objection. Interrogatory #12 calls for a legal conclusion. Discovery in this matter is just beginning and ongoing such that this interrogatory is premature. Subject to and without waiving the same, the Defendant has provisionally pled this Affirmative Defense in accordance with Fed. R. Civ. P. 8 and if discovery does not support said defense, Defendant will waive the same.

Interrogatory #13: Describe in detail what steps and measures Plaintiffs should have taken "to properly and adequately mitigate the damages they claim to have suffered and "to take advantage of preventative and corrective opportunities

provided” relating to Defendant’s allegations in Paragraphs C and V of its Affirmative Defenses. Identify any documents relating hereto.

ANSWER: Objection. Interrogatory #13 calls for a legal conclusion. Discovery in this matter is just beginning and ongoing such that this interrogatory is premature. Subject to and without waiving the same, the Defendant has provisionally pled this Affirmative Defense in accordance with Fed. R. Civ. P. 8 and if discovery does not support said defense, Defendant will waive the same.

Dated: June 24, 2021

By: /s/ Gregory M. Meihn
Foley & Mansfield, PLLP
130 E. 9 Mile Rd.
Ferndale, MI 48220
(248) 721-4200
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P38939

Proof of Service

I, Katie R. Johnson , certify that the *Defendant Peninsula Township’s Supplemental Answers to Plaintiff’s First Set of Interrogatories* was served on all parties in this case to each of the attorneys of record at their respective addresses as disclosed on the pleadings in this case on **June 24, 2021** by:

<input type="checkbox"/> U.S. Mail	<input type="checkbox"/> Fax
<input type="checkbox"/> Hand Delivery (2/26/2021)	<input type="checkbox"/> UPS Overnight
<input type="checkbox"/> Federal Express	<input checked="" type="checkbox"/> Email: infante@millercanfield.com ; gartman@millercanfield.com
<input type="checkbox"/> Other- E-FILING	

Signature: /s/ Katie R. Johnson
Katie R. Johnson

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 21

1 So can you tell me, what is the
2 governmental interest in limiting the sale of non-food
3 items at a remote winery tasting room to those that
4 include the winery logo only?

5 A. Yes. The purpose of that particular section is to
6 allow the normal marketing practices of wineries, as
7 we're accustomed to them. If they have their logo on
8 them, that means that they're proud of their winery
9 and they want people to remember it, so they will sell
10 things that identify the market it's coming from.

11 That's kind of unique in the wine industry
12 as compared to, say, cherries or apples, or something
13 like that. And so that's recognized in the township
14 as more to the agricultural end of that spectrum as
15 opposed to the commercial end. And so we want to
16 allow the wineries to have as much latitude as we can,
17 as long as the -- we don't cross that line from
18 agricultural use to a commercial use, which takes
19 place in a commercial zone.

20 So we know if you put your logo on it,
21 you're promoting agriculture. If it doesn't have the
22 logo, we don't know whether you're promoting
23 production or not.

24 So the whole purpose is related to that
25 issue of trying to preserve and promote that winery

1 production in the township, which is our definition of
2 farming, and all those kinds of things.

3 So that's -- if you're selling glasses, you
4 know, I can go to any store in town and buy a glass.
5 I may even buy a glass that says Old Mission Peninsula
6 or peninsula, or something like that, or Michigan, you
7 know. We see them all the time. That's the
8 commercial end. The winery, if you're going to buy
9 that at a winery, you're on-site, you're at the
10 winery, you're at the place where the stuff takes
11 place. That's agriculture, that's promotion of
12 agriculture.

13 So that's how the whole ordinances are put
14 together. If it's promoting, if it's supporting, if
15 it's encouraging, if it's marketing production, it's
16 okay. If it's just buying something and selling it,
17 then it's not necessarily promoting agriculture, and
18 that's, that's really what this whole governmental
19 interest is, is we've got a unique agricultural area
20 out here.

21 It's got an American Viticulture Area
22 designated by the federal government, identifies that
23 part of the township. That's -- the basis of our
24 industry is production. Everything else flows from
25 that.

1 Q. Okay. What is the harm to the governmental interest
2 if a remote winery tasting room sells a wine glass
3 without a logo on it?

4 A. Well, yeah, kind of the way that I look at that, is if
5 you can sell a glass that's not promoting or marketing
6 and you're going to need some furniture in your
7 winery, you know, why shouldn't we sell furniture out
8 of the tasting room? If you're going to have
9 air-conditioning units in your building, why shouldn't
10 we sell air-conditioning units?

11 Q. Okay.

12 A. That's a question. Why wouldn't we? And my answer
13 is, because it's not related to promoting or
14 preserving the agricultural industry.

15 Q. Okay, sir, but you didn't answer --

16 A. So it's a slippery slope, to who -- I'll try to answer
17 your question more specifically. It's a slippery
18 slope. If you can do A, why can't you do B, why can't
19 you do C, why can't you do D?

20 When the committee was putting together
21 these ordinances, and I don't recall whether it's
22 specific to this one or not, they had to draw that
23 line. It's like, it's like case law versus the
24 written word. The case law gets into the specifics,
25 what does this word mean, what does that word mean.

1 This is me talking. I'm not an attorney.

2 But it's kind of the difference between the generality
3 to the specific, and there's always a line. If we
4 can't agree, the judge decides what it means.

5 So that's the best that I can do to try to
6 describe that, the basic concept behind all of these
7 specific uses.

8 Q. Okay, that's fine, but you didn't answer my question.

9 A. I'm sorry.

10 Q. My question was, what is the harm, what harm comes to
11 the governmental interest if a remote winery tasting
12 room sells a non-logoed glass versus selling a logoed
13 glass?

14 A. I believe it's degrading the agricultural industry.

15 Q. Okay, but how does it degrade the agricultural
16 industry?

17 A. I already explained that.

18 MR. MEIHN: I'm just going to object. It
19 was asked and answered a moment ago during that long
20 explanation.

21 But if you can answer it again, please.

22 BY MR. INFANTE:

23 Q. Let me ask it a different way.

24 A. Sure.

25 Q. Has Peninsula Township performed a study that says

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1 that if a non-logoed wine glass is sold by a remote
2 winery tasting room, then the entire agricultural
3 industry in Peninsula Township is going to fail?

4 A. I don't agree with your analysis.

5 Q. My question was, has Peninsula Township done a study
6 that says that?

7 A. Not that I know of.

8 Q. Has Peninsula Township done a study at all that says
9 the sale of non-logoed merchandize will deteriorate
10 and cause agricultural businesses in Peninsula
11 Township to fail?

12 A. I don't know of one.

13 Q. Okay, but are you telling me that if a remote winery
14 tasting room sells a non-logoed wine glass, that some
15 farmer or some agricultural business in Peninsula
16 Township is going to be harmed by that?

17 A. Eventually, yes.

18 Q. What is the direct harm?

19 MR. MEIHN: I'm going to object, asked and
20 answered.

21 A. The direct harm is the degradation of the agricultural
22 industry over time, because it will tend to go into a
23 commercial area.

24 BY MR. INFANTE:

25 Q. Well, you're assuming that at some point this remote

1 winery tasting room is going to start selling, as your
2 example, air conditioners. Is that based on
3 assumption?

4 A. I didn't say that. I said as far as the ordinances
5 are concerned, if you start moving towards a
6 commercial use, and the committees and the people that
7 wrote the ordinance said we have to draw a line
8 someplace, we have to draw the line, and we have to be
9 specific enough so that everybody knows where the line
10 is.

11 And so we end up saying you can have a
12 glass with a logo but you can't have a glass without,
13 and --

14 Q. Why did you draw the line there?

15 A. Pardon me?

16 Q. Why was -- well, I should ask, are you the person who
17 drew that line, or was that the committee?

18 A. That was the committee.

19 Q. Okay. Did you have any involvement in drawing that
20 line?

21 A. I probably did.

22 Q. Okay. Then why was the line drawn there?

23 A. Because you had to draw it someplace, and as I
24 indicated before, we have two zones related to -- we
25 have a retail zone and we have an agricultural zone,

1 and the residents of the township understand what's
2 commercial and what isn't.

3 Q. Okay.

4 A. The ordinances are designed to be as specific and as
5 clarifying as possible by identifying specific things
6 which illustrate where that line is. And if you're
7 promoting agriculture in the agricultural production
8 area, then it's okay. If you're not, then you're in
9 the wrong zone.

10 If you want to have a bar or restaurant or
11 retail store in a commercial zone, fine. But if you
12 want to sell products that are produced in the
13 agricultural zone, then they've gotta be directly
14 related to the promotion and retention of that
15 agriculturally-preserved area.

16 Q. So you're saying a wine glass is not related to
17 production of wine grapes?

18 A. I'm saying that a wine glass is an example of the line
19 that the people that drafted this ordinance had to
20 draw. It's their decision, the town board's ultimate
21 decision, because they reviewed what the planning
22 commission recommended, and so forth, and there were a
23 whole number of factors that go into where that line
24 is drawn.

25 Q. But was it your decision?

WINERIES OF OLD MISSION PENINSULA vs PENINSULA TOWNSHIP
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1 A. No.

2 Q. Okay.

3 A. It was the committee's decision.

4 Q. When you -- when the committee was considering the
5 remote winery tasting room ordinance, do you know
6 whether the committee considered the First Amendment
7 rights of the remote wineries?

8 MR. MEIHN: I'm going to object. This
9 person is not a lawyer, and to ask him a question in
10 that regard is improper.

11 But you can answer, and if you understand
12 what the First Amendment rights are --

13 A. What are First Amendment rights?

14 BY MR. INFANTE:

15 Q. Let me ask a question. Do you know what First
16 Amendment rights are?

17 A. Not specifically. I couldn't quote it, no.

18 Q. Okay. And so if you don't know what they are, is it
19 safe to assume that at least as it relates to you
20 working on the remote winery tasting ordinance, you
21 did not consider First Amendment rights of wineries?

22 MR. MEIHN: I'm going to object again,
23 because he's not a lawyer and he can't testify --

24 A. My answer --

25 MR. MEIHN: Hang on, you've gotta let me

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 22

1 that area where they planted it. So, quite honestly,
2 no, I have not.

3 Q. But the family engages in commerce when they sell
4 your, sell the cherries from your land?

5 A. As I laid out, commerce on different levels -- when I
6 go to a store and buy something, that's commerce.
7 Yes, they participate in commerce. However,
8 commercialization has a completely different context,
9 and that's the level on which I'm saying the Township
10 is very careful.

11 We have very limited commercial zoning. We
12 have made the decision numerous times not to add any
13 commercial zoning because we want to limit that kind
14 of activity which is at odds to the successful
15 operation of a traditional farm, which must have the
16 ability without the interference of people moving
17 through property.

18 If you've got an operation right here next
19 to a farm that has 50, a hundred, 250, or in some
20 cases thousands of people milling around, you can't
21 spray. When you need to spray, you've got a limited
22 six-hour window to get that bug, and if you don't get
23 it then, you may not get it, you'll lose your whole
24 crop.

25 So that type of commercialization is what

1 the Township has tried to avoid so we can stay on our
2 path that we have defined for decades as being an area
3 that is dedicated to traditional agriculture with a
4 mix of some residential use.

5 Q. Does the Township not use buffer zones?

6 A. The buffer zones you're talking about, the size buffer
7 you need to not get the kind of complaints -- the
8 noise that a sprayer makes, you'll get complaints from
9 a mile away.

10 So a 50-foot buffer, that's nice, but
11 that's not going to keep you from getting complaints.
12 We have cases where people come into the township,
13 hear the noise of the sprayer, call sheriff's
14 department, "They're keeping me awake, I can't stand
15 this." The sheriff has to come out and the farmer has
16 to stop what he's doing, explain that, "I have the
17 right to do this with the Right to Farm Act." It's a
18 total hassle.

19 So those 50-foot buffers are not enough.
20 Plus, if you've got a wind going from north to south,
21 and this farm south or this land south of that is for
22 commercial use and you're spraying, that spray is
23 going to go for half a mile, and you'll have
24 complaints of the smell of the spray. You'll have
25 complaints about the health hazards, which is

1 primarily why it's very important that we not change
2 to having commercial activities in our agricultural
3 zone.

4 Q. Your family farm -- you said you have a farm stand?

5 A. They have a farm -- they have opened a farm stand
6 towards the south end of the peninsula.

7 Q. Does it have retail sales?

8 A. A limited amount of retail sales, basically
9 inconsequential.

10 Q. So your farm is allowed to engage in commercial
11 activity through retail sales, you family farm?

12 A. Again, I have defined quite clearly the various types
13 of commerce that are involved. Yes, there is
14 commerce, absolutely, but there's a big difference
15 between a commerce which is completely unrelated, such
16 as turning it into an event center, which really is a
17 commercial activity, or turning it into a retail of
18 all kinds of objects that have nothing to do with
19 farming.

20 This is retail of a specific farm product,
21 direct sales to the consumer of a farm product.

22 Direct sales of a consumer of a farm product, such as
23 fresh cherries or wine, those are direct products of
24 the land, direct retail sales of that. It is quite
25 different from bringing in a completely different

1 providing permanent land for the same;

2 Maintain the township's character;

3 Providing economically-feasible public
4 sewer and water systems to serve future populations;

5 And the fourth one: Establishing a
6 complete buildout population scenario and permitting
7 the vertical integration of agricultural production
8 without changing the agriculturally-zoned lands of the
9 township to commercial property inconsistent with the
10 use of those respective districts.

11 So which of those governmental interests is
12 furthered by restricting restaurants?

13 A. By restricting restaurants you are definitely helping
14 to keep the agricultural land, you are maintaining the
15 character, and you are also avoiding changing zoning.

16 I think the last -- read your last point,
17 please.

18 Q. Establishing a complete buildout population scenario
19 and permitting the vertical integration of
20 agricultural production without changing the
21 agriculturally-zoned lands of the township to
22 commercial property inconsistent with the use of those
23 respective districts.

24 A. Mmm-hmm. I would maintain that absolutely a
25 restaurant is inconsistent with the uses of the

1 agricultural district.

2 Q. How does a, how does a restaurant change agricultural
3 land?

4 A. It interferes with the ability to maintain farming and
5 to carry out the standard practices, and if you can't
6 farm, then you really are interfering with keeping the
7 character, which is based on agriculture. If the
8 farms cannot be farmed, they will eventually be sold
9 off and used for residential use, which is not
10 farming.

11 Q. But how does a restaurant prevent you from farming?

12 A. A restaurant brings in people who are going to be
13 getting in and out of their cars, walking back and
14 forth. If that's the hours you need to be spraying,
15 they're going to be complaining. It's going to be an
16 interference. If, as with most restaurants, they end
17 up with their patio areas, that would be in direct
18 conflict with the ability to do the standard
19 operations of farming.

20 I would say that what you're leaving out
21 when you talk about harms is the harm to the ordinance
22 itself, the harm to the purposes of the ordinances.

23 And so on a higher level, if you look at
24 the purposes stated in the master plans and in the
25 start of the agricultural section, if you drill down

1 to the fact that if you don't enforce what your
2 ordinance is, you're losing your entire ordinance.

3 So as well as clearly interfering with the
4 ability to retain the agricultural uses, I think it's
5 also a danger to the entire ordinance.

6 Q. Well, so what's the harm that Peninsula Township is
7 trying to prevent by not allowing restaurants?

8 A. The harm that it's trying --

9 MS. ANDREWS: Objection, form.

10 A. Restate your question, please.

11 BY MR. INFANTE:

12 Q. What is the harm Peninsula Township is trying to
13 prevent by not allowing restaurants?

14 MS. ANDREWS: Objection, Peninsula Township
15 doesn't not allow restaurants.

16 A. We have restaurants.

17 BY MR. INFANTE:

18 Q. Does not allow wineries to have restaurants.

19 MS. ANDREWS: Objection. Are you talking
20 specifically about the farm processing facility, are
21 we talking about Exhibit 2 still?

22 MR. INFANTE: Yes.

23 A. Be aware that there are -- you're making a broad
24 statement. This particular farm processing, this
25 particular type of winery is clearly not to have that.

1 prescribe what's allowed and what's not allowed, you
2 don't have that in this situation. You get to open up
3 and go.

4 And so that's why the potential harms are
5 higher with the farm processing than they are with the
6 winery-chateau.

7 BY MR. INFANTE:

8 Q. But what is the harm?

9 A. The harm is the incursion of -- the harm works on
10 several levels. The initial harm is the incursion of
11 more general human traffic that's going to interfere
12 with traditional farming. The harm is also on the
13 higher level of breaking the purpose of the ordinance.
14 The harm is the changing, in effect, without rezoning
15 to a commercial use.

16 And our zoning needs to be respected, and
17 the harm of, in effect, changing that zoning without
18 having changed it, putting a commercial use on the
19 farm land is not compatible, and that is a harm.

20 Q. So the harm you see is really changing the ordinance?

21 A. The harm I see is changing the land use without going
22 through the proper process. The harm is, in effect,
23 de facto changing it, which is why this is written the
24 way it's written.

25 Q. You made a comment about the land size, parcel size.

1 Farm processing facilities have to have 40 acres?

2 A. But the parcel itself only has to be 20.

3 Q. But they have to have 40.

4 A. They could have 20 over in another part of the
5 township. So the parcel itself could be as limited as
6 20.

7 Q. So you think the 50 acres for a chateau and 20 for a
8 farm processing, that makes a world of difference?

9 A. It does make a significant difference, yes.

10 Q. All right, I want to look down at (b)(ii), and
11 actually, (b)(ii) and (b)(iii) we can just read
12 together. They're mirror images of each other, I
13 believe.

14 MS. ANDREWS: (B)(1)(ii)?

15 MR. INFANTE: Sorry, (b)(1)(ii) I
16 apologize.

17 A. (B)(1)(ii).

18 BY MR. INFANTE:

19 Q. Yes. Grape wine that is processed, tasted and sold in
20 a farm processing facility under this section is
21 limited to Old Mission Peninsula appellation wine,
22 meaning 85 percent of the juice will be from fruit
23 grown on Old Mission Peninsula.

24 And then on (iii), it's the same thing
25 except it's fruit wine. Do you see that?

1 A. Yes.

2 Q. I assume that's meant to cover cherries.

3 What governmental interest is this
4 furthering, are these two sections furthering?

5 A. This governmental interest supports the balance
6 between the rights and interests of the entire
7 community towards the purpose of agriculture, against
8 the fact that as you begin to have more retail
9 directly from your operation, you're bringing in more
10 and more traffic, which is more stress on the
11 infrastructure.

12 Which when you're in our situation, which
13 is sort of like we're on an island, where there's one
14 single road that comes in, when you jam that up too
15 much, it's like the ferry's down, you can't get in and
16 out.

17 So the balance is that, in this case, if
18 we're going to have more traffic being brought in and
19 the potential nuisance and an infrastructural stress,
20 that also we're going to be ensured that more of the
21 land will be kept in active agriculture, because you
22 need to have Old Mission appellation.

23 So it was balancing the interest and the
24 forces of your added traffic, added stress, added
25 potential nuisance against the purpose of the Township

1 to keep land actively in agriculture.

2 Q. Okay. Well, these -- this section, does this apply
3 only to one sold in retail or one sold in wholesale,
4 as well?

5 A. For this particular operation, this applies to -- give
6 me a moment to re-read this section ...

7 Okay, grape wine that is processed, tasted
8 and sold. So unless you interpret that as all three,
9 if it's all three, tasted and sold in the processing
10 facility, then that would be that which is tasted and
11 sold in the farm processing facility. But I would not
12 be able to have the legal background to make a
13 distinct determination.

14 Q. That's a fair answer.

15 A. Well, I'm reading it right now. You're asking me a
16 question. My previous assumption would be that -- it
17 says at the top "Retail and Wholesale Sales." So that
18 would imply, before you drill down to (ii), that it
19 applies to both the retail and the wholesale. But if
20 you read (ii) in detail, then it perhaps is only for
21 that being sold there.

22 Q. So maybe it is a little vague?

23 A. I don't think it's vague. I think it's -- we need to,
24 I would say I would ask for some --

25 Q. Maybe it needs an interpretation?

1 I do not have a number in mind. I am aware
2 of why we have what we have and how it has allowed
3 them to succeed.

4 BY MR. INFANTE:

5 Q. You just told me that you don't want increased
6 guests --

7 A. If it does not --

8 Q. -- at the wineries.

9 A. -- if it does not support directly the agricultural
10 product being promoted and sold, then I think it's
11 unreasonable for the community, given the nuisance and
12 stress it would cause, it is unreasonable for the
13 community to take it beyond things that promote and
14 allow the sale of what they produce.

15 Q. What is the nuisance and stress you're talking about?

16 A. The traffic, the noise.

17 Q. Well, let's take those apart. Traffic, do you have a
18 traffic study?

19 A. Not personally, no, I do not. However, personally, at
20 this point, living 15 miles out of the peninsula, I
21 can sit for ten minutes before I get out of my
22 driveway. I've observed over decades the increase.

23 And I'm fine with the increase that we need
24 and that we are going to experience for the purposes
25 of tasting rooms that sell their products. That's

1 reasonable. We have to be reasonable, accept that,
2 and keep it within the guardrails we have set up and
3 accept what happens.

4 But to take down the guardrails is not
5 reasonable for the community. The community has an
6 agreement with the wineries. They agreed to work
7 under these rules, and they need to be maintained.

8 Q. Let me ask you a question. Okay, 3,000 people go into
9 a winery to taste wine. Okay?

10 A. Yup.

11 Q. Okay. 2,000 people go into a winery to taste wine and
12 1,000 people go into a winery to have food. Not okay?

13 A. You are putting together numbers that sound like
14 you're trying to parse out how many are doing what. I
15 don't care what the numbers are. We have accepted
16 that if they are coming out for the specific purpose
17 of what we have laid out in our ordinances and what is
18 clearly directly supportive of the production and sale
19 of the lands, the fruit of the lands, then we will
20 accept whatever that number is.

21 But to change the use to uses that are not
22 originally intended to uses that are, in effect,
23 commercial restaurants, that is not a direct use of
24 their product, and, therefore, if those numbers are
25 higher, it's not good. It's a harm. The numbers will

dictate what they are by the uses allowed.

Q. But you don't care about the number of people going into a winery and the number of cars driving to a winery so long as they're only going there to taste wine?

MS. ANDREWS: Objection, form.

BY MR. INFANTE:

Q. Is that your answer?

A. I would have to say that the increased traffic is not a pleasant thing, it's not great. If it's going to be there, it needs to serve the purpose of the Township, which is to continue agricultural use of the land. It has to serve that directly, and then it's okay.

Q. So as long as it's -- so the number of cars, as long as it serves ag, is okay?

A. As long as it serves the purpose of the community and the Township, which is the continuance of active agriculture, the continuance of keeping the land in active agriculture. If it serves those purposes, then it is okay.

Q. Okay. I just want to confirm, you've never done a traffic study, right?

A. No, I have not done a traffic study. I, however, lived in the township and observed the traffic and observed the changes that particularly have grown with

1 Q. (B)(1)(v), yeah. Sorry, this is a very hard ordinance
2 to track. Where it says "logo merchandise may be sold
3 provided," do you see that?

4 A. Yes.

5 Q. Okay. Follow along: Logo merchandise may be sold
6 provided: The logo merchandise is directly related to
7 the consumption and use of the fresh and/or processed
8 agricultural produce sold at retail.

9 What does that mean?

10 A. That, along with the second bullet, permanently
11 affixed, prominently displayed, that means that your
12 retail that is going on there is clearly directly
13 related to the purpose of that farm to promote itself
14 and to support the use in their wines.

15 Q. But if you look at 4, it says: Specifically not
16 allowed are unrelated ancillary merchandise such as
17 clothing, coffee cups, bumper stickers.

18 A. Correct.

19 Q. So in your interpretation, would a farm processing
20 facility be precluded from selling a T-shirt with its
21 logo on it?

22 A. As currently worded, I think yes.

23 Q. Okay. What governmental interest does precluding a
24 winery from using its trademark serve?

25 MS. ANDREWS: Objection, form.

1 A. This goes back to the same discussion we've had about
2 retail and commercial use. Do you want me to go
3 through it all again, or can you take from the last
4 four or five topics that were directly related to
5 this?

6 BY MR. INFANTE:

7 Q. Give it to me again.

8 A. Okay. So we have a township that has always avoided
9 adding commercial zoning, and once you break away from
10 things that are directly related to the use of the
11 product, you are not only violating the ordinance, but
12 you are opening the door to gradually eroding that, to
13 the point that perhaps someone could have, in effect,
14 have changed their zoning and could perhaps legally
15 sue for that.

16 But when it's clearly defined by this kind
17 of wording that ties it directly to the produce of the
18 premises and uses that have to do with consuming that
19 produce, you're tying it with great guardrails that
20 anyone can understand. There's a logic. They're
21 reasonable.

22 That's why the farm community that
23 participated, the grape growers that participated
24 agreed to this, because it was a reasonable guardrail
25 that allowed them to have ancillary sales that

1 directly had to do with what they were selling and
2 allowed them some degree of promotional activity.

3 Q. What's the harm in a farm processing winery selling a
4 T-shirt?

5 A. Again, you are moving into something that is not
6 directly related to the use of the land, to the
7 product of the land, and, therefore, you are, in
8 effect, moving to another type of commercial retail
9 outlet, which the Township has carefully not allowed
10 by not increasing the amount of commercial zoning we
11 have.

12 That answer -- question has been faced many
13 times over the decades. The answer has always been,
14 no, we don't want to start being more commercial. We
15 want to limit that to the areas that are already zoned
16 commercially. The rest of the area will be for direct
17 agricultural use.

18 Q. All right. Well, how about this. You're aware that a
19 winery-chateau can sell a T-shirt with its logo on it,
20 right?

21 A. Yes.

22 Q. So my question is, what harm do farm processing
23 wineries cause by selling a logoed T-shirt that
24 winery-chateaus don't?

25 A. I believe that it's already a harm when the

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**BRIEF IN SUPPORT OF DEFENDANT PENINSULA TOWNSHIP'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 23

WINERIES OF OLD MISSION PENINSULA vs PENINSULA TOWNSHIP
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1 was Exhibit 2, amendments to the winery; I just didn't
2 know which one it was.

3 MR. INFANTE: Exhibit 2 is the farm
4 processing facility.

5 MR. MEIHN: Got it. And Exhibit 3 is the
6 chateau?

7 MR. INFANTE: Yes. And Exhibit 1 is the
8 remote.

9 MR. MEIHN: Got it. And then I'd just
10 place an objection as it relates to your limitation on
11 the basis for enactment of the amendments and the
12 interest, but -- that is not correct in how you limit
13 it to four. But go ahead and proceed, it's your
14 deposition.

15 MR. INFANTE: Okay.

16 BY MR. INFANTE:

17 Q. Let me read the first item that the Township
18 identified. It's preserving the agricultural industry
19 and providing permanent land for the same.

20 Do you know what that means?

21 A. Yes, I do.

22 Q. Okay, what does that mean?

23 A. The decision long ago was made to help preserve
24 agriculture on Peninsula Township land, and it's been
25 refined and added to over the years, and it includes

1 studies like the American Farmland Trust, a study
2 comparing relative property tax revenue nets for
3 residential, commercial, and other, I guess.

4 And then it has been -- the PDR was
5 adopted. I was part of that deliberation and
6 education to the community, and I did home speaking
7 engagements on behalf of that, and you probably heard
8 about that from John Wunsch. You indicated you'd
9 taken his deposition. So preserving the ag industry
10 is critical to the lifestyle and land use, and it is
11 critical, really, to maintaining the very fragile
12 infrastructure out there.

13 And then the part where providing land,
14 some of the things I just mentioned go directly to
15 that. As you know, the Peninsula Township's zoning
16 code I think started around 1972, and all the land was
17 basically, if it wasn't already commercially
18 developed, all that land was reserved in agriculture,
19 and agriculture has provided a culture out there.

20 And it's part of the school ethic that
21 farmers', lawyers', and doctors' kids all go to school
22 together. And the taxes are kept down because we
23 don't have a lot of capacity on infrastructure because
24 of the nature of the geography, topography, and
25 limited road and access.

1 And we got into this in the Bell
2 development. I hired Bob Hotaling at that time, who
3 was kind of the godfather of the Michigan Township
4 Rural Zoning Act, as my expert, and we did a lot of
5 development of exactly how providing agricultural land
6 and preserving agriculture was necessary in this
7 township, especially beyond McKinley Road, which is
8 where the infrastructure really pretty much ends.
9 This is the sewer and water stuff, so --

10 Q. Well, you mentioned -- I'm sorry, I didn't mean -- I
11 thought you were done. I apologize.

12 A. I'm sorry, maybe I went on too far. If I'm
13 digressing, you let me know.

14 Q. Well, you mentioned infrastructure. When you say
15 "infrastructure," are you talking sewer and water?

16 A. No, not only. I'm talking roads. I'm talking the
17 lack of sewer and water, right? I mean, that ends at
18 McKinley Road.

19 Q. Well, yeah, because the township doesn't have sewer
20 and water -- or the majority of the township doesn't
21 have sewer and water, right?

22 A. It does not have community sewer and water, it doesn't
23 have -- and, as I was saying about Bob Hotaling, he
24 called it, you know, some townships run into leapfrog
25 development. The development goes beyond the existing

1 authority to speak on behalf of Peninsula Township?

2 A. No.

3 Q. So with that said, when I ask you questions regarding
4 the ordinances, you are giving me your opinion or are
5 you speaking on behalf of Peninsula Township?

6 MS. ANDREWS: Objection, form, asked and
7 answered.

8 A. I'm giving you what I know. I'm giving you my
9 personal observation and opinion.

10 BY MR. INFANTE:

11 Q. Okay. All right, the third proffered governmental
12 interest is providing economically-feasible public
13 sewer and water systems to serve future populations.

14 A. Say that one more time, excuse me.

15 Q. Providing economically-feasible public sewer and water
16 systems to serve future populations. Do you have an
17 idea of what that means?

18 A. Okay, so you're going back to -- you told me to take
19 notes on four interests, right?

20 Q. And this is the third one.

21 A. This is the third one. So I know the Township
22 studies, keeps track of its feasible sewer and water
23 system. I know it keeps track of what is not
24 feasible. And I mentioned that, the Hotaling, the
25 leapfrog development, the Bell development. Those

1 issues came up.

2 And so I'm not sure the word "provide" or,
3 you know, how this question goes, but I know the
4 Township is extremely concerned about the ability to
5 serve the population on, the entire population on the
6 peninsula with infrastructure, such as sewer, water,
7 roads, policing, schools, everything.

8 Q. Well, this says public sewer and water systems.

9 A. Okay, that's part and parcel of it, yes.

10 Q. Okay. And I think you said that the public sewer and
11 water system ends at McKinley Road?

12 A. That's my understanding right now. I'm not sure,
13 there's been some work done around that. That was my
14 understanding.

15 Q. Well, through other witnesses, I think we are saying
16 the general area of McKinley Road.

17 A. Right, exactly.

18 Q. Okay. But there's no public sewer and water system
19 north of McKinley Road, which is the majority of
20 Peninsula Township, right?

21 A. Two questions --

22 MS. ANDREWS: Objection, "the majority,"
23 I'm sorry how the word is used [audio distortion].

24 BY MR. INFANTE:

25 Q. Go ahead, sir, you can answer.

1 A. I hear two questions there. The majority of the land
2 is north of McKinley Road. I'm not sure about the
3 majority of the population. The foot of the peninsula
4 is really a lot of the population, I think, and the
5 sewer and water, certainly the majority of the sewer
6 and water stops at McKinley Road.

7 I'm not sure about the Lagina property or
8 UnderWood, if they somehow tagged on. I don't know
9 that for sure.

10 Q. Okay. The fourth proffered governmental interest in
11 establishing the winery ordinances -- and this one is
12 a long one, so bear with me, and I can read it twice
13 if you want.

14 A. All right.

15 Q. Establishing a complete buildout population scenario
16 and permitting the vertical integration of
17 agricultural production without changing the
18 agriculturally-zoned lands of the township to
19 commercial property, inconsistent with the use of
20 those respective districts.

21 A. Okay, if you could start with the having vertical,
22 start from there on, and let me catch up with you on
23 the second part of this.

24 Q. Permitting the vertical integration of agricultural
25 production without changing the agriculturally-zoned

lands of the township to commercial property,
inconsistent with the use of those respective
districts.

A. Mmm-hmm. And there's only one word now I'm missing
that might go into my thinking. Without changing the
what? What did you say?

Q. The agriculturally-zoned lands.

A. Okay, or the --

Q. Agriculturally-zoned lands of the township to
commercial property, inconsistent with the use of
those respective districts.

A. Mmm-hmm, yeah, I know what that means.

Q. Sorry, it was long. Okay, what is your opinion of
what that means?

A. Well, the first part of it goes to establish a
complete population buildout, I mean, there is
development going on on the peninsula, for sure, and
that's usually thought about in terms of residential
buildout.

And then the second part of the question,
having to do with vertical integration of agricultural
production is what I talked about before, and that is
on-site production, true farming, however
incorporating sales, and that is controlled by the
farm produce. That is controlled by the farmer.

1 And then without changing the
2 agriculturally-zoned lands, you know, that's a no-go
3 out there. That's the third rail in peninsula
4 politics. If you want to try rezoning agricultural
5 lands to something else, like commercial, you will get
6 a referendum every time.

7 And then to commercial property
8 inconsistent with those districts, that goes to this
9 balancing, this huge balancing act the peninsula is
10 constantly doing, and it revolves around the Township,
11 the PTP, and farmers and wineries.

12 And the whole balancing act, when you, when
13 you look at this ordinance, I think the genius of it
14 is that it knows it has agricultural practices that
15 are even -- there's farmers spraying for cherries or
16 apples, and then there's farmers growing grapes, and
17 then there's residences intermingled in all of the
18 above, and when you put in practices, you have to be
19 aware of how it's going to impact on the neighbor.

20 And Bob Hotaling always said zoning is the
21 most neighbor-to-neighbor form of government there is,
22 because everybody has individual rights, and everybody
23 has individual expectations and quality of life
24 concerns.

25 So, anyway, the real issue is allowing some

1 commerce but not turning into commerce, because every
2 winery and every farm is in the middle of its own
3 neighborhood, and you've gotta also respect the
4 neighbors around them.

5 Does that make sense? Maybe, all right. I
6 shouldn't ask questions, sorry.

7 Q. Have you been hired by Peninsula Township to give an
8 expert opinion in this case?

9 A. I haven't been paid a nickel by the Township, ever.

10 Q. Okay. Well, have you been asked by Peninsula Township
11 to provide an expert opinion in this case?

12 A. No.

13 Q. Do you plan to provide an expert opinion in this case?

14 A. I give my opinions. I don't know if they're expert or
15 not. But after 35 years of being involved in this, I
16 do have some, as I perceive, you know, information
17 that is, you know, is a little better than, you know,
18 better than average, frankly.

19 Q. Okay. Currently, what do you do for a living? Are
20 you a practicing lawyer?

21 A. Yeah.

22 Q. Haven't retired yet?

23 A. The thought has crossed my mind, so ...

24 Q. TJ and I were talking about that a couple hours ago,
25 about retiring, I apologize.

1 the way you did speaking objections in the last dep.
2 I'll do my best to stop it, but I'd ask if you'd do
3 your best to not misrepresent the facts.

4 MR. INFANTE: Mr. Meihn, are you saying
5 that I'm lying?

6 MR. MEIHN: I didn't say you're lying.
7 You've misrepresented our position, sir, that suggests
8 there are four governmental interests only. That's a
9 misrepresentation of our position. That's not lying.
10 You're smart enough to read, you're smart enough to
11 know what lying is, so stop it and get to the
12 deposition, sir. I'm tired of the process that you
13 tend to try to make. Go on with the dep.

14 BY MR. INFANTE:

15 Q. All right, Mr. Parsons, looking at 12(i), can you tell
16 me which of the governmental interests is furthered by
17 12(i)?

18 A. Yeah, 12(i) goes to allowing sustainability for
19 agriculture, that's a governmental interest. The
20 governmental interest in preventing the
21 commercialization of agricultural lands, that is a
22 governmental interest. And then the preservation of
23 the character of the surrounding vicinity of the
24 neighborhood in which the winery is located, that's a
25 governmental interest.

1 And then, more broadly, the -- these are,
2 these are helpful steps, in my view, that were to
3 allow vertical sales, vertical sales of ag products
4 with very minor ancillary items, non-ag items, like
5 corkscrews, wine glasses, gift boxes, T-shirts, that
6 would neither inflame the public to come out against
7 this remote wine tasting winery or prevent the winery
8 owner, in this case Dave Kroupa with the remote
9 tasting room, prevent him from being able to
10 reasonably carry out his vision of vertical ag sales.

11 It's a balancing act. Everything in this
12 ordinance, the genius of it is every paragraph or
13 section, basically, is a balancing act. And it
14 worked, you know, for the last, you know, however
15 decades.

16 Q. Well, Mr. Parsons, what is the, what is the harm of a
17 winery -- what is the harm to Peninsula Township, what
18 is the harm of a winery selling a hat?

19 A. A hat, I can't imagine that being harmful. A thousand
20 hats, that is -- what's the harm to a downtown like
21 Traverse City, where good, productive stores turn into
22 T-shirt shops, what's the harm of that? There is a
23 harm. It's a culture.

24 Q. We're not talking about Traverse City. We're talking
25 about Peninsula Township. Let me ask it a different

1 way.

2 So 12(i) requires that, it allows for a
3 T-shirt to be sold but requires that the T-shirt have
4 a logo.

5 So what is the harm in a Peninsula Township
6 remote winery tasting room selling a T-shirt without a
7 logo on it? What's the harm to the government?

8 A. I'm going to answer you with a question that I'm going
9 to, I think I'm going to turn into a statement.
10 What's the difference between a T-shirt with a winery
11 logo and a T-shirt shop? It is a very limited sales.
12 It's a sales specific to that winery, and there are
13 only so many, you know -- I mean, it just limits the
14 commercialization of the winery again.

15 It always goes back to that. I'm sorry to
16 repeat that so many times, but that's what it goes
17 back to.

18 Q. I understand, but I'm asking, what is the harm?

19 A. Well, the harm is you've got -- if you let wineries
20 turn into commercial stores, you've got the purpose of
21 it. That's what they'll be.

22 Farming and winery, I believe, is a labor
23 of love, and it's a unique labor. You've gotta want
24 to do it. You know, farmers joke, "We're going to
25 keep farming until the money runs out." That's not

1 exactly true of the wineries. Wineries are really
2 prospering, because they have this unique, unique
3 place. They're borrowing the character of the
4 peninsula that everybody has paid taxes to protect.
5 They're borrowing the orchard's views. They're
6 borrowing from the community and we're lending back,
7 and we're saying, "The only deal on your part is
8 you've gotta fit into the community and you can't
9 destroy the community by turning into just a T-shirt
10 shop, or something like that."

11 Q. Do you have a, do you have a study, do you have a
12 report, do you have research that shows that if
13 wineries are allowed to sell non-logoed merchandise,
14 that they will turn into T-shirt shops?

15 A. Effectively, yes, I do.

16 Q. Where is that study?

17 A. It's the American Farmland Trust Study, showing --
18 they did comparative net property tax revenue, they
19 compared commercial to agriculture to residential, and
20 they found that commercial, because it requires more
21 traffic, more police, more water, more sewer, more
22 schools, more this, more that, commercial, I think --
23 okay, I want to just protect this, if I can say the
24 American Farmland Trust Study showed that the relative
25 property tax net revenue compared to agriculture, say,

1 at 58 cents of services required for every dollar of
2 property tax delivered, as compared to about a dollar
3 26 services required for every residential property
4 tax dollar delivered in townships under 25,000.

5 And the result of that study was that in
6 townships under 25,000, which Peninsula Township is,
7 that the transformation from agriculture to
8 residential costs way more money than the revenue the
9 development supports, and, therefore, just, if I
10 can -- I won't go back to this, but if I can finish,
11 therefore, that's what all of us conservative township
12 residents and farmers caught on to. It was gonna cost
13 more to make that transformation.

14 And, therefore, every strategy that we've
15 come up with always hinges -- some of it's economic,
16 character, everything, but one of the, one of the
17 many, many elements it goes into is that it's way more
18 tax efficient to maintain agriculture.

19 Q. Okay. But you just told me that the study said that
20 you don't want -- you were talking ag to residential.

21 A. Correct.

22 Q. My question was -- you're not talking commercial. You
23 were saying ag to residential. My question was, do
24 you have a study that shows that if wineries are
25 allowed to sell non-logoed merchandise, that they

become, you know, like you said, T-shirt shops?

A. Okay, yes. I'm going to tell you yes, and I'm going to tell you, I don't have it in my possession, but what we did back then, we used two exemplars. As we were talking about winery ordinances on the Old Mission Peninsula, we held out two like terribles, two exemplar, terrible exemplars. One was Dorr County, I think the other was Fairfax County, and then we talked about Hudson Valley.

And people -- you were asking for studies. I'm positive there are studies about the deterioration of those agricultural communities when they went commercial. I don't have them. I don't have it with me. I'll tell you what, you pay me, I'll do the research, for sure.

Q. Well, no-no-no.

A. I'm kidding.

Q. Are these studies that you have or Peninsula Township has?

A. I don't know that, sorry.

Q. Okay. How about this. When you were drafting 12(i), did you consider any less-restrictive means to effectuate the government interest?

A. Okay, first of all, could I just -- I don't want to be falsely modest, but I keep saying that I helped draft

1 it, and I don't want to make -- if you come back and
2 tell somebody that I said that I drafted, okay, that
3 will be embarrassing for me, okay?

4 Now, the bulk of your question is whether
5 we considered less-restrictive means?

6 Q. Correct.

7 A. I think this ordinance is probably -- no, we -- well,
8 man, that's an interesting question. This ordinance
9 is such a balance, we had to consider means. We were
10 all over the map on considering -- we were taking in,
11 everybody was taking in and giving input, but
12 less-restrictive means, like what?

13 Q. I don't know. That's for you to tell me.

14 A. Well, insofar as everybody's input was considered, I'm
15 sure the winery came in with a longer list of
16 allowable sales than this. Right now I can't remember
17 what that is. But the Township -- look it, the
18 Township treated everybody with respect. So if you're
19 asking me, did the Township consider less-restrictive
20 means? Yeah, absolutely.

21 Q. Okay, so what were they?

22 A. Again, what I just said, I think the wineries came
23 in -- this winery came in with different -- and
24 wineries were always involved in every new part of the
25 winery ordinance. I'm sure the wineries came in with

1 a much broader expanded list of non-ag goods that
2 might be sold under the rubric of a winery, and --

3 Q. Can you give me one example?

4 A. You know what, I think one of them might have been --
5 I remember talking about picnic hampers, you know,
6 those straw boxes you put your picnic stuff in, the
7 Shishi people, and, I mean, napkins, and the
8 general -- those stand out, picnic hampers. Maybe
9 coolers. I think coolers. Coolers I think may have
10 been a big deal, as a matter of fact, you know,
11 because people want to take wine coolers, you know,
12 put white wine in coolers.

13 Q. What would be the harm in a wine cooler?

14 A. Commercialization, and then square footage. I mean,
15 again, you go back into those discussions, I can't
16 remember all the square footage. There was a lot of
17 talk about what percentage of square footage can you
18 use for non-wine sales, you know. It was -- again,
19 when I say -- look it, Joe, I say this was all a
20 balancing test, and it really was, it really was,
21 where it was a totality understanding of what they
22 were trying to produce.

23 Your questions are not as absurd as I might
24 think they were if I hadn't been involved in this, you
25 know, what's the harm in a hat, what's the harm in a

1 T-shirt, what's the harm in a cooler, but, you know,
2 we spent lot of time talking about that stuff, we
3 really did.

4 So what it came down to, the harm was that
5 taking the aggregate of non-produce sales, you know,
6 raw or produce process, you take the aggregate of the
7 farm sales, of the real produce, and then the
8 aggregate of the non-produce sales, and you wind up --
9 what we tried to wind up with is an equal balance, an
10 equal --

11 Q. Well, let me ask you --

12 A. I'll give you a really funny example of that. There's
13 the Gougeon brothers down in southern Michigan. I
14 don't know if you've ever heard of these guys. One
15 was a pretty good legislator. They made wind turbines
16 and they made an epoxy, the WEST SYSTEM, and one of
17 those Gougeon boys had on his -- on his wall, they
18 had -- the motto of their law firm was G over F equals
19 Q, and it says when grief, when the ratio of grief to
20 fun is greater than one, you quit.

21 And we, in a general way, when the ratio of
22 agriculture to commercial sales was less than one,
23 we'd say quit, and that's where we -- this is a very,
24 very balanced issue about what ancillary sales, I
25 think we called it at the time.

boxes/packaging containing the approved products for the specific farm operation; b) wine glasses; c) corkscrews; d) cherry pitter; and e) apple peeler; and

4. Specifically not allowed are unrelated ancillary merchandise such as: a) clothing; b) coffee cups; c) bumper stickers.

You follow along?

A. Yes.

MR. MEIHN: Could you tell me what section that was, sir? You broke up a bit and I was trying to find it.

MR. INFANTE: No prolem, 19(b)1(v), 1 through 4.

MR. MEIHN: That's enough, thank you.

BY MR. INFANTE:

Q. All right, were you able to follow along, Mr. Parsons?

A. Yes.

Q. Okay, tell me, what is the governmental interest in limiting the logo merchandise that a farm processing facility can sell?

A. Because you don't want somebody to set up a wine sale shop and become a Pottery Barn outlet. You want to have the logo about the agriculture. And you'll notice that's a theme that runs through all of this. Like when you say what's the difference between

1 allowing certain kinds of meetings, but those meetings
2 are supposed to be agricultural related.

3 Q. Well, does Peninsula Township -- for example, 2 Lads
4 is a farm processing facility. Does Peninsula
5 Township own 2 Lads' trademark?

6 A. I can't imagine it. I don't know. I have no
7 foundation for that, but I can't imagine.

8 Q. Okay. Yet Peninsula Township gets to dictate how
9 2 Lads uses its own logo, is that right?

10 MS. ANDREWS: Object, form of the question.

11 A. No, I don't view it that way at all.

12 BY MR. INFANTE:

13 Q. Okay, tell me how the governmental interest is
14 furthered by restricting how a farm processing winery
15 can use its logo.

16 A. I don't know. That is not what this section does.
17 What it does is it restricts sales items to those that
18 have the logo. It's not restricting how it can use
19 it, but it's requiring it to be used if you want to
20 sell certain bric-a-brac.

21 Q. Okay, but subsection 4 specifically precludes the sale
22 of clothing, coffee cups, and bumper stickers.

23 A. Right.

24 Q. So what is the --

25 A. Convenience store items.

1 Q. What is the -- you keep saying convenience store, but
2 you told me before you don't have a definition for
3 convenience store.

4 A. It's non-ag retail sales.

5 Q. Okay. So what, what government interest is furthered
6 from prohibiting a farm processing facility from
7 selling a logoed piece of clothing?

8 A. A non-logoed piece of clothing?

9 Q. No, a logoed piece of clothing.

10 A. Well, again, I mean, it's a clothes shop as opposed to
11 an ag shop. What I'm saying is you go sell what I'm
12 calling bric-a-brac stuff if you have your logo on it
13 of a certain type, but the idea is to keep sales of
14 what we call wineries, it's the sales are supposed to
15 be wineries related, and it is not supposed to be
16 opening an outlet store or convenience store.

17 I say Pottery Barn. That's with a capital
18 P and a capital B, and that rhymes with trouble, you
19 know. I mean, that is -- that's what I think we
20 intended with this logo theme. If you sell it with
21 your logo on it, then you're not going to become a
22 general retail outlet of non-ag items.

23 Q. Well, let me -- did Peninsula Township consider any
24 less-restrictive means that's been an outright
25 prohibition to further its governmental interest?

1 A. What's the outright prohibition? I'm sorry.

2 Q. It is the outright prohibition on the sale of logoed
3 clothing.

4 MS. ANDREWS: Objection, form.

5 A. The amount of discussion on this issue was long, and
6 as tedious as this deposition may be, that discussion
7 was way more tedious and it went on for a lot longer,
8 because the Township residents had already thrashed
9 the Township when it tried to adopt a less, I guess
10 you'd call it a less restrictive, whatever ABC was,
11 that was less restrictive. That had gone down in
12 defeat.

13 What we were trying to do was come up with
14 a means to allow wineries to promote ag, and then I
15 guess the wineries raised this issue, "Why the heck
16 can't we sell something with our logo on it," and
17 so --

18 Q. Sir, okay, you haven't answered my question. My
19 question was, did Peninsula Township consider any
20 less-restrictive means to accomplish its alleged
21 governmental interest besides an outright prohibition
22 on the items in subsection 4?

23 MS. ANDREWS: Objection, form.

24 A. And I thought I said, it was a tedious process, where
25 we considered, we talked, I don't know if it was weeks

1 or months, yes, we talked about what -- and we did
2 this -- look it, by "we," I mean Township, PTP,
3 wineries, residents --

4 BY MR. INFANTE:

5 Q. Give me an example of a less-restrictive means that
6 was considered.

7 A. Oh, I think there -- well, you mean like food hampers
8 and coolers, and what I'm calling convenience store
9 items?

10 Q. No, give me an example of a less-restrictive means
11 that was considered as opposed to an outright
12 prohibition on the sale of logoed clothing, coffee
13 cups, and bumper stickers in item 4.

14 MS. ANDREWS: Objection, form, prohibition
15 attached to, the word prohibition is objectionable
16 [audio distortion].

17 A. I am sorry, I'm losing you. I hate to ask you to
18 repeat it, but can you?

19 BY MR. INFANTE:

20 Q. I just would like an example of a less-restrictive
21 means that Peninsula Township considered as opposed
22 to --

23 A. For what? For a --

24 Q. -- as opposed to 19(b)1, Roman numeral (v), subpart 4.

25 A. Okay, less-restrictive means than saying "specifically

1 not allowed are unrelated ancillary merchandise such
2 as clothing, coffee cups, and bumper stickers."

3 A less-restrictive means than prohibiting
4 that would be -- such as? I mean, can you give me an
5 example, give me some?

6 Q. All right. So you keep telling me you don't want
7 these places to be convenience stores, Pottery Barns,
8 et cetera. Did the Township ever consider, say, a cap
9 on the sale of merchandise at 25 percent of total
10 sales?

11 A. There was discussion in terms of square footage of
12 retail space as opposed to agriculture produce space.
13 I recall that. And I can't tell you what the, I can't
14 tell you what the difference was in the square
15 footage, but --

16 Wow, you see the interplay between 3 and 4
17 here? The Township is trying to allow things that
18 might be thought of as ag related or wine-use related,
19 such as corkscrews. I remember the corkscrew
20 discussion was if you -- if somebody buys a bottle of
21 wine but they don't have a corkscrew in their car, how
22 the hell are they going to drive down the road
23 drinking their wine.

24 So the Township says, "Okay, that makes
25 sense, we'll give you the means to drink your

1 locally-produced wine." And that came off the
2 prohibition list, but then we said clothing and bumper
3 stickers, what does that add to anything.

4 Am I answering your question, or no?

5 Q. No, not at all.

6 A. Okay, sorry. Less-restrictive means than what? You
7 referred me to the section. I mean, I'm reading the
8 section, I'm trying to follow you, but I'm asking you
9 what, if I'm not answering you, what am I have missing
10 in my answer.

11 Q. Well, you just -- you keep referring to that you
12 didn't want these wineries to be convenience stores.
13 So my question for you is, did the Township ever
14 consider putting a limit on the percentage of sales
15 that could be, as you say, bric-a-brac of merchandise?

16 A. Okay, and I responded that there was consideration of
17 every issue of merchandising raised by the wineries
18 and others, and we went through and we said, "Well,
19 what does it mean if we allow sales of coolers, or
20 what does it mean if we allow a bunch of takeout
21 sandwiches to go out with the wine?" Because, well,
22 we don't want, you know -- people say, "Well, we buy a
23 bottle of wine, and we also want a sandwich."

24 We did consider those, those were very
25 rationally discussed, and it came down to, through

1 both -- the winery and the Township and PTP came up
2 with this list of, for example, "Here's what we want
3 you to be able to sell, and here's what we don't want
4 you to be able to sell," because it's
5 commercialization. It's not ag anymore.

6 And then we all agreed, and I want to tell
7 you, we all agreed. This thing didn't get into
8 writing just because some one group hammered it. It
9 really didn't. This was a very, very cooperative
10 effort.

11 So, yes, the Township considered
12 less-restrictive means, and everybody agreed
13 cooperatively, collaboratively that those, some worked
14 and some didn't work.

15 Q. All right. I'm going to try to wrap this up. Have
16 you told me today all the less-restrictive means that
17 the Township considered?

18 A. No.

19 Q. Okay, what else were there?

20 A. There were years of discussion between the time when
21 Bob Begin came in and Ed O'Keefe was on a different
22 track, and then 128-abc was proposed, and that got
23 defeated by 70 percent of the township voters. Then
24 the food processing came in, the remote processing
25 came in. Then -- oh, man, what happened after that.

1 I'm telling you --

2 Q. Sir, forgive me --

3 A. -- you cannot, you cannot -- you can neither silo nor
4 simplify this ordinance, because this was discussed,
5 and I don't want to say ad nauseam because we were all
6 in it. It wasn't ad nauseam, we didn't get nauseated,
7 we really participated in this, and we hammered out
8 these agreements with the wineries.

9 I've gotta tell you, your clients, man, not
10 all of them because they weren't all in existence, of
11 course, but we agreed. You've gotta remember, Ed
12 O'Keefe invited me out to his orchard to show me
13 around, show me his guest room, show me his stuff. I
14 debated Ed O'Keefe with the League of Women Voters
15 election forum publicly, televised ad during the
16 128-abc campaign.

17 If you want to say did the Township
18 consider and reasonably kick around -- and I don't
19 want to say "kick around." I want to say, did the
20 Township sit down respectfully, collaboratively, and
21 produce this, and I'm telling you, it did in spades,
22 like no other township I've ever seen, and I've sued a
23 lot of townships.

24 Q. Okay, sir, but that is not my question.

25 A. Okay.

1 Q. That has never been my question.

2 A. Okay, sorry.

3 Q. My question was, tell me what other less-restrictive
4 means were considered by the Township.

5 A. Okay.

6 MS. ANDREWS: Asked and answered,
7 objection.

8 A. We talked -- I, I brought up some examples when I
9 talked about bric-a-brac, Pottery Barn, clothing
10 stores, coffee events -- we're not even to events --
11 lighting, traffic, parking, night lights in neighbors'
12 windows. I mean, we had, we had a discussion. If you
13 want me to go product-by-product that the Township
14 considered and rejected, you know what, you might go
15 to the wineries and say, "All right, why do you need
16 that?"

17 Why don't you go to the wineries and say,
18 "What did you guys ask at the time that were
19 considered and rejected?" Because we were trying to
20 help them. They were the ones proposing ancillary
21 items. We were trying to help them.

22 Q. Sir, I've asked the question several times, what
23 restrictive means were considered. Have you told me
24 every restrictive means that was considered?

25 A. No.

1 BY MR. INFANTE:

2 Q. All right. Let's go to, still in 19(a), it's the
3 third-to-last sentence. It starts with "activities."
4 Do you see that?

5 A. Mmm-hmm, "such as weddings."

6 Q. Yes. Activities such as weddings, receptions and
7 other social functions for hire are not allowed.

8 What is the governmental interest that is
9 promoted by that prohibition?

10 A. Health, safety and welfare.

11 Q. And how is that promoting health, safety and welfare?

12 A. Because those, those -- in numerous ways. Those
13 functions, which, as you know, are consuming Northern
14 Michigan farmland in some places, they, they
15 supersede -- you want to talk about preemption of
16 another kind, that's when one commercial enterprise,
17 such as weddings, can charge ten or twenty thousand
18 dollars a day, while a farmer doesn't make a fraction
19 of that.

20 And what happens is that the -- as you know
21 from listening to cherry farmers who are talking at
22 recent meetings, they are saying you turn these
23 wineries into a wedding event place, and they are
24 going to make it impossible for us to farm, because we
25 cannot conduct our normal farm practices, such as

1 spraying and agriculture, and they, they're going to
2 drive the price of land sky high. A traditional
3 farmer will never be able to compete with the land
4 prices an events operator can afford to pay, because
5 it's just too overpowering.

6 And, finally, you get into the, you get
7 into the quiet use and enjoyment of the land, which is
8 about the limits of my property knowledge, but where
9 you have events, and I don't know if you watched all
10 the uproar in other townships, about -- like Frank
11 Noverr's event thing out in Leelanau Township,
12 Leelanau County, where the lights, the music, the
13 traffic, the parking, everything that goes with those
14 events has been extraordinarily detrimental to
15 agriculture and to rural culture, to quality of life
16 in small rural townships, so ...

17 Q. All right. Do you have a study that shows that if a
18 winery has a wedding, a farmer can't farm his land?

19 MS. ANDREWS: Objection, foundation,
20 misstates the testimony.

21 BY MR. INFANTE:

22 Q. Do you have a study that shows that?

23 A. I will tell you, I have a personal study from going
24 to, I don't know, a hundred or two hundred meetings
25 out in Peninsula Township, where farmers have talked

1 promotion by," and "such as." If you want to say it
2 should be "such as" instead of "by," I'll give you
3 that, if you want that, but this is, this is very
4 clear under local usage and practice. It really is.
5 It means they're intended to help. They're intended
6 to be examples of what Bob Begin can do with guest
7 activities.

8 Q. My question is, what is the harm to Peninsula Township
9 if they don't promote Peninsula agriculture?

10 A. Okay, I'm going to repeat my question, Mr. Infante,
11 because my question -- my answer is a truthful answer
12 that makes sense, it really does.

13 The harm is, if you do not use agriculture
14 property in an agriculture zone and the activities
15 thereon, even if you call them guest activities, if
16 you don't focus them on the intent of agriculture or
17 something related to agriculture, then you're in the
18 wrong zone. You're defeating the zoning principle and
19 the whole purpose of the ordinance.

20 Q. Would you agree with me that if wine is served at a
21 guest activity, then there's an agricultural component
22 to that guest activity?

23 A. If the wine is produced, if it's part of the Peninsula
24 appellation, if it's part of the process, yeah, it
25 could be.

1 and then you go through, like under Section 2, "Uses
2 Allowed Notwithstanding Section 8.7.3; the following
3 guest activities may be approved with a special use
4 permit," you know. We give more examples.

5 So there's a fail-safe. I thought that's
6 what we were doing. The intent was to do the best job
7 we could defining what it is, what's allowed, what the
8 requirements are, but then to say, also, there's a
9 special use process.

10 Q. Let's look at 2(a) -- I'm sorry, let's look at 2(b), I
11 apologize.

12 So 2 -- maybe we should start there.

13 2 says: Uses Allowed Notwithstanding Section
14 8.7.3(10)(m); the following guest activity uses may be
15 approved with a special use permit from the Township
16 board. And 2(b) says: Meetings of 501(c)(3)
17 non-profit groups within Grand Traverse County.

18 A. Right.

19 Q. Let's just stop there. What governmental interest is
20 served by prohibiting meetings of 501(c)(3) groups
21 based outside of Grand Traverse County?

22 A. It's a limitation on the intensity of use.

23 Q. Okay. Well, what harm comes to Peninsula Township if
24 a 501(c)(3) group based in Kent County has a meeting
25 at a winery?

1 A. If one group has a meeting? I don't know.

2 Q. One group has a meeting.

3 A. I don't think there's any problem.

4 Q. Okay.

5 A. The problem is, how many, how many non-profits are
6 there in Kent County.

7 Q. Well, but is the issue -- so the issue isn't the
8 location of the non-profit; you're saying the issue is
9 the number of meetings?

10 A. Correct.

11 Q. Okay. Well, in enacting this provision, did the
12 committee, those drafters, did you consider whether or
13 not instead of limiting who could attend, you limit
14 how many meetings there could be?

15 A. Yes.

16 Q. Okay. And why did you not go with that limitation?

17 A. There wasn't, there wasn't agreement on that, and that
18 was, that was, that was thought of as being more
19 tricky, because you've gotta have an enforcer counting
20 meetings, I mean, you know, and then those could be in
21 excess of the, of the actual use.

22 This came about because Bob Begin wanted to
23 have some meeting -- and I will tell you very
24 specifically, when he appeared at that meeting, he
25 said what's -- he's asking questions kind of like

1 A. Okay.

2 Q. All right. And would you agree with me that 5(a)
3 requires a winery-chateau to promote agricultural
4 production, with three examples of how to do it?

5 A. I agree with the first part of it, that it includes
6 agricultural production and it gives three examples,
7 yes.

8 Q. Okay. My question is, are these the only ways --
9 well, strike that.

10 Was it the intent when this was drafted
11 that these were the only ways that they could promote
12 agricultural production, or was it intended to be
13 open-ended?

14 A. No, it was intended to be examples.

15 Q. Okay. You would agree with me that 5(a) does not
16 include language along the lines of "such as"?

17 A. Correct.

18 Q. And it doesn't include language along the lines of
19 "et cetera"?

20 A. Correct.

21 Q. Do you believe this is written open-ended or is it
22 limited to these three items?

23 A. It's exemplary. It's intended to provide a framework
24 for the types of uses and the ways of promotion. The
25 ways of promotion, in other words.

1 Q. But you would agree with me, it's not written stating
2 that these are only examples.

3 A. Correct, it doesn't say that.

4 Q. Because it actually includes the words "shall
5 include."

6 A. And it doesn't include the word "such" before the "as
7 follows."

8 Q. What is the governmental interest being served by
9 requiring the promotion of agricultural production?

10 MS. ANDREWS: Objection. It misstates the
11 language in the ordinance.

12 A. The governmental purpose is to tie the use of
13 agricultural-zoned land to agriculturally-centered
14 purposes.

15 BY MR. INFANTE:

16 Q. How is that a governmental interest?

17 A. Well, for example, you know, we have a stated intent
18 on the Peninsula that we want to preserve and promote
19 agriculture, and we have actually adopted an
20 agriculture preservation act called purchases of
21 development rights, whereby we purchase development
22 rights from farmers, pay them pretty substantial money
23 to allow them to keep farming without developing their
24 land, and that is preservation of agriculture as a
25 community, community quality of life and character

issue, at a minimum.

Q. Well, how does 5(a), how does 5(a) keep land in agriculture?

A. Because it keeps the, the idea that if you want to have guest activity uses, they should have some nexus or some relationship to agriculture promotion as opposed to strict commerce or retail.

Q. Okay. My question is, how does 5(a) keep land in agriculture?

A. Well, you popularize an idea, that's what promotion means, right? I mean, you're saying -- I mean, boy, there are a lot of examples, I think, in life where we try to popularize an idea by promoting it.

Q. Okay, how does this do that?

A. Well --

MS. ANDREWS: Objection, you've pulled out one section, execution part of a larger ordinance. It speaks for itself.

A. It's that, but also, it's a limitation on the type of uses that says -- like you can't set up an amusement park, right?

BY MR. INFANTE:

Q. Sir, no, we're focusing on 5(a). 5(a) requires a winery-chateau to promote Peninsula Township agriculture.

1 want to say, for the record, I didn't scribe this but
2 I was involved in the drafting, and the consultant --
3 I think Gordon Hayward, I think, was the planner at
4 that time. I can't recall back then. It was 1989, I
5 believe, when this happened, a year after the Bell
6 lawsuit we were involved in.

7 So I don't know, I don't know. There was
8 an outside consultant.

9 Q. Same answer for when the guest activity amendment was
10 adopted?

11 A. Yup.

12 Q. Do you know whether any studies were done regarding
13 the alleged harms to Peninsula Township?

14 A. It wouldn't have been called that. There was an
15 American Farmland Trust Study done about the tax
16 benefits of retaining agricultural land in townships
17 under 25,000 and the respective economic cost of
18 residential development as opposed to residential
19 consumption of services. That's the only real study
20 that I'm aware of.

21 Q. You're not aware of any other studies that were
22 conducted or used?

23 A. No, I'm not. Well, okay, by "studies," do you mean
24 surveys? I mean, there were residential surveys.

25 Q. I mean studies.

1 A. Okay, no, no.

2 Q. Now, you mentioned residential surveys. Do you still
3 have a copy of those surveys?

4 A. I don't know.

5 Q. I guess I should ask, do you know if surveys were
6 done?

7 A. Oh, yeah, for sure.

8 Q. Do you know if you still have copies of them?

9 A. I don't. I don't. PTP -- I don't know if I do.

10 Q. Do you know if PTP has copies?

11 A. I would have to assume they do. They were involved,
12 you understand, doing those surveys.

13 Q. Well, let me ask a more specific question.

14 A. I should say we were involved, yup.

15 Q. And I'm talking about studies regarding the impact
16 here. I want to kind of go back to our, the
17 conversation we had regarding, you know, the ten
18 lawyers and the ten farmers having a meeting.

19 Did Peninsula Township conduct any study
20 regarding the impact of non-agricultural groups having
21 meetings at Peninsula Township wineries?

22 A. Yes.

23 Q. What was that?

24 A. Again, by "study," are you talking about studies or
25 are you saying consideration for outlined discussion?

1 Q. Studies.

2 A. I don't know of any documents that address that issue.

3 Q. Okay. And for any of the other issues we've talked
4 about today, any of the other paragraphs in the
5 winery-chateau ordinance, are you aware of any study
6 that Peninsula Township conducted regarding the, you
7 know, the impact or the harm that it was trying to
8 prevent?

9 A. Are you excluding general documents like the zoning
10 ordinance, reviews of other jurisdictions like Door
11 County, Napa, Sonoma, Hudson Valley? I mean, that's
12 what we did. We were looking at other wine areas.

13 Q. Okay. Let's take that in parts. Set those aside for
14 a second.

15 A. Okay.

16 Q. Are you aware of any studies that were conducted?

17 A. Other than American Farmland, no.

18 Q. Okay. And if I understand your testimony correctly,
19 the members of the committee looked at ordinances in
20 other wine areas?

21 A. Yes, and the culture and character of those areas.

22 Q. And what areas did it look at?

23 A. Door --

24 Q. That's a bad question. Let me re-ask this. It's a
25 terrible question.

Which specific ordinances did it look at?

A. I wasn't the one that looked at those so I can't tell you, but I can tell you the jurisdictions that we were reviewing to see what the impact of wineries was.

Q. Okay. Let me ask my question a different way.

Did you personally review any ordinances from any other jurisdiction?

A. I don't recall doing so.

Q. Do you have a specific recollection of anyone else doing that?

A. I know Gordon Hayward did that, I think. Okay, if you're asking me a specific meeting or anything, no, I don't.

Q. Well, those are all the questions I have. Thank you.

A. You're welcome.

EXAMINATION

BY MR. MEIHN:

Q. I just have a couple.

So you were about ready to talk about the other jurisdictions that you looked at and the impact of wineries in the overall engagement that you had involved with the ordinance. Can you talk about what those other places/locations were?

A. Yes. The locations specifically were Door County, which is just across the lake from where we are, which

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 RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

EXHIBIT 24

**PENINSULA TOWNSHIP
PLANNING COMMISSION
13235 Center Road, Traverse City, MI
July 14, 2003
7:00 p.m.**

CALL TO ORDER

ROLL CALL

PRESENT: Chair Coulter; Cronander; Sanger; Teahen; Fiebing; Hemming; Kroupa; Hayward, planner; Ford, township attorney; Boursaw, recording secretary.

ABSENT: None.

CHAIR'S REMARKS: None.

ADDITIONS/CHANGES TO AGENDA: None.

PLANNING - 7:00 Master Plan

Master Plan Committee Report: Sanger reported on the Master Plan; feels the process is moving along smoothly and on schedule. The next meeting is scheduled for August 18, with a public hearing possibly in September. Coulter noted that "seasonal housing" should be included under "affordable housing." Also feels that agri-tourism and commercial development should be discussed, since many roadside stands are selling items that do not fall under township guidelines. **Discussion** took place. Coulter also suggested adding a shoreline overlay to the plan.

BUSINESS - 7:30 P.M.

PUBLIC INPUT - BRIEF COMMENTS (FOR ITEMS NOT ON THE AGENDA):

Steve Beeker, 6296 East Shore Rd., thanked Coulter for her service, as this is her last meeting before resigning from the Planning Commission.

1. **CONSENT CALENDAR** (Any member of the Board or the Public may request an item to be removed from the consent calendar and placed on the agenda for discussion).
 - a. Planning Commission Minutes of June 16, 2003.

MOTION KROUPA/FIEBING to approve the June 16, 2003 minutes of the Planning Commission.

APPROVED UNAN

2. COMMUNICATIONS

- a. Township Board Minutes - June 10, 2003.
- b. Zoning Board of Appeals Minutes - June 12, 2003; Agenda for July 10, 2003.

PC Regular Meeting, 07/14/03

returns with necessary and sufficient information in writing.

APPROVED UNAN

4. Public Hearing - Amendment 141 Guest Activities - Winery/Chateau.

Hayward outlined the proposed amendment. **Coulter** opened the public hearing at 8:25 p.m.

Mark Nadolski, 10 McKinley Rd., reviewed several reasons why he is opposed to the amendment.

Laura Johnson, 3464 Kroupa Rd., lives across from Chateau Chantal. Expressed concerns regarding noise, lighting and traffic, and outlined conflicts with the Comprehensive Plan. This amendment gives special privileges to one specific niche of agriculture and to one specific winery chateau. If approved, more clarification is needed regarding guests, activities, tents, hours, etc. Also, this amendment will impact the community with additional use of parks and other township amenities.

Penny Rosi, 2711 Old Mission Rd., feels this type of agri-tourism will have a negative impact on the community.

Jill Byron, 10639 Center Rd., feels this is a commercial application in an agricultural zone. Need to resolve zoning issue. Also concerned about "contract groups" allowed.

MOTION FIEBING/CRONANDER to close public hearing.

APPROVED
UNAN

Coulter closed the public hearing at 9:45 p.m. **Hemming** feels it's too specific and written mainly for Chateau Chantal. Need to broaden the concept to include other types of agriculture. Also feels it would be impossible to enforce. **Sanger** feels this activity will help commerce on the Peninsula re B&B's, gas, stores, etc. **Coulter** reviewed concerns with specific items of the amendment. Also feels it won't be enforced. **Cronander** expressed concerns with the amendment; says this will turn Chateau Chantal into a commercial hall. **Teahen** and **Fiebing** spoke in favor of the amendment; feel that a lot of work has gone into it. **L Johnson** does this include PDR property? **Hayward** yes.

MOTION CRONANDER/FIEBING to recommend approval of "Amendment 141 Guest Activities - Winery/Chateau" to the Township Board, excluding "wedding receptions" and "family reunions".

Fiebing yes. **Cronander** yes. **Coulter** no. **Sanger** yes. **Kroupa** yes. **Hemming** yes. **Teahen** yes.

APPROVED 6-

1

MOTION FIEBING/CRONANDER to accept the language outlined by the Planner regarding removal of "wedding receptions" and "family reunions" and authorize the Planner to make any changes reflecting the removal of these two items.

UNAN

APPROVED

PC Regular Meeting, 07/14/03

MOTION TEAHEN/KROUPA to table the balance of tonight's agenda and adjourn the meeting.

APPROVED UNAN

5. Zoning Ordinance Amendment for Open Space in a Planned Unit Development - PUD/Open Space Committee report dated July 14, 2003. Tabled.

6. Review Site Condominium - Zimmers - Tabled for additional information. Tabled.

7. Rezoning Request - Theodore J. Kohler A-1 to R-1B on Parcel No. 28-11-017-023-10. Tabled for additional information. Continue to table pending required information. Tabled.

8. Amendment to Agricultural Preserve Area Map for PDR Applications - Master Plan Committee Report on Recommendations. Tabled.

9. Scenic View Restrictions for PDR Applications - Committee Report. Tabled.

10. Zoning Ordinance Amendment - Fencing - PUD/Open Space Committee Report; June 24, 2003 report. Tabled.

Township Board Report: None.

Zoning Board of Appeals Report: None.

Committee Reports:

Master Plan/TDR Committee: Fiebing, Kroupa, Sanger (chair).

Site Plan/Plat Review Committee: Cronander (chair), Coulter, Teahen.

Ad Hoc Committees:

Road Committee: Kroupa (chair), Hemming, Sanger.

South End Park Committee: Fiebing (chair), Cronander.

PUD/Open Space Committee: Teahen, Fiebing, Cronander.

Attorney's Report: None.

Planner's Report: None.

Meeting adjourned at 10:35 p.m.

These minutes stand to be approved: _____

Submitted by Jane Louise Boursaw, recording secretary

**PENINSULA TOWNSHIP
PLANNING COMMISSION
September 15, 2003**

Cronander/Sanger
10/20/03
as amended

CALL TO ORDER

ROLL CALL.

PRESENT: Chair Cronander; Hemming; Kroupa; Sanger; Fiebing; Rosi; Teahen; Hayward, Planner; Ford, township attorney; Witkop, recording secretary.

ABSENT: None.

CHAIR'S REMARKS

Cronander mentioned 2 conferences available to the Planning Commission members.

ADDITIONS TO THE AGENDA:

Sanger requested a report from the Planner on the status of the Mapleton Square business center sign and referenced the Township Board minutes that referred the Chateau Chantal Amendment back to the Planning Commission. **Cronander** added the 2 items to the agenda.

PUBLIC INPUT - BRIEF COMMENTS (FOR ITEMS NOT ON THE AGENDA):

Ellen Kohler, 7297 East Shore Rd., asked when the South Park Committee and Road Committee are going to be meeting again. **Kroupa** responded.

MASTER PLAN REPORT

Sanger reported. **Rosi** stated a concern about the Future Land Use Vision wording in the Master Plan and would like that area to be looked at again before it goes to print. **Sanger** agreed with **Rosi** and went over the next steps for the approval of the Master Plan.

- 1. CONSENT CALENDAR (Any member of the Board or the Public may request an item be removed from the consent calendar and placed on the agenda for discussion.)**
a. Planning Commission Minutes of August 18, 2003

MOTION FIEBING/SANGER approve the minutes of August 18, 2003 meeting.

APPROVED UNAN

2. COMMUNICATIONS

- a. Township Board Minutes - August 12, 2003 & ZBA Minutes - August 14, 2003**
b. Planning Commission Chair memo. to the Zoning Board of Appeals Re: POM

3. ELECTION OF OFFICERS

Hemming reported that the Nominating Committee recommended **Fiebing** as Chair, **Cronander** as Vice Chair and **Teahen** as Secretary.

MOTION Hemming/Teahen to close the slate.

unanimously elect the slate

APPROVED UNAN

Fiebing appointed **Rosi** to the plat review committee.

4. Special Use Permit 89 - Port of Old Mission Phase III A. Condominium - Consider recommendation to the Township Board.

Hemming reported from the Town Board. Discussion followed. **Sanger** reported that the decision from the Zoning Board of Appeals was that it appeared a road meeting Township standards could be built and the applicant had not provided a basis for granting a variance. **Cronander** asked Hayward to report on the Drain Commissioner's opinion. **Hayward** replied. **Fiebing** stated that the Planning Commission should not focus on one option for the road because there may several possibilities and that the developer should come to the Board with other options. Discussion followed about water access in this area.

MOTION Kroupa/Teahen to send this item to the Township Board with the recommendation that the original plan be adhered to, with a connection to East Shore road that meets the Zoning Ordinance road standards.

Discussion on the motion followed. **Hayward** reminded the Commission that the Town Board didn't want the Planning Commission to send items to them that do not meet the ordinance. Discussion followed. **Rosi** asked Dick Erickson if there were other options for a connection. **Erickson** stated that there is no desire to make the connection. **Erickson** explained that there are other areas to have a cross road put in that would not be a burden to private property owners. Discussion followed. **Hayward** stated that it is the developer's responsibility to show why he can't build the road and to send this item forward with no regard to the Master Plan, Public Safety, of our Zoning Ordinance in inappropriate. **Fiebing** agreed with Hayward and stated that 50 homes on a dead end road is direct violation of good planning standards. Discussion on the motion continued.

Kroupa stated that since this is already being discussed at the Township Board, he feels that the Planning Commission should move the item forward but wants the record clear that the Planning Commission does not recommend that the Township Board approve this item without the road standards being met.

MOTION AND SECOND RESCINDED

MOTION Kroupa/ Teahen to recommend denial because the developer has failed to comply with the original standards of the Plan, which included a connection that meets Ordinance standards between Center Road and East Shore Road.

APPROVED UNAN

5. Zoning ordinance Amendment 149 Kohler Rezoning request A-1 to R-1B on Parcel No. 28-11-017-023-10. Tabled for additional information.

Hayward gave an update and explained that the applicant is requesting a public hearing to see if the public's opinion is favorable before providing the information previously requested by the Commission. **Cronander** stated that if the applicant wanted to know what the public opinion is, he should ask his neighbors. **Hemming** mentioned a phone call that he received from Mr. Franks asking him to reference a letter written to the Planning Commission in 1991 against rezoning in this area. Discussion continued. **Hayward** stated that the applicant wants to know if the request can move forward without the requested information, and would like the Commission to take formal action. **Fiebing** stated that the applicant is not ready to be rezoned. Discussion continued.

MOTION Cronaner/Rosi to table this request until such time that the road access and suitability for well and septic conditions that the Planning Commission previously requested are met.

APPROVED 6-1 (Hemming)

6. Zoning Ordinance Amendment No 153 directional real estate signs. Master Plan Committee report. consider scheduling a public hearing.

Kroupa reported on the committee's discussion and stated that the road committee saw no reason to move forward on this amendment. **Fiebing** reminded the Commission of Ford's recommendation that this item could be unconstitutional if passed to include only private roads. **Hayward** stated that if a proposal is submitted with specific language and for a specific section of the Ordinance, procedure requires that a public hearing be held and then the amendment be sent to the Town Board. **Ford** disagreed and stated that unless this is how the Township has handled these situations in the past, he had concerns about one person being able to put the Township in the position to have to go to the time and expense of a Public Hearing when there appears to be consensus by the Planning Commission to not move forward. **Ford** also stated that it is different if the person is requesting a re-zoning amendment on their property. Discussion continued.

MOTION Hemming/Cronander to table pending a report from the Planner on past procedures for zoning amendment requests. **APPROVED UNAN.**

7. Zoning Ordinance Amendment No. 151 - Open Space in a Planned Unit Development PUD/Open Space Committee. Consider modifying the amendment for the Public Hearing in October.

Hayward reported. **Hemming** reported on discussion at the Township Board about the past interpretation of lot coverage in a PUD, and stated that he feels the proposed changes to the amendment are too complicated and would be difficult for the Zoning Administrator to track.. **Hayward** explained the amendment in simpler terms for clarification purposes. **Hemming** requested verification that the coverage allowed on each lot would not "float". **Hayward** stated that changes to each lot's coverage allowance would require an amendment to the Special Use Permit. Discussion followed. **Fiebing** offered a clearer version of the language. Discussion continued on whether to send the current amendment forward and have the language change sent through as a separate item.

MOTION Cronander/Sanger to change the language to Fiebing's version to add sub-section (5) to section 8.3.5 and hold the public hearing in October with the revised language. **APPROVED UNAN**

8. Amendment to Agricultural Preserve Map for PDR Applications - Master Plan Committee report on recommendations. Consider recommending that the Township Board authorize distribution for comments pursuant to the Planning Act.

Sanger presented the Committee's recommendations. **Hayward** explained the history that lead up to this request. **Sanger** stated that he feels the property owners affected by these recommendations should be given due process. **Hayward** explained that the procedure for an amendment to the Master Plan included a public hearing but suggested that letters could be mailed to all of the affected property owners. **Hayward** also stated that he would like to see the Planning Commission make a recommendation on these parcels to the Town Board so that the PDR Selection Committee can continue to move forward. Discussion followed about what type of parcels should be included in the PDR program and about the language and intent of ordinance # 23.

MOTION Sanger/Kroupa that a public informational meeting be held at the October Planning Commission meeting.

APPROVED UNAN

Dave Edmondson, 2514 Nelson Rd., asked who was making the recommendation to not include the Edmondson parcel in the additions to the Ag. Preserve Map. **Fiebing** responded.

Harold Edmondson, 12396 Peninsula Drive., read a resolution that was passed by the Town Board in 1995 for the purpose of recommending the Edmondson parcel for the State Program. **Hayward** explained the State program that existed at that time and how it related to the current PDR program. Discussion followed on the Edmondson Parcel.

Fiebing explained to Harold that this item would more properly be discussed at the Public informational meeting in October. **Sanger** stated that he would make sure that Mr. Edmondson was notified of the next committee meeting regarding this issue.

9. Master Plan Committee recommendations on Lagina request to add property to the Agricultural Preserve Area Map.

Sanger reported.

MOTION Sanger/Cronander to combine item 9 with item 8 for the purpose of holding an informational meeting.

APPROVED UNAN

10. Master Plan Committee recommendation on proposal by Schroeder to amend the Master Plan to add the Wilson Road scenic view area to the Prime Scenic View Map.

Hayward explained the request. **Hemming** asked how the property owners feel about being added to the Scenic View Map. **Hayward** responded.

MOTION Hemming/Cronander to add to items 8 & 9 for an informational meeting.

APPROVED UNAN

11. Master Plan Committee Report on recommendations regarding Scenic View restrictions for PDR applications.

Hayward explained the procedure for this item. **Sanger** reported from the committee. **Hemming** requested clarification on what constitutes "vegetation". **Hayward** responded that only non-crop vegetation such as wind breaks would be restricted.

MOTION Cronander/Rosi to accept the recommendations of the committee for the Scenic View restrictions.

APPROVED UNAN

12. Zoning Ordinance Amendment No. 152 - Fencing - Review Ordinance format for October Public Hearing.

Fiebing stated that he feels the language is confusing and needs to be sent back to the committee.

MOTION Kroupa/Sanger to withdraw for public hearing and send back to the Committee.

APPROVED UNAN

13. Review Site Condominium - Zimmers - Tabled for additional information.

No additional information. Remained tabled.

14. Preliminary presentation by S.K.H.W. LLC on preliminary Intent for the Development of the nine acre parcel known as Bowers Harbor Inn.

Hayward explained that the developer requested to be last on the agenda. No one present.

15. Request for a report from the Planner on the Mapleton Square Business Center Sign.

Hayward read from the Township Board minutes from December 16, 2002. **Sanger** stated that he was satisfied.

16. Chateau Amendment No. 141

Hemming reported that the Township Board returned this item to the Planning Commission because of the County Planning Commission's decision to recommend denial of this amendment. **Hayward** stated that the County Planning Commission recommended denial based on the Policy section of the Master Plan that deals with allowed uses on Agricultural land, specifically that allowed uses should be limited to those directly related to the operation of a farm and not extend commercial use. **Fiebing** read the opinion of the County Planning Commission. Discussion followed. **Hayward** mentioned a letter that had been received from the Protect the Peninsula group and recommended that the item be tabled pending further discussion with them. **Sanger** stated that he feels that these discussions should take place with a committee of the Planning Commission. **Hayward** explained that this request was originally made by Chateau Chantal and that this discussion was at their request. He further explained that any revised requests would be sent to the Planning Commission for review. **Kroupa** stated that he was concerned with the County Planning Commission's opinion that this item isn't an agricultural use. Discussion continued.

MOTION Teahen/Hemming to table Amendment 141.

APPROVED UNAN

TOWNSHIP BOARD REPORT

Hemming reported on the Hooper purchase.

BOARD OF APPEALS REPORT

Sanger reported on 4 items from the September meeting and explained the challenges that the ZBA deals with on non-conforming structures.

Fiebing stated that the City has a specific policy to deal with non-conforming structures that seems to work well and explained. **Ford** stated that if the ZBA reports to the Planning Commission that there is a pattern of a problem with the Ordinance, the Planning Commission should consider an amendment to the ordinance to correct the problem. **Fiebing** stated that the issue of non-conforming structures and natural life should be sent to Committee and assigning it to the Site Plan review committee. Discussion followed about setbacks and overhangs.

STANDING COMMITTEES REPORTS

Master Plan/TDR Committee- Fiebing, Kroupa, Sanger(Chair)

Site Plan/Plat review - Rosi, Teahen, Cronander(Chair)

AD HOC COMMITTEE REPORTS

Road Committee - Hemming, Sanger, Kroupa (Chair)
South End Park Committee - Cronander, Fiebing(Chair)
PUD/Open Space Committee - Teahen, Fiebing, Cronander(Chair)

ATTORNEY REPORT

Ford stated that at the last Township Board Meeting the Town Board authorized him to take action regarding the Santucci matter and whether a property owner can be a migrant on their own farm.

PLANNER REPORT

Hayward reported on the pre-construction meeting for the sewer and water extension and other pending projects.

MOTION Teahen to adjourn.

APPROVED UNAN

Meeting adjourned at 10:10 p.m.

These minutes stand to be approved _____

Submitted by Wendy L. Witkop, recording secretary.

**Peninsula Township Planning Commission
Peninsula Township Hall
13235 Center Rd., Traverse City, MI 49686
June 21, 2004
7:00 p.m.**

CALL TO ORDER

ROLL CALL

PRESENT: Chair Fiebing, Cronander; Sanger; Rosi; Teahen; Hemming; Kroupa; Hayward, planner; Ford, township attorney; Boursaw, recording secretary.

ABSENT: None.

7:00 p.m. - BUSINESS MEETING

CHAIR'S REMARKS: None.

ADDITIONS TO AGENDA: None.

ATTORNEY'S REPORT: None.

PLANNER'S REPORT: Hayward noted that staff is working on getting the Master Plan into a form that can be distributed.

PUBLIC INPUT - BRIEF COMMENTS (FOR ITEMS NOT ON THE AGENDA):

Jill Byron, 10639 Center Rd., asked what was happening at the Goodman Farm (corner of Bluff and Center Roads), where excavating is taking place. Hayward has not received any information, but will check on it.

1. COMMUNICATIONS

- a. Township Board Minutes
- b. Board of Appeals Minutes

2. CONSENT CALENDAR (Any member of the Board or the Public may request an item to be removed from the consent calendar and placed on the agenda for discussion).

- c. PC Minutes of May 17, 2004
- d. Site Condominium - Zimmers - Continue table pending report from applicant on water and sewer availability.

Rosi asked that the minutes be removed for discussion.

MOTION TEAHEN/CRONANDER to approve the consent calendar as amended.

APPROVED

UNAN

3. Public Hearing - Ordinance Amendment 141 - Guest Activity Uses - Winery Chateau.

Hayward gave an overview of the specific standards, procedures, and requirements for events that can and cannot take place under this proposed amendment. The amendment clarifies a number of current activities, i.e. wine/food seminars, cooking classes, ag-related events, etc. A number of activities are allowed, but with specific standards and requirements.

Cronander noted that when this was first discussed, the events were not to appear in competition with other commercial operations on the Peninsula. She feels this amendment accomplishes that. **Rosi** discussed parking spaces.

Fiebing opened the public hearing at 7:27 p.m.

Mark Nadolski, 10 McKinley Rd., noted further issues regarding parking.

Fiebing closed the public hearing at 7:28 p.m.

MOTION TEAHEN/CRONANDER to recommend approval of Ordinance Amendment 141 to the Township Board. **APPROVED 6-1, Hemming voting no**

4. Hooper Conservation Easement Request 2.

Teahen asked to be excused from this item, as he is representing the applicant. This was agreed.

Hayward explained the request, noting that this has come back to the Planning Commission after the building envelope was expanded. He believes this is a reasonable request. **Fiebing** doesn't see a problem, but feels it should go to the Development Review Committee for review, to avoid setting a precedent for similar conservation easement modifications in the future. Consensus to send this to committee, which will review and bring back to the Planning Commission.

5. Ordinance Amendment No. 153 - Rezoning Request - Jade Venture Group; Part of 28-11-031-004-00 - Master Plan and Ordinance Committee Report.

John Crosby, Generations Management, representing Jade Venture Group, was present and explained the request. They are requesting that the land be rezoned to R-1A; the surrounding land is also zoned R-1A. Jade Venture Group is seeking a use by right and feels this zoning complies with the zoning in the Master Plan.

Sanger gave a committee report, referencing the applicant's use by right, the PDR program, density, state law, transfer of density from one property to another, and other issues. The committee recommends denial of this rezoning request, as the applicant has other options available. **Fiebing** noted adjacent property owners who might consider transferring development rights. By asking for part of the

property to be rezoned, this leaves the remaining property open for future rezoning. **Hayward** noted that the applicant isn't in a hurry to develop; thus, the Township can continue the planning for this area which was started in 1991. Suggested working on a sub-area plan and asking the applicants to postpone any action on their request to give the Township time to come up with a plan everyone can agree on.

Mark Nadolski, 10 McKinley Rd., noted that voters have a right to referendum to vote against a zoning change. Feels it would save time to get the public involved.

Fiebing asked if **Crosby** would consider tabling this item. **Crosby** agreed and confirmed that he is requesting that the Planning Commission table this item pending further planning and information.

MOTION HEMMING/TEAHEN to table Ordinance Amendment No. 153. APPROVED UNAN

6. Request of Ronald R. Pohl, 8546 East Beach Trail, to reduce agricultural setback. Development Review Committee Report.

Rosi gave a committee report, noting that **Pohl** was not present at the meeting. He requested that the Planning Commission table this until next month's meeting, pending a site visit. **Discussion** took place regarding the ag setback. **Hayward** noted that there are procedures built into the Zoning Ordinance regarding ag setbacks.

MOTION ROSI/KROUPA to table the Request of Ronald R. Pohl regarding reducing the agricultural setback, and refer this to the Development Review Committee for review.

APPROVED

UNAN

7. Special Use Permit No. 92 - Proposed Amendment to Hidden Ridge Special Use Permit No. 76 - Phase II - Zimmers.

Hayward noted that the attorneys are discussing the proper procedures for handling this issue.

MOTION CRONANDER/TEAHEN to table Special Use Permit No. 92 until next month pending resolution of issues regarding the waterfront, parking for the waterfront, trees, and condo regulations.

APPROVED

UNAN

8. Chateau Grand Traverse SUP No. 94 - Additions to the winery building for office and bottle storage - Introduction.

Hayward gave an overview, referencing documents distributed to the Planning Commission. The applicants would like to make additions to the winery building for office space and bottle storage. The space in the building would change, but the uses would not change; thus, this is an amendment to the site plan.

Fiebing referred this to the Development Review Committee.

9. Planning Commission Minutes of May 17, 2004.

Rosi noted that on page 3, Item No. 7, paragraph 2 actually refers to Item No. 6. and should be relocated as such.

MOTION ROSI/KROUPA to approve the Planning Commission Minutes of May 17, 2004, as amended. **APPROVED UNAN**

Consensus to re-schedule the July meeting of the Planning Commission to July 12, 2004.

TOWNSHIP BOARD REPORT: Hemming reported.

BOARD OF APPEALS REPORT: Sanger reported.

STANDING COMMITTEE REPORTS: None.

Ordinance Committee: Cronander (chair), Kroupa, Fiebing, Sanger: Cronander reported.

Master Plan Committee: Sanger (chair), Cronander, Kroupa, Fiebing. Sanger reported.

Development Review Committee: Rosi (chair) Teahen, Fiebing. Rosi reported.

Steering Committee: Fiebing (chair), Cronander, Sanger, Rosi.

MOTION TEAHEN to adjourn meeting.

APPROVED
UNAN

Meeting adjourned at 8:50 p.m.

These minutes stand to be approved: _____

Submitted by Jane Louise Boursaw, recording secretary