

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

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

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal
corporation,

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

Case No. 1:20-cv-01008

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

**PROTECT THE PENINSULA'S
MOTION TO EXCLUDE
TESTIMONY AND EVIDENCE FROM
GARY MCDOWELL AND TERI QUIMBY**

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**PROTECT THE PENINSULA’S MOTION TO EXCLUDE TESTIMONY AND
EVIDENCE FROM GARY MCDOWELL AND TERI QUIMBY**

Intervenor Protect the Peninsula, Inc. (PTP) respectfully requests the Court issue an order under Fed. R. Civ. P. 16(f) to exclude testimony and disregard opinions from two of Plaintiffs’ three proposed “rebuttal expert witnesses” -- Gary McDowell and Teri Quimby. Plaintiffs did identify a rebuttal planning witness, David Moss, who provided a report rebutting opinions presented by PTP’s expert land use planning witness, Thomas Daniels, as discussed by the Court and parties at the Rule 16 conference and authorized in the Second Amended Case Management Order (CMO). (ECF 343)

Plaintiffs’ two excess witnesses are not planning witnesses and do not rebut Dr. Daniels opinions; they principally address issues on which Plaintiffs carry the burden of proof. Mr. McDowell is a farmer and former Director of the Michigan Department of Agriculture and Rural Development; he opined on “agritourism” and the importance of supporting Michigan farmers to thrive. Plaintiffs rely on Mr. McDowell’s report to support their summary judgment motion arguing that Peninsula Township zoning impairs protected “commercial speech,” though Mr. McDowell did not actually opine on advertising or speech. Ms. Quimby is an attorney and former member of the Michigan Liquor Control Commission; she reiterates Plaintiffs’ preemption legal arguments verbatim, and Plaintiffs rely on her opinions in summary judgment briefing on that claim.

Plaintiffs’ identification of two new experts to support claims upon which they have the burden of proof is untimely and unfair to PTP, which lacks an opportunity under this Court’s Second Amended CMO to identify rebuttal experts to Plaintiffs’ witnesses.

PTP intervention on the eve of trial thrust this case into atypical procedures: the Court authorized a second phase of discovery, a second set of experts, and a second round of dispositive motions to accommodate PTP. The Court was clear this second phase is not a start-over and it

would not rewind this case back to February 2021. Plaintiffs already had the opportunity to develop and present their case, and the Township had the opportunity to defend it.

Coincidentally (or not), these two new witnesses support Plaintiffs' position on two issues Plaintiffs lost in the first summary judgment order – whether liquor trafficking laws preempt locally-imposed limits on operating hours applicable to wineries (Ms. Quimby) and that weddings are not commercial speech protected by the First Amendment (Mr. McDowell). Plaintiffs cite in their most recent summary judgment briefs the reports of these two witnesses to support revamped theories to bolster their position on these two claims. Plaintiffs seek a second bite at the apple on the issues they already lost; it seems they hope support from these political appointees will help persuade the Court to find for their positions.

Plaintiffs should have identified these witnesses in August 2021, under the pre-PTP-intervention First Amended CMO establishing the schedule for expert witness designations for parties with the burden of proof. (ECF 72) Plaintiffs failed to do so and instead labelled them as “rebuttal experts” to PTP’s planning expert (Dr. Daniels) under the post-PTP-intervention Second Amended CMO. (ECF 343) Neither is a planning expert and neither offered rebuttal to Dr. Daniels. Plaintiffs’ attempt to bring in new non-rebuttal non-planning expert witnesses violates both CMOs. (ECF 72, 343) Allowing Plaintiffs to identify two new experts beyond their rebuttal planning witness wastes judicial resources and is unfair unless PTP has an opportunity to designate rebuttal witnesses to these witnesses.

PTP requests the Court exclude testimony and disregard opinions from Mr. McDowell and Ms. Quimby and order Plaintiffs to pay PTP’s expenses resulting from Plaintiffs’ failure to comply with the CMOs under Rule 16(f). PTP also objects under Fed. R. Civ. P. 56(c)(2) to Plaintiffs’

reliance on untimely opinions from Mr. McDowell and Ms. Quimby to support their summary judgment briefs.

Respectfully submitted,

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**BRIEF IN SUPPORT OF PROTECT THE PENINSULA’S MOTION
TO EXCLUDE TESTIMONY AND EVIDENCE
FROM GARY MCDOWELL AND TERI QUIMBY**

TABLE OF CONTENTS

| | |
|---|-----------|
| I. INTRODUCTION | 2 |
| II. FACTUAL BACKGROUND | 3 |
| a. Post-PTP intervention, the Court opened a limited new litigation phase. | 3 |
| b. The Court authorized PTP to identify a land use planning expert and Plaintiffs to identify a rebuttal planning expert..... | 4 |
| c. PTP timely identified its planning expert; Plaintiffs identified a rebuttal planning witness plus two non-planning witnesses. | 6 |
| d. The parties served witness reports, then Plaintiffs served Mr. Moss’s supplemental report responding to Dr. Daniels’ report..... | 8 |
| e. Plaintiffs rely on Mr. McDowell’s and Ms. Quimby’s opinions to support summary judgment on issues they previously lost. | 9 |
| III. LEGAL STANDARDS | 10 |
| IV. ARGUMENT | 12 |
| V. CONCLUSION | 16 |

EXHIBITS

| | |
|---|--|
| Ex 1 – PTP Expert Witness Disclosure | |
| Ex 2 – Plaintiffs’ Rebuttal Expert Witness Disclosure | |
| Ex 3 – Report by Dr. Thomas Daniels | |
| Ex 4 – Report by David Moss | |
| Ex 5 – Report by Teri Quimby | |
| Ex 6 – Report by Gary McDowell | |
| Ex 7 – Supplemental Report by David Moss | |
| Ex 8 – Email exchange – request for concurrence | |
| Ex 9 – Unpublished Cases | |
| • <i>Oklahoma v. Tyson Foods, Inc.</i> , 2009 WL 1065668 (N.D. Okla. Apr. 17, 2009) | |
| • <i>Maxum Indem. Co. v. Drive W. Ins. Servs.</i> , 2014 WL 12653865, (S.D. Ohio June 13, 2014) | |

I. INTRODUCTION

Following PTP intervention, the Court authorized PTP to identify a planning expert and Plaintiffs to identify a rebuttal planning expert. PTP identified Thomas L. Daniels, Ph.D., an expert in land use planning, and Plaintiffs identified David Moss, who has some experience related to land use planning. The Court also authorized PTP and Plaintiffs to disclose expert reports. Dr. Daniels and Mr. Moss did so, and Mr. Moss also disclosed a supplemental report directly responding to Dr. Daniels' opinions. Mr. Moss's credentials and opinions are not presently at issue.

Plaintiffs also identified two new non-planning witnesses disguised as "rebuttal experts." Both are former political appointees to state governmental entities with regulatory authority over agriculture (Gary McDowell) and liquor trafficking (Teri Quimby); neither offers land use planning opinions. Plaintiffs rely on these two witnesses' opinions not to rebut Dr. Daniels but to bolster their summary judgment briefing arguing that Peninsula Township zoning applicable to wineries is preempted by state liquor trafficking regulations and impairs agritourism, which they characterize as advertising that is protected commercial speech. (ECF 501, 473)

As the parties with the burden of proving their preemption and commercial speech claims, Plaintiffs had until August 13, 2021, to identify these witnesses under the Court's First Amended Case Management Order (CMO). (ECF 72) They did not. After PTP intervention, the Court issued a Second Amended CMO authorizing limited procedures to comply with the Sixth Circuit mandates on PTP intervention – not a start-over for Plaintiffs to reinvigorate rejected claims. (ECF 301, 303, 319, 343, 385)

While Plaintiffs labelled these new witnesses as "rebuttal experts" to PTP planning expert Dr. Daniels, neither identifies land use planning expertise, neither opines on land use planning in Michigan or Peninsula Township nor any particular Peninsula Township Zoning Ordinance

(PTZO) provisions, and neither offers rebuttal to Dr. Daniels. Any contrast between Dr. Daniels' opinions and theirs does not make their opinions rebuttal to Dr. Daniels; it reflects that Plaintiffs hired them to support their case-in-chief, which Dr. Daniels rebuts.

Plaintiffs' attempt to bring in new non-rebuttal non-planning witnesses is untimely under the First Amended CMO and violates the Second Amended CMO. (ECF 72, 343) Presenting three witnesses where one was authorized and suffices wastes judicial resources. It is also unfair to PTP to allow two new non-planning experts without an opportunity for PTP to rebut them. PTP requests this Court exclude testimony from Mr. McDowell and Ms. Quimby, disregard their opinions cited to support Plaintiffs' summary judgment briefing, and order Plaintiffs to pay PTP expenses under Rule 16(f)(2).

Additionally, PTP objects under Fed. R. Civ. P. 56(c)(2) to Plaintiffs' improper reliance upon Mr. McDowell's and Ms. Quimby's reports to support their summary judgment positions on commercial speech and preemption respectively because their reports are inadmissible as untimely opinions from late-designated witnesses.

II. FACTUAL BACKGROUND

a. Post-PTP intervention, the Court opened a limited new litigation phase.

Before PTP was granted intervention, under the First Amended CMO, Plaintiffs and the Township had the opportunity to identify experts. (ECF 72) Plaintiffs identified an expert to testify regarding damages; the Township identified none. (ECF 303, PageID.10838-10842) The Court granted summary judgment on many claims in June 2022. (ECF 162) In early August 2022, Plaintiffs were preparing for trial mostly on damages. They dismissed other issues as "ancillary" and not to be addressed at trial: freedom of religion was "moot"; freedom of association was "a

legal issue for post trial briefing”; they “d[id]n’t plan to present any evidence” on their “content-based speech” claim; and their regulatory takings claim was “part and parcel with [their] damages claim.” (ECF 239, PageID.8670-8672)

Responding to PTP intervention, the Court adjourned trial, vacated part of its summary judgment order, considered motions on PTP interests, then modified the schedule for PTP to be heard. (ECF 236, 301, 303, 319, 320, 343, 385) The Court revised the First Amended CMO because its deadlines had all “passed without PTP participating in discovery or meaningful motion practice.” (ECF 301, PageID.10699) The Court said it would “not rewind this case” or “go back to square one” because of PTP intervention. (ECF 301, PageID.10700) Instead, the Court articulated what each party may do, “[c]onsidering the reasons why PTP has been permitted to intervene in this matter and how its intervention requires this case to move forward.” (*Id.*) Under the subtitle, “**Limited Discovery**,” the Court explained the post-intervention discovery phase:

As for discovery that PTP seeks to pursue, such discovery will be limited to the issues that PTP has an interest in. That is, PTP may pursue discovery related to the nine issues that the Court indicated PTP has an interest in. And depending on the outcome of the Court’s decision on the remaining three issues, PTP may be able to pursue discovery related to those issues.

(ECF 301, PageID.10704) The Court issued the Second Amended CMO on May 2. (ECF 343)

b. The Court authorized PTP to identify a land use planning expert and Plaintiffs to identify a rebuttal planning expert.

In August 2022, in requesting trial adjournment, PTP expressed interest in identifying a land use planning expert witness:

PTP plans to identify an expert in land use and planning to testify regarding the farmland preservation, nuisance avoidance, infrastructure management, and compatible land use interests that Township planning, zoning, programs, and ordinances advance and how these protect the property and quality of life of PTP members.

(ECF 229-1, PageID.8451-52)

In the April 4, 2023, Joint Status Report, Plaintiffs acknowledged PTP's intent to name a land use planning expert:

Plaintiffs' Position:

PTP shall furnish the name of PTP's expert witness related to "*planning*" by April 28, 2023.

Plaintiffs shall furnish the names of rebuttal expert witnesses to PTP's expert witnesses, if any, by May 15, 2023.

The Township may not name any expert witnesses.

* * *

PTP's Position:

PTP expects to be able to furnish the name of PTP's expert witness on *land use planning* by July 14, 2023.

(ECF 323, PageID.11901, internal citations omitted, emphases added)

At the April 21, 2023, Rule 16 hearing, the Court addressed land use planning experts:

THE COURT: Okay. All right. Let's inquire -- Let me inquire about experts. There is references in the status report regarding land use planning experts. Do we anticipate experts on other subjects or is it just land use.

MS. ANDREWS: Just land use, your Honor. * * *

THE COURT: * * * You agree with that, Mr. Infante?

MR. INFANTE: Yes. We have a damages expert already. We would do a rebuttal planning expert. Our only question for the Court-- the issue is, does the Township then get a rebuttal planning expert of their own? * * *

(ECF 385, PageID.14146) Mr. Infante explained his "understanding is PTP wants a planning expert" but that Plaintiffs "are always worried about the Township trying to backdoor some sort of damages expert," to which Township Counsel responded by explaining they may want a planning expert. (*Id.* at PageID.14146-14148) The Court closed the experts discussion by instructing the

Township to file a motion if it wanted to “pursue a land use expert” and could not reach agreement among the parties, then instructed:

THE COURT: As far as naming land use experts, PTP, June 19th.

MS. ANDREWS: Yes, your Honor.

THE COURT: Plaintiff July 3rd.

(*Id.* at PageID.14149)

On May 2, 2023, the Court issued the Second Amended CMO (ECF 343):

| | | |
|--|---------------------|-------------------------------|
| Disclose Name, Address, Area of Expertise and a short summary of expected testimony of Expert Witnesses (Rule 26(a)(2)(A)) | PTP: Plaintiffs: | JUNE 19, 2023 JULY 3, 2023 |
| Disclosure of Expert Reports (Rule 26(a)(2)(B)) | | AUGUST 28, 2023 |

c. PTP timely identified its planning expert; Plaintiffs identified a rebuttal planning witness plus two non-planning witnesses.

On June 19, 2023, PTP provided a concise but comprehensive summary of proposed planning testimony from Dr. Daniels, a tenured professor at the University of Pennsylvania Department of City and Regional Planning:

Dr. Daniels is expected to testify regarding land use planning, the use of zoning regulations to control land use, the use of agricultural zoning, the application of agricultural zoning to wineries, and the connection between agricultural zoning and farmland preservation. Dr. Daniels is further expected to testify regarding the governmental interests advanced by the Peninsula Township Zoning Ordinance, including agricultural and farmland preservation and ensuring compatible land uses in Peninsula Township. Dr. Daniels is expected to provide expert testimony on how the Peninsula Township Zoning Ordinance, in conjunction with Peninsula Township’s master plan and other ordinances, advances those governmental interests. Dr. Daniels is expected to testify regarding how the Peninsula Township Zoning Ordinance, including sections that address wineries and winery tasting rooms, are tailored to address the governmental interests of agricultural and farmland preservation and ensuring compatible land uses. Dr. Daniels is expected to testify regarding how the land use and special use

permits issued by Peninsula Township to wineries advance its governmental interests of agricultural and farmland preservation and ensuring compatible land uses and are tailored to address those interests.

(Ex 1) PTP also provided Dr. Daniels' *curriculum vitae*, which lists his experience as a professor of land use planning; seven books related to agricultural preservation and land use planning; numerous recent publications on land use policy, planning, and agricultural preservation; grants administered to study farmland preservation and land use planning; and membership in professional planning organizations. (*Id.*)

Two weeks later, on July 3, 2023, Plaintiffs' Rebuttal Expert Witness Disclosures feigned uncertainty as to what Dr. Daniels might testify about to rationalize naming *three* experts:

Because PTP has only disclosed the general area of testimony for its expert witness and that witness has not disclosed an expert report, the Wineries, in an abundance of caution, disclose expert witnesses on various land use planning and zoning topics *though these experts may not testify when PTP's expert discloses his report and the specific opinions are known.*

(Ex 2, emphasis added) Plaintiffs identified David Moss, Gary McDowell, and Teri Quimby.

Mr. Moss is proposed as a rebuttal expert "regarding land use planning and the commonly available types of zoning regulations to promote and preserve agricultural land use and rural character." (Ex 2 p. 3) Plaintiffs provided Mr. Moss's resume; he lacks formal land use planning education but "manages a consulting firm specializing in zoning and building permits, site acquisition, architecture and engineering, and constraints analyses for the real estate, insurance, and telecommunications industries." (*Id.*, pp. 6-7)

Mr. McDowell is the former Director of the Michigan Department of Agriculture and Rural Development (MDARD) and, per Plaintiffs' disclosure, an expert on rural development, agricultural preservation, and agritourism. (Ex 2, p. 2) Plaintiffs summarized his potential testimony:

Mr. McDowell is expected to testify as a rebuttal expert to PTP's named expert, Dr. Thomas L. Daniels, regarding agricultural preservation, value added agriculture, and agritourism as a means to preserve agricultural land. Mr. McDowell is expected to testify that the Winery Ordinances and the enforcement of those ordinances do not further the preservation of agricultural land and, instead, have the opposite effect. Mr. McDowell is expected to testify that value-added activities and agritourism like those activities the Wineries seek to engage in further the preservation of agricultural land.

(Ex 2 pp. 2-3) Plaintiffs' disclosures provided no resume for Mr. McDowell.

Ms. Quimby is a former Michigan Liquor Control Commission member and, per Plaintiffs' disclosure, an expert on Michigan alcohol administration, licensing, purchasing, enforcement, merchandising, and distribution. (Ex 2 p. 2) Plaintiffs summarized her potential testimony:

Ms. Quimby is expected to testify as a rebuttal expert to PTP's named expert, Dr. Thomas L. Daniels, regarding local authority to regulate alcohol licensees by way of zoning **should Dr. Daniels provide an expert opinion on this topic.** Ms. Quimby is expected to testify regarding the limited authority granted to local governments to regulate the manufacture, sale and distribution of alcohol and the Michigan Liquor Control Commission's policies and procedures to ensure local governments do not exceed that authority should Dr. Daniels provide an expert opinion on this topic. **Should Dr. Daniels not offer expert testimony on these topics, the Wineries do not expect to offer Ms. Quimby's testimony.**

(Ex 2, p. 3, emphases added) The disclosures also provided no resume for Ms. Quimby.

d. The parties served witness reports, then Plaintiffs served Mr. Moss's supplemental report responding to Dr. Daniels' report.

On August 28, PTP and Plaintiffs exchanged reports from their identified proposed experts. (Exs 3, 4, 5, 6) Dr. Daniels and Mr. Moss addressed Peninsula Township land use planning and zoning, including specific aspects of challenged PTZO provisions. (Ex 3, 4) Mr. Moss anticipated a forthcoming "supplemental report" after reviewing Dr. Daniels' report. (Ex 4, p. 2)

Mr. McDowell opines on the stresses of farming in Michigan and how agritourism, which he suggests includes a wedding held in barn or vineyard, is valuable. (Ex 6 p. 3) He states agritourism is “important and necessary” because “a farm’s success rate can increase exponentially” with it. (*Id.*, p. 4) His opinions make no reference to Dr. Daniels or Peninsula Township or land use planning or the PTZO or advertising.

Ms. Quimby opines that the Commission has “sole authority” and “complete control” over “alcohol in Michigan” and offers interpretations of constitutional, statutory, regulatory, and zoning provisions and caselaw related to alcohol. (Ex 5 pp. 3-4) Her opinions make no reference to Dr. Daniels nor any PTZO provisions but conclude the PTZO prohibits what state law allows, there is conflict between the PTZO and state law, and state law preempts local regulation. (Ex 5 ¶¶ 10.f, 11.c, 12)

On September 11, Plaintiffs served Mr. Moss’s “supplemental” report responding to Dr. Daniels’ report and opinions. (Ex 7)

e. Plaintiffs rely on Mr. McDowell’s and Ms. Quimby’s opinions to support summary judgment on issues they previously lost.

When the Court first considered Plaintiffs’ preemption argument, it concluded that Michigan law does not preempt PTZO limits on winery operating hours but does preempt PTZO provisions on amplified music and catering kitchens. (ECF 162, PageID.5989-5993) The Court also concluded that weddings are not protected commercial speech but invalidated other PTZO provisions as impairing commercial speech. (ECF 162, PageID.6004-6005) After PTP intervened, the Court vacated those parts of its summary judgment order. (ECF 301, PageID.10697-10698)

Fast-forward to the second round of summary judgment motions, Plaintiffs cited Ms. Quimby’s opinions to support their response opposing Peninsula Township’s preemption summary

judgment motion. (ECF 473) Addressing the meaning of Mich. Admin Code R. 460.1030(1), providing liquor licensees “shall comply with all state and local building, plumbing, zoning, sanitation, and health laws, rules, and ordinances,” Plaintiffs state:

Teri Quimby, former Commissioner of the Michigan Liquor Control Commission confirms this Court’s conclusion that the Rule is simply a “reminder,” and “[t]he approval of an alcohol license does not equate to a building occupancy permit, for example.”

(ECF 473, PageID.18015; ECF 473-13) They further cite her opinions to support their argument that the Michigan Legislature “only allowed local governments to have a say in several discrete areas.” (ECF 473, PageID.18018)

Plaintiffs cited Mr. McDowell’s opinions to support their reply on their free speech summary judgment motion. (ECF 501) Plaintiffs argue “modern commercial advertising is agritourism,” advertising and marketing attracts customers so a farm business can sell products, then conclude this is consist with, *inter alia*, “the Michigan Department of Agriculture” [sic], citing Mr. McDowell’s opinions. (ECF 501, PageID.19456; ECF 501-1)

III. LEGAL STANDARDS

Part of the purpose of Rule 16 is “discouraging wasteful pretrial activities.” Fed. R. Civ. P. 16(a)(3). At a Rule 16 conference, a district court may consider and act on matters including “avoiding unnecessary proof,” “limiting” expert testimony, and “controlling and scheduling discovery, including orders affecting disclosures . . . under Rule 26.” Fed. R. Civ. P. 16(c)(2)(D), (F). The post-Rule 16 conference order “controls the course of the action unless the court modifies it.” Fed. R. Civ. P. 16(d). A court “may issue any just orders” if a party “fails to obey a scheduling or other pretrial order,” and “must order the party, its attorney, or both to pay the reasonable expenses--including attorney’s fees--incurred because of any noncompliance with this rule, unless

the noncompliance was substantially justified or other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 16(f).

A party must disclose the identity of any witness it intends to call as an expert “at the times and in the sequence that the court orders.” Fed. R. Civ. P. 26(a)(2)(A), (D).

A district court has discretion to limit proposed rebuttal testimony “to that which is directed to rebut new evidence or new theories proffered in the defendant’s case-in-chief.” *Martin v. Weaver*, 666 F.2d 1013, 1020 (6th Cir. 1981) (citing *Bowman v. General Motors Corp.*, 427 F.Supp. 234, 240 (E.D.Pa.1977) (noting abuse of discretion has only been found where “defendant’s witnesses have presented an alternative theory or new facts or have otherwise created a need for a particularized response”) (citing cases)). While proper rebuttal may include evidence that “might have been offered in chief,” (*id.*, quotation omitted), rebuttal “is not an opportunity for the correction of any oversights in the plaintiff’s case in chief.” *Oklahoma v. Tyson Foods, Inc.*, 2009 WL 1065668, at *1 (N.D. Okla. Apr. 17, 2009) (quotation omitted). “Rebuttal is a term of art, denoting evidence introduced by a Plaintiff to meet new facts brought out in his opponent’s case in chief.” *Morgan v. Com. Union Assur. Companies*, 606 F.2d 554, 555 (5th Cir. 1979). In the expert context, a proposed rebuttal expert’s opinions “are limited to that which is precisely directed to rebutting new matter or new theories presented by the opposing party’s case in chief.” *Maxum Indem. Co. v. Drive W. Ins. Servs. Inc.*, 2014 WL 12653865, at *1 (S.D. Ohio June 13, 2014) (quotation omitted). “The rebuttal disclosure must contain the same subject matter as defendant’s disclosure.” *Id.*

A party may object to material used to support or oppose a motion for summary judgment that cannot be presented in a form that would be admissible at trial. Fed. R. Civ. P. 56(c)(2), (e)

(“affidavits ... shall set forth such facts as would be admissible in evidence”); *McFeely v. United States*, 700 F.Supp. 414, 418 n. 1 (S.D.Ind.1988).

IV. ARGUMENT

The Court should exclude testimony and disregard opinions from Mr. McDowell and Ms. Quimby because it is not evidence on land use planning offered to rebut PTP’s planning expert. As discussed above, the Court authorized PTP and Plaintiffs each to identify only a land use planning expert. (ECF 385, PageID.14146) For PTP, that planning expert is Dr. Daniels, one of nation’s foremost authorities on the intersection between land use and agricultural preservation. (Ex 3) Even Plaintiffs’ planning witness cites Dr. Daniels authoritatively as a “noted expert on farmland preservation.” (Ex 4 ¶¶ 4.d, 4.j) Dr. Daniels’ report addresses how land use planning and zoning work together in Peninsula Township to complement and further its farmland preservation efforts. (Ex 3 pp. 14-32) He addresses how zoning in general and in Peninsula Township balances principle and accessory uses to prevent *de facto* rezoning and “spot zoning.” Dr. Daniels opines on agricultural zoning, the application of agricultural zoning to wineries, the connection between agricultural zoning and farmland preservation, and the governmental interests advanced by the PTZO. Dr. Daniels discusses neither agritourism¹ as such nor the relationship between local zoning and state liquor trafficking regulation.

Plaintiffs’ witness Mr. Moss has some zoning experience, his opinions address land use planning concepts, and he responded specifically to Dr. Daniels’ report. (Exs 4, 7)

Neither Mr. McDowell nor Ms. Quimby identify land use planning expertise and their opinions do not rebut Dr. Daniels’ opinions regarding land use and planning in Peninsula Township

¹ Plaintiffs deposed Dr. Daniels about their “weddings are agritourism” argument. (ECF 469-8, ECF 501-3)

or elsewhere. Mr. McDowell is a farmer, former elected official, and former head of a state department that oversees regulations related to farming and rural development. (Ex 6) His highly generalized opinions do not address Peninsula Township at all, let alone that the PTZO has “the opposite effect” of preserving agricultural land, per their disclosures. (Exs 6, 2) He addresses the importance of supporting farmers but not Peninsula Township’s plans, ordinances, and other farmland preservation efforts, nor specifically its highly successful Purchase of Development Rights (PDR) program that has preserved more acreage than any other local agricultural preservation program in Michigan. (Ex 3 p. 9) The report resembles a letter that a well-positioned official might provide to support a grant application or proposed legislation. It is not rebuttal to Dr. Daniels.

Ms. Quimby is an attorney and former member of the Commission. (Ex 5) Her opinions address provisions in the Michigan Constitution and Liquor Control Code (MLCC) that establish the Commission and articulate its authority – topics Dr. Daniels never addressed. (Ex 5) She quotes law extensively then regurgitates Plaintiffs’ interpretations nearly verbatim, citing the same cases Plaintiffs cite to support their preemption summary judgment motion. (*Id.*, p. 5; ECF 334) She addresses nothing specific in the PTZO but concludes it conflicts with and is preempted by state law. (*Id.*, pp. 7, 8) Her report resembles an amicus brief rather than expert rebuttal to Dr. Daniels’ analysis of Peninsula Township’s planning and zoning efforts to protect agriculture, including at wineries.

Plaintiffs understand the difference between a rebuttal land use planning expert and Mr. McDowell and Ms. Quimby. They identified Mr. Moss as their planning witness; after reviewing Dr. Daniels’ report, and in direct response to it, Plaintiffs served Mr. Moss’s “supplemental” report. (Exs 2, 4, 7) In their Rebuttal Witness Expert Disclosures, Plaintiffs noted their listed experts “may

not testify,” depending on what specifically Dr. Daniels opined. (Ex 2 p. 2) There is no “supplemental report” from Mr. McDowell nor Ms. Quimby responding to Dr. Daniels’ opinions. Plaintiffs nevertheless relied upon Mr. McDowell and Ms. Quimby’s opinions to support their agritourism-as-commercial-speech and preemption theories. (ECF 501, 501-1, 473, 473-13)

Plaintiffs refused to stipulate, when PTP requested, that Mr. McDowell and Ms. Quimby and their reports should be excluded because they are not proper rebuttal to Dr. Daniels. (Ex 7) According to Plaintiffs, Mr. McDowell and Ms. Quimby will offer testimony showing local governments may not enforce any local zoning restrictions they wish, that Mr. McDowell opines agritourism is important and necessary in rural communities, and that Ms. Quimby will rebut Dr. Daniels’ concerns that a winery can become a bar or operate as a restaurant under MLCC regulations. (*Id.*) Putting aside their limited relevance and judicial value, these points do not convert these witnesses into land use planning experts rebutting Dr. Daniels. There is no indication either witness disagrees with anything of consequence to this case that Dr. Daniels actually said. As Plaintiffs emphasized, Dr. Daniels acknowledged Michigan sources considering farm weddings as a form of agritourism. (ECF 469, PageID.16954 n.8; ECF 501, PageID.19458) Dr. Daniels never suggested that zoning is limitless, that agritourism as unimportant or unnecessary, or that PTZO provisions trump liquor control laws. Dr. Daniels introduced no new facts or theories related to agritourism or liquor trafficking that might have opened the door to rebuttal on agritourism and the balance between local zoning and state liquor regulations – he does not discuss these topics at all. Any contrast between Dr. Daniels’ opinions and those of Mr. McDowell and Ms. Quimby does not make their opinions proper rebuttal but reflects that they support Plaintiffs’ case-in-chief, which Dr. Daniels rebuts.

Contrary to how Plaintiffs try to characterize these witnesses' opinions as countering Dr. Daniels' opinions, Plaintiffs attempt to support their legal theories through rebuttal without in fact rebutting anything Dr. Daniels introduced. Plaintiffs cite Mr. McDowell's and Ms. Quimby's opinions to support their summary judgment positions on "weddings = agritourism = commercial speech" and preemption respectively. (ECF 501, PageID.19456; ECF 473, PageID.18015, 18018) Dr. Daniels simply did not opine on these issues. After Plaintiffs were unsuccessful in convincing the Court, pre-PTP-intervention, that weddings are commercial speech and the MLCC preempts local limits on operating hours (ECF 162, PageID.5989-5993, 6004-6005), they now offer support from Mr. McDowell and Ms. Quimby to fortify those claims.

At bottom, Plaintiffs carry the burden of proving that particular zoning provisions are unconstitutional and preempted by state law. Where Dr. Daniels presents facts and expert opinions that undermine Plaintiffs' claims, Plaintiffs' proposed rebuttal planning witness (Mr. Moss) might counter them. Plaintiffs use Mr. McDowell and Ms. Quimby's opinions to support their case-in-chief and could have identified them as experts in August 2021. Plaintiffs' failure to do so – and instead their attempt to shoehorn them in as "rebuttal experts" – would waste judicial resources by identifying three experts where one suffices and unfairly deprive PTP of the opportunity to rebut new evidence and theories introduced by late-designated witnesses.

The Court gave PTP the limited opportunity to identify a land use planning expert and for Plaintiffs to present a planning expert to rebut Dr. Daniels. Had PTP introduced an expert to opine on the economics of agritourism or the meaning of liquor manufacturing and trafficking regulations, undoubtedly Plaintiffs would cry foul. Neither Mr. McDowell nor Ms. Quimby are proper rebuttal experts authorized by the Second Amended CMO. (ECF 343, 385) They were not timely designated experts under the First Amended CMO. (ECF 72) Therefore, their August 2023

opinions are not admissible evidence to support Plaintiffs' summary judgment briefs. Fed. R. Civ. P. 56(c). The Court should preclude them from testifying at trial and disregard references to their opinions in briefing because Plaintiffs failed either to comply with the schedule under Rule 16 or to seek schedule modifications to permit late-filed experts. Plaintiffs' failure to comply with the CMOs is not substantially justified so the Court should order Plaintiffs to pay PTP expenses bringing this motion. Fed. R. Civ. P. 16(f)(2).

V. CONCLUSION

For these reasons, PTP requests the Court exclude the testimony of Mr. McDowell and Ms. Quimby, disregard their opinions as evidence supporting summary judgment and otherwise in this case, and award PTP its costs incurred bringing this motion to enforce the Court's CMOs.

Respectfully submitted,

Date: December 4, 2023

By: /s/ Tracy Jane Andrews
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Date: December 4, 2023

By: /s/ Holly L. Hillyer
Holly L. Hillyer (P85318)
Troposphere Legal, PLC
Co-Counsel for Intervenor-Defendant
420 East Front Street
Traverse City, MI 49686
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CERTIFICATE OF SERVICE

I, Tracy Jane Andrews, hereby certify that on the 4th day of December, 2023, I electronically filed the foregoing document with the ECF system which will send a notification of such to all parties of record.

By: /s/ Tracy Jane Andrews
Tracy Jane Andrews (P67467)
Holly L. Hillyer (P85318)

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

This Brief complies with the word count limit of L. Ci. R. 7.3(b)(i). This brief was written using Microsoft Word version 2016 and has a word count of 4,289 words.

Respectfully submitted,

Date: December 4, 2023

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

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

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal
corporation,

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

Case No. 1:20-cv-01008

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

**PROTECT THE PENINSULA'S
EXPERT WITNESS DISCLOSURES
PURSUANT TO RULE 26(a)(2)(A)**

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Stephen Michael Ragatzki (P81952)
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**PROTECT THE PENINSULA'S
EXPERT WITNESS DISCLOSURES PURSUANT TO RULE 26(a)(2)(A)**

Intervenor-Defendant PROTECT THE PENINSULA, INC. (PTP), by and through its attorneys, LAW OFFICE OF TRACY JANE ANDREWS, PLLC and OLSON BZDOK AND

HOWARD, P.C., makes the following initial expert witness disclosures pursuant to Fed. R. Civ.

P. 26(a)(2)(A) and the Second Amended Case Management Order (ECF 343). PTP reserves the right to supplement these expert disclosures based on ongoing investigation and discovery as permitted by Rule 26(a)(2)(E).

A. NAME, PROFESSIONAL ADDRESS AND TELEPHONE NUMBER OF EXPERT:

Thomas L. Daniels, Ph.D.
c/o Olson, Bzdok & Howard, P.C.
420 E. Front St.
Traverse City, MI 49686
(231) 946-0044

B. AREA OF EXPERTISE:

Dr. Daniels is an expert on land use planning, agricultural zoning, and farmland preservation. A copy of Dr. Daniels' *curriculum vitae* is attached as **Exhibit A**.

C. SHORT SUMMARY OF EXPECTED TESTIMONY:

Discovery is ongoing, and Dr. Daniels has not yet completed his investigation to develop his expert opinions and draft his expert report. The following short summary of Dr. Daniels' expert testimony is based on his preliminary review of Plaintiffs' claims, the Peninsula Township Zoning Ordinance, and historic Peninsula Township land use planning and agricultural preservation materials.

Dr. Daniels is expected to testify regarding land use planning, the use of zoning regulations to control land use, the use of agricultural zoning, the application of agricultural zoning to wineries, and the connection between agricultural zoning and farmland preservation.

Dr. Daniels is further expected to testify regarding the governmental interests advanced by the Peninsula Township Zoning Ordinance, including agricultural and farmland preservation and ensuring compatible land uses in Peninsula Township. Dr. Daniels is expected to provide expert testimony on how the Peninsula Township Zoning Ordinance, in conjunction with Peninsula Township's master plan and other ordinances, advances those governmental interests. Dr. Daniels is expected to testify regarding how the Peninsula Township Zoning Ordinance, including sections that address wineries and winery tasting rooms, are tailored to address the governmental interests of agricultural and farmland preservation and ensuring compatible land uses. Dr. Daniels is expected to testify regarding how the land use and special use permits issued by Peninsula Township to wineries advance its governmental interests of agricultural and farmland preservation and ensuring compatible land uses and are tailored to address those interests.

Dr. Daniels will provide a written expert report in accordance with the Court's Second Amended Case Management Order and Fed. R. Civ. P. 26(a)(2)(B).

Respectfully submitted,

Date: June 19, 2023

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Date: June 19, 2023

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Exhibit A



Thomas L. Daniels

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Nationality: American
Age: 69

(717) 368-0559 (cell)
e-mail: thomasld@design.upenn.edu

Education

1984 Ph.D. in Agricultural and Resource Economics, Oregon State University.

1977 M.S. in Agricultural and Resource Economics, University of Newcastle-upon-Tyne, England. Study on a Rotary Foundation Fellowship.

1976 B.A. cum laude in Economics, Harvard University.

Planning Experience

July 2003-
Present

Full Professor with Tenure, Department of City and Regional Planning,
University of Pennsylvania.

Teach: Land Use Planning, Environmental Planning, Planning for Climate Change,
and Land Preservation. Acting Chair, January-June 2006, July, 2015-June 2016.
Crossways Professor, 2020-present.

Erasmus Mundo Scholarship, University of Venice IUAV, March, 2017

Clarkson Chair, Department of Urban Planning, University of Buffalo, October, 2011.

July 1998-
June 2003

Full Professor with Tenure, The University at Albany, State University of New
York. Director of the Planning Master's Program, Fall 1998-December 2001.

Fulbright Senior Fellowship, University of New South Wales, Australia,
February-June, 2002.

May 1989-

July 1998

Director, Agricultural Preserve Board of Lancaster County, Pennsylvania. Administered a nationally-recognized farmland preservation easement acquisition program with an annual budget of over \$4 million. Preserved over 16,000 acres in 188 easement projects. Assisted Planning Commission staff with growth management and agricultural zoning issues. The program received the 1993 Outstanding Program Award from the Small Town and Rural Planning Division of the American Planning Association. Received the 1996 National Achievement Award from the American Farmland Trust.

Aug. 1987-

May 1989

Associate Professor with Tenure, Department of Regional and Community Planning, Kansas State University.

Jan. 1985-

July 1987

Assistant Professor, Department of Community and Regional Planning, Iowa State University. Taught in Semester Abroad program in London, Fall 1986.

Publications

Books

2018 The Law of Agricultural Land Preservation in the United States. Chicago: American Bar Association. (Senior author with John Keene).

2014 The Environmental Planning Handbook for Sustainable Communities and Regions (Second Edition). Chicago: American Planning Association.

2011 The Planners Guide to CommunityViz: The Essential Tool for a New Generation of Planning. Chicago: American Planning Association. (Second author with Doug Walker).

2007 The Small Town Planning Handbook (3rd edition). Chicago: American Planning Association. (Senior author with John Keller, Mark Lapping, Katherine Daniels, and Jim Segedy.)

1999 When City and Country Collide: Managing Growth in the Metropolitan Fringe. Washington, D.C.: Island Press.

1997 Holding Our Ground: Protecting America's Farms and Farmland. Washington, D.C.: Island Press. (Senior author with Deborah Bowers).

- 1989 Rural Planning and Development in the United States, New York: Guilford Publications. (Second author with Mark Lapping and John Keller).

Refereed Journal Articles

- 2022 "The potential of nature-based solutions to reduce greenhouse gas emissions from US agriculture," Socio-Ecological Practice Research, online August 4, doi.org/10.1007/s42532-022-00120-y

"How can the USA and China cooperate and learn from each other to reduce greenhouse gas emissions? Socio-Ecological Practice Research, online May 6, 2022. DOI 10.1007/s42532-022-00112-y

"Managing urban growth in the wake of climate change: Revisiting greenbelt policy in the US." Land Use Policy. Han, Albert, Thomas L. Daniels, and Chaeri Kim. Land Use Policy 112: 105867. <https://doi.org/10.1016/j.landusepol.2021.105867>.

- 2021 "Re-designing America's suburbs for the age of climate change and pandemics," Socio-Ecological Practice Research, 3(2), 225-236. <https://doi.org/10.1007/s42532-021-00084-5>.

- 2019 "Protected Land Management and Governance in the United States: More Than 150 Years of Change," (Senior author with Dan Moscovici). Society and Natural Resources, 33 (6).

"McHarg's Theory and Practice of Regional Ecological Planning: Retrospect and Prospect," Socio-ecological Practice Research, 1: 197–208. <https://doi.org/10.1007/s42532-019-00024-4>

"Assessing the Performance of Farmland Preservation in America's Farmland Preservation Heartland:: A Policy Review. Society and Natural Resources. 33(6):1-11. DOI: 10.1080/08941920.2019.1659893

"California's success in the socio-ecological practice of a forest carbon offset credit option to mitigate greenhouse gas emissions," Socio-ecological Practice and Research, Vol 1, No. 2, pp. 125-138. (2nd author with Chaeri Kim).

"The Napa County Agricultural Preserve: 50 Years as a Foundation of America's Premier Wine Region." *Journal of Planning History* Vol. 18(2): 102-115 .

- 2018 "The Plan for the Valleys: Assessing the Vision of David Wallace and Ian McHarg." *Journal of Planning History* Vol. 17, No. 1 (February, 2018) pp. 3-19. 2nd author with George Hundt, Jr.).

- 2017 "Preserving Large Farming Landscapes: The Case of Lancaster County Pennsylvania," *Journal of Agriculture, Food Systems and Community Development* Vol. 7, No. 3, pp. 67-81. (senior author with Lauren Payne-Riley).
- 2010 "Integrating Forest Carbon Sequestration Into a Cap-and-Trade Program to Reduce Net CO2 Emissions," *Journal of the American Planning Association*, 76 (4): 463-475.
- "The Use of Green Belts to Control Sprawl in the United States," *Planning Practice and Research*, 25: 2, 255 — 271.
- 2009 "A Trail Across Time: American Environmental Planning from City Beautiful to Sustainability. *Journal of the American Planning Association*. 75 (2): 178-192.
- 2005 "Land Preservation as a Key Element of Smart Growth," *Journal of Planning Literature*, 19:3, 316-329. (Senior author with Mark Lapping).
- 2001 "Smart Growth: A New American Approach to Regional Planning." *Planning Practice & Research*, Vols. 3 &4, pp. 271-281.
- 2000 "Integrated Working Landscape Protection: The Case of Lancaster County, Pennsylvania," *Society & Natural Resources*, 13:3, pp. 261-271.
- 1991 "The Purchase of Development Rights: Preserving Agricultural Land and Open Space," *Journal of the American Planning Association*, Vol. 57, No. 4, pp. 421-431.
- "The Goals and Values of Local Economic Development Strategies in Rural America," *Agriculture and Human Values*, Vol. 8, No. 3, pp. 3-9.
- 1989 "Small Town Economic Development: Growth or Survival?" *Journal of Planning Literature*, Vol. 4, No. 4 ,pp. 413-429.
- 1988 "America's Conservation Reserve Program: Rural Planning or Just Another Subsidy?" *Journal of Rural Studies*, Vol. 4, No. 4, pp. 405-411.
- 1987 "Small Town Triage: A Rural Settlement Policy for the American Midwest," *Journal of Rural Studies*, Vol. 3, No. 3, pp. 273-280. (Senior author with Mark Lapping).

Conference Papers and Presentations

- 2022 "The State of Farmland Preservation in Your County. Pennsylvania Land

Conservation Conference, March 17, 2022 Gettysburg, PA

2021 “Suzhou, China, Environmental Planning: What China and the United States Can Learn From Each Other, Sept. 24/5, 2021

2019 “Agricultural Performance Results from the 2017 Census of Agriculture and Implications for Farmland Preservation,” Farmland Preservation Roundtable, Saratoga Springs, NY, October 30, 2019.

2018 “The Law of Agricultural Land Preservation,” Pennsylvania Land Trust Association Conference, Malvern, PA, April 13, 2018

2017 “Using GIS to Measure Progress in Farmland Preservation,” Pennsylvania Land Trust Association Conference, Lancaster, PA, May 4, 2017.

2016 “Large Landscape Conservation: East,” American Planning Association National Conference, Phoenix, AZ, April 2, 2016

2015 “Green Infrastructure for Urban Stormwater Management,” Association of Collegiate Schools of Planning Conference, Houston, TX, October 22, 2015.

“What’s New in Environmental Planning?” American Planning Association Conference, Seattle, WA, April 18, 2015

2014 “A Comparison of Urban Containment: Oregon, Maryland, and Four Hybrid Counties.” Association of Collegiate Schools of Planning, Philadelphia, PA, October 30, 2014.

“Return on Investment: How PDR is Strengthening Local Economies and Remaining Relevant Moving Forward.” National Farmland Preservation Conference, Hershey, PA, May 12, 2014.

2013 “Planning for Climate Change: Mitigation and Adaptation,” Planners Training Session, Seattle, June 11-12, 2013.

“Philadelphia: Urban Water: Managing Stormwater, Rivers, and Watersheds,” Urban Ecosystems Services and Decision Making: A Green Philadelphia Conference, Philadelphia, PA, May 23, 2013.

“Climate Change Adaptation,” American Planning Association Conference, Chicago, IL, April 16, 2013.

2012 “Planning for Green Infrastructure,” Planners Training Session, Charlotte, NC, November 15-16, 2012.

- 2011 “Greenbelts to Control Sprawl in the United States,” American Planning Association Conference, Boston, April 10, 2011.
- 2010 “Landscape Scale Farmland Preservation,” American Society of Landscape Architects Conference, Washington, DC, September 14, 2010.

Professional Reports

- 2022 Regulating Utility-Scale Solar Projects on Agricultural Land, Kleinman Center for Energy Policy, University of Pennsylvania. August, 2022, 7 pp. (Senior author with Hannah Wagner).
- 2021 Study on Inclusionary Housing with Chrissy Quattro for Penn IUR, December 2021, 75 pp.
- 2020 The State of Farmland Preservation in Lancaster County. For Lancaster Farmland Trust, September 2020, 35 pp.

An Analysis of the Economic Impact of the Farmland Preservation Program in Carroll County, Maryland. Westminster, MD: Carroll County, MD, 53 pp.
- 2019 Agricultural Land Protection, Annexation, and Housing Development: An Analysis of Programs and Techniques with Potential Use in Napa County: A Report for the Jack L. Davies Napa Valley Agricultural Preservation Fund, 108 pp.

An Analysis of the Economic Impact of Pennsylvania’s Farmland Preservation Program, Pennsylvania Department of Agriculture, 78 pp.
- 2017 Land Use Study, Solebury Township, PA, 25 pp.
- 2010 Cost of Community Services Study for Four Municipalities and the Hempfield School District, for East and West Hempfield Townships and the Hempfield School District in Lancaster County, PA, 51 pp.
- 2008 Ideas for Rural Smart Growth, Promoting the Economic Viability of Farmland and Forestland in the Northeastern United States, for the Office of Smart Growth, US Environmental Protection Agency, Washington, D.C., 40 pp.

An Evaluation of the Peninsula Township, Michigan Farmland Preservation Program, for the Grand Traverse Regional Land Trust, Traverse Bay, MI, 60 pages.

- 2007 An Evaluation of the Consistency of the Plum Creek Timber Company Proposed Concept Plan in the Moosehead Lake Region with the Comprehensive Land Use Plan of the Maine Land Use Regulation Commission, 46 pp.
- 2006 Final Report to the National Fish and Wildlife Foundation: An Evaluation of the Foundation's Conservation Easement and Capacity-Building Grants Program. 221 pp.
- 2003 Dakota County, Minnesota, Farmland and Natural Area Preservation Program Guidelines, 54 pp., co-author with Jean Coleman, June, 2003.

Grants

- 2022 Climate Social Science Network. Agricultural Organizations and Their Messaging About Climate Change and Recommended Responses. \$16,000. Principal Investigator.
- Robert Schalkenbach Foundation. The California Sustainable Agricultural Lands Conservation Program: Evaluating the Use of Cap-and-Trade Funds to Promote Climate Mitigation and Adaptation. \$5,000. Principal Investigator.
- 2021 Kleinman Center for Energy Policy. Regulating Utility-Scale Solar Projects on Agricultural Land. \$4,500. Principal Investigator.
- 2019 Pennsylvania Department of Agriculture, An Analysis of the Economic Impact of Pennsylvania's Farmland Preservation Program, \$13,500. Principal Investigator.
- 2013-17 U.S. EPA. Green Infrastructure for Urban Stormwater Management. \$1 million. Project associate.
- 2004-06 National Fish and Wildlife Foundation. Effectiveness of NFWF's Investments in Conservation Easements to Protect Wildlife Habitat. \$125,000. Principal Investigator.
- 2002 Open Space Institute, Study of Sprawl and Land Use Change in the Capital District of New York, \$40,000. Project associate.
- 2000 Hudson River Foundation, Study of Land Use Planning Techniques in the Chesapeake Bay Estuary and the Hudson River Estuary, \$61,396, Principal Investigator.

Professional Memberships

1983 - Member, American Planning Association
Present

2004- Member, Land Protection Committee, Lancaster County
Present Conservancy (PA)

2005- Member, Board of Trustees, Orton Family Foundation
2020

2011- National Advisory Board, Land Conservation Advisory Network, Yarmouth,
Present Maine.

2012- National Advisory Board, Equine Land Conservation Resource,
Present Lexington, KY

2014- National Advisory Board, Conservation Finance Network, Washington, DC
Present

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.

PLAINTIFFS' REBUTTAL EXPERT WITNESS DISCLOSURES

Plaintiffs, through their attorneys Miller, Canfield, Paddock and Stone, PLC, make the following rebuttal expert witness disclosures pursuant to Federal Rule of Civil Procedure 26(a)(2)(A) and the Second Amended Case Management Order (ECF No. 343). Plaintiffs reserve the right to supplement these expert disclosures as allowed by Federal Rule of Civil Procedure 26(a)(2)(E).

Name and Address:

Gary McDowell
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99 Monroe Ave NW, Suite 1200
Grand Rapids, MI 49503
(616)776-6333

David E. Moss
c/o Miller, Canfield, Paddock and Stone, PLC
99 Monroe Ave NW, Suite 1200
Grand Rapids, MI 49503
(616)776-6333

Teri Quimby
c/o Miller, Canfield, Paddock and Stone, PLC
99 Monroe Ave NW, Suite 1200
Grand Rapids, MI 49503
(616)776-6333

Area of Expertise:

Mr. McDowell is the former Director of the Michigan Department of Agriculture and Rural Development and is an expert on rural development, agricultural preservation, and agritourism. A copy of Mr. McDowell's curriculum vitae will be provided at a later date.

Mr. Moss is an expert on land use planning and zoning regulations. A copy of Mr. Moss's curriculum vitae is attached as Exhibit A.

Ms. Quimby is a former Commissioner of the Michigan Liquor Control Commission and is an expert on alcohol administration, licensing, purchasing, enforcement, merchandising, and distribution within the State of Michigan. A copy of Ms. Quimby's curriculum vitae will be provided at a later date.

Short Summary of Expected Testimony:

Because PTP has only disclosed the general area of testimony for its expert witness and that witness has not disclosed an expert report, the Wineries, in an abundance of caution, disclose expert witnesses on various land use planning and zoning topics though these experts may not testify when PTP's expert discloses his report and the specific opinions are known.

Gary McDowell

Mr. McDowell is expected to testify as a rebuttal expert to PTP's named expert, Dr. Thomas L. Daniels, regarding agricultural preservation, value added agriculture, and agritourism as a means to preserve agricultural land. Mr. McDowell is expected to testify that the Winery Ordinances and the enforcement of those ordinances do not further the preservation of agricultural

land and, instead, have the opposite effect. Mr. McDowell is expected to testify that value-added activities and agritourism like those activities the Wineries seek to engage in further the preservation of agricultural land.

Mr. McDowell will provide a written expert report as required by the Court's Second Amended Case Management Order and Federal Rule of Civil Procedure 26(a)(2)(B). Because discovery is ongoing and Mr. McDowell is testifying as a rebuttal expert, it is expected that Mr. McDowell will issue a supplemental report after reviewing the report prepared by Dr. Thomas L. Daniels

David E. Moss

Mr. Moss is expected to testify as a rebuttal expert to PTP's named expert, Dr. Thomas L. Daniels, regarding land use planning and the commonly available types of zoning regulations to promote and preserve agricultural land use and rural character. Mr. Moss is further expected to testify about less restrictive and feasible alternatives Peninsula Township could have enacted to further its governmental interests in the Peninsula Township Zoning Ordinance, specifically those sections applicable to Plaintiffs. Mr. Moss is also expected to testify about how the Peninsula Township Zoning Ordinance, and specifically those sections applicable to Plaintiffs, do not promote and therefore detract from agricultural and farmland preservation.

Mr. Moss will provide a written expert report as required by the Court's Second Amended Case Management Order and Federal Rule of Civil Procedure 26(a)(2)(B). Because discovery is ongoing and Mr. Moss is testifying as a rebuttal expert, it is expected that Mr. Moss will issue a supplemental report after reviewing the report prepared by Dr. Thomas L. Daniels.

Teri Quimby

Ms. Quimby is expected to testify as a rebuttal expert to PTP's named expert, Dr. Thomas L. Daniels, regarding local authority to regulate alcohol licensees by way of zoning should Dr. Daniels provide an expert opinion on this topic. Ms. Quimby is expected to testify regarding the limited authority granted to local governments to regulate the manufacture, sale and distribution of alcohol and the Michigan Liquor Control Commission's policies and procedures to ensure local governments do not exceed that authority should Dr. Daniels provide an expert opinion on this topic. Should Dr. Daniels not offer expert testimony on these topics, the Wineries do not expect to offer Ms. Quimby's testimony.

Ms. Quimby will provide a written expert report as required by the Court's Second Amended Case Management Order and Federal Rule of Civil Procedure 26(a)(2)(B). Because discovery is ongoing and Ms. Quimby is testifying as a rebuttal expert, it is expected that Ms. Quimby will issue a supplemental report after reviewing the report prepared by Dr. Thomas L. Daniels

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)

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Grand Rapids, MI 49503

(616) 776-6333

Dated: July 3, 2023

Exhibit A

David E. Moss

Summary of qualifications

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

Professional experience

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

President

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

1984 – 1987 Engineering Science/Parsons Pasadena, CA

Senior Scientist/EIS-EIR Compliance

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

Education

BA, Biological Sciences, Univ. of Delaware, 1976

MA, Marine Studies, Univ. of Delaware, 1979

D. Env., Env. Science and Engineering, UCLA, 1989

MDE Certificate, UCLA Anderson School of Management, 1996

**Conference
speaking**

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

Publications

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

Expert Report

By

Thomas L. Daniels, Ph.D.
590 Northlawn Drive
Lancaster, PA 17603
August 28, 2023

In the matter of:

Wineries of the Old Mission Peninsula Assoc. et al v. Peninsula Township and Protect the Peninsula, Case No. 1:20-cv-01008-PLM-RSK (W. Dist. Mich.)

Prepared for:

Protect the Peninsula, Inc.
P.O. Box 1529
Traverse City, MI 49685

Expert Credentials

I am the Crossways Professor in the Department of City and Regional Planning at the University of Pennsylvania. I hold a Ph.D. in Agricultural and Resource Economics. I have taught land use planning for more than 25 years. I am the co-author of *The Small Town Planning Handbook* (3rd ed. 2007, American Planning Association) and co-author of *The Law of Agricultural Land Preservation in the United States* (2018, American Bar Association) and have written several journal articles dealing with agricultural zoning and farmland preservation. I served as the Director of the Lancaster County, PA Agricultural Preserve Board from 1989-1997, which is recognized as one of the leading county farmland preservation programs in the United States. I have performed consulting work and provided expert testimony on several cases involving land use and farmland. A copy of my professional resume is attached as Exhibit 1.

Materials Reviewed

To arrive at my opinions in this report, I reviewed the Michigan Planning Enabling Act, the Michigan Zoning Enabling Act, the Peninsula Township 2011 Master Plan, the Peninsula Township Zoning Ordinance text and maps, the Peninsula Township Purchase of Development Rights Ordinance and maps of preserved lands, Purchase of Development Rights conservation easements, Special Use Permits for Winery-Chateaus, Peninsula Township responses to interrogatories, deposition transcripts, the district court's June 3, 2022 order in the *Wineries of the Old Mission Peninsula Assoc. et al v. Peninsula Township and Protect the Peninsula*, Case No. 1:20-cv-01008-PLM-RSK (W. Dist. Mich.), Jesse Williams—*Balancing Development, Agriculture, and Preservation: Evaluating the Success of Old Mission Peninsula's Purchase of Development Rights Program*, and Tom Daniels—*An Evaluation of the Peninsula Township Farmland Preservation Program*, and additional documents as cited throughout this report. In addition, I toured Peninsula Township on August 9 and 10, 2023. I am presenting my opinions to a reasonable degree of professional certainty.

TABLE OF CONTENTS

| | |
|---|-----------|
| Introduction..... | 4 |
| I. Background | 4 |
| A. Peninsula Township..... | 4 |
| B. Land Use Planning and Zoning in General | 5 |
| C. Farmland Preservation..... | 7 |
| i. Purchase of Development Rights (PDR)..... | 7 |
| ii. Agricultural Zoning | 9 |
| D. Agricultural Zoning in Major Wine Producing Regions | 10 |
| i. Winery definition..... | 11 |
| ii. Special Use Permit for Wineries | 12 |
| iii. Tasting Rooms, Food, and Retail Sales | 12 |
| iv. Limits on Production Capacity | 13 |
| v. Summary..... | 14 |
| E. A Brief History of Land Use Planning, Zoning, Agricultural Zoning, and Farmland Preservation in Peninsula Township..... | 14 |
| II. Analysis of Challenged Zoning Provisions | 21 |
| A. Peninsula Township Zoning Ordinance (PTZO)..... | 21 |
| i. The A-1 Agricultural Zoning District..... | 21 |
| ii. Winery Uses in the A-1 District | 22 |
| B. How the Peninsula Township Zoning Ordinance Promotes Agricultural Preservation 24 | |
| i. Limits on food and beverage service:..... | 26 |
| ii. Exclusion of weddings, wedding receptions, and other private events for hire from the scope of permitted uses:..... | 27 |
| iii. Establishing standards and requiring advance notice and/or approval for some activities or events: | 28 |
| iv. Allowing retail sales of only wine and winery- and agriculture-related merchandise 29 | |
| v. Establishing maximum facility and retail space size..... | 29 |
| C. The Harm If the Provisions of the Peninsula Township Zoning Ordinance Are Invalidated | 30 |
| D. Conclusions | 31 |

Introduction

In October 2020, the Wineries of Old Mission Peninsula filed suit against Peninsula Township over provisions in the Peninsula Township Zoning Ordinance. In 2022, Protect the Peninsula was allowed to intervene in the suit.

In short, Plaintiffs' claims isolate a handful of provisions that limit their ability to engage in unfettered commercial activity in an agricultural zone, such as those regulating accessory uses at wineries and limiting production capacity. Any challenged provision must be evaluated in the context of the zoning ordinance as a whole, which, in turn, should be considered according to the content of the Township master plan.

To place the challenged provisions in their proper context, I explain how land use planning and zoning work together to protect public health, safety, and general welfare. I further explain the importance of farmland land preservation, its relationship to public health, safety, and general welfare, and the use of zoning to promote farmland preservation and farming activities. I discuss how the Peninsula Township Zoning Ordinance advances both farmland preservation and farm production goals. I also explain how allowing the unrestricted land uses Plaintiffs seek would undermine agricultural land preservation and the continuation of active agriculture in Peninsula Township.

After a brief description of Peninsula Township and before I address the specifics of the challenged provisions, I feel it is helpful to present an overview of the land use planning process, the use of zoning regulations to control land use, the use of agricultural zoning, the application of agricultural zoning to wineries, and the connection between agricultural zoning and farmland preservation. In discussing these topics, I will draw on research, publications, and practice I have conducted over the last 39 years on land use planning, zoning, agricultural zoning, and farmland preservation.

I. Background

A. Peninsula Township

Peninsula Township was established in 1853 and covers 17,755 acres in Grand Traverse County, Michigan. The Township extends for 18 miles into Grand Traverse Bay of Lake Michigan and borders the City of Traverse City to the south. The Township varies in width between a half mile and three miles, offering spectacular views of Grand Traverse Bay. The Township's permanent population was 6,068 in 2020 and part-time residents add to the population, especially during the summer months.

Peninsula Township is known geographically as Old Mission Peninsula and boasts soils and a microclimate that have long supported agriculture, especially the production of stone fruit (cherries), and more recently, apple orchards and grape vineyards. The Old Mission Peninsula became an American Viticultural Area (AVA) or appellation, known for its distinctive wines in 1987.¹ An AVA is a federal designation, managed by the Alcohol and Tobacco Tax and Trade Bureau within the U.S. Treasury Department. Wine may be labeled "Old Mission Peninsula" if

¹ See 27 C.F.R. § 9.114 (describing boundaries of Old Mission Peninsula AVA).

not less than 85% of it is derived from grapes grown within the AVA boundaries.² The Old Mission Peninsula AVA is 1 of only 5 AVAs in Michigan and 268 nationwide.³

Peninsula Township is a popular tourist destination known for beautiful views of Grand Traverse Bay, gently rolling hills of orchards and vineyards, a historic lighthouse, and miles of pristine beaches and hiking trails. Peninsula Township is close to Traverse City, Michigan, a growing tourism area, and regional attractions, including Sleeping Bear Dunes National Lakeshore. As noted in the Peninsula Township 2011 Master Plan, “[t]he Township’s primary economic base is shared between its agricultural production, tourism, and home-based businesses.”⁴

B. Land Use Planning and Zoning in General

Zoning is the most common regulation to control land use in the United States. Zoning powers are delegated from state legislatures to local governments, including townships, and a township zoning ordinance is a local law. Township zoning serves to implement a township government comprehensive plan (also known as a Master Plan), which describes how the township should grow and change over the next ten to twenty years; this is common planning and zoning practice.

The comprehensive plan provides an important legal base for the zoning ordinance. The comprehensive plan spells out goals and objectives for the township, and zoning is one tool that the township employs to achieve these goals and objectives and further the public health, safety, and welfare.

The United States Supreme Court has long recognized the legality of zoning as a valid use of the police power of government under the Tenth Amendment.⁵ A fundamental purpose of zoning is to protect the public health, safety, and welfare. In doing so, zoning must strike a balance between a property owner’s right to use land and the public’s right to a healthy, safe, and orderly living environment.⁶ Zoning is generally legitimate if it allows a reasonable economic use of the property. Zoning need not allow the “highest and best” use of the property.

Four aspects of zoning promote public health, safety, and welfare. First, zoning separates conflicting land uses (e.g., industrial and residential) and locates compatible land uses near each other. Second, it sets standards for building size, lot coverage, setbacks, and the density of development. Third, it ensures consistent application of standards across zoning districts. Fourth, it creates dispute resolution and enforcement mechanisms.⁷

² 27 C.F.R. § 4.25(e)(3)(ii).

³ Michigan Wine Country. 2023. Michigan’s Five AVAs. <https://michiganwinecountry.com/wines-grapes/avas/>. Accessed May 17, 2023; Alcohol and Tobacco Tax and Trade Bureau. Established American Viticultural Areas. <https://www.ttb.gov/wine/established-avas>. Accessed August 23, 2023.

⁴ Peninsula Township 2011 Master Plan, p. 3.

http://www.peninsulatownship.com/uploads/1/0/4/3/10438394/master_plan_2011_-_signed.pdf. Accessed August 23, 2023.

⁵ *Village of Euclid Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁶ Daniels et al. 2007. *The Small Town Planning Handbook*, Chicago: American Planning Association, p. 178.

⁷ *Ibid*, p. 179.

Zoning enables a local government to designate land for a particular zoning district with or without landowner consent.⁸ Zoning allows certain uses on some land and not on others, and can bestow economic benefits to some property owners while imposing economic limits on others.⁹

A zoning ordinance consists of a text and a map. The zoning text divides a township into different land use zones, such as agricultural, residential, and commercial, and zoning districts, such as R-1 single-family residential and R-2 duplex and triplex residential. The zoning map shows the location of the different zones and zoning districts.

The text also describes permissible uses for each district and commonly provides for both by-right uses and special uses. By-right uses generally include uses necessary to accomplish the purposes for which the district was created, such as houses in a residential district and farm buildings in an agricultural district. A by-right use is presumptively allowed if the landowner meets the standards for building and lot size standards, setbacks, use restrictions, and administrative permitting requirements.

Special uses are generally uses that align with the purposes of a zoning district but are not necessary to accomplish them, raise special concerns about public health, safety, and welfare, or both. Examples include childcare facilities in residential districts and produce packing and processing facilities in agricultural districts. Special uses generally require more than just administrative approval, and often involve a public application process before a planning commission, board, or other public body.

In Michigan, a township may provide for special uses in a zoning district subject to review and approval in accordance with its zoning ordinance. Approval may be at the township's discretion, in which case notice and a public hearing are required. The township may approve, deny, or approve with conditions a request for a special use, and its decision "shall be incorporated in a statement of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed."¹⁰ An applicant has no "right" to a special use permit; the applicant must meet standards and conditions set by the township.

Uses may also be principal (or primary), accessory, or support. A principal use is the preferred use of a property in that zoning district. An accessory use is customary, incidental, and subordinate to the principal use, such as with a shed built in the backyard of a house in a residential district. A support use is like an accessory use in that it is subordinate to the principal use but unlike an accessory use it is needed to support the principal use rather than incidental to it. For example, the principal use of a campground might be overnight camping; restroom facilities may be considered necessary to support that use; and a retail store selling matches and marshmallows may be considered accessory.

If an accessory use increases too much in intensity or size, it can constitute both a zoning permit violation and an unlawful de facto rezoning and spot zoning. For example, if a landowner receives a special use permit to build a 10'x30' farm stand in an agricultural zone but builds a 30'x50' farm

⁸ Daniels and Keene, 2018, *The Law of Agricultural Land Preservation in the United States*, p. 325.

⁹ Daniels et al. *The Small Town Planning Handbook*, p. 180.

¹⁰ MCL § 125.3502.

stand instead, the farm stand would violate the permit. The farm stand may also de facto rezone its location from agricultural to commercial without government approval by creating a primary commercial use in an agricultural zone. This would also create “spot zoning,” which may be deemed illegal for conferring a special benefit on one landowner.

C. Farmland Preservation

Farming is an industry that relies upon a critical mass of farms and farmland to sustain farm support businesses, such as machinery dealers, hardware stores, feed and seed suppliers, food processors, and trucking companies. Farmland preservation can help to retain land in agricultural use and maintain the volume of crop or livestock production and thus help to keep farm support businesses operating. When an agricultural area loses farms, the volume of agricultural production falls, putting financial pressure on both the farm support businesses and the remaining farm operations. Farmland preservation involves the aspiration and opportunity for a long-term future of farming in a community.

Farmland in Michigan is generally defined to include farms of five or more acres where more than half the land is “devoted to an agricultural use.”¹¹ “Agricultural use” means “the production of plants and animals useful to humans, including forages and sod crops; grains, feed crops, and field crops; dairy and dairy products; poultry and poultry products; livestock, including breeding and grazing of cattle, swine, captive cervidae, and similar animals; berries; herbs; flowers; seeds; grasses; nursery stock; fruits; vegetables; maple syrup production; Christmas trees; and other similar uses and activities.”¹²

In the United States, farmland is converted to other uses at a rate of several hundreds of thousands of acres each year.¹³ Purchase of Development Rights (PDR) programs and agricultural zoning are important and complementary tools for keeping land in active agriculture and supporting the continued viability of farming and the farm support economy. PDR provides greater protection than zoning alone because it permanently restricts land use, while agricultural zoning may be changed in accordance with local democratic processes but applies to much more land and at a far lower cost. In Michigan, supportive agricultural zoning, combined with tools like the Michigan Department of Agriculture and Rural Development (MDARD) Farmland and Open Space Preservation Program (formerly PA 116) and local PDR programs help stabilize the state’s farmland base to limit non-farm development and enhance the opportunity for farmland owners to preserve their land through the sale of development rights.

i. Purchase of Development Rights (PDR)

Farmland preservation through PDR programs, which involve the voluntary sale or donation of development rights by a landowner to a government agency or nonprofit land trust has emerged as

¹¹ MCL § 324.36101(h) (also recognizing specialty farms designated by the state and establishing minimum income thresholds for some farms).

¹² MCL § 324.36101(h) (also recognizing specialty farms designated by the state and establishing minimum income thresholds for some farms).

¹³ Sallet, Lori. 2022. American Farmland Trust. June 29, 2022. <https://farmland.org/new-report-smarter-land-use-planning-is-urgently-needed-to-safeguard-the-land-that-grows-our-food/>. Accessed May 23, 2023.

an important and effective way to maintain land in agricultural use over the long term. The development rights are in effect retired through a deed of easement, also known as a conservation easement. Most conservation easements are perpetual and run with the land, binding future landowners.¹⁴ A conservation easement can be removed through an eminent domain action by a government or a court ruling.

The payment for development rights has enabled farmers to enhance farming operations. Also, PDR supports long-term intergenerational farming and farmland planning.

The first local PDR program was adopted in the Town of Southold in Suffolk County, New York, in 1984.¹⁵ Since then, PDR has become a common nationwide farmland and open space preservation practice, with programs in 29 states and more than 95 counties and townships.¹⁶ The federal government launched the Farm and Ranch Land Protection Program (FRPP) in 1996 to provide matching grants to state and local governments and private, non-profit land trusts to purchase development rights to farmland. In the 2014 Farm Bill, the FRPP was merged with the Wetlands Reserve Program and the Grassland Reserve Program into the Agricultural Conservation Easement Program (ACEP), which has received about \$450 million in federal funding each year in recent years.¹⁷

State farmland preservation programs have spent \$8 billion to preserve 3.4 million acres.¹⁸ Nationwide, local governments, including those in major winery areas, have preserved 540,000 acres as of 2020 at cost of \$2.1 billion.¹⁹ As of 2020, Sonoma County, California, has preserved 36,161 acres through PDR at a cost of \$96,371,250, and the Town of Southold has preserved 2,312 acres at a cost of more than \$67 million.²⁰

Michigan began a program to purchase development rights to farmland in 1994 and has since spent \$55 million to preserve more than 27,000 acres.²¹ Table 1, below, lists the local PDR programs in Michigan. Peninsula Township's is the oldest, indicating its longstanding commitment to maintaining land for agricultural production. Peninsula Township has also invested more local funds and preserved more land with local funding than the other Michigan local governments.

¹⁴ Daniels and Keene, 2018. The Law of Agricultural Land Preservation in the United States, Chicago: American Bar Association, p. 80.

¹⁵ Ibid., p. 74.

¹⁶ See Daniels and Keene, 2018. The Law of Agricultural Land Preservation in the United States, Chicago: American Bar Association, pp. 215-220.

¹⁷ National Sustainable Agriculture Coalition. 2019. Agricultural Conservation Easement Program (ACEP). <https://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/agricultural-conservation-easement-program/>. Accessed August 27, 2023.

¹⁸ American Farmland Trust. 2022. Status of State PACE Programs, 2022, p. 7. https://farmlandinfo.org/wp-content/uploads/sites/2/2022/12/State_PACE_Program_Factsheet_2022.pdf. Accessed May 15, 2023.

¹⁹ American Farmland Trust. 2021. Status of Local PACE Programs, p. 6. https://farmlandinfo.org/wp-content/uploads/sites/2/2021/02/Local_Purchase_of_Agricultural_Conservation_Easement_Programs_2020_2.21_A_FT_FIC.pdf. Accessed May 15, 2023.

²⁰ American Farmland Trust. Status of Local PACE Programs, 2020, pp. 2, 4. https://farmlandinfo.org/wp-content/uploads/sites/2/2021/02/Local_Purchase_of_Agricultural_Conservation_Easement_Programs_2020_2.21_A_FT_FIC.pdf. Accessed May 18, 2023.

²¹ Ibid. p. 5.

Table 1. Michigan Local Governments with Farmland Preservation Programs.

| <u>Locality</u> | <u>Year of Inception / Year of First Acquisition</u> | <u>Independent Acres Preserved</u> | <u>Independent Program Funds Spent to Date</u> |
|----------------------------|--|--|--|
| Acme Township | 2004 / 2009 | 500 | \$1,749,444 |
| Ann Arbor Charter Township | 2003 / 2006 | 1,128 | \$3,735,544 |
| Ingham County | 2004 / 2006 | 3,147 | \$5,500,000 |
| Kent County | 2002 / 2005 | 1,966 | \$494,800 |
| Ottawa County | 2008 / NA | 91 | \$41,400 |
| Peninsula Township | 1994 / 1996 | 3,347 | \$15,173,800 |
| Scio Township | 2004 / 2008 | 731 | \$4,932,552 |
| Washtenaw County | 1998 / NA | 2,275 | \$3,617,812 |
| Webster Township | 2005 / 2009 | 897 | \$1,466,485 |

Source: American Farmland Trust. 2021. Status of Local PACE Programs, 2020, pp. 2, 4.

PDR alone keeps land from being developed. Effective agricultural zoning supports PDR programs and creates an environment in which farming can thrive on preserved land by ensuring compatibility of land uses and allowing uses that support agriculture while disallowing those that undermine it.

ii. Agricultural Zoning

Many townships and counties across the United States use agricultural zoning to reduce conflicts between farmers and nonfarmers, protect productive farmland from nonfarm development, and limit the density of development. As with all zoning, agricultural zoning is a set of regulations that implement goals expressed in a master plan.

Agriculture as practiced today is essentially an industrial land use involving heavy machinery and chemical sprays and fertilizers to produce food and fiber. These activities generate noise, dust, and odors which can cause conflicts with neighboring nonfarm residential or commercial developments. In turn, nonfarm homes and businesses placed near farms can create traffic that interferes with the movement of farm machinery. Thus, local governments use agricultural zoning districts to separate areas where agriculture is the dominant and preferred land use from residential and commercial zoning districts. Agricultural zoning can also promote orderly growth by limiting how many nonfarm parcels can be subdivided from farms, thereby controlling sprawl and the cost of public services.

A key distinction in an agricultural zoning ordinance is what constitutes an agricultural use as opposed to a commercial use of the property. An agricultural use is the production of food and fiber and may include the processing and sale of those agricultural products on the farm where they are grown and processed. Also, the leading grape and wine producing areas, including Peninsula Township, may allow tasting rooms and the sale of wine-related products, such as wine glasses, but not goods unrelated to wine, such as coffee mugs. By contrast, a commercial use is

the sale of goods and services not related to agriculture and which can be sold or offered at locations in commercial zoning districts.

In an agricultural zone, agricultural production is the principal use; other uses, such as tasting rooms and the sale of wine-related products, are accessory. It is a common practice for local governments to restrict the size of tasting rooms and gift shops at wineries so that the accessory uses do not overtake the principal use of agricultural production, as shown in the four major wine-producing jurisdictions, discussed in section D below.

Agricultural zoning need not allow the highest and best use of a property, such as for a housing development, but must be a reasonable economic use of property in the jurisdiction that enacts it.²² The purpose of agricultural zoning is to maintain land in agricultural production to support the local agricultural economy and, as with zoning in general, to promote the public health, safety, and welfare.

An agricultural zoning ordinance first explains its purpose and defines uses allowed in the agricultural zone. Principal uses are typically those directly related to agricultural production, such as growing crops and raising livestock. Accessory uses may include related activities like processing, marketing, and sales of agricultural products. By-right uses typically include farming, farm dwellings, forestry, greenhouses and nurseries, and a limited number of residences. Special uses may include farm stands for direct sales to consumers, some processing of farm products, and bed and breakfast operations that are accessory to the principal farming operation.

The connection between land zoned for agriculture and land preserved by PDR is critical to the overall success of a community's effort to retain agricultural land and support agricultural operations.²³ The agricultural zone helps to buffer the preserved farmland, limiting residential and commercial development on neighboring properties that could cause conflicts with farming activities on the preserved farmland (see Figure 3). Also, land uses on farmland subject to a conservation easement must comply with the provisions of the underlying agricultural zoning.

D. Agricultural Zoning in Major Wine Producing Regions

Wine production begins with growing grapes, which may involve the use of fertilizers, pesticides, and herbicides. Harvesting can be done by machinery or by hand. Harvested grapes are destemmed, crushed, pressed, fermented, and aged. Then the wine is filtered or "fined," and bottled for sale. A winery is typically used for the post-harvest production steps and storage of finished products. It may or may not have a tasting room where visitors may sample and purchase the wines produced by the winery.

The growing and harvesting of grapes creates noise, dust, and potential chemical spray drift. Wineries require significant space for processing equipment and storage. In essence, wine

²² "Highest and best" use refers to the land use that would produce the highest value for a property.

²³ Daniels and Keene, 2018, *The Law of Agricultural Land Preservation in the United States*, Chicago: American Bar Association, pp. 329-331.

production is an industrial process. This means zoning should work to separate it from non-farm residential and commercial land uses to avoid conflicts and nuisance situations.

Below, I examine how four major grape and wine producing areas use agricultural zoning to regulate wineries: Napa County, California; Sonoma County, California; Yamhill County, Oregon, and Suffolk County, New York. This examination shows that local governments commonly require a special use permit for construction and operation of a winery, increase minimum required lot size for wineries with tasting rooms and retail sales, and regulate the percentage of grapes in wine sold by wineries to protect their appellations and wine reputation.²⁴

Napa County, California, is located in the northern region of the San Francisco Bay area and famous for its premier wines. Napa County has more than 400 wineries and 16 AVAs.²⁵ Napa County's prime grape and wine producing area is protected by an agricultural zoning district, known as the Agricultural Reserve. The Reserve covers 32,000 acres in the heart of the Napa Valley.²⁶ Sonoma County, California, is adjacent to Napa County and is another of America's premier grape and wine producing regions. Sonoma County has more than 425 wineries and 18 AVAs.²⁷ The Town of Southold is located on the north fork of the eastern end of Long Island in Suffolk County, New York. The town has about a dozen wineries and is part of the North Fork of Long Island AVA.²⁸ Yamhill County, Oregon, is located in the Willamette Valley, southwest of Portland. It is a famous wine producing region and part of the Yamhill-Carlton AVA, which has more than 50 wineries.²⁹ Yamhill County has three agricultural zoning districts, EF-80 with an 80-acre minimum lot size, EF-40 with a 40-acre minimum lot size, and EF-20 with a 20-acre minimum lot size. Wineries are a permitted use in each of these three agricultural zoning districts, subject to site design review.³⁰

i. Winery definition

Wineries are agricultural processing facilities. While many people experience them only by visiting their public-facing tasting rooms, wineries are primarily for making wine – not tasting or selling it on-site. Napa County defines a winery as “an agricultural processing facility used for the fermenting and processing of grape juice into wine; or the refermenting of still wine into sparkling

²⁴ See Napa County zoning ordinance, Section 18.104.250 - Wineries—Production capacity C. 1. and 2.

²⁵ Napa Valley Wineries. 2023. <https://www.napavalley.com/wineries/>. Accessed May 17, 2023.

²⁶ Napa Valley Life. 2018. Napa Valley Agricultural Preserve 50 Anniversary. <https://www.napavalleylifemagazine.com/napa-valley-agricultural-preserve-50th-anniversary/#:~:text=The%20best%2Dknown%20part%20is,to%20more%20than%2032%2C000%20acres>. Accessed May 17, 2023.

²⁷ Sonoma County Tourism. 2023. <https://www.sonomacounty.com/activities/wineries-wine/#:~:text=With%20more%20than%20425%20wineries,to%20explore%20your%20own%20way>. Accessed May 17, 2023.

²⁸ See North Fork Wine Trail. 2023. <https://blog.signaturepremier.com/north-fork-wine-trail-guide/>. Accessed May 16, 2023; Wine-Searcher. 2023. North Fork of Long Island Wine. <https://www.wine-searcher.com/regions-north+fork+of+long+island#:~:text=North%20Fork%20of%20Long%20Island%20is%20an%20American%20Viticultural%20Area,vinifera%20grapes%20will%20reliably%20ripen>. Accessed May 17, 2023.

²⁹ Yamhill-Carlton AVA. 2023. <https://yamhillcarlton.org/wineries/#:~:text=With%20over%2050%20member%20wineries,for%20everyone%20in%20Yamhill%2DCarlton>. Accessed May 23, 2023).

³⁰ Section 402.02.H.

wine.”³¹ Sonoma County defines wineries as part of “agricultural processing,” which is allowed through a special use permit and “must be sized to accommodate, but not exceed, the needs of the on-site growing or processing operation.”³² The Town of Southold defines a winery as “a place or premises on which wine made from primarily Long Island grapes is produced and sold.”³³ Yamhill County defines a winery as “a facility that produces and sells wine” subject to maximum capacity requirements.³⁴

ii. Special Use Permit for Wineries

Wineries are commonly permitted as special land uses, but sometimes allowed by right. Napa County allows wineries only through a special use permit.³⁵ Uses allowed include wine production and bottling, offices and labs, and the sale of wine.³⁶

Sonoma County requires a special use permit for agricultural processing, defined as “[c]hanging an agricultural product from its natural state to a different form, as grapes to wine, apples to juice or sauce.”³⁷ Processing is limited to agricultural products “grown or produced primarily on-site or in the local area,” and storage, bottling, and canning, is limited to products grown or processed on-site.³⁸

The Town of Southold allows wineries as a by-right use if the winery meets certain standards, including that the wine produced and sold is “made from primarily Long Island grapes.”³⁹ Yamhill County allows a winery by right but subject to site design review.⁴⁰

iii. Tasting Rooms, Food, and Retail Sales

Wine tasting and retail sales are separate uses that may be associated with wineries, regulated either as accessory uses that are incidental and subordinate to the principal agricultural processing use or subject to their own special use permitting process. Tasting and retail sales are generally limited to local wines and wine-related promotional items.

Napa County regulates tasting rooms through the special use permitting process for wineries. Uses permitted as accessory to the principal agricultural processing use of a winery include tours, tasting, and the sale of wine-related products.⁴¹

Similarly, Sonoma County regulates tasting rooms as an additional use that must be authorized in a winery's special use permit. Tasting rooms are defined as “[a] retail food facility where one (1) or more agricultural products grown or processed in the county are tasted and sold,” and include

³¹ Napa County Zoning Ordinance, Section 18.08.640.

³² Sonoma County Zoning Ordinance, Sec. 26-18-030.C.1.

³³ Town of Southold Zoning Ordinance, Section 280-13 (4)(a).

³⁴ Yamhill County Zoning Ordinance, Sec. 402.02(H).

³⁵ Napa County Zoning Ordinance, Section 18.16.030 H.

³⁶ Napa County Zoning Ordinance, Section 19.08.640 G and Section 18.104.250.

³⁷ Sonoma County Zoning Ordinance, Section 26-18-030 A.

³⁸ Sonoma County Zoning Ordinance, Section 26-18-030.

³⁹ Town of Southold Zoning Ordinance, Section 280-13 (4) (a).

⁴⁰ Yamhill County Zoning Ordinance, Section 402.02.H.

⁴¹ Napa County Zoning Ordinance Section 18.08.640 H. 1; Section 18.08.620.

“wine tastings, olive oil, honey, fruit preserves” while excluding farm stands and farm retail sales.⁴²

The Town of Southold allows wineries to have “an accessory gift shop on the premises which may sell items accessory to wine, such as corkscrews, wine glasses, decanters, items for the storage and display of wine, books on winemaking and the region and nonspecific items bearing the insignia of the winery.”⁴³ “Wineries may not have a commercial kitchen as an accessory use but may have a noncommercial kitchen facility for private use by the employees.”⁴⁴

In Yamhill County, a winery may sell only “[w]ines produced in conjunction with the winery” and “[i]tems directly related to wine, the sales of which are incidental to the retail sale of wine on-site and do not exceed 25 percent of the total gross receipts of the retail facility.”⁴⁵ Items may include “those served by a limited service restaurant,” meaning “a restaurant serving only individually portioned prepackaged foods prepared from an approved source by a commercial processor and nonperishable beverages.”⁴⁶

iv. Limits on Production Capacity

Zoning commonly limits winery production capacity by fruit source, facility size, and/or volume of finished product. In Napa County, the maximum production capacity of a winery is established in its special use permit.⁴⁷ Napa County requires that “at least seventy-five percent of the grapes used to make the winery’s still wine, or the still wine used by the winery to make sparkling wine, shall be grown within the county of Napa.”⁴⁸ Napa County, named California’s first AVA in 1981, has a reputation and an appellation to protect and uphold.⁴⁹

Sonoma County requires agricultural processing, including winemaking, in its agricultural zones to be “sized to accommodate, but not exceed, the needs of the on-site growing or processing operation” and “limited to processing of agricultural products grown or produced on site, and bottling, canning, or storage of agricultural products grown and processed on site.”⁵⁰ Sonoma County also limits the combined square footage of all buildings used for processing or storage to 5,000 square feet.⁵¹

The Town of Southold requires that “[a]t least 66% of the agricultural products being processed must have been grown by that bona fide farm operation,” with an exception for “cases of a catastrophic crop failure.”⁵²

⁴² Sonoma County Zoning Ordinance section 26-18-210.

⁴³ Town of Southold Zoning Ordinance, Section 280-13. C. (10).

⁴⁴ Ibid.

⁴⁵ Yamhill County Zoning Ordinance Section 402. 10. I. 2. (a) and (b).

⁴⁶ Yamhill County zoning ordinance Section 402.10 I. 2.; ORS 624.010.

⁴⁷ Napa County Zoning Ordinance Section 18.16.030 H.

⁴⁸ Napa County Zoning Ordinance, Section 18.104.250 B.

⁴⁹ Daniels, The Napa County Agricultural Preserve, p. 106.

⁵⁰ Sonoma County Zoning Ordinance, Sec. 26-18-30(C).

⁵¹ Sonoma County Zoning Ordinance, Sec. 26-18-030(C).

⁵² Town of Southold Zoning Ordinance Section 280-13. C. (13)(e).

Yamhill County defines two sizes of wineries with production capacity limitations based on the size of the vineyards they support. Wineries with a maximum annual production of less than 50,000 gallons must own an on-site vineyard of at least 15 acres, a contiguous vineyard of at least 15 acres, have a long-term contract for the purchase of all grapes from a contiguous vineyard of at least 15 acres, or obtain grapes from a combination of those three options. For wineries that produce between 50,000 and 100,000 gallons, similar requirements apply with 40-acre vineyard requirements replacing the 15-acre vineyard requirements.

The limit on the use of grapes grown outside of Napa County, the Town of Southold, and Yamhill County is consistent with federal AVA standards, designed to ensure the authenticity of wine labeled from those distinct places and to protect the quality and reputation of those distinct wines. In Yamhill County, the requirement that the grapes to support the winery be produced on or adjacent to land on which the winery sits is also a reasonable requirement to protect the quality and reputation of the wine produced by and sold at Yamhill County wineries, and to limit wine production capacity to align with local farming capacity.

The limit on production capacity prioritizes local grape growing while allowing sufficient wineries to process those grapes. Tying the wineries to local grape sources allows the area's grape growing capacity to be a natural limit on the size and number of wineries. These grape source requirements are also part of the AVA designation. Local governments are under no obligation to allow as many wineries as possible, or to allow wineries to make as much wine as possible. Landowners who wish to propose a new winery but cannot meet AVA and local zoning standards may build elsewhere.

v. Summary

Based on my professional experience and research, it is my opinion that agricultural zoning in these four major wine-producing jurisdictions promotes agricultural preservation. By defining the land use to be principally winemaking and tying it to grape growing, these ordinances limit the initial scope of the land use. The ordinances that provide for special uses recognize the potential for additional site-specific considerations and conditions. Further, they restrict commercial, non-agricultural land uses that could otherwise turn agricultural processing facilities (wineries) into primarily commercial retail stores, selling merchandise unrelated to winemaking and tasting. Finally, they ensure agricultural focus through limited production capacity through requirements for the use of local grapes and size of wineries, which further supports the local distinctive AVAs.

E. A Brief History of Land Use Planning, Zoning, Agricultural Zoning, and Farmland Preservation in Peninsula Township

Protecting farmland has been a major goal of Peninsula Township since the first master plan was adopted in 1968. The Township's first zoning ordinance followed in 1972. The ordinance created an A-1 Agricultural zoning district which covered (and still applies to) nearly 12,000 acres or roughly two-thirds of the Township (see Figure 1).

In the late 1970s, with the pending sale of 500 acres at the northern tip of the Township, residents became concerned about the threats of large housing developments and scattered homes that could

rapidly change the rural and agricultural character of the Township. The Township's 1983 master plan called for the "continued viability of agricultural production by protection of valuable farm land." Its 2011 master plan recognizes that "the peninsula is a key asset for its open agricultural lands and recreational opportunities" and articulates a vision to "preserve and protect the unique and scenic character of Old Mission Peninsula."⁵³

Peninsula Township's agricultural zoning protects farmland by, among other things, indicating agriculture as the primary, preferred land use and limiting accessory uses and non-farm uses. It is tied to the goals of the Township's master plan, reflecting the Township's longstanding interest in protecting agricultural land.

Complementary to agricultural zoning, Peninsula Township drafted an Agricultural Preservation Plan (APP) as a subplan to the master plan in 1994.⁵⁴ The APP identifies an Agricultural Preservation Area encompassing a substantial portion of the A-1 Agricultural zoned land (9,861 acres). In 1994, Peninsula Township voters passed Michigan's first township PDR program, for which land in the Agricultural Preservation area is eligible (see Figure 2). Township voters have twice renewed the PDR program, in 2003 and 2022, indicating the importance of the Township's agricultural industry and character to the majority of residents, and reflecting the popularity of the Township's policies to maintain farmland and agriculture on Old Mission Peninsula.

The Township's PDR ordinance notes that "[i]t is the policy of the State of Michigan and Peninsula Township to protect, preserve and enhance agricultural and open space lands as evidenced by the Peninsula Township Master Plan including open space polices, the Farmland and Open Space Preservation Act of 1974 (P.A. 116), the Historic and Conservation Easement Act and the Township ordinances regulating land use by zoning and subdivision control."⁵⁵ Recognizing that "these policies and regulations, by themselves, have not been effective in providing long-term protection of farmland, shoreline, and open lands under the pressure of increasing urban development," the ordinance establishes a PDR program that will "permit these lands to remain in farmland and open space in a developing urban area and provide long-term protection for public benefits which are served by farmlands and open space lands within the Township."⁵⁶

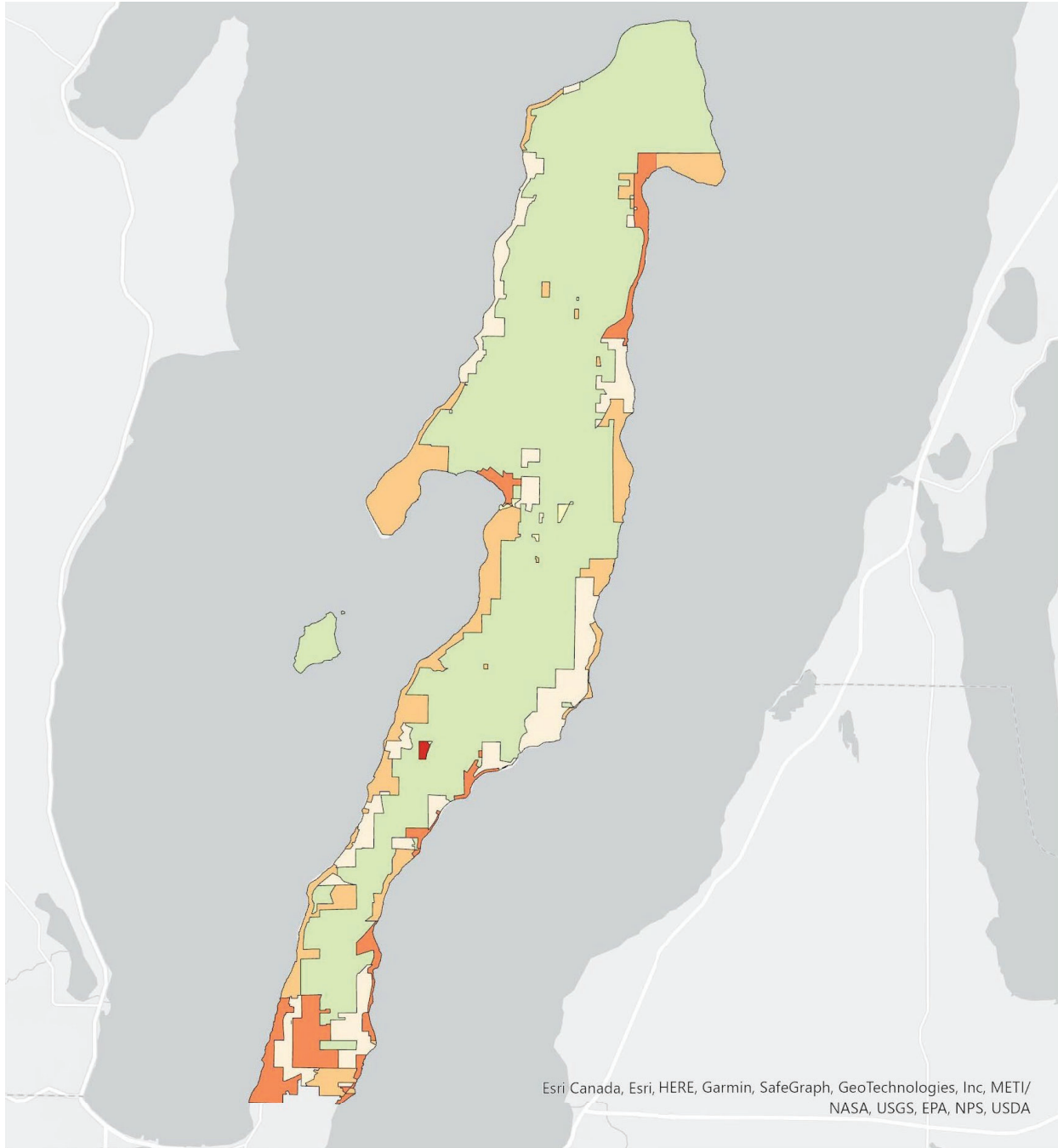
⁵³ 2011 Master Plan, p. 3.

⁵⁴ Williams, Jesse. 2022. Balancing Development, Agriculture, and Preservation: Evaluating the Success of the Old Mission Peninsula's Purchase of Development Rights Program.

⁵⁵ Peninsula Township PDR Ordinance Section 1 (4).

⁵⁶ Ibid.

Figure 1: Peninsula Township Zoning Map



- A-1 Agricultural Zoning
- C-1 Commercial Zoning
- R-1A Rural and Hillside Residential Zoning
- R-1B Coastal Zone Residential Zoning
- R-1C Suburban Residential Zoning
- R-1D Community Residential Zoning

Figure 2. Peninsula Township Agricultural Preservation Area



 Agricultural Preservation Area

This map highlights the Agricultural Preservation Area, the prioritized agricultural land that would be desirable to preserve. This does not represent the amount of land currently under conservation easements, although some land in this area is protected (see next figure).

“Properties on which the Township has purchased the Development Rights should remain substantially undeveloped in order to promote their ‘Agricultural Use,’” defined as “the production of plants and animals useful to man, including fruits; grapes; nuts; vegetables; green house plants; Christmas trees; forages and sod crops; grains and feed crops; dairy and dairy products; livestock, including breeding and grazing; and other similar uses and activities on substantially undeveloped land.”⁵⁷

Peninsula Township has 5,181 acres of preserved agricultural land, accounting for more than half of the land identified in the Agricultural Preservation Area. This is an impressive achievement resulting from more than \$15 million the Township has invested in its PDR program.⁵⁸ In addition, the Township has received funding from the State of Michigan, American Farmland Trust, and the federal Farm and Ranch Lands Protection Program (now part of the federal Agricultural Conservation Easement Program).⁵⁹ The combination of Township and outside funding has provided strong support for the Township’s agricultural economy to enable a long-term future for agriculture on Old Mission Peninsula. The passage of an additional millage for the Township’s PDR program in 2022 is expected to generate additional millions of dollars for farmland preservation.

Four of the eleven wineries on Old Mission Peninsula own or lease preserved farmland: Black Star Farms, Bonobo, Chateau Grand Traverse, and Mari Vineyards. Chateau Grand Traverse sold a permanent conservation easement to the State of Michigan; the Township holds the development rights for Black Star Farms, Bonobo, and Chateau Grand Traverse.

As I reported in 2008:

Peninsula Township has created the most successful farmland preservation program in Michigan and one of the most successful among local governments in the United States. The measures of success are many: a) Nearly one-third of the Township’s 17,755 acres have been placed under permanent conservation easements; b) The preserved farms are often adjacent to each other; c) Landowners continue to apply to sell their development rights; d) The Township has identified a 9,200-acre Agricultural Preservation Zone in its Master Plan where agriculture is the preferred use and 80% of the preserved land is located within the APZ.

* * *

The strategy of the Township PDR program has featured the preservation of farmland with scenic views of Grand Traverse Bay. This strategy has attempted to accomplish two goals at the same time: 1) preserve the scenic views which both the

⁵⁷ Ibid., Section 2 (1).

⁵⁸ American Farmland Trust. 2021. Status of Local PACE Programs, 2020, p. 4. https://farmlandinfo.org/wp-content/uploads/sites/2/2021/02/Local_Purchase_of_Agricultural_Conservation_Easement_Programs_2020_2.21_A_FT_FIC.pdf. Accessed May 18, 2023.

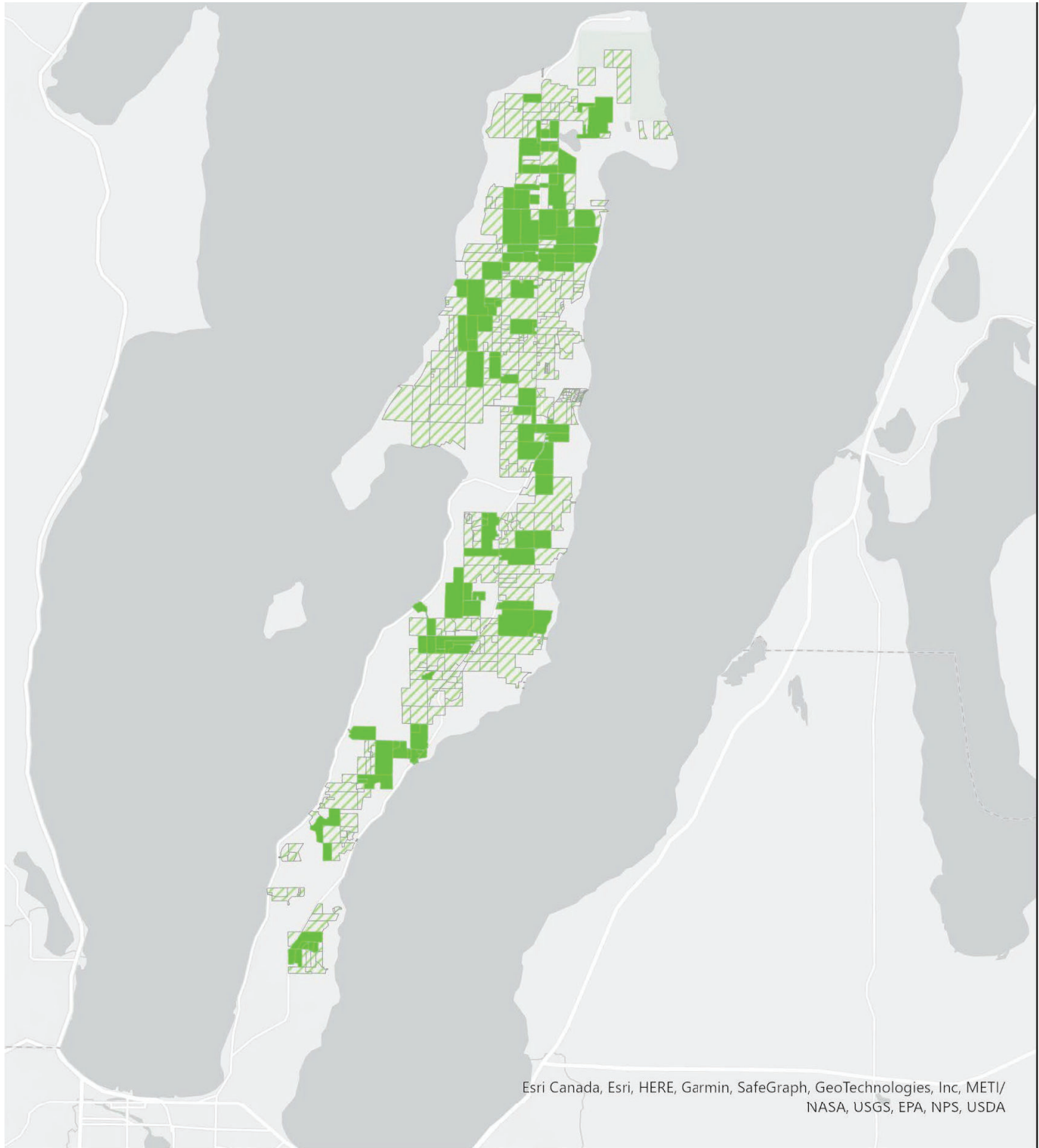
⁵⁹ Daniels, T. 2008. An Evaluation of the Peninsula Township Farmland Preservation Program, p. 4.

Township residents and tourists enjoy; and 2) preserve agricultural land in order to keep the fruit industry alive and thriving on the peninsula. The Township has done a good job of minimizing development along Michigan Route 37, and the views are often spectacular.⁶⁰

Figure 3 below shows how Township farmland has been preserved in several contiguous blocks, which helps to keep non-farm development at a distance, thus minimizing potential conflicts over farming practices.

⁶⁰ Ibid., pp. 5,7.

Figure 3. Preserved Farmland in Peninsula Township.



- Protected Parcels
- Agricultural Preservation Area

II. Analysis of Challenged Zoning Provisions

Plaintiffs challenge select subparts of Peninsula Township Zoning Ordinance sections that establish three winery uses in the A-1 District: Farm Processing Facility – a use by right under Section 6.7.2(19); Winery-Chateau – a special use under Section 8.7.3(10); and Remote Winery Tasting Room at 8.7.3(12). To analyze these challenges, I explain the purpose of the Peninsula Township Zoning Ordinance as a whole, the agricultural zoning provisions within the Township Ordinance, winery uses allowed by right and uses allowed by special use permits. The analysis shows that the challenged provisions are reasonable and are similar to provisions used by the four major wine producing areas cited in this report.

A. Peninsula Township Zoning Ordinance (PTZO)

The purposes of the Peninsula Township Zoning Ordinance (PTZO) are:

[T]o protect the public health, safety, morals and general welfare of the inhabitants of the Township; to provide for adequate light, air and convenience of access to secure safety from fire and other dangers; to avoid undue concentration of population by regulating minimum open spaces and by regulating and limiting types and locations of buildings and regulating the location of trades, industries, and buildings designated for specific uses; to provide for the orderly development of the Township; to encourage the use of lands and resources of the Township in accordance with their character and adaptability; to provide for safety in traffic, adequacy of parking and reduce hazards to life and property; to facilitate the development of adequate systems of fire protection, education, recreation, water supplies and sanitary facilities; and to conserve life, property, natural resources and the use of public funds for public services and improvements to conform with the most advantageous use of lands, resources and properties.⁶¹

To further these purposes, the Peninsula Township Zoning Ordinance divides the Township into six zoning districts: A-1 Agricultural, C-1 Commercial, R-1A Rural and Hillside Residential, R-1B Coastal Zone Residential, R-1C Suburban Residential, and R-1D Community Residential (see Figure 1). For each zoning district, it spells out required minimum lot sizes, setbacks, building height, lot coverage, and uses allowed by right or by special use permit. It also establishes who has zoning authority, the zoning permitting processes and procedures, appeals and requests for interpretation, land uses and their standards, enforcement procedures, and the amendment and re-zoning process. The A-1 Agricultural Zoning District in particular serves the goals of the Township master plan to “protect the unique and scenic character of Old Mission Peninsula” and to “retain and attract growers and agricultural entrepreneurs.”⁶²

i. The A-1 Agricultural Zoning District

⁶¹ Peninsula Township Zoning Ordinance Section 2.1.

⁶² 2011 Master Plan, pp. 3, 27.

The A-1 Agricultural Zoning district “is intended to recognize the unique ecological character of the Peninsula and to preserve, enhance, and stabiliz[e] 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.”⁶³ Uses permitted by right include one- and two-family dwellings; mobile homes; “field crop and fruit farming, truck gardening, horticulture, aviaries, hatcheries, apiaries, green houses, tree nurseries, and similar agricultural enterprises along with accessory uses incidental to” those uses; raising and keeping of small animals and livestock; customary home occupations; “[r]oadside stands selling regionally grown fresh and/or processed farm produce, raw forest products, cut flowers, potted plants, agricultural and forest products”; cemeteries; farmworker housing; public parks and recreation areas; conservation areas; customary uses and structures incidental to principal rural residential uses; mining and topsoil removal subject to supplementary use regulations; day care; barn storage; and “Farm Processing Facility” wineries.⁶⁴

Uses permitted by Special Use Permit include Planned Unit Developments, special open space uses, recreational vehicle parks or campgrounds, food processing plants, institutional structures like schools and places of worship, greenhouses and nurseries with retail sales, riding stables, livestock auction yards, raising of fur-bearing animals for profit, for-profit game and hunting preserves, veterinary facilities and kennels, sawmills, agricultural storage, golf courses and country clubs, public buildings and service installations, waste disposal and treatment facilities, airports and airfields, warehouses and light industrial uses, wind energy conversion systems, bed and breakfast establishments, adult foster care facilities, and Winery-Chateau and Remote Winery Tasting Room wineries.⁶⁵

Peninsula Township’s roadside stand provisions are an example of how it seeks to allow some degree of retail activity while maintaining the A-1 District’s purpose of ensuring land is used primarily for farming. It excludes non-regional and non-agricultural items from sale and is intended “to provide only for the limited seasonal sale of agricultural and related products, but not to encourage the size of investment in equipment that would require a commercial zone.”⁶⁶

ii. Winery Uses in the A-1 District

The Peninsula Township Zoning Ordinance defines a winery as “a state licensed facility where agricultural fruit production is maintained, juice is processed into wine, stored in bulk, packaged, and sold at retail or wholesale to the public with or without the use of a wine tasting facility. The site and buildings are used principally for the production of wine.”⁶⁷

Until it was amended in December 2022, the PTZO permitted the following three winery land uses in the A-1 District: Farm Processing Facilities, Winery-Chateaus, and Remote Winery Tasting Rooms. A Farm Processing Facility is “a building or buildings containing an area for processing

⁶³ Peninsula Township Zoning Ordinance Section 6.7.1.

⁶⁴ Peninsula Township Zoning Ordinance Section 6.7.2

⁶⁵ Peninsula Township Zoning Ordinance Section 6.7.3, 8.7.2.

⁶⁶ Peninsula Township Zoning Ordinance Section 6.7.2 (8)(f)

⁶⁷ Peninsula Township Zoning Ordinance Section 3.2

equipment where agricultural produce is processed or packaged and prepared for wholesale and/or retail sales” and “may also include a retail sales area for direct sales to customers and a tasting room for the tasting of fresh or processed agricultural produce including wine, as well as “necessary parking, lighting and access to a public road.”⁶⁸ A Winery-Chateau is “a state licensed facility whereat (1) commercial fruit production is maintained, juice is processed into wine, stored in bulk, packaged, and sold at retail or wholesale to the public with or without the use of a wine tasting facility and (2) a limited number of guest rooms with meals are offered to the public.”⁶⁹ A Remote Winery Tasting Room is a tasting room not located on the same property as its associated winery.⁷⁰

Use by Right – Farm Processing Facility

The construction and use of a Farm Processing Facility winery is allowed by right as a way “to promote a thriving local agricultural production industry and preservation of rural character.”⁷¹ A Farm Processing Facility is intended to include retail and wholesale sales of fresh and processed agricultural produce but is not intended to allow a bar or restaurant on agricultural properties and does not include permission to hold “weddings, receptions and other social functions for hire.”⁷²

Most of the produce sold must be grown on the specific farm operation associated with the Farm Processing Facility and must be grown on Old Mission Peninsula. A Farm Processing Facility must be located on a parcel that meets minimum acreage requirements. While it may have unlimited underground facilities, its above-grade floor area and retail space are limited.⁷³ The above-ground size limitation affects, among other things, stormwater runoff and visual impacts and thus relates to the public health, safety and welfare purpose of zoning.

Limiting accessory uses like food service, marketing, and retail sales; and limiting production capacity, including through building size and grape source requirements, are common practice in the zoning ordinances of the leading grape and wine producing regions mentioned earlier.

Special Uses – Winery Chateau and Remote Winery Tasting Room

The Winery-Chateau is a special use permitting the “construction and use of a winery, guest rooms, and single family residences as a part of a single site.”⁷⁴ It requires a 50-acre minimum site, upon which the principal use is a winery. There are no local grape source requirements for wine produced and sold, but at least 75% of the site must be used for active production of crops that can be used to make wine.⁷⁵ Guest rooms, a manager’s residence, and single-family residences are allowed as support uses, and accessory uses are permitted so long as they are no greater than reasonably necessary to serve the principal use.⁷⁶ “Accessory uses such as facilities, meeting

⁶⁸ Peninsula Township Zoning Ordinance Section 3.2

⁶⁹ Peninsula Township Zoning Ordinance Section 3.2

⁷⁰ Peninsula Township Zoning Ordinance Section 8.7.3 (12)

⁷¹ Peninsula Township Zoning Ordinance Section 6.7.2. (19) (a)

⁷² Peninsula Township Zoning Ordinance Section 6.7.2. (19) (a)

⁷³ Peninsula Township Zoning Ordinance Section 6.7.2. (19) (b) (6)

⁷⁴ Peninsula Township Zoning Ordinance Section 8.7.3 (10)

⁷⁵ Peninsula Township Zoning Ordinance Section 8.7.3 (10) (h)

⁷⁶ Peninsula Township Zoning Ordinance Section 8.7.3 (10) (d)

rooms, and food and beverage services shall be for registered guests only,” and “not . . . greater in size or number than those reasonably required for the use of registered guests.”⁷⁷ The Township Board may approve activities for people in addition to registered guests – “Guest Activity Uses” – as support uses if certain standards designed to promote active crop production beyond the 75% minimum are met.⁷⁸ Guest Activity Uses include wine and food seminars and cooking classes, meetings of local nonprofit groups, and agriculture-related meetings.⁷⁹ “[E]ntertainment, weddings, wedding receptions, [and] family reunions” are excluded from the definition of permissible Guest Activity Uses.⁸⁰

The Remote Winery Tasting Room is a special use that is allowed for a tasting room that is not on the same property as the winery that produces the wine. It is another example of the Township’s effort to use zoning to balance agricultural production with the sale of agricultural products grown on Old Mission Peninsula and protect the public health, safety, and welfare. While it requires only a 5-acre parcel for the tasting room site, the tasting room and winery parcel must be under single ownership with “a minimum of 150 acres in Peninsula Township under that ownership and a minimum of 50% of the 150 acres shall be in active agricultural use.”⁸¹

A discretionary decision whether to approve a special land use requires “a statement of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed.”⁸² These findings and conclusions and any conditions appear in the Special Use Permits issued for Winery-Chateaus and the Remote Winery Tasting Room in Peninsula Township.

Seven wineries in the Township have Special Use Permits for Winery-Chateaus (Bonobo, Bowers Harbor, Brys, Chateau Chantal, Chateau Grand Traverse, Hawthorne, and Mari) and one has a Special Use Permit for a Remote Winery Tasting Room (Peninsula Cellars). As contemplated by the Michigan Zoning Enabling Act, some have conditions in addition to the requirements of the Peninsula Township Zoning Ordinance to further promote health, safety, and general welfare. For example, in the Mari Vineyards Special Use Permit, the Township added a condition saying there can be no amplified sound outdoors in order to protect the residential neighbors.

B. How the Peninsula Township Zoning Ordinance Promotes Agricultural Preservation

The Peninsula Township Zoning Ordinance serves to implement the Township Master Plan, protect property values, protect natural resources, prevent nuisances, and ensure the compatibility of uses.⁸³ It describes the purpose, intent, and land use regulations for each zoning district, including the purpose for the A-1 District to “preserve, enhance, and stabiliz[e] existing areas

⁷⁷ Peninsula Township Zoning Ordinance Section 8.7.3 (10) (m)

⁷⁸ Peninsula Township Zoning Ordinance Section 8.7.3 (10) (u)(1)(a), 3

⁷⁹ Peninsula Township Zoning Ordinance Section 8.7.3 (10)(u) 2

⁸⁰ Peninsula Township Zoning Ordinance Section 8.7.3 (10)(u)(2)(d).

⁸¹ Peninsula Township Zoning Ordinance Section 8.7.3(12)(a)-(e).

⁸² MCL 125.3502(4).

⁸³ 2011 Master Plan, p. 45.

within the Township . . . used predominately for farming purposes” and allow limited, compatible other uses.⁸⁴

As Peninsula Township stated in response to Plaintiffs’ interrogatories, in adopting the challenged provisions, it “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.”⁸⁵ It described its interests as follows:

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.⁸⁶

These statements express common and standard purposes for agricultural zoning and reflect local government’s strong interest in maintaining productive agricultural land and promoting orderly growth. The provisions that are being challenged further these stated interests. For example, by limiting retail sales to logo merchandise and wine-related items, the Peninsula Township Zoning Ordinance allows wineries to be profitable without changing them to commercial uses on agricultural land.

The A-1 Agricultural District “identifies those parcels within the Township where the land’s unique ecological and physical attributes allow viable agricultural operations and farming practices to exist”; its regulations “are designed to preserve, enhance, and stabilize existing areas within Peninsula Township where agriculture is the predominant use of the land.”⁸⁷ The performance standards in the Peninsula Township Zoning Ordinance for Farm Processing Facilities, Winery-Chateaus, and Remote Winery Tasting Rooms further this purpose, as well as the general purpose of zoning to promote the public health, safety, and welfare.

Establishing acreage minimums, limiting production capacity, and ensuring tasting room and other accessory uses do not overshadow the primary use of wine production also aligns with zoning in other major wine-producing jurisdictions.

The performance standards in the Peninsula Township Zoning Ordinance differentiate between principal uses and accessory uses, which cannot overtake the principal use to become the dominant use of the property. Generally, the more acreage in active agricultural production, the more accessory and/or support uses are permitted. A property owner needs only a small area for a Farm Processing Facility use by right, but there are additional grape source requirements and other restrictions (similar to Yamhill County’s agricultural zoning ordinance). More land is

⁸⁴ Peninsula Township Zoning Ordinance Section 6.7.1

⁸⁵ DEFENDANT PENINSULA TOWNSHIP’S SUPPLEMENTAL ANSWERS TO PLAINTIFFS’ FIRST SET OF INTERROGATORIES, p. 7.

⁸⁶ Ibid., p. 8.

⁸⁷ 2011 Master Plan, p. 15.

required for a Winery-Chateau with guest rooms and no grape source requirements. And, Guest Activity Uses can be added to a Winery-Chateau Special Use Permit if the winery produces and/or buys a certain amount of grapes grown on Old Mission Peninsula. Additionally, a landowner needs more land to locate a remote tasting room somewhere other than on the farm parcel.

Below I list the kinds of limitations that the plaintiffs are challenging. Then, I offer a response, part of which includes examples from the zoning ordinances of the major wine producing areas cited in this report to show that the Peninsula Township Zoning Ordinance are common zoning practices in other wine producing areas.

Plaintiffs are challenging the following limitations:

i. Limits on food and beverage service:

- 6.7.2(19)(a) – Farm Processing Facilities are not intended, among other things, to allow bar or restaurant uses.
- 8.7.3(10)(m) – Accessory uses such as facilities, meeting rooms, and food and beverage service at Winery-Chateaus are limited to what is reasonably necessary for registered (i.e., overnight) guests.
- 8.7.3(10)(u) – Notwithstanding 8.7.3(10)(m), Winery-Chateaus may offer food service to Guest Activity Use attendees under the following circumstances:
 - 8.7.3(10)(u)(2)(a) – Attendees of wine and food seminars and cooking classes may consume food prepared in class;
 - 8.7.3(10)(u)(2)(b) – Light lunch or buffet, but not full course meals, may be served at local nonprofit meetings (which are not to resemble a bar or restaurant use);
 - 8.7.3(10)(u)(2)(c) – Full course meals are permitted at agriculture-related meetings to demonstrate connections between wine and other foods; and
 - 8.7.3(10)(u)(5)(c) – The only alcoholic beverages that may be served during Guest Activity Uses are those produced on-site.

Section 6.7.2(19)(a) states that: “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.” This provision reflects the American Viticultural Area designation for wine sold with the Old Mission Peninsula source on the label and helps maintain the distinctiveness and reputation of Old Missing Peninsula wine. The more distinctive a wine, the higher price it is likely to command, which benefits grape growers and wine producers alike. This is what branding is all about.

This provision is also consistent with requirements for a certain percentage of locally grown grapes in wine sold in the four major wine- producing areas cited earlier in this report. For example, Napa County requires at least 75% of grapes used to make a winery’s still wine or the still wine used by

the winery to make sparkling wine to be grown in the county.⁸⁸ The Town of Southold requires at least 66% of agricultural products being processed to have been grown by the winery's own farm operation.⁸⁹

Limitations on food and beverage service at wineries is common. For example, the Town of Southold prohibits wineries from having commercial kitchens.⁹⁰ So is allowing the tasting or sale only of wine produced onsite. For example, wineries in Yamhill County may only sell wines produced in conjunction with the winery.⁹¹

Bars, restaurants, and catering are commercial uses typically separated from other uses and limited to being located in a commercial zoning district. In my experience, a bar or restaurant is a commercial use and not an agricultural use because it does not produce agricultural commodities. By contrast, a tasting room is an accessory use that allows for the tasting and the sale of wine produced on the premises.

ii. Exclusion of weddings, wedding receptions, and other private events for hire from the scope of permitted uses:

- 6.7.2(19)(a) – “Activities such as weddings, receptions and other social functions for hire are not allowed, however, participation in approved township wide events is allowed.”
- 8.7.3(10)(u)(2)(d) – “Guest Activity Uses do not include weddings, wedding receptions, family reunions, or sale of wine by the glass.”
- 8.7.3(10)(m) – Accessory uses such as facilities, meeting rooms, and food and beverage service at Winery-Chateaus are limited to what is reasonably necessary for registered (i.e., overnight) guests.

A general concept in zoning is that uses not expressly permitted in a particular zoning district are presumed not to be permitted. For example, a zoning ordinance does not have to say event venues are not allowed in residential zoning districts. The ordinance would list the uses that are allowed in the zoning district, such as dwellings, churches, parks, and schools.

Wineries, which are the principal permitted use under the Farm Processing Facility and Winery-Chateau provisions, are agricultural processing facilities. Uses like tasting rooms and retail sales of wine produced in these facilities are accessory, meaning customary and incidental to the production of the wine. Winery-led events to promote themselves and local agriculture, like wine club promotional events in the tasting rooms, Guest Activity Uses, and Township-wide events like Blossom Days may be appropriate accessory uses.⁹² But private events for hire and facility rentals

⁸⁸ Napa County zoning ordinance Section 18.104.250B.

⁸⁹ Town of Southold Zoning Ordinance, Section 280-13. C. (13)(e).

⁹⁰ Section 280-13. C. (10).

⁹¹ Yamhill County zoning ordinance Section 402.02(H) 2 (a).

⁹² Blossom Day is a celebration of the cherry blossom in the spring in Peninsula Township. See Old Mission Peninsula Wine Trail. <https://www.ompwinetrail.com/event/blossom-day/>. Accessed August 27, 2023.

that use agriculture as a setting, like weddings, wedding receptions, corporate conferences, and family reunions, are not customary or incidental uses of agricultural processing facilities, so they are not principal nor support uses. At best, they are accessory uses that are reasonably limited.

Limitations on accessory uses, generally, are a common practice in the zoning ordinances of the major wine producing areas cited in this report. Limitations on activities and events such as weddings, wedding receptions, and family reunions are meant to keep non-agricultural uses out of agricultural areas. Like a bar or restaurant, uses such as weddings, receptions and other social functions for hire are commercial uses, not agricultural uses. These uses belong in a Commercial zoning district and that is where they typically occur. Weddings may also be appropriate as accessory uses at places of worship located in residential and agricultural districts, as they would be customary and incidental to those uses (unlike agricultural processing facilities).

iii. Establishing standards and requiring advance notice and/or approval for some activities or events:

- 8.7.3(10)(u) – Allowing the Township Board to approve Guest Activity Uses in a Winery-Chateau’s Special Use Permit as “Support Uses” in accordance with certain requirements, including that Guest Activity Uses are limited to food and wine seminars and cooking classes (8.7.3(10)(u)(2)(a)), local 501(c)(3) meetings (8.7.3(10)(u)(2)(b)), and agricultural-related meetings (8.7.3(10)(u)(2)(c)), which require either advance notice or (for ag-related meetings only) approval
- 8.7.3(10)(u) – Establishing standards for Guest Activity Uses, including:
 - 8.7.3(10)(u)(1)(b) – Guest Activity Uses are intended to promote Old Mission Peninsula agriculture by identifying local food/wine, providing promotional materials, or conducting tours;
 - 8.7.3(10)(u)(1)(d) – Guest Activity Uses do not include wine tasting and promotional activities and free entertainment in the tasting room;
 - 8.7.3(10)(u)(2)(d) – Guest Activity Uses do not include weddings, wedding receptions, family reunions, or sale of wine by the glass;
 - 8.7.3(10)(u)(5)(a) – Guest Activity Uses must promote Old Mission Peninsula agriculture by identifying local food/wine, providing promotional materials, or conducting tours;
 - 8.7.3(10)(u)(5)(c) – only wine produced on-site may be served during allowed events.
 - 8.7.3(10)(u)(5)(g) – no amplified instrumental music is allowed during allowed events; and
 - 8.7.3(10)(u)(5)(h) – no outdoor displays of merchandise, equipment, or signs are allowed during allowed events.

Limitations on the tasting and sale of wines only produced onsite is a common practice in the zoning ordinances of the major wine producing areas cited in this report as previously discussed. Limiting activities or events to those that promote local agriculture, including the wine they produce onsite, offers wineries an opportunity to increase their sales and profitability without allowing accessory activity and event uses to overtake the principal winery use of wine production.

Wineries are also likely to benefit from conducting tours of their facilities and promoting a local wine trail to visitors. In my experience, most visitors to a wine region look to sample wines from more than one winery.

Requiring notice or approval for certain activities and events is also, in my opinion, a reasonable way to regulate accessory activities, especially activities that are not normally permitted at a winery part of agricultural processing. The Township A-1 Agricultural District here is favorable to the wineries, in my opinion, by creating a process to allow meetings and activities that otherwise would not be permitted, generally related to food and agriculture at the wineries.

iv. Allowing retail sales of only wine and winery- and agriculture-related merchandise

- 6.7.2(19)(b)(1)(v) – Allows the retail sale of logo merchandise at Farm Processing Facilities “directly related to the consumption and use” of the agricultural produce sold at the winery (i.e., wine); the logo must be permanently affixed to the merchandise and prominent; the sale of wine glasses and corkscrews is permitted, but not clothing, coffee cups, or bumper stickers.
- 8.7.3(12)(i) – Allows the retail sale of logo merchandise that promotes the winery or Old Mission Peninsula agriculture at Remote Winery Tasting Rooms (such as Peninsula Cellars); the logo must be permanently affixed to the merchandise; the sale of corkscrews, wine glasses, t-shirts, and bumper stickers is permitted.

Limitations on the sale of wine and wine-related merchandise is a common practice in the zoning ordinances of the major wine producing regions cited in this report. For example, Napa County allows the sale of “wine-related products,” and the display, but not the sale, of art or items of historical, ecological, or viticultural significance to the wine industry.⁹³

These provisions, in my opinion, advance the goal of encouraging growers to produce, process, and market agricultural products” and thus maintain land in agricultural use. Merchandise not related to wine or the agricultural product grown on the farm property is a commercial activity, and that merchandise can and should be sold in a commercial zoning district.

v. Establishing maximum facility and retail space size

- 6.7.2(19)(b)(6) – Limits above-grade floor area of a Farm Processing Facility to 6,000 square feet or 0.5% of parcel size, whichever is less; requires retail space to be a separate room limited to the greater of 500 square feet or 25% of the facility’s total above-grade floor area.⁹⁴

Other wine-producing areas have provisions in their zoning ordinances to limit winery size. For instance, Yamhill County has a limit of does so by imposing a production capacity limit of 100,000

⁹³ Napa County Zoning Ordinance, Section 18.08.640 H.

⁹⁴ In January 2019, Amendment 197 changed this provision to allow a maximum above-grade facility size of 30,000 square feet with 1,500 square feet for retail, (or 250 square feet per acre with the retail space being no more than 25% of the total facility area, whichever is less).

gallons of wine.⁹⁵ The Town of Southold restricts accessory buildings to 3% of total parcel size.⁹⁶ Sonoma County requires agricultural processing, including winemaking, in its agricultural zones to be “sized to accommodate, but not exceed, the needs of the on-site growing or processing operation” and limits the combined square footage of all buildings used for processing or storage to 5,000 square feet.⁹⁷

C. The Harm If the Provisions of the Peninsula Township Zoning Ordinance Are Invalidated

The provisions discussed above limit or avoid threats to productive agriculture and advance the Township’s master plan principally by limiting nonagricultural uses in the A-1 District. The Plaintiffs through this lawsuit apparently seek to undo the Township’s agricultural zoning through the invalidation of the provisions that the Plaintiffs challenge. If these provisions were eliminated without the opportunity to replace them with other provisions intended to achieve the overall intent of the Peninsula Township Zoning Ordinance – *i.e.*, supporting agricultural preservation and ensuring compatible land uses – and if the result is that wineries may operate without effective limits on production and accessory uses, there would be several negative effects on the Township and its residents, in my opinion. These effects call into question whether the A-1 Agricultural District will be able to function according to its intent and purpose to further the Township’s interests as spelled out both in the Township Master Plan and the Peninsula Township Zoning Ordinance.

The likely negative effects that adversely impact agricultural operations, in my opinion, include but are not limited to:

1. More traffic and greater difficulty in moving farm machinery along roads. During my visit to the Township on Wednesday, August 9, 2023, I observed fairly heavy traffic along M-37 (Center Road) in the late morning and early afternoon. If wineries were allowed to offer additional commercial, non-farm-related goods and services, such as convenience store items, private events for hire, and non-local agricultural produce, traffic levels would likely increase, and the wineries would draw traffic during extended hours. Additional vehicles and additional times of heavier traffic would create additional challenges to moving farm machinery and harvested produce along the roads of Peninsula Township, as most of the wineries are located in the northern two-thirds of the Township.
2. The removal of on-site and local grape source limits will allow wineries in the A-1 District to increase the bottling, labeling, and retail sales of wine produced from juice or grapes produced elsewhere, to the detriment of local agriculture.
3. Adverse impacts on traditional farming through higher land prices brought about by the elevation of accessory uses for the sale of goods and services not related to agriculture above the principal use of properties for agricultural production.

⁹⁵ Yamhill County Zoning Ordinance, Section 402.02(H) 1 (b).

⁹⁶ Town of Southold Zoning Ordinance, 280-15.

⁹⁷ Sonoma County Zoning Ordinance, Sec. 26-18-030(C).

4. Undoing the Township's agricultural zoning to allow the sale of goods and services not related to agriculture and removing production requirements would likely open up agricultural lands to increased commercial development. The distinction between purely commercial use and agriculture would become blurred if wineries were allowed to buy, process, bottle, and sell wine without local active agricultural production. The wineries would simply become wine shops or bars, like those commonly found in a commercial district. Similarly, if the wineries are allowed to sell a variety of foods and generic items, then people on their way to the beaches will start visiting wineries for sandwiches and supplies, not wine tasting.
5. This commercialization of agricultural land would likely push up land prices, posing a threat to active agriculture, including stone fruit and apple production on the Peninsula. The opportunity for conversion from traditional farming to more lucrative land uses like facility rentals for private events and/or residential development will especially become a problem when the current generation of farmers retires because the next generation will be priced out of new entry or expansions due to the higher land costs.

D. Conclusions

Peninsula Township has invested considerable resources over many years to craft the Township Master Plan, A-1 Agricultural District, Agricultural Preservation Plan, Agricultural Preservation Areas, and PDR program to protect and maintain the agricultural land base and to support the agricultural industry on Old Mission Peninsula.

In my opinion, the Plaintiffs misinterpret the fundamental purpose of zoning and, in particular, the purpose of the Township A-1 Agricultural District, which is to "to preserve, enhance, and stabilize existing areas within the Township which are presently being used predominately for farming purposes."⁹⁸ The removal of limitations in the challenged provisions to allow more commercialized uses on agricultural land -would likely create externalities felt on neighboring properties, reducing the enjoyment of those properties by their residents and undermining efforts to maintain agricultural production as the primary land use in the A-1 district.

The Township, in my opinion, through its land use and related programs, strives to balance agricultural production, agricultural processing, and the sale of agricultural products against purely commercial activity with no direct relationship to agriculture. In setting this balance, Peninsula Township designed a zoning ordinance of by-right and special uses that is similar to those found in other leading grape and wine-producing areas in the United States. The balance is delicate but presently working. The A-1 District contains a significant amount of farmland in active agricultural production while allowing for the reasonable economic use of the property, as evidenced by some wineries operating their facilities as principally agricultural businesses in the A-1 District for decades.

Allowing retail sales of non-agricultural items in the A-1 Agricultural District invites a haphazard pattern of commercial development, which is contrary to the present rural and agricultural

⁹⁸ Peninsula Township Zoning Ordinance, Section 6.7.1

character of the Township. Furthermore, the retail sale of non-agricultural items and the addition of non-agricultural activities, such as weddings and receptions for hire, would push up land prices and make it more difficult for farmers on the Peninsula to maintain their agricultural operations over time.

Increased retail sales of non-agricultural goods and commercial hospitality services at the wineries would necessarily generate greater traffic along M-37, given that most of the wineries are located in the northern two-thirds of the county. This increased traffic, in turn, would create greater challenges for farmers attempting to move machinery along the Township's roads and move produce off the Peninsula during harvest time.

Also, the in-effect upzoning of agricultural land to allow for event venues for hire would raise agricultural property values in an undesirable way, reflecting not the fundamental agricultural productivity, but non-agricultural uses allowed on the properties. This puts farmers without venues for hire at a disadvantage in competing for land.

Upzoning wineries for more commercial activities would also create the opportunity to turn accessory non-agricultural uses into the principle uses in the A-1 district, contrary to longstanding Township plans and programs. Converting wineries into commercial uses would in effect mean re-zoning those parcels from agricultural to commercial, which only the Township Board has the authority to do.

In sum, it is my opinion that the Peninsula Township A-1 Agricultural District serves a common, standard, and reasonable public purpose in protecting agricultural land for agricultural production for the benefit and welfare of Township residents.

Exhibit 1



Thomas L. Daniels

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Education

1984 Ph.D. in Agricultural and Resource Economics, Oregon State University.

1977 M.S. in Agricultural and Resource Economics, University of Newcastle-upon-Tyne, England. Study on a Rotary Foundation Fellowship.

1976 B.A. cum laude in Economics, Harvard University.

Planning Experience

July 2003-
Present

Full Professor with Tenure, Department of City and Regional Planning,
University of Pennsylvania.

Teach: Land Use Planning, Environmental Planning, Planning for Climate Change,
and Land Preservation. Acting Chair, January-June 2006, July, 2015-June 2016.
Crossways Professor, 2020-present.

Erasmus Mundo Scholarship, University of Venice IUAV, March, 2017

Clarkson Chair, Department of Urban Planning, University of Buffalo, October, 2011.

July 1998-
June 2003

Full Professor with Tenure, The University at Albany, State University of New
York. Director of the Planning Master's Program, Fall 1998-December 2001.

Fulbright Senior Fellowship, University of New South Wales, Australia,
February-June, 2002.

May 1989-

July 1998

Director, Agricultural Preserve Board of Lancaster County, Pennsylvania. Administered a nationally-recognized farmland preservation easement acquisition program with an annual budget of over \$4 million. Preserved over 16,000 acres in 188 easement projects. Assisted Planning Commission staff with growth management and agricultural zoning issues. The program received the 1993 Outstanding Program Award from the Small Town and Rural Planning Division of the American Planning Association. Received the 1996 National Achievement Award from the American Farmland Trust.

Aug. 1987-

May 1989

Associate Professor with Tenure, Department of Regional and Community Planning, Kansas State University.

Jan. 1985-

July 1987

Assistant Professor, Department of Community and Regional Planning, Iowa State University. Taught in Semester Abroad program in London, Fall 1986.

Publications

Books

2018 The Law of Agricultural Land Preservation in the United States. Chicago: American Bar Association. (Senior author with John Keene).

2014 The Environmental Planning Handbook for Sustainable Communities and Regions (Second Edition). Chicago: American Planning Association.

2011 The Planners Guide to CommunityViz: The Essential Tool for a New Generation of Planning. Chicago: American Planning Association. (Second author with Doug Walker).

2007 The Small Town Planning Handbook (3rd edition). Chicago: American Planning Association. (Senior author with John Keller, Mark Lapping, Katherine Daniels, and Jim Segedy.)

1999 When City and Country Collide: Managing Growth in the Metropolitan Fringe. Washington, D.C.: Island Press.

1997 Holding Our Ground: Protecting America's Farms and Farmland. Washington, D.C.: Island Press. (Senior author with Deborah Bowers).

- 1989 Rural Planning and Development in the United States, New York: Guilford Publications. (Second author with Mark Lapping and John Keller).

Refereed Journal Articles

- 2022 "The potential of nature-based solutions to reduce greenhouse gas emissions from US agriculture," Socio-Ecological Practice Research, online August 4, doi.org/10.1007/s42532-022-00120-y

"How can the USA and China cooperate and learn from each other to reduce greenhouse gas emissions? Socio-Ecological Practice Research, online May 6, 2022. DOI 10.1007/s42532-022-00112-y

"Managing urban growth in the wake of climate change: Revisiting greenbelt policy in the US." Land Use Policy. Han, Albert, Thomas L. Daniels, and Chaeri Kim. Land Use Policy 112: 105867. <https://doi.org/10.1016/j.landusepol.2021.105867>.

- 2021 "Re-designing America's suburbs for the age of climate change and pandemics," Socio-Ecological Practice Research, 3(2), 225-236. <https://doi.org/10.1007/s42532-021-00084-5>.

- 2019 "Protected Land Management and Governance in the United States: More Than 150 Years of Change," (Senior author with Dan Moscovici). Society and Natural Resources, 33 (6).

"McHarg's Theory and Practice of Regional Ecological Planning: Retrospect and Prospect," Socio-ecological Practice Research, 1: 197–208. <https://doi.org/10.1007/s42532-019-00024-4>

"Assessing the Performance of Farmland Preservation in America's Farmland Preservation Heartland:: A Policy Review. Society and Natural Resources. 33(6):1-11. DOI: 10.1080/08941920.2019.1659893

"California's success in the socio-ecological practice of a forest carbon offset credit option to mitigate greenhouse gas emissions," Socio-ecological Practice and Research, Vol 1, No. 2, pp. 125-138. (2nd author with Chaeri Kim).

"The Napa County Agricultural Preserve: 50 Years as a Foundation of America's Premier Wine Region." *Journal of Planning History* Vol. 18(2): 102-115 .

- 2018 "The Plan for the Valleys: Assessing the Vision of David Wallace and Ian McHarg." *Journal of Planning History* Vol. 17, No. 1 (February, 2018) pp. 3-19. 2nd author with George Hundt, Jr.).

- 2017 "Preserving Large Farming Landscapes: The Case of Lancaster County Pennsylvania," *Journal of Agriculture, Food Systems and Community Development* Vol. 7, No. 3, pp. 67-81. (senior author with Lauren Payne-Riley).
- 2010 "Integrating Forest Carbon Sequestration Into a Cap-and-Trade Program to Reduce Net CO2 Emissions," *Journal of the American Planning Association*, 76 (4): 463-475.
- "The Use of Green Belts to Control Sprawl in the United States," *Planning Practice and Research*, 25: 2, 255 — 271.
- 2009 "A Trail Across Time: American Environmental Planning from City Beautiful to Sustainability. *Journal of the American Planning Association*. 75 (2): 178-192.
- 2005 "Land Preservation as a Key Element of Smart Growth," *Journal of Planning Literature*, 19:3, 316-329. (Senior author with Mark Lapping).
- 2001 "Smart Growth: A New American Approach to Regional Planning." *Planning Practice & Research*, Vols. 3 &4, pp. 271-281.
- 2000 "Integrated Working Landscape Protection: The Case of Lancaster County, Pennsylvania," *Society & Natural Resources*, 13:3, pp. 261-271.
- 1991 "The Purchase of Development Rights: Preserving Agricultural Land and Open Space," *Journal of the American Planning Association*, Vol. 57, No. 4, pp. 421-431.
- "The Goals and Values of Local Economic Development Strategies in Rural America," *Agriculture and Human Values*, Vol. 8, No. 3, pp. 3-9.
- 1989 "Small Town Economic Development: Growth or Survival?" *Journal of Planning Literature*, Vol. 4, No. 4, pp. 413-429.
- 1988 "America's Conservation Reserve Program: Rural Planning or Just Another Subsidy?" *Journal of Rural Studies*, Vol. 4, No. 4, pp. 405-411.
- 1987 "Small Town Triage: A Rural Settlement Policy for the American Midwest," *Journal of Rural Studies*, Vol. 3, No. 3, pp. 273-280. (Senior author with Mark Lapping).

Conference Papers and Presentations

- 2022 "The State of Farmland Preservation in Your County. Pennsylvania Land

Conservation Conference, March 17, 2022 Gettysburg, PA

2021 “Suzhou, China, Environmental Planning: What China and the United States Can Learn From Each Other, Sept. 24/5, 2021

2019 “Agricultural Performance Results from the 2017 Census of Agriculture and Implications for Farmland Preservation,” Farmland Preservation Roundtable, Saratoga Springs, NY, October 30, 2019.

2018 “The Law of Agricultural Land Preservation,” Pennsylvania Land Trust Association Conference, Malvern, PA, April 13, 2018

2017 “Using GIS to Measure Progress in Farmland Preservation,” Pennsylvania Land Trust Association Conference, Lancaster, PA, May 4, 2017.

2016 “Large Landscape Conservation: East,” American Planning Association National Conference, Phoenix, AZ, April 2, 2016

2015 “Green Infrastructure for Urban Stormwater Management,” Association of Collegiate Schools of Planning Conference, Houston, TX, October 22, 2015.

“What’s New in Environmental Planning?” American Planning Association Conference, Seattle, WA, April 18, 2015

2014 “A Comparison of Urban Containment: Oregon, Maryland, and Four Hybrid Counties.” Association of Collegiate Schools of Planning, Philadelphia, PA, October 30, 2014.

“Return on Investment: How PDR is Strengthening Local Economies and Remaining Relevant Moving Forward.” National Farmland Preservation Conference, Hershey, PA, May 12, 2014.

2013 “Planning for Climate Change: Mitigation and Adaptation,” Planners Training Session, Seattle, June 11-12, 2013.

“Philadelphia: Urban Water: Managing Stormwater, Rivers, and Watersheds,” Urban Ecosystems Services and Decision Making: A Green Philadelphia Conference, Philadelphia, PA, May 23, 2013.

“Climate Change Adaptation,” American Planning Association Conference, Chicago, IL, April 16, 2013.

2012 “Planning for Green Infrastructure,” Planners Training Session, Charlotte, NC, November 15-16, 2012.

- 2011 “Greenbelts to Control Sprawl in the United States,” American Planning Association Conference, Boston, April 10, 2011.
- 2010 “Landscape Scale Farmland Preservation,” American Society of Landscape Architects Conference, Washington, DC, September 14, 2010.

Professional Reports

- 2022 Regulating Utility-Scale Solar Projects on Agricultural Land, Kleinman Center for Energy Policy, University of Pennsylvania. August, 2022, 7 pp. (Senior author with Hannah Wagner).
- 2021 Study on Inclusionary Housing with Chrissy Quattro for Penn IUR, December 2021, 75 pp.
- 2020 The State of Farmland Preservation in Lancaster County. For Lancaster Farmland Trust, September 2020, 35 pp.

An Analysis of the Economic Impact of the Farmland Preservation Program in Carroll County, Maryland. Westminster, MD: Carroll County, MD, 53 pp.
- 2019 Agricultural Land Protection, Annexation, and Housing Development: An Analysis of Programs and Techniques with Potential Use in Napa County: A Report for the Jack L. Davies Napa Valley Agricultural Preservation Fund, 108 pp.

An Analysis of the Economic Impact of Pennsylvania’s Farmland Preservation Program, Pennsylvania Department of Agriculture, 78 pp.
- 2017 Land Use Study, Solebury Township, PA, 25 pp.
- 2010 Cost of Community Services Study for Four Municipalities and the Hempfield School District, for East and West Hempfield Townships and the Hempfield School District in Lancaster County, PA, 51 pp.
- 2008 Ideas for Rural Smart Growth, Promoting the Economic Viability of Farmland and Forestland in the Northeastern United States, for the Office of Smart Growth, US Environmental Protection Agency, Washington, D.C., 40 pp.

An Evaluation of the Peninsula Township, Michigan Farmland Preservation Program, for the Grand Traverse Regional Land Trust, Traverse Bay, MI, 60 pages.

- 2007 An Evaluation of the Consistency of the Plum Creek Timber Company Proposed Concept Plan in the Moosehead Lake Region with the Comprehensive Land Use Plan of the Maine Land Use Regulation Commission, 46 pp.
- 2006 Final Report to the National Fish and Wildlife Foundation: An Evaluation of the Foundation's Conservation Easement and Capacity-Building Grants Program. 221 pp.
- 2003 Dakota County, Minnesota, Farmland and Natural Area Preservation Program Guidelines, 54 pp., co-author with Jean Coleman, June, 2003.

Grants

- 2022 Climate Social Science Network. Agricultural Organizations and Their Messaging About Climate Change and Recommended Responses. \$16,000. Principal Investigator.
- Robert Schalkenbach Foundation. The California Sustainable Agricultural Lands Conservation Program: Evaluating the Use of Cap-and-Trade Funds to Promote Climate Mitigation and Adaptation. \$5,000. Principal Investigator.
- 2021 Kleinman Center for Energy Policy. Regulating Utility-Scale Solar Projects on Agricultural Land. \$4,500. Principal Investigator.
- 2019 Pennsylvania Department of Agriculture, An Analysis of the Economic Impact of Pennsylvania's Farmland Preservation Program, \$13,500. Principal Investigator.
- 2013-17 U.S. EPA. Green Infrastructure for Urban Stormwater Management. \$1 million. Project associate.
- 2004-06 National Fish and Wildlife Foundation. Effectiveness of NFWF's Investments in Conservation Easements to Protect Wildlife Habitat. \$125,000. Principal Investigator.
- 2002 Open Space Institute, Study of Sprawl and Land Use Change in the Capital District of New York, \$40,000. Project associate.
- 2000 Hudson River Foundation, Study of Land Use Planning Techniques in the Chesapeake Bay Estuary and the Hudson River Estuary, \$61,396, Principal Investigator.

Professional Memberships

1983 - Member, American Planning Association
Present

2004- Member, Land Protection Committee, Lancaster County
Present Conservancy (PA)

2005- Member, Board of Trustees, Orton Family Foundation
2020

2011- National Advisory Board, Land Conservation Advisory Network, Yarmouth,
Present Maine.

2012- National Advisory Board, Equine Land Conservation Resource,
Present Lexington, KY

2014- National Advisory Board, Conservation Finance Network, Washington, DC
Present

Expert Witness Report

Submitted in Support of Plaintiffs

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

V.

PENINSULA TOWNSHIP, a Michigan municipal corporation, Defendant

And

PROTECT THE PENINSULA, Inc., Intervenor-Defendant

Case No. 1 20-CV-01008

Peninsula Township Zoning Ordinance

A Land Use Code

Grand Traverse County

Traverse City, MI 49686

Effective Date June 5, 1972, and Amendments

In Accordance With:

Second Amended Case Management Order (ECF 343) and

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

Prepared by:

**DAVID E. Moss, Principal
DAVID MOSS & ASSOCIATES, INC.**

1009 Wilshire Blvd., Suite 224

Santa Monica, CA 90401

Tel (310) 395-3481

Name, Professional Address and Telephone Number of Expert:

David E. Moss, D. Env
 David Moss & Associates, Inc.
 1009 Wilshire Blvd., Suite 224
 Santa Monica, CA 90401
 (310) 395-3481

Area of Expertise:

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

Short Summary of Expected Testimony:

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

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

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

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

Qualifications:

My qualifications include:

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

Introduction and Background of Assignment:

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

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

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

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

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

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

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

Peninsula Township Environmental Setting:

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

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

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

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

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

Peninsula Township Lands and Applicable Socio-Economic Data:

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

Opinions are Based on Three Sections of the Township Zoning Ordinance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Opinion: Wineries Increase Agricultural Preservation

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

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

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

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

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

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

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

By: _____



Date: August 28, 2023

David E. Moss

Summary of qualifications

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

Professional experience

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

President

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

1984 – 1987 Engineering Science/Parsons Pasadena, CA

Senior Scientist/EIS-EIR Compliance

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

Education

BA, Biological Sciences, Univ. of Delaware, 1976

MA, Marine Studies, Univ. of Delaware, 1979

D. Env., Env. Science and Engineering, UCLA, 1989

MDE Certificate, UCLA Anderson School of Management, 1996

**Conference
speaking**

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

Publications

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

Report of Retained Expert Witness

Submitted Under Rule 26(a)(2)(B)

in Support of Plaintiffs

Wineries of the Old Mission Peninsula Association ("WOMP")

v.

Peninsula Township and Protect the Peninsula, Inc.

Case No. 1:20-cv-01008

Prepared and signed by:

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Quimby Consulting Group, LLC

E: teri@terquimby.com

C: 517-230-8320

Page 2

I have been retained as an expert witness and submit the following information under Rule 26(a)(2)(B):

1. Expert Witness contact Information.
 - a. Name: Teri Quimby, J.D., LL.M.
 - b. Company: President, Quimby Consulting Group
 - c. Address: 776 W. Grand River Avenue, Brighton, MI 48116
 - d. Email: teri@teriquimby.com
 - e. Cell: 517-230-8320
2. Qualifications of witness.
 - a. Former Commissioner, Michigan Liquor Control Commission.
 - b. Eight years of working knowledge and application of the Michigan Liquor Control Code.
 - c. CV attached.
3. Publications. A list is included in my CV; please refer to that list.
4. Sources Reviewed.
 - a. Plaintiff's Brief in Support of Motion for Partial Summary Judgment on Preemption Claims, ECF No. 334.
 - b. Peninsula Township's Corrected Response to Plaintiff's Motion for Partial Summary Judgment on Preemption, ECF 353.
 - c. PTP's Brief Opposing Plaintiff's Motion and Supporting PTP's Cross-Motion for Partial Summary Judgment on Preemption Claims, ECF No. 356.
 - d. Peninsula Township Zoning Ordinance (PTZO), a Land Use Code, Peninsula Township, Grand Traverse County, Traverse City, MI 49686; Effective Date: June 5, 1972; Including Amendments through August 31, 2009.
 - e. Michigan Liquor Control Code, MCL 436.1101 et seq.
 - f. Michigan Administrative Code, R 436.1001 et seq.
 - g. Michigan Constitution, Article IV, § 40
 - h. U.S. Constitution, Twenty-First Amendment.
 - i. *Noey v. Saginaw*, 271 Mich. 595; 261 N.W. 88 (1935).
 - j. *R.S.W.W., Inc. v City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005).
 - k. *Allen v. Liquor Control Commission*, 122 Mich. App. 718 (1982).
5. Exhibits. No exhibits are submitted.
6. Other cases in last four years where witness has testified as an expert at trial or by deposition. No other cases are listed.
7. Compensation paid for report and testimony.
 - a. Payment is based on an hourly rate.
 - b. The hourly rate is \$425 an hour.

Page 3

8. Opinion: **The Michigan Liquor Control Commission (MLCC) has sole authority over the alcohol in Michigan as granted to it by the U.S. Constitution, Michigan Constitution, and Michigan statute.**

- a. As a Commissioner, I accepted the great responsibility for the regulation of alcohol at the state level that is established by the Twenty-First Amendment, the Michigan Constitution, and the Michigan liquor control code. The Michigan liquor control commission ("Commission") has sole authority to issue a license for alcohol. When considering commission actions, I looked to the grant of authority from these sources.
- b. The historic era of alcohol prohibition was followed by regulation of it. Even now the alcohol beverage industry continues to be one of the most highly regulated by government. And although the length of the Twenty-First Amendment of the U.S. Constitution may be viewed as short, the carefully chosen words are extremely powerful with meaning for the regulation of this industry. For example, it prohibits the transporting or importing into "any **State**, Territory, or possession of the United States" for "**delivery or use therein**" . . . "in violation of **the laws** thereof." (Emphasis added.). After a state allows alcohol within its borders, then the state government controls it.
- c. In Michigan, the Constitution provides discretion in Article IV, §40 to the Michigan Legislature to statutorily create a liquor control commission. The legislature acted and the law is currently referenced as the "Michigan liquor control code of 1998." The specific wording in §40 states that the Commission "shall exercise **complete control** of the alcohol beverage traffic within this state, **including the retail sales** thereof" subject to statutory limitations. (Emphasis added). Also, it is important to note the words in the final sentence: "Neither the legislature nor the commission may authorize the manufacture or sale of alcoholic beverages **in any county** in which a majority of the electors voting thereon shall prohibit the same." (Emphasis added.). This one specific acknowledgement of local ability—to prohibit alcohol within a county, through the voice of voters—does not equate to a grant of authority to a local unit of government within a county to prohibit the manufacture or sale of alcohol. The state's complete control over alcohol is only limited in the few counties choosing to prohibit alcohol.
- d. MCL 436.1209 creates the Commission and clearly states in law the Commission's responsibilities over alcohol. This includes licensing, purchasing, enforcement, merchandising, and distribution. Further, while the Commission is the only authorized government entity enabled to grant alcohol licenses, it is also clear under MCL 436.1903(1) that commissioners are the only ones

Page 4

empowered to suspend or revoke an alcohol license—not local units of government.

- e. The constitutional grant of “complete control” is “subject to statutory limitations.” What are examples of these limitations placed on the Commission? If the Commission finds a violation, the maximum fine is set by statute (MCL 436.1903). If the Commission suspends or revokes a license, a notice and hearing is required by statute (MCL 436.1903). If the Commission approves a license in a quota category, the maximum number of available licenses is established in the law (MCL 436.1531). Simply stated, the Commission cannot exercise control beyond any legislatively set limits and has complete control up to those limits.

9. **Opinion: Unless the legislature statutorily limits the commission, the commission has complete control over alcohol in Michigan, which supports the preemption argument.**

- a. As a commissioner I looked to the enacted words—every one of them deemed to be intentionally chosen by the legislature—to guide me in the application of the law to the facts. Every word requires recognition. Only a handful of detailed provisions in the liquor control code exist that allow for very specific actions by local government. One example is MCL 436.2113, which governs Sunday alcohol sales. The wording of these provisions that allow limited local engagement deserves detailed attention.
- b. As noted, the law governing Sunday sales of alcohol is one example from the liquor control code specifically allowing local county governments to exercise extremely limited discretion over a very specific activity. The county may choose to act by resolution to prohibit Sunday sales or it may be forced by petition to place the issue on the ballot. Either way, if the prohibition of Sunday sales is approved for the county, then the prohibition is directed toward the licensee; it is not a limitation on the Commission or the Commission’s complete control over alcohol. Sunday sales are allowed, and regulated by the Commission, unless the county prohibits it by following the specifically outlined provisions set forth in statute.
- c. Once the Commission approves a license, MCL 436.2113(1) clearly states that a licensee “may sell at retail, and a person may buy, spirits or mixed spirit drink between the hours of 7 a.m. on Sunday and 2 a.m. on Monday.” This is the law, and it allows licensees to do this activity on the licensed premise, except for any of these specifically stated statutory reasons:
 - i. a county prohibits Sunday sales by a majority-approved resolution or voter-approved ballot initiative for consumption on or off the premises, or both; or

Page 5

- ii. any city, village, or township chooses to prohibit Sunday sales by resolution or ordinance—if on a legal holiday, primary election day, general election day, or municipal election day.
- d. The Sunday sales law is specific as to how, when, and which local government may engage on a limited basis in state authorized activities of an alcohol licensee. Also, the law differentiates the actions allowed by the various types of local governments. Further, the statute even sets forth specific ballot language to be used by a county for a Sunday sales vote. Overall, the law is comprehensively prescriptive in nature, leaving little room for the local government's own discretion or agenda.
- e. Defendant Peninsula Township also overlooks a key analytical point in the Keego Harbor case, choosing to quickly dismiss the case's relevance because the ruling is focused on the doctrine of unconstitutional conditions rather than being primarily a preemption or zoning case. (ECF No. 353, p. 24). However, the Keego Harbor Court pays close attention to what a city ordinance can't do, referencing the Noey decision; a city ordinance "cannot fix closing hours to a period shorter than that specified in the state rule." (*R.S.W.W., Inc. v City of Keego Harbor*, 397 F.3d 427, 435, citing *Noey v. City of Saginaw*, 271 Mich.595, 261 N.W. 88 (1935)). The Court comments that Mich. Admin. Code R 436.1403 does not appear to grant an explicit right to remain open "until 2:00 a.m." but, rather, prohibits alcohol sales "after 2:00 a.m." (*Id.*). Once again, the Commission has complete control over the license, licensee, and the licensed premises—including hours of operation. The limitation imposed on the Commission here is clear; the Commission cannot extend a licensee's hours of operation to include the hours between 2:00 a.m. and 7:00 a.m. However, the Commission's exercise of complete control over the legal hours of operation is verified on the Commission's website. Both the Licensing and the Enforcement Divisions reiterate the legal hours for serving or selling alcohol in Michigan is 7:00 A.M. To 2:00A.M. State regulations set and enforce this timeframe for the legal hours. Thus, the sale and service of alcohol is authorized during this time. The only limitation is for very specific reasons, such as by a county's prohibition on alcohol or by a local unit's Sunday sales prohibition for a legal holiday falling on a Sunday.
- f. Further, Michigan Administrative Code R 436.1403 addresses the need for a business wanting to stay open past the legal hours for alcohol sales and service—not for alcohol, but, rather for food service or other non-alcohol activities. Approval for these activities is reserved for and granted by the state.

Page 6

- g. This state control analysis extends to other provisions of the liquor control code and supports the position that the Commission has complete control over the regulation of alcohol in Michigan, unless specifically limited. Since the Commission is charged with review and consideration of additional activities for a licensee taking place on licensed premises, such as music, dancing, food, catering, and more, the Commission solely regulates the specifically mentioned activities occurring on the state-licensed premises.
- h. As a commissioner I did not interpret the liquor control code as allowing any type of local government engagement in the alcohol licensee's activities on a licensed premise, unless specifically set forth in the liquor control code.

10. Opinion: Defendant applies incorrect reasoning in concluding that because the township merely restricts the location of activities rather than prohibiting them, state law does not preempt the PTZO from doing so.

- a. As a commissioner, I placed great importance on the specificity of a well-defined and clearly marked perimeter of a licensed premise for clarity on exactly where alcohol is, and what activities are taking place where the alcohol is located. Given the highly regulated nature of alcohol, the Commission has complete control over these activities for a licensee at the location of the alcohol license. If the liquor control code authorizes an activity for a licensee, without exceptions, then the licensee may engage in that activity. Period.
- b. Otherwise, this highly regulated product would fall under an undesirable, loosely quilted patchwork of thousands of local governments trying to regulate what is perhaps the highest, or one of the highest, regulated industries of all.
- c. Rulemaking authority is clearly granted to the Commission under MCL 436.1215 to regulate "the duties and responsibilities of licensees in **the proper conduct and management of their licensed places.**" (Emphasis added.). The Commission retains complete control over a license, licensee, and state-specified activities on licensed premises.
- d. The definition of "licensee" describes the relationship between the Commission and the licensee, with the Commission granting authority to the licensee. (MCL 436.1107(13)). The Commission retains complete control over the license, licensee, and state-specified activities on the licensed premises.
- e. The definition of "licensed premises" in R 436.1001(1)(i) basically encompasses any part of the real estate owned or operated by a licensee "in the conduct of the business at the location for which the licensee is licensed by the

commission...". The alcohol license applies to the *conduct of the business*, and to *the location licensed by the commission*. Once the location is licensed by the Commission, the licensed premises along with the conduct of the business at that location falls under the control of the Commission. Any activities on state-licensed premises that are set forth in statute or rules falls exclusively with the Commission. The Commission retains complete control over the license, licensee, and state-specified activities on the licensed premises.

- f. Given the Commission's complete control, the liquor control code and administrative rules preempt the PTZO from restricting the location of state-specified activities allowed under the state regulations for a licensee. The PTZO prohibits what is allowed by statute.


11. Opinion: Defendant places improper reliance on Michigan Administrative Code R 436.1003 by labeling the rule as a "warning" to licensees, as well as improper inference of Commission authority over non-alcohol related codes such as building codes, fire codes, and health codes.

- a. As a Commissioner I would see businesses anxious to open as soon as the alcohol license was approved. While the Commission clearly has control over alcohol licenses, licensees, and activities on licensed premises, the Commission does not have statutory authority to enforce other codes. The approval of an alcohol license does not equate to a building occupancy permit, for example. Nor does it equate to a health department license. And it does not equate to an approval for having the required number of toilets.
- b. At some point while I served as a commissioner, the commissioners made the decision to include the language of R 436.1003 in Commission approval orders and on the license *as a reminder* to work with local units of government on matters concerning building, plumbing, zoning, sanitation, and health laws, rules, and ordinances. The Defendant's choice to label this reminder as a "warning" is misguided in my opinion, based upon my experience with this issue at the Commission. (ECF No. 350, p. 14).
- c. Defendant focuses on the word "zoning" and implies the *Allen* case creates an absolute permission to force compliance with all local zoning ordinances—even if the ordinances create a conflict with state authority. (ECF No. 353, p. 13-14). However, the Court notes that the exercise of police powers by local units of government is subject to the Commission's authority. (*Allen v. Liquor Control Comm.*, 122 Mich. App. 718, 720 (1982)). When a conflict arises, as it does here with the PTZO, the Commission's state authority preempts the local regulation.

Page 8

12. Conclusion. State authority over the regulation of alcohol extends state-wide and is constitutionally limited only in those counties prohibiting the manufacture or sale of alcohol and is statutorily limited only in a few specifically stated circumstances allowing for local government engagement. The state has complete control over state-specified activities occurring on licensed premises. In this case, a conflict arises between the state regulations and the local ordinance (PTZO). The state regulations over alcohol licenses, licensees, and specifically authorized activities on licensed premises preempt the attempted regulation by this local unit of government.

The above opinions are prepared and submitted by:


Teri Quimby, J.D., LL.M.,
President
Quimby Consulting Group, LLC

Teri Quimby, J.D., LL.M.

Corporate Governance · Compliance · Communication

teri@teriquimby.com · 517.230.8320 · LinkedIn: [teriquimby](#)

Accomplished attorney, board member, and former state regulator with background in several heavily regulated industries. Provides critical thinking and a mediator's approach for engaging others to drive actionable, positive solutions. Understands complex issues, appreciates diverse perspectives, and attends to details. A professional who handles information with discretion and care.

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|--------------------------------|--|
| Critical Transformation | Challenges status quo by continuously looking for optimized governance and compliance solutions, and streamlined practices, procedures, and modern techniques that move organizations forward to better serve all stakeholders with integrity. |
| Strategic Guidance | Guides the implementation and maintenance of regulatory and operational policies based on understanding of business practices, identifying opportunities, and managing risks. |
| Consensus Building | Blends relationship- and knowledge-based approaches to encourage dialogue that facilitates impactful changes rooted in understanding business objectives and stakeholder support. |
| Thought Leadership | Provides innovative perspectives and insights, impeccable research skills, and effective strategy planning and implementation to move matters forward. |

PROFESSIONAL EXPERIENCE

WESTERN MICHIGAN UNIVERSITY-COOLEY LAW SCHOOL · Adjunct Professor 2022 – Present

Adjunct Professor teaching legal drafting, a required third-year law school course, in the writing department.

ATTORNEY AT LAW / CONSULTANT · Teri Quimby Law, PLLC / Quimby Consulting Group, LLC 2019 – Present

Legal services, focusing on administrative law. Consulting services, focusing on governance and compliance initiatives, research, writing, and public policy issues.

GRAND VALLEY STATE UNIVERSITY, CHARTER SCHOOLS OFFICE · Governance & Compliance Consultant 2021 – 2022

Consultant for GVSU chartered school boards, focusing on board governance and compliance with university granted charter authorization contracts and regulatory compliance. Developed board training programs; promoted good governance initiatives.

COMMISSIONER · Michigan Liquor Control Commission 2011 – 2019

Appointed by the Governor of Michigan to carry out Constitutional and statutory responsibilities over alcoholic beverage traffic in Michigan (including manufacturing, importation, possession, transportation, and sales); also served on agency appellate board.

- ▶ **Business Transformation:** Modernized Commission's business practices by creating streamlined, constituent-focused processes.
 - Improved licensing procedures, resulting in 64% less processing time through commission-initiated, staff-driven project.
 - Commission received international recognition with 2016 Process Excellence Network Award for "Best Process Improvement Project Under 90 Days," outcompeting finalists from other states and foreign countries.
- ▶ **Hearings & Appeals:** Conducted and frequently chaired daily meetings to vote on Commission decisions for licensing applications, hearings and appeals, declaratory rulings, rulemaking, and wholesaling of spirit products. Exercised statutory subpoena power.
 - Empaneled as agency appeal board (approx. 200 cases per year); decisions based on careful application of statutes and rules.
 - Authorized actions included revocation and suspension of licenses. Also empowered with statutory authority to issue emergency suspension orders with immediate effect when necessary to maintain health, safety, and welfare.
- ▶ **Wholesale Oversight:** As a "control state" and "market participant" for spirit product sales, oversaw the Commission's money-making state enterprise and proprietary fund, which transfers \$200 million or more annually into the state's general fund.

CERTIFIED CIVIL MEDIATOR · Teri Quimby, Esq. 2006 – 2011

General services focused on civil, domestic, and special education mediations and facilitations. Prepared detailed mediation agreements achieving thoroughness and accuracy, avoiding opportunities for speculation and interpretation.

DEPUTY DIRECTOR & SENIOR LEGAL COUNSEL · Michigan House Of Representatives 1991 – 2006

Within the House Majority Policy Office, worked with both parties, and other internal and external stakeholders, to advance Michigan's public policy formation through legislation. Facilitated consensus with members and interest groups. Directed 20+ policy advisors, advised 50+ caucus members, and supported personnel functions such as including hiring and staff development. Highlights include:

- ▶ **Environmental Policy:** Key participant in collaborative group process codifying related laws into one, user-friendly code—Natural Resources and Environmental Protection Act (NREPA), Public Act 451 of 1994.
- ▶ **Public Utility Policy:** Critical collaborator on major revisions to Michigan Telecommunications Act, Public Act 295 of 2000, and Customer Choice and Electric Reliability Act, Public Act 141 of 2000.

BOARD POSITIONS

VICE-PRESIDENT FINANCE & TREASURER · National Speakers Association-Carolinas Chapter 2023-Present
Elected by members to be entrusted with appropriate handling of all financial aspects of the association, included preparation of monthly and annual P&L statements.

EDITORIAL & ADVISORY BOARD · Society of Corporate Compliance & Ethics, *The Complete Manual* 2023 – Present
Provider of thought leadership and editorial review for this globally distributed, annually updated manual on compliance.

EDITORIAL BOARD · American Craft Spirits Association, *Craft Spirits Magazine* 2022 – Present
Provider of thought leadership and editorial review of this globally distributed magazine on craft spirits.

CORPORATE BOARD OFFICER · Start-Up Company, Finance Sector 2021 – Present
Provider of governance and leadership as secretary and board member for an SEC-regulated corporation.

PRESIDENT & OFFICERS · National Conference of State Liquor Administrators 2015 – 2019
Served as 1st, 2nd, and 3rd Vice President; Central Region Chair; Annual Conference Program Planning Committee Member
Elected by peers from other states to promote dialogue between state regulators and others involved in all aspects of the alcoholic beverage sector. Improved governance through modernization of articles of incorporation, bylaws, and other policies and procedures.

CHARACTER & FITNESS COMMITTEE MEMBER · State Bar of Michigan District E 2010 – 2016
Appointed by the State Bar of Michigan Board of Commissioners to review and determine fitness of applicants for bar admission.

UTILITY CONSUMER PARTICIPATION BOARD CHAIR · State of Michigan 2000 – 2003
Appointed by Michigan Governor to review applications and grant funding to non-profit organizations that represent Michigan utility ratepayers in cost recovery proceedings between utilities and Michigan Public Service Commission.

BOARD TRUSTEE · Delta Charter Township 1992 – 1996
Committees: Environment/Utility Chair; Transportation and Elections Committee
Elected to public office by community to represent 29,000 township constituents and lead 70+ employees, with oversight for responsible spending of \$15 million annual budget. Chosen as Board's representative to serve on Zoning and Sign Boards of Appeals.

AWARDS & RECOGNITION

- ▶ **NLEA: Award of Appreciation (National)** 2021
- ▶ **Crain's Business Detroit: Most Notable Women Lawyers in Michigan (State)** 2017
- ▶ **NALCP: Best Practices Award for Extraordinary Innovation, Dedication & Leadership (National)** 2017

BAR ADMISSIONS & EDUCATION

- ▶ **Michigan & Illinois** · Admitted and in good standing
- ▶ **Post Graduate Certificate in Competition Policy (One Year Course)** · University of East Anglia, Centre for Competition Policy (U.K.)
- ▶ **LLM-Corporate Law: Regulatory Analysis & Compliance** · Widener University, Delaware Law School (U.S.)
- ▶ **JD** · Western Michigan University, Cooley Law School (U.S.)
- ▶ **BA · Major: Justice, Morality & Constitutional Democracy; Minor: German** · Michigan State University, James Madison College (U.S.)

MEDIATION CERTIFICATIONS

- ▶ Civil Mediation
- ▶ Domestic Relations Mediation
- ▶ Special Education Mediation & Facilitation

December 4, 2023

Source: Plaintiffs' Expert Report of Teri Quimby, August 28, 2023

Page 11 of 12

PROFESSIONAL AFFILIATIONS & MEMBERSHIPS

- ▶ Society of Corporate Compliance and Ethics (SCCE)
- ▶ National Association of Corporate Directors (NACD)
- ▶ Association of Certified Fraud Examiners (ACFE)
- ▶ National & State Speakers Associations (NSA-MI & NC/SC)
- ▶ American Craft Spirits Association (ACSA)
- ▶ National Liquor Law Enforcement Association (NLLEA)

REGULATORY & LEADERSHIP CERTIFICATES & TRAINING

- ▶ 25-hour Internal Investigations Workshop—Society of Corporate Compliance & Ethics (SCCE); special training on investigation techniques, documentary evidence, interviews, legal elements, conclusions and reports.
- ▶ 30-hour Compliance & Ethics Academy—SCCE; comprehensive program on compliance practice, legal and disclosure issues, auditing, best practices, investigations, and anti-corruption enforcement.
- ▶ 40-hour Certificate—NM State University College of Business Administration and Economics, Center for Public Utilities; intensive program on telecommunications rate-making and related issues.
- ▶ 40-hour Certificate—NM State University College of Business Administration and Economics, Center for Public Utilities; intensive program on public utilities rate-making and related issues.
- ▶ 80-hour Certificate—Institute of Public Utilities at MSU; intensive public utility regulatory and policy program.
- ▶ 80-hour Certificate—University of MN Humphrey Institute of Public Affairs, Legislative Staff Management Institute; emphasis on conflict negotiation, management techniques and strategic planning.
- ▶ 160-hour Certificate—Environmental Leadership Institute (Michigan Department of Natural Resources, Western Michigan University and Michigan State University); land management, natural resources, and environment management techniques.

PRESENTATIONS AT NATIONAL & REGIONAL CONFERENCES

- ▶ **Practising Law Institute (PLI)**
 - Ethics of Advising in Grey Areas (2022 & 2023);
 - Legal Issues in Alcohol Industry (2021);
 - Industry Trends & Emerging Legal Issues (2020)
- ▶ **Hospitality Law Annual Conference, Washington D.C.**
 - Evaluating Your Ethics & Compliance Culture: Check the Box, or Test & Track? (2022)
- ▶ **SOVOS Ship Compliant Annual Wine Summit**
 - The Shifting Beverage Alcohol Regulatory Landscape (2021); State Regulations in Motion (2017)
- ▶ **National Conference of State Liquor Administrators (NCSLA) Annual & Regional Conferences**
 - Rise of the Retail Tier & Impact of US Supreme Court Case—*TN Wine & Spirits Retailers v. Thomas* (2019)
 - Revealing the Great Oz—Behind the Curtain of the All-Powerful Regulator (2018)
 - I Know It When I See It—A Regulator's Guide to Tied House Policies & Things of Value (2018)
 - Regulator "Hot Topics" (2017)
 - The Other 3 Tier System of Legislators, Lobbyists & Laws: How Sausage is Really Made & Are Ethics Part of the Ingredients? (2017)
 - Social Media—Can Regulators Keep Up with the Marketplace or Will They & the System Fall Subject to "Adverse Possession?" (2016)
 - Cutting Edge Retail Practices—Balancing Consumer Demand, Market Forces & Regulations (2016)
 - Economic Development to Regulate Strictly, or Promote Economic Development? (2015)
 - Trade Practice Innovation—New, Exciting & Legal? (2015)
- ▶ **National Association of Licensing Compliance Professionals (NALCP) Annual Conferences**
 - Regulatory Updates (2019 & 2016); The Life Cycle of Information Privacy (2018); Innovative Licensing & Alcohol Regulators' Race with Technology in the 21st Century (2017)
- ▶ **Continuing Legal Education International (CLEI) Annual Conferences on Wine, Beer & Spirits Law**
 - The Significance of Regulatory Compliance (2016, 2017 & 2019)
- ▶ **Michigan Bar Association, Administrative Law Section**
 - Annual Meeting Speaker, Regulatory Update (2012-2019)
- ▶ **National Alcohol Beverage Control Association (NABCA) Legal Symposium**
 - Unraveling Trade Practice Violations (2019); Ethics—What Does Industry Want from Regulators? (2015)
- ▶ **National Liquor Law Enforcement Association (NLLEA) Annual Conference**
 - The Three-Tier System—Current Challenges Faced by Regulators & Enforcement (2018)
- ▶ **Responsible Retailing Forum**
 - Regulator Perspectives on Responsible Beverage Service (2017)
- ▶ **Michigan Brewer's Guild Winter Conference**
 - Rules & Regulations Related to Microbreweries (2017)
- ▶ **Responsible Hospitality Institute**
 - Sociable City Leadership Summits—Craft Culture (2017); State & Local Cooperation (2016)
- ▶ **Women in Government 22nd Annual Midwestern Regional Conference**
 - Adult Beverages—History & Update (2015)

MEDIA COVERAGE & PUBLICATIONS

| | |
|--|------|
| ▶ ACSA-Craft Spirits Magazine, "Minding Compliance: Understanding Compliance & Why It Matters to Craft Distillers" | 2023 |
| ▶ ACSA-Contributor to E-Book, "The ACSA Guide to Starting & Operating A Distillery" | 2023 |
| ▶ R Street Institute, "Comment to TTB on Potential Competition Rulemaking for the Alcohol Industry" | 2023 |
| ▶ SCCE-CEP Magazine-Column, "Better Board Communication" | 2023 |
| ▶ SCCE-CEP Magazine-Column, "What Value Do You Bring to The Board?" | 2023 |
| ▶ SCCE-CEP Magazine-Column, "Quantity Versus Quality: Communicating Measurements That Matter" | 2023 |
| ▶ SCCE-CEP Magazine-Column, "Personal Liability Fears: Reaction Versus Response" | 2023 |
| ▶ SCCE-Ethikos, "Designing Documents: Using the Art of Persuasion to Influence with Integrity" | 2023 |
| ▶ The American Spectator, "American Saloon Series: A Disturbing Precedent for America" | 2022 |
| ▶ SCCE-Ethikos, "Building Better Culture & Compliance With Trust" | 2022 |
| ▶ SCCE-Ethikos, "Culture & Code of Ethics: Connecting the Dots Through Measurement" | 2022 |
| ▶ SCCE-CEP Magazine (Cover & Featured Interview), "Meet Teri Quimby: Communication is a Priority" | 2022 |
| ▶ SCCE-Manual, "Government Agencies—Effective Compliance Programs are Necessary for Public Trust" | 2022 |
| ▶ R Street Institute, "Comments on Alcohol Industry Competition. Docket No. TTB-2021-0007; Notice No. 204." | 2021 |
| ▶ SCCE-CEP Magazine, "Are compliance violation 'smoking guns' hiding in the board minutes?" | 2021 |
| ▶ PLI Chronicle, "Export Controls in Academia: Bridging the Gaps" | 2021 |
| ▶ PLI Chronicle, "Vaccination Verification: Alcohol Licensee Mandates & Compliance Considerations" | 2021 |
| ▶ PLI Chronicle, "New Year's Resolution for Alcohol Licensees: Tip Scales in Your Favor with More Compliance" | 2021 |
| ▶ Governing, "A Chance to Liberate Booze Delivery — if Government Allows It" | 2021 |
| ▶ CEP Magazine, "Blockchain: Moving Target or Trusted Tech Trend?" | 2020 |
| ▶ SCCE, "Truth or Consequence: Demonstrating Regulator Ready Compliance Plans vs Consequences of First Draft Plans" | 2020 |
| ▶ USA Today, "A Century After Prohibition, Will the Coronavirus Finally End It? We'll Drink To That" | 2020 |
| ▶ R Street Institute, "Coming to a Door Near You: Alcohol Delivery in the COVID-19 New Normal" | 2020 |
| ▶ Crain's Business Detroit, "2017 Notable Women Lawyers in Michigan" | 2017 |
| ▶ Michigan Bar Journal, "Liquor Licensees: Avoiding Consequences of Negative Employee Actions" | 2016 |

August 25, 2023

Dear Joe Infante,

This letter serves as my expert report under Federal Rule of Civil Procedure 26(a)(2)(B). You asked me to express an opinion on the following topics: (1) what is “agritourism”, (2) whether “agritourism” is considered an agricultural use, and (3) whether “agritourism” is necessary for the viability of Michigan farms. A summary of my opinions is included below, along with the other information that I understand is required by Federal Rule of Civil Procedure 26(a)(2)(B).

Qualifications

I am a lifelong farmer. I served as the Director of the MDARD from January 1, 2019 through December 31, 2022. MDARD is responsible for cultivating and expanding economic opportunities for the food and agricultural sector; safeguarding the public’s food supply; inspecting and enforcing sound animal health practices; controlling and eradicating plant pests and diseases; preserving the environment by which the farming community makes their living and feeds consumers; and protecting consumers by enforcing laws related to weights and measures.

As Director, my duties included supervising six divisions, including the Agriculture Development Division, Animal Industry Division, Environmental Stewardship Division, Food and Dairy Division, Laboratory Division, and Pesticide and Plant Pest Management Division. The Agriculture Development Division also provides executive support for the Craft Beverage Council. I was the Chair of the Craft Beverage Council. My duties also included reviewing and approving the Generally Accepted Agricultural and Management Practices (GAAMPs) under the Michigan Right to Farm Act. The GAAMPs are updated annually to utilize current technology promoting sound environmental stewardship on Michigan farms.

A copy of my most recent resume, which more fully details my experience, is attached as Exhibit A. This resume is current up to my time with MDARD.

Publications and Prior Expert Testimony

I have not personally authored any publications within the last ten years. I have not testified at trial or by deposition as an expert within the last four years.

Compensation

I am being paid on an hourly basis. My hourly rate is \$435.00. My compensation is not contingent in any manner on the success of this case.

Facts and Data Considered

In forming these opinions, I relied on my experience as Director of MDARD for 4 years. During my time as Director of MDARD, Michigan agritourism was a top priority. Each year, October was proclaimed as 'Agritourism Month,' with joint proclamations as MDARD Director and Governor Gretchen Whitmer. This was put in place to highlight the importance of agritourism to the public. I also relied on the exhibits and documents listed below.

One of the major issues I was confronted with as a Michigan resident and former Director of MDARD, is how can we help young people become successful farmers? At this time, the average age of a farmer in Michigan is just under 60 years old. One of the reasons for this is that it is so difficult for young people to obtain a farm, unless it is a legacy handed down. So, it is imperative that we help the next generation of farmers to feed not just Michigan, but the world.

For young people to enter into farming, it has to be profitable. They have to be able to make a living doing it. Some of the major impediments are the high price of farm land (if it is even available) and the high cost of purchasing equipment.

On top of the roadblocks mentioned above, there is uncertainty when working in agriculture that is out of the farmer's control. Some examples are the price of farm commodities, the weather, the cost of your inputs, and the ever-changing climate, which farmers are the first to feel the impact.

During my time as Director of MDARD, I toured many farms that offered agritourism opportunities. The majority of the farmers I spoke with stressed how important the agribusiness

portion was to the success of their farm. Due to the high stress of farming, it is well documented that the mental health of farmers are at risk. Michigan has had to put in place resources for farmers to receive mental health treatments. One of the main causes for stress among farmers is the uncertainty of a successful operation.

Exhibits and Documents Reviewed

Michigan Commission of Agriculture and Rural Development.
Generally Accepted Agricultural and Management Practices for Farm Markets – 2023.

Opinion and Order on Summary Judgment (ECF No. 162)

Affidavits of Barbara Wunsch and John Jacobs

Peninsula Township Zoning Ordinance Sections 6.7.2(19),
8.7.3(10), and 8.7.3(12).

Michigan Agricultural Tourism Advisory Commission
Agricultural Tourism Local Zone Guidebook and Model Zoning Ordinance Provisions

Opinions

Agritourism is one way to help farmers with a supplementary and stable income. It is something the farmer can control, as opposed to the issues I mentioned above. It can make the difference between a successful farm operation and another business that couldn't survive. Their success can be achieved if they are given all available opportunities and tools to thrive.

Generally, "agritourism" is the practice of visiting an agricultural operation that is actively producing agricultural products for purchase while experiencing the venue. Michigan is very fortunate in the diversity of opportunities for agritourism, given we produce over 300 types of crops. This makes us one of the most diverse states in the nation. Examples of agritourism in Michigan are wineries, apple orchards, breweries, Christmas Tree farms, corn mazes, distilleries, farmer's markets, cideries, and pumpkin patches – just to name a few. When you are invited to a wedding that is in a barn or vineyard, that is agritourism. Farm to table is another form of agritourism.

With agritourism, it is very important to the economies in rural

Michigan. Every farm operation is equivalent to a small business in your community. Just as a small business would, a farm has employees, payroll, and purchases supplies and services from other local businesses. You are also increasing the number of visitors to your community, which in turn, increases the profitability of other businesses in the area. No tourist will only stop at one establishment when visiting our rural communities.

Businesses that contribute to agritourism contribute to the gathering of friends and family. It is a way for people to connect not only with each other, but also with Michigan's farming heritage. Most people have a connection to a farmer in one way or another. Being able to experience agritourism first-hand helps them understand the challenges and perseverance of our farm community, while also enjoying the fruits of the farmer's labor (or cherries, or grapes, or hay, etc). Because of this, agritourism is an agricultural use, given this is the only viable way that farm production and a unique farm experience can connect; while also successfully contributing to both the Michigan farm economy and tourism.

Agritourism is important and necessary. With it, a farm's success rate can increase exponentially. We must support our farmers to thrive in this very difficult environment and economy. We owe it to our them to give them every opportunity to succeed.

Thank you and please don't hesitate to reach out to me for any additional comments or feedback.

A handwritten signature in cursive script, reading "Gary McDowell", written in black ink over a horizontal line.

Gary McDowell

Exhibit A

Gary J. McDowell
 11585 W. Welch, Rudyard, MI 49780
 906-440-6149/garymcdowell498@gmail.com

PROFESSIONAL SKILLS SUMMARY

Managerial and Leadership Professional well respected for ability to be a conceptual thinker, delegate and mentor. Excellent organizational, communication, problem-solving, and decision-making skills. Attentive to detail, ability to quickly and effectively prioritize to meet specific goals. Broad knowledge of governmental legal compliances.

PROFESSIONAL EMPLOYMENT

MCDOWELL HAY, INC.
1/3 Owner & Treasurer

Rudyard, MI
 1981 - Present

- Negotiate the purchase of hay with local farmers.
- Marketing Eastern Upper Peninsula hay to markets across the country.
- Coordinate with trucking companies and loading crews for the transportation of hay to the markets.

MCDOWELL BROTHERS FARM
Partner

Rudyard, MI
 1980 - Present

- Operate a 1,000-acre farm.
- Specialize in high-quality horse hay for export.

CENTURY21 ADVANTAGE PLUS
Realtor

Sault Ste. Marie, MI
 2013 - Present

- Develop property listings by building rapport and reaching out to potential sellers.
- Lists property by examining property; recommend improvements that will enhance salability; coordinate with appraisers to set a selling price; close a contract; understand importance of time-sensitive material.
- Develop buyers by responding to inquiries.
- Close sales by understanding buyers' requirements; match requirements to listings; show properties; demonstrate benefits; relay offers; suggest alterations; negotiate contracts; write a contract.
- Update job knowledge by studying listings; visit properties; participate in educational opportunities; maintain personal networks; participate in professional and community organizations.
- Attend mandated Continuing Education classes approved by the State of Michigan.

MICHIGAN STATE HOUSE OF REPRESENTATIVES - 107th District
State Representative

Lansing, MI
 2005-2010

- Introduce and vote on bills pertaining to state government.
- Establish and monitor the state's budget.
- Maintain continuous communication with constituents assisting with issues they may have with state government.
- Identify processes that maximize efficiencies in government.
- Manage staff and set goals and objectives.

CHIPPEWA COUNTY COMMISSION - 7TH District
Commissioner

Sault Ste. Marie, MI
 1981 - 2002

- Introduce and vote on county ordinances.
- Establish and monitor the budget while maximizing government efficiencies.
- Develop and implement county personnel policies.
- Maintain continuous communication with constituents and assist with issues they may have with county government.

Gary J. McDowell
 11585 W. Welch, Rudyard, MI 49780
 906-440-6149/garymcdowell498@gmail.com

UNITED PARCEL SERVICE
Delivery Driver

Rudyard, MI
 1973 - 2003

- Sort, organize, and deliver 100 (M/L) packages to approximately 60 homes and/or businesses spread over 200 miles daily under tight schedules.
- Develop and maintain a good working rapport with businesses and agriculture community.
- Maintain work reports.

EDUCATION and LICENSES

Department of Licensing and Regulatory Affairs
 State of Michigan Real Estate Salesperson License

2013 - Present

Department of Licensing and Regulatory Affairs
 State of Michigan Emergency Medical Technician License

1995 - 2002

Lake Superior State College
 Completed two years with a focus on accounting.

1970 - 1972

Rudyard High School
 K-12

1970

ORGANIZATIONS & COMMUNITY SERVICE

- War Memorial Hospital Board of Trustees
- Member of the National Hay Association
- Michigan Farm Bureau (former)
- Sault Area Sportsman Club (former)
- Sault Elks Club (former)
- Rudyard Lions Club (former)
- Christopher Columbus Society
- EMT Rudyard Volunteer Ambulance Department (former)
- Chairman, Chippewa County Board of Commission (former)
- Chairman, Chippewa County 9-1-1 Board (former)
- Chairman, Chippewa County Emergency Services (former)
- Chippewa County Recycling Committee (former)
- Chippewa County Economic Development Commission (former)
- Rudyard Planning & Zoning (former)
- Rudyard Volunteer Fire Department (former)

December 4, 2023

Source: Plaintiffs' Expert Report of Gary McDowell, August 28, 2023

Page 8 of 8

Gary J. McDowell
 11585 W. Welch, Rudyard, MI 49780
 906-440-6149/garymcdowell498@gmail.com

AWARDS & RECOGNITIONS

| | |
|---|------|
| Century21 Advantage Plus - *Masters Emerald Award | 2017 |
| Century21 Great Lakes Region - *Platinum Sales Achievement Award | 2016 |
| Century21 Advantage Plus - *Ruby Award | 2014 |
| Community Based Mental Health Services - *Go-To-Bat | 2010 |
| Public Health Association - Health Policy Champion | 2010 |
| Michigan Oral Health Coalition - *Oral Health Champion | 2010 |
| Michigan Mental Health Association - *Snyder-Kok Award | 2010 |
| Michigan Council For Maternal & Child Health (MCMCH) - *Legislator of the Year | 2010 |
| Kent County Mental Health - *Certificate of Appreciation | 2010 |
| Comprehensive School Health Coordinators Association - *Healthy Children Award | 2010 |
| Michigan Primary Care Association - *Champion for the Medically Underserved | 2010 |
| Fight Crime Invest in Kids - *Crime Fighter Award | 2010 |
| Michigan After School Partnership - *After School Champion Award | 2009 |
| Michigan Pharmacist Association - *Legislator of the Year | 2009 |
| Food Bank Council of Michigan - *Hunger for Justice Award | 2009 |
| Northern Michigan Substance Abuse Services - *NMSAS Recognition | 2009 |
| Michigan Association of Substance Abuse Coordinating Agencies - *Legislator of the Year | 2009 |
| Michigan Health & Hospital Association - *Special Recognition Award | 2009 |
| National Kidney Foundation of Michigan - *Kidney of Hope Award | 2008 |
| Michigan Association of Health Plans - *Legislator of the Year | 2007 |
| In Appreciation of UP Ophthalmologists - *Legislator of the Year | 2007 |
| Michigan Rural Health Association - *Recognition Award | 2007 |
| Michigan Council For Maternal & Child Health (MCMCH) - *Legislator of the Year | 2007 |
| National Multiple Sclerosis Society - *Public Official of the Year Award | 2007 |
| Michigan Reading Association - *Literacy Advocate Award | 2006 |
| United Parcel Service - *Circle of Honor Award | 1999 |
| Rudyard High School - *National Honors Society | 1970 |
| Future Farmers of America - *State Farmer Award | 1970 |

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

September 11. 2023

Submitted in Support of Plaintiffs

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION ("WOMP"),

A Michigan Non-Profit Corporation and 11 Wineries

V.

PENINSULA TOWNSHIP, a Michigan municipal corporation, Defendant

And

PROTECT THE PENINSULA, Inc., Intervenor-Defendant

Case No. 1 20-CV-01008

Peninsula Township Zoning Ordinance

A Land Use Code

Grand Traverse County

Traverse City, MI 49686

Effective Date June 5, 1972, and Amendments

In Accordance With:

Second Amended Case Management Order (ECF 343) and

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

Prepared by:

DAVID E. Moss, Principal

David Moss & Associates, Inc.

Land Use – Environmental Consultants

1009 Wilshire Blvd., Suite 224

Santa Monica, CA 90401

Tel (310) 395-3481

Introduction

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

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

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

1. Rebuttal Opinion: Introduction Section (Pg 4)

a. **Statement:** Plaintiffs' claims isolate a handful of provisions that limit their ability to engage in "unfettered commercial activity" in an agricultural zone.

- i. **Rebuttal:** The Township has been non-responsive to the reasonable requests of Plaintiffs over decades to amend the zoning code to enable by-right or discretionary entitlement processing for a limited number of types of accessory uses - weddings, banquets, food service and associated – or branding-related retail sales.
- ii. **Rebuttal:** Prior to filing the lawsuit Plaintiffs never argued or claimed they should be provided by-right entitlement for unfettered commercial accessory land uses in the A-1 zone. They were amenable to entitlement processing based on the use of technical environmental and land use studies to identify site- and regional-specific measures to mitigation potential impacts like noise or traffic to a level of insignificance.
- iii. **Rebuttal:** Use of the term "unfettered commercial activity" is a flawed starting point for expert's report. Up until the filing of the lawsuit Plaintiffs were seeking narrowly focused zoning code changes. Code changes that would have enabled the Township to process either administrative site plan or discretionary zoning entitlement requests based on site-specific implications of clearly defined types and sizes of accessory uses. The Township historically refused to allow customarily-associated accessory agricultural uses to have options for entitlement processing despite willingness of Plaintiffs to support such requests with technical environmental and land use studies and agree to available measures to mitigate potential impacts to a level of insignificance.

b. **Statement:** "I further explain the importance of farmland land preservation, its relationship to public health, safety and welfare"

- i. **Rebuttal:** A second flawed starting point for expert's report is that retirement and/or transfer of development rights (PDR programs) is the only viable means of preventing the unrestricted implementation of accessory land uses that the Plaintiffs are seeking.
- ii. **Rebuttal:** Plaintiffs do not oppose and no part of the lawsuit questions the right of the Township or the potential viability to use and promote retirement/transfer of development rights or other preservation program methods. Dr. Daniels is recognized for contributions to such programs in Lancaster County, PA. The necessity to rely on those types of preservation programs doesn't negate the viability or utility of the Township also having a zoning code that enables review of accessory agricultural uses and setting site-specific conditions of approval to mitigate potential impacts to traffic safety, road capacity, road safety, parking, noise, or minimum land areas for growing vs maximum areas for ancillary agricultural uses. Such entitlement programs are routinely available even the handful of other jurisdictions that Dr. Daniels has considered.
- iii. **Rebuttal:** The Township's zoning code is out of sync with clearly stated goals in the Master Plan - to promote non-impactful use of A-1 zoned parcels, providing options to enhance the financial viability of a main agricultural use (grape growing and processing) while maintaining the quality of life and carrying capacity of the Township. There is no viable argument that there cannot be side by side use of preservation programs that retire or transfer development rights with zoning entitlement processes that promote the Master Plan goals and well documented demand for agritourism. It is not an either-or proposition.

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

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

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

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

- ii. **Rebuttal:** The township has 17,755 acres and 6,616 residents or 2.9 residents per acre. Michigan overall has 3.6 residents per acre and there are 30 states that have lower density than Michigan. The Agricultural Protection Zone identified in the PT Master Plan comprises 9,861 ac (53%) of the Township – which has increased from either 9,200 or 9,500 ac in 2008 (Daniels, T. An Evaluation of the Peninsula Township Farmland Preservation Program; Pg 5 states 9,200 ac and Pg 6 states 9,500 ac., 2008). The land area under permanent conservation easements or other mechanisms that limit development potential is 6,470 ac (36%) of the total Township area. Dr. Daniels has not provided any statistical land use metric applicable to the Township to support outright prohibition of accessory agricultural land uses on mere speculation that entitlement of such uses will lead to unfettered commercialization of A-1 zoned property or impact the rural character of the Township.
 - iii. **Rebuttal:** Wineries are farms and are directly responsible for retaining land in agricultural use.
- c. **Statement:** “...Local PDR programs help stabilize the state’s farmland base to limit non-farm development... .”
- i. **Rebuttal:** Dr. Daniels cannot provide proof that the size of the Township farmland base is endangered by current or proposed operations of grape growers, processors, or wineries even if accessory agricultural land uses can be entitled through an amended zoning code. The Plaintiff’s goal is to farm, process, sell and fully utilize their parcels for agricultural and accessory agricultural land uses. They do not seek to build housing, large hotels, factories or out of scale or environmentally impactful facilities for food service, banquets, and weddings.
 - ii. **Rebuttal:** The Township has a narrowly focused goal of maintaining rural character. Dr. Daniels offers nothing concrete to back up his opinions that rural character would be irreversibly altered towards more dense development or higher density residential if wineries are allowed to seek site-specific accessory uses – even if appropriately conditioned to prevent the loss of such character.
 - iii. **Rebuttal:** Wineries are farms and are directly responsible for retaining land in agricultural land use.

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

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

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

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

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

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

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

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

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

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

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

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

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

a. **Statement:** "...[A]gricultural zoning in these four major wine-producing jurisdictions promote agricultural preservation. The ordinances that provide for special uses recognize the potential for additional site-specific considerations and conditions. Further they restrict agricultural land uses that otherwise turn agricultural processing facilities (wineries) into primarily commercial retail stores Finally, they ensure agricultural focus through limited production capacity through requirements for the use of local grapes and size of wineries which further supports the local distinctive AVAs"

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

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

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

- a. **Statement:** The first zoning ordinance [was] in 1972. In the late 1970s with the pending sale of 500 ac at the northern end of the Township residents became concerned about the threats of large housing developments and scattered homes that could rapidly change the rural character... .”
 - i. **Rebuttal:** The legislative intent in the 1972 ordinance was to establish the Township's first codified land use regulations. The growing/processing of grapes and operations of wineries were not the main impetus nor were wineries yet targeted to curtail and prevent accessory uses because such accessory uses were not yet demanded by the grape growing/winery-operating landowners.
 - ii. **Rebuttal:** Plaintiff's lawsuit doesn't seek rights to densify and obtain zone changes to entitle residential development. Plaintiffs are aligned with the 1983 Township Master Plan, and subsequent amendments to promote open agricultural lands, agriculture as the main land use, preserve agricultural lands, and preserve and protect the unique and scenic character of Old Mission Peninsula.
- b. **Statement:** The Peninsula Township drafted an Agricultural Preservation Plan (“APP”) ... in 1994”. In 1994 Township voters passed Michigan's first PDR program ...and have twice renewed the APP in 2003 and 2022 reflecting the popularity of the Township's policies to maintain farmland and agriculture.... .”
 - i. **Rebuttal:** Plaintiff's support the PDR program and have the right to participate or not. Not all find it necessary or prefer not to transfer or diminish land use rights that would reduce the amount of their lands under active agricultural and processing uses, reduce the size of their surface rights, nor increase the amount of covenanted open space.
 - ii. **Rebuttal:** There is no conflict between the Township operating and promoting the PDR program, and Plaintiff's clearly articulated desire and need to have entitlement options for accessory agricultural land uses. And, Plaintiffs agree that entitlement should be based on technical land use and environmental studies and the imposition of reasonably applicable measures to mitigate impacts to or from amplified sound, noise in general, visual resources, parking ratios, frontage requirements, driveway/circulation dimensions, numbers and sizes of wedding and other events, numbers of guest allowed to attend a winery event, size of roadside produce stands, appropriately sized restaurants and food service facilities, and hours of operation and cumulative impacts of simultaneous accessory agricultural land uses in close of distant proximity.
 - iii. **Rebuttal:** The Township is characterized by its rural character. A handful of facts support this. The Agricultural Protection Zone identified in the Township Master Plan comprises 9,861 ac (53-56%) of the total Township – which has increased from either 9,200 or 9,500 ac in 2008 (Daniels, T. An Evaluation of the Peninsula Township Farmland Preservation Program; Pg 5 states 9,200 ac and Pg 6 states 9,500 ac., 2008). The land area under permanent conservation easements or other

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

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

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

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

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

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

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

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

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

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

d. Statement: B: How the Peninsula Township Zoning Ordinance Promotes Agricultural Preservation - Numerous Opinions (Pg 25)

- i. **Rebuttal:** The governmental interests in enacting the zoning ordinance have not kept pace with the reality that market and climate change requires that wineries and farms in general must have the opportunity to implement appropriately sized, non-impactful accessory agricultural uses. The handful of such uses that stakeholders have fought unsuccessfully for – may have been unneeded and even inappropriate to consider back in the period of the 1970s when the financial, practical, and branding difficulties of operations were less in flux and more able to withstand prohibitions against the uses that are identified as necessary today in the lawsuit. The sophistication of crafting and administering zoning codes to protect, preserve and enhance land uses in general and in ecologically sensitive areas like the township has become way more sophisticated in the past 51 years and the Township can pick and choose from many templates and work with recognized experts to have their code come up to the 21st century (use of ecologically sensitive refers not to environmentalism but to the wholistic approach to protecting and enhancing the synergistic occurrence of land uses in a particular geographic area).
- ii. **Rebuttal:** It has been five decades since the birth of environmental movements and enactment of sweeping federal, state, and local regulations. The PTP's expert has not and cannot prove that there would be irreversible impact to the amount of A-1 zoned land in crop production, the production per acre, or to rural character if the Townships' arbitrarily selected accessory land use prohibitions were overturned in whole or in part and that such uses were able to seek use by right or discretionary SUP entitlements.
- iii. **Rebuttal:** The Plaintiffs are precluded from seeking entitlements for accessory uses identified in the lawsuit regardless of how large a winery parcel is, and no matter how isolated or distant such parcels are from offsite sensitive receptors. Dr. Daniels recognizes that the larger the size of the parcel in other wine growing municipalities enables use of ratios for entitlement of accessory uses, number, kind, and size.

e. Statement: Limits on Food and Beverage Service (Pg. 26)"

- i. **Rebuttal:** There should never have been or continue to be arbitrarily established limits on what kinds of gatherings are permissible. The PTP's expert knows better than to accept the PTP or township's rhetoric that a wine industry event is less impactful than any other type of gathering.
- ii. **Rebuttal:** If the concern is noise, or sound, or parking – then there is no credible argument that industry events are less impactful. When a planning board considers an SUP for a hotel, restaurant, or nightclub – they don't have authority to require a specific hotel brand (Marriott vs Choice), restaurant (Thai vs. Mexican), or nightclub (Latin vs. line dancing). The authority is limited to considering potential impacts – the same ones that are associated with any gathering – parking, noise, traffic, visual impacts, and the numerous others stated in other rebuttal statements herein by Plaintiff's land use expert.

f. Statement: Bars, restaurants and catering are commercial uses typically separated from other uses and limited to being located in a commercial zoning district. Exclusion of weddings, wedding receptions, and other private events.... ." (Pg. 27)"

- i. **Rebuttal:** The Plaintiffs have been unsuccessful in seeking by right or discretionary entitlements for food-related accessory agricultural land uses customarily allowed by right or by SUP in many wine-growing regions and therefore had to file the lawsuit (See Par 9 a I above).

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

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

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

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

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

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

December 4, 2023

Source: Plaintiffs' Supplemental Report of David Moss, September 11, 2023

Page 16 of 16

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

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

By:  _____

Date: September 11, 2023

December 4, 2023

Source: Email seeking concurrence dated December 1, 2023

Page 1 of 2

From: [Ragatzki, Stephen M.](#)
To: [TJ Andrews](#); [Gartman, Christopher J.](#); [Infante, Joseph M.](#); [Kaltenbach, Barry P.](#); [Eldridge, Scott R.](#); [Tom McGraw](#); [Beau Rajsic](#); [William Fahey](#); [Christopher Patterson](#); [John Brennan](#); [Steven Baker](#)
Cc: [Karla Gerds](#); [Holly Hillyer](#)
Subject: RE: Concurrence in motion to exclude testimony and reports from Mr. McDowell, Ms. Quimby
Date: Friday, December 1, 2023 10:23:31 AM

TJ,

We do not concur in the relief sought. PTP offered Dr. Daniels as an expert in land use planning, agricultural zoning, and farmland preservation. Dr. Daniels testified that his “ultimate” opinion is that a local government should be allowed to enforce any zoning restriction it wishes. Ms. Quimby and Mr. McDowell will offer testimony from a state regulatory perspective that his opinion is incorrect. Their testimony will directly contradict his opinion.

Additionally, Ms. Quimby and Mr. McDowell rebut Dr. Daniels’ opinions in specific areas. For example, Dr. Daniels opined in his report and in his deposition about the distinction between agricultural and commercial uses. Mr. McDowell, as the former Director of the Michigan Department of Agriculture and Rural Development, is certainly qualified to challenge Dr. Daniels’ opinion on that distinction. Dr. Daniels also opines that PDR programs and agricultural zoning are two methods of farmland preservation. Mr. McDowell opined that agritourism is important and necessary in rural communities, which is a third and alternative form of farmland preservation to those proposed by Dr. Daniels.

Dr. Daniels also opined about the potential for wineries to “simply become wine shops or bars, like those commonly found in a commercial district.” During his deposition, Dr. Daniels admitted that he has never read the Michigan Liquor Control Code. Ms. Quimby, as a former Liquor Control Commissioner, is certainly qualified to challenge Dr. Daniels’ assertion that a winery can become a bar. (This, incidentally, is a common PTP talking point that is simply incorrect under Michigan law.) Ms. Quimby will similarly rebut Dr. Daniels’ erroneous opinion that a winery cannot operate a restaurant.

In sum, our rebuttal experts will testify to directly contradict the conclusions rendered by Dr. Daniels. Their testimony is appropriate, and we do not concur in any attempt to exclude it.

Steve

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From: TJ Andrews <tjandrews@envlaw.com>

Sent: Thursday, November 30, 2023 4:55 PM

December 4, 2023

Source: Email seeking concurrence dated December 1, 2023

Page 2 of 2

To: Ragatzki, Stephen M. <Ragatzki@millercanfield.com>; Gartman, Christopher J. <Gartman@millercanfield.com>; Infante, Joseph M. <infante@millercanfield.com>; Kaltenbach, Barry P. <Kaltenbach@millercanfield.com>; Eldridge, Scott R. <eldridge@millercanfield.com>; Tom McGraw <tmcgraw@mcgrawmorris.com>; Beau Rajsic <brajsic@mcgrawmorris.com>; William Fahey <wfahey@fsbrlaw.com>; Christopher Patterson <cpatterson@fsbrlaw.com>; John Brennan <jbrennan@fsbrlaw.com>; Steven Baker <sbaker@fsbrlaw.com>

Cc: Karla Gerds <karla@envlaw.com>; Holly Hillyer <holly@tropospherelegal.com>

Subject: Concurrence in motion to exclude testimony and reports from Mr. McDowell, Ms. Quimby

Caution: This is an external email. Do not open attachments or click links from unknown or unexpected emails.

Good afternoon, Counsel,

I am writing to ascertain whether you will oppose PTP's motion to exclude testimony and reports from Mr. McDowell and Ms. Quimby. Neither is a planning expert and neither provided opinions in rebuttal to Dr. Daniels, PTP's planning expert. As such, Plaintiffs should not call them as witnesses at trial, as Plaintiffs recognized in the Rebuttal Expert Witness Disclosures.

PTP would like to discuss if the parties are willing to discuss a stipulation that Plaintiffs will not call these witnesses to testify at trial, and that Plaintiffs' reliance on their reports to support Plaintiffs' summary judgment filings should be disregarded.

Thank you for your consideration.

~TJ

Tracy Jane (TJ) Andrews

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UNPUBLISHED CASES

Maxum Indem. Co. v. Drive W. Ins. Services

United States District Court for the Southern District of Ohio, Western Division

June 13, 2014, Filed

Civil Action No. 1:13-cv-191

Reporter

2014 U.S. Dist. LEXIS 196740 *

MAXUM INDEMNITY COMPANY, Plaintiff, vs.
 DRIVE WEST INSURANCE SERVICES
 INC./MULBERRY INSURANCE SERVICES, et
 al., Defendants.

Subsequent History: Summary judgment granted by, Dismissed by Maxum Indem. Co. v. Drive West Ins. Servs., 2015 U.S. Dist. LEXIS 12468 (S.D. Ohio, Feb. 3, 2015)

Prior History: Maxum Indem. Co. v. Drive West Ins. Servs., 2013 U.S. Dist. LEXIS 116349 (S.D. Ohio, Aug. 15, 2013)

Counsel: [*1] For Maxum Indemnity Company, Plaintiff, Counter Defendant: Robert D Anderle, LEAD ATTORNEY, Seeley Savidge Ebert & Gourash Co LPA, Cleveland, OH; Elan Kandel, PRO HAC VICE, Cozen O'Connor, New York, NY; Jazmyn J Stover, Seeley, Savidge, Ebert & Gourash Co. LPA, Cleveland, OH; Joseph A Ziemianski, Stephen M Edmundson, PRO HAC VICE, COZEN O'CONNOR, Houston, TX; Daniel F Gourash, Seeley Savidge Ebert & Gourash Co, LPA, Cleveland, OH.

For National Condo & Apartment Insurance Group, Defendant, Counter Claimant: Brian David Goldwasser, LEAD ATTORNEY, White, Getgey & Meyer, Cincinnati, OH; Joseph W Borchelt, LEAD ATTORNEY, Reminger & Reminger Co. LPA, Cincinnati, OH; Michael M. Mahon, LEAD ATTORNEY, Cincinnati, Oh.

For Norman Spencer Agency, Inc., Defendant: John F McLaughlin, LEAD ATTORNEY, Rendigs Fry Kiely & Dennis LLP - 1,

Cincinnati, OH.

For Sharp (Oakwood Estates), Inc., Defendant: Jason P Conte, LEAD ATTORNEY, Ulmer & Berne LLP - 1, Cincinnati, OH; Dacia Renee-LaShawn Crum, Ulmer & Berne LLP, Cincinnati, OH.

Judges: Stephanie K. Bowman, United States Magistrate Judge. Spiegel, J.

Opinion by: Stephanie K. Bowman

Opinion

ORDER

This is an insurance coverage lawsuit arising out of a policy allegedly procured by fraud and [*2] misrepresentation. This matter is before the court on Defendant National Condo and Apartment Insurance Group's ("NCAIG") motion to strike Plaintiff's purported rebuttal expert witness, Akos Swierkiewicz (Doc. 57), and the parties' responsive memoranda. (Docs. 60, 63). For the reasons explained below, Defendant NCAIG's motion to strike is not well-taken.

I. Background and Facts

The complaint alleges that Defendant Drive West Insurance Services, Inc./Mulberry Insurance Services, Inc. ("Mulberry"), through Defendant Tigran Pogosyan, a/k/a Tony Pogosyan, misrepresented, omitted, and/or

2014 U.S. Dist. LEXIS 196740, *2

concealed material facts on its application for insurance from Maxum. (Doc. 1 at ¶1). Maxum seeks rescission of the insurance policy, or in the alternative, a declaration that Maxum has no duty to defend and/or indemnify Mulberry in the underlying lawsuits. *Id.* Defendant NCAIG is named in this action because it may claim a legal interest that would be affected by the rescission and declaratory judgment action.

In November 2013, Maxum issued its disclosure and amended disclosure of expert witnesses naming Daniel Ginden as its expert witness. (Doc. 47). In December, 2013, NCAIG filed a disclosure and amended [*3] disclosure of expert witnesses naming Kent Littlejohn as its expert witness. (Doc. 50). Thereafter, on January 29, 2014, Maxum filed a disclosure and amended disclosure of rebuttal expert witnesses naming Akos Swierkiewicz as its rebuttal witness. (Doc. 55). NCAIG now moves to strike Maxum's purported rebuttal expert witness, Mr. Swierkiewicz. (Doc. 57).

II. Analysis

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, a plaintiff's rebuttal expert witness disclosure must be limited to evidence that will either contradict or rebut the defendant's expert witness disclosure. Fed R. Civ. P. 26(a)(2)(C). In order for a rebuttal expert disclosure to be proper, "there must be a nexus between the purported rebuttal evidence and the evidence that the purported rebuttal evidence seeks to rebut." *U.S. v. Henderson*, 485 F. Supp.2d 831, 848 (S.D. Ohio 2007). A rebuttal expert's opinions are limited to "that which is precisely directed to rebutting new matter or new theories presented by the [opposing party's] case in chief." *Duff v. Duff*, No. 04-345-KSF, 2005 U.S. Dist. LEXIS 46111, 2005 WL 6011250, *5 (E.D. Ky. Nov. 14, 2005). The rebuttal

disclosure must contain the same subject matter as defendant's disclosure. *Id.*

Here, NCAIG asserts Maxum's purported rebuttal expert witness, Mr. Swierkiewicz, is actually an impermissible sur-rebuttal witness, which is prohibited under the Federal Rules. Specifically, [*4] NCAIG argues that Mr. Littlejohn was offered only to provide rebuttal testimony against Maxum's expert witness, Mr. Ginden. (Doc. 57 at 4.). NCAIG further argues that it does not have any affirmative experts. *Id.* Thus, according to NCAIG, Maxum's designation of Mr. Swierkiewicz as a rebuttal witness makes him a rebuttal witness to NCAIG's rebuttal witness, which is prohibited under the FRCP. (*Id.* at p. 5).

Maxum, however, contends that NCAIG did not disclose Mr. Littlejohn *exclusively* as a rebuttal witness. (Doc. 60 at p. 2)(emphasis added). Notably, NCAIG's amended disclosure, states in relevant part;

"Mr. Littlejohn may provide testimony on the procedures of procuring insurance, and particularly, the duties of a potential insured relative to requirements for insurance applications. Specifically, Mr. Littlejohn may offer rebuttal testimony to one or more opinions of Plaintiff's expert, Daniel Ginden, regarding an insured's duty relative to an insurance application prior to the inception of an insurance policy."

(Doc. 50 at 1).

Maxum asserts that this language is evident of NCAIG's intent to offer both affirmative and rebuttal evidence through Mr. Littlejohn. (Doc. 60 at p. 5). Maxum's disclosure [*5] specifies that Mr. Swierkiewicz will offer rebuttal testimony to Mr. Littlejohn's opinions "regarding the duties of a prospective insured relative to the requirements for insurance applications and specifically the industry custom and practice as to what obligations, if any, a prospective insured or an insured has to

2014 U.S. Dist. LEXIS 196740, *5

supplement an insurance application upon receipt of additional accusations or information regarding his business." Contrary to NCAIG's assertion, Maxum does not intend to disclose Mr. Swierkiewicz as a sur-rebuttal expert, but has been designated to respond to Mr. Littlejohn's affirmative testimony.

NCAIG further asserts that Mr. Swierkiewicz was untimely disclosed and that Mr. Swierkiewicz's testimony will be irrelevant. Such arguments are not well taken. Notably, Maxum designated Mr. Swierkiewicz as its rebuttal expert witness on January 29, 2014, over a month before the discovery end date in this matter. *Piskura v. Taser Int'l*, No. 10-cv-248, 2012 U.S. Dist. LEXIS 52534, *11 (S.D. Ohio Apr. 13, 2012) (finding late disclosure harmless where counsel had sufficient time to depose witness) (citing *Matilla v. South Ky. Rural Elec. Co-op. Corp.*, 240 Fed. Appx. 35, 42 (6th Cir. 2007)). Furthermore, without the benefit of deposition or trial testimony providing a context for Mr. Swierkiewicz testimony, it is premature [*6] to make a determination that such testimony is irrelevant. See *In re Commercial Money Ctr., Inc., Equip. Lease Litig.*, 1:02CV16000, 2007 U.S. Dist. LEXIS 37260, 2007 WL 1514282 (N.D. Ohio May 22, 2007).

Moreover and perhaps most importantly, the motions to strike are generally disfavored and the proper use of such motions is quite narrow. *Watkins & Son Pet Supplies v. Iams Co.*, 107 F.Supp.2d 883 (S.D. Ohio 1999). See also *In re Commercial Money Ctr., Inc., Equip. Lease Litig.*, 1:02CV16000, 2007 U.S. Dist. LEXIS 37260, 2007 WL 1514282 (N.D. Ohio May 22, 2007). While some courts have employed Rule 12(f) to strike an affidavit or portions thereof, see *McLaughlin v. Copeland*, 435 F.Supp. 513, 519-20 (D.Md.1977), there is no basis in the Federal Rules for doing so. See *Dawson v. City of Kent*, 682 F.Supp. 920, 922 (N.D. Ohio

1988), *aff'd*, 865 F.2d 257 (6th Cir.1988) (Court refused to employ Rule 12(f) to strike an affidavit because "the rule relates only to pleadings and is inapplicable to other filings."). With respect to expert reports, too, courts in this Circuit have held that motions to strike are inapplicable, and have stated that the proper vehicle is a motion *in limine*. See *Johnson v. Manitowoc Boom Trucks, Inc.*, 406 F.Supp.2d 852, 864, n. 10 (M.D.Tenn.2005); *Porter v. Hamilton Beach/Proctor-Silex, Inc.*, 2003 U.S. Dist. LEXIS 14089, *5-6 (W.D.Tenn. Jul. 28, 2003)(unpublished disposition)(motion to strike supplementary expert report treated as motion *in limine*).

III. Conclusion

Accordingly, the undersigned finds that NCAIG's motion to strike is not the proper vehicle to exclude the proposed expert testimony of Mr. Swierkiewicz, as any limitation on expert testimony is premature at this point in the litigation. [*7] NCAIG's motion to strike (Doc. 57) is therefore **DENIED**.

IT IS SO ORDERED.

/s/ Stephanie K. Bowman

Stephanie K. Bowman

United States Magistrate Judge

End of Document

Oklahoma v. Tyson Foods, Inc.

United States District Court for the Northern District of Oklahoma

April 17, 2009, Decided; April 21, 2009, Filed

Case No. 05-CV-329-GKF-PJC

Reporter

2009 U.S. Dist. LEXIS 33944 *; 2009 WL 1065668

STATE OF OKLAHOMA, et al., Plaintiff, vs.
TYSON FOODS, INC., et al., Defendants.**Subsequent History:** Motion to strike denied by Oklahoma v. Tyson Foods, Inc., 2009 U.S. Dist. LEXIS 114870 (N.D. Okla., May 10, 2009)**Prior History:** State of Okla. ex rel. Edmondson v. Tyson Foods, Inc., 2009 U.S. Dist. LEXIS 10362 (N.D. Okla., Jan. 29, 2009)**Counsel:** [*1] For Attorney General of the State of Oklahoma, State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General - W A Drew Edmondson, Oklahoma Secretary of the Environment, Office of, State of Oklahoma, ex rel. J.D. Strong in his capacity as the Trustee for Natural Resources for the State of Oklahoma, Plaintiffs: C Miles Tolbert, LEAD ATTORNEY, Secretary of the Environment, OKLAHOMA CITY, OK; Daniel Patrick Lennington, John Trevor Hammons, LEAD ATTORNEYS, Kelly S Hunter Burch, Office of the Attorney General (OKC-313), OKLAHOMA CITY, OK; David Phillip Page, Richard T Garren, Sharon K Weaver, LEAD ATTORNEYS, Riggs Abney Neal Turpen Orbison & Lewis (Tulsa-502), Tulsa, OK; Elizabeth C Ward, Elizabeth Claire Xidis, Frederick C Baker, Lee M Heath, LEAD ATTORNEYS, Motley Rice LLC (Mount Pleasant), Mount Pleasant, SC; Fidelma L Fitzpatrick, Jonathan D Orent, Michael G Rousseau, LEAD ATTORNEYS, Motley Rice LLC (Providence), PROVIDENCE, RI; Ingrid L Moll, William H Narwold, LEAD ATTORNEYS,

Motley Rice LLC (Hartford), HARTFORD, CT; Louis Werner Bullock, LEAD ATTORNEY, Robert Murray Blakemore, Bullock Bullock & Blakemore, PLLC, TULSA, OK; Melvin David Riggs, LEAD ATTORNEY, Riggs [*2] Abney Neal Turpen Orbison & Lewis (Tulsa-502), Tulsa, OK; Robert Allen Nance, LEAD ATTORNEY, Dorothy Sharon Gentry, Riggs Abney Neal Turpen Orbison & Lewis (OKC), OKLAHOMA CITY, OK; W A Drew Edmondson, LEAD ATTORNEY, RICHARDSON LAW FIRM, MUSKOGEE, OK.

For Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Defendants: Dustin R Darst, LEAD ATTORNEY, Michael R. Bond, Kutak Rock LLP (Fayetteville), Fayetteville, AR; Erin Walker Thompson, LEAD ATTORNEY, Kutak Rock LLP, FAYETTEVILLE, AR; Gordon D Todd, Jay Thomas Jorgensen, Mark D Hopson, Timothy K Webster, LEAD ATTORNEYS, Sidley Austin LLP (Washington DC), WASHINGTON, DC; L Bryan Burns, LEAD ATTORNEY, Robert W George, Tyson Foods Inc, Springdale, AR; Patrick Michael Ryan, Stephen L Jantzen, LEAD ATTORNEYS, Paula M Buchwald, Ryan Whaley Coldiron and Shandy PC, Oklahoma City, OK; Thomas C Green, LEAD ATTORNEY, Sidley Austin Brown & Wood LLP, WASHINGTON, DC.

For Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Defendants: David Charles Senger, LEAD ATTORNEY, Coffey Gudgel & McDaniel PLLC, TULSA, OK; Edwin Stephen Williams, Robert E Sanders, LEAD ATTORNEYS,

2009 U.S. Dist. LEXIS 33944, *2

YoungWilliams P.A., JACKSON, MS; Robert Paul Redemann, LEAD [*3] ATTORNEY, Perrine McGivern Redemann Reid Berry & Taylor PLLC, TULSA, OK.

For Cargill, Inc., Cargill Turkey Production, LLC, Defendants: Bruce Jones, Christopher Harold Dolan, Delmar R Ehrich, Krisann C. Kleibacker Lee, LEAD ATTORNEYS, Faegre & Benson (Minneapolis), MINNEAPOLIS, MN; Colin C Deihl, Melissa C Collins, Todd P Walker, LEAD ATTORNEYS, Faegre & Benson (Denver), DENVER, CO; Colin Hampton Tucker, John H Tucker, Kerry R Lewis, Theresa Noble Hill, LEAD ATTORNEYS, Rhodes Hieronymus Jones Tucker & Gable, TULSA, OK; Dara D Mann, LEAD ATTORNEY, McKenna Long & Aldridge LLP, ATLANTA, GA; Terry Wayen West, LEAD ATTORNEY, West Law Firm, SHAWNEE, OK.

For George's, Inc., George's Farms, Inc., Defendants: Earl Buddy Chadick, Gary Vincent Weeks, James Martin Graves, KC Dupps Tucker, Woody Bassett, LEAD ATTORNEYS, Bassett Law Firm, Fayetteville, AR; George W Owens, Randall Eugene Rose, Owens Law Firm PC (Tulsa), Tulsa, OK.

For Peterson Farms, Inc., Defendant: Archer Scott McDaniel, Craig A Mirkes, LEAD ATTORNEYS, Nicole Marie Longwell, Philip D Hixon, McDaniel Hixon Longwell & Acord PLLC, TULSA, OK; Sherry P Bartley, LEAD ATTORNEY, Mitchell Williams Selig Gates & Woodyard PLLC, LITTLE ROCK, [*4] AR.

For Simmons Foods, Inc., Defendant: John R Elrod, Vicki Bronson, LEAD ATTORNEYS, P Joshua Wisley, Conner & Winters PLLC (AR), FAYETTEVILLE, AR; Bruce Wayne Freeman, Conner & Winters (Tulsa), TULSA, OK.

For Willow Brook Foods, Inc., Defendant: David Gregory Brown, Jennifer Stockton Griffin, LEAD ATTORNEYS, Lathrop & Gage LC (Jefferson City), JEFFERSON CITY, MO;

Frank M Evans, III, LEAD ATTORNEY, Lathrop & Gage LLP (Springfield), SPRINGFIELD, MO; Raymond Thomas Lay, LEAD ATTORNEY, Kerr Irvine Rhodes & Ables, Oklahoma City, OK.

For Tahlequah Livestock Auction, Inc., Defendant: Tim Keith Baker, Baker & Baker, Tahlequah, OK.

For Randy Allen, Defendant: Dale Kenyon Williams, Jr, LEAD ATTORNEY, Hall Estill Hardwick Gable Golden & Nelson (Tulsa), TULSA, OK.

For Tyson Poultry, Inc., Tyson Foods, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Third Party Plaintiffs: Dustin R Darst, LEAD ATTORNEY, Michael R. Bond, Kutak Rock LLP (Fayetteville), Fayetteville, AR; Erin Walker Thompson, LEAD ATTORNEY, Kutak Rock LLP, FAYETTEVILLE, AR; Nicole Marie Longwell, McDaniel Hixon Longwell & Acord PLLC, TULSA, OK; Stephen L Jantzen, LEAD ATTORNEY, Ryan Whaley Coldiron and Shandy PC, Oklahoma City, OK.

For [*5] Simmons Foods, Inc., Third Party Plaintiff: John R Elrod, LEAD ATTORNEY, P Joshua Wisley, Conner & Winters PLLC (AR), FAYETTEVILLE, AR; Nicole Marie Longwell, McDaniel Hixon Longwell & Acord PLLC, TULSA, OK.

For George's, Inc., George's Farms, Inc., Third Party Plaintiffs: Earl Buddy Chadick, LEAD ATTORNEY, Bassett Law Firm, Fayetteville, AR; Randall Eugene Rose, Owens Law Firm PC (Tulsa), Tulsa, OK; Nicole Marie Longwell, McDaniel Hixon Longwell & Acord PLLC, TULSA, OK.

For Willow Brook Foods, Inc., Third Party Plaintiff: Frank M Evans, III, LEAD ATTORNEY, Lathrop & Gage LLP (Springfield), SPRINGFIELD, MO; Nicole Marie Longwell, McDaniel Hixon Longwell & Acord PLLC, TULSA, OK.

2009 U.S. Dist. LEXIS 33944, *5

For Westville, Town of, Third Party Defendant: Michael Todd Hembree, Hembree and Hembree, TAHLEQUAH, OK.

For John W Adair, Third Party Defendant: Tony Michael Graham, LEAD ATTORNEY, Ronnie Jack Freeman, William Francis Smith, Graham & Freeman PLLC, TULSA, OK.

For John E Adair, John E. and Virginia W. Adair Family Trust, Trustees of the Revocable Trust, Third Party Defendants: Tony Michael Graham, LEAD ATTORNEY, Ronnie Jack Freeman, Graham & Freeman PLLC, TULSA, OK.

For Diamond Head Resort, Kevin R. Kelley, Individually [*6] and d/b/a Diamond Head Resort, Third Party Defendant: Marcus N Ratcliff, LEAD ATTORNEY, Latham Wagner Steele Lehman, TULSA, OK.

For Berry Group, The, Third Party Defendant: Ronnie Jack Freeman, Tony Michael Graham, LEAD ATTORNEY, Graham & Freeman PLLC, TULSA, OK.

For Arkansas Natural Resources Commission, State of Arkansas, Intervenor: Charles Livingston Moulton, Dustin McDaniel, Jim DePriest, Justin Allen, LEAD ATTORNEYS, Office of the Attorney General (Little Rock), Little Rock, AR; William Bernard Federman, LEAD ATTORNEY, Jennifer Faith Sherrill, Federman & Sherwood, OKLAHOMA CITY, OK.

For Texas Farm Bureau, Texas Cattle Feeders Association, Texas Pork Producers Association, Texas Association of Dairymen, Movants: Mark Richard Mullins, LEAD ATTORNEY, McAfee & Taft, OKLAHOMA CITY, OK.

For American Farm Bureau Federation, National Cattlemen's Beef Association, Movants: Barry Greg Reynolds, LEAD ATTORNEY, Jessica Eileen Rainey, Titus Hillis Reynolds Love Dickman & McCalmon,

TULSA, OK; Nikaa Baugh Jordan, William S Cox, III, LEAD ATTORNEYS, Lightfoot Franklin & White, BIRMINGHAM, AL.

For Peterson Farms, Inc., Third Party Plaintiff: Archer Scott McDaniel, Craig A Mirkes, LEAD ATTORNEYS, [*7] Nicole Marie Longwell, McDaniel Hixon Longwell & Acord PLLC, TULSA, OK; Sherry P Bartley, LEAD ATTORNEY, Mitchell Williams Selig Gates & Woodyard PLLC, LITTLE ROCK, AR.

For Brian R. Berry, d/b/a Town Branch Guest Ranch, Mary C. Berry, d/b/a Town Branch Guest Ranch, For Brian R. Berry, individually, Mary C. Berry, Individually, Dorothy Ann Means, Individually, and as Trustee of the Jerry L. Means Trust and Trustee of the Dorothy Ann Means Trust, Jerry Means, Individually, and as Trustee of the Jerry L. Means Trust and Trustee of the Dorothy Ann Means Trust, Billy Simpson, Individually and d/b/a Simpson Diary, Third Party Defendants: John Brian DesBarres, LEAD ATTORNEY, Wilson Cain & Acquaviva (Tulsa), TULSA, OK; Tony Michael Graham, LEAD ATTORNEY, Ronnie Jack Freeman, Graham & Freeman PLLC, TULSA, OK; William Francis Smith, Graham & Freeman PLLC, TULSA, OK.

For Austin L. Bennett, d/b/a Eagle Bluff Resort, Leslie Bennett, d/b/a Eagle Bluff Resort, Austin L. Bennett, Individually, Leslie Bennett, Individually, Third Party Defendants: J Ron Wright, Wright Stout Fite & Wilburn (300), Muskogee, OK.

For Jerry W. Hare, Trustee of Jerry Wayne Hare Revocable Trust, individually and d/b/a Crystal [*8] Creek Ranch, Mary Jo Hare, Individually and d/b/a Crystal Creek Ranch, Virginia W Adair, Arrowhead Camp, Inc., Cheryl D. Beaman, Philip L. Beaman, Norma Brooks, Individually and d/b/a Cookson Village and Cabins, Haskell L. Brown, Linda Mathis Canada, Roger K. Canada, LaDonna Eddings Caviness, Cherry Springs Golf Club, Inc.,

2009 U.S. Dist. LEXIS 33944, *8

Gene Colburn, Lorene Colburn, Brooks P. Connor, M. Wesley Connor, Tom Cotton, Individually and d/b/a Chicken Creek Village Store, Billie Davis, Veraman Davis, Elmo Eddings, Thomas E. Eddings, Falcon Floats, Inc., Flint Ridge Property Owners Association, Inc., Flintridge Park, LLC, Rickey Neil Fowler, Tonya Fowler, Billy D. Glenn, Norma Glenn, Grande Villa, Inc., Darrell Guffey, Individually and d/b/a Seldom Rest Diary, Dianna Guffey, Individually and d/b/a Seldom Rest Diary, Anthony Waye Hare, Individually and d/b/a Crystal Creek Ranch, Jerry W. Hare, Individually and d/b/a Crystal Creek Ranch, Mary Jo Hare, Trustee of the Mary Jo Hare Revocable Trust, individually and d/b/a Crystal Creek Ranch, Carolyn Hix, Danny E. Hix, Rickey Joe Hix, Rita Hix, Illinois River Ranch Recreational Vehicle Park Property Owners Association, Illinois River Valley Nursery, Inc., J5 [*9] Ranch, LLC, John T. Posey, Jr. Trust, Individually and d/b/a Meadow Park RV Park, Erin Jones, James Thomas Jones, Mark Kelly, Melissa Kelly, Bonnie Eddings Kile, Carolyn R. Lockwood, Larry R. Lockwood, Charline Eddings Long, Dale E. Mathews, Co-Trustee of the Dale E. Mathews Trust, Ellen Mathews, Co-Trustee of the Dale E. Mathews Trust, Millie Seratt Trust, Darrell Moss, John Nickle, Park Hill Plants & Trees, Inc., Daniel L. Parker, John T. Posey, Jr., Evelyn Proctor, Phillip Dewayne Proctor, Anne Marie Sanders, Verlie B. Secratt, Sue Eddings Shankle, Skelly Ranch, Inc., Robert A. Smith, Trustee of the Robert A. Smith Trust, Sylvia S. Smith, Trustee of the Robert A. Smith Trust, Snake Creek Wilderness Development, Inc., Brenda Spears, Individually and d/b/a Pine Valley Cabins, David Spears, Spring Hollow Feed Mill, Inc., Bill Stewart, Individually and d/b/a Dutchman's Cabins, Elise Tarrance, Willie Tarrance, Tom Tate, Thunderbird Resort, Inc., Twin City Construction, Inc., Helen Watts, Trustee of The Helen Watts Revocable Trust, Simp Watts, Trustee of the Simp Watts

Revocable Trust, Bobby Williams, Individually and d/b/a Williams Diary, Christina Williams, Individually and d/b/a Williams [*10] Diary, Clifton Williams, Individually and d/b/a Williams Diary, Jerry D. Williams, Individually and d/b/a Williams Diary, Marian Williams, Individually and d/b/a Williams Diary, Norma Williams, Perry Williams, Charles W. Wilson, Kimberlee Wilson, Third Party Defendants: Tony Michael Graham, LEAD ATTORNEY, Ronnie Jack Freeman, Graham & Freeman PLLC, TULSA, OK; William Francis Smith, Graham & Freeman PLLC, TULSA, OK.

Jim Bagby, Third Party Defendant, Pro se, Westville, OK.

For John Stacy, doing business as, Big John's Exterminators, Donna Doyle, Individually and d/b/a Simpson Diary, Ray Dean Doyle, Individually and d/b/a Simpson Diary, Billie D. Howard, Illinois River Ranch Property Owners Association, Floyd Simmons, Third Party Defendants: Lloyd E Cole, Jr, LEAD ATTORNEY, Cherokee Nation Office of the Attorney General, TAHLEQUAH, OK.

For Brazil Creek Minerals, Inc., Garner Garrison, Lena Garrison, Third Party Defendants: Thomas James McGeedy, LEAD ATTORNEY, John Stephen Neas, Logan & Lowry (Grove), GROVE, OK.

For Katherine Brown, Kermit Brown, Third Party Defendants: A Michelle Campney , LEAD ATTORNEY, Walls Walker Harris & Wolfe PLLC, OKLAHOMA CITY, OK.

For Tahlequah, City of, Third Party [*11] Defendant: Robert Park Medearis, Jr, LEAD ATTORNEY, Medearis Law Firm PLLC, TAHLEQUAH, OK.

For Watts, City of, John E. Cotherman, Julie A. Cotherman, Fin & Feather Resort, Inc., Third Party Defendants: Jo Nan Allen, LEAD ATTORNEY, Long James Maple and Monroe PLLC, SAND SPRINGS, OK.

2009 U.S. Dist. LEXIS 33944, *11

Gordon W. Clinton, Third Party Defendant, Pro se, WELLING, OK.

Susann Clinton, Third Party Defendant, Pro se, WELLING, OK.

Eugene Dill, Individually and d/b/a Cookson Country Store and Cabins, Third Party Defendant, Pro se.

For Eagle Nursery, LLC, doing business as, Midwestern Nursery Containers Division, Northland Farms, LLC, Sequoyah Fuels International Corporation, Third Party Defendants: Linda C Martin, LEAD ATTORNEY, Doerner Saunders Daniel & Anderson (Tulsa), TULSA, OK.

For Hoby Ferrell, Greater Tulsa Investments, LLC, Third Party Defendants: Douglas L Boyd, LEAD ATTORNEY, Tulsa, OK.

Marjorie Garman, Third Party Defendant, Pro se, COLCORD, OK.

For Marjorie Garman, Third Party Defendant: Earl Buddy Chadick, LEAD ATTORNEYS, Bassett Law Firm, Fayetteville, AR.

James C Geiger, Individually and d/b/a Spencer Ridge Resort, Third Party Defendant, Pro se.

For Greenleaf Nursery Co., Inc., Archie R. Peyton, Jr., Trustee [*12] of the Peyton Family Trust, individually and d/b/a Peyton's Place, Virginia M. Peyton, Trustee of the Peyton Family Trust, individually and d/b/a Peyton's Place, Katherine Tye, Kevin Tye, War Eagle Floats, Inc., Third Party Defendants: Tim Keith Baker, Baker & Baker, Tahlequah, OK.

For Bartow Hix, Wanda Hix, Tumbling T. Bar, LLC, Third Party Defendant: Angela Diane Cotner, LEAD ATTORNEY, Angela D Cotner Esq, Edmond, OK.

Cherrie House, Third Party Defendant, Pro se, STILWELL, OK.

William House, Third Party Defendant, Pro se,

STILWELL, OK.

For Barbara L. Kelley, Individually and d/b/a Diamond Head Resort, Third Party Defendant: Kenneth Edward Wagner, Marcus N Ratcliff, LEAD ATTORNEY, Latham Wagner Steele Lehman, TULSA, OK.

Dorothy Gene Lamb, Third Party Defendant, Pro se.

James Lamb, Third Party Defendant, Pro se.

Doris Mares, Individually and d/b/a Cookson Country Store and Cabins, Third Party Defendant, Pro se, CHOCTAW, OK.

For Snake Creek Marina, Third Party Defendant: Derek Stewart Allan Lawrence, Michael Lee Carr, Michelle B Skeens, LEAD ATTORNEYS, Holden Carr & Skeens, TULSA, OK.

For River Farms of Tahlequah, LLC, Tony Michael Graham, Jack Spears, Individually and d/b/a Pine Valley Cabins, [*13] Third Party Defendants: Ronnie Jack Freeman, Tony Michael Graham, Graham & Freeman PLLC, TULSA, OK; William Francis Smith, Graham & Freeman PLLC, TULSA, OK.

For Louise Squyres, Individually and d/b/a MX Ranch, Claire Wells, Individually and d/b/a MX Ranch, Third Party Defendants: Monte W Strout, Tahlequah, OK.

For Tahlequah Livestock Auction, Inc., Third Party Defendant: Mackenzie Lea Hamilton Jessie, LEAD ATTORNEY, Baker & Baker, Tahlequah, OK; Tim Keith Baker, Baker & Baker, Tahlequah, OK.

John E. and Virginia W. Adair Family Trust, Trustees of the Revocable Trust, Third Party Defendant, Pro se, STILWELL, OK.

For Wauhatchie Outing Club, Third Party Defendant: Michael Andrew Pollard, LEAD ATTORNEY, Heroux & Pollard PLLC, TULSA, OK; Reuben Davis, LEAD ATTORNEY, McAfee & Taft (Tulsa), TULSA, OK.

2009 U.S. Dist. LEXIS 33944, *13

Robin L. Wofford, Third Party Defendant, Pro se, Watts, OK.

For Suzanne M. Zieders, Third Party Defendant: Jerry M Maddux, LEAD ATTORNEY, Thomas Janer, Selby Connor Maddux Janer, BARTLESVILLE, OK

For Cargill Turkey Production, LLC, Third Party Plaintiff: Bruce Jones, Krisann C. Kleibacker Lee, LEAD ATTORNEYS, Faegre & Benson (Minneapolis), MINNEAPOLIS, MN; Colin C Deihl, Melissa C Collins, Todd P Walker, [*14] LEAD ATTORNEYS, Faegre & Benson (Denver), DENVER, CO; Colin Hampton Tucker, John H Tucker, LEAD ATTORNEYS, Rhodes Hieronymus Jones Tucker & Gable, TULSA, OK; Dara D Mann, LEAD ATTORNEY, McKenna Long & Aldridge LLP, ATLANTA, GA; Terry Wayen West, LEAD ATTORNEY, West Law Firm, SHAWNEE, OK.

For Peterson Farms, Inc., Counter Defendant: Sherry P Bartley, LEAD ATTORNEY, Mitchell Williams Selig Gates & Woodyard PLLC, LITTLE ROCK, AR.

For Cargill Turkey Production, LLC, Counter Defendant: Bruce Jones, Krisann C. Kleibacker Lee, LEAD ATTORNEYS, Faegre & Benson (Minneapolis), MINNEAPOLIS, MN; Colin C Deihl, Melissa C Collins, Todd P Walker, LEAD ATTORNEYS, Faegre & Benson (Denver), DENVER, CO; Colin Hampton Tucker, John H Tucker, LEAD ATTORNEYS, Rhodes Hieronymus Jones Tucker & Gable, TULSA, OK; Dara D Mann, LEAD ATTORNEY, McKenna Long & Aldridge LLP, ATLANTA, GA.

For Watts, City of, Counter Claimant, Cross Defendant: Jo Nan Allen, LEAD ATTORNEY, Long James Maple and Monroe PLLC, SAND SPRINGS, OK.

For Tyson Poultry, Inc., Tyson Foods, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc.,

Counter Defendants: Dustin R Darst, LEAD ATTORNEY, Michael R. Bond, Kutak Rock LLP (Fayetteville), Fayetteville, AR; [*15] Erin Walker Thompson, LEAD ATTORNEY, Kutak Rock LLP, FAYETTEVILLE, AR.

For Simmons Foods, Inc., Counter Defendant: John R Elrod, LEAD ATTORNEYS, P Joshua Wisley, Conner & Winters PLLC (AR), FAYETTEVILLE, AR.

For George's, Inc., George's Farms, Inc., Counter Defendants: Earl Buddy Chadick, LEAD ATTORNEYS, Bassett Law Firm, Fayetteville, AR; Randall Eugene Rose, LEAD ATTORNEY, Owens Law Firm PC (Tulsa), Tulsa, OK.

For Willow Brook Foods, Inc., Counter Defendant: Frank M Evans, III, LEAD ATTORNEY, Lathrop & Gage LLP (Springfield), SPRINGFIELD, MO.

For Cargill Turkey Production, LLC, Cargill, Inc., Cross Claimants: Colin C Deihl, Melissa C Collins, Todd P Walker, LEAD ATTORNEYS, Faegre & Benson (Denver), DENVER, CO; Dara D Mann, LEAD ATTORNEY, McKenna Long & Aldridge LLP, ATLANTA, GA; Krisann C. Kleibacker Lee, LEAD ATTORNEYS, Faegre & Benson (Minneapolis), MINNEAPOLIS, MN; John H Tucker, LEAD ATTORNEYS, Rhodes Hieronymus Jones Tucker & Gable, TULSA, OK.

Judges: Gregory K. Frizzell, United States District Judge.

Opinion by: Gregory K. Frizzell

Opinion

OPINION AND ORDER

Before the court is the "Defendants' Joint

2009 U.S. Dist. LEXIS 33944, *15

Motion for Clarification of the Court's January 29, 2009 Orders [Dkt. Nos. 1839 & 1842]." [Dkt. No. 1972]. In the [*16] Order docketed as Document 1839, the court denied the plaintiff's Motion for Leave to Serve a Supplemental Expert Report by Drs. Cooke and Welch. In the Order docketed as Document 1842, the court denied the plaintiff's Motion for Leave to Serve Rebuttal Expert Reports. In the latter order, the court wrote, in part:

[T]he motion to permit rebuttal expert reports [is] denied. To alter the course previously plotted by the scheduling orders entered by the magistrate judge and permit rebuttal expert reports (and, presumably, sur-rebuttal expert reports) at this late date would unduly increase the cost of this litigation and delay its ultimate resolution. Rebuttal expert testimony will be permitted at trial to the extent it constitutes true rebuttal.

Defendants suggest the court's reference to rebuttal in the last sentence of the preceeding paragraph has been the subject of some difference of opinion between the two sides in this case. It need not be. As the experienced trial lawyers in this case already know, rebuttal denotes evidence introduced by a plaintiff to meet new facts brought out in his opponent's case in chief. *Morgan v. Commercial Union Assur. Cos.*, 606 F.2d 554, 555 (5th Cir. 1979). [*17] At trial, it is properly within the discretion of the trial judge to limit rebuttal testimony to that which is precisely directed to rebutting new matter or new theories presented by the defendant's case-in-chief." ¹ *Upshur v.*

Shepherd, 538 F.Supp. 1176, 1180 (E.D. Pa. 1982), *aff'd*, 707 F.2d 1396 (3d Cir. 1983). Rebuttal is not "an opportunity for the correction of any oversights in the plaintiff's case in chief." *Crowley v. Chait*, 322 F.Supp.2d 530, 550-51 (D.N.J. 2004)(citation omitted).

WHEREFORE, "Defendants' Joint Motion for Clarification of the Court's January 29, 2009 Orders [Dkt. Nos. 1839 & 1842]" [Dkt. No. 1972] is granted.

IT IS SO ORDERED this 17th day of April 2009.

/s/ Gregory K. Frizzell

Gregory K. Frizzell

United States District Judge

Northern District of Oklahoma

End of Document

¹ Upon reflection, this general rule may be unlikely to have any application whatsoever in the context of expert testimony at the trial of this case. The opinions and theories of defendants' experts will have been fully revealed to plaintiff through expert reports. It is unlikely that any attempt by defendants' experts to opine as to some as yet unrevealed theory or opinion will be permitted.

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

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

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal
corporation,

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

Case No. 1:20-cv-01008

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

**PROTECT THE PENINSULA'S
MOTION TO EXCLUDE
TESTIMONY AND EVIDENCE FROM
GARY MCDOWELL AND TERI QUIMBY**

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**PROTECT THE PENINSULA’S MOTION TO EXCLUDE TESTIMONY AND
EVIDENCE FROM GARY MCDOWELL AND TERI QUIMBY**

Intervenor Protect the Peninsula, Inc. (PTP) respectfully requests the Court issue an order under Fed. R. Civ. P. 16(f) to exclude testimony and disregard opinions from two of Plaintiffs’ three proposed “rebuttal expert witnesses” -- Gary McDowell and Teri Quimby. Plaintiffs did identify a rebuttal planning witness, David Moss, who provided a report rebutting opinions presented by PTP’s expert land use planning witness, Thomas Daniels, as discussed by the Court and parties at the Rule 16 conference and authorized in the Second Amended Case Management Order (CMO). (ECF 343)

Plaintiffs’ two excess witnesses are not planning witnesses and do not rebut Dr. Daniels opinions; they principally address issues on which Plaintiffs carry the burden of proof. Mr. McDowell is a farmer and former Director of the Michigan Department of Agriculture and Rural Development; he opined on “agritourism” and the importance of supporting Michigan farmers to thrive. Plaintiffs rely on Mr. McDowell’s report to support their summary judgment motion arguing that Peninsula Township zoning impairs protected “commercial speech,” though Mr. McDowell did not actually opine on advertising or speech. Ms. Quimby is an attorney and former member of the Michigan Liquor Control Commission; she reiterates Plaintiffs’ preemption legal arguments verbatim, and Plaintiffs rely on her opinions in summary judgment briefing on that claim.

Plaintiffs’ identification of two new experts to support claims upon which they have the burden of proof is untimely and unfair to PTP, which lacks an opportunity under this Court’s Second Amended CMO to identify rebuttal experts to Plaintiffs’ witnesses.

PTP intervention on the eve of trial thrust this case into atypical procedures: the Court authorized a second phase of discovery, a second set of experts, and a second round of dispositive motions to accommodate PTP. The Court was clear this second phase is not a start-over and it

would not rewind this case back to February 2021. Plaintiffs already had the opportunity to develop and present their case, and the Township had the opportunity to defend it.

Coincidentally (or not), these two new witnesses support Plaintiffs' position on two issues Plaintiffs lost in the first summary judgment order – whether liquor trafficking laws preempt locally-imposed limits on operating hours applicable to wineries (Ms. Quimby) and that weddings are not commercial speech protected by the First Amendment (Mr. McDowell). Plaintiffs cite in their most recent summary judgment briefs the reports of these two witnesses to support revamped theories to bolster their position on these two claims. Plaintiffs seek a second bite at the apple on the issues they already lost; it seems they hope support from these political appointees will help persuade the Court to find for their positions.

Plaintiffs should have identified these witnesses in August 2021, under the pre-PTP-intervention First Amended CMO establishing the schedule for expert witness designations for parties with the burden of proof. (ECF 72) Plaintiffs failed to do so and instead labelled them as “rebuttal experts” to PTP’s planning expert (Dr. Daniels) under the post-PTP-intervention Second Amended CMO. (ECF 343) Neither is a planning expert and neither offered rebuttal to Dr. Daniels. Plaintiffs’ attempt to bring in new non-rebuttal non-planning expert witnesses violates both CMOs. (ECF 72, 343) Allowing Plaintiffs to identify two new experts beyond their rebuttal planning witness wastes judicial resources and is unfair unless PTP has an opportunity to designate rebuttal witnesses to these witnesses.

PTP requests the Court exclude testimony and disregard opinions from Mr. McDowell and Ms. Quimby and order Plaintiffs to pay PTP’s expenses resulting from Plaintiffs’ failure to comply with the CMOs under Rule 16(f). PTP also objects under Fed. R. Civ. P. 56(c)(2) to Plaintiffs’

reliance on untimely opinions from Mr. McDowell and Ms. Quimby to support their summary judgment briefs.

Respectfully submitted,

Date: December 4, 2023

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**BRIEF IN SUPPORT OF PROTECT THE PENINSULA’S MOTION
TO EXCLUDE TESTIMONY AND EVIDENCE
FROM GARY MCDOWELL AND TERI QUIMBY**

TABLE OF CONTENTS

| | |
|---|-----------|
| I. INTRODUCTION | 2 |
| II. FACTUAL BACKGROUND | 3 |
| a. Post-PTP intervention, the Court opened a limited new litigation phase. | 3 |
| b. The Court authorized PTP to identify a land use planning expert and Plaintiffs to identify a rebuttal planning expert..... | 4 |
| c. PTP timely identified its planning expert; Plaintiffs identified a rebuttal planning witness plus two non-planning witnesses. | 6 |
| d. The parties served witness reports, then Plaintiffs served Mr. Moss’s supplemental report responding to Dr. Daniels’ report..... | 8 |
| e. Plaintiffs rely on Mr. McDowell’s and Ms. Quimby’s opinions to support summary judgment on issues they previously lost. | 9 |
| III. LEGAL STANDARDS | 10 |
| IV. ARGUMENT | 12 |
| V. CONCLUSION | 16 |

EXHIBITS

| | |
|---|--|
| Ex 1 – PTP Expert Witness Disclosure | |
| Ex 2 – Plaintiffs’ Rebuttal Expert Witness Disclosure | |
| Ex 3 – Report by Dr. Thomas Daniels | |
| Ex 4 – Report by David Moss | |
| Ex 5 – Report by Teri Quimby | |
| Ex 6 – Report by Gary McDowell | |
| Ex 7 – Supplemental Report by David Moss | |
| Ex 8 – Email exchange – request for concurrence | |
| Ex 9 – Unpublished Cases | |
| • <i>Oklahoma v. Tyson Foods, Inc.</i> , 2009 WL 1065668 (N.D. Okla. Apr. 17, 2009) | |
| • <i>Maxum Indem. Co. v. Drive W. Ins. Servs.</i> , 2014 WL 12653865, (S.D. Ohio June 13, 2014) | |

I. INTRODUCTION

Following PTP intervention, the Court authorized PTP to identify a planning expert and Plaintiffs to identify a rebuttal planning expert. PTP identified Thomas L. Daniels, Ph.D., an expert in land use planning, and Plaintiffs identified David Moss, who has some experience related to land use planning. The Court also authorized PTP and Plaintiffs to disclose expert reports. Dr. Daniels and Mr. Moss did so, and Mr. Moss also disclosed a supplemental report directly responding to Dr. Daniels' opinions. Mr. Moss's credentials and opinions are not presently at issue.

Plaintiffs also identified two new non-planning witnesses disguised as "rebuttal experts." Both are former political appointees to state governmental entities with regulatory authority over agriculture (Gary McDowell) and liquor trafficking (Teri Quimby); neither offers land use planning opinions. Plaintiffs rely on these two witnesses' opinions not to rebut Dr. Daniels but to bolster their summary judgment briefing arguing that Peninsula Township zoning applicable to wineries is preempted by state liquor trafficking regulations and impairs agritourism, which they characterize as advertising that is protected commercial speech. (ECF 501, 473)

As the parties with the burden of proving their preemption and commercial speech claims, Plaintiffs had until August 13, 2021, to identify these witnesses under the Court's First Amended Case Management Order (CMO). (ECF 72) They did not. After PTP intervention, the Court issued a Second Amended CMO authorizing limited procedures to comply with the Sixth Circuit mandates on PTP intervention – not a start-over for Plaintiffs to reinvigorate rejected claims. (ECF 301, 303, 319, 343, 385)

While Plaintiffs labelled these new witnesses as "rebuttal experts" to PTP planning expert Dr. Daniels, neither identifies land use planning expertise, neither opines on land use planning in Michigan or Peninsula Township nor any particular Peninsula Township Zoning Ordinance

(PTZO) provisions, and neither offers rebuttal to Dr. Daniels. Any contrast between Dr. Daniels' opinions and theirs does not make their opinions rebuttal to Dr. Daniels; it reflects that Plaintiffs hired them to support their case-in-chief, which Dr. Daniels rebuts.

Plaintiffs' attempt to bring in new non-rebuttal non-planning witnesses is untimely under the First Amended CMO and violates the Second Amended CMO. (ECF 72, 343) Presenting three witnesses where one was authorized and suffices wastes judicial resources. It is also unfair to PTP to allow two new non-planning experts without an opportunity for PTP to rebut them. PTP requests this Court exclude testimony from Mr. McDowell and Ms. Quimby, disregard their opinions cited to support Plaintiffs' summary judgment briefing, and order Plaintiffs to pay PTP expenses under Rule 16(f)(2).

Additionally, PTP objects under Fed. R. Civ. P. 56(c)(2) to Plaintiffs' improper reliance upon Mr. McDowell's and Ms. Quimby's reports to support their summary judgment positions on commercial speech and preemption respectively because their reports are inadmissible as untimely opinions from late-designated witnesses.

II. FACTUAL BACKGROUND

a. Post-PTP intervention, the Court opened a limited new litigation phase.

Before PTP was granted intervention, under the First Amended CMO, Plaintiffs and the Township had the opportunity to identify experts. (ECF 72) Plaintiffs identified an expert to testify regarding damages; the Township identified none. (ECF 303, PageID.10838-10842) The Court granted summary judgment on many claims in June 2022. (ECF 162) In early August 2022, Plaintiffs were preparing for trial mostly on damages. They dismissed other issues as "ancillary" and not to be addressed at trial: freedom of religion was "moot"; freedom of association was "a

legal issue for post trial briefing”; they “d[id]n’t plan to present any evidence” on their “content-based speech” claim; and their regulatory takings claim was “part and parcel with [their] damages claim.” (ECF 239, PageID.8670-8672)

Responding to PTP intervention, the Court adjourned trial, vacated part of its summary judgment order, considered motions on PTP interests, then modified the schedule for PTP to be heard. (ECF 236, 301, 303, 319, 320, 343, 385) The Court revised the First Amended CMO because its deadlines had all “passed without PTP participating in discovery or meaningful motion practice.” (ECF 301, PageID.10699) The Court said it would “not rewind this case” or “go back to square one” because of PTP intervention. (ECF 301, PageID.10700) Instead, the Court articulated what each party may do, “[c]onsidering the reasons why PTP has been permitted to intervene in this matter and how its intervention requires this case to move forward.” (*Id.*) Under the subtitle, “**Limited Discovery**,” the Court explained the post-intervention discovery phase:

As for discovery that PTP seeks to pursue, such discovery will be limited to the issues that PTP has an interest in. That is, PTP may pursue discovery related to the nine issues that the Court indicated PTP has an interest in. And depending on the outcome of the Court’s decision on the remaining three issues, PTP may be able to pursue discovery related to those issues.

(ECF 301, PageID.10704) The Court issued the Second Amended CMO on May 2. (ECF 343)

b. The Court authorized PTP to identify a land use planning expert and Plaintiffs to identify a rebuttal planning expert.

In August 2022, in requesting trial adjournment, PTP expressed interest in identifying a land use planning expert witness:

PTP plans to identify an expert in land use and planning to testify regarding the farmland preservation, nuisance avoidance, infrastructure management, and compatible land use interests that Township planning, zoning, programs, and ordinances advance and how these protect the property and quality of life of PTP members.

(ECF 229-1, PageID.8451-52)

In the April 4, 2023, Joint Status Report, Plaintiffs acknowledged PTP's intent to name a land use planning expert:

Plaintiffs' Position:

PTP shall furnish the name of PTP's expert witness related to "*planning*" by April 28, 2023.

Plaintiffs shall furnish the names of rebuttal expert witnesses to PTP's expert witnesses, if any, by May 15, 2023.

The Township may not name any expert witnesses.

* * *

PTP's Position:

PTP expects to be able to furnish the name of PTP's expert witness on *land use planning* by July 14, 2023.

(ECF 323, PageID.11901, internal citations omitted, emphases added)

At the April 21, 2023, Rule 16 hearing, the Court addressed land use planning experts:

THE COURT: Okay. All right. Let's inquire -- Let me inquire about experts. There is references in the status report regarding land use planning experts. Do we anticipate experts on other subjects or is it just land use.

MS. ANDREWS: Just land use, your Honor. * * *

THE COURT: * * * You agree with that, Mr. Infante?

MR. INFANTE: Yes. We have a damages expert already. We would do a rebuttal planning expert. Our only question for the Court-- the issue is, does the Township then get a rebuttal planning expert of their own? * * *

(ECF 385, PageID.14146) Mr. Infante explained his "understanding is PTP wants a planning expert" but that Plaintiffs "are always worried about the Township trying to backdoor some sort of damages expert," to which Township Counsel responded by explaining they may want a planning expert. (*Id.* at PageID.14146-14148) The Court closed the experts discussion by instructing the

Township to file a motion if it wanted to “pursue a land use expert” and could not reach agreement among the parties, then instructed:

THE COURT: As far as naming land use experts, PTP, June 19th.

MS. ANDREWS: Yes, your Honor.

THE COURT: Plaintiff July 3rd.

(*Id.* at PageID.14149)

On May 2, 2023, the Court issued the Second Amended CMO (ECF 343):

| | | |
|--|---------------------|-------------------------------|
| Disclose Name, Address, Area of Expertise and a short summary of expected testimony of Expert Witnesses (Rule 26(a)(2)(A)) | PTP: Plaintiffs: | JUNE 19, 2023 JULY 3, 2023 |
| Disclosure of Expert Reports (Rule 26(a)(2)(B)) | | AUGUST 28, 2023 |

c. PTP timely identified its planning expert; Plaintiffs identified a rebuttal planning witness plus two non-planning witnesses.

On June 19, 2023, PTP provided a concise but comprehensive summary of proposed planning testimony from Dr. Daniels, a tenured professor at the University of Pennsylvania Department of City and Regional Planning:

Dr. Daniels is expected to testify regarding land use planning, the use of zoning regulations to control land use, the use of agricultural zoning, the application of agricultural zoning to wineries, and the connection between agricultural zoning and farmland preservation. Dr. Daniels is further expected to testify regarding the governmental interests advanced by the Peninsula Township Zoning Ordinance, including agricultural and farmland preservation and ensuring compatible land uses in Peninsula Township. Dr. Daniels is expected to provide expert testimony on how the Peninsula Township Zoning Ordinance, in conjunction with Peninsula Township’s master plan and other ordinances, advances those governmental interests. Dr. Daniels is expected to testify regarding how the Peninsula Township Zoning Ordinance, including sections that address wineries and winery tasting rooms, are tailored to address the governmental interests of agricultural and farmland preservation and ensuring compatible land uses. Dr. Daniels is expected to testify regarding how the land use and special use

permits issued by Peninsula Township to wineries advance its governmental interests of agricultural and farmland preservation and ensuring compatible land uses and are tailored to address those interests.

(Ex 1) PTP also provided Dr. Daniels' *curriculum vitae*, which lists his experience as a professor of land use planning; seven books related to agricultural preservation and land use planning; numerous recent publications on land use policy, planning, and agricultural preservation; grants administered to study farmland preservation and land use planning; and membership in professional planning organizations. (*Id.*)

Two weeks later, on July 3, 2023, Plaintiffs' Rebuttal Expert Witness Disclosures feigned uncertainty as to what Dr. Daniels might testify about to rationalize naming *three* experts:

Because PTP has only disclosed the general area of testimony for its expert witness and that witness has not disclosed an expert report, the Wineries, in an abundance of caution, disclose expert witnesses on various land use planning and zoning topics *though these experts may not testify when PTP's expert discloses his report and the specific opinions are known.*

(Ex 2, emphasis added) Plaintiffs identified David Moss, Gary McDowell, and Teri Quimby.

Mr. Moss is proposed as a rebuttal expert "regarding land use planning and the commonly available types of zoning regulations to promote and preserve agricultural land use and rural character." (Ex 2 p. 3) Plaintiffs provided Mr. Moss's resume; he lacks formal land use planning education but "manages a consulting firm specializing in zoning and building permits, site acquisition, architecture and engineering, and constraints analyses for the real estate, insurance, and telecommunications industries." (*Id.*, pp. 6-7)

Mr. McDowell is the former Director of the Michigan Department of Agriculture and Rural Development (MDARD) and, per Plaintiffs' disclosure, an expert on rural development, agricultural preservation, and agritourism. (Ex 2, p. 2) Plaintiffs summarized his potential testimony:

Mr. McDowell is expected to testify as a rebuttal expert to PTP's named expert, Dr. Thomas L. Daniels, regarding agricultural preservation, value added agriculture, and agritourism as a means to preserve agricultural land. Mr. McDowell is expected to testify that the Winery Ordinances and the enforcement of those ordinances do not further the preservation of agricultural land and, instead, have the opposite effect. Mr. McDowell is expected to testify that value-added activities and agritourism like those activities the Wineries seek to engage in further the preservation of agricultural land.

(Ex 2 pp. 2-3) Plaintiffs' disclosures provided no resume for Mr. McDowell.

Ms. Quimby is a former Michigan Liquor Control Commission member and, per Plaintiffs' disclosure, an expert on Michigan alcohol administration, licensing, purchasing, enforcement, merchandising, and distribution. (Ex 2 p. 2) Plaintiffs summarized her potential testimony:

Ms. Quimby is expected to testify as a rebuttal expert to PTP's named expert, Dr. Thomas L. Daniels, regarding local authority to regulate alcohol licensees by way of zoning **should Dr. Daniels provide an expert opinion on this topic.** Ms. Quimby is expected to testify regarding the limited authority granted to local governments to regulate the manufacture, sale and distribution of alcohol and the Michigan Liquor Control Commission's policies and procedures to ensure local governments do not exceed that authority should Dr. Daniels provide an expert opinion on this topic. **Should Dr. Daniels not offer expert testimony on these topics, the Wineries do not expect to offer Ms. Quimby's testimony.**

(Ex 2, p. 3, emphases added) The disclosures also provided no resume for Ms. Quimby.

d. The parties served witness reports, then Plaintiffs served Mr. Moss's supplemental report responding to Dr. Daniels' report.

On August 28, PTP and Plaintiffs exchanged reports from their identified proposed experts. (Exs 3, 4, 5, 6) Dr. Daniels and Mr. Moss addressed Peninsula Township land use planning and zoning, including specific aspects of challenged PTZO provisions. (Ex 3, 4) Mr. Moss anticipated a forthcoming "supplemental report" after reviewing Dr. Daniels' report. (Ex 4, p. 2)

Mr. McDowell opines on the stresses of farming in Michigan and how agritourism, which he suggests includes a wedding held in barn or vineyard, is valuable. (Ex 6 p. 3) He states agritourism is “important and necessary” because “a farm’s success rate can increase exponentially” with it. (*Id.*, p. 4) His opinions make no reference to Dr. Daniels or Peninsula Township or land use planning or the PTZO or advertising.

Ms. Quimby opines that the Commission has “sole authority” and “complete control” over “alcohol in Michigan” and offers interpretations of constitutional, statutory, regulatory, and zoning provisions and caselaw related to alcohol. (Ex 5 pp. 3-4) Her opinions make no reference to Dr. Daniels nor any PTZO provisions but conclude the PTZO prohibits what state law allows, there is conflict between the PTZO and state law, and state law preempts local regulation. (Ex 5 ¶¶ 10.f, 11.c, 12)

On September 11, Plaintiffs served Mr. Moss’s “supplemental” report responding to Dr. Daniels’ report and opinions. (Ex 7)

e. Plaintiffs rely on Mr. McDowell’s and Ms. Quimby’s opinions to support summary judgment on issues they previously lost.

When the Court first considered Plaintiffs’ preemption argument, it concluded that Michigan law does not preempt PTZO limits on winery operating hours but does preempt PTZO provisions on amplified music and catering kitchens. (ECF 162, PageID.5989-5993) The Court also concluded that weddings are not protected commercial speech but invalidated other PTZO provisions as impairing commercial speech. (ECF 162, PageID.6004-6005) After PTP intervened, the Court vacated those parts of its summary judgment order. (ECF 301, PageID.10697-10698)

Fast-forward to the second round of summary judgment motions, Plaintiffs cited Ms. Quimby’s opinions to support their response opposing Peninsula Township’s preemption summary

judgment motion. (ECF 473) Addressing the meaning of Mich. Admin Code R. 460.1030(1), providing liquor licensees “shall comply with all state and local building, plumbing, zoning, sanitation, and health laws, rules, and ordinances,” Plaintiffs state:

Teri Quimby, former Commissioner of the Michigan Liquor Control Commission confirms this Court’s conclusion that the Rule is simply a “reminder,” and “[t]he approval of an alcohol license does not equate to a building occupancy permit, for example.”

(ECF 473, PageID.18015; ECF 473-13) They further cite her opinions to support their argument that the Michigan Legislature “only allowed local governments to have a say in several discrete areas.” (ECF 473, PageID.18018)

Plaintiffs cited Mr. McDowell’s opinions to support their reply on their free speech summary judgment motion. (ECF 501) Plaintiffs argue “modern commercial advertising is agritourism,” advertising and marketing attracts customers so a farm business can sell products, then conclude this is consist with, *inter alia*, “the Michigan Department of Agriculture” [sic], citing Mr. McDowell’s opinions. (ECF 501, PageID.19456; ECF 501-1)

III. LEGAL STANDARDS

Part of the purpose of Rule 16 is “discouraging wasteful pretrial activities.” Fed. R. Civ. P. 16(a)(3). At a Rule 16 conference, a district court may consider and act on matters including “avoiding unnecessary proof,” “limiting” expert testimony, and “controlling and scheduling discovery, including orders affecting disclosures . . . under Rule 26.” Fed. R. Civ. P. 16(c)(2)(D), (F). The post-Rule 16 conference order “controls the course of the action unless the court modifies it.” Fed. R. Civ. P. 16(d). A court “may issue any just orders” if a party “fails to obey a scheduling or other pretrial order,” and “must order the party, its attorney, or both to pay the reasonable expenses--including attorney’s fees--incurred because of any noncompliance with this rule, unless

the noncompliance was substantially justified or other circumstances make an award of expenses unjust.” Fed. R. Civ. P. 16(f).

A party must disclose the identity of any witness it intends to call as an expert “at the times and in the sequence that the court orders.” Fed. R. Civ. P. 26(a)(2)(A), (D).

A district court has discretion to limit proposed rebuttal testimony “to that which is directed to rebut new evidence or new theories proffered in the defendant’s case-in-chief.” *Martin v. Weaver*, 666 F.2d 1013, 1020 (6th Cir. 1981) (citing *Bowman v. General Motors Corp.*, 427 F.Supp. 234, 240 (E.D.Pa.1977) (noting abuse of discretion has only been found where “defendant’s witnesses have presented an alternative theory or new facts or have otherwise created a need for a particularized response”) (citing cases)). While proper rebuttal may include evidence that “might have been offered in chief,” (*id.*, quotation omitted), rebuttal “is not an opportunity for the correction of any oversights in the plaintiff’s case in chief.” *Oklahoma v. Tyson Foods, Inc.*, 2009 WL 1065668, at *1 (N.D. Okla. Apr. 17, 2009) (quotation omitted). “Rebuttal is a term of art, denoting evidence introduced by a Plaintiff to meet new facts brought out in his opponent’s case in chief.” *Morgan v. Com. Union Assur. Companies*, 606 F.2d 554, 555 (5th Cir. 1979). In the expert context, a proposed rebuttal expert’s opinions “are limited to that which is precisely directed to rebutting new matter or new theories presented by the opposing party’s case in chief.” *Maxum Indem. Co. v. Drive W. Ins. Servs. Inc.*, 2014 WL 12653865, at *1 (S.D. Ohio June 13, 2014) (quotation omitted). “The rebuttal disclosure must contain the same subject matter as defendant’s disclosure.” *Id.*

A party may object to material used to support or oppose a motion for summary judgment that cannot be presented in a form that would be admissible at trial. Fed. R. Civ. P. 56(c)(2), (e)

(“affidavits ... shall set forth such facts as would be admissible in evidence”); *McFeely v. United States*, 700 F.Supp. 414, 418 n. 1 (S.D.Ind.1988).

IV. ARGUMENT

The Court should exclude testimony and disregard opinions from Mr. McDowell and Ms. Quimby because it is not evidence on land use planning offered to rebut PTP’s planning expert. As discussed above, the Court authorized PTP and Plaintiffs each to identify only a land use planning expert. (ECF 385, PageID.14146) For PTP, that planning expert is Dr. Daniels, one of nation’s foremost authorities on the intersection between land use and agricultural preservation. (Ex 3) Even Plaintiffs’ planning witness cites Dr. Daniels authoritatively as a “noted expert on farmland preservation.” (Ex 4 ¶¶ 4.d, 4.j) Dr. Daniels’ report addresses how land use planning and zoning work together in Peninsula Township to complement and further its farmland preservation efforts. (Ex 3 pp. 14-32) He addresses how zoning in general and in Peninsula Township balances principle and accessory uses to prevent *de facto* rezoning and “spot zoning.” Dr. Daniels opines on agricultural zoning, the application of agricultural zoning to wineries, the connection between agricultural zoning and farmland preservation, and the governmental interests advanced by the PTZO. Dr. Daniels discusses neither agritourism¹ as such nor the relationship between local zoning and state liquor trafficking regulation.

Plaintiffs’ witness Mr. Moss has some zoning experience, his opinions address land use planning concepts, and he responded specifically to Dr. Daniels’ report. (Exs 4, 7)

Neither Mr. McDowell nor Ms. Quimby identify land use planning expertise and their opinions do not rebut Dr. Daniels’ opinions regarding land use and planning in Peninsula Township

¹ Plaintiffs deposed Dr. Daniels about their “weddings are agritourism” argument. (ECF 469-8, ECF 501-3)

or elsewhere. Mr. McDowell is a farmer, former elected official, and former head of a state department that oversees regulations related to farming and rural development. (Ex 6) His highly generalized opinions do not address Peninsula Township at all, let alone that the PTZO has “the opposite effect” of preserving agricultural land, per their disclosures. (Exs 6, 2) He addresses the importance of supporting farmers but not Peninsula Township’s plans, ordinances, and other farmland preservation efforts, nor specifically its highly successful Purchase of Development Rights (PDR) program that has preserved more acreage than any other local agricultural preservation program in Michigan. (Ex 3 p. 9) The report resembles a letter that a well-positioned official might provide to support a grant application or proposed legislation. It is not rebuttal to Dr. Daniels.

Ms. Quimby is an attorney and former member of the Commission. (Ex 5) Her opinions address provisions in the Michigan Constitution and Liquor Control Code (MLCC) that establish the Commission and articulate its authority – topics Dr. Daniels never addressed. (Ex 5) She quotes law extensively then regurgitates Plaintiffs’ interpretations nearly verbatim, citing the same cases Plaintiffs cite to support their preemption summary judgment motion. (*Id.*, p. 5; ECF 334) She addresses nothing specific in the PTZO but concludes it conflicts with and is preempted by state law. (*Id.*, pp. 7, 8) Her report resembles an amicus brief rather than expert rebuttal to Dr. Daniels’ analysis of Peninsula Township’s planning and zoning efforts to protect agriculture, including at wineries.

Plaintiffs understand the difference between a rebuttal land use planning expert and Mr. McDowell and Ms. Quimby. They identified Mr. Moss as their planning witness; after reviewing Dr. Daniels’ report, and in direct response to it, Plaintiffs served Mr. Moss’s “supplemental” report. (Exs 2, 4, 7) In their Rebuttal Witness Expert Disclosures, Plaintiffs noted their listed experts “may

not testify,” depending on what specifically Dr. Daniels opined. (Ex 2 p. 2) There is no “supplemental report” from Mr. McDowell nor Ms. Quimby responding to Dr. Daniels’ opinions. Plaintiffs nevertheless relied upon Mr. McDowell and Ms. Quimby’s opinions to support their agritourism-as-commercial-speech and preemption theories. (ECF 501, 501-1, 473, 473-13)

Plaintiffs refused to stipulate, when PTP requested, that Mr. McDowell and Ms. Quimby and their reports should be excluded because they are not proper rebuttal to Dr. Daniels. (Ex 7) According to Plaintiffs, Mr. McDowell and Ms. Quimby will offer testimony showing local governments may not enforce any local zoning restrictions they wish, that Mr. McDowell opines agritourism is important and necessary in rural communities, and that Ms. Quimby will rebut Dr. Daniels’ concerns that a winery can become a bar or operate as a restaurant under MLCC regulations. (*Id.*) Putting aside their limited relevance and judicial value, these points do not convert these witnesses into land use planning experts rebutting Dr. Daniels. There is no indication either witness disagrees with anything of consequence to this case that Dr. Daniels actually said. As Plaintiffs emphasized, Dr. Daniels acknowledged Michigan sources considering farm weddings as a form of agritourism. (ECF 469, PageID.16954 n.8; ECF 501, PageID.19458) Dr. Daniels never suggested that zoning is limitless, that agritourism as unimportant or unnecessary, or that PTZO provisions trump liquor control laws. Dr. Daniels introduced no new facts or theories related to agritourism or liquor trafficking that might have opened the door to rebuttal on agritourism and the balance between local zoning and state liquor regulations – he does not discuss these topics at all. Any contrast between Dr. Daniels’ opinions and those of Mr. McDowell and Ms. Quimby does not make their opinions proper rebuttal but reflects that they support Plaintiffs’ case-in-chief, which Dr. Daniels rebuts.

Contrary to how Plaintiffs try to characterize these witnesses' opinions as countering Dr. Daniels' opinions, Plaintiffs attempt to support their legal theories through rebuttal without in fact rebutting anything Dr. Daniels introduced. Plaintiffs cite Mr. McDowell's and Ms. Quimby's opinions to support their summary judgment positions on "weddings = agritourism = commercial speech" and preemption respectively. (ECF 501, PageID.19456; ECF 473, PageID.18015, 18018) Dr. Daniels simply did not opine on these issues. After Plaintiffs were unsuccessful in convincing the Court, pre-PTP-intervention, that weddings are commercial speech and the MLCC preempts local limits on operating hours (ECF 162, PageID.5989-5993, 6004-6005), they now offer support from Mr. McDowell and Ms. Quimby to fortify those claims.

At bottom, Plaintiffs carry the burden of proving that particular zoning provisions are unconstitutional and preempted by state law. Where Dr. Daniels presents facts and expert opinions that undermine Plaintiffs' claims, Plaintiffs' proposed rebuttal planning witness (Mr. Moss) might counter them. Plaintiffs use Mr. McDowell and Ms. Quimby's opinions to support their case-in-chief and could have identified them as experts in August 2021. Plaintiffs' failure to do so – and instead their attempt to shoehorn them in as "rebuttal experts" – would waste judicial resources by identifying three experts where one suffices and unfairly deprive PTP of the opportunity to rebut new evidence and theories introduced by late-designated witnesses.

The Court gave PTP the limited opportunity to identify a land use planning expert and for Plaintiffs to present a planning expert to rebut Dr. Daniels. Had PTP introduced an expert to opine on the economics of agritourism or the meaning of liquor manufacturing and trafficking regulations, undoubtedly Plaintiffs would cry foul. Neither Mr. McDowell nor Ms. Quimby are proper rebuttal experts authorized by the Second Amended CMO. (ECF 343, 385) They were not timely designated experts under the First Amended CMO. (ECF 72) Therefore, their August 2023

opinions are not admissible evidence to support Plaintiffs' summary judgment briefs. Fed. R. Civ. P. 56(c). The Court should preclude them from testifying at trial and disregard references to their opinions in briefing because Plaintiffs failed either to comply with the schedule under Rule 16 or to seek schedule modifications to permit late-filed experts. Plaintiffs' failure to comply with the CMOs is not substantially justified so the Court should order Plaintiffs to pay PTP expenses bringing this motion. Fed. R. Civ. P. 16(f)(2).

V. CONCLUSION

For these reasons, PTP requests the Court exclude the testimony of Mr. McDowell and Ms. Quimby, disregard their opinions as evidence supporting summary judgment and otherwise in this case, and award PTP its costs incurred bringing this motion to enforce the Court's CMOs.

Respectfully submitted,

Date: December 4, 2023

By: /s/ Tracy Jane Andrews
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420 East Front Street
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tjandrews@envlaw.com

Date: December 4, 2023

By: /s/ Holly L. Hillyer
Holly L. Hillyer (P85318)
Troposphere Legal, PLC
Co-Counsel for Intervenor-Defendant
420 East Front Street
Traverse City, MI 49686
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CERTIFICATE OF SERVICE

I, Tracy Jane Andrews, hereby certify that on the 4th day of December, 2023, I electronically filed the foregoing document with the ECF system which will send a notification of such to all parties of record.

By: /s/ Tracy Jane Andrews
Tracy Jane Andrews (P67467)
Holly L. Hillyer (P85318)

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

This Brief complies with the word count limit of L. Ci. R. 7.3(b)(i). This brief was written using Microsoft Word version 2016 and has a word count of 4,289 words.

Respectfully submitted,

Date: December 4, 2023

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

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

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal
corporation,

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

Case No. 1:20-cv-01008

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

**PROTECT THE PENINSULA'S
EXPERT WITNESS DISCLOSURES
PURSUANT TO RULE 26(a)(2)(A)**

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Stephen Michael Ragatzki (P81952)
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**PROTECT THE PENINSULA'S
EXPERT WITNESS DISCLOSURES PURSUANT TO RULE 26(a)(2)(A)**

Intervenor-Defendant PROTECT THE PENINSULA, INC. (PTP), by and through its attorneys, LAW OFFICE OF TRACY JANE ANDREWS, PLLC and OLSON BZDOK AND

HOWARD, P.C., makes the following initial expert witness disclosures pursuant to Fed. R. Civ.

P. 26(a)(2)(A) and the Second Amended Case Management Order (ECF 343). PTP reserves the right to supplement these expert disclosures based on ongoing investigation and discovery as permitted by Rule 26(a)(2)(E).

A. NAME, PROFESSIONAL ADDRESS AND TELEPHONE NUMBER OF EXPERT:

Thomas L. Daniels, Ph.D.
c/o Olson, Bzdok & Howard, P.C.
420 E. Front St.
Traverse City, MI 49686
(231) 946-0044

B. AREA OF EXPERTISE:

Dr. Daniels is an expert on land use planning, agricultural zoning, and farmland preservation. A copy of Dr. Daniels' *curriculum vitae* is attached as **Exhibit A**.

C. SHORT SUMMARY OF EXPECTED TESTIMONY:

Discovery is ongoing, and Dr. Daniels has not yet completed his investigation to develop his expert opinions and draft his expert report. The following short summary of Dr. Daniels' expert testimony is based on his preliminary review of Plaintiffs' claims, the Peninsula Township Zoning Ordinance, and historic Peninsula Township land use planning and agricultural preservation materials.

Dr. Daniels is expected to testify regarding land use planning, the use of zoning regulations to control land use, the use of agricultural zoning, the application of agricultural zoning to wineries, and the connection between agricultural zoning and farmland preservation.

Dr. Daniels is further expected to testify regarding the governmental interests advanced by the Peninsula Township Zoning Ordinance, including agricultural and farmland preservation and ensuring compatible land uses in Peninsula Township. Dr. Daniels is expected to provide expert testimony on how the Peninsula Township Zoning Ordinance, in conjunction with Peninsula Township's master plan and other ordinances, advances those governmental interests. Dr. Daniels is expected to testify regarding how the Peninsula Township Zoning Ordinance, including sections that address wineries and winery tasting rooms, are tailored to address the governmental interests of agricultural and farmland preservation and ensuring compatible land uses. Dr. Daniels is expected to testify regarding how the land use and special use permits issued by Peninsula Township to wineries advance its governmental interests of agricultural and farmland preservation and ensuring compatible land uses and are tailored to address those interests.

Dr. Daniels will provide a written expert report in accordance with the Court's Second Amended Case Management Order and Fed. R. Civ. P. 26(a)(2)(B).

Respectfully submitted,

Date: June 19, 2023

By: /s/ Tracy Jane Andrews
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Date: June 19, 2023

By: /s/ Holly L. Hillyer
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Exhibit A



Thomas L. Daniels

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127 Meyerson Hall
Weitzman School of Design
University of Pennsylvania
Philadelphia, PA 19104-6311
Phone: (215) 573-8965 (W)
Fax: (215) 898-5731

Nationality: American
Age: 69

(717) 368-0559 (cell)
e-mail: thomasld@design.upenn.edu

Education

1984 Ph.D. in Agricultural and Resource Economics, Oregon State University.

1977 M.S. in Agricultural and Resource Economics, University of Newcastle-upon-Tyne, England. Study on a Rotary Foundation Fellowship.

1976 B.A. cum laude in Economics, Harvard University.

Planning Experience

July 2003-
Present

Full Professor with Tenure, Department of City and Regional Planning,
University of Pennsylvania.

Teach: Land Use Planning, Environmental Planning, Planning for Climate Change,
and Land Preservation. Acting Chair, January-June 2006, July, 2015-June 2016.
Crossways Professor, 2020-present.

Erasmus Mundo Scholarship, University of Venice IUAV, March, 2017

Clarkson Chair, Department of Urban Planning, University of Buffalo, October, 2011.

July 1998-
June 2003

Full Professor with Tenure, The University at Albany, State University of New
York. Director of the Planning Master's Program, Fall 1998-December 2001.

Fulbright Senior Fellowship, University of New South Wales, Australia,
February-June, 2002.

May 1989-

July 1998

Director, Agricultural Preserve Board of Lancaster County, Pennsylvania. Administered a nationally-recognized farmland preservation easement acquisition program with an annual budget of over \$4 million. Preserved over 16,000 acres in 188 easement projects. Assisted Planning Commission staff with growth management and agricultural zoning issues. The program received the 1993 Outstanding Program Award from the Small Town and Rural Planning Division of the American Planning Association. Received the 1996 National Achievement Award from the American Farmland Trust.

Aug. 1987-

May 1989

Associate Professor with Tenure, Department of Regional and Community Planning, Kansas State University.

Jan. 1985-

July 1987

Assistant Professor, Department of Community and Regional Planning, Iowa State University. Taught in Semester Abroad program in London, Fall 1986.

Publications

Books

2018 The Law of Agricultural Land Preservation in the United States. Chicago: American Bar Association. (Senior author with John Keene).

2014 The Environmental Planning Handbook for Sustainable Communities and Regions (Second Edition). Chicago: American Planning Association.

2011 The Planners Guide to CommunityViz: The Essential Tool for a New Generation of Planning. Chicago: American Planning Association. (Second author with Doug Walker).

2007 The Small Town Planning Handbook (3rd edition). Chicago: American Planning Association. (Senior author with John Keller, Mark Lapping, Katherine Daniels, and Jim Segedy.)

1999 When City and Country Collide: Managing Growth in the Metropolitan Fringe. Washington, D.C.: Island Press.

1997 Holding Our Ground: Protecting America's Farms and Farmland. Washington, D.C.: Island Press. (Senior author with Deborah Bowers).

- 1989 Rural Planning and Development in the United States, New York: Guilford Publications. (Second author with Mark Lapping and John Keller).

Refereed Journal Articles

- 2022 "The potential of nature-based solutions to reduce greenhouse gas emissions from US agriculture," Socio-Ecological Practice Research, online August 4, doi.org/10.1007/s42532-022-00120-y

"How can the USA and China cooperate and learn from each other to reduce greenhouse gas emissions? Socio-Ecological Practice Research, online May 6, 2022. DOI 10.1007/s42532-022-00112-y

"Managing urban growth in the wake of climate change: Revisiting greenbelt policy in the US." Land Use Policy. Han, Albert, Thomas L. Daniels, and Chaeri Kim. Land Use Policy 112: 105867. <https://doi.org/10.1016/j.landusepol.2021.105867>.

- 2021 "Re-designing America's suburbs for the age of climate change and pandemics," Socio-Ecological Practice Research, 3(2), 225-236. <https://doi.org/10.1007/s42532-021-00084-5>.

- 2019 "Protected Land Management and Governance in the United States: More Than 150 Years of Change," (Senior author with Dan Moscovici). Society and Natural Resources, 33 (6).

"McHarg's Theory and Practice of Regional Ecological Planning: Retrospect and Prospect," Socio-ecological Practice Research, 1: 197–208. <https://doi.org/10.1007/s42532-019-00024-4>

"Assessing the Performance of Farmland Preservation in America's Farmland Preservation Heartland:: A Policy Review. Society and Natural Resources. 33(6):1-11. DOI: 10.1080/08941920.2019.1659893

"California's success in the socio-ecological practice of a forest carbon offset credit option to mitigate greenhouse gas emissions," Socio-ecological Practice and Research, Vol 1, No. 2, pp. 125-138. (2nd author with Chaeri Kim).

"The Napa County Agricultural Preserve: 50 Years as a Foundation of America's Premier Wine Region." *Journal of Planning History* Vol. 18(2): 102-115 .

- 2018 "The Plan for the Valleys: Assessing the Vision of David Wallace and Ian McHarg." *Journal of Planning History* Vol. 17, No. 1 (February, 2018) pp. 3-19. 2nd author with George Hundt, Jr.).

- 2017 "Preserving Large Farming Landscapes: The Case of Lancaster County Pennsylvania," *Journal of Agriculture, Food Systems and Community Development* Vol. 7, No. 3, pp. 67-81. (senior author with Lauren Payne-Riley).
- 2010 "Integrating Forest Carbon Sequestration Into a Cap-and-Trade Program to Reduce Net CO2 Emissions," *Journal of the American Planning Association*, 76 (4): 463-475.
- "The Use of Green Belts to Control Sprawl in the United States," *Planning Practice and Research*, 25: 2, 255 — 271.
- 2009 "A Trail Across Time: American Environmental Planning from City Beautiful to Sustainability. *Journal of the American Planning Association*. 75 (2): 178-192.
- 2005 "Land Preservation as a Key Element of Smart Growth," *Journal of Planning Literature*, 19:3, 316-329. (Senior author with Mark Lapping).
- 2001 "Smart Growth: A New American Approach to Regional Planning." *Planning Practice & Research*, Vols. 3 &4, pp. 271-281.
- 2000 "Integrated Working Landscape Protection: The Case of Lancaster County, Pennsylvania," *Society & Natural Resources*, 13:3, pp. 261-271.
- 1991 "The Purchase of Development Rights: Preserving Agricultural Land and Open Space," *Journal of the American Planning Association*, Vol. 57, No. 4, pp. 421-431.
- "The Goals and Values of Local Economic Development Strategies in Rural America," *Agriculture and Human Values*, Vol. 8, No. 3, pp. 3-9.
- 1989 "Small Town Economic Development: Growth or Survival?" *Journal of Planning Literature*, Vol. 4, No. 4 ,pp. 413-429.
- 1988 "America's Conservation Reserve Program: Rural Planning or Just Another Subsidy?" *Journal of Rural Studies*, Vol. 4, No. 4, pp. 405-411.
- 1987 "Small Town Triage: A Rural Settlement Policy for the American Midwest," *Journal of Rural Studies*, Vol. 3, No. 3, pp. 273-280. (Senior author with Mark Lapping).

Conference Papers and Presentations

- 2022 "The State of Farmland Preservation in Your County. Pennsylvania Land

- Conservation Conference, March 17, 2022 Gettysburg, PA
- 2021 “Suzhou, China, Environmental Planning: What China and the United States Can Learn From Each Other, Sept. 24/5, 2021
- 2019 “Agricultural Performance Results from the 2017 Census of Agriculture and Implications for Farmland Preservation,” Farmland Preservation Roundtable, Saratoga Springs, NY, October 30, 2019.
- 2018 “The Law of Agricultural Land Preservation,” Pennsylvania Land Trust Association Conference, Malvern, PA, April 13, 2018
- 2017 “Using GIS to Measure Progress in Farmland Preservation,” Pennsylvania Land Trust Association Conference, Lancaster, PA, May 4, 2017.
- 2016 “Large Landscape Conservation: East,” American Planning Association National Conference, Phoenix, AZ, April 2, 2016
- 2015 “Green Infrastructure for Urban Stormwater Management,” Association of Collegiate Schools of Planning Conference, Houston, TX, October 22, 2015.
- “What’s New in Environmental Planning?” American Planning Association Conference, Seattle, WA, April 18, 2015
- 2014 “A Comparison of Urban Containment: Oregon, Maryland, and Four Hybrid Counties.” Association of Collegiate Schools of Planning, Philadelphia, PA, October 30, 2014.
- “Return on Investment: How PDR is Strengthening Local Economies and Remaining Relevant Moving Forward.” National Farmland Preservation Conference, Hershey, PA, May 12, 2014.
- 2013 “Planning for Climate Change: Mitigation and Adaptation,” Planners Training Session, Seattle, June 11-12, 2013.
- “Philadelphia: Urban Water: Managing Stormwater, Rivers, and Watersheds,” Urban Ecosystems Services and Decision Making: A Green Philadelphia Conference, Philadelphia, PA, May 23, 2013.
- “Climate Change Adaptation,” American Planning Association Conference, Chicago, IL, April 16, 2013.
- 2012 “Planning for Green Infrastructure,” Planners Training Session, Charlotte, NC, November 15-16, 2012.

- 2011 “Greenbelts to Control Sprawl in the United States,” American Planning Association Conference, Boston, April 10, 2011.
- 2010 “Landscape Scale Farmland Preservation,” American Society of Landscape Architects Conference, Washington, DC, September 14, 2010.

Professional Reports

- 2022 Regulating Utility-Scale Solar Projects on Agricultural Land, Kleinman Center for Energy Policy, University of Pennsylvania. August, 2022, 7 pp. (Senior author with Hannah Wagner).
- 2021 Study on Inclusionary Housing with Chrissy Quattro for Penn IUR, December 2021, 75 pp.
- 2020 The State of Farmland Preservation in Lancaster County. For Lancaster Farmland Trust, September 2020, 35 pp.
- An Analysis of the Economic Impact of the Farmland Preservation Program in Carroll County, Maryland. Westminster, MD: Carroll County, MD, 53 pp.
- 2019 Agricultural Land Protection, Annexation, and Housing Development: An Analysis of Programs and Techniques with Potential Use in Napa County: A Report for the Jack L. Davies Napa Valley Agricultural Preservation Fund, 108 pp.
- An Analysis of the Economic Impact of Pennsylvania’s Farmland Preservation Program, Pennsylvania Department of Agriculture, 78 pp.
- 2017 Land Use Study, Solebury Township, PA, 25 pp.
- 2010 Cost of Community Services Study for Four Municipalities and the Hempfield School District, for East and West Hempfield Townships and the Hempfield School District in Lancaster County, PA, 51 pp.
- 2008 Ideas for Rural Smart Growth, Promoting the Economic Viability of Farmland and Forestland in the Northeastern United States, for the Office of Smart Growth, US Environmental Protection Agency, Washington, D.C., 40 pp.
- An Evaluation of the Peninsula Township, Michigan Farmland Preservation Program, for the Grand Traverse Regional Land Trust, Traverse Bay, MI, 60 pages.

- 2007 An Evaluation of the Consistency of the Plum Creek Timber Company Proposed Concept Plan in the Moosehead Lake Region with the Comprehensive Land Use Plan of the Maine Land Use Regulation Commission, 46 pp.
- 2006 Final Report to the National Fish and Wildlife Foundation: An Evaluation of the Foundation's Conservation Easement and Capacity-Building Grants Program. 221 pp.
- 2003 Dakota County, Minnesota, Farmland and Natural Area Preservation Program Guidelines, 54 pp., co-author with Jean Coleman, June, 2003.

Grants

- 2022 Climate Social Science Network. Agricultural Organizations and Their Messaging About Climate Change and Recommended Responses. \$16,000. Principal Investigator.
- Robert Schalkenbach Foundation. The California Sustainable Agricultural Lands Conservation Program: Evaluating the Use of Cap-and-Trade Funds to Promote Climate Mitigation and Adaptation. \$5,000. Principal Investigator.
- 2021 Kleinman Center for Energy Policy. Regulating Utility-Scale Solar Projects on Agricultural Land. \$4,500. Principal Investigator.
- 2019 Pennsylvania Department of Agriculture, An Analysis of the Economic Impact of Pennsylvania's Farmland Preservation Program, \$13,500. Principal Investigator.
- 2013-17 U.S. EPA. Green Infrastructure for Urban Stormwater Management. \$1 million. Project associate.
- 2004-06 National Fish and Wildlife Foundation. Effectiveness of NFWF's Investments in Conservation Easements to Protect Wildlife Habitat. \$125,000. Principal Investigator.
- 2002 Open Space Institute, Study of Sprawl and Land Use Change in the Capital District of New York, \$40,000. Project associate.
- 2000 Hudson River Foundation, Study of Land Use Planning Techniques in the Chesapeake Bay Estuary and the Hudson River Estuary, \$61,396, Principal Investigator.

Professional Memberships

1983 - Member, American Planning Association
Present

2004- Member, Land Protection Committee, Lancaster County
Present Conservancy (PA)

2005- Member, Board of Trustees, Orton Family Foundation
2020

2011- National Advisory Board, Land Conservation Advisory Network, Yarmouth,
Present Maine.

2012- National Advisory Board, Equine Land Conservation Resource,
Present Lexington, KY

2014- National Advisory Board, Conservation Finance Network, Washington, DC
Present

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.

PLAINTIFFS' REBUTTAL EXPERT WITNESS DISCLOSURES

Plaintiffs, through their attorneys Miller, Canfield, Paddock and Stone, PLC, make the following rebuttal expert witness disclosures pursuant to Federal Rule of Civil Procedure 26(a)(2)(A) and the Second Amended Case Management Order (ECF No. 343). Plaintiffs reserve the right to supplement these expert disclosures as allowed by Federal Rule of Civil Procedure 26(a)(2)(E).

Name and Address:

Gary McDowell
c/o Miller, Canfield, Paddock and Stone, PLC
99 Monroe Ave NW, Suite 1200
Grand Rapids, MI 49503
(616)776-6333

David E. Moss
c/o Miller, Canfield, Paddock and Stone, PLC
99 Monroe Ave NW, Suite 1200
Grand Rapids, MI 49503
(616)776-6333

Teri Quimby
c/o Miller, Canfield, Paddock and Stone, PLC
99 Monroe Ave NW, Suite 1200
Grand Rapids, MI 49503
(616)776-6333

Area of Expertise:

Mr. McDowell is the former Director of the Michigan Department of Agriculture and Rural Development and is an expert on rural development, agricultural preservation, and agritourism. A copy of Mr. McDowell's curriculum vitae will be provided at a later date.

Mr. Moss is an expert on land use planning and zoning regulations. A copy of Mr. Moss's curriculum vitae is attached as Exhibit A.

Ms. Quimby is a former Commissioner of the Michigan Liquor Control Commission and is an expert on alcohol administration, licensing, purchasing, enforcement, merchandising, and distribution within the State of Michigan. A copy of Ms. Quimby's curriculum vitae will be provided at a later date.

Short Summary of Expected Testimony:

Because PTP has only disclosed the general area of testimony for its expert witness and that witness has not disclosed an expert report, the Wineries, in an abundance of caution, disclose expert witnesses on various land use planning and zoning topics though these experts may not testify when PTP's expert discloses his report and the specific opinions are known.

Gary McDowell

Mr. McDowell is expected to testify as a rebuttal expert to PTP's named expert, Dr. Thomas L. Daniels, regarding agricultural preservation, value added agriculture, and agritourism as a means to preserve agricultural land. Mr. McDowell is expected to testify that the Winery Ordinances and the enforcement of those ordinances do not further the preservation of agricultural

land and, instead, have the opposite effect. Mr. McDowell is expected to testify that value-added activities and agritourism like those activities the Wineries seek to engage in further the preservation of agricultural land.

Mr. McDowell will provide a written expert report as required by the Court's Second Amended Case Management Order and Federal Rule of Civil Procedure 26(a)(2)(B). Because discovery is ongoing and Mr. McDowell is testifying as a rebuttal expert, it is expected that Mr. McDowell will issue a supplemental report after reviewing the report prepared by Dr. Thomas L. Daniels

David E. Moss

Mr. Moss is expected to testify as a rebuttal expert to PTP's named expert, Dr. Thomas L. Daniels, regarding land use planning and the commonly available types of zoning regulations to promote and preserve agricultural land use and rural character. Mr. Moss is further expected to testify about less restrictive and feasible alternatives Peninsula Township could have enacted to further its governmental interests in the Peninsula Township Zoning Ordinance, specifically those sections applicable to Plaintiffs. Mr. Moss is also expected to testify about how the Peninsula Township Zoning Ordinance, and specifically those sections applicable to Plaintiffs, do not promote and therefore detract from agricultural and farmland preservation.

Mr. Moss will provide a written expert report as required by the Court's Second Amended Case Management Order and Federal Rule of Civil Procedure 26(a)(2)(B). Because discovery is ongoing and Mr. Moss is testifying as a rebuttal expert, it is expected that Mr. Moss will issue a supplemental report after reviewing the report prepared by Dr. Thomas L. Daniels.

Teri Quimby

Ms. Quimby is expected to testify as a rebuttal expert to PTP's named expert, Dr. Thomas L. Daniels, regarding local authority to regulate alcohol licensees by way of zoning should Dr. Daniels provide an expert opinion on this topic. Ms. Quimby is expected to testify regarding the limited authority granted to local governments to regulate the manufacture, sale and distribution of alcohol and the Michigan Liquor Control Commission's policies and procedures to ensure local governments do not exceed that authority should Dr. Daniels provide an expert opinion on this topic. Should Dr. Daniels not offer expert testimony on these topics, the Wineries do not expect to offer Ms. Quimby's testimony.

Ms. Quimby will provide a written expert report as required by the Court's Second Amended Case Management Order and Federal Rule of Civil Procedure 26(a)(2)(B). Because discovery is ongoing and Ms. Quimby is testifying as a rebuttal expert, it is expected that Ms. Quimby will issue a supplemental report after reviewing the report prepared by Dr. Thomas L. Daniels

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 3, 2023

Exhibit A

David E. Moss

Summary of qualifications

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

Professional experience

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

President

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

1984 – 1987 Engineering Science/Parsons Pasadena, CA

Senior Scientist/EIS-EIR Compliance

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

Education

BA, Biological Sciences, Univ. of Delaware, 1976

MA, Marine Studies, Univ. of Delaware, 1979

D. Env., Env. Science and Engineering, UCLA, 1989

MDE Certificate, UCLA Anderson School of Management, 1996

Conference speaking

- Guest Speaker, PCS Conferences – 1996 – 1999
- Shorecliff – PCIA Telecommunications Conferences
- Law Seminar International
- SCANPH Affordable Housing Moderator
- USC Infill Housing Seminar Series
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Expert Report

By

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590 Northlawn Drive
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August 28, 2023

In the matter of:

Wineries of the Old Mission Peninsula Assoc. et al v. Peninsula Township and Protect the Peninsula, Case No. 1:20-cv-01008-PLM-RSK (W. Dist. Mich.)

Prepared for:

Protect the Peninsula, Inc.
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Expert Credentials

I am the Crossways Professor in the Department of City and Regional Planning at the University of Pennsylvania. I hold a Ph.D. in Agricultural and Resource Economics. I have taught land use planning for more than 25 years. I am the co-author of *The Small Town Planning Handbook* (3rd ed. 2007, American Planning Association) and co-author of *The Law of Agricultural Land Preservation in the United States* (2018, American Bar Association) and have written several journal articles dealing with agricultural zoning and farmland preservation. I served as the Director of the Lancaster County, PA Agricultural Preserve Board from 1989-1997, which is recognized as one of the leading county farmland preservation programs in the United States. I have performed consulting work and provided expert testimony on several cases involving land use and farmland. A copy of my professional resume is attached as Exhibit 1.

Materials Reviewed

To arrive at my opinions in this report, I reviewed the Michigan Planning Enabling Act, the Michigan Zoning Enabling Act, the Peninsula Township 2011 Master Plan, the Peninsula Township Zoning Ordinance text and maps, the Peninsula Township Purchase of Development Rights Ordinance and maps of preserved lands, Purchase of Development Rights conservation easements, Special Use Permits for Winery-Chateaus, Peninsula Township responses to interrogatories, deposition transcripts, the district court's June 3, 2022 order in the *Wineries of the Old Mission Peninsula Assoc. et al v. Peninsula Township and Protect the Peninsula*, Case No. 1:20-cv-01008-PLM-RSK (W. Dist. Mich.), Jesse Williams—*Balancing Development, Agriculture, and Preservation: Evaluating the Success of Old Mission Peninsula's Purchase of Development Rights Program*, and Tom Daniels—*An Evaluation of the Peninsula Township Farmland Preservation Program*, and additional documents as cited throughout this report. In addition, I toured Peninsula Township on August 9 and 10, 2023. I am presenting my opinions to a reasonable degree of professional certainty.

TABLE OF CONTENTS

| | |
|---|-----------|
| Introduction..... | 4 |
| I. Background | 4 |
| A. Peninsula Township..... | 4 |
| B. Land Use Planning and Zoning in General | 5 |
| C. Farmland Preservation..... | 7 |
| i. Purchase of Development Rights (PDR)..... | 7 |
| ii. Agricultural Zoning | 9 |
| D. Agricultural Zoning in Major Wine Producing Regions | 10 |
| i. Winery definition..... | 11 |
| ii. Special Use Permit for Wineries | 12 |
| iii. Tasting Rooms, Food, and Retail Sales | 12 |
| iv. Limits on Production Capacity | 13 |
| v. Summary..... | 14 |
| E. A Brief History of Land Use Planning, Zoning, Agricultural Zoning, and Farmland Preservation in Peninsula Township..... | 14 |
| II. Analysis of Challenged Zoning Provisions | 21 |
| A. Peninsula Township Zoning Ordinance (PTZO)..... | 21 |
| i. The A-1 Agricultural Zoning District..... | 21 |
| ii. Winery Uses in the A-1 District | 22 |
| B. How the Peninsula Township Zoning Ordinance Promotes Agricultural Preservation 24 | |
| i. Limits on food and beverage service:..... | 26 |
| ii. Exclusion of weddings, wedding receptions, and other private events for hire from the scope of permitted uses:..... | 27 |
| iii. Establishing standards and requiring advance notice and/or approval for some activities or events: | 28 |
| iv. Allowing retail sales of only wine and winery- and agriculture-related merchandise 29 | |
| v. Establishing maximum facility and retail space size..... | 29 |
| C. The Harm If the Provisions of the Peninsula Township Zoning Ordinance Are Invalidated | 30 |
| D. Conclusions | 31 |

Introduction

In October 2020, the Wineries of Old Mission Peninsula filed suit against Peninsula Township over provisions in the Peninsula Township Zoning Ordinance. In 2022, Protect the Peninsula was allowed to intervene in the suit.

In short, Plaintiffs' claims isolate a handful of provisions that limit their ability to engage in unfettered commercial activity in an agricultural zone, such as those regulating accessory uses at wineries and limiting production capacity. Any challenged provision must be evaluated in the context of the zoning ordinance as a whole, which, in turn, should be considered according to the content of the Township master plan.

To place the challenged provisions in their proper context, I explain how land use planning and zoning work together to protect public health, safety, and general welfare. I further explain the importance of farmland land preservation, its relationship to public health, safety, and general welfare, and the use of zoning to promote farmland preservation and farming activities. I discuss how the Peninsula Township Zoning Ordinance advances both farmland preservation and farm production goals. I also explain how allowing the unrestricted land uses Plaintiffs seek would undermine agricultural land preservation and the continuation of active agriculture in Peninsula Township.

After a brief description of Peninsula Township and before I address the specifics of the challenged provisions, I feel it is helpful to present an overview of the land use planning process, the use of zoning regulations to control land use, the use of agricultural zoning, the application of agricultural zoning to wineries, and the connection between agricultural zoning and farmland preservation. In discussing these topics, I will draw on research, publications, and practice I have conducted over the last 39 years on land use planning, zoning, agricultural zoning, and farmland preservation.

I. Background

A. Peninsula Township

Peninsula Township was established in 1853 and covers 17,755 acres in Grand Traverse County, Michigan. The Township extends for 18 miles into Grand Traverse Bay of Lake Michigan and borders the City of Traverse City to the south. The Township varies in width between a half mile and three miles, offering spectacular views of Grand Traverse Bay. The Township's permanent population was 6,068 in 2020 and part-time residents add to the population, especially during the summer months.

Peninsula Township is known geographically as Old Mission Peninsula and boasts soils and a microclimate that have long supported agriculture, especially the production of stone fruit (cherries), and more recently, apple orchards and grape vineyards. The Old Mission Peninsula became an American Viticultural Area (AVA) or appellation, known for its distinctive wines in 1987.¹ An AVA is a federal designation, managed by the Alcohol and Tobacco Tax and Trade Bureau within the U.S. Treasury Department. Wine may be labeled "Old Mission Peninsula" if

¹ See 27 C.F.R. § 9.114 (describing boundaries of Old Mission Peninsula AVA).

not less than 85% of it is derived from grapes grown within the AVA boundaries.² The Old Mission Peninsula AVA is 1 of only 5 AVAs in Michigan and 268 nationwide.³

Peninsula Township is a popular tourist destination known for beautiful views of Grand Traverse Bay, gently rolling hills of orchards and vineyards, a historic lighthouse, and miles of pristine beaches and hiking trails. Peninsula Township is close to Traverse City, Michigan, a growing tourism area, and regional attractions, including Sleeping Bear Dunes National Lakeshore. As noted in the Peninsula Township 2011 Master Plan, “[t]he Township’s primary economic base is shared between its agricultural production, tourism, and home-based businesses.”⁴

B. Land Use Planning and Zoning in General

Zoning is the most common regulation to control land use in the United States. Zoning powers are delegated from state legislatures to local governments, including townships, and a township zoning ordinance is a local law. Township zoning serves to implement a township government comprehensive plan (also known as a Master Plan), which describes how the township should grow and change over the next ten to twenty years; this is common planning and zoning practice.

The comprehensive plan provides an important legal base for the zoning ordinance. The comprehensive plan spells out goals and objectives for the township, and zoning is one tool that the township employs to achieve these goals and objectives and further the public health, safety, and welfare.

The United States Supreme Court has long recognized the legality of zoning as a valid use of the police power of government under the Tenth Amendment.⁵ A fundamental purpose of zoning is to protect the public health, safety, and welfare. In doing so, zoning must strike a balance between a property owner’s right to use land and the public’s right to a healthy, safe, and orderly living environment.⁶ Zoning is generally legitimate if it allows a reasonable economic use of the property. Zoning need not allow the “highest and best” use of the property.

Four aspects of zoning promote public health, safety, and welfare. First, zoning separates conflicting land uses (e.g., industrial and residential) and locates compatible land uses near each other. Second, it sets standards for building size, lot coverage, setbacks, and the density of development. Third, it ensures consistent application of standards across zoning districts. Fourth, it creates dispute resolution and enforcement mechanisms.⁷

² 27 C.F.R. § 4.25(e)(3)(ii).

³ Michigan Wine Country. 2023. Michigan’s Five AVAs. <https://michiganwinecountry.com/wines-grapes/avas/>. Accessed May 17, 2023; Alcohol and Tobacco Tax and Trade Bureau. Established American Viticultural Areas. <https://www.ttb.gov/wine/established-avas>. Accessed August 23, 2023.

⁴ Peninsula Township 2011 Master Plan, p. 3.

http://www.peninsulatownship.com/uploads/1/0/4/3/10438394/master_plan_2011_-_signed.pdf. Accessed August 23, 2023.

⁵ *Village of Euclid Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁶ Daniels et al. 2007. *The Small Town Planning Handbook*, Chicago: American Planning Association, p. 178.

⁷ *Ibid*, p. 179.

Zoning enables a local government to designate land for a particular zoning district with or without landowner consent.⁸ Zoning allows certain uses on some land and not on others, and can bestow economic benefits to some property owners while imposing economic limits on others.⁹

A zoning ordinance consists of a text and a map. The zoning text divides a township into different land use zones, such as agricultural, residential, and commercial, and zoning districts, such as R-1 single-family residential and R-2 duplex and triplex residential. The zoning map shows the location of the different zones and zoning districts.

The text also describes permissible uses for each district and commonly provides for both by-right uses and special uses. By-right uses generally include uses necessary to accomplish the purposes for which the district was created, such as houses in a residential district and farm buildings in an agricultural district. A by-right use is presumptively allowed if the landowner meets the standards for building and lot size standards, setbacks, use restrictions, and administrative permitting requirements.

Special uses are generally uses that align with the purposes of a zoning district but are not necessary to accomplish them, raise special concerns about public health, safety, and welfare, or both. Examples include childcare facilities in residential districts and produce packing and processing facilities in agricultural districts. Special uses generally require more than just administrative approval, and often involve a public application process before a planning commission, board, or other public body.

In Michigan, a township may provide for special uses in a zoning district subject to review and approval in accordance with its zoning ordinance. Approval may be at the township's discretion, in which case notice and a public hearing are required. The township may approve, deny, or approve with conditions a request for a special use, and its decision "shall be incorporated in a statement of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed."¹⁰ An applicant has no "right" to a special use permit; the applicant must meet standards and conditions set by the township.

Uses may also be principal (or primary), accessory, or support. A principal use is the preferred use of a property in that zoning district. An accessory use is customary, incidental, and subordinate to the principal use, such as with a shed built in the backyard of a house in a residential district. A support use is like an accessory use in that it is subordinate to the principal use but unlike an accessory use it is needed to support the principal use rather than incidental to it. For example, the principal use of a campground might be overnight camping; restroom facilities may be considered necessary to support that use; and a retail store selling matches and marshmallows may be considered accessory.

If an accessory use increases too much in intensity or size, it can constitute both a zoning permit violation and an unlawful de facto rezoning and spot zoning. For example, if a landowner receives a special use permit to build a 10'x30' farm stand in an agricultural zone but builds a 30'x50' farm

⁸ Daniels and Keene, 2018, *The Law of Agricultural Land Preservation in the United States*, p. 325.

⁹ Daniels et al. *The Small Town Planning Handbook*, p. 180.

¹⁰ MCL § 125.3502.

stand instead, the farm stand would violate the permit. The farm stand may also de facto rezone its location from agricultural to commercial without government approval by creating a primary commercial use in an agricultural zone. This would also create “spot zoning,” which may be deemed illegal for conferring a special benefit on one landowner.

C. Farmland Preservation

Farming is an industry that relies upon a critical mass of farms and farmland to sustain farm support businesses, such as machinery dealers, hardware stores, feed and seed suppliers, food processors, and trucking companies. Farmland preservation can help to retain land in agricultural use and maintain the volume of crop or livestock production and thus help to keep farm support businesses operating. When an agricultural area loses farms, the volume of agricultural production falls, putting financial pressure on both the farm support businesses and the remaining farm operations. Farmland preservation involves the aspiration and opportunity for a long-term future of farming in a community.

Farmland in Michigan is generally defined to include farms of five or more acres where more than half the land is “devoted to an agricultural use.”¹¹ “Agricultural use” means “the production of plants and animals useful to humans, including forages and sod crops; grains, feed crops, and field crops; dairy and dairy products; poultry and poultry products; livestock, including breeding and grazing of cattle, swine, captive cervidae, and similar animals; berries; herbs; flowers; seeds; grasses; nursery stock; fruits; vegetables; maple syrup production; Christmas trees; and other similar uses and activities.”¹²

In the United States, farmland is converted to other uses at a rate of several hundreds of thousands of acres each year.¹³ Purchase of Development Rights (PDR) programs and agricultural zoning are important and complementary tools for keeping land in active agriculture and supporting the continued viability of farming and the farm support economy. PDR provides greater protection than zoning alone because it permanently restricts land use, while agricultural zoning may be changed in accordance with local democratic processes but applies to much more land and at a far lower cost. In Michigan, supportive agricultural zoning, combined with tools like the Michigan Department of Agriculture and Rural Development (MDARD) Farmland and Open Space Preservation Program (formerly PA 116) and local PDR programs help stabilize the state’s farmland base to limit non-farm development and enhance the opportunity for farmland owners to preserve their land through the sale of development rights.

i. Purchase of Development Rights (PDR)

Farmland preservation through PDR programs, which involve the voluntary sale or donation of development rights by a landowner to a government agency or nonprofit land trust has emerged as

¹¹ MCL § 324.36101(h) (also recognizing specialty farms designated by the state and establishing minimum income thresholds for some farms).

¹² MCL § 324.36101(h) (also recognizing specialty farms designated by the state and establishing minimum income thresholds for some farms).

¹³ Sallet, Lori. 2022. American Farmland Trust. June 29, 2022. <https://farmland.org/new-report-smarter-land-use-planning-is-urgently-needed-to-safeguard-the-land-that-grows-our-food/>. Accessed May 23, 2023.

an important and effective way to maintain land in agricultural use over the long term. The development rights are in effect retired through a deed of easement, also known as a conservation easement. Most conservation easements are perpetual and run with the land, binding future landowners.¹⁴ A conservation easement can be removed through an eminent domain action by a government or a court ruling.

The payment for development rights has enabled farmers to enhance farming operations. Also, PDR supports long-term intergenerational farming and farmland planning.

The first local PDR program was adopted in the Town of Southold in Suffolk County, New York, in 1984.¹⁵ Since then, PDR has become a common nationwide farmland and open space preservation practice, with programs in 29 states and more than 95 counties and townships.¹⁶ The federal government launched the Farm and Ranch Land Protection Program (FRPP) in 1996 to provide matching grants to state and local governments and private, non-profit land trusts to purchase development rights to farmland. In the 2014 Farm Bill, the FRPP was merged with the Wetlands Reserve Program and the Grassland Reserve Program into the Agricultural Conservation Easement Program (ACEP), which has received about \$450 million in federal funding each year in recent years.¹⁷

State farmland preservation programs have spent \$8 billion to preserve 3.4 million acres.¹⁸ Nationwide, local governments, including those in major winery areas, have preserved 540,000 acres as of 2020 at cost of \$2.1 billion.¹⁹ As of 2020, Sonoma County, California, has preserved 36,161 acres through PDR at a cost of \$96,371,250, and the Town of Southold has preserved 2,312 acres at a cost of more than \$67 million.²⁰

Michigan began a program to purchase development rights to farmland in 1994 and has since spent \$55 million to preserve more than 27,000 acres.²¹ Table 1, below, lists the local PDR programs in Michigan. Peninsula Township's is the oldest, indicating its longstanding commitment to maintaining land for agricultural production. Peninsula Township has also invested more local funds and preserved more land with local funding than the other Michigan local governments.

¹⁴ Daniels and Keene, 2018. The Law of Agricultural Land Preservation in the United States, Chicago: American Bar Association, p. 80.

¹⁵ Ibid., p. 74.

¹⁶ See Daniels and Keene, 2018. The Law of Agricultural Land Preservation in the United States, Chicago: American Bar Association, pp. 215-220.

¹⁷ National Sustainable Agriculture Coalition. 2019. Agricultural Conservation Easement Program (ACEP). <https://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/agricultural-conservation-easement-program/>. Accessed August 27, 2023.

¹⁸ American Farmland Trust. 2022. Status of State PACE Programs, 2022, p. 7. https://farmlandinfo.org/wp-content/uploads/sites/2/2022/12/State_PACE_Program_Factsheet_2022.pdf. Accessed May 15, 2023.

¹⁹ American Farmland Trust. 2021. Status of Local PACE Programs, p. 6. https://farmlandinfo.org/wp-content/uploads/sites/2/2021/02/Local_Purchase_of_Agricultural_Conservation_Easement_Programs_2020_2.21_A_FT_FIC.pdf. Accessed May 15, 2023.

²⁰ American Farmland Trust. Status of Local PACE Programs, 2020, pp. 2, 4. https://farmlandinfo.org/wp-content/uploads/sites/2/2021/02/Local_Purchase_of_Agricultural_Conservation_Easement_Programs_2020_2.21_A_FT_FIC.pdf. Accessed May 18, 2023.

²¹ Ibid. p. 5.

Table 1. Michigan Local Governments with Farmland Preservation Programs.

| <u>Locality</u> | <u>Year of Inception / Year of First Acquisition</u> | <u>Independent Acres Preserved</u> | <u>Independent Program Funds Spent to Date</u> |
|----------------------------|--|--|--|
| Acme Township | 2004 / 2009 | 500 | \$1,749,444 |
| Ann Arbor Charter Township | 2003 / 2006 | 1,128 | \$3,735,544 |
| Ingham County | 2004 / 2006 | 3,147 | \$5,500,000 |
| Kent County | 2002 / 2005 | 1,966 | \$494,800 |
| Ottawa County | 2008 / NA | 91 | \$41,400 |
| Peninsula Township | 1994 / 1996 | 3,347 | \$15,173,800 |
| Scio Township | 2004 / 2008 | 731 | \$4,932,552 |
| Washtenaw County | 1998 / NA | 2,275 | \$3,617,812 |
| Webster Township | 2005 / 2009 | 897 | \$1,466,485 |

Source: American Farmland Trust. 2021. Status of Local PACE Programs, 2020, pp. 2, 4.

PDR alone keeps land from being developed. Effective agricultural zoning supports PDR programs and creates an environment in which farming can thrive on preserved land by ensuring compatibility of land uses and allowing uses that support agriculture while disallowing those that undermine it.

ii. Agricultural Zoning

Many townships and counties across the United States use agricultural zoning to reduce conflicts between farmers and nonfarmers, protect productive farmland from nonfarm development, and limit the density of development. As with all zoning, agricultural zoning is a set of regulations that implement goals expressed in a master plan.

Agriculture as practiced today is essentially an industrial land use involving heavy machinery and chemical sprays and fertilizers to produce food and fiber. These activities generate noise, dust, and odors which can cause conflicts with neighboring nonfarm residential or commercial developments. In turn, nonfarm homes and businesses placed near farms can create traffic that interferes with the movement of farm machinery. Thus, local governments use agricultural zoning districts to separate areas where agriculture is the dominant and preferred land use from residential and commercial zoning districts. Agricultural zoning can also promote orderly growth by limiting how many nonfarm parcels can be subdivided from farms, thereby controlling sprawl and the cost of public services.

A key distinction in an agricultural zoning ordinance is what constitutes an agricultural use as opposed to a commercial use of the property. An agricultural use is the production of food and fiber and may include the processing and sale of those agricultural products on the farm where they are grown and processed. Also, the leading grape and wine producing areas, including Peninsula Township, may allow tasting rooms and the sale of wine-related products, such as wine glasses, but not goods unrelated to wine, such as coffee mugs. By contrast, a commercial use is

the sale of goods and services not related to agriculture and which can be sold or offered at locations in commercial zoning districts.

In an agricultural zone, agricultural production is the principal use; other uses, such as tasting rooms and the sale of wine-related products, are accessory. It is a common practice for local governments to restrict the size of tasting rooms and gift shops at wineries so that the accessory uses do not overtake the principal use of agricultural production, as shown in the four major wine-producing jurisdictions, discussed in section D below.

Agricultural zoning need not allow the highest and best use of a property, such as for a housing development, but must be a reasonable economic use of property in the jurisdiction that enacts it.²² The purpose of agricultural zoning is to maintain land in agricultural production to support the local agricultural economy and, as with zoning in general, to promote the public health, safety, and welfare.

An agricultural zoning ordinance first explains its purpose and defines uses allowed in the agricultural zone. Principal uses are typically those directly related to agricultural production, such as growing crops and raising livestock. Accessory uses may include related activities like processing, marketing, and sales of agricultural products. By-right uses typically include farming, farm dwellings, forestry, greenhouses and nurseries, and a limited number of residences. Special uses may include farm stands for direct sales to consumers, some processing of farm products, and bed and breakfast operations that are accessory to the principal farming operation.

The connection between land zoned for agriculture and land preserved by PDR is critical to the overall success of a community's effort to retain agricultural land and support agricultural operations.²³ The agricultural zone helps to buffer the preserved farmland, limiting residential and commercial development on neighboring properties that could cause conflicts with farming activities on the preserved farmland (see Figure 3). Also, land uses on farmland subject to a conservation easement must comply with the provisions of the underlying agricultural zoning.

D. Agricultural Zoning in Major Wine Producing Regions

Wine production begins with growing grapes, which may involve the use of fertilizers, pesticides, and herbicides. Harvesting can be done by machinery or by hand. Harvested grapes are destemmed, crushed, pressed, fermented, and aged. Then the wine is filtered or "fined," and bottled for sale. A winery is typically used for the post-harvest production steps and storage of finished products. It may or may not have a tasting room where visitors may sample and purchase the wines produced by the winery.

The growing and harvesting of grapes creates noise, dust, and potential chemical spray drift. Wineries require significant space for processing equipment and storage. In essence, wine

²² "Highest and best" use refers to the land use that would produce the highest value for a property.

²³ Daniels and Keene, 2018, *The Law of Agricultural Land Preservation in the United States*, Chicago: American Bar Association, pp. 329-331.

production is an industrial process. This means zoning should work to separate it from non-farm residential and commercial land uses to avoid conflicts and nuisance situations.

Below, I examine how four major grape and wine producing areas use agricultural zoning to regulate wineries: Napa County, California; Sonoma County, California; Yamhill County, Oregon, and Suffolk County, New York. This examination shows that local governments commonly require a special use permit for construction and operation of a winery, increase minimum required lot size for wineries with tasting rooms and retail sales, and regulate the percentage of grapes in wine sold by wineries to protect their appellations and wine reputation.²⁴

Napa County, California, is located in the northern region of the San Francisco Bay area and famous for its premier wines. Napa County has more than 400 wineries and 16 AVAs.²⁵ Napa County's prime grape and wine producing area is protected by an agricultural zoning district, known as the Agricultural Reserve. The Reserve covers 32,000 acres in the heart of the Napa Valley.²⁶ Sonoma County, California, is adjacent to Napa County and is another of America's premier grape and wine producing regions. Sonoma County has more than 425 wineries and 18 AVAs.²⁷ The Town of Southold is located on the north fork of the eastern end of Long Island in Suffolk County, New York. The town has about a dozen wineries and is part of the North Fork of Long Island AVA.²⁸ Yamhill County, Oregon, is located in the Willamette Valley, southwest of Portland. It is a famous wine producing region and part of the Yamhill-Carlton AVA, which has more than 50 wineries.²⁹ Yamhill County has three agricultural zoning districts, EF-80 with an 80-acre minimum lot size, EF-40 with a 40-acre minimum lot size, and EF-20 with a 20-acre minimum lot size. Wineries are a permitted use in each of these three agricultural zoning districts, subject to site design review.³⁰

i. Winery definition

Wineries are agricultural processing facilities. While many people experience them only by visiting their public-facing tasting rooms, wineries are primarily for making wine – not tasting or selling it on-site. Napa County defines a winery as “an agricultural processing facility used for the fermenting and processing of grape juice into wine; or the refermenting of still wine into sparkling

²⁴ See Napa County zoning ordinance, Section 18.104.250 - Wineries—Production capacity C. 1. and 2.

²⁵ Napa Valley Wineries. 2023. <https://www.napavalley.com/wineries/>. Accessed May 17, 2023.

²⁶ Napa Valley Life. 2018. Napa Valley Agricultural Preserve 50 Anniversary. <https://www.napavalleylifemagazine.com/napa-valley-agricultural-preserve-50th-anniversary/#:~:text=The%20best%2Dknown%20part%20is,to%20more%20than%2032%2C000%20acres>. Accessed May 17, 2023.

²⁷ Sonoma County Tourism. 2023. <https://www.sonomacounty.com/activities/wineries-wine/#:~:text=With%20more%20than%20425%20wineries,to%20explore%20your%20own%20way>. Accessed May 17, 2023.

²⁸ See North Fork Wine Trail. 2023. <https://blog.signaturepremier.com/north-fork-wine-trail-guide/>. Accessed May 16, 2023; Wine-Searcher. 2023. North Fork of Long Island Wine. <https://www.wine-searcher.com/regions-north+fork+of+long+island#:~:text=North%20Fork%20of%20Long%20Island%20is%20an%20American%20Viticultural%20Area,vinifera%20grapes%20will%20reliably%20ripen>. Accessed May 17, 2023.

²⁹ Yamhill-Carlton AVA. 2023. <https://yamhillcarlton.org/wineries/#:~:text=With%20over%2050%20member%20wineries,for%20everyone%20in%20Yamhill%2DCarlton>. Accessed May 23, 2023).

³⁰ Section 402.02.H.

wine.”³¹ Sonoma County defines wineries as part of “agricultural processing,” which is allowed through a special use permit and “must be sized to accommodate, but not exceed, the needs of the on-site growing or processing operation.”³² The Town of Southold defines a winery as “a place or premises on which wine made from primarily Long Island grapes is produced and sold.”³³ Yamhill County defines a winery as “a facility that produces and sells wine” subject to maximum capacity requirements.³⁴

ii. Special Use Permit for Wineries

Wineries are commonly permitted as special land uses, but sometimes allowed by right. Napa County allows wineries only through a special use permit.³⁵ Uses allowed include wine production and bottling, offices and labs, and the sale of wine.³⁶

Sonoma County requires a special use permit for agricultural processing, defined as “[c]hanging an agricultural product from its natural state to a different form, as grapes to wine, apples to juice or sauce.”³⁷ Processing is limited to agricultural products “grown or produced primarily on-site or in the local area,” and storage, bottling, and canning, is limited to products grown or processed on-site.³⁸

The Town of Southold allows wineries as a by-right use if the winery meets certain standards, including that the wine produced and sold is “made from primarily Long Island grapes.”³⁹ Yamhill County allows a winery by right but subject to site design review.⁴⁰

iii. Tasting Rooms, Food, and Retail Sales

Wine tasting and retail sales are separate uses that may be associated with wineries, regulated either as accessory uses that are incidental and subordinate to the principal agricultural processing use or subject to their own special use permitting process. Tasting and retail sales are generally limited to local wines and wine-related promotional items.

Napa County regulates tasting rooms through the special use permitting process for wineries. Uses permitted as accessory to the principal agricultural processing use of a winery include tours, tasting, and the sale of wine-related products.⁴¹

Similarly, Sonoma County regulates tasting rooms as an additional use that must be authorized in a winery's special use permit. Tasting rooms are defined as “[a] retail food facility where one (1) or more agricultural products grown or processed in the county are tasted and sold,” and include

³¹ Napa County Zoning Ordinance, Section 18.08.640.

³² Sonoma County Zoning Ordinance, Sec. 26-18-030.C.1.

³³ Town of Southold Zoning Ordinance, Section 280-13 (4)(a).

³⁴ Yamhill County Zoning Ordinance, Sec. 402.02(H).

³⁵ Napa County Zoning Ordinance, Section 18.16.030 H.

³⁶ Napa County Zoning Ordinance, Section 19.08.640 G and Section 18.104.250.

³⁷ Sonoma County Zoning Ordinance, Section 26-18-030 A.

³⁸ Sonoma County Zoning Ordinance, Section 26-18-030.

³⁹ Town of Southold Zoning Ordinance, Section 280-13 (4) (a).

⁴⁰ Yamhill County Zoning Ordinance, Section 402.02.H.

⁴¹ Napa County Zoning Ordinance Section 18.08.640 H. 1; Section 18.08.620.

“wine tastings, olive oil, honey, fruit preserves” while excluding farm stands and farm retail sales.⁴²

The Town of Southold allows wineries to have “an accessory gift shop on the premises which may sell items accessory to wine, such as corkscrews, wine glasses, decanters, items for the storage and display of wine, books on winemaking and the region and nonspecific items bearing the insignia of the winery.”⁴³ “Wineries may not have a commercial kitchen as an accessory use but may have a noncommercial kitchen facility for private use by the employees.”⁴⁴

In Yamhill County, a winery may sell only “[w]ines produced in conjunction with the winery” and “[i]tems directly related to wine, the sales of which are incidental to the retail sale of wine on-site and do not exceed 25 percent of the total gross receipts of the retail facility.”⁴⁵ Items may include “those served by a limited service restaurant,” meaning “a restaurant serving only individually portioned prepackaged foods prepared from an approved source by a commercial processor and nonperishable beverages.”⁴⁶

iv. Limits on Production Capacity

Zoning commonly limits winery production capacity by fruit source, facility size, and/or volume of finished product. In Napa County, the maximum production capacity of a winery is established in its special use permit.⁴⁷ Napa County requires that “at least seventy-five percent of the grapes used to make the winery’s still wine, or the still wine used by the winery to make sparkling wine, shall be grown within the county of Napa.”⁴⁸ Napa County, named California’s first AVA in 1981, has a reputation and an appellation to protect and uphold.⁴⁹

Sonoma County requires agricultural processing, including winemaking, in its agricultural zones to be “sized to accommodate, but not exceed, the needs of the on-site growing or processing operation” and “limited to processing of agricultural products grown or produced on site, and bottling, canning, or storage of agricultural products grown and processed on site.”⁵⁰ Sonoma County also limits the combined square footage of all buildings used for processing or storage to 5,000 square feet.⁵¹

The Town of Southold requires that “[a]t least 66% of the agricultural products being processed must have been grown by that bona fide farm operation,” with an exception for “cases of a catastrophic crop failure.”⁵²

⁴² Sonoma County Zoning Ordinance section 26-18-210.

⁴³ Town of Southold Zoning Ordinance, Section 280-13. C. (10).

⁴⁴ Ibid.

⁴⁵ Yamhill County Zoning Ordinance Section 402. 10. I. 2. (a) and (b).

⁴⁶ Yamhill County zoning ordinance Section 402.10 I. 2.; ORS 624.010.

⁴⁷ Napa County Zoning Ordinance Section 18.16.030 H.

⁴⁸ Napa County Zoning Ordinance, Section 18.104.250 B.

⁴⁹ Daniels, The Napa County Agricultural Preserve, p. 106.

⁵⁰ Sonoma County Zoning Ordinance, Sec. 26-18-30(C).

⁵¹ Sonoma County Zoning Ordinance, Sec. 26-18-030(C).

⁵² Town of Southold Zoning Ordinance Section 280-13. C. (13)(e).

Yamhill County defines two sizes of wineries with production capacity limitations based on the size of the vineyards they support. Wineries with a maximum annual production of less than 50,000 gallons must own an on-site vineyard of at least 15 acres, a contiguous vineyard of at least 15 acres, have a long-term contract for the purchase of all grapes from a contiguous vineyard of at least 15 acres, or obtain grapes from a combination of those three options. For wineries that produce between 50,000 and 100,000 gallons, similar requirements apply with 40-acre vineyard requirements replacing the 15-acre vineyard requirements.

The limit on the use of grapes grown outside of Napa County, the Town of Southold, and Yamhill County is consistent with federal AVA standards, designed to ensure the authenticity of wine labeled from those distinct places and to protect the quality and reputation of those distinct wines. In Yamhill County, the requirement that the grapes to support the winery be produced on or adjacent to land on which the winery sits is also a reasonable requirement to protect the quality and reputation of the wine produced by and sold at Yamhill County wineries, and to limit wine production capacity to align with local farming capacity.

The limit on production capacity prioritizes local grape growing while allowing sufficient wineries to process those grapes. Tying the wineries to local grape sources allows the area's grape growing capacity to be a natural limit on the size and number of wineries. These grape source requirements are also part of the AVA designation. Local governments are under no obligation to allow as many wineries as possible, or to allow wineries to make as much wine as possible. Landowners who wish to propose a new winery but cannot meet AVA and local zoning standards may build elsewhere.

v. Summary

Based on my professional experience and research, it is my opinion that agricultural zoning in these four major wine-producing jurisdictions promotes agricultural preservation. By defining the land use to be principally winemaking and tying it to grape growing, these ordinances limit the initial scope of the land use. The ordinances that provide for special uses recognize the potential for additional site-specific considerations and conditions. Further, they restrict commercial, non-agricultural land uses that could otherwise turn agricultural processing facilities (wineries) into primarily commercial retail stores, selling merchandise unrelated to winemaking and tasting. Finally, they ensure agricultural focus through limited production capacity through requirements for the use of local grapes and size of wineries, which further supports the local distinctive AVAs.

E. A Brief History of Land Use Planning, Zoning, Agricultural Zoning, and Farmland Preservation in Peninsula Township

Protecting farmland has been a major goal of Peninsula Township since the first master plan was adopted in 1968. The Township's first zoning ordinance followed in 1972. The ordinance created an A-1 Agricultural zoning district which covered (and still applies to) nearly 12,000 acres or roughly two-thirds of the Township (see Figure 1).

In the late 1970s, with the pending sale of 500 acres at the northern tip of the Township, residents became concerned about the threats of large housing developments and scattered homes that could

rapidly change the rural and agricultural character of the Township. The Township's 1983 master plan called for the "continued viability of agricultural production by protection of valuable farm land." Its 2011 master plan recognizes that "the peninsula is a key asset for its open agricultural lands and recreational opportunities" and articulates a vision to "preserve and protect the unique and scenic character of Old Mission Peninsula."⁵³

Peninsula Township's agricultural zoning protects farmland by, among other things, indicating agriculture as the primary, preferred land use and limiting accessory uses and non-farm uses. It is tied to the goals of the Township's master plan, reflecting the Township's longstanding interest in protecting agricultural land.

Complementary to agricultural zoning, Peninsula Township drafted an Agricultural Preservation Plan (APP) as a subplan to the master plan in 1994.⁵⁴ The APP identifies an Agricultural Preservation Area encompassing a substantial portion of the A-1 Agricultural zoned land (9,861 acres). In 1994, Peninsula Township voters passed Michigan's first township PDR program, for which land in the Agricultural Preservation area is eligible (see Figure 2). Township voters have twice renewed the PDR program, in 2003 and 2022, indicating the importance of the Township's agricultural industry and character to the majority of residents, and reflecting the popularity of the Township's policies to maintain farmland and agriculture on Old Mission Peninsula.

The Township's PDR ordinance notes that "[i]t is the policy of the State of Michigan and Peninsula Township to protect, preserve and enhance agricultural and open space lands as evidenced by the Peninsula Township Master Plan including open space polices, the Farmland and Open Space Preservation Act of 1974 (P.A. 116), the Historic and Conservation Easement Act and the Township ordinances regulating land use by zoning and subdivision control."⁵⁵ Recognizing that "these policies and regulations, by themselves, have not been effective in providing long-term protection of farmland, shoreline, and open lands under the pressure of increasing urban development," the ordinance establishes a PDR program that will "permit these lands to remain in farmland and open space in a developing urban area and provide long-term protection for public benefits which are served by farmlands and open space lands within the Township."⁵⁶

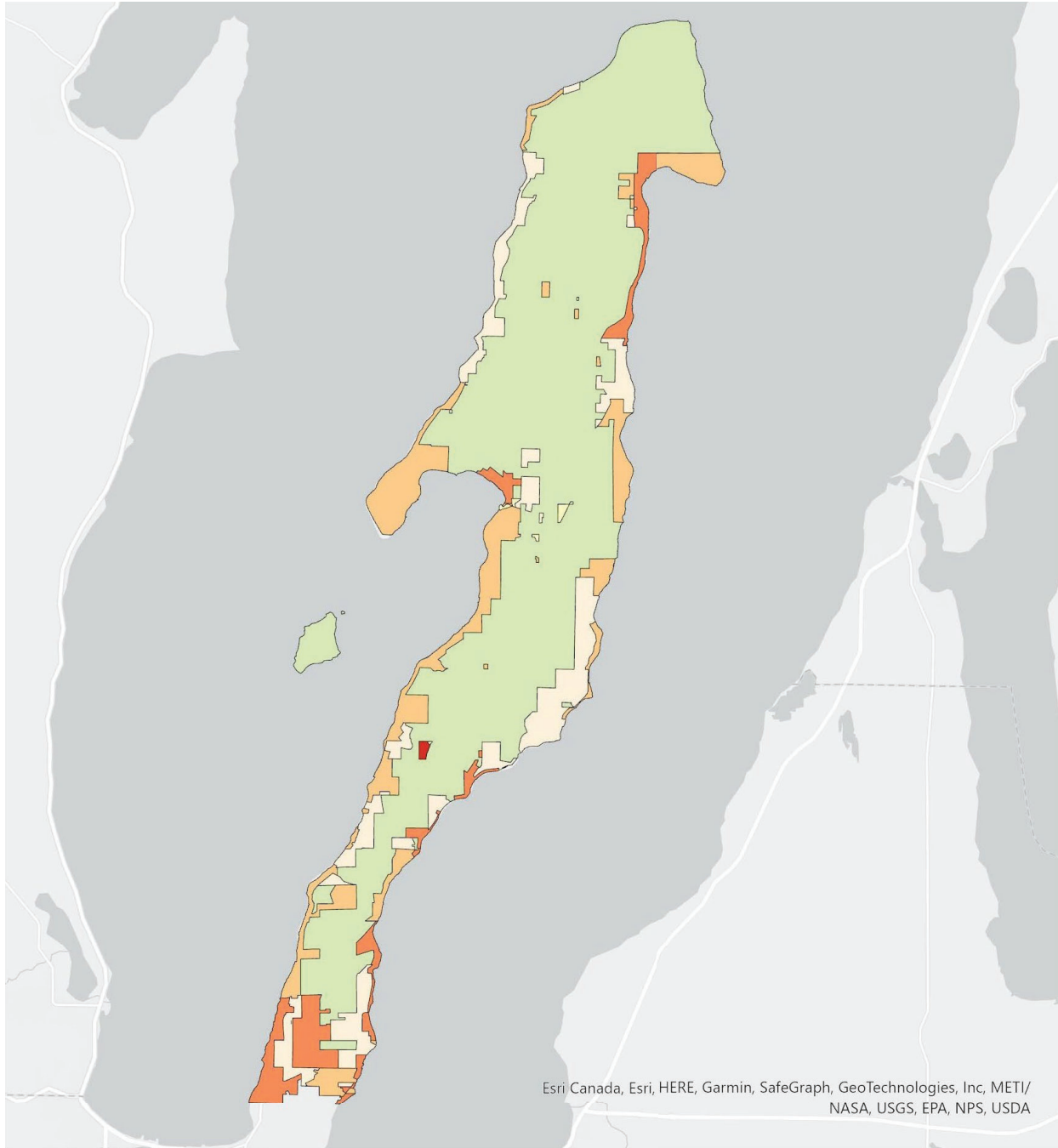
⁵³ 2011 Master Plan, p. 3.

⁵⁴ Williams, Jesse. 2022. Balancing Development, Agriculture, and Preservation: Evaluating the Success of the Old Mission Peninsula's Purchase of Development Rights Program.

⁵⁵ Peninsula Township PDR Ordinance Section 1 (4).

⁵⁶ Ibid.

Figure 1: Peninsula Township Zoning Map



- A-1 Agricultural Zoning
- C-1 Commercial Zoning
- R-1A Rural and Hillside Residential Zoning
- R-1B Coastal Zone Residential Zoning
- R-1C Suburban Residential Zoning
- R-1D Community Residential Zoning

Figure 2. Peninsula Township Agricultural Preservation Area



Agricultural Preservation Area

This map highlights the Agricultural Preservation Area, the prioritized agricultural land that would be desirable to preserve. This does not represent the amount of land currently under conservation easements, although some land in this area is protected (see next figure).

“Properties on which the Township has purchased the Development Rights should remain substantially undeveloped in order to promote their ‘Agricultural Use,’” defined as “the production of plants and animals useful to man, including fruits; grapes; nuts; vegetables; green house plants; Christmas trees; forages and sod crops; grains and feed crops; dairy and dairy products; livestock, including breeding and grazing; and other similar uses and activities on substantially undeveloped land.”⁵⁷

Peninsula Township has 5,181 acres of preserved agricultural land, accounting for more than half of the land identified in the Agricultural Preservation Area. This is an impressive achievement resulting from more than \$15 million the Township has invested in its PDR program.⁵⁸ In addition, the Township has received funding from the State of Michigan, American Farmland Trust, and the federal Farm and Ranch Lands Protection Program (now part of the federal Agricultural Conservation Easement Program).⁵⁹ The combination of Township and outside funding has provided strong support for the Township’s agricultural economy to enable a long-term future for agriculture on Old Mission Peninsula. The passage of an additional millage for the Township’s PDR program in 2022 is expected to generate additional millions of dollars for farmland preservation.

Four of the eleven wineries on Old Mission Peninsula own or lease preserved farmland: Black Star Farms, Bonobo, Chateau Grand Traverse, and Mari Vineyards. Chateau Grand Traverse sold a permanent conservation easement to the State of Michigan; the Township holds the development rights for Black Star Farms, Bonobo, and Chateau Grand Traverse.

As I reported in 2008:

Peninsula Township has created the most successful farmland preservation program in Michigan and one of the most successful among local governments in the United States. The measures of success are many: a) Nearly one-third of the Township’s 17,755 acres have been placed under permanent conservation easements; b) The preserved farms are often adjacent to each other; c) Landowners continue to apply to sell their development rights; d) The Township has identified a 9,200-acre Agricultural Preservation Zone in its Master Plan where agriculture is the preferred use and 80% of the preserved land is located within the APZ.

* * *

The strategy of the Township PDR program has featured the preservation of farmland with scenic views of Grand Traverse Bay. This strategy has attempted to accomplish two goals at the same time: 1) preserve the scenic views which both the

⁵⁷ Ibid., Section 2 (1).

⁵⁸ American Farmland Trust. 2021. Status of Local PACE Programs, 2020, p. 4. https://farmlandinfo.org/wp-content/uploads/sites/2/2021/02/Local_Purchase_of_Agricultural_Conservation_Easement_Programs_2020_2.21_A_FT_FIC.pdf. Accessed May 18, 2023.

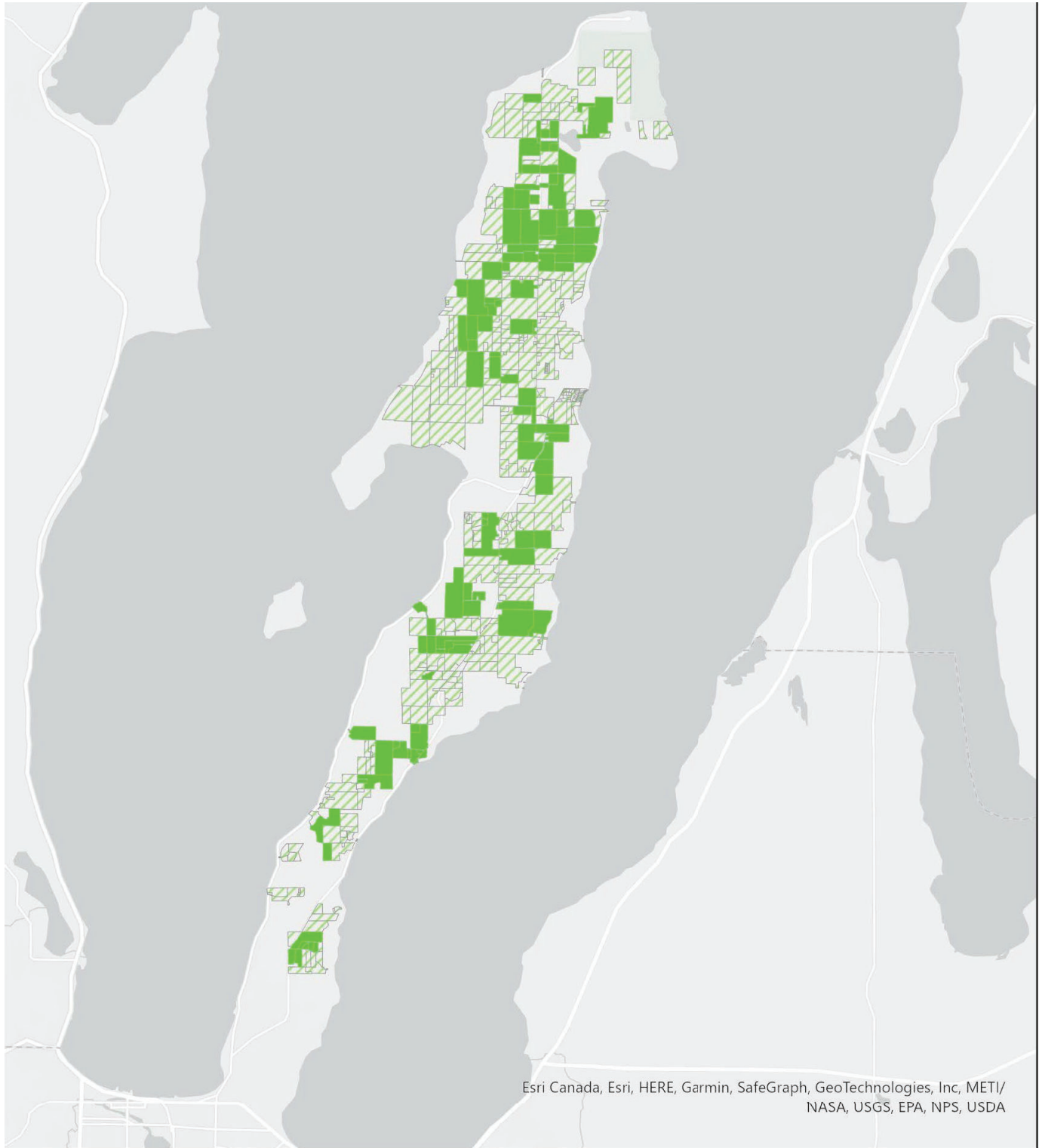
⁵⁹ Daniels, T. 2008. An Evaluation of the Peninsula Township Farmland Preservation Program, p. 4.

Township residents and tourists enjoy; and 2) preserve agricultural land in order to keep the fruit industry alive and thriving on the peninsula. The Township has done a good job of minimizing development along Michigan Route 37, and the views are often spectacular.⁶⁰

Figure 3 below shows how Township farmland has been preserved in several contiguous blocks, which helps to keep non-farm development at a distance, thus minimizing potential conflicts over farming practices.

⁶⁰ Ibid., pp. 5,7.

Figure 3. Preserved Farmland in Peninsula Township.



- Protected Parcels
- Agricultural Preservation Area

II. Analysis of Challenged Zoning Provisions

Plaintiffs challenge select subparts of Peninsula Township Zoning Ordinance sections that establish three winery uses in the A-1 District: Farm Processing Facility – a use by right under Section 6.7.2(19); Winery-Chateau – a special use under Section 8.7.3(10); and Remote Winery Tasting Room at 8.7.3(12). To analyze these challenges, I explain the purpose of the Peninsula Township Zoning Ordinance as a whole, the agricultural zoning provisions within the Township Ordinance, winery uses allowed by right and uses allowed by special use permits. The analysis shows that the challenged provisions are reasonable and are similar to provisions used by the four major wine producing areas cited in this report.

A. Peninsula Township Zoning Ordinance (PTZO)

The purposes of the Peninsula Township Zoning Ordinance (PTZO) are:

[T]o protect the public health, safety, morals and general welfare of the inhabitants of the Township; to provide for adequate light, air and convenience of access to secure safety from fire and other dangers; to avoid undue concentration of population by regulating minimum open spaces and by regulating and limiting types and locations of buildings and regulating the location of trades, industries, and buildings designated for specific uses; to provide for the orderly development of the Township; to encourage the use of lands and resources of the Township in accordance with their character and adaptability; to provide for safety in traffic, adequacy of parking and reduce hazards to life and property; to facilitate the development of adequate systems of fire protection, education, recreation, water supplies and sanitary facilities; and to conserve life, property, natural resources and the use of public funds for public services and improvements to conform with the most advantageous use of lands, resources and properties.⁶¹

To further these purposes, the Peninsula Township Zoning Ordinance divides the Township into six zoning districts: A-1 Agricultural, C-1 Commercial, R-1A Rural and Hillside Residential, R-1B Coastal Zone Residential, R-1C Suburban Residential, and R-1D Community Residential (see Figure 1). For each zoning district, it spells out required minimum lot sizes, setbacks, building height, lot coverage, and uses allowed by right or by special use permit. It also establishes who has zoning authority, the zoning permitting processes and procedures, appeals and requests for interpretation, land uses and their standards, enforcement procedures, and the amendment and re-zoning process. The A-1 Agricultural Zoning District in particular serves the goals of the Township master plan to “protect the unique and scenic character of Old Mission Peninsula” and to “retain and attract growers and agricultural entrepreneurs.”⁶²

i. The A-1 Agricultural Zoning District

⁶¹ Peninsula Township Zoning Ordinance Section 2.1.

⁶² 2011 Master Plan, pp. 3, 27.

The A-1 Agricultural Zoning district “is intended to recognize the unique ecological character of the Peninsula and to preserve, enhance, and stabiliz[e] 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.”⁶³ Uses permitted by right include one- and two-family dwellings; mobile homes; “field crop and fruit farming, truck gardening, horticulture, aviaries, hatcheries, apiaries, green houses, tree nurseries, and similar agricultural enterprises along with accessory uses incidental to” those uses; raising and keeping of small animals and livestock; customary home occupations; “[r]oadside stands selling regionally grown fresh and/or processed farm produce, raw forest products, cut flowers, potted plants, agricultural and forest products”; cemeteries; farmworker housing; public parks and recreation areas; conservation areas; customary uses and structures incidental to principal rural residential uses; mining and topsoil removal subject to supplementary use regulations; day care; barn storage; and “Farm Processing Facility” wineries.⁶⁴

Uses permitted by Special Use Permit include Planned Unit Developments, special open space uses, recreational vehicle parks or campgrounds, food processing plants, institutional structures like schools and places of worship, greenhouses and nurseries with retail sales, riding stables, livestock auction yards, raising of fur-bearing animals for profit, for-profit game and hunting preserves, veterinary facilities and kennels, sawmills, agricultural storage, golf courses and country clubs, public buildings and service installations, waste disposal and treatment facilities, airports and airfields, warehouses and light industrial uses, wind energy conversion systems, bed and breakfast establishments, adult foster care facilities, and Winery-Chateau and Remote Winery Tasting Room wineries.⁶⁵

Peninsula Township’s roadside stand provisions are an example of how it seeks to allow some degree of retail activity while maintaining the A-1 District’s purpose of ensuring land is used primarily for farming. It excludes non-regional and non-agricultural items from sale and is intended “to provide only for the limited seasonal sale of agricultural and related products, but not to encourage the size of investment in equipment that would require a commercial zone.”⁶⁶

ii. Winery Uses in the A-1 District

The Peninsula Township Zoning Ordinance defines a winery as “a state licensed facility where agricultural fruit production is maintained, juice is processed into wine, stored in bulk, packaged, and sold at retail or wholesale to the public with or without the use of a wine tasting facility. The site and buildings are used principally for the production of wine.”⁶⁷

Until it was amended in December 2022, the PTZO permitted the following three winery land uses in the A-1 District: Farm Processing Facilities, Winery-Chateaus, and Remote Winery Tasting Rooms. A Farm Processing Facility is “a building or buildings containing an area for processing

⁶³ Peninsula Township Zoning Ordinance Section 6.7.1.

⁶⁴ Peninsula Township Zoning Ordinance Section 6.7.2

⁶⁵ Peninsula Township Zoning Ordinance Section 6.7.3, 8.7.2.

⁶⁶ Peninsula Township Zoning Ordinance Section 6.7.2 (8)(f)

⁶⁷ Peninsula Township Zoning Ordinance Section 3.2

equipment where agricultural produce is processed or packaged and prepared for wholesale and/or retail sales” and “may also include a retail sales area for direct sales to customers and a tasting room for the tasting of fresh or processed agricultural produce including wine, as well as “necessary parking, lighting and access to a public road.”⁶⁸ A Winery-Chateau is “a state licensed facility whereat (1) commercial fruit production is maintained, juice is processed into wine, stored in bulk, packaged, and sold at retail or wholesale to the public with or without the use of a wine tasting facility and (2) a limited number of guest rooms with meals are offered to the public.”⁶⁹ A Remote Winery Tasting Room is a tasting room not located on the same property as its associated winery.⁷⁰

Use by Right – Farm Processing Facility

The construction and use of a Farm Processing Facility winery is allowed by right as a way “to promote a thriving local agricultural production industry and preservation of rural character.”⁷¹ A Farm Processing Facility is intended to include retail and wholesale sales of fresh and processed agricultural produce but is not intended to allow a bar or restaurant on agricultural properties and does not include permission to hold “weddings, receptions and other social functions for hire.”⁷²

Most of the produce sold must be grown on the specific farm operation associated with the Farm Processing Facility and must be grown on Old Mission Peninsula. A Farm Processing Facility must be located on a parcel that meets minimum acreage requirements. While it may have unlimited underground facilities, its above-grade floor area and retail space are limited.⁷³ The above-ground size limitation affects, among other things, stormwater runoff and visual impacts and thus relates to the public health, safety and welfare purpose of zoning.

Limiting accessory uses like food service, marketing, and retail sales; and limiting production capacity, including through building size and grape source requirements, are common practice in the zoning ordinances of the leading grape and wine producing regions mentioned earlier.

Special Uses – Winery Chateau and Remote Winery Tasting Room

The Winery-Chateau is a special use permitting the “construction and use of a winery, guest rooms, and single family residences as a part of a single site.”⁷⁴ It requires a 50-acre minimum site, upon which the principal use is a winery. There are no local grape source requirements for wine produced and sold, but at least 75% of the site must be used for active production of crops that can be used to make wine.⁷⁵ Guest rooms, a manager’s residence, and single-family residences are allowed as support uses, and accessory uses are permitted so long as they are no greater than reasonably necessary to serve the principal use.⁷⁶ “Accessory uses such as facilities, meeting

⁶⁸ Peninsula Township Zoning Ordinance Section 3.2

⁶⁹ Peninsula Township Zoning Ordinance Section 3.2

⁷⁰ Peninsula Township Zoning Ordinance Section 8.7.3 (12)

⁷¹ Peninsula Township Zoning Ordinance Section 6.7.2. (19) (a)

⁷² Peninsula Township Zoning Ordinance Section 6.7.2. (19) (a)

⁷³ Peninsula Township Zoning Ordinance Section 6.7.2. (19) (b) (6)

⁷⁴ Peninsula Township Zoning Ordinance Section 8.7.3 (10)

⁷⁵ Peninsula Township Zoning Ordinance Section 8.7.3 (10) (h)

⁷⁶ Peninsula Township Zoning Ordinance Section 8.7.3 (10) (d)

rooms, and food and beverage services shall be for registered guests only,” and “not . . . greater in size or number than those reasonably required for the use of registered guests.”⁷⁷ The Township Board may approve activities for people in addition to registered guests – “Guest Activity Uses” – as support uses if certain standards designed to promote active crop production beyond the 75% minimum are met.⁷⁸ Guest Activity Uses include wine and food seminars and cooking classes, meetings of local nonprofit groups, and agriculture-related meetings.⁷⁹ “[E]ntertainment, weddings, wedding receptions, [and] family reunions” are excluded from the definition of permissible Guest Activity Uses.⁸⁰

The Remote Winery Tasting Room is a special use that is allowed for a tasting room that is not on the same property as the winery that produces the wine. It is another example of the Township’s effort to use zoning to balance agricultural production with the sale of agricultural products grown on Old Mission Peninsula and protect the public health, safety, and welfare. While it requires only a 5-acre parcel for the tasting room site, the tasting room and winery parcel must be under single ownership with “a minimum of 150 acres in Peninsula Township under that ownership and a minimum of 50% of the 150 acres shall be in active agricultural use.”⁸¹

A discretionary decision whether to approve a special land use requires “a statement of findings and conclusions relative to the special land use which specifies the basis for the decision and any conditions imposed.”⁸² These findings and conclusions and any conditions appear in the Special Use Permits issued for Winery-Chateaus and the Remote Winery Tasting Room in Peninsula Township.

Seven wineries in the Township have Special Use Permits for Winery-Chateaus (Bonobo, Bowers Harbor, Brys, Chateau Chantal, Chateau Grand Traverse, Hawthorne, and Mari) and one has a Special Use Permit for a Remote Winery Tasting Room (Peninsula Cellars). As contemplated by the Michigan Zoning Enabling Act, some have conditions in addition to the requirements of the Peninsula Township Zoning Ordinance to further promote health, safety, and general welfare. For example, in the Mari Vineyards Special Use Permit, the Township added a condition saying there can be no amplified sound outdoors in order to protect the residential neighbors.

B. How the Peninsula Township Zoning Ordinance Promotes Agricultural Preservation

The Peninsula Township Zoning Ordinance serves to implement the Township Master Plan, protect property values, protect natural resources, prevent nuisances, and ensure the compatibility of uses.⁸³ It describes the purpose, intent, and land use regulations for each zoning district, including the purpose for the A-1 District to “preserve, enhance, and stabiliz[e] existing areas

⁷⁷ Peninsula Township Zoning Ordinance Section 8.7.3 (10) (m)

⁷⁸ Peninsula Township Zoning Ordinance Section 8.7.3 (10) (u)(1)(a), 3

⁷⁹ Peninsula Township Zoning Ordinance Section 8.7.3 (10)(u) 2

⁸⁰ Peninsula Township Zoning Ordinance Section 8.7.3 (10)(u)(2)(d).

⁸¹ Peninsula Township Zoning Ordinance Section 8.7.3(12)(a)-(e).

⁸² MCL 125.3502(4).

⁸³ 2011 Master Plan, p. 45.

within the Township . . . used predominately for farming purposes” and allow limited, compatible other uses.⁸⁴

As Peninsula Township stated in response to Plaintiffs’ interrogatories, in adopting the challenged provisions, it “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.”⁸⁵ It described its interests as follows:

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.⁸⁶

These statements express common and standard purposes for agricultural zoning and reflect local government’s strong interest in maintaining productive agricultural land and promoting orderly growth. The provisions that are being challenged further these stated interests. For example, by limiting retail sales to logo merchandise and wine-related items, the Peninsula Township Zoning Ordinance allows wineries to be profitable without changing them to commercial uses on agricultural land.

The A-1 Agricultural District “identifies those parcels within the Township where the land’s unique ecological and physical attributes allow viable agricultural operations and farming practices to exist”; its regulations “are designed to preserve, enhance, and stabilize existing areas within Peninsula Township where agriculture is the predominant use of the land.”⁸⁷ The performance standards in the Peninsula Township Zoning Ordinance for Farm Processing Facilities, Winery-Chateaus, and Remote Winery Tasting Rooms further this purpose, as well as the general purpose of zoning to promote the public health, safety, and welfare.

Establishing acreage minimums, limiting production capacity, and ensuring tasting room and other accessory uses do not overshadow the primary use of wine production also aligns with zoning in other major wine-producing jurisdictions.

The performance standards in the Peninsula Township Zoning Ordinance differentiate between principal uses and accessory uses, which cannot overtake the principal use to become the dominant use of the property. Generally, the more acreage in active agricultural production, the more accessory and/or support uses are permitted. A property owner needs only a small area for a Farm Processing Facility use by right, but there are additional grape source requirements and other restrictions (similar to Yamhill County’s agricultural zoning ordinance). More land is

⁸⁴ Peninsula Township Zoning Ordinance Section 6.7.1

⁸⁵ DEFENDANT PENINSULA TOWNSHIP’S SUPPLEMENTAL ANSWERS TO PLAINTIFFS’ FIRST SET OF INTERROGATORIES, p. 7.

⁸⁶ Ibid., p. 8.

⁸⁷ 2011 Master Plan, p. 15.

required for a Winery-Chateau with guest rooms and no grape source requirements. And, Guest Activity Uses can be added to a Winery-Chateau Special Use Permit if the winery produces and/or buys a certain amount of grapes grown on Old Mission Peninsula. Additionally, a landowner needs more land to locate a remote tasting room somewhere other than on the farm parcel.

Below I list the kinds of limitations that the plaintiffs are challenging. Then, I offer a response, part of which includes examples from the zoning ordinances of the major wine producing areas cited in this report to show that the Peninsula Township Zoning Ordinance are common zoning practices in other wine producing areas.

Plaintiffs are challenging the following limitations:

i. Limits on food and beverage service:

- 6.7.2(19)(a) – Farm Processing Facilities are not intended, among other things, to allow bar or restaurant uses.
- 8.7.3(10)(m) – Accessory uses such as facilities, meeting rooms, and food and beverage service at Winery-Chateaus are limited to what is reasonably necessary for registered (i.e., overnight) guests.
- 8.7.3(10)(u) – Notwithstanding 8.7.3(10)(m), Winery-Chateaus may offer food service to Guest Activity Use attendees under the following circumstances:
 - 8.7.3(10)(u)(2)(a) – Attendees of wine and food seminars and cooking classes may consume food prepared in class;
 - 8.7.3(10)(u)(2)(b) – Light lunch or buffet, but not full course meals, may be served at local nonprofit meetings (which are not to resemble a bar or restaurant use);
 - 8.7.3(10)(u)(2)(c) – Full course meals are permitted at agriculture-related meetings to demonstrate connections between wine and other foods; and
 - 8.7.3(10)(u)(5)(c) – The only alcoholic beverages that may be served during Guest Activity Uses are those produced on-site.

Section 6.7.2(19)(a) states that: “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.” This provision reflects the American Viticultural Area designation for wine sold with the Old Mission Peninsula source on the label and helps maintain the distinctiveness and reputation of Old Missing Peninsula wine. The more distinctive a wine, the higher price it is likely to command, which benefits grape growers and wine producers alike. This is what branding is all about.

This provision is also consistent with requirements for a certain percentage of locally grown grapes in wine sold in the four major wine- producing areas cited earlier in this report. For example, Napa County requires at least 75% of grapes used to make a winery’s still wine or the still wine used by

the winery to make sparkling wine to be grown in the county.⁸⁸ The Town of Southold requires at least 66% of agricultural products being processed to have been grown by the winery's own farm operation.⁸⁹

Limitations on food and beverage service at wineries is common. For example, the Town of Southold prohibits wineries from having commercial kitchens.⁹⁰ So is allowing the tasting or sale only of wine produced onsite. For example, wineries in Yamhill County may only sell wines produced in conjunction with the winery.⁹¹

Bars, restaurants, and catering are commercial uses typically separated from other uses and limited to being located in a commercial zoning district. In my experience, a bar or restaurant is a commercial use and not an agricultural use because it does not produce agricultural commodities. By contrast, a tasting room is an accessory use that allows for the tasting and the sale of wine produced on the premises.

ii. Exclusion of weddings, wedding receptions, and other private events for hire from the scope of permitted uses:

- 6.7.2(19)(a) – “Activities such as weddings, receptions and other social functions for hire are not allowed, however, participation in approved township wide events is allowed.”
- 8.7.3(10)(u)(2)(d) – “Guest Activity Uses do not include weddings, wedding receptions, family reunions, or sale of wine by the glass.”
- 8.7.3(10)(m) – Accessory uses such as facilities, meeting rooms, and food and beverage service at Winery-Chateaus are limited to what is reasonably necessary for registered (i.e., overnight) guests.

A general concept in zoning is that uses not expressly permitted in a particular zoning district are presumed not to be permitted. For example, a zoning ordinance does not have to say event venues are not allowed in residential zoning districts. The ordinance would list the uses that are allowed in the zoning district, such as dwellings, churches, parks, and schools.

Wineries, which are the principal permitted use under the Farm Processing Facility and Winery-Chateau provisions, are agricultural processing facilities. Uses like tasting rooms and retail sales of wine produced in these facilities are accessory, meaning customary and incidental to the production of the wine. Winery-led events to promote themselves and local agriculture, like wine club promotional events in the tasting rooms, Guest Activity Uses, and Township-wide events like Blossom Days may be appropriate accessory uses.⁹² But private events for hire and facility rentals

⁸⁸ Napa County zoning ordinance Section 18.104.250B.

⁸⁹ Town of Southold Zoning Ordinance, Section 280-13. C. (13)(e).

⁹⁰ Section 280-13. C. (10).

⁹¹ Yamhill County zoning ordinance Section 402.02(H) 2 (a).

⁹² Blossom Day is a celebration of the cherry blossom in the spring in Peninsula Township. See Old Mission Peninsula Wine Trail. <https://www.ompwineandtrail.com/event/blossom-day/>. Accessed August 27, 2023.

that use agriculture as a setting, like weddings, wedding receptions, corporate conferences, and family reunions, are not customary or incidental uses of agricultural processing facilities, so they are not principal nor support uses. At best, they are accessory uses that are reasonably limited.

Limitations on accessory uses, generally, are a common practice in the zoning ordinances of the major wine producing areas cited in this report. Limitations on activities and events such as weddings, wedding receptions, and family reunions are meant to keep non-agricultural uses out of agricultural areas. Like a bar or restaurant, uses such as weddings, receptions and other social functions for hire are commercial uses, not agricultural uses. These uses belong in a Commercial zoning district and that is where they typically occur. Weddings may also be appropriate as accessory uses at places of worship located in residential and agricultural districts, as they would be customary and incidental to those uses (unlike agricultural processing facilities).

iii. Establishing standards and requiring advance notice and/or approval for some activities or events:

- 8.7.3(10)(u) – Allowing the Township Board to approve Guest Activity Uses in a Winery-Chateau’s Special Use Permit as “Support Uses” in accordance with certain requirements, including that Guest Activity Uses are limited to food and wine seminars and cooking classes (8.7.3(10)(u)(2)(a)), local 501(c)(3) meetings (8.7.3(10)(u)(2)(b)), and agricultural-related meetings (8.7.3(10)(u)(2)(c)), which require either advance notice or (for ag-related meetings only) approval
- 8.7.3(10)(u) – Establishing standards for Guest Activity Uses, including:
 - 8.7.3(10)(u)(1)(b) – Guest Activity Uses are intended to promote Old Mission Peninsula agriculture by identifying local food/wine, providing promotional materials, or conducting tours;
 - 8.7.3(10)(u)(1)(d) – Guest Activity Uses do not include wine tasting and promotional activities and free entertainment in the tasting room;
 - 8.7.3(10)(u)(2)(d) – Guest Activity Uses do not include weddings, wedding receptions, family reunions, or sale of wine by the glass;
 - 8.7.3(10)(u)(5)(a) – Guest Activity Uses must promote Old Mission Peninsula agriculture by identifying local food/wine, providing promotional materials, or conducting tours;
 - 8.7.3(10)(u)(5)(c) – only wine produced on-site may be served during allowed events.
 - 8.7.3(10)(u)(5)(g) – no amplified instrumental music is allowed during allowed events; and
 - 8.7.3(10)(u)(5)(h) – no outdoor displays of merchandise, equipment, or signs are allowed during allowed events.

Limitations on the tasting and sale of wines only produced onsite is a common practice in the zoning ordinances of the major wine producing areas cited in this report as previously discussed. Limiting activities or events to those that promote local agriculture, including the wine they produce onsite, offers wineries an opportunity to increase their sales and profitability without allowing accessory activity and event uses to overtake the principal winery use of wine production.

Wineries are also likely to benefit from conducting tours of their facilities and promoting a local wine trail to visitors. In my experience, most visitors to a wine region look to sample wines from more than one winery.

Requiring notice or approval for certain activities and events is also, in my opinion, a reasonable way to regulate accessory activities, especially activities that are not normally permitted at a winery part of agricultural processing. The Township A-1 Agricultural District here is favorable to the wineries, in my opinion, by creating a process to allow meetings and activities that otherwise would not be permitted, generally related to food and agriculture at the wineries.

iv. Allowing retail sales of only wine and winery- and agriculture-related merchandise

- 6.7.2(19)(b)(1)(v) – Allows the retail sale of logo merchandise at Farm Processing Facilities “directly related to the consumption and use” of the agricultural produce sold at the winery (i.e., wine); the logo must be permanently affixed to the merchandise and prominent; the sale of wine glasses and corkscrews is permitted, but not clothing, coffee cups, or bumper stickers.
- 8.7.3(12)(i) – Allows the retail sale of logo merchandise that promotes the winery or Old Mission Peninsula agriculture at Remote Winery Tasting Rooms (such as Peninsula Cellars); the logo must be permanently affixed to the merchandise; the sale of corkscrews, wine glasses, t-shirts, and bumper stickers is permitted.

Limitations on the sale of wine and wine-related merchandise is a common practice in the zoning ordinances of the major wine producing regions cited in this report. For example, Napa County allows the sale of “wine-related products,” and the display, but not the sale, of art or items of historical, ecological, or viticultural significance to the wine industry.⁹³

These provisions, in my opinion, advance the goal of encouraging growers to produce, process, and market agricultural products” and thus maintain land in agricultural use. Merchandise not related to wine or the agricultural product grown on the farm property is a commercial activity, and that merchandise can and should be sold in a commercial zoning district.

v. Establishing maximum facility and retail space size

- 6.7.2(19)(b)(6) – Limits above-grade floor area of a Farm Processing Facility to 6,000 square feet or 0.5% of parcel size, whichever is less; requires retail space to be a separate room limited to the greater of 500 square feet or 25% of the facility’s total above-grade floor area.⁹⁴

Other wine-producing areas have provisions in their zoning ordinances to limit winery size. For instance, Yamhill County has a limit of does so by imposing a production capacity limit of 100,000

⁹³ Napa County Zoning Ordinance, Section 18.08.640 H.

⁹⁴ In January 2019, Amendment 197 changed this provision to allow a maximum above-grade facility size of 30,000 square feet with 1,500 square feet for retail, (or 250 square feet per acre with the retail space being no more than 25% of the total facility area, whichever is less).

gallons of wine.⁹⁵ The Town of Southold restricts accessory buildings to 3% of total parcel size.⁹⁶ Sonoma County requires agricultural processing, including winemaking, in its agricultural zones to be “sized to accommodate, but not exceed, the needs of the on-site growing or processing operation” and limits the combined square footage of all buildings used for processing or storage to 5,000 square feet.⁹⁷

C. The Harm If the Provisions of the Peninsula Township Zoning Ordinance Are Invalidated

The provisions discussed above limit or avoid threats to productive agriculture and advance the Township’s master plan principally by limiting nonagricultural uses in the A-1 District. The Plaintiffs through this lawsuit apparently seek to undo the Township’s agricultural zoning through the invalidation of the provisions that the Plaintiffs challenge. If these provisions were eliminated without the opportunity to replace them with other provisions intended to achieve the overall intent of the Peninsula Township Zoning Ordinance – *i.e.*, supporting agricultural preservation and ensuring compatible land uses – and if the result is that wineries may operate without effective limits on production and accessory uses, there would be several negative effects on the Township and its residents, in my opinion. These effects call into question whether the A-1 Agricultural District will be able to function according to its intent and purpose to further the Township’s interests as spelled out both in the Township Master Plan and the Peninsula Township Zoning Ordinance.

The likely negative effects that adversely impact agricultural operations, in my opinion, include but are not limited to:

1. More traffic and greater difficulty in moving farm machinery along roads. During my visit to the Township on Wednesday, August 9, 2023, I observed fairly heavy traffic along M-37 (Center Road) in the late morning and early afternoon. If wineries were allowed to offer additional commercial, non-farm-related goods and services, such as convenience store items, private events for hire, and non-local agricultural produce, traffic levels would likely increase, and the wineries would draw traffic during extended hours. Additional vehicles and additional times of heavier traffic would create additional challenges to moving farm machinery and harvested produce along the roads of Peninsula Township, as most of the wineries are located in the northern two-thirds of the Township.
2. The removal of on-site and local grape source limits will allow wineries in the A-1 District to increase the bottling, labeling, and retail sales of wine produced from juice or grapes produced elsewhere, to the detriment of local agriculture.
3. Adverse impacts on traditional farming through higher land prices brought about by the elevation of accessory uses for the sale of goods and services not related to agriculture above the principal use of properties for agricultural production.

⁹⁵ Yamhill County Zoning Ordinance, Section 402.02(H) 1 (b).

⁹⁶ Town of Southold Zoning Ordinance, 280-15.

⁹⁷ Sonoma County Zoning Ordinance, Sec. 26-18-030(C).

4. Undoing the Township's agricultural zoning to allow the sale of goods and services not related to agriculture and removing production requirements would likely open up agricultural lands to increased commercial development. The distinction between purely commercial use and agriculture would become blurred if wineries were allowed to buy, process, bottle, and sell wine without local active agricultural production. The wineries would simply become wine shops or bars, like those commonly found in a commercial district. Similarly, if the wineries are allowed to sell a variety of foods and generic items, then people on their way to the beaches will start visiting wineries for sandwiches and supplies, not wine tasting.
5. This commercialization of agricultural land would likely push up land prices, posing a threat to active agriculture, including stone fruit and apple production on the Peninsula. The opportunity for conversion from traditional farming to more lucrative land uses like facility rentals for private events and/or residential development will especially become a problem when the current generation of farmers retires because the next generation will be priced out of new entry or expansions due to the higher land costs.

D. Conclusions

Peninsula Township has invested considerable resources over many years to craft the Township Master Plan, A-1 Agricultural District, Agricultural Preservation Plan, Agricultural Preservation Areas, and PDR program to protect and maintain the agricultural land base and to support the agricultural industry on Old Mission Peninsula.

In my opinion, the Plaintiffs misinterpret the fundamental purpose of zoning and, in particular, the purpose of the Township A-1 Agricultural District, which is to "to preserve, enhance, and stabilize existing areas within the Township which are presently being used predominately for farming purposes."⁹⁸ The removal of limitations in the challenged provisions to allow more commercialized uses on agricultural land -would likely create externalities felt on neighboring properties, reducing the enjoyment of those properties by their residents and undermining efforts to maintain agricultural production as the primary land use in the A-1 district.

The Township, in my opinion, through its land use and related programs, strives to balance agricultural production, agricultural processing, and the sale of agricultural products against purely commercial activity with no direct relationship to agriculture. In setting this balance, Peninsula Township designed a zoning ordinance of by-right and special uses that is similar to those found in other leading grape and wine-producing areas in the United States. The balance is delicate but presently working. The A-1 District contains a significant amount of farmland in active agricultural production while allowing for the reasonable economic use of the property, as evidenced by some wineries operating their facilities as principally agricultural businesses in the A-1 District for decades.

Allowing retail sales of non-agricultural items in the A-1 Agricultural District invites a haphazard pattern of commercial development, which is contrary to the present rural and agricultural

⁹⁸ Peninsula Township Zoning Ordinance, Section 6.7.1

character of the Township. Furthermore, the retail sale of non-agricultural items and the addition of non-agricultural activities, such as weddings and receptions for hire, would push up land prices and make it more difficult for farmers on the Peninsula to maintain their agricultural operations over time.

Increased retail sales of non-agricultural goods and commercial hospitality services at the wineries would necessarily generate greater traffic along M-37, given that most of the wineries are located in the northern two-thirds of the county. This increased traffic, in turn, would create greater challenges for farmers attempting to move machinery along the Township's roads and move produce off the Peninsula during harvest time.

Also, the in-effect upzoning of agricultural land to allow for event venues for hire would raise agricultural property values in an undesirable way, reflecting not the fundamental agricultural productivity, but non-agricultural uses allowed on the properties. This puts farmers without venues for hire at a disadvantage in competing for land.

Upzoning wineries for more commercial activities would also create the opportunity to turn accessory non-agricultural uses into the principle uses in the A-1 district, contrary to longstanding Township plans and programs. Converting wineries into commercial uses would in effect mean re-zoning those parcels from agricultural to commercial, which only the Township Board has the authority to do.

In sum, it is my opinion that the Peninsula Township A-1 Agricultural District serves a common, standard, and reasonable public purpose in protecting agricultural land for agricultural production for the benefit and welfare of Township residents.

Exhibit 1



Thomas L. Daniels

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Education

1984 Ph.D. in Agricultural and Resource Economics, Oregon State University.

1977 M.S. in Agricultural and Resource Economics, University of Newcastle-upon-Tyne, England. Study on a Rotary Foundation Fellowship.

1976 B.A. cum laude in Economics, Harvard University.

Planning Experience

July 2003-
Present

Full Professor with Tenure, Department of City and Regional Planning,
University of Pennsylvania.

Teach: Land Use Planning, Environmental Planning, Planning for Climate Change,
and Land Preservation. Acting Chair, January-June 2006, July, 2015-June 2016.
Crossways Professor, 2020-present.

Erasmus Mundo Scholarship, University of Venice IUAV, March, 2017

Clarkson Chair, Department of Urban Planning, University of Buffalo, October, 2011.

July 1998-
June 2003

Full Professor with Tenure, The University at Albany, State University of New
York. Director of the Planning Master's Program, Fall 1998-December 2001.

Fulbright Senior Fellowship, University of New South Wales, Australia,
February-June, 2002.

May 1989-

July 1998

Director, Agricultural Preserve Board of Lancaster County, Pennsylvania. Administered a nationally-recognized farmland preservation easement acquisition program with an annual budget of over \$4 million. Preserved over 16,000 acres in 188 easement projects. Assisted Planning Commission staff with growth management and agricultural zoning issues. The program received the 1993 Outstanding Program Award from the Small Town and Rural Planning Division of the American Planning Association. Received the 1996 National Achievement Award from the American Farmland Trust.

Aug. 1987-

May 1989

Associate Professor with Tenure, Department of Regional and Community Planning, Kansas State University.

Jan. 1985-

July 1987

Assistant Professor, Department of Community and Regional Planning, Iowa State University. Taught in Semester Abroad program in London, Fall 1986.

Publications

Books

2018 The Law of Agricultural Land Preservation in the United States. Chicago: American Bar Association. (Senior author with John Keene).

2014 The Environmental Planning Handbook for Sustainable Communities and Regions (Second Edition). Chicago: American Planning Association.

2011 The Planners Guide to CommunityViz: The Essential Tool for a New Generation of Planning. Chicago: American Planning Association. (Second author with Doug Walker).

2007 The Small Town Planning Handbook (3rd edition). Chicago: American Planning Association. (Senior author with John Keller, Mark Lapping, Katherine Daniels, and Jim Segedy.)

1999 When City and Country Collide: Managing Growth in the Metropolitan Fringe. Washington, D.C.: Island Press.

1997 Holding Our Ground: Protecting America's Farms and Farmland. Washington, D.C.: Island Press. (Senior author with Deborah Bowers).

- 1989 Rural Planning and Development in the United States, New York: Guilford Publications. (Second author with Mark Lapping and John Keller).

Refereed Journal Articles

- 2022 "The potential of nature-based solutions to reduce greenhouse gas emissions from US agriculture," Socio-Ecological Practice Research, online August 4, doi.org/10.1007/s42532-022-00120-y

"How can the USA and China cooperate and learn from each other to reduce greenhouse gas emissions? Socio-Ecological Practice Research, online May 6, 2022. DOI 10.1007/s42532-022-00112-y

"Managing urban growth in the wake of climate change: Revisiting greenbelt policy in the US." Land Use Policy. Han, Albert, Thomas L. Daniels, and Chaeri Kim. Land Use Policy 112: 105867. <https://doi.org/10.1016/j.landusepol.2021.105867>.

- 2021 "Re-designing America's suburbs for the age of climate change and pandemics," Socio-Ecological Practice Research, 3(2), 225-236. <https://doi.org/10.1007/s42532-021-00084-5>.

- 2019 "Protected Land Management and Governance in the United States: More Than 150 Years of Change," (Senior author with Dan Moscovici). Society and Natural Resources, 33 (6).

"McHarg's Theory and Practice of Regional Ecological Planning: Retrospect and Prospect," Socio-ecological Practice Research, 1: 197–208. <https://doi.org/10.1007/s42532-019-00024-4>

"Assessing the Performance of Farmland Preservation in America's Farmland Preservation Heartland:: A Policy Review. Society and Natural Resources. 33(6):1-11. DOI: 10.1080/08941920.2019.1659893

"California's success in the socio-ecological practice of a forest carbon offset credit option to mitigate greenhouse gas emissions," Socio-ecological Practice and Research, Vol 1, No. 2, pp. 125-138. (2nd author with Chaeri Kim).

"The Napa County Agricultural Preserve: 50 Years as a Foundation of America's Premier Wine Region." *Journal of Planning History* Vol. 18(2): 102-115 .

- 2018 "The Plan for the Valleys: Assessing the Vision of David Wallace and Ian McHarg." *Journal of Planning History* Vol. 17, No. 1 (February, 2018) pp. 3-19. 2nd author with George Hundt, Jr.).

- 2017 "Preserving Large Farming Landscapes: The Case of Lancaster County Pennsylvania," *Journal of Agriculture, Food Systems and Community Development* Vol. 7, No. 3, pp. 67-81. (senior author with Lauren Payne-Riley).
- 2010 "Integrating Forest Carbon Sequestration Into a Cap-and-Trade Program to Reduce Net CO2 Emissions," *Journal of the American Planning Association*, 76 (4): 463-475.
- "The Use of Green Belts to Control Sprawl in the United States," *Planning Practice and Research*, 25: 2, 255 — 271.
- 2009 "A Trail Across Time: American Environmental Planning from City Beautiful to Sustainability. *Journal of the American Planning Association*. 75 (2): 178-192.
- 2005 "Land Preservation as a Key Element of Smart Growth," *Journal of Planning Literature*, 19:3, 316-329. (Senior author with Mark Lapping).
- 2001 "Smart Growth: A New American Approach to Regional Planning." *Planning Practice & Research*, Vols. 3 &4, pp. 271-281.
- 2000 "Integrated Working Landscape Protection: The Case of Lancaster County, Pennsylvania," *Society & Natural Resources*, 13:3, pp. 261-271.
- 1991 "The Purchase of Development Rights: Preserving Agricultural Land and Open Space," *Journal of the American Planning Association*, Vol. 57, No. 4, pp. 421-431.
- "The Goals and Values of Local Economic Development Strategies in Rural America," *Agriculture and Human Values*, Vol. 8, No. 3, pp. 3-9.
- 1989 "Small Town Economic Development: Growth or Survival?" *Journal of Planning Literature*, Vol. 4, No. 4, pp. 413-429.
- 1988 "America's Conservation Reserve Program: Rural Planning or Just Another Subsidy?" *Journal of Rural Studies*, Vol. 4, No. 4, pp. 405-411.
- 1987 "Small Town Triage: A Rural Settlement Policy for the American Midwest," *Journal of Rural Studies*, Vol. 3, No. 3, pp. 273-280. (Senior author with Mark Lapping).

Conference Papers and Presentations

- 2022 "The State of Farmland Preservation in Your County. Pennsylvania Land

Conservation Conference, March 17, 2022 Gettysburg, PA

2021 “Suzhou, China, Environmental Planning: What China and the United States Can Learn From Each Other, Sept. 24/5, 2021

2019 “Agricultural Performance Results from the 2017 Census of Agriculture and Implications for Farmland Preservation,” Farmland Preservation Roundtable, Saratoga Springs, NY, October 30, 2019.

2018 “The Law of Agricultural Land Preservation,” Pennsylvania Land Trust Association Conference, Malvern, PA, April 13, 2018

2017 “Using GIS to Measure Progress in Farmland Preservation,” Pennsylvania Land Trust Association Conference, Lancaster, PA, May 4, 2017.

2016 “Large Landscape Conservation: East,” American Planning Association National Conference, Phoenix, AZ, April 2, 2016

2015 “Green Infrastructure for Urban Stormwater Management,” Association of Collegiate Schools of Planning Conference, Houston, TX, October 22, 2015.

“What’s New in Environmental Planning?” American Planning Association Conference, Seattle, WA, April 18, 2015

2014 “A Comparison of Urban Containment: Oregon, Maryland, and Four Hybrid Counties.” Association of Collegiate Schools of Planning, Philadelphia, PA, October 30, 2014.

“Return on Investment: How PDR is Strengthening Local Economies and Remaining Relevant Moving Forward.” National Farmland Preservation Conference, Hershey, PA, May 12, 2014.

2013 “Planning for Climate Change: Mitigation and Adaptation,” Planners Training Session, Seattle, June 11-12, 2013.

“Philadelphia: Urban Water: Managing Stormwater, Rivers, and Watersheds,” Urban Ecosystems Services and Decision Making: A Green Philadelphia Conference, Philadelphia, PA, May 23, 2013.

“Climate Change Adaptation,” American Planning Association Conference, Chicago, IL, April 16, 2013.

2012 “Planning for Green Infrastructure,” Planners Training Session, Charlotte, NC, November 15-16, 2012.

- 2011 "Greenbelts to Control Sprawl in the United States," American Planning Association Conference, Boston, April 10, 2011.
- 2010 "Landscape Scale Farmland Preservation," American Society of Landscape Architects Conference, Washington, DC, September 14, 2010.

Professional Reports

- 2022 Regulating Utility-Scale Solar Projects on Agricultural Land, Kleinman Center for Energy Policy, University of Pennsylvania. August, 2022, 7 pp. (Senior author with Hannah Wagner).
- 2021 Study on Inclusionary Housing with Chrissy Quattro for Penn IUR, December 2021, 75 pp.
- 2020 The State of Farmland Preservation in Lancaster County. For Lancaster Farmland Trust, September 2020, 35 pp.
- An Analysis of the Economic Impact of the Farmland Preservation Program in Carroll County, Maryland. Westminster, MD: Carroll County, MD, 53 pp.
- 2019 Agricultural Land Protection, Annexation, and Housing Development: An Analysis of Programs and Techniques with Potential Use in Napa County: A Report for the Jack L. Davies Napa Valley Agricultural Preservation Fund, 108 pp.
- An Analysis of the Economic Impact of Pennsylvania's Farmland Preservation Program, Pennsylvania Department of Agriculture, 78 pp.
- 2017 Land Use Study, Solebury Township, PA, 25 pp.
- 2010 Cost of Community Services Study for Four Municipalities and the Hempfield School District, for East and West Hempfield Townships and the Hempfield School District in Lancaster County, PA, 51 pp.
- 2008 Ideas for Rural Smart Growth, Promoting the Economic Viability of Farmland and Forestland in the Northeastern United States, for the Office of Smart Growth, US Environmental Protection Agency, Washington, D.C., 40 pp.
- An Evaluation of the Peninsula Township, Michigan Farmland Preservation Program, for the Grand Traverse Regional Land Trust, Traverse Bay, MI, 60 pages.

- 2007 An Evaluation of the Consistency of the Plum Creek Timber Company Proposed Concept Plan in the Moosehead Lake Region with the Comprehensive Land Use Plan of the Maine Land Use Regulation Commission, 46 pp.
- 2006 Final Report to the National Fish and Wildlife Foundation: An Evaluation of the Foundation's Conservation Easement and Capacity-Building Grants Program. 221 pp.
- 2003 Dakota County, Minnesota, Farmland and Natural Area Preservation Program Guidelines, 54 pp., co-author with Jean Coleman, June, 2003.

Grants

- 2022 Climate Social Science Network. Agricultural Organizations and Their Messaging About Climate Change and Recommended Responses. \$16,000. Principal Investigator.

Robert Schalkenbach Foundation. The California Sustainable Agricultural Lands Conservation Program: Evaluating the Use of Cap-and-Trade Funds to Promote Climate Mitigation and Adaptation. \$5,000. Principal Investigator.
- 2021 Kleinman Center for Energy Policy. Regulating Utility-Scale Solar Projects on Agricultural Land. \$4,500. Principal Investigator.
- 2019 Pennsylvania Department of Agriculture, An Analysis of the Economic Impact of Pennsylvania's Farmland Preservation Program, \$13,500. Principal Investigator.
- 2013-17 U.S. EPA. Green Infrastructure for Urban Stormwater Management. \$1 million. Project associate.
- 2004-06 National Fish and Wildlife Foundation. Effectiveness of NFWF's Investments in Conservation Easements to Protect Wildlife Habitat. \$125,000. Principal Investigator.
- 2002 Open Space Institute, Study of Sprawl and Land Use Change in the Capital District of New York, \$40,000. Project associate.
- 2000 Hudson River Foundation, Study of Land Use Planning Techniques in the Chesapeake Bay Estuary and the Hudson River Estuary, \$61,396, Principal Investigator.

Professional Memberships

1983 - Member, American Planning Association
Present

2004- Member, Land Protection Committee, Lancaster County
Present Conservancy (PA)

2005- Member, Board of Trustees, Orton Family Foundation
2020

2011- National Advisory Board, Land Conservation Advisory Network, Yarmouth,
Present Maine.

2012- National Advisory Board, Equine Land Conservation Resource,
Present Lexington, KY

2014- National Advisory Board, Conservation Finance Network, Washington, DC
Present

Expert Witness Report

Submitted in Support of Plaintiffs

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

V.

PENINSULA TOWNSHIP, a Michigan municipal corporation, Defendant

And

PROTECT THE PENINSULA, Inc., Intervenor-Defendant

Case No. 1 20-CV-01008

Peninsula Township Zoning Ordinance

A Land Use Code

Grand Traverse County

Traverse City, MI 49686

Effective Date June 5, 1972, and Amendments

In Accordance With:

Second Amended Case Management Order (ECF 343) and

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

Prepared by:

**DAVID E. Moss, Principal
DAVID MOSS & ASSOCIATES, INC.**

1009 Wilshire Blvd., Suite 224

Santa Monica, CA 90401

Tel (310) 395-3481

Name, Professional Address and Telephone Number of Expert:

David E. Moss, D. Env
 David Moss & Associates, Inc.
 1009 Wilshire Blvd., Suite 224
 Santa Monica, CA 90401
 (310) 395-3481

Area of Expertise:

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

Short Summary of Expected Testimony:

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

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

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

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

Qualifications:

My qualifications include:

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

Introduction and Background of Assignment:

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

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

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

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

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

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

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

Peninsula Township Environmental Setting:

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

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

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

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

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

Peninsula Township Lands and Applicable Socio-Economic Data:

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

Opinions are Based on Three Sections of the Township Zoning Ordinance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Opinion: Wineries Increase Agricultural Preservation

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

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

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

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

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

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

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

By: _____



Date: August 28, 2023

David E. Moss

Summary of qualifications

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

Professional experience

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

President

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

1984 – 1987 Engineering Science/Parsons Pasadena, CA

Senior Scientist/EIS-EIR Compliance

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

Education

BA, Biological Sciences, Univ. of Delaware, 1976

MA, Marine Studies, Univ. of Delaware, 1979

D. Env., Env. Science and Engineering, UCLA, 1989

MDE Certificate, UCLA Anderson School of Management, 1996

**Conference
speaking**

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

Publications

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

Report of Retained Expert Witness

Submitted Under Rule 26(a)(2)(B)

in Support of Plaintiffs

Wineries of the Old Mission Peninsula Association ("WOMP")

v.

Peninsula Township and Protect the Peninsula, Inc.

Case No. 1:20-cv-01008

Prepared and signed by:

Teri Quimby, J.D., LL.M.,
President
Quimby Consulting Group, LLC

E: teri@terquimby.com

C: 517-230-8320

Page 2

I have been retained as an expert witness and submit the following information under Rule 26(a)(2)(B):

1. Expert Witness contact Information.
 - a. Name: Teri Quimby, J.D., LL.M.
 - b. Company: President, Quimby Consulting Group
 - c. Address: 776 W. Grand River Avenue, Brighton, MI 48116
 - d. Email: teri@teriquimby.com
 - e. Cell: 517-230-8320
2. Qualifications of witness.
 - a. Former Commissioner, Michigan Liquor Control Commission.
 - b. Eight years of working knowledge and application of the Michigan Liquor Control Code.
 - c. CV attached.
3. Publications. A list is included in my CV; please refer to that list.
4. Sources Reviewed.
 - a. Plaintiff's Brief in Support of Motion for Partial Summary Judgment on Preemption Claims, ECF No. 334.
 - b. Peninsula Township's Corrected Response to Plaintiff's Motion for Partial Summary Judgment on Preemption, ECF 353.
 - c. PTP's Brief Opposing Plaintiff's Motion and Supporting PTP's Cross-Motion for Partial Summary Judgment on Preemption Claims, ECF No. 356.
 - d. Peninsula Township Zoning Ordinance (PTZO), a Land Use Code, Peninsula Township, Grand Traverse County, Traverse City, MI 49686; Effective Date: June 5, 1972; Including Amendments through August 31, 2009.
 - e. Michigan Liquor Control Code, MCL 436.1101 et seq.
 - f. Michigan Administrative Code, R 436.1001 et seq.
 - g. Michigan Constitution, Article IV, § 40
 - h. U.S. Constitution, Twenty-First Amendment.
 - i. *Noey v. Saginaw*, 271 Mich. 595; 261 N.W. 88 (1935).
 - j. *R.S.W.W., Inc. v City of Keego Harbor*, 397 F.3d 427 (6th Cir. 2005).
 - k. *Allen v. Liquor Control Commission*, 122 Mich. App. 718 (1982).
5. Exhibits. No exhibits are submitted.
6. Other cases in last four years where witness has testified as an expert at trial or by deposition. No other cases are listed.
7. Compensation paid for report and testimony.
 - a. Payment is based on an hourly rate.
 - b. The hourly rate is \$425 an hour.

Page 3

8. Opinion: **The Michigan Liquor Control Commission (MLCC) has sole authority over the alcohol in Michigan as granted to it by the U.S. Constitution, Michigan Constitution, and Michigan statute.**

- a. As a Commissioner, I accepted the great responsibility for the regulation of alcohol at the state level that is established by the Twenty-First Amendment, the Michigan Constitution, and the Michigan liquor control code. The Michigan liquor control commission ("Commission") has sole authority to issue a license for alcohol. When considering commission actions, I looked to the grant of authority from these sources.
- b. The historic era of alcohol prohibition was followed by regulation of it. Even now the alcohol beverage industry continues to be one of the most highly regulated by government. And although the length of the Twenty-First Amendment of the U.S. Constitution may be viewed as short, the carefully chosen words are extremely powerful with meaning for the regulation of this industry. For example, it prohibits the transporting or importing into "any **State**, Territory, or possession of the United States" for "**delivery or use therein**" . . . "in violation of **the laws** thereof." (Emphasis added.). After a state allows alcohol within its borders, then the state government controls it.
- c. In Michigan, the Constitution provides discretion in Article IV, §40 to the Michigan Legislature to statutorily create a liquor control commission. The legislature acted and the law is currently referenced as the "Michigan liquor control code of 1998." The specific wording in §40 states that the Commission "shall exercise **complete control** of the alcohol beverage traffic within this state, **including the retail sales** thereof" subject to statutory limitations. (Emphasis added). Also, it is important to note the words in the final sentence: "Neither the legislature nor the commission may authorize the manufacture or sale of alcoholic beverages **in any county** in which a majority of the electors voting thereon shall prohibit the same." (Emphasis added.). This one specific acknowledgement of local ability—to prohibit alcohol within a county, through the voice of voters—does not equate to a grant of authority to a local unit of government within a county to prohibit the manufacture or sale of alcohol. The state's complete control over alcohol is only limited in the few counties choosing to prohibit alcohol.
- d. MCL 436.1209 creates the Commission and clearly states in law the Commission's responsibilities over alcohol. This includes licensing, purchasing, enforcement, merchandising, and distribution. Further, while the Commission is the only authorized government entity enabled to grant alcohol licenses, it is also clear under MCL 436.1903(1) that commissioners are the only ones

Page 4

empowered to suspend or revoke an alcohol license—not local units of government.

- e. The constitutional grant of “complete control” is “subject to statutory limitations.” What are examples of these limitations placed on the Commission? If the Commission finds a violation, the maximum fine is set by statute (MCL 436.1903). If the Commission suspends or revokes a license, a notice and hearing is required by statute (MCL 436.1903). If the Commission approves a license in a quota category, the maximum number of available licenses is established in the law (MCL 436.1531). Simply stated, the Commission cannot exercise control beyond any legislatively set limits and has complete control up to those limits.

9. **Opinion: Unless the legislature statutorily limits the commission, the commission has complete control over alcohol in Michigan, which supports the preemption argument.**

- a. As a commissioner I looked to the enacted words—every one of them deemed to be intentionally chosen by the legislature—to guide me in the application of the law to the facts. Every word requires recognition. Only a handful of detailed provisions in the liquor control code exist that allow for very specific actions by local government. One example is MCL 436.2113, which governs Sunday alcohol sales. The wording of these provisions that allow limited local engagement deserves detailed attention.
- b. As noted, the law governing Sunday sales of alcohol is one example from the liquor control code specifically allowing local county governments to exercise extremely limited discretion over a very specific activity. The county may choose to act by resolution to prohibit Sunday sales or it may be forced by petition to place the issue on the ballot. Either way, if the prohibition of Sunday sales is approved for the county, then the prohibition is directed toward the licensee; it is not a limitation on the Commission or the Commission’s complete control over alcohol. Sunday sales are allowed, and regulated by the Commission, unless the county prohibits it by following the specifically outlined provisions set forth in statute.
- c. Once the Commission approves a license, MCL 436.2113(1) clearly states that a licensee “may sell at retail, and a person may buy, spirits or mixed spirit drink between the hours of 7 a.m. on Sunday and 2 a.m. on Monday.” This is the law, and it allows licensees to do this activity on the licensed premise, except for any of these specifically stated statutory reasons:
 - i. a county prohibits Sunday sales by a majority-approved resolution or voter-approved ballot initiative for consumption on or off the premises, or both; or

Page 5

- ii. any city, village, or township chooses to prohibit Sunday sales by resolution or ordinance—if on a legal holiday, primary election day, general election day, or municipal election day.
- d. The Sunday sales law is specific as to how, when, and which local government may engage on a limited basis in state authorized activities of an alcohol licensee. Also, the law differentiates the actions allowed by the various types of local governments. Further, the statute even sets forth specific ballot language to be used by a county for a Sunday sales vote. Overall, the law is comprehensively prescriptive in nature, leaving little room for the local government's own discretion or agenda.
- e. Defendant Peninsula Township also overlooks a key analytical point in the Keego Harbor case, choosing to quickly dismiss the case's relevance because the ruling is focused on the doctrine of unconstitutional conditions rather than being primarily a preemption or zoning case. (ECF No. 353, p. 24). However, the Keego Harbor Court pays close attention to what a city ordinance can't do, referencing the Noey decision; a city ordinance "cannot fix closing hours to a period shorter than that specified in the state rule." (*R.S.W.W., Inc. v City of Keego Harbor*, 397 F.3d 427, 435, citing *Noey v. City of Saginaw*, 271 Mich.595, 261 N.W. 88 (1935)). The Court comments that Mich. Admin. Code R 436.1403 does not appear to grant an explicit right to remain open "until 2:00 a.m." but, rather, prohibits alcohol sales "after 2:00 a.m." (*Id.*). Once again, the Commission has complete control over the license, licensee, and the licensed premises—including hours of operation. The limitation imposed on the Commission here is clear; the Commission cannot extend a licensee's hours of operation to include the hours between 2:00 a.m. and 7:00 a.m. However, the Commission's exercise of complete control over the legal hours of operation is verified on the Commission's website. Both the Licensing and the Enforcement Divisions reiterate the legal hours for serving or selling alcohol in Michigan is 7:00 A.M. To 2:00A.M. State regulations set and enforce this timeframe for the legal hours. Thus, the sale and service of alcohol is authorized during this time. The only limitation is for very specific reasons, such as by a county's prohibition on alcohol or by a local unit's Sunday sales prohibition for a legal holiday falling on a Sunday.
- f. Further, Michigan Administrative Code R 436.1403 addresses the need for a business wanting to stay open past the legal hours for alcohol sales and service—not for alcohol, but, rather for food service or other non-alcohol activities. Approval for these activities is reserved for and granted by the state.

Page 6

- g. This state control analysis extends to other provisions of the liquor control code and supports the position that the Commission has complete control over the regulation of alcohol in Michigan, unless specifically limited. Since the Commission is charged with review and consideration of additional activities for a licensee taking place on licensed premises, such as music, dancing, food, catering, and more, the Commission solely regulates the specifically mentioned activities occurring on the state-licensed premises.
- h. As a commissioner I did not interpret the liquor control code as allowing any type of local government engagement in the alcohol licensee's activities on a licensed premise, unless specifically set forth in the liquor control code.

10. Opinion: Defendant applies incorrect reasoning in concluding that because the township merely restricts the location of activities rather than prohibiting them, state law does not preempt the PTZO from doing so.

- a. As a commissioner, I placed great importance on the specificity of a well-defined and clearly marked perimeter of a licensed premise for clarity on exactly where alcohol is, and what activities are taking place where the alcohol is located. Given the highly regulated nature of alcohol, the Commission has complete control over these activities for a licensee at the location of the alcohol license. If the liquor control code authorizes an activity for a licensee, without exceptions, then the licensee may engage in that activity. Period.
- b. Otherwise, this highly regulated product would fall under an undesirable, loosely quilted patchwork of thousands of local governments trying to regulate what is perhaps the highest, or one of the highest, regulated industries of all.
- c. Rulemaking authority is clearly granted to the Commission under MCL 436.1215 to regulate "the duties and responsibilities of licensees in **the proper conduct and management of their licensed places.**" (Emphasis added.). The Commission retains complete control over a license, licensee, and state-specified activities on licensed premises.
- d. The definition of "licensee" describes the relationship between the Commission and the licensee, with the Commission granting authority to the licensee. (MCL 436.1107(13)). The Commission retains complete control over the license, licensee, and state-specified activities on the licensed premises.
- e. The definition of "licensed premises" in R 436.1001(1)(i) basically encompasses any part of the real estate owned or operated by a licensee "in the conduct of the business at the location for which the licensee is licensed by the

Page 7

commission...". The alcohol license applies to the *conduct of the business*, and to *the location licensed by the commission*. Once the location is licensed by the Commission, the licensed premises along with the conduct of the business at that location falls under the control of the Commission. Any activities on state-licensed premises that are set forth in statute or rules falls exclusively with the Commission. The Commission retains complete control over the license, licensee, and state-specified activities on the licensed premises.

- f. Given the Commission's complete control, the liquor control code and administrative rules preempt the PTZO from restricting the location of state-specified activities allowed under the state regulations for a licensee. The PTZO prohibits what is allowed by statute.


11. Opinion: Defendant places improper reliance on Michigan Administrative Code R 436.1003 by labeling the rule as a "warning" to licensees, as well as improper inference of Commission authority over non-alcohol related codes such as building codes, fire codes, and health codes.

- a. As a Commissioner I would see businesses anxious to open as soon as the alcohol license was approved. While the Commission clearly has control over alcohol licenses, licensees, and activities on licensed premises, the Commission does not have statutory authority to enforce other codes. The approval of an alcohol license does not equate to a building occupancy permit, for example. Nor does it equate to a health department license. And it does not equate to an approval for having the required number of toilets.
- b. At some point while I served as a commissioner, the commissioners made the decision to include the language of R 436.1003 in Commission approval orders and on the license *as a reminder* to work with local units of government on matters concerning building, plumbing, zoning, sanitation, and health laws, rules, and ordinances. The Defendant's choice to label this reminder as a "warning" is misguided in my opinion, based upon my experience with this issue at the Commission. (ECF No. 350, p. 14).
- c. Defendant focuses on the word "zoning" and implies the *Allen* case creates an absolute permission to force compliance with all local zoning ordinances—even if the ordinances create a conflict with state authority. (ECF No. 353, p. 13-14). However, the Court notes that the exercise of police powers by local units of government is subject to the Commission's authority. (*Allen v. Liquor Control Comm.*, 122 Mich. App. 718, 720 (1982)). When a conflict arises, as it does here with the PTZO, the Commission's state authority preempts the local regulation.

Page 8

12. Conclusion. State authority over the regulation of alcohol extends state-wide and is constitutionally limited only in those counties prohibiting the manufacture or sale of alcohol and is statutorily limited only in a few specifically stated circumstances allowing for local government engagement. The state has complete control over state-specified activities occurring on licensed premises. In this case, a conflict arises between the state regulations and the local ordinance (PTZO). The state regulations over alcohol licenses, licensees, and specifically authorized activities on licensed premises preempt the attempted regulation by this local unit of government.

The above opinions are prepared and submitted by:


Teri Quimby, J.D., LL.M.,
President
Quimby Consulting Group, LLC

Teri Quimby, J.D., LL.M.

Corporate Governance · Compliance · Communication

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Accomplished attorney, board member, and former state regulator with background in several heavily regulated industries. Provides critical thinking and a mediator's approach for engaging others to drive actionable, positive solutions. Understands complex issues, appreciates diverse perspectives, and attends to details. A professional who handles information with discretion and care.

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|--------------------------------|--|
| Critical Transformation | Challenges status quo by continuously looking for optimized governance and compliance solutions, and streamlined practices, procedures, and modern techniques that move organizations forward to better serve all stakeholders with integrity. |
| Strategic Guidance | Guides the implementation and maintenance of regulatory and operational policies based on understanding of business practices, identifying opportunities, and managing risks. |
| Consensus Building | Blends relationship- and knowledge-based approaches to encourage dialogue that facilitates impactful changes rooted in understanding business objectives and stakeholder support. |
| Thought Leadership | Provides innovative perspectives and insights, impeccable research skills, and effective strategy planning and implementation to move matters forward. |

PROFESSIONAL EXPERIENCE

WESTERN MICHIGAN UNIVERSITY-COOLEY LAW SCHOOL · Adjunct Professor 2022 – Present

Adjunct Professor teaching legal drafting, a required third-year law school course, in the writing department.

ATTORNEY AT LAW / CONSULTANT · Teri Quimby Law, PLLC / Quimby Consulting Group, LLC 2019 – Present

Legal services, focusing on administrative law. Consulting services, focusing on governance and compliance initiatives, research, writing, and public policy issues.

GRAND VALLEY STATE UNIVERSITY, CHARTER SCHOOLS OFFICE · Governance & Compliance Consultant 2021 – 2022

Consultant for GVSU chartered school boards, focusing on board governance and compliance with university granted charter authorization contracts and regulatory compliance. Developed board training programs; promoted good governance initiatives.

COMMISSIONER · Michigan Liquor Control Commission 2011 – 2019

Appointed by the Governor of Michigan to carry out Constitutional and statutory responsibilities over alcoholic beverage traffic in Michigan (including manufacturing, importation, possession, transportation, and sales); also served on agency appellate board.

- ▶ **Business Transformation:** Modernized Commission's business practices by creating streamlined, constituent-focused processes.
 - Improved licensing procedures, resulting in 64% less processing time through commission-initiated, staff-driven project.
 - Commission received international recognition with 2016 Process Excellence Network Award for "Best Process Improvement Project Under 90 Days," outcompeting finalists from other states and foreign countries.
- ▶ **Hearings & Appeals:** Conducted and frequently chaired daily meetings to vote on Commission decisions for licensing applications, hearings and appeals, declaratory rulings, rulemaking, and wholesaling of spirit products. Exercised statutory subpoena power.
 - Empaneled as agency appeal board (approx. 200 cases per year); decisions based on careful application of statutes and rules.
 - Authorized actions included revocation and suspension of licenses. Also empowered with statutory authority to issue emergency suspension orders with immediate effect when necessary to maintain health, safety, and welfare.
- ▶ **Wholesale Oversight:** As a "control state" and "market participant" for spirit product sales, oversaw the Commission's money-making state enterprise and proprietary fund, which transfers \$200 million or more annually into the state's general fund.

CERTIFIED CIVIL MEDIATOR · Teri Quimby, Esq. 2006 – 2011

General services focused on civil, domestic, and special education mediations and facilitations. Prepared detailed mediation agreements achieving thoroughness and accuracy, avoiding opportunities for speculation and interpretation.

DEPUTY DIRECTOR & SENIOR LEGAL COUNSEL · Michigan House Of Representatives 1991 – 2006

Within the House Majority Policy Office, worked with both parties, and other internal and external stakeholders, to advance Michigan's public policy formation through legislation. Facilitated consensus with members and interest groups. Directed 20+ policy advisors, advised 50+ caucus members, and supported personnel functions such as including hiring and staff development. Highlights include:

- ▶ **Environmental Policy:** Key participant in collaborative group process codifying related laws into one, user-friendly code—Natural Resources and Environmental Protection Act (NREPA), Public Act 451 of 1994.
- ▶ **Public Utility Policy:** Critical collaborator on major revisions to Michigan Telecommunications Act, Public Act 295 of 2000, and Customer Choice and Electric Reliability Act, Public Act 141 of 2000.

BOARD POSITIONS

VICE-PRESIDENT FINANCE & TREASURER · National Speakers Association-Carolinas Chapter 2023-Present
Elected by members to be entrusted with appropriate handling of all financial aspects of the association, included preparation of monthly and annual P&L statements.

EDITORIAL & ADVISORY BOARD · Society of Corporate Compliance & Ethics, *The Complete Manual* 2023 – Present
Provider of thought leadership and editorial review for this globally distributed, annually updated manual on compliance.

EDITORIAL BOARD · American Craft Spirits Association, *Craft Spirits Magazine* 2022 – Present
Provider of thought leadership and editorial review of this globally distributed magazine on craft spirits.

CORPORATE BOARD OFFICER · Start-Up Company, Finance Sector 2021 – Present
Provider of governance and leadership as secretary and board member for an SEC-regulated corporation.

PRESIDENT & OFFICERS · National Conference of State Liquor Administrators 2015 – 2019
Served as 1st, 2nd, and 3rd Vice President; Central Region Chair; Annual Conference Program Planning Committee Member
Elected by peers from other states to promote dialogue between state regulators and others involved in all aspects of the alcoholic beverage sector. Improved governance through modernization of articles of incorporation, bylaws, and other policies and procedures.

CHARACTER & FITNESS COMMITTEE MEMBER · State Bar of Michigan District E 2010 – 2016
Appointed by the State Bar of Michigan Board of Commissioners to review and determine fitness of applicants for bar admission.

UTILITY CONSUMER PARTICIPATION BOARD CHAIR · State of Michigan 2000 – 2003
Appointed by Michigan Governor to review applications and grant funding to non-profit organizations that represent Michigan utility ratepayers in cost recovery proceedings between utilities and Michigan Public Service Commission.

BOARD TRUSTEE · Delta Charter Township 1992 – 1996
Committees: Environment/Utility Chair; Transportation and Elections Committee
Elected to public office by community to represent 29,000 township constituents and lead 70+ employees, with oversight for responsible spending of \$15 million annual budget. Chosen as Board's representative to serve on Zoning and Sign Boards of Appeals.

AWARDS & RECOGNITION

- ▶ **NLEA: Award of Appreciation (National)** 2021
- ▶ **Crain's Business Detroit: Most Notable Women Lawyers in Michigan (State)** 2017
- ▶ **NALCP: Best Practices Award for Extraordinary Innovation, Dedication & Leadership (National)** 2017

BAR ADMISSIONS & EDUCATION

- ▶ **Michigan & Illinois** · Admitted and in good standing
- ▶ **Post Graduate Certificate in Competition Policy (One Year Course)** · University of East Anglia, Centre for Competition Policy (U.K.)
- ▶ **LLM-Corporate Law: Regulatory Analysis & Compliance** · Widener University, Delaware Law School (U.S.)
- ▶ **JD** · Western Michigan University, Cooley Law School (U.S.)
- ▶ **BA · Major: Justice, Morality & Constitutional Democracy; Minor: German** · Michigan State University, James Madison College (U.S.)

MEDIATION CERTIFICATIONS

- ▶ Civil Mediation
- ▶ Domestic Relations Mediation
- ▶ Special Education Mediation & Facilitation

December 4, 2023

Source: Plaintiffs' Expert Report of Teri Quimby, August 28, 2023

Page 11 of 12

PROFESSIONAL AFFILIATIONS & MEMBERSHIPS

- ▶ Society of Corporate Compliance and Ethics (SCCE)
- ▶ National Association of Corporate Directors (NACD)
- ▶ Association of Certified Fraud Examiners (ACFE)
- ▶ National & State Speakers Associations (NSA-MI & NC/SC)
- ▶ American Craft Spirits Association (ACSA)
- ▶ National Liquor Law Enforcement Association (NLLEA)

REGULATORY & LEADERSHIP CERTIFICATES & TRAINING

- ▶ 25-hour Internal Investigations Workshop—Society of Corporate Compliance & Ethics (SCCE); special training on investigation techniques, documentary evidence, interviews, legal elements, conclusions and reports.
- ▶ 30-hour Compliance & Ethics Academy—SCCE; comprehensive program on compliance practice, legal and disclosure issues, auditing, best practices, investigations, and anti-corruption enforcement.
- ▶ 40-hour Certificate—NM State University College of Business Administration and Economics, Center for Public Utilities; intensive program on telecommunications rate-making and related issues.
- ▶ 40-hour Certificate—NM State University College of Business Administration and Economics, Center for Public Utilities; intensive program on public utilities rate-making and related issues.
- ▶ 80-hour Certificate—Institute of Public Utilities at MSU; intensive public utility regulatory and policy program.
- ▶ 80-hour Certificate—University of MN Humphrey Institute of Public Affairs, Legislative Staff Management Institute; emphasis on conflict negotiation, management techniques and strategic planning.
- ▶ 160-hour Certificate—Environmental Leadership Institute (Michigan Department of Natural Resources, Western Michigan University and Michigan State University); land management, natural resources, and environment management techniques.

PRESENTATIONS AT NATIONAL & REGIONAL CONFERENCES

- ▶ **Practising Law Institute (PLI)**
 - Ethics of Advising in Grey Areas (2022 & 2023);
 - Legal Issues in Alcohol Industry (2021);
 - Industry Trends & Emerging Legal Issues (2020)
- ▶ **Hospitality Law Annual Conference, Washington D.C.**
 - Evaluating Your Ethics & Compliance Culture: Check the Box, or Test & Track? (2022)
- ▶ **SOVOS Ship Compliant Annual Wine Summit**
 - The Shifting Beverage Alcohol Regulatory Landscape (2021); State Regulations in Motion (2017)
- ▶ **National Conference of State Liquor Administrators (NCSLA) Annual & Regional Conferences**
 - Rise of the Retail Tier & Impact of US Supreme Court Case—*TN Wine & Spirits Retailers v. Thomas* (2019)
 - Revealing the Great Oz—Behind the Curtain of the All-Powerful Regulator (2018)
 - I Know It When I See It—A Regulator's Guide to Tied House Policies & Things of Value (2018)
 - Regulator "Hot Topics" (2017)
 - The Other 3 Tier System of Legislators, Lobbyists & Laws: How Sausage is Really Made & Are Ethics Part of the Ingredients? (2017)
 - Social Media—Can Regulators Keep Up with the Marketplace or Will They & the System Fall Subject to "Adverse Possession?" (2016)
 - Cutting Edge Retail Practices—Balancing Consumer Demand, Market Forces & Regulations (2016)
 - Economic Development to Regulate Strictly, or Promote Economic Development? (2015)
 - Trade Practice Innovation—New, Exciting & Legal? (2015)
- ▶ **National Association of Licensing Compliance Professionals (NALCP) Annual Conferences**
 - Regulatory Updates (2019 & 2016); The Life Cycle of Information Privacy (2018); Innovative Licensing & Alcohol Regulators' Race with Technology in the 21st Century (2017)
- ▶ **Continuing Legal Education International (CLEI) Annual Conferences on Wine, Beer & Spirits Law**
 - The Significance of Regulatory Compliance (2016, 2017 & 2019)
- ▶ **Michigan Bar Association, Administrative Law Section**
 - Annual Meeting Speaker, Regulatory Update (2012-2019)
- ▶ **National Alcohol Beverage Control Association (NABCA) Legal Symposium**
 - Unraveling Trade Practice Violations (2019); Ethics—What Does Industry Want from Regulators? (2015)
- ▶ **National Liquor Law Enforcement Association (NLLEA) Annual Conference**
 - The Three-Tier System—Current Challenges Faced by Regulators & Enforcement (2018)
- ▶ **Responsible Retailing Forum**
 - Regulator Perspectives on Responsible Beverage Service (2017)
- ▶ **Michigan Brewer's Guild Winter Conference**
 - Rules & Regulations Related to Microbreweries (2017)
- ▶ **Responsible Hospitality Institute**
 - Sociable City Leadership Summits—Craft Culture (2017); State & Local Cooperation (2016)
- ▶ **Women in Government 22nd Annual Midwestern Regional Conference**
 - Adult Beverages—History & Update (2015)

MEDIA COVERAGE & PUBLICATIONS

| | |
|--|------|
| ▶ ACSA-Craft Spirits Magazine, "Minding Compliance: Understanding Compliance & Why It Matters to Craft Distillers" | 2023 |
| ▶ ACSA-Contributor to E-Book, "The ACSA Guide to Starting & Operating A Distillery" | 2023 |
| ▶ R Street Institute, "Comment to TTB on Potential Competition Rulemaking for the Alcohol Industry" | 2023 |
| ▶ SCCE-CEP Magazine-Column, "Better Board Communication" | 2023 |
| ▶ SCCE-CEP Magazine-Column, "What Value Do You Bring to The Board?" | 2023 |
| ▶ SCCE-CEP Magazine-Column, "Quantity Versus Quality: Communicating Measurements That Matter" | 2023 |
| ▶ SCCE-CEP Magazine-Column, "Personal Liability Fears: Reaction Versus Response" | 2023 |
| ▶ SCCE-Ethikos, "Designing Documents: Using the Art of Persuasion to Influence with Integrity" | 2023 |
| ▶ The American Spectator, "American Saloon Series: A Disturbing Precedent for America" | 2022 |
| ▶ SCCE-Ethikos, "Building Better Culture & Compliance With Trust" | 2022 |
| ▶ SCCE-Ethikos, "Culture & Code of Ethics: Connecting the Dots Through Measurement" | 2022 |
| ▶ SCCE-CEP Magazine (Cover & Featured Interview), "Meet Teri Quimby: Communication is a Priority" | 2022 |
| ▶ SCCE-Manual, "Government Agencies—Effective Compliance Programs are Necessary for Public Trust" | 2022 |
| ▶ R Street Institute, "Comments on Alcohol Industry Competition. Docket No. TTB-2021-0007; Notice No. 204." | 2021 |
| ▶ SCCE-CEP Magazine, "Are compliance violation 'smoking guns' hiding in the board minutes?" | 2021 |
| ▶ PLI Chronicle, "Export Controls in Academia: Bridging the Gaps" | 2021 |
| ▶ PLI Chronicle, "Vaccination Verification: Alcohol Licensee Mandates & Compliance Considerations" | 2021 |
| ▶ PLI Chronicle, "New Year's Resolution for Alcohol Licensees: Tip Scales in Your Favor with More Compliance" | 2021 |
| ▶ Governing, "A Chance to Liberate Booze Delivery — if Government Allows It" | 2021 |
| ▶ CEP Magazine, "Blockchain: Moving Target or Trusted Tech Trend?" | 2020 |
| ▶ SCCE, "Truth or Consequence: Demonstrating Regulator Ready Compliance Plans vs Consequences of First Draft Plans" | 2020 |
| ▶ USA Today, "A Century After Prohibition, Will the Coronavirus Finally End It? We'll Drink To That" | 2020 |
| ▶ R Street Institute, "Coming to a Door Near You: Alcohol Delivery in the COVID-19 New Normal" | 2020 |
| ▶ Crain's Business Detroit, "2017 Notable Women Lawyers in Michigan" | 2017 |
| ▶ Michigan Bar Journal, "Liquor Licensees: Avoiding Consequences of Negative Employee Actions" | 2016 |

August 25, 2023

Dear Joe Infante,

This letter serves as my expert report under Federal Rule of Civil Procedure 26(a)(2)(B). You asked me to express an opinion on the following topics: (1) what is “agritourism”, (2) whether “agritourism” is considered an agricultural use, and (3) whether “agritourism” is necessary for the viability of Michigan farms. A summary of my opinions is included below, along with the other information that I understand is required by Federal Rule of Civil Procedure 26(a)(2)(B).

Qualifications

I am a lifelong farmer. I served as the Director of the MDARD from January 1, 2019 through December 31, 2022. MDARD is responsible for cultivating and expanding economic opportunities for the food and agricultural sector; safeguarding the public’s food supply; inspecting and enforcing sound animal health practices; controlling and eradicating plant pests and diseases; preserving the environment by which the farming community makes their living and feeds consumers; and protecting consumers by enforcing laws related to weights and measures.

As Director, my duties included supervising six divisions, including the Agriculture Development Division, Animal Industry Division, Environmental Stewardship Division, Food and Dairy Division, Laboratory Division, and Pesticide and Plant Pest Management Division. The Agriculture Development Division also provides executive support for the Craft Beverage Council. I was the Chair of the Craft Beverage Council. My duties also included reviewing and approving the Generally Accepted Agricultural and Management Practices (GAAMPs) under the Michigan Right to Farm Act. The GAAMPs are updated annually to utilize current technology promoting sound environmental stewardship on Michigan farms.

A copy of my most recent resume, which more fully details my experience, is attached as Exhibit A. This resume is current up to my time with MDARD.

Publications and Prior Expert Testimony

I have not personally authored any publications within the last ten years. I have not testified at trial or by deposition as an expert within the last four years.

Compensation

I am being paid on an hourly basis. My hourly rate is \$435.00. My compensation is not contingent in any manner on the success of this case.

Facts and Data Considered

In forming these opinions, I relied on my experience as Director of MDARD for 4 years. During my time as Director of MDARD, Michigan agritourism was a top priority. Each year, October was proclaimed as 'Agritourism Month,' with joint proclamations as MDARD Director and Governor Gretchen Whitmer. This was put in place to highlight the importance of agritourism to the public. I also relied on the exhibits and documents listed below.

One of the major issues I was confronted with as a Michigan resident and former Director of MDARD, is how can we help young people become successful farmers? At this time, the average age of a farmer in Michigan is just under 60 years old. One of the reasons for this is that it is so difficult for young people to obtain a farm, unless it is a legacy handed down. So, it is imperative that we help the next generation of farmers to feed not just Michigan, but the world.

For young people to enter into farming, it has to be profitable. They have to be able to make a living doing it. Some of the major impediments are the high price of farm land (if it is even available) and the high cost of purchasing equipment.

On top of the roadblocks mentioned above, there is uncertainty when working in agriculture that is out of the farmer's control. Some examples are the price of farm commodities, the weather, the cost of your inputs, and the ever-changing climate, which farmers are the first to feel the impact.

During my time as Director of MDARD, I toured many farms that offered agritourism opportunities. The majority of the farmers I spoke with stressed how important the agribusiness

portion was to the success of their farm. Due to the high stress of farming, it is well documented that the mental health of farmers are at risk. Michigan has had to put in place resources for farmers to receive mental health treatments. One of the main causes for stress among farmers is the uncertainty of a successful operation.

Exhibits and Documents Reviewed

Michigan Commission of Agriculture and Rural Development.
Generally Accepted Agricultural and Management Practices for Farm Markets – 2023.

Opinion and Order on Summary Judgment (ECF No. 162)

Affidavits of Barbara Wunsch and John Jacobs

Peninsula Township Zoning Ordinance Sections 6.7.2(19), 8.7.3(10), and 8.7.3(12).

Michigan Agricultural Tourism Advisory Commission
Agricultural Tourism Local Zone Guidebook and Model Zoning Ordinance Provisions

Opinions

Agritourism is one way to help farmers with a supplementary and stable income. It is something the farmer can control, as opposed to the issues I mentioned above. It can make the difference between a successful farm operation and another business that couldn't survive. Their success can be achieved if they are given all available opportunities and tools to thrive.

Generally, "agritourism" is the practice of visiting an agricultural operation that is actively producing agricultural products for purchase while experiencing the venue. Michigan is very fortunate in the diversity of opportunities for agritourism, given we produce over 300 types of crops. This makes us one of the most diverse states in the nation. Examples of agritourism in Michigan are wineries, apple orchards, breweries, Christmas Tree farms, corn mazes, distilleries, farmer's markets, cideries, and pumpkin patches – just to name a few. When you are invited to a wedding that is in a barn or vineyard, that is agritourism. Farm to table is another form of agritourism.

With agritourism, it is very important to the economies in rural

Michigan. Every farm operation is equivalent to a small business in your community. Just as a small business would, a farm has employees, payroll, and purchases supplies and services from other local businesses. You are also increasing the number of visitors to your community, which in turn, increases the profitability of other businesses in the area. No tourist will only stop at one establishment when visiting our rural communities.

Businesses that contribute to agritourism contribute to the gathering of friends and family. It is a way for people to connect not only with each other, but also with Michigan's farming heritage. Most people have a connection to a farmer in one way or another. Being able to experience agritourism first-hand helps them understand the challenges and perseverance of our farm community, while also enjoying the fruits of the farmer's labor (or cherries, or grapes, or hay, etc). Because of this, agritourism is an agricultural use, given this is the only viable way that farm production and a unique farm experience can connect; while also successfully contributing to both the Michigan farm economy and tourism.

Agritourism is important and necessary. With it, a farm's success rate can increase exponentially. We must support our farmers to thrive in this very difficult environment and economy. We owe it to our them to give them every opportunity to succeed.

Thank you and please don't hesitate to reach out to me for any additional comments or feedback.

A handwritten signature in cursive script, reading "Gary McDowell", written in black ink over a horizontal line.

Gary McDowell

Exhibit A

Gary J. McDowell
 11585 W. Welch, Rudyard, MI 49780
 906-440-6149/garymcdowell498@gmail.com

PROFESSIONAL SKILLS SUMMARY

Managerial and Leadership Professional well respected for ability to be a conceptual thinker, delegate and mentor. Excellent organizational, communication, problem-solving, and decision-making skills. Attentive to detail, ability to quickly and effectively prioritize to meet specific goals. Broad knowledge of governmental legal compliances.

PROFESSIONAL EMPLOYMENT

MCDOWELL HAY, INC.
1/3 Owner & Treasurer

Rudyard, MI
 1981 - Present

- Negotiate the purchase of hay with local farmers.
- Marketing Eastern Upper Peninsula hay to markets across the country.
- Coordinate with trucking companies and loading crews for the transportation of hay to the markets.

MCDOWELL BROTHERS FARM
Partner

Rudyard, MI
 1980 - Present

- Operate a 1,000-acre farm.
- Specialize in high-quality horse hay for export.

CENTURY21 ADVANTAGE PLUS
Realtor

Sault Ste. Marie, MI
 2013 - Present

- Develop property listings by building rapport and reaching out to potential sellers.
- Lists property by examining property; recommend improvements that will enhance salability; coordinate with appraisers to set a selling price; close a contract; understand importance of time-sensitive material.
- Develop buyers by responding to inquiries.
- Close sales by understanding buyers' requirements; match requirements to listings; show properties; demonstrate benefits; relay offers; suggest alterations; negotiate contracts; write a contract.
- Update job knowledge by studying listings; visit properties; participate in educational opportunities; maintain personal networks; participate in professional and community organizations.
- Attend mandated Continuing Education classes approved by the State of Michigan.

MICHIGAN STATE HOUSE OF REPRESENTATIVES - 107th District
State Representative

Lansing, MI
 2005-2010

- Introduce and vote on bills pertaining to state government.
- Establish and monitor the state's budget.
- Maintain continuous communication with constituents assisting with issues they may have with state government.
- Identify processes that maximize efficiencies in government.
- Manage staff and set goals and objectives.

CHIPPEWA COUNTY COMMISSION - 7TH District
Commissioner

Sault Ste. Marie, MI
 1981 - 2002

- Introduce and vote on county ordinances.
- Establish and monitor the budget while maximizing government efficiencies.
- Develop and implement county personnel policies.
- Maintain continuous communication with constituents and assist with issues they may have with county government.

Gary J. McDowell
 11585 W. Welch, Rudyard, MI 49780
 906-440-6149/garymcdowell498@gmail.com

UNITED PARCEL SERVICE
Delivery Driver

Rudyard, MI
 1973 - 2003

- Sort, organize, and deliver 100 (M/L) packages to approximately 60 homes and/or businesses spread over 200 miles daily under tight schedules.
- Develop and maintain a good working rapport with businesses and agriculture community.
- Maintain work reports.

EDUCATION and LICENSES

Department of Licensing and Regulatory Affairs
 State of Michigan Real Estate Salesperson License

2013 - Present

Department of Licensing and Regulatory Affairs
 State of Michigan Emergency Medical Technician License

1995 - 2002

Lake Superior State College
 Completed two years with a focus on accounting.

1970 - 1972

Rudyard High School
 K-12

1970

ORGANIZATIONS & COMMUNITY SERVICE

- War Memorial Hospital Board of Trustees
- Member of the National Hay Association
- Michigan Farm Bureau (former)
- Sault Area Sportsman Club (former)
- Sault Elks Club (former)
- Rudyard Lions Club (former)
- Christopher Columbus Society
- EMT Rudyard Volunteer Ambulance Department (former)
- Chairman, Chippewa County Board of Commission (former)
- Chairman, Chippewa County 9-1-1 Board (former)
- Chairman, Chippewa County Emergency Services (former)
- Chippewa County Recycling Committee (former)
- Chippewa County Economic Development Commission (former)
- Rudyard Planning & Zoning (former)
- Rudyard Volunteer Fire Department (former)

Gary J. McDowell
 11585 W. Welch, Rudyard, MI 49780
 906-440-6149/garymcdowell498@gmail.com

AWARDS & RECOGNITIONS

| | |
|---|------|
| Century21 Advantage Plus – *Masters Emerald Award | 2017 |
| Century21 Great Lakes Region – *Platinum Sales Achievement Award | 2016 |
| Century21 Advantage Plus – *Ruby Award | 2014 |
| Community Based Mental Health Services – *Go-To-Bat | 2010 |
| Public Health Association – Health Policy Champion | 2010 |
| Michigan Oral Health Coalition – *Oral Health Champion | 2010 |
| Michigan Mental Health Association – *Snyder-Kok Award | 2010 |
| Michigan Council For Maternal & Child Health (MCMCH) – *Legislator of the Year | 2010 |
| Kent County Mental Health – *Certificate of Appreciation | 2010 |
| Comprehensive School Health Coordinators Association – *Healthy Children Award | 2010 |
| Michigan Primary Care Association – *Champion for the Medically Underserved | 2010 |
| Fight Crime Invest in Kids – *Crime Fighter Award | 2010 |
| Michigan After School Partnership – *After School Champion Award | 2009 |
| Michigan Pharmacist Association – *Legislator of the Year | 2009 |
| Food Bank Council of Michigan – *Hunger for Justice Award | 2009 |
| Northern Michigan Substance Abuse Services – *NMSAS Recognition | 2009 |
| Michigan Association of Substance Abuse Coordinating Agencies – *Legislator of the Year | 2009 |
| Michigan Health & Hospital Association – *Special Recognition Award | 2009 |
| National Kidney Foundation of Michigan – *Kidney of Hope Award | 2008 |
| Michigan Association of Health Plans – *Legislator of the Year | 2007 |
| In Appreciation of UP Ophthalmologists – *Legislator of the Year | 2007 |
| Michigan Rural Health Association – *Recognition Award | 2007 |
| Michigan Council For Maternal & Child Health (MCMCH) – *Legislator of the Year | 2007 |
| National Multiple Sclerosis Society – *Public Official of the Year Award | 2007 |
| Michigan Reading Association - *Literacy Advocate Award | 2006 |
| United Parcel Service – *Circle of Honor Award | 1999 |
| Rudyard High School - *National Honors Society | 1970 |
| Future Farmers of America - *State Farmer Award | 1970 |

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

September 11. 2023

Submitted in Support of Plaintiffs

WINERIES OF THE OLD MISSION PENINSULA ASSOCIATION ("WOMP"),

A Michigan Non-Profit Corporation and 11 Wineries

V.

PENINSULA TOWNSHIP, a Michigan municipal corporation, Defendant

And

PROTECT THE PENINSULA, Inc., Intervenor-Defendant

Case No. 1 20-CV-01008

Peninsula Township Zoning Ordinance

A Land Use Code

Grand Traverse County

Traverse City, MI 49686

Effective Date June 5, 1972, and Amendments

In Accordance With:

Second Amended Case Management Order (ECF 343) and

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

Prepared by:

DAVID E. Moss, Principal

David Moss & Associates, Inc.

Land Use – Environmental Consultants

1009 Wilshire Blvd., Suite 224

Santa Monica, CA 90401

Tel (310) 395-3481

Introduction

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

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

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

1. Rebuttal Opinion: Introduction Section (Pg 4)

a. **Statement:** Plaintiffs' claims isolate a handful of provisions that limit their ability to engage in "unfettered commercial activity" in an agricultural zone.

- i. **Rebuttal:** The Township has been non-responsive to the reasonable requests of Plaintiffs over decades to amend the zoning code to enable by-right or discretionary entitlement processing for a limited number of types of accessory uses - weddings, banquets, food service and associated – or branding-related retail sales.
- ii. **Rebuttal:** Prior to filing the lawsuit Plaintiffs never argued or claimed they should be provided by-right entitlement for unfettered commercial accessory land uses in the A-1 zone. They were amenable to entitlement processing based on the use of technical environmental and land use studies to identify site- and regional-specific measures to mitigation potential impacts like noise or traffic to a level of insignificance.
- iii. **Rebuttal:** Use of the term "unfettered commercial activity" is a flawed starting point for expert's report. Up until the filing of the lawsuit Plaintiffs were seeking narrowly focused zoning code changes. Code changes that would have enabled the Township to process either administrative site plan or discretionary zoning entitlement requests based on site-specific implications of clearly defined types and sizes of accessory uses. The Township historically refused to allow customarily-associated accessory agricultural uses to have options for entitlement processing despite willingness of Plaintiffs to support such requests with technical environmental and land use studies and agree to available measures to mitigate potential impacts to a level of insignificance.

b. **Statement:** "I further explain the importance of farmland land preservation, its relationship to public health, safety and welfare"

- i. **Rebuttal:** A second flawed starting point for expert's report is that retirement and/or transfer of development rights (PDR programs) is the only viable means of preventing the unrestricted implementation of accessory land uses that the Plaintiffs are seeking.
- ii. **Rebuttal:** Plaintiffs do not oppose and no part of the lawsuit questions the right of the Township or the potential viability to use and promote retirement/transfer of development rights or other preservation program methods. Dr. Daniels is recognized for contributions to such programs in Lancaster County, PA. The necessity to rely on those types of preservation programs doesn't negate the viability or utility of the Township also having a zoning code that enables review of accessory agricultural uses and setting site-specific conditions of approval to mitigate potential impacts to traffic safety, road capacity, road safety, parking, noise, or minimum land areas for growing vs maximum areas for ancillary agricultural uses. Such entitlement programs are routinely available even the handful of other jurisdictions that Dr. Daniels has considered.
- iii. **Rebuttal:** The Township's zoning code is out of sync with clearly stated goals in the Master Plan - to promote non-impactful use of A-1 zoned parcels, providing options to enhance the financial viability of a main agricultural use (grape growing and processing) while maintaining the quality of life and carrying capacity of the Township. There is no viable argument that there cannot be side by side use of preservation programs that retire or transfer development rights with zoning entitlement processes that promote the Master Plan goals and well documented demand for agritourism. It is not an either-or proposition.

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

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

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

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

- ii. **Rebuttal:** The township has 17,755 acres and 6,616 residents or 2.9 residents per acre. Michigan overall has 3.6 residents per acre and there are 30 states that have lower density than Michigan. The Agricultural Protection Zone identified in the PT Master Plan comprises 9,861 ac (53%) of the Township – which has increased from either 9,200 or 9,500 ac in 2008 (Daniels, T. An Evaluation of the Peninsula Township Farmland Preservation Program; Pg 5 states 9,200 ac and Pg 6 states 9,500 ac., 2008). The land area under permanent conservation easements or other mechanisms that limit development potential is 6,470 ac (36%) of the total Township area. Dr. Daniels has not provided any statistical land use metric applicable to the Township to support outright prohibition of accessory agricultural land uses on mere speculation that entitlement of such uses will lead to unfettered commercialization of A-1 zoned property or impact the rural character of the Township.
- iii. **Rebuttal:** Wineries are farms and are directly responsible for retaining land in agricultural use.
- c. **Statement:** “...Local PDR programs help stabilize the state’s farmland base to limit non-farm development...”
 - i. **Rebuttal:** Dr. Daniels cannot provide proof that the size of the Township farmland base is endangered by current or proposed operations of grape growers, processors, or wineries even if accessory agricultural land uses can be entitled through an amended zoning code. The Plaintiff’s goal is to farm, process, sell and fully utilize their parcels for agricultural and accessory agricultural land uses. They do not seek to build housing, large hotels, factories or out of scale or environmentally impactful facilities for food service, banquets, and weddings.
 - ii. **Rebuttal:** The Township has a narrowly focused goal of maintaining rural character. Dr. Daniels offers nothing concrete to back up his opinions that rural character would be irreversibly altered towards more dense development or higher density residential if wineries are allowed to seek site-specific accessory uses – even if appropriately conditioned to prevent the loss of such character.
 - iii. **Rebuttal:** Wineries are farms and are directly responsible for retaining land in agricultural land use.

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

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

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

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

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

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

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

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

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

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

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

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

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

a. **Statement:** "...[A]gricultural zoning in these four major wine-producing jurisdictions promote agricultural preservation. The ordinances that provide for special uses recognize the potential for additional site-specific considerations and conditions. Further they restrict agricultural land uses that otherwise turn agricultural processing facilities (wineries) into primarily commercial retail stores Finally, they ensure agricultural focus through limited production capacity through requirements for the use of local grapes and size of wineries which further supports the local distinctive AVAs"

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

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

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

- a. **Statement:** The first zoning ordinance [was] in 1972. In the late 1970s with the pending sale of 500 ac at the northern end of the Township residents became concerned about the threats of large housing developments and scattered homes that could rapidly change the rural character... .”
 - i. **Rebuttal:** The legislative intent in the 1972 ordinance was to establish the Township's first codified land use regulations. The growing/processing of grapes and operations of wineries were not the main impetus nor were wineries yet targeted to curtail and prevent accessory uses because such accessory uses were not yet demanded by the grape growing/winery-operating landowners.
 - ii. **Rebuttal:** Plaintiff's lawsuit doesn't seek rights to densify and obtain zone changes to entitle residential development. Plaintiffs are aligned with the 1983 Township Master Plan, and subsequent amendments to promote open agricultural lands, agriculture as the main land use, preserve agricultural lands, and preserve and protect the unique and scenic character of Old Mission Peninsula.
- b. **Statement:** The Peninsula Township drafted an Agricultural Preservation Plan (“APP”) ... in 1994”. In 1994 Township voters passed Michigan's first PDR program ...and have twice renewed the APP in 2003 and 2022 reflecting the popularity of the Township's policies to maintain farmland and agriculture.... .”
 - i. **Rebuttal:** Plaintiff's support the PDR program and have the right to participate or not. Not all find it necessary or prefer not to transfer or diminish land use rights that would reduce the amount of their lands under active agricultural and processing uses, reduce the size of their surface rights, nor increase the amount of covenanted open space.
 - ii. **Rebuttal:** There is no conflict between the Township operating and promoting the PDR program, and Plaintiff's clearly articulated desire and need to have entitlement options for accessory agricultural land uses. And, Plaintiffs agree that entitlement should be based on technical land use and environmental studies and the imposition of reasonably applicable measures to mitigate impacts to or from amplified sound, noise in general, visual resources, parking ratios, frontage requirements, driveway/circulation dimensions, numbers and sizes of wedding and other events, numbers of guest allowed to attend a winery event, size of roadside produce stands, appropriately sized restaurants and food service facilities, and hours of operation and cumulative impacts of simultaneous accessory agricultural land uses in close of distant proximity.
 - iii. **Rebuttal:** The Township is characterized by its rural character. A handful of facts support this. The Agricultural Protection Zone identified in the Township Master Plan comprises 9,861 ac (53-56%) of the total Township – which has increased from either 9,200 or 9,500 ac in 2008 (Daniels, T. An Evaluation of the Peninsula Township Farmland Preservation Program; Pg 5 states 9,200 ac and Pg 6 states 9,500 ac., 2008). The land area under permanent conservation easements or other

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

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

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

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

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

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

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

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

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

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

d. Statement: B: How the Peninsula Township Zoning Ordinance Promotes Agricultural Preservation - Numerous Opinions (Pg 25)

- i. **Rebuttal:** The governmental interests in enacting the zoning ordinance have not kept pace with the reality that market and climate change requires that wineries and farms in general must have the opportunity to implement appropriately sized, non-impactful accessory agricultural uses. The handful of such uses that stakeholders have fought unsuccessfully for – may have been unneeded and even inappropriate to consider back in the period of the 1970s when the financial, practical, and branding difficulties of operations were less in flux and more able to withstand prohibitions against the uses that are identified as necessary today in the lawsuit. The sophistication of crafting and administering zoning codes to protect, preserve and enhance land uses in general and in ecologically sensitive areas like the township has become way more sophisticated in the past 51 years and the Township can pick and choose from many templates and work with recognized experts to have their code come up to the 21st century (use of ecologically sensitive refers not to environmentalism but to the wholistic approach to protecting and enhancing the synergistic occurrence of land uses in a particular geographic area).
- ii. **Rebuttal:** It has been five decades since the birth of environmental movements and enactment of sweeping federal, state, and local regulations. The PTP's expert has not and cannot prove that there would be irreversible impact to the amount of A-1 zoned land in crop production, the production per acre, or to rural character if the Townships' arbitrarily selected accessory land use prohibitions were overturned in whole or in part and that such uses were able to seek use by right or discretionary SUP entitlements.
- iii. **Rebuttal:** The Plaintiffs are precluded from seeking entitlements for accessory uses identified in the lawsuit regardless of how large a winery parcel is, and no matter how isolated or distant such parcels are from offsite sensitive receptors. Dr. Daniels recognizes that the larger the size of the parcel in other wine growing municipalities enables use of ratios for entitlement of accessory uses, number, kind, and size.

e. Statement: Limits on Food and Beverage Service (Pg. 26)"

- i. **Rebuttal:** There should never have been or continue to be arbitrarily established limits on what kinds of gatherings are permissible. The PTP's expert knows better than to accept the PTP or township's rhetoric that a wine industry event is less impactful than any other type of gathering.
- ii. **Rebuttal:** If the concern is noise, or sound, or parking – then there is no credible argument that industry events are less impactful. When a planning board considers an SUP for a hotel, restaurant, or nightclub – they don't have authority to require a specific hotel brand (Marriott vs Choice), restaurant (Thai vs. Mexican), or nightclub (Latin vs. line dancing). The authority is limited to considering potential impacts – the same ones that are associated with any gathering – parking, noise, traffic, visual impacts, and the numerous others stated in other rebuttal statements herein by Plaintiff's land use expert.

f. Statement: Bars, restaurants and catering are commercial uses typically separated from other uses and limited to being located in a commercial zoning district. Exclusion of weddings, wedding receptions, and other private events.... ." (Pg. 27)"

- i. **Rebuttal:** The Plaintiffs have been unsuccessful in seeking by right or discretionary entitlements for food-related accessory agricultural land uses customarily allowed by right or by SUP in many wine-growing regions and therefore had to file the lawsuit (See Par 9 a I above).

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

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

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

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

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

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


December 4, 2023

Source: Plaintiffs' Supplemental Report of David Moss, September 11, 2023

Page 16 of 16

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

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

By:  _____

Date: September 11, 2023

December 4, 2023

Source: Email seeking concurrence dated December 1, 2023

Page 1 of 2

From: [Ragatzki, Stephen M.](#)
To: [TJ Andrews](#); [Gartman, Christopher J.](#); [Infante, Joseph M.](#); [Kaltenbach, Barry P.](#); [Eldridge, Scott R.](#); [Tom McGraw](#); [Beau Rajsic](#); [William Fahey](#); [Christopher Patterson](#); [John Brennan](#); [Steven Baker](#)
Cc: [Karla Gerds](#); [Holly Hillyer](#)
Subject: RE: Concurrence in motion to exclude testimony and reports from Mr. McDowell, Ms. Quimby
Date: Friday, December 1, 2023 10:23:31 AM

TJ,

We do not concur in the relief sought. PTP offered Dr. Daniels as an expert in land use planning, agricultural zoning, and farmland preservation. Dr. Daniels testified that his “ultimate” opinion is that a local government should be allowed to enforce any zoning restriction it wishes. Ms. Quimby and Mr. McDowell will offer testimony from a state regulatory perspective that his opinion is incorrect. Their testimony will directly contradict his opinion.

Additionally, Ms. Quimby and Mr. McDowell rebut Dr. Daniels’ opinions in specific areas. For example, Dr. Daniels opined in his report and in his deposition about the distinction between agricultural and commercial uses. Mr. McDowell, as the former Director of the Michigan Department of Agriculture and Rural Development, is certainly qualified to challenge Dr. Daniels’ opinion on that distinction. Dr. Daniels also opines that PDR programs and agricultural zoning are two methods of farmland preservation. Mr. McDowell opined that agritourism is important and necessary in rural communities, which is a third and alternative form of farmland preservation to those proposed by Dr. Daniels.

Dr. Daniels also opined about the potential for wineries to “simply become wine shops or bars, like those commonly found in a commercial district.” During his deposition, Dr. Daniels admitted that he has never read the Michigan Liquor Control Code. Ms. Quimby, as a former Liquor Control Commissioner, is certainly qualified to challenge Dr. Daniels’ assertion that a winery can become a bar. (This, incidentally, is a common PTP talking point that is simply incorrect under Michigan law.) Ms. Quimby will similarly rebut Dr. Daniels’ erroneous opinion that a winery cannot operate a restaurant.

In sum, our rebuttal experts will testify to directly contradict the conclusions rendered by Dr. Daniels. Their testimony is appropriate, and we do not concur in any attempt to exclude it.

Steve

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From: TJ Andrews <tjandrews@envlaw.com>

Sent: Thursday, November 30, 2023 4:55 PM

December 4, 2023

Source: Email seeking concurrence dated December 1, 2023

Page 2 of 2

To: Ragatzki, Stephen M. <Ragatzki@millercanfield.com>; Gartman, Christopher J. <Gartman@millercanfield.com>; Infante, Joseph M. <infante@millercanfield.com>; Kaltenbach, Barry P. <Kaltenbach@millercanfield.com>; Eldridge, Scott R. <eldridge@millercanfield.com>; Tom McGraw <tmcgraw@mcgrawmorris.com>; Beau Rajsic <brajsic@mcgrawmorris.com>; William Fahey <wfahey@fsbirlaw.com>; Christopher Patterson <cpatterson@fsbirlaw.com>; John Brennan <jbrennan@fsbirlaw.com>; Steven Baker <sbaker@fsbirlaw.com>

Cc: Karla Gerds <karla@envlaw.com>; Holly Hillyer <holly@tropospherelegal.com>

Subject: Concurrence in motion to exclude testimony and reports from Mr. McDowell, Ms. Quimby

Caution: This is an external email. Do not open attachments or click links from unknown or unexpected emails.

Good afternoon, Counsel,

I am writing to ascertain whether you will oppose PTP's motion to exclude testimony and reports from Mr. McDowell and Ms. Quimby. Neither is a planning expert and neither provided opinions in rebuttal to Dr. Daniels, PTP's planning expert. As such, Plaintiffs should not call them as witnesses at trial, as Plaintiffs recognized in the Rebuttal Expert Witness Disclosures.

PTP would like to discuss if the parties are willing to discuss a stipulation that Plaintiffs will not call these witnesses to testify at trial, and that Plaintiffs' reliance on their reports to support Plaintiffs' summary judgment filings should be disregarded.

Thank you for your consideration.

~TJ

Tracy Jane (TJ) Andrews

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