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; BRYS WINERY, LC, a Michigan corporation; CHATEAU GRAND TRAVERSE, LTD, a Michigan corporation; CHATEAU OPERATIONS, LTD, a Michigan corporation; GRAPE HARBOR, INC, a Michigan corporation; MONTAGUE DEVELOPMENT, LLC, a Michigan limited liability company; OV THE FARM, LLC, a Michigan limited liability company; TABONE VINEYARDS, LLC, a Michigan limited liability company; TWO LADS, LLC, a Michigan limited liability company; VILLA MARI, LLC, a Michigan limited liability company; WINERY AT BLACK STAR FARMS, 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

INTERVENER PROTECT THE PENINSULA'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

ORAL ARGUMENT REQUESTED

Joseph M. Infante (P68719)
Christopher J. Gartman (P83286)
Stephen Michael Ragatzki (P81952)
Miller, Canfield, Paddock
Attorneys for Plaintiffs
99 Monroe Ave., NW, Suite 1200
Grand Rapids, MI 49503
(616) 776-6333
infante@millercanfield.com
gartman@millercanfield.com
ragatzki@millercanfield.com

Barry Kaltenbach
Miller, Canfield, Paddock
Attorneys for Plaintiffs
227 Monroe Street, Ste 3600
Chicago, IL 60606
(312) 460-4200
kaltenbach@millercanfield.com

Scott Robert Eldridge (P66452)
Miller, Canfield, Paddock
Attorneys for Plaintiffs
One E. Michigan Avenue, Ste 900
Lansing, MI 48933
(517) 487-2070
eldridge@millercanfield.com

Thomas J. McGraw (P48817)
Bogomir Rajsic, III (P79191)
McGraw Morris, P.C.
Attorneys for Defendant
2075 W. Big Beaver Road, Ste 750
Troy, MI 48084
(248) 502-4000
tmcgraw@mcgrawmorris.com
brajsic@mcgrawmorris.com

William K. Fahey (P27745)
John S. Brennan (P55431)
Christopher S. Patterson (P74350)
Fahey Schultz Burzych Rhodes PLC
Co-Counsel for Defendant
4151 Okemos Road
Okemos, MI 48864
(517) 381-0100
wfahey@fsbrlaw.com
jbrennan@fsbrlaw.com
cpatterson@fsbrlaw.com

Tracy Jane Andrews (P67467)
Law Office of Tracy Jane Andrews, PLLC
Attorneys for Intervenor-Defendant
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
tjandrews@envlaw.com

Holly L. Hillyer (P85318)
Troposphere Legal, PLC
Co-Counsel for Intervenor-Defendant
420 East Front Street
Traverse City, MI 49686
(231) 709-4709
holly@tropospherelegal.com

**INTERVENER PROTECT THE PENINSULA'S
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INTERVENER PROTECT THE PENINSULA'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Intervenor Protect the Peninsula (PTP) respectfully asks the Court to grant summary judgment in its favor and dismiss Plaintiffs' claims as follows:

- All First Amendment and Taking claims (Counts I, II, III, and VII) by Black Star, Bonobo, and Tabone for lack of standing;
- All First Amendment and Taking claims (Counts I, II, III, and VII) by non-Chateaus Black Star, Two Lads, Tabone, and Peninsula Cellars relating to 8.7.3(10) for lack of standing because it is inapplicable to them;
- All First Amendment and Taking claims (Counts I, II, III, and VII) by Bonobo, Bowers, Brys, Grand Traverse, and Hawthorne relating to 8.7.3(10)(u) for lack of standing because it is inapplicable to them;
- All First Amendment and Taking claims (Counts I, II, III, and VII) by Black Star, Bonobo, Brys, Chateau Chantal, Grand Traverse, Mari, Peninsula Cellars, Tabone, Two Lads as barred by the statute of limitations;
- All Plaintiffs' First Amendment claims (Counts I, II, and III) relating to 6.7.2(19) or any subpart thereof; 8.7.3(10) or any subpart thereof; and 8.7.3(12)(g) and (i) because Plaintiffs failed to establish essential elements and there is no genuine issue as to any material fact[1]; and

[1] PTP does not move for summary judgment on the merits of Peninsula Cellars' First Amendment claims relating to 8.7.3(12)(k) but does move for summary judgment dismissing all Peninsula Cellars' claims as time-barred. PTP waives no defenses with respect to 8.7.3(12)(k).

- All Plaintiffs' Taking Claims (Count VII) because Plaintiffs failed to establish essential elements and there is no genuine issue as to any material fact.

II. LEGAL STANDARD

Summary judgment is appropriate when the pleadings, depositions, interrogatories, admissions, and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008). The burden is on the moving party to show no genuine issue of material fact, including an absence of evidence supporting the opponent's case. *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005) (citation omitted). Facts and factual inferences are viewed in the light most favorable to the non-moving party. *Id.* (citation omitted).

Once the moving party carries its burden, the non-moving party must set forth specific facts supported by record evidence showing a genuine issue for trial. Fed. R. Civ. P. 56(e). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Tucker,* 539 F.3d at 531 (internal quotation omitted). "The mere existence of a scintilla of evidence" in support of the non-movant's position is insufficient. *Id.* (internal quotation omitted). When opposing parties tell two different stories, and one is blatantly contradicted by the record, the court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. *Scott v. Harris*, 550 U.S. 372, 380 (2007). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–248 (1986) (emphasis in original).

Summary judgment is appropriate because Plaintiffs failed in discovery to support essential elements of their First Amendment and takings claims, three Plaintiffs lack standing entirely and several lack standing for certain claims, and most Plaintiffs' claims are time-barred. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Holis v. Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 543 (6th Cir. 2014).

III. FACTS

No two Plaintiffs are alike. Their authorized land uses depend on zoning at the time they established their winery operations, which winery land use they pursued, their location relative to neighbors, and how they operated their businesses. Additional distinctions include permit amendments, variances, conservation easements, and even a catastrophic fire. It is impossible to address their sweeping claims without first unpacking these briefly.

A. Peninsula zoning of winery land uses is ever evolving.

Since its 1972 adoption, the Peninsula Township Zoning Ordinance[2] (PTZO) became progressively more permissive towards non-agricultural commercial accessory uses co-located with primary farming and winemaking uses in the agricultural A-1 District.

*i. A-1 authorizes **winery** uses with additional **accessory** and **support** uses.*

Landowners with five acres may make and distribute wine from grapes grown anywhere with a special use permit (SUP) for a Food Processing Plant. PTZO 8.5.

[2] A version of the PTZO, excluding post-2009 amendments, is at ECF 1-1. That version plus post-2009 amendments are available online. https://www.peninsulatownship.com/ordinance.html

In 1989, the Township added the Winery-Chateau, a special use allowing a winery, guest rooms, and single-family residences on a 50-acre site with 75% in active wine crop production. PTZO 3.2, 8.7.3(10), 8.7.3(10)(h). The *winery* – a facility for "agricultural fruit production," including wine processing, storage, packaging, and sale – is the principal use. PTZO 3.2. It may have a *tasting room*, a place for wine tasting and sales by the bottle or glass. *Id*. Beyond these definitions, there are virtually no zoning limits on Winery-Chateau tasting rooms. Accessory uses must be "customary and incidental" to a principal use and "no greater in extent than those reasonably necessary to serve the principal use." PTZO 8.7.3(10)(d)(1). Accessory uses like "facilities, meeting rooms, and food and beverage services" are *only* for registered (overnight) guests. PTZO 8.7.3(10)(m); ECF 32-11, PageID.1839-1840.

In 1998, the Township added the Remote Winery Tasting Room special use "to allow wine tasting in a tasting room that is not on the same property as the winery with which is associated." PTZO 8.7.3(12)(a).

In 1999, the Township enacted the Small Winery special use, with lower acreage and no grape source limits, but voters rejected it.

In 2002, the Township added the Farm Processing Facility as the first winery by-right use. PTZO 6.7.2(19). It allows a winery on 40 acres with "a retail sales area for direct sales to customers and a tasting room for the tasting of fresh or processed agricultural produce including wine." PTZO 3.2. There are virtually no zoning limits on Farm Processing Facility tasting rooms.

In 2004, following litigation with Chateau Chantal over limits on food service and similar accessory uses for Winery-Chateaus, the Township amended the Winery-Chateau site development requirements to allow approval for Guest Activity Uses (GAUs) as support uses. PTZO 8.7.3(10)(u). GAUs allow food service beyond what Winery-Chateaus may otherwise offer tasting

room visitors and overnight guests and include "[w]ine and food seminars and cooking classes," meetings of local 501(c)(3) nonprofits, and "[m]eetings of Agricultural Related Groups that have a direct relationship to agricultural production." PTZO 8.7.3(10)(u)(2)(a)-(c). GAUs are not tastings or free promotional events in the tasting room like political rallies, winery tours, and free entertainment, which are otherwise allowed. PTZO 8.7.3(10)(u)(1)(d). GAUs are not weddings, receptions, or reunions (generally disallowed for hire but allowed under certain circumstances); or sale of wine by the glass (allowed in tasting rooms). PTZO 8.7.3(10)(u)(2)(d). To minimize impacts, GAUs must end by 9:30 p.m.; may not have outdoor food, beverages, temporary structures, or displays; may not have amplified instrumental music or generate sound "discernable at the property lines"; may have only minimal lighting; and the Board may limit their frequency and number. PTZO 8.7.3(10)(u)(5).

*ii. Landowners must obtain a **land** or **special use permit** for a new use.*

Any special use permit (SUP) requires Board approval in accordance with PTZO procedures, requirements, and standards. MCL 125.3502; PTZO 8.1.2. Those include general standards at 8.1.3(1), specific standards at 8.1.3(3), and applicable site development requirements like those for Winery-Chateaus at 8.7.3(10) and Remote Winery Tasting Rooms at 8.7.3(12). The procedures require an application and site plan, public notice, and two public hearings – first before the Planning Commission then the Board, which makes findings and may approve an application with or without conditions or deny it. PTZO 8.1.2. Board decisions may be appealed to state court.

If GAUs are approved in a Winery-Chateau SUP, no additional approvals are needed except for meetings of agricultural groups under 8.7.3(10)(u)(2)(c). The PTZO provides examples guiding

whether a proposed meeting has a direct relationship to agricultural production, and Zoning Administrator determinations may be appealed to the Board. PTZO 8.7.3(10)(u)(2)(c)(ii), (iv).

By-right approval is simpler. For a Farm Processing Facility, a site plan is submitted to the Zoning Administrator, who issues a preliminary permit allowing construction to begin if the plan meets minimum parcel, building size, acreage, setback, and parking requirements. PTZO 6.7.2(19)(b)(14). Once all other required federal, state, and local licenses and permits have been issued, the Zoning Administrator inspects the site to confirm compliance with PTZO requirements and issues a final permit allowing processing and sales to commence.

B. Each of the 11 Wineries took a different approach.

i. *Chateau Grand Traverse is a unique Winery-Chateau with allowed outdoor functions and special retail sales; it never sought Guest Activity Uses.*

Plaintiff Chateau Grand Traverse Ltd (Grand Traverse) is the oldest winery on Old Mission Peninsula. It has had six SUPs. In 1975, it obtained SUP 2 for a Food Processing Plant and winery. In 1990, within a year of the Township creating the Winery-Chateau special use, Grand Traverse sought and received SUP 24 for one. (ECF 32-8) Its sale of development rights to part of the Winery-Chateau site necessitated changes reflected in SUP 59. It then obtained SUP 64 for additional guest rooms. In 1999, it obtained SUP 66 for a Winery-Chateau and Planned Unit Development, which replaced all previous SUPs. (ECF 308-8) In 2004, soon after the Township amended the PTZO to allow GAUs to be added to a Winery-Chateau's SUP, Grand Traverse obtained SUP 94 approving a building addition *but* neither requested nor received GAU approval. (**Ex 2** dep 18; **Ex 3**) SUP 94 did not replace SUP 66, which remains its operative SUP. (*Id.* 17-18) Grand Traverse has never appealed any SUP or amendment and ignores them here.

Grand Traverse holds a Wine Maker license and On-Premises Tasting Room permit from the Michigan Liquor Control Commission (Commission). (ECF 356-1, PageID.12989) It offers overnight lodging and has a commercial kitchen it uses to prepare breakfast and occasional special dinners for overnight guests. (**Ex 2** dep 28-30) It has a tasting room and patio where anyone may enjoy wine tasting, nonalcoholic beverages, and small plates like charcuterie boards. Its tasting room is open until 7:00 p.m. in summer and closes earlier other times of year. Before the COVID-19 pandemic, it offered free winery tours to the public; now it offers paid private tours. (**Ex 2** dep 30-31) Overnight guests may use its facilities for private events like small weddings and family reunions. (**Ex 2** dep 31-32)

SUP 66 authorizes Grand Traverse to hold outdoor functions like wine tasting parties and festivals with up to 75 anticipated attendees; it may have larger functions and temporary structures with a special permit to account for concerns like sanitation and security. (ECF 308-8, PageID.11326-11327; **Ex 2** dep 21-25) Outdoor functions can go as late as 10:30 p.m. in summer. (*Id.*) No amplified music is allowed outside except "low level mood music" that cannot be heard beyond the property lines. (*Id.*) Pre-pandemic, Grand Traverse had larger functions, including "Wine Down Wednesdays" with outdoor live music and food, and provided facility rentals and food service for private corporate events. (**Ex 2** dep 22-25; **Exs 4, 5**)

ii. *Chateau Chantal has a Winery-Chateau SUP, hosts weddings, has regular live music outdoors, and has hosted hundreds of Guest Activity Uses.*

Plaintiff Chateau Chantal, through its founder Robert Begin, brought the idea of a European-style winery estate with bed-and-breakfast accommodations to the Township in the late 1980s and implored the Township to amend the PTZO to make it possible. (**Ex 10** dep 47-48; **Ex**

11) In 1989, the Township enacted the Winery-Chateau special use. In 1990, Chateau Chantal received the first Winery-Chateau SUP. (ECF 32-11, PageID.1856-1862)

In 1998, Chateau Chantal sued the Township over zoning provisions limiting food and beverage service to registered guests only.[3] The parties resolved the litigation by, among other things, agreeing that "registered guests" means overnight guests; and that the Township Board would establish guidelines for approving food and beverage service for non-registered guests at Chateau Chantal, then amend the PTZO based on those guidelines. (ECF 32-11). In 1999, the Board enacted the guidelines, creating for Chateau Chantal limited exceptions to the prohibition on food and beverage service for non-registered guests. (**Ex 12**)

In 2004, the Township enacted Amendment 141 giving Winery-Chateaus uniform access to exceptions to the zoning prohibition on food service and similar accessory uses for non-registered guests through GAU approval. That same year, Chateau Chantal requested and received GAU approval in SUP 95, which remains its operative SUP. (ECF 32-11). In 2010, Chateau Chantal received SUP 114, supplementing SUP 95 with approval to expand its wine processing area and tasting room. (ECF 457-14). In 2014, the Township approved an amendment to SUP 114 allowing solar panels and other site plan changes. (ECF 457-15; **Ex 10** dep 22) Chateau Chantal has never appealed any SUP or amendment and ignores them in this case.

Chateau Chantal has a Small Wine Maker license and On-Premises Tasting Room Permit. (ECF 334-4) Wine consumption is permitted in its tasting room, dining room, and on its west patio. (**Ex 10** dep 19-20) It offers overnight lodging and has a commercial kitchen it uses to prepare breakfast for overnight guests and food for GAUs and other events. (**Ex 10** dep 14)

[3] At the time, state law prohibited sale of wine by the glass.

Chateau Chantal has hosted hundreds of GAUs, mostly wine and food pairing dinners, some cooking classes, and occasional nonprofit meetings. (see *e.g.*, **Ex 10** dep 28; **Exs 13-15**) It hosts weddings and other private events for registered guests; it accommodates requests for private events by non-registered guests, including proposals and rehearsal dinners, by hosting private GAUs. (see, e.g., **Ex 14**) It has regular live music, including "Jazz at Sunset" for 30 years running. (**Ex 10** dep 31-32; **Ex 16**) It also hosts promotional events like its Ice Wine Festival. (**Ex 10** dep 29-30) Chateau Chantal sees 2,000-15,000 visitors per month depending on the season. (**Ex 10** dep 33-34) It is generally open from 11:00 a.m. to 6:00 on weekdays but stays open until 8:00 p.m. on weekends and 9:30 p.m. for Jazz at Sunset and other events. (**Ex 16**) Chateau Chantal markets itself through its website, social media, print advertising, and word of mouth. (**Ex 10** dep 33) In addition to wine, it sells shirts, hats, glassware, wine accessories, and art. (**Ex 10** dep 36-37)

iii. Bowers Harbor was a one-of-a-kind winery until mid-2019, when it became a Winery-Chateau with a path towards Guest Activity Uses, still unused.

Bowers Harbor Vineyard & Winery, Inc. (Bowers) leases around 47 acres. Bowers started winery-type operations[4] by converting an old horse farm to vineyards and a farm stand into a tasting room and shop for jams, jellies, and wine. In 1992, the Township approved SUP 32 authorizing Bowers to operate as a "Food Processing Plant/Winery," with limited, seasonal indoor retail sales (ECF 32-7, PageID.1780-81) In 2010, the Township amended SUP 32 to become a "Special Open Space Use" that authorized Bowers to host up to 20 events per year outdoors for up to 50 guests after normal business hours, with prior notice and no amplification. (ECF 308-11,

[4] Wine processing is offsite. (**Ex 6** dep 11-12)

PageID.11346) Under Amended SUP 32, Bowers partnered with a restaurant for "Dining in the Vines" and offered its facilities for private events. (**Ex 6** dep 41-44, 59-60, 91)

In July 2019, the Township approved Bowers as a Winery-Chateau under SUP 132. ECF 32-7, PageID.1773) To qualify, Bowers was granted a variance from the 50-acre minimum requirement. (**Ex 8**) Until SUP 132, Bowers was "one of a kind," a "non-conforming commercial roadside stand." (**Ex 6** dep 66; **Ex 7**) SUP 132 resolved "long-standing issues associated with [Bowers] that predate the establishment of local wineries and winery regulations in the zoning ordinance itself." (ECF 32-7, PageID.1796) SUP 132 required grape and fruit tree planning and Immediate and Near-Term Action Items; it authorized Bowers to continue SUP 32 activities (*e.g.*, Dining in the Vines) until Immediate Action Items were completed, "at which time [Bowers] may conduct [GAUs] and SUP #32 is rescinded." (ECF 32-7, PageID.1797) Bowers did not appeal SUP 32, its amendment, nor SUP 132, nor raise any challenge to it in this case.

Bowers does not know if all Immediate Action Items were completed and produced no evidence SUP 32 was rescinded so it may host GAUs. (**Ex 6** dep 76) It is clear Bowers has not hosted GAUs since it got SUP 132, though it equivocated on why not. (*Id.* 77-70, 90-94, 115-116)

In 1992, the Commission issued Bowers its small winemaker license. (**Ex 9**) It approved liquor sales on 12 (or 20) acres. (*Id.*; **Ex 6** dep 83) Bowers closes by 7:00 p.m. It has indoor and outdoor tasting areas. Average weekends in summer bring 750 to 1,100 visitors to its tasting areas. (**Ex 6** dep 85-86) Bowers entices winter visitors with snowshoeing treks among Peninsula wineries. (*Id.*) Bowers offers limited food service, merchandise, and vineyard tours. (*Id.* 86-88) Bowers has allowed friends to get married onsite. (*Id.* 95-96)

iv. Peninsula Cellars has the unique Remote Winery Tasting Room SUP, with its tasting room on a busy road miles from its farm.

Plaintiff Grape Harbor, Inc. (Peninsula Cellars) operates a tasting room on a five-acre parcel leased from Kroupa Enterprises, LLC. (**Ex 18** dep 8; **Ex 19**) In the late 1990s, its founders asked the Township to amend zoning so they could renovate the historic one-room schoolhouse on Center Road for their tasting room separate from their "hard to find" farming operation. (**Ex 18** dep 9, 17; **Ex 20**) In 1998, soon after the Township enacted the Remote Winery Tasting Room special use, Peninsula Cellars obtained SUP 62 under it. (ECF 32-9)

SUP 62 requires wine sold in the tasting room to be produced at the Peninsula Cellars winery. (ECF 32-9, PageID.1818) It allows up to 3% of the tasting room to be used for retail space displaying merchandise besides wine. (ECF 32-9, PageID.1819) It allows signage as shown on the Peninsula Cellars site plan. (*Id.*) No parking lot lighting is authorized because "operations are closing at dark." (ECF 32-9, PageID.1824) Peninsula Cellars did not appeal its SUP conditions nor has it ever sought an SUP amendment, nor does it challenge its SUP in this case.

Peninsula Cellars offers wine and cider tasting, plus root beer on tap. (**Ex 18** dep 41) To promote responsible drinking, it limits visitors to two glasses of wine. (**Ex 21**) It has a small prep kitchen for preparing charcuterie boards and small plates to enhance tasting. (**Ex 18** dep 9, 25) It has indoor capacity for 80 people and a patio with seating for 36, plus tables on the lawn. (*Id.* 18-19) It offers guided tours on request. (*Id.* 20) Pre-pandemic, it allowed groups to rent its space for private wine tasting and related activities. (*Id.* 21)

Peninsula Cellars markets itself mainly through its website and social media, with limited print advertising. (*Id.* 22) Its prominent location helps attract visitors. (*Id.*) From July to October, it sees 800-1,200 visitors per day and brings in portable restrooms to supplement its limited indoor

facilities. (*Id.* 23) Its posted hours are 10:00 a.m. to 7:00 p.m. but it will stay open as late as 8:00 p.m. to accommodate customers. (*Id.* 24-25, 34-35) Winter is much quieter. (*Id.* 23)

Peninsula Cellars offers yard games for tasting room visitors and has had occasional live music over the years. (*Id.* at 26, 30) It tried having regular live music in 2021 but stopped after Zoning Administrator Christina Deeren sent a violation notice for having amplified music outdoors. (*Id.* 26; **Exs 22, 23**) Its president, John Kroupa, had an informal conversation about the notice with former supervisor Robert Manigold but did not discuss it with Ms. Deeren or appeal Ms. Deeren's determination. (**Ex 18** dep 29-30) It has retail displays throughout its tasting room, including t-shirts, hats, corkscrews and other wine-related items, food, and wine. (*Id.* 25)

v. Brys is a Winery-Chateau with unexercised authority to host Guest Activity Uses.

Brys Winery, LLC (Brys) is a Winery-Chateau that is part of a 155-acre farm. Brys harvested its first grapes in 2004 and has operated a winery and tasting room since 2005. Brys started as a Farm Processing Facility and converted to a Winery-Chateau in 2011 when the Township approved SUP 115. (ECF 32-5) Even before it converted, Brys understood the zoning limitations on Winery-Chateaus that it now challenges; since at least 2008, it has been advocating for changes. (**Ex 25**; **Ex 24** dep 87-89, 97)

SUP 115 authorized two guestrooms and GAUs after normal operating hours. (ECF 32-5, PageID.1683, 1685) Brys requested amendments to SUP 115 in 2012, 2014 and 2018, and the Township approved them all. (ECF 32-5) These amendments approved additional processing space, outdoor tasting areas, and five additional guestrooms. While the Township recognized the additional outdoor patio space "could increase the potential for noise generated by guests visiting the property," it approved the additions due to Brys' "positive track records," location, and

screening. (ECF 457-16, PageID.16263) Brys never converted the farmhouse into five guest rooms, so it still has just two. Brys did not appeal any Township decision related SUP 115 and does not challenge it in this case.

In April 2005, the Commission issued Brys its small winemaker license. (ECF 334-2) It approved liquor sales throughout Brys' 80-acre farm. Brys offers wine sales in its original tasting room, on its brick patio, and on its elevated deck overlooking vineyards. On a busy day, Brys may receive 40 to 50 busses and seat 500 guests for tastings. (**Ex 24** dep 30-31, 40) Brys also offers charcuterie boards assembled in an on-site kitchen and boxed snacks prepared offsite. (*Id.* 35-36) Brys offers no tasting room entertainment. (*Id.* 32-34) It offers "wine wagon tours" for a fee. (*Id.* 93-94) Brys has hosted private family ceremonies onsite. (*Id.* 92-93)

Although SUP 115 authorizes GAUs, Brys has never hosted any. In discovery, Brys identified two instances when it engaged with Township staff about potential GAUs: a fundraiser for Big Brothers Big Sisters in 2019, and a political fundraiser in 2022. (**Ex 26**) For the Big Brothers Big Sisters event, Township staff notified Brys the proposed event "appears to be allowed under the Guest Activities section of the Winery-Chateau Ordinance section only, and not as a normal Winery-Chateau Tasting Room activity" based on articulated event characteristics (fee, tasting room closed, meeting of non-profit). (*Id.,* p. 8) Brys was asked to submit proof of Old Mission grapes grown or bought to support attendance levels. Following up by email, Brys noted the event had relocated to a local restaurant and inquired about tonnage calculations. (*Id.,* p. 7) Township staff responded with details, citing PTZO sections, noting "there is no cap on the number of events, or the total number of participants – just the maximum total number of people at any one event," and encouraging Brys to provide grape information so it may host GAUs if preferred. (*Id.,* p. 6) Three years later, Brys inquired about hosting a private political fundraiser with a tent

for 100-125 guests. (*Id.,* p. 2) Township staff responded that neither zoning nor Brys' SUP "authorize a tent and a gathering of this size," inviting Brys to identify any authority to the contrary. (*Id.,* p. 1)

vi. *Black Star Farms is a Farm Processing Facility located on preserved farmland, received a variance to use a structure twice the maximum size allowed, and has another location where it hosts all the events it pleases.*

Plaintiff Winery at Black Star Farms, LLC (Black Star) operates two wineries – one in Suttons Bay, Michigan, and one on Old Mission Peninsula. (**Ex 27** dep 9) Member Robert Mampe is a Peninsula grape farmer whose trust owns the Black Star winery property and leases Black Star five acres for limited use as an "agricultural production and sales operation." (**Ex 29**; **Ex 27** dep 9, 11, 71) In 2007, the Township issued Mr. Mampe and Black Star a Final Farm Processing Permit for agricultural processing without retail sales and tasting. (**Ex 30**) The Township also gave Mr. Mampe and Black Star a variance enabling full use of an existing 12,000-square-foot building despite Farm Processing Facilities then being limited to 6,000 square feet. (**Ex 27** dep 26) It is unclear if or when the Township authorized retail sales and tasting, but Black Star's tasting room has been open since 2008. (*Id.* 20-22)

In 2011, Black Star sought another variance to expand both its indoor and outdoor space. (*Id.* 35; **Ex 31**). In January 2012, Black Star withdrew its request to "pursu[e] other options." (**Ex 32**) In 2015 or 2016, Black Star added 2,000 square feet of covered outdoor fruit receiving space. (**Ex 27** dep 40)

In 2018, Mr. Mampe sought a variance for Black Star to expand again. Expansion could not be authorized by variance and required a zoning amendment. (**Ex 33**) In January 2019, the Township amended the PTZO to increase the maximum above-grade floor area for a Farm

Processing Facility to the lesser of 30,000 square feet or 250 square feet per acre of land owned or leased by the Farm Processing Facility's farm operation. PTZO 6.7.2(19)(b)(6). Black Star has not expanded since then. (**Ex 27** dep 42)

The Black Star property is protected by a conservation easement strictly prohibiting non-agricultural uses and held by the Township, which purchased the development rights from prior owner Underwood Orchards for $435,000 in 1997. (ECF 457-10) Black Star selected the property because it was outgrowing its Suttons Bay location and had a relationship with Mr. Mampe. (**Ex 27** dep 24) Adding the Old Mission location gave Black Star a presence on both the Leelanau and Old Mission Peninsulas – a "significant [market] advantage" since people generally go to one or the other. (*Id.* 27)

At its Old Mission location, Black Star primarily offers wine tasting and sales. It also offers spirit tasting, cocktails, prepackaged snacks; and sells logo t-shirts, hats, and "wine-related things like corkscrews and glasses." (*Id.* 60, 67-68; **Ex 34**) It has a small refrigerator but no kitchen. (**Ex 27** dep 60) Its tasting room generally closes by 6:00 p.m.

Black Star has more at its 160-acre Suttons Bay location, including a bed and breakfast, bistro, tours, weddings, corporate events, wine and food seminars, cooking classes, dining series, occasional "non-amplified music," gazebo rental for private gatherings, horse-drawn carriage rides, and hiking trails. (**Ex 27** dep 47, 50, 53, 55-56, 58-59, 63; **Ex 28** dep 14) It has an "incubator" kitchen where other local businesses have started operations and a commercial kitchen for catering and in-house food service. (**Ex 27** dep 58-59, 61) Its tasting room generally closes by 6:00 p.m. Outdoor events end by 10:30 p.m. to comply with Bingham Township zoning; indoor events generally end by 11:00 p.m. (**Ex 27** dep 61) It sells a wider variety of retail items than on Old Mission, including local art. (*Id.* 68-69)

Black Star promotes both locations through its website, social media, and print advertising. (**Ex 28** dep 12) When it receives inquiries about events and other experiences it does not offer at its Old Mission location, it responds by offering opportunities available in Suttons Bay. (*Id.* 8)

vii. Two Lads is a Farm Processor that wanted zoning simplicity more than Guest Activity Uses.

Two Lads, LLC, (Two Lads) is a Farm Processing Facility that leases about 60 acres from BOQ, Inc. It began wine processing in 2007 and retail operations in 2008. (**Ex 42**) Two Lads chose this use over Winery-Chateau because it is by right with a straightforward application, and GAUs and lodging were not appealing. (**Ex 36** dep 46-51) Starting in 2008, Two Lads has participated in numerous unsuccessful efforts to change the zoning limitations it now challenges. (*Id.* 158-163) Concluding zoning would never change without help, Two Lads joined this lawsuit: "it seemed to me that legal help/outside help might be the only way to actually effect lasting change, you know, in a way that would get the township to listen." (*Id.* 159-160)

In August 2007, the Commission issued Two Lads its small winemaker license. (**Ex 37**) The Commission approved liquor sales indoors and in two outdoor areas, where Two Lads occasionally deploys a mobile bar. (**Ex 38**) Two Lads generally restricts visitors from wandering in its "gnarly" vineyards but offers guided facility tours. (**Ex 36** dep 37-39) Two Lads prepares the Peninsula's best charcuterie boards in a small non-commercial kitchen. (*Id.* 32-33) It prefers smaller groups and avoids busses for more direct client engagement and because "busses don't buy." (*Id.* 97-99) It offers limited tasting room entertainment and closes by 6:00 p.m.

Two Lads responds to email inquiries for weddings by referring them to Chantal, Grand Traverse, and others and inviting the wedding party for a celebratory toast. (**Ex 36** dep 95-96; **Ex 39**). It participates in Township-wide winery promotional events (*e.g.*, Winter Warm-up, Mac &

Cheese Bake-Off). In 2014, Two Lads cancelled two planned private ticketed events with outside caterers ("bubbly pig," BBQ) because Township staff concluded they were "social events for hire" – an interpretation with which Two Lads did not necessarily agree but complied anyway. (**Ex 36** dep 64-65, 70-73; **Ex 40**) The only subsequent enforcement involved directional signage. (**Ex 36** dep 80-81) In 2022, Two Lads hosted two after-hours private corporate events involving tastings, tours, and offsite caterings. (**Ex 41**; **Ex 36** dep 112-14, 122-24)

viii. Hawthorne received its Winery-Chateau SUP just before filing this lawsuit and has never held Guest Activity Uses despite being authorized to do so.

Plaintiff Montague Development, LLC (Hawthorne) owns the land where the Hawthorne winery sits, while Hawthorne Vineyards, LLC operates its tasting room.[5] (**Ex 43** dep 11) Hawthorne began as a Farm Processing Facility in 2013. (**Ex 44**). In 2020, it sought a Winery-Chateau SUP to obtain GAU privileges and avoid grape source limits. (**Ex. 45**; **Ex 43** dep 16). The Township approved GAUs in Hawthorne's SUP but Hawthorne has not yet hosted one. (ECF 32-10, PageID.1836; **Ex 43** dep 23) Hawthorne did not appeal its SUP and ignores it in this case.

Hawthorne has a tasting room, patio, and lawn where visitors can enjoy wine. It has a prep area for assembling "nibbles" but no commercial kitchen. (**Ex 43** dep 20) Pre-pandemic, it regularly had live music; it now does so infrequently. (*Id.*; **Ex 46**). It offers vineyard tours, mostly as a perk for wine club members. It sells logo merchandise like t-shirts and corkscrews. It is generally open until 7:00 p.m. in summer and closes earlier in winter.

[5] Until 2020, Chateau Chantal operated the Hawthorne tasting room and held its Small Wine Maker license and On-Premises Tasting Room permit pursuant to a joint venture agreement. At some point, that license transferred to Hawthorne. (ECF 356-1, PageID.12993; **Ex 43** dep 11-12, 47; ECF 334, PageID.12022; ECF 334-6)

ix. Bonobo is a Winery Chateau on preserved farmland without authorization for Guest Activity Uses but hosts commercial events for hire regardless.

OV the Farm, LLC, (Bonobo) is a Winery-Chateau that leases about 51 acres from Oosterhouse Vineyards, LLC. (ECF 457-13, PageID.16246) Since about 1997, the land has been encumbered by a pair of nearly identical conservation easements purchased by the Township for $561,500.00, which strictly prohibit non-agricultural uses of the land. (ECF 457-11, 457-12) Before brothers Todd and Carter Oosterhouse bought the property, they visited the site with Township officials and zoning staff to discuss its limitations and the regulations for a Winery-Chateau there. (**Ex 47** dep 143-147) Bonobo has been negotiating with the Township to change the PTZO ever since. (*Id.* 154-55)

The Oosterhouse brothers obtained Township approval for a Winery-Chateau in SUP 118, approved in May 2013. (ECF 32-6) SUP 118 required them to plant an additional 8 acres to meet the 75% wine crop production requirement and allowed "meetings and special dinners" for people who are "*not* registered guests," substantially modifying 8.7.3(10)(m). (ECF 32-6, PageID.1766, 1767) (emphases added).

In November 2014, the Commission issued Bonobo its small winemaker license. (ECF 334-7) Bonobo has indoor tasting rooms, and the Commission permits outdoor tasting on its entire 50 acres. (**Ex 48**)

Also in November 2014, the Township approved the First Amendment to SUP 118. (ECF 457-13) Building modifications during construction necessitated Bonobo to seek the amendment. (**Ex 47** dep 51-52; ECF 447-5) Amended SUP 118 added a prohibition on amplified sound outdoors (ECF 457-13, PageID.16248) It reiterated Bonobo's obligation to plant eight additional acres and approval for "meetings and special dinners" for non-registered guests. (*Id.*, PageID.16255, PageID.16256-57) However, the Township did *not* approve GAUs as an additional support use

under 8.7.3(10)(u), specifying Bonobo had not applied for GAUs but could do so in a future application. (*Id.* PageID.16257) The next year, Bonobo applied to re-amend SUP 118 for GAUs approval, which the Township denied. (ECF 457-6, 7; ECF 308-14) Bonobo never appealed any Township decision related to SUP 118 and raises no challenge to SUP 118 in this case.

Long story short, disputes arose between Bonobo and the Township over crop planting and unauthorized GAUs. (ECF 457-6, 457-7, 457-8) In March 2017, Bonobo and the Township resolved differences with a Settlement Agreement. (ECF 457-9) It provided for Bonobo to develop a Farm Plan and specified Bonobo "shall not apply for any Guest Activity Uses, as stated in Section 8.7.3(10(u), for the Subject Property, until such time as this Agreement is completed." By September 2018, the settlement terms were completed. (**Ex 49**; **Ex 47** dep 67-72)

Since Bonobo became eligible to re-apply, there is no evidence Bonobo sought or received an SUP amendment including GAU authorization. Bonobo did not produce any. PTP scoured Township productions but failed to identify any application or approval to amend SUP 118 for GAUs. In response to PTP requests for communications with the Township going back to 2013, Bonobo produced a handful of documents unrelated to amending SUP 118 to add GAUs.[6] In deposition, Mr. Oosterhouse confirmed Bonobo has not compiled and submitted an application to amend SUP 118 for GAUs. (**Ex 47** dep 80) and has not obtained an amendment to SUP 118 since the settlement resolved in 2018. (*Id.* 71-72) And he confirmed the Board has not taken action at any public meeting to grant authority under an SUP or otherwise for Bonobo to conduct GAUs since September 2018. (*Id.* 90)

Without further amendment to SUP 118 authorizing GAUs, Bonobo is a Winery-Chateau with a tasting room and curious permission for "meetings and special dinners" for *non*-registered

[6] In 2021, Bonobo sought to re-amend SUP 118 related to an unpermitted pergola.

guests. (ECF 457-13, PageID.16256) It may host promotional events, political rallies, and groups meeting to drink wine. It hosts groups from Girl Scouts to book clubs, Gladhanders to alumni associations, who come to taste or drink wine. (**Ex 47** dep 92-97, 100-101; **Exs 50, 51**) Bonobo also staffs a commercial kitchen. (**Ex 47** dep 24-25)

While Bonobo's claims center around zoning as an "outright ban" on commercial weddings, Bonobo hosts weddings for hire and other corporate gatherings, without apparent Township recourse. (**Ex 47** dep 92-103, 120-33; **Exs 50, 51, 52**; ECF 457-4, PageID.16158) Bonobo accepts reservations for ceremonies and events indoors and out, with or without dining catered by Bonobo, with or without live or recorded amplified or unamplified music, and with porta-potties if needed. (*Id.*) Its representative testified Bonobo was able to "open them [events] up a little bit to see what was allowable and what the customer wanted" after Judge Maloney issued an opinion on the constitutionality of GAUs. (**Ex 47** dep 137-38) However, it produced records indicating it was hosting weddings for hire pre-litigation. (**Exs 51, 52**) The record shows Bonobo unabashedly does the things it complains the PTZO disallows.

x. Mari is a Winery Chateau that is authorized for GAUs and actually hosts them – and also commercial events for hire.

Villa Mari, LLC a/k/a Mari Vineyards (Mari) sits on about 51 acres. (ECF 63-10) The winery enterprise started with Township authorization in 2014 for a Farm Processing Facility. (**Ex 54**) After it built facilities, in March 2016 Mari obtained Township approval in SUP 126 to convert to a Winery-Chateau. (ECF 63-10) SUP 126 required Mari to plant an additional 4.14 acres in vineyards in 2018 to meet wine crop production requirements and "prior to commencement of Guest Activity Uses on site." (ECF 63-10, PageID.3012) To date, those vineyards still are not in

the ground. (**Ex 53** dep 24-26) SUP 126 authorized Mari to construct a guest house and five homes, it is unclear that happened. (*Id.* 82-83) SUP 126 acknowledged Mari facilities accommodate up to 312 people for GAUs but nevertheless authorized "a maximum of 50 attendees per [GAU]." (ECF 63-10, PageID.3015-3016) SUP 126 also requires all GAUs "shall occur indoors" and requires GAUs to comply with PTZO standards. Mari did not appeal SUP 126 and does not challenge it in this case. (*Id.*, 3016)

In May 2016, the Commission issued Mari its small winemaker license. (ECF 334-10) The Commission approved liquor sales throughout Mari's indoor tasting rooms, which include designated indoor and outdoor areas plus the entire winery premises. (**Ex 55**) While Mari's original Farm Processing Facility permit authorized a 1,500 square-foot retail space (PTZO 6.7.2(19)(b)(7)), Mari built a facility that includes, in addition to the main tasting room, the mezzanine room, the Founders Room and patio, a patio off the tasting room, and the 10,000 square-foot Cave, an underground area with storage and some dedicated seating. (**Ex 53** dep 30-34) Zoning allows use of these spaces for wine drinking, and while SUP 126 limited GAU participation for Mari, there is no wine tasting participation limit. (*Id.* 117) Mari sometimes hosts over a thousand visitors on a busy day. It promotes itself with free entertainment, happy hour and other tasting room activities, social media, retail "logo gear," sponsoring community events, and in other ways. (**Ex 53** dep 45, 61-63). Mari also offers daily tours, wedding photography packages, wine tasting classes, educational events, sunrise yoga, yoga in the vines, and "private wine dinners." (*Id.* 54-57, 93-98; **Ex 56**) It serves wine identifying it as appellation to satisfy the self-promotion requirement. (**Ex 53** dep 107)

Mari mostly seems to understand it may not host events for hire, including weddings. (**Ex 57** resp 2, 3; **Ex 58**) Mari openly hosted two wedding events for a friend and a family member.

(**Ex 57** resp 3; **Ex 53** dep 153-58) Mari asserted there was no charge for the friend's wedding, but the record is contradictory. (**Ex 60**; **Ex 53** dep 192-93) In discovery, Mari produced documents showing, starting in at least 2019, that its facilities are available for rent for events, including weddings, for hundreds of people, indoors and outdoors, with amplified music. (*See, e.g.,* **Exs 59, 61**) Mari GAUs have not been the subject of Township violation notices or citations. (**Ex 53** dep 120-22)

xi. Tabone is not a Farm Processing Facility, but a Food Processing Plant operating an unauthorized tasting room.

Plaintiff Tabone Vineyards, LLC (Tabone), which claims to be a Farm Processing Facility, is a Food Processing Plant under PTZO 8.5 and operates an unpermitted tasting room. Its sole member is Mario A. Tabone (Mr. Tabone). (**Ex 62** dep 8) Mr. Tabone owns the winery property subject to a life estate for his mother, Mary Ann Tabone, who since June 2014 has leased the property to Tabone Vineyards, LLC. (**Ex 63**; **Ex 62** dep 12)

The Tabone property was previously owned by Jack and Paula Seguin, who operated a winery called J. Joseph Vineyards. In 2000, the Township issued the Seguins and J. Joseph Vineyards SUP 73 for a Food Processing Plant winery, allowing retail sales of wine for off-premises consumption but no onsite tasting or non-wine retail sales. (ECF 32-2; **Ex 62** dep 37) The winery structure burned down in May 2014.[7]

[7] Mr. Tabone recalled the fire happened over Memorial Day weekend but could not recall the year, which is available in media coverage. (**Ex. 62** dep 40); *see* https://upnorthlive.com/news/local/crews-investigate-barn-fire-at-vineyard. Last visited Oct. 6, 2023.

In January 2016, Tabone sought a Farm Processing Facility permit. (**Ex 64**) In April 2016, the Township informed Tabone it needed a setback variance. (*Id.* 15) Tabone applied for a variance, then withdrew its application on June 21, 2016, to "pursu[e] operations outlined by SUP 73." (**Ex 65**) On June 30, 2016, the Township issued to Mr. Tabone and his mother a land use permit authorizing reconstruction of the destroyed Food Processing Plant winery. (**Ex 66**)

Meanwhile, in May 2016, the Board passed a resolution granting Tabone the local government approval required for its Small Wine Maker license application. (**Ex 67**) The Board passed a second resolution in September 2016 reflecting the new address assigned to Tabone when it created a new access driveway (**Ex 62** dep 13-14, 18) The MLCC approved Tabone's Small Wine Maker license on March 8, 2017. (**Ex 68**) Discovery produced no additional approvals from the Township for Tabone.

In January 2018, the Commission sent Mr. Tabone a notice of a new law allowing manufacturers, including small winemakers, to obtain a newly created on-premises tasting room permit. (**Ex 69**) To obtain the permit, holders of existing manufacturer licenses needed only to sign and return a certification form. (*Id.*) Mr. Tabone signed the form and returned it to the Commission, which issued Tabone an on-site tasting room permit. (*Id.*) Tabone opened in the fall of 2018 but has never obtained Township zoning approval for its tasting room. (**Ex 62** dep 19)

Tabone operates out of what is essentially a large pole barn with a small indoor tasting room for up to 48 people, a larger patio, a production area, and storage. It offers tours based on staff availability. It has a "prep area for very basic charcuterie" and "sometimes . . . carr[ies] bags of chips." (*Id.* 28) It primarily promotes itself through the Old Mission Peninsula Wine Trail. Besides wine, it sells logo glassware. It is generally open from 11:00 a.m. to 6:00 or 7:00 p.m. in peak season, with more limited winter hours.

IV. SOME PLAINTIFFS LACK STANDING

Federal jurisdiction requires a plaintiff to have a "personal stake" in the outcome. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). Standing requires an injury in fact, causation, and likely redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). In multiparty litigation, each plaintiff must establish standing to bring each of its claims. *Fednav, Ltd. v. Chester*, 547 F.3d 607, 614 (6th Cir. 2008) (standing is plaintiff- and provision-specific). *Pagan v. Calderon*, 448 F.3d 16, 26 (1st Cir. 2006) (requiring determination of "whether each particular plaintiff is entitled to have a federal court adjudicate each particular claim that he asserts."). At the summary judgment stage, each Plaintiff must present enough evidence to create a genuine issue of material fact over each standing element. *McKay v. Federspiel,* 823 F.3d 862, 866 (6th Cir. 2016). Conclusory allegations about a past injury or vague allegations about a future one no longer suffice. *Lujan,* 504 U.S. at 564.

A. Black Star, Bonobo, and Tabone lack standing to bring all claims.

i. Conservation easements preclude additional commercial uses at Black Star and Bonobo.

Black Star and Bonobo sit on land where additional commercial activities are prohibited in perpetuity. They cannot establish actual or imminent injury caused by the challenged zoning, and a favorable decision would not redress their alleged injuries. They therefore lack standing and this Court lacks subject matter jurisdiction over their claims. See *Franzel v. Kerr Mfg. Co.*, 959 F.2d 628, 630 (6th Cir. 1992); Fed. R. Civ. P. 12(b)(1), (h)(3).

Black Star and Bonobo lack standing because the commercial uses they seek are prohibited on the land they lease by perpetual conservation easements (Easements), regardless of the litigation outcome. In 1997, the Township purchased the rights to develop the Black Star land from prior

owner Underwood Orchards. (ECF 457-10) In 1997 and 1998, the Township purchased the rights to develop the Bonobo land from prior owners, the Edmondsons and Seaberg Farms. (ECF 457-11, ECF 457-12) The Seaberg Easement protects the Bonobo winery parcel; the Edmondson Easement protects adjacent vineyards. By selling their development rights to the Township, Underwood Orchards, the Edmondsons and Seaberg Farms permanently restricted the use of the land to those "agricultural and open space uses as *specifically delineated*" in the Easements.[8] (*See, e.g.,* ECF 457-10, PageID.16204) "'Agricultural use' means substantially undeveloped land devoted to the production of horticultural, silvicultural and agricultural crops and animals useful to man" and specific related uses and activities including "[r]etail and wholesale sales of . . . agricultural products *grown on the farm*," "[r]oadside stands selling products as allowed by Township Zoning," "[a]gricultural buildings and structures . . . used *solely* for agricultural purposes," and "[p]rocessing of agricultural products . . . *provided a majority of the agricultural products processed are grown by the Grantor's farm operation*." (*Id.* PageID.16205) Additional agricultural uses may be permitted only if recognized by the Board following "recommend[ation] by the Planning Commission and at least one other state or nationally recognized organization." (*Id.* PageID.16206) The Easements provide that open space and agricultural uses "do not include [] construction or expansion of buildings and structures for non-agricultural uses," except as specifically reserved. (*Id.*) The Easements are fully enforceable under Michigan law. *See Dep't of Agric. & Rural Dev. V. Engle*, No. 359098, -- N.W.2d --, 2022 Mich. App. LEXIS 6801 *8 (Mich. Ct. App. Nov. 10, 2022).

[8] The three Easements use identical language.

The Easements limit Black Star and Bonobo's land uses and activities. Irrespective of the processing and sales provisions in 6.7.2(19) and otherwise, Black Star and Bonobo may only process wine where the majority of grapes are grown on their respective farms. Even if 6.7.2(19) and 8.7.3(10) allowed bars, restaurants, and events for hire, Black Star and Bonobo buildings are for making, tasting, and selling wine from grapes grown on its farm. Winery-Chateaus have no retail limits and may offer overnight accommodations, but Bonobo buildings are solely for agricultural purposes. Even if Black Star or Bonobo historically operated in violation of Easement terms, that would not modify the Easement terms nor limit their prospective enforceability.

Black Star and Bonobo seek relief that would allow them to offer private events for hire, restaurant and catering services, and wine production without zoning limits. They have no legally protected interest in these uses; none are delineated in the Easements. If this case results in more or unlimited commercial accessory uses in A-1 at Farm Processing Facilities or Winery-Chateaus, or if the Township amends the PTZO to allow Black Star and Bonobo's desired uses in A-1, the Easements preclude them from participating. Their inability to expand commercial operations on preserved farmland is not a cognizable injury caused by Township enforcement of the challenged PTZO provisions, and a favorable order of this Court could not redress it. They therefore lack standing and the Court should dismiss all their claims.

ii. *Tabone is not subject to any challenged provisions.*

Tabone received zoning authorization to rebuild a destroyed Food Processing Plant structure for operations under its SUP 73, which does not allow a tasting room and retail sales. It withdrew its Farm Processing Facility application in 2017 when it became apparent it could not qualify for a setback variance. Neither 6.7.2(19) nor any other provision challenged in this case

has been applied to it. It is subject to the requirements of 8.5, which it does not challenge here. It has suffered no injury or threatened injury traceable to any challenged provision, and a decision from this Court invalidating the challenged provisions would redress nothing with respect to Tabone.

The only evidence supporting Tabone's allegation that it is a Farm Processing Facility is Mr. Tabone's self-serving and uncorroborated affidavit and evasive deposition testimony. In discovery, PTP asked Tabone to produce a copy of its Farm Processing Facility permit or any other documents supporting its allegation; it objected and produced nothing. PTP is unable to locate in the Township or Winery discovery any permit or any other document supporting Tabone's allegation.

The record shows Tabone is *not* a Farm Processing Facility. After Tabone received authorization to reconstruct a Food Processing Plant, it obtained an On-Premises Tasting Room permit from the *Commission* but never applied for or received a land use permit from the *Township* for a tasting room. Any person planning to "establish a new use for any premises in any land use district, shall file an application in writing with the Zoning Administrator for a land use permit," which will be issued if the land use complies with zoning. PTZO 4.1.3(1). Establishing a tasting room or any new use without a land use permit violates 4.1.3(1), which Tabone does not challenge, and is a municipal civil infraction. PTZO 4.2.1. Operating a tasting room without a land use permit makes Tabone a nuisance, not a Farm Processing Facility.

Tabone seeks relief that would allow it to offer private events for hire, expanded food service options, and wine production without zoning limits. It has no legally protected interest in these uses; none are included in its SUP. If this case results in more or unlimited commercial accessory uses at Farm Processing Facilities, Tabone remains a Food Processing Plant. Its inability

to expand commercial operations is not a cognizable injury caused by Township enforcement of the challenged PTZO provisions, and a favorable order of this Court could not redress it. It therefore lacks standing and the Court should dismiss all its claims.

B. Nine Plaintiffs lack standing to challenge 8.73(10)(u); four also lack standing to challenge 8.7.3(10)(m).

All Plaintiffs assert the GAU provisions in 8.7.3(10)(u) impair their First Amendment rights and work a regulatory taking, but most were never subject to them. Four non-Chateaus[9] are not subject to 8.7.3(10) at all. Two Chateaus[10] do not have SUP authorization to host GAUs and never lawfully hosted GAUs under 8.7.3(10)(u). Two Chateaus[11] have SUP authorization to host GAUs but produced no evidence they ever attempted to host GAUs due to COVID-19, staffing, and other reasons. One Chateau[12] is in GAU limbo; it may, but does not, offer "one-of-a-kind" special dinner events. None of these Plaintiffs have shown the Township applied these non-applicable GAU provisions to them. The four non-Chateaus likewise failed to show the Township applied non-applicable 8.7.3(10)(m) to them. They thus lack standing, their "as-applied" claims fail, and they are not entitled to damages. *Lujan*, 504 U.S. at 560-561. *McCullen v. Coakley,* 573 U.S. 464, 485 n. 4 (2014) (as-applied challenge requires showing law has been unconstitutionally applied to plaintiff). Moreover, the Township repealed 8.7.3(10), limiting their prospective declaratory and injunctive relief. *Brandywine, Inc. v. Richmond,* 359 F.3d 830, 836 (6th Cir. 2004) (repealed provision cannot be declared unconstitutional).

[9] Black Star, Two Lads, Peninsula Cellars, and Tabone.
[10] Bonobo and Grand Traverse
[11] Brys and Hawthorne
[12] Bowers.

IV. THE FIRST AMENDMENT CLAIMS FAIL.

Plaintiffs' First Amendment claims are grounded in their objection to being prevented by zoning from having desired commercial events, retail sales, food service, and facility size in A-1. They fail because none of the challenged PTZO sections regulate Plaintiffs' nor their patrons' protected speech, *expressive* conduct or association, or religious beliefs.

These claims fail also because the root cause of Plaintiffs' complaints is A-1 agricultural zoning, not the challenged provisions (6.7.2(19)(a), (b); 8.7.3(10)(m), (u); 8.7.3(12)). Even if these provisions are invalidated or repealed,[13] Plaintiffs are still in A-1 and subject to its zoning. Commercial events for hire, retail shops, bars, and restaurants are not otherwise permissible land uses in A-1. The PTZO affirmatively states allowable land uses and prohibits non-listed land uses. PTZO 6.1.4; *Pittsfield v. Malcolm,* 375 Mich. 135, 142-43; 134 N.W.2d 166 (1965) ("Under the ordinance which specifically sets forth permissible uses under each zoning classification, therefore, absence of the specifically stated use must be regarded as excluding that use."); *Independence Twp. v. Shibowski*, 136 Mich. App. 178; 355 N.W.2d 903 (1984) ("A permissive format states the permissive uses under the classification, and necessarily implies the exclusion of any other non-listed use.").

The PTZO reasonably does not identify non-agricultural commercial uses as allowable land uses in A-1. Numerous courts have upheld similar zoning restrictions on commercial uses in agricultural districts. *Di Ponio v. Cockrun*, 373 Mich. 115; 128 N.W.2d 544 (1964); *Webster Twp. v. Waitz*, 2016 Mich. App. LEXIS 1109, (June 7, 2016); *Shore v. Maple Lane Farms, LLC*, 411 S.W.3d 405 (Tenn. 2013); *Nixon v. Webster Twp*, No. 343505, Mich. Ct. App. (Jan. 21, 2020);

[13] 8.7.3(10)(u) was repealed in December 2022 with PTZO Amendment 201. https://www.peninsulatownship.com/uploads/1/0/4/3/10438394/ordinance_amendment_201_-_farm_processing.pdf Last visited Oct. 6, 2023.

Forester v. Town of Henniker, 118 A.3d 1016 (N.H. 2015); *Zarrella Trust v. Town of Exeter,* 176 A.3d 467 (R.I. 2018); *Miami Twp. v. Powlette*, 197 N.E.3d 998 (Ohio 2022).

Plaintiffs do not challenge A-1 zoning. They challenge provisions expressly allowing some limited commercial accessory uses with a sufficient nexus to agriculture as at Farm Processing Facilities, Winery-Chateaus, and Remote Winery Tasting Rooms in A-1:

- 6.7.2(19)(a) and (b)(1) allow retail and wholesale sales of agricultural produce, including wine, and limited retail merchandise sales;
- 8.7.3(10)(m) allows accessory uses for registered (overnight) guests (ECF 442-2);[14]
- 8.7.3(10)(u)(1) clarifies commercial-type gatherings that *are* generally permissible – political rallies, tours, free entertainment in the tasting room; and
- 8.7.3(10)(u)(2) authorizes three distinct categories of commercial-type gatherings (GAUs).

These provisions do not *restrict* commercial-type events in A-1, they *expand* them. Invalidating them would mean *fewer* lawful commercial activities in A-1. *See Superior v. Reimel Sign Co.*, 362 Mich. 481, 487; 107 N.W.2d 808 (1961) (voiding sign provision as "unconstitutional and void" would be "of little benefit to [appellant] since it leaves untouched the prohibition" against noncommercial uses in agricultural district).

The absence of these provisions is *more* restriction, not less. Wineries historically understood that, but for these challenged provisions, their location in A-1 means *fewer* commercial events, which is why they supported adoption of 6.7.2(19) and 8.7.3(10)(u). If the PTZO were stripped of these sections, virtually unlimited winemaking and wholesale distribution would remain lawful on 5-acre parcels in A-1 for Food Processing Plants (ZO 8.5). The challenged

[14] The Township modified this provision as applied to Bonobo in SUP 118 to permit meetings and special dinners for *non*-registered guests.

provisions are integral parts of land uses added to the PTZO at Plaintiffs' urging to expand commercial accessory uses in A-1. *Winchester v. WA Foote Memorial Hospital,* 153 Mich. App. 489, 501; 396 N.W.2d 456 (1986) ("Zoning ordinances must be construed as a whole, with regard to the object sought to be obtained and the general structure of the ordinance as a whole.") (citations omitted).

The First Amendment claims are thus foundationally flawed by challenging *permissions* rather than *restrictions*. Plaintiffs cannot achieve through the First Amendment what they apparently really want – *unlimited* commercial events and retailing in A-1. Not only is that patently unreasonable, it would require rewriting the PTZO, which only the Township may do. *Schwartz v. City of Flint,* 426 Mich. 295; 395 N.W.2d 678 (1986); *Ann Arbor v. Northwest Park Const. Corp*., 280 F.2d 212, 223-24 (6th Cir. 1960).

A. The Free Speech Claims (Counts I, II) Fail.

Counts I and II mount facial and as-applied challenges alleging some zoning provisions impair free speech rights protected by the First Amendment. (ECF 29, PageID.1116-19) In discovery, each Plaintiff identified particular provisions as content-based restrictions, commercial speech restrictions, prior restraints, and compelling speech, plus that an "outright ban on weddings" restricts commercial speech. (*See e.g.* ECF 457-4, PageID.16132-33, PageID.16136-37; PageID.16154-58)

These free speech claims never get off the ground. The threshold question is whether the challenged zoning regulates protected speech or expressive conduct intended to convey a message. *U.S. v. O'Brien,* 391 U.S. 367, 376-77 (1968); *Wine & Spirits Retails, Inc. v. Rhode Island,* 418 F.3d 36, 49 (1st Cir. 2005). The First Amendment does not prevent restrictions directed at

commerce or economic activity, and talking about non-expressive conduct does not transform it into protected "speech." *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 567 (2011); *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 66 (2006). Because the challenged zoning regulates no *speech*, Plaintiffs must show it regulates conduct with "a significant expressive element" – that the speaker intends to convey a particularized message understood by the audience. *Arcara v. Cloud Book, Inc,* 478 U.S. 697, 706-707 (1986); *Texas v. Johnson,* 491 U.S. 397, 404 (1989); *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.").

Plaintiffs want more business opportunities, not to convey any particular message. They want to expand their facilities and operations, sell their attractive agricultural setting to people planning weddings and other private events, sell more food and drinks to keep customers in their tasting rooms longer, and sell more retail items. Chateau Chantal wants more events so it can reach as many customers as possible; the only message it wants to convey is that it can sell the goods and services zoning currently precludes it from selling. (**Ex 10** dep 70-71, 79-80, 83, 87) Peninsula Cellars wants to sell more beverages and retail items. (**Ex 18** dep 18, 33-34, 40-41) Bonobo wants to reach more patrons at private events so they tell their friends to visit Bonobo. (**Ex 47** dep 160-165) Mari wants to host events so it can market its logo gear and increase sales. (**Ex 53** dep 143-144) Brys wants to host more events so more people can "enjoy the agricultural space while also supporting our business through the sale of wine by the glass or bottles of wine." (**Ex 24** dep 101). Hawthorne's "goal" is to "get[] more people to the property who maybe wouldn't have come." (**Ex 43** dep 26) Black Star is primarily interested in "expansion"; it wants more opportunities for

visitor engagement because "[t]hey're all just opportunities for us to introduce our business to more people and help us control our financial destiny of our business." (**Ex 27** dep 46; **Ex 28** dep 17)

There is no expressive conduct being restrained. Instructive is *Country Mill Farms, LLC v. East Lansing*, 2019 U.S. Dist. LEXIS 242129 (W.D. Mich. Dec. 18, 2019). Country Mill Farms operated as a commercial wedding venue, and a dispute arose related to same-sex weddings. This Court considered whether the farm's activities and business operations constituted "expressive conduct," finding the staging and coordinating of events "does not constitute the sort of expressive conduct protected by the First Amendment." The farm-owner's social media posts discussing their religious beliefs also were not expressive conduct protected by the First Amendment.

At bottom, these free speech claims fail because the conduct the challenged provisions regulates is not expressive, it is just commerce.

i. No challenged provisions are content-based restrictions.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (picketing law unconstitutional where "operative distinction" is message on sign). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citations omitted).

Contrary to the Chateaus' allegations, Sections 8.7.3(10)(u)(2)(b) and (c) are not content-based restrictions.[15] (*See, e.g.,* ECF 457-4, PageID.16084-85, PageID.16090-91) ECF 162, PageID.6010) They describe two categories of allowable GAUs – meetings of local nonprofits and agriculture-related groups – without addressing the contents of anyone's message or speech. They do not regulate speech, let alone "because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163 (citation omitted). No Chateau produced evidence the Township applied these in a way that identified let alone targeted speech or content.

ii. No challenged provisions restrict commercial speech.

Commercial speech "propos[es] a commercial transaction." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. at 561–62 (citations omitted) (ban on utility advertising unconstitutional); *Wine & Spirits,* 481 F.3d at 49.

(a) Weddings

Two Chateaus – Brys and Bonobo – argue the Township's "outright ban on weddings" violates their commercial speech rights. (ECF 457-4, PageID.16136-37, PageID.16157-58) All Plaintiffs complain that 8.7.3(10)(u)(2)(d) restricts their commercial speech, presumably based on its exclusion of weddings and similar events from the scope of allowable GAUs.[16] Black Star similarly argues 6.7.2(19)(a) restricts its commercial speech. (*Id.* PageID.16145-46)) Based on similarities between 8.7.3(10)(u)(2)(d) and 6.7.2(19)(a) and Black Star's desire for commercial

[15] No non-Chateau asserted this theory in discovery. Plaintiffs abandoned in discovery a theory that 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) were content-based restrictions. (ECF 162, PageID.6008-6009; *see, e.g.*, ECF 457-4, PageID.16128-29)

[16] This is inconsistent with Chateau Chantal and Mari's assertion that their religious claims are "moot." (ECF 457-4, PageID.16107)

events, PTP presumes its complaint is grounded in the exclusion of "weddings, receptions and other social functions for hire are not allowed" from the scope of the Farm Processing Facility by-right use.

Weddings and similar events do not propose a commercial transaction and are not commercial speech. (ECF 162, PageID.6005) Even if the Township did ban weddings (it does not; it disallows events for hire, including weddings, at most but not all wineries), that would not violate Plaintiffs' commercial speech rights. While weddings and events might bring new visitors, that does not convert them into advertisements. *See Rumsfeld;* 564 U.S. at 66. Commercial activity's marketing potential does not mean the First Amendment shields it from regulation.

(b) Winery-Chateau Provisions

Plaintiffs challenge various combinations of nine GAU subsections as restricting commercial speech:[17]

- 8.7.3(10)(u)(1)(b) describes GAUs as intended to help promote Peninsula agriculture;
- 8.7.3(10)(u)(1)(d) and 8.7.3(10)(u)(2)(d) identify activities that are *not* GAUs;[18]
- 8.7.3(10)(u)(2)(a) allows wine and food seminars and cooking classes as GAUs;
- 8.7.3(10)(u)(2)(b) allows local nonprofit meetings as GAUs;
- 8.7.3(10)(u)(2)(c) allows meetings of agricultural groups as GAU;
- 8.7.3(10)(u)(5)(c) limits alcoholic beverages at GAUs to those produced onsite;

[17] For example, the Chateaus did not identify 8.7.3(10)(u)(2)(b) or 8.7.3(10)(u)(2)(c) as restricting their commercial speech (ECF 457-4, PageID.16085), and Two Lads did not identify 8.7.3(10)(u)(5)(c) or 8.7.3(10)(u)(5)(h). (ECF 457-4, PageID.16129)

[18] To the extent these subsections exclude weddings from the scope of allowable GAUs, weddings are addressed above.

- 8.7.3(10)(u)(5)(g) prohibits amplified instrumental music during GAUs; and
- 8.7.3(10)(u)(5)(h) prohibits outdoor displays during GAUs.

No Plaintiff has identified any subsection of 8.7.3(10)(u) that regulates advertising or other commercial speech. None restricts how Plaintiffs may describe goods and services they offer. None prevents Plaintiffs from promoting their wines, events, entertainment, tours, tasting rooms, happy hours, new releases, or anything else they may lawfully do. And no Plaintiff identified any facts or evidence supporting their commercial speech theory; they start from the conclusion that these sections are facially unconstitutional per former Township counsel correspondence. (*See e.g.* ECF 457-4, PageID.16164-65, PageID.16174-75)

Plaintiffs also allege 8.7.3(10)(m), allowing accessory uses for registered (overnight) guests, impairs commercial speech. They identified no speech proposing a commercial transaction that would be limited by 8.7.3(10)(m), and there is none. They also failed to identify any facts or evidence supporting their theory. Bonobo's challenge to 8.7.3(10)(m) is particularly misplaced because the Township substantially reworked it in SUP 118.

(c) *Farm Processing Facility Provisions*

Two Lads and Black Star (the Farm Processors) and Tabone challenge parts of 6.7.2(19) besides 6.7.2(19)(a) as commercial speech restrictions. (ECF 457-4, PageID.16122-23, PageID.16128-29, PageID.16142-46, PageID,16149-50; PageID.16181-86) All allege 6.7.2(19)(b)(1)(iii), allowing sale of fruit wine from 85% local juice, impairs commercial speech. This theory is nonsensical, and there are no facts or evidence supporting it. Two Lads pulled out cherry trees on its land when it started its winery: "I don't want to make cherry wine. … We're grape growers, wine makers." (**Ex 36** dep 51)

All also assert 6.7.2(19)(b)(1)(v), allowing logo merchandise sales, restricts commercial speech. This subsection does not regulate what, when, where, or how they may advertise or describe goods they sell. It authorizes merchandise sales beyond what is otherwise allowed in A-1. *Di Ponio,* 373 Mich. at 120. Two Lads sells winery-related items but avoids "tchotchkes and things," noting, "I really like that we focus mostly on wine." (**Ex 36** dep 137-138) Moreover, there is no evidence the Township enforces this provision. Black Star sells logo t-shirts despite "clothing" sales being disallowed and has never experienced any enforcement.[19] (**Ex 27** dep 67-68) The PTZO does not prevent these Plaintiffs from selling tchotchkes in the commercial C-1 District, online, or elsewhere. They failed to support their theory with evidence and identify no cognizable injury.

Black Star alleges 6.7.2(19)(b)(6), establishing maximum above-grade floor area for Farm Processing Facilities,[20] restricts commercial speech. (ECF 457-4, PageID.16145-46) Two Lads testified similarly. (**Ex 36** dep 145-148) (limits on building square footage are restrictions "from a raw kind of constitutional commercial speech side") The size of a structure proposes no commercial transaction and is not "commercial speech.". The PTZO imposes no architectural nor aesthetic standards for winery structures. The theory that zoning limiting building size restricts commercial speech is meritless and further unsubstantiated with any evidence. MCL 125.3201(4) (townships may regulate, through zoning, "the location, height, bulk, number of stories, uses, and size of dwellings, buildings, and structures"

[19] Mr. Lutes "believe[d] there may have been a violation or two" sometime between 2010 and 2015 but could not recall the Township ever issuing a notice of violation, citation, or fine against it, and could not say what the "violations" were about. (**Ex 27** dep 44-45)

[20] They challenge an outdated version of 6.7.2(19)(b)(6), which was updated to significantly increase the caps nearly a year before they filed their complaint.

(d) Remote Winery Tasting Room provisions

Peninsula Cellars complains that 8.7.3(12)(g), allowing off-site tasting of a winery's wine, and 8.7.3(12)(i), allowing logo merchandise sales; restrict its commercial speech. (ECF 457-4, PageID.16117-118) Neither regulates speech proposing a commercial transaction; they outline the contours of permissible commercial accessory uses at A-1 tasting rooms that are not on the same parcel as their associated farms and wineries.

iii. No challenged provision is a prior restraint.

A prior restraint may be an order forbidding expressive activity before it occurs or when the exercise of a First Amendment right depends on prior governmental approval. *Alexander v. United States*, 509 U.S. 544, 550 (1993); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001) (licensing scheme for sexually oriented businesses is prior restraint on expressive conduct of nude dancing). Generally applicable laws do not constitute prior restraints if they govern other types of activities without singling out expressive conduct. *Bronco's Ent., Ltd. v. Chater Twp of Van Buren,* 421 F.3d 440, 444, 46 (6th Cir. 2005) (no prior restraint where ordinance required site plan approval for all commercial land uses, "not just those that involve protected speech," and gave officials no discretion "to allow or forbid expressive activity.").

(a) Winery-Chateau Provisions

Plaintiffs' prior restraint theory fails because 8.7.3(10)(u)(2)(a)-(d) do not target expressive activity. Subsections 8.7.3(10)(u)(2)(a)-(c) describe three categories of GAUs; subsection 8.7.3(10)(u)(2)(d) provides that "entertainment, weddings, wedding receptions, family reunions

[and] sale of wine by the glass" are not GAUs. SUP approval is no prior restraint – it lawfully requires all accessory and support uses to be in an approved site plan and conform to zoning and site development standards. MCL 125.3502; PTZO 8.1.2. Once GAUs are authorized in an SUP, a Winery-Chateau requires no Township approval for individual GAUs authorized by subsections 8.7.3(10)(u)(2)(a) and (b) (wine and food seminars, local non-profit meetings). Chateau Chantal, which has hosted hundreds of GAUs, admits as much. (**Ex 10** dep 71) Subsection 8.7.3(10)(u)(2)(c), for meetings of agricultural groups with a direct relationship to agricultural production, says the Zoning Administrator "*can* give prior approval," but pre-approval is not required. It also does not target protected speech or expressive conduct – it applies equally to an agricultural group organizing a political campaign or a book club; the Future Farmers may meet at Bonobo to discuss pigs, politics, or papacy. There is no administrative discretion to deny meetings based on message content.

No Plaintiff produced evidence it ever requested approval under 8.7.3(10)(u)(2)(c) for an ag-related meeting, so there is necessarily no evidence the Township ever denied approval nor inserted expressive content into the approval analysis. (**Ex 24** dep 74 (ag meetings not "something that would help financially with the business"); **Ex 10** dep 72-73)

Any suggestion that Township officials deny pre-approval for activities besides agricultural group meetings is misplaced. (ECF 162, PageID.6012-13) The Township cannot pre-approve (or deny) creative events (*e.g.*, snowshoeing or yoga in the vines[21]) that fall into no GAU category (wine and food seminars, local non-profit or ag-related group meetings). The Administrator lacks pre-approval authority over them. That a winery asks to do something the PTZO does not permit

[21] Grand Traverse, Bonobo, Mari, and Bowers (maybe others) have hosted yoga in the vines over the years.

does not render the lack of permission a "denial" constituting a prior restraint of protected speech. If a Chateau asked if its SUP allowed it to host Woodstock in 2024, "no" would be a response, not "prior restraint." If Plaintiffs believed Township staff interpretations or responses to their queries were arbitrary, unreasonable, or contrary to the PTZO or their SUPs, they had ample recourse, but such complaints establish no unconstitutional prior restraint. Plaintiffs produced no evidence that informal staff interpretations targeted or burdened any protected speech or expressive conduct. Brys complains it was denied pre-approval for a political fundraiser last summer, but the Township response had nothing to do with politics (and could not have been a basis for Plaintiffs' complaint filed in October 2020). (**Ex 26**; s*ee also* **Ex 53** dep 98-104 (bicycle tour, book club requests)) At bottom, restraints on Plaintiffs' use of winery facilities for commercial events arise not from Township review of message content but because each is a winery located in A-1.

(b) Farm Processing Facility Provisions

Black Star asserts 6.7.2(19)(b)(6), establishing floor area limits, is a prior restraint. (ECF 457-4, PageID.16145-46) This theory fails because 6.7.2(19)(b)(6) does not regulate speech or expressive conduct. It ensures that Farm Processing Facility parcels are mostly open space and that agricultural production, not retail sales, is the primary use. It involves no pre-approval to exercise First Amendment rights, let alone content-based approval, let alone administrative discretion. Black Star identified no evidence that the Township administered 6.7.2(19)(b)(6) in any way that targeted protected First Amendment activity or otherwise supporting this theory.

iv. No challenged provision unlawfully compels speech.

Courts have found unconstitutionally compelled speech in two types of cases: where "an individual is obliged personally to express a message *he disagrees with*, imposed by the government" and where "an individual is required by the government to subsidize a message *he disagrees with*, expressed by a private entity." *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) (emphasis added). The First Amendment may prevent the government from requiring a person to "repeat an objectionable message out of their own mouth[]," "use their own property to convey an antagonistic ideological message," "respond to a hostile message when they would prefer to remain silent," "be publicly identified or associated with another's message," or "pay subsidies for speech to which they object." *Glickman v. Wileman Bros. & Elliott*, 521 U.S. 457, 470–71 (1997) (citations and quotations omitted); *U.S. v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). No such circumstances exist here.

The Chateaus challenge two GAU sections: Section 8.7.3(10)(u)(1)(b) states the Township's *intent* in allowing GAUs to incentivize wine crop production and promote Peninsula agriculture; under 8.7.3(10)(u)(5)(a), Winery-Chateaus that choose to host GAUs must include Agricultural Production Promotion. (*See, e.g.,* 457-4, PageID.16132-33, PageID.16136-37, PageID.16154-58, PageID.16164-65, PageID.16170-71) There is no obligation to host GAUs; most Chateaus never have. And there is no evidence self-promotion is objectionable. Winery-Chateaus are necessarily part of Peninsula agriculture and production – by definition, they grow fruit and produce wine in Peninsula Township. PTZO 3.2; MCL 436.1111(12). To comply with 8.7.3(10)(u)(5)(a), they may promote *themselves* by identifying their own wines, distributing their own promotional materials, or providing tours of their own winery. The two Chateaus lawfully authorized to host GAUs expressed no objection to serving their Old Mission Peninsula AVA wine

or otherwise promoting themselves. (**Ex 53** dep 107-108; **Ex 10** dep 53, 55-58; *see also, e.g.*, **Ex 17**) The First Amendment does not prevent the Township from requiring activities it allows for a promotional purpose to include a promotional component where the promotional content is entirely up to the speaker, who need not convey or subsidize any disagreeable message.

B. <u>The Free Exercise of Religion Claim (Count I) Fails.</u>

Count I asserts a facial challenge to zoning that allegedly violates Plaintiffs' First Amendment right to free exercise of religion. (ECF 29, PageID.1116-18) To maintain this claim, Plaintiffs must show zoning regulates religious beliefs. *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (overruled by statute). A neutral law of general applicability that incidentally impinges on religious *practice* (as opposed to religious *belief*) cannot be challenged under the Free Exercise Clause. *Id.* at 876-82; *Roberts v. Neace,* 958 F.3d 408, 413 (6th Cir. 2020) (per curium).

One reason to reject Plaintiffs' free exercise claim is they wholly failed to support it in discovery. In response to an interrogatory asking when and how the PTZO first injured their First Amendment rights, each Plaintiff identified provisions allegedly impairing their freedoms of speech and association but none impairing religious freedom. (*See, e.g.,* ECF 457-4, PageID.16174-75, PageID.16181-82) They also identified no facts supporting this claim. (*Id.*) There is no evidence of what – if any – religious beliefs Plaintiffs hold, what religious practices they engage in, and whether or how zoning has ever impinged on their religious beliefs or practices.[22] *See McGowan v. Maryland,* 366 U.S. 420, 429 (1961) (appellant lacked standing to pursue free exercise claim where they asserted only economic injury to themselves and "the record

[22] It is unclear whether Chateaus – commercial corporate enterprises established to grow grapes and make wine – have religious beliefs and practices.

is silent as to what appellants' religious beliefs are"). There is no allegation or evidence Township officials ever inserted religion into zoning administration or enforcement. *Cf. Country Mill Farms, supra*. This claim wholly lacks supporting evidence.

The free exercise claim fails further because it appears based on zoning preventing Plaintiffs from hosting commercial weddings. (ECF 34, PageID.1872) Besides wine tasting and sales, the PTZO generally[23] prevents non-ag commercial enterprises in A-1, including (but not limited to) commercial events, including (but not limited to) weddings for hire, including (but not limited to) wedding ceremonies and receptions. Weddings for hire are one example of disallowed commercial activities. They are disallowed regardless of whether the ceremony is religious or secular. Zoning does not target religious weddings or any other type of ceremony, religious or secular. It prevents repurposing winery facilities into commercial event venues. The PTZO is facially neutral and at best only incidentally addresses potentially religious practices. *DiLaura v. Ann Arbor Charter Twp*., 30 Fed. Appx. 501, 508 (6th Cir. 2002) ("The zoning ordinance at issue in this case is facially neutral (a bed-and-breakfast would be treated the same way), and there is no evidence offered of any animus against religion involved in either the passage or interpretation of the law. The law does not violate the Constitution."); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. Lakewood,* 699 F.2d 303, 306 (6th Cir. 1983) ("The ordinance prohibits the purely secular act of building anything other than a home in a residential district."); *Alive Church of the Nazarene, Inc. v. Prince William Cnty*, 59 F.4th 92, 108 (4th Cir. 2023) (land use regulations neutral "if religious institutions are 'just one among many' other nonreligious regulated uses, and there is no independent evidence of religious animus.") (citation omitted). Moreover, the First Amendment does not generally protect commercial transactions, which is the core of these free exercise claims.

[23] Grand Traverse SUP permit events for hire, including weddings.

McGowan, supra; Roberts v. Jaycees, 468 U.S. 609, 634 (1984) (while constitution protects aspects of commercial transactions that may be expressive, "the State is free to impose any rational regulation on the commercial transaction itself.").

Chateau Chantal and Mari argued this claim is "moot" because former zoning director Christina Deeren "admitted that Wineries [] are allowed to host weddings."[24] (ECF 457-4, PageID.16107, PageID.16167) Ms. Deeren never "admitted" all Wineries are allowed to host weddings (including commercial weddings). *Some* wineries are allowed to host commercial weddings.[25] Several have hosted non-commercial "friends and family" weddings. Ms. Deeren accurately testified weddings are not GAUs, and therefore do not require Township "approval." (ECF 136-6, PageID.4819) Administrator approval may be provided – not for activities for "registered guests," nor wine tasting, nor most GAUs – but only for "meetings of agricultural related groups." PTZO 8.7.3(10)(u)(2)(c)(i). Since weddings are not GAUs, Township officials cannot "approve" weddings.

Ms. Deeren also lacked authority to contradict, modify, or "moot" the PTZO and SUPs, through deposition or otherwise. The Administrator is authorized to receive zoning applications, inspect, determine compliance with land use permits, and enforce the PTZO. PTZO 4.1.2. Only the Zoning Board of Appeals may interpret the PTZO. PTZO 5.7.2. Interpreting the PTZO is a legal question, not a fact question for a township employee. *See Roger Miller Music, Inc. v. Sony/ATV Publ'g, LLC*, 477 F.3d 383, 394-95 (6th Cir. 2007); *Moskovic v. City of New Buffalo*, 2023 U.S. Dist. LEXIS 7052, 2023 WL 179680 (W.D. Mich. Jan. 13, 2023) ("the City's witnesses

[24] This appears to contradict their claim that 8.7.3(10)(u)(2)(d), excluding weddings from the scope of allowable GAUs, restricts their commercial speech.

[25] Chateau Chantal, Chateau Grand Traverse, and Brys SUPs permit overnight guests, and commercial weddings are permissible for their overnight guests. PTZO 8.7.3(10)(m), (r). Chateau Grand Traverse's SUP also expressly authorizes commercial events, including weddings.

cannot make an admission about the law. It is the Court's province and duty to say what the law is. Statements by the parties do not control the Court's analysis of the ZO.") (cleaned up). Plaintiffs know commercial events, including weddings, remain prohibited in A-1, as they have been since the PTZO was adopted in 1972.

C. The Freedom of Association Claim (Count III) Fails.

Count III alleges zoning "directly and substantially burden[s]" Plaintiffs' First Amendment associative rights. (ECF 29, PageID.1120-21) The Chateaus, Black Star, Peninsula Cellars, and Tabone assert eight Winery-Chateau provisions prevent them from "freely associating with persons or groups of [their] choosing": seven subparts of 8.7.3(10)(u) (allowing GAUs); and 8.7.3(10)(m) (allowing accessory uses for registered (overnight) guests). (*See, e.g.,* ECF 457-4, PageID.16149-50, PageID.16117-18, PageID.16170-71; PageID.16184-85) The Farm Processors and Tabone allege Farm Processing Facility provisions 6.7.2(19)(a) (excluding social functions for hire from scope of use) and 6.7.2(19)(b)(1)(iii) (allowing retail sales of fruit wine from 85% local grapes) restrict their free association. (*Id.*, PageID.16125-26, PageID.16149-50, PageID.16184-85)

These claims fail because, as discussed above, Plaintiffs challenge the wrong parts of the PTZO – the parts that *expand* commercial gatherings rather than *restrict* them. The source of Plaintiffs' plight is their A-1 location.

These claims fail because Plaintiffs did not support them with any facts, only (erroneous) legal conclusions.[26] In discovery asking for facts supporting this claim, each Plaintiff stated the PTZO "is facially unconstitutional" and "[t]herefore, it has injured [its] First Amendment rights." (*See, e.g.*, 457-4, PageID.16154-55, PageID.16161-62) This is exactly backwards – each Plaintiff

[26] Brys alone identified a single interaction to support its claim, discussed below.

must first show an injury caused by the zoning before the Court can consider whether the zoning is unconstitutional. *Warth v. Seldin,* 422 U.S. 490, 499 (1975) (injury required to invoke jurisdiction). With one exception, no Plaintiff demonstrated for what protected purpose it sought to associate nor whether, when, or how the challenged provisions prevented it from doing so. Pre-litigation correspondence between Plaintiffs' and the Township's attorneys identify no restraints on association nor factual allegations supporting this claim – just legal opinions. (*See, e.g.,* 457-4, PageID.16164-65) (citing ECF 29-15, 29-16)) Without supporting facts, these claims fail.

This claim fails also because the challenged provisions do not limit protected associational activities. The First Amendment protects intimate and expressive association, not "social association." *Roberts v. Jaycees*, 468 U.S. 609, 617-18 (1984); *Stanglin,* 490 U.S. at 24-25 (dance hall patrons engaged in recreational dance is non-protected "social association").

Intimate expression means personal affiliations between humans, like marriage, childbirth, child-rearing, and co-habitation. *Roberts,* 468 U.S. at 619 (collecting cases). No Plaintiff can seriously maintain that hosting scores or hundreds of patrons with whom it has no personal relationship is intimate expression. *See Johnson v. Cincinnati,* 310 F.3d 484, 499-500 (2002); *Six v. Newsom*, 462 F.Supp.3d 1060, 1070 (C.D. Cal. May 22, 2020) (no constitutional right "to get married at a specific venue"). Chateau Chantal described its interaction with event attendees as negotiating a contract, planning the event, and being "[t]here to provide the contractually obligated operation of the[] event," and acknowledged that unless staff encounter someone they know, they do not participate but are "working the event." (**Ex 10** dep 104-105)

Expressive association is "for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618. The challenged provisions do not prevent any Plaintiff from engaging in

expressive association. Each may associate with whomever it likes to advocate for whatever political or cultural viewpoints they may have and practice whatever religion they may have. Plaintiffs host private "friends and family" weddings and ceremonies without reprise. The PTZO does not limit who may patronize their tasting rooms for wine-drinking nor what staff or patrons may discuss or express. The lone instance where a Plaintiff alleged specific impairment of free association involved Brys mischaracterizing the Township as preventing its association with the Democratic Party by "prohibit[ing]" a 2022 political fundraiser. (ECF 457-4, PageID.16135-36) The Township reasonably informed Brys the event appeared impermissible due to tents and participant numbers. (**Ex 26** p 1) To the extent otherwise permitted by campaign financing or otherwise, Brys was and is free to associate with the political party of its choosing. Zoning does not prevent any Plaintiff from affiliating with, donating to, or hosting political parties. Section 8.7.3(10)(u)(1)(d) expressly allows Winery-Chateaus to host "political rallies" along with other free activities in their tasting rooms. There are no limits on who may patronize tasting rooms. As Hawthorne acknowledges, a group that was unable to have an event there could "[a]bsolutely" come in for a glass of wine. (**Ex 43** dep 42) As far as zoning is concerned, Plaintiffs may freely entice preferred groups into their ample tasting rooms and organize alongside them to recall politicians or debate abortion.

At bottom, these claims are flawed because they are grounded in objection to limits on *commercial* association – the opportunity to capitalize on other people's gatherings, meetings, weddings, and events. Plaintiffs simply want to reach more customers. Brys itself acknowledged any group can come to the winery and have private tastings, what it wants is to host "a corporate group, a family function, a wedding, and be able to enjoy the agricultural space while also supporting our business through the sale of wine by the glass or bottles of wine." (**Ex 24** dep 100-

102; *see also*, **Ex 36** dep 152-157; **Ex 24** dep 100-103; **Ex 47** dep 160-165; **Ex 53** dep 142-144) The right to freely associate does not protect the pursuit of *commercial* enterprises. *In re Primus,* 436 U.S. 412, 438 n. 32 (1978) (association for advancement of one's own commercial interests is not protected associational activity); *Roberts*, 468 U.S. at 634 (O'Connor concurrence) (in contrast to right of expressive association, "there is only minimal constitutional protection of the freedom of commercial association," because "the State is free to impose any rational regulation on the commercial transaction itself"); *Jacoby & Meyers, LLP v. Presiding Justices,* 852 F.3d 178, 188-89 (2nd Cir. 2017) (no First Amendment interest protects for-profit lawyers engaged in business and serving clients' interests as business, even when firm provides "vehicle" for clients' political advocacy or expression); *IDK, Inc. v. County of Clark,* 599 F. Supp. 1402, 1406-409 (D.C. Nev. 1984) (rejecting escort service association claim because it was commercial enterprise; "[m]ere association, incidental to a commercial transaction, does not mean that the parties to the transaction are necessarily involved in a protected associational relationship."); *Six,* 462 F. Supp. 3d at 1071-72 (distinguishing between opportunities for desired *activities* (not protected) and *associating* with peers, friends (protected)). Plaintiffs failed to identify how the PTZO impairs any particular message or viewpoint they might want to express. That commercial events or gatherings might contain a kernel of expression is insufficient. *Stanglin*, 490 U.S. at 25. Nor could a Winery maintain this claim based on some unidentified group or organization's inability to hold events at their winery facility – those parties are not here, nor does the PTZO restrict their message or viewpoint. *See Mount Elliot Cemetery Assoc. v. City of Troy,* 171 F.3d 398, 404 (6th Cir.1999).

Plaintiffs are not associations predominantly engaged in protected expression, and their winery businesses were not "organized for specific expressive purposes." *New York State Club Ass'n., Inc. v. New York*, 487 U.S. 1, 13 (1988); *CompassCare v. Cuomo*, 465 F.Supp.3d 122 (N.D.

NY, June 5, 2020) ("[T]he Supreme Court has never held that a commercial enterprise, open to the general public, is an 'expressive association' for the purposes of First Amendment protections.") (citation omitted). They have patrons, not members, and seek to associate with more patrons for the purpose of selling more goods (wine and food) and services (facility use). *See Roberts,* 468 U.S. at 635-38 (O'Connor concurrence) (distinguishing between expressive and commercial associations). This is not the type of "association" the Constitution protects.

D. <u>The Challenged Zoning Withstands Judicial Review.</u>

Nothing in the challenged provisions suppresses protected First Amendment activity, so rational basis review applies. *Liberty Coins, LLC v. Goodman,* 748 F.3d 682, 693 (6th Cir. 2014); *Lakewood,* 966 F.2d at 305, 308-309. Under rational basis review, constitutionality is strongly presumed, review is highly deferential to the government, and the government need not produce evidence to sustain rationality. *Liberty Coins,* 748 F.3d at 694 (citations omitted); *Ann Arbor*, 280 F.2d at 223-24 (zoning is "clothed with every presumption of validity."); *Brae Burn, Inc. v. Bloomfield Hills,* 350 Mich. 425, 430-31; 86 N.W.2d 166 (1957) (courts do not approve "wisdom or desirability" of zoning).

The purposes of the PTZO include "to encourage the use of lands and resources of the Township in accordance with their character and adaptability." PTZO 2.1. The A-1 District aims to "preserve, enhance, and stabil[ize]" areas predominately for farming purposes and allow "other limited uses which are deemed to be compatible with agricultural and open space uses." PTZO 6.7.1. The SUP permitting process is intended to "provide a framework of regulatory standards" to address concerns about uses that are potentially "injurious to surrounding properties by depreciating the[ir] quality and value" and the Township as a whole. PTZO 8.7.1(1). The Winery-

Chateau section intends to "maintain the agricultural environment, be harmonious with the character of the surrounding land and uses, and [] not create undue traffic congestion, noise, or other conflict with the surrounding properties." PTZO 8.7.3(10)(a). The intent of the GAU section includes assuring "additional farm land in wine fruit production." PTZO 8.7.3(10)(u)(1). The Farm Processing Facility use is intended "to promote a thriving agricultural production industry and preserv[] [the] rural character" of the community. PTZO 6.7.2(19)(a). The PTZO aims to prevent deterioration of agricultural production and farming and maintain Township character. The PTZO advances the Township Master Plan, which envisions A-1 as predominantly agricultural with viable agricultural operations and farming practices. (ECF 142-2, PageID.5027, PageID.5038-41); MCL 125.3203(1). Peninsula Township has a distinguished history of farmland preservation, including through its historic taxpayer-funded Protection of Development Rights (PDR) program. PDR Ordinance No. 23.[27]

A municipality's interest in regulating land uses within its jurisdiction is significant. *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 50 (1968); *Lakewood,* 699 F.2d at 308 (collecting cases). Zoning prioritizing farming serves legitimate governmental interests. *Alive Church,* 59 F.4th at 109; *Whitmore Lake 23 v. Ann Arbor Charter Twp.,* 2011 Mich. App. LEXIS 790 (April 28, 2011); *Hendee v. Putnam Twp.*, 2008 Mich. App. LEXIS 1746 (Mich. App. Aug. 26, 2008), rev'd on other grounds. So does minimizing traffic congestion and noise and maintaining zones of sanctuary for compatible land uses. *Belle Terre v. Boraas,* 416 U.S. 1, 9 (1974); *Lakewood,* 699 F.2d at 308*; Curto v. Harper Woods,* 954 F.2d 1237, 1242-43 (6th Cir. 1992). So does preserving the character of the district. *Kyser v. Kasson Twp*, 486 Mich 514, 520; 786 NW2d 543 (2010); *Adams Outdoor*

[27] Available at https://peninsulatownship.com/uploads/1/0/4/3/10438394/ordinance_23_-_3rd_ammendment_purchase_of_development_rights.pdf, last accessed October 5, 2023.

Advertising v. Holland, 234 Mich. App. 681, 691-92 (1999). Authorizing commercial land uses in a noncommercial district would be *un*reasonable zoning. *Penning v. Owens*, 340 Mich. 355, 367; 65 N.W.2d 831 (1954); *Raabe v. Walker,* 383 Mich. 165, 177-79; 174 N.W.2d 789 (1970); *Superior v. Reimel Sign Co.,* 362 Mich. 481, 486; 107 N.W.2d 808 (1961) ("We know of no reason why a township ordinance may not forbid [] commercial uses in a noncommercial district."). The Township reasonably treats commercial event venues as neither primary nor accessory uses in A-1. *See Lerner v. Bloomfield Twp.*, 106 Mich. App. 809, 812-13; 308 N.W.2d 701 (1981) (meaning of "accessory uses"). Plaintiffs cannot show the PTZO is not rationally related to legitimate governmental interests.

V. THE TAKING CLAIM FAILS.

Count VII asserts a regulatory taking claim. (ECF 29, PageID.1124-25) Plaintiffs' original theory was that minimum acreage requirements are unconstitutional. (ECF 3, PageID.470-71; ECF 34, PageID.1874-75) They abandoned that in discovery,[28] instead challenging provisions they claim "operate[] as a regulatory taking of the property rights afforded by" their MLCC licenses by preventing them from staying open until 2:00 a.m., playing amplified music, catering, and operating a restaurant. (*See, e.g.,* ECF 457-4, PageID.16087-88, PageID.16101-102) The non-Chateaus assert Winery-Chateau GAU sections and the "ban[]" on restaurants operate as a takings of the same rights afforded to them by their small winemaker's license. (*See, e.g.,* ECF 457-4, PageID.16129-30)

Plaintiffs do not and cannot allege the PTZO denies all economically beneficial use of their winemaker license, so they cannot maintain a *per se* taking claim. *Lucas v. South Carolina Coastal*

[28] Perhaps because some are non-landowners.

Council, 505 U.S. 1003, 1015 (1992); *D.A.B.E., Inc. v. Toledo*, 393 F.3d 692, 965-96 (6th Cir. 2005) (causing bar and restaurant owners to lose customers is insufficient for categorical takings claim).

At best, each Plaintiff alleges a partial taking subject to *Penn. Cent. Transp. Co. v. New York,* 438 U.S. 104 (1978). But this requires an interest protected by the Takings Clause, where "property" is defined "much more narrowly than in the due process clauses." *Pittman v. Chicago Bd. Of Educ.,* 64 F.3d 1098, 1104 (7th Cir. 1995) (citation omitted); *Hall v. Meisner,* 51 F.4th 185 (6th Cir. 2022) ("existence of a property interest" for takings purposes "is determined by reference to existing rules or understandings that stem from an independent source such as state law") (quotations and citation omitted).

No Plaintiff has shown the PTZO has taken any property interest protected by the Takings Clause. They nebulously assert zoning impairs "property rights afforded" by their winemaker licenses. To be clear, the licenses themselves are not impaired. Grand Traverse holds a wine maker license entitling it to manufacture and distribute wine; the remaining 10 Plaintiffs hold small wine maker licenses entitling each to manufacture and distribute up to 50,000 gallons of wine annually. MCL 436.1111(12); 436.1113a(10). No Plaintiff alleges impairment of those operations. To maintain this claim, they must show PTZO provisions impair some *other* constitutionally protected property besides these.

For their state law preemption claims, Plaintiffs identified MLCC *permits* available to them, such as for an on-premises tasting room, entertainment, and catering. (ECF 334, PageID.12021-22) But in discovery, they failed to identify such permits, claimed no constitutionally protected property right in them, and did not allege they were impaired. They complain that zoning interferes with their ability to stay open late, amplify music, and offer food

catering and restaurant services. But the Commission does not issue permits for late hours, amplified music, food catering, or restaurant service; it issues permits to traffic liquor alongside those activities. With respect to the activities themselves, permit holders must comply with zoning. Mich. Admin. Code R. 436.1003(1) (*See e.g.* **Ex 9** p 4; **Ex 38** p 3) A permit might spur expectations but grants no property rights.

At bottom, Plaintiffs complain about zoning impacts to *business activities*, fabricate entitlement to those activities, then characterize the non-existent entitlement as a *property right*. Plaintiffs have no property right to stay open late or amplify music. They cannot transfer wine making permits because they are tied to each Plaintiff's winemaking. PTP identified no precedent in Michigan or beyond recognizing a property interest protected by the Takings Clause in permits and rules allowing liquor licensees to extend their liquor trafficking to supplemental business activities. *See Puckett v. Lexington-Fayette,* 60 F.Supp. 3d 772, 779 (E.D. Ky. 2014) ("A wide range of statutory entitlements are not covered by the Takings Clause, even though they covered [*sic*] by procedural due process safeguards.") (collecting cases).

Even if a Plaintiff had an MLCC permit to stay open late, amplify music, and serve food, such permit would provide no constitutionally protected property right to profitability or to obtain particular economic benefits from them. *Long v. Liquor Control Comm'n,* 322 Mich. App. 60, 70-72; 910 N.W.2d 674 (2017). Each Plaintiff's regulatory takings claim thus fails because the challenged provisions take no stick out of their bundle of property rights. *See Lucas,* 505 U.S. at 1027 (regulation is no taking if "the proscribed use interests were not part of his title to begin with"); *Nekrilov v. City of Jersey,* 45 F.4th 662, 669-70 (3rd Cir. 2022) ("[W]e decline to recognize a general right to do business as a property interest cognizable under the Takings Clause. . .. [T]o hold otherwise would broaden the scope of the Takings Clause such that any business regulation

could constitute a taking."); *Moskovic v. New Buffalo,* 2022 U.S. Dist. LEXIS 197730 (W.D. Mich. Oct. 31, 2022).

Even if a Plaintiff asserted some property interest to stay open later, amplify music, and provide catering and restaurant services cognizable under the Takings Clause, its claim would easily fail *Penn Central*. Under *Penn Central*, whether government regulations give rise to a taking requires a case-by-case factual inquiry considering including: (1) the economic impact of the regulation; (2) its interference with reasonable investment-backed expectations, and (3) the character of the government action.

The first *Penn Central* factor focuses on the magnitude or severity of the regulation's economic impact. *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 540 (2005). Reliance on lost profits, rather than diminished market value of property, is disfavored. In *Andrus v. Allard,* the Supreme Court explained:

> [L]oss of future profits — unaccompanied by any physical property restriction — provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

444 U.S. 51, 65-66 (1979); *see also Nekrilov,* 45 F. 4th at 673; *Rose Acre Farms, Inc. v. U.S.,* 559 F.3d 1260, 1268-70 (Fed. Cir. 2009) ("vast majority" of *Penn Central* takings claims examine lost value not lost profits; difficult to assess severity of economic impact of lost profits absent comparable numbers).

Plaintiffs' takings claims are based entirely on speculative expectations of future profits from intangible business activities. (*See e,g*, **Ex 36** dep 133-138) Because the PTZO does not limit tasting room hours and each Plaintiff voluntarily closes early in the evening, none can show

economic impact caused by PTZO limits on operating hours. Monetizing lost profits from wine tasting at midnight on a Tuesday at a rural winery is the definition of speculation. The PTZO does not limit music amplification in tasting rooms; there is no consequent economic impact. Besides, how many fewer glasses of wine did Mari sell because the guitarist was unplugged? All Plaintiffs serve food; charcuterie boards dominate. At best, zoning and other limits prevent some Plaintiffs from offering full course meals and offsite food catering, but PTP is dubious they could demonstrate severe profit losses.[29] Since Plaintiffs refused to share retained values and profits associated with their MLCC licenses, they have not supported a finding of severe profit loss. (ECF 339) The economic impact factor thus weighs against them.

Second, Plaintiffs cannot have any reasonable investment-backed expectations that they may engage in the desired conduct because each knew about the limitations of A-1 zoning before they sought their MLCC licenses. (*See, e.g.*, **Ex 36** dep 158-163; **Ex 27** dep 24-25; **Ex 24** dep 87-89, 97; **Ex 47** dep 143-147; **Ex 53** dep 127-131); *Palazzolo v. Rhode Island,* 533 U.S. 606, 633 (2001) ("the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those [investment-backed] expectations."). This case is not one where a developer "bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Oberer Land Devs. v. Sugarcreek Twp,* 2022 U.S.App. LEXIS 15290 (6th Cir. 2022) (citations and quotations omitted).

Finally, the character of government action is zoning, long recognized as the traditional exercise of state police power to protect the health, safety, and general welfare of the community. *Penn Central,* 438 U.S. at 124-25 ("Zoning laws are, of course, the classic example" of

[29] According to Plaintiffs' original damages calculation, the collective economic impact to the 11 wineries for 5 years of lost profits from catering business was $1,468,500. (ECF 171-1, PageID.6371). That equates to $26,700 per winery per year.

"permissible governmental action even when prohibiting the most beneficial use of the property."); *Rogin v. Bensalem Twp.,* 616 F.2d 680, 690-91 (3rd Cir. 1980).

VI. THESE CLAIMS ARE TIME-BARRED.

The First Amendment and takings claims of all Plaintiffs save Hawthorne and Bowers Harbor cannot survive the 3-year statute of limitations for Section 1983 claims in Michigan because they accrued before October 21, 2017 – more than 3 years pre-suit. *Carroll v. Wilkerson*, 782 F.2d 44, 45 (6th Cir. 1986).

A Section 1983 cause of action accrues when the plaintiff has a complete and present cause of action, meaning they can file suit and obtain relief. *Wallace v. Kato,* 549 U.S. 384, 388 (2007) (citations omitted); *Bannister v. Knox County Board of Educ.,* 49 F.4th 1000, 1008 (6th Cir. 2022) (presumptive rule is Section 1983 claim accrues on first day plaintiff may sue). Claim accrual considers the specific constitutional right invoked. *Bannister*, 49 F.4th at 1008-1009 (citations omitted). Courts look to "what event should have alerted the typical lay person to protect their rights." *Kuhnle Bros., Inc. v. Geauga County,* 103 F.3d 516, 520 (6th Cir. 1997) (citations omitted); *Ruff v. Runyon,* 258 F.3d 498, 500 (6th Cir. 2001).

The five Chateaus challenge Winery-Chateau provisions adopted in 1989 and 2004 and applied to them before October 2017. Section 8.7.3(10) first applied to Grand Traverse and Chateau Chantal in 1990 through SUPs 21 and 24, respectively; subsequently added subsection (u) first applied to Chateau Chantal in 2004 through SUP 95 and has never applied to Grand Traverse. Section 8.7.3(10), including subsection (u), first applied to Brys through SUP 115 in 2011; and to Mari through SUP 126 in 2016. Section 8.7.3(10) first applied to Bonobo through SUP 118 in 2013; subsection (u) has been inapplicable to it since 2014. The Farm Processors

challenge Farm Processing Facility provisions adopted in 2002 and theoretically applied to them when they obtained their Farm Processing Facility permits – 2007 for both Black Star and Two Lads.

Since before 2017, each of these nine Plaintiffs knew or had reason to know their SUPs and Farm Processing Facility permits authorized explicitly limited land uses, which they now characterize as deprivations of constitutional rights. (*See e.g.* ECF 457-4, PageID.16154-55;). They testified about the lengths they went to understand the limitations, select among available land uses, and advocate for the same zoning changes they now pursue through litigation. (*See e.g.* **Ex 24** dep 87-89, 97; **Ex 36** dep 46-50, 158-63; **Ex 47** dep 143-47; **Ex 53** dep 127-31) Each of their claims was complete and present, and thus accrued, when they received their respective SUPs and land use permits.

These Plaintiffs try to avoid dismissal by arguing they are injured anew every day the "unconstitutional" zoning provisions continue to exist. (*See e.g.* ECF 457-4, PageID.16122-23) Their position seems to be that the three-year period limits damages but is no bar to suit. They thus invoke the continuing violation theory, a narrow exception to the timely filing requirement available when a defendant's wrongful conduct is part of a continuing practice, with rare applicability to Section 1983 claims. *Sharpe v. Cureton,* 319 F.3d 259, 267-68 (6th Cir. 2003). It fails here because these Plaintiffs' complaints are continuing *consequences* of long-ago-enacted zoning, not continuing new injurious *acts*.

Any takings claim accrued for each Plaintiff as soon as it had both its MLCC license and Township land use approval (Farm Processing Permit or SUP) applying the zoning limitations it claims took its property. *Kuhnle,* 103 F.3d at 522 ("In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has

effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed.") (cleaned up); *Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jiménez*, 659 F.3d 42, 51-52 (1st Cir. 2011). Continuing violations do not save these claims. For each of these Plaintiffs, their takings claim accrued more than three years pre-litigation.

These Plaintiffs' First Amendment claims likewise were complete and present when each was first subject to the challenged zoning; its continued passive existence is not a perpetual series of new, daily Township violations that saves these untimely claims. The Sixth Circuit has rejected applying the continuing violations theory to excuse plaintiffs like these, who waited too long after their injury was "complete and present" before filing suit. *See Tolbert v. Ohio Dep't Transport*, 172 F.3d 934, 940 (6th Cir. 1999). To successfully invoke this doctrine, a plaintiff must show (1) the defendant's wrongful conduct continued after the precipitating event that began a pattern, (2) plaintiff's injury continued to accrue after that event, and (3) further injury must have been avoidable if the defendant had at any time ceased its wrongful conduct. *Id.*., (citing *Kuhnle*, *supra*). In *Tolbert,* the Sixth Circuit found Section 1983 challenges to Ohio Department of Transport (ODOT) decisions reflected in ODOT's approved Environmental Impact Statement (EIS) failed each prong: (1) the EIS was a discrete event – not part of a pattern; (2) plaintiffs' harm was completed upon EIS approval, albeit with "continuing ill effect;" and (3) adherence to the EIS was simply "passive inaction." The Sixth Circuit requires a plaintiff to identify some affirmative ***act*** by the defendant within the limitations period. *Id.*; *Eidson v. Tenn. Dep't Children's Servs.*, 510 F.3d. 631, 635 (6th Cir. 2007) ("passive inaction does not support a continuing violation theory"); *Howell v. Cox*, 758 Fed. Appx. 480, 484 (6th Cir. 2018) ("to qualify as a continuing violation, [plaintiff] must prove that [defendant's] continuing unlawful *acts* caused him to suffer continuing

injuries") (emphasis in original); *see also Gould v. Bristol Borough,* 615 Fed. Appx. 112, 116 (3rd Cir. 2015) ("A government official's refusal to undo or correct a harm caused by the official's unlawful conduct is not an affirmative act for purposes of establishing a continuing violation.") (cleaned up).

These Plaintiffs understood the restrictions and tried "numerous times" to negotiate changes during the years they waited to file suit. (*See e.g.* **Ex_36** dep 46-50, 158-163; **Ex 24** dep 87-89, 97) Any residual injuries are continuing "ill effects" of an original injury, not "new violations" or repeated wrongful acts. Courts consistently reject "continuing violations" to save Section 1983 challenges alleging government violated First Amendment rights when the plaintiff had all necessary facts for the case but persistent injuries. *See, e.g., Beebe v. Birkett,* 749 F.Supp.2d 580, 596 (E.D. Mich. Feb. 22, 2010) (claim accrued when prison denied religious meals, though effects continued; "plaintiff cannot sit on his rights for over two years and then claim a 'continuing' violation in order to preserve claims that accrued more than three years before he filed his complaint."); *Johnson v. Knox County,* 2022 U.S. Dist. LEXIS 54166 (E.D. Tenn. Mar. 25, 2022) (claim accrued when No Trespass order issued, ongoing sanction is no continuing violation); *Yetto v. City of Jackson,* 2919 U.S. Dis. LEXIS 18285 (W.D. Tenn Feb. 5, 2019) (claim accrued when plaintiffs received notice zoning prohibited pagan home-gatherings); *Pitts v. City of Kankakee*, 267 F.3d 592, 595-96 (7th Cir. 2001) (claim accrued when city posted allegedly defamatory signs on plaintiff's property); *Harris v. O'Hara Twp.*, 282 Fed.Appx. 172 (3rd Cir. 2008) (claim accrued when plaintiffs received notice "house parties" were prohibited in residential district); *Mitchell v. Clackamas River Water,* 2016 U.S. Dist. LEXIS 151096 (D. Or. Oct. 31, 2016), *aff'd* 727 Fed.Appx. 418 (9th Cir. 2018) (claim accrued when gag order issued, despite continuing effects).

Kuhnle does not support applying the continuing violations doctrine here. That case considered the timeliness under Ohio's two-year limitations period of three Section 1983 claims filed May 13, 1994, challenging a county resolution enacted August 20, 1991, and voided June 1, 1992. 103 F.3d at 518. The resolution barred plaintiff trucking company from using a road to haul material from a quarry after the county had specifically granted Kuhnle the right to use the road for quarry access in a 1989 settlement agreement. Takings and "property deprivation" claims filed more than two years after resolution enactment were time-barred. *Id.* at 521. A substantive due process "deprivation of liberty" claim, filed within two years after the county stopped enforcing the resolution, survived. As the Sixth Circuit subsequently emphasized in *Tolbert, Eidson,* and *Howell, supra,* the resolution "actively deprived" the trucking company of its undisputed right, vindicated by state court, to use the road for quarry access, contrary to its constitutional and contractual rights to travel freely. *Id.* at 521-22. These Plaintiffs assert no active deprivation. Moreover, since *Kuhnle,* courts recognize its limits. *See, e.g., Bird v. State,* 935 F.3d 738, 745 (9th Cir. 2019) (*Kuhnle* does not mean plaintiff may delay facial statutory challenge "ad infinitum until the statute is repealed," nullifying any limitations for facial statutory challenges. *Yetto, supra* (*Kuhnle* inapplicable to save untimely challenge to presumptively valid zoning ordinance).

Operation of the statute of limitations requires dismissal of these nine Plaintiffs' claims because they accrued years ago and are now beyond stale. *See Am. Pipe & Constr. v. Utah*, 414 U.S. 538, 555 (1974) (limitations promote justice by preventing surprise revival of stale claims).

VII. CONCLUSION

For the foregoing reasons, PTP respectfully asks the Court to grant summary judgment in its favor and dismiss Plaintiffs' claims as follows and grant PTP all other just and appropriate relief:

- All First Amendment and Taking claims (Counts I, II, III, and VII) by Black Star, Bonobo, and Tabone for lack of standing;
- All First Amendment and Taking claims (Counts I, II, III, and VII) by non-Chateaus Black Star, Two Lads, Tabone, and Peninsula Cellars relating to 8.7.3(10) for lack of standing because it is inapplicable to them;
- All First Amendment and Taking claims (Counts I, II, III, and VII) by Bonobo, Bowers, Brys, Grand Traverse, and Hawthorne relating to 8.7.3(10)(u) for lack of standing because it is inapplicable to them;
- All First Amendment and Taking claims (Counts I, II, III, and VII) by Black Star, Bonobo, Brys, Chateau Chantal, Grand Traverse, Mari, Peninsula Cellars, Tabone, Two Lads as barred by the statute of limitations;
- All Plaintiffs' First Amendment claims (Counts I, II, and III) relating to 6.7.2(19) or any subpart thereof; 8.7.3(10) or any subpart thereof; and 8.7.3(12)(g) and (i) because Plaintiffs failed to establish essential elements and there is no genuine issue as to any material fact; and
- All Plaintiffs' Taking Claims (Count VII) because Plaintiffs failed to establish essential elements and there is no genuine issue as to any material fact.

Respectfully submitted,

Date: October 6, 2023

By: /s/ Tracy Jane Andrews

Tracy Jane Andrews (P67467)
Law Office of Tracy Jane Andrews, PLLC
Attorneys for Intervener
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
tjandrews@envlaw.com

Date: October 6, 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
(231) 709-4709
holly@tropospherelegal.com

CERTIFICATE OF SERVICE

I, Tracy Jane Andrews, hereby certify that on the 6th day of October 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 7.2(b)(i)

This Brief complies with the word count limit of L. Ci. R. 7.2(b)(i). This brief was written using Microsoft Word version 2016 and has a word count of 18,099 words.

Respectfully submitted,

Date: October 6, 2023 By: /s/ Tracy Jane Andrews

Tracy Jane Andrews (P67467)
Law Office of Tracy Jane Andrews, PLLC
Attorneys for Intervener
420 East Front Street
Traverse City, MI 49686
(231) 946-0044
tjandrews@envlaw.com

Date: October 6, 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
(231) 709-4709
holly@tropospherelegal.com