UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN - SOUTHERN DIVISION

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

Plaintiffs,

v.

PENINSULA TOWNSHIP, a Michigan Municipal Corporation,

Defendant,

And

PROTECT THE PENINSULA,

Intervenor-Defendant.

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

PENINSULA TOWNSHIP'S RESPONSE IN SUPPORT OF PTP'S MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF 516)

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PENINSULA TOWNSHIP'S RESPONSE IN SUPPORT OF PROTECT THE PENINSULA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

EXHIBITS

I. INTRODUCTION

PTP moves this Court to grant summary judgment on Plaintiffs' claims in Counts I, II, III, and VII of Plaintiffs' First Amended Complaint. Defendant Peninsula Township (the "Township") concurs in the relief sought in PTP's motion for summary judgment and, pursuant to this Court's Orders, files this response in support of PTP's motion. (*See* ECF No. 301, PageID.10704 ("PTP may file a motion for summary judgment . . . and the Township will be permitted to respond . . ."); ECF No. 303, PageID.10838 ("[T]he Township may respond to PTP and the Wineries' summary judgment motions within the time provided by the court rules.").[1]

The Township writes separately to address certain discrete issues. To the extent the Township does not respond to every issue addressed by PTP, the Township adopts PTP's position and concurs in the relief sought.

First, Plaintiffs Bonobo, Black Star, and Tabone lack standing under Article III to assert their claims for a lack of redressability. Bonobo and Black Star operate wineries on parcels that are subject to conservation easements granted in favor of the Township. These conservation easements, obtained by the Township for substantial consideration, convey the development rights (including commercial uses) of the burdened parcels to the Township. Even if Plaintiffs are successful in this litigation and the Court orders relief, Bonobo and Black Star will not be able to have their alleged injuries redressed by the Court because the conservation easements on their properties preclude the uses they seek to engage in. Moreover, while Tabone claims it is a Farm Processing Facility subject to the requirements of Section 6.7.2(19) of the PTZO, the record evidence demonstrate that Tabone is a Food Processing Plant, governed by Section 8.5 of the

[1] The Court has already denied Plaintiffs' attempt to preclude the Township from responding to Plaintiffs' motion for summary judgment despite the clear, unambiguous language in ECF Nos. 301 and 303. (ECF No. 498).

PTZO. Tabone has not been injured by any of the sections of the PTZO challenged in this matter. As such, any relief entered by the Court would not redress their alleged harms.

Second, with the exception of Hawthorne and Bowers Harbor (who obtained their operative land-use permits in 2020 and 2019 respectively), Plaintiffs' claims are barred by the statute of limitations. Plaintiffs' claims accrued years, and in some cases decades, before suit was filed in October, 2020. While Plaintiffs were aware of the basis of their claim and their alleged injuries, they sat on the claims until well after the expiration of the statute of limitations. Plaintiffs errantly rely on a continuing violations theory to support their claims. However, the continuing violations theory, which is rarely applied in the Section 1983 context, does not apply to save Plaintiffs' claims.

II. PLAINTIFFS BONOBO, BLACK STAR, AND TABONE DO NOT HAVE STANDING.

Article III limits federal courts' jurisdiction to resolve only actual cases or controversies. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337, 136 S.Ct. 1540 (2016). The doctrine of standing "limits the category of litigants empowered to maintain a lawsuit in federal court to [those who] seek redress for a legal wrong." *Id.* at 338. The "irreducible constitutional minimum of standing" requires (1) an injury in fact that is (2) fairly traceable to the defendant's conduct and (3) likely redressable by a favorable judicial decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992).

To meet the redressability requirement of standing, the plaintiff must show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotation omitted). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Glennborough Homeowners Ass'n v. U.S. Postal Serv.*, 21 F.4th 410, 417 (6th Cir. 2021) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107, 118 S.Ct.

1003 (1998)). The Sixth Circuit has reasoned that to demonstrate redressability for purposes of Article III standing:

> The plaintiff must show that each requested remedy will redress some portion of the plaintiff's injury. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352–53, 126 S. Ct. 1854, 164 L.Ed.2d 589 (2006). Conversely, the plaintiff cannot seek a remedy that has no ameliorative effects on that injury. *See California* [v. *Texas*, — – U.S. ——], 141 S. Ct. [2104] at 2116 [210 L.Ed.2d 230 (2021)]. While, for example, a completed injury may give a plaintiff the right to seek damages, it does not alone give the plaintiff the right to seek an injunction. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 75 L.Ed.2d 675 (1983). Likewise, a plaintiff cannot "combin[e] a request for injunctive relief for which he *has* standing with a request for injunctive relief for which he *lacks* standing." *Salazar v. Buono*, 559 U.S. 700, 731, 130 S. Ct. 1803, 176 L.Ed.2d 634 (2010) (Scalia, J., concurring in the judgment); *see Lewis*, 518 U.S. at 357, 116 S. Ct. 2174.

Ass'n of Am. Physicians & Surgeons v. U.S. Food & Drug Admin., 13 F.4th 531, 540 (6th Cir. 2021) (cleaned up) (emphasis in original).

A. Bonobo and Black Star Cannot Meet the Redressability Requirements of Standing Because Their Properties are Burdened by Conservation Easements.

The Township created one of the first publicly-funded Purchase of Development Rights ("PDR") programs in the United States. In 1994, Township residents agreed to tax themselves to fund a program that would allow the Township to purchase development rights from agricultural landowners in the Township. Township residents have continued to reapprove the PDR program through democratic elections. Since the initiation of the program in 1994, more than 3,400 acres of agriculturally-zoned land in the Township have been protected through the PDR program.

The Township's PDR program's specific goal is to allow reasonable growth while preserving agricultural resources and scenic views. The PDR program is intended to preserve scenic views, shoreline, and farmland all of which add value and character to Old Mission Peninsula. (Exhibit 1, Peninsula Township PDR Ordinance).

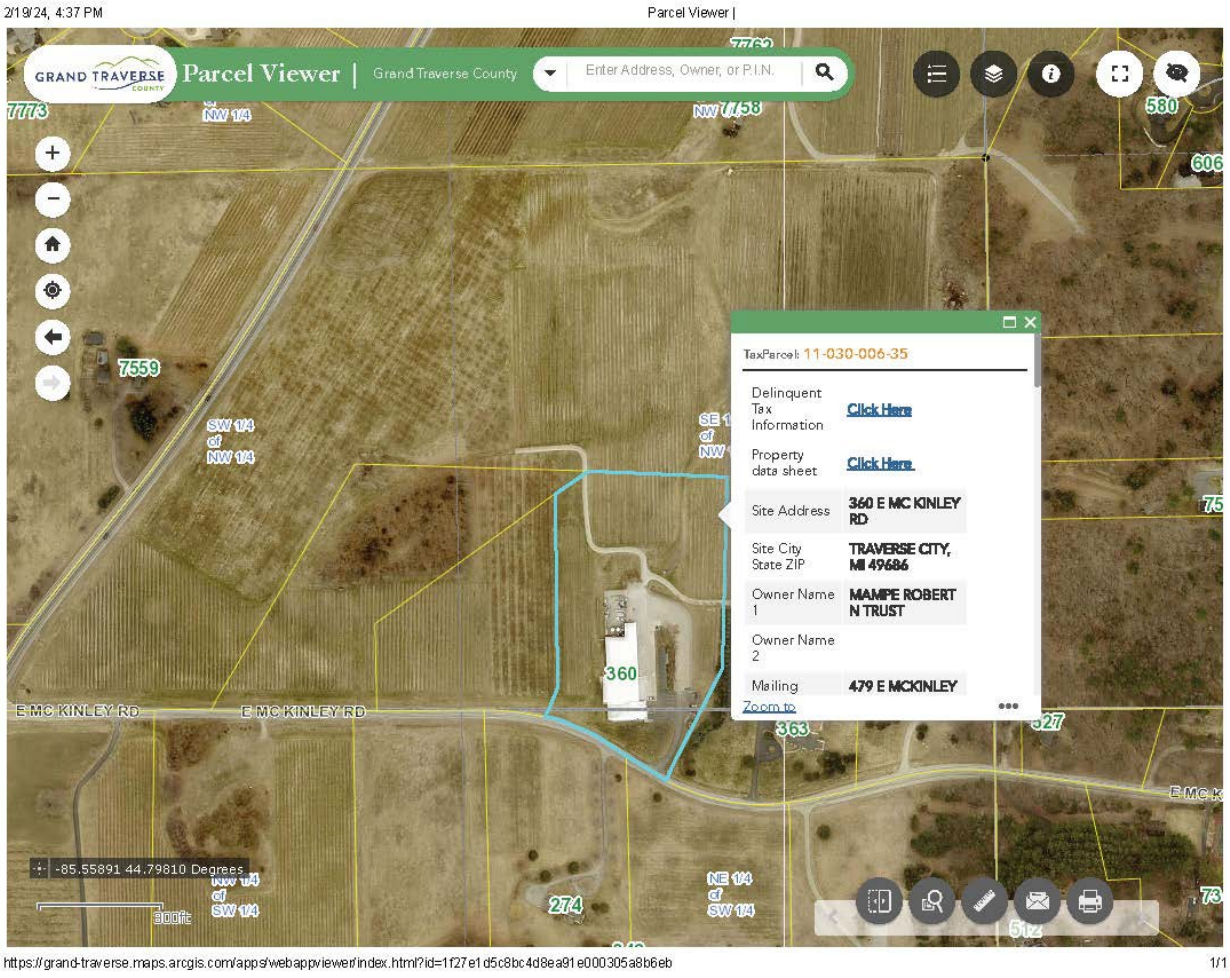
As recognized through the PDR Ordinance, land suitable for farming is an irreplaceable natural resource, with soil and topographic characteristics that have been enhanced by generations of agricultural use. (*Id.*). Farmland which has a market value greater than its agricultural value does not attract sustained agricultural investment and eventually this land is sold by farmers and removed from agricultural uses. When land is converted to residential or other urban uses which do not require those special characteristics, an important community resource is permanently lost to the citizens of the Township. (*Id.*).

In addition to funding through the PDR tax, the Township obtains outside funding from the State of Michigan, American Farmland Trust, the Grand Traverse Regional Land Conservancy, and the federal Farm and Ranch Lands Protection Program. The permanent acquisition by the Township of voluntarily offered interests in Farmland and Open Space Lands within the Township, permits these lands to remain in farmland and open space in a developing urban area and provide long-term protection for the public interests which are served by Farmlands and Open Space Lands. Properties on which the Township has purchased the Development Rights should remain substantially undeveloped in order to promote their "Agricultural Use". (*See id.*).

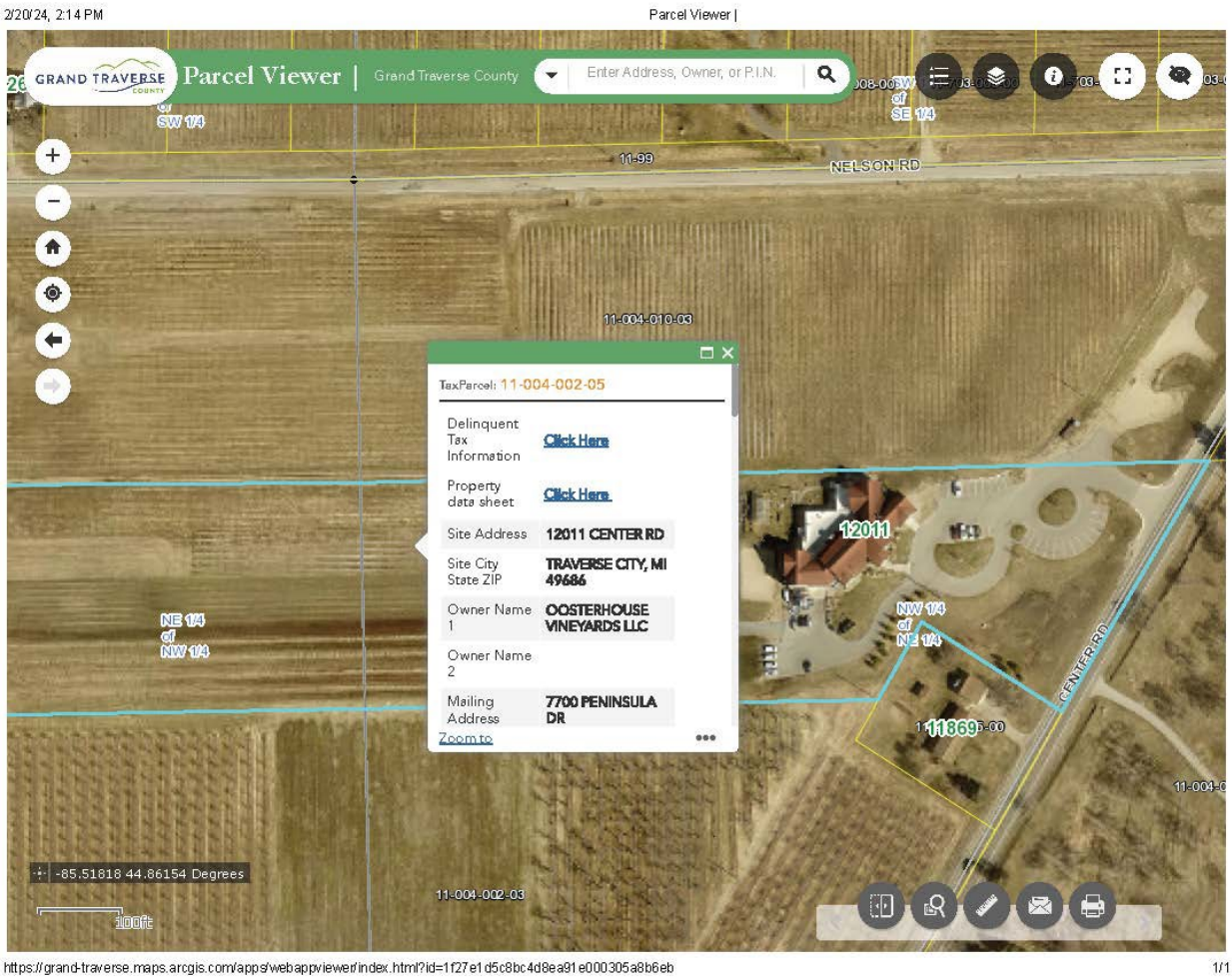
Both Bonobo and Black Star sit on land burdened by conservation easements purchased through the PDR program. To put it bluntly, Bonobo and Black Star have no right to engage in commercial activities on their properties. Regardless of their desire to host commercial weddings, sell endless logoed merchandise, etc., Bonobo and Black Star have no right to do for reasons separate and distinct from the PTZO. The Township owns the development rights through the conservation easements granted to the Township by Bonobo and Black Star's predecessors in interest – and the Township is not willing to permit these activities when it paid good taxpayer money to forever preserve the properties as agricultural in nature.

Black Star's Farm Processing Facility is located at 360 McKinley Rd. E, Traverse City, MI. (Exhibit 2, Deposition of Black Star Farms at 32; Exhibit 3, Black Star Parcel Information). It cannot be reasonably disputed that this parcel is subject to a PDR easement.

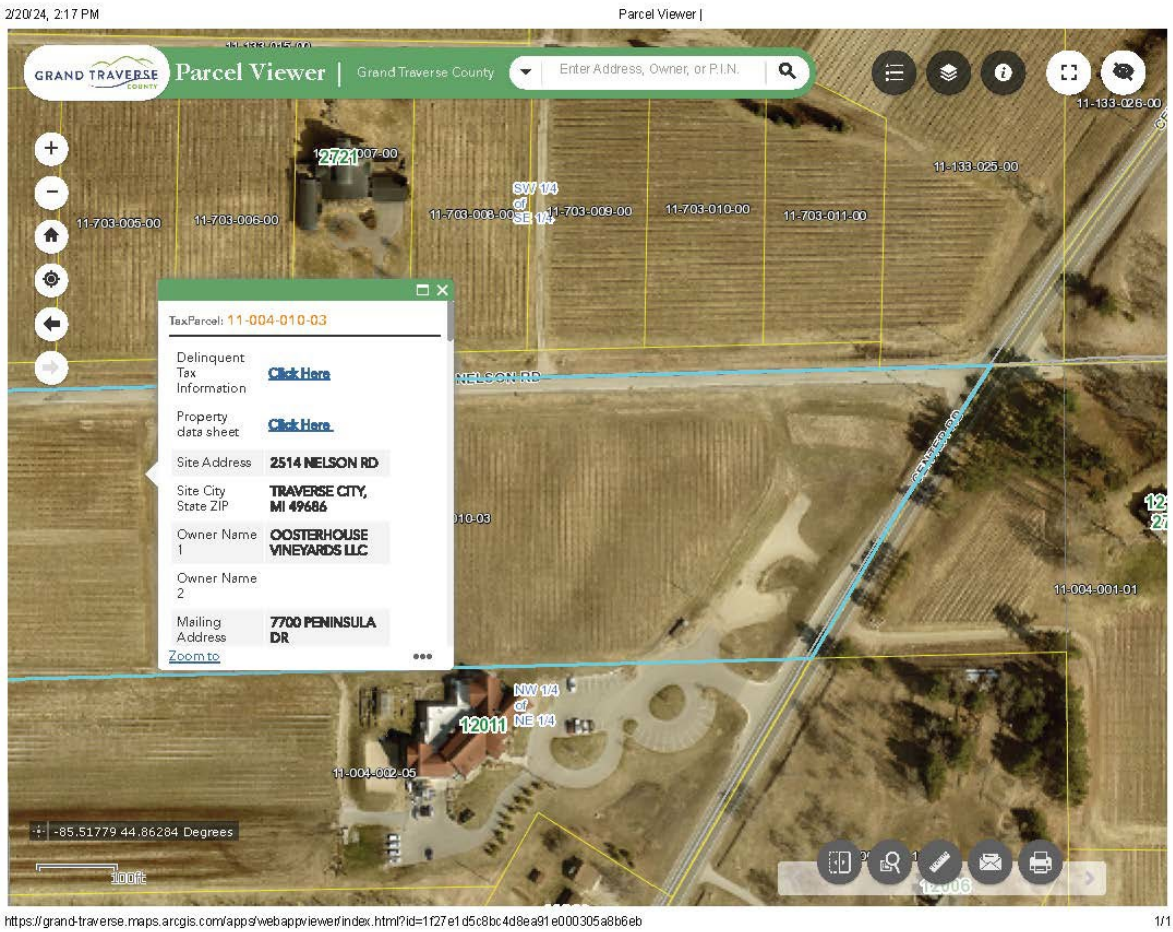
As Black Star testified, the physical winery – where the commercial activities are proposed to occur – is located in the building identified as "360", which is 360 E. McKinley Road. The parcel identification number for this parcel is 11-030-006-35. Records from the Grand Traverse County Register of Deeds confirms that this parcel is subject to a PDR easement. (Exhibit 3, Black Star Parcel Information).



Bonobo is located at 12011 Center Road. (https://www.bonobowinery.com/). Similar to Black Star, it cannot reasonably be disputed that the winery (and the land surrounding it) is located on land subject to a PDR easement.



Bonobo's physical winery sits on Parcel Number 11-004-002-05. Records from the Grand Traverse County Register of Deeds confirms Parcel 11-004-002-05 is subject to a PDR easement recorded at "LIBER 1196 PAGE 85-97". (Exhibit 4, Bonobo Parcel Information). Similarly, the parcel immediately to the north of the physical winery, Parcel 11-004-010-03, on which a portion of the parking lot for Bonobo is located, is also subject to the PDR easement:



Records from the Grand Traverse County Register of Deeds confirms Parcel 11-004-010-03 is subject to a PDR easement. The description from Grand Traverse County notes the easement is recorded at Liber 1182 Page 240. (*Id.*).

On September 22, 1997, the property on which the Black Star winery sits was encumbered by a PDR easement entered into between the Township and Underwood Orchards LP. (ECF No. 457-10, PageID.16203). The Township paid Underwood Orchards LP $435,000 to acquire the development rights to, among many others, the parcels on which the winery is located. (*Id.*). Similarly, Bonobo's predecessors in interest encumbered the property upon which the winery sits with two separate PDR easement. One easement was entered into between the Township and Seaberg Farms, Inc. on January 5, 1998. (ECF No. 457-12, PageID.16233). The Seaberg Farms,

Inc. easement was recorded at Liber 1196, Page 085 with the Grand Traverse County Register of Deeds. (*Id.*). The Township paid Seaberg Farms, Inc. $224,000 to acquire the development rights of the land described in the easement. (*Id.* at PageID.16234). Separately, the Township and Harold and Elsie Edmunson entered into a PDR easement on October 22, 1997. (ECF No. 457-11, PageID.16218). The Edmunson PDR easement is recorded at Liber 1182, Page 248 with the Grand Traverse County Register of Deeds. (*Id.*). The Township paid the Edmunsons $335,500 to acquire the development rights to the property. (*Id.*).

The easements that encumber the Black Star and Bonobo parcels are identical. As part of the easement agreement, Underwood Orchards, Seaberg Farms, and the Edmunsons agreed they were:

> [W]illing to grant and convey to the Grantee [the Township] to Development Rights in the Property as such rights are defined in the Ordinance (said rights being the interest in and the right to use and subdivide land for any and all residential, commercial, and industrial purposes and activities which are not incident to agricultural and open space uses) . . . .

(ECF No. 457-10, PageID.16204; ECF No. 457-11, PageID.16219; ECF No. 457-12, PageID.16324). The grantors of the easements agreed that by conveying the development rights to the parcels to the Township, they were limiting the uses of the properties to those specifically granted in the easement, and granting to the Township ownership of all development rights not specifically delineated in the easement:

> [T]he Grantor being therewith fully satisfied, does by these presents grant, bargain, sell, transfer and convey unto the Grantee forever all Development Rights in respect to the Property, hereby perpetually binding the Property to the restrictions limiting permitted activities to agricultural and open space uses as specifically delineated in the covenants, terms and conditions contained herein, and do also grant such interests, rights, and easements, make such covenants and subject the land to such servitude as is necessary to bind the Property in perpetuity to such restrictions.

(*Id.* at PageID.16206).

Pursuant to the easements, "'agricultural use'" means "substantially undeveloped land devoted to the production of horticultural, silvicultural and agricultural crops and animals useful to man" and related uses and activities including:

- "Retail and wholesale sales of the above agricultural products grown on the farm;"
- "Roadside stands";
- "The lying fallow or nonuse of the Property;"
- Use of an agricultural labor camp (with specific restrictions);
- Tenant house for full time farm employees associated with the principal use (with specific restrictions);
- "Agricultural buildings and structures . . . to be used solely for agricultural purposes";
- "Storage of agricultural machinery, equipment and agricultural materials . . . .";
- "Processing of agricultural products" so long as the majority of the agricultural products are grown by the Grantor's operation; and
- "Other Agricultural Practices that may in the future be determined by the Township Board to be a common agricultural practice in the region after the use is recommended by the Planning Commission and at least one other state or nationally recognized agricultural organization."

(*Id.* at PageID.16205-16206). "'Open Space Uses'" mean:

- The above agricultural uses;
- Non-agricultural uses that "conserve natural, scenic, or designated historic resources; and
- Wind breaks and other vegetation.

Unfettered commercial uses – exactly those uses demanded by Plaintiffs in this lawsuit – are not included in the bundle of rights maintained by the grantor as part of the conservation easement. The predecessors in interest to the owners of the properties on which Bonobo and Black Star sit (Plaintiffs must concede Black Star does not own the property it sits on, the property is owned by the Robert Mampe Trust) sold the rights to engage in commercial activities to the Township in 1997 and 1998. (*Id.* at PageID.16206, 16204 ("[T]he Grantor being therewith fully satisfied, does by these presents grant, bargain, sell, transfer and convey unto the Grantee [Peninsula Township] forever **all Development Rights in respect to the Property**" and "Development Rights in the Property" means the rights "defined in the Ordinance (**said rights**

being the interest in and the right to use and subdivide land for any and all residential, **commercial**, and industrial purposes and activities which are not incident to agricultural and open space uses")).

Black Star and Bonobo have no right to engage in commercial activities. Their predecessors in right sold those rights for hundreds of thousands of dollars more than a decade before this suit was filed. The Township now owns those interests. If Black Star and Bonobo feel aggrieved by that reality, their anger is misdirected at the Township and the PTZO. Simply speaking, Black Star and Bonobo seek permission through this lawsuit to engage in commercial activities (including but not limited to hosting commercial weddings, private events for hire, operating restaurants, engaging in catering, etc.) that are expressly prohibited by the conservation easements. Even if the ultimate conclusion of this case results in an increase in commercial activities for *other* Farm Processing Facilities and/or Winery-Chateaus, Black Star and Bonobo are going to be left in the cold by the reality of the conservation easements encumbering their properties. In other words, the Court cannot grant them the relief they are looking for (there is no redressability) because Black Star and Bonobo do not have the right to engage in those activities. A favorable decision by this Court will not redress Black Star and Bonobo's alleged injuries.

Bonobo has previously argued that the PDR easements do not apply to them based on a memorandum sent by the Township's general counsel to the Planning Commission when the Township was considering Bonobo's SUP application. (ECF No. 477, PageID.18389).[2] Plaintiffs essentially claim that because the Township approved the construction of a Winery-Chateau, any use under the scope of a "Winery-Chateau" – regardless of the commercial nature – is precluded

[2] This argument obviously cannot apply to Black Star since the memorandum upon which Plaintiffs rely was related only to the Township's consideration of Bonobo's SUP application.

from enforcement under the PDR easement. This position ignores the scope of the memorandum upon which Plaintiffs rely and ignores the statements of Todd Oosterhouse, the representative of Bonobo, made during public comment on the SUP application in 2013. First, the memorandum upon which Plaintiffs reply from the Township's counsel in 2013 addressed whether including PDR land within the minimum acreage requirement for the Winery-Chateau was acceptable. (ECF No. 275-1, PageID.10057):

> The Oosterhouse application proposes that a winery-Château be developed on land totaling 50.84 acres. This property consists of a [sic] three (3) parcels, the first being 9.75 acres where the primary winery will be located and the other two (2) parcels being 35.98 and 5.11 acres respectively that will be used for farming associated with the winery-Château. The two (2) parcels used for the adjacent farming are subject to a conservation easement between Harold Edmunson and Elsie Edmunson, husband and wife, and Peninsula Township. The conservation easement, dated October 22, 1997, is recorded in the Grand Traverse County Register of Deed's Office at Liber 1182, Page 240.
>
> In his April 8, 2013 letter, Mr. Bimber asserts that including the 41 acres that are subject to the conservation easement in the winery-Château development violates Section II.D of the conservation easement. A careful reading of the conservation easement, however, does not support this conclusion.

(ECF No. 275-1, PageID.10057). The question addressed by the Township's general counsel was whether the land adjacent to the Winery-Chateau that was to be planted in grapes to meet the minimum lot size requirements was permitted by the conservation easement. The opinion letter did not resolve whether the conservation easement would permit unlimited commercial activities on the property.

In 2013, when the Township was considering Bonobo's SUP application, the Township and several residents questioned Bonobo regarding whether the use was permitted by the conservation easement. Bonobo made it clear that the Winery-Chateau was to be agricultural in nature only. During the public hearing on the SUP application before the planning commission on March 18, 2013, the Township planner noted:

> Leonard [Township Planner] will begin the discussion. The applicants are present. This is SUP for a new winery just south of Nelson Road on the West side of Center. The applicant is proposing to do a new winery/chateau operation **exclusively for wine production**. They are limited since the land is on previous PDR easement and are not proposing to have any guest rooms or new residences.

(Exhibit 5, March 18, 2013 PC Meeting Minutes at Page 2) (emphasis added).

> **Hosmer** [Planning Commission member] explain what the educational center is for. That is a big space. Oosterhouse uses of the winery are able to have different agricultural functions. **Hosmer** at this point it is not useable until you come back with your tonnage. Is this related to guest services? It is not a room to host events. Oosterhouse strictly educational.

(*Id.* at Page 5) (emphasis in original).

The Township, in approving the SUP, was led to believe that the Winery-Chateau to be constructed by Bonobo was a use in line with the PDR program as an agricultural use inasmuch that it was for wine production. When Todd Oosterhouse was questioned regarding the large "educational center" noted on the drawings, Oosterhouse deflected that the winery is "able to have different agricultural functions" and that the "educational center" was not for guest services, but rather "strictly educational". (*Id.*). Based on this lawsuit, it is perfectly clear that Bonobo has far grander commercial aspirations for land protected by a conservation easement – unlimited commercial weddings, operating a full-scale restaurant, engaging in catering services, hosting corporate retreats, etc.

If Plaintiffs believe, however, that the Township's previous grant of the construction of a winery waives application of the conservation easement and allows unlimited future commercial activities, the language of the conservation easement should disabuse them of that notion:

> If the Grantor, Grantor's successors, assigns or employees violate or allow the violation of any of the terms, conditions, restrictions and covenants set forth herein, then the Grantee will be entitled to all remedies available at law or in equity, including but not limited to all injunctive relief, recission of contract, or damages, including actual attorneys' fees and court costs reasonably incurred by the Grantee in prosecuting such action(s). No waiver or waivers by the Grantee, or by its

> successors or assigns, or any breach or a term, condition, restrictions, or covenant contained herein shall be deemed a waiver of any subsequent breach or such term, condition, restriction or covenant or of any other term, condition, restriction or covenant contained herein.

(ECF No. 457-11, PageID.16224) (emphasis added).

Perhaps anticipating this rejoinder, Plaintiffs argue, "even if an easement was violated, PTP is not a party to the easement and has no standing to enforce its terms." (ECF No. 477, PageID.18389). Well, the Township is a party to the easements and it intends to enforce the terms of the conservations easements that the Township's taxpayers paid good money for. Commercial activities violate the terms of the conservation easement. To the extent Bonobo and/or Black Star are or intend in the future to violate the terms of the conservation easements on their property, the Township will seek all remedies available to it under the conservation easement, including actions for injunctive relief and damages.

Black Star and Bonobo do not have standing because a favorable ruling by this Court would not redress their alleged harms. The conservation easements burdening the lands upon which Black Star and Bonobo's wineries sit preclude the uses in which Plaintiffs seek to engage.

B. Tabone is Not a Farm Processing Facility and is Not Subject to Any of the Sections of the PTZO Challenged in this Litigation Precluding it from Showing Injury, Traceability, and Redressability for Article III Standing Purposes.

In the First Amended Complaint, Tabone claims it operates its winery as a Farm Processing Facility. (ECF No. 29, PageID.1092, Para. 45; ECF No. 459-16, PageID.16423). This is incorrect. Tabone is a Food Processing Plant. There is no competent evidence supporting that Tabone is a Farm Processing Facility. Food Processing Plants are a use permitted by SUP under Section 8.5 of the PTZO. (ECF No. 29-1, PageID.1259; Section 8.5 of PTZO).

Tabone's predecessor in interest, J. Josef Vineyards, applied for and obtained an SUP in April, 2000, that allowed it to operate as a Food Processing Plant. (ECF No. 459-17). The SUP

was transferred to Tabone in February, 2004. (ECF No. 32-2, PageID.1636). The allowed use under SUP No. 73 is for a "Food Processing Plant – Winery and Bottled Juice". Food Processing Plants, and specifically through the applicable SUP No. 73, allows for grapes to be crushed, pressed and transported for fermenting and bottling inside. (ECF No. 459-17, PageID.16426). Under the terms of SUP No. 73, retail sales of wine for off premises consumption are allowed, but wine tasting is not allowed on the premises. (*Id*. at PageID.16432).

Mario Tabone, Tabone's owner, mistakenly believes that Tabone is a Farm Processing Facility. The evidence belies this assumption. On January 29, 2016, Burkholder Construction applied for a Farm Processing Permit and Land Use Permit on behalf of Mario Tabone for a "Winery Farm Processing & Tasting Room" structure. (ECF No. 459-18). On April 27, 2016, the Township advised Tabone of outstanding items to complete in support of the application for a Farm Processing Facility. (ECF No. 459-19). Specifically, the Township advised Tabone that a dimensional variance was required in order to comply with the requirements of the Farm Processing Facility ordinance. (*Id.*). Tabone was instructed to submit an application for a variance to the ZBA requesting a setback of 11 feet from the required 100-foot side yard setback required under §6.2.7(19)(b)(5) of the PTZO. (*Id*.).

Tabone ultimately applied for a variance of the setback requirements. A public hearing before the ZBA on the variance was scheduled for June 28, 2016. On June 21, 2016, the Township Planner e-mailed Mr. Tabone discussing the option of working within the current SUP, and advising Tabone that currently the winery is not authorized for wine tasting within the building, to do so will require the winery to convert to a Farm Processing Facility – pending a variance of 11 feet from the 100-foot side yard setback – or convert to a Winery-Chateau. (ECF No. 459-20). Mr. Tabone replied to this email confirming that Tabone withdraws Variance Request No. 851 – the

required dimensional variance – in light of Tabone's intent to "pursu[e] operations outlined by SUP 73" – the SUP that authorized a Food Processing Plant. (*Id.*). Tabone's Farm Processing and Tasting Room Land Use Permit application was subsequently updated to reflect that the proposed use of the structure would continue to be a Food Processing Plant. (ECF No. 459-21).

Tabone never filed any applications to amend SUP No. 73. (ECF No. 459-1, PageID.16358). The Township never approved any application for Tabone to become a Farm Processing Facility. (*Id.* at PageID.16359). Other than the variance discussed above, Tabone has never applied for or requested a variance or interpretation from the ZBA regarding SUP No. 73. (*Id.*).

Tabone is a Food Processing Plant subject to Section 8.5 of the PTZO. There is no evidence that Tabone was ever approved to operate as a Farm Processing Facility. Instead, Tabone simply declares that it is a Farm Processing Facility and when asked whether it has a copy of this phantom land use permit (which does not exist) Mr. Tabone declared: "Not to my knowledge." (Exhibit 6, Deposition of Tabone at 54). Tabone is not a Farm Processing Facility and it has never been subject to Section 6.7.2(19) of the PTZO. Tabone has not filed suit alleging that Section 8.5 of the PTZO, which controls Food Processing Plants, violates its constitutional rights. In other words, Tabone has opted to ride along in this lawsuit, feigning that it is a Farm Processing Facility, hoping that the Court will award it damages based upon and enjoin the enforcement of ordinance sections which have not and never will apply to it.

In other words, Tabone does not have an injury for standing purposes that is fairly traceable to any of the sections of the PTZO challenged in this lawsuit. Section 6.7.2(19) applies to Farm Processing Facilities, not Food Processing Plants. Moreover, because the challenged sections of the ordinance do not apply to Tabone, any damages or other relief entered by this Court will not

redress Tabone's alleged injuries. Simply put, if the Court enters an award of damages and starts enjoining sections of the PTZO, Tabone will be left with no relief.

III. PLAINTIFFS' CLAIMS ARE NEARLY UNIVERSALLY BARRED BY THE STATUTE OF LIMITATIONS.

The United States Supreme Court has reasoned:

> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

Burnett v. New York Cent. R. Co., 380 U.S. 424, 428, 85 S. Ct. 1050, 1054, 13 L. Ed. 2d 941 (1965) (quoting *Ord. of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49, 64 S. Ct. 582, 586, 88 L. Ed. 788 (1944)).

A. With the Exception of Hawthorne and Bowers Harbor, Plaintiffs' Claims Accrued More Than Three Years Before Suit was Filed and, as Such, are Time Barred.

Plaintiffs' claims concern events that occurred years and, in several cases, decades ago. Indeed, Chateau Grand Traverse first obtained an SUP to operate as a Winery-Chateau under the PTZO in 1990. Universally, Plaintiffs assert that they were harmed when they first obtained an SUP or land-use approval. Nevertheless, Plaintiffs let their claims "slumber", as the Supreme Court described and, in waiting to file suit until October, 2020, "evidence has been lost [and] memories have faded."

Plaintiffs' claims asserted pursuant to Section 1983 are subject to a three-year statute of limitations. In cases brought pursuant to Section 1983, "state law determines which statute of limitations applies," while "federal law determines when the statutory period begins to run." *Harrison v. Michigan*, 722 F.3d 768, 772–73 (6th Cir. 2013). Sixth Circuit precedent makes clear

that Michigan's three-year statute of limitations for injuries to persons or property applies to claims brought under Section 1983. *Garza v. Lansing Sch. Dist.*, 972 F.3d 853 (6th Cir. 2020). Plaintiffs' claims asserted under Section 1983 are, therefore, subject to a three-year statute of limitations.

Plaintiffs' constitutional claims accrued years, and in many cases, decades ago. While state law controls the length of the limitations period, federal law determines the event that causes the three-year clock to start running (i.e., the "accrual date"). *Wallace v. Kato*, 549 U.S. 384, 388, 127 S. Ct. 1091 (2007). The Supreme Court has previously warned that in the § 1983 context the accrual date is the first day that a plaintiff may sue on a claim, which occurs once the plaintiff has "a complete and present cause of action[.]" *Id.* (*quoting Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201, 118 S. Ct. 542 (1997)); *McDonough v. Smith*, ___ U.S. ____, 139 S. Ct. 2149, 2155 (2019).

The Sixth Circuit has applied the Supreme Court's "complete and present cause of action" standard through a "discovery rule" for § 1983 claims. *See, e.g.*, *Johnson v. Memphis Light Gas & Water Div.*, 777 F.3d 838, 843 (6th Cir. 2015). "[A]s developed in [the Sixth] Circuit, the statute of limitations period begins to run [for § 1983 claims] when the plaintiff knows or has reason to know that the act providing the basis of his or her injury has occurred." *Cooey v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007). The Sixth Circuit recently recognized its "discovery rule" is not wholly consistent with the Supreme Court's "standard rule" for accrual of federal claims:

> The "standard" accrual "rule" for federal claims starts the limitations period "when the plaintiff has a complete and present cause of action" that can be raised in court. The Supreme Court has contrasted [the] "standard" rule with a "discovery" rule that ties the start of the limitations period to when the plaintiff discovered (or should have discovered) the cause of action. ... In this § 1983 context, the Court has started its accrual analysis with the standard rule: that a claim accrues when the plaintiff has a complete cause of action. Our § 1983 case law, by contrast, has started the accrual analysis with the competing discovery rule: that the claim accrues when the plaintiff knows of, or should have known of, that cause of action.

Dibrell v. City of Knoxville, 984 F.3d 1156, 1162 (6th Cir. 2021). The *Dibrell* panel, however, declined to "resolve this tension" because the claims at issue were barred even if the standard rule were applied. *Id.*

"'[I]n determining when the cause of action accrues in section 1983 actions, we have looked to what events should have alerted the typical lay person to protect his or her rights." *Edison v. State of Tenn. Dept. of Children's Servs.* 510 F.3d 361, 635 (6th Cir. 2007) (quoting *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997)).

In the takings and zoning context, Plaintiffs' claims accrued when the Township granted Plaintiffs' their land-use approvals. *See A to Z, Inc. v. City of Cleveland*, 281 Fed. Appx. 458 (6th Cir. 2008) (holding that the statute of limitations for a § 1983 action that challenged zoning ordinance accrued when the city ordered the denial of a zoning permit); *see also Epcon Homestead, LLC v. Town of Chapel Hill*, 62 F.4th 882 (4th Cir. 2023) (affirming a district court holding that "Epcon knew or had reason to know of the [inclusionary zoning provision's] mandates, including the fee-in-lieu alternative, certainly by the time the [special use permit] was issued in October 2014, when it—or its affiliates—agreed to abide by the Ordinance's terms."). Therefore, in this case, Plaintiffs' claims accrued, at the latest, when they received their most recent land-use approval.

Plaintiffs' claims arise from discrete actions by the Township: passing amendments to the PTZO or approving land-use permits. These actions were certainly ascertainable by Plaintiffs. If they did not have a viable cause of action at that time, they should have known of the cause of action once they obtained either a permit to operate as a Farm Processing Facility or an SUP, through which they tacitly agreed to operate pursuant to the terms of the PTZO. As identified *infra*, for all Plaintiffs except for Hawthorne (obtained its SUP in 2020) and Bowers Harbor

(obtained its most recent SUP in 2019), these actions occurred far beyond three years before they filed this action.

On July 9, 2002, the Township adopted Amendment 139 to the PTZO, permitting agriculturally-zoned landowners to operate Farm Processing Facilities as a matter of right. (ECF No. 29-1, PageID.1183).

Two Lads received its Final Farm Processing Facility Permit from the Township in October, 2007. (ECF No. 459-3, PageID.16363). When Two Lads was asked to identify when it was first injured by the sections of the PTZO that apply to it, Two Lads' representative testified "since we started the winery that first day when we were trying to make decisions about what the building is going to lay out as and how big it can be and what you can and can't do…". (Exhibit 7, Deposition of Two Lads at 144). Two Lads' representative further testified that Two Lads was injured by the applicable section of the PTZO from the day it considered a location for the winery stating "I guess you could say as soon as we started to look at parcels…you know, once we found some how do you lay out the building, how do you try to accommodate the minimum acreages, all those square footage requirements and all that." (*Id*. at 144-145).

Based on Two Lads' testimony:

- It had a complete and present cause of action in October, 2007.
- The statute of limitations expired in October, 2010.
- Plaintiffs' Complaint was filed on October 21, 2020.
- Two Lads claims were filed ten years after the expiration of the statute of limitations.

Black Star obtained its Final Farm Processing Permit in September, 2007. (ECF No. 459-7, PageID.16375). The representative for Black Star testified that Black Star was first injured "[w]hen we started our operations on the Old Mission peninsula." (Exhibit 2, Deposition of Black Star at 43-44).

Based on Black Star's testimony:

- It had a complete and present cause of action in September, 2007.
- The statute of limitations expired in September, 2010.
- Plaintiffs' Complaint was filed on October 21, 2020.
- Black Star's claims were filed ten years after the expiration of the statute of limitations.

Tabone Vineyards, operates under SUP No. 73 which allows Tabone to operate as a Food Processing Plant. (ECF No. 459-17, PageID.16425-16433). Tabone's predecessor in interest obtained SUP No. 73 in April, 2000. (ECF No. 459-17). The SUP was transferred to Tabone in February, 2004. (ECF No. 32-2, PageID.1636). Tabone, although a Food Processing Plant, maintains that it has been injured by the Farm Processing ordinance of the PTZO "since at least opening of the winery and continuing every day since". (Exhibit 6, Deposition of Tabone at 56).

Based on Tabone's testimony:

- It had a complete and present cause of action in February, 2004 at the latest.
- The statute of limitations expired in February, 2007.
- Plaintiffs' Complaint was filed on October 21, 2020.
- Tabone's claims were filed more than 13 years after the expiration of the statute of limitations.

On December 16, 1989, the Township approved Amendment 79 to the PTZO, permitting agriculturally-zoned landowners to obtain an SUP to operate a Winery-Chateau. (ECF No. 142-5, PageID.5136). Over time, the Winery-Chateau provisions in the PTZO were amended, most recently in 2004 via Amendment 141, which allowed Guest Activity Uses at Winery-Chateaus.

Bonobo obtained SUP No. 118 on May 14, 2013 allowing it to operate as a Winery-Chateau. (ECF No. 32-6, PageID.1755-1771). Bonobo obtained an Amendment to its SUP in November, 2014. (ECF No. 457-13). In response to PTP's Interrogatories and affirmed by the testimony of Bonobo's representative, Bonobo stated that it was first injured when the Winery-Chateau ordinance of the PTZO was passed. (Exhibit 8, Deposition of Bonobo at 155).

Based on Bonobo's testimony:

- It had a complete and present cause of action in November, 2013 at the latest.
- The statute of limitations expired in November, 2016.
- Plaintiffs' Complaint was filed on October 21, 2020.
- Black Star's claims were filed nearly three years after the expiration of the statute of limitations.

Brys Estate Vineyard & Winery ("Brys"), received SUP No. 115 on February 8, 2011, to operate as a Winery-Chateau. (ECF No. 463-9, PageID.16590-16600). While SUP No. 115 was subsequently amended to provide for physical and structural changes to the winery, the substance of the original SUP was unchanged. In response to Intervening Defendant PTP's 1st Interrogatories, Brys stated that it was first harmed by the PTZO "since its passage" specifically citing to sections of the Winery-Chateau Ordinance. (Exhibit 9, Plaintiff Brys Winery, LLC's Answers to PTP's First Set of Interrogatories).

Based on Brys' history:

- It had a complete and present cause of action on February 8, 2011 at the latest.
- The statute of limitations expired in February 8, 2014.
- Plaintiffs' Complaint was filed on October 21, 2020.
- Brys' claims were filed more than six years after the expiration of the statute of limitations.

Chateau Grand Traverse, LTD, ("CGT") transitioned to a Winery-Chateau on July 10, 1990, under SUP No. 24. The operative SUP for CGT, SUP No. 66, was approved on July 13, 1999 and later amended on September 14, 2004 by SUP No. 94. (ECF No. 463-23, PageID.16738). CGT's representative testified that CGT was first injured "since the passing of the ordnance, of the winery ordinance." (Exhibit 10, Deposition of CGT at 46). CGT's representative testified further stating CGT's "interpretation of wrong", regarding the Winery-Chateau ordinance, occurred when CGT first obtained its SUP. (*Id*. at 48).

Based on CGT's history:

- It had a complete and present cause of action on September 14, 2004 at the latest.
- The statute of limitations expired in September 14, 2007.
- Plaintiffs' Complaint was filed on October 21, 2020.
- CGT' claims were filed more than sixteen years after the expiration of the statute of limitations.

Chateau Operations, Ltd. ("Chateau Chantal"), obtained SUP No. 21 on January 9, 1990. (ECF No. 463-16, PageID.16671-16677). On December 14, 2004 the Township approved SUP No. 95 which is Chateau Chantal's operative SUP. (ECF No. 463-17, PageID.16679). The representative for Chateau Chantal testified that Chateau Chantal was first injured by the PTZO the day the winery-chateau ordinance was passed in 1989 stating "I would say since its passage, so since the winery-chateau ordinance was passed". (Exhibit 11, Deposition of Chateau Chantal at 46).

Based on Chateau Chantal's history:

- It had a complete and present cause of action on December 14, 2004 at the latest.
- The statute of limitations expired in December 14, 2007.
- Plaintiffs' Complaint was filed on October 21, 2020.
- Chateau Chantal's claims were filed just under sixteen years after the expiration of the statute of limitations.

Villa Mari, LLC ("Villa Mari"), obtained its SUP on March 15, 2016. (ECF No. 63-10, PageID.2994.) In response to Intervening Defendant PTP's 1st Interrogatories, Villa Mari stated that it was first harmed by the PTZO "since its passage" specifically citing to sections of the Winery-Chateau Ordinance. (Exhibit 12, Plaintiff Villa Mari, LLC's Answers to PTP's First Set of Interrogatories).

Based on Villa Mari's history:

- It had a complete and present cause of action on March 15, 2016 at the latest.
- The statute of limitations expired in March 15, 2019.
- Plaintiffs' Complaint was filed on October 21, 2020.
- Villa Mari's claims were filed more than a year after the expiration of the statute of limitations.

On May 12, 1998 the Township added Amendment 120 to the PTZO, permitting agriculturally-zoned landowners to operate Remote Tasting Rooms associated with the wineries pursuant to an SUP and under §8.7.3(12). (ECF No. 142-7, PageID.5162-5166). Grape Harbor, Inc. ("Peninsula Cellars") obtained SUP No. 62 on November 10, 1998. (ECF No. 463-27, PageID.16765). The representative for Peninsula Cellars testified that Peninsula Cellars has been injured by application of the PTZO since the day the Remote Winery Tasting Room ordinance was enacted stating "we mean when this went into effect that's when the violation began, and has been in violation ever since." (Exhibit 13, Deposition of Peninsula Cellars at 46).

Based on Peninsula Cellar's history:

- It had a complete and present cause of action on November 10, 1998 at the latest.
- The statute of limitations expired in November 10, 2001.
- Plaintiffs' Complaint was filed on October 21, 2020.
- Peninsula Cellar's claims were filed nearly nineteen (19) years after the expiration of the statute of limitations.

B. The Continuing Violations Theory Does Not Apply and Does Not Extend the Statute of Limitations to Save Plaintiffs' Claims.

To avoid the dismissal of their claims based on the running of the statute of limitations, Plaintiffs rely on a theory of alleged continuing violations. Federal courts recognize that, when a pattern or practice of behavior results in a continuing violation of a plaintiff's rights, the statute of limitations is deemed to begin running only with the conclusion of the pattern of harmful conduct such as when the last wrongful event occurs. *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002). When a plaintiff can establish a continuing violation, the statute of limitations expands to reach back to the first date of the violation. *Sharpe v. Cureton*, 319 F.3d 259, 268-269 (6th Cir. 2003). However, a continuing violation "requires continued action and not simply continuing harm or 'passive inaction.'" *Moss v. Columbus Bd. of Educ.*, 98 Fed. Appx. 393, 396 (6th Cir. 2004). Moreover, "[t]he doctrine applies most frequently in the context of Title VII cases, and is

rarely extended to § 1983 actions." *Goldsmith v. Sharrett*, 614 Fed. Appx. 824, 828 (6th Cir. 2016) (citing *Sharpe*, 319 F.3d at 267); *see also LRL Props. V. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1105 n.3 (6th Cir. 1995); *Laney Brentwood Homes, LLC v. Town of Collierville*, 144 Fed. Appx. 506, 511 (6th Cir. 2005).

The Sixth Circuit has presented the following test to determine the existence of a continuing violation:

> First, the defendant's wrongful conduct must continue after the precipitating event that began the pattern.... Second, injury to the plaintiff must continue to accrue after that event. Finally, further injury to the plaintiff[ ] must have been avoidable if the defendants had at any time ceased their wrongful conduct.

Eidson v. Tenn. Dep't of Children's Servs., 510 F.3d 631, 635 (6th Cir. 2007) (quoting *Tolbert v. State of Ohio Dep't of Transp.*, 172 F.3d 934, 940 (6th Cir. 1999).

However, a continuing violation claim still fails when "'the plaintiff knew, or through the exercise of reasonable diligence would have known, she was being discriminated against at the time the earlier events occurred.'" *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1184 (10th Cir. 1993) (internal citation omitted). As the United States District Court for the Western District of Tennessee reasoned in *Yetto v. City of Jackson*, 2019 WL 454603, at *7 (E.D. Tenn., Feb. 5, 2019):

> The Eleventh Circuit also has "limited the application of the continuing violation doctrine to situations in which a reasonably prudent plaintiff would have been able to determine that a violation had occurred." *Center for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006). "If an event or series of events should have alerted a reasonable person to act to assert his or her rights at the time of the violation, the victim cannot later rely on the continuing violation doctrine[.]" *Id.* (alteration in original) (internal quotation marks and citation omitted). *See also Flowers v. Carville*, 310 F.3d 1118, 1126 (9th Cir. 2002) ("The doctrine applies [when] there is no single incident that can fairly or realistically be identified as the cause of significant harm."); *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001) ("[M]ere continuing impact from past violations is not actionable.").

There is no reason to apply the continuing violations theory in this case. First, the Sixth Circuit has urged extreme caution when applying the theory in Section 1983 actions. Moreover, the Township is not engaged in new violations or repeated wrong acts, but rather Plaintiffs are experiencing, at most, continuing effects of an alleged original violation, not ongoing unlawful acts. *See Tolbert*, 172 F.3d at 940 ("[A] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation."). In other words, Plaintiffs are allegedly experiencing the effects of an alleged original violation from years before (e.g., the existence of the ordinance as Plaintiffs cite relentlessly in their discovery responses) not any ongoing actions by the Township. As discussed *supra*, Plaintiffs (with the exception of Hawthorne and Bowers Harbor) obtained their land-use approvals years before filing this suit, at which point in time, any reasonably prudent Plaintiff would have been aware of the actions causing harms that gave rise to their causes of action. These are discrete acts that Plaintiffs knew occurred; such discrete acts are anathema to a continuing violations theory. *See Yetto*, 2019 WL 464603, at *7; *Flowers v. Carville*, 310 F.3d 1118, 1126 (9th Cir. 2002) ("The doctrine applies [when] there is no single incident that can fairly or realistically be identified as the cause of significant harm."); *Goldsmith*, 614 Fed. Appx. at 828 (holding that continuing violation theory was inapplicable in First Amendment claim based on an alleges series of discrete, easily identifiable incidents).

Moreover, the final element of the continuing violations theory requires Plaintiffs to show that "further injury to the plaintiff[ ] must have been avoidable if the defendants had at any time ceased their wrongful conduct." *Eidson*, 510 F.3d at 635. There is a substantial problem with Plaintiffs' claims here that simmers beneath the surface – and ties into their lack of standing addressed above: even if Plaintiffs are successful in this lawsuit in invalidating the challenged sections of the PTZO, they are in no better position and their injuries would not be redressed

because their properties remain in the A-1 District, which does not allow for the commercial uses they seek. The intent and purpose of the A-1 District is for land use that is predominantly for agricultural and open-space uses:

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

(ECF No. 29-1, PageID.1180, § 6.7.1 of PTZO).

Neither the uses permitted by right nor the special uses in the A-1 District include unfettered commercial activities – the purpose of the A-1 District is to promote agricultural and open space uses. Section 6.1.4 of the PTZO provides that:

> No building or structure, or part thereof, shall be erected, moved, constructed, or altered, and no new use or change in use shall be made unless in conformity with the provision of this Ordinance and with the regulations specified for the district in which it is located.
>
> (1) The regulations applying to each district include specific limitations on the use of land and structure, height and bulk structures, density of population, lot area, yard dimensions, and area of lot that can be covered by each structure.

In other words, only uses that are specifically delineated as permissible within the A-1 District are allowed. This is known as permissive zoning. Permissive zoning ordinances permit only those uses that are specifically listed in the ordinance. Uses that are not listed are not permitted. This is not an unusual concept in zoning and is one that was reaffirmed by the Michigan Supreme Court only months ago in *Dezman v. Charter Twp. of Bloomfield*, ___ Mich. ___, 997 N.W.2d 42 (2023). In *Dezman*, the Michigan Supreme Court peremptorily reversed the Michigan Court of Appeals in a decision involving the Charter Township of Bloomfield's zoning ordinance, which is silent on

the use sought. The Charter Township of Bloomfield's zoning ordinance is functionally equivalent to the present ordinance.

In *Dezman*, the plaintiffs kept pet chickens in the backyard of their home that was zoned as single-family residential. *Dezman v. Charter Township of Bloomfield*, 2023 WL 3767221, at *1 (Mich. Ct. App., June 1, 2023) (*Dezman I*), rev'd *Dezman v. Charter Twp. of Bloomfield*, ___ Mich. ___, 997 N.W.2d 42 (2023) (*Dezman II*). Following neighbor complaints, the township informed the plaintiffs they were violating the zoning ordinance because keeping chickens was not a listed accessory use in the single-family residential district, and, instead, keeping chickens was considered a farm use. The subject ordinance listed the principal permitted land uses in the R-3 One-Family Residential Zone as one-family detached dwellings, farms, and accessory structures customarily incidental to principal permitted uses. *Dezman I*, 2023 WL at *1. The zoning ordinance defined a one-family detached dwelling as "'[A] building designed exclusively for and occupied by one (1) family.'" *Id.* However, the ordinance did not state what activities may be conducted at a one-family detached dwelling. *Id.* Similar to the PTZO, the Bloomfield Township zoning ordinance contained language expressly limiting the use of land to only those listed in the ordinance: "'No building or structure, or part thereof, shall hereafter be erected, constructed or altered and maintained, *and no new use or change shall be made or maintained of any building, structure or land, or part thereof except in conformity with the provisions of this Chapter.*'" *Id.* at *5 (emphasis in original).

On appeal, Bloomfield Charter Township argued, "because the ordinance does not expressly state residents may keep chickens at a one-family detached dwelling, such use is necessarily excluded." *Id.* The Michigan Court of Appeals disagreed and despite citing to the correct Michigan Supreme Court precedent in *Pittsfield Twp. v. Malcolm*, 375 Mich. 135; 134

N.W.2d 166 (1965), concluded that, "[b]ecause the unambiguous, plain language of the zoning ordinance contains no express provision prohibiting plaintiffs from keeping chickens at their one-family detached dwelling or limiting the keeping of chickens to a farm," the plaintiffs did not need to seek a variance. *Dezman I*, 2023 WL at *5.

The Michigan Supreme Court correctly stepped in to correct the Court of Appeals error. In a peremptory order, the Michigan Supreme Court reversed the Court of Appeals and concluded that because the ordinance stated what uses were permitted, any use not specifically allowed must be excluded:

> The zoning ordinance stated what activities are permitted at the one-family detached dwelling on plaintiffs' property: accessory uses and accessory structures customarily incidental to one-family detached dwellings. Zoning Ordinance § 42-3.1.3(B)(i) and (vi). "Under the ordinance which specifically sets forth permissible uses under each zoning classification ... absence of the specifically stated use must be regarded as excluding that use." *Pittsfield Twp v Malcolm*, 375 Mich. 135, 142, 134 N.W.2d 166 (1965).

Dezman II , 997 N.W.2d at 42.

The same reasoning applies here as the PTZO is a permissive zoning ordinance inasmuch that it lists the uses permitted in the A-1 District. Uses not specifically permitted are excluded. So, for the sake of argument, if the Township has decided to one day simply remove all of the sections of the PTZO challenged in this litigation – all of Sections 6.7.2(19), 8.7.3(10), and 8.7.3(12) – Plaintiffs' "injuries" would not be avoided. The reason is simple: if those sections of the PTZO were removed, Plaintiffs would not be able to engage in the commercial uses they seek because their properties are still zoned A-1 and subject to agricultural zoning restrictions. The PTZO does not specifically permit the sought uses, so in the absence of that permission, the desired use is prohibited in that zone. *See id*.

For example, Plaintiffs assert that Section 6.7.2(19)(b)(6) violates the First Amendment by limiting the size of Farm Processing Facilities, presumably claiming that they should be entitled to construct a facility of limitless size in which they can sell their tchotchkes and merchandise to the masses. If the Township struck Section 6.7.2(19)(b)(6) from the PTZO, Plaintiff Two Lads would not be able to build a 10,000 square foot winery bonanza in the A-1 District and begin to sell, for example, limitless corkscrews, hats, t-shirts, and wineglasses for profit. That is known commonly as a commercial use. The PTZO does not permit commercial uses in the A-1 District. *See* Section 6.7.2 of the PTZO. If the challenged section of the PTZO no longer existed, Plaintiffs would still be in the same "predicament" as they are now because their proposed uses are incompatible with agricultural zoning and are not specifically allowed. Again, Plaintiffs in this lawsuit have challenged sections of the ordinance that give them permissions to engage in uses that would otherwise be completely barred by the zoning of the properties as A-1. Plaintiffs have not challenged agricultural zoning. That is, they have not filed suit claiming that their existence in an agriculturally zoned district violates their First Amendment rights and works a taking of their property.

In cognate form, this issue has been addressed by the Sixth Circuit in the realm of standing for Article III purposes. The issues of redressability and continuing violations are, in this instance, inextricably linked (i.e., if the defendant voluntarily stopped the "wrongful" behavior the continuing harm would stop). In *Midwest Media Prop., L.L.C. v. Symmes Tp., Ohio*, 503 F.3d 456 (6th Cir. 2007), the plaintiffs challenged sign regulations that banned "off-premises" signs. The plaintiffs' applications were denied on the basis of the "off-premises" provision and some were also rejected on the basis that the proposed signs violated size and height requirements in the ordinance. *Id.* at 459-460. The defendants argued that the plaintiffs lacked standing because had

they prevailed on the claim that the "off-premises" ban was unconstitutional, their claims were not redressable because the signs could have been equally rejected on other grounds because the signs did not comply with size and height regulations. *Id.* at 460. The size and height regulations went unchallenged in the lawsuit.

The Sixth Circuit affirmed the District Court's decision granting the defendants' summary judgment on redressability. In doing so, it reasoned:

> The key problem with plaintiffs' claim is one of redressability. Even if plaintiffs could show that the township's original off-premises advertising ban (or its sign-approval process) violated the First Amendment, each of Midwest Media's nine sign applications sought permission to post signs that plainly violated the township's size and height regulations. *See* JA 92 (denying application and noting that sign exceeded height limit); JA 77 (denying application and citing general provision containing size and height limits); JA 88 (same); JA 110 (same); JA 157 (affidavit from zoning inspector stating that application "could have been denied" because the proposed sign "exceeded the height limitation" and "exceeded the maximum square footage" permissible); JA 160 (affidavit from zoning-plans examiner stating that three applications "could have been denied because" they "exceeded height limitations" and "exceeded the maximum square footage" permissible); JA 163 (affidavit from zoning-plans examiner stating that application "could have been denied because ... it exceeded height limitations" and "exceeded the maximum square footage" permissible). Yet plaintiffs chose not to challenge the size and height requirements in their complaint—perhaps in view of the difficulty of such a challenge here. *See Prime Media, Inc. v. City of Brentwood*, 398 F.3d 814, 818–21 (6th Cir.2005) (rejecting challenge to sign ordinance's size and height requirements); *see also Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 807, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (rejecting challenge to city's ban on posting signs on public property).
>
> Having chosen not to challenge the size and height regulations and having filed nine applications to post a sign in the township that violated these regulations, plaintiffs cannot tenably show that success in challenging other regulations of the sign ordinance will redress any injury caused by these regulations. For even in the absence of these regulations—even if, consistent with the relief sought in plaintiffs' complaint, our court invalidated them—that **would not redress plaintiffs' injury because the size and height restrictions still would preclude the township from approving their sign applications** and thus still would preclude plaintiffs from erecting each of these signs.

Id. at 461-462 (emphasis added). The same analysis applies to redressability and injury in this case. Even in the absence of the challenged sections of the PTZO (for example, in the vein of continuing violations, if the Township stopped enforcing the challenged sections) Plaintiffs' injuries would not be redressed because their location in the A-1 District would preclude their proposed commercial uses. *See also Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006) (finding no redressability because a favorable decision "would not allow [Plaintiff] to build its proposed signs, for these would still violate other unchallenged provisions of the sign code like the restrictions on size, height, location, and setback."); *K.H. Outdoor, L.L.C. v. Clay Cnty.*, 482 F.3d 1299, 1303 (11th Cir. 2007) (holding that injury not redressable because "Any injury [plaintiff] actually suffered from the billboard and offsite sign prohibition is not redressable because the applications failed to meet the requirements of other statutes and regulations not challenged.").

Finally, Plaintiffs errantly rely on the Sixth Circuit's decision in *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516 (6th Cir. 1997). As Plaintiffs favorably cite *ad infinitum*, the Sixth Circuit did reason that "each day that the invalid resolution remained in effect, it inflicted 'continuing and accumulating harm' on Kuhnle." *Id.* In other words, the plaintiff was "actively deprived . . . of its asserted constitutional rights every day that [Resolution 91–87] remained in effect." *Id.*

However, upon a more in-depth review, *Kuhnle* is clearly distinguishable. In *Kuhnle*, Geauga County enacted Resolution 91-87 which prohibited the plaintiff, a trucking company, from traveling on certain roads to access a stone quarry. *Id.* at 521. In a separate action, Ohio state courts subsequently ruled that a Geauga County resolution similar to Resolution 91-87 was unconstitutional and, therefore, the county stopped enforcing Resolution 91-87. *Id.* The plaintiff

filed suit against the county more than two years after the resolution was passed (the relevant statute of limitations was two years) but less than two years after the county stopped enforcing the resolution. The plaintiff's causes of action included a takings claim, a substantive Due Process claim for deprivation of property, and substantive Due Process claim for deprivation of liberty. *Id.* at 518-519, 521. The Sixth Circuit considered the application of the continuing violations theory to each claim. Contrary to Plaintiffs' one-size-fits-all analysis, *Kuhnle* did not universally apply the continuing violations theory.

First, the *Kuhnle* panel roundly rejected the application of the continuing violations theory to the takings claim:

> If Resolution 91–87 did, in fact, "take" any property interests belonging to Kuhnle, that taking occurred when the resolution was enacted. "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." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir.1993); *accord National Adver. Co. v. City of Raleigh*, 947 F.2d 1158, 1163–66 (4th Cir.1991).

Kuhnle, 103 F.3d at 521. So, Plaintiffs cannot find safe harbor for their takings claim in the continuing violations theory. The Sixth Circuit has unequivocally rejected that position; a takings claim accrues upon enactment of the ordinance because it is a single harm compensable when the ordinance is passed.

Second, the *Kuhnle* panel considered the application of continuing harms to the Due Process deprivation of property claim and, again, summarily rejected the plaintiff's reliance on that theory:

> Kuhnle's substantive Due Process claim for deprivation of property is time-barred for the same reason. Any deprivation of property that Kuhnle suffered was fully effectuated when Resolution 91–87 was enacted, and the statute of limitations began to run at that time. *See Ocean Acres Ltd. Partnership v. Dare County Bd. of Health*, 707 F.2d 103 (4th Cir.1983).

Kuhnle, 103 F.3d at 521. The *only* claim the Sixth Circuit considered applying the continuing violations theory to was the substantive Due Process liberty interest claim: "Kuhnle's substantive Due Process claim for deprivation of liberty is another matter. Kuhnle claims that Resolution 91–87's through truck traffic ban deprived it of liberty interests assertedly created by a fundamental constitutional right to intrastate travel and by the prior settlement agreement between Kuhnle and the County." *Id.* at 521-522. It was in this context alone, a liberty interest claim, that the Sixth Circuit considered applying the continuing violations theory based upon the language cited continuously by Plaintiffs. Plaintiffs do not raise liberty interest claims under the Due Process clause. They assert First Amendment and takings claims. As *Kuhnle* concluded, continuing violations do not apply to the takings claim.

Further, the Sixth Circuit has walked back its application of *Kuhnle* and concluded it does not apply in the First Amendment context. In *Goldsmith v. Sharrett*, 614 Fed. Appx. 824 (6th Cir. 2015), a prisoner plaintiff complained that "a series of events involving repeated seizures of his manuscripts by prison staff" gave rise to a First Amendment claim. *Id.* at 825. The plaintiff in *Goldsmith*, relying on *Kuhnle*, alleges that eventually the defendants "instituted a complete and ongoing ban on his writing" which he claims "constitute[ed] a continuing violation of his rights under the First Amendment." *Id.* at 828.

The *Goldsmith* panel found *Kuhnle* inapplicable and reasoned:

> The case at bar is very different from *Kuhnle Brothers*, however. First, in *Kuhnle Brothers*, the law at issue—Resolution 91–87—was determined to be unlawful. *See id.* at 518. Here, Goldsmith has failed to allege facts to establish that there was a ban on his writing that could possibly constitute a continuing violation of his constitutional rights. Rather, Goldsmith alleges a series of discrete, easily identifiable incidents—i.e., individual seizures of his manuscripts followed by individual hearings. In *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 114, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), the Supreme Court contrasted a continuing violation with discrete acts that are "easy to identify." Continuing violations in the Section 1983 context are akin to hostile-work

> environment claims where the harm "cannot be said to occur on any particular day" and individual incidents are not actionable on their own. *Id.* at 115, 122 S.Ct. 2061. A generous reading of Goldsmith's complaint reveals a host of significant discrete events.

Id. at 828-829.

Goldsmith, relying on the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*, recognized that the continuing violations theory does not apply in the context of discrete acts by a defendant, acts that were readily ascertainable by the plaintiffs. These acts are, on their own, actionable. The same reasoning applies in this case. As discussed *supra*, Plaintiffs' case is predicated upon a series of discrete acts (e.g., the passing of an ordinance, the granting of an SUP that requires compliance with an ordinance, etc.) that were readily ascertainable, and indeed known, to the Plaintiffs. On this basis, in addition to the Sixth Circuit's repudiation of *Kuhnle* in a similar factual scenario, the continuing violations theory should not apply to save Plaintiffs' claims. *See also Robinson v. Genesee Cty. Sheriff's Dept.*, 2018 WL 4145933 at *5 (E.D. Mich., Aug. 30, 2018) ("When the alleged 'continuing violation' consists of actions that are actionable on their own, they do not qualify in the aggregate as a continuing violation.") (citing *Goldsmith*, 614 Fed. Appx. at 828-829).

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, Defendant Peninsula Township concurs in and respectfully requests that this Honorable Court grant PTP's motion for partial summary judgment and dismiss Plaintiffs' claims.

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