UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

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

Plaintiffs,

v.

PENINSULA TOWNSHIP, Michigan Municipal Corporation,

Defendant,

and

PROTECT THE PENINSULA,

Intervenor-Defendant.

Case No: 1:20-cv-01008

Honorable Paul L. Maloney
Magistrate Judge Ray S. Kent

ORAL ARGUMENT REQUESTED

PLAINTIFFS' RESPONSE IN OPPOSITION TO INTERVENER PROTECT THE PENINSULA'S MOTION FOR PARTIAL SUMMARY JUDGMENT [516]

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Protect the Peninsula ("PTP") is neither the government nor a winery. It is a special interest group comprised of a handful of members dedicated to stopping land use within Peninsula Township that does not match their subjective ideal. Because of its limited role, PTP was allowed to intervene in this case "based on PTP members' 'property interest,' including maintaining property values, quiet enjoyment, and preserving their farms." ECF No. 345, PageID.12557-12558 (citing *Wineries of the Old Mission Peninsula, Ass'n v. Twp. of Peninsula*, 41 F.4th 767, 771-772, 775 (6th Cir. 2022)). Given this, one would expect that PTP's motion would focus on how striking down the Winery Ordinances would affect PTP's property interest. Yet nowhere in PTP's brief does it allege its members' property interests will be harmed. Instead, PTP takes the opportunity to re-argue issues which Peninsula Township has already argued and which this Court has rejected. Where PTP attempts to make legal arguments, those arguments are superficial and vague. Where PTP attempts to argue facts, it focuses on facts not relevant to the legal analysis. PTP's motion should be denied.

I. FACTUAL BACKGROUND

A. The Ordinances regulate each Winery.

Peninsula Township adopted its Zoning Ordinance in 1972 (the "PTZO" or, or those parts applicable to the Wineries, the "Ordinances"). Peninsula Township's Answer to First Amend. Compl., ECF No. 35, PageID.1888, ¶ 42. The PTZO has been amended over time to add various provisions related to wineries. *Id.* ¶ 43. Three specific provisions are at issue here: Section 6.2.7(19) Use by Right – Farm Processing Facility; Section 8.7.3(10) Winery-Chateau; and Section 8.7.3(12) Remote Winery Tasting Room (collectively the "Winery Ordinances") The Wineries, Peninsula Township, and this Court all agree that one of the three Sections of the Winery Ordinances applies to each of the Wineries and regulates their operations.

1. Villa Mari.

The Township agrees that the Chateau Ordinance applies to Villa Mari. ECF No. 142, PageID.4974; ECF No. 143, PageID.5351. This Court made this same determination. ECF No. 162, PageID.5984, n. 5.

2. Brys Estate.

The Township agrees that the Chateau Ordinance applies to Brys Estate. ECF No. 142, PageID.4974; ECF No. 143, PageID.5351. This Court made this same determination. ECF No. 162, PageID.5984, n. 5.

3. Black Star.

The Township agrees that the Farm Processing Ordinance applies to Black Star. ECF No. 142, PageID.4974; ECF No. 143, PageID.5351. This Court made this same determination. ECF No. 162, PageID.5984, n. 4.

4. Chateau Operations.

The Township agrees that the Chateau Ordinance applies to Chateau Operations ("Chateau Chantal"). ECF No. 142, PageID.4974; ECF No. 143, PageID.5351. This Court made this same determination. ECF No. 162, PageID.5984, n. 5.

5. Chateau Grand Traverse.

The Township agrees that the Chateau Ordinance applies to Chateau Grand Traverse. ECF No. 142, PageID.4974-4975; ECF No. 143, PageID.5351. This Court made this same determination. ECF No. 162, PageID.5984, n. 5.

6. Bowers Harbor.

The Township agrees that the Chateau Ordinance applies to Bowers Harbor. ECF No. 142, PageID.4974; ECF No. 143, PageID.5351. This Court made this same determination. ECF No.

162, PageID.5984, n. 5.

7. Montague Development.

The Township agrees that the Chateau Ordinance applies to Montague Development ("Hawthorne"). ECF No. 142, PageID.4974; ECF No. 143, PageID.5351. This Court made this same determination. ECF No. 162, PageID.5984, n. 5.

8. Peninsula Cellars.

The Township agrees that the Remote Winery Tasting Room Ordinance applies to Peninsula Cellars. ECF No. 142, PageID.4975; ECF No. 143, PageID.5351. This Court made this same determination. ECF No. 162, PageID.5984, n. 6.

9. Two Lads.

The Township agrees that the Farm Processing Ordinance applies to Two Lads. ECF No. 142, PageID.4974; ECF No. 143, PageID.5351. This Court made this same determination. ECF No. 162, PageID.5984, n. 4.

10. Bonobo.

The Township agrees that the Chateau Ordinance applies to Bonobo. ECF No. 142, PageID.4974; ECF No. 143, PageID.5351. This Court made this same determination. ECF No. 162, PageID.5984, n. 5.

PTP argues that Bonobo was never approved for guest activities. Bonobo's SUP provides that to have guest activities Bonobo needed to "submit annual grape production and purchase numbers to the Township staff for review." ECF No. 32-6, PageID.1770. Bonobo did this. For example, in April 2019, the Township reminded Bonobo to submit its tonnage report "to qualify Bonobo for 'Guest Activities' under the Zoning Ordinance." ECF 487-1, PageID.18768-18769. The Township also warned Bonobo that if it went forward with an advertised event, "the penalties

include issuance of a Civil Infraction Citation, plus the Township Board may hold a hearing that could result in the closure of all Guest Activities." *Id.* The next day, Bonobo provided the requested information. ECF 487-2, PageID.18771. In a June 2019 email, the Township concluded that Bonobo's tonnage report "would qualify Bonobo for 61 attendees at a Guest Activity." ECF 487-3, PageID.18773. The next day, the Township advised Bonobo that "the Zoning Administrator has approved the Guest Activity uses detailed in your email…." ECF 487-4, PaageID.18775-18776; *see also* ECF No. 487-5, PageID.18778: "[Bonobo] qualified for Guest Activities (I wrote a letter to him) and this pairing activity is allowed."

11. Tabone.

The Township agrees that the Farm Processing Ordinance applies to Tabone. ECF No. 142, PageID.4974; ECF No. 143, PageID.5351. This Court made this same determination. ECF No. 162, PageID.5984, n.4.

B. The Township enforces the Winery Ordinances.

Previously, the Wineries provided this Court with a "list [of] over twenty instances where the Township, through varying degrees of formality, informed the Wineries that there was a PTZO violation." ECF No. 518, PageID.20728. In addition, Christina Deeren, the Township's director of zoning, confirmed that "the Township regularly enforced the PTZO." *Id.* (citing ECF No, 469-2). This Court referenced those enforcement actions in its recent order, ECF No. 518, PageID.20727–28, 20735. The Wineries reference additional enforcement activities below.

II. ARGUMENT

A. Standard of Review.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). PTP, as the movant, bears "the initial burden of establishing an absence of evidence to support [the Wineries'] case." *Copeland v. Machulis*, 57 F.3d 476, 478-79 (6th Cir. 1995) (citations omitted). "In deciding a motion for summary judgment, the court views the factual evidence and draws all reasonable inferences in favor of the nonmoving party." *McLean v. 988011 Ontario Ltd.*, 224 F.3d 797, 800 (6th Cir. 2000).

B. PTP Ignores the Right to Farm Act and Invents Unsupportable Restrictions.

Contrary to PTP's desires, the PTZO does not prohibit "commercial" uses in the "agricultural" district and if it did, the PTZO would violate Michigan's Right to Farm Act. To start, the term "commercial use" is only used once in the PTZO and that is in reference to lighting requirements in parking lots. ECF No. 3-1, PageID.591, Section 7.14.3(6). The term "commercial activity" is not used at all. ECF 3-1. The term "commercial" is used occasionally, but not in a prohibitive manner. *Id*. And, as it relates to agriculture, the PTZO recognizes Peninsula Township as "a commercial fruit producing area where the livelihood and well-being of many area residents depends on the successful production of fruit crops." *Id*. at PageID.566, Section 7.8. While, the PTZO does not define "commercial use," "commercial activity," or "commercial," the PTZO provides that "[a]ny word or term not interpreted or defined by this Article shall be used with a meaning of common or standard utilization." *Id*. at PageID.494, Section 3.1(7).

Under Michigan's Right to Farm Act, a "farm" is defined as "the land, plants, animals, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the commercial production of farm products." MCL 286.472(a) (emphasis added). Additionally, a "farm operation" is defined as "the operation and management of a farm or a condition or activity that occurs at any time as necessary on a farm in connection

with the commercial production, harvesting, and storage of farm products ...." MCL 286.472(b) (emphasis added). The Generally Accepted Agricultural and Management Practices ("GAAMPs") for Farms Markets promulgated by the Michigan Department of Agriculture ("MDARD") take this one step further:

> As farmers look for ways to keep their businesses economically viable, many have chosen to shift their operations from a farmer-to-processor to a direct market business model. This includes selling raw and value-added products directly to the consumer through on-farm establishments, farmers markets, and other agricultural outlets. This allows farms to take advantage of consumer interest in agritourism, the "buy local" movement, and a desire for a connection with farmers and food production. These activities have far-reaching economic impacts. Many regions have capitalized on the growth of farm markets by developing regional farm market and culinary trails, and tourism promotion based on authentic culinary experiences offered by local farm markets. Farm markets provide the opportunity for visitors to meet a farmer, learn about modern agricultural practices, and gain access to fresh, local, nutritious food. Finally, farm markets and the associated farm, help maintain green space adding to the quality of life. Thriving farmland enhances the beauty of communities, retains residents, and attracts visitors.

ECF No. 501-4, PageID.19506. "GAAMPs for Farm Markets were developed to provide guidance as to what constitutes an on-farm market and farm market activities." *Id.* "A farm market is a year-round or seasonal location where transactions and marketing activities between farm market operators and customers take place." *Id.* at PageID.19507. Marketing includes "[p]romotional and educational activities at the farm market incidental to farm products with the intention of selling more farm products. These activities include, but are not limited to, farm tours (walking or motorized), demonstrations, cooking and other classes utilizing farm products, and farm-to-table dinners." *Id.* (emphasis added). Clearly, in Michigan, farming includes commercial activities and uses.[1]

[1] It is undisputed that each of the Wineries is a farm. In fact, the Ordinances use the terms "farm operations," "farmland" and "farm crops" when describing winery operations.

PTP members, however, have their own views. Scott Phillips believes that "agriculture is devoted to the growth of crops" and nothing else, with even U-pick cherry stands being a commercial activity. Exhibit 1: Phillips Dep. 17-18, 34-35. Michelle Zebell testified that agriculture means growing and caring for crops, but selling them is commercial. Exhibit 2: Zebell Dep. at 24-25.

The Right to Farm Act precludes PTP's subjective beliefs. A similar situation was confronted in *Milan Township v. Jaworski*, 2003 WL 22872141 (Mich. Ct. App. Dec. 4, 2003). There, an ordinance required an SUP before commercial recreation areas could be operated on agriculturally zoned property. *Id*. at *1. The landowner was denied a permit for a hunting preserve at which he raised and sold game birds and allowed hunting the land for a fee. *Id*. The township determined this was a commercial operation and a nuisance per se. *Id*. The court disagreed, finding that the restrictions were preempted by the Right to Farm Act. The property was a "'farm' because it was used for breeding, raising and selling game birds for commercial purposes. The game birds were 'farm products' because the[y] are useful to human beings and produced by agriculture. The hunting of game birds on defendant's property constitutes a 'farm operation' because it involves the 'harvesting of farm products.'" *Id*. at *4. Because the ordinance proscribed an operation protected by the Right to Farm Act, the court concluded that the ordinance conflicted with and was preempted by the RFTA. *Id*. at *6.[2]

Not even Peninsula Township officials seem to agree with PTP's views. Christina Deeren testified regarding a motorcycle rally that occurred on agricultural land. Exhibit 3: Deeren Dep. at 12-15. She testified the event was a "commercial use on agricultural land, so they were

[2] Under *Milan Township*, Peninsula Township's requirement that wineries obtain an SUP before they engage in operations protected by Michigan's Right to Farm Act would be preempted.

commercially bringing people into their property, doing demonstrations of motorcycles, and the property is zoned as agricultural." *Id*. at 14. But Peninsula Township took enforcement action only with respect to signs: "We didn't stop the actual event from going on. What we stopped was all the banners they had up and advertisements for the rally -- or for the rides, the demo rides." *Id*. Otherwise, Peninsula Township allowed the event to proceed on agricultural land. *Id*. at 15. Similarly, former Township planner Gordon Hayward testified that Peninsula Township allows "every residence in the township to not only operate a business, but they can have two full time equivalent employees as a residential use." ECF No. 488-5, PageID.19133. Houses are allowed in the agricultural zone, so every residence in the agricultural zone can apparently operate a home business with employees.

PTP's arguments are based on its incorrect view that agricultural properties are intended to provide PTP members with a scenic view, but not operate as working farms. Michigan's Right to Farm Act says otherwise and PTP's imagined restrictions on agricultural land would be unenforceable even if set forth in the Ordinances.

C. All Wineries Have Standing.

Article III standing has three elements: injury-in-fact; causation; and redressability. *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002). An injury-in-fact is an "'invasion of a legally protected interest' that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical." *Id*. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Causation exists where the injury is "'fairly trace[able] to the challenged action of the defendant,' rather than some third party not before the court." *Id*. (brackets in original). Redressability exists where it is "likely that a favorable court decision will redress the injury to the plaintiff." *Id*. While "[t]he burden to establish standing rests on the party invoking

federal jurisdiction," when standing is raised at summary judgment, the moving party "must establish that there exists no genuine issue of material fact as to justiciability…." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999).

Courts, however, "must not confuse standing with the merits." *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1256 (10th Cir. 2004) (finding standing to challenge a law even if it was later determined that the law was not applicable). Standing does not depend upon the ultimate success of the merits. *See Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("standing in no way depends upon the merits of the plaintiff's contention that particular conduct is illegal...."). Rather, standing "depends…on whether the plaintiff is the proper party to bring the suit." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 460 (4th Cir. 2005) (cleaned up). Otherwise, if standing depended upon success on the merits, "every unsuccessful plaintiff will have lacked standing in the first place." *Id*. at 461 (cleaned up).

This Court has determined that all of the Wineries have standing. See ECF No. 319, PageID.11888 ("Tabone, Chateau Grand Traverse, and Bonobo have standing to pursue their claims"); ECF No. 162, PageID.5995, n. 16 (finding all Winery-Chateaus and Farm Processing Wineries "have standing" to raise Commerce Clause claims); *Id*. at PageID.6001, n. 18 (finding all Plaintiffs "have standing" to raise commercial speech claims); *Id*. at PageID.6008, n. 20 (finding that "Bowers Harbor, Brys Estate, Grand Traverse, Chateau Chantal, Bonobo, Villa Mari, and Hawthorne…have standing [to] raise" content-based speech claims); *Id*. at PageID.6010, n. 21 (finding that "Black Star, Tabone, Two Lads, Bowers Harbor, Brys Estate, Grand Traverse, Chateau Chantal, Bonobo, Villa Mari, and Hawthorne…have standing [to] raise" prior restraint claims); *Id*. at PageID.6014, n. 23 (finding that "Bowers Harbor, Brys Estate, Grand Traverse, Chateau Chantal, Bonobo, Villa Mari, and Hawthorne…have standing [to] raise" compelled

speech claims); *Id*. at PageID.6019, n. 26 (finding that "Black Star, Tabone, Two Lads" and "Bowers Harbor, Brys Estate, Grand Traverse, Chateau Chantal, Bonobo, Villa Mari, and Hawthorne" have standing to challenge the wedding prohibition).

Despite this, PTP argues that some of the Wineries lack standing because PTP theorizes that some portions of the Ordinances do not apply to them. PTP is incorrect, but even if PTP were correct, these are arguments go to the Wineries' damages, which is an issue in which PTP cannot participate. See ECF No. 301, PageID.10703-10704 (citing *Wineries of the Old Mission Peninsula v. Township of Peninsula*, 41 F. 4th 767, 777 (6th Cir. 2022)).

1. PTP misinterprets conservation easements.

PTP is not a party to any conservation easement. Despite this, PTP believes it has the authority to determine permissible uses. But that authority is reserved for the State of Michigan. See MCL 324.36101(m) ("The state land use agency shall determine whether a use … is a permitted use…."). The agency may consider various factors, including whether the use adversely affects the productivity of the farmland and whether the use is allowed by state law. MCL 324.36104a.

Regardless, PTP asks this Court to accept its interpretation of conservation easements even though Peninsula Township, Bonobo and Black Star, interpret the easements differently than PTP. When Bonobo applied for its SUP, its conservation easement was fully addressed. The Township found "that according to the subject property's PDR easement, agricultural development of the land with structures in this area is allowed, more specifically, a winery-chateau is considered an acceptable agricultural use upon the land." ECF No. 32-6, PageID.1757. The Township continued, "the board finds that the proposed winery-chateau is an agricultural use. This type of land use is specifically supported within the 2011 Master Plan as one of the goals in this district to encourage

local growers to produce, process and market agricultural products." *Id*. at PageID.1758. As for Black Star, it is a Farm Processing Winery and a use by right which did not require an SUP, but its purported easement is nearly identical to that of Bonobo so its operations must also be considered agricultural uses. This is consistent with its Land Use Permit which allows for "Retail sales / Tasting." ECF No. 517-30. Further, it is not clear that Black Star's winery building is subject to a conservation easement. *See* Exhibit 4: Lutes Dep. at 28-31 (referring to the easement map, "I don't believe this map shows where the – where the winery farm processing facility is.").

According to PTP, property under a conservation easement cannot be put to productive use, even as an agricultural enterprise. The conservation easements, however, allow for "Agricultural uses" which include retail and wholesale sales, roadside stands selling products, agricultural buildings, processing agricultural products and other agricultural practices approved by the Township Board. *See*, *e.g.*, ECF No 457-12, PageID.16235-16236. In addition to identifying agricultural uses, the easements identify *non*-agricultural uses. See, *e.g.*, *id*. at PageID.16236. But these non-agricultural uses are activities like the dumping and storage of solid waste, trailer parks, airports and other similar uses. *Id*. The restrictions do not include selling agricultural products.

PTP's and the Township's[3] primary complaint is that they believe the easements prohibit "commercial uses." Like the PTZO, the term "commercial use" is not defined in the easements,

[3] Peninsula Township filed a 10,714 word "response in support" of PTP's motion. ECF No. 519.That "response" concurred in all of the relief sought, cited 28 new cases, and significantly expanded upon the arguments PTP made. While the Wineries recognize this Court's order that the Township would be able to respond to PTP's motion for summary judgment, it is doubtful that the Township's brief qualifies as a "response." The Township's brief is just more evidence of the coordination of efforts between two parties with a joint defense agreement who do not have the divergent interests necessary to support PTP's continued intervention. It is also more evidence of why an award of attorneys' fees in favor of the Wineries should be joint and several against the Township and PTP.

leaving the terms open to judicial interpretation. *Craig v. Bossenbery*, 351 N.W.2d 596, 599 (Mich. Ct. App. 1984). But the real problem is the conflation between a principal use and an accessory use. The conservation easements prohibit "residential, commercial, and industrial purposes and activities which are not incident to agricultural and open space uses." ECF No. 457-10, PageID.16204. By implication, uses that are "incident to agricultural and open space uses" are allowed. That is consistent with the Township's allowance for accessory uses at the Wineries. Accessory uses are "[a] use customarily incidental and subordinate to the principal use or building located on the same lot as the principal use or building." ECF No. 3-1, PageID.494, Section 3.2. The plain language of the Winery Ordinances allows accessory uses. See ECF No 3-1, PageID.531, PageID.619-622 ("In addition to the principal and support uses, accessory uses for each such use shall be permitted provided, that all such accessory uses shall be no greater in extent than those reasonably necessary to serve the principal use."), Section 8.7.3(10)(d)(1), Section 8.7.3(10)(u)(1)(e) and Section 6.7.2(4). Therefore, both the Winery Ordinances and the conservation easements allow the Wineries to engage in accessory uses. As explained further below, accessory uses such as agritourism events are allowed.

Ultimately, restrictive covenants must be reasonably construed, *Boston–Edison Protective Association v. Paulist Fathers, Inc.*, 10 N.W.2d 847, 848 (Mich. 1943), and construed against the party seeking to enforce them, with all doubts being resolved in favor of the free use of property. *City of Livonia v. Dep't of Social Services*, 378 N.W.2d 402, 430 (Mich. 1985). A restriction cannot be "enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written." *Flajole*

v. Gallaher, 93 N.W.2d 249, 250–51 (Mich. 1958). Here, the clear intent of the Winery Ordinances and the conservation easements is to allow agricultural and accessory uses.

That intent is consistent with Michigan's Right to Farm Act, where a "farm" includes the commercial production of farm products. MCL 286.472(a). Additionally, a "farm operation" includes the "commercial production, harvesting, and storage of farm products…." MCL 286.472(b). Michigan's GAAMPs recognize that farms are allowed to engage in marketing and other promotional activities. PTP's and the Township's argument that conservation easements preclude Bonobo and Black Star from operating their agricultural businesses in accordance with Michigan's Right to Farm Act is nonsense. Nothing in the easements preclude Bonobo or Black Star from operating their businesses. To the contrary, each specifically allows for retail and wholesale sales.

Finally, PTP's and the Township's argument that the easements bar commercial uses also ignores Michigan Supreme Court precedent that a restrictive covenant that permits certain uses allows for a wider variety of uses than a covenant that prohibits certain uses. *Terrien v. Zwit*, 648 N.W.2d 602, 605–06 (Mich. 2002) (citing *Beverly Island Ass'n v. Zinger*, 317 N.W.2d 611, 613 (Mich. Ct. App. 1982)). In *Beverly Island*, a deed contained a restriction that a home could only be used for residential uses, while the property owner also used the home as a daycare. *Id*. at 612. Like PTP, the plaintiff argued that the restriction permitted only residential uses and thereby prohibited commercial uses. *Id*. The court disagreed and noted that "the deed permits residential uses rather than prohibiting business or commercial uses." *Id*. at 612–13. It explained, "[a] restriction allowing residential uses permits a wider variety of uses than a restriction prohibiting commercial or business uses." *Id*. at 613. *See also Miller v. Ettinger*, 209 N.W. 568 (Mich. 1926)

(holding deed restriction that lots "shall be used solely for residence purposes" did not forbid building apartments).

2. Tabone has Standing.

The Township agreed that the Farm Processing Ordinance applies to Tabone. ECF No. 142, PageID.4974; ECF No. 143, PageID.5351. This Court made this same determination. ECF No. 162, PageID.5984, n.4. There is also no dispute that Tabone holds a Small Wine Maker license and an on-premises tasting room permit issued by the MLCC.

Tabone has operated as a use-by-right farm processing facility for the better part of a decade and does not require an SUP. Mario Tabone explained that "we're operating under a…farm processing facility." ECF No. 459-16, PageID.16423. In May 2016, Peninsula Township approved Tabone for an on-premises tasting room to allow Tabone to serve wine. ECF No. 517-67. In October 2016, the Township notified the MLCC that it had approved Tabone for on-premises tasting of wine. ECF No. 517-67, PageID.20547–20549. Both the Township and Tabone have treated Tabone as a use by right winery and PTP cannot change this fact. Further, even if PTP were correct that Tabone is not a farm processing winery, the Township has still prevented Tabone from exercising its constitutional rights and fully utilizing its state-issued license because it has applied the Winery Ordinances to every Winery without regard to their classification.

Despite previously conceding that Tabone is regulated by the Farm Processing Ordinance, ECF No. 142, PageID.4974; ECF No. 143, PageID.5351, in responding to PTP's Motion, Peninsula Township now wishes to change course and claim that Tabone is not regulated by the Farm Processing Ordinance. ECF No. 519, PageID.20758-20761. But the Township is precluded from now challenging this issue. "Judicial admissions are formal admissions in the pleadings which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *In re Fordson Eng'g Corp.*, 25 B.R. 506, 509 (Bankr. E.D. Mich. 1982). Factual

assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them. *See White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983); *Fordson*, 25 B.R. at 509; *see also Barnes v. Owens–Corning Fiberglas Corp.*, 201 F.3d 815, 829 (6th Cir. 2000) ("[f]actual assertions in pleadings" are generally "binding on the party who made them.") (quotation omitted). At no time has Peninsula Township sought to withdraw its prior admission and is thus bound by it. Further, Peninsula Township does not explain why it was enforcing the Winery Ordinances against Tabone if Tabone was not subject to them. *See* e.g. Section (II)(E)(2) below. Not only has Peninsula Township taken the position before this Court that Tabone was a Farm Processing Winery, but it has historically enforced the Winery Ordinances against Tabone. Tabone clearly has standing to challenge ordinances which have been enforced against it.

3. All Plaintiff Wineries Have Standing.

PTP's standing argument as to the remaining Wineries is superficial, consisting of a single paragraph. ECF No. 517, PageID.20038. PTP believes the Ordinances do not apply to these Wineries, that the Township has not applied the Ordinances to these Wineries, or that the claims were mooted by Amendment 201. These are the same arguments Peninsula Township made in ECF Nos. 458 and 462, which this Court rejected in ECF No. 518. This Court determined that the Ordinances do apply to the Wineries, that the Township has applied the ordinances to the Wineries, and that Amendment 201 has not mooted this case. *Id.* The Wineries incorporate their prior arguments on this issue as well as this Court's order. See ECF No. 487, PageID.18746-64; ECF No. 473, PageID.17991-18005.

PTP also alleges that some of the Wineries did not have permission from the Township to engage in all the activities at issue; but this would not deprive a party of standing. *MacDonald v.*

Safir, 206 F.3d 183, 189 (2d Cir.2000) ("[T]here is no need for a party actually to apply or to request a permit in order to bring a facial challenge to an ordinance (or parts of it) ...") (referencing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755–56 (1988)); *Charette v. Town of Oyster Bay*, 159 F.3d 749, 757 (2d Cir. 1998) ("[making] no effort to apply for a permit .... does not, of course, deprive [plaintiff] of standing to assert that the [zoning ordinance] is facially invalid ...."). The Wineries are challenging the entire scheme requiring them to apply for and receive approval for guest activity uses, and they are not required to violate the scheme before doing so. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("it is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights"); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) ("where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat").

Ironically, PTP argues the Wineries needed Township permission to engage in guest activities (a prior restraint). Further, the requirement to receive such permission was the purchase of a minimum number of tons of grapes from local farmers (a Commerce Clause violation). The Wineries needed to do none of these things to challenge the constitutionality of the Ordinances.

Finally, this Court already declared the entire guest activity scheme void for vagueness. See ECF 162, PageID.6016-6019. PTP cannot carry its burden to show that some of the Wineries were not authorized to engage in guest activities when no one knows what that term means.

4. The Township's Redressability Argument.

The Township goes through great pains to argue that relief from this Court will not redress the injuries the Wineries face. Specifically, the Township argues that because Peninsula Township has permissive zoning, any invalidation of their zoning authorization means that the Wineries

would not be able to do anything. ECF No. 519, PageID.20771. This Court should reject the Township's argument for four reasons.

First, this Court authorized the Township to respond to PTP's motion for summary judgment. ECF No. 303, PageID.10838. It did not give the Township the ability to make new arguments of its own. "The Township will not get a second bite at the apple in defending against the Wineries' constitutional claims—which it utterly failed to do the first time around—simply because PTP has now been permitted to intervene in this matter." *Id.* This Court should simply strike this portion of the Township's brief as in violation of prior orders.

Second, as explained extensively above, the Township is again incorrectly conflating "commercial use" with "primary use." The Winery Ordinances allow the Wineries to engage in accessory uses to their agricultural operations. Those are explicitly allowed in the Winery Ordinances, so the Township's suggestion that the Wineries want "unfettered commercial activity" is simply wrong.

Third, the Township's citation to *Dezman v. Charter Twp. of Bloomfield*, 997 N.W.2d 42 (Mich. 2023) should not change the outcome here. In *Dezman*, the Court of Appeals ruled that keeping chickens at a single family home was a permissible zoning use even though it was not expressly allowed within the township's zoning ordinance. No. 360406, 2023 WL 3767221, at *5 (Mich. Ct. App. June 1, 2023). The Supreme Court reversed, citing *Pittsfield Twp. v. Malcolm*, 134 N.W.2d 166 (Mich. 1965). But Peninsula Township omits that the Michigan Supreme Court remanded to decide whether a chicken coop was a permissible accessory use. 997 N.W.2d 42. The Wineries are arguing just that—their proposed uses would be accessory uses under the Winery Ordinances. *Dezman* does not stand for the broad proposition that the Township asserts.

Fourth, the Township is wrong in its argument that the Wineries could not do anything if simply zoned A-1 Agricultural. The Wineries are farms, so they would be allowed to do anything under the Michigan Right to Farm Act and the GAAMPs. *See* MCL 286.473 ("A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices[.]"). The Wineries hold liquor licenses, so they would be allowed to do everything authorized by the Michigan Liquor Control Code. Eight of the Wineries have special use permits, which contain continuing authorizations. And, if nothing else, the Wineries would be nonconforming uses that could continue to operate as wineries with accessory uses.

D. PTP's First Amendment Arguments are Incorrect.

PTP's argument here stems from its incorrect position that agriculturally zoned property cannot be used to sell or market agricultural products. As discussed above, PTP's "commercial use" argument is incorrect both factually and legally. A farm is allowed to sell the products it grows and any argument to the contrary is frivolous.

In support of its frivolous argument, PTP cites *Pittsfield Township v. Malcolm*, 134 N.W.2d 166 (Mich. 1965), to argue that unless the PTZO explicitly states that a land use is allowed, it is prohibited. But PTP uses the term "use" too broadly when PTP really means principal use. The principal use of a winery is allowed in Peninsula Township. What is at issue is whether accessory uses are allowed. The Ordinances defines accessory uses as "[a] use customarily incidental and subordinate to the principal use or building located on the same lot as the principal use or building." ECF No. 3-1, PageID.494, Section 3.2. The plain language of the Ordinances allows accessory uses. See ECF No 3-1, PageID.531, PageID.619-622 ("In addition to the principal and support uses, accessory uses for each such use shall be permitted provided, that all such accessory uses

shall be no greater in extent than those reasonably necessary to serve the principal use."), Section 8.7.3(10)(d)(1), Section 8.7.3(10)(u)(1)(e) and Section 6.7.2(4).

1. PTP's Free Speech Arguments are Incorrect.

PTP's free speech arguments are superficial at best. For the most part, PTP cites cases for general propositions on free speech, content-based speech, prior restraints and compelled speech, and then PTP just pontificates. PTP does not cite or discuss cases dealing with laws or issues like those before the Court. "[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." *McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) (citations omitted).

a) The Winery Ordinances Restrict Commercial Speech.

PTP's commercial speech argument rests entirely on PTP's conclusory statement that the activities the Wineries wish to engage in are not commercial speech. PTP, accordingly, does not so much as discuss *Central Hudson*. Should this Court conclude that the activities the Wineries wish to engage in are commercial speech, PTP's motion must be denied as PTP concedes it cannot meet the *Central Hudson* factors.[4]

While commercial speech is "usually defined as speech that does no more than propose a commercial transaction," *U.S. v. United Foods, Inc.*, 533 U.S. 405, 409 (2001), "this definition [is] just a starting point" and courts apply "a common-sense distinction between commercial speech and other varieties of speech." *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 (7th Cir. 2014) (internal quotation omitted). Commercial speech is not limited to speech that does no more

[4] Peninsula Township agreed that the subject activities, except for weddings, were commercial speech and that *Central Hudson* applied. ECF No. 162, PageID.6004-05; ECF No. 143 PageID.5373-75, ECF No. 142, PageID.4983-85; ECF No. 211, PageID.7809-10.

than propose a commercial transaction. *Conn. Bar Ass'n v. U.S.*, 620 F.3d 81, 93–94 (2d Cir. 2010); *Semco, Inc. v. Amcast*, Inc., 52 F.3d 108, 112 (6th Cir. 1995). The word "speech" "is not construed literally, or even limited to the use of words." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 158 (3rd Cir. 2002). Indeed, "commercial speech analysis is fact-driven, due to the inherent difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category." *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1272 (9th Cir. 2017) (internal quotations omitted). Relevant considerations include "whether: (1) the speech is an advertisement; (2) the speech refers to a specific product; and (3) the speaker has an economic motivation for the speech." *U.S. v. Benson*, 561 F.3d 718, 725 (7th Cir. 2009) (citing *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66–67 (1983)). No one factor is sufficient, and not all are necessary. *Jordan*, 743 F.3d at 517.

Commercial speech includes a broad range of commercial-related expression. *See, e.g.*, *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 818-19 (9th Cir. 2013) (solicitation of day laborers); *Campbell v. Robb*, 162 F. App'x 460, 469-70 (6th Cir. 2006) (statements made by a landlord to a prospective tenant); and *New York State Restaurant Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131–32 (2d Cir. 2009) (nutritional information). Courts have found commercial speech even when it involves indirect benefits, such as benefits to employee compensation, *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1273 (9th Cir. 2017); improvements to a brand's image, *Jordan*, 743 F.3d at 519-520; general exposure of a product, *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008); and protection of licensees' interests, *Handsome Brook Farm, LLC v. Humane Farm Animal Care, Inc.*, 193 F. Supp. 3d 556, 568–69 (E.D. Va. 2016); *see also American Future Sys., Inc. v. State University of New York College of Cortland*, 565 F. Supp. 754 (S.D.N.Y. 1983) (product demonstrations were commercial speech even though sales were not permitted); and

Anabell's Ice Cream Corp. v. Town of Gocester, 925 F. Supp. 920 (D.R.I. 1996) (amplified music was commercial speech intended to draw customers).

Commercial speech must be viewed through a modern lens:

> Modern commercial advertising is enormously varied in form and style [and it] occupies diverse media, draws on a limitless array of imaginative techniques, and is often supported by sophisticated marketing research. It is highly creative, sometimes abstract, and frequently relies on subtle cues. The notion that an advertisement counts as "commercial" only if it makes an appeal to purchase a particular product makes no sense today, and we doubt that it ever did. An advertisement is no less "commercial" because it promotes brand awareness or loyalty rather than explicitly proposing a transaction in a specific product or service. Applying the "core" definition of commercial speech too rigidly ignores this reality. Very often the commercial message is general and implicit rather than specific and explicit.

Jordan, 743 F.3d at 518.

For the Wineries, modern commercial advertising is agritourism. Winery owners explained experiential marketing, which is an advertising strategy to create a connection between a brand and its customers through events in which customers participate. See ECF No. 469, PageID.16954-16955. Advertising and marketing attract customers so that a farm business can sell products. That is consistent with the Township's Master Plan, ECF No. 142-2, PageID.5040, Governor Whitmer's policy directive, ECF No. 469-7, and MDARD, ECF No. 507-5, ECF No. 503-6, PageID.19770–19777.

PTP agrees with the Wineries that agritourism "is a business activity to attract customers." ECF No. 488, PageID.18927. PTP's own brief on this motion succinctly explains the Wineries' commercial speech:

> 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).

ECF No. 517, PageID.20042-43. PTP posits that these things are "just commerce." *Id.* at PageID.20043. PTP is only partially correct; they are agricultural commerce and commercial speech. Ironically, PTP member Grant Parsons testified that agricultural commerce is desired. Exhibit 5: Parsons Dep. at 225-226 ("Q: Is it your position that a farmer cannot engage in commerce? A. Absolutely not. That's the point of the farm processing ordinance … Ag commerce is okay. Ag commerce is what we want.").

In *Alive Church of the Nazarene, Inc. v. Prince William County, Virginia*, 59 F. 4th 92, 104 (4th Cir. 2023), the court discussed winery events involving the marketing and sale of farm products and their importance to preserving agricultural land:

> [S]pecial events…further agricultural activity. Farm wineries and limited-license breweries remain profitable by selling their products directly to the public. Hosting special events enhances the ability to market and sell products and therefore increase their economic viability. Put simply, the more profitable farm wineries and limited-license breweries are, the more likely they will continue in operation and draw more investment in the same industry. Because farm wineries and limited-license breweries must be located on producing farms, vineyards, or orchards, investment in their continued success directly advances the promotion of farming.

Alive Church, 59 F. 4th at 104. The underlying district court decision noted that "meetings, conferences, banquets, dinners, wedding receptions, private parties and other events conducted for the purpose of marketing wine…produced on the premises" and "agritourism events" are usual

and customary agricultural operations. *Alive Church of Nazarene, Inc. Prince William County, Virginia*, 2021 WL 5237238, *1-2 (E.D. Va. Nov. 10, 2021).

PTP also cites cases for the proposition that courts have upheld bans on commercial uses on agriculturally zoned land. ECF No. 517, PageID.20039. But PTP fails to engage in more than superficial analysis and those cases are distinguishable. In *Nixon v. Webster Township*, 2020 WL 359625, *4 (Mich. Ct. App. Jan. 21, 2020), the dispositive issue was that the weddings did not use any agricultural products and, thus, did not fit in the ordinance's definition of "seasonal agri-tourism." *Id.*[5] Here, however, a wedding is associated with a farm product—wine—made from grapes grown on the property. Even PTP's proffered expert witness "agree[d]" that "on-farm weddings and events" are agritourism. ECF No. 507-4, PageID.19926. He also agreed that the Township's master plan identifies agritourism as helping preserve agricultural land. *Id.* at PageID.19927.

In the same vein, PTP cites *Webster Township v. Waitz*, 2016 WL 3176963 (Mich. Ct. App. June 7, 2016). That ruling was limited, as Judge Beckering explained in her concurrence:

> I also agree with the majority's conclusion that the particular use of the barn by defendants, i.e., a year-round leasing facility designed to host numerous events, is not an accessory use under the zoning ordinance. I note, however, that neither this Court nor the trial court was asked to weigh in on whether a far more limited in scope use of the barn, such as for occasional weddings and gatherings in a manner that is truly incidental and subordinate to the primary use of the property as residential, is nevertheless permitted. The parties did not seek such a determination. Thus, our ruling should not be construed so as to preclude any use of the barn in a manner that qualifies as an accessory use under the applicable zoning ordinance.

Id. at *14 (emphasis added).

PTP cites *Shore v. Maple Lane Farms, LLC*, 411 SW.3d 405 (Tenn. 2013), but that case supports the Wineries. The issue was whether a farm concert was exempt from noise restrictions

[5] *Miami Township Board of Trustees v. Powlette*, 197 N.E. 3d 998 (Oh. Ct. App. 2002), is similar.

under Tennessee's right-to-farm act. The court determined it was not because the statute did not cover marketing, *id*. at 421, but Michigan's Act does. *See* MCL 286.472(b)(i) (defining a farm operation as including "marketing" produce); ECF No. 501-4, Farm Market GAAMPs. The *Maple Lane* court also "agree[d]" that farm concerts are "a right clever marketing operation" and "a marketing and promotion effort to further the income of the farming operation and put the farm in the mind of the public." *Id*.

On-farm agricultural marketing is an important component of modern farming and the preservation of agricultural land and is something the State of Michigan encourages. MDARD's Agriculture Development Division invests in Michigan's agricultural industries. Exhibit 6: 2022 MDARD Annual Report. One of its goals is to "[a]ccelerate the growth of Michigan agriculture companies through an increase in value-added processing opportunities." *Id.* at 6. In 2022, MDARD invested in Youngblood Vineyard to "[i]ncrease production capacity for wine production and create event space," and for Iron Fish Distillery, MDARD invested in the "[e]xpansion of the spirits distillery to meet demand and investments in the agricultural destination facilities to accommodate more visitors." *Id.* at 8.

The Wineries want to engage in commercial speech to promote and sell more of their wine. This speech is not limited to advertisements and is consistent with Michigan's goals of promoting agritourism and driving more business to farms so that farming can be a sustainable business which keeps agricultural land alive.

b) The Winery Ordinances are Content-Based Restrictions.

PTP's argument that the Winery Ordinances are not content-based restrictions is superficial, comprising only two paragraphs. PTP again fails to provide meaningful analysis.

The Wineries provided this Court with meaningful analysis, however, in ECF No. 469, PageID.16965-68. For example, under the Winery Ordinances, a meeting at a Winery can occur

under two scenarios. First, facially agricultural groups or local non-profits can meet at a Winery and, according to the Township, discuss anything they want. ECF No. 485, PageID.18535. Second, a group can meet and discuss agriculture if the zoning administrator determines that the group "has a direct relationship to agricultural production." ECF No. 3-1, PageID.623. Ms. Deeren testified that for her to approve a group it must supply her with information showing they are agriculturally related. *See* ECF No. 136-6, PageID.4817 (describing how a group of bankers, realtors, accountants or lawyers might qualify if they provided sufficient information).

Presumably, a group like Future Farmers of America would qualify without further information. But to host an attorney meeting, a Winery would need to inform the Township that the attorneys would be discussing agriculture. The Winery Ordinances do not "contain any definite criteria or definition to determine what type of activity is 'agriculturally related.'" ECF No. 162, PageID.6012. This means the Township's determination is purely subjective. Further, to ensure that these groups discuss agriculture, the Township "enforcement authorities must examine the content of the message that is conveyed' to know whether the law has been violated. . . . That's about as content based as it gets." *Otto v. City of Boca Raton, Florida*, 981 F.3d 854, 862 (11th Cir. 2020) (cleaned up). Because the Township must assess the content of a group's speech before determining whether a Winery may host the group, the Township has unlawfully imposed a content-based restriction.

c) The Winery Ordinances Act as a Prior Restraint.

As with its other arguments, PTP sets forth only some general law, fails to perform any real analysis, and concludes with attorney pontification. But there is no question the Township engages in prior restraint. This Court has already determined that "Director Deeren determines whether an activity is 'agriculturally related' based on what information the winery-host provides

([ECF No. 143] at PageID.4743). There does not appear to be any definite criteria or definition to determine what type of activity is 'agriculturally related.' Instead, Director Deeren makes that determination, and she has regularly denied many events, such as Yoga in the Vines, Painting in the Vines, and snow shoeing (*Id.*)." ECF No. 162, PageID.6012. The "Ordinances fail to define 'agriculturally related,' leaving room for Director Deeren to make that determination. Plaintiffs have provided multiple examples where they have applied to host a certain Guest Activity and Director Deeren has denied their application to do so." ECF No. 162, PageID.6013 (citing ECF No. 136, PageID.4743-44). "Plaintiffs provided multiple examples of events that they were prohibited from holding, while the Township did not provide examples of any events it permitted Plaintiffs to hold." ECF No. 162, PageID.6014. PTP likewise does not provide examples of permitted events. The Wineries have again provided this Court with a mountain of evidence. *See, e.g.*, ECF No. 469, PageID.16970-71, ECF No. 487, PageID.18740-43.

Ms. Deeren confirmed that her approval was required for guest activities, testifying wineries "are supposed to make a request to me, yes, 30 days in advance of whatever the activity is." ECF No. 136-6, PageID.4812: Deeren Dep. at 25. Wineries "have to notify us if they're having dinners. So if they're having an advertised wine pairing dinner, cooking classes, those types of things are what they have to engage us and notify us of." *Id.* at PageID.4815. When asked if there was a difference between notifying the Township and getting Township approval, she responded "No." *Id.* She was also asked if there are certain uses where all the Wineries need to do is notify the Township, as opposed to getting its approval, and she again said, "No." *Id.* Finally, as to the question of whether all events are approved or all events are denied, Ms. Deeren testified it falls somewhere in the middle. *Id.* at PageID.4813. PTP is simply incorrect that Peninsula Township does not engage in prior restraint.

d) The Winery Ordinances Unlawfully Compel Speech.

PTP argues that the Winery Ordinances do not compel speech because the Wineries do not object to the message. ECF No. 517, PageID.20051. This argument misstates applicable law and the case PTP relies upon, *Glickman v. Wileman Brothers & Elliott*, 521 U.S. 457 (1997), was distinguished in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001). The distinction between *Glickman* and *United Foods* is "clear and easy to apply:"

> If the generic advertising assessment is part of a "comprehensive program" that "displace[s] many aspects of independent business activity," exempts the firms within its scope from the antitrust laws, and makes them "part of a broader collective enterprise," the assessment does not violate the First Amendment. If the program is, in the main, simply an assessment of independent and competing firms to pay for generic advertising, it does violate the First Amendment. Collectivization of the industry eliminates the otherwise extant First Amendment protection for firms' commercial speech.

Delano Farms Co. v. California Table Grapes Comm'n, 318 F.3d 895, 898-899 (9th Cir. 2003). The Wineries are independent and competing businesses and not part of a comprehensive program. Thus, whether the Wineries disagree with the message is immaterial.

PTP also argues that the Winery Ordinances describe an intent and not an obligation. ECF No. 517, PageID.20038. This Court already rejected a similar argument: "the Township argues, in six sentences, that these sections do not compel speech because these provisions describe the Township Ordinances' intent rather than mandate speech (ECF No. 142, PageID.4986) ('[T]his provision *only* states and intent, not a requirement compelling anyone to do anything.') However, after discovery, Plaintiffs' motion demonstrates that the Township is indeed enforcing these sections as a mandate, and as such, the Township has failed to meet its burden." ECF No. 162, PageID.6016. Likewise, PTP has failed to meet its burden.

Finally, PTP also suggests that there is no obligation to engage in guest activities so there is no obligation to engage in compelled speech. Such a scheme is a violation of the

unconstitutional conditions doctrine, which states that "a state actor cannot constitutionally condition the receipt of a benefit, such as a liquor license or an entertainment permit, on an agreement to refrain from exercising one's constitutional rights…." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1077 (6th Cir. 1994).

2. The Wineries' Need Not Pursue Their Freedom of Religion Argument.

Peninsula Township has conceded that the Winery Ordinances do not prohibit weddings. ECF No. 162, PageID.6019-6021. Thus, the Wineries are no longer pursuing this claim.

3. The Wineries' Freedom of Association is Impaired.

Because this Court has already determined that Winery Ordinance sections using the term "guest activities" are unconstitutionally vague, ECF No. 162, PageID.6019, the freedom of association claim may be unnecessary. The Wineries are challenging the same sections as a prior restraint[6] and content-based restriction as discussed above and the relief the Wineries seek may be more straightforward through those claims. Regardless, the Wineries believe that a law which dictates the type of group a business can host is problematic. Two Ordinance sections do that:

- 8.7.3(10)(u)(2)(b): "Meetings of 501(c)(3) non-profit groups within Grand Traverse County. These activities are not intended to resemble a bar or restaurant use and therefore full course meals are not allowed, however light lunch or buffet may be served."

- 8.7.3(10)(u)(2)(c): "Meetings of Agricultural Related Groups that have a direct relationship to agricultural production [may be approved]" with prior approval by the Zoning Administrator.

Peninsula Township enforces these sections and dictates the type of groups the Wineries can host. For example, the Winery Ordinances would prohibit the Wineries from hosting a meeting of the either the Michigan Republican or Democratic Party because neither is a Grand Traverse

[6] The Court previously declared these sections to be unconstitutional prior restraints of speech. ECF No. 162, PageID.6014.

County 501(c)(3) or an agriculturally related group. Similarly, members of PTP (who is also on Peninsula Township's Parks Committee) stated that the Winery Ordinances would prohibit the Wineries from hosting groups from St. Francis Church, an African American sorority, or an LGBT group, while those same groups would be welcome to meet at Bowers Harbor Park. Exhibit 2: Zebell Dep. at 39-46. On this point, Hawthorne's COO testified that "it scares me that some protected class or group would [] say, hey, we'd love to use your space [] and I can't offer it to them because of my understanding of the ordinance and then I have a legal liability there because what stops them from suing us." Exhibit 7: Maier Dep. at 41-42. These concerns are well founded as Michigan's Elliott-Larsen Civil Rights Act prohibits places of public accommodation from denying "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, or marital status." MCL 37.2302. The Wineries should be able to freely associate with any group that they choose; PTP's desire to prevent the Wineries from hosting protected classes is simply contrary to Michigan's public policy and puts the Wineries at risk of liability under the ELCRA.

"Freedom of association is not an enumerated constitutional right, but arises as a necessary attendant to the Bill of Rights' protection of individual liberty interests." *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002). While there are different types of right to association, the Supreme Court has articulated a "right to associate 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. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties." *Roberts v. U.S.*

Jaycees, 468 U.S. 609, 617 (1984). Sections 8.7.3(10)(u)(2)(b) and 8.7.3(10)(u)(2)(c) violate this freedom of association.

4. The Winery Ordinances Fail All Levels of Constitutional Review.

PTP argues the Winery Ordinances satisfy rational basis, but does not argue they survive intermediate or strict scrutiny. By failing to so argue, PTP concedes the Winery Ordinances cannot survive heightened review. As discussed in previous pleadings, the Winery Ordinances are subject to intermediate and strict scrutiny depending on the claim. However, the Winery Ordinances also fail a rational basis review.

Under rational basis review, a law "is invalid if it fails to advance a legitimate governmental interest or it is an unreasonable means of advancing a legitimate government interest." *Montgomery v. Carr*, 101 F.3d 1117, 1130 (6th Cir. 1996) (quoting *Curto v. City of Harper Woods*, 954 F.2d 1237, 1243 (6th Cir. 1992) (per curiam)). "Rational basis review, while deferential, is not 'toothless.'" *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (quoting *Mathews v. Lucas*, 427 U.S. 495 (1976)); *see also Barletta v. Rilling*, 973 F. Supp. 2d 132, 136 (D. Conn. 2013) ("If it is a test with meaning—if it has 'teeth'—rational basis review must mean something beyond absolute deference to the legislature; otherwise it is not review at all."). PTP cites to several cases supporting the notion that a municipality has a legitimate interest in regulating land uses, prioritizing farming, minimizing traffic congestion and noise, and preserving the "character" of a zoning district. ECF No. 517, at PageID.20060-61.

Problematically for PTP, however, is that the Township has asserted that the governmental interest for enacting the Ordinances was to preserve agricultural land. ECF No. 162, PageID.6006. PTP, as the intervening party, cannot come in at the eleventh hour and assert interests that the Township never has. "[O]ne of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge

those issues or compel an alteration of the nature of the proceeding." *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944). PTP must "take the main suit as [it] finds it, but only in the sense that [it] cannot change the issues framed between the original parties, and must join subject to the proceedings that have occurred prior to his intervention; he cannot unring the bell." *Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141, 153 (S.D. Cal. 1954). By asserting new interests, PTP is impermissibly trying to "enlarge those issues" and "change the issues framed between the parties." This Court already rejected PTP's attempt to do that once on a motion for reconsideration. *See* ECF No. 319. PTP should not get yet another attempt to change the issue here, and this Court should limit the governmental interest at issue to preserving agricultural land.

Even if the government purports to advance a legitimate interest, its means of achieving that interest still must be rationally related to the end being sought. Here, the Winery Ordinances are "so unrelated to the achievement" of agricultural land preservation that they cannot withstand rational basis. *Michael v. Ghee*, 498 F.3d 372, 379 (6th Cir. 2007). Supervisor Manigold testified repeatedly that there was no relationship between the Ordinances and preserving farmland. As this Court previously noted, "Supervisor Manigold's deposition [] confirms that these challenged sections of the Township Ordinances likely do not advance the stated interests." ECF No. 162, PageID.6006-07. This Court also noted that "the Township's justifications for the Winery Ordinances—the preservation of the agricultural industry in Peninsula Township—are likely not legitimate, and even if they were, the Winery Ordinances are not actually helping the Township achieve these interests associated with maintaining the agricultural industry." ECF No. 319, PageID.11887.

PTP's litany of cases add nothing to the analysis. Regardless, as this Court has previously determined, review of the Winery Ordinances is subject to intermediate and strict scrutiny, not rational basis. PTP's motion for summary judgment on this issue should be denied.

E. The Winery Ordinances Take the Wineries' Property Without Just Compensation.

Private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. "The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

While the "clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use," governmental regulation of property may also become a taking. *Id.* "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). When the regulation "denies all economically beneficial or productive use of land," the analysis falls under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). But "[w]here a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 533 U.S. at 617 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

The *Penn Central* factors are not absolute. The Supreme Court has "generally eschewed any set formula for determining how far is too far, choosing instead to engage in essentially ad hoc, factual inquiries." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S.

302, 326 (2002) (cleaned up). Thus, "[r]esolution of each case … ultimately calls as much for the exercise of judgment as for the application of logic." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). There is no "'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central*, 438 U.S. at 124.

Here, the Wineries have asserted a regulatory taking under *Penn Central*.[7] Specifically, the Wineries are asserting that the Winery Ordinances have operated as a taking of their rights to operate restaurants, keep certain hours of operations, cater, and play amplified music as allowed by their Wine Maker and Small Wine Maker Licenses and the Michigan Liquor Control Code.

1. The Wineries' liquor licenses are "property" within the meaning of the Takings Clause.

"The concept of 'property' in the law is extremely broad and abstract. The legal definition of 'property' most often refers not to a particular physical object, but rather to the legal bundle of rights recognized in that object." *Brotherton v. Cleveland*, 923 F.2d 477, 481 (6th Cir. 1991). This bundle of rights includes "the rights to possess, to use, to exclude, to profit, and to dispose." *Id.*

Property need not be tangible. "That intangible property rights protected by state law are deserving of the protection of the Taking Clause has long been implicit in the thinking of" the Supreme Court. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). For example, the Supreme Court has held that a trade secret is a property right. *Id.* at 1003–4. So are real estate liens, *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596–602 (1935), and contracts, *Lynch v. United States*, 292 U.S. 571, 579 (1934). Ultimately, "the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent

[7] The Wineries are not asserting a claim under *Lucas*. *See also* ECF No. 211, PageID.7810.

source such as state law.'" *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

Michigan law recognizes the Wineries' licenses as constitutionally protected property rights. *Wojcik v. City of Romulus*, 257 F.3d 600, 609 (6th Cir. 2001). *See also Bisco's, Inc. v. Michigan Liquor Control Comm'n*, 238 N.W.2d 166, 169 (Mich. 1976) ("We conclude that a liquor licensee has a property interest within the meaning of the Due Process Clause[.]"); *Underground Flint, Inc. v. Viro, Inc.*, 80 B.R. 87, 89 (E.D. Mich. 1982) ("Clearly, the liquor license is personal property in the sense that it has value even though it is not tangible.") *See also In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1171 (6th Cir. 1990) ("It is undeniable that a liquor license has pecuniary value to its holder since the license enables the holder to sell alcoholic beverages and can be sold for value. Since the state has vested the owner of a liquor license with these beneficial interests, a liquor license constitutes 'property' or 'rights to property' within the meaning of federal tax lien law.").

Here, each Winery holds either a Wine Maker or Small Wine Maker license from the State of Michigan. ECF No. 54, PageID.2277-2278; ECF No. 162, PageID.5987. Those licenses are a "legal bundle of rights." They contain the right to serve alcohol until 2:00 a.m. *See, e.g.*, MCL 436.2114(1); Mich. Admin. Code R. 436.1403; Mich. Admin. Code R 436.1503; *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 436 (6th Cir. 2005) ("Under Michigan law, a liquor license is property which includes the right to serve alcohol until 2:00 a.m."). They contain the right to operate a restaurant. MCL 436.1536(7)(h). They contain the right to cater. MCL 436.1547. And they contain the right to provide entertainment. MCL 436.1916(11).

These rights are "determined by reference to 'existing rules or understandings that stem from an independent source such as state law'" and are therefore property rights subject to the

Takings Clause. *Phillips*, 524 U.S. at 164 (quoting *Roth*, 408 U.S. at 577).

2. Peninsula Township has taken these property rights.

Peninsula Township effected a taking through a combination of vague ordinances and government action. For example, Section 8.7.3(10)(u)(5)(b) states that all guest activities must end by 9:30pm. While on its face this Section appears to apply only to guest activities at Winery Chateaus, Peninsula Township admitted it has applied the restriction to all the Wineries. ECF No. 136-1, PageID.4777. Later in this litigation, Peninsula Township and PTP admitted this application was incorrect. ECF No. 159, PageID.5884-5, ECF No. 356, PageID.12966.

Similarly, the only prohibition on amplified music is in Section 8.7.3(10)(u)(5)(g), which appears to apply only to Winery Chateau guest activities. But Peninsula Township applies this restriction to all Wineries at all times. For example, Peninsula Cellars, a Remote Tasting Room, received a violation warning on September 9, 2021, for having "amplified music." Exhibit 8: Kroupa Enforcement Letter. 2 Lads, a Farm Processing Facility, has had "numerous verbal rebuffs" from the Township about having live music. Exhibit 9: Baldyga Dep. at 46–48. The Township prevented 2 Lads from hosting a jazz band and the "Old Fogeys Orchestra." *Id.* at 48. Tabone, another Farm Processing Facility, was also told that it could not have live music. Exhibit 10: Tabone Dep. at 27–28. And Chateau Chantal, a Winery Chateau, has experienced the restriction applied beyond guest activities. Exhibit 11: Chantal Dep. at 101.

Catering is similar as Section 8.7.3(10)(u)(5)(i) prohibits catering, but only in reference to the term "guest activities," which this Court has already determined is vague. As to restaurants, Section 8.7.3(10)(u)(2)(b) states that a guest activity is not intended to resemble a restaurant and Section 6.7.2(19)(a) uses similar language. While the Township has stated that some food is

allowed, these restrictions are a moving target as to what kind and how much.[8] For example, a conservancy group from Michigan State University of which Supervisor Manigold was involved sought to host a tasting at Black Star with food. When Black Star asked Supervisor Manigold about allowing food service to the group, he replied that if Black Star served them food "I would fine you." Exhibit 12: Fenton Dep. at 10. Remote Tasting Rooms do not have a similar ban in their Ordinance, yet Peninsula Township applies the restriction regardless.

The question is whether those prohibitions rise to a taking. *Mahon*, 260 U.S. at 415. To answer that question, this Court must assess the "regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo*, 533 U.S. at 617 (citing *Penn Central*, 438 U.S. at 124).

PTP claims that the Wineries cannot use lost profits to show a regulation's economic effects. This is incorrect as "[t]he loss of profitable uses of property is occasionally considered in takings cases as a measure of economic impact." *Nekrilov v. City of Jersey City*, 45 F.4th 662, 673 (3rd Cir. 2022). A party "may introduce evidence of distinct investment-backed expectations for the relevant takings period, such as realistic lost profits, in the course of seeking to prove that a *Penn Central* taking occurred." *DW Aina Le'a Development, LLC v. State of Hawaii Land Use Comm'n*, 2024 WL 449317, *3 (D. Haw. Feb. 6, 2024). As the Federal Circuit explained:

> "[L]ost profits" are, by definition, a measurement of what a party would have received absent the breaching party's action; in other words, in this case they involved only those losses that the court determined the government was directly

[8] PTP members are all over the place on this issue. According to John Wunsch, a slice of pizza is fine but not sit-down pizza service. Exhibit 13: Wunsch Dep. at 27-28. Similarly, a sandwich might be acceptable but "[n]ot full sandwiches." *Id*. at 28. Scott Phillips does not object to the Wineries serving pizza or sandwiches. Exhibit 1: Phillips Dep. at 65. His concern is the number of items on their menu. *Id*. at 65-66. John Jacobs objects to Wineries serving sandwiches but thinks but crackers and cheese are permissible. Exhibit 14: Jacobs Dep. at 51-54.

> responsible for and the number is offset by expenses the party would have incurred to receive its profits, to a reasonable degree of certainty. Its analysis overlaps in many ways with the analysis of the "economic impact" of the same actions. See generally *Chain Belt Co. v. United States*, 127 Ct.Cl. 38, 115 F.Supp. 701 (1953). "Economic impact" requires similar evidence to quantify the harm to the plaintiffs resulting from the government's actions to determine whether it amounts to "serious financial loss" (although the evidence required for sufficient "economic impact" may actually be less stringent than that required for loss profits).

Cienega Gardens v. U.S., 331 F.3d 1319, 1341 (Fed. Cir. 2003).

In that case, the court noted that the economic impact and the damage model based on lost profits were bolstered by credibility determinations the trial court made of the plaintiffs' expert witness. *Id*. Here, the Wineries will present unrebutted expert testimony on how the Wineries were harmed by the Winery Ordinances because they were prevented from fully utilizing the rights afforded them by their MLCC licenses.[9] This evidence will also demonstrate the extent to which the Winery Ordinances interfered with investment-backed expectations. For example, Bonobo invested in a commercial kitchen. Exhibit 15: Oosterhouse Dep. at 24–25. The expert will quantify Bonobo's lost profits and its resulting economic impact.

The character of the Township action also weighs in favor of finding that a taking has occurred. Actions taken to protect public health are less likely to constitute a taking. *Bojicic v. DeWine*, 2022 WL 3585636, at *9 (6th Cir. Aug. 22, 2022), *cert. denied*, 143 S. Ct. 735 (2023). But PTP does not argue the Winery Ordinances protect public health. Nor could it, because Supervisor Manigold admitted that none of the Winery Ordinances were enacted to address public health, safety or welfare. ECF No. 136-1, PageID,4777: Manigold Dep. at 130-132. Short-term regulations are also less likely to constitute a taking—but the Winery Ordinances were not temporary measures. *Bojicic*, 2022 WL 3585636, at *9. Similarly, actions to abate nuisances are

[9] A complete copy of Plaintiffs' expert report is in the record with restricted access. ECF No. 205.

less likely to constitute takings, but PTP offers no evidence that the Wineries have engaged in a nuisance. *Id.*

3. PTP's arguments do not defeat the takings claim.

PTP asserts that "[n]o Plaintiff has shown the PTZO has taken any property interest protected by the Takings Clause" because "the licenses themselves are not impaired." ECF No. 517, PageID.20062. But PTP is wrong because the Wineries' property rights granted by their licenses—the right to operate restaurants, to cater, to stay open later and to host entertainment—are found in the Liquor Control Code. See, e.g., MCL 436.1536(7)(h), 436.1547, 436.1916(11)(a), and 436.2111. Those rights "stem from an independent source such as state law," and are therefore property interests within the meaning of the Takings Clause. *Phillips*, 524 U.S. at 164. Further, the taking of the Wineries' property was the result of both vague ordinances and Peninsula Township's overreaching enforcement of those ordinances.

PTP cites *Long v. Liquor Control Commission*, 910 N.W.2d 674 (Mich. Ct. App. 2017), for the proposition that a liquor license "would provide no constitutionally protected property right to profitability or to obtain particular economic benefits from them." ECF No. 517, PageID.20063. In *Long*, a local party store sued the MLCC under an inverse condemnation theory when it issued a specially designated distributor ("SDD") license to a Family Fare grocery store. *Id.* at 677. According to the party store, the MLCC issued the SDD license in excess of the relevant quota. *Id.* The party store complained that it suffered a taking from "the loss of sales and reduced value of [its] SDD license" when it had to compete with Family Fare. *Id.* The Michigan Court of Appeals rejected that theory because the party store "lacked a property right in being free from increased competition and that the [M]LCC's actions in issuing an SDD license to Family Fare were not aimed directly at plaintiff's liquor license." *Id.* at 678. The court clarified that "the property that plaintiff contends has been taken is not his liquor license," but the alleged "right to

be free from increased competition and to retain a set market share in the liquor industry…." *Id.* at 679. *Long* is distinguishable on its face. The Wineries are alleging that Peninsula Township enacted regulations preventing the Wineries from using their licenses to the extent allowed by the Liquor Control Code, not that some other business is now permitted to compete with the Wineries.

PTP's citation to *Puckett v. Lexington-Fayette Urban County Government*, 60 F. Supp. 3d 772, 774 (E.D. Ky. 2014), is irrelevant. There, retirees alleged a taking when a Kentucky statute reduced their cost-of-living adjustments. The court determined no taking had occurred because the statutory entitlement could be amended by the legislature. *See also Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104–05 (7th Cir. 1995) ("If a statutory benefit could not be rescinded without the payment of compensation to the beneficiaries, it would be extremely difficult to amend or repeal statutes[.]"). Here, the Wineries' licenses are not entitlements; they are distinct property rights as recognized by the Michigan Supreme Court and Sixth Circuit. *See Bisco's*, 238 N.W.2d at 169; *Wojcik*, 257 F.3d at 609.

Finally, throughout this case, Peninsula Township and PTP have suggested that the Wineries acquired their wineries with knowledge of the Winery Ordinances, precluding any recovery. The Supreme Court has squarely rejected that argument:

> The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. *See, e.g., Phillips v. Washington Legal Foundation*, 524 U.S. 156, 163 (1998). So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
>
> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions. *See Pennsylvania Coal Co.*, 260 U.S. at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"). The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's

> regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.

Palazzolo, 533 U.S. at 626–27.

F. The Wineries' Claims are Timely.

PTP and the Township assert that some Wineries' First Amendment and Takings claims are barred by a three-year statute of limitations. ECF No. 517, PageID.20066.[10] PTP asserts this with respect to Count I (facial challenge on First Amendment grounds), Count II (as-applied challenge to violating freedom of speech), Count III (violating freedom of association), and Count VII (regulatory taking). ECF No. 517, PageID.20071. The Township makes no distinction between the specific claims, especially with regard to the difference between the facial and as-applied challenges.[11]

The Wineries concede that Michigan has a three-year limitations period for injuries to persons and property and that they are not seeking damages incurred more than three years before filing suit. ECF No. 392, PageID.14633 (citing MCL 600.5805(2)). Therefore, the Wineries are

[10] PTP does not make this argument for Hawthorne and Bowers Harbor. But, given PTP's rationale in doing so, it should also not challenge Tabone's standing given that its MLCC license was not issued until July 26, 2018. See ECF No. 54-8, PageID.2332.

[11] The interrogatory responses Peninsula Township cites refer to the Wineries' claim that their First Amendment rights were harmed. The Township represents to this Court that the Wineries responded that they were generally harmed by the Winery Ordinances when those sections were passed. In reality, the Winery representatives responded that their First Amendment rights were harmed by the passage of the Winery Ordinances and every day that the Township enforced those Winery Ordinances, which constituted a new violation. *See, e.g.*, ECF No. 519-9, PageID.20845.

not pursuing any as-applied First Amendment claims in Count II that seek damages that occurred before October 21, 2017. PTP's motion and the Township's "response" are moot with respect to those claims. PTP and the Township are incorrect with respect to the facial challenges and the Takings claim.

1. Facial challenges are not time-barred.

PTP broadly claims that the Wineries' First Amendment and freedom of association claims are barred because they were not raised within three years of the enactment of the respective sections of the Winery Ordinances, thereby immunizing the Winery Ordinances for all time.

This argument is directed by the Sixth Circuit's decision in *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516 (6th Cir. 1997). There, Geauga County passed a resolution barring truck traffic on some county roads. *Id.* at 518. The trucking company filed suit seeking damages under 42 U.S.C. § 1983, alleging that the resolution violated the Due Process Clause and the Takings Clause. *Id.* at 518–519. The lawsuit was filed outside of Ohio's two-year statute of limitations. *Id.* at 519. Geauga County made the same argument PTP makes here—that the resolution was immune from review because it was not immediately challenged. The Sixth Circuit rejected that argument on plaintiff's claim of deprivation of liberty because it "barred Kuhnle from using the roads in question on an ongoing basis, and thus actively deprived Kuhnle of its asserted constitutional rights every day that it remained in effect." *Id.* at 522. The Sixth Circuit explained that "[a] law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment." *Id.*

The same thing is happening to the Wineries. The Township enacted the Winery Ordinances, which this Court has already held were substantially vague and undecipherable, engaged in a mix-and-match enforcement with some Winery Ordinances being applied other than

as-written, and every day they apply to and are enforced against the Wineries is a new violation. This Court already recognized that the continuing violations doctrine does not bar the Wineries' dormant Commerce Clause claims. *See* ECF No. 319, PageID.11888. It should apply the same reasoning to the Wineries' First Amendment and Freedom of Association claims. *See also 3570 E. Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268, 1278 (C.D. Cal. 1996) ("a statute that, on its face, violates the First Amendment's guarantee of free speech inflicts a continuing harm. . . . This harm continues until the statute is either repealed or invalidated.").

In opposition, the Township raises a three-part test from the Sixth Circuit regarding the continuing violations doctrine. ECF No. 519, PageID.20769. To apply this doctrine, (1) "the defendant's wrongful conduct must continue after the precipitating event that began the pattern," (2) injury to the plaintiff must continue to accrue after the event," and (3) 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) (citation omitted). The Wineries easily meet that test. First, there is no dispute that the Township passed the unlawful Winery Ordinances and continue to enforce them (as well as their interpretation as to what is "implied" by the Winery Ordinances). Second, and relatedly, the injury to the Wineries has continued to accrue. The Wineries have submitted dozens of examples of enforcement against them since the enactment of the Winery Ordinances with many of those enforcement actions imposing restrictions which do not appear on the face of the Winery Ordinances. Moreover, "it is well-settled that 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality)). Third, this injury would have been avoidable if the Township had repealed or stopped enforcing the Winery

Ordinances, as well as their flawed interpretation of those ordinances, when its attorney admitted they were unlawful.

The cases PTP cites all involve discrete harms, not the ongoing application of an unconstitutional zoning ordinance regulating everyday activities. For example, in *Sharpe v. Cureton*, 319 F.3d 259 (6th Cir. 2003), firefighters who had supported the losing party in an election were transferred to less favorable locations and did not receive merit pay. This was not a continuing violation because the acts of transferring the firefighters to new posts and refusing to give them merit pay were not continuing. *Id.* at 268–269.

In *Tolbert v. State of Ohio Department of Transportation*, 172 F.3d 934 (6th Cir. 1999), the harm occurred when the government decided to construct sound barriers along I-75. In *Eidson v. State of Tennessee Department of Children's Services*, 510 F.3d 631, 635 (6th Cir. 2007), the harm occurred when the government removed the plaintiff's children from his custody. In *Howell v. Cox*, 758 F. App'x 480, 485 (6th Cir. 2018), the harm occurred when the plaintiff was arrested, cited, detained, and testified against falsely. In *Gould v. Borough*, 615 F. App'x 112, 114 (3d Cir. 2015), the harm occurred when a variance was denied. In *Beebe v. Birkett*, 749 F. Supp. 2d 580, 596 (E.D. Mich. 2010), the harm occurred when a prisoner was denied a Kosher meal in violation of his religious beliefs, but he submitted no evidence that he continued to be denied Kosher meals. In *Johnson v. Knox County, Tennessee*, 2022 WL 894601, at *3 (E.D. Tenn. Mar. 25, 2022), the harm occurred when a "No Trespass" order was issued. In *Yetto v. City of Jackson*, 2019 WL 454603, at *8 (W.D. Tenn. Feb. 5, 2019), the harm occurred when the city issued a notice of zoning violation; this was not a continuing violation because, in part, "the Zoning Ordinance has not been found to be invalid or unlawful." In *Pitts v. City of Kankakee, Ill.*, 267 F.3d 592, 594 (7th Cir. 2001), the harm occurred when the city posted a sign stating "SLUM PROPERTY" on the

plaintiff's home. In *Harris v. Township of O'Hara*, 282 F. App'x 172, 175 (3d Cir. 2008), the harm occurred when a zoning enforcement was affirmed by the local zoning board. Finally, in *Mitchell v. Clackamas River Water*, 2016 WL 6471450, at *3 (D. Or. Oct. 31, 2016), aff'd sub nom. *Mitchell v. Water*, 727 F. App'x 418 (9th Cir. 2018), the harm occurred when a gag order was issued in retaliation for the plaintiff exercising his freedom of speech. None of those cases involved the continued application of an unconstitutional ordinance that regulated ongoing activities.

The additional cases cited by Peninsula Township fare no better. For example, *Epcon Homestead, LLC v. Town of Chapel Hill*, 62 F. 4th 882 (4th Cir. 2023) did not involve the continued enforcement of a zoning ordinance. Instead, the plaintiff claimed a fee imposed by a permit constituted a taking and the Fourth Circuit concluded that the plaintiff's claim accrued when it knew it would have to pay the fee. *Id.* at 887-888. There was no continuing violation because the case did not involve the continued enforcement of an ordinance, but instead a singular effect imposed by a permit. *Id.* at 888. *Goldsmith v. Sharrett*, 614 F. App'x 824 (6th Cir. 2015) is similarly inapplicable. There a prisoner claimed a continuing violation because the DOC allegedly imposed a "continuing and permanent ban on his [sexually explicit and criminal] writing." *Id.* at 827. The Sixth Circuit refused to apply the continuing violations doctrine because the prisoner could write generally but "would not be permitted to write about criminal behavior." *Id.* at 828. Therefore, there was a singular violation when his writings were seized. *Id.* at 828-29. Further, there was no continuing violation because "prison administrators are afforded great latitude in the execution of practices and policies that 'are needed to preserve internal order and discipline and to maintain institutional security.'" *Id.* at 829 (quoting *Bell v. Wolfish*, 441 U.S. 520 (1979)). *Davidson v. America Online, Inc.*, 337 F. 3d 1179 (10th Cir. 2003) is neither a constitutional case

nor a case involving government action. It is a Title VII case against a private company. *Flowers v. Carville*, 310 F.3d 1118 (9th Cir. 2002) was not a constitutional case or an ordinance case. Instead, that case involved whether Gennifer Flowers could timely bring claims against alleged allies of President Clinton who she claimed defamed her in books and television interviews. But the court noted that the alleged wrongful act was the publishing of a book. *Id*. at 1126.

Ultimately, PTP and the Township's argument is that Peninsula Township enacted unconstitutional ordinances that are now forever immunized from judicial review. That cannot be. If a law is unconstitutional, it cannot stand. The Supreme Court in *Brown v. Board of Education of Topeka, Shawnee County, Kansas*, 347 U.S. 483 (1954) struck down the 60-year-old law providing for "separate, but equal" treatment that had been upheld in *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896). Similarly, the Supreme Court declared unconstitutional a New York firearm regulatory framework that had been on the books "at least since the early 20th century." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 11 (2022). No matter how longstanding, once the Court decided the laws at issue were unconstitutional, they were struck down.

Judge Easterbrook pointedly took on this question in *Palmer v. Board of Education of Community Unit School Dist. 201-U, Will County, Ill.*, 46 F. 3d 682 (7th Cir. 1995) where he began the opinion by identifying:

> The principal question in this case is whether the suits that produced Brown v. Board of Education…should have been dismissed as untimely rather than decided on the merits. Some of the states whose laws were at issue had segregated their schools by race since the nineteenth century, but the plaintiffs did not file suit until 1950. If the claim accrued when the discriminatory assignment system came into being, then the suit was far too late. Our case involves a school system that the plaintiffs believe instituted a discriminatory assignment and school closing plan in 1987. They did not file suit until late 1990, and the defendants insist that the suit is untimely.

Rejecting the suggestion that unconstitutional deprivations become immune from judicial review, the court explained its thinking through the following hypothetical:

> Suppose the school board had voted in 1980 to provide white pupils, but not black pupils, with school books. A child whose parents neglected to sue during his first two years in school would not be doomed to another 10 years of education without books. Each time the teacher passed out books to white children while withholding them from blacks would be a new injury and start a new period to sue. That the school district had committed similar wrongs in the past would not give it an easement across the Constitution, allowing it to perpetrate additional wrongs.

Id. at 685. The court in *Heard v. Sheahan*, 253 F.3d 316 (7th Cir. 2001) relied on *Palmer* and *Kuhnle* to find that a prisoner's Eight Amendment claim was not time barred. There, the district court had determined that claim for cruel and unusual punishment accrued when the inmate discover he had a possible medical condition and was not extended by the period of time he was refused treatment. Id. at 318. The Seventh Circuit disagreed, determining that "[e]very day that they prolonged his agony by not treating his painful condition marked a fresh infliction of punishment that caused the statute of limitations to start running anew. A series of wrongful acts creates a series of claims." *Id.* (citing *Palmer*, 46 F.3d at 686; *Webb v. Indiana Nat'l Bank*, 931 F.2d 434, 438 (7th Cir. 1991); *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 828 (11th Cir. 1999); *Kuhnle Bros.*, 103 F.3d at 522–23).

The same rationale applies here. This Court should reject PTP's statute of limitations argument. The Township is unconstitutionally regulating the ongoing and daily activities of its residents—and yet PTP argues that such regulation is immunized from judicial review.

2. The Wineries' takings claims are not time barred.

PTP also asserts that the Wineries' regulatory takings claims are time barred because they 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." ECF No. 517, PageID.20067. However, that characterization is imprecise given the nature of the Township's action that resulted in the taking.

The Wineries' each possess winemaking licenses granted by the State of Michigan which allow them, among other things, to have music, stay open until 2:00 a.m., have restaurants[12] and cater private events. Peninsula Township has interfered with the Wineries' ability to fully utilize those licenses by the Township's inconsistent conduct and interpretation, or misinterpretation, of its undecipherable ordinances. For example, as discussed above, the Township imposed a restriction on the Wineries being open past 9:30 p.m. even though that is not what the Winery Ordinances say. See, *e.g.*, ECF No. 136-1, PageID.4779: Manigold Dep. at 179-180 ("Q: Tell me where it says a tasting room has to close at 9:30 p.m. A: To us, that's what was implied there."). The Township now concedes this restriction is not actually in the Ordinances. ECF No. 159, PageID.5884-5885.

Peninsula Township has taken varying positions and enforcement actions over the years, not based on the face of the Winery Ordinances, but based on its perceived interpretation. E.g., Exhibit 8: Kroupa Enforcement Letter; Exhibit 9: Baldyga Dep. at 46–48.; Exhibit 10: Tabone Dep. at 27–28; Exhibit 11: Chantal Dep. at 101. Because the taking of property was not borne out on the face of the Winery Ordinances, *Kuhnle Bros.* is inapplicable. Instead, this case is more closely aligned to *Sherman v. Town of Chester*, 752 F.3d 554, 566 (2nd Cir. 2014), where the taking was the result of a "death by a thousand cuts" and the court "consider[ed] the entirety of the government entity's conduct, not just a slice of it." The claim there was "based on an unusual series of regulations and tactical maneuvers that constitutes a taking when considered together…." *Id*. at 567. The court concluded that "it cannot be said that [plaintiff's] property was 'taken' on

[12] MCL 436.1536(7)(h) which allows wineries to operate restaurants was first effective December 19, 2018, well within the limitations period. See ECF No. 29-16, PageID.1384.

any particular day. But because [plaintiff] alleges that at least one of the acts comprising the taking occurred within three years of filing the case, his claim is not time barred." *Id*.

Recently, the Eastern District of Michigan applied the "continuing violation" doctrine to a taking case, *Miner v. Ogemaw County Road Commission*, 625 F. Supp. 3d 640 (E.D. Mich. 2022). In that case the court noted: "This is a 'continuing violation' case. Defendants' wrongful conduct is the physical trespass of the culvert onto Plaintiff's land after they unblocked it—not its initial installation or the intermittent flooding that it allegedly causes." *Id*. at 653. The court determined that the "physical trespass newly accrues 'each day'" and that "if the culvert was removed from Plaintiff's land, then further injury—the trespass—would be avoided." *Id*. (citing *Kuhnle Bros*., 103 F.3d at 522).

Here, a similar conclusion is reached. It cannot be said that the Wineries' property was taken on any particular day because it is the result of the Township's varying interpretation and enforcement of its Winery Ordinances over the years. There was no single day where the Wineries should have known their property was taken; there was death by a thousand cuts. Thus, the continuing violation doctrine restarts the statute of limitations daily. To find otherwise would reward the Township for enacting unlawful ordinances cast in vague language and then enforcing them based on what the Township decided the Winery Ordinances "implied."

The Township could have avoided or limited the taking if at any time it had ceased its wrongful conduct. *Kuhnle Bros.*, 103 F.3d at 521. And the Township had plenty of opportunities to do so. For example, in August 2019, counsel for Peninsula Township sent a memorandum to the Wineries noting that the Winery Ordinances do not contain an "explicit restriction" on wineries operating restaurants. ECF No. 29-16, PageID.1385. Counsel continued, "the Township ordinances, as currently enacted, specifically contemplate the operation of food and beverage

services that would be offered at a restaurant by a winery and otherwise place no explicit restriction upon the ownership or operation of a restaurant by a winery…." *Id.* This would have been an opportune time for Peninsula Township to cease prohibiting restaurants.[13] The same is true for hours of operation; counsel for the Township noted that the Winery Ordinances restricted hours of operations for guest activities but that this restriction was preempted by state law. *Id.* at PageID.1391-92. Yet, Peninsula Township continued to enforce this prohibition against the Wineries. It was the culmination of all these (only now admitted) wrongdoings that constituted a taking.

II. CONCLUSION

PTP may view itself as the hall monitor of Peninsula Township, but that does not provide it with the authority to interpret the Winery Ordinances or alter how Peninsula Township has historically enforced the Winery Ordinances to the detriment of the Wineries' constitutional rights. This Court should deny PTP's Motion for Summary Judgment and award the Wineries their costs and attorneys' fees incurred in defending against it.

Respectfully submitted,

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

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Dated: February 26, 2024

[13] Counsel for the Township also concluded that portions of the Winery Ordinances which restrict food service were preempted by the Michigan Liquor Control Code and needed to be amended. *Id.*

CERTIFICATE OF COMPLIANCE WITH LOCAL CIVIL RULE 7.2(b)(i)

1. This Brief complies with the type-volume limitation of L. Civ. R. 7.2(b)(i) and ECF No. 515, PageID.19995 because this Brief contains 16,032 words.

/s/ Joseph M. Infante
Joseph M. Infante

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2024, I filed the foregoing Response in Opposition to Protect the Peninsula's Motion Partial Summary Judgment via the Court's CM/ECF System, which will automatically provide notice of the filing to all registered participants in this matter.

/s/ Joseph M. Infante
Joseph M. Infante