UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v

PENINSULA TOWNSHIP, a Michigan municipal corporation,

Defendant,

and

PROTECT THE PENINSULA, INC.,

Intervenor-Defendant.

Case No. 1:20-cv-01008

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

DEFENDANT PROTECT THE PENINSULA'S POST-TRIAL BRIEF

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DEFENDANT PROTECT THE PENINSULA'S POST-TRIAL BRIEF

TABLE OF CONTENTS

INTERVENING DEFENDANT PROTECT THE PENINSULA'S POST-TRIAL BRIEF

Pursuant to the Court's instructions, Intervening Defendant Protect the Peninsula, Inc. (PTP) submits this Post-Trial Brief. PTP addresses those issues that Defendants identified in their Trial Brief as live for trial and new issues that arose during trial. Under this Court's prior orders, PTP does not address Plaintiffs' dormant Commerce Clause or vagueness claims; the amount of damages to which Plaintiffs may be entitled; or affirmative defenses where the Court granted summary judgment to Plaintiffs. PTP aims to succinctly summarize the trial evidence on the trial issues but waives nothing.

I. INTRODUCTION

At trial, Plaintiffs failed to prove they are entitled to the millions in lost profits and judicial rezoning they demand. Most of Plaintiffs' evidence was non-relevant, and Plaintiffs failed to support their positions on the only unresolved issues: whether five former PTZO provisions regulating commercial speech were constitutional; and whether and to what extent Plaintiffs are entitled to relief.

Plaintiffs characterized this Court's most recent summary judgment ruling[1] as "nothing more than an interlocutory order" with no meaningful consequence for trial; they proceeded accordingly, asserting identical arguments in their Trial Brief as in summary judgment.[2] On the first day of trial, the Court sustained the objection to evidence of lost large events profits in light of its ruling that agritourism events are not commercial speech[3] but permitted Plaintiffs to "make

[1] ECF 559.

[2] ECF 580, PageID.22602-22603; ECF 586.

[3] ECF 559, PageID.21904-21906.

[their] record."[4] Most of Plaintiffs' trial evidence furthered this record-making exercise, with extensive testimony about Plaintiffs' marketing messages, how they try to sell wine to everyone who walks through their doors, how they sell more wine when they have activities and events, and how they want more activities and events, all for the ostensible purpose of demonstrating that activities and events are commercial speech protected by the First Amendment.[5]

Plaintiffs also repackaged their imagined lost profits from activities and events they never hosted as damages for their vagueness claim.[6] Ignoring the Court's ruling that Section 8.7.3(10)(u) has only been applied to Chateau Chantal and Mari[7], every Plaintiff testified about lost profits from large and small events they never hosted allegedly because of Section 8.7.3(10)(u).[8]

Regarding Plaintiffs' commercial speech claims, Defendants proved that Sections 6.7.2(19)(b)(1)(v), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(5)(h), 8.7.3(12)(i), and 8.7.3(12)(k) satisfy *Central Hudson* scrutiny, and Plaintiffs failed to rebut Defendants' evidence. Defendants presented hundreds of pages of Township Board and Planning Commission meeting minutes documenting the community interests and public policy concerns the Township balanced in creating the winery land uses challenged in this case and considering the permits, zoning amendments, and variances Plaintiffs have requested since 1989. PTP also presented expert testimony from Dr. Thomas Daniels, a nationally renowned expert on land use planning, agricultural zoning, and farmland

[4] ECF 600, PageID.230098, PageID.230103.

[5] ECF 600, PageID.23014-23028; ECF 601, PageID.23261-23268; ECF 602, PageID.23439-23440, 23449-23450, 23452-23456; ECF 602, PageID.23611-23618; ECF 603, PageID.23748-23757; ECF 605, PageID.24081-24088; ECF 605, PageID.24250-24252; ECF 606, PageID.24360-24362; ECF 606, PageID.24488-24493; ECF 607, PageID.24682-24689; ECF 608, PageID.24876-24878.

[6] ECF 559, PageID.21902-21903.

[7] *Id*.

[8] ECF 580, PageID.22616-22620.

preservation, who attested to the Township's strong interest and demonstrated history supporting agricultural production. He further testified about how the winery land uses and challenged provisions advance the Township interests in promoting agricultural production while also maintaining its rural character and ensuring new land uses compatible with the Township Master Plan and the intent of the zoning ordinance and agricultural district.

The trial record shows the Township struck a reasonable balance, fostering a thriving local wine industry while preserving the Peninsula's rural character. Plaintiffs and Defendants alike presented evidence demonstrating that Peninsula wineries enjoy flexible and supportive zoning that allows myriad opportunities to process, promote, and sell their wines. From 1989 to 2004, the Township amended its zoning ordinance four times to create winery land uses with virtually unlimited onsite retail wine sales and broad freedom to create the customer experiences that draw visitors to their tasting rooms by the thousands. Here is what Plaintiffs do under Township zoning:

- Offer tastings, flights, and wine by the glass and bottle for individuals and groups in their tasting rooms, where the margins on wine sales are highest;[9]
- Maintain wine clubs with thousands of members who help sustain them during the off-season and offer membership perks like pick-up parties to taste special vintages;[10]
- Engage in wholesale distribution as a revenue stream and a promotional channel;[11]

[9] ECF 600, PageID.23009; ECF 601, PageID.23274; ECF 603, PageID.23736; ECF 605, PageID.24241; ECF 606, PageID.24317; ECF 607, PageID.2460.

[10] ECF 600, PageID.23011-23012; ECF 601, PageID.23255; ECF 602, PageID.23437; ECF 603, PageID.23738-23740, 23754; ECF 605, PageID.24075; ECF 606, PageID.24357; ECF 608, PageID.24868-24870.

[11] ECF 602, PageID.23435; ECF 607, PageID.24675-24676.

- Offer tours through vineyards and production facilities, with built-in promotional photo opportunities;[12]
- Host free promotional activities like Jazz at Sunset,[13] Wine Down Wednesdays,[14] "Read Between the Wines" book club,[15] Vintrivia trivia night,[16] yoga, [17] painting, [18] and snowshoeing; [19]
- Operate bed and breakfast facilities and host weddings, retreats, and other private events for overnight guests;[20]
- Hold wine education activities like pairings and cooking classes for a fee.[21]
- Serve charcuterie boards,[22] mezze platters,[23] soups,[24] cheeses,[25] chocolates,[26] crab cakes and tacos,[27] and more;

[12] ECF 603, PageID.23742-23743; ECF 605, PageID.24080.

[13] ECF 606, PageID.24499.

[14] ECF 607, PageID.24694.

[15] ECF 611-116, PageID.27198, 27200, 27202-27204 (Ex 160).

[16] ECF 611-116, PageID.27199, 27201 (Ex 160).

[17] ECF 611-116, PageID.27211-27215 (Ex 160).

[18] ECF 606, PageID.24426.

[19] ECF 603, PageID.23758-23759.

[20] ECF 611-87, PageID.26801-26808 (Ex 121).

[21] ECF 611-92; ECF 601, PageID.26234 (Ex 135).

[22] ECF 601, PageID.23358.

[23] ECF 607, PageID.24817.

[24] ECF 603, PageID.23832.

[25] ECF 603, PageID.23735.

[26] ECF 606, PageID.24276.

[27] ECF 600, PageID.23106.

- Participate in WOMP Wine Trail events promoting Peninsula wineries, including Blossom Days, Romancing the Riesling, Winter Warm-Up, and the super-popular post-Thanksgiving Mac & Cheese Bake-Off;[28]
- Sell branded t-shirts, hats, mugs and more for revenue and self-promotion;[29] and
- Advertise all their offerings through websites, traditional print media, social media, and mailing lists.[30]

As a general rule, the Township's winery land uses ensure more acreage in agricultural production as their commercial activities become further removed from farming. A landowner with five acres can make and distribute wine from grapes grown anywhere with no onsite retail or tasting. With 40 acres, a farmer can make and distribute Old Mission Peninsula appellation wine with onsite retail and tasting plus a little merchandise shop. With 50 acres and 75% in active wine crop production, a farmer can make wine with grapes from anywhere, plus have onsite retail, tasting, and a B&B for overnight guests; for local grapes grown or purchased beyond the 75% requirement, that farmer may also hold promotional activities like wine and food pairings for a fee. With 50% of 150 acres in active production, a farmer may have off-site retail and tasting.

But the Township had to draw lines somewhere and it consistently drew them where commercial activities lose their nexus to agricultural production or are otherwise incompatible with surrounding land uses. The Township created winery land uses to include limited permissions to engage in commercial activities right up to those lines and not beyond them. None of the challenged provisions was enacted in isolation or as a stand-alone restriction on wineries, and none

[28] ECF 603, PageID.23754-23757; ECF 606, PageID.24367.

[29] ECF 606, PageID.24399; ECF 608, PageID.24928-24929.

[30] ECF 600, PageID.23135-23137; ECF 603, PageID.23747, 23800-23801.

restricted uses otherwise permissible in A-1. Except for overnight Winery-Chateau guests, Township zoning has never authorized wineries, or other farms or processing facilities, in A-1 to be used as commercial wedding and event venues. Nor has the Township ever authorized retail food or merchandise sales in A-1 unrelated to agricultural production.

To the extent Plaintiffs argue invalidating these limited permissions means they are entitled to *unlimited* permission to conduct commercial activity in A-1, they have zoning upside down and backward. From the inception of this case, they have misinterpreted provisions granting limited permissions as prohibitory and assumed that the absence of a prohibition equaled permission. Under the PTZO and Michigan zoning law, the absence of an express prohibition does not render a use permitted; the absence of express permission means the use is prohibited. PTZO § 6.1.4 (no structures or uses unless in conformity with regulations for district where located); *Pittsfield v. Malcolm*, 375 Mich. 135, 142-43; 134 N.W.2d 166 (1965) ("absence of the specifically stated use must be regarded as excluding that use"); *Dezman v. Bloomfield Charter Twp.*, 2023 Mich. LEXIS 1936 (Mich. Nov. 22, 2023); *Jostock v. Mayfield Twp.,* 2024 Mich LEXIS 1128 at *6 to *7 (July 1, 2024) (dragways excluded from district where not expressly authorized); *Dezman v. Bloomfield Charter Twp,* 2024 Mich. App. LEXIS 5043 (Mich. App. June 27, 2024) (no chicken-keeping in zoning ordinance means chicken-keeping not permitted); *Moskovic v. City of Buffalo*, 2023 U.S. App. LEXIS 33273 (6th Cir. Dec. 14, 2023) (zoning ordinance "prohibited all uses that it did not expressly permit").

Turning to remedies, Plaintiffs failed to prove that any provisions found unconstitutional caused them injury. They did not show profits *lost* because of the challenged provisions, but profits *made* because of them – profits impossible in A-1 but for the provisions they challenged. Plaintiffs are entitled to limited equitable relief for unconstitutional or preempted zoning provisions. The

challenged provisions were repealed in December 2022, Plaintiffs never pleaded winery-specific injunctive relief, and their proofs are insufficient to support special use permits modifications anyway. Their request for a judicial declaration unzoning them is unprecedented and unreasonable.

II. ARGUMENT

A. Plaintiffs' First Amendment claims fail.

The Court resolved most First Amendment issues before trial, but three remain: 1) whether five provisions regulating commercial speech satisfy *Central Hudson*; 2); whether and to what extent Plaintiffs are entitled to relief for any injury caused by any provision that does not pass *Central Hudson*; and 3) whether and to what extent Plaintiffs are entitled to relief for any injury caused by four provisions found pretrial to be prior restraints or to compel speech:

First Amendment Theory	Provisions with Live Trial Issues
Commercial Speech (liability & relief)	6.7.2(19)(b)(1)(v) (retail merchandise sales) 8.7.3(10)(u)(1)(b) (Intent/promote Peninsula ag during GAUs)[31] 8.7.3(10)(u)(5)(h) (no outdoor displays during GAUs) 8.7.3(12)(i) (retail merchandise sales) 8.7.3(12)(k) (signs and advertising)
Prior Restraint (relief)	8.7.3(10)(u)(2)(b) (local 501(c)(3) group meetings) 8.7.3(10)(u)(2)(c) (ag-related group meetings)
Compelled Speech (relief)	8.7.3(10)(u)(1)(b) (Intent/promote Peninsula ag during GAUs) 8.7.3(10)(u)(5)(a) (promote Peninsula ag during GAUs)

1. The sections that implicate commercial speech satisfy Central Hudson.

[31] Plaintiffs inexplicably challenged section 8.7.3(10)(u)(1)(b), the inoperative *Intent* statement for the Winery-Chateau Guest Activity Use enactment, not section 8.7.3(10)(u)(5)(a), the operative provision, and they should be held to their position. (ECF 469, PageID.16952) Both satisfy *Central Hudson.*

Most commercial speech issues were resolved pretrial when the Court narrowed them down to whether five provisions satisfy the last two prongs of the *Central Hudson* test.[32] These provisions allowed delineated retail merchandise (non-wine) sales for Farm Processing Facilities and the Remote Winery Tasting Room, limited advertising and signage for non-wine merchandise at the Remote Winery Tasting Room and outdoor displays at Guest Activity Uses, and expressed the intent that Guest Activity Uses include promoting local agriculture. The Court already found they implicate Peninsula Township's substantial governmental interests in "preserving agriculture and regulating for the general health and safety of citizens are substantial governmental interests."[33] Defendants presented substantial evidence showing they directly and materially advance the Township's interests and are narrowly drawn, which Plaintiffs failed to rebut. Moreover, no Plaintiff showed it was injured by any subsection. What's left of Plaintiffs' commercial speech claim fails.

a. <u>The five remaining provisions are narrowly drawn and directly and materially advance the Township's substantial interests in zoning and agricultural preservation.</u>

Part three of *Central Hudson* asks whether a regulation directly advances the governmental interest asserted; the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." 447 U.S. at 566; *Florida Bar v. Went*

[32] ECF 559, PageID.21903-21906, 21916-21918; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980) ("[1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine [3] whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.").

[33] ECF 559, PageID.21918-21919.

for It, 515 U.S. 618, 626 (1995). Supreme Court precedent guides the evidentiary presentation. *Went for It* addressed a prohibition on personal injury lawyers sending solicitations to victims and their relatives for 30 days following an accident or disaster. The Florida Bar showed the rules were developed based on a record that included a study of the effects of lawyer advertising on public opinion, hearings, surveys, review of public commentary, newspaper articles, and more. 515 U.S. at 620, 626-27. The Supreme Court commended the "breadth and detail" of the "anecdotal record" supporting the rule. *Id.* at 627. While the record lacked copies of cited surveys and details about their methodology, the evidence was sufficient for *Central Hudson* purposes:

> [W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense. Nothing in *Edenfield*, a case in which the State offered *no* evidence or anecdotes in support of its restriction, requires more.

Id. at 628 (citations omitted).

Part four of *Central Hudson* asks whether the restriction "is not more extensive than is necessary to serve" the governmental interest. 447 U.S. at 566; *Went for It,* 515 U.S. at 624 ("the regulation must be narrowly drawn") (citing *Central Hudson, supra*)). This part considers the fit between the regulation and governmental interest. *Went for it,* 515 U.S. at 632; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981 (regulation must "reach[] no further than necessary to accomplish the given objective"). Contrary to Plaintiffs' characterization,[34] the Supreme Court has explicitly and repeatedly rejected the contention that *Central Hudson* requires a "least restrictive means" analysis. *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 556 (2001); *Went for It,*

[34] ECF 580, PageID.22607.

515 U.S. at 632; *Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 480 (1989) ("What our decisions require is a fit between the legislature's ends and the means chosen to accomplish those ends, []a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but[] . . . a means narrowly tailored to achieve the desired objective.") (citations and internal quotation marks omitted);

Plaintiffs too narrowly characterize the Township's interests as "preserving agriculture," when the substantial interests that the winery land uses and challenged zoning advance also include protecting the public health, safety, and welfare through zoning.[35] For geographic, historic, economic, and other reasons, Peninsula Township has uniquely strong governmental interests in simultaneously promoting agricultural production while maintaining the rural character of the community.[36] The Township's nationally-recognized, tax-supported agricultural preservation program (Purchase of Development Rights (PDR)) complements zoning and evidences these interests and the Township's commitment to advancing them.[37]

(i) *The Master Plan, PTZO, and minutes from the legislative enactments of the challenged provisions show they were narrowly tailored and directly and materially advance the Township's substantial interests in zoning and agricultural preservation.*

Defendants' evidence proves the challenged provisions helped alleviate real harms to a material degree and achieved a reasonable fit with the Township's zoning and agricultural

[35] ECF 580, PageID.22607; ECF 559, PageID.21918-21919.

[36] ECF 604, PageID.23880-23884, 23887-23888. ECF 583, PageID.22792-22795, Defendants' Proposed Findings of Fact (DPFOF) ¶¶ 9-27. For efficiency, PTP references and incorporates its DPFOF and citations therein by paragraph.

[37] ECF 604, PageID.2389096; ECF 616, PageID.30803- 30805 (Ex H pp 7-10).

preservation goals. Evaluating how the challenged provisions fit with and advance Township zoning and agricultural interests must be considered in the context of the PTZO and the Master Plan it implements. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999) ("[o]n the whole, then, the challenged regulation should indicate that its proponent carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition") (internal quotation marks omitted); MCL § 125.3203 ("[a] zoning ordinance shall be based upon a plan designed to promote the public health, safety, and general welfare, to encourage the use of lands in accordance with their character and adaptability, to limit the improper use of land"); *see also Renton v. Playtime Theaters,* 475 U.S. 41, 50 ("essence of zoning" is allowing uses in some areas "while . . . preserving the quality of life in the community at large by preventing those [uses] from locating in other areas."); *Macenas v. Michiana*, 433 Mich. 380, 396; 446 N.W.2d 102 (1989); *Fremont Twp. v. McGarvie,* 164 Mich. App. 611, 614; 417 N.W.2d 560 (1987). "[T]he entire ordinance must be read together." *Winchester v. WA Foote Memorial Hospital*, 153 Mich. App. 489, 501; 396 N.W.2d 456 (1986) ("Zoning ordinances must be construed as a whole, with regard to the object sought to be obtained and the general structure of the ordinance as a whole.") (citations omitted); *Executive Art Studio, Inc. v. Kalamazoo*, 674 F. Supp. 1288, 1290 (W.D. Mich. 1987) ("the Court has read the language of the [zoning] ordinance in the context of the problems the statute seeks to address, in this case, land use, parking and traffic problems associated with certain types of commercial as well as noncommercial enterprises."). The PTZO and Master Plan express the Township's intents and purposes for the A-1 district and winery land uses that the five challenged provisions advance – to support agricultural production and maintain the community's rural character with uniform land uses compatible with predominantly farming purposes.[38]

[38] ECF 583, PageID.22791 *et seq,* DPFOF ¶¶ 9-27, 30-45. ECF 583, PageID.22791-0842.

The Township Board and Planning Commission meeting minutes are also compelling evidence, especially here where Plaintiffs challenge subparts of amendments adopted 20 (or more) years ago. These are the official record of what Township legislators considered, determined, and intended regarding how the challenged provisions fit with and advance the Township's governmental interests. *See 46th Circuit Trial Court v. Crawford Cty.*, 266 Mich. App. 150, 161; 702 N.W.2d 588, 597-98 (2005) ("A county board speaks only through its official minutes and resolutions and their import may not be altered or supplemented by parol evidence regarding the intention of the individual members."), rev'd on other grounds, 476 Mich. 131; 719 N.W.2d 553 (2006); *Stevenson v. Bay City*, 26 Mich 44, 46-47 (1872) (minutes "are intended to serve as perpetual evidence, and no unwritten proofs can have this permanence").

Plaintiffs challenge select subsections integrated in amendments that created new winery land uses (Remote Winery Tasting Room, Farm Processing Facility) and a new use of Winery-Chateau accessory facilities for non-registered (overnight) guests. The challenged provisions were not grafted onto existing winery land uses to restrict them; they were developed as part of the creation of the land use *ab initio* to balance other provisions. The legislative history resulting in the winery land uses containing the challenged sections is extensive. It documents Plaintiffs' repeated requests for expanded uses, extensive public input about compatibility with the agricultural purposes of the district and potential nuisances, and iterative efforts by three main Township bodies – the Agricultural Committee, Planning Commission, and Township Board – to collaboratively develop and tailor new uses to balance Plaintiffs' requests with the Township's zoning and agricultural goals.

Defendants' Proposed Findings of Fact[39] summarize the record, distilled below:

[39] ECF 583, PageID.22791-22842, DPFOF.

- The Master Plan and PTZO emphasize the importance of separating incompatible uses and maintaining agricultural areas for agricultural production.[40]
- Initially, zoning authorized "food processing related to local agricultural production" on five acres, without retail or tasting, by special use permit. PTZO §§ 6.8, 8.5.
- In 1989, the Township Board approved the new Winery-Chateau special use with facilities, which authorized overnight accommodations and related accessory uses on 50 acres with 75% in agricultural production. At public hearings, there were expressions of support for the proposal to keep land in agricultural production, of concern about attracting lots of visitors, and about spot zoning by creating new non-ag commercial uses in A-1.[41]
- In 1989, the Township granted the first Winery-Chateau SUP to Chateau Chantal. Soon thereafter, the Township began considering Chateau Chantal's requests for additional zoning amendments to authorize it to use its accessory facilities for events and food service for non-overnight guests. The meetings reflect discussions about, *inter alia*, preventing food service from dominating wine tasting, noise from outdoor activities, degradation of the Township's rural character, and compatibility with A-1's agricultural purposes.[42]
- After litigation confirming Chateau Chantal's B&B facilities were for overnight guests only, per court order, the Township worked with Chateau Chantal to develop Standards to expand their use for non-overnight guests, which were required by court order to form the basis for a zoning amendment. The meetings reflect the recognition that additional activities would "[p]romote agricultural production on Old Mission Peninsula" through

[40] *Id.*, ¶¶ 12-35, 42.

[41] *Id.*, ¶¶ 36-37, 43-44, 46-58.

[42] *Id.*, ¶¶ 59-103.

wine sales and addressed "special advertising signs" for new outdoor wine tastings, among other issues.[43]

- The Township considered but rejected less restrictive amendments as contrary to its zoning and agricultural goals, including Chateau Chantal's proposal to allow "contract groups, contract events, and community events" at Winery-Chateaus. The meetings reflect concerns and discussion about sale of promotional materials (t-shirts, hats), grape sources, boxed lunches and fundraisers for groups, cooking classes, and many other activities, the compatibility of proposed activities with agricultural production, and efforts to tie new activities to agriculture via promotion of the local wine industry and support for increased crop production. The Board declined the Planning Commission's recommendation to approve a less restrictive amendment after the county planning commission found it inconsistent with the Master Plan.[44]
- The Township ultimately enacted an amendment allowing the use of Winery-Chateau accessory facilities for non-overnight guests who may be charged a fee for limited additional promotional activities – food and wine seminars and group meetings – called Guest Activity Uses. Sections 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(5)(a), and 8.7.3(10)(u)(5)(h) were integrated in the amendment. The Township tied Guest Activity Use to agricultural production with additional grape tonnage and wine appellation requirements and limited their scope and secondary effects with limits on hours, outdoor displays, noise, capacity, and more.[45]

[43] *Id.*, ¶¶ 104-114.

[44] *Id.*, ¶¶ 115-156.

[45] *Id.*, ¶¶ 157-175.

- The Township considered Peninsula Cellars' proposed amendment for a Remote Winery Tasting Room and SUP application together, addressing specific concerns about repurposing a schoolhouse on Center Road for their tasting room that was then located inside the Old Mission commercial area. The meetings reflect concerns about spot zoning, whether the proposed use belonged in an agricultural or commercial district, potential impacts on residential neighbors, ensuring a nexus to agricultural production, and others. Agricultural Committee, Planning Commission, and Township Board members, the Township Planner, and citizens discussed signage, buffering, parking, agricultural production, neighborhood character, sale of non-wine items (food, merchandise), the size of the retail area, and more. The Township enacted the amendment to allow a stand-alone tasting room with 150 acres and 50% in active agricultural production elsewhere on the Peninsula, with limited retail sales of merchandise containing the winery logo, with 8.7.3(12)(i) and (k) integrated in the amendment.[46]
- The Township crafted the Farm Processing Facility use by right to further its zoning interests and promote agricultural production and farmland preservation. Minutes reflect the intent to develop a non-discretionary land use to let farmers with 40 acres process and sell what they grow, with limited non-wine retail sales, with 6.7.2(19)(b)(1)(v) integrated in the amendment. The Township intended this new use would be available for agricultural land protected by its farmland preservation program (PDR).[47]

The historic record confirms the Township Board did not invent harms associated with non-agricultural commercial activities to justify the challenged provisions; the harms were (and

[46] *Id.*, ¶¶ 176-222.

[47] *Id.*, ¶¶ 223-252.

remain) real, concrete, and well-documented in the minutes. MCL §§ 125.3103, 125.3306, 125.3308, 125.3401; *City of Essexville v. Carrollton Concrete Mix, Inc,* 259 Mich. App. 257; 673 N.W.2d 815 (2003) (recognizing role of public opinion and surveys in community development planning); *Nolan Bros. v. City of Royal Oak,* 1999 Mich. App. LEXIS 698 *5 (Aug. 3, 1999) (reasonableness of zoning supported by evidence it was developed with public input). Township officials, residents, farmers, and even winery owners raised concerns about how increasing the intensity and scope of commercial activity at A-1 wineries would create additional traffic and noise, degrade the Peninsula's rural character, and otherwise be inconsistent with the purposes of A-1 zoning. *See Went for It,* 515 U.S. at 627-28 (quoting complaints from solicitation recipients excerpted in record); *Anderson v. Treadwell*, 294 F.3d 453, 462 (2nd Cir. 2002) (statements at public hearings showed harm was real and regulations alleviated it). The Township applied its own experience and knowledge, community input, and common sense to develop expanded commercial uses balanced with additional agricultural production. *See Went for It,* 515 U.S. at 628 (commercial speech restrictions may be justified "based solely on history, consensus, and simple common sense.") (citations omitted); *Metromedia*, 453 U.S. at 509-10 (declining to "disagree with the accumulated, commonsense judgments of local lawmakers" and finding "nothing . . . to suggest that these judgments are unreasonable"); *Fruchtman v. Town of Dewey Beach,* 60 F.Supp.3d 556, 562 (D. Del. 2014) (upholding ordinance banning outdoor merchandise displays with deference to judgment of local lawmakers). The zoning provisions – to the extent they restrict commercial speech at all – restrict only the most tangential to agricultural activities. *First Choice Chiropractic, LLC v. Dewine,* 969 F.3d 675, 684 (6th Cir. 2020).

The meeting minutes show that each provision was narrowly tailored and directly and material advanced the Township interests in promoting agricultural production by authorizing

additional revenue streams and requiring additional agricultural production or acreage without undermining the Township's rural character. Each enactment included scores of provisions addressing parcel size, parcel ownership, produce sourcing, participation in Township-wide events, onsite dwellings, setbacks, buildings, parking, lighting, signs, access, records, occupancy, enforcement, and more. To the extent the challenged provisions limited expressive activities or speech, they went no further than necessary to advance the goals of the Master Plan and the intent of A-1 zoning. With each enactment, in four distinct ways, the Township advanced its dual interests in promoting agriculture and maintaining the rural character of the community and tailored the enactment to those interests:

(1) Each provided an opportunity for a winery to develop a new revenue stream to support their financial success. For Winery-Chateaus, the Guest Activity Use enactment allowed them to rent out their facilities for group meetings and charge people to attend food and wine seminars. The Farm Processing Facility and Remote Winery Tasting Room enactments allowed those wineries to sell stuff besides wine. The Township further tailored non-wine retail sales: the Remote Winery Tasting Room allows logo-wear (t-shirts, hats) and packaged food sales, but only as a discretionary special use; retail permissions for by-right Farm Processing Facilities were more limited.

(2) Each supported the wineries and the local wine industry by allowing wineries to promote themselves. For Winery-Chateaus, the Guest Activity Use enactment expects the winery to self-promote or promote Peninsula agriculture by simply identifying their wine, offering winery tours, or providing promotional material when they host guests for private for-pay events. The Farm Processing Facility and Remote Winery

Tasting Room enactments allowed those wineries to self-promote by selling branded merchandise in addition to their wine.

(3) Each supported agricultural production in the Township by defining the new land use to include additional farmland in agricultural production. The Remote Winery Tasting Room required 150 acres with 75% in active production. The Farm Processing Facility required 40 acres in production and use of local grapes. For Winery-Chateaus to host Guest Activity Uses, there was a local grape requirement.

(4) Each imposed slight limits on the new *non*-wine-related commercial activities they authorized but not on the new wine-related commercial activities. None of the amendments imposed limits on winemaking, wholesale and retail wine sales, or wine tasting. But the Farm Processing Facility and Remote Winery Tasting Room enactments limited retail sales of *non-wine* merchandise to items bearing a logo (sections 8.7.3(12)(i), 6.7.2(19)(b)(1)(v)). The Township imposed no limits on signage or advertising for wine tasting or sales – just on Remote Wine Tasting Room retail sales of *non*-wine merchandise and food (section 8.7.3(12)(k)). The Township imposed no limits for indoor displays during Guest Activity uses – just outdoor displays (section 8.7.3(10)(u)(5)(h)). The only provisions imposing promotional requirements (sections 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(5)(b)) apply only when a Winery-Chateau is using its facilities for profit-generating Guest Activity Uses.

The result of each zoning amendment was a new winery land use, with the provisions Plaintiffs challenge embedded, that promoted agricultural production, maintained the Township's rural character, and ensured compatibility with A-1. The Township authorized additional retail sales of promotional merchandise without authorizing unlimited retail at a location with the

potential to become a convenience store (sections 8.7.3(12)(i), 6.7.2(19)(b)(1)(v)). The Township authorized new outlets for wine sales while preventing the enticement of tourists looking for snacks and souvenirs (section 8.7.3(12)(k)). Requiring the logo to be permanently affixed and of a certain size prevented the use of stickers or stamps on generic souvenirs and convenience store items to expand retail sales beyond intended limits (section 8.7.3(12)(i)). The Township authorized Winery-Chateaus to have for-fee promotional activities and events while minimizing disruption and clutter associated with outdoor displays (sections 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(5)(a), 8.7.3(10)(u)(5)(h).

The zoning amendments were no more extensive than necessary to advance the Township interests in zoning and agricultural preservation. No section prevented a winery from advertising or promoting its wines or tasting room activities. Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) restricted nothing – they *promoted* wine and winery promotion. Section 8.7.3(10)(u)(5)(h) left ample opportunity for Winery-Chateaus to communicate as they could have unlimited indoor displays during Guest Activity Uses and outdoor signage in accordance with their site plans, SUPs, and the unchallenged signage provisions at PTZO § 7.11. Likewise, subsection 8.7.3(12)(k) allowed the Remote Winery Tasting Room signage consistent with its site plan, SUP, and PTZO § 7.11. Sections 8.7.3(12)(i) and 6.7.2(19)(b)(1)(v) did not prevent Farm Processing Facilities and the Remote Winery Tasting Room from selling generic items on property located outside A-1, such as in the C-1 commercial district or downtown Traverse City, or through their websites.

(ii) *Dr. Daniels' expert testimony supports that the challenged sections were narrowly drawn and directly and materially advanced the Township's substantial interests in zoning and agricultural preservation.*

PTP presented expert testimony from Dr. Thomas Daniels, a nationally renowned expert on land use planning, agricultural zoning, and farmland preservation with extensive first-hand knowledge of Peninsula Township agricultural preservation zoning and programs.[48] Dr. Daniels testified that the Township Master Plan emphasizes the maintenance of productive agricultural land, agricultural preservation, protection of rural character, and the Township's spectacular scenery and outlined the Township's interests in promoting the long-term health of its agricultural economy, preserving agricultural land, maintaining rural character, and managing public infrastructure.[49] He testified that the PTZO serves to implement the Master Plan, promote the public health, safety, and welfare by separating conflicting land uses, setting development standards, ensuring consistent application of standards across zoning districts, and creating dispute resolution and enforcement mechanisms.[50] He further testified that, complementary to agricultural zoning, the Township created the most successful farmland preservation program in Michigan and one of the most successful among local governments in the United States, indicating the importance of the Township's agricultural industry and character to its residents and reflecting the popularity of the Township's policies to maintain farmland and agriculture on Old Mission Peninsula.[51]

[48] ECF 604, PageID.23922; ECF 616, (Ex H).

[49] ECF 604, PageID.23880-23881; PageID.23882-23883; PageID.23888; ECF 615-8, PageID.28728 (Ex G).

[50] ECF 604 PageID.23883, 23886-23887, 23888; ECF 616, PageID.30801, 30817- 30818 (Ex H pp 5, 21); ECF 615-7, PageID.28720 (Ex G).

[51] ECF 604, PageID.23890-23892, 23894-23896; ECF 616, PageID.30803- 30805, 30810- 30816 (Ex H pp 7-9, 14-20).

Dr. Daniels testified that the winery land uses and each of their challenged subparts advance the Township interests in promoting agricultural production and support the Township's intended purposes for the Agricultural District:

- The Winery-Chateau use promoted agricultural production by requiring a minimum 50-acre parcel and providing additional winery revenue from rooms for overnight guests and food service. The added Guest Activity Uses further promoted agricultural production with additional winery revenue opportunities and tonnage requirements while minimizing conflicts with neighboring properties through operating limits and the discretionary special use approval process.[52]
- Intent section 8.7.3(10)(u)(1)(b) and operative section 8.7.3(10)(u)(5)(a) provided Winery-Chateaus additional opportunities to showcase their wineries, promote local agricultural production, and persuade their guests to buy their products. These sections balanced allowing additional uses for guests while tying those to agriculture and avoiding restaurant operations.[53]
- Section 8.7.3(u)(5)(h) maintained rural character by avoiding unneeded visual clutter in A-1 and keeping Guest Activity Uses consistent with surrounding uses. Displaying merchandise, equipment, and signage related to Guest Activity Uses is not promoting agricultural production, which is the purpose of A-1.[54]
- The Remote Winery Tasting Room use promoted agricultural production by providing an opportunity for the owner of 150 acres to have a tasting room and retail sales apart from

[52] ECF 604, PageID.23897-23899, PageID.23913-23914; ECF 616, PageID.30819-30822, 30824-30825, 30827-30828,(Ex H pp. 23-26, 28-29, 31-32).

[53] ECF 616, PageID.30824- 30825 (Ex H pp 28-29).

[54] ECF 604, PageID.23917-23918; ECF 616, PageID.30824- 30825 (Ex H pp 28-29).

their winery and farm, providing revenue streams from retail sales of wine and branded merchandise. It also supported agricultural production and the rural character of A-1 by maintaining at least 50% of the 150 acres in active production.[55]

- The Farm Processing Facility use promoted agricultural production by allowing a winery with a tasting room as use by right on 40 non-contiguous acres, requiring 85% of what was processed and sold to be grown locally, providing additional revenue streams for the farmer, ensuring separation from adjacent land uses, and limiting the size of the retail space.[56]
- Sections 8.7.3(12)(i) and 6.7.2(19)(b)(1)(v) allowed for an additional revenue stream for the Remote Winery Tasting Room and Farm Processing Facilities to promote agricultural production. Promoting the winery's brand helps develop brand loyalty from visitors, leading to additional revenue for the winery. Limits on merchandise sales guard against the retail portion of the processing facility becoming the dominant use or turning the facility into a commercial convenience store.[57]
- Section 8.7.3(12)(k) allows the winery owner to promote the wine available in the tasting room, which is in keeping with the rural character of the area, while preventing signs advertising other items, which is not.[58]

[55] ECF 604, PageID.23899-23901; ECF 616, PageID.30819-30822, 30824-30825, 30827-30828 (Ex H, pp. 23-26, 28, 31-32).

[56] ECF 604, PageID.23907-23908; ECF 616, PageID.30819-30822, 30824-30825, 30827-30828 (Ex H, pp. 23-26, 28, 31-32).

[57] ECF 604, PageID.23909-23910, PageID.23904; ECF 616, PageID.30825, 30827- 30828 (Ex H pp 29, 31-32).

[58] ECF 604, PageID.23905-23906.

Plaintiffs attempted to minimize Dr. Daniels' testimony in cross examination. Plaintiffs elicited confirmation that Dr. Daniels did not review the Michigan Liquor Control Code (MLCC), including a provision requiring a winemaker to "provide water" for on- or off-site consumption, and that Dr. Daniels was unfamiliar with the "three-tier system of alcohol."[59] Those regimes and provisions have no bearing on whether the winery land uses and challenged subsections advance the Township's substantial governmental interests in promoting agricultural production, ensuring compatible land uses, and maintaining rural character in A-1. Plaintiffs never invoked any MLCC provision to support their commercial speech claims – only preemption.[60] That Dr. Daniels did not read the MLCC to form opinions on whether and how the challenged provisions advance the Township's interests in zoning and agricultural production has no bearing on the credibility or reliability of his testimony.

Dr. Daniels also affirmed in cross examination that he did not review the Michigan Right to Farm Act (RTFA) nor the Michigan Generally Accepted Agricultural and Management Practices (GAAMPs) for Farm Markets.[61] Plaintiffs never asserted in pleadings or argument that the RTFA or Farm Market GAAMPs undermine the Township's efforts to promote agricultural production and maintain the rural character of A-1. In fact, Plaintiffs did not invoke the RTFA or Farm Market GAAMPs until their summary judgment reply brief, to make a different point.[62] Moreover, the first Farm Market GAAMPs were not developed until 2010, six years *after* the last challenged zoning amendment was enacted.[63] Whether the RTFA or Farm Market GAAMPs are consistent

[59] ECF 604, PageID.23939-23959.

[60] ECF 29.

[61] ECF 604, PageID.23956, 23965, 23978.

[62] ECF 501, PageID.19458.

[63] ECF 611-146 (Ex 201).

with or contrary to the winery land uses or challenged provisions, they shed no light on whether the provisions were narrowly drawn and advanced the Township's substantial interests in zoning and agricultural preservation.

(iii) Plaintiffs present no contradictory evidence related to how the challenged sections advanced the Township's substantial interests in zoning and agricultural preservation.

Once the government meets its evidentiary burden and shows the challenged regulations would have their desired effect, the burden then shifts back to the plaintiff to cast "direct doubt" on the government's rationale. *Richland Bookmart, Inc. v. Knox County,* 555 F.3d 512, 527 (6th Cir. 2009) (citation omitted). And while the government may meet its burden with "evidence from other locations and anecdotal evidence, the plaintiff's burden is heavier and cannot be met with unsound inference or similarly anecdotal information." *Id.*

Plaintiffs testified at trial that, but for zoning limits on activities and events at wineries, they could sell more wine, make more money, and reinvest additional profits into grape growing operations. They threatened that, should their wineries become unprofitable, they might take their farmland out of agriculture and develop it. They presented virtually no testimony or other evidence about the five provisions at issue, except to the extent they testified about how selling logo merchandise generates revenue and helps them promote their wineries. None contradicted anything in the Township meeting minutes or Dr. Daniels' testimony. Even if there was evidence Plaintiffs' preferred approach to agricultural preservation – unlimited commercial activity to generate additional profits available for additional farmland purchases[64] – could work (there isn't),

[64] Dr. Daniels testified to the contrary – increasing profits from non-agricultural activities is more likely to make farming unsustainable. (ECF 604, PageID.23919-23920; ECF 616, PageID.30827-30828 (Ex H pp 30-31).

it would not prove the challenged provisions are unconstitutional. *Richland,* 555 F.3d at 527 ("evidence suggesting that a different conclusion is also reasonable does not prove that the County's findings were impermissible or its rationale unsustainable") (citations omitted).

Plaintiffs designated but did not call a land use planning expert to rebut Dr. Daniels.[65] Instead, they called witnesses to testify about the MLCC and GAAMPs. Plaintiffs called Teri Quimby as an expert on liquor control; her only zoning-related experience derived from when she was a member of a township board of appeals in the early 1990s.[66] She did not indicate she read the PTZO or had any familiarity with the winery land uses or the challenged provisions. She offered no testimony or expert opinions on whether or how the winery land uses and challenged subsections advance Township zoning and agricultural production interests.[67]

Rebuttal witness Gary McDowell was qualified as an expert on "rural development and agricultural preservation and agricultural tourism."[68] He, too, has no land use planning or zoning credentials; his testimony was based on his hay farming experience and three years directing a state development agency.[69] He identified activities like hayrides and farm weddings as "agritourism" that can help generate revenue for farmers, introduce people to farmers, and allow

[65] ECF 573, PageID.22405-406.

[66] ECF 607, PageID.24748-24750, PageID.24757-758, PageID.24775.

[67] Ms. Quimby disagreed with Dr. Daniels and testified on a variety of non-relevant points about state liquor laws: it allows wine tasting outdoors (ECF 607, PageID.24762-24763); it has provisions governing signs and advertising "and where brands can be displayed" (ECF 607, PageID.24763-24765); it regulates the "size and scale of wine production." (ECF 607, PageID.24765-24766) and make it impossible for wineries to become "wine shops and bars, selling alcohol made by other businesses" like Applebee's or Meijer. ECF 607, PageID.24766-24770. She also opined that serving food and non-alcoholic drink with alcohol is a good idea. ECF 607, PageID.24770-24774.

[68] ECF 609, PageID.25220.

[69] ECF 609, PageID.25213-25222.

farmers to promote their products.[70] He offered no testimony specific to Peninsula Township's winery land uses or the challenged sections. He testified that the Farm Market GAAMPs protect opportunities for farmers.[71] Since those GAAMPs were not enacted until 2010, they shed no light on what the Township considered when it enacted the challenged provisions. He mischaracterized Dr. Daniels' testimony explaining how lucrative non-agricultural commercial activity like weddings could inflate Peninsula land values and make PDR more costly[72] as supporting "trying to reduce the price of farmland."[73] He supported retail sales at farm markets of "things that are associated with agriculture" to help generate revenue and promote farming.[74] He offered no testimony countering Defendants' evidence that the winery land uses and challenged subsections were narrowly drawn and advanced the Township's zoning and agricultural preservation interests.

Plaintiffs apparently intend to rely exclusively on former Supervisor Manigold's deposition to counter Defendants' *Central Hudson* evidence.[75] Mr. Manigold's deposition is unavailing for four key reasons. First, Mr. Manigold repeatedly testified *he did not know* how particular provisions, including those authorizing retail sales of non-wine logo merchandise, advanced Township interests.[76] "I don't know" sheds no light on whether the provisions advance Township

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[70] ECF 609, PageID.25236-25242.

[71] ECF 609, PageID.25223-25230.

[72] ECF 604, PageID.23919-23920.

[73] ECF 609, PageID.25231-25232; PageID.25242-25243. Dr. Daniels never addressed "reducing the price of farmland." He raised concerns about Plaintiffs' desire for zoning changes that may have the effect of increasing the value of farmland acreage because higher returns from non-agricultural-production activities (weddings, non-wine retail sales) puts *upward* pressure on ag land values, which challenges the Township's strong interest in the long-term sustainability of agricultural production. ECF 604, PageID.23919:12-23920:18, 23972:24-23975:14; ECF 616, PageID.30827-30828 (Ex H pp. 30-31 ¶¶ 3, 5).

[74] ECF 609, PageID.25233-25236. This is notably consistent with Peninsula's Township's rationale for enacting winery land uses with retail sales of promotional merchandise in addition to wine.

[75] ECF 580, PageID.22605.

[76] ECF 611-154, PageID.27937, 27957-27959, 27965.

interests. And Plaintiffs' counsel repeatedly asked Mr. Manigold the wrong question: "[W]ere any less-restrictive means considered?" That is not what *Central Hudson* requires.[77]

Second, Mr. Manigold's testimony cannot contradict or alter the Master Plan, PTZO, and contemporaneous legislative history documenting the intent, purpose, and mechanics of the winery land uses and challenged provisions.[78] *Stevenson*, 26 Mich at 46-47. While his testimony about isolated subsections enacted decades ago generally hedged, even if Mr. Manigold had unambiguously testified each section did *not* advance the Township's substantial government interests (he did not), so what? Zoning is legislative; it derives legitimacy by providing community-wide stability and predictability. *See Schwartz v. Flint,* 426 Mich. 295, 306-307; N.W.2d 678 (1986); *Raabe v. Walker*, 383 Mich. 165; 174 N.W.2d 789, 795-96 (1970). The supervisor is one of seven individual legislators who comprise the legislative body with authority to zone. MCL § 125.3401(5). Beyond being one of seven votes to adopt zoning amendments, Mr. Manigold lacked authority to administer, interpret, or enforce the PTZO. PTZO § 4.1.2 (zoning administrator and ordinance enforcement officer enforce zoning); 5.7.2 (zoning board of appeals interprets zoning). *See also Lemaster v. Lawrence County*, 65 F.4th 302 (6th Cir. 2022) (municipality only responsible for decisions of officials with delegated authority to make those decisions) (citations omitted). Before he testified, Mr. Manigold had not read the PTZO in "probably ten years, maybe longer."[79] Deposition testimony from single legislator about the intent or objectives of ancient legislative enactments invites an opportunity to undermine the legislative

[77] ECF 615-1, PageID.28094, 28107, 28108, 28116, 28117, 28131; ECF 611-154, PageID.27959.

[78] Plaintiffs agree: "testimony from witnesses to the enactment of legislation is inadmissible." ECF 580, PageID.22604-22605, citing, *inter alia*, *Michigan United Conservation Clubs v. Lujan,* 949 F.2d 202, 209 (6th Cir. 1991) ("we decline to give significant to sponsors' private thoughts expressed subsequent to the enactment of a bill or an amendment").

[79] ECF 615-1, PageID.28118.

process. *See Moskovic v. City of New Buffalo,* 2023 U.S. Dist. LEXIS 7052 (W.D. Mich. Jan. 13, 2023) (municipal witnesses "cannot make an admission about the law" and do not control judicial analysis of zoning ordinance)

Third, Mr. Manigold's deposition cannot be used against PTP, an absent non-party at the deposition. Rule 32 governs admissibility of deposition testimony at trial and establishes conditions precedent to using depositions at trial.[80] *See* 8A Wright & Miller, FED. PRAC. & PROC. CIV. (3d ed) § 2142 ("In considering the use of depositions at a trial or hearing, it is helpful to remember that the problem has two aspects. First, the conditions set forth in Rule 32(a) must be satisfied before the deposition can be used at all. Second, when it is found that these conditions authorize the use of the deposition, it must be determined whether the matters contained in it are admissible under the rules of evidence.").[81] One condition to using a deposition at trial is that the party was present or represented at the deposition. Fed. R. Civ. P. 32(a)(1)(A). PTP was not a party nor present at Mr. Manigold's November 2021 deposition. Nor was PTP represented by Peninsula Township. The Sixth Circuit found the Township is motivated differently than PTP and the Township does not adequately represent PTP's distinct litigation interests. *WOMP v. Peninsula Township,* 41 F.4th 767, 774-78 (6th Cir. 2022). Practically, too, the Township attorney may have been less willing than PTP to question his client representative's comprehension, memory, credibility, or authority. PTP objected to Plaintiffs' proposed submission of Mr. Manigold's

[80] The deposition does not meet the "former testimony" hearsay exception because PTP was not present nor had predecessor present and because Plaintiffs did not show Mr. Manigold was unavailable. Fed. R. Evid. 804(b)(1); *Williams v. United Dairy Farmers*, 188 F.R.D. 266 (S.D. Ohio 1999) ("Under Rule 804, the proponent of a hearsay statement bears the burden of showing that the declarant is unavailable.") (citing *Ohio v. Roberts*, 448 U.S. 56, 65 (1980)).

[81] Plaintiffs' argument that Mr. Manigold, as Supervisor at the time of the deposition, renders his deposition non-hearsay under Federal Rule of Evidence 801(d)(2) ignores threshold inadmissibility under Rule 32 and is also legally and logically flawed.

testimony as trial evidence because PTP was not a party at the time and lacked meaningful opportunity to preserve objections to the testimony.[82] Plaintiffs might have cured PTP's objection by calling Mr. Manigold to testify at trial, but they did not. The deposition cannot now be wielded against PTP.

Fourth, if the Court does consider deposition testimony from Mr. Manigold, it should reject Plaintiffs' cherry-picking and consider Mr. Manigold's deposition in context. In addition to "I don't know" responses for some subsections, Mr. Manigold explained how others advanced Township interests. He testified the subsection limiting outdoor displays during Guest Activity Uses (subsection 8.7.3(10)(u)(5)(h)) was trying to prevent the Township from "look[ing] like the Copemish Flea Market" and furthered its interests in "keeping the rural character of the peninsula" by not having "a winery looking like a garage sale."[83] He testified the Remote Winery Tasting Room use gives "the winery another option to sell their product" and said, "We have to have the winery [be] successful[.]"[84] Regarding 8.7.3(12)(i),, he testified, "The Kroupa family, who asked us to do this, wanted to sell additional merchandise, and they worked with the planning commission and came up with that verbiage to sell that out of their remote wine tasting [room]."[85] He further explained: "[W]hat we want to do is have the wineries be successful and to get their name on their product to get it out. You know, Bonobo, on these sunglasses, that is a good trademark to get it out in the public, and that's what we were encouraging the Kroupa family to do."[86] When asked how wineries having their logo on their merchandise furthers the governmental

[82] ECF 609, PageID.25202; ECF 573, PageID.22415.

[83] ECF 615-1, PageID.28138- 28139.

[84] ECF 615-1, PageID.28085.

[85] ECF 615-1, PageID.28087.

[86] ECF 615-1, PageID.28086-28088.

interest in "preventing farmland from becoming houses,"[87] Mr. Manigold testified the intent was to help "get that name out and brand out into the community and to work with our appellation to make us a very successful unit."[88]

In other words, the Township created the winery land uses, including the challenged provisions, to support the success of the Peninsula wine industry because that furthered the Township's interest in agricultural production. Mr. Manigold testified extensively that challenged zoning tried to *support* wineries with added promotional activities to bring in more customers while carefully drawing lines to maintain A-1 as the agricultural not commercial district.[89] When responding to the wrong "were any less-restrictive means considered" question, Mr. Manigold accurately indicated that the challenged zoning *is* the least restrictive way the Township could find to balance the wine industry's desire for looser zoning with the goals and purposes of A-1 zoning.[90]

Others also testified, consistent with the official legislative record, that the winery land uses and challenged subsections were tailored to advance the Township's governmental interests. Former Zoning Administrator and Planner Gordon Hayward testified at length about how the winery land uses advance the Township zoning and agricultural production interests.[91] He testified that harm the Township attempted to avoid in enacting the winery land uses and challenged subsections was the "incremental deterioration of the agricultural zone."[92] He testified section 8.7.3(12)(i) preserved and promoted winery production by encouraging wineries to promote their

[87] The Township objected to form. The question lacks foundation as the Township interests are broader.

[88] ECF 615-1, PageID.28088- 28089.

[89] ECF 615-1, PageID.28073- 28075, 28090- 28092, 28094, 28100- 28101, 28110- 28112, 28115, 28117, 28121, 28128- 28129, 28130, 28132- 28133.

[90] ECF 615-1, PageID.28094, 28131; ECF 611-154, PageID.27958.

[91] ECF 615-3, PageID.28229-28240.

[92] ECF 615-3, PageID.28193- 28198, 28202, 28212-13.

products and brand, without crossing the line from agricultural to commercial use[93] and section 8.7.3(12)(k) aimed to avoid promoting retail sales of non-agricultural products while supporting agricultural production promotion.[94] Additional participants in the drafting process testified consistently.[95]

Defendants demonstrated with ample, reliable evidence that the winery land uses and challenged subsections targeted concrete, non-speculative harms and directly and materially advance the Township's zoning and agricultural interests. Plaintiffs introduced nothing contrary.

b. No Plaintiff showed harm or injury from the five zoning provisions.

Even if Sections 6.7.2(19)(b)(1)(v), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(5)(h), 8.7.3(12)(i), and 8.7.3(12)(k) failed *Central Hudson* scrutiny, no Plaintiff proved it was harmed and no Plaintiff is entitled to its requested relief.

Section 6.7.2(19)(b)(1)(v) authorized retail sales of logo merchandise for Farm Processing Facilities. Plaintiffs Two Lads, Black Star, and Tabone[96] did not prove these sections caused them to *lose* profits; to the contrary, these sections *increased* their profits. All the Plaintiffs testified at

[93]ECF 615-3, PageID.28198- 28200 ("[I]f you're selling glasses, you know, I can go to any store in town and buy a glass. I may even buy a glass that says Old Mission Peninsula or peninsula, or something like that, or Michigan, you know. We see them all the time. That's the commercial end. The winery, if you're going to buy that at a winery, you're on-site, you're at the winery, you're at the place where the stuff takes place. That's agriculture, that's promotion of agriculture. So that's how the whole ordinances are put together. If it's promoting, if it's supporting, if it's encouraging, if it's marketing production, it's okay. If it's just buying something and selling it, then it's not necessarily promoting agriculture, and that's, that's really what this whole governmental interest is, is we've got a unique agricultural area out here.").

[94] ECF 615-3, PageID.28210, 28215.

[95] Mr. Parsons and Mr. Wunsch were also identified by Peninsula Township to testify regarding how zoning was tailored to advance Township interests, including section 8.7.3(12)(i) (ECF 615-4, PageID.28257- 28265), section 6.7.2(19(b)(1)(v) (ECF 615-4, PageID.28266-28275; ECF 615-2, PageID.28179- 28180), and section 8.7.3(10)(u)(5)(b) (ECF 615-4, PageID.28283-28285, 28286).

[96] PTP maintains that Tabone has no Farm Processing Facility permit and is therefore not a Farm Processing Facility but will treat Tabone as one here in accordance with this Court's summary judgment order finding that Tabone has standing to challenge Section 6.7.2(19). ECF 559, PageID.21901-21902.

length about their desire to promote their brands, including through the sale of branded merchandise. Even though sub-subsection 6.7.2(19)(b)(1)(v)(3) states that "clothing" is not among the logo merchandise authorized to be sold at Farm Processing Facilities, the Farm Processing Facility Plaintiffs testified they sell t-shirts and other clothing and the Township has never sought to enforce this provision against them – in fact, Two Lads witness Baldyga testified that former Supervisor Manigold indicated that the Township tacitly approved of reasonable clothing sales.[97]

- Black Star sells "shirts, maybe sweatshirts, hats, tumbler mugs" with their logo.[98]
- Two Lads sells t-shirts and ball caps with their logo.[99]
- Tabone sells glassware, t-shirts, sweatshirts, hats, coffee mugs, and "things of that nature" and promotes them online.[100]

Plaintiffs want to sell *other* merchandise not authorized by Section 6.7.2(19)(b)(1)(v) to generate even *more* revenue. They apparently mistakenly believe that, but for Section 6.7.2(19)(b)(1)(v), they could use their tasting rooms for unlimited non-wine retail sales. But retail shops are not a permitted use in A-1; absent 6.7.2(19)(b)(1)(v), these

[97] ECF 608, PageID.24930-24931.

[98] ECF 602, PageID.23492-23493, 23518-23520, 25528-23529, 23578.

[99] ECF 608, PageID.23929-24931.

[100] ECF 603, PageID.23651-23652, 23694-23695, ECF 611-142 (Ex 191).

Plaintiffs could sell only their wine and would have generated *less* revenue. None proved 6.7.2(19)(b)(1)(v) caused them any harm.

Section 8.7.3(10)(u)(1)(b), the non-operative intent provision for Guest Activity Uses, described the agricultural promotion component of Guest Activity Uses. Plaintiffs never challenged operative Section 8.7.3(10)(u)(5)(a), obligating a Winery-Chateau to promote Peninsula agriculture during Guest Activity Uses, as regulating commercial speech.[101] Even if they had, Chateau Chantal and Mari – the only Winery-Chateaus that hosted Guest Activity Uses – did not prove obligatory self-promotion caused them harm. On the contrary, they both testified that they have promotional events like Guest Activity Uses to increase profits.[102] As discussed in more detail in the Compelled Speech section below, neither Mari nor Chateau Chantal proved Section 8.7.3(10)(u)(1)(b) or 8.7.3(10)(u)(5)(a) caused them any harm.

Section 8.7.3(10)(u)(5)(h) prohibited "outdoor displays of merchandise, equipment or signs" during Guest Activity Uses. For the two wineries who hosted Guest Activity Uses (Mari and Chateau Chantal), neither presented any evidence pertaining to outdoor displays, let alone evidence that restricting outdoor displays during Guest Activity Uses caused them any harm.

Section 8.7.3(12)(i) allowed the Remote Winery Tasting Room to sell logo merchandise, including clothing. This provision provided Peninsula Cellars the opportunity to generate additional revenue, which it did. In addition to logo merchandise, Peninsula Cellars would also like to be able to sell cleaning spray, vacuum-sealing devices, and local artwork.[103] Peninsula Cellars may mistakenly believe that, but for Section 8.7.3(12)(i), it could have unlimited retail

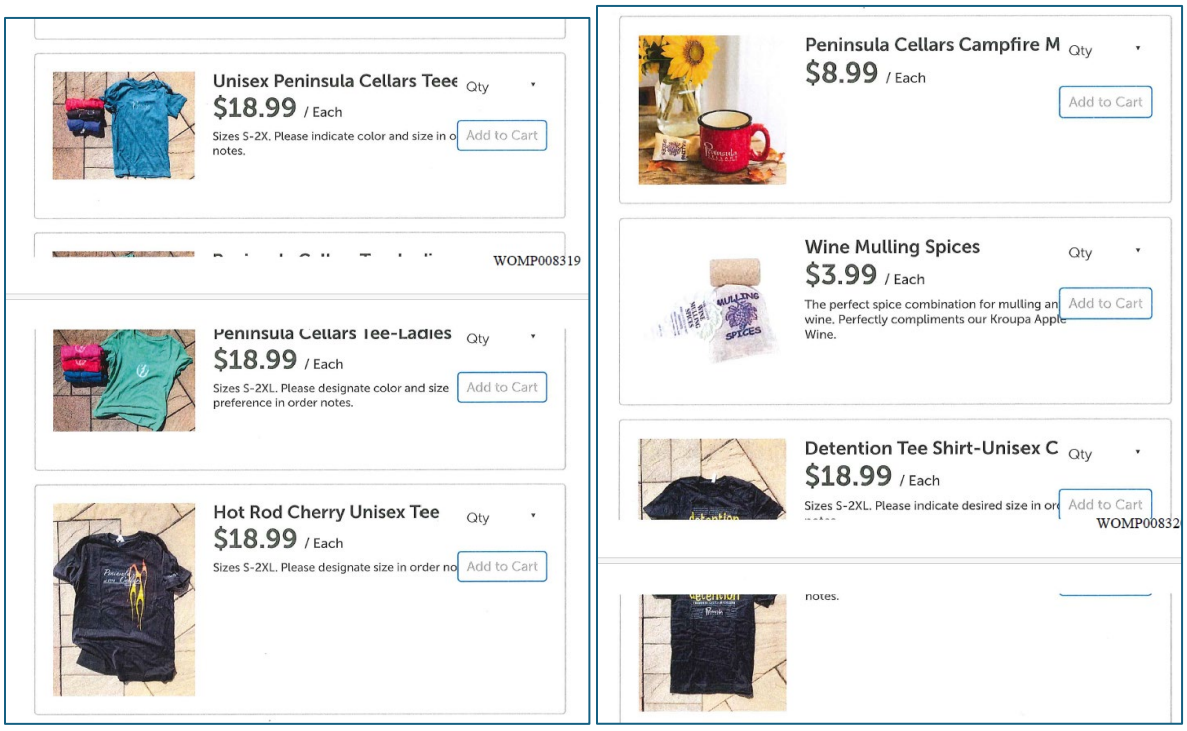
[101] ECF 162, PageID.6008; ECF 559, PageID.21916-21918; ECF 457-4; ECF 517, PageID.20045-20046.

[102] ECF 601, PageID.23267-23268; ECF 606, PageID.24492.

[103] ECF 606, PageID.24400.

sales. But as discussed above, retail shops are not a permitted use in A-1. Absent Section 8.7.3(12)(i), Peninsula Cellars would have had less revenue, not more. Peninsula Cellars did not prove 8.7.3(12)(i) caused it any harm.

Former Section 8.7.3(12)(k) prohibited the Remote Winery Tasting Room from identifying its non-wine offerings (*i.e.*, food and non-food merchandise) on signs and other advertising. Peninsula Cellars presented no evidence that the Township ever enforced this provision or that it refrained from promoting items it otherwise would have promoted but for this provision. Peninsula Cellars produced photographs and testimony demonstrating that it does in fact promote items for sale besides wine, including its mulling spices and logo apparel.[104] Peninsula Cellars also promotes its t-shirts, mugs, mulling spices, and more on its website[105]:



[104] ECF 606, PageID.24422-24425; ECF 611-135 (Ex 183).

[105] ECF 611-132 (Ex 179).

In deposition, former Township Planner and Zoning Administrator Hayward testified this provision does not prevent Peninsula Cellars from listing sale items, including food, inside the tasting room, only on the outdoor sign.[106] Former Supervisor Manigold similarly testified, notwithstanding its language, this provision did not in practice prevent Peninsula Cellars from listing sale items on the blackboard inside their building.[107] Peninsula Cellars did not prove Section 8.7.3(12)(k) caused it any harm.

Because the Township repealed Sections 6.7.2(19)(b)(1)(v), 8.7.3(10)(u)(1)(b), 8.7.3(10)(u)(5)(h), 8.7.3(12)(i), and 8.7.3(12)(k) when it enacted Amendment 201, there are no provisions to invalidate through injunction. Striking any reference to Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(h) Chateau Chantal and Mari's SUPs, and Sections 8.7.3(12)(i) and 8.7.3(12)(k) from Peninsula Cellars' SUP, would raise insurmountable challenges as discussed below. Enjoining enforcement of Section 6.7.2(19)(b)(1)(v) against Farm Processing Facilities would present additional challenges, as also discussed below.

2. No Plaintiff was harmed by the alleged prior restraint sections.

As discussed in Defendants' Pretrial Brief[108], the Court's conclusion that Sections 8.7.3(10)(u)(2)(b) and 8.7.3(10)(u)(2)(c) are prior restraints appears inconsistent with its findings that they do not implicate protected First Amendment activity.[109] Regardless, neither Chateau Chantal nor Mari – the only two Winery-Chateaus with standing to pursue as-applied challenges to these provisions – produced evidence at trial showing injury caused by either Section

[106] ECF 615-3, PageID.28208-28211.

[107] ECF 611-154, PageID.27935- 27936; ECF 611-135 (Ex 183)

[108] ECF 581, PageID.22668-22671.

[109] ECF 559, PageID.21903-21907, PageID.21912-21913; ECF 162, PageID.6009-6010.

8.7.3(10)(u)(2)(b) or 8.7.3(10)(u)(2)(c). Both freely host groups of all kinds in their tasting rooms and at Guest Activity Uses under Section 8.7.3(10)(u)(2)(a) (allowing wine and food seminars and cooking classes).[110]

Neither Chateau Chantal nor Mari has ever sought permission to have a Guest Activity Use under Section 8.7.3(10)(u)(2)(b) or 8.7.3(10)(u)(2)(c). Neither showed it has had to apply for permission to exercise First Amendment rights under those sections or that the Township decided whether to grant permission based on the content of proposed speech or expressive conduct. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975). Neither demonstrated that Section 8.7.3(10)(u)(2)(b) required approval or that approval under Section 8.7.3(10)(u)(2)(c) was anything but routine. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975).

Chateau Chantal knows it does not need approval for Guest Activity Uses under Section 8.7.3(10)(u)(2)(b), as the notification forms it created for routine submission to the Township indicate – albeit inaccurately – that meetings of local 501(c)(3) nonprofit meetings "Only Require[] Notification."[111] Section 8.7.3(10)(u)(2)(b) does *not* require notice for meetings of Grand Traverse County 501(c)(3) nonprofits – it simply allows them.

Chateau Chantal does not host nonprofit and agricultural-related group meetings not because of the challenged provisions but because there is no money in it.[112] Chateau Chantal also produced no evidence that has been unable to host groups *other than* local nonprofits and

[110] ECF 611-84, PageID.26723-26726 (Ex 117); ECF 611-87 (Ex 121); ECF 611-92 (Ex 135); ECF 615-12, PageID.29250 (Ex HHHH (Hx4)); ECF 615-12, PageID.29251-29253 (Ex IIII (Ix4)); ECF 615-12, PageID.29254-29264 (Ex. KKKK (Kx4)); ECF 611-114, PageID.27160-27165 (Ex 158); ECF 611-115 (Ex 159); ECF 602, PageID.23373-23374.

[111] ECF 611-92 (Ex 135).

[112] ECF 606, PageID.24518 ("those two groups are not folks that have a large bank account to be spending on events").

agricultural-related groups. When asked to confirm that Chateau Chantal could host a food and wine pairing dinner under Section 8.7.3(10)(u)(2)(a) for anyone – a group of Purdue alumni, for example – Ms. Dalese briefly feigned confusion, then admitted that she does understand Chateau Chantal can host any group under Section 8.7.3(10)(u)(2)(a).[113] It routinely does so.[114]

Mari also knows approval is not needed for Guest Activity Uses under Section 8.7.3(10)(u)(2)(b).[115] The only other evidence Mari produced that could conceivably relate to Section 8.7.3(10)(u)(2)(b) concerns a 2019 Big Brothers Big Sisters fundraiser. Big Brothers Big Sisters is presumably a nonprofit, but Mari did not show it was a Grand Traverse County 501(c)(3) organization and produced no credible evidence that the event was a meeting. Instead, the evidence indicates that the event was an evening wine tasting fundraiser that Mari planned to host under Section 8.7.3(10)(u)(2)(a).[116] A Mari employee provided notice to the Township and said she should have done so 30 days in advance.[117] Of the three allowed Guest Activity Use categories, only wine and food seminars and cooking classes under Section 8.7.3(10)(u)(2)(a) require 30 days' notice. Mari witness Alexander Lagina tried and failed to bring the event within the ambit of Section 8.7.3(10)(u)(2)(b), testifying that it was a "charity event for Big Brothers Big Sisters" before unpersuasively recharacterizing it as "you know, basically a meeting of Big Brothers Big Sisters at the winery to taste wine in support of the charity."[118]

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[113] ECF 607, PageID.24624.

[114] ECF 611-92 (Ex 135); ECF 615-12, PageID.29257 (Ex KKKK (Kx4)) (giving notice of a "wine education event" for an "MSU Alumni Meeting" under Section 8.7.3(10)(u)(2)(a)).

[115] ECF 611-114, PageID.27164 (giving belated notice for a meeting of a 501(c)(6) organization under as a "Food & Wine Seminar" under 8.7.3(10)(u)(2)(a), noting it had "originally thought that the group was a 501(c)(3), requiring no notice") (Ex 158).

[116] ECF 611-117, PageID.27238 (Ex 161).

[117] ECF 611-117, PageID.27239, 27249 (Ex 161).

[118] ECF 601, PageID.23300-23301.

Mari also presented no evidence that the Township decided the permissibility of the Big Brothers Big Sisters event based any proposed speech or expressive conduct. Permissibility turned on the number of planned attendees and Mari's submission of tonnage documentation.[119] After Mari provided notice to the Township, the Township notified Mari that it needed to establish how many attendees it could host.[120] The PTZO provisions that govern Guest Activity Use size are Sections 8.7.3(10)(u)(3) and 8.7.3(10)(u)(4) – not Section 8.7.3(10)(u)(2)(b). Pursuant to Section 8.7.3(10)(u)(4), which Mari does not challenge here, Mari's SUP limits its Guest Activity Uses to 50 attendees and requires them to be held indoors because of concerns about impacts on adjacent neighbors.[121] Mr. Lagina did not remember if the Big Brothers Big Sisters event happened or not but, had the Township denied Mari permission to host the event because of its size, such denial would not have been related to protected First Amendment activity and would not have been a prior restraint under Section 8.7.3(10)(u)(2)(b).

3. No Plaintiff was harmed by the sections that allegedly compel speech.

At trial, the evidence showed that Chateau Chantal and Mari – the only Winery-Chateaus with standing to pursue as-applied challenges to Sections 8.7.3(10)(u)(1)(b) and 8.7.3(10)(u)(5)(a) – did not object to or disagree with any promotional message required by these provisions but eagerly promoted their estate wines, wine club memberships, bed and breakfast facilities, and other

[119] While the Court has found the provision tying the number of permissible Guest Activity Use attendees to growing or purchasing local grapes violates the dormant Commerce Clause, Plaintiffs' dormant Commerce Clause claims are unrelated to their First Amendment claims.

[120] ECF 611-117, PageID.27238 (Ex 161).

[121] ECF 611-113, PageID.27153 (Ex 157); ECF 615-20, PageID.30213 (Ex ZZZZZZZ (Zx7)); ECF 601, PageID.23351-23352.

offerings during Guest Activity Uses.[122] Nothing in Section 8.7.3(10)(u)(1)(b) or 8.7.3(10)(u)(5)(a) requires Winery-Chateaus to do anything they don't already do voluntarily.

Mr. Lagina testified that Mari does nothing during a ticketed wine and food pairing dinner – *i.e.*, a Guest Activity Use under Section 8.7.3(10)(u)(2)(a) – that it doesn't do as part of its normal tasting room operations for any customer who walks through the door:

> Anything we do, you know, it's all the same. We are always trying to demonstrate our product to our guests and encourage them to buy our wine. . . . Everything that we do, from our perspective, is the same. We are always trying to educate our guests about our wine. . . . [T]he experience is the same pretty much across the board.[123]

During Mari's wine and food pairing dinners, Mari provides a menu describing the pairings and staff discuss the wines and why they were chosen.[124] Staff also discuss the vineyard operations, provide tasting notes, and offer take-home materials.[125] Mari holds promotional events like wine and food pairing dinners to get people to the winery where Mari can sell them wine, and wine sales and wine club sign-ups are higher on days Mari hosts a promotional event.[126]

Ms. Dalese testified that, for anyone who comes to taste wine at Chateau Chantal, staff gives them information about their food and wine pairings and the B&B.[127] All staff are trained and expected to promote and educate customers about the Chateau Chantal property, its wines, and all its offerings.[128] Section 8.7.3(10)(u)(5)(a) requires nothing more.

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[122] *See* ECF 615-12, PageID.29265-29272 (Ex LLLL (Lx4)); ECF 607, PageID.24597-24598, 24627-24628; ECF 601, PageID.23261-23268.

[123] ECF 601, PageID.23263-23264.

[124] ECF 601, PageID.23266.

[125] ECF 601, PageID.23266.

[126] ECF 601, PageID.23266-23268.

[127] ECF 606, PageID.24484.

[128] ECF 606, PageID.24484-24485.

Ms. Dalese testified that Chateau Chantal is required to provide tours for "attendees of food and wine seminars," *i.e.*, Guest Activity Uses under Section 8.7.3(10)(u)(2)(a).[129] She is mistaken in her belief that there is a tour requirement – Section 8.7.3(10)(u)(5)(a) merely lists tours as one of three possible categories of Agricultural Production Promotion. A Winery-Chateau may satisfy Section 8.7.3(10)(u)(5)(a) by identifying its own wines to customers, which Chateau Chantal's staff surely does in performing their expected promotional and educational duties. Even if Section 8.7.3(10)(u)(5)(a) did require tours, Chateau Chantal produced no evidence that it found providing tours objectionable – it voluntarily offers them to the public upon request and to overnight guests. Ms. Dalese confirmed that she likes promoting Chateau Chantal and does not disagree with promoting Chateau Chantal's products at its own events.[130]

B. Plaintiffs' unpleaded claim related to winery closing time is improper and meritless.

Defendants explained in their Joint Trial Brief[131] why Plaintiffs' non-pleaded "admissions and concessions" theories about the Township's wedding "ban"[132] and tasting room closing time requirement fail. PTP here addresses new arguments Plaintiffs raised at trial.

Plaintiffs say the Township "enforces" a 9:30 p.m. closing time requirement that is not in the PTZO, citing Mr. Manigold's deposition, which they say "prove[s] that the 9:30 [p.m.] closing time was unconstitutionally vague in violation of the Due Process Clause and that the closing time

[129] ECF 606, PageID.24486.

[130] ECF 607, PageID.24628.

[131] ECF 580, PageID.22704-22705. See also ECF 488, PageID.18948-49.

[132] ECF 580, PageID.22625.

was enforced against all Plaintiffs."[133] Plaintiffs say they are entitled to the money they might have made by staying open until their unanimously "preferred" closing time of 11:00 p.m. [134] They also ask the Court to enjoin the Township from "enforcing a 9:30 p.m. closing time" against the Winery-Chateaus because it "only applied to 'Guest Activity Uses' which has [sic] been ruled vague in violation of the Due Process Clause" and against the remaining Plaintiffs because "there are no closing time restrictions contained in the Farm Processing Facility Ordinance, Section 6.7.2(19), or the Remote Winery Tasting Room Ordinance, Section 8.7.3(12)."[135]

At trial, Defendants objected to the admission of evidence purportedly showing profits lost between 9:30 and 11:00 p.m. as non-relevant to any live trial issue.[136] Plaintiffs' counsel responded by introducing a brand-new claim never before mentioned in nearly four years of litigation: that Plaintiffs have "a constitutional right to engage in their businesses under life and liberty" and "a business right to operate, which is a constitutional right which cannot be taken away by the government by enforcement of ordinances that do not exist."[137] In support of this claim, Plaintiffs' counsel cited *Sanderson v. Greenhills*, 726 F.2d 284, 286 (6th Cir., 1984), in which the Sixth Circuit found that a plaintiff, who had been denied a license he needed to operate his business, had unsuccessfully pleaded the denial of a property interest but could survive a motion to dismiss because he had also "constructively charge[d] a denial of a 'liberty' interest to engage in whatever legal business he elects to pursue without arbitrary interference."[138] 726 F.2d at 286.

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[133] ECF 580, PageID.22613, PageID.22625. PTP objects to the admission of Mr. Manigold's deposition, as discussed above in the Commercial Speech section. ECF 573, PageID.22415.

[134] ECF 611-144, PageID.27694 (Ex 194); ECF 580, PageID.22613-14.

[135] ECF 580, PageID.22625, 22633.

[136] ECF 601, PageID.22311-12.

[137] ECF 601, PageID.23312.

[138] ECF 601, PageID.23312.

In defense of springing this surprise new claim on Defendants at trial, Plaintiffs' counsel argued that Plaintiffs "didn't learn of [Defendants'] concession that this ordinance" – *i.e.*, Plaintiffs' alleged 9:30 p.m. closing time requirement – "wasn't really on the books[] . . . until during this case" so they "couldn't have pled it in the Complaint."[139] He further argued that pleading was unnecessary because Federal Rule of Civil Procedure 54(c) authorized the Court to "grant the relief to which a party is entitled, even if the party has not demanded the relief in the pleading."[140] In support of these arguments, he cited three cases: *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir. 1979); *Bluegrass Ctr v. United States Intec, Inc*, 49 F App'x 25 (6th Cir., 2002); and *Colonial Refrigerated Transp, Inc v. Worsham*, 705 F2d 821 (6th Cir., 1983). The Court overruled Defendants' objection, finding that "the issue of closing time and guest activity has been in this case since day one" and allowing Plaintiffs to present evidence relating to their hours of operation.[141]

The Court should now reject Plaintiffs' last-minute "hours" theory, which – despite Plaintiffs' counsel's insistence that "[i]t's void for vagueness"[142] – is a new due process claim alleging the arbitrary deprivation of a liberty interest that Plaintiffs appear to have concocted in the seven days between filing their Trial Brief, which contains no mention of it, and the second day of trial. Plaintiffs did not plead this claim, they did not allege sufficient facts to put PTP on notice of it, PTP would be prejudiced if the Court permitted Plaintiffs to pursue it, Plaintiffs have waived their arguments in support of it by not raising them at any previous point in this litigation, and Plaintiffs failed to prove it.

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[139] ECF 601, PageID.23313.

[140] ECF 601, PageID.23313.

[141] ECF 601, PageID.23319.

[142] ECF 601, PageID.23318.

Plaintiffs rely on cases establishing the sufficiency of pleadings or affirming relief for unarticulated or mislabeled claims where a plaintiff had alleged sufficient facts to support those claims in their complaint and there was no prejudice to other parties. None of those cases are like this one. In *Oglala Sioux Tribe*, an intervening plaintiff's amended complaint alleged that a Bureau of Indian Affairs decision was "not rationally based" and violated the Indian Reorganization Act (IRA). 603 F.2d at 714. In post-trial briefing, the plaintiff "fully articulated" his argument that the Bureau's application of particular regulations violated a particular section of the IRA. *Id.* The district court declined to consider the post-trial argument, finding it had not been pleaded in the amended complaint or otherwise previously raised. *Id.* The Eighth Circuit reversed, finding the allegations in the complaint were "certainly broad enough to put the Bureau on notice of [the] claim that [the Bureau's] use of the Civil Service regulations contravened the I.R.A.," that the plaintiff had merely "restated [his claim] in greater detail, in substantially the same form." *Id.* In *Bluegrass*, the plaintiff brought claims of negligent instruction, negligent manufacture, and breach of guarantee. The Sixth Circuit upheld a district court decision granting the plaintiff relief for promissory estoppel, finding that "[d]espite having labeled its theory as one of 'negligent training,' Bluegrass alleged and argued each of the factual elements of promissory estoppel throughout the case." 49 FedAppx. at 31. Similarly, in *Colonial Refrigerated*, the Sixth Circuit upheld a district court decision granting relief under a theory of implied indemnity where the plaintiff had pleaded only a claim under a particular indemnity provision because the complaint contained allegations sufficient to support both theories. 705 F.2d at 824.

Here, Plaintiffs neither pleaded nor alleged sufficient facts to support a due process claim grounded in the arbitrary deprivation of a liberty interest. Plaintiffs did plead a due process claim grounded in the theory that the PTZO's Winery-Chateau Guest Activity Use provisions were vague

and chilled Plaintiffs' First Amendment speech and association rights, which has entirely different elements including a lack of clarity about proscribed conduct and a nexus to protected First Amendment activity. Plaintiffs never alleged that they did not know how late they could stay open or that confusion about closing times chilled their speech – they alleged closing hour facts in support of their preemption claim. Nine Plaintiffs[143] alleged "*the Winery Ordinances* force [their] business to close at 9:30 p.m.," and Plaintiffs claimed that "Section 8.7.3(10)(u)(5)(b) conflicts with Mich. Admin Code R. 436.1403(1), which allows wineries to serve alcohol until 2:00 AM every night."[144] Now, Plaintiffs say the opposite – that the PTZO does *not* require them to close by 9:30 p.m. – in support of a claim that the Township deprived them of a liberty interest without sufficient justification.

Incredibly, Plaintiffs' counsel argued that Plaintiffs could not have pleaded their new due process claim in their complaint because the "final firm concession" that there is no closing time in the PTZO "didn't come until" Defendants filed their pre-trial brief in April 2024.[145] This assertion is completely contradicted by the fact that Plaintiffs have been arguing that the Township "conceded" there is no closing time in the PTZO since at least December 2021.[146] Moreover, the Township and PTP conceded nothing. They may have educated Plaintiffs about what the PTZO doesn't say, but accurately representing the PTZO is neither a concession nor information that Plaintiffs could not have known when they filed their complaint. The PTZO speaks for itself, and

[143] All except Chateau Grand Traverse and Peninsula Cellars.

[144] ECF 29, PageID.1125; ECF 29-2, ECF 29-3, ECF 29-4, ECF 29-5, ECF 29-6, ECF 29-7, ECF 29-9, ECF 29-10, ECF 29-11.

[145] ECF 601, PageID.23318.

[146] ECF 136, PageID.4751-52 ("The Township now admits that there is no explicit closing time for wineries contained within the Ordinances.").

Plaintiffs and their counsel have always been free to read it. Their failure to do so should not excuse Plaintiffs from pleading all their claims.

Even if the Court finds Plaintiffs alleged sufficient facts to support their new claim, permitting Plaintiffs to pursue it would prejudice PTP. Plaintiffs did not articulate their arbitrary deprivation of a liberty interest theory until the second day of trial, after two rounds of discovery, two rounds of summary judgment, and two rounds of pretrial orders over more than three years. Had Plaintiffs done so sooner, PTP could have conducted discovery and presented evidence that any deprivation satisfied whatever level of constitutional scrutiny might apply, such as evidence that there is nothing arbitrary about a 9:30 p.m. closing time in a rural community where most businesses close much earlier. Plaintiffs' failure to raise their new theory sooner should also result in a finding that they have waived it.

Finally, even if the Court permits Plaintiffs to pursue an arbitrary interference with a liberty interest claim, Plaintiffs failed to prove one. Plaintiffs have not shown that the Township enforced a 9:30 p.m. closing time against them. None has ever maintained hours as late as 9:30 p.m., and most close much earlier.[147] They close when they do mainly because demand drops off when customers leave to eat dinner and because they choose not to staff their tasting rooms to stay open later.[148] A few winery representatives testified that various Township officials – none of whom were responsible for administering, interpreting, or enforcing the PTZO – told them at some point

[147] ECF 600, PageID.23134-23135; ECF 601, PageID.23319, 23355; ECF 602, PageID.23571; ECF 603, PageID.23700-23701; ECF 603, PageID.23785; ECF 605, PageID.24163-24164; ECF 606, PageID.24274, 24320; ECF 606, PageID.24380; ECF 606, Page.ID.24525, ECF 607, PageID.24611-24612; ECF 607, PageID.24826-24828; ECF 608, PageID.24907.

[148]ECF 601, PageID.23210-2321; ECF 601, PageID.23320; ECF 602, PageID.23585-23586; ECF 603, PageID.23635-23636; ECF 603, PageID.23785-23786; ECF 605, PageID.24126; ECF 606, PageID.24275; ECF 606, PageID.24380-24381; ECF 606, PageID.24525-24526; ECF 607, PageID.24716; ECF 608, PageID.24901.

in the past that they should close at various times ranging from 6:00 p.m. to 9:30 p.m.[149] Others believed they must close by 9:30 p.m. because they misread or failed to read the PTZO or relied on misinformation circulating among their fellow winery owners.[150] Not one has ever received a letter, violation notice, in-person visit, or other communication from the Township instructing them to close by 9:30 or else face consequences. Not one has received a citation, fine, municipal civil infraction, or other penalty for staying open past 9:30 p.m. And even if the Township did require wineries in A-1 to close their tasting rooms at 9:30 p.m., having to close one's business to the public 90 minute earlier than preferred is not at all the same as having to close one's *business*, full stop, like the plaintiff in *Sanderson*. 726 F.2d at 286. Plaintiffs proved no protected liberty interest in being open from 9:30 to 11:00 p.m.

C. Plaintiffs have not shown they are entitled to the injunctive relief they request.

Heading into trial, Plaintiffs proposed injunctive relief in two parts. First, they requested relief consistent with what they pleaded in their Complaint, asking the Court to permanently enjoin Peninsula Township from enforcing every zoning provision invalidated by this Court, together with several additional provisions they seek to invalidate, under each theory they pursued.[151] Second, Plaintiffs invite the Court to declare their proposed uses reasonable and enjoin the Township from interfering with them as follows:

> The Court declares that the Wineries' proposed uses of serving food as permitted by their MLCC and MDARD licenses, engaging in promotional and education activities, hosting small and large activities, and selling

[149] ECF 600, PageID.23063; ECF 602, PageID.23523-23524, 23526; ECF 606, PageID.24379; ECF 608, PageID.24899.

[150] ECF 601, PageID.23311; ECF 603, PageID.23635; ECF 603, PageID.23783; ECF 605, PageID.24125; ECF 606, PageID.24274; ECF 606, PageID.24498, 24524.

[151] ECF 580, PageID.22623-25.

> merchandise are reasonable and that Peninsula Township is enjoined from interfering with those uses. The Wineries' proposed uses are subject to generally applicable setback, fire code capacity, and noise ordinance limitations. [152]

Neither is proper relief. Defendants' Joint Trial Brief, incorporated herein, discussed the legal standard for an injunction, together with three major flaws in Plaintiffs' request:[153]

(1) Plaintiffs' request to enjoin enforcement of unconstitutional and other provisions would be meaningless after Amendment 201, which repealed all challenged sections.[154]

(2) Plaintiffs never requested winery-specific injunctive relief tied to their individual land use permits and never produced necessary evidence to support such relief.

(3) This Court cannot declare that Plaintiffs are entitled to new land uses because to do so would be improper judicial zoning.

At trial, Plaintiffs testified in support of their desired declaration authorizing new winery uses – food service, small and large events, broader merchandise sales, and more. For the reasons briefed pre-trial, that relief is simply unavailable here. The remainder of this brief debunks Plaintiffs' assertion that their preferred uses are allowed under the Farm Market GAAMPs.

Plaintiffs called Mr. McDowell as an expert to rebut Dr. Daniels, as discussed above in the Commercial Speech section. Through Mr. McDowell's rebuttal testimony, Plaintiffs introduced the Farm Market GAAMPs,[155] also discussed above. Plaintiffs rely on the Farm Market GAAMPs

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[152] ECF 580, PageID.22625-26.

[153] ECF 581, PageID.22693-700.

[154] Plaintiffs' assertion that Amendment 201 resembles repealed provisions is not accurate. (ECF 487, 18760-61) For example, as Plaintiffs testified, the repealed winery land uses imposed no closing time for tasting rooms. Amendment 201 imposes a tasting room closing time of 9:30 p.m. under the new winery land uses.

[155] ECF 611-146 (Ex 201).

to support their request for injunctive relief.[156] They say they presented evidence they comply with these GAAMPs and their "proposed uses" are "promotional and educational activities allowed under the GAAMPS."[157] This argument is meritless and lacks proper evidentiary support.

First, Plaintiffs never asserted any claim nor otherwise invoked or mentioned the RTFA or the Farm Market GAAMPs in their complaint.[158] Nor could they – the RTFA generally provides farmers a defense to nuisance lawsuits. MCL § 286.473; *Shelby Charter Twp. v. Papesh,* 267 Mich.App. 92, 99; 704 N.W.2d 92 (2005). Plaintiffs might have asserted an RTFA preemption claim, but they did not.

Second, Plaintiffs' reliance on the Farm Market GAAMPs to support injunctive relief is improper; they are – at best – dubious rebuttal evidence on commercial speech issues. Plaintiffs sought to undermine Dr. Daniels' credibility on cross examination by eliciting testimony that he did not review the Farm Market GAAMPs, as noted above.[159] Plaintiffs then had Mr. McDowell discuss the Farm Market GAAMPs that Dr. Daniels did not review.[160] Plaintiffs now rely on that supposed rebuttal evidence to argue they are entitled to an injunction declaring their proposed uses are "promotional and educational activities allowed under the GAAMPs."[161] Plaintiffs' attempt to bolster their claim for injunctive relief with the Farm Market GAAMPs is beyond the proper scope of rebuttal evidence.

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[156] ECF 580, PageID.22626.

[157] ECF 580, PageID.22626.

[158] ECF 29.

[159] ECF 604, PageID.23956, 23965, 23978.

[160] ECF 609, PageID.25223-25230.

[161] ECF 580, PageID.22626.

Rebuttal evidence is to counter new evidence or theories proffered in PTP's case-in-chief – here, Dr. Daniels' testimony related to the fit between challenged zoning and Township's governmental interests. *See Martin v. Weaver*, 666 F.2d 1013, 1020 (6th Cir. 1981) (citing *Bowman v. General Motors Corp*., 427 F.Supp. 234, 240 (E.D.Pa.1977). Rebuttal "is not an opportunity for the correction of any oversights in the plaintiff's case in chief." *Oklahoma v. Tyson Foods, Inc*., 2009 WL 1065668, at *1 (N.D. Okla. Apr. 17, 2009) (quotation omitted). "Rebuttal is a term of art, denoting evidence introduced by a Plaintiff to meet new facts brought out in his opponent's case in chief." *Morgan v. Com. Union Assur. Companies*, 606 F.2d 554, 555 (5th Cir. 1979). Where evidence was not raised in the plaintiff's case-in-chief, it is improper to "elicit a denial from the defendant on cross-examination only to inject a new issue on rebuttal or revive the right to introduce evidence that should have been introduced in the case in chief." *People v Holland*, 179 Mich. App. 184, 194; 445 N.W.2d 206 (1989). That is precisely what Plaintiffs have attempted to do with the Farm Market GAAMPs – bolster their case in chief by asking if he reviewed the GAAMPs then using his denial to inject the GAAMPs as a trial issue with new evidence (and a whole new legal theory) they should have introduced in their case. Even before Dr. Daniels testified or Mr. McDowell introduced the Farm Market GAAMPs in rebuttal, each Plaintiff testified on direct that more than 50% of tasting room sales come from their own land.[162] The Farm Market GAAMPs are not proper evidence to support Plaintiffs' injunction request.

Third, Plaintiffs exaggerate what the Farm Market GAAMPs might get them. The Farm Market GAAMPs address "[p]romotional and educational activities at the farm market *incidental* to farm products with the intention of selling more farm products."[163] Plaintiffs consider literally

[162] *See, e.g*., ECF 600, PageID.23013; ECF 601, PageID.23249, 23260.
[163] ECF 611-146 (Ex 201).

any engagement with a potential customer as a promotional opportunity – including weddings, dinners, and much more. It is questionable whether Plaintiffs' intent is to sell more wine or to garner rental profits from their facilities. The relief they request is not for *incidental* promotional activities, which the zoning ordinance provided in the subsections at issue, but Plaintiffs challenged; they ask the Court to allow them to use their facilities as they wish, as long as at least 50% of profits are from wine made with at least 50% on-farm grapes. They suppose their multi-level structures with multiple bars, multiple expansive tasting areas, multiple private gathering spaces, multiple decks and patios, outdoor alcohol service areas as big as the parcel the winery sits upon, bed-and-breakfast facilities, and much more are "farm markets." They want to use their entire property and facilities for "promotional and education activities,"[164] not just their indoor retail (market) space, which is a fraction of their interior and exterior guest entertainment space. The marketing activities Plaintiffs try to shoehorn in under the Farm Market GAAMPs would not be "incidental" to wine sales; they would dominate, as evidenced by the projected scope and revenues associated with small and large events.[165] Court have repeatedly concluded wedding and similar events are not incidental activities on farms. *See Webster Twp. v. Waitz,* 2016 Mich. App. LEXIS 1109 (June 7, 2016) (using barn as wedding venue was not "clearly incidental to" farmer's market and other permissible farm uses); *Miami Twp. v. Powlette*, 197 N.E.3d 998 ¶ 23 (Ohio 2022) (distinguishing barn built to serve as event venue from barn incident to agricultural use); *Forester v. Town of Henniker*, 118 A.3d 1016 (N.H. 2015) (hosting wedding events is not incidental to farming operations). What Plaintiffs seek is not incidental promotional and educational activities at a farm market to sell more wine. Their whole case is an effort to *undo* careful zoning intended

[164] ECF 580, PageID.22626.
[165] ECF 611-144, PageID.27697-27698 (Ex 194); ECF 580, PageID.22618-20.

to provide wineries with additional opportunities for promotional and educational activities incidental to wine-making to sell more wine and replace it with unlimited commercial enterprises.

III. CONCLUSION

PTP proved the zoning provisions Plaintiffs challenge as commercial speech restrictions are narrowly drawn and directly and materially advance the Township's substantial zoning and agricultural preservation interests. Plaintiffs did not carry their burden at trial of demonstrating actual injury under any of their First Amendment claims. Further, no Plaintiff proved it is entitled to equitable relief on the claims resolved in its favor, whether in summary judgment or at trial. For these reasons and as discussed in Defendants' Joint Trial Brief and above, PTP respectfully request this Court enter final judgment in its favor.

Respectfully submitted,

Date: August 29, 2024

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CERTIFICATE OF SERVICE

I, Tracy Jane Andrews, hereby certify that on the 28th day of August, 2024, I electronically filed the Intervener PTP's Trial Brief with the ECF system which will send a notification of such to all parties of record.

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