Case Nos. 20-1447, 20-1466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH JUDICIAL CIRCUIT

F.P. DEVELOPMENT, LLC., a Michigan Corporation,

Plaintiff-Appellee/Cross-Appellant,

v.

CHARTER TOWNSHIP OF CANTON, Michigan,
a Michigan Municipal Corporation,

Defendant-Appellant/Cross-Appellee.

EASTERN DISTRICT OF MICHIGAN
Hon. George Caram Steeh
No. 18-13690

THIRD BRIEF ON APPEAL OF DEFENDANT-APPELLANT/CROSS-APPELLEE

ORAL ARGUMENT REQUESTED

CERTIFICATE OF SERVICE

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The District Court answers:	"Yes."
Plaintiff/Cross-Appellant answers:	"No."

II. Whether the District Court properly held that the Fourth Amendment does not apply to the case before this Court?

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The District Court answers:	"Yes."
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Plaintiff/Cross-Appellant answers:	"No."

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Defendant/Cross-Appellee answers:	"Yes."
The District Court answers:	"No."
Plaintiff/Cross-Appellant answers:	"No."

INTRODUCTION

Having already set forth its Statement of the Case in its principal brief, for brevity's sake and to avoid repetition, Defendant-Appellant/Cross-Appellee here generally makes only such arguments as are necessary to address the issues and arguments raised in the Plaintiff-Appellee/Cross-Appellant's brief.

Plaintiff's reference to the Pine Tree Rebellion at the outset of its brief infers that because the American colonists rebelled against the British Crown's prohibition of removing white pine trees, then no municipality can regulate tree removal to manage urbanization in the 21st Century. Plaintiff characterizes the subject Canton Township tree protection ordinance as "almost identical," despite the fact that nowhere does the Canton ordinance impose a blanket prohibition on the removal of trees.

Moreover, "[o]rdinances that protect trees and vegetation are one of the fastest 'growing' areas of land use law at the local level." 1 Zoning & Plan. Deskbook § 5:47 (2d ed.) (2018). "These ordinances protect existing trees and vegetation and require replacement where preservation isn't feasible. In California, over 80 incorporated cities have such ordinances. (Footnote omitted.) Other states that have such ordinances include Illinois, Missouri, and Texas." *Id.* Numerous municipalities in Michigan have adopted ordinances similar to Canton Township's ordinance.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT THE TREE PROTECTION ORDINANCE DID NOT CONSTITUTE A *PER SE* TAKING.

Plaintiff-Appellee takes issue with the district court's ruling that Canton Township's Forest Preservation and Tree Clearing Ordinance did not constitute a taking *per se* under Fifth Amendment jurisprudence. Specifically, Plaintiff argues that the district court erred in disagreeing with Plaintiff's position that the Ordinance accomplished such a *per se* taking in the vein of both *Horne v. Dept. of Agriculture*, 135 S.Ct. 2419 (2015) and *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982).

In *Horne,* "the government required the raisin growers to turn over their raisins to the government for its use, and limited their crop production, with no guarantee that they would be paid for doing so." *F.P. Development, LLC v. Charter Township of Canton*, 456 F.Supp.3d 879, 889 (E.D. Mich. 2020). The district court held that contrary to *Horne*, "the government regulation at stake does not physically take F.P.'s trees for public use." *Id.*

Plaintiff argues that the linchpin of the district court's application of *Horne* was based upon the transfer of *title* of the raisins to the federal government. To the contrary, however, the district court distinguished the two cases as follows: "Unlike *Horne*, where the government required the raisin growers to turn over their raisins to the government for its use, and limited their crop production, with no guarantee that they would be paid for doing so, 135 S. Ct. at 2428, here, the government regulation at stake does not

physically take F.P.'s trees for public use." *F.P. Dev, supra*. Plaintiff argues that the tree ordinance constitutes constructive possession of the trees on Plaintiff's property.

Plaintiff misleadingly asserts that, "Just as the statute in *Horne* forbade the property owners from exercising any property right with regard to their raisins, the Tree Ordinance forbids F.P. from exercising *any property right* with regard to its trees." (Pltf's Second Brief, p. 33.) This is simply false, and a conclusion with no basis whatever in fact.

As noted in Defendant-Appellant's First Brief, Plaintiff may continue to use the trees in any manner it wishes once any tree is removed– it may keep the trees or sell the timber (which it did as compensation to the company performing the tree removal), or alienate the trees in whatever manner it deems appropriate. Def-Appt's First Brief, p. 16. There is otherwise no limitation on how Plaintiff may choose to dispose of the removed trees. *Id.* Canton Township did not take or seek to acquire physical possession of the trees on Plaintiff's property in any sense.

Nor does *Loretto v. Teleprompter Manhattan CATV Corp., supra*, aid Plaintiff. There, the Court held that a municipal ordinance requiring placement of a cable box on the plaintiff's property constituted a taking because it was a direct physical intrusion onto the property. See *Lingle v Chevron*, 544 U.S. 528 (2005). Plaintiff did not allege facts to demonstrate that Canton Township directly, physically intruded on its property, though, a requirement for the application of *Loretto*.

The district court here agreed with Defendant Township. "Unlike *Loretto*, the

government did not intrude on F.P.'s property, and there was no physical appropriation of property. Also, here, landowners could choose to pay into the tree fund, rather than replanting on their property." *F.P. Dev., supra,* at 889. The issue is as simple as this. Canton did not physically intrude onto Plaintiff's property, the distinguishing factor between this case and *Loretto*.

Plaintiff's amicus, Cato Institute, submits that Canton's ordinance burdens the "fundamental attributes of ownership" under *Loretto* and *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). However, the right to exclude others from the property, as found in *Loretto,* is not affected in any way by the Canton tree ordinance. Furthermore, the "right to gainful use" as posited by amicus Cato Institute under *Lucas* also remains. Although the proper consideration is the full bundle of property rights implicated by a regulation, even considering the trees as a segmented portion of those rights, Plaintiff still has gainful use of the trees themselves, as previously demonstrated. *Lucas* stands for the proposition, that even Plaintiff has cited in its Second Brief, that a taking occurs when a regulation deprives a property owner of "all economically beneficial use of land." *Id.* at 1029. Amicus Cato Institute baldly asserts that the foregoing cases suggest that "*any* government interference with a fundamental attribute of ownership is a *per se* taking," so long as it does not constitute a nuisance. Cato Brf., p. 13. But this is clearly not the law under Fifth Amendment jurisprudence. If it were, virtually no government regulation of land use could withstand constitutional scrutiny.

The district court did not err in holding that Canton's tree protection ordinance

did not constitute a *per se* taking, and this Court should uphold that determination.

II. THE DISTRICT COURT PROPERLY HELD THAT THE FOURTH AMENDMENT DOES NOT APPLY TO THE CASE BEFORE THIS COURT.

Plaintiff also argued that the tree ordinance and its requirements amounted to a violation of the Fourth Amendment proscription against unreasonable seizures. The Fourth Amendment provides in pertinent part that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated…" *Ker v. California*, 374 U.S. 23, 30 (1963). A "seizure" of property occurs when "there is some meaningful interference with an individual's possessory interest in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The Fourth Amendment does not, however, protect possessory interests in all kinds of property. *Soldal v. Cook County,* 506 U.S. 56, 62, n. 7 (1992), citing *Oliver v. United States*, 466 U.S. 170, 176-177 (1984). "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' *is not extended to the open fields*. The distinction between the latter and the house is as old as the common law." *Oliver, supra,* 466 U.S. at 176.

The property here is not a person, his/her house, papers or effects. It is a vacant, mostly treed parcel of approximately 24 acres. The "open fields" doctrine thus applies and the Fourth Amendment does not. The district court recognized that, "these protections are limited to the home and its curtilage or the area 'immediately surrounding and associated with the home.' " *F.P. Dev.*, 456 F.Supp.3d at 895, quoting

Florida v. Jardines, 569 U.S. 1, 6 (2013) (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). The district court correctly noted that Plaintiff's 24-acre parcel, zoned as light industrial use, does not contain a home. *Id.* Therefore, the district court held, the Fourth Amendment does not apply to these facts. *Id.*

Having decided that the Fourth Amendment did not apply to *F.P.*'s property, the District Court did not decide the substance of whether the Township's ordinance otherwise constituted an unreasonable seizure under the Fourth Amendment. Plaintiff relied principally upon *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009), *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006), and *Soldal, supra.* The district court did note that these cases all involved residential property on which a house existed, and that other cases cited by Plaintiff involved "effects", so as to distinguish them from the facts here. 456 F.Supp.3d at 895. But even further, the facts of those cases are so distinguishable from this case as to make them inapposite.

In *Soldal*, the defendant-deputy sheriffs took possession of the plaintiff's mobile home by physically tearing it from its foundation and towing it to another lot. The defendants actually dispossessed the plaintiff of his property. Both *Severance* and *Presley* presented situations where the government imposed a requirement on the private property that restricted the property owner's right to exclude others. In *Severance*, the government imposed an easement across the plaintiff's property, by definition creating in the government and the public dominant rights over the real property and preventing the owner from restricting access to the property. 566 F.3d at 492-493.

Similarly, the city in *Presley* published a map showing a public trail across the plaintiff's property and "encouraged the public to trespass" on the property. 464 F.3d at 483. Members of the public did, indeed, use the trail, walking across the plaintiff's property. *Id.*

The hallmark of a "seizure" by government, whether reasonable or unreasonable, is "meaningful interference with the owner's *possessory interest* in the property." *Presley,* 464 F.3d at 487, citing *U.S. v. Jacobsen, supra.* (emphasis added). Canton did not impose any regulation or restriction on Plaintiff's property, either as a whole or in the trees themselves, that physically intruded on the property or prevented Plaintiff from alienating the property or keeping others out.

It is also important to recognize that neither the *Severance* nor *Presley* courts held that the respective governments were responsible for a violation of the Fourth Amendment; the courts in both cases merely held that the respective plaintiffs had stated a claim for violation of the Fourth Amendment sufficient to withstand dismissal under Fed.R.Civ.P. 12(b)(6).

Defendant-Appellee would note that this Court has not directly endorsed application of a Fourth Amendment claim in the same context as *Severance* and *Presley*, there being a clear distinction between a "seizure" under the Fourth Amendment and a "taking" under the Fifth Amendment. In the civil context, the Fourth Amendment applies to searches and seizures only "to resolve the legality of these government actions without reference to other constitutional provisions." *U.S. v. James Daniel Good Real*

Property, 510 U.S. 43, 51 (1993). If the government's action goes beyond the traditional meaning of a search and seizure and other constitutional provisions apply, those provisions should be analyzed instead of the Fourth Amendment. *Id.* In *James Daniel Good,* the court found that since the government's alleged seizure of property was not to preserve evidence of wrongdoing, but instead to assert control over the property, the actions should be brought under the Due Process Clause of the Fifth and Fourteenth Amendments. *Id.*

This is not to say that the Fourth and Fifth Amendments are mutually exclusive, in this case or otherwise. However, as deprivation of a property owner's possessory interest in its property is a necessary ingredient to finding a seizure, Plaintiff's claim here of an unreasonable seizure of its property by Canton Township must fail. The district court did not err in rejecting Plaintiff's allegation of a Fourth Amendment violation. Defendant-Appellee respectfully urges this Court to affirm.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE TREE FEES DO NOT VIOLATE THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

Plaintiff further claims that the mitigation fees violate the Eighth Amendment proscription against excessive fines. That constitutional provision reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Excessive Fines Clause of the Eighth Amendment bars forfeitures that are grossly disproportionate or excessive in relation to the offense committed. *United States*

v. Bajakajian, 524 U.S. 321, 323 (1998) (prohibiting forfeitures that are "grossly disproportional to the gravity of a defendant's offense"); *Alexander v. United States*, 509 U.S. 544, 558-59 (1993). In *Timbs v. Indiana*, ___U.S.___, 139 S.Ct. 682, 687 (2019), the Court held that the Excessive Fines Clause applies to the states through the Fourteenth Amendment. In so holding, the Court recognized that, "the protection against excessive fines guards against abuses of government's *punitive or criminal-law-enforcement authority*." *Id.*, 139 S.Ct. at 686 (emphasis added).

The Eighth Amendment proscription against excessive fines is not implicated in this case. This case does not involve Canton's criminal or punitive ordinances; the Forest Preservation and Tree Clearing Ordinance is part of the Township's land use regulations, specifically the zoning ordinance. Although Plaintiff continually and self-servingly refers to the monies to be paid into the Township's tree fund as a "fine," this is a deliberate misnomer in order to persuade the Court that it is a punitive measure subject to the Eighth Amendment. There is a fine for a criminal violation of the Zoning Ordinance of $500.00. See Complaint [R. 1, Page ID 20], ¶ 105; Canton Twp. Ord. § 1.7(c)("Except as otherwise provided by law or ordinance, a person convicted of a violation of this Code shall be punished by a fine not to exceed $500.00, imprisonment for a period of not more than 90 days, or both.")

As stated above, the Excessive Fines Clause applies to the government's penal authority. *Timbs, supra; Bajakajian, supra.* The tree ordinance here imposes the tree fund fee whether or not a property owner violates the ordinance. The fee is imposed only if,

as part of a tree removal permit, the property owner chooses not to replace trees on its own property or elsewhere, and even when he/she has applied for a permit and there is no violation of the ordinance. § 5A.08. This is not a fine; it is valid mitigation for costs that the Township would incur to undertake the replacement of removed trees. In essence, it permits the property owner to transfer the replanting requirement to Canton Township while covering the cost of doing so.

In *Shoemaker v. Howell*, 795 F.3d 553 (6th Cir. 2015), this Court upheld as valid a user fee for abatement of an ordinance violation. There, the property owner refused to cut the lawn on his property that sat in the public right-of-way of the residential street abutting his house. The overgrown lawn became an eyesore and the City of Howell contacted the owner attempting to obtain his cooperation and cut the vegetation (mow the grass) to comply with the relevant ordinance. When after numerous efforts the owner refused to mow the lawn, the City of Howell had the work performed by a local contractor. In issuing the owner a notice of violation of the ordinance, the City assessed a fine for the violation of the ordinance and charged the owner for the cost of the grass mowing abatement plus a nominal administrative fee.

The owner filed suit against the City of Howell, claiming violation of procedural and substantive due process. Although the Excessive Fines Clause was not implicated in that case, the Court recognized the difference between the "fine" imposed for the ordinance violation, and a "fee" to pay for the service that the City had to engage to mitigate the consequences of the violation:

> Like many American cities, the City of Howell, Michigan requires its property owners to keep their lawns mowed below a certain height. Violators of the ordinance are charged *a fine as well as a fee* for the costs associated with hiring a private contractor to mow or otherwise maintain the property.

795 F.2d at 556 (emphasis added).

This case is analogous, albeit on a larger scale, to *Shoemaker*. Canton Twp. Ord. § 1.7 imposes the $500.00 fine for a violation of any part of the Township Code. The Forest Preservation and Tree Clearing Ordinance provides for a fee in lieu of replanting to be deposited in the tree fund. Ord. § 5A.08.E.1. Like Howell in *Shoemaker*, Canton imposes the tree replacement fee to cover the Township's costs of replanting trees if the owner chooses not to do so.

Plaintiff argues with the analogy to municipal sewer tap fees because, Plaintiff claims, it does not receive a service for a contribution to the tree fund. Pl's Second Brief, p. . *Shoemaker* demonstrates, however, that a violator of an ordinance may be held responsible to bear the costs of the government's mitigation of the violation. That is exactly what the tree replacement fee does: imposes on the property owner a fee for Canton Township's service of replanting trees where the owner does not wish to undertake that performance itself.

Plaintiff also insists, contrary to the evidence, that the tree replacement fee is punitive in nature. For this proposition, Plaintiff relies upon the testimony of Township Planner Jeff Goulet, who termed the tree fund a "disincentive". But the "disincentive" is not to prevent or deter a violation of the law. It is, as the New Jersey Supreme Court

put it, "To encourage replanting." See *New Jersey Shore Builders Ass'n v. Township of Jackson*, 199 N.J. 38, 970 A.2d 992 (2009). Replanting would be a much less expensive endeavor than paying into the tree fund to have the Township perform the replacement.

Furthermore, the tree fund payment does not depend on a violation of the Ordinance. It is part of the permit process, and only becomes relevant if the property owner chooses not to replant trees on site or somewhere else. Ord. § 5A.08.E.[1]**Error! Bookmark not defined.** In this case, it became relevant because Plaintiff did not obtain a permit and has never indicated a willingness to replant trees on its site. Plaintiff is in no different a position *vis-à-vis* the tree replacement fee than if he had obtained a permit and was not charged with a violation of the ordinance.

The district court here held that Plaintiff's burden to prove an Eighth Amendment violation is to "show that the fine is payment as 'punishment for some offense.'" *F.P. Dev., supra,* 456 F.Supp.3d at 896, citing *Austin v. United States*, 509 U.S. 602, 622 (1993). The court correctly observed that, "But the removal of trees is not an 'offense' but merely a regulated land use activity. (Footnote omitted.) The replacement costs associated with the granting of a tree removal permit, whether a landowner

[1] "Wherever possible, replacement trees must be located on the same parcel of land on which the activity is to be conducted. Where tree relocation or replacement is not possible on the same property on which the activity is to be conducted, the permit grantee shall either: 1. Pay monies into the township tree fund for tree replacement within the township. These monies shall be equal to the per-tree amount representing the current market value for the tree replacement that would have been otherwise required. 2. Plant the required trees off site."

chooses to pay into the tree fund or replaces trees herself, is not penal in nature, but remedial." *Id.* The court then held that because the tree fees are not penal in nature, the Eighth Amendment does not apply here, noting that "Plaintiff is comparing apples to oranges," *Id.*, by comparing the $500.00 fine to the much larger tree replacement fee.

Even if the Eighth Amendment applies to these fees, however, "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. "Excessive means surpassing the usual, the proper, or a normal measure of proportion." *Id.* (quoting Webster, American Dictionary of the English Language when defines "excessive" as "beyond the common measure of proportion"). The burden of showing disproportionality fall squarely on the party challenging the ordinance. *United States v. Jose*, 499 F.3d 105, 108 (1st Cir. 2007); *United States v. Ahmad*, 213 F.3d 805, n. 1, 816 (4th Cir. 2000).

Courts have found that if a fine is equal to the loss caused by the actions, then it is not excessive in violation of the Eighth Amendment. *U.S. v. Blackwell*, 459 F.3d 739, 771 (6th Cir. 2006) (holding that $1,000,000 fine for insider trading was not excessive because it was equal to the loss.). In this case, Canton Township's fees are clearly not excessive. The Ordinance lists the specific landmark/historic trees covered under the Ordinance. Ord. § 5A.06. The Ordinance does not prohibit tree removal, but merely requires a permit before doing so. Additionally, the Ordinance in no way requires

payment to the Township for specific tree removals. Instead, consistent with the purpose of this Ordinance, it requires *replacement* of the specific tree(s) removed. Ord. § 5A.08(E). Since an equivalent replacement of a regulated tree on a 1:1 or 3:1 basis is without question proportionate to the harm caused by its removal, there is absolutely no way Plaintiff can show the fees are "grossly disproportionate" as required under the Eighth Amendment.

Furthermore, the cost assessed pursuant to the fee schedule is a market cost. Ord. § 5A.08E ("the township tree fund [is] for tree replacement within the township. These monies shall be equal to the per-tree amount representing the current market value for the tree replacement that would have been otherwise required.") The Township Planner testified to the average cost of replacement trees, which had not changed since 2006. [R. 29-2, Page ID 569.] Plaintiff has never refuted this evidence as reflective of the Township's cost in performing tree replacement. That the total fees are in excess of $47,000 only serves to demonstrate the extent of Plaintiff's tree removal that must be remedied. The fees themselves are not "grossly disproportionate" and satisfy the strictures of the Eighth Amendment.

The district court properly held that the Eighth Amendment Excessive Fines Clause does not apply and Defendant-Appellant/Cross-Appellee respectfully requests that the Court affirm that ruling.

IV. THE COURT SHOULD REVERSE THE DISTRICT COURT'S HOLDING THAT THE TREE ORDINANCE AS APPLIED WAS A TAKING UNDER THE *PENN*

***CENTRAL* ANALYSIS.**

Without rehashing its previous arguments in this regard, Defendant-Appellant will address a few key components of the ad hoc analysis under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). See also, *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

The first factor to analyze under *Penn Central* is the economic impact of the regulation. *Id.*, 438 U.S. at 124. This factor simply compares the value that has been taken from the property with the value that remains in the property. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). As to the character of the government action, courts look at "whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good' to determine whether a taking has occurred." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005).

Plaintiff claims that the economic impact of the tree ordinance on its property is "significant". But neither Plaintiff nor the district court compared the value allegedly taken from the property as a result of the tree ordinance with the value that remains in the property. The district court noted that Plaintiff purchased the property for $550,000 in 2007, but there is no evidence in the record whatever of the value of the property in 2018 when this lawsuit was filed, or in 2020 when the district court decided the case. As amicus Michigan Townships Association astutely observed, this should be a simple comparison between the value of the property with trees and without trees, which an

appraisal would accomplish. But Plaintiff did not submit an appraisal or any evidence of the current value of the property.

Furthermore, Plaintiff focuses on the tree replacement fees compared with the 2007 value of the property, arguing that the fees would exceed the value of the property. But this assumes the removal of every regulated tree from the property. There has been no development plan proffered to establish what trees would need to be removed if Plaintiff's owner, Mr. Powelson, expanded his business on the adjoining property. IN this regard, then, amicus MTA is correct that the district court was merely speculating about the true economic impact.

Considering the reasonable investment-backed expectations of Plaintiff, the third criterion in *Penn Central*, Plaintiff and its amicus also assert that pre-acquisition regulation of property is always immaterial, citing for this proposition Justice Antonin Scalia's concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). However, the U.S. Supreme Court has never endorsed this approach. Even 16 years post-*Palazzolo*, the Supreme Court continued to recognize that pre-existing regulation is but one factor in the determination of the reasonableness of an owner's investment-backed expectations. *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017). Without some indication that a majority of the Court favors the absolutist position proposed by the Cato Institute, that pre-existing regulations are always immaterial, this Court would be stepping out on a limb unsupported by the current state of the law as expressed by the Supreme Court.

V. THE DISTRICT COURT ERRED IN HOLDING THAT THE TREE ORDINANCE IS AN UNCONSTITUTIONAL EXACTION UNDER *DOLAN V. CITY OF TIGARD*.

As Defendant-Appellant argued in its First Brief, the holding of the district court that the tree ordinance is an unconstitutional exaction in substance applied a stricter test than the "essential nexus/rough proportionality" test expressed in *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Both the district court and Plaintiff relied upon *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74 (Tex. App—Dallas, 2013). In that case, the City required a subdivision developer to pay what the Court called "tree retribution fees," in the amount of $34,500 before the City would approve the subdivision. The Court found the fees to be an exaction, and the burden then shifted to the City to establish the essential nexus/rough proportionality of the fees. *Id.*, 421 S.W.3d at 95. The Court held that the City's stated interests were legitimate and the fees bore an essential nexus to the substantial advancement of those interests. *Id.* The Court held, however, that the evidence proffered by the City in support of summary judgment did not sufficiently explain the projected impact caused by removal of the trees during the development. *Id.* at 96.

The *Mira Mar* case is distinguishable in that the Coppell ordinance required a permit to remove trees and a fee per tree of $100 per inch of trunk diameter. There was no provision in that ordinance, or at least not one that was discussed in the decision, giving the property owner any option to replace trees on site or elsewhere, or take any

other type of action to mitigate the effects of the tree removal. The decision also does not mention any exemptions that would decrease the burden to the property owner, like the Canton Ordinance's exemption of 25% of the inventory of regulated trees. Finally, there was apparently no similar provision to 5A.05.F., where the individualized assessment is performed at the time of the tree count, counting and including only healthy trees of 6" diameter at breast height, and eliminating brush, scrub trees, and dead or diseased trees. Canton's Ordinance differs in these significant respects.

This case also differs from *Mira Mar* in that both the Township Planner and deputy Planner have testified to the aesthetics of a tree canopy, and Ms. Thurston expressly referenced a problem of a shortage of trees in Canton. Logically, where a shortage exists, removal of more trees cannot improve that circumstance. The record evidence here also shows that Plaintiff was not developing the property in a manner in which the effects of tree removal could be mitigated in other ways. Plaintiff never submitted a tree inventory, and Mr. Powelson conceded he never had one prepared before any trees were removed. Plaintiff did not submit a site plan, plot plan or other plan that the Township could review to determine whether the 25% applies, or in what other ways it could work with Mr. Powelson to achieve the goals of both parties.

The Canton Township Forest Preservation and Tree Clearing Ordinance, Appendix A, § 5A.05.F. expressly provides for an analysis on a case-by-case basis:

> F. *Review standards*. The following standards shall be used to review the applications for tree removal permits:

> 1. The protection and conservation of irreplaceable natural resources from pollution, impairment or destruction is of paramount concern. The preservation of landmark/historic trees, forest trees, similar woody vegetation and related natural resources shall have priority over development when there are other on-site location alternatives.
>
> 2. The tree *shall be evaluated for effect on the quality of the area* of *location, including tree species, habitat quality, health and vigor of tree, tree size and density. Consideration must be given to scenic assets, wind blocks and noise buffers.*
>
> 3. The trees and surrounding area *shall be evaluated for* the quality of the involved area by considering the following:
>
> a. Soil quality as it relates to potential tree disruption.
> b. Habitat quality.
> c. Tree species (including diversity of tree species).
> d. Tree size and density.
> e. Health and vigor of tree stand.
> f. Understory species and quality.
> g. Other factors such as value of the trees as an environmental asset (i.e., cooling effect, etc.). (Emphasis added.)

Contrary to Plaintiff's assertion and the district court's holding, the Ordinance mandates an individualized assessment of the effect of tree removal on the public by requiring a consideration of "quality of the area of location, including tree species, habitat quality, health and vigor of tree, tree size and density," "*scenic assets*, *wind blocks and noise buffers*," and other factors including "such as value of the trees *as an environmental asset*." This is necessarily an individualized assessment on the effect of tree removal on the public. To pretend otherwise is to simply ignore the language of the ordinance.

Furthermore, the district court and Plaintiff assume that evaluating the impact of tree removal means impacts only on neighboring property. But as Ms. Thurston and Mr. Goulet testified, the green landscape and an overall tree canopy desired by the Township are diminished unless those healthy, regulated trees that are removed get

replaced.

Thus, as set forth in Defendant-Appellant's First Brief, the tree replacement fee required by the Canton Township ordinance bears an essential nexus and rough proportionality to the impact of the tree removal. It therefore does not constitute an unconstitutional exaction, and the district court erred when it so held.

CONCLUSION

Defendant-Appellant/Cross-Appellee, Charter Township of Canton, Michigan, therefore respectfully requests that this Court REVERSE the District Court's grant of summary judgment to Plaintiff and findings that Defendant-Appellant's as applied to Plaintiff created a regulatory taking and an unconstitutional exaction under the Fifth and Fourteenth Amendments, AFFIRM the District Court's grant of summary judgment to Defendant of Plaintiff's claims of *per se* taking and violation of the Fourth and Eighth Amendments, and REMAND to the District Court with instructions to enter summary judgment for Defendant-Appellant.

CERTIFICATE OF CONFORMITY

Pursuant to Fed.R.App.P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation found at Fed.R.App.P. 32(a)(7)(B). It contains 5,378 words and has been prepared in Microsoft Word, using a proportionally spaced face, Garamond, and a 14-point font size.

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2020, I electronically filed the Third Brief of Defendant-Appellant/Cross-Appellee with the Clerk of the Court of the United States Court of Appeals for the Sixth Circuit using the ECF system which will send notification of such filing to all counsel of record.

/s/ PAULA M. ROSENTHAL