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

BRIEF ON APPEAL OF DEFENDANT-APPELLANT/CROSS-APPELLEE

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JURISDICTIONAL STATEMENT

Plaintiff brought its action in the United States District Court for the Eastern District of Michigan under 42 U.S.C. § 1983, seeking remedies for alleged violation of its rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution. The District Court had jurisdiction over the matter based on a federal question under 28 U.S.C. § 1331.

This Court has appellate jurisdiction of the final decision of the District Court, consisting of a Judgment entered on April 23, 2020. 28 U.S.C. § 1291. Defendant-Appellant filed its Notice of Appeal on May 13, 2020, twenty (20) days after the entry of judgment. The appeal is from a final judgment of the District Court disposing of all parties' claims.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed.R.App.P. 34(a)(1) and 6 Cir. R. 34(a), Defendants-Appellant/Cross-Appellee, CHARTER TOWNSHIP OF CANTON, respectfully requests that the Court entertain oral argument to enable counsel for the respective parties to address any outstanding issues regarding the facts or the applicable legal principles. Oral argument will permit Defendant-Appellant to clarify and to answer any questions that the Court may have with respect to any of the issues presented. Argument will also permit Defendant, as Cross-Appellee, to rebut arguments presented by Plaintiff/Cross-Appellant in its Reply Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED BY FINDING THAT THE TREE ORDINANCE PROVISIONS AS APPLIED TO PLAINTIFF CONSTITUTED A REGULATORY TAKING?

The District Court answered, "No."

Plaintiff-Appellee answers, "No."

Defendant-Appellant answers, "Yes."

WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT THE TREE ORDINANCE PROVISIONS AS APPLIED TO PLAINTIFF IMPOSED AN UNCONSTITUTIONAL EXACTION

The District Court answered, "No."

Plaintiff-Appellee answers, "No."

Defendant-Appellant answers, "Yes."

STATEMENT OF THE CASE

At issue in this action is an approximately 24-acre vacant parcel of property located west of Sheldon Road and south of Michigan Avenue in Canton Township, Wayne County, Michigan, Parcel ID# 71-135-99-0001-708 ("the Property"). See First Amended Verified Counter-Complaint [R. 16, 16-1, Page ID # 149-165, 167]. The Property at issue in this matter was once part of a larger, 40-acre parcel that is traversed along its eastern edge by the Fisher-Lenge Drain, a county drain established pursuant to the Drain Code of 1956 and under the jurisdiction of Wayne County ("the Drain").

Plaintiff/Appellee, F.P. Development, Inc., purchased the Property from Defendant/Appellant, Charter Township of Canton ("Canton" or "the Township") in approximately 2007. [R. 34-3, Page ID # 672-673.] Plaintiff's manager and sole member, Martin F. ("Frank") Powelson, testified at deposition that when he purchased the Property, he intended to use it to expand his adjacent sign business, Poco. [R. 34-3, Page ID # 674-675.] Before purchasing the Property, Mr. Powelson testified, the only research or due diligence he did was to make sure the Property was not contaminated. [34-3, Page ID # 675.]

On or about October 27, 2016, Canton Township's Planning Services Division received an application to split off 16 acres from the 40-acre parcel. [R. 16-2, Page ID # 169-176.] According to the property split application, Plaintiff would retain ownership of an approximately 24-acre parcel (the "Property"), while the 16

acres being split off would be conveyed to 44650, Inc. (the "Split Parcel"). [R. 16-2, Page ID # 169-176]. The Property and the Split Parcel were undeveloped parcels and covered with mature, high quality trees and other vegetation. [R. 16, Page ID # 149-165.]

On December 22, 2016, after initial review, Canton Township ("Canton" or "the Township") responded with comments on items that needed to be addressed prior to finalizing the split request. [R. 16-3, Page ID # 178-180.] In correspondence dated July 14, 2017, Ginger Michaelski-Wallace, the engineer for Plaintiff/Appellee and 44650, Inc., was notified in writing that the split application was tentatively approved, subject to the submission of certain, enumerated documents. [R. 16-4, Page ID # 182.] The letter further noted pertinent information about use of the Property, including, but not limited to, the requirements to submit a site plan as a pre-condition to development and the requirement to obtain a tree removal permit prior to the removal of any trees from the Property. *Id*.

On or about August 1, 2017, before the lot split became final, Mr. Powelson executed a deed conveying the Split Parcel to 44650, Inc. [R. 16-5, Page ID # 184-186.] On November 27, 2017, correspondence was again sent to the Property and Split Parcel representative, reiterating the requirements to complete the parcel split, including a tree removal permit prior to the removal of any trees from the Property. [R. 16-6, Page ID # 188.] On January 22, 2018, following receipt of the documents

identified in the July 14, 2017 and November 27, 2017 letters, Ms. Michalski-Wallace was notified the property split was complete and new parcel identification numbers had been issued. [R. 16-7, Page ID # 190-194.]

On or about April 27, 2018, Township Landscape Architect and Planner Leigh Thurston received a phone call from an individual inquiring why so many trees were permitted to be removed from the Split Parcel. [R. 16, Page ID # 149-165.] When Ms. Thurston investigated the allegation of unpermitted tree removal from the Split Parcel, she saw tree removal also actively occurring on the Property. *Id*. This was the first notification to the Township that any trees were being removed from the Property. *Id*. Ms. Thurston noticed piles of brush on the western side of the property, opposite the location of the Drain on the eastern edge of the property; further, she noticed piles of logs that had recently been felled. *Id*.

The Canton Township Zoning Ordinance requires a permit for tree removal as set forth in Article 5A, § 5A.05(A) for:

> a. The removal or relocation of any tree with a DBH (diameter at breast height) of six inches or greater on any property;
>
> b. The removal, damage or destruction of any landmark tree;
>
> c. The removal, damage or destruction of any tree located within a forest; and
>
> d. Clear cutting or grubbing within the dripline of a forest.

[R. 16-8, Page ID # 196-201, Canton Township Forest Preservation and Tree Clearing Ordinance.]

At no time did Plaintiff and/or anyone acting on behalf of Plaintiff submit a site plan or apply for a tree removal permit under the Ordinance. [R. 16, Page ID # 149-165; R. 34-3, Page ID # 683.]

After viewing the Property from a neighboring parcel, Ms. Thurston noted the following ordinance violations:

a. Removal of regulated trees without a Township permit;

b. Removal of landmark trees without a Township permit;

c. Removal of trees within the dripline of a forest without a Township permit;

d. Cutting of trees within 25 feet of the Drain; and

e. Cutting of trees and other work within a county drain and drain easement under the jurisdiction of Wayne County. [*Id*., Page ID #154.]

Ms. Thurston immediately went to the adjacent business operated by Mr. Powelson, POCO, where staff got him on the phone to speak with Ms. Thurston. *Id*. Ms. Thurston informed Mr. Powelson that he needed a permit to remove the trees. *Id*. Page ID #155. Mr. Powelson responded that he "had already paid [the tree removal] guys," and that he had "tried to get Wayne County to clean the drain ... ." *Id*.

Based on the possible impact to the rights of other public agencies having an interest in the Property, Ms. Thurston notified the Michigan Department of Environmental Quality, Wayne County and the Wayne County Drain

Commissioner's Office of the tree removal and impacts to regulated areas on both the Property and the Split Parcel. *Id*.

Despite requests from Township representatives, up to and including the Township Supervisor, staff was continuously denied access to the Property by Mr. Powelson to analyze the Property to determine the extent of the tree removal. *Id*. On July 24, 2018, the Township's in-house counsel was contacted by counsel for Plaintiff/Appellee, indicating all communication concerning the Property and the Split Parcel was to be directed to him. *Id*.

After much back and forth, the date of August 22, 2018, was agreed upon to inspect of the Property in order to conduct an analysis of the trees removed from the Split Parcel, which had been completely clear-cut. *Id*. While on the Property, Ms. Thurston saw a number of tree stumps, confirming the tree removal she had observed in April. *Id*. She further observed that numbers had been spray painted on various standing trees, and that the piles of logs that she had observed in April had been removed from the Property. *Id*., Page ID #156. She also noted that the majority of the trees that had been cut appeared to be oak trees. *Id*.

Despite Ms. Thurston's verbal notice of the ordinance violation to Mr. Powelson, logging activities continued on the Property. *Id*. Defendant/Appellant therefore posted a "Stop Work" notice to prevent further Ordinance violations, and further provided a Written Notice of Violation to Plaintiff/Appellee through its counsel. [R. 16-9, Page

ID # 203-204.] On October 12, 2018, a second visit was conducted to the Property to count and measure the illegally removed trees in order to estimate the number and species of trees that had been removed from the Property. [R. 16, Page ID # 149-165.]

Under Canton Township ordinance, a "regulated tree" is "...any tree with a DBH [diameter breast height] of six inches or greater, and a "landmark tree" is defined as ...any tree which stands apart from neighboring trees by size, form or species, ... which has a DBH of 24 inches or more." [R. 16-8, Page ID # 197-198, 201.] Upon conducting the tree count, Ms. Thurston prepared a spreadsheet showing the types, sizes and numbers of trees that she personally observed had been cut on the Property. Her analysis concluded that at least 159 "regulated trees" were removed, including 14 "landmark" trees. The Township Ordinance requires replacement of regulated trees on a 1:1 ratio, and replacement of landmark trees on a 3:1 ratio. [R. 16-8, Page ID # 200-201.] In total, based on the Township's analysis, Plaintiff is required under Township Ordinance to replace 187 trees that were removed.

In lieu of planting replacement trees, Plaintiff has other options, as set forth in § 5A.08(E), one of which is paying into the Township's tree fund the market value of the trees that were removed. [R. 16-8, Page ID # 201.] With current market values for the types of trees required to replace the regulated trees removed at approximately $300 per tree, and market value of the trees required to replace the landmark trees averaging $450 per tree, Plaintiff is responsible for paying into the tree fund for

the unlawfully removed trees—should it choose not to replant any of the removed trees. See First Amended Verified Counter-Complaint [R. 16, Page ID # 151-157.]

PROCEDURAL HISTORY

Plaintiff filed its Complaint here on November 26, 2018 to preempt further proceedings on the Notice of Violation and Stop Work Order. Plaintiff's Complaint [R. 1, Page ID # 1-25.] alleges that the Township has in one or more ways committed a taking of Plaintiff's property for public use without just compensation in violation of the Fifth and Fourteenth Amendments (Counts I, II and IV), a seizure of Plaintiff's property in violation of the Fourth Amendment (Count III), and that the replacement of trees or deposit into the tree fund violates the Eighth Amendment proscription against excessive fines. (Count V)

As any prosecution of the ordinance violation against F.P. Development arose out of the transaction or occurrence that is the subject matter of its Complaint, Defendant filed a Verified Counter-Complaint [R. 13, Page ID # 149-165.] to pursue the ordinance violation as a compulsory counterclaim under Fed.R.Civ.P. 13(a)(1)(A). Defendant amended the Counter-Complaint as of right pursuant to Fed.R.Civ.P. 15(a)(1). See [R. 16, Page ID # 149-165.], Amended Counter-Complaint.

Following discovery, the parties both filed dispositive motions, Plaintiff filing a Motion for Summary Judgment [R. 26, Page ID # 300-343.] on September 30, 2019, followed by Defendant's Motion to Dismiss, for Judgment on the Pleadings and/or for Summary Judgment [R. 29, Page ID # 480-509.] on October 7, 2019. Defendant's

Motion sought dismissal of the action on the grounds that Plaintiff's as-applied constitutional claims were not ripe, as there had been only a Stop Work order issued, and no final decision as to the consequences of the ordinance violation by Plaintiff. Defendant also sought judgment on the pleadings of Plaintiff's facial challenges, and summary judgment of the as-applied challenges.

Following briefing, the Court held oral argument on the motions on January 23, 2020. On April 23, 2020, the District Court entered its Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment. [R. 44, Page ID # 973-1012.] The opinion is reported at 456 F.Supp.3d 879.

The District Court's Order granted Defendant's Motion for Summary Judgment[1] and denied Plaintiff's Motion for Summary Judgment on Plaintiff's claims of takings *per se* under *Horne v Dept. of Agriculture*, 135 S.Ct. 2419 (2015), holding that Defendant Township did not take Plaintiff's trees in the same manner that the Department of Agriculture took the plaintiffs' raisins in *Horne.* The Court further granted Defendant's motion as there was no physical invasion by the Township that would bring this case within the ambit of *Loretto v Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court also ruled that the Fourth Amendment did not

[1] In ruling on Defendant's Motion, the District Court did not distinguish among the grounds in Rule 12(c) and 56(c), although it ruled in Defendant's favor on the grounds raised under Rule 12(c), ruling that the Ordinance was not unconstitutional on its face.

apply to the claims alleged, and the tree fund did not violate the Eighth Amendment proscription against excessive fines. 456 F.Supp.3d at 895-897.

The District Court denied Defendant's Motion to Dismiss on the ground of ripeness and denied Defendant's Motion for Summary Judgment on Plaintiff's as-applied challenges. The Court granted Plaintiff's Motion for Summary Judgment, finding that the tree ordinance as applied to Plaintiff constituted a regulatory taking and an unconstitutional exaction. Having disposed of all federal claims, the Court declined to exercise supplemental jurisdiction over Defendant's Counterclaim and dismissed that pleading without prejudice. The Court entered a final Judgment on the same date, April 23, 2020. [R. 45, Page ID # 1013.] Defendant timely appealed the District Court's Order by its Notice of Appeal on May 13, 2020. [R. 46, Page ID # 1014.] Plaintiff also cross-appealed the District Court's grants of summary judgment to Defendant. [R. 48, Page ID # 1016.]

STANDARD OF REVIEW

The case comes before this Court upon appeal of the grant of Plaintiff's Motion for Summary Judgment and denial of Defendant's Motion for Summary Judgment as to the claims of regulatory takings and unconstitutional exaction. Appellate courts review the grant of summary judgment *de novo*. *Hunt v. Sycamore Community School Dist. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008).

SUMMARY OF ARGUMENT

Defendant-Appellant, CHARTER TOWNSHIP OF CANTON, appeals the determination that its Defendant-Appellant appeals the grant of partial summary judgment in favor of Plaintiff/Appellee and denial of Defendant/Appellant's motion for summary judgment as to Counts I, II and IV of the Complaint. Specifically, Appellant appeals the district court's holding that Appellant Township's Forest Preservation and Tree Clearing Ordinance, Canton Charter Township Code of Ordinances, Appendix A-Zoning, Art. 5A.00, §§ 5A.01-5A.08, as applied to Plaintiff/Appellee, is an unconstitutional regulatory taking and an unconstitutional exaction amounting to a taking of private property for public use without just compensation under the Fifth Amendment to the U.S. Constitution.

Defendant-Appellant asserts that the District Court erred in holding that Plaintiff has satisfied the factors set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) to constitute a regulatory taking requiring compensation. Defendant-Appellant further argues that the tree replacement and/or mitigation fees required under its Forest Preservation and Tree Clearing Ordinance are not an unconstitutional exaction, as ruled by the District Court. The tree ordinance as applied to Plaintiff-Appellee fulfills the essential nexus and rough proportionality requirements of the Fifth Amendment, as set forth by *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) and

Koontz v. St. Johns River Water Management Dist., 570 U.S. 595, 612 (2013). The District Court should have granted summary judgment in Defendant's favor.

ARGUMENT

I. THE DISTRICT COURT ERRED BY FINDING THAT THE TREE ORDINANCE PROVISIONS AS APPLIED TO PLAINTIFF CONSTITUTED A REGULATORY TAKING.

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." This Clause applies to the states by virtue of the Fourteenth Amendment. The goal of the Clause is to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

A party challenging governmental action as an unconstitutional burden bears a substantial burden. *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989). Government regulation often "curtails some potential for the use or economic exploitation of private property." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Indeed, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). "As long recognized some values are enjoyed under an implied limitation and must yield to the police power." *Id.*

Therefore, "not every destruction or injury to property by government action has been held to be a taking in the constitutional sense." *Armstrong v. United States*, 364 U.S. 40, 48 (1960). The process for evaluating a regulation's constitutionality involves an examination of the "justice and fairness" of the governmental action. *Andrus*, 444 U.S. at 65. The Supreme Court wrestled for decades how to decide this "fairness and justice" of government regulations to determine whether the public burdens imposed by regulation constituted a taking requiring compensation under the Fifth Amendment.

The Court arrived at several factors to consider when determining whether "justice and fairness" require an economic injury caused by public action to be compensated by the government: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

The economic impact of the regulation 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).

"A 'taking' may more readily be found" in the former case than in the latter. *Penn Central Transp. Co., supra,* at 124. If the regulation serves a public interest and is ubiquitous, then a plaintiff must show that the regulation's economic impact and its effect on investment-backed expectations is the equivalent of a physical invasion upon the property. *K & K Construction, Inc. v. Department of Environmental Quality*, 267 Mich App 523, 553 (2005).

"All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another. In the words of Mr. Justice Holmes, speaking for the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), there is 'an average reciprocity of advantage.'" *Penn Central Transp. Co., supra*, at 140 (Rehnquist, J. dissenting).

Even when the evidence is viewed in the light most favorable to Plaintiff, it cannot prevail under this test as a matter of law. First, zoning and land use regulations are ubiquitous in nature and all property owners bear some burden and some benefit under these schemes. *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 341 (2002). This average reciprocity of advantage benefits all property owners. *Pennsylvania Coal, supra*, at 41. *Penn Central, supra,* 438 U.S. at 140 (Rehnquist, J., dissenting). The purpose of the Township's Tree Ordinance is "to promote an increased quality of life through the regulation,

maintenance and protection of trees, forests and other natural resources." [R. 16-8, Page ID # 197.] This is without question a public interest that is ubiquitous to all residents of the Township.

Furthermore, Plaintiff has not shown a sufficient economic impact or effect on its investment-backed expectations because of the regulation. With respect to the comparison under *Keystone*, the value that has been taken from the property with the value that remains in the property, value remains in the property. the mere requirement of tree replacement or payment into the tree fund and has not impaired Mr. Powelson's ability to develop the Property to expand his POCO business.

In reaching this conclusion, the court is to consider the property as a whole, not separated into various bundles of rights. *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017).

> This requirement that "the aggregate must be viewed in its entirety" explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. *Andrus v. Allard*, 444 U.S. 51, 66, 100 S.Ct. 318, 62 L.Ed.2d 210 (1979). It also clarifies why restrictions on the use of only limited portions of the parcel, such as setback ordinances, *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927), or a requirement that coal pillars be left in place to prevent mine subsidence, *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S., at 498, 107 S.Ct. 1232, were not considered regulatory takings. In each of these cases, we affirmed that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking." *Andrus*, 444 U.S., at 65–66, 100 S.Ct. 318.

Tahoe–Sierra Preservation Council, Inc., supra, 535 U.S. at 327.

Considering Plaintiff's "full bundle of property rights," the regulation of one strand of that bundle, removal of trees, is not a taking. *Id*., citing *Andrus*. The case here is analogous to *Andrus, supra*, as referenced by the *Tahoe-Sierra* Court. Defendant Township's regulation of trees does not prohibit tree removal, but merely requires a permit to remove those specifically defined trees that are deemed valuable and therefore regulated. The Township does not otherwise impose any physical intrusion or restraint upon the trees. Unlike the regulation at issue in *Andrus*, Canton's Ordinance does not prohibit commercial transactions in the trees once removed. Plaintiff could (and did) sell the timber by bargaining it as payment for the services of the company that performed the removal. [R. 34-3, Page ID # 676, 684.] There was otherwise no limitation on how Plaintiff chose to dispose of the removed trees. Trees are but one strand in the bundle of property rights that is otherwise unburdened here.

With respect to Plaintiff's reasonable investment backed expectations, the tree ordinance had been in effect before Plaintiff purchased this property, and no changes have been made to the Ordinance since Plaintiff's original purchase in 2007. Although the pre-existing nature of the ordinance is not dispositive of the question of investment-back expectations, *Palazzolo v. Rhode Island*, 533 U.S. 606, 616 (2001), landowners' expectations must be reasonable. "The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property." *Murr v. Wisconsin*, 137 S.Ct. 1933, 1945 (2017). "A

reasonable restriction that predates a landowner's acquisition, however, can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property." *Id*.

Before purchasing the property from the Township, Plaintiff knew that trees predominated the Property and would have to be removed should Mr. Powelson decide to expand the POCO business onto the Property. The Property is vacant and was not subject to any specific use before Plaintiff purchased it from Canton Township. Plaintiff therefore had no legitimate expectation of any specific use. Upon the lot split, both Plaintiff and the purchaser of the Split Parcel were warned multiple times about the necessity of obtaining a permit before removing trees.

Nor does the Ordinance prohibit Plaintiff from removing the trees on its property and developing its land in compliance with the Township's Code and Zoning Ordinance. It merely requires Plaintiff to receive a permit before removing certain trees and requires the trees to be replaced in another location. [R. 16-8, Page ID # 197-198]. Thus, Plaintiff's investment-backed expectations could have not changed because of this Ordinance.

The District Court held that the economic impact of the Ordinance favored Plaintiff based upon Mr. Powelson's Declaration that the tree made the property more difficult to sell. However, Mr. Powelson testified at his deposition that he had had only an inquiry from a storage company named Rose. "They are interested in the property.

That's all I can say." [R. 34-3, Page ID # 689, p. 77.] He had not otherwise attempted to sell or market the property for sale or received any other offers to purchase the property. [*Id*., Page ID # 689, p. 78.] Although he had received inquiries, he testified "because of the issue I have right now with trees, nothing is going." *Id*.

Moreover, Mr. Powelson testified that he bought the Property for the purpose of expanding his existing business, POCO. [R. 34-3, Page ID # 674, 675, pp. 17, 21.] Mr. Powelson has acknowledged that he has never read the Canton Forest Preservation and Tree Clearing Ordinance. [*Id*., Page ID # 686, p. 65] , or inquired of the Township what tree permits may be required. [*Id*., Page ID # 683, pp. 53-54.]

Finally, as to the character of the government action, the District Court correctly noted that regulations that are "akin to traditional nuisance abatement generally do not amount to compensable takings." 456 F.Supp.3d at 891. But the District Court ruled that Canton may not immunize its zoning ordinance from constitutional challenge by declaring a nuisance. 456 F.Supp.3d at 891.

In so stating, the court disregarded the Michigan Zoning Enabling Act, Mich.Comp.Laws § 125.3407, which defines a use of land in violation of zoning ordinance a nuisance per se. Furthermore, the District Court did not consider the precept set forth in *Lingle* whether the character of government action is a physical invasion of Plaintiff's property by Canton Township, or whether the Ordinance merely "affects property interests through 'some public program adjusting the benefits and

burdens of economic life to promote the common good.'" *Lingle*, *supra*, 544 U.S. at 539. Rather, the District Court held, "Here, the character of the government action is to require a private property owner to maintain the trees on its property for the benefit of the community at large. This is a burden that should be shared by the community as a whole." *F.P. Development*, *supra*, 456 F.Supp.3d at 891.

The District Court's ruling disregards that the Ordinance applies to all properties in the Township, with few exceptions. Thus, the community does share this burden. Ord. § 5A.05(B). [R. 16-8, Page ID # 196-201]. As noted earlier, the "average reciprocity of advantage" operates to benefit and burden all property owners. *Pennsylvania Coal*, *supra; Penn Central*, *supra* (Rehnquist, J. dissenting). Moreover, applying *Lingle*'s analysis, there was no physical invasion of Plaintiff's property; the Ordinance "adjusts the benefits and burdens of economic life to promote the common good." *Id*. at 539. This is the balance required of living in a civilized society.

The District Court thus erred in finding that the *Penn Central* factors weighed in Plaintiff's favor and concluding that Defendant Township's Ordinance had effected a regulatory taking. Defendant/Appellant therefore requests that this Court reverse that determination, and order summary judgment entered in favor of Canton Charter Township as to the regulatory takings claim.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE TREE ORDINANCE PROVISIONS AS APPLIED TO PLAINTIFF IMPOSED AN UNCONSTITUTIONAL EXACTION.

A government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). It must be determined whether an "essential nexus" exists between a legitimate state interest and the permit condition. *Id*., at 386, citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987). "Government exactions as a condition of a land use permit must satisfy requirements that government's mitigation demand have an essential nexus and rough proportionality to the impacts of a proposed development." *Koontz v. St. Johns River Water Management Dist*., 570 U.S. 595, 612 (2013). "[T]he government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Id.* at 606.

Dolan requires that government make an individualized assessment of the impact of a particular development to determine whether the benefit or "exaction" is related to the property. *Dolan* and *Nollan* both dealt with traditional exactions – dedication of property to the government in exchange for land use approval. Before *Koontz*, the Supreme Court had held that the unconstitutional conditions doctrine did

not apply where payment of money was concerned. But recognizing that "so-called 'in lieu of' fees are utterly commonplace," *Koontz* expressly overruled that holding: "[S]o-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." 570 U.S. at 612.

In deciding what local findings are "constitutionally sufficient to justify … conditions imposed by" government on land-use approval, the *Dolan* Court considered three representative decisions among state courts in addressing the necessary relationship. Several states used "very generalized statements as to the necessary connection between the required dedication and the proposed development," while others required a "very exacting correspondence described as the 'specific and uniquely attributable'[2] test." *Dolan*, 512 U.S. at 389. Yet a third category of states (comprising a majority) required a showing of a "reasonable relationship" between a required exaction—usually a dedication of property—and the impact of the proposed development. *Id*. The "essential nexus and rough proportionality" test of *Dolan* emerged as the Court's resolution of this split of authority after the Court rejected the "generalized statements" as too lax and the "specific and uniquely attributable" test as too exacting. *Id*. at 389-390. The Court decided that the "reasonable relationship" test was most appropriate as an intermediate standard but considered it too close to the

[2] The "specific and uniquely attributable" test required that the local government demonstrate that its exaction be *directly* proportional to the specifically created need caused by the development.

"rational basis" test under equal protection analysis that requires only minimum scrutiny. *Id*. at 391. "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id*.

Essential nexus and rough proportionality thus combine to form a test of intermediate scrutiny. First, there must be an "essential nexus" between a legitimate state interest and the permit condition. *Id*. The District Court did not address this element of the *Dolan* test of Canton's regulations applied to Plaintiff's property here, focusing instead on the "rough proportionality" of the Township's mitigation efforts.

As expressed in the Township's briefing below, in addition to other benefits provided by trees, the ordinance's stated interests of tree protection and the benefits lost by removal of trees does bear an essential nexus to the requirement of tree replacement, either by the property owner on its own property or on other property in the Township, or by payment of the cost to the Township to replace the tree.[3]

In this case, the legitimate governmental interest advanced by the tree removal ordinance is preservation of aesthetics and abating losses occasioned by tree removal. Aesthetics is among the governmental interests recognized by the courts as not only legitimate, but significant. *H.D.V.–Greektown, LLC v. City of Detroit*, 568 F.3d 609, 623 (6th Cir. 2009), citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509–

10, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); *Berman v Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 99 L.Ed. 27 (1954) ("It is within the power of the legislature to determine that the community should be beautiful").[4]

As Leigh Thurston testified, "It's a goal to create a tree canopy on our major streets. We're only in the process of it because we're a young township, so we haven't completed it." [R. 26-4.] The Township Planner, Jeffrey Goulet similarly testified that, "And we replace those trees [removed] elsewhere within the community to re-establish that canopy." [R. 29-2, Page ID # 558.]

The Ordinance further advances "Protection of natural green open spaces, forests, woodlands, waterways." [R. 29-4, pp. 50-51.] Asked if there is a shortage of trees in Michigan, Ms. Thurston responded, "We've cut a lot of trees down. … There is a shortage in many areas," including in Canton. *Id.* Ms. Thurston further testified that, "Continuing to plant trees satisfies one of the goals of the Township to beautify the Township, to improve it socially, culturally, economically, and trees help do that." *Id*. One can hardly blame a rural township for its desire not to be the next concrete jungle. Replacement of trees, then, serves to advance the legitimate interests expressed

[3]Generally, the party challenging an ordinance has the significant burden of overcoming the presumption of constitutionality, and showing that the Ordinance is not rationally related to a legitimate governmental interest. *Dumont v. Lyon*, 341 F.Supp.3d 706, 742 (E.D. Mich. 2018), quoting *FCC v. Beach*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). "'[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.' *Id.* … '[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' *Id."*

by the Ordinance and confirmed by the testimony of Ms. Thurston and Mr. Goulet. This satisfies the essential nexus prong required by *Dolan.*

For the element of rough proportionality, in this case, Ms. Thurston visited the property and conducted a tree count [R. 16-10, Page ID # 205-209.] Ms. Thurston noted that most of the cut trees were oak trees, a valuable species. [R. 16, Page ID # 156.] But a simple accounting of all trees cut down was not the end of her inquiry. Her count reflects that she did subtract trees from the initial calculus before making her calculations based on the final number of regulated and landmark trees removed.

Ms. Thurston did, so she witnessed the number of trees lost and did conduct the individualized assessment that the Court ruled was not done here. See [R. 34-2, Page ID # 654-669.], photographs taken by F.P. Development's owner, Frank Powelson, and identified at his deposition. Ms. Thurston is depicted in those photographs. Ms. Thurston saw herself the loss of tree canopy (shown in the photos), which can only further worsen the shortage of trees.

The District Court held that Ms. Thurston's work and the considerations of the tree ordinance were simply to determine whether a removal permit would be granted in the first instance. But by determining that a tree may be removed and subject to a permit under the Ordinance inherently considers the impact of the tree's removal, including for landmark trees. Ord. 5A.05(F)(2) and (3); 5A.06. [R. 16-8, Page ID #198-199.] And as both Mr. Goulet and Ms. Thurston have testified, the impact is the loss

of tree canopy. The individualized assessment required by *Dolan* is accomplished upon producing a count of healthy, regulated trees, which Ms. Thurston did here.

Here, there is also no showing that the fees are not proportional. In fact, the testimony of Jeff Goulet and Leigh Thurston establishes that the fees of $300 per regulated tree and $450 for landmark trees (for those required to be removed) are an average market cost, most recently updated in 2006, to replace trees.

In this case, both of these elements are satisfied by the singular fact that the Ordinance requires replacement of "regulated" and "landmark" trees with trees of the same species or plant community. [R. 16-8, Page ID # 200-201.] Except for landmark trees, the ordinance requires a 1:1 replacement of trees, or payment of the market cost to replace a tree into the Township's tree fund. § 5A.08(E).

The replacement of trees on a 1:1 for 6" DBH trees and 3:1 for landmark trees (after the 25% exemption provided in § 5A.08(B)) is a requirement to replace what is lost to the community upon tree removal. Although Plaintiff simply sees the trees as commodities, the community at large has an interest in conserving its natural resources, *i.e.*, preserving forests (as indicated in the title of the ordinance). The Michigan Zoning

Enabling Act, Mich.Comp.Laws §§ 125.3201[5] and 3203[6], expressly authorizes regulating land use for these purposes.

The District Court held that the $47,898 mitigation fee is not roughly proportional in this case. But that figure is not a random figure; it is derived by the number of healthy, regulated trees actually removed from the property. [R. 16-10, Page ID #205-209.] Furthermore, there cannot be a better proportionality than a 1:1 replacement of removed trees as set forth in Ms. Thurston's final count. Replacing landmark trees on a 3:1 basis, as provided in the ordinance, also reflects that a 4" tree currently planted cannot immediately replace the lost benefits of a very large tree grown over many years or decades. Neither the District Court nor the Plaintiff addressed the reasonableness or proportionality of the individual fees, or the testimony of either Mr. Goulet or Ms. Thurston that the fees represented the actual cost to the

[5] (1) A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare.

[6] A zoning ordinance shall be made with reasonable consideration of the character of each district, its peculiar suitability for particular uses, *the conservation of* property values and *natural resources*, and the general and appropriate trend and character of land, building, and population development. (Emphasis added.)

Township of tree replacement (and since the fees have remained static for 14 years since 2006, they may even be lower than current market rates).

Instead, the District Court concentrated solely on the total sum resulting from Plaintiff's removal of nearly 200 regulated (including landmark) trees. That Plaintiff may be responsible for a hefty contribution to the tree fund only reflects the magnitude of the tree removal it conducted without a permit. The market cost of replacement of trees is the surest way to achieve the goals of the ordinance while imposing a reasonable burden on the property owner.

Furthermore, the tree fund itself is used solely for the purposes stated in the Ordinance: replacement of trees. [R. 29-2, Page ID # 558.] ("That money goes into a fixed account used for replacement and maintenance of trees on property. So generally the Township will take that money and the ordinance specifies what it can be used for. So we'll go out and plant trees in parks, we'll plant trees along streets to re-establish the tree cover that was removed on the property. And we'll replace those trees elsewhere within the community to re-establish that canopy.") The tree fund is not deposited into the general fund or used to fund unrelated community projects. *Id.*, Page ID # 558-560.

The District Court also assumed that the impact of tree removal sought to be mitigated must be a direct impact on other real property. The District Court's ruling thus applied a test closer to the "specific but uniquely attributable" test that the

Supreme Court in *Dolan* expressly rejected for examination of the constitutionality of exactions. The District Court did not address the relationship between the tree fund provisions and the essential nexus to the legitimate interest of maintaining a "tree canopy," as testified by Ms. Thurston and Mr. Goulet.

Furthermore, the District Court's ruling did not consider that another method for mitigating loss of tree removal is replacement on one's own property. In providing this avenue for mitigation, the Ordinance clearly meets the essential nexus and rough proportionality requirements of *Dolan*.

The land dedication at issue in *Dolan* is also qualitatively different than and distinguishable from the requirement to replace trees. The Court held against the City of Tigard's condition that Dolan grant to the City property to create a public greenway space for flood control, as the City could not justify why a public, as opposed to private, space for this purpose was roughly proportional. The Court observed that, "[s]uch public access would deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan*, 512 U.S. at 384.

In the case before this Court, the tree replacement or fee in lieu of replacement, conversely, does not require dedication of property for public access. Plaintiff has always retained, and still retains, control over its Property, including the right to exclude others. See testimony of Jeff Goulet:

> It's their (the property owner's) choice on how they manage the trees on the property. … I'm saying how they maintain their property is up to them, whether or not they maintain the property without any trees on it or whether they maintain the property with portions of the trees on it or all of the trees on it. They decide how many trees they're going to remove and then we determine what the ordinance requires.
>
> [R. 29-2, Page ID # 535.]

In summary, then, Canton's Tree Ordinance passes the *Dolan* test of bearing an essential nexus and rough proportionality to the impact of tree removal. The District Court erred in holding that the Ordinance as applied to Plaintiff constitutes an unconstitutional exaction and Defendant-Appellant urges this Court to reverse that determination.

CONCLUSION AND RELIEF REQUESTED

Defendant-Appellant, CHARTER TOWNSHIP OF CANTON, 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, 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 6,993 words and has been prepared in Microsoft Word, using a proportionally spaced face, Times New Roman, and a 14-point font size.

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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

APPENDIX
DEFENDANT-APPELLANT/CROSS-APPELLEE'S
DESIGNATION OF THE RECORD ON APPEAL

Pursuant to 6 Cir R 30(b), Defendant-Appellant/Cross-Appellee hereby designate the following filings in the district court's record as items being part of the pertinent Record on Appeal:

Document Description	Record Number	Page IDs
Complaint	1	1-25
Verified Counter-Complaint	13	81-142
First Amended Verified Counter-Complaint	16	149-211
Plaintiffs/Counter-Defendants' Motion for Summary Judgment	26	300-468
Motion to Dismiss, for Judgment on the Pleadings and for Summary Judgment of Defendant/Counter Plaintiff	29	480-609
Defendant/Counter-Plaintiff's Response to Plaintiff/Counter-Defendant's Motion for Summary Judgment	34	629-700
Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment and Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment	44	973-1012

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2020, I electronically filed the Brief on Appeal of Defendants-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/ MICHELLE IRICK