UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

F.P. DEVELOPMENT, LLC, a Michigan corporation *Plaintiff/Counter-Defendant,*	§	Case No. 2:18-cv-13690 Honorable George Caram Steeh
V.	§	**ORAL ARGUMENT REQUESTED**
CHARTER TOWNSHIP OF, CANTON, MICHIGAN, a Michigan municipal corporation *Defendant/Counter-Plaintiff.*	§	

PLAINTIFF/COUNTER-DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(a), Plaintiff/Counter-Defendant, F.P. DEVELOPMENT, LLC (hereafter, "F.P.") hereby moves for summary judgment on its claims against Defendant/Counter-Plaintiff, CHARTER TOWNSHIP OF CANTON (hereafter "Canton").

Canton Code of Ordinances, Art. 5A, (the "Tree Ordinance" or the "Ordinance") makes it a civil and criminal violation for a property owner to remove certain trees from its property without a permit from Canton. A permit will only be granted if Canton agrees that the removal is "necessary" and the property owner agrees to pay up to $450 (the alleged "fair market value") for each removed tree, or

agrees to plant up to three trees as replacement. Canton Code of Ordinances, Art. 5A.08.

F.P., which owns property subject to the Tree Ordinance and has been subject to fines thereunder, brings this lawsuit challenging the constitutionality of the ordinance. This motion is based on the grounds that there is no genuine issue as to any material fact and that F.P. is entitled to summary judgment as a matter of law because: (1) the Tree Ordinance constitutes an unconstitutional taking in violation of the Fifth Amendment; (2) the Ordinance is an unconstitutional seizure of property in violation of the Fourth Amendment; (3) the Ordinance is an unconstitutional condition on the use of property in violation of the Fourteenth Amendment; and (4) the fines and penalties authorized by the Tree Ordinance, as well as the specific fine Canton seeks against F.P., violate the excessive fines clause of the Eighth Amendment. In support of this Motion, F.P. relies on the pleadings on file with the Court, the facts, law, and arguments contained in the accompanying Brief in Support of this Motion, the declaration and exhibits attached thereto, and upon such other matters as may be presented to the Court at the time of the requested hearing.

Pursuant to LR 7.1(a), the undersigned counsel conferred with Canton's counsel regarding these claims. The matter cannot be resolved and Canton will oppose this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2019, I caused electronic filing of the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all properly registered counsel.

/s/Chance Weldon
CHANCE WELDON

UNITED STATES DISTRICT COURT
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CHARTER TOWNSHIP OF, CANTON, MICHIGAN, a Michigan municipal corporation *Defendant/Counter-Plaintiff.*	§	

PLAINTIFF'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(a), Plaintiff/Counter-Defendant, F.P. DEVELOPMENT, LLC (hereafter, "F.P.") files this brief in support of its motion for summary judgment on its claims against Defendant/Counter-Plaintiff, CHARTER TOWNSHIP OF CANTON (hereafter "Canton").

CONCISE STATEMENT OF ISSUES PRESENTED

Canton Code of Ordinances, Art. 5A.05, (the "Tree Ordinance" or the "Ordinance") makes it a civil and criminal violation to remove trees from one's property without permission from Canton. F.P., which owns property subject to the Tree Ordinance, filed a civil rights lawsuit in this Court seeking declaratory and injunctive relief form the unconstitutional Tree Ordinance. The instant motion for summary judgment presents the following issues:

1. Does Canton's Tree Ordinance constitute an unconstitutional regulatory taking in violation of the Fifth Amendment?

2. Does Canton's Tree Ordinance constitute an unconstitutional seizure of property in violation of the Fourth Amendment?

3. Does Canton's Tree Ordinance constitute an unconstitutional condition on the use of property in violation of the Fourteenth Amendment?

4. Do the fines and penalties for violating the Ordinance for removing trees from one's property, including Canton's $47,898 fine levied against F.P., violate the "excessive fines" clause of the Eighth Amendment?

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Horne v. Dep't of Agric., 135 S.Ct. 2419 (2015)(standard for *per se* takings); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)(standard for *per se* takings); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)(standard for *ad hoc* takings); *Presley v. City Of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006)(standard or establishing that a land-use regulation is an unconstitutional seizure under the Fourth Amendment); *Miranda v. City of Cornelius*, 429 F. 3d 858, 861 (9th Cir. 2005)(balancing test for Fourth Amendment Seizure claims); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)(standard for establishing an unconstitutional condition on the use of property); *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. App—Dallas, 2013)(Tree Ordinance was an unconstitutional condition under *Dolan*); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)(standard for establishing an excessive fine under the Eighth Amendment).

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INTRODUCTION

In late 2018, F.P. removed trees and scrub brush from its property in order to access a drain that had become clogged and was causing flooding. F.P.'s activities on its property did not harm anyone. Nonetheless, Canton seeks tens of thousands of dollars from F.P. for engaging in basic property maintenance.

Under Canton's Tree Ordinance, it is a crime to remove certain trees from private property without a permit. A permit will only be granted if Canton agrees that the removal is "necessary" and the property owner agrees either to pay $450 for each removed tree or to plant up to three trees as replacement. Because F.P. did neither, Canton sought approximately $47,898 from F.P. for allegedly violating the Tree Ordinance.

Both on its face and as applied in this case, the Tree Ordinance constitutes an unconstitutional taking in violation of the Fifth Amendment, an unconstitutional seizure of property in violation of the Fourth Amendment, and an unconstitutional condition on the use of property in violation of the Fourteenth Amendment. In addition, the fines and penalties authorized by the Tree Ordinance, as well as the specific fine Canton seeks against F.P., violate the excessive fines clause of the Eighth Amendment because they are grossly disproportionate to any harm that conceivably could be caused. Accordingly, F.P. asks this Court to declare that the

Tree Ordinance is unconstitutional and to issue an injunction preventing its enforcement against F.P.

LEGAL AND FACTUAL BACKGROUND

A. Legal Background: The Challenged Tree Ordinance

The Tree Ordinance requires that certain[1] private property owners, including F.P., apply for and receive a permit from Canton before removing any "tree"[2] from their properties. "Tree" is broadly defined to include "any woody plant with at least one well-defined stem and having a minimum [diameter at breast-height] ("DBH") of three inches." Canton Code of Ordinances, Art. 5A.01. (Ex. 1). If the targeted tree happens to be in a "forest," restrictions are even greater. Canton prohibits not only removal, but also damage to any tree within a forest. Canton Code of Ordinances, Art. 5A.05 (A). Even removing undergrowth or brush in a forest requires Canton's approval. *Id.*; Dep. of J. Goulet at 57:23-25; 58:1-5. (Ex. 2). "Forest" is defined as "any treed area of one-half acre or more, containing at least 28 trees with DBH of six inches or more." Canton Code of Ordinances, Art. 5A.01. Canton asserts that the tree removal in this case occurred in a "forest." *See* Dep. of J. Goulet, 9:24-25, 10:1-4.

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[1] The Ordinance exempts occupied residential lots under two acres, farms, and licensed nurseries. Art. 5A.05(B). None of which are at issue here.

[2] The Tree Ordinance distinguishes between trees in a "forest" and trees not in a "forest." If the tree is not in a "forest," a permit is required only if the tree is 6 inches DBH or greater. *See* Art. 5A.05(A).

Generally, a tree removal permit will only be granted if Canton concludes that the removal is "necessary" and the owner agrees to either 1) replace any removed tree with up to three trees of Canton's choosing, or 2) pay a designated amount (currently between $300 and $450 per tree) into Canton's tree fund. Canton Code of Ordinances, Art. 5A.08. These requirements are mandatory and apply regardless of the impact or benefit that may accrue from the tree removal. *Id.*; Dep. of J. Goulet at 18:2-6. Payments into the tree fund need not be used solely for planting trees. Dep. of L. Thurston at 41:1-7. Nor do trees purchased with those funds have to be planted on or near the subject property. Dep. of J. Goulet at 52:7-13.

Under the Ordinance, property owners who remove trees from their properties without a permit are required to pay the "market value" of any tree removed, or may pay the fine in-kind by replacing each removed tree with up to three trees of Canton's choosing. *See* Dep of L. Thurston at 8:7-16 (Ex. 3). Additionally, a property owner may be subject to criminal penalties of up to $500 and 90-days imprisonment. Dep. of J. Goulet at 35:1-10.

B. Factual Background: F.P. Removes trees from its property to prevent flooding

F.P. is a real estate holding company that exists primarily to manage property owned by Frank Powelson. Dec. of F. Powelson at ¶ 3. (Ex. 4). Mr. Powelson's primary business is known as POCO, a business he took over from his father. *Id*. at ¶ 4. POCO builds, stores, leases, transports, and sells signs. *Id*. at ¶ 8. The business

is headquartered on the lot adjacent to the property at issue in this case, which is an approximately 24-acre parcel located west of Sheldon Road and South of Michigan Avenue in Canton Township, Michigan (the "Property"). *Id*. at ¶ 5. The two properties are bisected by a drainage ditch that was originally dug in the 1800's and by law must be maintained by Wayne County. *Id*. at ¶ 16.

Over the years, the drain became clogged by fallen trees, scrub brush, and other debris. *Id*. at ¶ 17. With the recent increase in rainfall, these obstructions caused the drain to back up and resulted in flooding on the Property and a neighboring property owned by another company. *Id*. at ¶ 18. This flooding was killing trees, increasing mosquitos, and making it more difficult to navigate or use the properties. *Id*. at ¶ 19.

Mr. Powelson reached out to the County Drain Commissioner's office to see if the County would perform the required maintenance of the drain. *Id*. at ¶ 21. He was informed that the County would not do so. *Id*. at ¶ 22. As a result, in the Spring of 2018, F.P. entered into an agreement with Fodor Timber to clean the fallen trees and other debris from the drain. *Id*. at ¶ 24.

In order to reach the drain with heavy equipment, some tree removal was necessary. *Id*. at ¶ 26. As part of its agreement with Fodor Timber, F.P. offered Fodor the rights to any trees that had to be removed to access the ditch as well as

any fallen trees removed from the ditch. *Id*. at ¶ 24. In exchange, Fodor agreed to clean the ditch. *Id*. at ¶ 25.

C. Canton enforces the Tree Ordinance against F.P.

Before the work could be completed, Canton issued F.P. a Notice of Violation and Stop Work Order alleging violations of the Tree Ordinance and seeking an undisclosed amount in penalties. Ex. 5. Mr. Powelson immediately stopped the work. Dec. of F. Powelson at ¶ 28.

There is no administrative appeals process for challenging the constitutional validity of a notice of violation or fine assessed under the Tree Ordinance. Dep. of J. Goulet at 65:4-12. Once a notice of violation has been issued, Canton may, at its discretion, initiate civil or criminal proceedings. *Id*. at 31:1-8. Canton initiated civil proceedings against F.P.'s neighbors seeking nearly $450,000 for violation of the Ordinance. Ex. 6. Fearing the possibility of such enormous penalties, F.P. filed suit for declaratory and injunctive relief in this Court under 42 U.S.C. §1983. ECF 1. (Ex. 7). Canton countersued for $47,898 in penalties for alleged violations of the Tree Ordinance. ECF 13, p. 15. (Ex. 8).

SUMMARY OF ARGUMENT

Canton's Tree Ordinance is unconstitutional in several ways. First, both on its face and as applied, the Tree Ordinance violates the Fifth Amendment because it is an uncompensated regulatory taking. Under Michigan law, a property owner's

right to fell and utilize trees on its property is a severable interest akin to minerals beneath the surface or standing crops. When a government regulation wholly deprives the owner of the ability to utilize or alienate a severable interest in property, that regulation constitutes a *per se* taking of that severable interest, even if the owner maintains full title in the underlying property. Here, the Tree Ordinance explicitly prohibits F.P. from felling, moving, or otherwise utilizing its trees without a permit, while impermissibly exacting substantial sums under the permitting program, thereby constituting a *per se* regulatory taking. Furthermore, the Ordinance requires F.P. to maintain numerous unwanted objects, i.e., the trees, on its property. The Supreme Court has held that any government mandated physical occupation of private property by unwanted objects—however small—constitutes a *per se* taking of the occupied property under the Fifth Amendment. Moreover, the application of the Tree Ordinance against F.P. constitutes a regulatory taking under the balancing test established in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), because it goes "too far" in interfering with F.P.'s property rights in the trees and F.P.'s reasonable investment-backed expectations. In effect, the Ordinance makes the Property useless to F.P. and unmarketable, while Canton asserts the Ordinance was enacted for some ill-defined "public benefit." *Penn Central* forbids such overreaching government intrusions on property rights.

Second, both on its face and as applied, the Tree Ordinance constitutes an unreasonable seizure of private property in violation of the Fourth Amendment. An ordinance regulating private property constitutes a Fourth Amendment seizure when it creates a "meaningful interference with property" that is either not justified or not compensated. Here the Tree Ordinance creates a meaningful interference with F.P.'s property interest by preventing F.P. from felling, moving, or otherwise utilizing its trees. This interference is unreasonable because Canton concedes that the removal of trees will not injure F.P.'s neighbors. And this interference is uncompensated because Canton denies that it owes F.P. compensation.

Third, the Tree Ordinance creates an unconstitutional condition on the use of property under the standards set forth in Dolan *v. City of Tigard*, 512 U.S. 374 (1994) and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). When government requires a permit to utilize property, the conditions for acquiring that permit must have a sufficient "nexus" to a legitimate government interest and be "roughly proportional" to the impact the proposed use will have on that interest. This requires an "individualized assessment" of the actual impact the proposed use has on neighbors. Under the Tree Ordinance, if F.P. wants a tree removal permit, it must pay Canton up to $450 for every tree removed, regardless of the actual impact that a tree removal would have on F.P.'s neighbors. Indeed, Canton concedes that it does not engage in any individualized impact assessment under the Tree Ordinance.

Applying this ordinance, Canton now demands that F.P. pay $47,898, despite the fact that Canton concedes there is no evidence that the removal of trees on the property injured F.P.'s neighbors or anyone else. Such a large exaction in the absence of actual harm fails under *Nolan* and *Dolan*.

Fourth, the penalties imposed under the ordinance are unconstitutionally excessive under the Eighth Amendment. A civil fine is unconstitutionally excessive when it is disproportionate to the actual harm caused by the offense or the maximum criminal penalty imposed for the same conduct. Here, the Tree Ordinance mandates that F.P. pay $47,898 for removing trees from its own property. Yet Canton admits that there is no evidence that the removal of these trees harmed anyone, and the maximum criminal penalty for violating a zoning ordinance is only $500—almost 100 times less than the civil fine sought in this case. This sort of gross disproportionality violates the Eighth Amendment.

STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

In 1722, British Authorities of the Crown in the American Colonies adopted a law almost identical to the one at issue here

(https://www.arboretum.harvard.edu/pinus-strobus-pine-tree-riot/).[3] Under the law, it was illegal for colonists to cut down any white pine tree on their own property that was greater than 12 inches DBH. Violators were fined £5 for any tree cut. *Id.*

The law went largely unenforced for 50 years, until 1772, when the Royal Governor of New Hampshire sent representatives to Weare, New Hampshire, to enforce the Crown's tree fines. *Id.* The Colonists were so enraged that they captured the governor's representatives, subjected them to lashing (one lash for every tree the Crown claimed), shaved their horses, and ran them out of town. *Id.* In honor of that act of rebellion, the "Pine Tree Flag" became a symbol of independence and was the first flag authorized by George Washington to fly from the Colonial Navy's warships. *Id.* It should come as little surprise then that the Founders designed a Constitution that places multiple structural limitations on government power to prevent laws similar to the Crown's tree edict. Accordingly, Canton's attempt to revive a modern version of the edict is flat-out unconstitutional.

I. CANTON'S TREE ORDINANCE IS AN UNCONSTITUTIONAL REGULATORY TAKING

The Fifth Amendment, made applicable to the states by the Fourteenth Amendment, provides that private property shall not be taken "for public use,

[3] Site last visited on September 24, 2019; *see also*, Steven L. Danver, *Revolts, Protests, Demonstrations, and Rebellions in American History: An Encyclopedia* (2010), p. 183-185.

without just compensation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). There are two forms of takings subject to compensation under the takings clause: the classic taking—where the government formally acquires title to private property through eminent domain—and a regulatory taking. As relevant here, a regulatory taking can occur in three ways: 1) when the government effectively takes possession and control over an interest in property through regulation[4]; 2) when the government mandates that an owner maintain unwanted objects on the property for a public purpose, thus appropriating a portion of the property for the public without compensation[5]; or 3) when a regulation goes "too far" under the balancing test articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). The Tree Ordinance meets the criteria of all three forms of regulatory taking.

A. The Tree Ordinance is a *per se* regulatory taking because it effectively grants Canton constructive possession of the trees on F.P.'s property

In Michigan, the right to own real property typically includes the right to fell and utilize any trees on that property. *See Delaney v. Manshum*, 146 Mich. 525, 528 (Mich. 1906). This is often referred to as the right to "timber." *See Mulder v. Durand Hoop Co.*, 238 Mich. 373, 375 (1927). The right to timber is a separate property interest that is severable from the underlying estate in the same manner as

4 *See Horne v. Dep't of Agric.*, 135 S.Ct. 2419 (2015).

5 *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

minerals. *See e.g., Groth v. Stillson*, 20 Mich. App. 704, 707 (1969) (trees are severable interests).

A property right is often described as a bundle of rights, including "the rights to possess, use and dispose of [it.]" *Horne v. Dep't of Agric.*, 135 S.Ct. 2419, 2428 (2015). When the government effectively takes control of any of these rights, it can give rise to a taking. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (restriction on access to severed mineral estate constituted a taking); *State Hwy. Commr. v. Hahn*, 380 Mich. 115, 117 (1968) (same). In *Horne*, the plaintiffs successfully challenged a federal statute by which they were required to set aside a portion of their raisins for the government to control as a means of restricting the supply of raisins in the national raisin market. The set-aside raisins remained on the plaintiffs' property, 135 S.Ct. at 2428, but the plaintiffs' could not sell, use, or destroy the raisins without being fined their "fair market value," *id*. at 2433. The Court held that this was a *per se* taking. As the Court explained, "[r]aisin growers subject to the reserve requirement thus lose the entire 'bundle' of property rights in the appropriated raisins—'the rights to possess, use and dispose' of them . . . gives rise to a taking as clearly 'as if the Government held full title and ownership.'" *Id*. at 2428.

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. Like the raisins in *Horne*, the trees remain on F.P.'s property, but F.P. may not sell, use, or destroy them without paying Canton the "current market value." Canton Code of Ordinances, Art. 5A.08(E). Accordingly, because Canton's tree ordinance effectively takes possession of the trees without compensation, it is a *per se* regulatory taking.

B. The Tree Ordinance is a *per se* regulatory taking because it forces F.P. to maintain unwanted objects on the Property

In addition to taking possession of the trees, the Tree Ordinance also constitutes a *per se* taking of portions of the underlying Property by requiring that F.P. maintain unwanted objects—trees—on the Property. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), the Court held that a state law requiring that landlords allow cable boxes to remain attached to their buildings constituted a *per se* taking that was entitled to compensation under the Constitution. The Court explained that forbidding the removal of the cable boxes was tantamount to "physical occupation authorized by government [and] is a taking without regard to the public interests that it may serve" *Id*. at 426. This remains true, even if the occupation involves "relatively insubstantial amounts of space and do[es] not seriously interfere with the landowner's use of the rest of his land." *Id*. at 430.

Similarly, in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) the EPA drilled testing wells on private property in order to monitor groundwater contamination. The court recognized that those wells served an important

government interest, but nonetheless held that the physical occupation of private property by an unwanted object constituted a *per se* taking warranting compensation. *Id*. at 1378, As that court explained, once a permanent physical occupation is established "…nothing more needed to be shown [to establish a taking]." *Id.*

Here, the physical invasion is far more extensive than the cable box recognized as a taking in *Loretto* or the test wells in *Hendler*. Under the Tree Ordinance, property owners must maintain potentially thousands of unwanted trees on their property. As these trees inevitably grow and spread over time, the extent of this legally mandated physical occupation increases over time. Dep. of J. Goulet at 55:6-25; 56:1-7. Accordingly, the ordinance is a *per se* taking under *Loretto*.

C. The Tree Ordinance is a regulatory taking because it goes "too far" in depriving F.P. of the economic value of the Property.

The Tree Ordinance constitutes a regulatory taking under the balancing approach announced in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Under that approach, a government regulation that deprives a property owner of some—but not all—of a property's economic value may be a taking if the regulation "goes too far." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

To determine whether the regulation goes too far, courts look at three factors: 1) "the economic impact of the regulation on the claimant"; 2) "the extent to which

the regulation has interfered with distinct investment-backed expectations"; and 3) "the character of the governmental action." *Palazzolo*, 533 U.S. at 633-34 (quoting *Penn Central*, 438 U.S. at 124). These factors are not "mathematically precise variables, but instead provide[] important guideposts that lead to the ultimate determination whether just compensation is required." *Palazzolo*, 533 U.S. at 634.

The Tree Ordinance meets all three of the *Penn Central* regulatory takings criteria. First, the economic impact of the Tree Ordinance on F.P. is substantial. Canton is seeking nearly $47,898 from F.P. for the removal of just a small portion of the trees from its property. ECF 13, p. 15. Applied across the entire property, the fine would be catastrophic. Dec. of F. Powelson ¶¶ 9-13; *see also*, Dep. of. F. Powelson at 13:17-25; 14:1. (the entire 62 acre parcel was purchased for approximately $550,000.). Indeed, F.P.'s neighbors were fined approximately $450,000 for allegedly clearing 16-acres of their property. *See* Ex. 6. There is no reason to believe that F.P. would suffer any less crippling fines if it were to clear its property.

Second, the Tree Ordinance has substantially interfered with F.P.'s reasonable investment-backed expectations. F.P. purchased the industrially zoned property from Canton with the reasonable expectation that it would be able to put the property to some business use. Dec. of F. Powelson at ¶¶ 6-7. Here, F.P. is prevented from

making nearly any business use of the property without being subject to significant sanctions or exactions. *Id*. at ¶¶ 8-11.

Third, in determining the "character of the governmental action" courts ask whether the regulation is more akin to traditional nuisance abatement, for which no compensation is generally required, (*see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488, 492 (1987)) or more akin to a regulation to generate public benefits, in which case, "fairness and justice" demand that the cost of that burden "should be borne by the public as a whole." *See Bowen v. Gilliard*, 483 U.S. 587, 608-09 (1987). This determination requires that courts "inquire into the degree of harm created by the claimant's prohibited activity, its social value and location, and the ease with which any harm stemming from it could be prevented." *Maritrans Inc. v. United States*, 342 F.3d 1344, 1356 (Fed. Cir. 2003).

Canton admits that the removal of trees from private property is not a nuisance at common law, (Dep. of L. Thurston 11: 4-16), and admits that it has no evidence that the tree removal in this case caused any public injury. *Id*. at 16:20-25; 17:1-25; 18:1-7. Indeed, Canton's representative was quite clear that the purpose of the tree ordinance is to provide "public benefits"—not to remedy an actual injury. 48:23-25; 49:1-20. But government may not acquire a public benefit at a property owners' expense without paying the property owner for it. *See Mahon*, 260 U.S. at 416 ("a strong public desire to improve the public condition is not enough to warrant

achieving the desire by a shorter cut than the constitutional way of paying for the change."). The "desire to improve the public condition" is precisely the purpose of the Tree Ordinance, as acknowledged by Canton's designated representative during deposition. Dep. of L. Thurston at 16:20-25; 17:1-25; 18:1-7.

II. CANTON'S TREE ORDINANCE CONSTITUTES AN UNCONSTITUTIONAL SEIZURE

Canton's enforcement of its Tree Ordinance is unconstitutional under the Fourth Amendment because it constitutes a meaningful interference with F.P.'s possessory interests in the Property without compensation or justification. *See Severance v. Patterson*, 566 F.3d 490, 503–04 (5th Cir. 2009). The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits "unreasonable seizures" of private property. *Ker v. California*, 374 U.S. 23, 30 (1963). While this prohibition is most often encountered in the criminal context, multiple courts have held that it applies with equal force in the civil context to land use regulations that interfere with the possession or use of private property. *See e.g. Severance*, 566 F.3d at 503–04 (government mandated easement); *Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006) (anti-fencing ordinance). Thus, a property regulation violates the Fourth Amendment if it is "(a) a meaningful interference with [a Plaintiff's] possessory interests in [its] property, which is (b) unreasonable because the interference is unjustified by law or, if justified, then uncompensated." *Severance*, 566 F.3d at 502.

While this test appears to track fairly closely to the takings clause of the Fifth Amendment, the Supreme Court has recognized takings and seizures as distinct claims, because they focus on different aspects of government action. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 50 (1993). The takings clause is primarily concerned with whether the interference is for "public use" and whether the interference is compensated. The Fourth Amendment, by contrast, is primarily concerned with whether or not the interference is "reasonable." *See United States v. Proctor*, 489 F.3d 1348, 1352 (D.C. Cir. 2007) ("[T]he touchstone of the Fourth Amendment is reasonableness based upon the facts and circumstances of the case.") (citations omitted).

The Fourth Amendment also sweeps more broadly than the takings clause. While an unreported case in this jurisdiction held that the takings clause only applies to total deprivations of a property right (*see Tannian v. City of Grosse Pointe Park*, 1995 U.S. Dist. LEXIS 12084, at *15 (E.D. Mich. July 31, 1995)), in fact partial deprivations of property rights are actionable as seizures under the Fourth Amendment. *See e.g., United States v. Gray*, 484 F.2d 352, 356 (6th Cir. 1973) (holding that temporarily removing rifles from a closet to copy down their serial numbers was a seizure.)

A. The Tree Ordinance creates a meaningful interference with F.P.'s property rights

The Supreme Court has held that a seizure of property occurs whenever "there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). Typically, regulations that prevent a property owner from excluding unwanted things from his property are sufficient to trigger Fourth Amendment protections. For example, in *Severance*, 566 F.3d at 503–04, the court held that the government's claim of a public use easement on Carol Severance's beach front property was a Fourth Amendment seizure because it limited her right to exclude people and things from her property and therefore was a clear interference with her possessory interest in the property. Similarly, in *Presley*, 464 F.3d 480, 487 the court held that the plaintiff had stated a claim for a Fourth Amendment violation when a city passed an ordinance that prevented the plaintiff from fencing her property to keep trespassers and trash off the property.

Here, the Tree Ordinance creates a meaningful interference with F.P.'s property interest in its trees by preventing F.P. from felling, moving, or selling its trees. Indeed, the Tree Ordinance effectively prohibits F.P. from otherwise using the trees for any purpose other than perhaps enjoying them aesthetically or climbing them. The Tree Ordinance also constitutes a meaningful interference with F.P.'s

interest in its land, because it denies F.P. the right to exclude unwanted trees from the property.

B. The interference with F.P.'s property rights is unreasonable because it is not justified by any risk to the public

To assess the reasonableness of a seizure under the Fourth Amendment, courts "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v. Jacobsen*, 466 U.S. 109, 125 (1984). In balancing these interests, a government "allegation that a seizure was for a public purpose does not somehow eliminate Fourth Amendment scrutiny." *Presley*, 464 F.3d at 487. Instead, the alleged government purpose must be examined and balanced against the real-world effects of the seizure. *Id.*

For example, in *Miranda v. City of Cornelius*, 429 F.3d 858 (9th Cir. 2005), the court struck down the application of an ordinance that allowed police to tow and impound the car of any person reasonably believed to have operated a vehicle without a license. An officer towed Miranda's vehicle from her driveway because he believed Miranda lacked a license. The government did not dispute that a seizure had occurred but argued that the seizure was reasonable because it was authorized by the ordinance. The court disagreed, explaining that a "city ordinance . . . does not, in and of itself, determine the reasonableness of the seizure under the Fourth Amendment." *Id.* at 864. Instead, the Fourth Amendment requires a careful

balancing of harms. Looking at the facts, the court noted that the government's stated interest in preventing vehicles from "impeding traffic or threatening public safety and convenience" could not justify the seizure. The car was already safely in Miranda's driveway and was causing no threat to the public. The fact that Miranda may drive the car improperly in the future was also not sufficient to justify a seizure. *Id.* at 865.

Just as in *Miranda*, Canton invokes its power to abate nuisances to justify its interference with F.P.'s possessory interest in the trees, while conceding that tree removal does not, of itself, constitute a nuisance at common law and that it has no evidence that tree removal from F.P.'s property has caused an actual nuisance or injured anyone. Dep. of L. Thurston, 16:20-25; 17:1-25; 18:1-7. By contrast, the nature and quality of the intrusion is significant. The Tree Ordinance not only interferes with F.P.'s ability to develop its property (or even access the clogged drain that was flooding it and its neighbor) but also its right to exclude unwanted objects—"one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto*, 458 U.S. at 433. Canton is thus left with little more to justify its seizure of F.P.'s property than an abstract desire to populate the Township with trees and to enforce its Tree Ordinance. Dep. of L. Thurston, 13:16-25; 14:1-13.

C. The interference with F.P.'s property rights is unreasonable because it is uncompensated

Outside of narrow circumstances, such as the existence of exigent circumstances, or the seizure of a public nuisance, contraband, or evidence of a crime, an uncompensated seizure of private property is deemed *per se* unreasonable. *See Bloem v. Unknown Dep't of the Interior Employees*, 920 F.Supp.2d 154, 162–63 (D.D.C. 2013) (seizure and destruction violated Fourth Amendment where property was not "abandoned, a public nuisance, contraband, or evidence of a crime.") Regardless of its intentions, the government may not take a person's property without paying for it. *See Mahon*, 260 U.S. at 416 ("a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

Here, Canton concedes that it does not intend to compensate F.P. for its interference with F.P.'s property rights. Dep. of J. Goulet at 26:3-17. Indeed, Canton has never compensated property owners for its restrictions under the Tree Ordinance and it lacks any mechanism by which compensation could be sought. *Id*. Accordingly, both on its face and as applied, any interference with property rights under the Tree Ordinance is uncompensated and therefore *per se* unreasonable.

III. CANTON'S TREE ORDINANCE CONSTITUTES AN UNCONSTITUTIONAL CONDITION ON THE USE OF PROPERTY

The Tree Ordinance is also unconstitutional because it places unconstitutional conditions on the use of private property by requiring F.P. to either plant trees or pay fees as mitigation well in excess of any injury caused by F.P.'s removal of its own trees. Under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U. S. 374 (1994), "a unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *See Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013). This analysis may not be made in the abstract, but must be based on an individualized assessment of the facts on the ground, both as to the existence of a sufficient nexus and as to rough proportionality. *See Dolan*, 512 U.S. at 391 (the government "must make some sort of individualized determination that the required dedication is related both in nature [i.e., nexus] and extent [i.e., rough proportionality] to the impact of the proposed development.")

In *Dolan*, the city required the plaintiff to construct a bike path on its property as a condition of granting a construction permit. *Id.* at 380. The city argued that this mitigation requirement was proper because the proposed construction would

increase traffic and parking problems and the bike path could offset some of those problems. *Id*. at 381-82. The city produced evidence that the proposed construction would increase traffic, but provided no site-specific evidence as to the actual effect that the proposed bike-path would have on the traffic in the area. *Id.* at 395. Instead, the city's official findings relied on the common knowledge that, in general, a bike path "could offset some of the traffic demand . . . and lessen the increase in traffic congestion." *Id*. The Court rejected this abstract approach to exactions, noting that "findings of fact that the bicycle pathway system '*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely* to, offset some of the traffic demand." *Id*. at 395-96. As the Court explained, "the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated." *Id*. Because the city failed to engage in this site-specific analysis, the proposed mitigation requirement was unconstitutional. *Id*.

Here, Canton claims that tree removal has a nexus to public benefits like air quality and flood control, and that its mitigation requirements are roughly proportional to that interest. But, as in *Dolan*, Canton does not base its claim of "rough proportionality" on any site-specific analysis of the impacts of tree removal on F.P.'s property. Dep. of L. Thurston 84:1-8. Indeed, the type of site-specific analysis required by *Dolan*, is precluded by the Tree Ordinance on its face. Under

the ordinance, property owners *shall* pay market value of any removed tree into the tree fund or plant a pre-set number of replacement trees, regardless of its impact on neighbors. Dep. of J. Goulet, 16:13-25, 17:1-25; 18:1-6[6] Moreover, even if site specific analysis were permitted under the Tree Ordinance—it is not—the proposed mitigation in this case would still fail under *Dolan*. Canton admits that it has "no evidence" that F.P. removal of trees has impacted any neighbors, much less that the removal has caused injuries sufficient to justify Canton's proposed mitigation payments. Dep. of L. Thurston, at 16:20-25; 17:1-25; 18:1-7.

While this Court has not yet had the opportunity to apply *Nolan* and *Dolan* to a tree ordinance, courts in states as diverse as Texas and New Jersey have. Those cases are instructive. In *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. App—Dallas, 2013), the court struck down the application of a tree ordinance that required developers removing a tree to pay a "mitigation fee" that would be used to plant replacement trees elsewhere. As in this case, the city argued that the mitigation requirement would "protect trees and promote urban forestation for the many benefits trees provide…including shade and cooling, reduction of noise and glare, protection of soils, providing of ecosystems, and increasing property values." *Id*. But the City presented no evidence of the actual impact of removing

[6] This is particularly odd, because Canton concedes that the impact of tree removal will vary based on the type of tree removed and its location. Dep. of L. Thurston 80:21-25; 81:1-3.

trees from the relevant property and no comparison of that impact with the actual benefit of planting replacement trees on public property. *Id*. The court held that with "no evidence of any projected impact caused by the removal of trees during the development, the City did not raise a genuine issue of material fact that any amount of tree retribution fees would be roughly proportional." *Id*. The Court therefore granted summary judgment in favor of the property owner.

A similar requirement was struck down in New Jersey. *New Jersey Shore Builders Ass'n v. Township of Jackson*, 2007 N.J. Super. Unpub. LEXIS 2987, *13-14 (2007). In that case, the ordinance required individuals removing trees to pay into a tree fund to plant replacement trees elsewhere. The Township of Jackson argued that this tree replacement regime served to mitigate the effects of tree removal on things like soil erosion and diminished property values for adjacent properties. *Id*. But the Township did not engage in any site specific analysis of the actual effects of tree removal from the property in question. Instead, the Township argued that because trees *generally* can provide erosion control benefits, requiring payment for replacement trees elsewhere had a significant nexus to damage caused to the public by tree removal on the private property at issue. *Id*. at 7-8. The court disagreed, noting that "the payment of a fee to plant new trees on other public land does not in any way address the objective of ameliorating the negative effects of removing trees on [the] private property [at issue]." *Id*. at 13-14. The ordinance was therefore

unconstitutional. Canton's Tree Ordinance fails for the same reasons—*i.e.*, it does not allow the site-specific analysis mandated by *Dolan*.

IV. CANTON'S TREE ORDINANCE REQUIRES THE IMPOSITION OF UNCONSTITUTIONALLY EXCESSIVE FINES.

Finally, the Tree Ordinance is unconstitutional and should be enjoined because it mandates fines that are grossly disproportionate to any public harm caused by tree removal. The excessive fines clause of the Eighth Amendment "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019). The Eighth Amendment is violated when there is a: 1) mandatory payment "in cash or in kind" to the government (*id*.); 2) the required payment is intended, at least in part, to serve "either retributive or deterrent purposes" (*Austin v. United States*, 509 U.S. 602, 610, (1993)); and 3) the payment is not proportional to the violation allegedly committed. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). That burden is met here.

First, the Tree Ordinance requires a mandatory payment in "cash or in kind" to the government. The Tree Ordinance requires that F.P. pay either thousands of dollars or plant over 100-trees as a penalty for removing trees on its own property. (Dep. of J. Goulet, 16:13-25, 17:1-25; 18:1-6). These payments are mandatory on the face of the ordinance (Canton Code of Ordinances, Art. 5A.08) and are being affirmatively sought by Canton in this case. ECF 13, p. 15.

Second, these payments are designed, at least in part, for "retributive or deterrent purposes." *See Austin v. United States*, 509 U.S. at 610. At deposition, Canton's representative conceded that the purpose of requiring after-the-fact payments was to ensure compliance with the Tree Ordinance and to deter individuals from removing trees. Dep. of J. Goulet, 38:23-25; 39:1-4 (compliance); *id.*, at 13:3-11 (deterrence). The required payments are therefore punitive in nature. *See WCI, Inc. v. Ohio Dep't of Pub. Safety*, No. 18-3962, 2019 U.S. App. LEXIS 15527, at *18 (6th Cir. May 24, 2019) ("even if only intended partially as a punishment, and partially for other reasons—the protections of the Eighth Amendment apply.")

Finally, the fines sought in this case are grossly disproportional to any public harm F.P. may have caused by removing trees from its own property. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." *Bajakajian*, 524 U.S. at 334. The "amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Madison*, 226 Fed. Appx. 535, 548 (6th Cir. 2011).

In determining proportionality, courts look at several factors—two of which are dispositive here. First, courts look at the actual "harm that respondent caused." *Bajakajian*, 524 U.S. 321. In *Bajakajian*, the Court held that a seizure of $ 357,144 was "grossly disproportional" to the crime of not reporting the amount of currency leaving the country to federal authorities, because "the harm that respondent caused

was …minimal." *Id*. at 339. As the Court explained, the respondent's failure "to report his currency affected only one party, the Government, and in a relatively minor way." *Id*. There "was no fraud on the United States, and respondent caused no loss to the public fisc." *Id*. Given these minimal injuries, the forfeiture of thousands of dollars was excessive. *Id*.

Second, courts compare the civil fine to the criminal penalties for the same offense. For example, in *Bajakajian*, the court compared the $357,144 seizure with the criminal penalty for the same offense, which was $5,000. *Id*. The Supreme Court held that the civil penalty was grossly disproportional because it was "many orders of magnitude" greater than the criminal penalty. *Id*. at 340.

The fines assessed under the Tree Ordinance in this case fail both tests. First, there is no public harm at issue in this case. Canton concedes that removing trees from private property does not, of itself, constitute a nuisance. Dep. of L. Thurston 11:4-16. And Canton concedes that there is no evidence that the tree removal in this case harmed or otherwise injure F.P.'s neighbors. *Id*. at 16:20-25; 17:1-25; 18:1-7. The only harm that Canton argues in this case is that violation of a zoning ordinance is a *per se* public injury. *Id*. at 13:16-25; 14:1-13. But such an abstract injury cannot justify $47,898 in fines. *See Bajakajian*, 524 U.S. at 339 (government's inherent offense in having its laws violated not sufficient).

Second, the fine in this case is grossly excessive in comparison to the maximum criminal penalties available for the same offense. In *Bajakajian*, a forfeiture of $ 357,144 was considered "grossly" excessive because it was seventy times larger than the maximum criminal penalty. *Bajakajian*, 524 U.S. at 339. Here, the maximum criminal penalty for violating the Tree Ordinance is $500, but the civil fines sought against F.P. under that same ordinance for removal of only a fraction of trees on the property are $47,898 - nearly 100-times greater than the maximum criminal penalty. Accordingly, such a level of disproportionality cannot pass under *Bajakajian*.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in F.P.'s favor, declare the Tree Ordinance unconstitutional, and enjoin its enforcement against F.P.

Respectfully submitted,

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By: */s/Chance Weldon*
CHANCE WELDON

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2019, I caused electronic filing of the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all properly registered counsel.

/s/Chance Weldon
CHANCE WELDON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

F.P. DEVELOPMENT, LLC, a Michigan corporation *Plaintiff/Counter-Defendant,*	§	Case No. 2:18-cv-13690 Honorable George Caram Steeh
V.	§	
CHARTER TOWNSHIP OF, CANTON, MICHIGAN, a Michigan municipal corporation *Defendant/Counter-Plaintiff.*	§	

INDEX OF EXHIBITS

Exhibit	**Description**
1	Canton Code of Ordinances, Arts. 5A.01, 5A.05, and 5A.08
2	Excerpts of Deposition of Jeff Goulet dated June 12, 2019
3	Excerpts of Deposition of Leigh Thurston dated June 12, 2019
4	Declaration of Frank Powelson in Support of Plaintiff/Counter-Defendants' Motion for Summary Judgment dated September 26, 2019
5	Notice of Violation and Stop Work Order dated September 13, 2018
6	Charter Township of Canton's Verified Complaint without Exhibits filed on November 9, 2018
7	F.P.'s Complaint filed on November 26, 2018 [ECF 1]
8	Excerpts of Charter Township of Canton's Counter-Complaint filed on December 19, 2018 [ECF 13]

EXHIBIT 1

5A.01. - Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Agriculture/farming means any land in which the principal use is to derive income from the growing of plants and trees, including but not limited to land used principally for fruit and timber production.

Caliper means the diameter of a tree trunk measured six inches (15 cm) above ground level for trees up to four-inch caliper and 12 inches above the ground for larger sizes.

Clear cutting means the complete clearing, cutting or removal of trees and vegetation.

Commercial nursery/tree farm means any commercial establishment which is licensed by the state or federal government for the planting, growing and sale of live trees, shrubs, plants and plant materials for gardening and landscaping purposes.

Developed property means any land which is either currently used for residential, commercial, industrial, or agricultural purposes or is under construction of a new building, reconstruction of an existing building or improvement of a structure on a parcel or lot, the relocation of an existing building to another lot, or the improvement of open land for a new use.

Diameter at breast height (DBH) means the diameter in inches of the tree measured at four feet above the existing grade.

Dripline means an imaginary vertical line that extends downward from the outermost tips of the tree branches to the ground.

Forest means any treed area of one-half acre or more, containing at least 28 trees with a DBH of six inches or more.

Grade means the ground elevation.

Grubbing means the effective removal of under-canopy vegetation from a site. This shall not include the removal of any trees.

Landmark/historic tree means any tree which stands apart from neighboring trees by size, form or species, as specified in the landmark tree list in section 94-36, [4] or any tree, except box elder, catalpa, poplar, silver maple, tree of heaven, elm or willow, which has a DBH of 24 inches or more.

Single-family lot means any piece of land under single ownership and control that is two acres or more in size and used for residential purposes.

Township tree fund means a fund established for maintenance and preservation of forest areas and the planting and maintenance of trees within the township.

Tree means any woody plant with at least one well-defined stem and having a minimum DBH of three inches.

Undeveloped property means any property in its natural state that is neither being used for residential, commercial, industrial or agricultural purposes nor under construction.

(Amend. of 7-11-2006(2); Amend. of 10-20-2009)

Footnotes:

*--- (**4**) ---*

***Note—** Section 94-36 was repealed by an ordinance adopted July 10, 2006.*

5A.05. - Tree removal permit.

A. *Required.*

1. The removal or relocation of any tree with a DBH of six inches or greater on any property without first obtaining a tree removal permit shall be prohibited.
2. The removal, damage or destruction of any landmark tree without first obtaining a tree removal permit shall be prohibited.
3. The removal, damage or destruction of any tree located within a forest without first obtaining a tree removal permit is prohibited.
4. Clear cutting or grubbing within the dripline of a forest without first obtaining a tree removal permit is prohibited.

B. *Exemptions.* All agricultural/farming operations, commercial nursery/tree farm operations and occupied lots of less than two acres in size, including utility companies and public tree trimming agencies, shall be exempt from all permit requirements of this article.

C. *Display* . Tree removal permits shall be continuously displayed for the entire period while the trees are being removed.

D. *Application* . Permits shall be obtained by submitting a tree removal permit application in a form provided by the municipal services department. The application shall *include a tree survey conducted not more than two years prior to the date of application* and contain the following information:

1. The owner and/or occupant of the land on which the tree is located.
2. The legal description of the property on which the tree is located.
3. A description of the area affected by the tree removal, including tree species mixture, sampling of tree size and the notation of unusual, scarce or endangered trees.
4. A description of each tree to be removed, including diseased or damaged trees, and the location thereof.
5. A general description of the affected area after the proposed tree removal.

E. *Review procedures* . Municipal services shall review the applications for tree removal permits and may impose such conditions on the manner and extent of the proposed activity as are necessary to ensure that the activity or use will be conducted in such a manner as will cause the least possible damage, encroachment or interference with natural resources and natural processes within the affected area.

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.).
4. The removal or relocation of trees within the affected areas shall be limited to instances:
    a. Where necessary for the location of a structure or site improvement and when no reasonable or prudent alternative location for such structure or improvement can be had without causing undue hardship.
    b. Where the tree is dead, diseased, injured and in danger of falling too close to proposed or existing structures, or interferes with existing utility service, interferes with safe vision clearances or conflicts with other ordinances or regulations.
    c. Where removal or relocation of the tree is consistent with good forestry practices or if it will enhance the health of remaining trees.
5. The burden of demonstrating that no feasible or prudent alternative location or improvement without undue hardship shall be upon the applicant.
6. Tree removal shall not commence prior to approval of a site plan, final site plan for site condominiums or final preliminary plat for the subject property.

(Amend. of 7-11-2006(2); Amend. of 10-20-2009)

5A.08. - Relocation or replacement of trees.

A. *Landmark tree replacement* . Whenever a tree removal permit is issued for the removal of any landmark tree with a DBH of six inches or greater, such trees shall be relocated or replaced by the permit grantee. Every landmark/historic tree that is removed shall be replaced by three trees with a minimum caliper of four inches. Such trees will be of the species from section 5b.06.

B. *Replacement of other trees.* Whenever a tree removal permit is issued for the removal of trees, other than landmark/historic trees, with a DBH of six inches or greater (excluding boxelder (acer negundo), ash(fraxinus spp) and cottonwood (populus spp)), such trees shall be relocated or replaced by the permit grantee if more than 25 percent of the total inventory of regulated trees is removed. Tree replacement shall be done in accordance with the following: If the replacement trees are of at least two-inch caliper at six inches above the ground or eight-foot height for evergreens, but less than three inches measured at six inches above the ground or nine-foot height for evergreens, the permit grantee shall be given credit for replacing one tree. If the replacement trees are of at least three-inch caliper at six inches above the ground or nine-foot height for evergreens, but less than four inches measured at 12 inches above the ground or ten-foot height for evergreens, the permit grantee shall be given credit for replacing 1½ trees. If the replacement trees are of at least four-inch caliper at 12 inches above the ground or ten-foot height for evergreens, the permit grantee shall be given credit for replacing two trees.

C. *Exemptions* . All agricultural/farming operations, commercial nursery/tree farm operations and occupied lots of less than two acres shall not be required to replace or relocate removed trees.

D. *Replacement tree standards* . All replacement trees shall:

1. Meet both the American Association of Nurserymen Standards and the requirements of the state department of agriculture.
2. Be nursery grown.
3. Be guaranteed for two years, including labor to remove and dispose of dead material.
4. Be replaced immediately after the removal of the existing tree, in accordance with the American Association of Nurserymen standards.
5. Be of the same species or plant community as the removed trees. When replacement trees of the same species are not available from Michigan nurseries, the applicant may substitute any species listed in section 5a.06 provided that shade trees are substituted with shade trees and evergreen trees with evergreen species. Ornamental trees need not necessarily be replaced with ornamental trees, but this shall be encouraged where feasible.

E. *[Location of replacement trees.]* 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. If the grantee chooses to replace trees offsite the following must be submitted prior to approval of the permit:

a. A landscape plan, prepared by a registered landscape architect, indicating the sizes, species and proposed locations for the replacement trees on the parcel.

b. Written permission from the property owner to plant the replacement trees on the site.

c. Written agreement to permit the grantee to inspect, maintain and replace the replacement trees or assumption of that responsibility by the owner of the property where the trees are to be planted.

d. Written agreement to permit township personnel access to inspect the replacements as required.

(Amend. of 7-11-2006(2); Amend. of 10-20-2009)

EXHIBIT 2

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

F.P. DEVELOPMENT, LLC,
a Michigan Corporation,
Plaintiff/Counter-Defendant,
vs. Case No. 2:18-cv-13690
Hon. George Caram Steeh
CHARTER TOWNSHIP OF CANTON,
MICHIGAN, a Michigan Municipal
Corporation,
Defendant/Counter-Plaintiff.
_____/

DEPOSITION OF JEFF GOULET

The deposition of JEFF GOULET, taken before CHRISTINE A. LERCHENFELD, Notary Public and Court Reporter, in and for the County of Macomb, State of Michigan, acting in the County of Oakland, on Wednesday, June 12, 2019, at 27555 Executive Drive, Suite 250, Farmington Hills, Michigan 48331, commencing at 9:31 A.M.

A Right, if they choose to remove more than 25 percent.

Q What if a property owner doesn't want any trees on his property at all?

A Then he can choose to -- then he can choose to pay into the tree fund if he doesn't want any trees on his property. It's his choice. We don't prevent people from removing all of the trees on their property. The Code provides a disincentive for doing that in terms of preserving the forest that was there to begin with.

Q What if the owner thinks the ordinance is unconstitutional and he says, "I don't want to pay anything"? Is that an option under the ordinance?

MS. McLAUGHLIN: Objection to the form of the question. Go ahead and answer.

THE WITNESS: I guess he could always sue us for it being unconstitutional. I'm not an attorney.

BY MR. WELDON:

Q But there's not -- I'm sorry, you can go ahead and answer. There's not anything under this ordinance that allows him some sort of option that says, "Hey, I'm not paying anything"?

A We wouldn't issue a permit unless he chose one or

down under the heading "Tree Fund" that seems to indicate that the current going rate for a 2-inch tree is $300 and a 4-inch tree is $450; is that correct?

A That's correct.

Q And so that is what the Township has determined is the market rate?

A Yes.

Q And it doesn't seem to indicate that there is any sort of variation between types of trees; is that correct?

A It's an average cost.

Q Does the Township -- if they require payment into the tree fund does the Township differentiate on the basis of tree type?

A No.

Q So to be clear, if it's a 2-inch oak tree or 2-inch some other hardwood tree it's going to be this $300 cost?

A That's correct.

Q So under the ordinance if a person wants to cut down a tree and they don't want to have replacement trees placed on their property you go to these two numbers, either 300 or 450 and you give them a price based on the size of a replacement tree, correct?

A That's correct.
Q And that applies regardless whose property the tree is on, correct?
A That's correct.
Q And that applies whether the tree is on a hill or down in a valley, correct?
A Can you clarify what tree you're talking about? The replacement tree or the removed tree?
Q Either one. Let's start with the replacement tree.
A If it's on the property and it's regulated, it's regulated.
Q Same with the removed tree. It doesn't matter if they remove the tree in a valley or on a hill it's going to be the same replacement cost, correct?
A If it's a regulated tree, yes.
Q Let's say the property owners, their neighbors don't really think that the tree removal on their neighbor's property impacted them in any way. The replacement cost is still going to be 200 or 450, correct?
A That's correct.
Q So the actual impact on the neighbors of removing the tree isn't relevant in this calculation, correct?
A The calculation is based on the number of trees that

are required to be replaced.

Q So I'm going to ask that again. The actual impact to the neighbors of removal of the tree is not relevant to how you calculate the dollar amount for the tree fund, correct?

A No.

MR. WELDON: Let's go to Exhibit 3.

(Exhibit Number 3 was marked for identification at 9:50 a.m.)

BY MR. WELDON:

Q Are you familiar with this document?

A Not specifically.

Q Does it look like -- have you seen documents like this before?

A Similar to this.

Q And do you know what these types of documents are? Can you tell by looking at it what it is?

A It appears to be a survey of trees on the property.

Q Turn to what's marked at the top as page 3. It looks like it's the second page, but it says page 3. You know what? Since you're not familiar with this document I'm just going to strike this line of questioning. So I won't ask you any questions about it.

Go back to Exhibit 1, please, back to the

not a choice without consequences, is it?

A They have to meet the requirements of the ordinance.

Q Right. So does the Township compensate property owners for trees they're required to keep on their property?

MS. McLAUGHLIN: Objection to the form of the question. Assumes facts not in evidence. It's contrary to his prior testimony. You may answer.

THE WITNESS: We don't physically pay anybody to maintain trees on their property.

BY MR. WELDON:

Q So there's nothing in this ordinance that says that the Township will pay private property owners for requiring them to maintain trees on their property?

MS. McLAUGHLIN: Objection to the form of the question. Assumes facts not in evidence.

THE WITNESS: No.

BY MR. WELDON:

Q Let's say that -- and we talked about this a little bit earlier. Let's say that a property owner cuts down a tree without a permit. What does the Township generally do in that situation?

A If we're aware of it we would issue a Notice of Violation and require them to get a permit.

MR. WELDON: I'd like to introduce Exhibit

A I do not.

Q So the way that I read this section it also says -- it says basically that a Notice of Violation gives a property owner a time period to comply with the Township's demand, in this case filing an after-the-fact permit, and if that doesn't happen then the next step is the Township can file suit, correct?

A That's correct.

MS. McLAUGHLIN: Objection to the form of the question.

THE WITNESS: If they do not meet the requirements of the Notice of Violation we would then proceed to issue a court appearance ticket.

BY MR. WELDON:

Q Can you turn back to Exhibit 4, the Notice of Violation? Is there anything in that Notice of Violation that talks about an administrative appeal?

MS. McLAUGHLIN: I'm going to place an objection to the form of the question and lack of foundation. This document was not authored by this Witness. You haven't established that he has knowledge of this, the specific terms of this document.

MR. WELDON: I think that I already laid the predicate that he was familiar with it, but I

A Yes.
Q And under this Section 27.09 if a person doesn't do either of those things they can be subject to criminal penalties for violating the ordinance, correct?
A Yes.
Q And those penalties, it appears to be, are a fine not exceeding $500 or by imprisonment not exceeding 90 days for each offense, correct?
A That's what it says.
Q But typically that's not all a person is on the hook for if they cut down trees without a permit, correct?
A I'm not sure what you mean.
Q In this case, for example, the Township is seeking approximately $48,000 from my client; isn't that correct?
A I don't believe so. I'm not aware of that.
Q Are you familiar with the counter-complaint filed in this lawsuit?
A Not specifically.
Q You spoke earlier about the fact that if you cut down trees without a permit you still have to go and apply for an after-the-fact permit?
A That would be a normal sequence of events.

MS. McLAUGHLIN: Objection to the form of the question. It's compound. It also has been asked and answered.

THE WITNESS: In accordance with the ordinance he may be subject to a criminal penalty. Pursuant to the permit requirements he may be required to either replace trees on the site and/or pay for a portion of the trees on the site, depending on what the outcome of the tree removal permit and the litigation is.

BY MR. WELDON:

Q What's the purpose of requiring individuals who cut down trees without a permit to go through the permit process and make that payments or whatever after the fact?

A They never received a permit, so how do we know what they did on the property without them getting a permit. They have to establish what they are doing on their property so we can determine what the permit is for or was for. And if they're going to take additional trees down what additional trees do they plan on taking down.

Q I guess I'm asking if they violated the ordinance why not just do the criminal penalty and be done with it? Why the additional going back and paying

the tree fund or planting replacement trees?

A Because they still didn't get a permit. They still didn't comply with the ordinance. So our intent is to achieve compliance with the ordinance.

MR. WELDON: Why don't we take a break for just a minute? Off the record.

(Off the record at 10:21 a.m.)

(Back on the record at 10:34 a.m.)

BY MR. WELDON:

Q You testified earlier that the replacement or tree fund payments don't apply if the property owner removes less than 25 percent of the regulated trees on the property, correct?

A That's correct.

Q So in this case if F.P. Development removed less than 25 percent of regulated trees on the property this case would have to be dismissed then, correct?

MS. McLAUGHLIN: Objection. Calls for a legal conclusion. Foundation.

THE WITNESS: We would have to make a determination of what trees were removed, what size were there, whether they were landmark trees and whether or not the landmark trees needed to be replaced. So there's two provisions in the ordinance, one for regulated trees and one for

BY MR. WELDON:

Q Who would know that?

A Our finance department.

Q Do you know an individual that you could give a name of that would know that?

A That would be our finance director.

Q So if the Township does do actual replacement trees from the tree fund for a tree that's removed on the property does the Township have to plant that replacement tree in the same vicinity as the property is was removed from or can they plant it anywhere in the Township?

A We can plant it anywhere in the Township.

Q Do you know how much money was collected in the tree fund last year?

A Not specifically.

Q Do you have a ballpark figure?

A Not offhand.

Q Do you know how many trees were planted last year out of funds from the tree fund?

A Not specifically.

Q Have you got a ballpark figure?

A I'd have to go back and look at the program from last year.

Q More than ten?

BY MR. WELDON:
Q So we discussed earlier that the 25 percent requirement doesn't apply to landmark trees, correct?
A That's correct.
Q And so if I have a landmark tree on my property my choices are to either pay into the tree fund or replant it if I want it cut down, right?
MS. McLAUGHLIN: Objection. Asked and answered. Go ahead.
THE WITNESS: Those are the two choices.
BY MR. WELDON:
Q And you would agree that landmark trees can grow over time, correct?
A That's how they become a landmark tree.
Q So you would agree that they can get bigger, correct?
A Yes.
Q And their root zone can get bigger, correct?
A Yes.
Q So over time they take up a larger portion of the property, correct?
A Whether they take up a larger portion of the property the canopy area, yes, will get bigger.
Q And does the Township pay property owners for the

amount of the property that's consumed by that landmark tree?

A No, we do not physically pay the property owner for maintenance of the landmark tree.

Q I was saying like as in compensation for the fact that the property is now consumed by a tree.

A No.

Q We talked a little bit earlier about the 6-inch requirement, the 6-inch DBH requirement not applying to removal of trees within a forest, correct?

A Right. So --

MS. McLAUGHLIN: Objection -- go ahead.

THE WITNESS: Based on the definition of forest, no.

BY MR. WELDON:

Q And it talks about -- the ordinance talks about damaging trees in a forest, as well, correct?

A That's correct.

Q Would damaging include, you know, trimming branches off of trees?

A Damaging would be injuring the tree.

Q Does that include cutting branches off of the tree?

MS. McLAUGHLIN: Objection. Form of the question. Asked and answered.

THE WITNESS: It depends on what branches

they were removing.
BY MR. WELDON:
Q And who would decide whether or not removing a branch is damaging?
A We would have to evaluate the -- what they did to the tree.
Q So would a property owner who wants to cut branches off of a tree in a forest have to go to the Township for a permit?
A No.
Q If they remove branches without a permit could they be subject to penalties?
MS. McLAUGHLIN: Objection to the form of the question. Asked and answered. Foundation.
THE WITNESS: It depends on how many branches they've removed and whether or not it damaged the tree.
BY MR. WELDON:
Q And whether or not it damages the tree is that at the discretion of the Township?
A That would be upon the Township's technical staff or a consultant evaluating the health of the tree.
Q If a property owner wants to clear out undergrowth in a forest, wants to clear brush and undergrowth in a forest would he need a permit for that?

A Yes.

Q If he wanted to clear out invasives in a forest would he need a permit for that?

A Any clearing work within a forest you'd need a permit.

MR. WELDON: I think that's all the questions that I have. Thank you.

MS. McLAUGHLIN: I have a couple follow-up questions.

EXAMINATION

BY MS. McLAUGHLIN:

Q Mr. Goulet, I'd like you to refer to Exhibit 2, specifically page 2 of that exhibit. Counsel earlier asked you about the --

MR. WELDON: Can you hold on for just a second and let me figure out where you're at.

MS. McLAUGHLIN: Page 2 of Exhibit 2.

MR. WELDON: Okay. Thank you.

BY MS. McLAUGHLIN:

Q Counsel earlier asked you about the policy referred to on page 2 of Exhibit 2 with respect to the tree fund that is referenced a little more than halfway down the page. Do you see that section?

A Yes.

Q And the replacement tree cost is referenced in that

MS. McLAUGHLIN: It's mischaracterizing his prior answer.

BY MR. WELDON:

Q You talked about the potential of an administrative appeal for interpretations of the Zoning Code. Okay? In that administrative appeal process is it possible -- what if they don't -- they're not disagreeing with your interpretation, they think your interpretation is correct. They think the ordinance is unconstitutional. Would that be a basis for an administrative appeal?

A No.

MR. WELDON: I have no further questions.

(Deposition concluded at 11:20 a.m.)

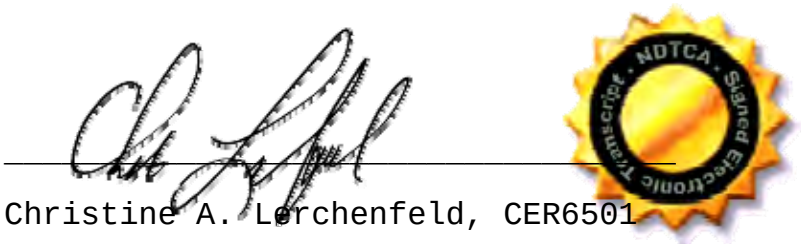
** ** ** ** **

STATE OF MICHIGAN)
) ss.
COUNTY OF MACOMB)

I certify that this transcript, consisting of sixty-five (65) pages, is a complete, true, and correct transcript of the testimony of JEFF GOULET held in this case on June 12, 2019.

I also certify that prior to taking this deposition JEFF GOULET was sworn to tell the truth.

I also certify that I am not a relative or employee of or an attorney for a party; or a relative or employee of an attorney for a party; or financially interested in this action.



Christine A. Lerchenfeld, CER6501
Notary Public, Macomb County, Michigan
My Commission Expires: 07/07/2020

EXHIBIT 3

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

F.P. DEVELOPMENT, LLC,
a Michigan Corporation,
Plaintiff/Counter-Defendant,
vs. Case No. 2:18-cv-13690
Hon. George Caram Steeh
CHARTER TOWNSHIP OF CANTON,
MICHIGAN, a Michigan Municipal
Corporation,
Defendant/Counter-Plaintiff.
_____/

DEPOSITION OF LEIGH THURSTON

The deposition of LEIGH THURSTON, taken before CHRISTINE A. LERCHENFELD, Notary Public and Court Reporter, in and for the County of Macomb, State of Michigan, acting in the County of Oakland, on Wednesday, June 12, 2019, at 27555 Executive Drive, Suite 250, Farmington Hills, Michigan 48331, commencing at 1:04 P.M.

A Okay.

Q Are you familiar with that document?

A Yes, I am.

Q And what is it?

A It's our tree ordinance. Forest preservation and tree removal -- tree removal and replacement.

Q And I was speaking with your colleague earlier and he agreed that under that tree ordinance a property owner who removes trees, certain trees, without a permit is required to either replace those trees or pay into the tree fund; is that correct?

A That's correct.

Q And that this replacement or payment is in addition to any criminal penalties under that ordinance. Do you agree with that?

A Yes. It's the value of the trees.

Q And he explained a little bit there at the end that this payment or replacement is a form of nuisance abatement. Do you agree with that?

A Yes.

MR. WELDON: I'd like to go to Exhibit 2, please.

THE WITNESS: Okay.

BY MR. WELDON:

Q Go ahead and take a look at that document and

Q So you did that in your capacity representing the Township; is that correct?
A Correct.
Q If you take a look at request for admission number 1 it says -- it asks to "Admit that removing trees from one's own private property does not, of itself, constitute a nuisance at common law"; is that correct? It's going to be on that first page. The question is --
A I see it. I would say that's true.
Q And the Township's official answer there, if you go down to the very last line of that paragraph, it admits that removing trees from one's own property does not, of itself, constitute a nuisance at common law; is that correct?
A That's correct.
Q Has the Township changed its official position without notifying the Court?
MS. McLAUGHLIN: Objection. Foundation. Vague. Object to the form of the question.
BY MR. WELDON:
Q Has the Township, to your knowledge -- actually, you're speaking on behalf of the Township regarding nuisances so you can answer this question directly. Has the Township changed its position that removing

that a true statement?

A Yes.

Q So whenever you said earlier that the payments under the tree ordinance are nuisance abatement you're not talking about a common law nuisance; is that correct?

MS. McLAUGHLIN: Objection. Calls for a legal conclusion. Lack of foundation.

THE WITNESS: I don't know how to apply that.

MR. WELDON: I'm sorry. Can I go off the record for just one second?

(Off the record at 1:16 p.m.)

(Back on the record at 1:16 p.m.)

BY MR. WELDON:

Q When you were talking about payments under the tree ordinance being nuisance abatement is that -- the nuisance that you're talking about there is that simply the violation of the ordinance?

A It's the violation of the ordinance. Removing trees violates the ordinance without proper permits.

Q And that's the nuisance that's being abated is the violation of the ordinance?

A Yes.

Q And that's because the Township has this theory that

under state law any violation of a zoning ordinance is a nuisance per se, correct?

MS. McLAUGHLIN: Objection to the form of the question. You can answer.

THE WITNESS: Yes.

BY MR. WELDON:

Q And that is true regardless of any injuries that have or have not been caused by this alleged violation, correct?

MS. McLAUGHLIN: Objection to the form of the question. Calls for a legal conclusion. You may answer.

THE WITNESS: Yes.

BY MR. WELDON:

Q In the present case the Township has claimed that it doesn't have any evidence that F.P. Development's removal of trees from its own property has created an actual nuisance, correct?

MS. McLAUGHLIN: Objection to the form of the question. I believe that's a mischaracterization of the Township's answers to its request for admissions in the present case, not in the Wayne County case that does not apply to this case.

MR. WELDON: Okay. We can introduce

other tangible injuries to neighboring properties, et cetera, correct?

A It does ask that.

Q And if you go down to your response on the following page the Township's answer there is "not applicable"; is that correct?

A Without waiving objections it's not applicable.

Q So you don't have any evidence that the removal of trees on F.P. Development's property caused concrete injuries to his neighbors, do you? Let me rephrase that. Other than the per se injury that you assume is caused per se by violating an ordinance.

A Well, there are injuries. It affects air quality, storm water management, protection of a natural resource. There are all those injuries.

Q Because I -- I'm sorry. I didn't mean to talk over you.

A And nobody is aware yet of what might have happened to adjacent or downstream properties.

Q Do you have any evidence that the removal of trees on the F.P. Development property caused the spread of infectious diseases?

A I do not.

Q Do you have any evidence that the removal of trees on the property caused fires?

A No.

Q Do you have any evidence that it caused flooding on adjacent properties?

A I can't answer that because there is already potential for flooding there because there are constricted waterways and this very well could have made it worse and I don't know the answer to that.

Q So it's your position that you do or do not have evidence to that effect, that the removal of trees caused flooding on neighboring properties?

MS. McLAUGHLIN: Asked and answered. Go ahead again.

THE WITNESS: I don't know.

BY MR. WELDON:

Q You don't know if you have evidence or you don't know --

A I don't have evidence.

Q Do you have any evidence that removing trees on the property has caused any physical injury to anyone in the Township?

MS. McLAUGHLIN: You mean a person?

BY MR. WELDON:

Q A person.

A I do not.

Q Do you have any evidence that removing trees on the

property has caused any injury to any corporation or business entity?

A **Physical injury?**

Q Physical injury, lost profit margins, anything.

A **I don't know, but it's possible.**

Q Do you have any evidence of it?

A **I don't.**

Q In responses to these interrogatories the answer that you provided is "not applicable." What does that mean? It seems like you're saying that you don't have any of this evidence that we're requesting, but I just want to confirm that.

A **The questions are so broad, we need something more specific to answer them directly.**

Q When you say that interrogatory, for example, number 3 is too broad, you've already answered a lot of those questions for me today, about whether or not you had evidence, what part of that interrogatory is too broad?

A **We believe -- our ordinance believes that this affects public safety, safety of our natural resources and the welfare of our residents.**

Q Yes, you assume that trees provide those benefits; is that correct?

A **Yes.**

Q And then that's all paid out of the tree fund?
A It is.
Q So would that include things like putting mulch down?
A It does.
Q Watering the existing trees?
A Right.
Q Landscaping, things like that?
A Not much landscaping; tree planting.
Q Does it involve any landscaping?
A Not to my knowledge.
Q Do you know if the tree fund is a separate account from the general fund?
MS. McLAUGHLIN: Foundation.
THE WITNESS: I don't know legally if it's separated, but monies that go in are separated and can only be used for planting and maintenance out of that account.
BY MR. WELDON:
Q Do you know if it's the same account, though, at the bank?
A I don't.
Q Turn back to interrogatory number 5. One of the government interests that's listed in there is storm water management, correct?

whether or not in that situation it would have to provide compensation?

MS. McLAUGHLIN: Objection to the form of the question.

THE WITNESS: The Township doesn't require them to plant a park or to provide a park, so the question is irrelevant to me.

BY MR. WELDON:

Q I didn't ask you whether or not you thought it was relevant, I just asked you if you could provide an answer to it.

A No, I can't.

Q Fair enough. So is the Township's position then that it could require a private individual to provide a public benefit without providing compensation?

MS. McLAUGHLIN: Objection to the form of the question. Lack of foundation. Calls for a legal conclusion and that's an improper hypothetical.

THE WITNESS: I can't answer that.

BY MR. WELDON:

Q Let's work through the foundation again. You said that the tree ordinance provides public benefits, correct?

A Yes.

Q And you said that it provides these public benefits by requiring individuals to either keep trees on their property or pay mitigation either through replanting or paying into the tree fund, correct?

MS. McLAUGHLIN: Asked and answered.

THE WITNESS: Certain properties.

BY MR. WELDON:

Q The F.P. Development property which you said the ordinance applies to.

A Yes.

Q So F.P. Development either has to maintain the trees on the property or pay into the tree fund or plant trees elsewhere, correct?

MS. McLAUGHLIN: Asked and answered.

THE WITNESS: Yes.

BY MR. WELDON:

Q And that's so that it can provide these public benefits, correct?

A Yes.

Q And that's the method by which the ordinance provides public benefits, correct?

MS. McLAUGHLIN: I'm going to place an objection to the form of the question and foundation to the extent it calls for a legal conclusion.

BY MR. WELDON:

Q Can you turn to interrogatory number 12? Interrogatory number 12 seems to claim that the market value -- sorry. The market value for replacing a tree is roughly proportional to the public value created by a tree; is that correct?

MS. McLAUGHLIN: Objection to the form of the question.

THE WITNESS: I don't know that I can say that. I can just say that we know what current tree costs are and that's what -- that's the value we assign to it, because that's what we would have to pay for it if we planted it.

BY MR. WELDON:

Q Do you think that that dollar amount is a good measure of the public benefit that's generated from a tree on private property?

MS. McLAUGHLIN: Object to foundation.

THE WITNESS: Yes, in general.

BY MR. WELDON:

Q Do trees produce different benefits, and when I say benefits I'm talking about the benefits we talked about earlier, you know, storm water mitigation, carbon, things like that, based on the type of tree?

A Yes.

Q Do they provide different benefits based on where the tree is located?
A It could.
Q But the tree ordinance seems to assign the value just based on, you know, its diameter regardless; is that correct?
MS. McLAUGHLIN: Objection to the form.
THE WITNESS: Yes. To base it on every feature of every different species of tree would be impossible.
BY MR. WELDON:
Q Do you know what types of trees were allegedly cut down on the F.P. Development property?
A White oak, sugar maple, red maple, silver maple, basswood, possibly some elm, black cherry, as well as some invasives or unregulated trees like cottonwood, buckthorn, box elder.
Q Your recall is very good. I would not remember all those tree names. How much flood mitigation is provided by a 6-inch diameter tree? A 6-inch diameter white oak, for example.
A I don't know.
Q Would you say that the amount of flood mitigation provided by a tree will vary based on things like location and soil and topography?

MS. McLAUGHLIN: Objection. Improper hypothetical. Objection to form.

THE WITNESS: Probably not.

BY MR. WELDON:

Q Was there ever a calculation done on the F.P. Development property to determine whether or not tree removal would make flooding better or worse?

A No calculation was done.

Q Are there things that a property owner could do to offset increased flooding other than planting trees?

A Well, you could come in with a site plan for development that included a detention basin, other planting zones. But we would still require that those trees be replaced after the 25 percent allowance.

Q But you could get the same flood mitigation benefit that you do from a tree from something else, correct, from digging a detention basin?

A Other things contribute to reducing flooding.

MR. WELDON: I think that I am finished. Give me just one minute. Yeah, I don't have any other questions at this time unless I need to redirect for some reason.

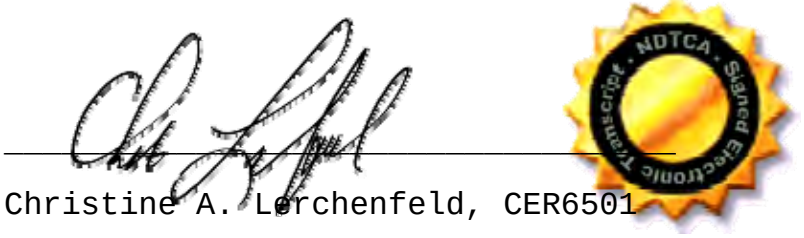
MS. McLAUGHLIN: I have just a few follow-up questions.

STATE OF MICHIGAN)
) ss.
COUNTY OF MACOMB)

I certify that this transcript, consisting of eighty-seven (87) pages, is a complete, true, and correct transcript of the testimony of LEIGH THURSTON held in this case on June 12, 2019.

I also certify that prior to taking this deposition LEIGH THURSTON was sworn to tell the truth.

I also certify that I am not a relative or employee of or an attorney for a party; or a relative or employee of an attorney for a party; or financially interested in this action.



Christine A. Lerchenfeld, CER6501
Notary Public, Macomb County, Michigan
My Commission Expires: 07/07/2020

EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

F.P. DEVELOPMENT, LLC, a Michigan corporation *Plaintiff/Counter-Defendant,*	§	
V.	§	Civil Case No. 2:18-cv-13690
CHARTER TOWNSHIP OF, CANTON, MICHIGAN, a Michigan municipal corporation *Defendant/Counter-Plaintiff.*	§	

DECLARATION OF FRANK POWELSON IN SUPPORT OF PLAINTIFF/COUNTER-DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Martin Frank Powelson, hereby declare as follows:

1. I have personal knowledge of the following facts and if called upon to do so could competently testify to them under oath. As to those matters that reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. I am the owner of F.P. Development, LLC (hereafter, "F.P.") and have authority to sign this declaration on its behalf.

3. F.P. is a land holding company designed primarily to manage my business property in Canton.

4. My primary business is POCO signs, which I took over from my father.

5. F.P. owns an approximately 24-acre parcel of property (hereafter "the Property") located west of Sheldon Road and South of Michigan Avenue in Canton Township, Michigan.

6. The Property at issue in this litigation is adjacent to POCO signs and was purchased with the intention of expanding POCO's operations in the future.

7. The Property was purchased as a replacement for developed property that POCO sold to Sysco as part of a negotiation with Canton to help Sysco stay in the area.

8. POCO builds, stores, leases, transports, and sells signs.

9. Expanding POCO's operations onto the Property in the future would necessarily require the removal of trees from the Property.

10. It is my understanding that under Canton's Tree Ordinance, F.P. would have to pay into Canton's "Tree Fund" for any trees removed, or replace any removed trees elsewhere.

11. Given the number of trees on the Property, those penalties make it prohibitively expensive to expand POCO's operation onto the Property.

12. The existence of these trees, and the legal cost for their removal under the Tree Ordinance, has also made it difficult for F.P. to sell the Property.

13. Potential buyers have informed me that they will not purchase the Property because they cannot remove the trees without penalty.

14. The Property has become the basis of the above styled lawsuit.

15. I have been advised that the Property does not contain any state regulated wetlands.

16. The Property is traversed by a drain (hereafter, "the Drain.") that is supposed to be maintained by Wayne County.

17. Over the years, the Drain fell into a state of neglect and became obstructed by fallen trees, vegetation and other debris.

18. These obstructions impeded the flow in the Drain, causing flooding on the Property and neighboring properties.

19. The flooding mentioned in paragraph 18 made the Property more difficult to use, increased mosquitos, and damaged or caused the death of trees on the Property.

20. On behalf of F.P., I contacted the permit department of Wayne County by telephone to see if the County would be willing to remove the fallen trees from the Drain.

21. The individual I spoke with said that the County would not remove the fallen trees from the Drain.

22. I also contacted Canton's Supervisor, Pat Williams, and informed him that F.P. needed to remove fallen trees from the drain to stop flooding.

23. Neither the County employee nor Mr. Williams informed me that F.P. would be subject to any penalties for doing that work.

24. Sometime in the Spring of 2018, F.P. hired Fodor Timber to remove the fallen trees from the Drain.

25. Under the terms of the agreement with Fodor Timber, Fodor Timber agreed to clear a path to the Drain and remove the fallen trees from the Drain in exchange for the right to any timber felled to complete the job.

26. In order to make a path by which to reach the Drain, Fodor Timber was required to remove trees and vegetation from the Property.

27. Before Fodor Timber could complete the project on the Property, Canton Township issued F.P. a stop work order preventing the removal of any additional trees from the Property.

28. F.P. immediately ordered Fodor Timber to stop work on the project and Fodor Timber complied.

29. To my knowledge, at no time did F.P. or Fodor Timber engage in any earth movement, excavation, land balancing or earth disruption of any kind within 25 feet of any wetlands on the Property or within 25 feet of the Drain or any other watercourse.

30. To my knowledge, at no time did F.P or Fodor Timber cut down any tree within the Drain or any other wetland or watercourse on the Property.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 26, 2019.

Martin Frank Powelson

Martin Frank Powelson

EXHIBIT 5

CANTON
Community

GENERAL OFFICES

1150 Canton Center S.
Canton, MI 48188-1699
734/394-5100
734/394-5128 FAX

Pat Williams
Supervisor
394-5185
394-5234 FAX

Michael Siegrist
Clerk
394-5120
394-5128 FAX

Dian Slavens
Treasurer
394-5130
394-5139 FAX

John Anthony
Sommer N. Foster
Anne Marie Graham-Hudak
Steven Sneideman
Trustees

September 13, 2018

Via electronic mail to mpattwell@clarkhill.com and regular U.S. Mail

Michael Pattwell, Esq.
Clark Hill PLC
212 Cesar Chavez Avenue
Lansing, Michigan 48906

Re: Your client F. P. Development, LLC; Frank Powelson

Dear Mr. Pattwell:

Attached you will find a Notice of Violation for property owned by your client, F. P. Development, LLC, for which Frank Powelson is the resident agent. As we have discussed, Mr. Powelson and/or individuals acting at his direction were seen removing trees from the property without a permit in violation of the Zoning Ordinance. As I advised you yesterday, the Township needs access to your client's property to count the tree stumps to determine the number and types of trees removed. In order the ensure that no further violations are committed by your client, and that existing conditions remain untouched so an analysis of the prior violation can be performed, the property will be posted with a "STOP WORK" order today. Any further tree removal, or any change in the condition of the property as it exists today will constitute an independent ordinance violation. Feel free to contact me, should you have any questions.

Canton Township is requesting dates that staff could access Mr. Powelson's property to conduct a tree count. Kindly provide available dates at your earliest convenience.

Thank you for your attention to these matters.

Kristin B. Kolb

Kristin Bricker Kolb
Corporation Counsel
Charter Township of Canton

Cc: Pat Williams, Supervisor
Tim Faas, Municipal Services Director
Leigh Thurston, Landscape Architect

Enc.\

CHARTER TOWNSHIP OF CANTON

DEPARTMENT OF BUILDING & INSPECTION SERVICES
1150 S. Canton Center Road, Canton, MI 48188

NOTICE OF VIOLATION

CASE NO. CE20180000046
NAME F.P. Development, LLC (Frank Powelson, Resident Agent)
ADDRESS 4850 Sheldon S
Canton, MI 48188
D.L.N.
D.O.B. PHONE

This officer has investigated a complaint at the stated address as required by LAW and has found the following ordinance violation(s):
Article and Section: 5A.05
Zoning Ordinance Article 5A, Section 5A.05, TREE REMOVAL PERMIT. The removal or relocation of any tree with a DBH of six inches or greater on any property without first obtaining a tree removal permit shall be prohibited.
Comments:
On 4/27/18 it was observed that a significant area of the south end of the POCO woods was being cleared that day in the vicinity of the Fisher & Leng/McKinstry Drain. The tree removal was in violation of Zoning Ordinance Article 5A. Forest Preservation and Tree Clearing, Section 5A.05.A.1 Tree Removal Permit: 1. The removal or relocation of any tree with a DBH of six inches or greater on any property without first obtaining a tree removal permit shall be prohibited; and, 2. The removal or relocation of any landmark tree without first obtaining a tree removal permit shall be prohibited; and 3. The removal, damage or destruction of any tree located within the dripline of a forest without first obtaining a tree removal permit is prohibited; and 4. Clear cutting or grubbing within the dripline of a forest without first obtaining a tree removal permit is prohibited.

Brief inspection of the site on 8/22/18 and evaluation of remaining numbered existing trees, logs, and tree stumps indicate the high quality trees in the woods were being logged and other regulated trees were being cut and/or removed.

Further investigation of the woods is required to determine the probable numbers and species of trees removed and quantity of regulated trees needing replacement.

ADDRESS OF CONCERN:
4850 SHELDON S, Canton, MI 48188
A response to this violation shall be received within 14 day(s). Failure to comply will result in further legal action.

Leigh Thurston

THURSTON, LEIGH — 09/13/18
Officer — **Date**

For further information, call (734) 394-5170 between 8:30 a.m. and 4:30 p.m.

WARNING: Damage or injury resulting from delay or failure to comply with this notice will be attributed to negligence on the part of the responsible party or parties.

EXHIBIT 6

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF CANTON,

Plaintiff,

Case No. 18- -CE
Hon.

v

44650, INC., a Michigan corporation,

Defendant.

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC
Anne McClorey McLaughlin (P40455)
Stephanie Simon Morita (P53864)
Attorneys for Plaintiff
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100
amclaughlin@rsjalaw.com

Kristin Bricker Kolb (P59496)
Charter Township of Canton
Co-Counsel for Plaintiff
1150 S. Canton Center Road
Canton, Michigan 48188
(734) 394-5199
kristin.kolb@canton-mi.org

There is no other pending or resolved civil action arising out of the transaction or occurrence as alleged in this verified complaint.

VERIFIED COMPLAINT

Plaintiff, CHARTER TOWNSHIP OF CANTON, by and through its counsel, for its Complaint states as follows:

1. Plaintiff, Charter Township of Canton, is a Michigan charter township with its principal place of business located at 1150 South Canton Center, Canton Township, Wayne County, Michigan.

2. Defendant, 44560, Inc., is a Michigan corporation, with its principal place of business located at 5601 Belleville Road, Canton Township, Wayne County, Michigan.

3. According to records on file with the state of Michigan, the resident agent for Defendant is Gary Percy. Gary Percy is also the President of AD Transport, Inc., which business occupies the nearby property.

4. At issue in this action is a 16-acre vacant parcel of property located east of Belleville Road and north of Yost Road in Canton Township, Wayne County Michigan, Parcel ID# 71-135-99-0001-709; therefore, venue is proper in this Court.

5. This Complaint seeks declaratory and injunctive relief, and the amount in dispute is in excess of $25,000; therefore, jurisdiction is proper in this Court.

COMMON ALLEGATIONS

6. On or about October 27, 2016, Canton Township's Planning Services Division received an application to split off a 16-acre parcel (the "Property") from a 40-acre parcel (the "Parent Parcel") owned by F. P. Development, LLC; the owner for the 16-acre split parcel was identified as Defendant 44650, Inc. (The Property Split/Combination Application is attached as Exhibit A.)

7. On December 22, 2016, the Township responded with some comments on items that needed to be addressed prior to finalizing the split request.

8. In April of 2017, the Property was still fully treed, and no work had commenced on the Property, as evidenced by the attached aerial photograph, which the Township purchased from NearMap. (Exhibit B).

9. In correspondence dated July 14, 2017, Ginger Michaelski-Wallace, the engineer for F. P. Development and Defendant, was notified in writing that the split

application was tentatively approved, subject to the submission of certain, enumerated documents. (Exhibit C).

10. The letter further noted some 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.

11. On or about August 1, 2017, a deed was signed by F. P. Development's manager and sole member, Martin F. Powelson, conveying the 16-acre split parcel to Defendant. (Exhibit D).

12. Unbeknownst to the Township until more than six months later, at some point during this time, Defendant and/or its agent had every single tree removed from the Property, as evidenced by the attached aerial photograph dated October 20, 2017, which the Township purchased from NearMap. (Exhibit E). In addition, Defendant bulldozed the acreage and removed the existing stumps.

13. On November 27, 2017, correspondence was again sent to the Property and Parent Parcel representative, reiterating the requirements to complete the parcel split. (Exhibit F).

14. 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 the new parcel identification numbers had been issued. (Exhibit G).

15. In late April of 2018, Township Landscape Architect and Planner Leigh Thurston received a phone call from an individual owning property adjacent to the Property, inquiring why so many trees were permitted to be removed.

16. This was the first notification to the Township that any trees had been removed from the Property.

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

1. The removal or relocation of any tree with a DBH of six inches or greater on any property without first obtaining a tree removal permit shall be prohibited.

2. The removal, damage or destruction of any landmark tree without first obtaining a tree removal permit shall be prohibited.

3. The removal, damage or destruction of any tree located within a forest without first obtaining a tree removal permit is prohibited.

4. Clear cutting or grubbing within the dripline of a forest without first obtaining a tree removal permit is prohibited. (Exhibit H, Canton Township Forest Preservation and Tree Clearing Ordinance).

18. At no time was a site plan submitted and/or a tree removal permit applied for or obtained by Defendant and/or anyone acting on behalf of Defendant.

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

a. Clear cutting of approximately 16 acres of trees without a Township permit;

b. Cutting of trees and other work within a county drain and drain easement under the jurisdiction of Wayne County;

c. Cutting of trees and other work within wetlands regulated by the Michigan Department of Environmental Quality;

d. Performing underground work adjacent to a public water main under the jurisdiction of Canton Township; and

e. Parking vehicles within the Yost Road public right of way.

20. Furthermore, Ms. Thurston saw evidence of a woodchipping operation on the Property.

21. Ms. Thurston immediately contacted Gary Percy to advise him of the violation, in response to which he admitted cutting the trees and asked "what do I have to do now?"

22. Mr. Percy then stated that he had no knowledge that a permit was required to remove trees from the Property.

23. 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.

24. Through subsequent communications with the Township Supervisor, Mr. Percy reiterated his intention to plant corn on the Property.

25. On or about June 11, 2018, the Michigan Department of Environmental Quality issued a Violation Notice and Order to Restore to Gary Percy, requiring him to complete certain actions to bring the Property into compliance with the Natural Resources and Environmental Protection Act, including (among others), to "refrain from all farming activities (e.g. plowing, seeding, minor drainage, cultivation) within the wetland areas…" (Exhibit I).

26. Mr. Percy was also required to "remove all unauthorized fill material (e.g. woodchips)…" from the Property.

27. On or about July 26, 2018, Wayne County issued its Notice of Determination to Gary Percy, notifying him that the Wayne County Department of Public Services had found that a violation of the County's Soil Erosion and Sedimentation Control Ordinance had occurred on the Property. (Exhibit J).

28. On or about July 31, 2018, the Wayne County Drain Commissioner's Office sent correspondence to Gary Percy advising him that actions taken on the Property may have negatively impacted the Fisher and Lenge Drainage District, an established county drain under the Michigan Drain Code, 40 PA 1956. (See Exhibit K, July 31, 2018 correspondence and Exhibit L, Drainage District Map.)

29. The Wayne County Drain Commissioner's office's letter also indicated that a notice of violation had been issued for the unauthorized work.

30. Despite requests from Township representatives, up to and including the Township Supervisor, staff was continuously denied access to the Property by Gary Percy to analyze the Property to determine the extent of the tree removal.

31. On July 24, 2018, the Township's in-house counsel was contacted by counsel for Defendant, indicating all communication concerning the Property was to be directed to him.

32. After much back and forth, a date was agreed upon to conduct an inspection of the Property.

33. On August 22, 2018, representatives of the Township—including the Landscape Architect/Planner, an Ordinance Officer and a consulting Arborist—met representatives of Defendant to walk the Property and the Parent Parcel to conduct a scientific analysis to come up with an estimate of how many trees and what types of trees may have been removed from the Property.

34. The analysis included, among other things, identifying six representative plots on the (still treed) Parent Parcel directly adjacent to the Property, and then counting and identifying the species of the regulated trees within those plots.

35. Using the number and types of trees that were identified in the representative plots and taking into consideration soil conditions and topography of the Property, a scientific estimate was made of the number and types of trees that were removed.

36. As set forth in the attached spreadsheets, the analysis concluded that 1,385 "regulated trees" and 100 "landmark" trees were removed. (Exhibit M).

37. 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." (Exhibit H, Canton Township Forest Preservation and Tree Clearing Ordinance, §§ 5A.05 and 5A.01.)

38. The Township Ordinance requires replacement of regulated trees on a 1:1 ratio, and replacement of landmark trees on a 3:1 ratio. (Exhibit H, § 5A.08.)

39. In total, based on the Township's analysis, Defendant is required under Township Ordinance to replace in the above ratios the 1,485 trees that were removed.

40. In lieu of planting replacement trees, Defendant has the option of paying into the Township's tree fund the market value of the trees that were removed, in the ratios of required replacement, accordance with § 5A.08(E).

41. With current market values for the types of trees required to replace the regulated trees removed running between $225 and $300 per tree, and market value of the trees required to replace the landmark trees averaging $450 per tree, the total amount Defendant is responsible for paying into the tree fund for the unlawfully removed trees is between $412,000 and $446,625.

42. At the request of Defendant's counsel, a proposal was sent to resolve the dispute between the Township and Defendant on September 13, 2018, and as of the date of the filing of this Complaint, no real response has been received.

43. Rather, the Township learned on October 22, 2018 through a news media report that Defendant was now claiming it was starting a "Christmas tree farm" and had planted some 1,000 Norway spruce trees on the Property. Defendant has indicated that it intends to continue to plant Christmas trees.

44. The Property is zoned LI—Light Industrial. The intent of the LI district is to provide locations for planned industrial development, including planned industrial park subdivision. (Exhibit N, Article 22 of Appendix A of the Canton Code of Ordinances.) Agricultural uses are not allowed as a principal permitted or special land use on property zoned LI.

45. Furthermore, an agricultural use requires a minimum of 40 acres; as stated above, the Property is only 16 acres.

46. To use the Property for agricultural purposes, Defendant must file an application to rezone the Property to RA-Rural Agricultural (Exhibit O, Article 9 of Appendix A of the Canton Code of Ordinances), and a request for a variance to allow the agricultural use on property smaller than 40 acres.

47. No applications for either have been submitted to the Township for the Property.

48. Additionally, because the Property contains regulated wetlands, Defendant is required to obtain a permit from the MDEQ to plant trees; in an email dated October 23, 2018, a MDEQ representative confirmed that no such permit had been obtained. (Exhibit P).

49. Defendant does not have any protection under the Michigan Right to Farm Act, MCL 286.471 *et seq*, because Defendant does not comply with the Generally Accepted Agricultural and Management practices for Farm Markets (GAAMPS). A Christmas tree farm falls under these GAAMPS. The GAAMPS require, among other things, that "…. the market must be located on property where local land use zoning allows for agriculture and its related activities." (Exhibit Q).

50. Agricultural uses, including a Christmas tree farm, are not permitted or special land uses in the LI District. (Exhibit N).

51. Plaintiff is fearful that if there is no immediate intervention by this Court, Defendant will continue to violate the Township Code, and will continue to plant Norway spruce trees on the Property.

52. This is not Mr. Percy's first rodeo. AD Transport, Inc. has, in the past, violated the Township Code resulting in litigation, including expanding a building on its industrial site and constructing a parking lot, all without prior approvals and permits required by ordinance, and tampering with the Township's water meter resulting in the industrial use receiving free water for a period of time.

53. Plaintiff's requests for ordinance compliance by Defendant have been repeatedly ignored, Defendant continues to thumb its nose at the ordinance requirements, and Defendant continues to take actions in violation of the Township Code of Ordinances.

54. Indeed, Defendant has chosen to disseminate incomplete or inaccurate statements to the press in an attempt to enlist support from the public to place pressure on the Township to ignore the blatant ordinance violations. (For example, Exhibit R).

COUNT I – VIOLATION OF THE ZONING ORDINANCE
NUISANCE PER SE
§ 5A.05-Failure to Obtain a Tree Removal Permit

55. Plaintiff hereby incorporates Paragraphs 1 - 55 as though fully set forth herein.

56. As set forth in detail above in Paragraph 18, Article 5A of the Canton Township Code of Ordinances, § 5A.05(A) requires a permit to remove trees from property in the following situations:

a. Removal or relocation of any tree with a diameter breast height of 6" or greater;

b. Removal of any landmark tree;

c. Removal of any tree within a forest;

d. Clear cutting or grubbing within the dripline of a forest. (Exhibit H).

57. It is undisputed that neither Defendant nor any representative on behalf of Defendant obtained a permit, yet Defendant was required to do so as it performed activities on the Property that require a permit under the Zoning Ordinance.

58. Defendant clear cut the 16-acre parcel without first obtaining a permit.

59. The failure to obtain a tree permit prior to clear-cutting the Property – including the removal of 1,385 "regulated trees" and 100 "landmark" trees - is a violation of § 5A.05 of the Zoning Ordinance.

60. Although § 5A.08(C) of the Zoning Ordinance contains an exemption for "agricultural/farming operations" and "commercial nursery/tree farm operations", those uses are not permitted in the LI District, the Property's zoning classification, and are limited to the RA, Rural Agricultural District, under the Zoning Ordinance. Thus, Defendant cannot claim any exemption from the provisions of the Zoning Ordinance.

61. A violation of the Zoning Ordinance is a nuisance per se that shall be abated by the Court.

62. Plaintiff is not required to show a nuisance in fact under the MZEA and existing law.

63. Pursuant to MCL 600.2940, a nuisance is abated through order of the Court and is done so at the expense of the Defendants.

64. Plaintiff has incurred and will continue to incur costs in attempting to enforce the provisions of Appendix A, Zoning, of the Code of Ordinances to abate the nuisances per se, including attorney fees, because of Defendant's continued violations pertaining to the Property.

COUNT II – VIOLATION OF THE ZONING ORDINANCE
NUISANCE PER SE
§ 5A.07 – Failure to Erect a Protective Barrier Around a Landmark Tree

65. Plaintiff hereby incorporates Paragraphs 1 – 65 as though fully set forth herein.

66. The Zoning Ordinance requires a protective barrier be erected around a landmark tree:

> **Sec. 5A.07. – Protective barriers.**
> It shall be unlawful to develop, clear, fill or commence any activity for which a use permit is required in or around a landmark/historic tree or forest without first erecting a continuous protective barrier around the perimeter dripline.

67. It is undisputed that neither Defendant nor any representative on behalf of Defendant erected any barrier around a landmark tree, but instead, in callous disregard of the Township Ordinance, removed all the landmark trees.

68. Defendant clear cut the 16-acre parcel without erecting a protective barrier around the landmark trees.

69. The failure to obtain erect a barrier around the landmark trees is a violation of § 5A.07 of the Zoning Ordinance.

70. Although § 5A.08(C) of the Zoning Ordinance contains an exemption for "agricultural/farming operations" and "commercial nursery/tree farm operations", those

uses are not permitted in the LI District, the Property's zoning classification, and are limited to the RA, Rural Agricultural District, under the Zoning Ordinance. Thus, Defendant cannot claim any exempt from the provisions of the Zoning Ordinance.

71. A violation of the Zoning Ordinance is a nuisance per se that shall be abated by the Court. MCL 125.3407.

72. Plaintiff is not required to show a nuisance in fact under the MZEA and existing law.

73. Pursuant to MCL 600.2940, a nuisance is abated through order of the Court and is done so at the expense of the Defendants.

74. Plaintiff has incurred and will continue to incur costs in attempting to enforce the provisions of Appendix A, Zoning, of the Code of Ordinances to abate the nuisances per se, including attorney fees, because of Defendant's continued violations pertaining to the Property.

COUNT III-VIOLATION OF THE ZONING ORDINANCE
NUISANCE PER SE
§ 2.24 – Failure to Observe Setback from Wetland Areas and Watercourses

75. Plaintiff hereby incorporates Paragraphs 1 - 75 as though fully set forth herein.

76. The Canton Township Zoning Ordinance prohibits and "earth movement, excavation, land balancing or earth disruption of any kind" within 25 feet from of any wetland. (Exhibit S).

77. As verified by the inspection by the Michigan Department of Environmental Quality and confirmed in a letter date June 11, 2018 from the Michigan Department of

Environmental Quality issuing a Violation Notice and Order to Restore, Defendant not only excavated, moved and disrupted the grade and soil within 25 feet of a wetland on the Property, but also removed earth within the wetland itself.

78. The movement of the earth during the clear-cutting of the Property within 25 feet of the wetland is a violation of § 2.24 of the Zoning Ordinance.

79. A violation of the Zoning Ordinance is a nuisance per se that shall be abated by the Court. MCL 125.3407.

80. Plaintiff is not required to show a nuisance in fact under the MZEA and existing law.

81. Pursuant to MCL 600.2940, a nuisance is abated through order of the Court and is done so at the expense of the Defendants.

82. Plaintiff has incurred and will continue to incur costs in attempting to enforce the provisions of Appendix A, Zoning, of the Code of Ordinances to abate the nuisances per se, including attorney fees, because of Defendant's continued violations pertaining to the Property.

COUNT IV –VIOLATION OF THE ZONING ORDINANCE
NUSANCE PER SE
Article 22.00 – LI, Light Industrial District

83. Plaintiff hereby incorporates Paragraphs 1 - 83 as though fully set forth herein.

84. Section 27.09(1) of the Zoning Ordinance declares that any uses "…carried on in violation of this ordinance are hereby declared to be a nuisance per se, and shall

be subject to abatement or other action by a court of appropriate jurisdiction." (See attached Exhibit S.)

85. The language contained in § 27.09 was adopted pursuant to the Michigan Zoning Enabling Act (P.A. 110 of 2006) ("MZEA").

86. Section 407 of the MZEA provides the following in relevant part:

> Sec. 407. Except as otherwise provided by law, a use of land or a dwelling, building, or structure, including a tent or recreational vehicle, used, erected, altered, razed, or converted in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se. The court shall order the nuisance abated, and the owner or agent in charge of the dwelling, building, structure, tent, recreational vehicle, or land is liable for maintaining a nuisance per se… (Emphasis added.)
>
> MCL 125.3407.

87. Pursuant to § 2.01A of the Zoning Ordinance, no land can be used except in conformity with the regulations specified for the zoning district in which the land is located. (Exhibit T).

88. As set forth above, Defendant is using the Property for a use not permitted under the LI District, the zoning classification applicable to the Property.

89. Agricultural uses, farming operations, and commercial nursery/tree farm operations are only permitted in the RA, Rural Agricultural District, under the Zoning Ordinance, and are prohibited in the LI District.

90. Pursuant to MCL 125.3407, a violation of the Zoning Ordinance is a nuisance per se that shall be abated by the Court.

91. Plaintiff is not required to show a nuisance in fact under the MZEA and existing law.

92. Pursuant to MCL 600.2940, a nuisance is abated through order of the Court and is done so at the expense of the Defendants.

93. Plaintiff has incurred and will continue to incur costs in attempting to enforce the provisions of Appendix A, Zoning, of the Code of Ordinances to abate the nuisances per se, including attorney fees, because of Defendant's continued violations pertaining to the Property.

REQUEST FOR DECLARATORY JUDGMENT, TEMPORARY RESTRAINING ORDER AND PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF, AND PAYMENT TO TREE FUND

Based upon the foregoing, Plaintiff requests this Honorable Court grant the following relief:

(A) Issue a Temporary Restraining Order pursuant to MCR 3.310(B) to prevent the further planting of Norway Spruce or any other type of evergreen trees for the purported use as a commercial Christmas tree farm and to maintain the status quo pending a Show Cause Hearing.

(B) Issue an Order to Show Cause pursuant to MCL 3.310 compelling Defendant to appear before this Court to demonstrate why Defendant should not be immediately enjoined from attempting to establish a commercial Christmas tree farm on the Property, or for taking any further action on the Property in violation of the Township Code of Ordinances, and why the monetary, equitable and injunctive relief requested herein should not be immediately granted.

(C) Declare and determine that the actions taken by Defendant to date in violating the provisions of the Zoning Ordinance are a nuisance per se entitled to immediate injunctive relief and abatement;

(D) Authorize the Township, through its agents and employees, to enter onto the Property and post notice of the Court's order.

(E) Order Defendant to immediately correct all ordinance violations and grant the Township permission to enter onto the Property to determine compliance with the Court's order.

(F) Order Defendant to pay the amount of between $412,000 and $446,625 to the Township's tree fund for the clear cutting of the Property within sixty (60) days of enter of the Order;

(G) Alternatively, appoint a receiver pursuant to MCL 125.535 to monitor the rehabilitation of the Property and the correction of the violations, with all costs related thereto to be paid by Defendant.

(H) Enter judgment in favor of the Township against Defendant for all costs, expenses, and attorney fees incurred by the Township in these proceedings and abating or being able to abate the nuisance per se and authorize an order that, in the event of Defendant's failure to pay such amount within 30 days of being invoiced, or the payment to the tree fund within 60 days, a lien in favor of the Township, in the amount of such costs, expenses and attorney fees be placed on the Property with the amount thereof to be assessed on the tax roll, for collection in the same manner provided by law for real property taxes.

(I) Grant such other relief as is appropriate in law and/or equity under the facts and law present.

VERIFICATION

I declare that the statements and code provisions contained in or attached to this Complaint are true and accurate to the best of my information, knowledge and belief.

Leigh Thurston

Leigh Thurston

Subscribed and sworn to before me this
2ND day of NOVEMBER 2018

Joan Ada Lager 11-2-18

Notary Public, Wayne County, MI
My Commission Expires: 10/10/19

JOAN ADA LAGER
NOTARY PUBLIC-STATE OF MICHIGAN
COUNTY OF WAYNE
My Commission Expires 10/10/2019
Acting in the County of WAYNE

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

/s/ Anne McClorey McLaughlin (P40455)
Attorney for Plaintiff
27555 Executive Drive, Suite 250
Farmington Hills, MI 48331-3550
(248) 489-4100
amclaughlin@rsjalaw.com

EXHIBIT 7

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Civil Case No. 2:18-cv-13690

Hon. _____
Hon. Mag. _____

v.

CHARTER TOWNSHIP OF
CANTON, MICHIGAN, a Michigan
Municipal Corporation
Defendant.

COMPLAINT

INTRODUCTION

1. Plaintiff F.P. Development, LLC (the "Plaintiff") is a Michigan limited liability company whose resident agent is Mr. Martin F. Powelson, and whose registered address is 4850 S. Sheldon Road, Canton, MI 48188.

2. The Charter Township of Canton (the "Defendant" or the "Township") is a Michigan municipal corporation whose clerk is Michael A. Siegrist, and whose address is 1150 S. Canton Center Road, Canton, MI 48188.

3. Plaintiff challenges the constitutionality of Defendant's Forest Preservation and Tree Clearing ordinance, Article 5A.00 of the Township's Code of Ordinances (the "Ordinance"). On its face, the Ordinance seizes ownership of private property

and then requires the owner to seek permission from and provide payment to the Township for the privilege of using the seized property. Failure to comply with the Ordinance's restrictions on constitutionally protected property rights results in substantial civil and criminal sanctions.

4. Plaintiff owns an approximately 30-acre parcel of industrially zoned property (the "Property") located in the Township.

5. In 2018, Plaintiff engaged in forestry work for a dual purposes. Plaintiff removed vegetation that included both trees and scrub brush, invasive species, dead ash trees, and some cotton wood trees (the "harvested or unwanted objects") from the Property in accord with accepted silvicultural purposes and in order to access an obstructed drain that was causing flooding on the Property.

6. The Property retains significant numbers of trees and no areas of the Property were completely cleared as a result of the work undertaken by Plaintiff.

7. Under the Ordinance, property owners are prohibited from removing from their properties any object broadly defined as a "tree"—including brush only a few feet high and a few inches in diameter—unless they first seek a permit.

8. A permit will not be granted unless the property owner agrees to pay up to $450.00 for the removal of a single "tree," or alternatively, to replace it with up to three trees of the Township's choosing.

9. Because Plaintiff did not receive a permit before removing the harvested or unwanted objects, the Township has issued a Notice of Violation to Plaintiff by which the Township could seek potentially hundreds of thousands of dollars in penalties under the Ordinance. The Notice of Violation was issued notwithstanding the fact that Plaintiff's removal of the harvested or unwanted objects from the Property was necessary to access an obstructed drain that was causing flooding, damaging or destroying trees, and otherwise making the Property unusable.

10. Because of its explicit restrictions, penalties, and sanctions on the use of private property, and because of its application by the Township to the Plaintiff's Property through the Notice of Violation, the Ordinance, both on its face and as applied in this case, constitutes: (1) an unlawful taking and seizure in violation of the Fourth and Fifth Amendments; (2) an unconstitutional condition on the use of property under the Fifth and Fourteenth Amendments; and (3) an excessive fine under the Eighth Amendment to the United States Constitution.

JURISDICTION AND VENUE

11. Plaintiff brings this civil-rights lawsuit pursuant to 42 U.S.C. § 1983, 28 U.S.C. § 1331, and the Declaratory Judgments Act, 28 U.S.C. § 2201, for violations of rights, privileges, or immunities secured by the Fourth, Fifth, Eighth, and Fourteenth Amendments of the Constitution of the United States.

12. Plaintiff seeks injunctive and declaratory relief against Defendant Township of Canton because the Township's ordinance both facially and as-applied to Plaintiff violates its constitutional rights. Accordingly, this Court has jurisdiction over Plaintiff's claims under 28 U.S.C. § 1331 (federal-question jurisdiction) and § 1343 (civil-rights jurisdiction).

13. Venue is appropriate in this Court under 28 U.S.C. § 1391(b)(1). The defendant is a charter township of Wayne County, which is located in the Eastern District of Michigan in the Southern Division. *See* 28 U.S.C. § 102 (a)(1). The Property is situated, and the actions set forth herein occurred, within the territorial jurisdiction of this Court.

PARTIES

A. PLAINTIFF

14. Plaintiff is a Michigan corporation founded by Mr. Martin F. Powelson.

15. Since the 1970's the Powelson family has operated businesses in Canton that provide products, services, and jobs for the people of the Township and others.

16. Because the property at issue in this case is located in the Township, it is subject to the restrictions of the Ordinance.

17. The Township has applied the Ordinance to Plaintiff, issuing a Notice of Violation of the Ordinance carrying with it substantial penalties for removing the harvested or unwanted objects from the Property without a permit.

18. Unless enjoined by this Court, the Ordinance will continue to injure Plaintiff by unconstitutionally restricting its property rights and limiting its ability maintain or otherwise productively use the Property.

B. DEFENDANT

19. Defendant is the political entity that enacted and enforces the Ordinance.

STATEMENT OF FACTS

20. The Property is a largely vegetated parcel in Canton Township that is surrounded on all four sides by industrial or commercial uses.

21. In the late 1800's, a drainage ditch was dug on the Property and through nearby properties in the area to prevent flooding.

22. Under state law, the County has a responsibility to maintain the drainage ditch.

23. Over the last several decades, however, the drainage ditch has fallen into a state of neglect so as to not function as designed.

24. As a result, sediment, trees, and other vegetation have congregated in and around the drainage ditch obstructing its flow.

25. These obstructions have reached the point that they are causing flooding on the Property and the properties of Plaintiff's neighbors.

26. The flooding provides a breeding ground for mosquitos and has resulted in the death of numerous trees.

27. Additionally, portions of the Property have become or are becoming infested with invasive species of vegetation and destructive bugs.

28. In 2018, Plaintiff decided it would be willing to bear the cost of maintaining the drainage ditch in order to abate the problems caused on the Property by the County's failure to maintain the drainage ditch.

29. In order to even be able to stage the necessary equipment in the vicinity of the drainage ditch to be able to eventually conduct the drain maintenance work, Plaintiff first had to remove a number of trees and scrub brush between the entrance of the Property and the drainage ditch.

30. To facilitate the removal, Plaintiff entered into an agreement with a private contractor who agreed to cut the path, clear the obstructions, and pay Plaintiff a fee in exchange for the rights to any harvestable wood that was removed in the process.

31. During that process, certain wood was harvested in accord with accepted silvacultural principles.

32. Plaintiff, however, was unable to complete the project. In July of 2018 the Township notified Plaintiff that Plaintiff had violated the Ordinance by removing "trees" without a permit and would be required to pay an undisclosed penalty.

33. The Township then conducted inspections of the Property in August and September of 2018.

34. On September 13, 2018, the Township served Plaintiff with a Notice of Violation, stating that Plaintiff had violated the Ordinance by removing "trees" without a permit and was required to pay an undisclosed penalty. The face of the Ordinance authorizes substantial civil and criminal penalties in connection with the Notice of Violation.

35. Also on September 13, 2018, the Township posted a "Stop Work" order on the Property preventing Plaintiff from continuing work necessary to remove the obstructions in and around the drain.

36. As a result, the Property continues to flood and Plaintiff was unable to collect the contracted fee for the timber.

LEGAL FRAMEWORK

A. OWNERSHIP OF TREES, SHRUBS, AND OTHER OBJECTS ON PRIVATE PROPERTY

37. At common law, the right to own property includes an absolute ownership right in the trees, shrubs, and other objects situated thereon, including the right to fell, remove, or otherwise utilize same.

38. A third party who interferes with that property interest is guilty of a crime under Michigan law. MCL 750.382.

39. The right of a property owner to fell and utilize trees, shrubs or other objects on his property is a severable interest, akin to a mineral interest, and may be sold or leased to others.

40. Government interference with that severable interest can give rise to a taking under the Fifth and Fourteenth Amendments to the United States Constitution, even when the underlying property may still be used for other purposes. *See Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 34 (2012).

B. THE FIFTH AMENDMENT

41. The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amdt. V.

42. The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

43. A *per se* taking occurs when the government acquires title to a property through the process of eminent domain and in two other circumstances relevant in this case.

44. First, a *per se* taking occurs when a government regulation of private property grants the government "control and use" over an interest in private

property, even if actual possession remains with the private property owner. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2428 (2015). In *Horne*, a federal law that required raisin farmers to dedicate control over a certain percentage of their raisins to the federal government was deemed by the Supreme Court to be a *per se* taking, despite the fact that the raisins remained on the farmers' property and the farmers would receive a portion of the proceeds if the government decided to sell the raisins. *Id*. The Court explained that the regulation was a taking because it granted the government total discretion to "dispose [] of what become its raisins as it wishes." *Id*.

45. Second, a per se taking occurs when a government regulation requires that a private property owner maintain an unwanted object on her property. *Loretto*, 458 U.S. at 441. In *Loretto*, the Court held that a law requiring a property owner to allow an unwanted cable box to remain on her property constituted a *per se* taking. *Id.*

C. THE FOURTH AMENDMENT

46. The Fourth Amendment to the United States Constitution provides, in part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

47. The Fourth Amendment is incorporated against the states through the Fourteenth Amendment.

48. A land use regulation violates the Fourth Amendment if it is "(a) a meaningful interference with [a Plaintiff's] possessory interests in property, which is (b) unreasonable because the interference is unjustified by [ ] law or, if justified, then uncompensated." *Severance v. Patterson*, 566 F.3d 490, 503–04 (5th Cir. 2009). In *Severance*, the court held that government claim to a public use easement across a homeowner's yard constituted a seizure for Fourth Amendment purposes, because it interfered with the owner's ability to use the property and exclude others. *Id.*

D. THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

49. Under the Fifth and Fourteenth Amendment to the United States Constitution, conditions attached to a land-use permit must be "roughly proportional" to the government interest protected. *Dolan v. City of Tigard*, 512 U.S. 374, 391(1994).

50. To meet this burden, "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.*

E. THE EXCESSIVE FINES CLAUSE

51. The Eighth Amendment of the United States Constitution provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

52. The Excessive Fines Clause of that amendment "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609–610 (1993).

53. 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." *U.S. v. Bajakajian* 524 U.S. 321, 334 (1998).

F. THE ORDINANCE

54. Canton Code of Ordinances, Art. 5A.00 et seq. (Exhibit 1), prohibits:

1. "The removal or relocation of any tree with a [diameter at breast height] of six inches or greater on any property without first obtaining a tree removal permit";
2. "The removal, damage or destruction of any landmark tree without first obtaining a tree removal permit";
3. "The removal, damage or destruction of any tree located within a forest without first obtaining a tree removal permit"; or
4. "Clear cutting or grubbing within the dripline of a forest without first obtaining a tree removal permit." Canton Code of Ordinances, Art. 5A.05

55. "Tree" is broadly defined in the ordinance to include "any woody plant with at least one well-defined stem and having a minimum DBH of three inches." Canton Code of Ordinances, Art. 5A.01.

56. "Forest" is likewise broadly defined to include "any treed area of one-half acre or more, containing at least 28 trees with a DBH of six inches or more." Canton Code of Ordinances, Art. 5A.01.

57. A permit will not be granted for the above listed activities unless the applicant can show that there is "no feasible or prudent alternative" to removal that would not cause an "undue hardship." Canton Code of Ordinances, Art. 5A.05 (F).

58. Even if the burden set forth in Art. 5A.05 (F) of the ordinance is met, a permit will only be granted if the property owner agrees to replace any removed trees with 1-3 replacement trees, or agrees to pay "monies into the township tree fund for tree replacement within the township." Canton Code of Ordinances, Art. 5A.08.

59. "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." Canton Code of Ordinances, Art. 5A.08.

60. In practice, these fees range from $250-450 per tree.[1]

[1] *See* Canton Tree Removal Application, https://www.canton-mi.org/DocumentCenter/View/310/Tree-Removal-Application-PDF (last reviewed on November 9, 2018).

61. A property owner who removes trees without a permit is liable for the fees or replacement trees that would have been required, had the owner applied for a permit.

62. The owner is subject to up to an additional $500 in penalties and up to 90 days of imprisonment for each offense, or both. Canton Code of Ordinances, Sec. 1-7 (c).

CLAIMS FOR RELIEF

Count I

Unconstitutional taking in violation of Fifth and Fourteenth Amendments to the United States Constitution

(Government seizure of control and use of an interest in property—*Horne v. Dep't of Agric*., 135 S.Ct. 2419 (2015))

63. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in Paragraphs 1-62 as though fully set forth herein.

64. Both on its face and as applied in this case, the Ordinance effectively grants the Township a controlling interest in the "trees," as defined in the Ordinance, on Plaintiff's Property.

65. So complete is the Township's claim of ownership under the Ordinance that it will not grant a permit to remove or engage in certain activities in connection with a "tree" on the Property unless Plaintiff agrees to compensate the

Township by a cash payment or incur costs of replacement as dictated by the Township. Canton Code of Ordinances, Art. 5A.08.

66. Issuance of a permit is not based on whether removing a "tree" will injure others, create a public nuisance, or cause any other cognizable public or private harm.

67. Instead, the granting of a permit is solely contingent on whether Plaintiff compensates[2] the Township and the Township agrees that the removal of the harvested or unwanted objects is necessary. Canton Code of Ordinances, Art. 5A.05, 5A.08.

68. By claiming a right to control the use and disposition of the harvested or unwanted objects on the Plaintiff's Property, the Township has made a claim to ownership that is in fact a possession of the objects.

69. The Township has not offered any compensation to Plaintiff and the Ordinance does not provide any mechanism by which Plaintiff may be compensated for the Township's taking such a possessory interest.

70. The Township denies that it has any obligation to compensate Plaintiff.

71. The Township has asserted, and the Ordinance on its face provides, that Plaintiff must pay the Township money for removing the harvested or unwanted objects from Plaintiff's own Property without government permission.

[2] In the form of cash payment or planting replacement trees.

72. Accordingly, the ordinance, both on its face and as applied in this case, is an uncompensated taking in violation of the Fifth Amendment.

Count II

Unconstitutional taking in violation of Fifth and Fourteenth Amendments to the Constitution

(Government mandated occupation of private property by an unwanted object—*Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).)

73. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in Paragraphs 1-72 as though fully set forth herein.

74. The Ordinance, both on its face and as applied to Plaintiff requires that Plaintiff allow harvested or unwanted objects to remain on its property unless the Township grants it a permit to remove them.

75. Such a permit will only be granted if the Township agrees that removal is necessary and Plaintiff agrees to replace the harvested or unwanted objects or pay a penalty in lieu of replacement. Canton Code of Ordinances, Art. 5A.05, 5A.08.

76. Plaintiff is thus left with the choice of allowing harvested or unwanted objects to remain on its property or incurring costs by replacing the objects with ones of the Township's choosing or paying a fine.

77. This government-mandated occupation of the Plaintiff's property by harvested or unwanted objects is a per se taking under *Loretto*, 458 U.S. 419.

78. The Township denies any obligation to compensate Plaintiff for this taking.

79. The Township claims, and the Ordinance mandates, that the Township is entitled to compensation from Plaintiff for its removal of the harvested or unwanted objects from its Property.

80. In addition, the Ordinance sets forth civil and criminal sanctions for such removal by Plaintiff, regardless of whether Plaintiff's actions actually benefit the health, safety, and environment of the Township and its residents.

81. Accordingly, both on its face and as applied, the Ordinance is an uncompensated taking in violation of the Fifth Amendment.

Count III

Unreasonable seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution

(Unreasonable interference with a possessory interest in property—*Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009))

82. Plaintiff re-alleges and incorporates by reference each and every allegation set forth Paragraphs 1- 81 as though fully set forth herein.

83. A land use regulation violates the Fourth Amendment if it is "(a) meaningful interference with [a Plaintiff's] possessory interests in property, which is (b) unreasonable because the interference is unjustified by [ ] law or, if justified, then uncompensated." *Severance*, 566 F.3d at 502.

84. The Ordinance, both on its face and as applied, creates a meaningful interference with Plaintiff's possessory interest in the trees on its property by eliminating its ability to use, modify, destroy, or alienate the "trees" without paying a penalty.

85. Additionally, the Ordinance, both on its face and as applied, creates a meaningful interference with the Plaintiff's possessory interest in its property as a whole by eliminating the right to exclude harvested or unwanted objects from the property, or conduct necessary maintenance.

86. Neither of the above interferences with Plaintiff's property interests have been compensated.

87. The Township demands, and the Ordinance mandates, that Plaintiff pay for exercising control over its own property without government consent.

88. These interferences with Plaintiff's property rights are not reasonable.

89. The Ordinance does not limit its seizures of "trees" to seizures seeking evidence of a crime or seizures necessary to prevent or rectify a public nuisance or any other cognizable harm.

90. Nor does the Township claim that Plaintiff's removal of the harvested or unwanted objects to conduct maintenance on the Property has endangered or injured the Property's neighbors or the Township.

91. Accordingly, the Ordinance, both on its face and as applied, is an unreasonable seizure in violation of the Fourth Amendment.

Count IV

Unconstitutional condition of the use of private property in violation of the Fifth and Fourteenth Amendments the United States Constitution

(*Dolan v. City of Tigard*, 512 U.S. 374 (1994))

92. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in Paragraphs 1-91 as though fully set forth herein.

93. In *Dolan*, 512 U.S. at 391, the Court held that conditions attached to a land-use permit must be roughly proportional to the government interest protected.

94. Both on its face and as applied in this case the Ordinance allows the Township to charge hundreds of dollars for permission to remove a single "tree" that is only a few inches across.

95. Alternatively, the Township could force the owner to plant up to three trees of the Town's choosing.

96. Such a condition imposed by the Ordinance is not "roughly proportional" to any interest the government has in keeping the harvested or unwanted objects in place on the Property.

97. There is no evidence that clearing the harvested or unwanted objects from the Property will negatively affect the Plaintiff's neighbors, or the health, safety or environment of the Township or its residents.

98. In fact, the clearing will benefit neighbors by reducing flooding, bugs, and other invasive species.

99. The conditions imposed by the Ordinance are therefore not roughly proportional to any public harm caused by Plaintiff's removal of the harvested or unwanted objects from its Property and are therefore unconstitutional as applied.

100. Because this gross disproportionality is built into the ordinance—i.e., the ordinance requires excessive compensation for the removal of "trees" including scrub brush—the ordinance is also unconstitutional on its face.

Count V

Excessive fine in violation of the Eighth and Fourteenth Amendments the United States Constitution

(*U.S. v. Bajakajian*, 524 U.S. 321 (1998))

101. Plaintiff re-alleges and incorporates by reference each and every allegation set forth in Paragraphs 1-100 as though fully set forth herein.

102. 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.

103. Both on its face, and as applied in this case, the ordinance mandates penalties of hundreds of dollars for any single "tree" Plaintiff removed from its property.

104. The top penalty, reserved for "heritage trees" is $450.00 per tree removed.

105. Additionally, each violation of the ordinance is punishable by a fine of up to $500.00, up to 90 days in jail, or both.

106. Because "tree" is broadly defined to include scrub brush, clearing several acres can result in hundreds of thousands of dollars in fines asserted by the Township.

107. Upon information and belief, the Township contends it is entitled to hundreds of thousands of dollars in penalties from Plaintiff because Plaintiff removed harvested or unwanted objects in order to perform maintenance on its Property.

108. By contrast, the fine assigned for knowingly assaulting a pregnant woman in Michigan is "…not more than $500…" MCL 750.81 (3).

109. The penalties assigned by the Township to Plaintiff in this case for clearing the Property are so out of proportion with the gravity of the offense charged as to be excessive in violation of the Eighth Amendment.

110. Because this gross disproportionality is built into the Ordinance—i.e., the ordinance provides for hundreds of dollars in penalties for the removal a single "tree" including scrub brush—the Ordinance is also unconstitutional on its face.

INJUNCTIVE RELIEF ALLEGATIONS

111. The Plaintiff hereby re-alleges and incorporates by reference each and every allegation set forth in Paragraphs 1- 110 as though fully set forth herein.

112. Plaintiff alleges that both on its face and as applied, the Ordinance violates its constitutional rights.

113. If an injunction does not issue enjoining Defendants from enforcing the Ordinance, Plaintiff will be irreparably harmed.

114. Plaintiff has no plain, speedy, and adequate remedy at law to prevent the Defendant from enforcing the ordinance.

115. If not enjoined by this Court, Defendants will continue to enforce the Ordinance in derogation of Plaintiff's rights.

116. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

117. Plaintiff hereby re-alleges and incorporates by reference each and every allegation set forth in Paragraphs 1-116 as though fully set forth herein.

118. An actual and substantial controversy exists between Plaintiff and Defendant as to their legal rights and duties with respect to whether the Ordinance violates the United States Constitution on its face.

119. An actual and substantial controversy exists between Plaintiff and Defendant as to their legal rights and duties with respect to whether the Ordinance violates the United States Constitution as applied to the Plaintiff.

120. This case is presently justiciable because the Ordinance applies to Plaintiff on its face, and has been applied against the Plaintiff because the Township has issued a Notice of Violation and Stop Work Order against Plaintiff alleging that Plaintiff has violated the Ordinance and is subject to civil and criminal sanctions.

121. Declaratory relief is therefore appropriate to resolve this controversy.

PRAYER & CONCLUSION

As remedies for the constitutional violations set forth herein, Plaintiff respectfully requests the following relief:

A. Entry of judgment declaring the Ordinance an unconstitutional taking, on its face, in violation of the Fifth and Fourteenth Amendments to the United States Constitution;

B. Entry of judgment declaring the Ordinance an unconstitutional taking, as applied to Plaintiff, in violation of the Fifth and Fourteenth Amendments to the United States Constitution;

C. Entry of judgment declaring that the Ordinance, on its face, constitutes an unreasonable seizure of property in violation of the Fourth and Fourteenth Amendments to the United States Constitution;

D. Entry of judgment that the Ordinance, as applied to Plaintiff, constitutes an unreasonable seizure of property in violation of the Fourth and Fourteenth Amendments to the United States Constitution;

E. Entry of judgment declaring that, on its face, the Ordinance places an unconstitutional condition on the use of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution by conditioning tree removal on payment $250.00 - $450.00 per tree, or replacement of removed trees by 1 to 3 replacement trees;

F. Entry of judgment declaring that, as applied to Plaintiff, the Ordinance places an unconstitutional condition on the use of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution by conditioning tree removal on payment $250.00 - $450.00 per tree, or replacement of removed trees by 1 to 3 replacement trees;

G. Entry of judgment that the penalties mandated by the Ordinance for the removal of trees on private property are unconstitutionally excessive on their face, in violation of the Eighth and Fourteenth Amendments to the United States Constitution;

H. Entry of judgment declaring that the penalties assessed by the Township against Plaintiff for clearing the above described property are unconstitutionally

excessive in violation of the Eighth and Fourteenth Amendments to the United States Constitution;

I. Entry of a preliminary and a permanent injunction prohibiting the Township from enforcing the Ordinance against Plaintiff and prohibiting the Township from collecting fees for violation of the Ordinance;

J. An award of attorneys' fees, costs, and expenses in this action pursuant to the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988; and

K. Such further legal and equitable relief as the Court may deem just and proper.

Respectfully submitted,
CLARK HILL PLC

/s/ Michael J. Pattwell

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Date: November 26, 2018

EXHIBIT 1

ARTICLE 5A.00. - FOREST PRESERVATION AND TREE CLEARING

5A.01. - Definitions.

The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Agriculture/farming means any land in which the principal use is to derive income from the growing of plants and trees, including but not limited to land used principally for fruit and timber production.

Caliper means the diameter of a tree trunk measured six inches (15 cm) above ground level for trees up to four-inch caliper and 12 inches above the ground for larger sizes.

Clear cutting means the complete clearing, cutting or removal of trees and vegetation.

Commercial nursery/tree farm means any commercial establishment which is licensed by the state or federal government for the planting, growing and sale of live trees, shrubs, plants and plant materials for gardening and landscaping purposes.

Developed property means any land which is either currently used for residential, commercial, industrial, or agricultural purposes or is under construction of a new building, reconstruction of an existing building or improvement of a structure on a parcel or lot, the relocation of an existing building to another lot, or the improvement of open land for a new use.

Diameter at breast height (DBH) means the diameter in inches of the tree measured at four feet above the existing grade.

Dripline means an imaginary vertical line that extends downward from the outermost tips of the tree branches to the ground.

Forest means any treed area of one-half acre or more, containing at least 28 trees with a DBH of six inches or more.

Grade means the ground elevation.

Grubbing means the effective removal of under-canopy vegetation from a site. This shall not include the removal of any trees.

Landmark/historic tree means any tree which stands apart from neighboring trees by size, form or species, as specified in the landmark tree list in section 94-36, [4] or any tree, except box elder, catalpa, poplar, silver maple, tree of heaven, elm or willow, which has a DBH of 24 inches or more.

Single-family lot means any piece of land under single ownership and control that is two acres or more in size and used for residential purposes.

Township tree fund means a fund established for maintenance and preservation of forest areas and the planting and maintenance of trees within the township.

Tree means any woody plant with at least one well-defined stem and having a minimum DBH of three inches.

Undeveloped property means any property in its natural state that is neither being used for residential, commercial, industrial or agricultural purposes nor under construction.

(Amend. of 7-11-2006(2); Amend. of 10-20-2009)

5A.02. - Purpose.

The purpose of this article is to promote an increased quality of life through the regulation, maintenance and protection of trees, forests and other natural resources.

(Amend. of 7-11-2006(2))

5A.03. - Interpretation; conflicts with other ordinances.

The provisions of this article shall be construed, if possible, in such a manner as to make such provisions compatible and consistent with the provisions of all existing and future zoning and other ordinances of the township and all amendments thereto. If there is believed to be a conflict between the stated intent and any specific provision of this article, the township board may, in accordance with established zoning ordinance procedures, permit modification of such specific provisions while retaining the intent in such appealed instance.

(Amend. of 7-11-2006(2))

5A.04. - Notice of violation; issuance of appearance ticket.

If a violation of this article is noted, the ordinance inspector will notify the owner of record and the occupant of the property of the violation. Such notice shall specify the violation and the time within which corrective action must be completed. This notice may be served personally or by mail. If the property is not in compliance with this article at the end of the period specified in the notice of violation, an appearance ticket may be issued.

(Amend. of 7-11-2006(2))

5A.05. - Tree removal permit.

A. *Required.*

1. The removal or relocation of any tree with a DBH of six inches or greater on any property without first obtaining a tree removal permit shall be prohibited.
2. The removal, damage or destruction of any landmark tree without first obtaining a tree removal permit shall be prohibited.
3. The removal, damage or destruction of any tree located within a forest without first obtaining a tree removal permit is prohibited.
4. Clear cutting or grubbing within the dripline of a forest without first obtaining a tree removal permit is prohibited.

B. *Exemptions.* All agricultural/farming operations, commercial nursery/tree farm operations and occupied lots of less than two acres in size, including utility companies and public tree trimming agencies, shall be exempt from all permit requirements of this article.

C. *Display* . Tree removal permits shall be continuously displayed for the entire period while the trees are being removed.

D. *Application* . Permits shall be obtained by submitting a tree removal permit application in a form provided by the municipal services department. The application shall *include a tree survey conducted not more than two years prior to the date of application* and contain the following information:

1. The owner and/or occupant of the land on which the tree is located.
2. The legal description of the property on which the tree is located.
3.

A description of the area affected by the tree removal, including tree species mixture, sampling of tree size and the notation of unusual, scarce or endangered trees.

4. A description of each tree to be removed, including diseased or damaged trees, and the location thereof.
5. A general description of the affected area after the proposed tree removal.

E. *Review procedures* . Municipal services shall review the applications for tree removal permits and may impose such conditions on the manner and extent of the proposed activity as are necessary to ensure that the activity or use will be conducted in such a manner as will cause the least possible damage, encroachment or interference with natural resources and natural processes within the affected area.

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.).

4. The removal or relocation of trees within the affected areas shall be limited to instances:
   a. Where necessary for the location of a structure or site improvement and when no reasonable or prudent alternative location for such structure or improvement can be had without causing undue hardship.
   b. Where the tree is dead, diseased, injured and in danger of falling too close to proposed or existing structures, or interferes with existing utility service, interferes with safe vision clearances or conflicts with other ordinances or regulations.
   c. Where removal or relocation of the tree is consistent with good forestry practices or if it will enhance the health of remaining trees.
5. The burden of demonstrating that no feasible or prudent alternative location or improvement without undue hardship shall be upon the applicant.
6. Tree removal shall not commence prior to approval of a site plan, final site plan for site condominiums or final preliminary plat for the subject property.

(Amend. of 7-11-2006(2); Amend. of 10-20-2009)

Sec. 5a.06. - List of landmark/historic trees.

Landmark/historic trees are as follows:

Common Name	Species	DBH
Arborvitae	Thuja occidentalis	18"
American Basswood	Tilia americana	24"
American Beech	Fagus grandifolia	18"
American Chestnut	Castanea	8"
Birch	Betula spp.	18"
Black Alder	Alnus glutinosa	12"

Black Tupelo	Nyssa sylvatica	12"
Black Walnut	Juglans nigra	20"
White Walnut	Juglans cinerea	20"
Buckeye (Horse Chestnut)	Aesculus spp.	18"
Cedar, Red	Juniperus spp.	12"
Crabapple (cultivar)	Malus spp.	12"
Douglas Fir	Pseudotsuga menziesii	18"
Eastern Hemlock	Tsuga canadensis	12"
Fir	Abies spp.	18"
Flowering Dogwood	Cornus florida	8"
Ginkgo	Ginkgo biloba	18"
Hackberry	Celtis occidentalis	18"
Hickory	Carya spp.	18"
Honey Locust	Gleditsia triacanthos	24"
Kentucky Coffeetree	Gymnocladus dioicus	18"
Larch/tamarack	Larix laricina (Eastern)	12"
Sycamore/London Planetree	Platanus spp.	18"

Maple	Acer spp.(except negundo and saccharinum)	18"
Oak	Quercus spp.	20"
Pine	Pinus spp.	18"
Sassafras	Sassafras albidum	15"
Spruce	Picea spp.	18"
Tuliptree	Liriodendron tulipifera	18"
Cherry	Prunus spp.	18"

(Amend. of 7-11-2006(2); Amend. of 10-20-2009)

5A.07. - Protective barriers.

It shall be unlawful to develop, clear, fill or commence any activity for which a use permit is required in or around a landmark/historic tree or forest without first erecting a continuous protective barrier around the perimeter dripline.

(Amend. of 7-11-2006(2))

5A.08. - Relocation or replacement of trees.

A. *Landmark tree replacement*. Whenever a tree removal permit is issued for the removal of any landmark tree with a DBH of six inches or greater, such trees shall be relocated or replaced by the permit grantee. Every landmark/historic tree that is removed shall be replaced by three trees with a minimum caliper of four inches. Such trees will be of the species from section 5b.06.

B.

Replacement of other trees. Whenever a tree removal permit is issued for the removal of trees, other than landmark/historic trees, with a DBH of six inches or greater (excluding boxelder (acer negundo), ash(fraxinus spp) and cottonwood (populus spp)), such trees shall be relocated or replaced by the permit grantee if more than 25 percent of the total inventory of regulated trees is removed. Tree replacement shall be done in accordance with the following: If the replacement trees are of at least two-inch caliper at six inches above the ground or eight-foot height for evergreens, but less than three inches measured at six inches above the ground or nine-foot height for evergreens, the permit grantee shall be given credit for replacing one tree. If the replacement trees are of at least three-inch caliper at six inches above the ground or nine-foot height for evergreens, but less than four inches measured at 12 inches above the ground or ten-foot height for evergreens, the permit grantee shall be given credit for replacing 1½ trees. If the replacement trees are of at least four-inch caliper at 12 inches above the ground or ten-foot height for evergreens, the permit grantee shall be given credit for replacing two trees.

C. *Exemptions* . All agricultural/farming operations, commercial nursery/tree farm operations and occupied lots of less than two acres shall not be required to replace or relocate removed trees.

D. *Replacement tree standards* . All replacement trees shall:

1. Meet both the American Association of Nurserymen Standards and the requirements of the state department of agriculture.
2. Be nursery grown.
3. Be guaranteed for two years, including labor to remove and dispose of dead material.
4. Be replaced immediately after the removal of the existing tree, in accordance with the American Association of Nurserymen standards.
5. Be of the same species or plant community as the removed trees. When replacement trees of the same species are not available from Michigan nurseries, the applicant may substitute any species listed in section 5a.06 provided that shade trees are substituted with shade trees and evergreen trees with evergreen species. Ornamental trees need not necessarily be replaced with ornamental trees, but this shall be encouraged where feasible.

E.

[Location of replacement trees.] 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. If the grantee chooses to replace trees offsite the following must be submitted prior to approval of the permit:

a. A landscape plan, prepared by a registered landscape architect, indicating the sizes, species and proposed locations for the replacement trees on the parcel.

b. Written permission from the property owner to plant the replacement trees on the site.

c. Written agreement to permit the grantee to inspect, maintain and replace the replacement trees or assumption of that responsibility by the owner of the property where the trees are to be planted.

d. Written agreement to permit township personnel access to inspect the replacements as required.

(Amend. of 7-11-2006(2); Amend. of 10-20-2009)

EXHIBIT 8

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

F. P. DEVELOPMENT, LLC,
a Michigan limited liability company,

Plaintiff,

v

CHARTER TOWNSHIP OF CANTON,
A Michigan municipal corporation,

Defendant.

Civil Case No. 2:18-cv-13690

Hon. George Caram Steeh
Mag. Judge Elizabeth A. Stafford

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(E) Order Plaintiff/Counter-Defendant to pay the amount of $47,898 to the Township's tree fund for the removing trees from the Property within sixty (60) days of entry of the Order;

(F) Alternatively, appoint a receiver pursuant to Mich.Comp.Laws § 125.535 to monitor the rehabilitation of the Property and the correction of the violations, with all costs related thereto to be paid by Plaintiff/Counter-Defendant.

(G) Enter judgment in favor of the Township against Plaintiff/Counter-Defendant for all costs, expenses, and attorney fees incurred by the Township in these proceedings and abating or being able to abate the nuisance per se and authorize an order that, in the event of Plaintiff/Counter-Defendant's failure to pay such amount within 30 days of being invoiced, or the payment to the tree fund within 60 days, a lien in favor of the Township, in the amount of such costs, expenses and attorney fees be placed on the Property with the amount thereof to be assessed on the tax roll, for collection in the same manner provided by law for real property taxes.

(H) Grant such other relief as is appropriate in law and/or equity under the facts and law present.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

F.P. DEVELOPMENT, LLC, a Michigan corporation *Plaintiff/Counter-Defendant,*	§	Case No. 2:18-cv-13690 Honorable George Caram Steeh
V.	§	
CHARTER TOWNSHIP OF, CANTON, MICHIGAN, a Michigan municipal corporation *Defendant/Counter-Plaintiff.*	§	

INDEX OF APPENDIX

1. *New Jersey Shore Builders Ass'n v. Township of Jackson,* 2007 N.J. Super. Unpub. LEXIS 2987

2. *Tannian v. City of Grosse Point Park,* 1995 U.S. Dist. LEXIS 12084

APPENDIX 1

New Jersey Shore Builders Ass'n v. Township of Jackson

Superior Court of New Jersey, Appellate Division

February 7, 2007, Argued; July 11, 2007, Decided

DOCKET NO. A-2507-05T5

Reporter
2007 N.J. Super. Unpub. LEXIS 2987 *; 2007 WL 2005258

NEW JERSEY SHORE BUILDERS ASSOCIATION, a non-profit New Jersey Corporation, Plaintiff-Respondent, v. TOWNSHIP OF JACKSON, a New Jersey Municipal Corporation located in Ocean County, Defendant-Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY RULE 1:36-3 FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: **[*1]** On appeal from the Superior Court of New Jersey, Law Division, Ocean County, L-1148-04PW.

Core Terms

ordinance, planting, escrow fund, Forester, replacement, municipal, negative effect, public property, tree removal, properties, replanted, utilized, site, indiscriminate, landowner, provides, inches, shrubs

Counsel: Kevin N. Starkey argued the cause for appellant (Starkey, Kelly, Bauer, Kenneally & Cunningham, attorneys; Mr. Starkey, of counsel and on the brief; Dina R. Khajezadeh, on the brief).

Paul H. Schneider argued the cause for respondent (Giordano, Halleran & Ciesla, attorneys; Mr. Schneider, of counsel and on the brief; Afiyfa H. Bolton, on the brief).

Judges: Before Judges A. A. Rodriguez and Lyons.

Opinion

PER CURIAM

The Township of Jackson (Township) appeals from the December 12, 2005 final judgment of the Law Division declaring that Jackson Township Ordinance 41-03 and Chapter 100 of the Township Code are "invalid, void and unenforceable." We affirm substantially for the reasons expressed by Judge Eugene D. Serpentelli in his December 1, 2005 written opinion.

These are **[*2]** the salient facts. In 2001, the Township adopted an ordinance regulating the removal of trees (2001 ordinance). The New Jersey Shore Builders Association (Association), filed an action in lieu of prerogative writs in order to challenge the 2001 ordinance. Judge James D. Clyne held the 2001 ordinance invalid and declared that it was ultra vires and unenforceable.

On May 12, 2003, the Township adopted the ordinance under appeal (2003 ordinance), which attempted to address the deficiencies in the 2001 ordinance. The 2003 ordinance created Chapter 100 of the Township Code, entitled "Tree Removal." It required that any trees removed from lands within the Township be replanted with new trees on the same site on a one-to-one basis. There are two exceptions to this general requirement: (1) trees located in designated "exempt areas" do not have to be replanted; and (2) in lieu of replanting, a landowner may pay a designated fee to a Tree Escrow Fund (TEF). The money in the TEF will then be used by the Township to plant new trees on other properties owned by the Township. The 2003 ordinance states:

> A Tree Escrow Fund shall be established by the Township for the administration and promotion of **[*3]** tree and shrub planting projects on or within public properties or facilities.
> . . .
> Appropriations from the Tree Escrow Fund shall be authorized by the governing body and shall be used for the foregoing public purposes through the recommendation of the Township Forester, Township Engineer or Township Planner.
> [Ord. 41-03, Section I(3)(a)(3).]

The 2003 ordinance further requires a landowner to

obtain a permit prior to the removal of any tree with a trunk diameter breast height (DBH) of three inches or more. To obtain a permit, the landowner must submit an application and the requisite fee to the Township Forester who then reviews the application, inspects the site and files a completed report. The applicant must also provide a proposed tree replacement plan. The Township Forester, after consulting with the Township Engineer or the Shade Tree Commission, "may deny [a] permit if the following conditions exist: any negative effect upon ground and surface water quality, specimen trees, soil erosion, dust, reusability of land, and impact on adjacent properties." Ordinance 41-03, Section F(2).

The landowner applicant must pay tree replacement fees for each tree that is removed, but not replanted, **[*4]** on the same site on a one-to-one basis, or implement a reforestation scheme on other portions of the same property for each square foot of tree area removed. The replacement fee is set by a sliding scale (from $ 200 per tree, for trees six inches DBH to twelve inches DBH, to $ 800 per tree, for trees twenty-four inches DBH or larger).

In order to challenge the 2003 ordinance, the Association filed another complaint in lieu of prerogative writs. During a two-day bench trial, the Association presented testimony from its expert witness, Peter G. Steck, a licensed city and regional planning consultant. He opined that the 2003 ordinance does not serve its intended purpose. He also opined that, although tree removal could have a negative effect when the trees are located: on steep slopes; in a stream corridor; in buffer areas; or on wooded ridgelines; the substantive provisions of the 2003 ordinance, namely the TEF, does nothing to remedy these negative effects of tree removal.

The Township presented two witnesses, Jeffrey Nagle, a certified planner and landscape architect who was the primary drafter of the 2003 ordinance, and Robert Eckhoff, a certified arborist and tree expert who is the **[*5]** Township Forester. [1] Nagle testified that when drafting the 2003 ordinance, similar ordinances adopted in other municipalities were used as a model. Nagle testified as to the purpose and intent of the 2003 ordinance, namely, to reduce indiscriminate tree removal. However, Nagle admitted that the 2003 ordinance allows the TEF to be used to plant shrubs and plants other than trees.

Eckhoff testified as to the general application process for an owner of a single family residential home or for a builder of new homes to obtain a tree removal permit. Eckhoff also testified as to the expenditures from the TEF. He testified that the replanted shrubs, plants, or trees must be on public property because they are not permitted to replant trees on private property.

On December 1, 2005, Judge Eugene D. Serpentelli issued a letter opinion finding the 2003 ordinance invalid for the following two reasons: (1) the means employed by the ordinance to control the tree removal were not rationally related to the goals of the ordinance; and (2) certain provisions **[*6]** of the ordinance were overly vague. The judge wrote:

> At the outset, the court acknowledges that municipalities have the power and authority to enact ordinances in support of their police power and those ordinances, like statutes, carry a presumption of validity. *Hutton Park Gardens v. West Orange Township Council, 68 N.J. 543, 564, 350 A.2d 1 (1975)*. That principle is based on the recognition that legislatures, both state and local, are better situated than courts to make policy decisions concerning public health, safety and welfare. *Brown v. Newark, 113 N.J. 565, 571, 552 A.2d 125 (1989)*. *See also Pheasant Bridge Corp. v. Warren Twp., 169 N.J. 282, 289, 777 A.2d 334* (compiling cases regarding judicial deference to local policy decisions). Consistent with the presumption, the courts will impute a proper governmental purpose or interest as the object to be served by the ordinance. If necessary, courts will infer an adequate basis to support the legislation, even if the purposes or findings are not expressed by the lawmakers. *Bell v. Stafford Twp., 110 N.J. 384, 394, 541 A.2d 692 (1988)*[;] [*s*]*ee also Hutton Park Gardens, supra, 68 N.J. at 564-565*; *Burton v. Sills, 53 N.J. 86, 95, 248 A.2d 521 (1968)*, *appeal dismissed*, *394 U.S. 812[, 89 S. Ct. 1486, 22 L. Ed. 2d 748] (1969)*. **[*7]** The presumption of validity is rebuttable. However, the burden placed on the party seeking to overturn the ordinance is a heavy one. *Hutton Park Gardens, supra, 68 N.J. at 564*.
>
> Therefore, the court will not review the wisdom of any policy determination which the legislative body might have made, but will examine the ordinance to determine its validity. In order to be sustained, an ordinance must (1) represent a reasonable exercise

[1] Nagle and Eckhoff hold their positions as consultants to the Township, but are employees of a private company, Consulting Municipal Engineers Associates.

of the police power and bear a real and substantial relation to a legitimate municipal goal, and (2) the regulation "may not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated." *State v. Baker, 81 N.J. 99, 105, 405 A.2d 368 (1979)*[;] [*s]ee also Pheasant Bridge Corp., supra, 169 N.J. at 290-291*; *Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 251, 281 A.2d 513 (1971)*.

In this instance, the challenged ordinance contains a specific statement of purpose.

. . .

Thus, the evils addressed by the Ordinance are clearly stated as the indiscriminate, uncontrolled and excess destruction, removal and cutting of trees upon lots and tracts of land within the Township. The resulting conditions **[*8]** are described as creating increased soil erosion and dust, deteriorated property values and further rendering land unfit and unsuitable for its most appropriate use, thereby causing a deterioration of conditions affecting the health, safety and general well-being of the inhabitants of the Township of Jackson. Thereby, the aim of the Ordinance is to ameliorate those hazards by regulating and controlling the indiscriminate and excessive cutting of trees in the Township.

. . .

Without addressing the question of whether the municipality could require a landowner to replace any trees removed on private property subject to some reasonable standards and exceptions relating to the legitimate use of the premises, the central question becomes whether a payment to an escrow fund for trees not to be replaced on site in any way addresses the evils sought to be controlled by the regulation of the indiscriminate and excessive cutting of trees on the specific properties. It is to be remembered that the ordinance provides that the escrow fund is to be utilized for the planting of trees and shrubs only on public properties throughout the Township. The [Borough's] expert witnesses failed to establish any **[*9]** nexus between the planting of trees on the public property and the prevention of soil erosion, dust deteriorating property values and the suitability of land on the sites from which the trees were removed. Put another way, the witnesses failed to explain how the planting of the trees on public lands would have any beneficial effect upon the properties from which trees were removed or how it would prevent the hazards caused by clear cutting in future development.

The Township's witnesses did suggest that it was the hope of the drafters of the Ordinance that the cost of replacing trees on site would be less onerous than the payment which must be made to the escrow fund for trees removed and not replaced. However, as plaintiff's brief asserts, that thinking, which is not supported by the evidence in the record, in any event would cause the court to examine the issue of whether the escrow fund was being utilized as an indirect tax.

The experts also made passing reference to the need to maintain the biomass within the Township. In that regard, the Forester explained that the presence of a tree created a canopy effect producing ecological benefits to the property upon which the trees are planted. **[*10]** The argument was not pursued adequately in the record. Furthermore, it is tenuous at best. First, the trees that are planted on public property only have to be two inches in diameter and therefore will not replace larger trees which might have a significant canopy or ground cover. More importantly, the concerns which are the target of the Ordinance would not be avoided in any respect by the planting of trees which provide biomass at other locations. Thus, the court concludes that the method chosen to combat the evil perceived, that is, the creation of the Tree Escrow Fund and the utilization of the fund to plant trees on public property only, does not bear a real and substantial relationship to the purposes of the Ordinance.

. . .

As noted, Section C(1) provides for a tree save plan review by the Forester with the recommendations of the Shade Tree Commission, Engineer and Environmental Commission, where appropriate. The Ordinance completely fails to suggest what criteria should be utilized to determine whether a particular application should be subject to scrutiny by all entities and which applications would contain a lesser review. Additionally, the Ordinance provides no guidance to **[*11]** each of those four entities in terms of the criteria which should be utilized in making its recommendation. Furthermore, the Ordinance contains inconsistent provisions relating to the person or agency responsible for its enforcement (compare Section

A(3) to Section O). [2]

. . .

Next, the Ordinance in Section F(1)(c) vests the Forester with absolute discretion to determine what will constitute an "other useful or productive activity" or a "useful or beneficial purpose." Again, there are no standards or criteria to guide the exercise of the Forester's discretion in the implementation of this language.

Third, the provisions of Section F(2) relating to "negative impact" which include "negative effects" on ground surface water quality, specimen trees, soil erosion, dust, reusability of land and "impact on adjacent property" suffer from the same absence of clear and discernable standards by which the Forester can make informed and consistent decisions and by which applicants can also be aware of the standards which must be met. In this instance, the Ordinance fails to even suggest to the Forester what negative effects or impact on adjacent properties would constitute a sufficient basis to deny **[*12]** an application. It should be noted that in Judge Clyne's prior ruling, the court held the phrase "significant adverse impact" to be impermissibly vague because it failed to specify what was meant by the phrase. The Township's response was to amend the ordinance to substitute the words "negative effect" in place of "significant adverse impact" but no effort was made to define that phrase or provide criteria by which the Ordinance enforcement would be guided. Furthermore, the Ordinance continues to contain the imprecise phrase relating to "impact on adjacent properties." Virtually every use of land will have some impact on contiguous property. The issue must be whether it is so negative as to warrant a denial of the permit. In that regard, the Ordinance must contain criteria which will assist in guiding reasonable and consistent decisions.

Finally, Section I(3)(a)(3) allows the utilization of the Tree Escrow Fund for the "administration and promotion of tree and shrub planting projects on public properties or facilities." In his previous ruling, Judge Clyne reviewed the earlier version of this provision and found it unenforceable because it gave the Township discretion to spend the escrow **[*13]** funds in virtually any way it pleased. He noted that the ordinance failed to "specify any criteria upon which the governing body must rely in order to use the escrow fund."

. . .

As noted above, an ordinance must be reasonably precise so that property owners may understand the restrictions that are imposed upon the use of their land and to avoid discriminatory application. [*Jantausch v. Verona, 41 N.J. Super. 89, 104, 124 A.2d 14 (Law Div. 1956)*, *aff'd by*, *24 N.J. 326, 131 A.2d 881 (1957)*.] This ordinance clearly fails to meet the well established standards of precision and is therefore void for vagueness.

The Township appeals, contending that its tree removal ordinance: (1) "is a valid exercise of the municipal police power for the protection of the health, safety and welfare of its residents;" and (2) "provides proper standards to guide and limit the forester's discretion." We reject these contentions.

We agree, as did Judge Serpentelli, that the Borough has the right to exercise its police powers to protect the health, safety and welfare of the community. *N.J.S.A. 40:48-2*. We also agree with the trial judge that the 2003 ordinance is **[*14]** not a valid exercise of that power because the payment of a fee to plant new trees on other public land does not in any way address the objective of ameliorating the negative effects of removing trees on private property. Thus, the 2003 ordinance fails to "bear a real and substantial relation to a legitimate municipal goal." *Baker, supra, 81 N.J. at 105*.

We also reject the argument that the 2003 ordinance provides proper standards for its implementation. The trial judge's thoughtful analysis reveals that it does not. It is well-settled that an ordinance must be clear and explicit in its terms, setting forth sufficient standards to prevent arbitrary and indiscriminate interpretation or application by local officials. *Damurjaian v. Bd. of Adjustment of the Tp. of Colts Neck, 299 N.J. Super. 84, 95-96, 690 A.2d 655 (App. Div. 1997)*; *Township of Maplewood v. Tannenhaus, 64 N.J. Super. 80, 89, 165 A.2d 300 (App. Div. 1960)*, *certif. denied*, *34 N.J. 325, 168 A.2d 691 (1961)*; 8 McQuillin, *Municipal Corporations* (3d ed. 1991), Sec. 25.59. Here, the Borough did not provide such standards in the 2003 ordinance.

Affirmed.

[2] *See also* *N.J.S.A. 40:37-5* (defining the powers of the Shade Tree Commission).

APPENDIX 2

Tannian v. City of Grosse Pointe Park

United States District Court for the Eastern District of Michigan, Southern Division

July 31, 1995, Decided

CIVIL ACTION NO. 94-72587

Reporter
1995 U.S. Dist. LEXIS 12084 *; 1995 WL 871179

PHILIP G. TANNIAN and BEVERLY D. TANNIAN, Plaintiffs, v. CITY OF GROSSE POINTE PARK, Defendant.

Core Terms

ordinance, plaintiffs', trailer, recreational vehicle, nonmovant, zoning, motor home, storage, truck, boat, summary judgment, residential, vague, item of personal property, parking, summary judgment motion, just compensation, personal property, genuine, yard, pad

Case Summary

Procedural Posture
Plaintiff residents filed a state court action against defendant City of Grosse Pointe Park, which alleged that a zoning ordinance passed by the City was unconstitutional. The ordinance prohibited the residents from parking their recreational vehicle in their yard. The City removed the action, and the parties filed cross-motions for summary judgment.

Overview

The residents understood that the ordinance prohibited them from keeping their motor home in their yard because they filed the instant action. Therefore, it was not unconstitutionally vague. Also, because the ordinance did not relate to free speech, the residents had to show that it was incapable of any valid application. The residents' own statement was that many residences were in open and notorious violation. The overbreadth doctrine only applied to *First Amendment* claims. In order to state a substantive due process claim, the residents had to show that the ordinance was not rationally related to legitimate state land use concern. The residents were unable to do so even though the director of public safety told them that there were no safety concerns related to the ordinance. The residents' claim for taking without just compensation was not ripe because they had not pursued the State's inverse condemnation procedure. Even if the claim was ripe, it failed because the ordinance substantially advanced legitimate state interests and did not deny an owner economically viable use of his land. There was no equal protection violation when the residents did not allege unequal treatment.

Outcome
The court denied the residents' motion for summary judgment and granted the City's motion for summary judgment.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Real Property Law > Zoning > Local Planning

Governments > Local Governments > Duties & Powers

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN1[ ] **Zoning, Local Planning**

Pursuant to the Zoning Enabling Act, *Mich. Comp. Laws § 125.581(1)*, a city may regulate and restrict the use of land structures to insure that uses of the land shall be situated in appropriate locations and relationships to promote public health, safety, and welfare.

Civil Procedure > ... > Summary

Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN2[] Entitlement as Matter of Law, Appropriateness

Under Fed. R. Civ. P. 56(c), summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material and precludes grant of summary judgment if proof of that fact would have the effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect the application of appropriate principles of law to the rights and obligations of the parties. A court must view the evidence in a light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. The movant bears the burden of demonstrating the absence of all genuine issues of material fact. The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of material fact; rather, the burden on the moving party may be discharged by showing that there is an absence of evidence to support the nonmoving party's case. Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56(e).

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Evidence > Weight & Sufficiency

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Evidentiary Considerations > Scintilla Rule

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN3[] Entitlement as Matter of Law, Appropriateness

To create a genuine issue of material fact and prevent summary judgment, the nonmovant must do more than present some evidence on a disputed issue. There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the nonmovant's evidence is merely colorable, or is not significantly probative, summary judgment may be granted. The standard for summary judgment mirrors the standard for a directed verdict under Fed. R. Civ. P. 50(a). Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the

nonmovant must produce evidence that would be sufficient to require submission of the issue to the jury. The evidence itself need not be the sort admissible at trial. However, the evidence must be more than the nonmovant's own pleadings.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Environmental Law > Land Use & Zoning > Constitutional Limits

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Constitutional Law > Equal Protection > Nature & Scope of Protection

Governments > Legislation > Overbreadth

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN4 **Zoning, Constitutional Limits**

A zoning ordinance is presumed to be constitutionally valid with the burden of unreasonableness being cast upon those who challenge the ordinance.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Governments > Legislation > Vagueness

HN5 **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

Because courts assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. If a statute clearly applies to an individual's conduct, that individual cannot successfully challenge the statute for vagueness.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

HN6 **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

A challenged ordinance need not be cast in mathematically precise terms so long as it gives fair warning of the conduct proscribed in light of common understanding and practices.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Governments > Legislation > Vagueness

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN7 **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

Laws that do not reach constitutionally protected conduct such as free speech may be considered unconstitutionally vague if the complainant demonstrates that the law is impermissibly vague in all of its applications.

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

Governments > Legislation > Overbreadth

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

HN8 **Judicial & Legislative Restraints, Overbreadth & Vagueness of Legislation**

The overbreadth doctrine only applies to constitutionally protected conduct and is limited to *First Amendment* claims.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Real Property Law > Zoning > Judicial Review

Constitutional Law > Substantive Due Process > General Overview

Constitutional Law > Substantive Due Process > Scope

Environmental Law > Land Use & Zoning > Constitutional Limits

Governments > State & Territorial Governments > Property

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN9 **Zoning, Constitutional Limits**

The right not to be subject to "arbitrary or capricious" actions is commonly referred to as a "substantive due process right." The Sixth Circuit has established a very deferential standard of review for substantive due process attacks on zoning ordinances. A plaintiff would have to show that the zoning ordinance was not rationally related to legitimate state land use concerns.

Governments > Legislation > Overbreadth

Real Property Law > Inverse Condemnation > Defenses

Civil Procedure > ... > Justiciability > Exhaustion of Remedies > General Overview

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Process

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > State Condemnations

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > Inverse Condemnation > General Overview

Real Property Law > Inverse Condemnation > Procedures

Real Property Law > Inverse Condemnation > Remedies

HN10 **Legislation, Overbreadth**

Where a plaintiff claims that the zoning is so stringent as to constitute a taking without just compensation, the United States Supreme Court requires what amounts to exhaustion of state judicial remedies, including the bringing of an inverse condemnation action, if the state affords such a remedy. A deprivation of economic viability is also a prerequisite.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > Inverse Condemnation > Defenses

Real Property Law > Inverse Condemnation > Regulatory Takings

HN11 **Fundamental Rights, Eminent Domain & Takings**

A land use regulation does not effect a taking if it substantially advances legitimate state interest and does not deny an owner economically viable use of his land. Government could not go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Real Property Law > Zoning > Judicial Review

Constitutional Law > Substantive Due Process > Scope

HN12 **Zoning, Constitutional Limits**

In a zoning case, where a plaintiff is not a member of a protected class or a discrete, insular minority, equal protection claims merge with substantive due process

claims, and are subject to the same review standard.

Counsel: **[*1]** For PHILIP G. TANNIAN, BEVERLY D. TANNIAN, plaintiffs: Kathleen A. Tannian, Macuga, Swartz, Detroit, MI.

For GROSSE POINTE PARK, CITY OF, defendant: Dennis J. Levasseur, James J. Walsh, R. Carl Lanfear, Bodman, Longley, Detroit, MI.

Judges: HONORABLE PAUL V. GADOLA, U.S. DISTRICT JUDGE

Opinion by: PAUL V. GADOLA

Opinion

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs Philip and Beverly Tannian filed this action against defendant City of Grosse Pointe Park ("City") alleging that an ordinance passed by the City is unconstitutional. The City denies that the ordinance is unconstitutional. Before the court are cross-motions for summary judgment.

I. Facts

Plaintiffs have owned and resided in a home on 1117 Yorkshire in the City of Grosse Pointe Park since 1983. In December 1986, Mr. Tannian purchased a Pace Arrow motor home. Initially, plaintiffs paid to park the motor home at a motor home storage facility. However, after two years of keeping the motor home at this location, plaintiffs' motor home was burglarized. Plaintiffs then decided to park their motor home in their backyard. [1]

[*2] Philip Tannian, along with his contractor, Mr. Kajowski, approached the City of Gross Pointe Park ("City"), about building a special parking pad for the plaintiffs' motor home behind their house next to their garage. The plaintiffs obtained permission from the City to build this parking pad. The City also recommended that, because of the size and weight of the vehicle, plaintiffs should build the concrete parking pad with six inches instead of the four inches used in a normal driveway. In addition, the City recommended that plaintiffs use steel reinforcing rods in the parking pad. Plaintiffs followed the City's recommendations. The plaintiffs also received permission to run electricity out to the parking pad. [2]

[*3] The City is a municipality organized under Michigan law. ***HN1***[↑] Pursuant to the Zoning Enabling Act, *Mich. Comp. Laws Ann. § 125.581(1)*, the City may "regulate and restrict the use of land structures … to insure that uses of the land shall be situated in appropriate locations and relationships … to promote public health, safety, and welfare …" On March 28, 1994, the City Council of the City passed an amendment to Ordinance No. 154, Section 1002. The Council set July 1, 1994, as the date on which the amendment was to take effect. According to plaintiffs, as of the date of the filing of their motion for summary judgment, the City had not issued any tickets regarding violations of this section of the Ordinance.

The amended Section 1002 states in relevant part:

> 1. Storage restricted. No part of a rear yard located (i) between a side lot line and a line extending from the closest side of a building to the rear lot line, or (ii) within ten feet of a street, no side yard, and no front yard in R-A, R-B, R-C, or R-D Residential Districts shall be used for the storage of boats, trailers, recreational vehicles, busses, trucks, or other personal property, and no more than one boat, **[*4]** trailer, recreational vehicle, bus, truck, or other item of personal property (or combination thereof as a boat or vehicle on a trailer) shall be stored in any other portion of a rear yard outside the confines of a garage. Provided, however, that no boat, trailer, recreational vehicle, bus, truck, or

[1] These facts are taken from plaintiffs' motion for summary judgment. They are not supported by affidavits, other than attorney's affidavit. Affidavits of counsel do not support facts. *See, e.g., RTC v. Juergens, 965 F.2d 149, 152-53 (7th Cir. 1992)*. Therefore, the court cannot take these facts as true for determination of this motion, but cites them for purposes of background information.

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other item of personal property stored outside the confines of a garage (i) shall be a size in excess of twelve (12) feet high, twelve (12) feet wide, or thirty two feet in length, or (ii) occupy an area (determined by the maximum length and width of such item) which, when added to the area of the lot occupied by buildings, including accessory buildings, exceeds applicable lot coverage requirements.

2. Permit for temporary storage. The Department of Public Service may issue a permit to the owner of any zoning lot allowing the temporary storage of a boat, trailer, recreational vehicle, bus, truck, or other item of personal property on an access drive or in any portion of a side or rear yard for a period of not more than 7 days notwithstanding the restrictions contained in subsection 1002.1. No more than one such permit for one boat, trailer, recreational, vehicle, bus truck, or other **[*5]** item of personal property shall be issued with respect to any zoning lot in any calendar month.

Shortly after the amendment was passed, plaintiffs filed suit in Wayne County Circuit Court. The City removed this action to this court. Both parties have filed motions for summary judgment.

II. Standard of Review

HN2[⬆] Under *Rule 56(c) of the Federal Rules of Civil Procedure*, summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "A fact is 'material' and precludes grant of summary judgment if proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect [the] application of appropriate principle[s] of law to the rights and obligations of the parties." *Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984)* (quoting Black's Law Dictionary 881 (6th ed. 1979)) (citation omitted). The Court must view the evidence in a **[*6]** light most favorable to the nonmovant as well as draw all reasonable inferences in the nonmovant's favor. *See United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)*; *Bender v. Southland Corp., 749 F.2d 1205, 1210-11 (6th Cir. 1984)*.

The movant bears the burden of demonstrating the absence of all genuine issues of material fact. *See Gregg v. Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir. 1986)*. The initial burden on the movant is not as formidable as some decisions have indicated. The moving party need not produce evidence showing the absence of a genuine issue of material fact; rather, "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. *Fed. R. Civ. P. 56(e)*; *Gregg, 801 F.2d at 861*.

HN3[⬆] To create a genuine issue of material fact, however, the nonmovant must do more **[*7]** than present some evidence on a disputed issue. As the United States Supreme Court stated in *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*,

> There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

(Citations omitted); *see also Celotex, 477 U.S. at 322-23*; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. The standard for summary judgment mirrors the standard for a directed verdict under *Fed. R. Civ. P. 50(a)*. *Anderson, 477 U.S. at 250*. Consequently, a nonmovant must do more than raise some doubt as to the existence of a fact; the nonmovant must produce evidence that would be sufficient to require submission of the issue to the jury. *Lucas v. Leaseway Multi Transp. Serv., Inc., 738 F. Supp. 214, 217 (E.D. Mich. 1990)*, *aff'd, 929 F.2d 701 (6th Cir. 1991)*. The evidence itself need not be the sort admissible at trial. *Ashbrook v. Block, **[*8]** 917 F.2d 918, 921 (6th Cir. 1990)*. However, the evidence must be more than the nonmovant's own pleadings. *Id.*

III. Analysis

Plaintiffs allege that Section 1002 is unconstitutional on its face because it is vague and overbroad. Further, plaintiffs argue that Section 1002 constitutes a taking without just compensation and violates plaintiffs' substantive due process and equal protection rights.

HN4[] A zoning ordinance is presumed to be constitutionally valid "with the burden of unreasonableness being cast upon those who challenge the ordinance." Curto v. City of Harper Woods, 954 F.2d 1237, 1242 (6th Cir. 1992). Defendants argue that Section 1002 is constitutional because it clearly applies to plaintiffs, it does not regulate a constitutional right, and it is based on legitimate safety, health, and welfare concerns.

A. Unconstitutionally Vague

Plaintiffs argue that Section 1002 is unconstitutional because Ordinance 154 fails to define the following terms: storage, recreational vehicle, truck, other personal property, trailer, "closest side of a building" and standards for temporary permits. The Supreme Court provided the standard for evaluating vagueness in **[*9]** Grayned v. City of Rockford, 408 U.S. 104, 109, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972):

> HN5[] because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.

Id. at 109. If a statute clearly applies to an individual's conduct, that individual cannot successfully challenge the statute for vagueness. Parker v. Levy, 417 U.S. 733, 756, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974). Therefore, the issue in this case is whether Ordinance 154, Section 1002, clearly applies to plaintiffs' conduct.

There is no question that the term "recreational vehicle" applies to plaintiffs' motor home and that plaintiffs are storing it. Although plaintiffs argue that they do not understand the ordinance, by filing this lawsuit, plaintiffs basically admit that the ordinance applies to them. HN6[] A challenged ordinance "need not be cast in mathematically precise terms so long as it gives fair warning of the conduct proscribed in light of common understanding and practices." Rumpke Waste, Inc. v. Henderson, 591 F. Supp. 521, 529 **[*10]** (S.D. Ohio 1984). It is clear that Section 1002 applies to the plaintiffs and that plaintiffs understood that Section 1002 would prohibit them from keeping their motor home in its current location because they filed this action.

Plaintiffs argue that the individuals who were to enforce the Ordinance could not explain the definition of truck, trailer, and other personal property. HN7[] Laws that do not reach constitutionally protected conduct such as free speech may be considered unconstitutionally vague if the complainant demonstrates that the "law is impermissibly vague in all of its applications." Village of Hoffman v. Flipside, 455 U.S. 489, 498, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982). To maintain a facial challenge, plaintiffs must show that the law is "invalid in toto- and, therefore, incapable of any valid application." Id. at 494 n.5. Plaintiffs' own statement is that "a very large number of residences [are] in *open and notorious violation*" of section 1002.1. *See* plaintiffs' brief, at 3. Therefore, there are certainly some applications which are clearly valid. Therefore, plaintiffs have not sustained their burden of demonstrating that Section 1002 is unconstitutionally **[*11]** vague.

B. Overbreadth Doctrine

Plaintiffs argue that Section 1002 is overbroad because it forbids the keeping of any "other personal property" on the real property owned by plaintiffs and other citizens of the City. Particularly, plaintiffs argue that Section 1002 would make it illegal to store patio furniture, or any other multitude of items of personal property in the backyard or anywhere other than in a garage. HN8[] The overbreadth doctrine only applies to constitutionally protected conduct. Village of Hoffman, 455 U.S. at 495. There is no constitutional right to outside storage. Furthermore, the overbreadth doctrine is limited to First Amendment claims. Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 135 (6th Cir. 1994).

C. Substantive Due Process

Plaintiffs claim that section 1002 is unconstitutional because it makes arbitrary and capricious distinctions between the sizes of objects and their rational relation to health, safety and welfare concerns. HN9[] The right not to be subject to "arbitrary or capricious" actions is commonly referred to as a "substantive due process right." *See* Curto, 954 F.2d at 1243. The Sixth Circuit has established a very **[*12]** deferential standard of review for substantive due process attacks on zoning ordinances. *Pearson,* 961 F.2d at 1223. A plaintiff would have to show that the zoning ordinance was not rationally related to legitimate state land use concerns. *Id.*

The preamble to the City's Zoning Ordinance states that its purpose is to promote public health, safety, peace and general welfare of City residents. Defendant

attaches the affidavit of Dale Krajniak, the City's City Manager since 1988. Mr. Krajniak cites six reasons for the passage of the amended section 1002: (1) reducing the safety hazards associated with storage of boats, trailers, recreational vehicles, buses, trucks and other similar items of personal property in purely residential areas; (2) providing access to homes in the event of fire, health, or police emergencies; (3) controlling overcrowding of purely residential areas; (4) protecting property values; (5) allowing City residents adequate access to light, air, and sunshine; and (6) promoting aesthetics and preserving the residential character of residential neighborhoods. Clearly there is a rational relation here between the ordinance and the health, safety and welfare concerns **[*13]** for the citizens of the City.

Plaintiffs are unable to prove that Section 1002 is not rationally related to legitimate state concerns. Plaintiffs attach the affidavit of Philip Tannian, who asserts that at a Council meeting, he asked each of the Council members if Section 1002 was passed for aesthetic reasons only and each Council member present said "yes." Further, Mr. Tannian states that he had an opportunity to speak with the Director of Public Safety for the City, who informed Mr. Tannian that there were no safety reasons for Section 1002. The City has established that Section 1002 is rationally related to legitimate state concerns such as the safety, health, and welfare of its citizens and the aesthetics of the neighborhood. Under the deferential standard of review in the Sixth Circuit, Mr. Tannian's affidavit is insufficient to show that Section 1002 is not rationally related to legitimate state concerns.

Plaintiffs question the size limitations in Section 1002 as being arbitrary. Presumably, plaintiffs are arguing that smaller vehicles may pose similar problems. The Constitution does not require the City to deal with every aspect of a particular problem. *See* Semler v. Oregon **[*14]** State Board of Dental Examiners, 294 U.S. 608, 610, 79 L. Ed. 1086, 55 S. Ct. 570 (1935).

D. Taking Without Just Compensation

Plaintiffs argue that Section 1002 constitutes a taking because the language is so overbroad that it would prevent plaintiffs from having patio furniture, keeping a hose at the side of their house, or parting any vehicle in their driveway. In Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992), the court found that **HN10**[↑] where "plaintiff claims that the zoning is so stringent as to constitute a taking without just compensation, the Supreme Court requires what amounts to exhaustion of state judicial remedies, including the bringing of an inverse condemnation action, if the state affords such a remedy." Id. at 1214. [3] *See also,* Curto, 954 F.2d at 1245. A deprivation of economic viability is also a prerequisite. Id. at 1214. Plaintiffs have not pursued Michigan's inverse condemnation procedure. Therefore, plaintiffs' claim that Section 1002 constitutes a taking without just compensation is not ripe for adjudication.

[*15] Even if plaintiffs had a ripe claim, they could not prevail. **HN11**[↑] A land use regulation does not effect a taking if it "substantially advance[s] legitimate state interest" and does not "deny an owner economically viable use of his land." Dolan v. City of Tigard, 129 L. Ed. 2d 304, 114 S. Ct. 2309, 2316 (1994) (quoting Agins v. Tiburon, 447 U.S. 255, 260, 65 L. Ed. 2d 106, 100 S. Ct. 2138 (1980)). As the Supreme Court recognized long ago, government could not 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. Mahon, 260 U.S. 393, 413, 67 L. Ed. 322, 43 S. Ct. 158 (1922). Further, Section 1002 does not constitute a taking because it clearly permits alternative uses for plaintiffs' property and does not deny them economically viable use of their land.

In support of their argument, plaintiffs cite Dolan v. City of Tigard, 129 L. Ed. 2d 304, 114 S. Ct. 2309, 2316 (1994). In *Dolan,* the city forced the landowner to dedicate a certain portion of her property as a public bicycle path. The Supreme Court distinguished the case from ordinary zoning regulations cases by **[*16]** stating that "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of her property to the city." Id. at 2316. In the instant action, Section 1002 does not even remotely require that plaintiffs deed a portion of their property to the City.

The court finds analogous the situation in Recreational Vehicle UCA v. Sterling Heights, 165 Mich. App. 130, 418 N.W.2d 702 (1987), where the Michigan appellate court found that an ordinance that regulated parking and

[3] Plaintiffs seem to think that the City is requesting that plaintiffs seek a variance in order to exhaust their administrative remedies. The court does not find that plaintiffs must seek a variance. Rather, the law states that plaintiffs must institute inverse condemnation proceedings before a claim for taking without just compensation is ripe for the court to hear.

storage of recreational vehicles, boats, trailers, and other such items of personal property on public and private property in single-family residential areas was not a taking because "it permits reasonable alternatives uses for plaintiffs' properties." *Id. at 138*.

E. Equal Protection

Although not alleged in their complaint, plaintiffs argue at page 17 of their brief that the equal protection cause is violated by Section 1002. ***HN12***[⬆] In a zoning case, where a plaintiff is not a member of a protected class or a discrete, insular minority (and plaintiffs do not claim that they are), equal protection claims merge with substantive **[*17]** due process claims, and are subject to the same review standard. *Pearson, 961 F.2d at 1216*. As already discussed, plaintiffs have not provided sufficient evidence that they are able to sustain an action for violation process. *See also Bigelow v. Michigan DNR, 970 F.2d 154*, (6th Cir. 1992).

To succeed in an equal protection claim, plaintiffs must prove that they were treated differently than other similarly situated individuals. *See, e.g., City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985)*; *Silver v. Franklin Township, 966 F.2d 1031, 1036-37 (6th Cir. 1992)*. Here plaintiffs do not even claim that they were treated any differently than anyone else in the City who lives in a residential district. Section 1002 applies to all persons who live in residential districts in the City who want to store boats, recreational vehicles, trailers, and trucks. Therefore, plaintiffs cannot sustain their equal protection claim.

ORDER

Therefore, it is hereby **ORDERED** that plaintiffs' motion for summary judgment is **DENIED.**

It is further **ORDERED** that defendant's motion for summary judgment is **GRANTED.**

[*18] SO ORDERED.

Dated: *7/31/95*

PAUL V. GADOLA

UNITED STATES DISTRICT JUDGE

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