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.*	§	

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

Plaintiff/Counter-Defendant, F.P. DEVELOPMENT, LLC (hereafter, "F.P.") files this brief in support of its summary judgment motion against Defendant/Counter-Plaintiff's, CHARTER TOWNSHIP OF CANTON (hereafter "Canton").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s):**

INTRODUCTION

Canton's untimely-filed response brief mostly treads ground covered in its motion for summary judgment and refuted by F.P.'s response. To the extent Canton raises new arguments, it does so by misquoting cases or raising theories already rejected by the Supreme Court. Accordingly, F.P.'s summary judgment motion should be granted.

ARGUMENT

I. CANTON FAILS TO REFUTE F.P.'S TAKINGS CLAIMS

F.P. raises three takings theories: 1) that the Tree Ordinance is a *per se* taking of its severable interest in its trees under *Horne v. Dep't of Agric*., 135 S.Ct. 2419 (2015); 2) that the Tree Ordinance is a *per se* taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), because it requires that F.P. maintain unwanted objects—trees—on its property for public benefit; and 3) that the Tree Ordinance is a regulatory taking under the balancing test from *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Canton's arguments in response fail.

A. Canton's new attempt to distinguish *Horne* fails

Canton's response to F.P.'s *Horne* claim largely repeats the arguments from its motion for summary judgment. Those arguments are rebutted on pages 14-17 of F.P.'s response brief. ECF 35. Canton's only new argument is that the statute in *Horne* can be distinguished from the Tree Ordinance because the farmers in that case

were "forbidden to sell their raisins at all," and F.P. may allegedly "choose" to remove its trees if it replaces them or pays Canton their market value. C. Resp. at 3.

But the farmers in *Horne* were given the exact same "choice"[1] with their raisins that F.P. has with its trees—namely, they could set them aside for public benefit, or use them and pay the government their "market value." *Horne*, 135 S.Ct. at 2421-22. The farmers chose to use their raisins and the government fined them the "market value" of those raisins in response. *Id.* Similarly, F.P. chose to use its trees by removing them and Canton now seeks their "market value" in penalties. In both cases, the claimed "choice" was nonexistent because the property at issue was effectively seized by the government. A taking by any other name remains a taking.

B. Canton's new attempt to distinguish *Loretto* fails

Canton's discussion of *Loretto* also largely repeats its arguments from its motion for summary judgment. Those arguments are rebutted on pages 17-18 of F.P.'s response (ECF 35).[2] Canton's only new argument falsely claims that the court

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[1] The choice to do what the government desires or pay money is a Hobson's choice, and "a Hobson's choice is not a choice." *Zelman v. Simmons-Harris*, 536 U.S. 639, 707 (2002). Indeed, the Court in *Horne* sternly rejected the government's argument that the restriction there was not a taking because the farmers could "choose" not to sell their raisins, noting that ""[l]et them sell wine" is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history." *Horne*, 135 S.Ct. at 2430.

[2] By way of summary, *Loretto* does not require government agents to be "literally occupying" the property. *See, Montgomery v. Carter Cty.*, 226 F.3d 758, 766 (6th Cir. 2000). And the fact that the remainder of the property could be used for other purposes is wholly irrelevant to a *Loretto* claim. *Horne*, 135 S.Ct. at 2429.

in *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992) "rejected the argument that the refusal to allow the developer there to remove the trees was a physical taking under *Loretto*." C. Resp. at 4. But a physical taking due to occupation by trees was not alleged in that case. *See Waters v. Churchill*, 511 U.S. 661, 678 (1994) ("Cases cannot be read as foreclosing an argument that they never dealt with."). The plaintiff in *Southview* argued that the denial of a proposed development permit deprived it "of its right to exclude the *deer* from its property." *Southview*, 980 F.2d at 92. (emphasis added). The court disagreed, noting that the plaintiff could exclude and "even hunt deer on this land..." *Id.* at 94. It simply could not build the particular development it wanted. *Id*. Accordingly, the court held that *Loretto* was not implicated. *Id*. at 95 ("foreclosing one configuration of a development plan—represents a regulation of the use of Southview's property, rather than a *per se* physical taking.").

Not only was a ban on tree removal not alleged as a physical taking in *Southview*, but the court explicitly noted that the plaintiff could remove trees without a permit, and could engage in "construction for farming, *logging* or forestry purposes, on the entire 44 acres..." *Id.* (emphasis added and citations omitted). In its block quote on page 4-5 of its brief, Canton conveniently deletes the above language regarding tree removal and replaces it with an ellipsis.

C. Canton's new *Penn Central* Arguments fail

Canton's response also repeats its prior arguments that F.P.'s *Penn Central* claim fails because the Tree Ordinance was in effect when it purchased the property, and because the Ordinance provides public benefits. As explained in F.P.'s response (ECF 35, p. 18-20), these arguments lack merit.[3] Canton's only new argument asks this Court to strike portions of the Declaration of Frank Powelson. C. Resp. at 9, claiming that without the evidence it seeks to strike from that declaration, F.P. cannot show "economic impact" necessary to establish a taking under *Penn Central*. *Id.* Canton's effort fails for at least two reasons. First, Canton's objections are disagreements about weight, characterization of facts, or word choice and do not support a motion to strike.[4] For example, Canton objects to Mr. Powelson's statement that the Township Supervisor did not inform him of ordinance requirements. C. Resp. at 9. Canton's sole objection to this statement is that Mr.

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[3] As explained in F.P.'s response brief, the Supreme Court has firmly rejected the notion that a *Penn Central* claim is "barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001). And the fact that the Tree Ordinance is designed to provide public benefits makes it more likely a taking, not less so. *See*, ECF 35, p. 19-20 (*citing*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).)

[4] *See, e.g.* C. Resp. at 9 (objecting to ¶ 11 because it disagrees with Mr. Powelson's characterization of the tree payments as "penalties" and "prohibitively expensive" for his business.); *id*. (objecting to ¶ 12 because Mr. Powelson's characterization that selling the property has been "difficult"); *id*. (strangely objecting to ¶¶ 29 and 30 on the ground that Mr. Powelson would somehow not have "knowledge" of work performed on his property for which he contracted.)

Powelson did not establish that the Supervisor had decision authority under the Ordinance. *Id.* But whether the Supervisor had authority goes to the value of his statements as evidence, not whether those statements are admissible. Canton's two objections that actually do go to admissibility—*i.e.*, "hearsay"—fail on the merits. Paragraph 13 is admissible under FRE 803 (1), (3), and (20), while Paragraph 15 is not hearsay because it is not offered for the truth of the matter asserted but only for Mr. Powelson's motive or state of mind.

Second, F.P. establishes economic impact, even without the language challenged in the declaration. The 24-acre property at issue (the "Property") was originally part of a much larger parcel that was purchased for approximately $550,000. Dep. of. F. Powelson at 13:17-25; 14:1. The Property is heavily treed. For any regulated tree removed, F.P. must pay Canton between $300-450. Canton Code of Ordinances, Art. 5A.08. Applying that rule, Canton contends that F.P. is responsible for $47,898 in penalties for selectively removing trees from a tiny fraction of the Property. ECF 13, p. 15. Given these facts, the fines against F.P. for clearing a significant portion of the Property could easily be hundreds of thousands of dollars. A greater showing of "economic impact" is not required.

II. CANTON FAILS TO REFUTE F.P.'S SEIZURE CLAIM

Canton's response also re-argues its claim from its motion for summary judgment that the Fourth Amendment does not apply in this case because any alleged

seizure was not to "preserve evidence of wrongdoing." C. Resp. at 10. As explained more fully in F.P.'s response brief (ECF 35, p. 20-22), this argument has been explicitly rejected by the Supreme Court and various circuit courts. *See, e.g.*, *Soldal v. Cook Cty.*, 506 U.S. 56, 69 (1992) (the "reason the government effectuates a seizure is wholly irrelevant to the threshold question whether the Fourth Amendment applies."); *Severance v. Patterson*, 566 F.3d 490, 503–04 (5th Cir. 2009), (public easement was a potential seizure); *Presley v. City of Charlottesville*, 464 F.3d 480, 487 (4th Cir. 2006) (anti-fencing ordinance was a seizure of private property). Accordingly, Canton's Fourth Amendment argument is meritless.

III. CANTON FAILS TO REFUTE F.P.'S *DOLAN* CLAIM

Despite multiple rounds of briefing, Canton still does not contend with the fundamental *Dolan* issue in this case—Canton does not (and did not) base its tree mitigation requirements on site-specific evidence of the impact of tree removal. Under *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), any mitigation payment required for the use of private property must be "roughly proportional" to the impact of the property use on the public. Determinations as to "rough proportionality" cannot be made in the abstract. *Id*. The government must make an "individualized determination" establishing site-specific evidence that the mitigation it seeks is "related both in nature and extent to the impact of the [property use]." *Id*.

Canton spends two full pages in its response trying to explain why restricting tree removal could serve a legitimate government interest. C. Resp. at 12-14.[5] But even assuming that to be the case, it does not reach the fundamental question at issue. In *Dolan*, 512 U.S. at 380 the city required the plaintiff to construct a bike path on its property as a condition of granting a construction permit. The Court acknowledged that the construction at issue could increase traffic, that the bike path could reduce some of that traffic, and that traffic reduction was a legitimate government interest. *Id*. at 395-96. But the exaction was still unconstitutional, because the city produced no site-specific evidence or data as to the actual effect that the proposed bike-path would have on the traffic in the area. *Id*.

Similarly, 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. The court did not dispute that purposes of the ordinance were legitimate, nonetheless, the court struck down the ordinance on

[5] Mostly Canton claims aesthetic benefits, but also quotes from Ms. Thurston's deposition to claim there is a "shortage" of trees in Canton. C. Resp. at 14. This claim is surprising because at deposition Canton's counsel objected and stated on the record that "[t]he issue of a shortage of trees has not been presented as an issue in this case." Dep. of L. Thurston 51:5-10. In any event, the claim of "shortage" is pure *ipse dixit*. Ms. Thurston admitted that there was no "objective metric" for determining a "shortage," other than the fact that Canton "wants to improve [its] community with more trees." *Id*. at 51:18-25; 52:1-10.

summary judgement because the City presented no evidence of the actual impact of removing trees from the relevant property and no comparison of that impact with the actual benefit of planting replacement trees on public property. *Id*.

Canton admits that it engaged in no site-specific evaluation in this case to determine the impact of tree removal. Dep. of L. Thurston 84:1-8. (Ex. 1). As in all cases, tree payments under the Ordinance are based solely on the number of trees removed, regardless of impact. Dep. of J. Goulet, 16:13-25, 17:1-25; 18:1-6 (Ex. 2).

Canton tries to get around this admission by noting that it allegedly counted the trees removed,[6] but *Dolan* requires more than a tree-count. It requires an evaluation of the externalities of tree removal in that particular circumstance. In *Mira Mar*, *supra*, the city knew the exact amount of trees and trunk space that had been removed. It still needed an analysis of the impact of that removal *and* the benefit of replacing those trees elsewhere before it could demand "*any* amount of tree retribution fees." *Mira Mar*, 421 S.W.3d at 96. Canton's *Dolan* arguments are therefore meritless.[7]

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[6] Canton states that "Plaintiff has failed to submit any evidence" disputing its tree count. But this is irrelevant and untrue. To the extent any factual dispute about the tree count matters, it matters only to Canton's counterclaims. Canton therefore bears the burden of establishing its count's accuracy. Nonetheless, F.P. did dispute the accuracy of the tree count in its briefing and submitted an expert report as evidence that the tree count was invalid. *See*, ECF 35, p.2, n. 1. Report attached again here as (Ex.3).

[7] Canton also repeatedly notes (contrary to the fines issued in this case) that F.P. could allegedly remove 25% of its trees without penalty. But it is unclear how

IV. CANTON FAILS TO REFUTE F.P.'S EXCESSIVE FINES CLAIM

As required by its Tree Ordinance, Canton is currently seeking $47,898 in penalties from F.P. for removing trees from its own property. As explained in F.P.'s Motion for Summary Judgment (p. 26-27) and response to Canton's Motion for Summary Judgment, (p. 28-30), these penalties are a "fine" subject to review under the Eighth Amendment. Canton now claims that the penalties assessed under the Tree Ordinance are not "fines," but "fees" comparable to the "fees required of a business who obtains a permit to tap into a municipal water supply or sewer system." C. Resp. at 18. But tree fines and tap-fees are fundamentally different.

A "fee" is generally understood as a payment "exchanged for a service rendered or a benefit conferred…." *Bolt v. City of Lansing*, 459 Mich. 152, 161 (1998); *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974) (same). A charge for connecting to the water system is a "fee," because it does nothing more than require owners to pay the rates for receiving the benefit of "water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water." *Id*. at 162.

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this relates to any of Canton's arguments. The plaintiff in *Dolan* could still use far more than 25% of its property. The plaintiff in *Horne*, could still use 70% of its raisins. The Plaintiff in *Loretto* could still use all but a few feet of her property, and the Plaintiff in *Severance* could still use most of her property. In all of those cases, that fact was irrelevant. It is likewise irrelevant here.

F.P. does not receive any benefit or service in exchange for its tree fines. They are penalties that F.P. must pay for exercising its common law right to remove its own trees from its property. That Canton chooses to call these fees is of no consequence. As this Court has noted in other contexts, "if it looks like a duck, talks like a duck, and walks like a duck, then it must be a duck." *GMAC Bus. Credit, L.L.C. v. Ford Motor Co*, 2002 U.S. Dist. LEXIS 27613, at *8-9 (E.D. Mich., 2002). In this case, the tree penalties look, talk, and walk, like a fine.

CONCLUSION

For the foregoing reasons, F.P.'s motion for summary judgment should be granted.

Respectfully submitted,

ROBERT HENNEKE
THEODORE HADZI-ANTICH
CHANCE WELDON
Texas Bar No. 24076767
cweldon@texaspolicy.com
901 Congress Avenue
Austin, Texas 78701
Telephone: (512) 472-2700
Facsimile: (512) 472-2728

MICHAEL J. PATTWELL (P72419)
212 E. Cesar Chavez Avenue
Lansing, Michigan 48906
Telephone: (517) 318-3043
Facsimile: (517) 318-3082

By: _____ */s/Chance Weldon* _____
CHANCE WELDON

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 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	Excerpts of Deposition of Leigh Thurston dated June 12, 2019
2	Excerpts of Deposition of Jeff Goulet dated June 12, 2019
3	Expert Report dated July 11, 2019

EXHIBIT 1

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.

which would be impossible to do.

Q You can't replace all of it because there are houses and things there now, right?

A Correct.

Q So what is the metric by which a shortage is determined?

MS. McLAUGHLIN: I'm going to place an objection to the form of the question and foundation. The issue of a shortage of trees has not been presented as an issue in this case.

MR. WELDON: I'm just trying to figure out the reason for the ordinance.

THE WITNESS: Continuing to plant trees satisfies one of the goals of the Township to beautify the Township, to improve it socially, culturally, economically, and trees help do that.

BY MR. WELDON:

Q Is there an objective metric by which you measure whether or not there's a shortage of trees?

A No.

Q And so that's left to the discretion of the Township, correct?

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

THE WITNESS: I don't know how to answer

that.

BY MR. WELDON:

Q When you say there's a shortage of trees and you said there's no objective metric are you really saying that the Township wants more trees?

MS. McLAUGHLIN: More than what?

BY MR. WELDON:

Q Than it currently has.

A The Township definitely wants to improve our community with more trees.

Q If a property owner is -- so you're claiming then that trees are a public resource?

MS. McLAUGHLIN: Objection to the form of the question. I don't know what public resource means, but -- I mean, do you mean publicly owned benefit? I don't know what you mean by that. Can you be more specific?

MR. WELDON: It's another speaking objection. I'll clarify.

MS. McLAUGHLIN: Objection to the form of the question. (Unintelligible).

MR. WELDON: I mean, if she wants me to clarify -- yeah, if she wants me to clarify it I'll -- you know, she can ask and I'll provide clarification.

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.

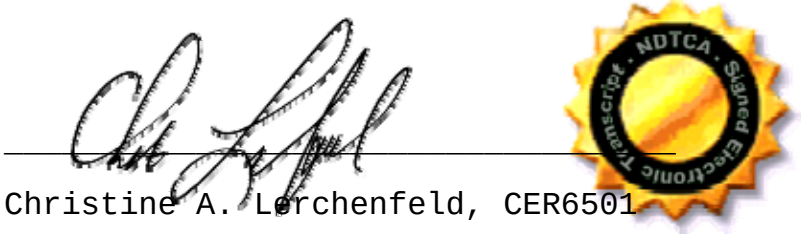
MS. McLAUGHLIN: I have just a few follow-up questions.

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 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,
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_____/

DEPOSITION OF JEFF GOULET

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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.

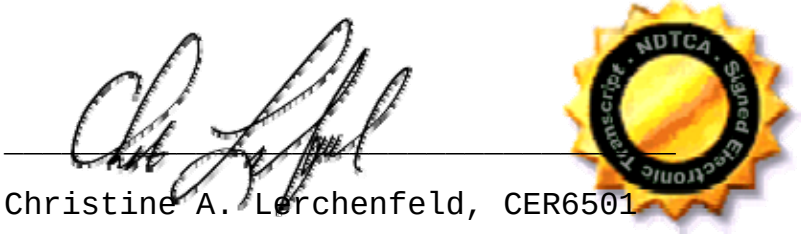
Go back to Exhibit 1, please, back to the

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

AURORA
Landscape Design and Appraisal, L.L.C.

325 Red Oak Lane
Rochester Hills, MI 48307

Telephone (248) 563-0797
tmhurst@att.net

July 11, 2019

RE: FP Development, LLC – Canton Township Ordinance
Client: Frank Powelson on Behalf of FP Development, LLC
Vacant Land Adjacent to Sheldon Road
Canton, MI

The client and intended users of this report are: Frank Powelson on behalf of FP Development, LLC and Clark Hill, PLC

The effective date of this report is: July 11, 2019

On October 12, 2018 I met at the above-captioned property to observe the inspection of trees done by: Leigh Thurston (Canton Township Planning Services), Mark Hook (Canton Township Ordinance Enforcement) and Kristin Kolb (Canton Township attorney). They conducted their inspection from approximately 10:25 until 12:53. Also on site was Stephon Bagne from Clark Hill. The township's representatives entered from the east adjoining property and proceeded to the far south-west corner of the FP Development property to begin their inspection.

I took 67 photos during the inspection and have developed and numbered them on the back. I did not take photos of every stump, but several of them. I did not observe anyone from the township taking photos.

Here are my observations from that inspection:

-Within the property in question there was a great deal of "upper branches" on the ground: Ash, Cherry, Hickory, Sugar Maple.

-The wooded area was a little more "upland" setting along the southern property border, but then as you moved to the north there was quite a bit of standing water, deep ruts, fallen, dead trees and branches, and thick undergrowth.

-They started by taking caliper measurements on these cut branches (Mark Hook), wanting to note those 6" in caliper and greater. Mark was then spraying those counted with red paint. Leigh was recording the information. Mark appeared to be the one with the only tape measure throughout the inspection as well.

-At first, they were taking dismembered branch measurements, and did not appear to count stumps in proximity. They were not concerned if there was a stump in the vicinity of a branch. After a few they then started measuring and counting stumps.

-They moved somewhat to the north of the property; there was heavy Rhamnus present.

-After tree #21 there were a number of them that Mark was looking at, but Leigh was not:

> Her: "Throw me the tape."
> Him: "There's a lot of water sitting between you and me."

-There was a great deal of rot in many of the stumps included in their count. (as documented in photos: 3,4,8,27,30,32,35,36,37,38,39,40,43,46,49,56,59,60,62,63,65,66). Some were obviously long dead. It was my general observation that it was Mark who did count and include rotting and dead stumps in the count.

-Note: photo number 64 is of a stump that Leigh looked at and did not count, because she said it was dead. Its condition is similar to many of the stumps that were counted.

-Further to north changed to more of a wetland. Present: raspberries, phragmites, thistle, poplar seedlings, buckthorn (Rhamnus).

-The individual measurements of the multi-stemmed stumps, or clump trees—as documented in Leigh's report—were added together and are stated to represent the dbh of that tree.

-For the majority of trees, Mark was measuring, painting, and calling out measurements and Leigh was recording them without inspecting the stumps. They did not record species or conditions of the stumps.

-After twenty or so, Mark stopped painting a number on the stumps, and just put a red dot on them. The vigorous underbrush and rot and debris made it difficult for the paint to adhere to the wood and be legible. Mark made no effort to remove that debris before painting the stumps.

-Throughout the wood the Cherry specimens had borer infestation (see photos 1,23,24). These are photos of standing Cherry trees from different areas of this property with extensive borer infestation—further demonstrating the condition of all the cherry in this wood.

-Per my notes there were at least four cherry tree stumps that were included in their count (see photo 32).

-They proceeded throughout all their inspection in a "meandering" path.

-Most all the clumps inspected were Basswood, (see photos 13,22,25,26,30,33,50,55,57,58,).

-There were at least two trees that I looked at after Mark had measured and counted them (Leigh did not inspect them) that were in fact Poplar and should not have been included in their count. (See photos 56 and 63)

My experience in this area:

-I graduated from Michigan State University in 1983 in the Landscape and Nursery Agricultural Technology program.

-I am a certified arborist and Certified Green Industry Professional and have worked in this industry for thirty-nine years.

-I have attended numerous conferences and continuing education seminars in the industry through the years and have presented at three different conferences for the International Right of Way Association, Michigan Chapter, on subjects related to landscape appraisal.

-I have considerable experience in the field, inspecting and inventorying natural wood stands throughout the state of Michigan, completing thousands of landscape/timber appraisal reports for pipeline projects and other entities such as:

> -Enbridge Energy Company- Extensive landscape appraisal work and timber valuation for the 6B Pipeline project which runs from Niles at the west edge of the state to Marysville at the east end. I also appraised nursery stock, strawberry and blueberry farms—calculating income losses, as well as cost of cure and mitigation projects. As part of this project, I walked the proposed pipeline corridor over hundreds of properties. In order to undertake tree inventories, I actually walked and counted all the trees, because sampling would have resulted in inaccurate results. Small changes in distance, topography, soils, and historic uses caused substantial differences in tree populations.
>
> -Consumers Energy- At least thirty years of landscape appraisal work, as well as various situations where arborist expertise is required. I have also been involved in large projects in Oakland Twp and Northville where community tree ordinances were at issue: performing inventories, tree tagging and ratings.
>
> -ITC Corporation- Extensive landscape appraisal and inventory work for residential and commercial properties within the vegetation management easements

throughout the state, as well as nursery and orchard appraisals. I have a great deal of experience in landscape appraisal work where only stumps remain.

-Oakland Road Commission, Oakland Drain Commission, Macomb County Road, Washtenaw County Road: I have completed an extensive number of projects in residential and commercial settings—landscape appraisals, tree inventories, tree tagging and ratings in accordance with various community tree ordinances throughout southeast Michigan and overseeing tree installations/mitigation in compliance with ordinances.

I do not believe the township's conclusions are reliable or accurate for the following reasons:

-All the trunks counted had at least some decay fungus present. Many of them showed extensive amounts—indicating the very real likelihood that a significant percentage of the trees were dead when they were cut down, if not dead, then diseased/poor condition, (see photos listed above) which is not consistent with the township ordinance.

-The developing wetland/standing water/boggy soils denote that area is changing, and the hardwoods may be dying off there. While Hickory, Basswood, and Oak (some of the varieties present here) can tolerate moist soils, they must be well-drained. They cannot tolerate standing water; they will begin to die off.

-Any measurements from fallen branches is inaccurate as there is no way to know a proper height for a correct measurement, or if all those branches might have been from the same specimen.

-They counted some cherry stumps and there is evidence of borer infestation, which will prove fatal to all Prunus in the area, which is not consistent with the township ordinance.

-Poplar trees were in fact counted in their recorded numbers, which is not consistent with the township ordinance. (see again photos 56 and 63)

-The person who was physically examining and measuring the majority of the trees (Mark) does not appear to be qualified for that task: as he was unable to identify varieties and if a tree was long dead (see photos 6,42,51,52).

-Within her report Leigh states in point #1: the "surrounding approximately 20 acres was dominated by White Oak." This is not true. While there is a strong presence of White Oak, there were also many Sugar Maple, Basswood, Hickory, and Cherry. The branch litter were mainly from Ash, Cherry, Hickory, and Sugar Maple.

-In her report, point #4: "The size of designated landmark trees varies by Species according to Canton's zoning ordinance. An Oak tree must be at least 20 inches in caliper to be classified as a landmark tree, and Oaks were the targeted tree for harvesting on this site.

Therefore, any 20 inch caliper stump will be considered a landmark tree." This is simply untrue. While some stumps were very difficult to discern due to extensive rot, I have a great deal of experience identifying trees by their stumps. There was a wide variety of tree stumps present, and to blanket them all as Oaks, is wrong. White Oak does not usually grow in clumps, Basswood does.

-The trees are numbered in their report but not in the field and there is no way to verify their findings.

-The township is misrepresenting "landmark trees" in all those they recorded as "multi". ("Multi" is a tree that has multiple trunks coming up from the base, as opposed to a single-stem tree.) The township added the diameters of each trunk in the clump for a total dbh. These inflated numbers, then, allow them to qualify the trees as "landmark" or those varieties that have matured to a point as to be noteworthy due to that advanced age. I am not sure how they can reason this as in the township ordinance (Sec. 5a.06) it lists the different varieties of trees that qualify for landmark with their individual size requirements, *and they don't even know what varieties they've documented in their report.*

-It is incorrect and misleading to call a clump tree a landmark tree as the actual age of that tree is not the sum of each individual trunk, but more accurately approximately the largest trunk's age. As an example: Basswood, which usually grows as a clump form. If we take a tree as documented in their report as a LM and is actually a Basswood: "multi 10.5" + 11.2" = 21.7" and multiply that inflated measurement of 21.7 x the accepted "growth factor" for Basswood which is 3, the approximate age of that tree is considered: 65.1 years. In actuality, that tree is closer to: 11.2 (the larger trunk measurement) x 3 = 33.6 years old, or *half that age*. 'Growth factor' is a number that you multiply times a tree's diameter to estimate the tree's age. Each tree's growth factor is different depending on rate of growth for each species.

-Another concrete example of this point: recently, on a non-related project I was inspecting a row of mature Norway Spruce along a property frontage. There were eight trees, obviously planted and grown together. Most of them had a dbh measurement of 16-18", but one of them was a multi-stemmed with trunks measuring 15,8, and 8". If we were to use the Canton Township's methods, that tree would be a 31" tree, which would be wrong, as it is a more accurately a 16" tree, like all the other planted in that hedgerow.

-As another example: you would not take a nursery stock tree that is clump form, with 3 individual trunks measuring 2.5" each and call it a 7.5" tree. It would be listed as a 2.5" clump. It would be the age of a 2.5" tree, not a 7.5" tree.

-In that listing of landmark trees, it says the Basswood must reach a diameter of 24" to be considered landmark. There are eight multi-trees listed as landmark in their

survey. Most, if not all, of them are Basswood and would not qualify as a landmark tree per their standards. (See again photos 13, 22,25,26,30,33,50,55,57,58)

-Their report lacks scientific credibility.

-There are no notes to back up their findings.

-I did not observe any photographs being taken.

-The person doing the analysis was not the person taking the notes, because of the density of the brush, fallen branches/trees, wetlands, and distance between them, Mark was shouting a lot of the data over to Leigh who was taking notes.

-Very often the person taking the notes and the person calling out information were not even close to each other, further jeopardizing accurate results if they didn't hear correctly (see photos).

-No one would be able to duplicate their results as their meandering inspection and lack of proper tagging would make that impossible.

-A tree inventory of this nature should have used tree tags. A tree tag is a metal disc about the size of a quarter with numbers stamped on it and a small hole at the top allowing it to be nailed into the tree. If the trees were tagged, it would be possible to actually identify the trees included in the counts.

Other Important Points

- I want to make a statement about the proper maintenance of woodlands. At the very core of proper woodland stewardship is the requirement of the landowner to thin a tree stand. This is beneficial as it controls the healthy development of a wood. As trees mature competition for nutrients, water, and light increase. Selective thinning eliminates this issue.

Thinning select trees stimulates the growth of the remaining trees. It opens up the canopy or crown area above and allows sunlight for the germination of new trees. Debris left from harvesting trees provide food and shelter for wildlife. Soils are also exposed in the clearing process for tree seed germination.

Also, and importantly, select cutting helps promote an uneven-aged stand of trees. This is essential in a healthy wood as it can be more resistant to insect and disease attacks, because most pests prefer a certain-aged tree species.

I think it inappropriate for an ordinance to penalize a landowner for the proper stewardship of his woodland. I question also their mitigation requirements: replacing those trees requiring permits with trees at least 2" in caliper. If, hypothetically, you replant trees removed from a wood with nursery stock 2-4", the likelihood of them surviving in minimal.

The larger the tree the greater the root system and the necessity for more water. This is never the practice to reestablish a woodland.

Instead, allowing nature to replenish with seedlings after the woodland is thinned is the proper and correct course. This, to me, is another example of the inconsistencies and inappropriate design of this township ordinance.

-In the Canton Township Ordinance, it states (5A.05): *1. The protection and conservation of irreplaceable natural resources from pollution, impairment or destruction is of paramount concern*. If in fact this is true, then it should be of "paramount concern" to allow a landowner to be a proper steward of his own woodland. Also, to say these natural resources are "irreplaceable" is incorrect. The nature of nature is that it is always changing, always replenishing itself, and in fact, it can be detrimental to nature when proper clearing and maintenance practices are penalized.

-It also states (5A.05): *4. The removal or relocation of trees within the affected areas shall be limited to instances: b. where the tree is dead, diseased, injured and in danger of falling… c. Where removal or relocation of the tree is consistent with good forestry practices or if it will enhance the health of remaining trees.* These points have been completely overlooked in this case. In their quest to count trees above anything else, the township representatives disregarded trees that were most likely dead, diseased, unhealthy, and dangerous. It was irrelevant to the township that thinning trees is actually a *good thing* here. They proved to me, a professional arborist, that "good forestry practices" were not the motive.

-At the center of this case is the Township's unwavering contention that trees were removed, and they must be replaced. I am not going to get into the legalities as it is not my expertise, but what I can and will comment on is the fact that the overlying environmental "bigger picture" is being ignored in a mission to adhere to arbitrary rules. The heart of the law is being overruled by the letter of the law, and as a professional arborist, I don't believe that is right.

In conclusion, I certify that, to the best of my knowledge and belief:
-The statements of fact contained in this report are true and correct.
-The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions, and are my personal, impartial, and unbiased professional analyses, opinions, conclusions, and recommendations.
-I have no present or prospective interest in the property that is the subject of this report, and I have no personal interest with respect to the parties involved.
-I have performed no services, as an appraiser or in any other capacity, regarding the property that is the subject of this report within the three-year period immediately preceding acceptance of this assignment.

-I have no bias with respect to any property that is the subject of this report or to the parties involved with this assignment.
-My engagement in this assignment was not contingent upon developing or reporting predetermined results.
-My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal consulting assignment.
-I have made a personal inspection of the property that is the subject of this report.

If you have any questions on any portion of this report, please do not hesitate to contact me. A list of my qualifications is available upon request.

Respectfully submitted,

Teresa Hurst
Certified Arborist
Michigan Certified Nurseryman (CGIP)
Limited Real Estate Appraiser