

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiff,

v.

CHARTER TOWNSHIP OF CANTON,
MICHIGAN, a Michigan municipal
corporation,

Defendant.

Civil Action No. 2:18-cv-13690
Hon. George Caram Steeh
Mag. Judge Elizabeth A. Stafford

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DEFENDANT/COUNTER-PLAINTIFF'S
RESPONSE TO PLAINTIFF/COUNTER-
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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CONCISE STATEMENT OF ISSUES PRESENTED

- I. WHETHER THE TREE CLEARING ORDINANCE CONSTITUTES A TAKING.
- II. WHETHER THE ORDINANCE EFFECTS AN UNREASONABLE SEIZURE UNDER THE FOURTH AMENDMENT.
- III. WHETHER THE TREE ORDINANCE IMPOSES UNCONSTITUTIONAL CONDITIONS.
- IV. WHETHER THE ORDINANCE IMPLICATES OR VIOLATE THE EXCESSIVE FINES CLAUSE.

INTRODUCTION

Despite Plaintiff's characterization of Canton's as "reviving" a centuries-old, disfavored regulation, "[o]rdinances that protect trees and vegetation are one of the fastest 'growing' areas of land use law at the local level." 1 Zoning & Plan. Deskbook § 5:47 (2d ed.) (2018). "These ordinances protect existing trees and vegetation and require replacement where preservation isn't feasible. In California, over 80 incorporated cities have such ordinances. (Footnote omitted.) Other states that have such ordinances include Illinois, Missouri, and Texas." *Id.*

Plaintiff's so-called Statement of "Facts" is a collection of partial representations and mischaracterizations of the evidence here for the transparent purpose of painting a false picture of the Forest Preservation and Tree Clearing Ordinance, part of Canton Township's Zoning Ordinance. First and foremost, Plaintiff attempts to portray the Ordinance as regulating *any* tree and requiring a permit for the removal of *any* tree from real property. The Ordinance defines regulated trees and landmark trees. Canton Township Zoning Ordinance, Appendix A, §§ 5A.05 and 5A.08 [D. 16-8]. A tree removal permit is required only where more than 25% of the inventory of regulated trees is proposed to be removed. Ordinance § 5A.08.B.2. Certain nuisance species, boxelder, ash and cottonwood are also excluded from the permit requirements. *Id.*

Plaintiff also claims that the funds collected in the tree fund are "not just for planting trees", citing to Leigh Thurston's testimony. But Plaintiff omitted the rest of Ms. Thurston's testimony that all of the monies deposited in the tree fund are used for

planting *and maintenance* of trees. There is no evidence or testimony to even suggest that the funds deposited into the tree fund are used for any purpose unrelated to tree planting or maintenance. As Ms. Thurston testified, “the monies that go in (the tree fund) are separated and can only be used for planting and (tree) maintenance out of that account.” [D. 26-4, pp. 40-41.] See also, testimony of Jeff Goulet, [D. 29-2, p. 48](monies in the tree fund may be used only for “[t]rees and their maintenance.”); Ord. § 5A.08E (“the township tree fund [is] for tree replacement within the township. These monies shall be equal to the per-tree amount representing the current market value for the tree replacement that would have been otherwise required.”)

Plaintiff raises several non sequiturs as well. For example, Plaintiff claims that there is no administrative appeal process in the ordinance, directly in contradiction of § 28.04(E) [D. 29-3] of the Zoning Ordinance that provides an appeal to the Zoning Board of Appeals for any matter under the Zoning Ordinance, including the provisions of § 5A.01, *et seq.* Nevertheless, Plaintiff has not made a procedural or substantive due process claim, nor did Plaintiff even mention that fact again in the context of arguing any of the theories of liability it has proffered here.

This does, however go to the ripeness argument and the lack of a final decision, as raised in Defendant’s Motion to Dismiss, for Judgment on the Pleadings and for Summary Judgment [D. 29.] Plaintiff’s assertion of a lack of administrative appeal is a tacit admission that it did not seek an appeal from the Township’s interpretation of the Ordinance and did not obtain a final decision.

Plaintiff also continually and self-servingly calls the payment to the tree fund a “fine.” But the fine for violating the ordinance is \$500.00. Canton Twp. Ord. § 1.7(c). Where there is a violation, the contribution to the tree fund is the only way to ameliorate the violation and the loss of trees themselves.

ARGUMENT

I. The tree clearing ordinance does not constitute a taking.

Plaintiff relies on *Horne v Dept of Agriculture*, 135 S.Ct. 2419 (2015), to assert that Defendant has taken Plaintiff’s property. In *Horne*, raisin farmers were required to set aside a percentage of their raisin crop at the behest of the U.S.D.A., and were forbidden to sell the raisins at all. Contrary to that situation, the Ordinance here in fact provides the Plaintiff a choice. If Plaintiff seeks to remove the trees, it may do so, but obtain a permit. In the context of the permit, Plaintiff then can either replace trees on its own site or, if not feasible, it can plant trees on other property, or pay into the tree fund and the Township will replace trees at another location.

The case before this Court is also different from *Horne*, as the Township has not taken and does not seek to take Plaintiff’s trees for its own use. The Township did not prevent Plaintiff from selling the timber produced as a result of the unpermitted tree removal. The case of *Georgia Outdoor Network, Inc. v. Marion County, Ga.*, 652 F.Supp.2d 1355 (M.D. Ga. 2009) is a closer analogy here than *Horne*. There, the county regulation required “All trees, shrubs[,] plants, and/or other natural buffers around an Outdoor Recreation Camp shall be preserved for a minimum width of fifty (50) feet. However,

brush cutting is allowed to reduce a fire hazard.” *Id.* at 1363. In that case, there was no permit process to allow removal of any trees within the buffer zone, except brush that would create a fire hazard. The District Court there held that the regulation did not amount to a taking requiring compensation.

Plaintiff also claims that the ordinance here requires placement of “unwanted objects” similar to that ruled a taking in *Loretto v Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, the Court held that a municipal ordinance requiring placement of a cable box on the plaintiff’s property constituted a taking because it was a direct physical intrusion onto the property. Plaintiff has not alleged facts to demonstrate that the Township has directly, physically intruded on its property, though, a requirement for the application of *Loretto*.

The Second Circuit came to the same conclusion that there was no direct physical intrusion on property in *Southview Associates, Ltd v. Bongartz*, 980 F.2d 84, 95, 36 Env’t. Rep. Cas. (BNA) 1024, 23 Env’t. L. Rep. 20132 (2d Cir. 1992). There, a developer was denied the right to remove trees by the Vermont Environmental Board in an area serving as a winter habitat for white-tailed deer. The developer sued the Board.

The Second Circuit rejected the argument that the refusal to allow the developer there to remove the trees was a physical taking under *Loretto*:

First, Southview has not lost the right to possess the allegedly occupied land that forms part of the deeryard. Southview retains the right to exclude any persons from the land, perhaps by posting “No Trespassing” signs. Southview can even exclude the deer, perhaps with a fence, provided it does so under circumstances that do not require it to obtain an Act 250

permit—such as by the planting of an orchard. Second, Southview retains substantial power to control the use of the property. ... In addition, Southview's owners can, to the exclusion of others, walk, camp, cross-country ski, observe wildlife, even hunt deer on this land—irrespective of whether these activities cause the deer to abandon the deeryard. Third, because all of these uses, and many more, are available to any owner of the deeryard land, Southview's right to sell the land is by no means worthless. The Board's denial of Southview's one application for an Act 250 permit can hardly be said to have “empt[ied] ... of any value” Southview's right to dispose of the 44 acres of deeryard. See *Loretto*, 458 U.S. at 436, 102 S.Ct. at 3175.

Put differently, no absolute, exclusive physical occupation exists.

980 F.2d at 94-95 (emphasis added).

Applying this rationale and the factors under *Loretto*, Plaintiff here has not lost the right to possess its property. It retains the right to exclude persons from the land. Indeed, Leigh Thurston, the Township's Landscape Architect and deputy Planner, and other Township officials were denied access to the property by Frank Powelson to analyze the extent of tree removal. [D.16, ¶¶ 30-32.] It was only after some negotiation after Mr. Powelson retained counsel that Ms. Thurston and others were provided access to the property more than two months after Ms. Thurston's first observation of tree removal on Plaintiff's property. *Id.*

Plaintiff also retains “substantial power” to control the use of the property. As Jeff Goulet, Township Planner, testified, “I’m saying how they maintain their property is up to them, whether or not they maintain the property without any trees on it or whether they maintain the property with portions of the trees on it or all of the trees on it. They decide how many trees they’re going to remove and then we determine what

the ordinance requires.” [D. 29-2, p. 25.] Plaintiff can also alienate (lease, sell, etc.) the property in any manner it pleases.

Notably, the Second Circuit in *Southview* made its ruling even in the face of the Vermont regulation that required a permit to keep deer out of the property, unless it took other mitigation action, “such as planting an orchard.” *Id.* at 94. In short, the tenets of *Loretto* do not apply here, and the Ordinance does not constitute direct, physical possession amounting to a taking.

Government regulation often “curtails some potential for the use or economic exploitation of private property.” *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Therefore, “not every destruction or injury to property by government action has been held to be a taking in the constitutional sense.” *Armstrong v. United States*, 364 U.S. 40, 48 (1960). 48. The process for evaluating a regulation’s constitutionality involves an examination of the “justice and fairness” of the governmental action. *Andrus*, 444 U.S. at 65. The Supreme Court has provided several factors to consider to determine whether “justice and fairness” require an economic injury caused by public action to be compensated by the government: “the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action.” *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

The economic impact of the regulation factor simply compares the value that has been taken from the property with the value that remains in the property. *Keystone*

Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987). As to the character of the government action, courts look at “whether it amounts to a physical invasion or instead merely affects property interests through ‘some public program adjusting the benefits and burdens of economic life to promote the common good’” to determine whether a taking has occurred. *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 539 (2005). If the regulation serves a public interest and is ubiquitous, then a plaintiff must show that the regulation’s economic impact and its effect on investment-backed expectations is the equivalent of a physical invasion upon the property. *K & K Construction, Inc. v. Department of Environmental Quality*, 267 Mich App 523, 553 (2005).

Even when the evidence is viewed in the light most favorable to Plaintiff, it cannot prevail under this test as a matter of law. First, zoning regulations are ubiquitous in nature and all property owners bear some burden and some benefit under these schemes. *Id.* at 527 n. 3. The purpose of the Township’s Tree Ordinance is “to promote an increased quality of life through the regulation, maintenance and protection of trees, forests and other natural resources.” [D. 16-8, § 5A.02]. This is without question a public interest that is ubiquitous to all residents of the Township.

Furthermore, even the Declaration of Plaintiff’s owner, Frank Powelson, supplied with its Motion does not demonstrate an economic impact or effect on its investment-backed expectations because of the regulation. First, this regulation had been in effect before Plaintiff purchased this property, and no more restrictive changes have been made to the Ordinance since Plaintiff’s original purchase/investment.

Before purchasing the property, Plaintiff knew of these requirements imposed by the ordinance. When Plaintiff conducted the lot split in 2016, before it undertook the work here, it was expressly reminded of the ordinance requirements.

In correspondence dated July 14, 2017, Ginger Michaelski-Wallace, the engineer for Plaintiff/Counter-Defendant and the owners of the split parcel, 44650, Inc., was notified in writing that the split application was tentatively approved, subject to the submission of certain, enumerated documents. [D. 16-4]. The letter further noted pertinent information about use of the Property, including, but not limited to, the *requirements to submit a site plan as a pre-condition to development and the requirement to obtain a tree removal permit prior to the removal of any trees from the Property. Id.* [D. 16, ¶¶ 14-15.] Thus, Plaintiff's investment-backed expectations could not have changed because of this Ordinance.

Plaintiff has submitted the declaration of Mr. Powelson under 28 U.S.C. § 1746 in support of its Motion in this respect. An affidavit or declaration offered in support of or opposition to a motion for summary judgment “must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.” *Wilson v. Budco*, 762 F.Supp.2d 1047, 1057 (E.D. Mich. 2011). “It is the burden of the party submitting the affidavits to demonstrate that the witness has personal knowledge of the statements contained in the affidavit.” *Id.* Further, hearsay evidence cannot be considered on a motion for summary judgment. *Id.*

A review of the Declaration of Mr. Powelson indicates that it is in large part not based upon personal knowledge. Defendant therefore moves to strike the Declaration insofar as it is not based upon personal knowledge. Specifically, Defendant moves to strike the following paragraphs:

¶¶ 10 (“It is my understanding” suffers from a foundational defect, as does not identify the source of his “understanding”), 11 (using the term “penalties” and lacking a foundation for the conclusion that expanding his business would be “prohibitively expensive”); 12 (no facts to indicate efforts to sell the property to support the conclusion that it is “difficult” to sell the property); 13 (hearsay); 15 (hearsay); 23 (referencing Township Supervisor’s failure to inform Plaintiff of ordinance requirements; no facts to establish that Supervisor, rather than Township Planner and deputy Planner, is responsible for the tree clearing ordinance application and enforcement); 29 and 30 (“To my knowledge” does not indicate foundation for personal knowledge, either by a personal observation or information; it is speculation or hearsay). With these deletions, Plaintiff’s Declaration is insufficient to establish an economic impact. More importantly, Plaintiff has failed to submit any evidence to establish a lack of a genuine issue of fact that Leigh Thurston’s tree count was incorrect or that many or any of the trees she counted were not regulated or landmark trees.

II. The ordinance does not effect an unreasonable seizure under the Fourth Amendment.

As argued in its own dispositive motion, Canton submits that the Fourth Amendment does not apply in this context. The Fourth Amendment applies to searches and seizures in the civil context only “to resolve the legality of these government actions without reference to other constitutional provisions.” *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 51 (1993). If the government’s action goes beyond the traditional meaning of a search and seizure and other constitutional provisions apply, those provisions should be analyzed instead of the Fourth Amendment. *Id.* In *James Daniel*, the court found that since the government’s alleged seizure of property was not to preserve evidence of wrongdoing, but instead to assert control over the property, the actions should be brought under the Due Process Clause of the Fifth and Fourteen Amendments. *Id.*

In the case before this Court, Plaintiff relies upon *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009). There, the Fifth Circuit ostensibly recognized a Fourth Amendment claim where state officials enforced an easement on Plaintiff’s property, restricting her access and right to keep others out. Moreover, the Court there held that the plaintiff’s taking claim under the Fifth Amendment was not ripe and affirmed dismissal of that claim, while certifying the question of unreasonable seizure to the Texas Supreme Court. *Id.* at 503-504.

The *Severance* decision recognized that its approach had not been endorsed by the U.S. Supreme Court decision in *U.S. v. James Daniel Good Real Property*, *supra*. It also has not been directly endorsed by the Sixth Circuit Court of Appeals. Importantly, the *Severance* rationale does not apply here because Canton Township has not asserted “control” over Plaintiff’s property similar to an easement. It has not asserted even a right to entry on Plaintiff’s property without its consent, much less limiting Plaintiff’s right of access or right to keep others out. It simply does not apply here.

Scott v Garrard County Fiscal Ct., 2012 WL 176485 (E.D. Ky. 2012) held the same reservation about Fourth Amendment claims brought where a takings claim is available. Referring to, *inter alia*, the *Severance* case, that Court stated, “But while some courts have recognized Fourth Amendment claims as being separate and independent of takings claims[], this Court is not persuaded that this is the correct analysis in a situation such as Plaintiff’s.” 2012 WL 176485 at *7. The Court continued:

To allow Plaintiff to pursue a Fourth Amendment claim for the seizure of Lanham Lane would eviscerate the ripeness requirement for takings claims under the Fifth Amendment. The Court is not convinced that Plaintiff can escape those requirements by asserting a claim that is nearly identical to her takings claim by simply labeling it a Fourth Amendment claim. Further, to establish a claim under the Fourth Amendment, Plaintiff must establish that the seizure of her property was unreasonable. See *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 62 (1992). Because it is within Defendants’ police power to open and establish roads, the Court is not persuaded that Plaintiff has averred facts upon which Defendants’ actions could be deemed unreasonable.

Id.

Plaintiff also cites *U.S. v. Gray*, 484 F.2d 352 (6th Cir. 1973) for the proposition that temporary deprivations of property are “actionable as seizures under the Fourth Amendment.” That case is wholly inapposite here, for it dealt with the “plain view” doctrine of unreasonable seizure and the suppression of evidence under the Exclusionary Rule, preventing admission of the tainted evidence in a criminal prosecution arising out of execution of a search warrant. The temporary deprivation (seizure) by a police officer of evidence seized in a raid is not “actionable” in the sense that Plaintiff argues here. Plaintiff’s argument in this respect is the essence of trying to fit a square peg in a round hole.

III. The tree ordinance does not impose unconstitutional conditions.

“Government exactions as a condition of a land use permit must satisfy requirements that government’s mitigation demand have an essential nexus and rough proportionality to the impacts of a proposed development.” *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 612 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994). “[T]he government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.” *Koontz*, *supra*, at 606.

Under this framework, Plaintiff argues, the mitigation demand must bear an essential 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.

In this case, the legitimate governmental interest advanced by the tree removal ordinance is preservation of aesthetics and abating losses occasioned by tree removal. Aesthetics is among the governmental interests recognized by the courts as not only legitimate, but significant. *H.D.V.—Greektown, LLC v. City of Detroit*, 568 F.3d 609, 623 (6th Cir. 2009), citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509–10, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); *Berman v Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (“It is within the power of the legislature to determine that the community should be beautiful”).¹

Plaintiff dismissively refers to Canton’s “desire to populate” the Township with trees, but the goal is more than that. As Leigh Thurston testified, “It’s a goal to create a tree canopy on our major streets. We’re only in the process of it because we’re a young township, so we haven’t completed it.” [D. 26-4, p. 40.]. Mr. Goulet similarly testified that, “And we replace those trees elsewhere within the community to re-establish that canopy.” [D. 29-2, p. 48.]

¹ Generally, the party challenging an ordinance has the significant burden of overcoming the presumption of constitutionality, and showing that the Ordinance is not rationally related to a legitimate governmental interest. *Dumont v. Lyon*, 341 F.Supp.3d 706, 742 (E.D. Mich. 2018), quoting *FCC v. Beach*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.’ *Id.* ... ‘[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.’ *Id.*”

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

In this case, Ms. Thurston visited the property and conducted a tree count, so she witnessed the number of trees lost and did conduct the individualized assessment that Plaintiff asserts was not done here. See Exhibit 1 attached, photographs taken by Frank Powelson and identified at his deposition. Ms. Thurston is depicted in those photographs. Ms. Thurston saw herself the loss of tree canopy (shown in the photos), which can only further worsen the shortage of trees.

Plaintiff relies upon *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74 (Tex. App.—Dallas, 2013). In that case, the City required a subdivision developer to pay what the Court called “tree retribution fees,” in the amount of \$34,500 before the City would approve the subdivision. The Court found the fees to be an exaction, and the burden then shifted to the City to establish the essential nexus/rough proportionality of the fees. *Id.*, 421 S.W.3d at 95. The Court held that the City’s stated interests were legitimate and the fees bore an essential nexus to the substantial advancement of those interests.

Id. The Court held, however, that the evidence proffered by the City in support of summary judgment of the projected impact caused by removal of the trees during the development. *Id.* at 96.

The *Mira Mar* case is distinguishable in that the Coppell ordinance required a permit to remove trees and a fee per tree of \$100 per inch of trunk diameter. There is no provision, or at least not one that was discussed in the decision, giving the property owner any option to replace trees on site or elsewhere, or take any other type of action to mitigate the effects of the tree removal. The decision also does not mention any exemptions that would decrease the burden to the property owner, like the Canton Ordinance's exemption of 25% of the inventory of regulated trees. Canton's Ordinance differs in these significant respects.

This case also differs from *Mira Mar* in that both the Township Planner and deputy Planner have testified to the aesthetics of a tree canopy, and Ms. Thurston expressly referenced a problem of a shortage of trees in Canton. Logically, where a shortage exists, removal of more trees cannot improve that circumstance. The record evidence here also shows that Plaintiff was not developing the property in a manner in which the effects of tree removal could be mitigated in other ways. Plaintiff never submitted a tree inventory, and Mr. Powelson conceded he never had one prepared before any trees were removed. Ex. 2, Powelson dep., pp. 42-43. Plaintiff did not submit a site plan, plot plan or other plan that the Township could review to determine whether

the 25% applies, or in what other ways it could work with Mr. Powelson to achieve the goals of both parties.

Plaintiff also cites *New Jersey Shore Builders Ass'n v. Township of Jackson*, 2007 N.J. Super. Unpub. LEXIS 2987, *13-14 (2007), involving an ordinance very similar to Canton's Ordinance. However, that decision by the New Jersey Superior Court Appellate Division striking the ordinance was unanimously reversed by the New Jersey Supreme Court. *New Jersey Shore Builders Ass'n v. Township of Jackson*, 199 N.J. 38, 970 A.2d 992 (2009). The Court did not squarely consider the tree ordinance in that case under the unconstitutional conditions framework of *Dolan* and *Koontz*, but the Court did consider a challenge that the ordinance was an improper method of raising revenue.

Ruling as to that issue, the Court stated:

Here, the payment of a fee is only one of three possible approaches to tree replacement. The first two involve replanting one-to-one or pursuant to a tree area replacement/ reforestation scheme on the property from which the trees were removed. As the Township's witnesses recognized, replanting on the original site is the scheme of choice. To encourage such replanting, the ordinance makes it the least expensive option for the landowner. If that is not feasible, the tree replacement fee is triggered. According to the testimony of the Township Forester, the fee is calculated based on the cost of replacing a tree of similar size or a number of smaller trees. NJSBA has failed to produce any evidence to suggest that the fee exceeds the Township's cost for administration of the tree replacement program, including the replacement itself. In the absence of such evidence, there is no basis to conclude that the fee is a revenue raiser or that it unreasonably exceeds the cost of regulation.

Id., 199 N.J. at 60-61 (emphasis added).

The observations of the New Jersey Supreme Court all apply to the case at bar. Like the New Jersey ordinance, payment of the fee under the Canton Ordinance is only

one of three possible approaches to tree replacement, and replanting on site is the scheme of choice. Jeff Goulet testimony, [D. 26-2, p. 13.]

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

Plaintiff claims that the \$47,000+ fee is not roughly proportional in this case. But that figure is not a random figure; it is derived by the number of trees actually removed from the property. [D. 16.] Furthermore, there cannot be a better proportionality than a 1:1 replacement of trees removed. The fee of \$450 is even less than the \$900 it would cost to replace landmark trees on a 3:1 basis, as provided in the ordinance. Plaintiff has not at all addressed the reasonableness or proportionality of the individual fees, concentrating solely on the total sum resulting from Plaintiff's removal of nearly 200 regulated (including landmark) trees. As Mr. Goulet testified, "We do not prevent people from removing all of the trees on their property." [D. 29-2, p. 13.]

IV. The ordinance does not implicate or violate the Excessive Fines Clause.

To prevent repeating itself, Defendant relies upon its dispositive motion [D. 29] which addressed the claims made here under the Excessive Fines Clause of the Eighth Amendment. However, Defendant specifically responds here to Plaintiff's argument

that the tree fund payments are penal in nature, and argument that they are “retributive and deterrent” under *Austin v. United States*, 509 U.S. 602, 610 (1993).

Plaintiff relies upon the testimony of Jeff Goulet, who termed the tree fund a “disincentive”. But the “disincentive” is not to prevent or deter a violation of the law. It is, as the New Jersey Supreme Court put it, “To encourage replanting,” which is a much less expensive endeavor than paying into the tree fund.

Furthermore, the tree fund payment does not depend on a violation of the Ordinance. It is part of the permit process, and only becomes relevant if the property owner chooses not to replant trees on site or somewhere else. Ord. § 5A.08.E. (“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.”)

This is no more a penal fine than fees required of a business who obtains a permit to tap into a municipal water supply or sewer system, where the fees can run into the thousands of dollars depending on the structure served. Permit fees are not subject to the Excessive Fines Clause, because they are not fines or penalties

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Defendant, CHARTER TOWNSHIP OF CANTON, respectfully requests that this Honorable Court deny Plaintiff's Motion for Summary Judgment.

s/ ANNE McCLOREY McLAUGHLIN
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CERTIFICATE OF SERVICE

THE UNDERSIGNED CERTIFIES THAT THE WITHIN INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE ABOVE CAUSE TO EACH OF THE ATTORNEYS OF RECORD HEREIN AT THEIR RESPECTIVE ADDRESSES DISCLOSED ON THE PLEADINGS ON November 6, 2019, BY:

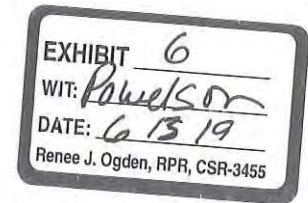
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SIGNATURE: /s/ Michelle Irick

INDEX OF EXHIBITS

<u>Ex. No.</u>	<u>Description</u>
1	Photographs
2	Transcript of Deposition of Martin Frank Powelson

EXHIBIT 1



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P-00005



P-00006



P-00007



P-00008



P-00009



P-00010



P-00011



P-00012



P-00013



P-00014





P-00016



EXHIBIT 2

Frank Powelson
F.P.Development, LLC v. Charter Township of Canton

1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

vs. Case No. 2:18-cv-13690

CHARTER TOWNSHIP OF CANTON, MICHIGAN,
a Michigan municipal corporation,
Defendant.

The Deposition of FRANK POWELSON
Taken at 500 Woodward Avenue
Detroit, Michigan
Commencing at 10:11 a.m.
Thursday, June 13, 2019
Before Renee J. Ogden, CSR-3455, RPR.

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F.P.Development, LLC v. Charter Township of Canton

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APPEARANCES:

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ALSO PRESENT:

Leigh Thurston
Juliana Butler

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Detroit, Michigan
Thursday, June 13, 2019
10:11 a.m.

FRANK POWELSON,

was thereupon called as a witness herein, and after having first been duly sworn or affirmed to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

MR. WELDON: Before we get started, I'd like to go on the record making an objection to the fact that Leigh Thurston is here. She has been designated as a representative of the township. Township's corporate counsel is also present, who is also an employee of the township, and Ms. Thurston is a witness in this case. We have asked that she leave and the township's representative has said that she is not.

MS. MCLAUGHLIN: The township is entitled to have a corporate representative here who is not counsel and Ms. Thurston is fulfilling that role today.

EXAMINATION

BY MS. MCLAUGHLIN:

Q. Would you please state your full legal name for the

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record.

A. Martin Franklin Powelson.

Q. How are you normally referred to, as Frank?

A. Frank.

Q. How do you prefer to be addressed today?

A. Frank, please.

Q. What is your date of birth, sir?

A. August 11, 1954.

Q. You are currently married?

A. Yes.

Q. Do you have children?

A. Yes.

Q. Are they adult children?

A. Yes, they are. They're adults.

Q. And where do you presently reside?

A. In Jackson.

Q. Jackson, Michigan?

A. Mm-hmm.

Q. What's your residence address there?

A. 6527 Imperial Court, Brooklyn, Michigan.

Q. How long have you lived there?

A. 27 years, I do believe.

Q. Okay. What is the farthest level of formal education you have attained?

A. High school.

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1 Q. What year did you graduate from high school?
2 A. 1972.
3 Q. From what high school?
4 A. Miami Coral Park in Florida.
5 Q. How long have you lived in Michigan?
6 A. Since 1972.
7 Q. So you graduated from college and came up here?
8 A. No. High school.
9 Q. Oh, I'm sorry. I meant high school. And then you
10 made your way up to Michigan?
11 A. Made my way up to Michigan, yes, I did.
12 Q. Since high school have you had any type of formal
13 training of any kind for any type of certification or
14 diploma, degree, anything of that nature?
15 A. Explain a little bit more what you're saying here.
16 Q. Do you have any type of state-issued license that
17 requires some kind of an accreditation? You know, are
18 you certified -- for example, are you a certified
19 accountant? Are you a certified --
20 A. No.
21 Q. Anything of that nature, not necessarily an
22 accountant.
23 A. No, ma'am.
24 Q. Do you have a background in forestry or silviculture?
25 A. No, I don't.

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1 Q. What is your present employment?
2 A. Who do I work for?
3 Q. Yes.
4 A. Myself.
5 Q. And are you a -- in terms of your employment?
6 A. The company name is Poco, P-o-c-o. We do traffic
7 control for cities, counties, municipalities like
8 Canton Township.
9 Q. That's located at what address?
10 A. 4850 South Sheldon Road, Canton.
11 Q. How long has Poco been located at that address?
12 A. Probably ten years. Prior to that we were in Canton
13 further down on Van Born and Haggerty Road. We have
14 been in Canton for quite a long time.
15 Q. What other business entities do you have an ownership
16 interest in that are located at 4850 South Sheldon
17 Road?
18 A. We have a permanent sign division, Poco Sales, which
19 also sells traffic control companies to Canton and
20 other municipalities. There is another company called
21 MFP, that we manufacture sign stands and sell it to
22 the other traffic control companies.
23 Q. Okay. You are an owner or member of the plaintiff in
24 this matter, F.P. Development, L.L.C.?
25 A. Yes, I am.

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1 Q. Are there any other members of F.P. Development?
2 A. No, ma'am.
3 Q. So you are the sole shareholder or member manager, all
4 of that?
5 A. One-man army.
6 Q. Okay. Are there any other corporate entities or LLCs
7 or anything of that nature of which you have an
8 ownership interest?
9 A. Yes. F.P. Holdings, they're a real estate holding.
10 That's pretty well it.
11 Q. Okay. The property that we -- that this litigation
12 involves, how do you normally refer to that parcel of
13 property?
14 A. Normally I just call it the vacant lot.
15 Q. Okay. So for purposes -- unless I specify otherwise,
16 for the purposes of the deposition when I say the
17 property, that's what I will be referring to.
18 A. The vacant lot.
19 Q. The vacant lot.
20 Have you ever served in the military?
21 A. No, ma'am.
22 Q. Have you ever been convicted of a crime including any
23 misdemeanors?
24 A. Not that I can remember.
25 Q. Okay.

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1 A. Remember, I'm 64, 65, so, no.
2 Q. With respect to the property, the original parcel that
3 was a single parcel at that location, was the subject
4 of a lot split, correct?
5 A. Yes, ma'am.
6 Q. You previously purchased that property from Canton
7 Township?
8 A. From Canton Township, yes.
9 Q. My understanding is, and you can tell me if I'm
10 incorrect, is that there was sort of a three-way deal
11 for lack of a better word between Canton Township,
12 Poco or FP, one of your business entities, and
13 Miesel/Sysco Food Service; is that right?
14 **MR. WELDON:** I'm going to object to the
15 form of the question.
16 You can answer.
17 A. When you say Miesel/Sysco, that was my old shop. I
18 sold it to them.
19 **BY MS. McLAUGHLIN:**
20 Q. That was the property down on Van Born?
21 A. Yes, ma'am.
22 Q. And at the time, was that at the same time that you
23 purchased the parent parcel that was split into two?
24 A. Pretty much so, yes.
25 Q. Was there anything in writing between yourself, Canton

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Township, or Miesel/Sysco indicating that the purchase or sale of any of those properties was related to the other?

MR. WELDON: Objection to the form of the question.

You can answer.

A. I'm trying to see where you're going with this.

BY MS. MCLAUGHLIN:

Q. I'm just trying to understand. My understanding was that the township sold you the vacant parcel and the parent parcel at roughly the same time you sold the vacant property to Miesel/Sysco?

A. Yes, ma'am.

Q. Were those transactions related to each other in any way as far as you're concerned?

A. No.

Q. The original parcel that you purchased was how many acres?

A. 62.

Q. And you purchased it for how much?

A. \$550,000.

Q. Do you remember the year that you bought that property?

A. I would say no, but generally maybe ten years ago.

Q. Okay. Does 2007 sound right?

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A. Probably.

Q. Before the lot split that created two different parcels on that property, was there any development anywhere on that parcel that you own?

A. I own both.

MR. WELDON: Objection.

Go ahead.

A. I own both properties. I don't know what you mean.

BY MS. MCLAUGHLIN:

Q. Was there ever any development on that property?

A. No. It was farmland.

Q. There is a piece of property directly to the north that Poco owns, is that right, or is that all one parcel?

A. You were saying it was all one parcel at one time.

Q. Let me see if I can --

MARKED FOR IDENTIFICATION:

DEPOSITION EXHIBIT 1

10:20 a.m.

BY MS. MCLAUGHLIN:

Q. I'm going to show you, Mr. Powelson, what I have had marked as Exhibit 1.

A. Thank you.

Q. I would have you take a look at that. Do you recognize that document?

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A. I'm sure I have seen it before, but I don't recognize it now, but go ahead.

Q. Do you recognize that as the parent parcel or the parcel that it was split in two in 2017?

A. Well, where are you showing me the parcel that's split in two?

Q. At the top of the exhibit is an indication of a parent parcel with a tax identification number. Do you see that?

A. Yes, I do.

Q. It says it's roughly 46 acres?

A. 46 acres.

Q. Gross?

A. Mm-hmm.

Q. That piece of property was split into parcel A and parcel B; is that correct?

A. Show me where Sheldon Road is.

Q. It's on the right side of the page.

A. Yes.

Q. And Yost Road is designated to the south?

A. Yost Road is down here.

Q. Does that orient you better?

A. It does.

Q. That is sort of a sideways T-shaped parcel in total. Is that the entire parcel that you brought from the

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township?

A. Yes, the entire parcel.

Q. And then you split off essentially the bottom portion -- I don't even know how to describe it -- but essentially about 16 acres?

A. Yes.

Q. And those 16 acres you sold to the Percys?

A. The Percy brothers, yes, ma'am.

Q. When you purchased the property, did you purchase it in your own name?

A. No. I think it was purchased in -- you know what? I'm not sure. I don't want to say if it was F.P. Development or Franco Realty or just myself.

Q. Franco Real Estate Holdings, I believe?

A. Yes, ma'am.

Q. That is not a Michigan entity?

A. It is.

Q. I have an address that shows it's in Arizona.

A. I don't know who is in Arizona.

Q. So Franco Real Estate Holdings, is that another company that you have an ownership interest in?

A. Yes.

Q. How old is that organization, if you know?

A. It's probably about the same time as when I bought the -- purchased the property.

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1 Q. But that is a Michigan entity?
2 A. Yes, ma'am.
3 Q. And when you purchased the property, the entire parcel
4 from the township, did you have a specific use in mind
5 at that time?
6 A. Well, Poco was growing at the time. We didn't know
7 how fast Poco would be growing. As you know, you
8 looked at the old shop, we were in a 10-acre facility.
9 But now moving to Canton, there were so many detention
10 ponds and bioswales and everything else, and we have
11 grown extremely fast. The intent was it was going to
12 be Poco and if I needed some more property to sell, I
13 would sell property as needed.
14 Q. Okay. Did you ever take any measures to expand Poco's
15 operations onto any part of this property?
16 A. No.
17 Q. In 2017 you split the property; is that right?
18 A. I do believe it was 2017. I couldn't tell you exactly
19 when. That's when the Percys purchased it.
20 Q. You retained the services of Alpine Engineering, is
21 that right, to assist with the lot split?
22 A. I do believe it was Alpine because I see them written
23 down here.
24 Q. You retained them for that purpose?
25 A. No.

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1 Q. Ginger Michaelski-Wallace was the principal contact
2 between yourself and --
3 A. I can't help you with that.
4 Q. Did you have any contact with the township about the
5 lot split itself?
6 A. No. It might have been at the time. I do believe Tom
7 Yack was there, I do believe. We mentioned it to Tom
8 we didn't foresee any issue with the split. Gary was
9 interested in expanding. That's where we went with
10 it. We didn't have any issues at all with the split.
11 Q. Eventually you -- after the lot was split, you
12 transferred the southern portion of the split to an
13 entity owned by the Percys?
14 A. Yes, ma'am.
15 **MARKED FOR IDENTIFICATION:**
16 DEPOSITION EXHIBIT 2
17 10:27 a.m.
18 **BY MS. MCLAUGHLIN:**
19 Q. I'm going to hand you Deposition Exhibit 2. But for
20 some errant handwriting up in the right-hand corner,
21 do you recognize that as your signature in that
22 document?
23 A. Down at the bottom?
24 Q. Yes.
25 A. That's my signature.

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1 Q. That is the document conveying what is shown on
2 Exhibit 1 as parcel B to the entity 44650, Inc. owned
3 by the Percys, correct?
4 A. If that's their company, 44650. I don't know.
5 Q. But you have identified your signature on that
6 document?
7 A. Yes, I did.
8 Q. Okay. Thank you. Does F.P. Development own any other
9 properties in Canton Township?
10 A. No, ma'am.
11 Q. Does it own any other properties in the tri-county
12 area?
13 A. No, ma'am.
14 Q. Does it own any other property at all?
15 A. No.
16 Q. Was it formed specifically for the purpose of this
17 purchase and lot split?
18 A. No. It was formed to be a holder of the property. As
19 time went on, if we were going to sell it, it would be
20 sold through F.P. Development.
21 Q. I see. At some point, you had some trees removed from
22 the property, correct?
23 A. Whose property, Gary's or mine?
24 Q. Did you ever remove trees from Gary's property?
25 A. No, ma'am.

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1 Q. Then I'm talking about your property.
2 A. Well, when you said your property in the very
3 beginning I owned all of it.
4 Q. For purposes to make it a little bit easier, maybe we
5 should refer to parcel A as your property because
6 parcel B is owned by them.
7 A. That works.
8 Q. Parcel A had some trees removed from it at some point?
9 A. Yes, ma'am.
10 Q. That's obviously the subject of the litigation that
11 we're here for.
12 A. Yes, ma'am.
13 Q. When was the first time that any trees were cut on
14 that property as related to the events underlying this
15 case?
16 A. There was only one time.
17 Q. Was it on a single day?
18 A. Probably a day, maybe a day and a half, until Leigh
19 called up and said stop it and we did. What we did
20 there was, we were cleaning a ditch and it's a
21 drainage ditch, and what I recall about cleaning is we
22 were removing the trees that had fallen in the ditch
23 and dyked it out which was causing floods. Actually,
24 to be real honest with you, I even notified Pat
25 explaining to him we have got to do something about

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the ditch.

Q. Pat who?

A. Your township supervisor. I emailed him and I showed him pictures of how bad the ditch was.

Q. I do want to go back because I think I missed a question. Before we get any further, at the time that you purchased the property from Canton Township, what sort of due diligence did you perform on the property?

MR. WELDON: Objection. It's vague.

A. Explain to me.

BY MS. MCLAUGHLIN:

Q. What did you do to satisfy yourself that that parcel of property was something you wanted to buy and was worth the price you were going to pay for it?

MR. WELDON: Objection to the form of the question. It's a compound question.

A. One question at a time. I will say I bought the property because I needed the property to expand. Mr. Tom Yack at that time said -- because I almost backed out of the deal with Sysco. I could not find any property that was good enough for Poco where I could build a building.

I came back to Tom and I said, Tom, I got to back out of the deal. He says, Frank, you can't back out of the deal. This is 700 jobs, Sysco Foods

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will move, and we were deep into it. I said, Tom, I can't find any property. He found the property. I knew it was farmland because the farmer lives next door to my shop.

BY MS. MCLAUGHLIN:

Q. What is his name?

A. What's the drain called? What's the drain called? You should know that.

Q. I'm not here to answer questions.

Is the drain named after the farmer? Is that what you're saying?

A. Yes.

MS. THURSTON: Can I help?

THE WITNESS: Yeah, you can.

MS. THURSTON: The Lenge Drain or McKinstry.

A. It's also called --

BY MS. MCLAUGHLIN:

Q. Fisher Lenge?

A. Fisher.

Q. Fisher Lenge.

A. Fisher lives next door to my shop and he is the one that owned all the property, including your property where your DPW was at. Apparently, the property that I purchased was sold to a developer. The developer

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went bankrupt and Canton took it over for back taxes.

Q. Other than -- let me start over. Strike that question.

Other than getting information from Mr. Yack that a piece of property was available, did you do anything else to investigate the nature of the property, the condition of the property, the market value of the property, or any other normal types of due diligence that would accompany the purchase of a substantial piece of property?

MR. WELDON: Objection. It's a compound question.

Go ahead.

A. The only research we did was to make sure it was not contaminated.

BY MS. MCLAUGHLIN:

Q. How did you do that?

A. We hired a company to check that out, only because there were steel companies back behind me and some other things and we just wanted to make sure and it was all cleared.

Q. Great. Did they take soil borings, do you know?

A. I don't know.

Q. What was the name of the company that you hired?

A. Couldn't help you with that.

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Q. Do you know where they were located?

A. Located in Michigan for sure.

Q. General geographic area?

A. I can't tell you, but I do have a copy of the information.

Q. Okay. Did anybody indicate to you or in anything that you did, did you learn that any part of that property was or is wetlands?

A. No.

Q. Now, getting back to the specifics of the tree removal. Do you remember when that occurred?

A. Probably about a year ago, year and a half ago. Maybe in May. Without my paperwork in front of me, I don't want to pin that down.

Q. And at that time why were you having the trees removed from the property?

A. We needed access to the ditch.

Q. You're referring to the drain?

A. To the drain to remove the fallen trees.

Q. You said you sent Mr. Yack an email?

A. No. Pat Williams.

Q. I'm sorry. Yes, Pat Williams.

A. With pictures.

Q. What did the pictures depict?

A. Trees falling in the drain.

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1 Q. You contracted with a company to remove those trees?
2 A. Yes, ma'am.
3 Q. What was the name of it?
4 A. Fodor, F-o-d-o-r.
5 Q. Where are they located?
6 A. Out of the west side out around the Brooklyn area.
7 Q. Did you have a previous familiarity or were you
8 referred to them?
9 A. I was referred to them.
10 Q. By whom?
11 A. Just other forestry people.
12 Q. What other forestry people?
13 A. People that cut down trees. When I say forestry,
14 maybe they're not forestry. Just tree trimmers.
15 Q. Do you know who you consulted to get a referral?
16 A. No.
17 Q. So you didn't have any previous contact with Fodor?
18 A. No, ma'am.
19 Q. Is that how you say it?
20 A. That's how I say it. I could be wrong.
21 Q. That's how I would say it too.
22 Did you have a written contract with Fodor?
23 A. Yes, ma'am.
24 Q. What were the general terms of that agreement?
25 A. He was going to go in there and clean out the ditch

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1 and take down the trees to access it. Then he would
2 take down -- I can't say how many trees. I don't even
3 know how many trees he took down to tell you the
4 truth. He was taking down the trees to access and I
5 would pay him.
6 Q. And was part of that contract that he would be able to
7 keep the timber that was removed?
8 A. Yes, ma'am.
9 Q. What was the monetary consideration for that contract?
10 A. I think it turned out to be nothing.
11 Q. Well, what was the written --
12 A. Because I didn't pay him.
13 Q. What was the written agreement; what did the written
14 agreement specify?
15 A. I'd have to look at it again. I'm not exactly sure.
16 I do believe it was about \$6,000. I could be wrong.
17 Q. Was it a flat rate that you paid or that you
18 contracted for?
19 A. Yes.
20 Q. It wasn't a per tree --
21 A. No, ma'am.
22 Q. It was cut me an accessway, take out this -- clear out
23 the ditch for \$6,000 roughly?
24 A. Mm-hmm.
25 Q. Okay. When were you notified by Leigh of any

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1 enforcement action to be taken there?
2 A. There was no real enforcement other than Leigh said
3 you have got to stop cutting down the trees. So then
4 I got ahold of Fodor and told him no more cutting.
5 Q. Did you have that conversation with Leigh?
6 A. Yes, I did.
7 Q. Was it in person or on the phone?
8 A. On the phone.
9 Q. And you stopped removing trees at that time?
10 A. Yes, ma'am.
11 Q. At that time there were trees that had been cut but
12 the stumps had not been removed; is that right?
13 A. Yes, ma'am.
14 Q. Do you know if all of the trees that were contemplated
15 to be cut had been cut at the time that Ms. Thurston
16 advised you to stop?
17 A. I have no idea.
18 Q. Other than calling Mr. Fodor, did you ever go to the
19 property to see what was the progress of the tree
20 removal and work was when Ms. Thurston --
21 A. After she called, then I went on over there.
22 Q. And what were the conditions that you observed at that
23 time?
24 **MR. WELDON:** Objection, vague question.
25 You can question.

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1 A. Trees down.
2 **BY MS. MCLAUGHLIN:**
3 Q. Stumps?
4 A. Stumps what?
5 Q. Were there stumps?
6 A. Yes.
7 Q. Had that work been done at the drain?
8 A. We cleaned out the drain.
9 Q. Had that work already been done at the time that
10 Ms. Thurston told you to stop --
11 A. Yes, ma'am.
12 Q. -- cutting trees?
13 A. I do believe.
14 Q. Normally at the beginning of a deposition I go through
15 a little instructional phase. I'll try not to talk
16 over you and you try not to talk over me.
17 A. Okay.
18 Q. Please make sure I finish my question before you
19 answer and I'll try to make sure you finish your
20 answer.
21 A. I'll leave a big gap from now on.
22 Q. Good idea. Also, if you don't understand my question,
23 please let me know; otherwise, I'll assume you
24 understood the question and answered accordingly. All
25 right? Is that fair?

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1 A. Yes.
2 Q. Okay.
3 A. Thank you.
4 Q. At that time that Ms. Thurston contacted you to let
5 you know that the work had to be discontinued on the
6 property, did you have contact with anyone else from
7 Canton Township at that time?
8 A. I can't remember. If I did, it might have been Pat.
9 Q. Pat Williams?
10 A. Yes.
11 Q. Okay. If you'd had -- I'm sorry. If you'd had
12 contact with Mr. Williams, would that have been in
13 person, by phone or by email or some other form of
14 communication?
15 A. Probably all three.
16 Q. But you don't have a specific recollection of that
17 happening?
18 A. No.
19 Q. Did you have any other contact with anyone from Canton
20 Township other than with Mr. Williams or Ms. Thurston
21 at that time?
22 A. Not that I can remember.
23 Q. At the time that Ms. Thurston notified you to
24 discontinue the work on your property, were you aware
25 of any similar work being done or having been done on

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1 the parcel B, the property owned by the Percys'
2 company?
3 **MR. WELDON:** Objection. It's a vague
4 question.
5 A. Do I know what?
6 **BY MS. MCLAUGHLIN:**
7 Q. All right. At the time, Ms. Thurston notified you to
8 essentially issue the stop-work order, correct?
9 A. Yes.
10 Q. Okay.
11 A. She verbally --
12 Q. Correct.
13 A. Okay.
14 Q. At that time, were you aware that there had been any
15 tree removal either in progress or already completed
16 on the Percys' property to the south, the parcel that
17 you sold to them?
18 A. Yes, I have seen some tree removal.
19 Q. Okay. After you received this contact from
20 Ms. Thurston, did you have conversations with either
21 Gary or Matt Percy about the township stop-work order?
22 A. I'm sure I did.
23 Q. Do you know when?
24 A. No, ma'am.
25 Q. Did you ever have any type of meeting with

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1 Ms. Thurston or Pat Williams or anyone else from
2 Canton Township about the subject of the stop-work
3 order?
4 A. I'm sure I had discussions with both.
5 Q. Okay. Do you recall any type of planned gatherings,
6 come to the township hall or come to Poco and we'll
7 talk about this kind of a thing?
8 A. Well, we did meet a few times over at Pat's house in
9 regards to a beer-and-greet, whatever they might call
10 it, where the people in the township get together and
11 talk over issues. So I know I was over at Pat's house
12 at least twice and then maybe one other person that is
13 part of that -- how do I say it -- club?
14 Q. Group?
15 A. Group.
16 Q. Who was the other person?
17 A. I don't know his name.
18 Q. Okay. Who was present when you had these
19 meet-and-greets?
20 A. Probably about 30 people from Canton. When I say
21 meet-and-greet, it's businesses that are run in
22 Canton.
23 Q. Did you have conversations with Mr. Williams at that
24 time about the tree ordinance enforcement?
25 A. We did at the last meeting in which we were learning

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1 the basics of what I call your slush fund for trees.
2 And we both offered Gary at that time \$25,000 each to
3 go into the slush fund, but at that time Pat said to
4 Gary \$700,000. Now, at that time there was no fine up
5 against my property.
6 Q. Okay. Other than issuing a stop work -- verbal
7 stop-work order to you, had Ms. Thurston at that time
8 taken any other type of enforcement action that you're
9 aware of?
10 A. Yes. She came onto my Poco property in which she was
11 not supposed to come onto. She has always been --
12 like I told Pat Williams, Pat called me up, hey, can
13 we come onto the property? Of course you can, but you
14 do not come through the Poco property, we got semis
15 and hi-los and everything else going.
16 I came into my shop and I looked and I seen
17 Leigh locked into my shop because she had no passcode
18 to get back out. She said to me, Frank, I want out.
19 I got a little upset with Leigh. I said, Leigh, hit
20 the code. I don't have a code. What are you doing on
21 the property? She said I have a warrant.
22 So at that time I called up Mike and I
23 said, Mike, apparently, she has a warrant. Apparently
24 that warrant was not for the Poco property. I let her
25 out.

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She called the police. The Canton police came out and I would say kind of roughed me up. We can do it the easy way, Frank, or the hard way. Come to find out, that warrant was for the vacant property and not for the Poco property. I tried to explain that to everyone, but no one would listen.

Q. Since you answered a little more than I asked for, this meet-and-greet at Pat Williams' house where you said there were about 30 people where you and Gary both offered \$25,000 to go into -- would that be the tree fund?

A. Slush fund, but go ahead.

Q. That's what you call it?

A. Yes, ma'am.

Q. You know by ordinance it's called the tree fund?

A. No, I don't.

Q. When did that meeting or encounter take place?

A. You'd have to get with Pat on that. I could look up my notes. It was at his house.

Q. Do you keep a calendar of any kind?

A. On and off. I got an email invite so I'm sure that will be on my email.

Q. An email invite to Pat Williams' house?

A. Yes, ma'am, probably from Pat.

Q. Do you remember what month that took place in?

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could help me out in any instance, I'm fair with that. I don't authorize him to talk for me.

Q. Okay. Before the tree removal began, did you or anyone on your behalf make any type of photographic or video recording of what the property looked like?

MR. WELDON: Objection, vague.

You can answer.

A. No video, but pictures were made and sent to Pat Williams as I stated earlier.

BY MS. MCLAUGHLIN:

Q. Okay. Are those the only pictures that you're aware of that reflect the condition of the property right before the trees were removed?

A. Yes, ma'am.

Q. Who took those pictures?

A. Fodor. I might have taken a few of them myself.

Q. When Ms. Thurston obtained a search warrant --

MS. MCLAUGHLIN: Excuse me. Off the record.

(Off the record at 10:53 a.m.)

(Back on the record at 10:54 a.m.)

BY MS. MCLAUGHLIN:

Q. After this email of May 5th of 2018 that you just looked at, did you have any further discussion with Mr. Williams about the ordinance enforcement related

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A. No, ma'am.

Q. Did you ever authorize Gary Percy to speak on your behalf with the township with respect to the tree enforcement issues?

MR. WELDON: Objection. It's a vague question.

A. I can't answer that.

MARKED FOR IDENTIFICATION:

DEPOSITION EXHIBIT 3

10:50 a.m.

BY MS. MCLAUGHLIN:

Q. I'm going to hand you what I have had marked as Exhibit 3. Have you had a chance to read that?

A. I just did. I never seen it before.

Q. That was going to be my next question. You have never seen this document before?

A. No, ma'am.

Q. Did you know that Mr. Percy had contacted Mr. Williams by email on Saturday, May 5, 2018, to address the ordinance enforcement on both of your properties?

A. No.

Q. So the basis for my question earlier, did you authorize Mr. Percy to speak on your behalf with Mr. Williams, would the answer be no?

A. Well, as a friend, and I do call Gary a friend, if he

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to the tree removal?

A. I couldn't tell you. I'm sorry.

Q. If you had sent him emails, would they still be on your server? Would you still have possession of them?

A. Oh, yes, ma'am.

Q. Okay. Did you have any further contact with Ms. Thurston possibly after that email was sent before she showed up at your property with a search warrant?

A. Before she trespassed? I can't tell you the trespass date compared to this date. Was it before or after? I'm not sure.

MS. MCLAUGHLIN: I'm going to place an objection to the nonresponsive nature of the question and the answer and the characterization.

BY MS. MCLAUGHLIN:

Q. When Ms. Thurston had a search warrant, at that time had you already received a written notice of ordinance violations?

MR. WELDON: Objection, vague question. Go ahead.

A. Don't know.

MARKED FOR IDENTIFICATION:

DEPOSITION EXHIBIT 4

10:56 a.m.

BY MS. MCLAUGHLIN:

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1 Q. I'm going to show you what's been marked as Exhibit 4
2 consisting of three pages. Have you had a chance to
3 look at that?
4 A. Yes, ma'am.
5 Q. Have you seen those documents before?
6 A. I don't remember. I'm sure I might have, especially a
7 notice of violation.
8 Q. Okay.
9 A. But I didn't need it. A verbal was good for me.
10 Q. The first page of Exhibit 4 is a letter from the
11 township attorney to your attorney, Mr. Patwell,
12 advising that a -- that a written stop-work order
13 would be posted on your property on that day, correct?
14 A. Yes.
15 Q. Was a written stop-work order posted on your property?
16 A. I do believe it was posted on the Poco property and
17 not the vacant property, but go ahead.
18 Q. Where on the Poco property was it posted?
19 A. I'm not sure. It might have been on the front gate,
20 but I'm not sure.
21 Q. Do the vacant property and the Poco property have the
22 same address?
23 A. No, ma'am.
24 Q. What is the address of the vacant property?
25 A. I'm not sure. We just call it the vacant property.

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1 The address for Poco is 4850 South Sheldon Road.
2 Because I look at it as two completely different
3 identities.
4 Q. And F.P. Development is also located at 4850 South
5 Sheldon Road?
6 A. Yes, ma'am.
7 Q. And F.P. owns this particular parcel?
8 A. Yes, ma'am.
9 Q. On Exhibit 1, I'll have you go back to the diagram or
10 the survey, engineering survey. Where in relation to
11 the vacant property is Poco located on that diagram?
12 A. It is to the north.
13 Q. Although it isn't marked, would the area of Poco's
14 property in part be on that diagram?
15 A. No, ma'am.
16 Q. Is the Poco property adjacent to the vacant property?
17 A. It's north. It runs a strip. I know it's very for
18 her to understand this because she can't type it.
19 This is the property. Poco is here.
20 Detention pond or retention pond is here. Then you go
21 to the vacant property and then you go to Gary Percy's
22 property which is just south.
23 Q. Can you turn that over?
24 A. Yes, ma'am.
25 Q. So in the area on Exhibit 1 where there are some

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1 latitude and longitudinal dimensions at the very top,
2 would that be in the general area of where there is a
3 detention pond?
4 A. Yes.
5 Q. And north of that would be the Poco property?
6 A. I do believe so.
7 Q. And Poco is directly accessible from Sheldon Road?
8 A. Yes, ma'am.
9 Q. You said the stop-work order was posted on the front
10 gate?
11 A. I do believe it was. You know what? I can't tell you
12 for sure.
13 Q. Do you have any photographs of that stop-work order
14 and where it was posted?
15 A. No, ma'am.
16 **MARKED FOR IDENTIFICATION:**
17 **DEPOSITION EXHIBIT 5**
18 **11:02 a.m.**
19 **BY MS. MCLAUGHLIN:**
20 Q. Mr. Powelson, I'm going to have you look at what I
21 have had marked as Exhibit 5, which consists of three
22 pages of 8 by 10 roughly photographs. Do you
23 recognize what is depicted in those photographs?
24 A. A vacant field.
25 Q. Do you recognize that -- what is in that at all? Does

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1 it look familiar to you?
2 A. It looks like a vacant field. It's not my field. It
3 might be Gary's field.
4 Q. Do you recognize any of the photographs? They all
5 depict -- have some different --
6 A. I see a trucking company there.
7 **MR. WELDON:** I'm going to object to the
8 relevance of these questions. The client doesn't
9 recognize the property, doesn't recognize what's
10 depicted here unless you can tie it into some issue in
11 this case.
12 **MS. MCLAUGHLIN:** Well, that's what I'm
13 asking you. That's why I asked him if he recognized
14 these pictures.
15 A. I did not take them so I don't know.
16 **BY MS. MCLAUGHLIN:**
17 Q. So do any of these pictures reflect any conditions
18 that might have been on your property?
19 A. No, ma'am.
20 Q. Okay. Ms. Thurston did implement or execute the
21 search warrant on the vacant parcel, did she not?
22 A. She came through Poco where our hi-los and semis run.
23 Q. Well, I heard you say that, but she actually did go
24 down to the vacant property?
25 A. I did not see her. When I seen her, she was coming

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out of the property and she was stuck in my fence because she had no code to get out.

Q. All right.

A. We have an electric fence.

Q. Were you ever aware that she actually went to the vacant parcels to conduct a tree count, a stump count?

A. Not then. Later on, she did. She went through the attorneys and the attorneys worked out a date and time for her to come through.

Q. Were you present when that took place?

A. No, ma'am.

MARKED FOR IDENTIFICATION:

DEPOSITION EXHIBIT 6

11:05 a.m.

BY MS. MCLAUGHLIN:

Q. Look at what's been marked Exhibit 6, which is a series of pages containing copies of photographs and they are identified at the bottom by P4 through 17. Have you ever seen these photographs before?

A. No, ma'am.

Q. So you didn't take them?

A. No, ma'am.

Q. Did you ever see the conditions depicted in those photographs on your property?

A. No, ma'am. I mean, I see a tree, a dead tree, on 13,

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the property before Fodor removed any or cut down any trees?

A. No, ma'am.

Q. Do you have any knowledge of how many trees were actually cut at that time?

A. No, ma'am.

Q. Do you have any knowledge as to how many trees -- I'm sorry -- the acreage of the property where the trees were removed?

A. No, ma'am.

Q. Do you have any knowledge as to the ratio of trees that were removed or cut in relation to the total number of trees on the property?

MR. WELDON: Objection, form of the question. It's vague.

A. No, ma'am.

BY MS. MCLAUGHLIN:

Q. All right. And you would agree with me that before Fodor undertook the work under the contract with you, neither you nor anyone from F.P. Development contacted the township to address compliance with the tree ordinance; is that true?

MR. WELDON: Objection. That's a compound question.

You can answer.

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P00013. I mean, that could be my tree. I don't know. That's a dead tree, hollowed in the bottom.

Q. Okay. Go back to the first page, P4.

A. P4.

Q. That appears to be a tree with some blue paint on it, correct?

A. Yes, ma'am.

Q. My reading of what's on that tree looks like it says 48 with a line under it. Does that appear to be what it looks like to you?

A. Yes, it does. It appears to be.

Q. Before Fodor did their work on the property, do you know if they marked trees in the fashion shown on P4 of Exhibit 6?

A. I couldn't tell you.

Q. You never saw the property before they actually did the work?

A. Well --

MR. WELDON: Objection, mischaracterizes his testimony.

BY MS. MCLAUGHLIN:

Q. In terms of whatever means they used to prepare for actually doing the work.

A. No, ma'am.

Q. Did you ever have any type of tree inventory done of

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A. Probably the only notification which might have been would be to Pat Williams in regards to cleaning the ditch of the debris. I don't know if it corresponds with the exact date which mentions that I have got to clean the ditch, everything is flooding.

BY MS. MCLAUGHLIN:

Q. How did Pat respond, if at all?

A. We might even have had a luncheon or a breakfast after that. I'm not sure. We discussed it. He understood that I have an issue. I have flooding.

And the problem with that ditch, it comes into a curve right there on my property and it just overflows and backflows into the Percy property and everything else. That ditch probably goes back to the 1800s. We have never been notified it's been cleaned out since the 1800s. The house next to me was built in about 1864. According to the owner of the property, it's never been cleaned.

Q. The owner being who you referred to as Fisher?

A. Yes, ma'am.

Q. Did Pat ever refer to the need to talk to anyone from the township about what ordinance requirements there might be for the ditch cleaning or tree removal?

MR. WELDON: Objection. That calls for speculation.

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Go ahead.

A. The ditch is not yours. The ditch is Wayne County's.
So back when --

MS. MCLAUGHLIN: I'm going to object to the
answer as being not responsive.

BY MS. MCLAUGHLIN:

Q. My question is: Did Pat ever refer to the need to
talk to anyone from the township about what ordinance
requirements there might be for the ditch cleaning or
the tree removal?

MR. WELDON: Same objection.

A. I don't remember if he did.

BY MS. MCLAUGHLIN:

Q. What contact did you have, if any, with Wayne County
about work being done in the ditch?

A. None because I was not dredging it. I was cleaning
fallen logs. When I first moved in there -- what did
you say, 2007, 2006 when I first purchased the
property -- we went to Wayne County. I got ahold of
somebody at Wayne County. I said we would love to
have the ditch cleaned. We all know, and it's even in
an email to Pat, that Wayne County doesn't even have
enough money to fill up potholes so they are surely
not going to come out and work on a ditch.

Q. Did you talk to somebody at Wayne County or the Wayne

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County drain commissioner's office?

A. Somebody at Wayne County.

Q. Did you ever have contact with anyone at the drain
commissioner's office about the Fisher Lenge Drain?

A. No, ma'am.

Q. Do you know whether trees were removed within 25 feet
of the drain?

A. No, ma'am. When I say no, ma'am, I did not know.

Q. Who would have that knowledge?

A. Maybe Leigh. She walked the property.

Q. Who from Fodor was actually on the property performing
the work?

A. The owner.

Q. Do you know his name?

A. If I turn on my phone, I would.

Q. You can look at the name.

A. Do you mind?

Q. No.

A. I had my phone turned off so I had to turn it back on.

Q. Okay.

A. I thought it was under Fodor. I'm sorry. I have to
go through every name. Todd. Todd, I just remembered
it.

Q. Todd Fodor?

A. Yes.

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Q. Do you know of anyone else who was on the property
performing the work?

A. I'm sure his workers were.

Q. But you weren't out there so you didn't see them?

A. No, ma'am.

Q. Are you familiar with a gentleman by the name of
Leander Richmond?

A. It doesn't ring a bell. If you could pin me down on
what he does, that might help me.

Q. I think your answer suffices.

Have you ever had any contact regarding the
issues involving the tree ordinance and enforcement
and this litigation with anybody from the Mackinaw
Public Policy Center?

MR. WELDON: I'm going to object. That is
privileged communication.

MS. MCLAUGHLIN: In what way?

MR. WELDON: Any communication with
Mackinaw would have been through his attorneys.

MS. MCLAUGHLIN: Okay. I asked if he had
communications with Mackinaw.

MR. WELDON: You can answer.

A. Yes.

BY MS. MCLAUGHLIN:

Q. You have had conversations with persons from the

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Mackinaw Center for Public Policy?

A. I introduced myself.

Q. Who did you speak to there?

A. I couldn't tell you.

Q. What was the occasion for you to contact them?

MR. WELDON: Objection. Mischaracterizes
his testimony.

BY MS. MCLAUGHLIN:

Q. What was the occasion for you to have contact with
them?

A. I went to an event.

Q. What type of event?

THE WITNESS: Explain that.

MR. WELDON: I can't testify. You can go
ahead.

A. I went to an event they were putting on in which my
attorney was there and just maybe learning the ways of
tree ordinances throughout the state.

BY MS. MCLAUGHLIN:

Q. Okay. Did you have conversations with anyone who
writes for the Michigan Capitol Confidential website
or newsletter?

A. I do not know.

Q. When was this event that you attended at the Mackinaw
center?

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1 A. I couldn't tell you. You can look it up.
2 Q. Where was it?
3 A. I want to say Lansing.
4 Q. Was it in 2018?
5 A. 2019.
6 Q. '19. Do you know the month?
7 A. No, ma'am.
8 Q. Do you know a gentleman by the name of Tyler Arnold?
9 A. It doesn't ring a bell.

10 **MARKED FOR IDENTIFICATION:**
11 DEPOSITION EXHIBIT 7
12 11:18 a.m.

13 **BY MS. MCLAUGHLIN:**

14 Q. Have you walked the property since Ms. Thurston was
15 out there?
16 A. Yes, I have.
17 Q. When did you do that?
18 A. Probably two days ago with the attorneys.
19 Q. Okay. Was that in preparation for today, for today's
20 deposition?
21 A. I wanted to show them the ditch that was cleaned out,
22 yes.
23 Q. Okay. Did you do anything else to prepare for today's
24 deposition?
25 A. No, ma'am.

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1 Q. Did you review any documents?
2 A. No, ma'am.
3 Q. I'm going to hand you what's been marked as Exhibit 7,
4 which is the complaint that has been filed on behalf
5 of F.P. Development in this case.
6 Have you seen that document before?
7 A. I may have. I don't recollect it. I may have.
8 Q. I'd like to have you take a look at paragraph 5 of the
9 complaint. Wrong folder.
10 Paragraph 5 says, "In 2018 plaintiff
11 engaged in forestry work for dual purposes. Plaintiff
12 removed vegetation that included both trees and scrub
13 brush, invasive species, dead Ash trees, and some
14 Cottonwood trees, the harvested or unwanted objects
15 from the property in accord with accepted
16 silvicultural purposes and in order to access an
17 obstructed drain that was causing flooding on the
18 property."

19 Did I read that correctly?
20 A. I guess so.
21 Q. What was the dual purpose for which plaintiff engaged
22 in forestry work that was alleged in that paragraph?
23 **MR. WELDON:** I would object. The document
24 speaks for itself.
25 You can answer.

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1 A. It does. We cleaned the drain. It stopped some
2 flooding. That was the dual purpose.

3 **BY MS. MCLAUGHLIN:**

4 Q. Who can testify to any facts to support that
5 paragraph?
6 A. Probably Pat Williams.

7 **MR. WELDON:** Objection, calls for
8 speculation.
9 Please wait before you answer to give me a
10 chance.

11 Go ahead.

12 A. Probably Pat Williams.

13 **BY MS. MCLAUGHLIN:**

14 Q. How would Mr. Williams have personal knowledge of
15 that?
16 A. Because I sent him pictures of the ditch with all the
17 trees falling in it.
18 Q. Did he have some input into F.P. Development's
19 decision-making process?
20 A. No, ma'am.
21 Q. And with respect to accepted silvicultural purposes,
22 do you know what that means?
23 A. No, ma'am.
24 Q. Do you know who would be able to testify that any work
25 that was done on the property was done in accord with

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1 accepted silvicultural purposes?

2 A. No, ma'am.

3 **MR. WELDON:** Do you mind if we take a
4 break?

5 **MS. MCLAUGHLIN:** No.

6 (Off the record at 11:23 a.m.)

7 (Back on the record at 11:42 a.m.)

8 **BY MS. MCLAUGHLIN:**

9 Q. When we took the break, we were looking at Exhibit 7
10 which is the complaint.

11 **MR. WELDON:** Excuse me just one second. We
12 need to put on the record that Ted Hadzi-Antich has
13 left.

14 **MS. MCLAUGHLIN:** Oh.

15 **MR. WELDON:** He won't be coming back.

16 **MS. MCLAUGHLIN:** Okay. Off the record.

17 (Off the record at 11:43 a.m.)

18 (Back on the record at 11:43 a.m.)

19 **BY MS. MCLAUGHLIN:**

20 Q. Paragraph 8 says that "A permit will not be granted
21 unless the property owner agrees to pay up to \$450 for
22 the removal of a single 'tree' or, alternatively, to
23 replace it with up to three trees of the township's
24 choosing."

25 Did I read that correctly?

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A. Are you asking me? I'm sorry. Yes. I didn't go word for word.

Q. Okay. Do you have any personal knowledge to support the allegation in paragraph 8?

MR. WELDON: Objection, calls for a legal conclusion.

Go ahead.

MS. MCLAUGHLIN: Are you instructing him not to answer?

MR. WELDON: No. He can answer.

A. A permit will not be granted unless the property owner agrees to pay up to -- what am I agreeing with?

BY MS. MCLAUGHLIN:

Q. I'm not asking you to agree with anything. I'm asking you what information or knowledge do you have personally to support that allegation?

MR. WELDON: Same objection.

A. We did not pay \$450 for a tree.

BY MS. MCLAUGHLIN:

Q. Okay. You did not apply for any type of permit from Canton Township for the work that was done by Fodor on the vacant property, correct?

A. Correct.

Q. Did you ever inquire at any time of anyone from Canton Township what the permit requirements are?

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A. No.

Q. Do you know who has knowledge to support that allegation in paragraph 8?

A. No, I don't.

Q. Paragraph 9 indicates "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."

That's the first sentence of paragraph 9.

Do you have any personal knowledge of the facts to support that statement?

MR. WELDON: Objection, calls for a legal conclusion.

You can answer the question.

A. You are asking me if we received a permit?

BY MS. MCLAUGHLIN:

Q. It says you didn't receive a permit.

A. I agree, we did not.

Q. Because you didn't apply for one, correct?

A. Yes.

Q. Okay. Do you have any knowledge to support the allegation there that the township could seek potentially hundreds of thousands of dollars in

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penalties under the ordinance against F.P. Development?

MR. WELDON: Same objection.

A. I did not think that they could get hundreds of thousands of dollars from me for removing trees. No, I did not.

BY MS. MCLAUGHLIN:

Q. Do you know of anyone who may have knowledge to support that allegation?

A. No, I don't.

Q. The next sentence of paragraph 9 says, "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."

In that sentence, does that mean that the notice of violation was making the property unusable or the obstructed drain was making the property unusable?

MR. WELDON: Objection, calls for a legal conclusion. Objection, vague. Objection, compound question. Objection, mischaracterizes what is in that sentence.

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You can answer if you understand what she asked you.

A. I don't.

BY MS. MCLAUGHLIN:

Q. The very last clause in that paragraph says, "and otherwise making the property unusable."

It's unclear to me and that's why I'm asking you. Is it the notice of violation that made the property unusable?

MR. WELDON: Objection, calls for a legal conclusion.

A. I don't know what you mean by this.

BY MS. MCLAUGHLIN:

Q. Okay. I'm just trying to understand what this sentence means in your complaint: "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 destroys trees, and otherwise making the property unusable."

Was the obstructed drain making the property unusable?

A. Yes.

Q. I'd like you to turn to paragraph 15 which says,

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

Does that refer to anyone besides you as the Powelson family?

A. That's plural. My father started the business in about '64, '65. Then my brother and I took over.

Q. Which business?

A. Poco.

Q. Does the operation of the Poco business have anything to do with enforcement of the tree ordinance on the vacant property?

MR. WELDON: Objection, vague. Objection, calls for a legal conclusion.

A. I don't know what you mean.

BY MS. MCLAUGHLIN:

Q. Okay. You have indicated that the family has operated the Poco business since the '70s and even before that your father in the '60s.

A. Right, in two different locations in Canton.

Q. Poco is not the plaintiff here, correct?

A. Right.

Q. Poco does not own the vacant property, correct?

A. Correct.

Q. Does Poco have anything to do with this lawsuit?

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Q. I thought you had testified earlier that Fodor had completed the work in the ditch, but not the --

A. Fodor has pulled out. As soon as Leigh mentioned, they got their tools and gangs and pulled out, but they did complete quite a bit of it, but not the whole thing.

Q. All right. Please look at paragraph 21 which says, "In the late 1800s, a drainage ditch was dug on the property and through nearby properties in the area to prevent flooding."

Where does that information come from?

A. That comes from the neighbor and a little bit of Pat.

Q. Pat Williams?

A. Yes. Pat knows how old that ditch is. The house was built next door I think pre-Civil War and it's all farmland. Where that drainage ditch goes, I couldn't tell you.

Q. What is the first name -- is it Mr. Fisher who lives next door to you?

A. Yes, it is.

Q. What is his first name?

A. I couldn't tell you. I call him Mr. Fisher.

Q. Do you know approximately how old he is?

A. No. I wouldn't even ask.

Q. Is he older than you?

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A. No.

Q. Okay. Although you have received the notice of violation that I previously marked and showed you as Exhibit --

A. Whatever.

Q. As an exhibit, you never received an appearance ticket to appear in court, did you?

A. No, ma'am, not that I know of.

Q. Paragraph 18 says, "That unless enjoined by the court the ordinance will continue to injure plaintiff by unconstitutionally restricting his property rights and limiting its ability to maintain or otherwise productively use the property."

In what way does the ordinance limit your ability to maintain or otherwise productively use the property?

MR. WELDON: Objection, calls for a legal conclusion. Objection, it's compound, it's vague.

You can answer, Frank.

A. The flooding continues to be an issue on all of the property. Unless we can clean out and finish cleaning out the ditch, it will continue.

BY MS. MCLAUGHLIN:

Q. The drain clean-out is not complete?

A. No, ma'am.

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A. Yes, ma'am.

Q. Since the drainage ditch, as you say, is still obstructed and work isn't completed there, have you taken any other measures to try to mitigate the flooding issue on that property?

A. No, ma'am.

Q. When Fodor did whatever work they did on the property, did they remove timber from the property?

A. Yes, ma'am.

Q. Was part of your arrangement -- and pardon me if I asked this before when we were discussing your arrangement with Fodor. Was the arrangement that they would be able to take timber as compensation for part of the work that was being done?

MR. WELDON: Objection to foundation.
You can answer.

A. Yes.

BY MS. MCLAUGHLIN:

Q. They didn't have to pay you to take the timber; it was part of the quid pro quo contract?

MR. WELDON: Objection, mischaracterizes testimony.

A. Yes.

BY MS. MCLAUGHLIN:

Q. Paragraph 25 refers to flooding on the property around

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1 the property of the neighbors. What neighbors'
2 properties have been flooded as a result of what you
3 claim is the obstruction in the drainage ditch?
4 A. I will start off with the Percys' property.
5 Q. That would be parcel B?
6 A. I guess so. I would go on from that property to my
7 property then back to the Fisher property and then
8 whatever is going east from there.
9 Q. East toward Belleville Road?
10 A. No. That's west.
11 Q. That is west. So east towards Sheldon Road?
12 A. Right, towards your DPW.
13 Q. Did you ever submit an application or a petition to
14 the Wayne County drain commissioner to conduct any
15 maintenance work on the drain?
16 A. No, ma'am.
17 Q. Paragraph 31 indicates that during -- it says that
18 process, but it presumably refers to the previous
19 paragraph talking about the contractor doing the work.
20 "Certain wood was harvested in accordance with
21 accepted silvicultural principles."
22 For the record, you don't know what those
23 principles are, do you?
24 **MR. WELDON:** Objection, calls for a legal
25 conclusion.

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1 Go ahead.
2 A. No.
3 **BY MS. MCLAUGHLIN:**
4 Q. Do you know who would be able to testify what accepted
5 silvicultural principles are and how they apply to the
6 work that was done?
7 A. Probably Fodor.
8 Q. Did you ever get a figure from anyone from Canton
9 Township for deposit in the tree fund if you chose not
10 to replace trees?
11 A. No, ma'am. That fine did not come to me until months
12 and months afterward. I didn't even know what the
13 fine was going to be. Go ahead.
14 Q. Are you aware under the ordinance that the violation
15 of the tree ordinance is a misdemeanor?
16 A. No.
17 **MR. WELDON:** Objection, calls for a legal
18 conclusion.
19 A. I'm not an attorney.
20 **BY MS. MCLAUGHLIN:**
21 Q. I understand. That's why I'm asking if you're aware.
22 And that the potential penalties for a
23 misdemeanor in Canton Township is a fine up to \$500
24 and/or 90 days in jail?
25 **MR. WELDON:** Objection, calls for a legal

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1 conclusion.
2 A. No.
3 **BY MS. MCLAUGHLIN:**
4 Q. Do you know what the money in the tree fund is used
5 for in the township?
6 A. No. That's why I mentioned it's a slush fund. I know
7 it's not a slush fund. It's a tree fund. I have no
8 idea.
9 Q. Paragraph 36 indicates that "As a result of the
10 stop-work order, the property continues to flood and
11 plaintiff was unable to collect the contracted fee for
12 the timber."
13 Based on your prior testimony, that does
14 not appear to be the case. Is that true?
15 A. That is the case. I have not received any money from
16 Fodor and they have not finished the ditch.
17 Q. Did you not just testify that they were permitted to
18 take the timber from the property in compensation for
19 their work on the property?
20 A. And they would pay me finished. Completely finished
21 they would pay me \$6,000 or \$7,000. They never
22 finished so I got no compensation whatsoever.
23 Q. Have you sought any damages or reimbursement from
24 Fodor for the timber that they took from your
25 property?

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1 A. No, ma'am.
2 Q. Are you seeking damages from the township here?
3 **MR. WELDON:** Objection, calls for a legal
4 conclusion.
5 A. I can't tell you that. I don't know where I'm at with
6 the whole thing.
7 **BY MS. MCLAUGHLIN:**
8 Q. You don't know if your complaint requests payment of
9 damages by Canton Township to you as a result of the
10 enforcement here?
11 A. I haven't put a dollar figure on it.
12 Q. Do you know whether the complaint even seeks monetary
13 damages as a remedy?
14 A. No, I don't.
15 Q. I would like to refer you to paragraph 94 of the
16 complaint. That paragraph says that "Both on its face
17 and as applied in this case, the ordinance allows the
18 township to charge hundreds of dollars for permission
19 to remove a single tree that is only a few inches
20 across."
21 Do you have any personal knowledge to
22 support that allegation?
23 **MR. WELDON:** Objection, calls for a legal
24 conclusion.
25 You can answer.

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1 A. I am under the understanding that if a tree is 6
2 inches tall -- or 12 inches tall or 6 inches wide in
3 circumference, that they can charge me money for a
4 tree. That's what I have been told.

5 **BY MS. MCLAUGHLIN:**

6 Q. Okay. You haven't read the township's forest
7 preservation and clearing ordinance, have you?

8 A. No, ma'am.

9 Q. Paragraph 95 says, "Alternatively, the township could
10 force the owner to plant up to three trees of the
11 town's choosing."

12 Do you have any knowledge to support that
13 allegation?

14 **MR. WELDON:** Objection, calls for a legal
15 conclusion.

16 You can answer.

17 A. I have read that through Canton.

18 **BY MS. MCLAUGHLIN:**

19 Q. What do you mean?

20 A. Canton has some paperwork that says they can charge
21 you three trees for removing one.

22 Q. Where did you read that?

23 A. Couldn't tell you, but I've read it before.

24 Q. Was it in a document provided by your attorney
25 relating to this case?

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1 A. I'm not sure.

2 Q. What about have you ever looked at the township's
3 website with respect to the tree ordinance enforcement
4 or permit application?

5 A. Afterward, I do believe I have seen the permit that
6 there is one tree for three, but I couldn't tell you
7 where I read it.

8 Q. Do you know under what circumstances that one for
9 three applies?

10 A. No, ma'am.

11 Q. Paragraph 98 indicates that clearing trees from the
12 property, and I'm paraphrasing, will benefit neighbors
13 by reducing flooding, bugs, and other invasive
14 species. Who has knowledge to support that
15 allegation?

16 **MR. WELDON:** Objection, calls for a legal
17 conclusion.

18 Go ahead.

19 A. I think it's pretty well understanding if you're
20 flooding you're going to have mosquitoes, bugs, and
21 other invasive species. I think just the way it
22 reads, it's the truth.

23 **BY MS. MCLAUGHLIN:**

24 Q. What is an invasive species?

25 **MR. WELDON:** Objection, calls for a legal

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1 conclusion.

2 Go ahead, Frank.

3 A. I take it some of the bushes, poison ivy maybe, and
4 whatever else. I know we are having an extremely wet
5 season and the flooding is not beneficial to the
6 neighborhood.

7 **BY MS. MCLAUGHLIN:**

8 Q. When Ms. Thurston conducted her inspection of the
9 vacant property to perform a tree count or stump
10 count, who was there on behalf of F.P. Development?

11 A. It might have been the attorneys. I was not there for
12 the count.

13 Q. Okay.

14 A. No one from F.P.

15 Q. Have you retained an expert who you expect to testify
16 at trial to render opinion testimony in this case?

17 **MR. WELDON:** I'm going to object. That may
18 touch on some privileged information. I'm not sure
19 that he knows anything about it.

20 You can answer.

21 A. Yes.

22 **BY MS. MCLAUGHLIN:**

23 Q. Do you know whether your attorneys have retained an
24 expert witness to testify at trial in this case?

25 A. I'm not sure.

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1 Q. Do you know -- have you met or do you know Theresa
2 Hurst?

3 A. I have met Theresa, yes.

4 Q. Under what circumstances?

5 A. A year ago when we went up in front of the senate and
6 congress to try and change some of these rulings.

7 Q. You're referring to state capitol hearings?

8 A. Yes, ma'am.

9 Q. And you met Ms. Hurst at that time?

10 A. Yes, ma'am.

11 Q. Do you know whether Ms. Hurst was present on the
12 property when Ms. Thurston and the township's
13 ordinance officer did their inspection?

14 A. I do not know that.

15 Q. I'd like you to look at paragraphs 106 and 107 of the
16 complaint. Paragraph 106 says that "tree," in
17 quotation marks, "is broadly defined to include scrub
18 brush."

19 Who to your knowledge has personal
20 knowledge to testify to that statement?

21 **MR. WELDON:** I'm going to object. It calls
22 for a legal conclusion again.

23 A. I couldn't tell you other than Canton does believe,
24 and I don't know what they're calling a tree other
25 than 12 inches high and 6 inches wide, they consider

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that a tree and I consider they're scrub brush. If I have to get a permit to take out scrub brush, that it can result in hundreds of thousands of dollars.

BY MS. MCLAUGHLIN:

Q. Do you know how the term "tree" is defined in the ordinance?

MR. WELDON: Objection, calls for a legal conclusion.

A. The way I understand it, anything 12 inches high and 6 inches wide determines a tree.

BY MS. MCLAUGHLIN:

Q. Where did you obtain that understanding?

A. I read it.

Q. Where?

A. Somewhere in an ordinance.

Q. I just asked you if you had read the ordinance.

A. When I say the ordinance, I mean paperwork. I read that. They're saying anything more than 6 inches wide and 12 inches high.

Q. Do you know what diameter breast height is?

A. No.

Q. Do you know that regulated trees under the ordinance have to be 6 inches high at diameter breast height?

MS. MCLAUGHLIN: Did I say high? I meant wide.

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before we have received the fine. I almost thought that Canton might be turning their head.

Q. How did you become aware of a -- what you refer to as a fine?

A. When it came to my attorneys.

Q. Was that in writing?

MR. WELDON: I'm going to object to any statements that would be between you as being privileged communications. If you have something outside of those from when you have seen that number, feel free to testify to that.

MR. PATTWELL: When you're done with your line of questioning, can we go off the record?

MS. MCLAUGHLIN: Yes.

BY MS. MCLAUGHLIN:

Q. Are there any type of liens, mortgages, anything of that nature on the vacant property?

A. No, ma'am.

Q. Have you ever sought or obtained any expert appraisals on the vacant property?

MR. WELDON: Objection, vague as to expert appraisals.

You can answer if you know.

A. No, ma'am.

BY MS. MCLAUGHLIN:

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MR. WELDON: You did.

MS. MCLAUGHLIN: I will rephrase the question just to make it clear for the record.

BY MS. MCLAUGHLIN:

Q. Do you know that regulated trees under the ordinance have to be 6 inches wide at diameter breast height?

A. I did not know it was breast height.

Q. Paragraph 107 again says, "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 his property."

Where does the information that the township contends it is entitled to hundreds of thousands of dollars from plaintiff, which is F.P. Development, come from?

A. Well, you started off at \$47,000. Where you came up with that number, I'm not sure. I'm not sure it's over.

Q. Okay.

A. You came up with the fine of \$47,000.

Q. Is that hundreds of thousands of dollars?

A. By the time I'm finished with attorneys and everything else, I'm sure it could be. Remember, for a while we were never even fined. Months and months and months

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Q. I think I'm just about finished. Let me make sure that I haven't -- there are a couple of other questions I wanted to ask.

Have you ever been a party to a lawsuit other than this case?

A. Oh, yes.

Q. By your response, more than one?

A. Yes, ma'am.

Q. How many lawsuits have you been a party to?

A. I can't even count.

Q. Okay. And when I say "you," I'm sure you and I have some understanding of what we're talking about, but how are you interpreting that, you personally or you with relation to any of your businesses?

A. My businesses.

Q. Okay.

A. If you have an accident in a construction zone, you sue me so you understand my business.

Q. You're talking about Poco?

A. Yes, ma'am.

Q. Okay. Has F.P. Development been a party to any other lawsuit that you're aware of?

A. No, ma'am.

Q. You referred to -- when I asked you about the monies that the township contends it is entitled to, you

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mentioned attorney fees. How much have you paid your attorneys in fees for this case?

MR. WELDON: Objection, it's privileged.

MS. MCLAUGHLIN: How is it privileged?

MR. WELDON: That's attorney-client communications. You can't talk about what our billing arrangements are.

MS. MCLAUGHLIN: Okay. Are you seeking attorney fees if you're successful in this lawsuit?

MR. WELDON: We intend to but we haven't calculated yet.

MS. MCLAUGHLIN: I have every right to inquire into that if my client has potential exposure for that.

MR. WELDON: If we move for attorney's fees then you're entitled to discovery on that.

MS. MCLAUGHLIN: So you're saying I have to wait until then and you won't -- you're instructing him not to answer?

MR. WELDON: Let's go off the record.

(Off the record at 12:16 p.m.)

(Back on the record at 12:18 p.m.)

BY MS. MCLAUGHLIN:

Q. Before the matter of enforcement of the tree ordinance with respect to the vacant property, did you have a

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professional relationship with Mr. Patwell or his firm?

A. No.

Q. How were you referred to Mr. Pattwell?

A. I knew of the firm for many years from other people. I do believe that Gary, the Percys, already had him hired and I just jumped aboard.

Q. Did you ask the Percys for contact information from Mr. Pattwell?

A. I think Mr. Pattwell might have called me. I can't remember. As you can see, they're a pretty established firm.

Q. I'm not arguing that. I know it well.

How were you referred to the Texas Public Policy Foundation?

MR. WELDON: I'm going to object to that. It's privileged again.

MS. MCLAUGHLIN: On what grounds?

MR. WELDON: Attorney-client communication, joint defendant, joint plaintiff privilege. Any sort of those conversations that may have been had at that time would be protected as privileged.

MS. MCLAUGHLIN: I didn't ask for any privileged communication. I asked how he was referred to your organization.

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MR. WELDON: You have to lay a foundation for that or it wouldn't be privileged.

BY MS. MCLAUGHLIN:

Q. Mr. Powelson, did you contact the Texas Public Policy Foundation yourself?

A. Yes.

Q. How did you learn of that organization?

MR. WELDON: I'm going to object again as to privilege.

MS. KOLB: Do we have one or two attorneys conducting this deposition?

MR. PATTWELL: Fair point.

MR. WELDON: I'm going to object as to privilege and ask him not to answer.

BY MS. MCLAUGHLIN:

Q. Are you a member of any organizations that have other relationships or prior relationships with the Texas Public Policy Foundation?

A. Not that I know of.

Q. Okay. Let me just review my notes and make sure I have covered everything.

Other than your attorneys, do you know of anyone else who has investigated the events involved in this case on your behalf?

MR. WELDON: Objection, it's a vague

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question.

You can answer.

A. I couldn't tell you. I'm not sure --

BY MS. MCLAUGHLIN:

Q. Okay.

A. -- if anyone else investigated or not.

Q. Are you aware of anyone who has personal knowledge of facts relevant to this case that we have not already identified today?

A. I do not believe so.

Q. Do you know whether any statements have been obtained from any person related to the events involved in this case?

A. I'm not sure. You'd have to ask my attorneys.

Q. Do you know what the fair market value of your property is now?

MR. WELDON: Objection, calls for a legal conclusion.

A. No, ma'am.

BY MS. MCLAUGHLIN:

Q. Have you lost any income as a result of the allegations, the incidents alleged in the complaint?

MR. WELDON: Objection, calls for a legal conclusion.

A. I've lost the possibility of selling the property.

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BY MS. MCLAUGHLIN:

Q. Have you tried to sell the property?

A. Someone has tried to buy the property, yes.

Q. Who was that?

A. Rose.

Q. Who is Rose?

A. They're a storage company.

Q. Is that R-o-w-e- apostrophe -s --

A. I think it's R-o-s-e.

Q. -- or R-o-s-e? Okay.

A. They are interested in the property. That's all I can say.

Q. Have you had written communications with them?

A. Yes. There was a letter they sent me on an intent to buy the property.

Q. How long ago was this?

A. Six months ago.

Q. So after the ordinance enforcement began?

A. Yes. Maybe even before. I'm not exactly sure of the date.

Q. Do you still have those communications from Rose?

A. I have a letter or a fax, yes.

Q. Was any specific offer made for the property from Rose?

A. No, ma'am.

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Q. Have you otherwise attempted to sell or market the property for sale?

A. No, ma'am.

Q. Have you received any other offers to purchase the property?

A. There have been a number of people that have asked if it's for sale. I get calls from real estate companies all the time. I say because of the issue I have right now with trees, nothing is going.

MS. MCLAUGHLIN: That's all the questions I have for you. Thank you.

THE WITNESS: Thank you.

MR. WELDON: Take a break brief and I'll do a redirect.

MS. MCLAUGHLIN: Sure.

(Off the record at 12:25 p.m.)

(Back on the record at 12:53 p.m.)

MS. MCLAUGHLIN: May I ask three questions that really are probably not going to affect your redirect at all just so that I can complete it and you can do your redirect?

MR. WELDON: Sure.

BY MS. MCLAUGHLIN:

Q. Mr. Powelson, regardless of how you characterized that, whether a fine, a penalty, a fee, you have not

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paid any money to Canton Township as a result of the tree ordinance violation, true?

A. True.

Q. You haven't been convicted of a misdemeanor for which there is a sentence imposed of either up to \$500 or 90 days in jail, true?

A. True.

MS. MCLAUGHLIN: Okay.

EXAMINATION

BY MR. WELDON:

Q. Brief questioning on redirect.

You were asked earlier with regard to several paragraphs within the complaint how you came to believe that you could be fined up to hundreds of thousands of dollars; is that correct?

A. Yes.

MR. WELDON: I have here something that I would like to mark Exhibit 8.

MARKED FOR IDENTIFICATION:

DEPOSITION EXHIBIT 8

12:55 p.m.

MS. MCLAUGHLIN: Do you have an extra copy?

MR. WELDON: That's what we were trying to get. Go ahead and look it over and we'll take a minute.

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MS. MCLAUGHLIN: We may have to pass it back and forth.

MR. WELDON: We're not going to use it just yet. I wanted it marked so it was there.

BY MR. WELDON:

Q. Mr. Powelson, at the time that you filed this lawsuit, to your knowledge had you been fined yet?

A. No, I don't believe I was. I'd have to look at the dates -- look at the dates because my fine was held back for months prior to anything else.

Q. So at the time that you filed this lawsuit, did you know exactly what your fine would be?

A. No, nope.

Q. Take a look at what we've marked as Exhibit 8.

A. Yes.

Q. Do you recognize this document?

A. Yes.

Q. What is that document?

A. It's an affidavit and -- yep, yep. It was the affidavit from Leigh and from Canton.

Q. And how are you familiar with this document?

A. Because it was given to us and at that time when I looked at the bottom that Gary was going to be fined in excess of \$700,000, I thought for sure --

Q. Were you ever --

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1 A. -- mine would be high.
2 Q. Were you ever given a warrant in this case for them to
3 search your property?
4 A. Yes.
5 Q. Is this the warrant that you were given?
6 A. Yes.
7 Q. Is the affidavit attached to this warrant, was that
8 attached to the warrant that you were given?
9 A. Yes.
10 Q. And if you look at paragraph Q, does that reference a
11 potential \$700,000 fine for parcel B?
12 A. Yes.
13 Q. How big is parcel B?
14 A. 16 acres.
15 Q. How big is your property?
16 A. 22 maybe, 24.
17 Q. Did you reasonably think that you might have a similar
18 fine because of that?
19 A. Yes.
20 Q. Do you have a lot of trees on the property,
21 Mr. Powelson?
22 A. Yes, I do.
23 Q. Did that make you think you would have a significant
24 fine if you removed them?
25 A. Large.

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1 **MR. WELDON:** I'm going to introduce this as
2 Exhibit 9.
3 **MARKED FOR IDENTIFICATION:**
4 DEPOSITION EXHIBIT 9
5 1:00 p.m.
6 **MR. WELDON:** Have you guys seen this?
7 **BY MR. WELDON:**
8 Q. Mr. Powelson, prior to filing this lawsuit, you were
9 issued a notice of violation by the township?
10 A. Yes.
11 Q. Do notices of violation in your experience typically
12 carry with them the potential for future penalties?
13 A. Yes.
14 Q. Were you given a time period to respond to that notice
15 of violation?
16 A. No.
17 Q. I have here what's marked as Exhibit 9. You are
18 familiar with this document?
19 A. Oh. You're asking me?
20 Q. Yes.
21 A. Mm-hmm.
22 Q. And what is this?
23 A. Countercomplaint.
24 Q. Is that a countercomplaint in the ongoing lawsuit?
25 A. Yes.

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1 Q. Who filed that countercomplaint?
2 A. We did.
3 Q. Are you sure we're the ones that filed the
4 countercomplaint?
5 **MS. MCCLAUGHLIN:** Objection, asked and
6 answered.
7 A. I just seen F.P. up there.
8 **BY MR. WELDON:**
9 Q. Is this document the countercomplaint that was filed
10 by the township in this complaint?
11 A. Yes, I see it here.
12 **MS. MCCLAUGHLIN:** I'll stipulate that it
13 was. I don't know why we need deposition testimony to
14 establish that but go ahead.
15 **BY MR. WELDON:**
16 Q. Can you turn to paragraph 9 of this countercomplaint,
17 please?
18 A. Yes.
19 Q. Paragraph 44.
20 A. Yes.
21 Q. Does that paragraph contain the sum that the township
22 is requesting from you?
23 A. Yes.
24 Q. What is that sum?
25 A. \$47,898.

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1 Q. Did you remove -- are there still more trees remaining
2 on your property?
3 A. Yes.
4 Q. So if you were to remove more trees, do you think that
5 that sum could be higher?
6 **MR. WELDON:** Objection, foundation.
7 A. Hundreds of thousands of dollars.
8 **BY MR. WELDON:**
9 Q. You mentioned earlier today that you had had a
10 discussion with Pat Williams about potentially
11 settling out the tree ordinance issues in your case?
12 A. Yes.
13 Q. Was that prior to filing the lawsuit in this case?
14 A. No. We filed afterwards, I do believe. I'd have to
15 look at the dates.
16 Q. Okay.
17 A. Which time? You mean at Pat's house?
18 Q. Yes.
19 A. Oh. Pat's house was way before this.
20 Q. Did you offer at that point to pay money into the tree
21 fund to resolve any dispute here?
22 A. Yes. I offered \$25,000.
23 Q. What was Mr. Williams' response?
24 A. We both offered, both Percys and myself was each
25 \$25,000, and he denied it.

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Q. Did that lead you to believe that your actual penalties could be significantly higher than \$25,000?

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

A. Way higher because the Percys were already at 700,000 and I had a few trees of my own. So, yes, I was considering hundreds of thousands.

BY MR. WELDON:

Q. Mr. Powelson, are you an attorney?

A. Not at all.

Q. Do you have an expertise in issues of constitutional law?

A. No.

Q. Whenever you filed this complaint did your attorneys explain to you the legal theories involved in this complaint?

A. As in what?

Q. As in the theory of your case.

A. As in who owns the trees?

Q. Did we ever at any point in time explain to you your claims in this case?

A. Yes.

Q. And you believe that those claims are reflected in your complaint?

A. Yes.

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Q. You were asked earlier about the way this ordinance has affected your ability to use your property. Do you believe that you own the trees on your property?

MS. MCLAUGHLIN: I'm going to place an objection to the form of the question. I believe the question that was asked was whether the drainage ditch and its obstruction made the property unusable. That was the question that he answered.

MR. WELDON: Okay.

MS. MCLAUGHLIN: Subject to the objection, you can go ahead.

A. Do I believe I own the trees?

BY MR. WELDON:

Q. Yes.

A. Yes, I do.

Q. Do you believe that the tree ordinance affects your ownership of the trees?

A. Yes, I do.

MS. MCLAUGHLIN: Objection, foundation, calls for a legal conclusion.

BY MR. WELDON:

Q. Does it prevent you from using the trees in ways that you might want?

MS. MCLAUGHLIN: Objection, foundation, form.

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A. Yes.

BY MR. WELDON:

Q. Do you believe that it prevents you from using underlying property around the trees?

A. Of course.

Q. Do you believe that that violates your constitutional rights?

MS. MCLAUGHLIN: Objection, foundation and calls for a legal conclusion.

A. Totally.

BY MR. WELDON:

Q. Do you know if invasive species are defined under Michigan statute?

A. No.

Q. Do you have any idea what that term "invasive species" means?

A. Not really.

Q. Do you defer to your attorney's expertise on those sorts of issues?

MS. MCLAUGHLIN: Objection, form of the question.

A. Of course.

BY MR. WELDON:

Q. How were you first introduced to the Texas Public Policy Foundation?

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MS. MCLAUGHLIN: How come he can answer that question but from when I asked it, it was privileged?

MR. WELDON: Where you were going. I'm laying the predicate for privilege.

A. Mike Pattwell.

BY MR. WELDON:

Q. Was Mike Pattwell your attorney at that time?

A. Yes.

Q. Was that a private attorney communication?

A. Yes.

MR. WELDON: I'm good.

MS. MCLAUGHLIN: I have some additional redirect here.

RE-EXAMINATION

BY MS. MCLAUGHLIN:

Q. I'd like to take a look at Exhibit 8, the search warrant affidavit or the affidavit and search warrant I should say.

MS. MCLAUGHLIN: We're going to have to share.

MR. WELDON: That's okay.

BY MS. MCLAUGHLIN:

Q. I'm going to have you look at paragraph Q on page 2 of the affidavit that your counsel asked you about a

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1 moment ago.
2 A. Yes.
3 Q. And it was your testimony, correct me if I'm wrong,
4 that based on the statements made in paragraph Q that
5 those led you to believe that your exposure was
6 potentially hundreds of thousands of dollars?
7 A. Yes.
8 Q. Okay. The work done on your property did not involve
9 clear-cutting the property, did it?
10 A. No, ma'am.
11 Q. Are you aware that the Percys' property was clear-cut?
12 A. Yes, ma'am.
13 Q. Okay. You are aware that the number of trees on the
14 Percys' property that were removed was far greater
15 than those that you had removed or had contemplated
16 removing at the time of the work in this case?
17 **MR. WELDON:** Objection, assumes facts not
18 in evidence.
19 A. I didn't count the Percys' trees so I don't know.
20 **BY MS. MCLAUGHLIN:**
21 Q. So, well, you knew that that's a 16-acre parcel,
22 right?
23 A. Yes, ma'am.
24 Q. And it pretty much was covered in trees, wasn't it?
25 **MR. WELDON:** Objection, assumes facts not

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1 in evidence, calls for a legal conclusion.
2 A. I'm not a forestry man.
3 **BY MS. MCLAUGHLIN:**
4 Q. I'm not asking you to be an expert in anything.
5 A. Good, because I'm not.
6 Q. I'm asking you to tell me what you can see. I asked
7 you to tell me because you owned it, right?
8 A. I didn't even walk it.
9 Q. Okay. Had you seen it when the Percys were having the
10 trees removed from their property?
11 A. No. I seen it afterwards.
12 Q. Before the Percys had the trees removed, could you see
13 the area of Yost Road from parcel A, your vacant
14 property?
15 **MR. WELDON:** Objection, vague question.
16 A. Could I see what now?
17 **BY MS. MCLAUGHLIN:**
18 Q. Could you see Yost Road?
19 A. I could see Yost Road from Sheldon.
20 Q. If you were standing on parcel A, the vacant property.
21 A. My vacant property.
22 Q. Your vacant property before the Percys had the trees
23 removed from parcel B.
24 A. Could I see the trees removed?
25 Q. No. Could you see Yost Road with the trees there?

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1 **MR. WELDON:** Objection, it's a vague
2 question.
3 A. There is no Yost Road. Yost Road is an overgrown
4 grass path.
5 **BY MS. MCLAUGHLIN:**
6 Q. Right, but it's still an established right-of-way --
7 A. Can I see the right-of-way?
8 Q. -- even if it's not improved, it's not paved.
9 A. I don't go back there.
10 Q. Could you see that area if you were standing on your
11 property through the trees before they were removed?
12 **MR. WELDON:** Objection, assumes facts not
13 in evidence. Objection, it's a vague question.
14 A. I wasn't on the property to see it, but do I know that
15 they cleared trees? Yes.
16 **BY MS. MCLAUGHLIN:**
17 Q. Did you have designs on clear-cutting your property?
18 A. No.
19 Q. So when you refer to paragraph Q of this affidavit in
20 support of the search warrant, did you understand that
21 it referred to a substantially higher number of trees
22 that were involved in your case?
23 **MR. WELDON:** Objection, assumes facts not
24 in evidence.
25 A. I didn't have a count on my trees so I couldn't tell

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1 you.
2 **BY MS. MCLAUGHLIN:**
3 Q. Did you think you had over 1,000 trees affected?
4 A. I don't know. All I know is looking at Percys at
5 700,000. I thought the first one was higher than
6 that. I'm sure I'm in the hundreds of thousands.
7 Q. How did the \$700,000 figure come to be calculated?
8 **MR. WELDON:** Objection, calls for
9 speculation.
10 A. I didn't do it.
11 **BY MS. MCLAUGHLIN:**
12 Q. Do you know how the deposits into the tree fund are
13 calculated under the ordinance?
14 A. No, I don't.
15 Q. Does paragraph Q say that the Percys had to pay
16 \$700,000 into the tree fund?
17 A. I look at it if you were fined you had to pay.
18 Q. Where does it say they were fined?
19 A. Well, it's in excess of 700,000.
20 Q. Where it does say --
21 **MR. WELDON:** Objection, asked and answered.
22 **MS. MCLAUGHLIN:** His answer was
23 nonresponsive. I'm objecting to the answer.
24 **BY MS. MCLAUGHLIN:**
25 Q. Where does it say that the Percys were fined \$700,000?

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MR. WELDON: Objection, asked and answered.

BY MS. MCLAUGHLIN:

Q. You can answer it again.

A. The total replacement value of excess of \$700,000 that pretty well tells me there is a fine.

Q. How does that tell you there is a fine?

A. It states it right there.

Q. It doesn't say fine. It says the value of the trees removed.

A. So you throw up a number. Then I don't owe you \$47,000.

MR. WELDON: Objection, objection.

A. I'm not understanding.

BY MS. MCLAUGHLIN:

Q. All right. If you read the paragraph aloud, "The conclusion of affiant," which is Ms. Thurston and the professional arborist, is that "It is likely that more than 500 regulated trees, including an estimated \$140 landmark trees, have been unlawfully removed from parcel B alone."

That refers to the Percys' parcel, correct?

A. Yes.

Q. Continuing in that paragraph, "with a total replacement value in excess of \$700,000."

A. Yes.

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Q. Where does that say the Percys have been made to pay that much money anywhere?

MR. WELDON: Objection, asked and answered.

You can answer her again if you want, Frank.

A. I keep on going with in excess of \$700,000. I look at that as a fine or a levy or whatever you want to call it.

BY MS. MCLAUGHLIN:

Q. So if I say my property is in worth in excess of \$700,000, that means I'm going to get that much money from somebody?

MR. WELDON: Objection, argumentative.

A. I have no idea.

BY MS. MCLAUGHLIN:

Q. Do you have any knowledge that the Percys have, in fact, been assessed any type of monetary payment to the township at this point?

MR. WELDON: Objection, calls for a legal conclusion.

A. No.

BY MS. MCLAUGHLIN:

Q. Have you ever seen the complaint that was filed by Canton Township against 44560, Inc., the Percys' entity that actually owns parcel B?

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A. I think I seen it through this paper. No. I thought it was in here.

MARKED FOR IDENTIFICATION:

DEPOSITION EXHIBIT 10

1:17 p.m.

BY MS. MCLAUGHLIN:

Q. I'm going to have you look in a moment --

MR. WELDON: This is -- I'm going to object to any statements about that separate lawsuit are well outside the scope of redirect.

BY MS. MCLAUGHLIN:

Q. I'm going to have you look at Exhibit 10, paragraph 41.

A. Paragraph 41?

Q. Mm-hmm.

A. Okay.

Q. That paragraph indicates that the Percys' entity, 44650, is responsible for paying, as alleged by the township, between \$412,000 and \$446,625, doesn't it?

MR. WELDON: Objection, lack of foundation. Objection, relevance.

A. Go ahead.

BY MS. MCLAUGHLIN:

Q. I asked a question.

A. Ask it again.

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Q. Okay. The paragraph indicates that the township is seeking from the Percys through their lawsuit the amount between \$412 to \$446,625; is that right?

A. That's what it reads.

Q. I'm going to refer you to page 17, subparagraph F, which is the township's specific request for relief in that complaint.

A. Okay.

Q. That specifically requests \$412,000 to \$446,625; is that right?

MR. WELDON: I'm going to object to relevance and lack of foundation. He's testified he has never seen this before.

A. I have never seen this.

MS. MCLAUGHLIN: I'm showing it to him now.

BY MS. MCLAUGHLIN:

Q. You can read it.

MR. WELDON: It's outside the scope of redirect.

MS. MCLAUGHLIN: You're asking him about \$700,000 and I'm getting to the foundation where he came up with that.

MR. WELDON: He answered that.

MS. MCLAUGHLIN: I'm showing him other documents that reflect otherwise.

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A. I even came up with that with Pat Williams. Pat Williams came back to the Percys and said I want 700,000 leaving his house at that time.

BY MS. MCLAUGHLIN:

Q. Did Pat Williams issue a ticket to the Percys?

A. He's the mayor of Canton. I don't know.

MR. WELDON: Objection, vague.

BY MS. MCLAUGHLIN:

Q. Did he issue a notice of violation of the tree ordinance to the Percys?

A. He's the township supervisor. He holds all.

Q. Is he directly involved in ordinance enforcement?

A. I have no idea.

Q. As for paragraph 44 of your countercomplaint --

MR. WELDON: Which document are we on?

MS. MCLAUGHLIN: Exhibit 9.

BY MS. MCLAUGHLIN:

Q. Paragraph 44 of the township's countercomplaint that you previously referred to --

MR. WELDON: It's right here.

A. Okay.

BY MS. MCLAUGHLIN:

Q. -- where you reference the sum of \$47,898, do you know how that figure was arrived at?

A. No, ma'am.

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Q. Okay. Do you know what number -- do you know how many trees it was based on?

A. No, ma'am.

Q. Do you know what -- how much dollar value per tree it was based on?

A. No, ma'am.

Q. When you say that you offered \$25,000 to Pat Williams at that gathering at his house before the lawsuit was filed, did he ever indicate to you a figure that you expected would be acceptable?

A. No, ma'am.

Q. Did you ever make that \$25,000 offer in writing to the township?

A. No, ma'am.

Q. Did you ever tell your attorneys to make that offer to the township?

MR. WELDON: Objection, calls for privileged communications.

MS. MCLAUGHLIN: Are you telling him not to answer?

MR. WELDON: Don't answer.

BY MS. MCLAUGHLIN:

Q. Do you have any reason to believe that that figure was conveyed to the township personnel directly involved in the ordinance enforcement?

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MR. WELDON: Objection, calls for speculation.

You can answer if you know.

A. I don't know.

BY MS. MCLAUGHLIN:

Q. Which of your constitutional rights have been violated by the township's enforcement of the tree ordinance?

A. Well, they are apparently no longer my trees. They must belong to Canton.

Q. That's not my --

MR. WELDON: I'm going to object. That calls for a legal conclusion.

BY MS. MCLAUGHLIN:

Q. Well, you testified you felt -- in response to your own attorney's questioning you felt your constitutional rights were violated. Which ones?

A. To do whatever I want to do on my own property pertaining to the trees.

Q. Okay. What constitutional right does that effect?

A. I can't do anything with my property. My property has become a forest, a national forest of Canton.

Q. That's not responsive to my question. What constitutional right was violated?

MR. WELDON: I'm going to object and say that it's been asked and answered to the best of his

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knowledge.

A. I can't use my property.

BY MS. MCLAUGHLIN:

Q. Is that protected by the first amendment to the U.S. Constitution?

A. I have no idea.

Q. You don't know which provision of the law or Constitution protects those rights?

A. I always thought my constitutional right in my own property would be to do what I want to do on my own property to make it valuable. Apparently, I can't because the trees now are more valuable than the property.

MS. MCLAUGHLIN: Objection, not responsive to the question.

BY MS. MCLAUGHLIN:

Q. Do you know which provision of the Constitution protects the rights you're talking about?

MR. WELDON: Objection, asked and answered. Objection, argumentative.

MS. MCLAUGHLIN: I have objected and said his answer was not responsive so I asked the question again.

MR. WELDON: That's the third time you've asked it, but you can continue to ask a non-lawyer

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1 what the Constitution says, that's fine.
2 A. I'm not an attorney.
3 **BY MS. MCLAUGHLIN:**
4 Q. I know you aren't.
5 A. Thank you.
6 Q. You indicated that in response to your own attorney's
7 question that your constitutional rights have been
8 violated. I'm trying to get at if you have enough
9 knowledge to say your constitutional rights have been
10 violated, which one?
11 A. Well, I'm saying my constitutional rights have been
12 violated due to the fact I can't do what I want to do
13 on my property. I can't clean it up. It floods.
14 Apparently, you own the trees. So as soon as I do
15 something, you fine me. Now the value of the trees
16 are more than what the property is. It's now become a
17 vacant piece of property that I will be paying taxes
18 on for the rest of my life.
19 **MS. MCLAUGHLIN:** Objection, not responsive
20 to the question asked.
21 **BY MS. MCLAUGHLIN:**
22 Q. Before the stop-work order was issued in this case,
23 what did you plan to do with the property?
24 A. Eventually --
25 **MR. WELDON:** Objection. I believe that's

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1 outside the scope of the redirect.
2 You can answer.
3 A. Eventually, I'd like to get the value of the property
4 and sell it at one time.
5 **BY MS. MCLAUGHLIN:**
6 Q. Did you plan on removing any more trees?
7 A. Maybe later on. Whoever buys the property would have
8 to remove the trees.
9 Q. Do you mean in order to develop it?
10 A. Yes.
11 Q. You responded a moment ago that the ordinance prevents
12 you from doing what you want with the property. What
13 does that mean?
14 A. You cannot harvest the trees or cut them down without
15 paying a fine, a substantial fine, where the value of
16 the trees become more than the property.
17 Q. Okay. What use did you have in mind when you said it
18 prevented you from using the property the way you
19 want?
20 A. You can't sell it. I can't park anything underneath
21 the trees. I can't expand. It's become a national
22 forest.
23 Q. Did you have any plan to develop the property?
24 A. If I expand, yes.
25 Q. Has --

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1 A. I don't know where the future is. That's what I can
2 tell you.
3 Q. So you may or may not develop the property?
4 A. May or may not.
5 **MS. MCLAUGHLIN:** That's all the questions I
6 have.
7 **MR. WELDON:** Very brief redirect.
8 RE-EXAMINATION
9 **MR. WELDON:**
10 Q. Mr. Powelson, would you like to remove more trees to
11 access the drain?
12 A. Yes.
13 Q. Do you believe that you can do that under the existing
14 ordinance without being fined?
15 **MS. MCLAUGHLIN:** Foundation.
16 A. No.
17 **BY MR. WELDON:**
18 Q. Do you believe that you can develop your property
19 without being fined?
20 **MS. MCLAUGHLIN:** Objection, foundation.
21 A. No, not at all.
22 **BY MR. WELDON:**
23 Q. Do you believe that you could harvest and sell timber
24 on that property without being fined?
25 **MS. MCLAUGHLIN:** Objection, foundation.

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1 A. Not now.
2 **BY MR. WELDON:**
3 Q. Are you an expert on constitutional law?
4 A. Not at all.
5 Q. Do you believe that the Constitution protects your
6 private property rights?
7 **MS. MCLAUGHLIN:** Objection, foundation.
8 A. I always thought so.
9 **BY MR. WELDON:**
10 Q. But you're not an expert so you wouldn't be able to
11 point to what part of the Constitution?
12 A. No.
13 **MS. MCLAUGHLIN:** Form of the question,
14 foundation.
15 **BY MR. WELDON:**
16 Q. Is that what you hire attorneys for?
17 A. Yes.
18 **MR. WELDON:** I don't have any other
19 questions.
20 RE-EXAMINATION
21 **BY MR. WELDON:**
22 Q. Do you have any understanding of an exemption of
23 25 percent of the trees on the property from the
24 application of the ordinance?
25 A. No.

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MS. MCLAUGHLIN: Thanks. That's all I have.
(The deposition was concluded at 1:31 p.m.
Signature of the witness was not requested by counsel for the respective parties hereto.)

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CERTIFICATE OF NOTARY
STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

I, RENEE J. OGDEN, certify that this deposition was taken before me on the date hereinbefore set forth; that the foregoing questions and answers were recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to, either party nor interested in the event of this cause.

RENEE J. OGDEN, CSR-3455

Notary Public,
Wayne County, Michigan

My Commission expires: June 21, 2025

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