STATE OF MICHIGAN
IN THE COURT OF APPEALS

CHARTER TOWNSHIP OF CANTON,
a Michigan municipal corporation,

Plaintiff/Counter-Defendant/
Appellant/Cross-Appellee,

v.

44650, INC., a Michigan corporation,

Defendant/Counter-Plaintiff/
Appellee/Cross-Appellant.

COA Docket No. 354309

Wayne County Circuit Court

Lower Court No. 18-014569-CE

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DEFENDANT/COUNTER-PLAINTIFF/APPELLEE/CROSS-APPELLANT 44650, INC.'S COMBINED APPELLEE/CROSS-APPELLANT BRIEF

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF JURISDICTION

Appellee/Cross-Appellant agrees that jurisdiction is proper under MCR 7.202(6)(A)(*i*) and 7.203(A)(1).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Collateral estoppel generally precludes parties or their privies from relitigating issues already decided. The U.S. Court of Appeals for the Sixth Circuit has held that Canton's Tree Ordinance violates the unconstitutional conditions doctrine as articulated in *Dolan*. Is Canton's attempt to relitigate whether the Tree Ordinance imposes an unconstitutional condition on the use of property barred by collateral estoppel?

Appellant/Cross-Appellee's position: No.
Appellee/Cross-Appellant's position: Yes.
The lower court's answer: Yes.

II. Under the unconstitutional condition doctrine, government-imposed "mitigation" for the exercise of property rights must be tied to any "negative externalities" created by the owners' use of their property—which, among other things, requires a site-specific analysis of the property. Canton's Tree Ordinance imposes pre-set "mitigation" requirements unrelated to any site-specific analysis. Even if collateral estoppel does not apply, did the lower court correctly hold that the Tree Ordinance imposes an unconstitutional condition on the use of property?

Appellant/Cross-Appellee's position: No.
Appellee/Cross-Appellant's position: Yes.
The lower court's answer: Yes.

III. Regulatory takings are based on a totality of the circumstances considering: (1) the economic impact of the regulation; (2) the extent of interference with investment-backed expectations; and (3) the character of the governmental action. Here, Canton's Tree Ordinance imposed "mitigation" exceeding the value of the Property, would effectively prevent development of the site, and did so not to prevent any nuisance but rather to promote a general public "benefit." Did the lower court correctly hold that the Tree Ordinance as applied to the Percys constitutes a regulatory taking?

Appellant/Cross-Appellee's position: No.
Appellee/Cross-Appellant's position: Yes.
The lower court's answer: Yes.

IV. The Fourth Amendment prohibits unreasonable seizures even in the civil context, including where the government meaningfully interferes with a person's possessory interest in property in an unjustified manner. Canton's Tree Ordinance makes it a crime for the Percys to remove or utilize their own trees without both permission and substantial payment to Canton Did the lower court correctly hold that the Tree Ordinance violated the Fourth Amendment and that the Percys' Fourth-Amendment claims were not barred by collateral estoppel?

Appellant/Cross-Appellee's position: No.
Appellee/Cross-Appellant's position: Yes.

The lower court's answer: Yes

V. The Eighth Amendment requires civil fines to be roughly proportional to the offense that they are designed to punish. Canton has imposed fines of $446,625 for the removal of trees—an amount 900 times greater than the maximum criminal fine for the same conduct—yet it has not articulated any public harm. Are the penalties demanded by Canton under its Tree Ordinance an excessive fine under the Eighth Amendment?

Appellant/Cross-Appellee's position: No.
Appellee/Cross-Appellant's position: Yes.
The lower court's answer: No.

CONSTITUTIONAL PROVISIONS INVOLVED

US Const, Am IV: *The right of the people to be secure in their persons, houses, papers, and effects*, *against unreasonable searches and seizures, shall not be violated*, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Emphasis added).

US Const, Am V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation*. (Emphasis added).

US Const, Am VIII: Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted. (Emphasis added).

INTRODUCTION

In late 2018, Appellee/Cross-Appellant 44650, Inc. (hereafter "the Percys") cleared sixteen acres of mostly scrub-brush, dead trees, and other vegetation from their own property and then planted spruce trees for a Christmas tree farm. In response to this exercise of the Percys' property rights, Appellant/Cross-Appellee Charter Township of Canton ("Canton") filed suit against the Percys seeking as much as $446,625 in penalties for alleged violations of its Tree Ordinance—an amount the lower court noted was "grossly disproportionate, and . . . appear[ed] to be punitive."

After years of costly litigation, the lower court rightly held Canton's Tree Ordinance unconstitutional both on its face and as applied to the Percys. This holding was in accord with the conclusions of prior courts that had struck down similar tree ordinances in other jurisdictions. It was also consistent with a federal district court judgment that had already struck down *this same* Tree Ordinance.

Canton now seeks review in this Court. But this is no ordinary appeal. Since Canton began its action against the Percys, *eighteen* separate state and federal judges have reviewed federal challenges to Canton's ordinance.[1] *Not one* has argued that the Ordinance is constitutional.

Undeterred, Canton inexplicably presses forward with this appeal. Canton apparently hopes against hope that this Court will aid it in its quest for a pound of flesh from the Percys. But Canton's opening appellate brief raises no new arguments on the merits that were not raised in the Sixth Circuit. And Canton makes no good-faith argument as to why this Court should defy a Sixth Circuit judgment against Canton on a matter of federal constitutional law involving the *same ordinance* at issue in this case. The lower court's ruling should be affirmed.

[1] That includes the trial court judge in this matter, U.S. District Court Judge George Caram Steeh, and all sixteen members of the U.S. Court of Appeals who served either on the panel or reviewed the matter *en banc*.

STATEMENT OF FACTS

44650, Inc. is a landholding corporation that manages properties for Matt and Gary Percy—the owners of the property at issue in this case (the Property). (Appellee's Appendix (hereinafter "App"), pp 008 – 010.) The Percys purchased the Property in 2017. *Id.* At the time, property was covered with largely blighted vegetation including dead trees, scrub brush, and invasive species. (App, p 013.) It had also become a dumping ground for trash and other debris.

To make use of the Property and to abate these nuisance-like conditions, the Percys cleared the Property and thereafter planted 1,000 Norway Spruce trees that they could later harvest as Christmas Trees. (App, p 021, ¶ 43.) Canton admits that none of these activities caused a common law nuisance or injured the Percys' neighbors in any way. (App, pp 032–033; App, p 188; App, pp 191–193.)

Nonetheless, Canton soon contacted the Percys claiming that they owed Canton hundreds of thousands of dollars in mitigation under Canton Charter Township Code of Ordinances, part II, appx A – Zoning, art 5A87p (the "Tree Ordinance")[2] for clearing their own vegetation from their own private property. The Tree Ordinance mandates that private property owners apply for and receive a permit from Canton before removing any "tree" from their properties. "Tree" is broadly defined and includes "any woody plant with at least one well-defined stem and having a minimum [diameter at breast-height] ("DBH") of three inches." *Id.*, art 5A.01. The Tree Ordinance distinguishes between trees in a "forest" and trees not in a "forest." If the tree is not in a "forest," a permit is required only if the tree is 6 inches DBH or greater. *Id.*, art 5A.05(A). (App, p 187.)

[2] Available at: https://library.municode.com/mi/canton_charter_township,_(wayne_co.)/codes/code_of_ordinances.

A tree removal permit will only be granted if Canton decides that the removal is "necessary." *Id*., art 5A.05. The owner must also agree to either: (1) replace any removed tree with up to three trees of Canton's choosing, or (2) pay the "market value" of replacement trees (currently between $300 and $450 per tree) into Canton's tree fund. *Id*., art 5A.08. These "mitigation" requirements are mandatory, regardless of the impact or benefit accruing from the tree removal. Code of Ordinances, art 5A.08. (App, p 137.)

Applying its ordinance to the Property, Canton demanded that the Percys pay hundreds of thousands of dollars into the tree fund or plant over 1,500 trees of Canton's choosing. (App, p 021, ¶ 39–41.) The Percys objected to Canton's demands, noting: (1) that they believed nursery operations were exempt from the ordinance[3]; (2) that Canton's tree count was wrong as to the number of trees removed; and (3) that the fines sought were unreasonable. After the Percys went to the press about Canton's ruinous fines, settlement negotiations broke down, and Canton filed suit in the Wayne County Circuit Court seeking as much as $446,625 for alleged violations of the Tree Ordinance. **(**App, pp 14–30; App, pp 38–54.)

The Percys responded with affirmative defenses and counterclaims that the Tree Ordinance violates both the United States and Michigan Constitutions as well as Michigan's Right to Farm Act. In particular, the Percys argued that the Tree Ordinance was: (1) an unconstitutional exaction under *Dolan v City of Tigard,* 512 US 374; 114 SCt 2309; 129 LEd2d 304 (1994); (2) a *per se* taking under both *Horne v Dep't of Agric,* 576 US 351; 135 SCt 2419; 192 LEd2d 388 (2015) and *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419; 102 SCt 3164; 73 LEd2d 868 (1982); (3) an as-applied taking under *Penn Central Transp Co v New York City*, 438 US 104; 98 SCt 2646; 57 LEd2d 631 (1978); (4) an unreasonable seizure under *Severance v Patterson*, 566 F3d

[3] Art 5A.05(B) exempts nurseries from the replacement requirement.

490 (CA5, 2009); and (5) an excessive fine under the Eighth Amendment as articulated in *United States v Bajakajian*, 524 US 321; 118 SCt 2028; 141 LEd2d 314 (1998).

While Canton's action against the Percys was pending in state court, the Federal District Court for the Eastern District of Michigan heard a challenge to Canton's Tree Ordinance brought by the Percys' neighbor who had also been threatened with penalties under the Ordinance. *FP Dev, LLC v Charter Twp of Canton*, 456 F Supp 3d 879, 897 (ED Mich 2020). Based on arguments almost identical to those raised in this case, that court concluded that the mitigation mandated by Canton's Tree Ordinance constituted an unconstitutional exaction under *Dolan*, and an unconstitutional taking under *Penn Central*. *Id.*

Despite a federal court ruling its ordinance unconstitutional, Canton continued its action against the Percys in state court, seeking over half a million dollars in penalties for the harmless use of their own property. In June of 2020, Judge Hubbard of Wayne County Circuit Court also held Canton's ordinance unconstitutional. *First*, the court held that Canton's arguments on the takings and exactions issues were barred by collateral estoppel because they had been raised and rejected in *FP Development*. (App, pp 075–078.) *Second*, the court found that, even if collateral estoppel did not apply, Canton's ordinance was: (1) an unconstitutional exaction under *Dolan* because the mitigation demanded under the ordinance is not based on an individualized assessment of the impact of tree removal (App, pp 70–72); (2) a *per se* taking in violation of the Fifth Amendment under *Horne* because it granted Canton constructive possession of the Percys' trees, (App, p 067); (3) a regulatory taking under *Penn Central* because it went "too far" in regulating the Percys' property, (App, pp 068–069); and (4) an unreasonable seizure under the Fourth Amendment because it amounted to an unjustified interference with the Percys' possessory interest in their property. (App, p 070.) Like the federal district court in *FP Development,* the court denied

the Percys' Eighth Amendment claim because it found that the penalties under the ordinance were remedial mitigation subject to review under *Dolan* and therefore not a fine. *Id*. at 19.

Canton appealed to this Court. Before briefing commenced in this case, however, the Sixth Circuit scheduled oral argument in *FP Development*. Because the parties agreed that the outcome of *FP Development* would be relevant to this case, both sides agreed to a stay.

In October of 2021, the Sixth Circuit Court of Appeals affirmed the district court's judgment in *FP Development.* Like every other court to review this issue, the Sixth Circuit held that Canton's Tree Ordinance is an unconstitutional exaction under *Dolan*, because mitigation under the ordinance is not based on an individualized assessment of the impact of tree removal. *FP Dev, LLC v Charter Twp of Canton*, 16 F4th 198, 207 (CA6, 2021). Because it ruled in F.P.'s favor on the exactions claim, the court did not reach the other takings claims. *Id*. at 204. Furthermore, having found that because the penalties under the Ordinance were remedial mitigation subject to *Dolan*, the Court concluded that they were not "fines" and the Eighth Amendment therefore did not apply. *Id*. at 209.

Canton petitioned the Sixth Circuit for *en banc* review arguing that the panel had failed to consider whether *Dolan* should apply in this case because the Tree Ordinance does not demand a formal dedication of property or an easement. The Court unanimously rejected *en banc* review. *FP Dev, LLC v Charter Twp of Canton*, No. 20-1447/1466, 2022 US App LEXIS 3282 (CA6, Jan 3, 2022). In doing so, the Court noted that—contrary to Canton's assertions in its *en banc* petition—the original panel had considered the issue. *Id*. at *2. Canton has thus far chosen not to appeal to the U.S. Supreme Court. Instead, Canton seeks to relitigate those issues here.

Because the exactions holding from *FP Development* is dispositive in this case, the Percys' counsel requested that Canton dismiss its appeal. Canton has refused, continuing its quest for ruinous penalties under an ordinance thrice-found unconstitutional.

ARGUMENT

When a party raises half-a-dozen grounds for reversing the trial court, "that usually means there are none." *Umfress v City of Memphis*, No 20-6115, 2021 US App LEXIS 20367, at *1 (CA6, July 7, 2021) (quoting *Fifth Third Mortg Co v Chi Title Ins Co*, 692 F3d 507, 509 (CA6, 2012)). For Canton to prevail here, it must establish that the lower court committed reversible error on at least seven holdings—perhaps more.[4] It cannot do so, and the lower court's judgment should be affirmed.

I. Canton's Appeal is Barred by Collateral Estoppel.

As an initial matter, the lower court rightly held that Canton's ongoing attempt to enforce its Tree Ordinance against the Percys in this case is barred by collateral estoppel. (App, p 077.) Generally speaking, the doctrine of collateral estoppel forbids a party from relitigating claims

[4] Those include: (1) that Canton's arguments are barred by collateral estoppel; (2) that Canton's Tree Ordinance constitutes an unconstitutional exaction under *Dolan* because it does not serve a legitimate government interest; (3) that Canton's Tree Ordinance constitutes an unconstitutional exaction under *Dolan* because it isn't based on an individualized assessment of impact; (4) that Canton's Tree Ordinance constitutes an unconstitutional exaction under *Dolan* because the mitigation demanded in this case is not roughly proportional to the impact of tree removal; (5) that Canton's Tree Ordinance is a *per se* taking under *Horne*; (6) that Canton's Tree Ordinance is a regulatory taking under *Penn Central*; and (7) that Canton's Ordinance is a unreasonable seizure under the Fourth Amendment. Even if Canton were to prevail on those seven claims, it would also have to establish the same errors for six of these claims with regard to the Michigan Constitution which can provide greater protection than its federal counterpart. *Sitz v Dep't of State Police*, 443 Mich 744, 761; 506 NW2d 209 (1993). That arguably brings the total number of claimed reversible errors to thirteen. But that is not all. Even if Canton were to convince this Court that the lower court erred in all of these respects, that alone would not be sufficient for Canton to win. It would still have to convince the Court that over half-a-million dollars in penalties are not an excessive fine under the Eighth Amendment or the Excessive Fines Clause of the Michigan Constitution.

which it has already fully and unsuccessfully litigated in a prior proceeding. *Monat v State Farm Ins Co*, 469 Mich 679, 682–85; 677 NW2d 843 (2004). That principle applies here.

As explained more fully in Section II, *infra*, the U.S. Court of Appeals for the Sixth Circuit held that Canton's Tree Ordinance violates the unconstitutional conditions doctrine as articulated in *Dolan*. In particular, the court held that: (1) *Dolan* requires that mitigation requirements be based on an "individualized assessment" of the impact of the property use; and (2) Canton's ordinance runs afoul of this requirement because "removal of regulated trees triggers the mitigation requirements, regardless of the specific impact caused by their removal." *FP Development*, 16 F4th at 207. Because Canton had a full and fair opportunity to litigate these issues in the Sixth Circuit, *and did so*, any attempt to re-litigate these issues here is barred by collateral estoppel. *Monat*, 469 Mich at 682–85.

Canton raises only one argument against collateral estoppel resolving this case. Canton argues that the Sixth Circuit failed to consider an argument it allegedly seeks to raise for the first time here. Namely, Canton argues that *Dolan* does not apply because the Tree Ordinance does not demand a formal dedication of title to property or a formal easement as mitigation. Because this argument was allegedly not litigated in *FP Development*, Canton argues it would not be barred by collateral estoppel from raising it here. *Id*.

This argument fails for at least two reasons. *First*, assuming arguendo that Canton's "new" argument was not previously litigated in the Sixth Circuit—it was—it is undisputed that Canton has never raised the argument before *in this case*. (App, pp 360–381.) Canton's failure to raise the argument at the trial court *in this case* means the argument was waived. *Walters v Nadell*, 481 Mich 377, 388; 751 NW2d 431, 437 (2008). It therefore cannot be raised for the first time here as a means to circumvent estoppel.

Second, and more importantly for collateral estoppel purposes, Canton *did* raise its allegedly "new" argument at the Sixth Circuit *and lost*. Indeed, both parties discussed the issue in their primary and supplemental Sixth Circuit briefs (App, pp 234–235; App, pp 242–310; App, pp 311–356; App, pp 357–359.) The issue was debated extensively at oral argument,[5] and Canton spent the entirety of its petition for *en banc* review on the issue, alleging that the court had failed to consider it. (App, pp 087–105.) In response to that petition, the *en banc* court expressly rejected Canton's contention that the issue was not considered by the panel, concluding that "***the issues raised in the petition were fully considered upon the original submission and decision of the cases***." *FP Dev, LLC*, No 20-1447/1466, 2022 US App LEXIS 3282, at *2 (CA6, Jan 3, 2022) (emphasis added). Indeed, Canton itself has previously argued that it raised the issue in the Sixth Circuit. (App, p 096.) It may not argue otherwise now. *Czymbor's Timber, Inc v City of Saginaw*, 269 Mich App 551, 556; 711 NW2d 442, 445 (2006). Collateral estoppel therefore applies.

Canton notes that the Sixth Circuit panel in *FP Development* said that there was "an interesting question" not raised by the parties as to whether *Dolan* should apply in these circumstances. *FP Development*, 16 F4th at 206. But that stray line of *dicta* did not refer to the dedication/easement distinction issue that Canton attempts to raise here for two reasons. First, the panel noted that the "interesting question" it referred to was not raised by any of the parties. *Id*.

[5] See oral argument audio at: 12:14–12:22 (delegating authority to amicus); 16:00–19:26 (discussing the dedication/ easement distinction); 20:43–22:50 (same); 43:00–43:50 (same). available at: https://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=recent/06-10-2021%20-%20Thursday/20 1447%201466%20FP%20Development%20LLC%20v%20Charter%20Township%20of%20Canton%20MI.mp3&name=20-1447%201466%20FP%20Development%20LLC%20v%20Charter%20Township%20of%20Canton%20MI

But, as discussed above, both parties and *amici* raised the easement/dedication distinction before the Sixth Circuit panel.

Second, the "interesting question" in exaction cases has nothing to do with Canton's alleged easement/dedication distinction. As a district court recently noted with regard to the decision in *FP Development*, the "interesting question" referred to in *FP Development* was whether *Dolan* applies to so-called "legislative exactions." *Knight v Metro Gov't of Nashville & Davidson Cty*, No 3:20-cv-00922, 2021 US Dist LEXIS 221927, at *18–20 (MD Tenn Nov 16, 2021). Until several weeks ago, the Ninth Circuit Court of Appeals had departed from other courts by finding that *Dolan* only applied to exactions demanded through an adjudicative process (so called administrative exactions) and did not apply to exactions imposed by ordinance (so called legislative exactions). *Id*. The Ninth Circuit's position created a circuit split that has been the cause of a cottage industry of law review articles and litigation. *Id*. But the Ninth Circuit itself recently rejected this distinction, noting that the Supreme Court has since clarified its position that *Dolan* applies to both forms of exactions. *Ballinger v City of Oakland*, No 19-16550, 2022 US App LEXIS 2862, at *20 (CA9, Feb 1, 2022). That should be sufficient to put the issue to rest.

More importantly, Canton has never raised the issue of legislative exactions in this case or in the Sixth Circuit. Indeed, Canton was given the opportunity at oral argument in the Sixth Circuit to address the legislative versus administrative exactions issue; it refused.[6] Canton wisely has not raised that issue here.

[6] At oral argument in the Sixth Circuit, Canton's *amici* was given authority by Canton's counsel to "present the arguments [Canton] would like to make" on the *Dolan* issue. Audio at: 12:14–12:22 (delegating authority to amicus). Acting on Canton's behalf, he expressly denied that that the distinction was meaningful, instead relying on the easement/dedication argument Canton raises here. Audio at: 16:00–16:40.

Accordingly, because Canton presents no new arguments on the exaction issue that were not fully adjudicated by the Sixth Circuit in *FP Development,* Canton's appeal is barred by collateral estoppel and should be dismissed.

II. Multiple Courts Have Rightly Held that the Mitigation Demanded Under Canton's Tree Ordinance Constitutes an Unconstitutional Exaction Under *Dolan*.

Assuming *arguendo* that estoppel does not apply, the lower court's ruling should be affirmed because Judge Hubbard got it right. As noted *supra*, the lower court rightly held that the Tree Ordinance is unconstitutional because its mitigation demands are not based on an individualized quantifiable assessment of impact. This is in accord with other courts that struck down similarly crafted tree ordinances, and other ordinances with pre-set mitigation requirements. See, e.g., *Mira Mar Development Corp v City of Coppell*, 421 SW3d 74, 95–96 (Tex Ct App 2013) (striking down tree mitigation requirements under *Dolan*); *Goss v City of Little Rock*, 151 F3d 861, 863 (CA8, 1998) (striking down traffic mitigation requirement).

Because Canton's brief mischaracterizes the nature and history of the Supreme Court's exaction jurisprudence, some background is helpful. The exactions test was designed to solve a problem. It is well established that governments can require that property owners mitigate for harms or "negative externalities" created by the owners' use of their property. *Koontz v St Johns River Water Mgmt Dist*, 570 US 595, 605; 133 SCT 2586; 186 LEd2d 697 (2013). For example, if paving a parking lot on your property causes an adjacent property to flood, the local government can condition the grant of a parking lot permit on you building drainage culverts to abate this flooding concern. See *id*. This sort of mitigation requirement does not impair property rights, because the right to own property does not include the right to use it in ways that cause a nuisance

for your neighbors. *Lucas v South Carolina Coastal Council*, 505 US 1003, 1029–30; 112 SCt 2886; 120 LEd2d 798 (1992).

On the other hand, history teaches that governments can abuse this permitting privilege by demanding substantially more in mitigation for a permit than what is necessary to mitigate for the externalities created by the proposed property use. *Koontz*, 570 US at 604–05. In those circumstances, the government is no longer demanding mitigation at all but attempting to exact a public benefit from the property owner without compensation by holding the right to use his property hostage. See *Id.* Worse, because the permit is often more valuable than the exaction demanded, the "owner is likely to accede to the government's demand, no matter how unreasonable." *Id.* at 605.

The test developed through *Nolan*, *Dolan*, and *Koontz* was designed to address this concern by ensuring that mitigation demanded by a permit condition is *actually mitigation* for externalities, and not extortion of a public benefit at private expense. *Koontz*, 570 US at 606. It does so by setting three criteria for mitigation demands.

First, the mitigation demanded must have an "essential nexus" to the harm the government seeks to mitigate. *Nollan v California Coastal Comm'n*, 483 US 825, 837; 107 SCt 3141; 97 LEd2d 677 (1987); see also *Lambert v City & Cty of SF*, 529 US 1045, 1046; 120 SCt 1549; 146 LEd2d 360 (2000) (Scalia, Kennedy, and Thomas, dissenting from the denial of certiorari) ("a burden imposed as a condition of permit approval must be related to the public harm that would justify denying the permit."). This ensures that the government is seeking to mitigate harm created by a property use, and not simply using permitting requirements as pretext to discourage development or acquire something it would otherwise have to pay for. *Nollan*, 483 US at 837.

Second, the mitigation must be "roughly proportional" to what is needed to eliminate the harm or externality which justifies the mitigation. *Dolan*, 512 US at 391; *Lambert*, 529 US at 1046. This is because when the "city demand[s] more" than what is required, that excess demand is not really mitigation at all, but a demand for a public benefit at private expense. See *id.* at 393.

Finally, the assessment of rough proportionality must be based on a site-specific "individualized determination" that the mitigation is related "both in nature and extent to the impact of the proposed development." *Dolan*, 512 US at 391. This site-specific approach ensures that governments cannot circumvent the requirements of *Dolan* with "conclusory statement[s]" about the public interest. *Id*. at 395. Each property is unique, and therefore the harm caused by a given property use will necessarily vary based on site-specific factors. By requiring that the government "make some effort to quantify its findings," *Dolan* ensures that the government does not by mere *ipse dixit* establish that a particular property use is harming one's neighbors, and demand mitigation based on imaginary harms. *Id*.; see also *Yates v City of Milwaukee*, 77 US 497, 505; 19 LEd984; 10 Wall 497 (1870) ("[T]he mere declaration by the city council. . . that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character."). As explained below, Canton's ordinance fails this test.

A. The Tree Ordinance violates *Dolan* because mitigation under the ordinance is not based on an individualized assessment of the impact of tree removal.

As every court to look at this issue has noted, Canton's ordinance violates the criteria put forth in *Dolan* because, at a minimum, mitigation under the ordinance is not based on an individualized assessment of the impact of tree removal. *FP Dev, LLC*, 16 F4th at 207. Instead, the Tree Ordinance mandates a pre-set mitigation regardless of impact. *Id*. Canton does not dispute this fact here.

As multiple courts have noted, this lack of a site-specific evaluation of harm is particularly problematic with regard to tree ordinances, because the impact of tree removal can vary greatly from property to property. For example, while tree removal may have impacts on flooding (which ordinarily might allow for the government to mandate some mitigation), those impacts will vary greatly depending on site-specific factors, such as topography and other vegetation. Indeed, in some cases, tree removal can create positive externalities. In those cases, no mitigation would be appropriate at all, yet Canton's ordinance does not make this distinction, requiring that property owners provide pre-set mitigation for the number of trees removed, no matter what.

Here, the Percys removed largely blighted vegetation from an industrially zoned property that they owned and replaced it with a 1,000-tree Christmas-tree farm. Canton admits that the removal did not cause any injury to the Percys' neighbors or Canton. (App, pp 32–37.) Accordingly, there is no adverse impact to mitigate. Yet Canton's Tree Ordinance demands that the Percys pay nearly half-a-million dollars in mitigation fees or spend substantial time and money planting over 1,500 additional unwanted trees on their property or elsewhere. It does so without regard to site-specific factors. (App, pp 135–137.) Both the circuit court here and the Sixth Circuit in *FP Development* rightly held that this one-size-fits-all approach violates the mandates of *Dolan* and is therefore unconstitutional.

B. Canton's argument that *Dolan* is limited to demands for formal dedications or easements has already been rejected in the Sixth Circuit.

Faced with this precedent, Canton's only argument is that *Dolan* should not apply because the Tree Ordinance does not require the dedication of a formal easement or its equivalent. But the Supreme Court recently rejected such empty formalism in property rights cases. See *Cedar Point Nursery v Hassid,* 141 SCt 2063, 2075–76; 210 LEd2d 369 (2021). This Court likewise has previously applied *Dolan* to demands that were not easements or dedications of property. See, e.g.,

Dowerk v Oxford Charter Twp, 233 Mich App 62, 68; 592 NW2d 724 (1998) (applying *Dolan's* rough proportionality test to a demand that a property owner make improvements on a private road on her property as a condition for a development permit). Moreover, as noted *supra*, Canton fully litigated this issue in the Sixth Circuit, and their position was rejected.

This makes sense. The Supreme Court's exaction jurisprudence was not a unique innovation to deal solely with demands for formal dedications or easements. Rather, *Nolan*, *Dolan*, and *Koontz* were natural expansions of the Court's unconstitutional conditions doctrine applied in the property rights context. *Koontz*, 570 US at 604. Those cases are based on the principle that the government cannot condition the exercise of any constitutionally protected property right (here, the right to remove your own trees) on the waiver of another constitutionally protected property right. *Id*.

Accordingly, the exactions test is not only triggered when the government demands title or an easement, but any time the government demands something as a condition on the exercise of a property right that the government otherwise could not demand or otherwise could not demand without compensation. *Town of Flower Mound v Stafford Estates Ltd P'ship*, 135 SW3d 620, 625 (Tex 2004). Put another way, the test for whether something triggers *Dolan* is "would the government be able to constitutionally require what it is demanding as mitigation outside of the mitigation/permitting context?" If not, then *Dolan* review is necessary to ensure that what is being demanded is *actually mitigation* and not a demand for public benefits at private expense.

In this case, the answer is clear. Canton demands that the Percys plant over 1,500 trees or pay approximately half a million dollars into Canton's tree fund. But there is no doubt that Canton could not demand that the Percy's plant 1,500 trees on their property for the benefit of the public, independent of any mitigation concerns. Such a mandatory physical occupation of private property

for the public benefit would be a *per se* taking requiring compensation. *Loretto*, 458 US at 435. The fact that Canton does not label it an easement would be irrelevant. *Cedar Point*, 141 SCt at 2075–76. Nor could Canton simply demand that the Percys plant trees in a public park or turn over half a million dollars for no reason. Such demands would be unconstitutional. *Koontz*, 570 US at 619 (holding that demands that property owner improve city owned property or pay money for the same purpose were both exactions). Canton's demands are therefore exactions subject to review under *Dolan* to ensure that they are actually mitigation and not extortion.

Under Canton's alternative theory, the government could demand that a property owner repave entire public streets, build a new city sewage system, or build a golden statute of the mayor as "mitigation" for removing a single tree, and such demands would be unreviewable under *Dolan* because they are not technically easements or dedications. This Court need not abide such absurdity.

III. The Lower Court Rightly Held That Canton's Application of the Tree Ordinance to the Percys was a Regulatory Taking.

Assuming that *Dolan* does not apply here, the lower court also rightly held that Canton's Tree Ordinance constitutes a regulatory taking. Regulatory takings can take at least three forms: (1) when the government effectively takes control over an interest in property through regulation, *Horne*, 576 US at 357–358; (2) when the government mandates that an owner maintain unwanted objects on the property for a public purpose, thus appropriating a portion of the property for the public without compensation, *Loretto*, 458 US at 435; or (3) when a regulation goes "too far" under the balancing test articulated in *Penn Central Transp Co*, 438 US at 104. The Ordinance meets the criteria of all three forms of regulatory taking.

A. The Tree Ordinance is a *per se* taking under *Horne.*

The lower court rightly held that the Tree Ordinance is a *per se* taking under *Horne v Department of Agriculture* because it effectively grants Canton constructive ownership of the Percys' trees. 576 US at 357–358. As the lower court rightly recognized, the Tree Ordinance is remarkably similar to the statute the Supreme Court found to be a *per se* taking in *Horne*. In that case, the plaintiffs successfully challenged a federal statute that required them to set aside a portion of their raisin crop for the government to control as a means of restricting the supply of raisins in the national raisin market. The set-aside raisins remained on the plaintiffs' property, 576 US at 361, but the plaintiffs could not sell, use, or destroy the raisins unless they paid the government the "fair market value" of the raisins. *Id*. at 370. The plaintiffs sold a portion of their set aside raisins and the government sought to recover the "market value" of the raisins sold. The Court held that this was a *per se* taking. As the Court explained, requiring that the growers pay the government for the use of their own raisins "gives rise to a taking as clearly 'as if the Government held full title and ownership.'" *Id*. at 362.

Just as the statute in *Horne* forbade the property owners from exercising any property right with regard to their raisins without paying the government, the Tree Ordinance forbids the Percys from exercising any property right with regard to their trees.[7] Like the raisins in *Horne*, the trees remain on the Percys' property, but the Percys may not sell, use, or destroy them without paying Canton the "current market value" of the trees. Canton Code of Ordinances, part II, appx A – Zoning, art 5A.08(E). And, like the plaintiffs in *Horne*, the Percys used a portion of the trees, and the government demanded the trees' "market value." Accordingly, Canton's tree ordinance

[7] In Michigan, trees are a separate property interest that is severable from the underlying estate in the same manner as crops. See, e.g., *Groth v Stillson*, 20 Mich App 704, 707; 174 NW2 596 (1969) (trees are severable interests); *State Highway Comm'r v Green*, 5 Mich App 583, 589–90; 147 NW2d 427 (1967) (trees separate interest for takings analysis).

effectively takes possession of the Percys' trees without compensation just as the statute in *Horne* effectively took control of raisins. It is therefore a *per se* regulatory taking. The circuit court's judgment on this issue should be affirmed.

Canton's sole objection to this argument is that the government in *Horne* could have taken actual title to the raisins. But the possibility of a title transfer of the raisins was not the dispositive fact that created a taking in *Horne*. Indeed, the government in *Horne* never took actual possession or title of the raisins at issue. The farmers in that case sold the raisins and were fined their "market value." Nonetheless, the Court in *Horne* held that the inability of the plaintiffs to consume or sell the raisins without paying the government compensation "gives rise to a taking as clearly '***as if*** the Government held full title and ownership.'" *Horne,* 576 US at 362 (emphasis added). In other words, the denial of the ability to consume or sell the raisins without compensating the government would have given rise to a taking whether title was transferred or not. *Id*.; see also, *Peterman v Dep't of Nat Res*, 446 Mich 177, 189–90; 521 NW 499 (1994) ("any injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation.")

This makes sense. Imagine that you have a basket of apples sitting on your porch. The government tells you that if you want to eat an apple from the basket you have to: (1) get government permission (which it can deny at its discretion); and (2) pay the government the market value of any apple you eat or replace it with one to three new apples of the government's choosing. It would be nonsense in that scenario for the government to insist that you own the apples in the basket simply because it leaves them on your porch. The government has effectively claimed all the traditional hallmarks of ownership.

That is precisely what the Tree Ordinance does with the Percys' trees. The Percys may not utilize them at all without: (1) asking permission (which Canton may deny); and (2) compensating Canton by paying the market value of any tree removed or by replacing it with up to three trees. The fact that these trees remain on the Percys' property is irrelevant. Canton has effectively claimed all the other hallmarks of ownership. The lower court's judgment on this issue should be affirmed.

B. The Tree Ordinance is a *per se* taking under *Loretto.*

The Tree Ordinance also constitutes a *per se* taking of portions of the underlying Property by requiring that the Percys maintain unwanted objects—trees—on the Property for the government's benefit. (App, pp 195–196.) In *Loretto v Teleprompter Manhattan CATV Corp*, the Court held that a state law requiring landlords to allow cable boxes to remain attached to their buildings constituted a *per se* taking. 458 US at 438. The Court explained that forbidding the removal of the cable boxes was tantamount to "physical occupation authorized by government [and] is a taking without regard to the public interests that it may serve." *Id*. at 426. This remains true even if the occupation involves "relatively insubstantial amounts of space and do[es] not seriously interfere with the landowner's use of the rest of his land." *Id*. at 430.

Here, the physical invasion is far more extensive than the cable box recognized as a taking in *Loretto*. Under the Tree Ordinance, property owners must maintain potentially thousands of unwanted trees on their property. As these trees inevitably grow and spread over time, the extent of this legally mandated physical occupation increases. Accordingly, the ordinance is a *per se* taking under *Loretto*.

The court below rejected this argument with a single sentence noting that the Ordinance did not require that the Percys maintain trees on the Property because "trees may be removed, but

at a cost." (App, p 068.) The Court found that circumstance to be closer aligned to *Horne*, and therefore held that *Loretto* did not apply. *Id.* However, if this Court has reached this question, it is only because it is not persuaded that *Horne* applies. In that circumstance, the lower court's observation that "trees may be removed, but at a cost" would not preclude a *Loretto* claim. Indeed, the exact same observation could be made of *every* property regulation. All regulations enforced by civil penalties are effectively a choice—obey the law or pay the penalty. In that sense, a property owner may always violate the law "but at a cost." That is not sufficient to preclude a takings claim.

C. The Tree Ordinance is a regulatory taking under *Penn Central.*

Finally, the lower court rightly held that the Tree Ordinance as applied to the Percys was a regulatory taking under the *ad hoc* balancing test described in *Penn Central*. Under *Penn Central*, courts look at three factors: (1) "the economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the character of the governmental action." *Palazzolo v Rhode Island*, 533 US 606, 633–34; 121 SCt 2448; 150 LEd2d 592 (2001) (quoting *Penn Central*, 438 US at 124). These factors, commonly referred to as the "*Penn Central* test," are not "mathematically precise variables, but instead provide[] important guideposts that lead to the ultimate determination whether just compensation is required." *Palazzolo*, 533 US at 634. Each factor cuts in the Percys' favor.

First, there is no dispute that the economic impact of the regulation is significant. In order to make any use of the Property, the Percys had to clear blighted vegetation. The cost of doing so under the ordinance was more than the value of the Property itself. Canton wisely does not argue that this is not a significant economic impact.

Second, the Percys had a reasonable expectation that they could remove vegetation from an industrially zoned property. Clearing vegetation from one's property is a common and ordinary

use of property and a common-law right. Canton argues that any investment backed expectation was precluded by the fact that the Tree Ordinance was in effect at the time the Property was purchased. But the Supreme Court has repeatedly made clear that a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Palazzolo v Rhode Island*, 533 US 606, 630; 121 SCt 2448, 2464 (2001) (citing *Nollan*, 483 US at 834, n 2). An unreasonable and unconstitutional ordinance is not shielded by the mere passage of time. Indeed, this issue was litigated below and the court rightly concluded that *Palazzolo* foreclosed Canton's argument. (App, p 068.) The fact that Canton raises the same argument again here without so much as an attempt to distinguish or even discuss *Palazzolo* is telling.

Finally, the character of the government action here indicates that it is a taking. The third prong of *Penn Central* effectively asks the court to determine whether the regulation at issue looks more like a common law nuisance abatement measure—for which no compensation is generally required—or looks more like an invasion or appropriation of property for a public benefit—for which compensation is necessary. Here, there is no genuine dispute that the Tree Ordinance is far closer to the latter. Canton admits that the removal of trees from private property is not a nuisance at common law. (App, pp 032–033.) Instead, as the lower court rightly recognized, the Tree Ordinance in both purpose and effect, is designed to force the Percys to keep trees on their property for abstract public benefits. See, e.g., App, p 072.) That is a taking.

Canton's only objection is that the Tree Ordinance is ubiquitous and applies to everyone. But that is neither relevant nor true. First, the alleged ubiquity of the ordinance is irrelevant. All zoning ordinances apply to a broad swath of individuals. If that were sufficient to defeat a takings claim, then no zoning ordinance could ever be a taking. Second, the Ordinance does not apply to everyone. It expressly exempts developed residential lots of less than two acres as well as farming

and nursery operations. Canton Code of Ordinances, part II, appx A – Zoning, art 5A.05. In other words, it exempts the areas with the most votes, and leaves the burden of the ordinance to fall on larger undeveloped properties who have less political power. This is exactly the type public choice problem the Takings Clause is designed to avoid.

IV. The Lower Court Rightly Held That Canton's Tree Ordinance Unreasonably Interferes with the Percys' Possessory Interest in Their Property in Violation of the Fourth Amendment.

Next, the lower court rightly held that the Tree Ordinance violates the Fourth Amendment. The Fourth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits "unreasonable seizures" of private property. *Kerr v California*, 374 US 23, 30; 83 SCt 1623; 10 LEd2d 726 (1963). While this prohibition is most often encountered in the criminal context, multiple courts have held that it applies with equal force in the civil context to land use regulations that interfere with the possession or use of private property. See, e.g., *Severance,* 566 F3d at 503–04 (government mandated easement); *Presley v City of Charlottesville*, 464 F3d at 487 (CA4, 2006) (anti-fencing ordinance). A property regulation violates the Fourth Amendment if it is "(a) a meaningful interference with [a Plaintiff's] possessory interests in [its] property, which is (b) unreasonable because the interference is unjustified by law or, if justified, then uncompensated." *Severance,* 566 F3d at 502.

Canton does not raise any argument that the Tree Ordinance is not a meaningful interference with the Percys' possessory interest in their trees or the underlying property. This makes sense. Under the Ordinance it is a crime for the Percys to remove or utilize their own trees without both permission and substantial payment to Canton. Because the Percys cannot remove the trees, they also cannot use the property beneath the trees. This is just as much a seizure as if Canton had wrapped police tape around the Percys' property and set civil and criminal penalties

for crossing it without permission. The fact that the Percys still technically have title to the trees and the Property is irrelevant. See *United States v Gray,* 484 F2d 352, 356 (CA6, 1973) (guns were seized even though they were never removed from the house); *Severance,* 566 F3d at 503–04 (regulation of private property was a seizure, even though property owner still held title); *Presley*, 464 F3d at 487 (same). Canton wisely does not make that argument.

Likewise, Canton does not make any substantive argument that its interference with the Percys' possessory interest in their trees or the underlying property is justified. Again, Canton's hesitation to argue this point makes sense. To determine whether a seizure is justified, courts must "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *United States v Jacobsen*, 466 US 109, 125; 104 SCt 1652; 80 LEd2d 85 (1984). Here, the interference with property rights is significant. As a practical matter, the Ordinance prevents the Percys from making use of sixteen acres worth of vegetation, or the land under that vegetation, unless they pay Canton more in penalties than they paid for the Property. By contrast, the public harm here is basically non-existent. Canton admits that tree removal is not a nuisance and the removal here did not harm anyone. (App, pp 032–033.) Accordingly, because the Tree Ordinance creates a meaningful interference with the Percys' property rights that is neither justified nor compensated, it is an unreasonable seizure, and the lower court's judgment should be affirmed. *Severance,* 566 F3d at 502.

In the face of this, Canton puts all of its eggs in one basket. It argues that the Percys' Fourth Amendment claims are barred by collateral estoppel because the Sixth Circuit held in *FP Development* that the Fourth Amendment's prohibition on unreasonable seizures does not apply to real property and trees are real property. As explained below, these arguments fail.

A. The Percys' Fourth Amendment claims are not barred by collateral estoppel.

Canton argues that the Percys' Fourth Amendment claims are barred by collateral estoppel because they were raised in some form by *FP Development* in the Sixth Circuit.[8] But, in order for a judgment to have collateral estoppel effect against a party, that party generally must have been a party to the original case. *Monat*, 469 Mich at 682–85. Here, unlike Canton, the Percys were not a party in *FP Development*. Collateral estoppel therefore does not apply against the Percys.

Canton objects that even though the Percys were not a party in *FP Development*, they have "privity" with the party in that case because their businesses are next door to each other and share some of the same attorneys. (App. Br. at 15.) But this flatly contradicts Canton's position below. According to Canton's trial brief, "***[t]his case does not involve the same parties or their privies***" as *F.P. Development*. (App, p 083.) This contradiction alone defeats Canton's argument. *Czymbor's Timber, Inc*, 269 Mich App at 556 ("A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court.").

Moreover, Canton had it right the first time. Privity only applies when there is a clear working relationship such as "a principal to an agent, a master to a servant, or an indemnitor to an indemnitee" or when an individual "*after rendition of the judgment*, has acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase and the judgment would therefore apply with equal force to the new owner." *Phinisee v Rogers,* 229 Mich App 547, 553–554; 582 NW2d 852 (1998) (internal quotations omitted, emphasis added). Here, Canton does not allege any principal-agent relationship between the

[8] Canton's lack of self-awareness here is worth noting. It opens its brief with the bold claim that the Percys are bound by collateral estoppel by *dicta* from a secondary issue in case to which they were not a party, while simultaneously arguing that Canton is not bound by collateral estoppel from the actual holding of that *same case* despite the fact that Canton *was* a party.

parties, nor could it. Nor does it allege that the Percys inherited their interest in their property after the judgment in *FP Development.* The best it can manage is to note that the two properties at issue used to be one parcel long before either case took place. That is not sufficient to create privity. As Canton already rightly recognized when it thought doing so was in its interest, "[t]his case does not involve the same parties or their privies." Collateral estoppel therefore does not apply against the Percys.

B. The Sixth Circuit holding on the Fourth Amendment was *dicta*.

The Sixth Circuit's holding regarding the Fourth Amendment also lacks any collateral estoppel or precedential effect because it was non-binding *dicta*. "It is a well-settled rule that any statements and comments in an opinion concerning some rule of law or debated legal proposition not necessarily involved nor essential to determination of the case in hand are, however illuminating, but obiter dicta . . . ." *Tyrrell v Univ of Mich*, 335 Mich App 254, 267; 966 NW2d 219 (2020) (quoting *McNally v Wayne Co Bd of Canvassers*, 316 Mich 551, 558; 25 NW2d 613 (1947)). That is certainly true of the Sixth Circuit's discussion of the Fourth and Eighth Amendments in *FP Development*.

As the Sixth Circuit recognized, once it had held that the penalties under the Tree Ordinance were unconstitutional exactions under *Dolan*, it "need not consider the other two theories for relief." *FP Development*, 16 F4th at 204. This makes sense. Once the Court declared the mitigation demands unconstitutional no other holding could have any additional outcome on the case. Any discussion of those claims is therefore *dicta*. The fact that the Court went on to discuss the Fourth and Eighth Amendment claims anyway, does not change that fact.

C. The Sixth Circuit's Fourth Amendment *dicta* is in tension with United States Supreme Court precedent.

Even if the Sixth Circuit's Fourth Amendment statements were not *dicta*, they are not binding on this Court because they are in tension with holdings of other Courts of Appeal and the United States Supreme Court. In particular, the Sixth Circuit's decision turns solely on its claim that the Fourth Amendment only applies to personal property. *FP Development*, 16 F4th at 208. But the unreasonable seizure provision of the Fourth Amendment has long been applied to both personal and real property. *United States v James Daniel Good Real Property*, 510 US 43, 52; 114 SCt 492; 126 LEd2d 490 (1993) (noting that the Fourth Amendment applies to the seizure of a four-acre parcel of land); *Presley*, 464 F3d at 483 ("[t]he Fourth Amendment's protections against unreasonable seizures clearly extend to real property."); *Severance*, 566 F3d at 502 (applying Fourth Amendment to real property). Despite briefing on this issue, the Sixth Circuit's opinion tellingly does not even attempt to grapple with these cases, instead pointing to earlier cases dealing with searches. This Court need not follow *dicta* from a federal appellate court decision that is in tension with the Supreme Court and other Courts of Appeals. *Young v Young*, 211 Mich App 446, 450; 536 NW2d 254 (1995) (internal citations omitted) ("[B]ecause this issue has divided the circuits of the federal court of appeals, we are free to choose the most appropriate view.").

V. If this Court Holds that Canton's Demands are Not Mitigation Covered by *Dolan*, then it Should Strike them Down as Excessive Fines Under the Eighth Amendment.

Finally, if this Court is convinced that all other arguments fail, it should find that the penalties levied in this case are excessive under the Eighth Amendment. The lower court in this case agreed that the penalties sought in this case were "unreasonably excessive, grossly disproportionate, and . . . appear to be punitive," but refused to engage in the Eighth Amendment analysis because it held that the payments in this case were designed as mitigation subject to *Dolan*, and therefore not fines. (App, pp 072–073.) The Sixth Circuit came to the same conclusion in *FP*

Development. See *FP Development*, 16 F4th at 209. However, if this Court finds that the Tree Ordinance mitigation payments are not, in fact, mitigation for *Dolan* purposes, then this Court must address the Eighth Amendment claim.

A. The tree payments are fines for Eighth Amendment purposes.

The Eighth Amendment's prohibition on excessive fines applies to any payment, whether in cash or in kind, designed at least in part to serve "either retributive or deterrent purposes." *Austin v United States*, 509 US 602, 610; 113 SCt 2801; 125 LEd2d 488 (1993). The facts in this case indicate that the tree payments are fines, because they are designed, at least in part, for "retributive or deterrent purposes." See *Austin v United States*, 509 US at 610. At deposition, Canton's representative conceded that the purpose of requiring after-the-fact payments was to ensure compliance with the Tree Ordinance and to deter individuals from removing trees. (App, p 132; App, pp 157–158.) The required payments are therefore punitive in nature. See *WCI, Inc v Ohio Dep't of Pub Safety,* 774 Fed Appx 959, 967 (CA6, 2019) ("even if only intended partially as a punishment, and partially for other reasons—the protections of the Eighth Amendment apply."). Indeed, the lower court recognized as much, conceding that the penalties sought here "appear to be punitive." (App, p 073.)

B. The tree payments are excessive.

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." *Bajakajian*, 524 US at 334. The "amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v Madison*, 226 Fed Appx 535, 548 (CA6, 2011).

In determining proportionality, courts look at several factors—two of which are dispositive here. First, courts look at the actual "harm that respondent caused." *Bajakajian*, 524 US 321. In

Bajakajian, the Court held that a seizure of $357,144 was "grossly disproportional" to the crime of not reporting the amount of currency leaving the country to federal authorities, because "[t]he harm that respondent caused was . . . minimal." *Id*. at 339. As the Court explained, the respondent's failure "to report his currency affected only one party, the Government, and in a relatively minor way." *Id*. "There was no fraud on the United States, and respondent caused no loss to the public fisc." *Id*. Given these minimal injuries, the forfeiture of thousands of dollars was excessive. *Id*.

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

The fines assessed under the Tree Ordinance in this case fail both tests. First, there is no public harm at issue in this case. Canton concedes that removing trees from private property does not, of itself, constitute a nuisance and that there is no evidence that the tree removal in this case harmed or otherwise injured the Percys' neighbors. (App, pp 032–037; 188; 191–193.) The only harm that Canton argues in this case is that violation of a zoning ordinance is a *per se* public injury. But such an abstract injury cannot justify $446,625 in penalties. See *Bajakajian*, 524 US at 339 (government's inherent offense in having its laws violated not sufficient).

Second, as the lower court rightly recognized, the penalties in this case are grossly excessive in comparison to the maximum criminal penalties available for the same offense. In *Bajakajian*, a forfeiture of $357,144 was considered "grossly" excessive because it was seventy-times larger than the maximum criminal penalty. *Bajakajian*, 524 US at 339. Here, the maximum criminal penalty for violating the Tree Ordinance is $500, but the civil fines sought against the

Percys under that same ordinance are over $ 446,625 (almost 900-times greater than the maximum criminal penalty.) Such a level of disproportionality cannot pass under *Bajakajian*.

CONCLUSION

At the end of the day, this case has always been straightforward. Canton is demanding almost half-a-million dollars because the Percys removed their own trees, from their own private property, and planted Christmas Trees instead. Under any test applied to land use regulations (and plain common sense), Canton's demands—which exceed the purchase price of the property itself—are unconstitutional because they are grossly disproportionate to any impact that Percys' tree removal may have had on anyone else.

Yet, after three separate courts have found its ordinance unconstitutional, Canton moves forward, confident that even if it cannot convince this Court to make new law on a host of issues, it can at least make the Percys go through the process a little longer. As of the time this brief is filed, this litigation is approaching its fifth year. In the meantime, the Percys continue on with the threat of ruinous penalties hanging over their heads. "Enough is enough, and then some." See *Kruse v Vill of Chagrin Falls*, 74 F3d 694, 701 (CA6, 1996). The lower court's holding that Canton's Tree Ordinance is unconstitutional both on its face and as applied to the Percys should be affirmed. It is time for Canton's saga to come to an end.

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Dated: March 9, 2022

STATE OF MICHIGAN
IN THE COURT OF APPEALS

CHARTER TOWNSHIP OF CANTON,
a Michigan municipal corporation,

Plaintiff/Counter-Defendant/
Appellant/Cross-Appellee,

v.

44650, INC., a Michigan corporation,

Defendant/Counter-Plaintiff/
Appellee/Cross-Appellant.

COA Docket No. 354309

Wayne County Circuit Court

Lower Court No. 18-014569-CE

APPENDIX TO DEFENDANT/COUNTER-PLAINTIFF/APPELLEE/ CROSS-APPELLANT 44650, INC.'S COMBINED APPELLEE/CROSS-APPELLANT BRIEF – VOLUME I

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APPELLEE 44650, INC.'S APPENDIX - VOLUME I

Appellee's Appendix 001 – 004

Register of Actions, Wayne County Circuit Court
Case No. 18-014569-CE

REGISTER OF ACTIONS

CASE NO. 18-014569-CE

PARTY INFORMATION

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EVENTS & ORDERS OF THE COURT

OTHER EVENTS AND HEARINGS

11/09/2018	**Complaint, Filed**
11/09/2018	**Service Review Scheduled**
11/09/2018	**Status Conference Scheduled**
11/09/2018	Case Filing Fee - Paid
11/12/2018	Motion for Injunction, Filed
11/12/2018	Proof of Service, Filed
11/12/2018	Proof of Service, Filed
11/14/2018	Injunctive/Restraining Order, Signed and Filed
11/19/2018	Appearance of Attorney, Filed
11/19/2018	Proof of Service, Filed
11/19/2018	Proof of Service, Filed
11/20/2018	Order to Show Cause, Signed and Filed
11/20/2018	Appearance of Attorney, Filed
11/20/2018	Proof of Service, Filed
11/30/2018	Answer to Motion, Filed
11/30/2018	Proof of Service, Filed
11/30/2018	Service of Complaint, filed
11/30/2018	Proof of Service, Filed
12/03/2018	Proof of Service, Filed
12/03/2018	Proof of Service, Filed
12/04/2018	**Show Cause Hearing** (9:30 AM) (Judicial Officer Hubbard, Susan L.) *11/20/2018 Reset by Court to 12/04/2018* Result: Reviewed by Court
12/05/2018	Order, Signed and Filed
12/05/2018	Proof of Service, Filed
12/07/2018	Proof of Service, Filed
12/11/2018	Order Extending Time, Signed and Filed

12/17/2018 Answer to Complaint-with Jury Demand, Filed
12/17/2018 Proof of Service, Filed
12/17/2018 Proof of Service, Filed
12/17/2018 Proof of Service, Filed
01/07/2019 Answer to Counter Complaint, Filed
01/07/2019 Proof of Service, Filed
01/16/2019 Miscellaneous Motion, Filed
01/16/2019 Proof of Service, Filed
01/18/2019 Miscellaneous Motion, Filed
01/18/2019 Notice of Hearing, Filed
01/18/2019 Proof of Service, Filed
01/18/2019 Notice of Hearing, Filed
01/18/2019 Proof of Service, Filed
01/18/2019 Proof of Service, Filed
01/22/2019 Praecipe, Filed (Judicial Officer: Hubbard, Susan L.)
01/22/2019 Praecipe, Filed (Judicial Officer: Hubbard, Susan L.)
01/22/2019 Amended Complaint, Filed
01/22/2019 Proof of Service, Filed
01/23/2019 Exhibit, Filed
01/23/2019 Exhibit, Filed
01/23/2019 Exhibit, Filed
01/23/2019 Exhibit, Filed
01/23/2019 Exhibit, Filed
01/23/2019 Proof of Service, Filed
01/23/2019 Proof of Service, Filed
01/23/2019 Exhibit, Filed
01/24/2019 Proof of Service, Filed
01/25/2019 **Motion Hearing** (9:00 AM) (Judicial Officer Hubbard, Susan L.)
Result: Reviewed by Court
01/25/2019 **Motion Hearing** (9:00 AM) (Judicial Officer Hubbard, Susan L.)
Result: Reviewed by Court
01/25/2019 **Motion Granted, Order to Follow** (Judicial Officer: Hubbard, Susan L.)
01/25/2019 **Motion Granted, Order to Follow** (Judicial Officer: Hubbard, Susan L.)
01/25/2019 Order Granting Motion, Signed and Filed (Judicial Officer: Hubbard, Susan L.)
01/31/2019 Exhibit, Filed
01/31/2019 Exhibit, Filed
01/31/2019 Proof of Service, Filed
02/05/2019 Praecipe, Filed (Judicial Officer: Hubbard, Susan L.)
02/05/2019 Notice of Hearing, Filed
02/05/2019 Miscellaneous Motion, Filed
02/05/2019 Proof of Service, Filed
02/11/2019 **Status Conference** (8:00 AM) (Judicial Officer Hubbard, Susan L.)
Result: Reviewed by Court
02/11/2019 Status Conference Scheduling Order, Signed and Filed
02/11/2019 Answer to Counter Complaint, Filed
02/11/2019 Proof of Service, Filed
02/13/2019 **Settlement Conference Scheduled**
02/15/2019 **Motion Hearing** (9:00 AM) (Judicial Officer Hubbard, Susan L.)
Result: Motion and/or Praecipe Dismissed
02/19/2019 Order Pro Hac Vice, Signed and Filed
02/19/2019 Proof of Service, Filed
02/21/2019 Miscellaneous Pleadings, Filed
02/21/2019 Proof of Service, Filed
02/21/2019 Proof of Service, Filed
03/01/2019 Miscellaneous Pleadings, Filed
03/01/2019 Objection, Filed
03/01/2019 Miscellaneous Pleadings, Filed
03/01/2019 Miscellaneous Pleadings, Filed
03/01/2019 Miscellaneous Pleadings, Filed
03/01/2019 Proof of Service, Filed
03/15/2019 Proof of Service, Filed
03/15/2019 Proof of Service, Filed
03/20/2019 Miscellaneous Pleadings, Filed
03/20/2019 Proof of Service, Filed
03/21/2019 Proof of Service, Filed
03/22/2019 Order Substituting Defendant Attorney, Signed and Filed
03/26/2019 Proof of Service, Filed
03/27/2019 Order Adjourning Mediation and Settlement Conference, S/F
05/03/2019 Witness List, Filed
05/03/2019 Proof of Service, Filed
07/19/2019 Witness List, Filed
07/19/2019 Proof of Service, Filed
07/19/2019 Witness List, Filed
07/19/2019 Proof of Service, Filed
09/13/2019 Proof of Service, Filed
09/16/2019 Case Removed from Case Evaluation, Signed and Filed
09/17/2019 **Case Evaluation - General Civil**
09/19/2019 Order Adjourning Mediation and Settlement Conference, S/F
09/19/2019 Proof of Service, Filed
09/20/2019 Miscellaneous Pleadings, Filed
09/20/2019 Proof of Service, Filed
09/20/2019 Miscellaneous Pleadings, Filed
09/20/2019 Proof of Service, Filed
09/20/2019 Proof of Service, Filed

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09/20/2019 Proof of Service, Filed
09/20/2019 Miscellaneous Pleadings, Filed
09/24/2019 Proof of Service, Filed
09/24/2019 Proof of Service, Filed
09/24/2019 Proof of Service, Filed
09/25/2019 Proof of Service, Filed
09/25/2019 Proof of Service, Filed
09/25/2019 Proof of Service, Filed
10/04/2019 Proof of Service, Filed
10/04/2019 Miscellaneous Pleadings, Filed
10/17/2019 Miscellaneous Pleadings, Filed
10/17/2019 Objection, Filed
10/17/2019 Proof of Service, Filed
10/18/2019 Proof of Service, Filed
10/18/2019 Miscellaneous Pleadings, Filed
10/18/2019 Miscellaneous Pleadings, Filed
10/18/2019 Proof of Service, Filed
01/21/2020 Proof of Service, Filed
01/21/2020 Motion for Summary Judgment/Disposition, Filed
01/21/2020 Motion for Summary Judgment/Disposition, Filed
01/21/2020 Notice of Hearing, Filed
01/21/2020 Proof of Service, Filed
01/21/2020 Motion for Summary Judgment/Disposition, Filed
01/22/2020 Praecipe, Filed (Judicial Officer: Hubbard, Susan L.)
01/22/2020 Order, Signed and Filed
01/24/2020 Praecipe, Filed (Judicial Officer: Hubbard, Susan L.)
02/12/2020 Proof of Service, Filed
02/13/2020 Order, Signed and Filed
02/18/2020 Order, Signed and Filed
02/18/2020 Proof of Service, Filed
02/25/2020 Order, Signed and Filed
02/25/2020 Proof of Service, Filed
02/25/2020 Brief, Filed
02/25/2020 Proof of Service, Filed
02/25/2020 Exhibit, Filed
02/27/2020 Answer to Motion, Filed
02/27/2020 Proof of Service, Filed
02/27/2020 Exhibit, Filed
03/04/2020 Answer to Motion, Filed
03/04/2020 Proof of Service, Filed
03/05/2020 Reply to Brief, Filed
03/05/2020 Proof of Service, Filed
03/06/2020 Proof of Service, Filed
03/06/2020 Exhibit, Filed
03/06/2020 Exhibit, Filed
03/12/2020 *CANCELED* **Motion Hearing** (10:30 AM) (Judicial Officer Hubbard, Susan L.)
Dismiss Hearing or Injunction
03/18/2020 Notice of Hearing, Filed
03/18/2020 Proof of Service, Filed
03/18/2020 Notice of Hearing, Filed
04/29/2020 Proof of Service, Filed
04/29/2020 Miscellaneous Pleadings, Filed
05/01/2020 Proof of Service, Filed
05/01/2020 Objection, Filed
05/01/2020 Proof of Service, Filed
05/01/2020 Answer to Motion, Filed
05/29/2020 Notice of Hearing, Filed
05/29/2020 Proof of Service, Filed
05/29/2020 Notice of Hearing, Filed
06/26/2020 Motion for Summary Judgment/Disposition, Filed
06/26/2020 Proof of Service, Filed
06/30/2020 Praecipe, Filed (Judicial Officer: Hubbard, Susan L.)
07/08/2020 Brief, Filed
07/08/2020 Proof of Service, Filed
07/08/2020 Proof of Service, Filed
07/08/2020 Miscellaneous Pleadings, Filed
07/09/2020 **Motion Hearing** (11:15 AM) (Judicial Officer Hubbard, Susan L.)
03/12/2020 Reset by Court to 03/20/2020
03/20/2020 Reset by Court to 05/07/2020
05/07/2020 Reset by Court to 06/04/2020
06/04/2020 Reset by Court to 07/09/2020
Result: Held
07/16/2020 *CANCELED* **Settlement Conference** (11:45 AM) (Judicial Officer Hubbard, Susan L.)
Dismiss Hearing or Injunction
10/08/2019 Reset by Court to 12/17/2019
12/17/2019 Reset by Court to 06/10/2020
06/10/2020 Reset by Court to 07/09/2020

	07/09/2020 Reset by Court to 07/16/2020
07/16/2020	*CANCELED* **Motion Hearing** (11:45 AM) (Judicial Officer Hubbard, Susan L.) *Dismiss Hearing or Injunction*
07/17/2020	**Order Granting Motion, Signed and Filed**
07/24/2020	**Claim of Appeal, Filed**
07/24/2020	**Proof of Service, Filed**
07/24/2020	**Closed/Final -Ord Summary Jdmnt/Disp Grntd, Signed and Filed**
08/05/2020	**Proof of Service, Filed**
08/06/2020	**Order, Signed and Filed**
08/13/2020	*CANCELED* **Motion Hearing** (10:30 AM) (Judicial Officer Hubbard, Susan L.) *Dismiss Hearing or Injunction*
01/12/2021	**Transcript, Filed**

FINANCIAL INFORMATION

Plaintiff Charter Township of Canton

	Total Financial Assessment			445.00
	Total Payments and Credits			445.00
	Balance Due as of 03/08/2022			**0.00**
11/12/2018	Transaction Assessment			175.00
11/12/2018	eFiling	Receipt # 2018-93907	Rosati Schultz Joppich & Amtsbuecher, PC	(175.00)
11/13/2018	Transaction Assessment			20.00
11/13/2018	eFiling	Receipt # 2018-94333	Rosati Schultz Joppich & Amtsbuecher, PC	(20.00)
12/18/2018	Transaction Assessment			85.00
12/18/2018	eFiling	Receipt # 2018-103114	Clark Hill	(85.00)
01/17/2019	Transaction Assessment			20.00
01/17/2019	eFiling	Receipt # 2019-04549	Clark Hill	(20.00)
01/22/2019	Transaction Assessment			20.00
01/22/2019	eFiling	Receipt # 2019-05789	Clark Hill	(20.00)
02/05/2019	Transaction Assessment			20.00
02/05/2019	eFiling	Receipt # 2019-09591	Clark Hill	(20.00)
01/21/2020	Transaction Assessment			20.00
01/21/2020	eFiling	Receipt # 2020-06135	Clark Hill	(20.00)
01/21/2020	Transaction Assessment			20.00
01/21/2020	eFiling	Receipt # 2020-06138	Clark Hill	(20.00)
01/22/2020	Transaction Assessment			20.00
01/22/2020	eFiling	Receipt # 2020-06343	Rosati Schultz Joppich & Amtsbuechler PC	(20.00)
06/26/2020	Transaction Assessment			20.00
06/26/2020	eFiling	Receipt # 2020-43134	Clark Hill	(20.00)
07/24/2020	Transaction Assessment			25.00
07/24/2020	eFiling	Receipt # 2020-50741	Rosati Schultz Joppich & Amtsbuechler PC	(25.00)

Appellee's Appendix 005–012

Parcel Split / Warranty Deed

Property Split / Combination Application

CHARTER TOWNSHIP OF CANTON
DEPARTMENT OF MUNICIPAL SERVICES
PLANNING SERVICES DIVISION
1150 Canton Center Road, Canton, MI 48188 • 734/394-5170

Instructions: This completed application, when filed with the necessary supporting materials outlined below, will serve to initiate processing of a property split/combination in accordance with the provisions of the Zoning and Subdivision Control Ordinances. Be sure to complete each applicable section and to provide all requested materials. Incomplete applications will delay the review process.

DATE: 10/27/16

PURPOSE OF APPLICATION: (check one) ✓ PROPERTY SPLIT ___COMBINATION ___BOTH

PROPERTY IDENTIFICATION NUMBER(S): (of all properties effected)
71-135-99-0001-707

ZONING CLASSIFICATION: Industrial NET ACREAGE: 44.7 Total
Parcel A - 28.6 & Parcel B - 16.1

CURRENT LEGAL PROPERTY OWNER(S):

NAME: Frank'o Real Estate Holdings LLC NAME:
STREET: 2390 E Camelback Road, Suite 325 STREET:
CITY: Phoenix CITY:
STATE/ZIP AZ, 85016 STATE/ZIP
PHONE: 734-397-1677 PHONE:

NEW PROPERTY OWNER(S):

NAME: 44650, Inc. NAME:
STREET: 5601 Belleville Road STREET:
CITY: Canton CITY:
STATE/ZIP: MI, 48188 STATE/ZIP:
PHONE: 734-397-7100 PHONE:

PROJECT REPRESENTATIVE:

NAME: Ginger Michalski-Wallace
STREET: 46892 West Rd, Suite 109
CITY: Novi
STATE/ZIP: MI 48377
EMAIL: Ginger@alpine-inc.net
PHONE: 248-906-3701
FAX: 248-926-3765

Property Split / Combination Application

DESCRIBE WHAT YOU WISH TO ACCOMPLISH IN AS MUCH DETAIL AS POSSIBLE ON THE LINES BELOW:

We wish to split this parcel into 2 parcels for the sale of the southerly parcel.

The legal owner(s) and project representative indicated above must sign this application. All correspondence and notices regarding the application will be transmitted to the project representative. by signing this application, the project representative is indicating that all information contained in this application, all accompanying plans and all attachments are complete and accurate to the best of his or her knowledge. This application is not valid unless it is accompanied by a processing and review fee in accordance with the fee schedule as adopted by the Board of Trustees and the completed information as described in the Subdivision Control Ordinance.

SIGNATURE(S) OF LEGAL OWNER(S):

Martin J Powelson

SIGNATURE OF PROJECT REPRESENTATIVE:

For Township Use

File Number: 135-B3-3887 Sec. 34 Date Received: 12/14/16

Fee Paid: $1,350.00 Receipt Number: 20160814/5

Ownership verified by computer - matches current owner(s) _____

Michigan Department of Treasury
2766 (Rev. 01-16)

L-4260

Property Transfer Affidavit

This form is issued under authority of P.A. 415 of 1994. Filing is mandatory.

This form must be filed whenever real estate or some types of personal property are transferred (even if you are not recording a deed). **The Affidavit must be filed by the new owner with the assessor for the city or township where the property is located within 45 days of the transfer.** The information on this form is NOT CONFIDENTIAL.

1. Street Address of Property	2. County	3. Date of Transfer (or land contract signed)
V/L Yost Rd, Parcel B	Wayne	August 3, 2017

4. Location of Real Estate (Check appropriate field and enter name in the space below.)	5. Purchase Price of Real Estate
☐ City ☒ Township ☐ Village Canton	$404,250.00
	6. Seller's (Transferor) Name F.P. Development, LLC
7. Property Identification Number (PIN). If you don't have a PIN, attach legal description. PIN. This number ranges from 10 to 25 digits. It usually includes hyphens and sometimes includes letters. It is on the property tax bill and on the assessment notice. 71-135-99-0001-707, cml	8. Buyer's (Transferee) Name and Mailing Address 44650, Inc. 5601 Belleville Rd Canton, MI 48188
	9. Buyer's (Transferee) Telephone Number

Items 10-15 are optional. However, by completing them you may avoid further correspondence.

10. Type of Transfer. Transfers include deeds, land contracts, transfers involving trusts or wills, certain long-term leases and interest in a business. See Page 2 for list.
☐ Land Contract ☐ Lease ☐ Deed ☐ Other (specify) _____

11. Was property purchased from a financial institution?	12. Is the transfer between related persons?	13. Amount of Down Payment
☐ Yes ☐ No	☐ Yes ☐ No	

14. If you financed the purchase, did you pay market rate of interest?	15. Amount Financed (Borrowed)
☐ Yes ☐ No	

EXEMPTIONS

Certain types of transfers are exempt from uncapping. If you believe this transfer is exempt, indicate below the type of exemption you are claiming. If you claim an exemption, your assessor may request more information to support your claim.

- ☐ Transfer from one spouse to the other spouse.
- ☐ Change in ownership solely to exclude or include a spouse.
- ☐ Transfer between certain family members *(see page 2).
- ☐ Transfer of that portion of a property subject to a life lease or life estate (until the life lease or life estate expires).
- ☐ Transfer to effect the foreclosure or forfeiture of real property.
- ☐ Transfer by redemption from a tax sale.
- ☐ Transfer into a trust where the settlor or the settlor's spouse conveys property to the trust and is also the sole beneficiary of the trust.
- ☐ Transfer resulting from a court order unless the order specifies a monetary payment.
- ☐ Transfer creating or ending a joint tenancy if at least one person is an original owner of the property (or his/her spouse).
- ☐ Transfer to establish or release a security interest (collateral).
- ☐ Transfer of real estate through normal public trading of stocks.
- ☐ Transfer between entities under common control or among members of an affiliated group.
- ☐ Transfer resulting from transactions that qualify as a tax-free reorganization.
- ☐ Transfer of qualified agricultural property when the property remains qualified agricultural property and affidavit has been filed.
- ☐ Transfer of qualified forest property when the property remains qualified forest property and affidavit has been filed.
- ☐ Transfer of land with qualified conservation easement (land only - not improvements).
- ☐ Other, specify: _____

CERTIFICATION

I certify that the information above is true and complete to the best of my knowledge.

Printed Name		
Signature		Date August 3, 2017
Name and title, if signer is other than the owner	Daytime Phone Number 734-744-5950	E-mail Address [illegible]@[illegible].com

2017 AUG 25 AM 9:42

Bernard J. Youngblood
Wayne County Register of Deeds
2017287280 L: 53912 P: 57
08/25/2017 09:42 AM WD Total Pages: 3

MICHIGAN REAL ESTATE TRANSFER TAX
Wayne County Tax Stamp #454224
08/25/2017
Receipt# 17-246629 L: 53912 P: 57
State Tax: $3033.75 County Tax: $444.95

WARRANTY DEED

The Grantor,	**F.P. DEVELOPMENT, LLC**, a Michigan limited company (the "Grantor"),
whose address is	4850 S. Sheldon Road, Canton, MI 48188
Conveys and Warrants to	**44650, INC.**, a Michigan corporation (the "Grantee"),
whose address is	5601 Belleville Road, Canton, MI 48188

the premises situated in the Township of Canton, County of Wayne, State of Michigan, described in Exhibit A attached hereto, together with all and singular tenements, hereditaments, appurtenances and easements benefiting the said premises and all improvements located thereon (collectively, the "Premises"), for the sum of Four Hundred Four Thousand Two Hundred Fifty and No/100 ($404,250.00), the receipt of which is hereby acknowledged.

Grantor grants the Grantee the right to make all permitted divisions under Section 108 of the Land Divisions Act, Act No. 288 of the Public Acts of 1967.

The Premises may be located within the vicinity of farmland or a farm operation. Generally accepted agricultural and management practices which may generate noise, dust, odors, and other associated conditions may be used and are protected by the Michigan Right to Farm Act.

Effective as of August 1, 2017.

GRANTOR:

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

BY: Martin F. Powelson
MARTIN F. POWLESON, a/k/a
Frank Powelson

ITS: Manager and Sole Member

[Notary Page Follows]

SELECT TITLE COMPANY
6870 GRAND RIVER
BRIGHTON, MI 48114
82-17101Y-B

5 - 21 - 3,478.20
WD 3p. RD 4

[Notary Page to Warranty Deed]

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

The foregoing instrument was acknowledged before me this 1st day of August, 2017, by Martin F. Powelson, also known as Frank Powelson, the Manager and Sole Member of **F.P. DEVELOPMENT, LLC**, a Michigan limited liability company, on behalf of said limited liability company.

Antoinette Bostice
Notary Public, State of Michigan
County of Oakland
My Commission Expires 12/10/2018

Notary Public, Oakland County, MI
My Commission Expires: 12/10/2018

When recorded return to and send subsequent tax bills to:

F.P. Development, LLC
Attn: Martin F. Powelson
4850 S. Sheldon Road
Canton, MI 48188

Drafted by:

Sullivan Ward Asher & Patton, P.C.
A. Stuart Tompkins, Esq.
25800 Northwestern Highway
Suite 1000
Southfield, Michigan 48075

EXHIBIT A

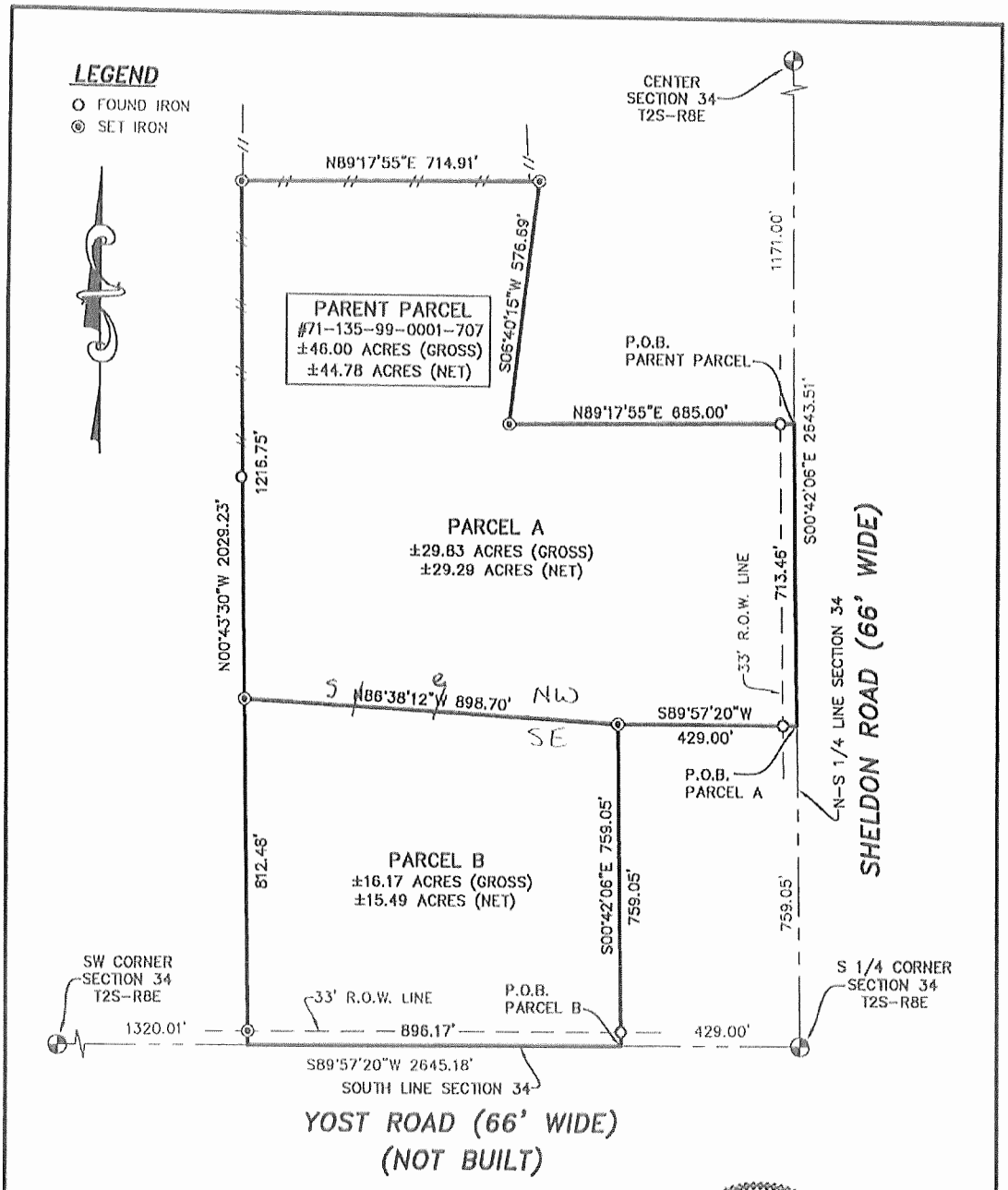
Legal Description

Parcel B

PART OF THE SOUTHWEST ¼ OF SECTION 34, T2S-R8E, CANTON TOWNSHIP, WAYNE COUNTY, MICHIGAN, DESCRIBED AS FOLLOWS: COMMENCING AT THE SOUTH ¼ CORNER OF SECTION 34, SAID POINT BEARING S00'42'06"E 2643.51 FEET FROM THE CENTER OF SAID SECTION 34; THENCE S89 '57'20"W 429.00 FEET ALONG THE SOUTH LINE OF SAID SECTION 34 TO THE POINT OF BEGINNING; THENCE CONTINUING S89 '57'20"W 896.17 FEET ALONG THE SOUTH LINE OF SAID SECTION 34; THENCE N00'43'30"W 812.48 FEET; THENCE N89 44'47"E 896.47 FEET; THENCE S00'42'06"E 815.74 FEET TO THE POINT OF BEGINNING, CONTAINING 16.75 ACRES, MORE OR LESS, SUBJECT TO THE RIGHTS OF THE PUBLIC OVER THE EASTERLY 33.00 FEET FOR SHELDON ROAD

71-135-99-0001-707 (PART OF)
Vacant Ypst Rd Parcel B

This is to certify that there are no delinquent property taxes owed to our office on this property for five years prior to the date of this instrument. No representation is made as to the status of any tax liens or titles owed to any other entities.
Not Examined
No. 17913
Date 11-7-17
WAYNE COUNTY TREASURER Clerk



CERTIFICATION:

I HEREBY CERTIFY THAT I HAVE SURVEYED THE PROPERTY HEREIN DESCRIBED IN ACCORDANCE WITH PUBLIC ACT 132 OF 1970, AND THAT THE ERROR OF CLOSURE OF THIS SURVEY WAS NOT GREATER THAN 1 PART IN 5,000.

Ginger Michalski-Wallace

GINGER MICHALSKI-WALLACE
PROFESSIONAL SURVEYOR NO. 47964

STATE OF MICHIGAN
GINGER MICHALSKI-WALLACE
PROFESSIONAL SURVEYOR
No. 47964
LICENSED PROFESSIONAL SURVEYOR

ALPINE ENGINEERING, INC.
CIVIL ENGINEERS & LAND SURVEYORS
46892 WEST ROAD
SUITE 109
NOVI, MICHIGAN 48377
(248) 926-3701 (BUS)
(248) 926-3765 (FAX)

REVISED 3-30-17

CLIENT: FP DEVELOPMENT

PARCEL SPLIT

4850 SHELDON ROAD

SECTION: 34 TOWNSHIP: 2S RANGE: 8E
CANTON TOWNSHIP
WAYNE COUNTY
MICHIGAN

DATE: 12/7/2016
DRAWN BY: SMD
CHECKED BY: JOH
0 150 300
FBK: 309
CHF: RDF
1/2
16-215
SCALE HOR 1"=300FT.
VER 1"= FT.

PARENT PARCEL:

PART OF THE SOUTHWEST 1/4 OF SECTION 34, T2S-R8E, CANTON TOWNSHIP, WAYNE COUNTY, MICHIGAN, DESCRIBED AS FOLLOWS: COMMENCING AT THE CENTER OF SECTION 34; THENCE ALONG THE NORTH-SOUTH 1/4 LINE OF SAID SECTION 34, S00°42'06"E 1171.00 FEET TO THE POINT OF BEGINNING; THENCE S00°42'06"E 713.46 FEET; THENCE S89°57'20"W 429.00 FEET; THENCE S00°42'06"E 759.05 FEET; THENCE S89°57'20"W 896.17 FEET ALONG THE SOUTH LINE OF SAID SECTION; THENCE N00°43'30"W 2029.23 FEET; THENCE N89°17'55"E 714.91 FEET; THENCE S06°40'15"W 576.69 FEET; THENCE N89°17'55"E 685.00 FEET TO THE POINT OF BEGINNING, CONTAINING 46.00 ACRES, MORE OR LESS, SUBJECT TO THE RIGHTS OF THE PUBLIC OVER THE SOUTHERLY 33.00 FEET FOR YOST ROAD AND THE EASTERLY 33.00 FEET FOR SHELDON ROAD.

PARCEL A:

PART OF THE SOUTHWEST 1/4 OF SECTION 34, T2S-R8E, CANTON TOWNSHIP, WAYNE COUNTY, MICHIGAN, DESCRIBED AS FOLLOWS: COMMENCING AT THE SOUTH 1/4 CORNER OF SECTION 34, SAID POINT BEARING S00°42'06"E 2643.51 FEET FROM THE CENTER OF SAID SECTION 34; THENCE N00°42'06"W 759.05 FEET ALONG THE NORTH-SOUTH 1/4 LINE OF SAID SECTION 34 TO THE POINT OF BEGINNING; THENCE S89°57'20"W 429.00 FEET; THENCE N86°38'12"W 898.70 FEET; THENCE N00°43'30"W 1216.75 FEET; THENCE N89°17'55"E 714.91 FEET; THENCE S06°40'15"W 576.69 FEET; THENCE N89°17'55"E 685.00 FEET; THENCE S00°42'06"E 713.46 FEET ALONG THE NORTH-SOUTH 1/4 LINE OF SAID SECTION 34 TO THE POINT OF BEGINNING, CONTAINING 29.83 ACRES, MORE OR LESS, SUBJECT TO THE RIGHTS OF THE PUBLIC OVER THE EASTERLY 33.00 FEET FOR SHELDON ROAD.

PARCEL B:

PART OF THE SOUTHWEST 1/4 OF SECTION 34, T2S-R8E, CANTON TOWNSHIP, WAYNE COUNTY, MICHIGAN, DESCRIBED AS FOLLOWS: COMMENCING AT THE SOUTH 1/4 CORNER OF SECTION 34, SAID POINT BEARING S00°42'06"E 2643.51 FEET FROM THE CENTER OF SAID SECTION 34; THENCE S89°57'20"W 429.00 FEET ALONG THE SOUTH LINE OF SAID SECTION 34 TO THE POINT OF BEGINNING; THENCE CONTINUING S89°57'20"W 896.17 FEET ALONG THE SOUTH LINE OF SAID SECTION 34; THENCE N00°43'30"W 812.48 FEET; THENCE S86°38'12"E 898.70 FEET; THENCE S00°42'06"E 759.05 FEET TO THE POINT OF BEGINNING, CONTAINING 16.17 ACRES, MORE OR LESS, SUBJECT TO THE RIGHTS OF THE PUBLIC OVER THE SOUTHERLY 33.00 FEET FOR YOST ROAD.

BEARINGS:

BEARINGS ARE BASED ON PREVIOUS SURVEYS OF RECORD.

SECTION CORNER WITNESSES:

CENTER - SECTION 34, T2S-R8E
FOUND PER L.C.R.C. RECORDED IN L. 49256, PP. 1047-1048

S 1/4 CORNER - SECTION 34, T2S-R8E
FOUND PER L.C.R.C. RECORDED IN L. 43380, PP. 56-57

SW CORNER - SECTION 34, T2S-R8E
FOUND PER L.C.R.C. RECORDED IN L. 27797, PP. 630-631

REVISED 3-30-17

ALPINE ENGINEERING, INC.
CIVIL ENGINEERS & LAND SURVEYORS
46892 WEST ROAD
SUITE 109
NOVI, MICHIGAN 48377
(248) 926-3701 (BUS)
(248) 926-3765 (FAX)

CLIENT: FP DEVELOPMENT

PARCEL SPLIT

4850 SHELDON ROAD

SECTION: 34 TOWNSHIP: 2S RANGE: 8E
CANTON TOWNSHIP
WAYNE COUNTY
MICHIGAN

DATE: 12/7/2016
DRAWN BY: SMO
CHECKED BY: JDH
0 150 300
FBK: 309
CHF: RDF
2/2
16-215
SCALE HOR 1"=300FT.
VER 1"= FT.

Appellee's Appendix 013

Aerial Photograph of Property (2017)

Notes: Tree Clearing

Date: Tue, 18 Apr 2017

Appellee's Appendix 014–031

Charter Township of Canton's Verified Complaint (without exhibits), Dated November 9, 2018

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

CHARTER TOWNSHIP OF CANTON,

Plaintiff,

Case No. 18- -CE
Hon.

v

44650, INC., a Michigan corporation,

Defendant.

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC
Anne McClorey McLaughlin (P40455)
Stephanie Simon Morita (P53864)
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There is no other pending or resolved civil action arising out of the transaction or occurrence as alleged in this verified complaint.

VERIFIED COMPLAINT

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

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

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

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

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

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

COMMON ALLEGATIONS

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

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

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

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

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

10. The letter further noted some pertinent information about use of the Property, including, but not limited to, the requirements to submit a site plan as a pre-condition to development and the requirement to obtain a tree removal permit prior to the removal of any trees from the Property.

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

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

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

14. On January 22, 2018, following receipt of the documents identified in the July 14, 2017 and November 27, 2017 letters, Ms. Michalski-Wallace was notified the property split was complete and the new parcel identification numbers had been issued. (Exhibit G).

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

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

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

> 1. The removal or relocation of any tree with a DBH of six inches or greater on any property without first obtaining a tree removal permit shall be prohibited.
>
> 2. The removal, damage or destruction of any landmark tree without first obtaining a tree removal permit shall be prohibited.
>
> 3. The removal, damage or destruction of any tree located within a forest without first obtaining a tree removal permit is prohibited.
>
> 4. Clear cutting or grubbing within the dripline of a forest without first obtaining a tree removal permit is prohibited. (Exhibit H, Canton Township Forest Preservation and Tree Clearing Ordinance).

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

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

> a. Clear cutting of approximately 16 acres of trees without a Township permit;
>
> b. Cutting of trees and other work within a county drain and drain easement under the jurisdiction of Wayne County;

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

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

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

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

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

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

23. Based on the possible impact to the rights of other public agencies having an interest in the Property, Ms. Thurston notified the Michigan Department of Environmental Quality, Wayne County and the Wayne County Drain Commissioner's Office of the tree removal and impacts to regulated areas.

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

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

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

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

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

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

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

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

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

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

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

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

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

37. Under Canton Township ordinance, a "regulated tree" is "…any tree with a DBH [diameter breast height] of six inches or greater, " and a "landmark tree" is defined as "…any tree which stands apart from neighboring trees by size, form or species, …, which has a DBH of 24 inches or more." (Exhibit H, Canton Township Forest Preservation and Tree Clearing Ordinance, §§ 5A.05 and 5A.01.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Removal of any landmark tree;

c. Removal of any tree within a forest;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VERIFICATION

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

Leigh Thurston
Leigh Thurston

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

Joan Ada Lager 11-2-18

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

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

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

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Appellee's Appendix 032–037

Charter Township of Canton's Responses to Defendant 44650, Inc.'s First Request for Admissions
Dated March 20, 2019

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF CANTON,
a Michigan municipal corporation,

Plaintiff/Counter-Defendant,

v.

44650, INC., a Michigan corporation,

Defendant/Counter-Plaintiff.

Case No. 18-014569-CE
Hon. Susan L. Hubbard

Anne McClorey McLaughlin (P40455)
Stephanie Simon Morita (P53864)
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PLAINTIFF/COUNTER-DEFENDANT CHARTER TOWNSHIP OF CANTON'S RESPONSES TO DEFENDANT/COUNTER-PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS

REQUEST FOR ADMISSION No 1: Admit that removing trees from one's own private property does not, of itself, constitute a nuisance at common law.

RESPONSE: Canton objects to Request for Admission No. 1 as irrelevant and not within the scope of MCR 2.312(A) and MCR 2.302(B). The existence of a nuisance at common law has not been alleged in this matter. The Request also presents a hypothetical situation and does not request admission of the truth of a fact or the application of law to fact. Further, the request is vague, ambiguous and overbroad. Without waiving such objection, Canton admits that removing trees from one's own property does not of itself constitute a nuisance at common law.

REQUEST FOR ADMISSION No 2: Admit that the removal of trees from the Property has not resulted in flooding, fires, the spread of infectious disease, or any other tangible injury to neighboring properties.

RESPONSE: Canton objects to Request for Admission No. 2 as irrelevant and not within the scope of MCR 2.312(A) and MCR 2.302(B). The request is directed to the elements of a nuisance *per accidens*, which is not at issue in this case. The extensive removal of trees from the Property without applying for and obtaining a permit violates the Zoning Ordinance. By operation of law, violation of the Zoning Ordinance is presumed to cause injury to the health, safety and general welfare of the public and does not depend on circumstances. Without waiving this objection, Canton admits that it presently has no evidence that the unpermitted removal of trees from the Property has resulted in flooding, fires, the spread of infectious disease, or any other tangible injury to neighboring properties.

REQUEST FOR ADMISSION No 3: Admit that the Township has no evidence that anyone has been injured by the removal of the trees from the Property.

RESPONSE: Canton objects to Request for Admission No. 3 as irrelevant and not within the scope of MCR 2.312(A) and MCR 2.302(B). The request is directed to the elements of a nuisance *per accidens*, which is not at issue in this case. The extensive removal of trees from the Property without applying for and obtaining a permit violates the Zoning Ordinance. By operation of law, violation of the Zoning Ordinance is presumed to cause injury to the health, safety and general welfare of the public and does not depend on circumstances. Without waiving this objection, Canton admits that it presently has no evidence that anyone has been injured by the unpermitted removal of trees from the Property.

REQUEST FOR ADMISSION No 4: Admit that at the time of the removal of trees made the basis of this lawsuit, the Property contained at least some invasive species covered by the Insect Pest and Plant Disease Act, MCL 286.201 et seq.

RESPONSE: Canton is unable to admit or deny this request, as Defendant/Counter-Plaintiff never submitted a tree survey to Canton or identified the items that were removed from the property. Further, Defendant/Counter-Plaintiff clear-cut the Property without notifying Canton and before Canton had the opportunity to inspect the property.

REQUEST FOR ADMISSION No 5: Admit that at the time of the removal of trees made the basis of this lawsuit the Property contained at least some invasive species covered by the Michigan Insect Pest and Plant Diseases Law, MCL 286.251 et seq.

RESPONSE: Canton is unable to admit or deny this request, as Defendant/Counter-Plaintiff never submitted a tree survey to Canton or identified the items that were removed from the property. Further, Defendant/Counter-Plaintiff clear-cut the Property without notifying Canton and before Canton had the opportunity to inspect the property.

REQUEST FOR ADMISSION No 6: Admit that at the time of the removal of trees made the basis of this lawsuit the property contained at least some scrub brush, trash, and other objects or vegetation that are not protected under the Tree Ordinance.

RESPONSE: Canton objects to Request for Admission No. 6, as irrelevant and not within the scope of MCR 2.312(A) and 2.302(B). Canton has not enforced and does not seek to enforce the Forest Preservation and Tree Clearing Ordinance for removal of trash, objects or vegetation that is not regulated under the Ordinance. Without waiving this objection, Canton is unable to admit or deny this request, as Defendant/Counter-Plaintiff never submitted a tree survey to Canton or identified what was removed from the property. Further, Defendant/Counter-Plaintiff clear-cut the Property without notifying Canton and before Canton Township had the opportunity to inspect the property.

REQUEST FOR ADMISSION No 7: Admit that the Defendant's planting of Christmas trees on the property is not harmful to the health, safety, or general welfare of the Defendant's neighbors.

RESPONSE: Canton objects to Request for Admission No. 7 as irrelevant and not within the scope of MCR 2.312(A) and MCR 2.302(B). The request is directed to the elements of a nuisance *per accidens*, which is not at issue in this case. Without waiving this objection, Canton denies this request, as the planting of Christmas trees on the Property is an agricultural use not permitted on the Property, which is zoned LI-Light Industrial, and violates the Zoning Ordinance. By operation of law, violation of the Zoning Ordinance is presumed to cause injury to the health, safety and general welfare of the public and does not depend on circumstances.

REQUEST FOR ADMISSION No 8: Admit that prior to the adoption of the Tree Ordinance, citizens of the Township had a right to remove trees from their property without a tree removal permit.

RESPONSE: Canton objects to this Request as irrelevant, vague, ambiguous and overbroad, and is an improper hypothetical, and therefore is not within the scope of MCR 2.302(B) and MCR 2.312(A). Without waiving this objection, Canton admits that prior to the adoption of the original ordinance in the 1970s by Canton Township, which was the predecessor to the Forest Preservation and Tree Clearing Ordinance, property owners were generally allowed to remove trees from their own property without a tree removal permit *from the Township*. This does not include permits that may have been required by other governmental agencies under regulations governing the type and/or location of the work performed. In further response, Canton states that under the Forest Preservation and Tree Clearing Ordinance, only removal of trees with a diameter breast height ("dbh") in the Ordinance of 6 inches or greater requires a permit. Existing agricultural/farming uses, and commercial nurseries and trees farms are also exempt from the permit requirements. Canton Code of Ordinances, Appendix A, Sec. 5A.05(B). Additionally, certain species of plants and trees, and dead or dying trees do not require a permit prior to removal.

REQUEST FOR ADMISSION No 9: Admit that under the Tree Ordinance it would be unlawful for Defendant to remove trees on its property for the purpose of selling them as timber, unless it applied for and received a tree removal permit from the Township.

RESPONSE: Canton objects to Request for Admission No. 9 as it is not within the scope of MCR 2.312(A) and MCR 2.302(B). The Request presents a hypothetical situation and does not request admission of the truth of a fact or the application of law to fact. Further, it is irrelevant, vague, ambiguous and overbroad. Without waiving this objection, Canton denies this Request as phrased. Under the Forest Preservation and Tree Clearing Ordinance, only removal of trees with a diameter breast height ("dbh") of 6 inches or greater requires a permit. Commercial nursery and tree farms are also exempt from the permit requirements. Canton Code of Ordinances, Appendix A, Sec. 5A.05(B). Additionally, certain species of trees do not require a permit prior to removal. In further response, Canton states that agricultural uses are not permitted on the Property.

REQUEST FOR ADMISSION No 10: Admit that under the Tree Ordinance it would be unlawful for Defendant to remove trees on its property for the purpose of using them as firewood, unless it applied for and received a tree removal permit from the Township.

RESPONSE: Canton objects to Request for Admission No. 10, as it is not within the scope of MCR 2.312(A) and MCR 2.302(B). The Request presents a hypothetical situation and does not request admission of the truth of a fact or the application of law to fact. Further, it is irrelevant, vague, ambiguous and overbroad. Without waiving this objection, Canton denies this Request. Under the Forest Preservation and Tree Clearing Ordinance, only removal of trees with a diameter breast height ("dbh") of 6 inches or greater require a permit. Additionally, a permit is not required for removal of trees from existing agricultural/farming operations, existing commercial nursery/tree farms, and occupied lots of less than two acres. Removal of dead or dying trees also does not require a permit. Canton Code of Ordinances, Appendix A, Sec. 5A.05(A) and (B).

REQUEST FOR ADMISSION No 11: Admit that under the Tree Ordinance it would be unlawful for Defendant to remove trees on its property for the purpose of building a house, unless it applied for and received a tree removal permit from the Township.

RESPONSE: Canton objects to Request for Admission No. 11, as it is not within the scope of MCR 2.312(A) and MCR 2.302(B). The Request presents a hypothetical situation and does not request admission of the truth of a fact or the application of law to fact. Further, it is irrelevant, vague, ambiguous and overbroad. Without waiving these objections, Canton denies this Request. Under the Forest Preservation and Tree Clearing Ordinance, only removal of trees with a diameter breast height ("dbh") of 6 inches or greater require a permit. Additionally, a permit is not required for removal of trees from existing agricultural/farming operations, existing commercial nursery/tree farms, and occupied lots of less than two acres. Canton Code of Ordinances, Appendix A, Sec. 5A.05(B). In further response, Canton states that Defendant/Counter-Plaintiff would not be permitted to construct a house on the property, as residential uses are not permitted on the Property, which is zoned LI-Light Industrial.

REQUEST FOR ADMISSION No 12: Admit that under the Tree Ordinance it would be unlawful for Defendant to remove trees on its property for the purpose of wood working or boat building, unless it applied for and received a permit from the Township.

RESPONSE: Canton objects to Request for Admission No. 12, as it is not within the scope of MCR 2.312(A) and MCR 2.302(B). The Request presents a hypothetical situation and does not request admission of the truth of a fact or the application of law to fact. Further, it is irrelevant, vague, ambiguous and overbroad. Without waiving this objection, Canton denies this Request. Under the Forest Preservation and Tree Clearing Ordinance, only removal of trees with a diameter breast height ("dbh") of 6 inches or greater requires a permit. Canton Code of Ordinances, Appendix A, Sec. 5A.05(A).

REQUEST FOR ADMISSION No 13: Admit that the Tree Ordinance applies to the removal of a tree even if the removal of that tree would not constitute a nuisance in fact.

RESPONSE: Canton objects to Request for Admission No. 13. The Request presents a hypothetical situation, and does not request admission of the truth of a fact or the application of law to fact. It is also vague and ambiguous, and overbroad, and is therefore not within the scope of MCR 2.312(A) and MCR 2.302(B). Without waiving these objections, Canton denies this Request. Under the Forest Preservation and Tree Clearing Ordinance, only removal of trees with a diameter breast height ("dbh") of 6 inches or greater requires a permit. Additionally, a permit is not required for removal of trees from existing agricultural/farming operations, existing commercial nursery/tree farms, and occupied lots of less than two acres. Canton Code of Ordinances, Appendix A, Sec. 5A.05(B). In further response, Canton states that the existence of a nuisance in fact is not at issue in this matter.

REQUEST FOR ADMISSION No 14: Admit that at the time of the removal of trees made the basis of this lawsuit, the market value of the Property was less than $450,000.

RESPONSE: Canton Township is unable to admit or deny this fact as: (1) The Township has no involvement in the sale or purchase of private property and therefore has no knowledge or information of the details of any individual transaction; (2) The Township has not been provided with a copy of any property appraisal for the Property at issue in this matter; and (3) the Township has not conducted its own independent appraisal of the Property.

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

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CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2019, I electronically filed the foregoing paper with the Clerk of the Court using the MiFile system which will send notification of such filing to all counsel of record.

/s/ Dawn Hallman

Appellee's Appendix 038–054

Charter Township of Canton's Motion for Ex-Parte TRO and Order to Show Cause (without exhibits)
Dated November 12, 2018

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF CANTON,

Plaintiff,

Case No. 18-014569-CE

Hon. Susan L. Hubbard

v

44650, INC., a Michigan corporation,

Defendant.
_____/

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_____/

PLAINTIFF'S MOTION FOR EX-PARTE TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Plaintiff, CHARTER TOWNSHIP OF CANTON, by and through its counsel, files this Motion for Ex-Parte Restraining Order and Order to Show Cause against Defendant, 44650 INC., and states as follows:

1. Plaintiff requests that this Honorable Court issue an ex-parte temporary restraining order enjoining Defendant, 44650, Inc. from conducting any activities on the property located east of Belleville Road and north of Yost Road, parcel identification number 71-135-99-0001-709, Canton Township, Wayne County, Michigan, including the planting of any further Christmas trees, until further order of the Court.

2. As grounds for this Motion, Plaintiff relies upon the Verified Complaint, the Brief in Support of Plaintiff's Motion, and any testimony the Court may allow at a hearing on this matter.

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BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR EX-PARTE TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

Plaintiff, CHARTER TOWNSHIP OF CANTON, by and through its counsel, submits this Brief in support of its Motion for Ex-Parte Restraining Order and Order to Show Cause.

FACTUAL BACKGROUND

The facts as stated here are established by the Verified Complaint, to which Leigh Thurston, the Canton Township Landscape Architect and Planner, has attested under oath. Alphabetical exhibit references are exhibits to the Verified Complaint that Plaintiff has attached here for the Court's convenience as Exhibit 1.

Defendant, 44650, Inc., is a Michigan corporation located at 5601 Belleville Road in Canton Township, Michigan. The resident agent for Defendant is Gary Percy. At issue in this case is the actions taken by Defendant with respect to a 16-acre vacant parcel of property located east of Belleville Road and north of Yost Road, parcel identification number 71-135-99-0001-709.

On or about October 27, 2016, Canton Township's Planning Services Division received an application to split off a 16-acre parcel (the "Property") from a 40-acre parcel (the "Parent Parcel") owned by FP Development, LLC. The owner for the 16-acre split parcel was identified as Defendant, 44650, Inc. (Verified Complaint Ex. A.) On December 22, 2016, the Township

responded with comments on items that needed to be addressed before finalizing the split request.

Notably, in April 2017, the Property was still fully treed and no work had commenced on the Property, as evidenced by the aerial photograph. (Verified Complaint Ex. B.)

On July 14, 2017, the Township notified Ginger Machaelski-Wallace, the engineer for FP Development and Defendant, that the split application was tentatively approved, subject to the submission of certain, enumerated documents. (Verified Complaint Ex. B.) The letter noted:

(1) The subject property was zoned LI, Light Industrial, and permitted uses did not include truck terminals;

(2) Site plan approval must be obtained for any activities or development on the property;

(3) A tree removal permit must be obtained from Planning Services prior to any tree removal activity taking place on the site;

(4) Approval of the land division was not a determination of whether the land division complies with other ordinances of the Township or the State;

(5) Approval of the Land Division is no a determination that the Land Division complies with other Ordinances of Canton Township of laws of the State of Michigan and

(6) Parcel identification numbers would not be active until the tax rolls were set in February.

Defendant was told that when a copy of the recorded deed for the newly created parcel including the page and number assigned by the Wayne County Register of Deeds, the completed land division form, and property transfer affidavit were provided, the property split would be finalized and parcel identification numbers assigned.

On August 1, 2017, a Deed was signed by FP Development Manager and Sole Member, Martin F. Powelson, conveying the 16-acre parcel to Defendant.

Unbeknownst to the Township, at some point in time following conveyance of the Property, Defendant and/or its agent had every single tree removed from the Property. (See

Verified Complaint Exhibit E.) In addition, Defendant bulldozed the acreage and removed the existing stumps – all in an effort to hide the extent of destruction.

On November 27, 2017, the property split was tentatively approved by Planning Services. As of this time, Defendant still had not provided the documents requested in the July 14, 2017 letter. Ms. Machaelski-Wallace was notified again that the documents were required, and again cautioned, among other things, that site plan approval must be obtained before any activities or development on the parcel, and any tree removal required a prior tree removal permit. Following receipt of the documents identified in the July 14, 2017 and November 27, 2017 letters, Ms. Machaelski-Wallace was notified the property split was complete and new parcel identification numbers were assigned.

In late April of 2018, Township landscape architect and planner Leigh Thurston received a phone call from an individual owning land adjacent to the Property, inquiring why so many trees were permitted to be removed. This was the first notification that the Township had that any trees had been removed from the Property. After viewing the Property from a neighboring parcel, Ms. Thurston noted the following ordinance violations:

a. Clearcutting of approximately 16 acres of trees without a Township permit;
b. Cutting of trees and other work within a County drain and drain easement under the jurisdiction of Wayne County;
c. Cutting of trees and other work within wetlands regulated by the Michigan Department of Environmental Quality;
d. Performing underground work adjacent to a public watermain under the jurisdiction of Canton Township; and
e. Parking vehicles within the Yost Road public right-of-way.

At that time, Ms. Thurston also observed a woodchipping operation on the property.

Based on the possible impacts to the rights of other public agencies, Ms. Thurston notified the Michigan Department of Environmental Quality, Wayne County, and the Wayne County Drain Commissioner's Office of the tree removal and impacts to regulated areas. Ms. Thurston then contacted Gary Percy, the resident agent for Defendant, to advise him of the violations. Despite

a history of violating the Township's ordinances in the past, Mr. Percy disingenuously professed that he had no knowledge that a permit was required to remove trees from the Property. Through subsequent communications with the Township Supervisor, Mr. Percy stated that he intended to plant corn on the Property.

Land within the Township is governed by the Canton Township Zoning Ordinance. The Property in question is zoned LI, Light Industrial. The intent of the LI District is to provide locations for planned industrial development, including planned industrial park subdivisions. (Verified Complaint Ex. N, Art. 22 of Appendix of the Canton Code of Ordinances.) Agricultural uses – such as the planting of corn or a Christmas tree farm – are not allowed as a permitted as of right or special land use in the LI zoning district. In addition, under the Zoning Ordinance, an agricultural use requires a minimum of 40 acres; the subject property is only 16 acres.

Further, the Canton Township Zoning Ordinance requires a permit for tree removal, Article 5A, § 5A.05(A) for:

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

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

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

4. Clearcutting or grubbing within the drip line of a forest without first obtaining a tree removal permit is prohibited.

(Verified Complaint Ex. H, Canton Township Forest Preservation and Tree Clearing Ordinance.) Under Canton Township's ordinance, a "regulated tree" is ". . . any tree with a DBH [diameter breast height] of six inches or greater" and a "landmark tree" is a defined as ". . . any tree which stands apart from neighboring trees by size, form or species . . . which has a DBH of 24 inches or more." (Verified Complaint Ex. H, § 5A.05 and 5A.01.) The Township's ordinance requires

replacement of regulated trees on a 1:1 ratio, and replacement of landmark trees on a 3:1 ratio. (Verified Complaint Ex. H, § 5A.08.)

On June 11, 2018, the MDEQ issued a violation notice and order to restore to Gary Percy on behalf of Defendant, requiring him to complete certain actions to bring the Property in compliance with the Natural Resources and Environmental Protection Act, including, among other things, to "refrain from all farming activities (e.g., plowing, seeding, minor drainage, cultivation) within the wetland areas . . ." (Verified Complaint Ex. I.) Mr. Percy was also required to "remove all unauthorized fill material (e.g., wood chips) . . . from the property."

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

On July 31, 2018, the Wayne County Drain Commissioner's Office sent correspondence to Gary Percy, on behalf of Defendant, advising him that actions taken on the Property may have negatively impacted the Fisher and Lenge Drainage District, an established county drain under the Michigan Drain Code, 1956 PA 40. (Verified Complaint Ex. K.) The Wayne County Drain Commissioner's Office later advised the Township that a notice of violation had been issued for the unauthorized work.

Despite numerous requests from Township representatives, up to and including the Township Supervisor, staff was denied access to the Property by Gary Percy to analyze the Property in order to determine the extent of the tree removal. On July 24, 2018, the Township's in-house counsel was contacted by counsel for Defendant, indicating all communications concerning the Property was to be directed to him. After much back and forth, a date was agreed upon to conduct an inspection of the Property.

On August 22, 2018, representatives of the Township – including the landscape architect/planner, an ordinance officer and a consulting arborist – met representatives of Defendant to walk the Property and the Parent Parcel to conduct a scientific analysis to come up with an estimate of how many trees and what types of trees had been removed from the Property. The analysis included, among other things, identifying six representative plots on the "still treed" Parent Parcel and then counting and identifying the species of the regulated trees within those plots. Using the numbers and types of trees that were identified in the representative plots and taking into consideration soil conditions and topography of the Property, a scientific estimate was made of the number and types of trees that were removed. The analysis concluded that 1,385 "regulated trees" and 100 "landmark" trees were removed. (Verified Complaint Ex. M.) Based upon the requirements in the Township's Tree Ordinance, and based on the Township's analysis of the tree removal, Defendants were required under Township ordinance to plant 1,685 trees in replacement of the 1,485 trees that were removed. Zoning Ordinance, § 5A.08(E).

In lieu of planting replacement trees, Defendant has the option of paying into the Township's Tree Fund the market value of the number of required replacement trees, in accordance with § 5A.08(E) of the Zoning Ordinance. With current market values for the types of trees required to replace the 1,385 regulated trees removed running between $225 and $300 per tree, and market value of the trees required to replace the 100 landmark trees averaging $450 per tree, the total amount Defendant is responsible for paying into the Tree Fund for the unlawfully removed trees is as much as $550,500.

At the request of Defendant's counsel, a proposal was sent to resolve the dispute between the Township and Defendant on September 13, 2018. No meaningful response was received. Rather, the Township learned on October 22, 2018, through a news media report initiated by Defendant, that Defendant was claiming that it was now starting a "Christmas tree farm," and

that Defendant had planted some 1,000 Norway Spruce trees on the Property. As noted above, the Property is zoned LI, Light Industrial, and a Christmas tree farm is not a permitted use. To use the Property for agricultural purposes, Defendant would have to file an application to rezone the Property to RA, Rural Agricultural, and a request for a variance to allow the agricultural use on property smaller than 40 acres. No applications for either have been submitted to the Township.

The Property also contains regulated wetlands. Because of this, Defendant is required to obtain a permit from the MDEQ to plant trees. In an email dated October 23, 2018, an MDEQ representative confirmed that no such permit had been obtained. (Verified Complaint Ex. P.)

This is not the Township's first run-in with Mr. Percy and his businesses. Mr. Percy is also the President and Resident Agent of AD Transport, Inc., located on nearby property. In the past, Mr. Percy has expanded the AD Transport building and constructed a parking lot, without obtaining prior approvals and permits, resulting in litigation. In addition, Mr. Percy tampered with the Township's water meter, resulting in the AD Transport industrial use receiving free water for a period of time. The Township's requests for ordinance compliance by Mr. Percy have been repeatedly ignored, Mr. Percy continues to thumb his nose at the ordinance requirements, and he continues to take actions in violation of the Township Code. Mr. Percy has made it clear through his attorney and through the media that he intends to continue to plant a Christmas tree farm on the site. (Verified Complaint Ex. R.)

The Township seeks an Ex-Parte Temporary Restraining Order to halt any further Christmas tree plantings on the Property, and an Order to Show Cause requiring Defendant to appear and show cause why a preliminary injunction should not issue restraining Defendant from conducting any further activities on the Property in violation of the Township's ordinances.

ARGUMENT

I. Defendant's violations of the Zoning Ordinance are a nuisance per se which shall be abated by the Court.

It is well-settled that the use of land in violation of a local ordinance constitutes a nuisance *per se*. *High v Cascade Hills Country Club*, 173 Mich App 622 (1988). Specifically, the Michigan Zoning Enabling Act, MCL 125.3407, states as follows in relevant part:

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

Therefore, once the contested activity is shown to be in violation of the ordinance, the party bringing the action need not prove a nuisance in fact, as the ordinance violation renders the use or activity a nuisance *per se*. *City of Fenton v Nyhof*, COA No. 186625, 197 Mich App Lexis 2853; *Towne v Harr*, 185 Mich App 230, 232 (1990); *High v Cascade Hills Country Club, supra*; *Independence Township v Eghigian*, 161 Mich App 110, 114 (1987). More importantly, a showing of irreparable and immediate harm to the governmental entity is not required before the complained of activity must be enjoined. *Independence Township v Skibowski*, 136 Mich App 178, 184 (1984); *City of Fenton v Nyhof, supra*. Thus, where the activity violates the Township's Zoning Ordinance, the trial court is required to find the use a nuisance *per se* pursuant to MCL 125.3407; *Towne, supra*, at 232.

MCL 125.3407 requires that once a use or activity is determined to constitute a nuisance *per se*, the" Court shall order the nuisance abated . . ." The use of the word "shall" in a statute indicates mandatory rather than discretionary action. *City of Lake Angelus v Oakland County Road Comm'n*, 194 Mich App 220, 224 (1992). Thus, the Michigan legislature has mandated

enjoinment of conditions violating a municipality's ordinance regardless of their impact upon the health, safety, welfare, and morals of the surrounding community. *Towne, supra,* at 231-232; *High, supra*, at 630. The trial court errs as a matter of law by failing to enjoin a defendant's prohibited activity pursuant to MCL 125.3407. *City of Fenton v Nyhof*, *supra*.

As stated in the Verified Complaint, and the factual background above, Defendant has violated the Zoning Ordinance in the following ways:

1. Violation of Section 58.05-failure to obtain a tree removal permit.

The Zoning Ordinance requires a permit to remove trees from property in the following situations:

a. Removal or relocation of any tree with a diameter breast height of six inches or greater;
b. Removal of any landmark tree;
c. Removal of any tree within a forest;
d. Clearcutting or grubbing within the drip line of a forest.

It is undisputed that neither Defendant nor any representative on behalf of Defendant obtained a permit, yet a permit was required to perform activities on the Property. Instead of obtaining the permit, Defendant clear cut the entire 16-acre parcel. Failure to obtain a tree removal permit prior to clearcutting, the removal of 1,385 "regulated trees" and 100 "landmark trees," destroying the forest that covered the 16-acre site, and clearcutting the Property is a blatant violation of § 58.05 of the Zoning Ordinance.

After being caught, Mr. Percy claimed first that he intended to plant corn, and later that he was going to start a Christmas tree farm. It is believed that these claims were made because Defendant was trying to circumvent the ordinance by attempting to qualify for the exemption contained in § 58.08(C) of the Zoning Ordinance. That section exempts "agricultural/farming operations" and "commercial nursery/tree farm operations" from the requirements of the Tree Ordinance. However, as noted, these uses are *not* permitted in the LI District, and are limited to

the RA, Rural Agricultural District under the Zoning Ordinance. The exemption would only apply to those operations taking place on properly zoned land. Defendant cannot attempt to circumvent his ordinance violations by claiming an exemption.

2. Section 58.07-failure to erect a protective barrier around a landmark tree.

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

> Sec. 58.07-Protective Barriers. It shall be unlawful to develop, clear, fill or commence any activity for which a use permit is required in or around a landmark/historic tree or forest without first erecting a continuous protective barrier around the perimeter drip line.

(Verified Complaint Ex. H.) It is undisputed that neither Defendant, nor any representative on behalf of Defendant, erected any barrier around a landmark tree, but instead, in callous disregard of the ordinance, removed all landmark trees. Again, Defendant clear cut the entire 16-acre parcel without erecting a protective barrier. The failure to erect a protective barrier around the landmark trees is a violation of § 58.07.

3. Section 2.24-failure to observe setback from wetland areas and water courses.

The Canton Township Zoning Ordinance prohibits any "earth movement, excavation, land balancing or earth disruption of any kind" within 25-feet of any wetland. (Verified Complaint Ex. S.) As verified by the inspection of the MDEQ and confirmed in a letter dated June 11, 2018 from the MDEQ issuing a violation notice and order to restore, Defendant not only excavated, moved and disrupted the land earth within 25 feet of the wetland on the Property, but also removed earth within the wetland itself. The movement of the earth during the clearcutting of the Property within 25 feet of the wetland is a violation of § 2.24 of the Zoning Ordinance.

4. Article 22.00-LI, Light Industrial District.

Section 27.09(1) of the Zoning Ordinance declares that any uses carried on in violation of this ordinance are declared to be a nuisance *per se* and shall be submit to abatement or other action by a court of appropriate jurisdiction. (Verified Complaint Ex. S.)

Pursuant to § 2.01A of the Zoning Ordinance, no land can be used except in conformity with the regulations specified for the zoning district in which the land is located. (Verified Complaint Ex. T.) As set forth above, Defendant is using the Property for a use not permitted under the LI District. Agricultural uses, farming operations, and commercial nursery/tree farm operations are permitted only in the RA, Rural Agricultural District, under the Zoning Ordinance.

The existence of the above violations is confirmed by the Complaint, as verified under MCR 1.109(d)(3) by Leigh Thurston, the Township's Landscape Architect/Planner. attached hereto as Exhibit 1.

In summary, there is no question that the Defendant acted in total disregard of ordinance requirements and violated the Township's Zoning Ordinance. These violations are nuisances *per se*, which shall be abated by the Court.

II. The Court should grant a Temporary Restraining Order to preserve the status quo and to prevent further and imminent harm caused by Defendant's violations of Township ordinance.

Motions for Temporary Restraining Order are governed by MCR 3.310:

> (B) (1) A temporary restraining order may be granted without written or oral notice to the adverse party or the adverse party's attorney only if
>
> (a) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant from the delay required to effect notice or from the risk that notice will itself precipitate adverse action before an order can be issued;
>
> (b) the applicant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required; and
>
> (c) a permanent record or memorandum is made of any nonwritten evidence, argument, or other representations made in support of the application.

The purpose of a temporary restraining order is to prevent immediate and irreparable harm during the period necessary to conduct hearing on a preliminary injunction. *Dow Chemical Co v Blum*, 469 F Supp 892 (E D Mich 1979). An injunction represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity. *Davis v City of Detroit Financial Review Team*, 296 Mich App 568; 821 NW2d 896 (2012). Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. *Id.*

Here, the Verified Complaint establishes this situation as the type contemplated by the courts requiring the drastic measure of a temporary restraining order. Defendant's zoning ordinance violations creating a nuisance *per se* and constituting immediate and irreparable injury have continued despite the Township's admonitions and attempts to gain compliance and will continue without a temporary restraining order. Defendant's principal, Gary Percy, has already flouted the necessity of obtaining a permit to remove some 1,500 trees or otherwise complying with the Zoning Ordinance. He has further refused to cease the ordinance violations by continuing to plant a "Christmas tree farm" on property not zoned for such a use. The Norway Spruce trees that are being planted do not qualify as replacement trees for the 1,485 trees lost to Defendant's improper removal, as they are not of the same type and species as those removed and are not the proper size for replacement trees. In addition, the purpose of a Christmas Tree farm is to plant trees that are subsequently removed and sold. The Tree Ordinance requires the permanent replacement of trees. Defendant has also largely ignored the Township in its efforts to obtain compliance with the Zoning Ordinance.

Township Attorney and co-counsel for Plaintiff also wrote to Defendant's attorney on September 13 and October 8, 2018 (see Exhibit 2) in an attempt to resolve the matter short of

litigation. Rather than cease its violations and signal its willingness to cooperate with the Township or to make any effort to comply, Defendant has gone to the media to try its case in the court of public opinion to generate sympathy for its self-created plight and to impugn the Township for its efforts merely to enforce its ordinances. (Ex. R.) Ms. Kolb has attempted to obtain Defendant's cooperation but has been met with refusal.

Based on Defendant's stated intention to continue activities that violate Township ordinances, Plaintiff has reason to believe that if notice of this motion is provided to Defendant, Defendant will step up its activities on the property and take other action to hide or to destroy evidence of its violations before a TRO is issued. Therefore, Plaintiff submits that notice should not be required before issuance of a TRO. MCR 3.310(B)(1)(b).

When a temporary restraining order (preliminary injunction) is sought, the Court must analyze the facts and circumstances of the case according to four factors: (1) whether plaintiff has shown a strong or substantial likelihood of probability of success on the merits; (2) whether plaintiff has shown irreparable injury absent injunctive relief; (3) whether issuance of a injunctive relief will cause substantial harm to others; and (4) whether the public interest would be served by issuing the requested injunctive relief. *Thermatool Corp v Borzym,* 227 Mich App 366, 376; 575 NW2d 334 (1998). Even though Plaintiff does not have to make a showing of these elements – as proof of the ordinance violation in and of itself is sufficient to establish a nuisance per see that shall be abated by the Court – Plaintiff nonetheless also meets the factors for issuance of the relief requested.

Plaintiff has demonstrated a substantial likelihood of success on the merits. Section 5A.05(A) of Plaintiff's zoning ordinance requires a permit for (1) the removal or relocation of any tree with a DBH of six inches or greater on any property; (2) the removal, damage or destruction of any landmark tree; (3) the removal, damage or destruction of any tree located within a forest;

and (4) clear cutting or grubbing within the dripline of a forest. Defendant does not and cannot dispute that it has never sought a permit to conduct any of the tree removals documented in the Verified Complaint. Defendant simply seeks to be absolved for doing so, in its mentality that it may do with its property what it wishes irrespective of the law. Furthermore, Defendant, through Gary Percy, has indicated its intention to continue planting Norway Spruces for its "Christmas tree farm" on property not zoned for such a use; in other words, to continue violating Township law. The tree ordinance is meant to preserve the Township's natural resources. Zoning Ord. § 5A.02 ("The purpose of this article is to promote an increased quality of life through the regulation, maintenance and protection of trees, forests and other natural resources.") Operation of a Christmas tree farm does not promote this purpose, even on land zoned for such a use. The Spruce trees are not to replace those removed; they are not permanent, but are for a commercial purpose – to sell as Christmas trees. Without permanently replacing the trees removed, Defendant is harming the public's interest in preservation of its natural resources.

Defendant's continued planting of the trees is a continuation of a nuisance *per se*, and Plaintiff has suffered and will continue to suffer irreparable injury by this ongoing violation in deliberate disregard of the law. Issuance of a TRO is necessary both to cease and to abate the violation and to impress on Defendant that it may not continue to violate the law with impunity. A TRO will not harm others. To the contrary, it is in the public interest to see that the Township's ordinances are enforced. Compelling Defendant to comply with the zoning ordinances furthers the public health, safety and welfare and promotes the public's interest in proper management of land uses as expressed by the zoning ordinance.

CONCLUSION

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

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

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

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

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

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

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

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

(H) Enter judgment in favor of the Township against Defendant for all costs, expenses, and attorney fees incurred by the Township in these proceedings and abating or being able to abate the nuisance *per se* and authorize an order that, in the event of Defendant's failure to pay

such amount within 30 days of being invoiced, or the payment to the tree fund within 60 days, a lien in favor of the Township, in the amount of such costs, expenses and attorney fees be placed on the Property with the amount thereof to be assessed on the tax roll, for collection in the same manner provided by law for real property taxes;

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

ROSATI SCHULTZ JOPPICH
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DATED: November 12, 2018

Appellee's Appendix 055–079

Opinion and Order, Dated July 17, 2020

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF CANTON,
a Michigan Municipal Corporation,

Plaintiff/Counter-Defendant,

-v-

44650, INC, a Michigan corporation,

Defendant/Counter-Plaintiff.

Case No. 18-014569-CE

Hon. Susan L. Hubbard

OPINION AND ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan, on this: 7/17/2020

PRESENT: Hon.Susan Hubbard
Circuit Judge

This civil matter is before the Court on a motion for summary disposition filed by Defendant/Counter-Plaintiff 44650, Inc. The Court will also address the supplemental briefs submitted by the parties regarding the decision of the U.S. District Court for the Eastern District of Michigan – Southern Division in Case No. 2:18-cv-13690-GCS-EAS. For the reasons stated below, the Court grants in part and denies in part Defendant/Counter-Plaintiff's motion.

I. BACKGROUND

Defendant/Counter-Plaintiff, 44650, Inc. ("44650"), is a Michigan corporation located at 5601 Belleville Road in Canton Township, Michigan. Gary Percy is resident agent of 44650 and is also the President of AD Transport, Inc., which is owned by him and his brother, Matt Percy.

AD Transport, Inc. occupies a nearby property. Martin F. Powelson, owner of F.P. Development, LLC ("F.P."), wished to sell 16.17 acres ("the subject property") of a 46-acre parcel[1] to 44650. Powelson's 46-acre parcel was zoned industrial. The 16.17 acre parcel, which is vacant, is located east of Belleville Road and north of Yost Road in Canton Township, Wayne County Michigan. On October 27, 2016, F.P.'s representative and engineer, Ginger Michaelski-Wallace, submitted an application for a property split to Plaintiff Charter Township of Canton ("the township" or "Canton"). On July 14, 2017, the application was tentatively approved subject to certain conditions. The conditions included: (1) submission of a copy of the recorded deed for the newly created parcel that includes the liber and page number assigned by Wayne County Register of Deeds; (2) submission of a completed Land Division Form; and (3) submission of a completed Property Transfer Affidavit. The 16.17-acre parcel is referred to as "Parcel B" and F.P's remaining 29.83-acre parcel is referred to as "Parcel A." A deed was executed by Powelson conveying Parcel B to 44650 on August 1, 2017. On January 22, 2018, Ms. Michaelski-Wallace was notified by the township of the assignment of new parcel numbers for each parcel and of a revised assessment record with a change of ownership of each parcel as well as each parcel's new legal description.

After the property split, both F.P. and 44650, Inc. removed many trees from their adjacent properties without first obtaining tree permits. According to 44650, the subject property was overgrown with brush, fallen trees, and invasive species. These species include ash trees, which were killed by the ash borer in recent years. It also contends that flooding caused by a clogged ditch on an adjacent property had caused some trees on the property to die or rot. It also

[1] The parties refer to the properties as 40-acre and 16-acre parcels. However, the township's notice of the approved split with new parcel identification numbers and new legal descriptions for tax assessment records indicates that the F.P.'s original parcel was, in fact, 46 acres and the split parcel is 16.17 acres. F.P.'s new remaining acreage is 29.83 acres.

states that the property was full of trash due to dumping. The Percy brothers then planted approximately 1,000 Norway spruce trees because they intended to start a Christmas tree farm.

In April 2018, Leigh Thurston, the township's Planner and Architect, notified Gary Percy that she believed that 44650 had violated the township "Tree Ordinance." On August 29, 2018, the township issued a violation to Gary Percy. Ms. Thurston also noted that several ordinance violations included the following:

- Clear-cutting approximately 16 acres of trees without a Township permit;
- Cutting of trees and other work within a County drain and drain easement under the jurisdiction of Wayne County;
- Cutting trees and other work within wetlands regulated by the Michigan Department of Environmental Quality;
- Performing underground work adjacent to a public water main under the jurisdiction of Canton Township; and
- Parking vehicles within the Yost Road public right-of-way.

Ms. Thurston advised Gary Percy of these violations. On June 11, 2018, the Michigan Department of Environmental Quality ("the DEQ") issued a violation notice to Gary Percy indicating that, within 30 days of the notice, he must bring the property into compliance by taking the following actions:

- Remove all unauthorized fill material (e.g. woodchips) as generally shown on the Preliminary Wetland Map;
- Restore all ditches as shown on the Preliminary Wetland Map to original grade utilizing adjacent side-cast spoil material;
- Seed the wetland areas with a DEQ approved native wetland seed mix and allow the existing vegetation to continue reestablish (sic);

- Refrain from all farming activities (e.g. plowing, seeding, minor drainage, cultivation) within the wetland areas identified on the map.

On July 26, 2018, the Wayne County Department of Public Services Land Resource Management Division notified Gary Percy that activities on the subject property violated Wayne County Soil Erosion and Sedimentation Control Ordinance by removing vegetation and constructing trench drains on the subject property without a permit. On July 31, 2018, the Wayne County Drain Commissioner notified Percy of a violation by interfering with the drainage easement held by the Fisher and Lenge Drain Drainage District, which was established by the Michigan Drain Code.

Notwithstanding the DEQ and Wayne County notices of violations, the issue before this Court is the constitutionality of Article 5A.00. - Forest Preservation and Tree Clearing of Canton's Zoning Ordinance, otherwise known as the "Tree Ordinance." The Tree Ordinance provides in relevant part:

> **5A.02. - Purpose.**
>
> The purpose of this article is to promote an increased quality of life through the regulation, maintenance and protection of trees, forests and other natural resources.
>
> ***
>
> **5A.05. - Tree removal permit.**
>
> A. Required.
>
> 1. The removal or relocation of any tree with a DBH[2] of six inches or greater on any property without first obtaining a tree removal permit shall be prohibited.

---

[2] *"Diameter at breast height (DBH)* means the diameter in inches of the tree measured at four feet above the existing grade." Article 5A §5A.01.

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

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

4. Clear cutting or grubbing within the dripline of a forest without first obtaining a tree removal permit is prohibited.

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

…

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

…

4. The removal or relocation of trees within the affected areas shall be limited to instances:

a. Where necessary for the location of a structure or site improvement and when no reasonable or prudent alternative location for such structure or improvement can be had without causing undue hardship.

b. Where the tree is dead, diseased, injured and in danger of falling too close to proposed or existing structures, or interferes with existing utility service, interferes with safe vision clearances or conflicts with other ordinances or regulations.

c. Where removal or relocation of the tree is consistent with good forestry practices or if it will enhance the health of remaining trees.

6. Tree removal shall not commence prior to approval of a site plan, final site plan for site condominiums or final preliminary plat for the subject property.

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

…

> E. [Location of replacement trees.] Wherever possible, replacement trees must be located on the same parcel of land on which the activity is to be conducted. Where tree relocation or replacement is not possible on the same property on which the activity is to be conducted, the permit grantee shall either:
>
> > 1. Pay monies into the township tree fund for tree replacement within the township. These monies shall be equal to the per-tree amount representing the current market value for the tree replacement that would have been otherwise required.
> >
> > 2. Plant the required trees off site. If the grantee chooses to replace trees offsite the following must be submitted prior to approval of the permit:
> >
> > > a. A landscape plan, prepared by a registered landscape architect, indicating the sizes, species and proposed locations for the replacement trees on the parcel.
> > >
> > > b. Written permission from the property owner to plant the replacement trees on the site.
> > >
> > > c. Written agreement to permit the grantee to inspect, maintain and replace the replacement trees or assumption of that responsibility by the owner of the property where the trees are to be planted.
> > >
> > > d. Written agreement to permit township personnel access to inspect the replacements as required.

There is no dispute that 44650 failed to obtain a permit for clearing the subject property.

On August 22, 2018, Ms. Thurston, along with a code enforcement officer and a consulting arborist met with Defendant/Counter-Plaintiff's representatives to walk the property and conduct an analysis of the number of trees removed from the property. Using the numbers and types of trees that were identified in the representative plots and taking into consideration soil conditions and topography of the subject property, an estimate was made of the number and types of trees that were removed. The analysis concluded that 1,385 "regulated trees" and 100 "landmark" trees were removed. "*Landmark/historic tree* means any tree which stands apart

from neighboring trees by size, form or species, as specified in the landmark tree list in section 94-36, or any tree, except box elder, catalpa, poplar, silver maple, tree of heaven, elm or willow, which has a DBH of 24 inches or more." Article 5A, §5A.01.[3] There is no definition of "regulated tree" provided in the ordinance, but it appears that a "regulated tree" may be "any *tree,"* except for a landmark tree "with a DBH of six inches or greater." § 5A.05(A)(1). A permit is required for removal of a regulated tree.

According to the township's analysis, under the ordinance, 44650 is required to plant 1,685 trees in replacement of the alleged 1,485 trees that were removed. Zoning Ordinance, § 5A.08(E). Defendant has the option, in lieu of planting replacement trees, of paying into the township Tree Fund an amount calculated based on the market value of the number of required replacement trees. Id. The current market value for the 1,385 regulated trees is between $225 and $300 per tree, and the market value of the 100 landmark trees averaging $450 per tree. In addition, a property owner may be subject to criminal penalties of up to $500.00 and 90 days imprisonment.

On September 13, 2018, the township issued a letter to 44650's counsel stating that the total due to the township for payment into the Tree Fund was $446,625.00. The letter also made an offer to settle the matter in the amount of $342,750.00 to avoid litigation. The township then filed a complaint in this Court alleging the following: (1) violation of the zoning ordinance constituting a nuisance per se based on the failure to obtain a tree removal permit; (2) violation of the zoning ordinance constituting a nuisance per se based on failure to erect a protective barrier around a Landmark Tree; (3) violation of the zoning ordinance constituting a nuisance per se based on failure to observe setback from wetland areas and watercourses; and (4) violation of the zoning ordinance constituting a nuisance per se by using the subject property for a use that is

[3] §5a.06 provides a list of the trees specified as "landmark/historic trees."

not permitted on a property zoned as light industrial in an LI District. In its complaint, the township also requests a declaratory judgment deeming that the actions taken by 44650 violate the zoning ordinance and constitute a nuisance per se such that the township is entitled to immediate injunctive relief and abatement. Defendant/Counter-Plaintiff filed an answer along with a counter-complaint alleging essentially the same constitutional claims upon which it bases the instant motion as well as claims arising out of the Michigan Right to Farm Act, MCL 286.471, *et seq.*

Now before the Court is Defendant/Counter-Plaintiff's motion for summary disposition. In addition, the Court ordered that the parties brief the issue of res judicata and collateral estoppel relative to an "Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment (ECF No. 29) and Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment (ECF No. 26)," entered by the U.S. District Court for the Eastern District of Michigan - Southern Division. Case No. 2:18-cv-13690-GCS-EAS. As indicated above, F.P. had also cleared its property and was issued a violation by the township. F.P. filed a complaint in federal court alleging various constitutional violations, which the District Court addressed in its order. In addition to the instant motion, this Court will address below the issues of res judicata and collateral estoppel with respect to the District Court's order.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION

Defendant/Counter-Plaintiff bases its motion on MCR 2.116(C)(10). In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "A motion under MCR 2.116(C)(10), tests the *factual sufficiency* of a claim." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019), citing *Johnson v VanderKooi*, 502 Mich 751,

761; 918 NW2d 785 (2018)[Emphasis in original]. If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The moving party has the initial burden of supporting its position through documentary evidence. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish the existence of a genuine issue of material fact. *Id.* The non-moving party "…may not rest on the mere allegations or denials of his or her pleadings, but must, by affidavit or otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116 (G)(4). If the opposing party fails to do so, the motion for summary disposition is properly granted. *Id*; *Quinto, supra* at 363. Finally, a "reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden, supra* at 121.

III. ANALYSIS

A. 44650's Motion

1. Regulatory "Taking"

In support of its motion, 44650 first argues that Canton's tree ordinance is an unconstitutional regulatory taking under both the Michigan and Unites States Constitutions. In response, Canton argues that the cases cited by 44650 are distinguishable. However, Canton does not address the issue directly.

"Both our federal and state constitutions mandate that when private property is taken for public use, its owner must receive just compensation. U.S. Const., Am. V; Const. 1963, art. 10, § 2. In the regulatory context, a compensable taking occurs when the government uses its power to so restrict the use of property that its owner has been deprived of all economically viable use." *Miller Bros v Dept of Nat. Res*, 203 Mich App 674, 679; 513 NW2d 217 (1994).

A regulatory taking claim may be framed as either a Fifth Amendment taking or as a Fourteenth Amendment due process type of taking. *Electro-Tech, Inc v Campbell Co*, 433 Mich 57, 68; 445 NW2d 61 (1989).The latter type of taking is based on a denial of substantive due process, *Bevan v Brandon Twp*, 438 Mich 385, 391; 475 NW2d 37 (1991), for which a plaintiff may establish that a land use regulation is unconstitutional as applied by showing "(1) that there is no reasonable governmental interest being advanced by the present zoning classification or (2) that an ordinance is unreasonable because of the purely arbitrary, capricious, and unfounded exclusion of other types of legitimate land use from the area in question." *Frericks v Highland Twp*, 228 Mich App 575, 594; 579 NW2d 441 (1998).

"The United States Supreme Court has recognized that the government may effectively 'take' a person's property by overburdening that property with regulations." *K & K Const, Inc v Dept of Nat. Res*, 456 Mich 570, 576; 575 NW2d 531 (1998). "The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land'" or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transportation Co v New York City,* 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978)." *Id* at 576-577, quoting *Lucas v South Carolina Coastal Council,* 505 US 1003, 1015; 112 S Ct 2886, 2893; 120 L Ed 2d 798 (1992). The *Penn Central* balancing test involves an analysis "centering on three factors: (1) the character of the

government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *Id* at 577, citing *Penn Central, supra* at 124.

Here, the stated purpose of the "Tree Ordinance" "is to promote an increased quality of life through the regulation, maintenance and protection of trees, forests and other natural resources." Zoning Ordinance, § 5A.02. In the Court's view, the "character" of the action here is to effectively require that any entity pay for removal of trees such that it imposes an unreasonable economic effect on any "investment-backed expectations." *Id.* Moreover, in the situation of a property that is zoned for industrial or light industrial activity, the question arises whether the ordinance serves its stated purpose to preserve trees, forest, and natural resources. It requires an entity to preserve another's, i.e., Canton's, property by making the owner pay into a tree fund if it chooses to remove unwanted objects from a property, with or without a permit.

In support of its argument, 44650 cites various U.S. Supreme Court cases and other lower federal court decisions. The most relevant cases are summarized as follows:

- *Horne v Dept of Agric*, 576 US 350; 135 S Ct 2419; 192 L Ed 2d 388 (2015)

  Farmers brought an action for judicial review of imposition of civil penalties for failure to comply with United States Department of Agriculture (USDA) raisin marketing order. The Raisin Administrative Committee pursuant to the Agricultural Marketing Agreement Act required that growers set aside a certain percentage of the raisin crop for the government. The *Horne* holding relevant to the instant case is that: (1) the regulatory reserve requirement was a physical taking; (2) the failure to pay growers and handlers violated the Fifth Amendment Takings Clause; (3) the retention of contingent interest in portion of raisins' value did not negate government's duty to pay just compensation; and (4) the mandate to reserve raisins as condition to engage in the market was a per se taking.

- *Pennsylvania Coal Co v Mahon*, 260 US 393, 412; 43 S Ct 158, 159; 67 L Ed 322 (1922)

  The defendants appealed to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has

very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does." *Id* at 414-415. The court stated: "We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall." *Id* at 416.

- *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419; 102 S Ct 3164; 73 L Ed 2d 868 (1982)

  A New York City landlord sued cable television company claiming that the defendant's installation of its facilities on plaintiff's property pursuant to New York law requiring a landlord to permit installation of such facilities on rental properties constituted a constitutionally compensable taking.

  The court held that: (1) the physical occupation of plaintiff's rental property which occurred in connection with cable television company's installation of "crossover" and "noncrossover" cables on plaintiff's apartment building constituted a "taking" notwithstanding that the statute might be within state's police power as authorizing rapid development and maximum penetration by means of communication having important educational and community aspects; (2) allegedly minimal size of the physical installation was not determinative; (3) the fact that statute applied only to rental property did not make it simply a regulation of use of real property; and (4) the statute could not be construed as merely granting a tenant a property right as an appurtenance to his leasehold.

- *Hendler v United States*, 952 F2d 1364 (Fed Cir, 1991)

  Property owners brought action against the federal Environmental Protection Agency (EPA) alleging that EPA's entry onto property owners' land to install groundwater monitoring wells and to conduct monitoring activities of groundwater constituted a "taking" of property under the Fifth Amendment.

  The EPA's actions in placing groundwater wells on private property, as part of its efforts to combat groundwater pollution from adjacent hazardous waste site, effected a "taking" under traditional physical occupation theory; (2) activities of state officials in pursuance of state's formal cooperative agreement with federal Government to assist in carrying out superfund activities were properly attributable to federal Government, for purpose of plaintiffs' takings claim; and (3) dismissal of plaintiffs' action as sanction for alleged inadequacy of discovery responses was abuse of discretion.

- *Palazzolo v Rhode Island*, 533 US 606; 121 S Ct 2448; 150 L Ed 2d 592 (2001)

  A landowner brought an inverse condemnation action against the Rhode Island Coastal Resources Management Council (CRMC), alleging that the CRMC's denial of his application to fill 18 acres of coastal wetlands and to construct a beach club constituted a taking for which he was entitled to compensation. After a bench trial, the Rhode Island

Superior Court, Washington County, entered judgment for CRMC. The Rhode Island Supreme Court, 746 A2d 707, affirmed, and landowner petitioned for certiorari. The United States Supreme Court, held that: (1) the claims were ripe for adjudication; (2) the acquisition of title after the effective date of the regulations did not bar regulatory takings claims; and (3) the *Lucas* claim for deprivation of all economic use was precluded by undisputed value of the portion of the tract for construction of a residence.

- *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470; 107 S Ct 1232; 94 L Ed 2d 472 (1987)

  Coal companies brought action challenging Pennsylvania Subsidence Act which requires that 50 percent of the coal beneath certain structures be kept in place to provide surface support. held that: (1) there was public purpose for the Act; (2) there was no showing of the diminution of value in land resulting from the Act; (3) Act did not work an unconstitutional taking on its face; (4) there was no showing of an unconstitutional taking of the separate support estate recognized by Pennsylvania law; and (5) public interests in the legislation were adequate to justify impact of the Act on coal companies' contractual agreements.

  A taking may be more readily found when an interference with a property can be characterized as a physical invasion by the government rather than when the interference arises from some public program adjusting benefits and burdens of economic life to promote a common good. *Id* at 488.

- *Maritrans Inc v United States*, 342 F3d 1344, 1356 (Fed Cir 2003) Owners of a tank barge fleet brought a Tucker Act suit against the United States alleging that double hull requirement of Oil Pollution Act of 1990 effected a regulatory taking of single hull tank barges.

  The Court of Appeals, held that: (1) the owners had cognizable property interest in single hull barges; (2) the United States did not effect a categorical taking of eight single hull barges by enacting double hull requirement; (3) double hull requirement did not effect regulatory taking; and (4) claim that double hull requirement constituted taking of seven single hull barges that had not been sold, retrofitted, or scrapped was ripe for review.

Canton's response to Defendant/Counter-Plaintiff's reliance on the *Horne* case is that Canton does not require Defendant to relinquish title to its trees, but must obtain a permit to remove them. If removed, the trees must either be replaced or payment must be made into the tree fund. The trees may also be planted in another location. Canton also argues that it did not take the trees for its own use. This Court disagrees. The value of the trees has been claimed for Canton's use to fund the tree fund.

Canton next argues that *Loretto* is inapplicable and distinguishable because "Defendant has not alleged facts to demonstrate that the Township has directly, physically invaded its property … a requirement for the application of *Loretto*." It cites *Southview Associates, Ltd v Bongartz,* 980 F2d 84, 95; 36 Env't Rep Cas (BNA) 1024, 23 Envtl L Rep 20132 (CA 2 1992), in which 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. That court stated that "Southview has not lost the right to possess the allegedly occupied land that forms part of the deeryard" and "no absolute, exclusive physical occupation exists." In response, 44650 maintains that the ordinance forces it to keep unwanted objects on its property. However, as Canton argues, the trees may be removed, but at a cost. This Court agrees that *Loretto* is inapplicable to the case at bar, but does find *Horne* instructive because, in *Horne,* the growers were required to provide an economic reserve of raisins for the government's benefit.

Canton further argues that the economic impact of the regulation factor compares the value that has been taken from the property with the value that remains in the property. *Keystone, supra.* Here, Defendant/Counter-Plaintiff paid $404,250.00 for the 16-acre parcel and is now expected to pay $446,625.00 into the tree fund in order to use the property. The amount required to use the property "goes too far," *K & K Const, Inc*, supra at 576, quoting *Pennsylvania Coal Co, supra* at 415, and precipitates an unreasonable economic effect on any "investment-backed expectations," *Lucas, supra.* Canton argues that that the investment back expectations could not have changed from the time it purchased the property and the time it cleared the property because 44650 knew of the "Tree Ordinance" and that it should have submitted a site plan before proceeding with any work on the property. Even if 44650 were aware of the ordinance, its awareness does not make the ordinance constitutionally valid. *Palazzolo, supra* at 627.

Hence, this Court finds that the "Tree Ordinance" as applied to 44650 is a constitutionally invalid regulatory taking of 44650's property and it does not serve a legitimate public purpose as to an industrially zoned parcel. The economic effect of the ordinance creates an unreasonable economic effect on 44650's "investment-backed expectations."

2. Fourth Amendment and "Unreasonable Seizure"

Defendant/Counter-Plaintiff next argues that the ordinance is a property regulation, which constitutes an unreasonable seizure violating the Fourth Amendment's prohibition against unreasonable seizures. It contends that the ordinance creates a "meaningful interference with an individual's possessory interests in that property." *United States v Jacobsen*, 466 US 109; 104 S Ct 1652; 80 L Ed 2d 85 (1984). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *Id* at 113.

Canton counters by asserting that the Fourth Amendment "does not protect possessory interests in all kinds of property." *Solda v Cook Cnty, Ill.*, 506 US 56, 62, fn 7; 113 S Ct 538, 544; 121 L Ed 2d 450 (1992), citing *Oliver v US*, 466 US 170, 176-177; 104 S Ct 1735; 80 L Ed 2d 214 (1984). Canton contends that the protection does not extend to open fields.

In *Solda*, mobile home owners brought a §1983 suit against deputy sheriffs and the owner and manager of a trailer park arising from a trailer park employee being observed by deputies disconnecting a trailer from the utilities and towing the trailer off the park premises. The *Solda* court held that the complaint by mobile home owners alleging that deputy sheriffs and the owner and the manager of mobile home park dispossessed the owners of their mobile home by physically tearing it from foundation and towing it to another lot sufficiently alleged "seizure" within meaning of Fourth Amendment.

44650 cites *Presley v City Of Charlottesville*, 464 F3d 480 (CA 4, 2006) to support its Fourth Amendment seizure claim. The *Presley* court stated:

> The Fourth Amendment's protections against unreasonable seizures clearly extend to real property. *See, e.g., United States v James Daniel Good Real Property,* 510 US 43, 52; 114 S Ct 492; 126 L Ed 2d 490 (1993) (noting that the Fourth Amendment applies to the seizure of a four-acre parcel of land with a house); *Freeman v. City of Dallas,* 242 F 3d 642, 647 (5th Cir.2001) (en banc) ("[T]he City seized the Freemans' real property for demolition.").
>
> *Id* at 483-484.

As Canton argues, open fields are not "'effects' within the meaning of the Fourth Amendment." *Oliver v United States*, 466 US 170, 176; 104 S Ct 1735, 1740; 80 L Ed 2d 214 (1984). "[T]he government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment." *Id* at 177. [4]

In the instant case, however, the claim is not a claim for unreasonable search, but is one for unreasonable seizure of property. In the Court's view, given the facts of this case where the owner is forced to pay for tree removal at an unreasonable cost, the Fourth Amendment claim is applicable as to a seizure of property to the extent that it is a "meaningful interference" with 44650's "possessory interests" in its property. *Jacobsen, supra.*

3. <u>Imposition of Unconstitutional Conditions</u>

44650's third contention is that the ordinance "places unconstitutional conditions on the use of private property by requiring the Percys to either plant trees or pay fees as mitigation well in excess of any injury caused by the Percys' removal of their own trees." In support of this argument, 44650 cites *Nollan v California Coastal Com'n*, 483 US 825; 107 S Ct 3141; 97 L Ed 2d 677 (1987) and *Dolan v City of Tigard*, 512 US 374; 114 S Ct 2309; 129 L Ed 2d 304 (1994).

In *Nollan*, property owners brought an action against the California Coastal Commission seeking a writ of mandate. The Commission had imposed as a condition to approval of

[4] "[N]o expectation of privacy legitimately attaches to open fields." *Oliver v United States*, 466 US 170, 180; 104 S Ct 1735; 80 L Ed 2d 214 (1984).

rebuilding a permit requirement that owners provide lateral access to the public to pass and re-pass across the property. The *Nollan* court found "that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes." *Id* at 836. "California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this 'public purpose,' see US Const, Amdt 5; but if it wants an easement across the Nollans' property, it must pay for it." *Id* at 841-842.

Although the purpose of Canton's ordinance may be laudable and admirable, the permit condition of requirement of tree replacement or payment into the tree fund for a "public purpose," Canton must itself pay for the condition instead of requiring the property owner to pay for the privilege of removing its own trees.

In *Dolan*, a landowner petitioned for judicial review of a decision of Oregon Land Use Board of Appeals, affirming the conditions placed by the city on the development of commercial property. The Supreme Court held that: (1) city's requirement that the landowner dedicate a portion of her property lying within flood plain for improvement of a storm drainage system and property adjacent to the flood plain as a bicycle/pedestrian pathway, as condition for building permit allowing expansion of landowner's commercial property, had a nexus with legitimate public purposes; (2) the findings relied upon by city to require the landowner to dedicate a portion of her property in the flood plain as a public greenway, did not show the required reasonable relationship necessary to satisfy the requirements of the Fifth Amendment; and (3) the city failed to meet its burden of demonstrating that the additional number of vehicle and bicycle trips generated by proposed commercial development reasonably related to city's requirement of dedication of pedestrian/bicycle pathway easement. The *Dolan* court explained:

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required

> dedication is related both in nature and extent to the impact of the proposed development.
>
> *Id* at 391.

Canton argues that its ordinance advances a legitimate governmental interest of preservation of aesthetics and that aesthetics is among the governmental interests recognized by courts as legitimate and significant. However, there still must be some reasonable relationship between the "penalty" for removal and the impact on aesthetics. Here, the removal of trees requires replacement of trees on the property, replacement of trees somewhere else, or payment into the tree fund. In the Court's estimation, the placement of this condition on a property zoned industrial or light industrial bears no relationship to the aesthetics of the subject property, but only provides a benefit to Canton in the form of payment or planting of trees in Canton's tree farm. These are unconstitutional conditions on the use of the subject property.

4. Eighth Amendment "Excessive Fines" Clause

44650's final argument is the "Tree Ordinance" violates the Eighth Amendment's prohibition against the imposition of excessive fines. It further asserts that that the amount Canton is seeking from 44650 is grossly disproportionate to any public harm caused by tree removal. Canton argues that the "excessive fines" clause does not apply in this case because it is applicable only to criminal or punitive ordinances. Canton also states that monies paid into the tree fund are not fines. Instead, Canton argues that the only fine is a $500.00 fine for criminal violation of the zoning ordinance. Ordinance §1.7(c). Canton contends that payment into the tree fund is not a fine or even penal in nature, but is "valid mitigation for costs that the Township would incur to undertake the replacement of removed trees."

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." US Const, Am VIII; *United States v Bajakajian*, 524 US 321, 327; 118 S Ct 2028, 2033; 141 L Ed 2d 314 (1998). To determine if an

excessive fine exists, the Court must first determine if the fine is a punishment. *Id* at 328. Although the Eighth Amendment "excessive fines" clause may be applicable in both civil and criminal contexts, the civil contexts generally involve in rem forfeiture proceedings or personal property forfeiture in connection with the commission of some crime or use or sale of contraband.. *Austin v United States*, 509 US 602, 604; 113 S Ct 2801; 125 L Ed 2d 488 (1993). Hence, the determinative question is whether the fine is punishment for some offense. *Id* at 610.

In the instant case, the amounts sought by Canton are part of a land use regulatory scheme and are not intended to be punishment for some offense. On the other hand, the criminal fine for violation of the ordinance is $500.00. Ordinance §1.7(c). Although the Court finds that the amounts sought by Canton are unreasonably excessive, grossly disproportionate, and they appear to be punitive, the amounts are not punishment for an offense, but are part of Canton's aesthetic objective in land use regulation. Therefore, the Eighth Amendment "excessive fines" clause is inapplicable to the case at bar.

B. Res Judicata

As indicated above, this Court ordered the parties to brief the issues of res judicata and collateral estoppel relative to the decision of the U.S. District Court for the Eastern District of Michigan – Southern Division in Case No. 2:18-cv-13690-GCS-EAS.

By way of background, F.P., the vendor 44650's property and neighbor of 44650, filed suit in federal district court after the township issued a stop work order. F.P. had removed approximately 200 trees from its property and Canton sought $47,898.00 for removal of the trees. F.P.'s lawsuit alleged the same constitutional challenges as asserted in Defendant/Counter-Plaintiff's motion and counter-complaint in the instant case. The District Court concluded that the Fourth Amendment unreasonable seizure claim and the Eighth Amendment "excessive fines" claim was not applicable to F.P.'s case and dismissed those claims. The court, however, did

conclude that, as applied to F.P., "the Tree Ordinance goes too far and is an unconstitutional regulatory taking." [District Court Order, p. 39].

The question addressed in the parties' briefs is whether the District Court's decision constitutes res judicata in the case before this Court. Res judicata comprises two concepts: claim preclusion and issue preclusion also known as collateral estoppel.

> Within the general doctrine of res judicata, there are two principal categories or branches: (1) claim preclusion also known as res judicata; and (2) issue preclusion also known as collateral estoppel.
>
> Res judicata (or claim preclusion) and collateral estoppel (or issue preclusion) are related but independent preclusion concepts that involve distinct questions of law.
>
> ***
>
> Fundamentally, under both res judicata and collateral estoppel, a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies. More specifically, "res judicata" or "claim preclusion" refers to the effect of a prior judgment in preventing a litigant from reasserting or relitigating a claim that has already been decided on the merits by a court of competent jurisdiction, whether relitigation of the claim raises the same issues as the earlier suit. "Collateral estoppel" or "issue preclusion," on the other hand, generally refers to the effect of a prior judgment in limiting or precluding relitigation of issues that were actually litigated in the previous action, regardless of whether the previous action was based on the same cause of action as the second suit.
>
> The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim...usually ought not to have another chance to do so. A related but narrower principle -- that one who has actually litigated an issue should not be allowed to relitigate it -- underlies the rule of issue preclusion.
>
> 47 AmJur 2d, Judgments, §464, p 20-21 [Footnotes omitted][Emphasis added].

Res judicata, also known as claim preclusion, bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those that were necessary in a

prior action. *Begin v Michigan Bell Tel Co*, 284 Mich App 581, 599; 773 NW2d 271 (2009); *Pierson Sand and Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 380; 596 NW2d 153 (1999).

In the instant case, the applicable concept is issue preclusion. The question is whether collateral estoppel applies to bar Canton's suit against 44650. Generally, to constitute collateral estoppel, three conditions must exist:

> (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment"; (2) "the same parties must have had a full [and fair] opportunity to litigate the issue"; and (3) "there must be mutuality of estoppel." *Storey v Meijer, Inc,* 431 Mich 368, 373 n 3, 429 NW2d 169 (1988). "[M]utuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action. In other words, '[t]he estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.' " *Lichon v. American Universal Ins. Co.,* 435 Mich. 408, 427, 459 N.W.2d 288 (1990), quoting *Howell v. Vito's Trucking & Excavating Co.,* 386 Mich. 37, 43, 191 N.W.2d 313 (1971).
>
> *Monat v State Farm Ins Co*, 469 Mich 679, 682-85; 677 NW2d 843 (2004) [Footnotes omitted].

The *Monat* court expressly explained that, when collateral estoppel is used defensively, mutuality of estoppel is not required as long as the opposing party had a full and fair opportunity to litigate the issue or issues in a prior proceeding. Here, Canton litigated the identical constitutional issues in District Court as are before this Court. The court stated:

> …we believe that the lack of mutuality of estoppel should not preclude the use of collateral estoppel when it is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit. Such a belief is supported by the Restatement of Judgments. "A party precluded from relitigating an issue with an opposing party ... is also precluded from doing so with another person unless ... he lacked full and fair opportunity to litigate the issue in the first action...." 1 Restatement Judgments, 2d, ch 3, § 29, p. 291. "A party who has had a full and fair opportunity to litigate an issue has been accorded the elements of due process.

Id at 691-692.

Thus, collateral estoppel may be used defensively in this case because the identical issues were litigated by Canton, albeit against a party different from 44650

The District Court held that the Tree Ordinance is an uncompensated taking as to F.P. and is an unconstitutional condition on the use of the property. Canton argues that collateral estoppel cannot be applied to the issues in this case because the District Court's ruling was based on an "as-applied" challenge to the ordinance as opposed to a facial challenge.

A facial challenge alleges that an ordinance is unconstitutional "on its face" because to make a successful facial challenge to the constitutionality of a statute, the challenger must establish that no set of circumstances exists under which the act would be valid. *Bonner v City of Brighton*, 495 Mich 209, 223; 848 NW2d 380 (2014). An as-applied challenge, to be distinguished from a facial challenge, alleges a present infringement or denial of a specific right or of a particular injury in process of actual execution of government action. Id, fn 27, quoting *Village of Euclid, Ohio v Ambler Realty Co,* 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926).

Canton contends that the language in the District Court's order confirms its assertion that F.P's challenge was an "as-applied" challenge because it analyzed the ordinance under the the *Penn Central* balancing test.

The District Court noted that "Counts I and ll allege facial and as applied regulatory takings in violation of the Fifth Amendment." [District Court Order, p. 17][Emphasis added]. The District Court also stated:

> It is not reasonable for F.P. to be required to keep his wooded Property undeveloped, or pay an exorbitant price to replace trees, when he purchased property which was zoned industrial with the expectation that he could expand his adjacent sign business on that Property.
>
> [Id at 22].

With respect to Canton's argument, the District Court did state that after "[h]aving considered the three *Penn Central* factors to be balanced, the court finds that as applied to this Plaintiff the Tree Ordinance goes too far and is an unconstitutional regulatory taking." [Id at 39]. Although the District Court does state that it "has found that the Ordinance is an unconstitutional takings as applied to F.P. under the Penn Central balancing test and the *Nollan/Dolan* rough proportionality test," the court also opined that the ordinance requiring replacement of trees or payment into the tree places an unconstitutional per se condition on any tree removal permit. More specifically, the court stated:

> It is undisputed that the Tree Ordinance requires property owners to pay the market value of any removed tree into the tree fund or plant a preset number of replacement trees, without any analysis of the impact of tree removal on neighbors, on aesthetics of the site and the surrounding area, on air quality, noise abatement, or any other site specific consideration. The tree replacement requirement is a per se condition of any tree removal permit. The mandatory nature of the tree replacement fees set forth in Ordinance, without any site specific analysis, renders the Ordinance invalid under *Nollan/Dolan* as there is no method to ensure that the permit requirement is roughly proportionate to the environmental and economic impact of tree removal on the Township and its residents.
>
> [Id at 33-34].

Hence, as to the "unconstitutional conditions" argument, the District Court appears to imply that no matter what the circumstances are or who the parties are, the ordinance is facially invalid because there is no method by which the permit requirement would be applied to insure that the requirement is roughly proportionate to the environmental or economic impact. In other words, the ordinance applies no matter the impact and is not case or fact specific. Therefore, this Court finds that collateral estoppel may be applied to 44650's argument that the ordinance places unconstitutional conditions on the use of the subject property. It also applies to the Fourth Amendment argument only to the extent that the amendment applies only to "unreasonable

"intrusions" on a property. As to the unreasonable seizure argument, the District Court did not address whether the ordinance effected a "meaningful interference" with 44650's "possessory interests" in its property. *Jacobsen, supra.* This Court also agrees that collateral estoppel applies to the Eighth Amendment argument because the District Court's analysis is essentially the same as this Court's analysis.

To summarize, collateral estoppel does not apply the "regulatory takings" challenge because it requires an "as-applied" analysis and application of the *Penn Central* balancing test. As to the "unconstitutional conditions" contention, collateral estoppel does apply. Because the District Court did not undertake an examination of the ordinance's "meaningful interference" that would constitute an unreasonable seizure of the property, collateral estoppel is inapplicable. Finally, collateral estoppel also applies to the Eighth Amendment "excessive fines" claim.

IV. CONCLUSION

The "Tree Ordinance" as applied to 44650 is a constitutionally invalid regulatory taking of the subject property. The Fourth Amendment claim is applicable as to a seizure of property to the extent that it is a "meaningful interference" with 44650's "possessory interests" in its property. *Jacobsen, supra.* The "Tree Ordinance" places unconstitutional conditions on the use of the subject property. Finally, the Eighth Amendment "excessive fines" clause is inapplicable to the case at bar. Accordingly, the Court grants 44650's motion, except with respect to the Eighth Amendment "excessive fines" claim.

On the basis of the foregoing opinion,

IT IS ORDERED that the motion for summary disposition filed by Defendant/Counter-Plaintiff 44650, Inc. is hereby **GRANTED**;

IT IS FURTHER ORDERED that the complaint filed by Plaintiff/Counter-Defendant Charter Township of Canton is hereby **DISMISSED.**

IT IS SO ORDERED.

DATED: 7/17/2020

/s/ Susan Hubbard 7/17/2020
Circuit Judge

Appellee's Appendix 080–086

Plaintiff Charter Township of Canton's Brief Re Applicability of *Res Judicata*, Dated July 8, 2020

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF CANTON,

Plaintiff/Counter-Defendant,

Case No. 18-014569-CE

-vs-

Hon. Susan L. Hubbard

44650, INC., a Michigan corporation,

Defendant/Counter-Plaintiff,

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BRIEF OF PLAINTIFF/COUNTER-DEFENDANT, CHARTER TOWNSHIP OF CANTON, REGARDING APPLICABILITY OF *RES JUDICATA*

Plaintiff/Counter-Defendant, CHARTER TOWNSHIP OF CANTON, through its Attorneys, ROSATI, SCHULTZ, JOPPICH & AMTSBUECHLER, P.C., and submits the following brief on the applicability of *res judicata* with respect to the Opinion of the U.S. District Court for the

Eastern District of Michigan in the matter of *F.P. Development v. Charter Township of Canton*, Case No. 18-CV-13690 (E.D. Mich. 2020), 2020 WL 1952537.

This matter arose when Plaintiff, Charter Township of Canton, filed suit to abate a nuisance under the Michigan Zoning Enabling Act, MCL 125.2407, and Canton Township Zoning Ordinance, due to Plaintiff's clear-cutting of a 16-acre parcel of trees without proceeding in accordance with the tree removal and permit provisions of the ordinance. Defendant removed approximately 1,685 trees under the ordinance. In response, Defendant filed a Counterclaim challenging the constitutionality of the ordinance and the Township's enforcement action under the Fourth, Fifth and Eighth Amendments to the U.S. Constitution.

In a separate matter, a neighboring property owner, F.P. Development, LLC, removed trees (amounting to less than 200) from its property, also without complying with the Township's Zoning Ordinance, specifically the tree removal and permit provisions. When the Township issued a "stop work" order, F.P. Development, filed suit in the U.S. District Court for the Eastern District of Michigan alleging the same constitutional challenges as Defendant/Counter-Plaintiff here.

On April 23, 2020, the federal court issued an Opinion and Order granting F.P. Development's Motion for Summary Judgment in part based upon on the Fifth Amendment challenge, finding that the ordinance, as applied in the case of F.P. Development, constituted a taking in violation of the Fifth Amendment. "Having considered the three *Penn Central*[1] factors to be balanced, the court finds that *as applied to this Plaintiff* the Tree Ordinance goes too far and is an unconstitutional regulatory taking." 2020 WL 1952537 at *9 (emphasis added). Furthermore, the Court held that, "the Township's failure to consider the specific impact of tree removal on the community in determining the need for tree replacement *renders its Ordinance as applied to F.P. invalid.*" *Id.* at *12

[1] *Penn Central Transp Co v City of New York,* 438 US 104; 98 SCt 2646; 57 LEd2d 631 (1978).

(emphasis added). The Court denied F.P. Development's other Fifth Amendment challenges and granted to Canton Township judgment on F.P.'s challenges under the Fourth and Eighth Amendments.

Defendant has submitted the *F.P. Development* decision in its filing of supplemental authority and argued that it is binding on this Court and the application of the law on the same constitutional challenges. For the reasons set forth below, Plaintiff/Counter-Defendant here is not barred by the doctrine of *res judicata* by the *F.P. Development* decision.

I. RES JUDICATA DOES NOT APPLY IN THIS MATTER.

"The doctrine of *res judicata* is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when '(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies.' *Sewell v Clean Cut Mgt, Inc,* 463 Mich 569, 575; 621 NW2d 222 (2001), quoting *Dart v Dart,* 460 Mich 573, 586; 597 NW2d 82 (1999)." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). The Michigan Supreme Court "has taken a broad approach to the doctrine of *res judicata*, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Id.*

Res judicata, also known as claim preclusion, prevents parties from raising claims that could have been raised and decided in a prior action—even if they were not actually litigated. *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, —U.S.—; 140 SCt 1589, 1594 (May 14, 2020). If a later suit advances the same claim as an earlier suit between the same parties, the earlier suit's judgment "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Id.*

Res judicata does not apply to the *F.P. Development* decision, because that decision involved Canton's enforcement against F.P. Development, LLC, not Defendant, 44650, Inc. Although the legal issues are similar, the doctrine of *res judicata* requires that the action sought to bar a subsequent claim be between the same parties. Applying the same elements cited by the Michigan Supreme Court, the matter contested in the second action (the case before this Court) could not have been resolved in the first. F.P. Development, LLC and 44650, Inc. are separate, legal entities with separate ownership, and the two cases involve two separate and distinct parcels of land. The Township could not proceed to abate a nuisance against F.P. Development for the actions taken by 44650, Inc. on its separate piece of land, and vice versa. This case does not involve the same parties or their privies. See *Adair, supra,* 470 Mich at 121. Therefore, the doctrine of *res judicata* does not apply here.

II. CANTON TOWNSHIP IS NOT PRECLUDED FROM LITIGATING ITS CLAIMS AND THE ISSUES HERE AGAINST DEFENDANT 44650.

Canton Township anticipates that Defendant, 44650, Inc., will argue that the doctrine of collateral estoppel applies. Collateral estoppel, also known as issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding. *City of Detroit v Qualls*, 434 Mich 340; 454 NW2d 374 (1990); *Rental Properties Owners Ass'n of Kent County v Kent County Treasurer*, 308 Mich App. 498, 528; 866 NW2d 817 (2014). Ordinarily, there must also be mutuality of estoppel, a requirement that may, however, be relaxed when collateral estoppel is asserted defensively to prevent a party from relitigating an issue that such party has already had a full and fair opportunity to litigate in a prior suit. *Monat v State Farm Ins Co*, 469 Mich 679, 691-692; 677 NW2d 843 (2004).

At first blush, the defensive assertion of collateral estoppel in this case perhaps has some appeal, and Defendant might have a colorable argument for defensive assertion of collateral estoppel if the *F.P. Development* Court had found the tree removal provisions of the Zoning Ordinance

unconstitutional on their face. If the entire ordinance were struck on constitutional grounds, regardless of its application to any individual property or owner, Canton would be hard-pressed to argue that it is not precluded from enforcing the ordinance altogether. However, the *F.P. Development* Court expressly disavowed any finding that the ordinance was facially invalid. It specifically rejected F.P. Development's argument that the tree removal ordinance was a *per se* taking. "[T]he Tree Ordinance is not a *per se* taking. Thus, the court analyzes whether the Tree Ordinance goes 'too far' under the *Penn Central* balancing test." 2020 WL 1952537 at *7. Application of the *Penn Central* test requires a fact-specific analysis of the economic impact of the regulation *on the property owner*, the investment-backed expectations of *the property owner*, and the character of the government action. *Id.* at *8-*9; *Penn Central, supra*, 438 US 104 at 124.

The application of the tree regulation in the instances of F.P. Development and that of Defendant 44650 here are different in nature and scope, Defendant here having clear cut an entire 16 acres of property, whereas F.P. Development had removed less than 200 regulated trees on a distinct parcel of land. Therefore, the Court's analysis of the *Penn Central* factors specifically with respect to F.P. Development cannot bind this Court in the analysis of 44650's actions and the Township's ordinance enforcement.

In Michigan, collateral estoppel requires that "a *question of fact* essential to the judgment must have been actually litigated and determined by a valid and final judgment." Contrary to Defendant's assertion in its April 29, 2020 filing of supplemental authority, the F.P. Development Court did not entirely strike Canton Township's tree removal ordinance as constitutionally infirm. Moreover, the *F.P. Development* Court did not, and could not have, decided any questions of fact that apply to Canton Township's enforcement of 44650's clear cutting 16 acres of land, as those issues were not before the federal court.

Application of collateral estoppel also requires that the "the same parties must have had a full [and fair] opportunity to litigate the issue." *Monat, supra,* 469 Mich at 682-84. A "full and fair opportunity to litigate" normally encompasses the opportunity to both litigate and appeal. *Id.*, 469 Mich at 685. Canton Township has taken an appeal of right of the District Court's decision in the *F.P. Development* case, barring its preclusive effect on the parties here.

In its 4/29/20 supplemental authority, Defendant also cited *Public Citizen v Carlin*, 2 F Supp 2d 18 (D DC 1998) for the proposition that a declaratory judgment issued is binding and final until reversed on appeal. Plaintiff does not contend otherwise; however, the judgment is binding and final only with respect to the parties to the judgment. Defendant 44650 is not a party to the declaratory judgment in *F.P. Development.* Moreover, the *Public Citizen* case is inapposite to the question of a judgment's binding effect on other courts in other cases with other parties, as the decision there addressed only that court's ability to enforce its declaratory judgment against the parties to that case. *Id.*, 2 FSupp2d at 20.

Most notably, the *F.P. Development* decision declared that the tree removal ordinance is unconstitutional *only as applied to F.P. Development.* The Court there did not opine on the application of the ordinance to any other property owner or parcel of land, including Defendant here. Nor is there an injunction or other decree preventing Canton Township from continuing to enforce the ordinance in other circumstances and against other property owners, including Defendant 44650. In short, neither doctrine of the preclusive effect of judgments, *res judicata* or collateral estoppel, applies to these parties and the issues in this case. Plaintiff/Counter-Defendant respectfully reiterates its request for relief under MCR 2.116(I)(2) and for entry of summary disposition in its favor.

Respectfully submitted,

ROSATI SCHULTZ JOPPICH & AMTSBUECHLER PC

/s/ Anne McClorey McLaughlin (P40455)
Attorney for Plaintiff/Counter-Defendant

PROOF 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 July 8, 2020, BY:

___ U.S. MAIL	___ FAX
___ HAND DELIVERED	___ FEDEX
___ UPS	xxx EFILE

SIGNATURE: /s/ Michelle Irick

Appellee's Appendix 087–119

Defendant-Appellant Charter Township of Canton's
Petition for Rehearing *En Banc*
(6th Cir., November 30, 2021)

Case Nos. 20-1447, 20-1466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH JUDICIAL CIRCUIT

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

Plaintiff-Appellee/Cross-Appellant,

v.

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

Defendant-Appellant/Cross-Appellee.

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

DEFENDANT-APPELLANT'S PETITION FOR REHEARING *EN BANC*

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Other Authorities

Rules

Fed.R.App.P. 35(b) Statement in Support of Rehearing En Banc

The U.S. Supreme Court decisions in *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), developed and applied a test of heightened judicial scrutiny for evaluating local government land use permits that are conditioned on conveyance of an easement or other dedication of real property to the local agency (exactions). In *Koontz v. St. Johns River Water Management Dist*., 570 U.S. 595 (2013), the Court included in this test cases where a fee in lieu of such a dedication is charged. Though the dissent in *Koontz* expressed concern that this heightened scrutiny would be applied to land use permitting fees that do not involve conveyance of an easement or other property, the majority dismissed those concerns, stating that it was not extending the rule to all fees, but only those to which the exactions rule already applied.

Contrary to *Koontz,* however, the panel here did extend application of the *Dolan* test to other permit conditions and fees not involving any sort of conveyance of an interest in the landowner's property. The panel's decision thereby conflicts with the U.S. Supreme Court's decisions in *Nollan, Dolan*, and *Koontz.*

Consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions.

This case is also of exceptional importance, as the panel has designated it for publication. Thus, the decision affects not just Canton Township, but binds every local government that enacts land use regulations and permitting fees for preservation of

trees and other natural resources in the context of land development in accordance with local concerns. It establishes a rule that will impair local governments' ability to charge reasonable permitting fees and will substantially change the way local governments administer well-established zoning and land use schemes.

STATEMENT OF PERTINENT FACTS

At issue in this action is an approximately 24-acre, undeveloped parcel of property in Canton Township, Wayne County, Michigan ("the Property"). [R. 16, 16-1, Page ID # 149-165, 167]. The Property at issue in this matter was once part of a larger, 40-acre parcel that is traversed along its eastern edge by the Fisher-Lenge Drain, a drain established under the Drain Code of 1956 and under the jurisdiction of Wayne County ("the Drain").

F.P. Development, Inc. (F.P.), purchased the Property from Petitioner, Charter Township of Canton ("Canton" or "the Township") in approximately 2007. [R. 34-3, Page ID # 672-673.] In late 2016, Canton received an application to split the property into two parcels of 24 acres and 16 acres, respectively. [R. 16-2, Page ID # 169-176.] F.P. would retain the larger parcel (the "Property"), and convey the 16-acre parcel to 44650, Inc. (the "Split Parcel"). [R. 16-2, Page ID # 169-176]. The Property and the Split Parcel were undeveloped and covered with mature, high quality trees and other vegetation. [R. 16, Page ID # 149-165.]

Canton responded in writing to the application, identifying certain requirements before finalizing the split request. [R. 16-3, Page ID # 178-180; R. 16-4, Page ID # 182.] The letter tentatively approving the split further noted information about use of the Property, including the requirements to submit a site plan as a pre-condition to development and to obtain a tree removal permit before removal of any trees from the Property. *Id.*

On November 27, 2017, the Township again corresponded to F.P.'s agent reiterating the requirements to complete the parcel split, including a permit before removal of any trees from the Property. [R. 16-6, Page ID # 188.] On January 22, 2018, the Township notified F.P.'s agent that the property split was complete. [R. 16-7, Page ID # 190-194.]

On or about April 27, 2018, Township deputy Planner Leigh Thurston received a phone call from an individual inquiring why so many trees were removed from the Split Parcel. [R. 16, Page ID # 149-165.] When she investigated this allegation the Split Parcel, she observed tree removal also actively occurring on the Property. *Id.*

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

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

> d. Clear cutting or grubbing within the dripline of a forest.
>
> [R. 16-8, Page ID # 196-201, Canton Township Forest Preservation and Tree Clearing Ordinance.]

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

Viewing the Property from a neighboring parcel, Thurston noted the following ordinance violations:

> a. Removal of regulated trees without a Township permit;
>
> b. Removal of landmark trees without a Township permit;
>
> c. Removal of trees within the dripline of a forest without a Township permit;
>
> d. Cutting of trees within 25 feet of the Drain; and
>
> e. Cutting of trees and other work within a county drain and drain easement under the jurisdiction of Wayne County. [*Id.,* Page ID #154.]

Ms. Thurston immediately contacted Mr. Powelson, and informed him that he needed a permit to remove the trees. *Id.* Page ID #155. Mr. Powelson responded that he "had already paid [the tree removal] guys," and that he had "tried to get Wayne County to clean the drain .. ." *Id.*

After some difficulty, the parties eventually agreed to a date for the Township to inspect the Property and to analyze the trees removed from the Split Parcel, which had been completely clear-cut. *Id.* While on the Property, Ms. Thurston saw a number of tree stumps, confirming the tree removal she had observed in April. *Id.* She further observed that numbers had been spray painted on various standing trees, and that the piles of logs that she had observed in April had been removed from the Property. *Id.,*

Page ID #156. She also noted that the majority of the trees that had been cut were oak trees. *Id.*

Despite notice of the ordinance violation, F.P. continued logging activities on the Property. *Id.* Canton therefore posted a "Stop Work" Order and provided a written Notice of Violation to F.P.'s counsel. [R. 16-9, Page ID # 203-204.] On October 12, 2018, Thurston made a second visit to the Property to verify the number and species of trees that had been removed from the Property. [R. 16, Page ID # 149-165.]

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

In lieu of planting replacement trees, Ord. § 5A.08(E) affords F.P. other options, including paying into the Township's tree fund the replacement cost of the trees that were removed. [R. 16-8, Page ID # 201.] Then-current market prices for the types of

trees required to replace the regulated trees removed at approximately $300 per tree, and market cost of trees required to replace landmark trees averaging $450 per tree, F.P. was responsible for paying into the tree fund for the unlawfully removed trees—should it choose not to replant any of the removed trees. [R. 16, Page ID # 151-157.]

Plaintiff filed its Complaint on November 26, 2018 to preempt further enforcement of the Notice of Violation and Stop Work Order. Plaintiff filed a five-count complaint claiming a taking of property for public use without just compensation in violation of the Fifth and Fourteenth Amendments, a seizure of property in violation of the Fourth Amendment, and that the replacement of trees or deposit into the tree fund violates the Eighth Amendment proscription against excessive fines.

On cross-motions for summary judgment, the district court held in the Township's favor on Plaintiff's claims of takings *per se*, and on the Fourth and Eighth Amendment claims. The district court granted Plaintiff's motion for summary judgment, finding that the tree ordinance as applied to Plaintiff constituted a regulatory taking and an unconstitutional exaction.

On Canton's appeal here, the panel issued a decision holding that the exactions test of *Nollan/Dollan* applies and that the Township's requirement that F.P. replace trees or deposit funds equivalent to replacement costs was a taking requiring just compensation. (10/13/21 Opinion, attached.) The panel did not decide Plaintiff's other takings theories, and affirmed the district court's finding of no violation of the Fourth and Eighth Amendments.

ARGUMENT

The panel noted that amici Michigan Townships Association and Michigan Municipal League had briefed the issue of ripeness, which Canton had raised in the district court but did not appeal. Yet, the panel went on to analyze the question and decided that F.P.'s claim was ripe.

Conversely, the panel found it "an interesting question whether Canton's application of the Tree Ordinance to F.P. falls into the category of governmental action covered by *Nollan, Dolan* and *Koontz*," but declined to answer the question as "the parties [did] not raise it." Opinion, Doc. 84-2, p. 9. Petitioner respectfully disagrees that it did not raise that question.

In its First Brief, Petitioner submitted:

> *The land dedication at issue in Dolan is also qualitatively different than and distinguishable from the requirement to replace trees.* The Court held against the City of Tigard's condition that Dolan grant to the City property to create a public greenway space for flood control, as the City could not justify why a public, as opposed to private, space for this purpose was roughly proportional. The Court observed that, "[s]uch public access would deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan*, 512 U.S. at 384.
>
> *In the case before this Court, the tree replacement or fee in lieu of replacement, conversely, does not require dedication of property for public access*. Plaintiff has always retained, and still retains, control over its Property, including the right to exclude others. Doc. 34, pp. 28-29 (emphasis added.)

While Defendant did not expressly argue that the facts here take this case outside the scope of *Nollan, Dolan,* and *Koontz* exaction tests, Defendant did distinguish tree replacement or fee in lieu of replacement from the type of regulation that deprives a

property owner of the right to exclude others, which is the hallmark of a takings claim. Defendant submits that its distinction in the nature of the property interests at issue was sufficient to raise the question it asks the full Court to consider here.

Moreover, the panel conspicuously disregarded the arguments of amici curiae Michigan Association of Planning (MAP) and Michigan Environmental Council (MEC), who did argue and explain why the *Nollan/Dolan* test does not apply to these facts.. Doc. 37, p. 24.[1] The Court also granted amici counsel the opportunity to present at oral argument, splitting time with the respective counsel for the parties. Counsel for amici MAP and MEC dedicated the substantial portion of his argument that *Nollan, Dolan* and *Koontz* did not apply to every regulation requiring a permit (*Koontz* even said so) where there was no demand for a dedication or, in the words of Justice Alito in *Koontz*, a "fee in lieu of" dedication. Petitioner's counsel discussed this aspect of *Koontz* in her rebuttal argument at the hearing as well.

This Court's "review of a district court's summary-judgment ruling is confined to the record." *Bormuth v. County of Jackson*, 870 F.3d 494, 499 (6th Cir. 2017)(en banc)

[1] "In other words, the burdens a property owner bears are not conditional dedications or 'monetary exactions' demanded via a discretionary permitting or 'adjudicatory' process in exchange for a permit, but rather more like the burdens a property owner normally bears when she must provide, for example, subterranean support, landscaping, or stormwater control as a nondiscretionary requirement to build. As such, the *Koontz* Court's holding—that land use permits premised on the *conditional* demand for an *easement,* or a *monetary* exaction in lieu of such a dedication, implicate the unconstitutional conditions doctrine (570 U.S. at 612 and 617)—does not apply here because neither of those demands were made here[.]" (Emphasis original.)

(citation omitted). This rule of review is limited, however, only to the *factual* record, not to questions of law. Petitioner is not requesting that the Court review additional facts or evidence, but solely a question of law.

Even if the Court disagrees that the issue was sufficiently raised by Canton or its amici, that does not foreclose the Court from addressing the question. "[O]nce an issue or claim is properly before a court, the court is not limited to the particular legal theories advanced by the parties but retains the independent power to identify and apply the proper construction of governing law." *Kamen v Kemper Fin Servs. Inc.*, 500 U.S. 90, 99 (1991). The Court is always free to consider and to decide questions of law before it, even those not raised by the parties and even *sua sponte*. "[T]he refusal to consider arguments not raised is a sound prudential practice, rather than a statutory or constitutional mandate, and there are times when prudence dictates the contrary." *Davis v. United States,* 512 U.S. 452, 464-465 (1994) (Scalia, J., concurring). In any event, "It is beyond dispute that, in general, we have the power to consider issues that a party fails to raise on appeal even though the petitioner does not have the right to demand such consideration." *Thomas v. Crosby*, 371 F.3d 782, 793-794 (11th Cir. 2004), and cases cited therein. "U.S. courts of appeal have the discretion to raise legal issues not raised by a party." *Patton v. West,* 12 Vet. App. 272, 283 (1999).

In addition to the parties, amici can advise even the Supreme Court of "missing arguments." *Massachusetts Food Ass'n v. Massachusetts Alcoholic Beverages Control Comm'n*, 197

F.3d 560, 567-568 (1st Cir. 1999)("[A] court is usually delighted to hear additional arguments from able amici that will help the court toward right answers[.]")

So, while the panel appeared skeptical whether *Nollan, Dolan* and *Koontz* apply here, it proceeded nonetheless to review Canton's actions under that framework. Petitioner respectfully suggests that the panel should have paused and answered its own question in the negative. It is especially important here, where the panel has issued a decision for publication that will serve as binding precedent in this Circuit for Canton Township and all government agencies whose regulations and permitting processes involve some financial burden on property development. The decision as it stands will further erode local government's ability to impose reasonable restrictions on land use and development far beyond that contemplated in *Nollan*, *Dolan* and *Koontz*, by Justice Alito's own words.

The test for exactions established by *Nollan, Dolan* and *Koontz* was expressed under the unconstitutional conditions doctrine: a government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property. *Dolan*, 512 U.S. at 385. It must be determined whether an "essential nexus" exists between a legitimate state interest and the permit condition. *Id.*, at 386, citing *Nollan, supra,* 483 U.S. at 837. "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. at 612. "[T]he government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Id.* at 606.

Dolan requires that government make an individualized assessment of the impact of a development to determine whether the benefit or "exaction" is related to the property. *Dolan* and *Nollan* both dealt with traditional exactions – dedication of property to the government in exchange for land use approval. Before *Koontz*, the Supreme Court had held that the unconstitutional conditions doctrine did not apply where payment of money was concerned. But recognizing that "so-called 'in lieu of' fees are utterly commonplace," *Koontz* expressly overruled that holding: "[S]o-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." 570 U.S. at 612.

But *Koontz* did not extend this test to just any payment required as a condition for a permit to engage in a desired use of property; it specifically addressed fees *in lieu of a grant of a title interest* or *a dedication of property to the government*. *Id.* at 612. The mere fact that the government imposed a condition on a land use permit does not automatically trip heightened *Nollan/Dolan* review; the key distinction is the underlying constitutional protection implicated by the condition.

In *Dolan*, the condition imposed was the dedication of an easement, while in *Koontz* the condition imposed was payment of fees in lieu of an easement. In both cases,

it was appropriate to apply the heightened level of scrutiny, and the Court discussed the unconstitutional conditions doctrine and the *Nollan/Dolan* test in the context of the facts before it.

Here, Canton's ordinance condition is a constraint on use (replanting of trees, or fees in lieu of replanting), not an action to take an easement or to require dedication of another property interest—i.e., not an ouster. As the panel here recognized, Canton did not even take a proprietary interest in the removed trees themselves. Opinion, p. 12. While the unconstitutional conditions doctrine still applies (i.e., the ordinance is subject to a regulatory takings analysis), the *Nollan/Dolan* level of scrutiny does not apply.

Significantly, *Koontz* addressed two questions: 1) Is a regulation that establishes a payment of fees in lieu of a prohibition or an exaction subject to a regulatory takings claim, or does the use of fees preclude such a claim; and 2) Does the fact that a governmental agency ultimately denies a permit preclude a regulatory takings claim? The Court clarified that, in both cases, a regulatory takings claim is still viable. The key significance of *Koontz* is that a government cannot evade a regulatory takings claim merely by converting all or part of its prohibition or exaction demand into a demand for payment of fees, or by denying a permit altogether. It is clear the Court's analysis of what constitutes a "monetary exaction" was made in the context of a demand for an easement:

> Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority *wishing to exact an easement* could simply give the owner

> a choice of either surrendering an easement or making a payment equal to the easement's value. Such so-called "in lieu of" fees are utterly commonplace, and they are *functionally equivalent to other types of land use exactions*. For that reason and those that follow, we reject respondent's argument and hold that so-called "monetary exactions" must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.

Koontz, 570 US at 612 (citations omitted, emphasis added).

All the *Koontz* Court did was clarify that a demand for payment of fees in lieu of a demand for an exaction implicates the regulatory takings doctrine, nothing more (*i.e.*, it did not extend *Nollan/Dolan* review to any and all requirements for payment of fees). As the Court stated further: "This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners." *Id.* at 615.

Justice Kagan dissented in *Koontz*, raising the concern that the Court's ruling would be interpreted as applying heightened judicial scrutiny to all fee-based permitting regulations. 570 U.S. at 625.

The panel here essentially accepted F.P.'s contention that any and all mitigation, including fees, required for a land use permit are subject to heightened *Nollan/Dolan* review. But the *Koontz* Court made clear that it was not changing any other aspect of the regulatory takings doctrine, only clarifying that "permitting fees in lieu of" an appropriation are subject to regulatory takings review, just as are constraints or appropriations themselves. The Court cited to *Lingle v Chevron, U.S.A*, 544 U.S. 528 (2005), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), and

Dolan extensively to explain the "unconstitutional conditions" reasoning for application of the regulatory takings doctrine, even when a permit is denied and nothing is "taken." See, 570 U.S. at 605, 618. But these cases, especially *Lingle*, also make clear that the heightened judicial scrutiny required via *Nollan* and *Dolan* stem from "takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit…. In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking." 544 U.S. at 547 (citations omitted). *Lingle* also cited parenthetically to *Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 702 (1999), "emphasizing that we have not extended this standard 'beyond the special context of [such] exactions.'" 544 U.S. at 547 (citations omitted).

For a potential regulatory taking (based on a constraint on use, or payment of fees in lieu of a constraint on use), the constitutional protection is the right not to be subjected to a regulation that goes too far. Since F.P. has not been deprived of all economic value of its property, the appropriate adjudicatory test is that set forth in *Penn Central, supra.*

By applying the *Nollan/Dolan* heightened scrutiny to the circumstances in this case, the panel exceeded the Supreme Court's express limitation in *Koontz* that elevated scrutiny applies only to demands for easements or other interests in land, or fees in lieu of such interests. It therefore conflicts with *Nollan, Dolan,* and *Koontz.* The panel should

have quickly disposed of that question, applied the *Penn Central* balancing test for regulatory takings, and reached a judgment in Canton Township's favor.

Petitioner respectfully requests that the Court grant rehearing *en banc* to properly consider this matter for the sake of Petitioner and all local governments whose regulatory schemes will be upended by the panel's decision as it stands.

WHEREFORE, for all of the foregoing reasons, Defendant-Appellant/ Petitioner respectfully requests that the Court grant rehearing *en banc*.

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CERTIFICATE OF CONFORMITY

The undersigned hereby certifies that this brief complies with the type-volume limitation found at Fed.R.App.P. 35(b)(2)(A). It contains 3,881 words and has been prepared in Microsoft Word, using a proportionally spaced face, Garamond, and a 14-point font size.

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2021, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

/s/ Sheila Bodenbach

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0240p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

F.P. DEVELOPMENT, LLC,
Plaintiff-Appellee/Cross-Appellant,

v.

CHARTER TOWNSHIP OF CANTON, MICHIGAN,
Defendant-Appellant/Cross-Appellee.

Nos. 20-1447/1466

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:18-cv-13690—George Caram Steeh, III, District Judge.

Argued: June 10, 2021

Decided and Filed: October 13, 2021

Before: COLE, BUSH, and NALBANDIAN, Circuit Judges.

COUNSEL

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OPINION

JOHN K. BUSH, Circuit Judge. American history teems with stories and myths of trees. Johnny Appleseed's apple trees and George Washington's cherry tree are but a few of those timber tales that inspire and teach. Whether to plant or cut down a tree can be, for better or worse, an individual choice. But sometimes the government gets involved. For example, it can reward those who plant, *see, e.g.*, Timber Culture Act of 1873, ch. 277, 17 Stat. 605 (granting additional land to homesteaders who planted seedlings), or compensate for land taken to conserve, *see, e.g.*, Migratory Bird Conservation Act of 1929, 16 U.S.C. § 715 *et seq.* Those "carrot" measures serve to further the public interest in tree cultivation and management while compensating private parties for their property and efforts.

Here, however, the government used what F.P. Development portrays as the "stick" approach. Intending to help preserve its greenery, the Charter Township of Canton, Michigan, passed an ordinance that prohibits F.P. from removing certain trees on its land without a permit and requires F.P. to mitigate the removal. F.P. challenges the regulation, claiming that it constitutes a taking of its property without just compensation, an unreasonable seizure, and an excessive fine. The district court granted summary judgment to F.P. on the takings claim and to Canton on the others. We affirm.

I.

Around July 2006, Canton passed an ordinance, which the parties refer to as the Tree Ordinance, addressing forest preservation and tree clearing. The township's aim was to improve its community and protect its natural resources. Accordingly, the Tree Ordinance requires tree owners in Canton to get a permit before removing certain trees or undergrowth from their properties. Specifically, the ordinance deals with four categories of tree-related clearing. It prohibits the unpermitted removal, damage, or destruction of (1) any tree with a diameter at

breast height of six inches or greater, (2) any landmark or historic tree,[1] (3) any tree located within a forest and with a diameter at breast height of three inches or more, and (4) any under-canopy vegetation within the dripline of a forest. There are, however, numerous exceptions. For example, agricultural and farming operations, commercial nurseries, tree farms, and occupied lots of fewer than two acres are not subject to the permitting requirement.

The unlucky tree owner who does not fall into one of those exceptions has to submit a tree-removal-permit application to Canton before commissioning an arborist. Among other requirements, the application must describe the area affected by the tree removal, each tree to be removed and its location, and what the affected area will look like after the proposed removal. The ordinance also lists review procedures and standards that Canton must follow when reviewing applications. Those procedures require the township to evaluate the effect of the proposed development on the quality of the surrounding area.

If Canton issues a permit, a tree owner must agree to mitigate the tree removal. The Tree Ordinance lists three standardized mitigation options: a tree owner can replace removed trees on its own property, replace them on someone else's property, or pay a designated amount into Canton's tree fund so the township can replace them elsewhere. For every landmark tree cut down, a tree owner must replant three trees or pay about $450 into the tree fund. For every non-landmark tree cut down as part of a larger-scale tree removal, a tree owner must replant one tree or pay about $300 into the tree fund. If a tree owner fails to comply with those requirements, Canton sends a notice of violation and requires that the tree owner submit a permit application or face an enforcement lawsuit.[2]

F.P. Development, a real-estate holding company owned by Martin F. Powelson, is one of those non-complying tree owners. In 2007, F.P. purchased a 62-acre parcel of undeveloped land from Canton for $550,000. The plan was to use the land to expand Powelson's traffic-

[1]A "landmark" or "historic" tree means "any tree which stands apart from neighboring trees by size, form or species, as specified in the [township's] landmark tree list . . . or any tree, except box elder, catalpa, poplar, silver maple, tree of heaven, elm or willow, which has a [diameter at breast height] of 24 inches or more."

[2]Canton also has the authority to impose criminal penalties on violators in the form of a $500 fine and up to 90 days' imprisonment.

control sign business, POCO, which occupied the lot adjacent to the 62-acre parcel. F.P. left the land undeveloped until 2016, when it filed a property split application with Canton, requesting permission to split 44 acres of the property roughly in two: a 28-acre plot for F.P. to keep and a 16-acre plot to sell. Canton tentatively approved the separation and noted that any development involving tree removal would require the proper permitting. By 2017, F.P. completed the split.

But, unfortunately for F.P., the two parcels were bisected by a county drainage ditch that had become clogged with fallen trees and other debris. After the county refused to clear the ditch, F.P. contracted with a timber company to remove the trees and debris and to clear several other trees from the property. As to that removal, F.P. did not apply for or receive a permit. Nor did it receive permission from Canton to proceed without a permit.

Soon after, someone tipped off Canton's Landscape Architect and Planner to F.P.'s unpermitted tree removal. The township investigated and confirmed the tip. It then posted a "Stop Work" order on F.P.'s property and issued a "Notice of Violation." The notice made clear that a survey of the property was required to determine the number and species of trees removed so that Canton could enforce the Tree Ordinance.

From that survey, Canton determined that F.P. had removed 159 trees—14 landmark trees and 145 non-landmark trees. To comply with the ordinance, F.P. had to either replant 187 trees (three for every landmark tree removed and one for every non-landmark tree) on its or another's property or deposit $47,898 into Canton's tree fund.

F.P. chose neither option. Instead, it filed a lawsuit, seeking declaratory and injunctive relief under 42 U.S.C. § 1983. It claimed that Canton's Tree Ordinance constituted (1) a facial and as-applied unconstitutional taking, in violation of the Fifth and Fourteenth Amendments; (2) an unreasonable seizure, in violation of the Fourth and Fourteenth Amendments; and (3) an excessive fine, in violation of the Eighth and Fourteenth Amendments. The Township filed a counterclaim seeking $47,898 in damages.

After several months of discovery, F.P. moved for summary judgment. Canton moved to dismiss the case on ripeness grounds, for judgment on the pleadings, or for summary judgment in its favor. The district court denied Canton's motion to dismiss on ripeness grounds. The court

then granted F.P. summary judgment on its as-applied Fifth Amendment claim. It reasoned that although the ordinance, as applied to F.P., was not unconstitutional as a per se physical taking, it was unconstitutional as a regulatory taking and as an unconstitutional condition. The court did not decide F.P.'s facial challenge. Finally, the court granted Canton summary judgment on F.P.'s Fourth and Eighth Amendment claims. Both parties appeal.

II.

We review a district court's decision on summary judgment de novo. *Jackson v. City of Cleveland*, 925 F.3d 793, 806 (6th Cir. 2019). Summary judgment is appropriate when there is "no genuine dispute as to any material fact" and the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We construe the evidence and draw all reasonable inferences in favor of the nonmoving party. *Jackson*, 925 F.3d at 806.

III.

A. RIPENESS

We begin with the questions about our jurisdiction. The doctrine of ripeness prevents courts from deciding cases or controversies prematurely. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807–08 (2003). It is "drawn both from Article III limitations on judicial power and from prudential" concerns. *Id.* at 808 (quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993)). Issues of ripeness rooted in Article III are jurisdictional; those based on prudence are not. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1012–13 (1992).

Amici Michigan Township Association and Michigan Municipal League argue on appeal that F.P.'s as-applied challenge to the Canton Tree Ordinance is not ripe for review, citing prudential ripeness concerns. But Canton did not raise those concerns in its briefing before us. So the argument is forfeited. *See Self-Ins. Inst. of Am., Inc. v. Snyder*, 761 F.3d 631, 641 (6th Cir. 2014) ("[W]hile an amicus may offer assistance in resolving issues properly before a court, it may not raise additional issues or arguments not raised by the parties." (quoting *Cellnet*

Commc'ns Inc. v. FCC, 149 F.3d 429, 443 (6th Cir. 1998))); *see also Stolt-Nielsen*, 559 U.S. at 670 n.2 (holding that a prudential ripeness argument was waived).

What's more, "we do not think it prudent to apply" the doctrine of prudential ripeness sua sponte here. F.P. has standing under Article III, and the status of the prudential ripeness doctrine is uncertain. *See Lucas*, 505 U.S. at 1013; *see also, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125–27 (2014) (questioning the vitality of the doctrine of prudential ripeness); *Miller v. City of Wickliffe*, 852 F.3d 497, 503 & n.2 (6th Cir. 2017) (declining to address prudential ripeness because plaintiff lacked standing under Article III and because of the questioned vitality of the doctrine). We thus proceed to the merits.

B. TAKING WITHOUT JUST COMPENSATION

F.P.'s first claim is that Canton's Tree Ordinance constitutes a taking of its trees in violation of the Takings Clause of the Fifth Amendment, as incorporated by the Fourteenth Amendment. The Takings Clause states that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V. In F.P.'s view, Canton's Ordinance violates that prohibition in three ways: the ordinance imposes (1) a per se taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) and *Horne v. Department of Agriculture*, 576 U.S. 350 (2015); (2) a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978); and (3) an unconstitutional condition under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 604 (2013). For reasons discussed below, we agree with F.P. that the ordinance violates the Fifth Amendment, through the Fourteenth Amendment, based on the unconstitutional-conditions doctrine, so we need not consider the other two theories for relief. *See Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 575 n.6 (9th Cir. 2020); *Phillip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 674 n.4 (1st Cir. 1998). Before addressing pertinent legal issues below, however, we provide some background on what began as a highly contentious subject in American history.

1. Historical Background

On April 13, 1772, almost two years before the Boston Tea Party, and three years before an American Patriot fired the shot heard 'round the world, a group of colonists revolted against the Crown's longstanding Pine Tree Act. The act prohibited colonists from cutting down white pine trees on their own land without first obtaining a royal license and subjected violators to fines that grew with the size of the tree felled. *See* An Act Giving Further Encouragement for the Importation of Naval Stores, and for the Purposes Therein Mentioned, 1721, 5 Geo I., c. 12 (Eng.). The colonists ignored the act, and a large group of disgruntled tree owners captured the British representatives, beat them with switches (one lashing for every tree the Crown claimed), maimed and shaved their horses, and ran them out of town. *See* William Little, *History of Weare, New Hampshire 1735–1888*, 189 (S.W. Huse & Co., 1888).

F.P. suggests that the Founders adopted and ratified the Takings Clause of the Fifth Amendment, in part, to prevent the type of tree restrictions imposed by both the British Crown and the Township of Canton. It is true that "[t]he Founders recognized that the protection of private property [would be] indispensable to the promotion of individual freedom." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021). So, as part of the Bill of Rights, they included the Takings Clause in the Fifth Amendment. But that constitutional guarantee does not, as a matter of original meaning, obviously invalidate Canton's property regulation.

Indeed, history presents a more complicated picture of land-use regulation in the Founding Era than F.P. suggests. The Takings Clause may not have even extended to regulations of private property like the one at issue in this case. *See id.* at 2071 (noting that the Takings Clause was originally "limited to physical appropriations of property"). In fact, despite the early colonists' frustration with the Crown's Pine Tree Act, general land regulation was commonplace in colonial America. *See* Act of May 12, 1724, 7 The Public Records of the Colony of Connecticut 10 (Charles J. Hoadly ed., Hartford, Conn. Cass, Lockwood & Brainard Co. 1876) (requiring removal of barberry bushes to prevent wheat blight).[3] Indeed, the author of

[3]*See also, e.g.*, Ordinance of Feb. 23, 1656, Laws and Ordinances of New Netherland, 1638–1674, 361, 361 (E.B. O'Callaghan, trans., Albany, N.Y., Weed, Parsons and Co. 1868) (requiring installation of fences to support the "cultivation of the soil"); Act of Nov. 27, 1700, ch. LIII, sec. III, 2 The Statutes at Large of Pennsylvania

the Takings Clause, James Madison, seemed to view the constitutional text as limiting only the government's power to take property physically for public use. *See* James Madison, *Property*, Nat'l Gazette, Mar. 27, 1792, in 14 The Papers of James Madison, 266–68 (Robert A. Rutland et al. eds., 1983) (invoking the Takings Clause and distinguishing between "direct" and "indirect[]" violations of property). Madison's interpretation finds support in common law and statutes that allowed certain government land-use regulations without requiring compensation to other land owners. *See* 1 *Blackstone's Commentaries* editor's app., 305–06 (St. George Tucker ed., Philadelphia, Birch & Small 1803).[4]

Of course, questions abound regarding whether the ratification of the Fourteenth Amendment placed greater limits on state-government regulation of private property than did the Fifth Amendment. *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1957 (2017) (Thomas, J. dissenting). But, as a court of middle management, we have no occasion or authority to answer those questions here. Regardless, the Supreme Court made clear in 1922 that the rights guaranteed by the Takings Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment, limit all regulations of private property that go "too far." *See Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). And later, the Court held that certain permitting schemes should be subject to analysis under the unconstitutional-conditions doctrine. *See Nollan*, 483 U.S. at 835–37; *Dolan*, 512 U.S. at 386–88; *Koontz*, 570 U.S. at 604. Our analysis begins and ends there.[5]

2. Unconstitutional Conditions

Under the unconstitutional-conditions doctrine, "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz*, 570 U.S. at 604 (quoting *Regan*

65, 66–67 (James T. Mitchell & Harry Flanders eds., Pa., Clarence M. Busch 1896) (requiring planting and maintenance of certain trees).

[4]*See also, e.g.*, Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings but the Fourteenth Amendment May*, 45 San Diego L. Rev. 729, 736 (2008); *see generally* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 798–859 (1995).

[5]The briefing on appeal concluded before the Supreme Court issued its opinion in *Cedar Point Nursery*—the Court's most recent case involving the Takings Clause. 141 S. Ct. at 2063. But nothing in that case demands that we review F.P.'s challenge to Canton's ordinance under a per se or regulatory takings approach.

v. Taxation with Representation of Wash., 461 U.S. 540, 545 (1983)). In practice, the doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id.*

F.P. argues that Canton's Tree Ordinance places an unconstitutional condition on its Fifth Amendment rights by coercing it into giving up its right to just compensation for the township's taking of trees in exchange for a permit. As noted, F.P. points to *Nollan*, *Dolan*, and *Koontz* for support.

Those cases "'involve a special application' of" the unconstitutional-conditions doctrine "that protects the Fifth Amendment right to just compensation" when the government demands property in exchange for land-use permits. *Koontz*, 570 U.S. at 604 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005)). In particular, they hold that "the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Id.* at 606.

There is an interesting question whether Canton's application of the Tree Ordinance to F.P. falls into the category of government action covered by *Nollan*, *Dolan*, and *Koontz*. But the parties do not raise it. And we decline to do so on our own accord. So we proceed, as the parties request, and apply the essential nexus and rough proportionality test provided in those cases.

3. Essential Nexus and Rough Proportionality

The parties agree that there is an "essential nexus" between Canton's "legitimate" interest in forest and natural resource preservation and the permit conditions. *See Dolan*, 512 U.S. at 386. Therefore, we need only address the "rough proportionality" prong of *Nollan* and *Dolan*.

That prong "requires us to determine whether the degree of the exactions demanded by the [township's] permit conditions bears the required relationship to the projected impact of [F.P.'s] proposed development." *Dolan*, 512 U.S. at 388. The "required relationship" does not have to be "exacting," but it cannot be "generalized." *Id.* at 389–90. It must be "rough[ly] proportional[]." *Id.* at 391. Of course, "[n]o precise mathematical calculation is required, but the

[township] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.*

Canton fails to carry its burden to show that it made the required individualized determination. Under the Tree Ordinance, F.P. must replant one tree for every non-landmark tree removed and three trees for every felled landmark tree. The township also requires F.P. to bear the associated costs, whether F.P. does the replanting and relocation itself or outsources the task to the township. Of course, Canton's mitigation options could offset F.P.'s tree removal, and they arguably involve some individualized assessment given that Canton must determine the number and type of trees cut. But *Dolan* requires more.

In *Dolan*, the government argued that its exaction of an easement for a bicycle pathway was necessary to reduce traffic congestion that the property owner's proposed development might cause. 512 U.S. at 395. The Court held that the government's assertion that the conditioned path "'*could* offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand." *Id.* (quoting *Dolan v. City of Tigard*, 845 P.2d 437, 447 (Ore. 1993) (en banc) (Peterson, J., dissenting)). Here, the township provides us with little information about its replacement or relocation requirements. Like the government in *Dolan*, it seems to assume that its mitigation requirements are appropriate. And the information it presents concerning the amount of money F.P. must spend to satisfy those requirements is based on tree replacement costs calculated fifteen years ago, in 2006. That limited and arguably stale information does not suffice.

Canton has pointed to nothing indicating, for example, that F.P.'s tree removal effects a certain level of environmental degradation on the surrounding area. Nor does it demonstrate whether it considered that F.P.'s clearing of the clogged ditch on its property or its removal of dead trees may have improved the surrounding environment. The only evidence on that point suggests that even if F.P. offset its tree removal in a manner not contemplated by the township, Canton would still demand its pre-set mitigation. At bottom, Canton's support fails to get it over the bar set by *Nollan* and *Dolan*. *See id.* at 395–96 (noting that "the city must make some effort to quantify its findings in support" of its exactions); *see also Goss v. City of Little Rock*, 151 F.3d 861, 863 (8th Cir. 1998) (holding that local traffic mitigation requirements did not satisfy

Dolan's rough-proportionality test because they were based on pre-set assumptions, rather than an individualized impact assessment).

That a representative from Canton went to F.P.'s property to count and categorize the trees F.P. cut down does not alter our conclusion. And the "individualized assessment" that Canton points to in the ordinance relates to the initial review of a permit application, not to the proportionality of the mitigation requirements. *See* Canton Code of Ordinances Art. § 5A.05(F). According to Canton's own representative, F.P.'s removal of regulated trees triggers the mitigation requirements, regardless of the specific impact caused by their removal. Canton has not made the necessary individualized determination here.

Finally, our conclusion accords with analogous decisions handed down by state courts. *See Dolan*, 512 U.S. at 389 (recognizing the importance of state court decisions in this context given that they have dealt with the question "a good deal longer than we have").

For example, in *Mira Mar Development Corp. v. City of Coppell*, a state court in Texas similarly concluded that the government's lack of evidence sank its ability to demonstrate rough proportionality. 421 S.W.3d 74, 95–96 (Tex. Ct. App. 2013). There, a property owner applied to the City of Coppell for a development permit. *Id.* at 95. Like Canton, the city in part conditioned its granting of the permit on the owner's agreeing to pay thousands of dollars in "tree mitigation fees" for trees it planned to remove from its property. *Id.* The Texas court first determined that the fees were exactions subject to the nexus and rough proportionality requirements of *Nollan* and *Dolan*. *Id.* Then, it noted the government's lack of evidence to support a finding of rough proportionality: the city did "not show that the removal of trees in the development would harm the air quality, increase noise and glare, remove ecosystems, bring down property values, or reduce the other benefits of trees described in the ordinance." *Id.* at 96. As we do here, the Texas court held that, based on the record before it, the ordinance could not meet the evidentiary bar set for rough proportionality in *Dolan*. *Id.*; *see also, e.g.*, *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 644–45 (Tex. 2004) (holding that the Town's monetary exaction was not roughly proportional because the rationale for it was too abstract and because the town provided no real evidence of impact).

In other state court cases, like those the Supreme Court cited positively in *Koontz*, the government generally satisfies the nexus and rough proportionality test with ease by introducing some evidence relating to the "methodology and functioning" of its exactions. *See, e.g.*, *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 729 N.E.2d 349, 357–59 (Ohio 2000); *see also, e.g.*, *Sparks v. Douglas Cnty.*, 904 P.2d 738, 745 (Wash. 1995) ("In this case, the findings made by the County were more than mere conclusory statements of general impact."); *Hallmark Inns & Resorts, Inc. v. City of Lake Oswego*, 88 P.3d 284, 291 (Or. Ct. App. 2004) (same). That is not the case here. On the record before us, Canton's Tree Ordinance, as applied to F.P., fails rough proportionality and is thus an unconstitutional condition under *Nollan*, *Dolan*, and *Koontz*.

C. UNREASONABLE SEIZURE

F.P.'s next claim involves the same trees, but a different right. The Fourth Amendment, as incorporated through the Fourteenth, preserves the right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "[F]rom the time of the founding to the present," when speaking of property, "the word 'seizure' has meant a 'taking possession.'" *Torres v. Madrid*, 141 S. Ct. 989, 995 (2021) (quoting *California v. Hodari D.*, 499 U.S. 621, 624 (1991)). So, "a 'seizure' of property . . . occurs when 'there is some meaningful interference with an individual's possessory interests in that property.'" *Fox v. Van Oosterum*, 176 F.3d 342, 350 (6th Cir. 1999) (quoting *Soldal v. Cook County*, 506 U.S. 56, 61 (1992)).

F.P. argues that the Tree Ordinance meaningfully interferes with its possessory interest in its trees and is therefore an unreasonable seizure. But the ordinance here does not enable Canton to take actual possession of F.P.'s trees. Nor does it meaningly interfere with F.P.'s possession of its trees. F.P. was able to sell its trees to the timber company that removed them. In short, F.P. has full control over the trees it removes from its property. Canton therefore has not seized them.

The most that can be said of the ordinance in this context is that it might interfere with F.P.'s control over some of its standing trees by limiting its ability to cut them down. But that does not mean that the ordinance should be subject to Fourth Amendment scrutiny.

The ordinance requires a permit for F.P.'s removal of its standing trees—real property, not located on or anywhere near a house or its curtilage. *See Kerschensteiner v. N. Mich. Land Co.*, 221 N.W. 322, 327 (Mich. 1928) ("Standing timber is real estate. It is a part of the realty the same as the soil from which it grows."). And the trees themselves are obviously not houses, persons, or papers. So the trees, if they are covered by the Fourth Amendment, must be effects. But the Supreme Court has told us that real property is not an "effect" within the meaning of the Fourth Amendment. *Oliver v. United States*, 466 U.S. 170, 177 n.7 (1984) ("The Framers would have understood the term 'effects' to be limited to personal, rather than real, property."); *see also Soldal*, 506 U.S. at 62 n.7 ("[T]he [Fourth] Amendment does not protect possessory interests in all kinds of property."). Therefore, as applied to F.P., Canton's Tree Ordinance is not subject to the limitations of the Fourth Amendment.

D. EXCESSIVE FINE

In its final claim, F.P. looks to the Eighth Amendment. The Excessive Fines Clause of that Amendment, as applied to localities through the Fourteenth, dictates that "excessive fines" shall not be "imposed." U.S. Const. amend. VIII. As is clear from its language, the clause "limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.'" *Austin v. United States*, 509 U.S. 602, 609–10 (1993) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). It guards only "against abuses of [the] government's punitive or criminal-law-enforcement authority." *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019). So a monetary demand that is retributive or deterrent and thus intended to punish, even in part, is subject to the limitations of the Excessive Fines Clause. *Austin*, 509 U.S. at 621 (quoting *United States v. Ward*, 448 U.S. 242, 254 (1980)). But a demand that is related only to "damages sustained by society or to the cost of enforcing the law," and thus wholly remedial, is not. *Ward*, 448 U.S. at 254.

F.P. argues that the ordinance violates the Excessive Fines Clause because Canton's demand for payment in accordance with the Tree Ordinance is punishment that is grossly disproportionate to its tree removal. But that law is designed to remedy the harm that removing trees causes, and it purports to estimate the monetary demands it makes based on the cost it expects to incur replacing them. That purpose is remedial, not punitive, so it does not implicate the Eighth Amendment.[6]

IV.

Canton's Tree Ordinance, as applied to F.P., is not an unreasonable seizure or an excessive fine. But it does represent an unconstitutional taking. Accordingly, we affirm.

[6]There is a form of punishment under Michigan law for F.P.'s violation of the ordinance: a $500 fine and up to 90 days' imprisonment. But Canton has not levied that fine, nor has it attempted to arrest any representative of F.P. And F.P. does not challenge either of those penalties.

Appellee's Appendix 120–185

Deposition of Jeff Goulet,
Dated October 7, 2019

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

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

DEPOSITION OF JEFF GOULET

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

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ALSO APPEARING: JULIANA BUTLER

** ** ** ** **

REPORTED BY: Christine A. Lerchenfeld, CER6501
Certified Electronic Reporter
FOR: Network Reporting Corporation
Firm Registration Number 8151
1-800-632-2720

TABLE OF CONTENTS

** ** ** ** **

Farmington Hills, Michigan

Wednesday, June 12, 2019

9:31 a.m.

** ** ** ** **

JEFF GOULET

** ** ** ** **

COURT REPORTER: Would you raise your right hand, please? Do you solemnly swear or affirm to tell the truth, the whole truth and nothing but the truth in this matter?

THE WITNESS: Yes.

MR. WELDON: Could you please state your name for the record?

THE WITNESS: My name is Jeff Goulet.

MR. WELDON: Have you ever given a deposition before?

THE WITNESS: Yes.

MR. WELDON: So this will be sort of old hat, but just a couple of things up front. So we can keep a clear record for the Reporter will you agree that you'll wait until I finish asking any of my questions before you give an answer and I'll extend the same courtesy and wait till you finish your answer before I ask another question; is that fair?

THE WITNESS: Yes.

MR. WELDON: And if at any point you need to take a break, just let me know. I just ask that if there's a question out on the table at the time that you answer that question before we break; is that fair?

THE WITNESS: That's fine.

EXAMINATION

BY MR. WELDON:

Q Now, you've been designated by the Township to testify on a few topics today; is that correct?

A Yes.

Q Do you know what those topics are?

A It's in the summons.

Q And that would be the interpretation and application of the tree ordinance; is that correct?

A That's correct.

Q Do you work for the Township?

A Yes.

Q And what do you do there?

A I'm the community planner for Canton Township.

Q And what does that involve?

A It's administration of the Zoning Ordinance and the land development regulations, review of all new develop plans. It involves putting together a

master plan, the administration of all the planning and zoning activities in the Township.

Q And does that involve the interpretation and application of Canton Code of Ordinances Article 5A?

A Yes.

Q And how long have you been in that position?

MS. KOLB: Can we clarify that? Because 5A is actually in the appendix to the Code of Ordinances. 5A of the Code is a different section.

MR. WELDON: Are you testifying?

MS. KOLB: I'm making a clarification for the record. 5A of the Code is not the ordinance.

MR. WELDON: I'm going to object that you're testifying on behalf of your Witness.

BY MR. WELDON:

Q For the purposes of today's deposition I'm going to refer to Article 5A that we just spoke of as the tree ordinance. Is that okay?

A Article 5A of Appendix A Zoning is the tree ordinance.

Q Yes. So how long have you worked for the Township?

A Twenty-six years.

MR. WELDON: I'm going to go ahead and introduce Exhibit 1 here.

(Exhibit Number 1 was marked for

identification at 9:34 a.m.)

BY MR. WELDON:

Q Take a look at that, please. Are you familiar with this document?

A Yes.

Q And what is that?

A This is alluding to the version of the Code of Ordinances Article 5A of Appendix A Zoning.

Q Can you turn to 5A.05-A, please? Are you familiar with that section?

A Yes.

Q And that section of the ordinance says that a permit is required to remove or relocate any tree with a DBH of 6 inches or greater; is that correct?

A Yes.

Q And so does that mean that if a property owner has a tree on his property that's 5 inches that he can just cut it down without notifying the Township?

A Yes, generally.

Q Can you turn to A3 under 5A.05? That section prohibits the removal, damage or destruction of a tree in a forest, correct?

A Yes.

Q So does that mean that the 6-inch DBH requirement doesn't apply to trees that are in a forest?

A All the requirements in here are read together, not separately. So you have to look at these together and it depends on the particular application on that particular piece of property.

Q Right. So I'm trying to understand, because A-1 says the removal of any tree with a DBH of 6 inches or greater, but then when you go down to A-3 it says the removal or damage or destruction of any tree located within a forest. So does that apply to trees less than 6 inches if they're in a forest?

A Yes.

Q How does the Township determine what constitutes a forest?

A The constitution of a forest could be looking at the definition. There's the definition of a forest in the code. Forest means any treed area of 1/2 acre or more containing at least 28 trees with a DBH of 6 inches or more.

Q Do you know if the trees allegedly removed in this case were in a forest?

A I'm not familiar with the exact manner of the trees in this particular thing. I was not on-site, I did not do the investigation.

Q Do you know if the Township has made a determination as to whether or not the trees were in a forest?

A I believe it has.

Q And did the Township determine that they were in a forest?

A I believe we did.

Q But under this ordinance, whether they're in a forest or not, if the tree has a DBH of 6 inches then you need a permit to remove it, correct?

A That's correct.

Q And that permit requirement applies whether the tree you want to remove is a big, beautiful tree or if it's an ugly tree. If it's bigger than 6 inches you need a permit, correct?

A Right.

Q And that applies whether removing the tree causes any injury to your neighbors or not, correct?

A That's correct.

Q And that permit requirement applies regardless why the property owner wants to cut down the tree, correct?

A That's correct.

Q So hypothetically let's say that a property owner doesn't want to chop down the tree, but he wants to dig it up and sell it. Like if someone sees he has a big oak tree and they want it. Would he need a permit for that?

A If somebody is removing a tree that's over 6 inches it needs a permit for removal.

Q What if removing the tree would, say, reduce flooding, would he still need a permit?

A Removal of a tree that's regulated requires a permit.

Q No matter what?

A No matter what.

Q So let's talk about what's required to get a permit under the ordinance. Can you turn to Section 5A.08? Are you familiar with that section of the ordinance?

A Yes.

Q Under that section to remove a tree that's covered by the ordinance a property owner will need to either pay market value of the tree into the tree fund or plant a replacement tree, correct?

A It depends on how many trees they're removing.

Q Can you explain what you mean?

A There is a provision in the ordinance that allows for development of a property or use of a property that they can remove up to 25 percent of the regulated trees without any penalty or any replacement on the site. So it depends on how many trees are on the property and how many trees they're removing.

Q So after that 25 percent threshold is reached they have to either pay into the tree fund or provide replacement trees, correct?

A First option is to replace the trees on the property. The second option, if they choose not to and they want to use more property and they don't want to preserve any of the trees, they have an option of paying into the tree fund, so the trees can be planted elsewhere.

Q So is that 25 percent exemption you were talking about is that automatic or does the Township have to sign off on it?

A It's automatic. It's part of the calculation of the permit.

Q Can you point to the section of the Code that provides for that 25 percent?

A The same section you just said. It's 5A.08. It's in the middle portion of it. It states that such trees shall be relocated or replaced by the permit if more than 25 percent of the total inventory of trees is removed. So replacement only kicks in after 25 percent.

Q But once we've reached this 25 percent tree replacement or paying into the tree fund is a mandatory condition of any permit, correct?

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

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

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

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

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

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

BY MR. WELDON:

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

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

the other.

Q Can you turn to Section 5A.08-E-1?

A Which section?

Q We're still in 08 and we're in E-1. I know we've already touched on this briefly, but that says that the owner can replace the tree or pay the market value; is that correct?

A That's correct.

Q How does the Township determine what the market value of a tree is?

A The market value is the going rate for that size tree, you know, retail price of the tree planted on-site with a warranty.

Q When is that determined?

A We determine that every several years. We go by policy based on what the Township is paying for trees under its tree programs.

Q So you said it's not based on what other townships are paying for trees under their tree programs? I'm sorry.

A Based on what the going rate for trees is, based on bidding trees out on the market we know what the price of trees is planted with warranties. So obviously that market changes from year to year based on the cost of trees. So the policy

establishes those costs based on the size of the tree in the policy and based on the current market rate of those trees.

Q And how often do you guys set your rates?

A Every several years.

Q When is the last time you guys reset the rate?

A I don't recall.

Q In the last five years?

A I don't recall.

MR. WELDON: I'm going to introduce Exhibit 2.

(Exhibit Number 2 was marked for identification at 9:45 a.m.)

BY MR. WELDON:

Q Have you seen this document before? And take time to look at it.

A Yes.

MS. McLAUGHLIN: Do you have a copy?

MR. WELDON: Yeah.

BY MR. WELDON:

Q Can you tell me what the document is that I just handed you?

A This is the application form for a tree removal permit.

Q And if you turn to what's marked in here as page 2

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

A That's correct.

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

A Yes.

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

A It's an average cost.

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

A No.

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

A That's correct.

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

A That's correct.

Q And that applies regardless whose property the tree is on, correct?

A That's correct.

Q And that applies whether the tree is on a hill or down in a valley, correct?

A Can you clarify what tree you're talking about? The replacement tree or the removed tree?

Q Either one. Let's start with the replacement tree.

A If it's on the property and it's regulated, it's regulated.

Q Same with the removed tree. It doesn't matter if they remove the tree in a valley or on a hill it's going to be the same replacement cost, correct?

A If it's a regulated tree, yes.

Q Let's say the property owners, their neighbors don't really think that the tree removal on their neighbor's property impacted them in any way. The replacement cost is still going to be 200 or 450, correct?

A That's correct.

Q So the actual impact on the neighbors of removing the tree isn't relevant in this calculation, correct?

A The calculation is based on the number of trees that

are required to be replaced.

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

A No.

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

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

BY MR. WELDON:

Q Are you familiar with this document?

A Not specifically.

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

A Similar to this.

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

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

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

Go back to Exhibit 1, please, back to the

tree ordinance. Can you turn to section 5A.05-F-4? Are you familiar with that section?

A Yes.

Q The next section says that a permit will only be granted under three conditions. They're listed there as A, B and C; is that correct?

A Yes.

Q So if you're applying for a tree removal do you have to satisfy all three of these criteria or is it --

A Which ones are applicable. So they may not all be applicable.

Q And whether a proposed tree removal meets these criteria that's at the sole discretion of the Township, correct?

A Yes.

Q And those are in addition to the requirement that the applicant pay into the tree fund or buy replacement trees, correct?

A Well, payment into -- replacing trees on the site or payment into the tree fund would be a result of evaluation of these criteria.

Q Correct. So let me clarify that question. So if they don't satisfy these criteria it doesn't matter if they're willing to pay into the tree fund or not, correct?

A Payment into the tree fund is not an issue. The issue is what are they removing and why are they removing them and have they taken actions to minimize the necessary removal of trees based on what they want to do on the property.

Q So let me try and clarify what I'm asking here. To get a tree removal permit you have to satisfy these criteria and either pay into the tree fund or replace the trees, correct?

A Right.

Q Would you agree that trees, by their nature, tend to get bigger over time?

A Yes.

Q So any unwanted tree that an owner is required to keep on his property under this ordinance that could get bigger, too, correct?

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

THE WITNESS: I'm not sure what the question is -- what you're asking me.

BY MR. WELDON:

Q You said that trees get bigger. I'm just applying it to a tree that's required to be kept on the property under the ordinance. It's in the category

of trees, it could get bigger, too, correct?

MS. McLAUGHLIN: Objection to the form of the question. There's no testimony that the ordinance requires anyone to keep trees on their property. Assumes facts not in evidence. Go ahead.

THE WITNESS: If somebody has trees on their property and they want to remove them and it's considered a forest they need a permit that allows them to remove a certain amount of trees on the property to maintain the property in the condition they want to maintain it.

MR. WELDON: I'm going to object that that's nonresponsive.

BY MR. WELDON:

Q You said earlier that you can't remove a tree, I'm paraphrasing here, correct me if I'm wrong, you can't remove a tree without permission from the Township, correct?

MS. KOLB: Objection. You're misrepresenting his testimony.

MR. WELDON: I'm sorry, I don't believe two attorneys can object at a deposition. So I'm going to object to the other speaking objection from a second attorney.

MS. KOLB: I'm Counsel of record. I

can --

MR. WELDON: That's fine.

MS. KOLB: -- put objections on the record.

MR. WELDON: Under the rules you're not the attorney that is representing right now.

BY MR. WELDON:

Q We spoke earlier that you need a permit to remove a tree under the tree ordinance, correct?

A Yes, if you're removing regulated trees over a certain percentage and it met the criteria for removal.

Q And to get a permit you have to meet the criteria in Section 4 that we talked about, correct?

A Yes.

Q And if you meet those criteria then you either have to pay into the tree fund or plant replacement trees, correct?

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

THE WITNESS: Only if they're removing more than 25 percent of the regulated trees. If they're not removing trees that are regulated they're going to get a permit to remove anything that's under 6 inches in order to maintain the

property. That was the purpose of my answer before that you objected to, because it depends on what they're removing. They need to show us on a plan what they're removing, what the sizes of the trees are in order for us to apply these criteria.

BY MR. WELDON:

Q So if they don't want to pay into the tree fund, the property owner, and the property owner does not want to plant replacement trees then under this ordinance they would have to keep those trees on the property, correct?

A They'd have to maintain up to 75 percent of the regulated trees on the property if they didn't want to replace any trees. They're allowed 25 percent removal of the regulated trees. If they're removing trees that are not regulated that's considered brush and maintenance of the property. They still need a permit, but they would be allowed to do that without replacing trees on the property. So part of it depends on what they're removing and how many they're removing.

Q But there are trees, theoretically, that would be on the property that you would need to either pay for or replace to remove, correct?

A Not necessarily. It depends on the size and the

number. Say if there's 100 trees on the property. I'm going to give you a hypothetical. Okay? There's 100 trees on the property and 50 of them are regulated and 50 of them are not regulated. They can remove 50 trees without replacing trees on the property. If they remove 25 trees that are regulated, more than 25 percent of the regulated trees, then they would have to start replacing on the property.

Q I see what's happening here.

A So part of it depends on what's on the property and it depends on the composition of the trees and what they're proposing to remove.

Q Let me be clear. Regulated trees on the property, to use your term, they want to remove more than 25 percent of the regulated trees on the property. If they wish to do that they either have to pay into the tree fund or they have to replace trees, correct?

A That's correct.

Q Okay. So my question was in that case there will be some trees, regulated trees, that they will have to maintain on the property if they don't want to do that, if they don't want to pay into the tree fund or replace the trees, correct?

A Right. It's their choice on how they manage the trees on the property.

Q I just want to clarify that answer. You're saying, yes, they would have to maintain those trees on the property if they don't want to pay?

A 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.

Q Are there penalties for removing trees without a permit under this ordinance?

A It would be misdemeanor requirements for violation of not getting a permit.

Q And in addition to those penalties could you then also be forced to pay into the tree fund or provide replacement trees after the fact?

A That would be a mitigation issue that -- it would be a legal issue if they chose to go that route. If they come in with an after-the-fact permit obviously they're going to have to mitigate what they've removed.

Q So when you say that it's their choice to do so it's

not a choice without consequences, is it?

A They have to meet the requirements of the ordinance.

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

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

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

BY MR. WELDON:

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

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

THE WITNESS: No.

BY MR. WELDON:

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

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

MR. WELDON: I'd like to introduce Exhibit

4.

(Exhibit Number 4 was marked for identification at 10:02 a.m.)

BY MR. WELDON:

Q Are you familiar with this document?

A Generally.

Q What is it?

A It's a stop work order and Notice of Violation.

Q Would you say that this is a typical Notice of Violation issued by the Township for violating the tree ordinance?

A Yes.

Q You said -- you mentioned just a second ago a stop work order. If the Township thinks that a property owner is still cutting down trees after the Notice of Violation it could issue a stop work order, correct?

A That's correct.

Q Are there penalties for violating a stop work order?

A Whatever the legal remedies are. I'm not an attorney.

Q Does the Township typically assess penalties for violating a stop work order?

A I'm not sure what the penalties are for violating a stop work order, whether it's a misdemeanor, how the

ordinance considers that in terms of what type of violation that is. I guess the answer would be I don't know.

Q You agree, though, that there is some sort of penalty. The Township doesn't just let people violate stop work orders, correct?

A That's correct.

Q And would those penalties be in addition to any penalties that may exist for violating the tree ordinance?

A I guess that would be for a court to determine. It would be a part of a court action of the Notice of Violation.

Q You were designated by the Township to testify as to the interpretation and application of the tree ordinance. Isn't that correct?

A That's correct.

Q So as the Township's representative are you stating you are unaware if there are penalties for violating a stop work order?

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

THE WITNESS: I answered that at the beginning of the deposition that it would be a misdemeanor.

BY MR. WELDON:

Q So are the penalties for violating a stop work order independent of the penalties for violating the tree ordinance?

A It's part of the same violation.

Q So if I'm a property owner in that case then I don't have to worry about any sort of additional new violation if I choose to violate a stop work order?

MS. McLAUGHLIN: Objection to the form of the question. Foundation. I believe it calls for a legal conclusion.

THE WITNESS: I don't know whether that would be considered another occurrence and another, you know -- whether or not the penalties are going to be done on a day-by-day basis or whether it would be part of the continuation of the same violation. I'm not sure. I'm not an attorney.

BY MR. WELDON:

Q You said just a moment ago -- well, I'll ask you this. Do you know if a stop work order was issued to F.P. Development in this case?

A I believe a stop work order was issued based on what you provided me in Exhibit 4 signed by Kristin Kolb.

Q Can you turn back to Exhibit 1? That's going to be 5A.04 of the tree ordinance. It's actually going to

be on page 3 of what I gave you what I'm going to ask about, but it's the Notice of Violation; issuance of an appearance ticket. Are you familiar with that section?

A Yeah.

Q And that section says that if a property is not in compliance with this article at the end of the period specified in the Notice of Violation an appearance ticket may be issued, correct?

A Yes.

Q And an appearance ticket, that's basically a lawsuit, right?

A An appearance ticket is a notice to appear in court.

Q So if the property owner receives a Notice of Violation how would one come into compliance?

A They would submit an after-the-fact tree removal permit, have it evaluated and meet the requirements for issuance of a permit.

Q And that would -- assuming that they were covered trees and more than 25 percent were removed that would require him to replant or pay for removed trees, correct?

A Yes.

Q Do you know if F.P. Development removed more than 25 percent of the trees on the property in this case?

A I do not.

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

A That's correct.

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

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

BY MR. WELDON:

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

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

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

can ask him again.

THE WITNESS: What are you asking me again? I'm not sure I understand.

BY MR. WELDON:

Q Are you familiar with this document?

A Generally.

Q And the document is in front of you, correct?

A Yes.

Q And you said that that was a typical Notice of Violation, correct?

A Yes, this is the typical format that the Township uses for all Notices of Violation.

Q Is there anything on that Notice of Violation that talks about an administrative appeal?

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

BY MR. WELDON:

Q You can take your time.

A It doesn't appear that the Notice of Violation specifically addresses administrative appeals on the form of the notice.

Q Turn back to Exhibit 1, please. Sorry to jump around.

MS. McLAUGHLIN: What page?

MR. WELDON: I'm just going to ask a

general question about the ordinance in its entirety since he's familiar with it.

BY MR. WELDON:

Q Are you aware of anything in this ordinance, the tree removal ordinance, that talks about an administrative appeal?

MS. McLAUGHLIN: I'm going to place an objection to the form of the question. The entire ordinance is an administrative process.

THE WITNESS: This ordinance is part of the overall Zoning Code of Appendix A, Zone A. Appendix A, Zone A does have a section in the Zoning Code dealing with administrative appeals.

BY MR. WELDON:

Q In the tree ordinance, including the section dealing with Notices of Violation, which, as we've just discussed, is 5A.04, is there anything in that section that mentions administrative appeals?

A As I mentioned before, this ordinance is part of a larger ordinance and there is a separate section in Appendix A, Zoning that deals with administrative appeals.

Q Do those administrative appeals deal with Notices of Violation?

A Not specifically.

MR. WELDON: I'd like to turn to Exhibit 5, please. I haven't given it to you yet.

(Exhibit Number 5 was marked for identification at 10:12 a.m.)

BY MR. WELDON:

Q Are you familiar with the document that I've handed you, Exhibit 5?

A Yes.

Q And what is that?

A This is Section 27.09 of Appendix A, Zoning.

Q And that section deals with penalties for violations, correct?

A Yes.

Q So if I had been issued a Notice of Violation as a property owner this might be where I would rationally look?

A Yes.

Q Is there anything in this section that talks about administrative appeals?

A No.

Q So as we discussed earlier, if we're dealing with covered trees and the ordinance has been triggered, then the ordinance requires individuals who remove those covered trees to either pay into the tree fund or plant replacement trees, correct?

A **Yes.**

Q And under this Section 27.09 if a person doesn't do either of those things they can be subject to criminal penalties for violating the ordinance, correct?

A **Yes.**

Q And those penalties, it appears to be, are a fine not exceeding $500 or by imprisonment not exceeding 90 days for each offense, correct?

A **That's what it says.**

Q But typically that's not all a person is on the hook for if they cut down trees without a permit, correct?

A **I'm not sure what you mean.**

Q In this case, for example, the Township is seeking approximately $48,000 from my client; isn't that correct?

A **I don't believe so. I'm not aware of that.**

Q Are you familiar with the counter-complaint filed in this lawsuit?

A **Not specifically.**

Q You spoke earlier about the fact that if you cut down trees without a permit you still have to go and apply for an after-the-fact permit?

A **That would be a normal sequence of events.**

Q So let's say that my client did cut down trees on the property. He doesn't want to pay you guys anything and he doesn't want to plant any replacement trees. Are you telling me that you're going to fine him $500 and be done with it?

A No. He's still subject to the terms of the tree ordinance, so I assume that would be why we're here in terms of settling the court case.

Q And the terms of the tree ordinance would require either some replacement or payment into the tree fund, correct?

A Normally.

Q You say normally there and I'm curious why you didn't use the term always. Are there situations where you can cut down regulated trees and not pay anything?

A Somebody submits a permit under normal circumstances they would need to follow the ordinance. Obviously we're in a court case here. Court cases are resolved by resolving the court case. I don't know what the resolution will be in this particular case. I can't allude to what will happen in this particular case.

Q Well, I'm not asking you to speculate about what will happen in this case, I'm asking you to testify

regarding the way that the ordinance is interpreted and applied.

A Okay. Well, you were basically referring to the section of it dealing with penalties and misdemeanors.

Q Right.

A So when we get into a legal issue with somebody that does not get a tree removal permit obviously we have to go through the legal process to determine what the resolution of that's going to be. So that was the basis of my answer, based on the context of the question.

Q I'm just asking what the ordinance requires and it seems like the ordinance requires, as you testified to earlier, the potential of a criminal penalty and I'm asking if that's it.

MS. McLAUGHLIN: Is that another question?

MR. WELDON: Yes.

THE WITNESS: Is what it?

BY MR. WELDON:

Q The criminal penalty. Is that all that the client could be on the hook for? Or do they have to actually, as you testified to earlier, have to go back in and still pay something or plant some replacement tree?

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

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

BY MR. WELDON:

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

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

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

the tree fund or planting replacement trees?

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

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

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

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

BY MR. WELDON:

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

A That's correct.

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

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

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

landmark trees, which are larger trees than the normal regulated trees.

BY MR. WELDON:

Q Can you turn back to Exhibit 1, please? So your position here is that the 25 percent requirement only applies to regulated trees, but not to landmark trees. Can you point to the section of the tree ordinance that you base that on?

MS. McLAUGHLIN: Hold on. Let me object to the preamble to your question, the form of it, insofar as it's part of the question. But go ahead, answer the question.

THE WITNESS: Section 5A.08, Relocation or replacement of trees, subsection A, Landmark tree replacement. It says, "Every landmark/historic tree that is removed shall be replaced by three trees with a minimum caliper of 4 inches. Such trees will be of the species from Section 5B.06." Landmark trees are identified in 5B.06.

BY MR. WELDON:

Q So the 25 percent exemption does not apply to landmark trees?

A That's correct.

Q So if a property owner wants to remove any landmark tree then they have to either replace the tree or

pay into the tree fund, correct?

A That's correct.

Q So if less than 25 percent is -- sorry, let me run that back. So your position is even if F.P. Development removed less than 25 percent of the regulated trees on the property there would still need to be an additional investigation as to whether or not landmark trees were removed, correct?

MS. McLAUGHLIN: I'm going to place an objection to the qualification of your position as to the terms of the ordinance that apply. But go ahead.

THE WITNESS: The ordinance would evaluate the number of trees and type of trees and size of trees removed and determine whether or not they needed to be replaced based on the ordinance standards.

BY MR. WELDON:

Q And when you say the ordinance standards what do you mean by that?

A Whether it was a landmark tree, whether it was a regulated tree, whether it was an exempt tree.

Q You testified earlier, feel free to correct me if I'm wrong, if I paraphrase this wrong, that in addition to the criminal penalties in the ordinance

that a property owner who cut down trees without a permit would still have to go back and comply with the permitting requirement, correct?

A The ordinance requires a permit. The intent of the ordinance is to achieve compliance with permit requirements.

Q Look at Exhibit 1 and turn to Section 5A.04. Is that the only section -- sorry. That section deals with enforcement mechanism for the ordinance; is that correct?

A This issue deals with the Notice of Violation.

Q Is there any other section in the tree ordinance that deals with enforcements?

A Enforcement of the Zoning Ordinance generally would be in the section that you referred to in Exhibit 5.

Q And that would be 27.09?

A Yes.

Q Is there any other section that deals with enforcement?

A I'm not aware of any other particular section.

Q Is there anything, either in .04 that we just talked about or in 27.09, that talks about requiring an after-the-fact permit for a violation of the tree ordinance?

A There's nothing that specifically talks about an

after-the-fact permit, but the method of coming into compliance with the ordinance would be submitting an after-the-fact tree permit.

Q Is there anything in the tree ordinance or 27.09 that talks about filing a lawsuit -- that gives the Township authority to file a lawsuit to demand that my client apply for an after-the-fact permit?

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

THE WITNESS: I'm not sure how to answer that question.

BY MR. WELDON:

Q It seems like you've pointed to two places for enforcement mechanisms of the tree ordinance, correct?

A Yes.

Q Do either one of those sections include filing a lawsuit to demand compliance with an after-the-fact -- submission of an after-the-fact permit?

A It refers to issuance of a court appearance ticket. So the section that says other remedies in the Code under 27.09 -- where's 27.10? It looks like it's not all here. This would be 27.09, subsection 5 are the remedies. "The rights and remedies set forth above shall not preclude the use of other remedies

provided by law, including any additional rights of the Township to initiate proceedings in an appropriate court of law."

Q So to be clear, that's the provision that you're saying gives the Township authority to file a lawsuit to demand submission of an after-the-fact permit?

MS. McLAUGHLIN: Objection. Calls for a legal conclusion. Asked and answered.

THE WITNESS: Yes.

BY MR. WELDON:

Q In that section it talks about, looking at it right here, to abate noncompliance. Is that what you're talking about?

A That's the last section of that section. I didn't read the entire section.

Q Is it your position that requiring a submission of an after-the-fact permit and all the tree fund and replacement costs and things of that nature that we've spoken of, that's to abate noncompliance?

A That's one way of doing it.

Q Is that what you're claiming this lawsuit -- is that what you're claiming the counterclaims are in this case?

MS. McLAUGHLIN: Objection to foundation.

He's already testified he was not specifically familiar with the counterclaim.

BY MR. WELDON:

Q When the Township -- does the Township file lawsuits to require after-the-fact submission of permits?

MS. McLAUGHLIN: Foundation.

THE WITNESS: In the event that they do not comply with the Notice of Violation, come to the Township to abate or remedy the noncompliance, they would either be issued a court appearance ticket or we would use other remedies provided by law to achieve compliance.

BY MR. WELDON:

Q Other remedies like what?

A I assume filing a lawsuit. That's one remedy. There may be other remedies.

Q And that would be, again, to abate noncompliance?

A That's correct.

Q So the Township -- if you cut down a tree without a permit, a regulated tree, or a landmark tree without a permit, and the Township requires you to come back in after the fact and pay into the tree fund, is that a penalty?

MS. McLAUGHLIN: I'll place an objection to the form of the question. It assumes facts not

in evidence and it's contrary to his prior testimony. And foundation. I think the term penalty calls for a legal conclusion as well.

THE WITNESS: Is it a penalty? Not specifically. It's a permit.

BY MR. WELDON:

Q It requires payment after the fact, correct?

A Not necessarily.

Q It requires payment or replacement of trees, correct?

A Not necessarily.

Q What else could happen?

A The tree may not necessarily need to be replaced. It depends on whether or not it was an exempt tree, whether or not -- depending on how many trees they removed --

MR. WELDON: Objection. Nonresponsive to my question.

THE WITNESS: Well, I'm trying to explain to you how -- I'm trying to explain to you how we would evaluate whether the tree had to be replaced and whether or not they chose to replace it or whether they chose to pay into the tree fund.

BY MR. WELDON:

Q So hypothetically speaking let's say that an

individual cuts down a landmark tree without a permit. Under this ordinance they will have to either replace the tree or pay into the tree fund, correct?

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

THE WITNESS: Those would be his two choices.

BY MR. WELDON:

Q Would you say that that is a penalty?

MS. McLAUGHLIN: Objection. Asked and answered.

THE WITNESS: No, that would be his choice on how he wanted to comply with the tree removal permit requirements.

BY MR. WELDON:

Q I guess what I'm unclear on is I'm trying to figure out what gives the Township authority to force compliance like this after the fact. Now, you pointed to that code section that talked about abatement. What are they trying to abate? Are they trying to abate a nuisance?

A It would be abating the fact that he didn't get a permit and they need to resolve the permit issue and resolve the matter of getting a permit and

mitigating the impact of removal of the tree. In this particular case abatement would be mitigation, I guess.

Q When you collect payments into the tree fund under the tree ordinance how is that money used?

A That money goes into a fixed account used for replacement and maintenance of trees on property. So generally the Township will take that money and the ordinance specifies what it can be used for. So we'll go out and plant trees in parks, we'll plant trees along streets to re-establish the tree cover that was removed on the property. And we'll replace those trees elsewhere within the community to re-establish that canopy.

Q Can money paid into the tree fund be used for anything besides trees?

A Trees and their maintenance.

Q Is there any sort of statute, regulation or ordinance that states that explicitly?

A The ordinance specifically talks about the tree fund, so Section 5.08-E.

Q I'm sorry. Can you say that again, please?

A 5.08-E talks about paying money into the Township tree fund for replacement within the Township. These monies shall be equal to the tree amount

representing the current market value for the tree replacement that would have been otherwise required.

Q That seems to indicate what the property owner has to do, but I'm asking is there any sort of ordinance, statute or regulation that limits what the Township can do with the money once they have it?

A I believe we have a policy that addresses how the tree fund is to be used.

Q Is that a written policy?

A I believe so.

Q Do you know what it's called?

A I don't know specifically the title of the policy. It would be a division policy. I would have to pull it.

Q Is that a binding policy?

A It's a policy that can be evaluated from time to time. It's a policy that we use in order to go to the Board and ask for disbursement of monies from the tree fund to provide some standard procedures on the use of the tree fund.

Q I guess my question is does the Board have discretion to use money from the tree fund for other things?

MS. McLAUGHLIN: Foundation.

THE WITNESS: The ordinance specifically says tree fund, monies paid into the Township tree fund for replacement within the Township.

BY MR. WELDON:

Q So the Township's position on the interpretation of this ordinance is that that language in this ordinance binds the Board and says that they can't spend the money on anything else but tree replacement and maintenance?

A Right.

Q How long did you say you've been with the Township?

A Twenty-six years.

Q Are you aware of any time that the Township has spent money from the tree fund on anything else?

A Not that I'm aware of.

Q If a property owner pays money into the tree fund for a tree removal how long is it before the Township purchases and plants a tree? Let me take that back. If they pay into the tree fund for a tree removal does the Township have to plant a tree with that money or they can spend that money for other tree-related things?

A The tree fund is used for tree planting and maintenance. So we have an ongoing budget every year where the Township Board budgets a certain

amount of money for tree planting and tree maintenance.

Q So I guess what I'm getting at is that's not like a one-to-one. So if the property owner pays into the tree fund for the removal of a tree the Township doesn't just take that money and plant a tree, correct?

A No, not directly.

Q Is there a separate bank account for the tree fund?

A It's a separate fund within the Township's accounts.

Q Is it part of the general fund?

A No.

Q Is it held in a bank?

A Yes.

Q Is it a separate bank account?

A I don't know how the Township manages their bank accounts in terms of how they divvy up money. We follow standard accounting procedures that are for public agencies.

Q Are any of those funds ever commingled?

MS. McLAUGHLIN: Objection. Foundation.

THE WITNESS: I'm not sure what you mean by funds commingling. I'm not sure how the bank accounts are maintained. We have to follow State guidelines on deposits of our monies.

BY MR. WELDON:

Q Who would know that?

A Our finance department.

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

A That would be our finance director.

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

A We can plant it anywhere in the Township.

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

A Not specifically.

Q Do you have a ballpark figure?

A Not offhand.

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

A Not specifically.

Q Have you got a ballpark figure?

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

Q More than ten?

A Yes.

Q More than 100?

A Maybe.

Q More than 200?

A I can't answer that question. That would be a question for my program manager.

Q Who would that be?

A Leigh Thurston.

Q I'll ask her today. If the Township removes trees does it have to pay into the tree fund?

A We require a tree removal permit for all Township projects. Right now we have a fire station project. They've submitted a tree removal permit. So they have to comply with the tree removal regulations just like anybody else does.

Q So it's your position that the Township never removes trees without paying into the tree fund or applying for a tree removal permit?

MS. McLAUGHLIN: Objection to the form of the question. It mischaracterizes his testimony. Assumes facts not in evidence. Go ahead.

THE WITNESS: Our general policy is to apply the tree removal permit guidelines to all Township projects just like we do to everybody else.

BY MR. WELDON:

Q Is that a binding policy that applies all the time or is it possible for the Township to remove trees without paying into the tree fund?

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

THE WITNESS: If the Township were to comply with the ordinance generally we're going to replace the trees on the property of where they came from. The Township doesn't have a policy of paying into the tree fund, we have a policy of replacing the trees on the site.

BY MR. WELDON:

Q Is that discretionary?

A It's always up to the Board.

Q You've been here for a long time. Has the Township ever removed trees without replacing them or paying into the tree fund?

MS. McLAUGHLIN: Objection. Form of the question. Foundation.

THE WITNESS: I don't know. I can't answer that question.

MR. WELDON: Can we go off the record for a second, please?

(Off the record at 10:57 a.m.)

(Back on the record at 11:07 a.m.)

BY MR. WELDON:

Q So we discussed earlier that the 25 percent requirement doesn't apply to landmark trees, correct?

A That's correct.

Q And so if I have a landmark tree on my property my choices are to either pay into the tree fund or replant it if I want it cut down, right?

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

THE WITNESS: Those are the two choices.

BY MR. WELDON:

Q And you would agree that landmark trees can grow over time, correct?

A That's how they become a landmark tree.

Q So you would agree that they can get bigger, correct?

A Yes.

Q And their root zone can get bigger, correct?

A Yes.

Q So over time they take up a larger portion of the property, correct?

A Whether they take up a larger portion of the property the canopy area, yes, will get bigger.

Q And does the Township pay property owners for the

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

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

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

A No.

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

A Right. So --

MS. McLAUGHLIN: Objection -- go ahead.

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

BY MR. WELDON:

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

A That's correct.

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

A Damaging would be injuring the tree.

Q Does that include cutting branches off of the tree?

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

THE WITNESS: It depends on what branches

they were removing.

BY MR. WELDON:

Q And who would decide whether or not removing a branch is damaging?

A We would have to evaluate the -- what they did to the tree.

Q So would a property owner who wants to cut branches off of a tree in a forest have to go to the Township for a permit?

A No.

Q If they remove branches without a permit could they be subject to penalties?

MS. McLAUGHLIN: Objection to the form of the question. Asked and answered. Foundation.

THE WITNESS: It depends on how many branches they've removed and whether or not it damaged the tree.

BY MR. WELDON:

Q And whether or not it damages the tree is that at the discretion of the Township?

A That would be upon the Township's technical staff or a consultant evaluating the health of the tree.

Q If a property owner wants to clear out undergrowth in a forest, wants to clear brush and undergrowth in a forest would he need a permit for that?

A Yes.

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

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

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

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

EXAMINATION

BY MS. McLAUGHLIN:

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

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

MS. McLAUGHLIN: Page 2 of Exhibit 2.

MR. WELDON: Okay. Thank you.

BY MS. McLAUGHLIN:

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

A Yes.

Q And the replacement tree cost is referenced in that

paragraph, correct?

A Yes.

Q The last time, apparently, that the cost of $300 for a 2-inch DBH replacement tree or $450 for a 4-inch DBH replacement tree was in 2006; is that correct?

A That's correct.

Q That hasn't been changed in 13 years?

A That's correct.

Q Has that been reviewed since 2006?

A Yes. We generally review that every one to two years based on market value of the trees to determine whether or not the policy needs to be updated.

Q I'd also like to refer you to Exhibit 5. This is Section 27.09 of the Violations and Penalties section of the Zoning Ordinance, correct?

A Yes.

Q Did I say 05? I meant 09. 27.09. The first section of 27.09 refers to a public nuisance, correct?

A Yes.

Q And it indicates, "uses carried on in violation of any provision of the ordinance are declared to be a nuisance, per se." Do you see that?

A Yes.

Q Does that include violations of the tree ordinance?

A Yes. Tree ordinance is part of the Zoning Code.

Q The following section it says, such violations, I'm paraphrasing, shall be subject to abatement or other action by a court of appropriate jurisdiction. Do you see that in paragraph 1?

A Yes.

Q Is a nuisance per se, to your knowledge, subject to abatement by any other means other than by a court?

A Voluntarily or involuntarily? Voluntarily?

Q Yes.

A If the violator comes into the Township and wants to abate it without going through a court process we'll work with him to abate the nuisance and we will not then take him to court. If he voluntarily wants to do that, then we will work with him, for example, submitting an after-the-fact permit and going out and evaluating the damage and having him then mitigate the issue, whether or not -- depending on what the issue is.

Q And as far as interpretation of the tree ordinance, itself, is there any part of the Zoning Ordinance that refers to any administrative appeals for interpretation of the ordinance?

A The administrative section, I believe it's Article

27 or 28 of the Code, it deals with administrative procedures. Zoning Board of Appeals does have a provision in there where they can -- if somebody does not agree with my interpretation of the ordinance they can appeal my interpretation to the Zoning Board of Appeals.

Q And Counsel, just at the closing of his questions, asked you about landmark trees and the fact that they grow. The canopy they provide also grows, doesn't it?

A Yes.

Q And so removal of a landmark tree with a large canopy has an effect on the surrounding property, doesn't it?

A Yes.

MS. McLAUGHLIN: That's all the questions I have.

MR. WELDON: I have just a couple of follow-up questions.

RE-EXAMINATION

BY MR. WELDON:

Q You talked just a second ago about nuisance abatement in 27.09. Is the Township's position that requiring an after-the-fact permit application is nuisance abatement?

A That can be one form of nuisance abatement.

Q Is that how you interpret the ordinance?

A That would be an interpretation if that's what the -- if we had an applicant that was noticed -- received a Notice of Violation and they came in with after-the-fact permit and they came in compliance with the ordinance that would abate the nuisance.

Q And the nuisance here, to be clear, the nuisance here is simply violating the tree ordinance, correct?

A Right.

Q We're not talking about a traditional nuisance where a fire has been caused or something, correct?

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

THE WITNESS: A nuisance in this case would be damage of the property by removal of the trees without a permit. Abatement of a nuisance would be restoration of the property.

BY MR. WELDON:

Q Well, it's their property, correct?

A Yes.

Q Nuisance typically applies to damaging someone else's property, correct?

A Why would it apply to anybody else's property? It

could apply to their own property.

Q You can cause a nuisance by damaging your own stuff?

A Yes.

Q That's your position. Does the Township claim that F.P. Development has caused any sort of public nuisance injuries other than violating the tree ordinance in this case?

MS. McLAUGHLIN: Objection to foundation.

THE WITNESS: Violation of the ordinance is a nuisance per se.

BY MR. WELDON:

Q Regardless whether or not it causes any other injuries, correct?

MS. McLAUGHLIN: Asked and answered.

THE WITNESS: Violation of the ordinance is a nuisance per se.

BY MR. WELDON:

Q Regardless whether or not it causes any other injuries, correct?

MS. McLAUGHLIN: Objection to the question. The form of the question assumes that a nuisance per se is subject to evaluation other than specific circumstances. The definition of a nuisance per se under Michigan law controls.

THE WITNESS: Correct.

MR. WELDON: That's fine. Well, then he can answer the question. You don't have to testify on his behalf.

MS. McLAUGHLIN: I'm not testifying, I'm making an objection.

MR. WELDON: That's a speaking objection.

BY MR. WELDON:

Q But just to be clear your answer was "correct"? That was the answer you gave?

A Pursuant to the ordinance, yes.

Q You talked just a minute ago in the follow-up questions, you were asked about the potential of an administrative appeal if someone disagreed with the interpretation of the ordinance. What if they just thought the ordinance was unconstitutional and they didn't want to pay anything?

MS. McLAUGHLIN: Objection to the form of the question. Asked and answered.

MR. WELDON: That is correct.

BY MR. WELDON:

Q You did say earlier that they still have to pay, correct?

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

THE WITNESS: What's the question?

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

BY MR. WELDON:

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

A No.

MR. WELDON: I have no further questions.

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

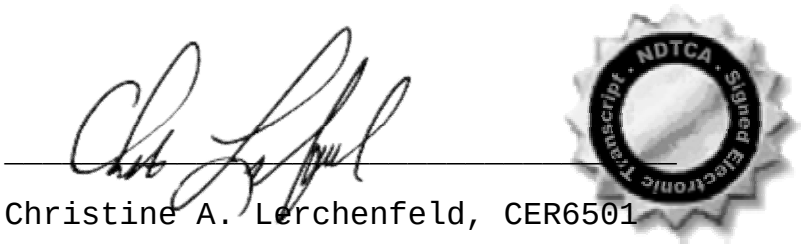
** ** ** ** **

STATE OF MICHIGAN)
) ss.
COUNTY OF MACOMB)

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

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

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



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

Appellee's Appendix 186–200

Deposition of Leigh Thurston,
Dated June 12, 2019

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

F.P. DEVELOPMENT, LLC,
a Michigan Corporation,
Plaintiff/Counter-Defendant,

vs. Case No. 2:18-cv-13690
Hon. George Caram Steeh

CHARTER TOWNSHIP OF CANTON,
MICHIGAN, a Michigan Municipal
Corporation,
Defendant/Counter-Plaintiff.
_____/

DEPOSITION OF LEIGH THURSTON

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

A Okay.

Q Are you familiar with that document?

A Yes, I am.

Q And what is it?

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

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

A That's correct.

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

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

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

A Yes.

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

THE WITNESS: Okay.

BY MR. WELDON:

Q Go ahead and take a look at that document and

Q So you did that in your capacity representing the Township; is that correct?

A Correct.

Q If you take a look at request for admission number 1 it says -- it asks to "Admit that removing trees from one's own private property does not, of itself, constitute a nuisance at common law"; is that correct? It's going to be on that first page. The question is --

A I see it. I would say that's true.

Q And the Township's official answer there, if you go down to the very last line of that paragraph, it admits that removing trees from one's own property does not, of itself, constitute a nuisance at common law; is that correct?

A That's correct.

Q Has the Township changed its official position without notifying the Court?

MS. McLAUGHLIN: Objection. Foundation. Vague. Object to the form of the question.

BY MR. WELDON:

Q Has the Township, to your knowledge -- actually, you're speaking on behalf of the Township regarding nuisances so you can answer this question directly. Has the Township changed its position that removing

that a true statement?

A Yes.

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

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

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

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

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

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

BY MR. WELDON:

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

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

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

A Yes.

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

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

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

THE WITNESS: Yes.

BY MR. WELDON:

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

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

THE WITNESS: Yes.

BY MR. WELDON:

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

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

MR. WELDON: Okay. We can introduce

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

A It does ask that.

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

A Without waiving objections it's not applicable.

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

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

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

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

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

A I do not.

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

A No.

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

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

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

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

THE WITNESS: I don't know.

BY MR. WELDON:

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

A I don't have evidence.

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

MS. McLAUGHLIN: You mean a person?

BY MR. WELDON:

Q A person.

A I do not.

Q Do you have any evidence that removing trees on the

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

A Physical injury?

Q Physical injury, lost profit margins, anything.

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

Q Do you have any evidence of it?

A I don't.

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

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

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

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

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

A Yes.

Q And then that's all paid out of the tree fund?
A It is.
Q So would that include things like putting mulch down?
A It does.
Q Watering the existing trees?
A Right.
Q Landscaping, things like that?
A Not much landscaping; tree planting.
Q Does it involve any landscaping?
A Not to my knowledge.
Q Do you know if the tree fund is a separate account from the general fund?

MS. McLAUGHLIN: Foundation.

THE WITNESS: I don't know legally if it's separated, but monies that go in are separated and can only be used for planting and maintenance out of that account.

BY MR. WELDON:
Q Do you know if it's the same account, though, at the bank?
A I don't.
Q Turn back to interrogatory number 5. One of the government interests that's listed in there is storm water management, correct?

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

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

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

BY MR. WELDON:

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

A No, I can't.

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

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

THE WITNESS: I can't answer that.

BY MR. WELDON:

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

A Yes.

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

MS. McLAUGHLIN: Asked and answered.

THE WITNESS: Certain properties.

BY MR. WELDON:

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

A Yes.

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

MS. McLAUGHLIN: Asked and answered.

THE WITNESS: Yes.

BY MR. WELDON:

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

A Yes.

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

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

BY MR. WELDON:

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

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

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

BY MR. WELDON:

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

MS. McLAUGHLIN: Object to foundation.

THE WITNESS: Yes, in general.

BY MR. WELDON:

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

A Yes.

Q Do they provide different benefits based on where the tree is located?

A It could.

Q But the tree ordinance seems to assign the value just based on, you know, its diameter regardless; is that correct?

MS. McLAUGHLIN: Objection to the form.

THE WITNESS: Yes. To base it on every feature of every different species of tree would be impossible.

BY MR. WELDON:

Q Do you know what types of trees were allegedly cut down on the F.P. Development property?

A White oak, sugar maple, red maple, silver maple, basswood, possibly some elm, black cherry, as well as some invasives or unregulated trees like cottonwood, buckthorn, box elder.

Q Your recall is very good. I would not remember all those tree names. How much flood mitigation is provided by a 6-inch diameter tree? A 6-inch diameter white oak, for example.

A I don't know.

Q Would you say that the amount of flood mitigation provided by a tree will vary based on things like location and soil and topography?

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

THE WITNESS: Probably not.

BY MR. WELDON:

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

A No calculation was done.

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

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

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

A Other things contribute to reducing flooding.

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

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

STATE OF MICHIGAN)
) ss.
COUNTY OF MACOMB)

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

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

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

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

STATE OF MICHIGAN
IN THE COURT OF APPEALS

CHARTER TOWNSHIP OF CANTON,
a Michigan municipal corporation,

Plaintiff/Counter-Defendant/
Appellant/Cross-Appellee,

v.

44650, INC., a Michigan corporation,

Defendant/Counter-Plaintiff/
Appellee/Cross-Appellant.

COA Docket No. 354309

Wayne County Circuit Court

Lower Court No. 18-014569-CE

APPENDIX TO DEFENDANT/COUNTER-PLAINTIFF/APPELLEE/ CROSS-APPELLANT 44650, INC.'S COMBINED APPELLEE/CROSS-APPELLANT BRIEF – VOLUME II

Respectfully submitted,

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Dated: March 9, 2022

APPELLEE 44650, INC.'S APPENDIX - VOLUME II

Appellee's Appendix 201–241

Brief on Appeal of Defendant-Appellant/Cross-Appellee
Charter Township of Canton
(Dkt. #34, 6th Cir., October 28, 2020)

Case Nos. 20-1447, 20-1466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH JUDICIAL CIRCUIT

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

Plaintiff-Appellee/Cross-Appellant,

v.

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

Defendant-Appellant/Cross-Appellee.

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

BRIEF ON APPEAL OF
DEFENDANT-APPELLANT/CROSS-APPELLEE

ORAL ARGUMENT REQUESTED

APPENDIX

CERTIFICATE OF SERVICE

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

JURISDICTIONAL STATEMENT

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

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

STATEMENT REGARDING ORAL ARGUMENT

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

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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

The District Court answered, "No."

Plaintiff-Appellee answers, "No."

Defendant-Appellant answers, "Yes."

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

The District Court answered, "No."

Plaintiff-Appellee answers, "No."

Defendant-Appellant answers, "Yes."

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Removal of regulated trees without a Township permit;

b. Removal of landmark trees without a Township permit;

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

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

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

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

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

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

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

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

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

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

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

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

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

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

STANDARD OF REVIEW

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

SUMMARY OF ARGUMENT

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION AND RELIEF REQUESTED

Defendant-Appellant, CHARTER TOWNSHIP OF CANTON, respectfully requests that this Court REVERSE the District Court's grant of summary judgment to Plaintiff and findings that Defendant-Appellant's as applied to Plaintiff created a regulatory taking and an unconstitutional exaction under the Fifth and Fourteenth Amendments, and REMAND to the District Court with instructions to enter summary judgment for Defendant-Appellant.

CERTIFICATE OF CONFORMITY

Pursuant to Fed.R.App.P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation found at Fed.R.App.P. 32(a)(7)(B). It contains 6,993 words and has been prepared in Microsoft Word, using a proportionally spaced face, Times New Roman, and a 14-point font size.

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Case Nos. 20-1447, 20-1466

UNITED STATES COURT OF APPEALS
FOR THE SIXTH JUDICIAL CIRCUIT

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

Plaintiff-Appellee/Cross-Appellant,

v.

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

Defendant-Appellant/Cross-Appellee.

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

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

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

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

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CERTIFICATE OF SERVICE

I hereby certify that on October 28, 2020, I electronically filed the Brief on Appeal of Defendants-Appellant/Cross-Appellee with the Clerk of the Court of the United States Court of Appeals for the Sixth Circuit using the ECF system which will send notification of such filing to all counsel of record.

/S/ MICHELLE IRICK

Appellee's Appendix 242–310

Brief of Appellee/Cross-Appellant F.P. Development, LLC
(Dkt. #51, 6th Cir., December 4, 2020)

NOS. 20-1447, 20-1466

IN THE COURT OF APPEALS
FOR THE SIXTH JUDICIAL CIRCUIT
CINCINNATI, OHIO

F.P. DEVELOPMENT, LLC, a Michigan Corporation,
Plaintiff-Appellee/Cross-Appellant,

v.

CHARTER TOWNSHIP OF CANTON, MICHIGAN,
a Michigan Municipal Corporation,
Defendant-Appellant/Cross-Appellee.

On Appeal from the Eastern District of Michigan
Cause No. 2:18-cv-13690

BRIEF OF APPELLEE/CROSS-APPELLANT F.P. DEVELOPMENT, LLC

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

F.P. Development, LLC is not a publicly held corporation and does not have a parent corporation that is a publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s):**

Other Authorities:

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case involves multi-faceted arguments on multiple constitutional claims where the parties disagree on the controlling tests. Accordingly, oral argument would assist the court in resolving the case.

STATEMENT OF ISSUES

1. Did the district court correctly hold that the mitigation requirements of Canton's Tree Ordinance constitute an unconstitutional exaction under *Dolan v. City of Tigard*, 512 U.S. 374 (1994)?

2. Did the district court correctly hold that Canton's Tree Ordinance as applied to F.P. Development's property was an unconstitutional regulatory taking under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)?

3. Did the district court err in holding that Canton's Tree Ordinance was not a *per se* regulatory taking under *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015)?

4. Did the district court err in holding that Canton's Tree Ordinance was not a *per se* regulatory taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)?

5. Did the district court err in holding that Canton's Tree Ordinance does not violate the unreasonable seizure protections of the Fourth Amendment?

6. Did the district court err in holding that the payments demanded by Canton under the Tree Ordinance are not fines subject to review under the Eighth Amendment?

STATEMENT OF THE CASE

This case involves several facial and as-applied constitutional challenges to Canton Code of Ordinances, Art. 5A (the "Tree Ordinance" or the "Ordinance")[1]. In 2018, F.P. Development ("F.P.") cleared a narrow strip of vegetation on its industrially zoned property to access a drainage ditch that had become clogged and was causing flooding. Declaration of Frank Powelson, ECF No. 35-4, PageID.766. Canton admits that it has no evidence that this generally permissible property maintenance adversely impacted F.P.'s neighbors or anyone else. Dep. of L. Thurston, ECF No. 35-10, Page ID 797-799. Nonetheless, Canton sought $47,898 in mitigation penalties from F.P. under its Tree Ordinance, which requires that private property owners pay set mitigation to Canton for removing trees from their own private properties, regardless of impact.F.P. filed a civil rights suit in district court alleging that the Tree Ordinance, both on its face and as applied (1) was an unconstitutional exaction under *Dolan v. City of Tigard*, 512 U.S. 374 (1994), (2) constituted a regulatory taking in violation of the Fifth Amendment, (3) amounted to an unconstitutional seizure under the Fourth Amendment, and (4) mandated excessive fines in violation of the Eighth Amendment.

[1] A copy of the ordinance can be found in the record at ECF No. 13-8 Page ID 127-132.

The district court entered a final judgment on cross motions for summary judgment holding that F.P.'s claims were ripe and that the Tree Ordinance (1) was an unconstitutional exaction under *Dolan*, both on its face and as applied, and (2) constituted a regulatory taking as applied under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *See F.P. Dev., LLC v. Charter Twp. of Canton*, 456 F.Supp.3d 879, 897 (E.D. Mich. 2020). The court also held that the Fourth and Eighth Amendments were inapplicable under the facts of the case and dismissed those claims. *Id*. Canton appealed the district court's judgment and F.P. cross appealed.

A. The Challenged Tree Ordinance

The Tree Ordinance requires that certain private property owners apply for and receive a permit from Canton before removing any "tree"[2] from their properties. "Tree" is broadly defined to include "any woody plant with at least one well-defined stem and having a minimum [diameter at breast-height] ("DBH") of three inches." Canton Code of Ordinances, Art. 5A.01.

If the targeted tree happens to be in a "forest," restrictions are even greater. Canton prohibits not only removal, but also damage to any tree within a forest. Canton Code of Ordinances, Art. 5A.05 (A). Even removing undergrowth or brush

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

in a forest requires Canton's approval. *Id.*; Dep. of J. Goulet EXF No. 26-3, Page ID 366-67.

"Forest" is defined as "any treed area of one-half acre or more, containing at least 28 trees with DBH of six inches or more." Canton Code of Ordinances, Art. 5A.01. Canton asserted in the district court that the tree removal in this case occurred in a "forest." *See* Dep. of J. Goulet, ECF No. 35-3, Page ID 748-49.

A tree removal permit will only be granted if the property owner agrees to either (1) replace any removed tree with up to three trees of Canton's choosing, or (2) pay a designated amount (currently between $300 and $450 per tree) into Canton's tree fund. Canton Code of Ordinances, Art. 5A.08. These requirements are mandatory and apply regardless of the impact or benefit that may accrue from the tree removal. *Id.*; Dep. of J. Goulet, Dep. of J. Goulet, ECF No. 35-3, Page ID 749-52. Indeed, Canton's official was asked numerous hypotheticals and *repeatedly* confirmed that site specific impacts have no relevance to the amount of mitigation required. Dep. of J. Goulet, Dep. of J. Goulet, ECF No. 35-3, Page ID 749-52, 753-755. Canton's other designated witness likewise confirmed that site-specific factors have no bearing on the mitigation amounts. Dep. of L. Thurston, ECF No. 35-10, Page ID 801-02.[3]

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

Under the Ordinance, property owners who remove trees from their properties without a permit are required to pay the same mitigation they would have paid if they had applied for a permit. *See* Dep of L. Thurston ECF No. 26-4, Page ID 372. Additionally, a property owner may be subject to criminal penalties of up to $500 and 90-days imprisonment. Dep. of J. Goulet, ECF No. 35-3, Page ID 761.

The Ordinance exempts occupied residential lots under two acres, farms, and licensed nurseries from its mitigation requirements. Canton Code of Ordinances, Art. 5A.05(B).

B. F.P. Removes Trees from Its Property to Prevent Flooding

F.P. is a real estate holding company that exists primarily to manage property owned by Frank Powelson. Dec. of F. Powelson, ECF No. 35-4, Page ID 765. Mr. Powelson's primary business is known as POCO, a business he took over from his father. *Id*. POCO builds, stores, leases, transports, and sells signs for traffic control. *Id*. at 766. The business is headquartered on the lot adjacent to the Property at issue in this case. *Id*. at 766.The Property at issue is an approximately 24-acre parcel located west of Sheldon Road and South of Michigan Avenue in Canton Township,

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A: Yes.
Q: Do they provide different benefits based on where the tree is located?
A: It could.
Q: But the tree ordinance seems to assign the value just based on, you know, its diameter regardless; is that correct?
MS. McLAUGHLIN: Objection to the form.
THE WITNESS: Yes…"

Michigan (the "Property"). *Id*. at 765. The Property was purchased from Canton as a replacement property for a developed lot that F.P. had sold to Sysco, at Canton's urging, to convince Sysco to keep its business in Canton. *Id*. at 766. The two F.P. parcels are bisected by a drainage ditch that was originally dug in the 1800's and by law must be maintained by Wayne County. *Id*.

Over the years, the drainage ditch became clogged by fallen trees, scrub brush, and other debris. *Id*. These obstructions caused the drain to back up and resulted in flooding on the Property and a neighboring property owned by another company. *Id*. This flooding was killing trees, increasing mosquitos, and making it more difficult to navigate and use the properties. *Id*. at 767.

Mr. Powelson reached out to the County Drain Commissioner's office to ask the County to perform the required maintenance of the drain. *Id*. He was informed that the County would not do so. *Id*. Accordingly, in the Spring of 2018, F.P. entered into an agreement with Fodor Timber to clean the fallen trees and other debris from the drain located on its Property. *Id*.

In order to reach the drain with heavy equipment, some[4] tree removal was necessary. *Id*. As part of its agreement with Fodor Timber, F.P. offered Fodor the

[4] In an effort to confuse this Court and reframe the equities of this case, Canton consistently refers to the clear cutting of sixteen-acres that occurred on a different property by parties that are not involved in this case. There was no clear-cutting involved here.

rights to any trees that had to be removed to access the ditch as well as any fallen trees removed from the ditch. *Id*. In exchange, Fodor agreed to clean the ditch. *Id*.

C. Canton Enforces the Tree Ordinance Against F.P.

Before the work was completed, Canton issued F.P. a Notice of Violation and Stop Work Order alleging violations of the Tree Ordinance and seeking an undisclosed amount in penalties. Notice of Violation, ECF No. 35-6, Page ID 779-81. Contrary to Canton's assertions in its opening brief, Mr. Powelson immediately stopped the work.[5] Dec. of F. Powelson, ECF No. 35-4, Page ID 767.

There is no administrative appeals process for challenging the constitutional validity of a notice of violation or fine assessed under the Tree Ordinance. Dep. of J. Goulet, ECF No. 35-3, Page ID 759-760, 762. Once a notice of violation has been issued, Canton may, at its discretion, initiate civil or criminal proceedings. *Id*. at 757. Indeed, just weeks before F.P. filed the lawsuit, Canton initiated civil proceedings against F.P.'s neighbors seeking nearly $450,000 for violation of the Ordinance. Fearing the possibility of such enormous penalties, F.P. filed suit for declaratory and injunctive relief under 42 U.S.C. §1983. Complaint, ECF No. 1.

[5] In an attempt to besmirch the character of Mr. Powelson, Canton falsely claimed that Canton was repeatedly denied access to the Property. In fact, Canton initially was caught on F.P.'s Property without notice and without a warrant. Dep. of F. Powelson, ECF 34-3, Page ID 677. Despite this unlawful and dangerous entry onto an active industrial site, F.P. worked immediately to schedule inspection times that would be mutually agreeable. *Id*. Access was never denied. *Id*.

Canton countersued for $47,898 in penalties for alleged violations of the Tree Ordinance. Canton's Counter-Complaint, ECF No. 13, Page ID 95. Both sides moved for summary judgment.

D. Judgment of the District Court

On April 23, 2020, the district court entered a final judgment. First, the court held that F.P.'s facial and as applied claims were ripe. *F.P. Dev., LLC*, 456 F.Supp.3d at 888. Second, the court concluded that the tree mitigation mandated under the ordinance was an unconstitutional exaction under *Dolan v. City of Tigard*, 512 U.S. 374 (1994) both on its face and as applied, because the Tree Ordinance does not allow for an individualized assessment of impact. *Id*. at 895. Third, the court held that Tree Ordinance was not a *per se* taking under *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015) or *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), but was an as applied taking under the *ad hoc* balancing approach of *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). *Id*. at 891. The court also held that the Fourth and Eighth Amendments were not applicable to the facts of the case and dismissed those claims. In particular, the court held that the Fourth Amendment's protection against unreasonable seizures does not apply to open fields (*Id*. at 895) and that the Eighth Amendment's prohibition on excessive fines did not apply because the tree payments were designed for mitigation. *Id*. at

897. Canton appealed the district court's judgment on the *Penn Central* and *Dolan* claims and F.P. cross appealed on the Fourth, Fifth, and Eighth Amendment claims.

SUMMARY OF ARGUMENT

The district court's judgment striking down the Tree Ordinance as unconstitutional should be affirmed for three independent reasons. First, the district court rightly found that F.P.'s facial and as-applied claims are ripe. Facial challenges to land use ordinances are ripe the moment the ordinance is passed, while as-applied challenges to land use regulations become ripe as soon as the application of the ordinance to the property becomes reasonably clear. Those criteria have been met here. With regard to the facial challenge, the terms of the Ordinance applied immediately upon adoption in all instances and Canton lacks discretion to depart from them. With regard to the as-applied challenge, Canton issued a notice of violation to F.P. for violating the Tree Ordinance before this lawsuit was filed, and there was no administrative appeal that could have granted F.P. relief. F.P. is not required to file futile administrative appeals or await prosecution before bringing a constitutional challenge under 42 U.S.C. 1983. Accordingly, F.P.'s claims are ripe.

Second, the district court rightly concluded that mitigation mandated by the Tree Ordinance is an unconstitutional exaction. Under *Dolan*, when mitigation is required for a land-use permit, there must be a sufficient "'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed

land use." This analysis cannot be based in the abstract but must be based on an "individualized determination" that the required mitigation "is related both in nature and extent to the impact of the proposed development." The Tree Ordinance forbids such a site-specific approach by requiring that property owners seeking a permit to remove trees either replace the trees on a 1-1 or 1-3 ratio, or pay the market value of the trees to Canton, without any individualized determination that mitigation is necessary and regardless of the impact of the tree removal. The district court rightly joined other courts that have addressed this issue in holding that such an ordinance violates *Dolan*.

Canton and its amici argue that (1) *Dolan* only applies to mitigation demanded in an *ad hoc* administrative process, not to mitigation mandated legislatively in ordinances; (2) *Dolan* only applies to actual transfers of property or money; and (3) that rough proportionality is met because the ordinance requires either a 1-1 or 1-3 replacement ratio for trees. But neither the Supreme Court nor this Court have limited *Dolan* to administrative exactions. To the contrary, the Supreme Court has repeatedly cited cases striking down local legislative exactions of the type at issue here as examples of the proper application of *Dolan*. Nor has the Supreme Court limited *Dolan* to demands for transfers of real property or money. Rather the Court has held that *Dolan* applies any time mitigation implicates any right in property. Further, Canton's tree-for-tree argument fundamentally misunderstands *Dolan* and

has been rejected by other courts. *Dolan* requires that mitigation be based on an individualized assessment of *the impacts* of the property use on neighbors. Because the removal of a given tree will have a significantly different impact based on the unique features of a given property—in some cases even improving neighboring properties—Canton's mandatory tree-for-tree approach is not sufficient to satisfy the site-specific rough proportionality standard of *Dolan*.

Third, the district court rightly held that the Tree Ordinance, as applied against F.P., constituted a regulatory taking under the *ad hoc* balancing approach of *Penn Central*. Under *Penn Central*, courts weigh three factors: (1) the economic impact of the regulation; (2) the owner's reasonable investment backed expectations to use the property; and (3) the character of the government action. The district court found that all three factors counseled in favor of finding a taking. First, the economic impact of the regulation was significant because the tree mitigation requirements likely exceeded the purchase price of the property. Second, the regulation undercut reasonable investment backed expectations, because F.P. reasonably believed that he would be able to put the industrially zoned property to some use without suffering ruinous penalties. And third, the character of the government action was that of a taking because it forces F.P. to bear the burden of an undeveloped parcel, including the burdens associated with flooding caused by a drain obstructed by untamed overgrowth, in order to provide the public benefit of having more trees in the area.

Canton and its amici object that (1) F.P. failed to show economic impact because it did not prove that it had been denied all value or use of the property; (2) F.P. had no reasonable expectation to use the property because the Tree Ordinance was in effect at the time of purchase; and (3) the character of the government action makes it not a taking, because it is a zoning regulation and therefore ubiquitous. But these arguments run afoul of well-established takings jurisprudence and rely in large part on non-takings cases, as well as the dissenting opinion in *Penn Central*. First, the *threshold* for applying the *Penn Central* test is that some value still exists in the property not that the property lacks all economic value. Second, Canton's reasonable expectations argument is contradicted by *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), which makes clear that purchasing property after the adoption of a challenged regulation does not preclude a takings claim. Finally, Canton's objection that the Ordinance distributes burdens evenly and is therefore not a taking is contradicted by the text of the Ordinance, is based on the standard proposed by the dissent in *Penn Central*, and would render all zoning ordinances *ipso facto* constitutional under *Penn Central*—an approach contrary to the last forty-years of precedent.

Accordingly, this Court should affirm the district court's judgment that the Tree Ordinance is an unconstitutional exaction under *Dolan* and an unconstitutional taking under *Penn Central*.

On the other hand, the district court wrongly determined that the Tree Ordinance does not constitute a *per se* taking, an unconstitutional seizure or an excessive fine, and this Court should reverse the district court on those claims.

First, the Tree Ordinance is a *per se* taking of F.P.'s trees under *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015). In that case the Supreme Court held that a regulation requiring farmers to set aside a portion of their raisins or to pay the federal government the "market value" of those raisins was a *per se* taking because it granted the government constructive possession of the raisins. Just so here, the Tree Ordinance is a taking because it grants Canton constructive possession of F.P.'s trees by requiring F.P. to keep the trees on the property or pay Canton the "market value" for any trees used. The district court below wrongly distinguished *Horne* because the statute in that case allowed the government to take actual title to the raisins. But the Court's opinion in *Horne* was not based on title transfer—it was based on constructive possession. Accordingly, *Horne* provides an independent basis to find the Tree Ordinance unconstitutional.

Second, the Tree Ordinance is a *per se* taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) because it mandates physical occupation of F.P.'s property by unwanted objects—*i.e.*, trees. In *Loretto*, the court held that a law forbidding a property owner from removing a pre-existing cable box from her building was effectively a government mandated occupation by an

unwanted object and therefore a taking. Similarly, the Tree Ordinance here requires that F.P. maintain numerous unwanted trees on its property. The ordinance therefore mandates a physical occupation of F.P.'s property in violation of *Loretto*. The district court rejected this approach by holding that *Loretto* claims are limited to physical occupations by government agents. But that narrow reading conflicts with *Loretto* itself, which did not involve government agents, and subsequent treatment of *Loretto* by this Court. Accordingly, *Loretto* provides another distinct basis to find the Tree Ordinance unconstitutional.

Third, the Tree Ordinance is an unconstitutional seizure under cases like *Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006) and *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009), because it is a meaningful interference with F.P.'s possessory interest in its property that is not justified by the facts and is uncompensated. The district court refused to apply those cases, holding instead that the Fourth Amendment's seizure protections do not apply outside of the curtilage of the home. But such a narrow reading would radically and impermissibly restrict the scope of the Fourth Amendment. Accordingly, the Fourth Amendment serves as a third, discrete basis to find the Tree Ordinance unconstitutional.

Fourth, the penalties sought by Canton in this case violate the Eighth Amendment because they are grossly disproportional to any harm caused by the property maintenance at issue. The district court rejected F.P.'s Eighth Amendment

claim solely because it found that the tree replacement payments were intended as mitigation and not as penalties. However, if this Court finds that the penalties under the Tree Ordinance are not mitigation for the purposes of *Dolan*, it should consider them as fines under the Eighth Amendment.

ARGUMENT

In 1722, British Authorities of the Crown in the American Colonies adopted a law almost identical to the one at issue here. Steven L. Danver, *Revolts, Protests, Demonstrations, and Rebellions in American History: An Encyclopedia* (2010), p. 183-185. Under that law, it was illegal for colonists to cut down any white pine trees on their properties that were greater than 12 inches diameter. Violators were fined £5 for any tree cut. *Id.*

The law went largely unenforced for fifty years, until 1772 when the Royal Governor sent representatives to Weare, New Hampshire, to enforce the Crown's tree mandate. *Id.* The Colonists were so enraged that they captured the governor's representatives, subjected them to lashing (one lash for every tree the Crown claimed), shaved their horses, and ran them out of town. *Id.* In honor of that act of rebellion, the "Pine Tree Flag" became a symbol of independence and was one of

the first flags authorized by George Washington to fly from the Colonial Navy's warships.[6]

Faced with an almost identical law, F.P.'s response was less violent—it filed a lawsuit. Applying well-established principles of exaction and takings jurisprudence, the district court concluded that Canton's reimagining of the Crown's tree edict was unconstitutional. That judgment is consistent with other courts which have evaluated similar constitutional challenges to tree ordinances. *See, e.g., Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. App—Dallas, 2013).

Canton and its amici ask this Court to overturn that judgment by adopting unprecedented standards for both exactions and takings that would effectively relegate constitutionally protected property rights to second-class status. There is no basis for such a radical reimagining of our constitutional principles. The district court's judgment that the Tree Ordinance is unconstitutional should be affirmed.

I. STANDARD OF REVIEW

The parties agree that a grant of summary judgment is reviewed *de novo*. *Hunt v. Sycamore Community School Dist. Bd. of Educ.*, 542 F.3d 529, 534 (6th Cir. 2008).

[6] *https://web.archive.org/web/20180503220610/https://www.arboretum.harvard.edu/pinus-strobus-pine-tree-riot/* (last viewed 12/3/2020).

II. THE DISTRICT COURT RIGHTLY HELD THAT F.P.'S CONSTITUIONAL CLAIMS ARE RIPE FOR REVIEW[7]

At the district court, Canton argued that F.P.'s takings and exaction claims were not ripe under *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), because F.P. did not file a futile administrative appeal with the Zoning Board of Appeals before filing this lawsuit. The district court rightly rejected these claims and Canton does not raise them again here. *F.P. Dev., LLC*, 456 F.Supp.3d at 888. Amicus, the Michigan Township Association, nonetheless attempts to resuscitate Canton's abandoned prudential ripeness arguments. Doc. 44 Page: 10-16. These arguments should be rejected for four reasons.

First, any *Williamson County* arguments have been waived. *Williamson County's* finality rule is prudential rather than jurisdictional in nature. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1013 (1992); *Lilly Invs. v. City of Rochester*, 674 Fed. Appx. 523, 526 (6th Cir. 2017). Unlike jurisdictional questions that may be raised at any time, prudential ripeness considerations are generally waived if not raised in appellant's opening brief. *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 89 (5th Cir. 2011) (*Williamson County* issue waived

[7] As explained below, Canton's prudential ripeness arguments from the district court are not raised as a question presented by any party in this case and are therefore waived. However, because the specter of ripeness was raised by Canton's Amici, it is addressed here out of an abundance of caution.

because not raised).[8] Here, Canton did not raise prudential ripeness as a basis for appeal in its opening brief. Accordingly, any prudential ripeness arguments are waived and cannot be resuscitated by amici. *Miller v. Admin. Office of the Courts*, 448 F.3d 887, 893 (6th Cir. 2006) ("issues are waived when 'not raised in the appellant's opening brief.'")

Second, even if prudential ripeness could be raised, it would not be grounds to overturn the judgment below. As the district court noted, prudential ripeness is relevant only to as-applied takings claims. *F.P. Dev., LLC*, 456 F.Supp.3d at 886 (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987)). Here, the district court held that the Tree Ordinance violates *Dolan* both on its face and as applied. *Id*. at 895 (noting that the ordinance is invalid in all circumstances). As such, even if F.P.'s as-applied claims were not ripe, the judgment below would stand because the facial claims are dispositive.

[8] Indeed, the Supreme Court and this Court have both recently questioned whether prudential ripeness is a constitutionally valid means to dismiss a case and whether it should continue to apply its prudential ripeness precedents at all. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014); *see also Miller v. City of Wickliffe*, 852 F.3d 497, 503 n.2 (6th Cir. 2017) ("Although the concurrence recommends disposing of this case on prudential-ripeness grounds, we need not reach that issue here. Given the Supreme Court's questioning of the continued vitality of the prudential-standing doctrine and the doubt that has been cast upon it by our own decisions, we are hesitant to ground our decision in prudential-standing principles.") (citations omitted).

Third, contrary to amici's assertion, *Williamson County's* prudential ripeness standard does not categorically require an administrative appeal, or any other form of administrative exhaustion before challenging a land use regulation. *See*, *Williamson County*, 473 U.S. at 193-94 ("respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals" to ripen its claims.); *id*. at 192-93; *Patsy v. Bd. of Regents*, 457 U.S. 496, 500-01 (1982) ("this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983."). A decision is final and ripe for *Williamson County* purposes once the application of the challenged ordinance to the property is reasonably clear. *Palazzolo v. Rhode Island*, 533 U.S. 606, 619 (2001). When, as in this case, the government's discretion is limited by the text of the ordinance, *Williamson County's* prudential ripeness standard is satisfied. *See Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 739 (1997).

Moreover, the application of the Tree Ordinance to F.P.'s tree removal is not only reasonably clear; it is crystal clear. The challenged prohibitions and mitigation requirements of the Tree Ordinance apply to F.P. on their face and are not discretionary. Canton Code of Ordinances, Art. 5A.05; *id.* Art. 5A.08 (A), (B), (D), (E) (stating that the pre-set mitigation amounts "shall" be required for any permit); *SAS Inst., Inc. v. Iancu*, 138 S.Ct. 1348, 1354 (2018) (the word "shall" means "must" because it "generally imposes a nondiscretionary duty"). Indeed, Canton's

designated witnesses testified that there was *no circumstance* where the prohibition and mitigation requirements would not apply. Dep. of J. Goulet, ECF No. 35-3, Page ID 749-50, 753-55; Dep. of L. Thurston, ECF No. 35-10, Page ID 800. Furthermore, Canton issued F.P. a notice of violation for violating the Tree Ordinance, which Canton admits is unappealable. Dep. of J. Goulet, ECF No. 35-3, Page ID 758-62. Canton also stated with specificity both the number of trees allegedly removed and the amount of mitigation owed. Canton's Counter Complaint, ECF 13, Page ID 89. The next step, according to Canton, would have been a lawsuit by Canton in state court. Dep. of J. Goulet, ECF No. 35-3, Page ID 759. F.P. need not await prosecution before bringing claims under 42 U.S.C. § 1983. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). (a party need not "expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.")

Fourth, as the district court rightly recognized, any appeal to the Zoning Board of Appeals would be futile because the ZBA "is not authorized to grant variances related to the use of land." Art. 27.05(D)(2). Amici try to weave together snippets of various state statutes with miscellaneous bits of Canton's ordinances in a strained effort to argue that Canton's Zoning Board of Appeals hypothetically could have granted some sort of variance that would have allowed the removal of some trees without the mandatory mitigation payments. But that awkward interpretation

contradicts the text of the Tree Ordinance (discussed *supra*) and Canton's own testimony regarding how the Tree Ordinance and the Zoning Appeals process work. Canton's representative testified that appeals to the ZBA do not and cannot involve constitutional questions. *See*, Dep. of J. Goulet, ECF No. 35-3 Page ID 762. But those are the only types of questions raised here. As the district court rightly recognized, F.P. need not file a futile administrative appeal simply "for its own sake" in order to ripen its claims. *F.P. Dev., LLC*, 456 F.Supp.3d at 886 (quoting *Palazzolo*, 533 U.S. at 622.)

III. THE DISTRICT COURT RIGHTLY HELD THAT THE TREE ORDINANCE IS AN UNCONSTITUTIONAL EXACTION

Both on its face and as applied in this case, the Tree Ordinance requires a permit from Canton before F.P. may remove trees from its property. Canton Code of Ordinances, Art. 5A.05. And a permit will only be granted if F.P. agrees to mitigate for the removal by planting a pre-set number of replacement trees or paying a pre-set sum of money for each tree removed. *Id.* Art. 5A.08 (A), (B), (D), (E).

When, as in this case, the government requires mitigation as a condition for a permit to use property, there must be a sufficient "'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 599 (2013). Importantly, the analysis of rough proportionality must not be made in the abstract but must be based on "individualized determination that the required dedication is

related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391.

In practice, this sets up three requirements for mitigation demands: (1) the mitigation must have a sufficient nexus to a legitimate government interest; (2) the mitigation must be roughly proportional to the impact on that interest created by a proposed property use, and (3) the rough proportionality analysis must be based on an individualized, quantifiable, and site-specific assessment of both the impact created by the property use and the mitigation's ability to address that impact in a roughly proportional way. *See Dolan*, 512 U.S. at 391.

In *Dolan*, the city required the plaintiff to construct a bike path on its property as a condition of granting a construction permit. *Id.* at 380. The city argued the mitigation requirement was justified because the proposed construction would increase traffic and parking problems, which the bike path could offset. *Id*. at 381-82. The city produced evidence that the proposed construction would increase traffic, but provided no site-specific evidence as to the actual effect that the proposed bike-path would have on the traffic in the area. *Id.* at 395. Instead, the city's official findings relied on what it characterized as common knowledge that, in general, a bike path "could offset some of the traffic demand . . . and lessen the increase in traffic congestion." *Id*. The Court rejected this unsubstantiated approach to exactions, noting that "findings of fact that the bicycle pathway system '*could* offset

some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely* to, offset some of the traffic demand." *Id*. at 395-96. As the Court explained, "the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated." *Id*. Because the city failed to engage in a site-specific analysis, *Dolan* held that the proposed mitigation requirement was unconstitutional. *Id*.

Following *Dolan's* teaching, the district court held that Canton's Tree Ordinance is unconstitutional on its face and as applied because the mitigation required under the Ordinance is not based on *any* individualized assessment of the impact of tree removal. *F.P. Dev., LLC*, 456 F.Supp.3d at 894-95. In fact, the Tree Ordinance *forbids* the individualized assessment of impact mandated by *Dolan*. Under the Tree Ordinance, mitigation is determined solely by the size and number of trees removed, regardless of impact. Canton Code of Ordinances, Art. 5A.05; *id.* Art. 5A.08 (A), (B), (D), (E) (noting that the pre-set mitigation amounts set forth in the Ordinance "shall" be required for any permit). This mitigation is set forth on the face of the ordinance and is non-discretionary. *Id*.; see also *SAS Inst., Inc. v. Iancu*, 138 S.Ct. 1348, 1354 (2018) (the word "shall" means "must" because it "generally imposes a nondiscretionary duty").

As the district court noted, this is particularly problematic for a tree ordinance under *Dolan*, because the costs and benefits of both tree removal and tree replacement can vary based on site-specific factors. *F.P. Dev., LLC*, 456 F.Supp.3d at 895. Yet the Ordinance explicitly and categorically forbids consideration of such factors under its tree-for-tree approach. *Id*. at 894-95. The Tree Ordinance therefore violates *Dolan* because mitigation under the Ordinance is wholly disconnected from any individualized assessment of the impacts of tree removal or the ability of the required mitigation to address those impacts. *Id*. The district court's judgment on this issue is in accord with other courts addressing *Dolan's* individualized assessment requirement. *See, e.g., Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. App—Dallas, 2013) (discussed *infra*); *Goss v. City of Little Rock*, 151 F.3d 861, 863 (8th Cir. 1998) (local traffic mitigation requirements failed to satisfy *Dolan* because they were based on pre-set assumptions about potential traffic increases, rather than site-specific quantified assessments of the actual impact of the proposed project).

In their briefing, Canton and its amici raise a grab bag of forced and unconvincing arguments, each of which fails to pass muster under *Dolan* and its progeny, for the following reasons.

A. Canton's attempts to evade review under the *Dolan* standard are contrary to precedent

Dolan review is triggered when the government mandates mitigation as a condition of issuing a land use permit. *Koontz*, 570 U.S. at 599. Despite *Dolan's* obvious application to the mitigation demanded under the Tree Ordinance, Canton and its amici raise two arguments that *Dolan* does not apply, both of which fail.

First, Amici argue that *Dolan* does not apply because the mitigation here is mandated legislatively by an ordinance and not by an *ad hoc* administrative process. But neither the Supreme Court nor the Sixth Circuit have ever sanctioned such a distinction. To the contrary, in support of its judgement *Dolan* itself approvingly cited *College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 807 (Tex. 1984), which was a challenge to mitigation requirements built into a local land-use ordinance, not an administrative exaction. *See Dolan*, 512 U.S. at 391. Indeed, it would be irrational to hold that a mitigation requirement that is unconstitutional when applied by a zoning board becomes wholly acceptable and unreviewable if adopted by a city council. Accordingly, Amici's suggestion that this Court make new law on this issue should be rejected.

Second, Canton and its amici argue that *Dolan* only applies when the government seeks a full appropriation of property (like an easement) or a monetary exaction in lieu of property. But neither the Supreme Court nor the Sixth Circuit have limited *Dolan* to easements or monetary exactions. Rather, *Dolan* is a

particular application of the broader "unconstitutional conditions doctrine," which generally applies when the government demands the surrender of a constitutional right in exchange for a permit. *Koontz*, 570 U.S. at 604; *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 625 (Tex. 2004) (noting that "any requirement that a developer provide[s] or do[es] something as a condition to receiving municipal approval is an exaction" subject to *Dolan*).[9]

Tellingly, the limitation of *Dolan* proposed by Canton here was raised by the dissent in *Koontz* but was not adopted by the majority. In *Koontz*, the Court reviewed a law which required that property owners apply for a permit in order to develop private property containing wetlands. Koontz applied for a permit to develop several acres of his property. *Koontz*, 570 U.S. at 602. The government refused to grant the permit unless Koontz agreed to leave 13.9 acres of his property undeveloped or agreed to pay money to have contractors enhance government owned wetlands elsewhere. *Id.* The Court held that either condition—leaving the land fallow *or* paying money—would be an exaction triggering evaluation under *Dolan*. *Id*. at 619. The dissent disagreed, raising the exact argument raised by Canton here—*i.e.*, that *Dolan* only applies to formal transfers of property. *See Koontz*, 570 U.S. at 622 (Kagan, J., dissenting). In the dissent's view, *neither* the demand to leave the land

[9] While *Flower Mound* is a Texas Supreme Court case and therefore not binding, the United States Supreme Court has cited *Flower Mound* favorably for its application of *Dolan*. *See, Koontz,* 570 U.S. at 618.

fallow *or* the demand to pay money were exactions, because neither involved a direct transfer of property. *Id*. That dissenting approach was not adopted by the majority. Instead, the majority concluded that *Dolan* applies when the mitigation involves the relinquishment of any "interest in real property" or other "constitutional interest." *Id*. at 606, 613-14.

That low burden is met here. Canton concedes that F.P. would have the right at common law to fell and utilize the trees on the property. Indeed, the right to fell and utilize trees is so important in Michigan that it has been treated as a separate interest in property for calculating just compensation in takings cases. *See e.g.*, *State Highway Comm'r v. Green,* 5 Mich. App. 583, 589-90 (1967). As such, had Canton simply prohibited the removal of any tree from F.P.'s property, such an absolute prohibition would constitute a taking of F.P.'s severable interest in its trees and perhaps even the property as a whole. *See Id*.; *see, also*, *Lucas v. S.C. Coastal Council,* 505 U.S. 1003, 1029 (1992) (taking occurs when regulation denies all economically beneficial use of land). Indeed, it is telling that Canton does not assert a right to simply prohibit all tree removal on F.P.'s industrially zoned property, as it is aware that such a flat prohibition on developing an industrially zoned property would be a taking. *See Id.* If *Nolan* and *Dolan* stand for anything, it is that the government may not avoid its duty to pay compensation for a taking by crafting its regulation as a permit condition.

B. The District Court rightly held that simply counting the number of trees removed does not meet the individualized assessment requirement of *Dolan*

Canton's primary merits argument is that its 1-1 or 1-3 nondiscretionary tree replacement requirement is, by definition, roughly proportional. But this fundamentally misunderstands *Dolan*. Mitigation under Dolan must be roughly proportional to *the impact* of the property use on others. *See Koontz*, 570 U.S. 595, 605-06 (explaining that mitigation under *Dolan* is tied to "negative externalities"). In the case of tree removal from private property, the impact on the public to be mitigated is not "a lost tree," because the public never owned the tree. Instead, the impact consists of any "negative externalities" that removing the tree might create, like flooding, erosion, etc. Because these externalities vary depending on where the tree was located, topography, species of tree, and local climate, site-specific analysis is required to determine a "roughly proportional" response. Canton's blanket 1-1 or 1-3 replacement policy does not meet that standard.

In *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. App.—Dallas, 2013), the court struck down the application of a tree ordinance almost identical to the one at issue here. Like Canton's Tree Ordinance, the ordinance in *Mira Mar* required developers removing a tree to pay a "mitigation fee" that would be used to plant replacement trees elsewhere. As in this case, the mitigation was set solely by the number and size of trees removed, as opposed to a

site-specific analysis of the actual impact of tree removal. The court found this lack of individualized assessment of impact to be fatal to the ordinance under *Dolan*. *Id*. at 96. The court noted that the city's tree-for-tree approach was unconstitutional because it did not require the city to establish that the "removal of trees in the development would harm the air quality, increase noise and glare, remove ecosystems, bring down property values, or reduce the other benefits of trees described in the ordinance" nor did it require "evidence that the removal of trees from appellant's private property would increase the need for trees on public property or for the other programs beyond what already existed before appellant removed the trees on its property." *Id*. "With no evidence of any projected impact caused by the removal of trees during the development, the City did not raise a genuine issue of material fact that any amount of tree retribution fees would be roughly proportional." *Id.*

Canton's amici claim that *Mira Mar's* demand for some site-specific assessment of impact is irrelevant because *Mira Mar* allegedly applied the "specific and uniquely attributable test" rejected in *Dolan*. But Canton's Amici does not quote *Mira Mar* or any case discussing *Mira Mar* for this proposition. Nor could it—*Mira Mar* expressly relied on the "rough proportionality" standard of *Dolan* by name. And *Mira Mar's* demand for site-specific evidence of impact is in accord with *Dolan* (which explicitly requires "an individualized assessment") as well as other courts

applying *Dolan* across the country. *See, e.g., Goss*, 151 F.3d at 863 (local traffic mitigation requirements failed to satisfy *Dolan* because they were based on pre-set assumptions about potential traffic increases, rather than site-specific quantified assessments of the actual impact of the proposed project).

Indeed, Texas courts have never applied the "specific and uniquely attributable test." To the contrary, in *Dolan*, the Supreme Court pointed to Texas courts as an example of the intermediate level of scrutiny adopted in *Dolan* in opposition to the "specific and uniquely attributable test." *See Dolan*, 512 U.S. at 391(*citing Turtle Rock*, discussed *supra*). And the Supreme Court has continued to cite to Texas courts as examples of how *Dolan* should work in practice. *See Koontz*, 570 U.S. at 618 (*citing Flower Mound*, discussed *supra*). Amici's *ipse dixit* that *Mira Mar* was secretly applying a different standard does not hold water. The district court's judgment on this issue should be affirmed.

C. The Tree Ordinance is also unconstitutional as applied in this case

Because the district court held that the tree-for-tree approach mandated by the Ordinance could not satisfy *Dolan* under any circumstance and is therefore facially defective, it did not evaluate whether the tree ordinance has a sufficient nexus to a legitimate government interest, or if the mitigation demanded in this case was

roughly proportional to any impact on that interest.[10] This Court likewise does not have to reach these questions. However, should the Court wish to evaluate the Tree Ordinance under the as-applied standard, the mitigation required by Canton in this case also fails the *Dolan* test as applied.

F.P.'s tree removal occurred on an industrially zoned property in an area that is not visible from the street. Canton admits that there is no evidence that the removal created a nuisance or negatively impacted F.P.'s neighbors in any way. Dep. of L. Thurston, ECF No. 35-10, Page ID 797-799. Accordingly, Canton's demand that F.P. plant over 100 new trees, or pay $47,898 to Canton in mitigation fees lacks a sufficient nexus and rough proportionality to any legitimate government interest.

Aware of this evidentiary problem, Canton now pivots and claims that the legitimate government interest served by the mitigation requirement is aesthetics. For three reasons, Canton's pivot does not help its position. First, *Dolan* requires the government to "quantify" the impact of the property use. *Dolan*, 512 U.S. at 395. But "because aesthetic concerns are subjective, [they are] extremely difficult to quantify." *Citizens United for Free Speech II v. Long Beach Twp. Bd. of Comm'rs*,

[10] Canton strangely claims that the district court "focused on" the $47,898 amount actually charged. But the proportionality of the mitigation required was never discussed. The district court's judgment was based on the fact that the ordinance itself did not allow for individualized assessments of impact, thus any amount of mitigation would have violated *Dolan*.

802 F. Supp. 1223, 1235 (D.N.J. 1992). Moreover, it is at least unclear how payment into the tree fund, or tree replacement offsite, potentially miles away, could have any remedial effect on the aesthetic impacts of tree removal on or near F.P.'s property.

Second, the structure of the Tree Ordinance undermines Canton's claims that the mitigation required under the Tree Ordinance has any nexus to a government interest in aesthetics. Residential lots of less than two-acres—arguably, where the aesthetic interest in trees would be the highest—are exempt from the Tree Ordinance. Canton Code of Ordinances, Art. 5A.05 (B). Yet, the Tree Ordinance applies with full force to industrially zoned property, like F.P.'s., where aesthetic interests are at the lowest. *Id*.

Third, even if aesthetics were a legitimate interest given the facts of this case, Canton would still need to establish under *Dolan* that the actual mitigation demanded was roughly proportional to F.P.'s impact on that interest. *Goss*, 151 F.3d at 863 ("Little Rock argues that it had a legitimate reason for demanding the dedication. This is true, but it does not prove that the legitimate reason was proportionate to the demand.") Canton cannot meet that burden. The narrow strip of vegetation removed to access the ditch in this case occurred on a portion of industrially zoned property that is not visible from the street. Any impacts on aesthetics are therefore minimal and do not justify the penalties sought. The district court's judgment that the Tree Ordinance is an unconstitutional exaction should be affirmed.

IV. THE DISTRICT COURT RIGHTLY HELD THAT THE TREE ORDINANCE, AS APPLIED TO F.P., IS A REGULATORY TAKING UNDER *PENN CENTRAL*

A government regulation that deprives a property owner of some—but not all—of a property's economic value may be a taking if the regulation "goes too far." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). To determine whether the regulation goes too far, courts look at three factors: 1) "the economic impact of the regulation on the claimant;" 2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and 3) "the character of the governmental action." *Palazzolo*, 533 U.S. at 633-34 (quoting *Penn Central*, 438 U.S. at 124). These factors, commonly referred to as the "*Penn Central* test," are not "mathematically precise variables, but instead provide[] important guideposts that lead to the ultimate determination whether just compensation is required." *Palazzolo*, 533 U.S. at 634.

Here, the district court carefully considered each of these factors and found that the Tree Ordinance, as applied to F.P.'s property, went too far and therefore was a taking. In seeking reversal, Canton and its amici propose radical new tests for the *Penn Central* factors, import tests from cases where *Penn Central* was not at issue, or rely on the reasoning from the *Penn Central* dissent. If taken seriously, these arguments would convert *Penn Central* into an empty formality where the

government always wins. Accordingly, the careful judgment of the district court, which is based on the actual *Penn Central* test should be affirmed.

A. The economic impact of the Tree Ordinance on F.P.'s property is significant

The first category in *Penn Central* requires the Court to evaluate the "economic impact" of the challenged regulation on the property. *Penn Central*, 438 U.S. at 124. The district court held that the Tree Ordinance would have a significant economic impact on the property because, based on the facts in the record, the penalties under the ordinance for clearing the property likely exceeded the value of the property itself. *F.P. Dev., LLC*, 456 F.Supp.3d at 889-90. Canton and amici raise arguments in response, but each falls of its own weight.

First, Canton and amici argue that the district court erred by finding a significant economic impact under *Penn Central* because some value or some possibility of use allegedly remains in the property. In support of this argument amici cite two cases—neither of which involved regulatory takings claims and one of which predates the regulatory takings doctrine all together. Brief of Michigan Townships Association, Doc. 44, Page 21 (citing, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (substantive due process challenge to zoning regulation); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (substantive due process challenge to a law regulating the manufacture of bricks in certain areas as falling outside the

police power)[11]. Assuming arguendo, that the cases say what amici suggests—they do not[12]—they would have no precedential value here because they are not takings cases.

Just as importantly, this objection is fatally flawed because it wrongly conflates the first factor of *Penn Central* with a total taking under *Lucas*, under which the property owner must show that the regulation denies him "all economically beneficial use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992). *Penn Central*, by contrast, applies only in those circumstances where a *Lucas* taking has not occurred—*i.e.*, when the regulation has taken some, but not all, of the value and use of the property. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (distinguishing *Lucas* and *Penn Central*). As such, *Penn Central* assumes, as its initial premise, that there is some value or use left in the regulated property. *Murr v. Wisconsin*, 137 S.Ct. 1933, 1943 (2017) (noting that *Penn Central* applies only when "a regulation impedes the use of property without depriving the owner of all economically beneficial use.") The district court therefore did not err

[11] Tellingly, *Hadacheck*, which predates the first regulatory takings case by several years, noted in dicta that had the law prohibited the removal of clay from the property as opposed to merely regulating the nuisance caused by the manufacture of bricks, the law "could not be upheld." *Hadacheck*, 239 U.S. at 413. Accordingly, the very case amici cites could be read to hold that Canton's ban on the removal of trees is unconstitutional.

[12] Amici tellingly does not provide a pin cite from either case to support its proposition and F.P. cannot find anything in those cases supporting the proposition for which they are cited.

by holding that a regulation requiring F.P. to spend hundreds of thousands of dollars if it wanted to clear its industrially zoned property of trees has a significant economic impact under *Penn Central*. *See F.P. Dev., LLC*, 456 F.Supp.3d at 890.

Second, both Canton and amici argue that F.P.'s economic impact is self-inflicted, and therefore should not be considered, because F.P. removed trees without a permit. But this argument ignores the fact that the tree mitigation payments are the same under the Tree Ordinance whether F.P. applies for a permit before removing the trees or pays the penalties after removing the trees. And Canton's designated witness testified that there is *no circumstance* where F.P. could have removed trees from this property without making the same mitigation payments. Dep. of J. Goulet, ECF No. 35-3, Page ID 749-50, 753-55; Dep. of L. Thurston, ECF No. 35-10, Page ID 800. The ongoing burden on F.P.'s property is therefore a necessary result of the Tree Ordinance, not a result of anything done by F.P.

Third, both Canton and amici argue the district court erred by finding any economic impact from the Tree Ordinance because F.P. did not submit additional evidence such as a current appraisal of the property with the trees removed. But neither Canton nor amici point to a single case holding that such evidence is required to prove an economic impact.

In any event, the proper comparison for impact analysis is not the value of the property with or without the trees; it is the value of the property with or without the

Tree Ordinance. *Penn Central*, 438 U.S. at 124 (emphasis added) (measuring "the economic impact *of the regulation* on the claimant.") Here mitigation payments are pre-set and mandatory. Canton Code of Ordinances, Art. 5A.08. Accordingly, based on the undisputed facts in the record regarding the property and Canton's prior application of the Tree Ordinance, the district court concluded that clearing the property of trees entirely would trigger hundreds of thousands of dollars in mitigation requirements under the Ordinance, likely exceeding the purchase price of the property. *See F.P. Dev., LLC*, 456 F.Supp.3d at 890. Even if F.P.'s property value has gone up since purchase—a new allegation for which Canton provides no evidence—it is disingenuous for Canton to argue that any such increase would mean that hundreds of thousands of dollars in mitigation would not rise to the level of a significant economic impact.

B. F.P. had a reasonable expectation that it would be able to develop industrially zoned property to expand its business without facing ruinous penalties

The district court also rightly held that the Tree Ordinance interfered with F.P.'s reasonable investment backed expectations. *F.P. Dev., LLC*, 456 F.Supp.3d at 890. F.P. purchased the industrially zoned property as a replacement property for a fully developed lot that it sold at Canton's urging. *Id.*; ECF No. 26-5, Page ID 388. F.P. thus had every reason to believe that it would be able to develop the

property for industrial use without facing ruinous penalties exceeding the value of the property as a whole. *Id*.

Canton objects that the Tree Ordinance was already in effect at the time the property was purchased, but the Supreme Court has repeatedly made clear that a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 630, 121 S.Ct. 2448, 2464 (2001) (*citing Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, n. 2 (1987)).

Canton objects that *Palazzolo* also held that the pre-existence of a law might play some role in determining reasonable expectations in some cases. But that caveat does not apply here. Although *Palazzolo* pointed to the holding in *Lucas* that a regulation is not a taking when it merely enforces those "restrictions that background principles of the State's law of property and nuisance already place upon land ownership," it explained further that such limitations are confined to those background principles of property that "inhere in the title itself" such as common law nuisance restrictions that prevent harm to neighboring properties. *Palazzolo*, 533 U.S. at 629-30. *Palazzolo* flatly rejected the argument that "any new regulation, once enacted, becomes a background principle of property law" which falls into this narrow category of pre-existing law worthy of consideration. *Id* at 629. To hold otherwise, would allow the government to redefine what it means to own property

by simply passing regulations. *Id*. at 627. As the Court put it, the government "may not put so potent a Hobbesian stick into the Lockean bundle." *Id*. Accordingly, the Tree Ordinance does not fall into the narrow class of pre-existing nuisance-based laws that warrant consideration under *Palazzolo.*[13]

Canton admits that the removal of trees from private property is not a nuisance at common law (Dep. of L. Thurston, ECF No. 35-10, Page ID 796), and admits that it has no evidence that the tree removal in this case caused any public injury. *Id*. at 797-99. Nevertheless, Canton argues that Michigan law holds that *any* violation of a zoning ordinance is a nuisance *per se*. But the district court rightly observed[14] that Canton does "not have the unfettered authority to shape and define property rights…" by simply declaring something a nuisance which is not so in fact. *See, Murr v. Wisconsin*, 137 S.Ct. 1933, 1944–45 (2017); *see also Yates v. Milwaukee*, 77 U.S. 497, 505 (1870) ("the mere declaration by the city council…that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character."). If Canton's

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[13] The only justice to provide a potentially broader conception of what pre-existing laws might count for this analysis in *Palazzolo* was Justice O'Connor. *See Palazzolo*, 533 U.S. at 632 (O'Connor concurring). But her opinion was not joined by any other justice, and was expressly attacked in a separate concurrence by Justice Scalia. Moreover, even Justice O'Connor's broader conception of reasonable expectations rejected any notion that the pre-existence of an ordinance was controlling. *Id*. She merely suggested that it might be considered to some degree—which is precisely what the district court did here. *Id*.

[14] *F.P. Dev., LLC*, 456 F.Supp.3d at 891.

approach were to be adopted, then all cities could simply immunize their local zoning codes from constitutional challenge by declaring, *ipse dixit*, that any violation of the zoning code is a public nuisance *per se*. Michigan courts have wisely rejected that approach. *See*, *Ypsilanti Charter Twp. v. Kircher*, 281 Mich. App. 251, 277-78 (2008) ("the mere fact that a condition constitutes a violation of a local ordinance does not make that condition a public nuisance.")

C. The Tree Ordinance impermissibly requires F.P. to provide a public benefit

When evaluating the third *Penn Central* factor, courts consider the "character of the governmental action." If the character of the regulation is more akin to traditional nuisance abatement, no compensation is generally required. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488, 492 (1987). By contrast, if the regulation is designed to merely generate public benefits, "fairness and justice" often demand that the cost of that burden "should be borne by the public as a whole." *See Bowen v. Gilliard*, 483 U.S. 587, 608-09 (1987).

Canton admits that the removal of trees from private property is not a nuisance at common law, (Dep. of L. Thurston, ECF No. 35-10, Page ID 796), and admits that it has no evidence that the tree removal in this case caused any public injury. *Id*. at 797-99. Indeed, Canton's representative was quite clear that the purpose of the tree ordinance is to provide "public benefits"—not to remedy an actual injury. *Id*. at 800. But government may not acquire a public benefit at a property owners'

expense without paying the property owner for it. *See Mahon*, 260 U.S. at 416 ("a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

Canton argues that the Tree Ordinance is not a taking because it is part of Canton's zoning code and therefore applies to everyone. But this argument, which is allegedly based on Justice Rehnquist's dissent in *Penn Central*, was not adopted by the majority in that case nor by any other court since, and for good reason. Under Canton's theory, government could always take property without compensation, so long as it took enough of it from enough people. But a regulation that eradicates the property rights of one thousand township residents is no less a taking than a regulation that eradicates the property rights of one. Imagine an ordinance in the Township Zoning Code that required each individual who purchases land to dedicate one-third of his property for exclusive government use. Such a "zoning" ordinance would certainly be "ubiquitous" and burden all property owners equally. It would nonetheless be a taking because it acquires private property for public use without compensation.

Furthermore, the Tree Ordinance, in fact, is not the ubiquitous regulation Canton suggests because it is riddled with exceptions for most of the voting public—*e.g.*, farms, nurseries, and residential lots of less than two acres. Canton Code of

Ordinances, Art. 5A.05(B). The sting of the Ordinance is reserved for those with sufficiently deep pockets, but less numbers at the ballot box—large property owners, developers, and industrially zoned properties. That is hardly the even distribution of benefits and burdens Canton asserts. The district court therefore did not err in holding that the Tree Ordinance is a taking.

V. THE DISTRICT COURT'S ORDER ON F.P.'S *PER SE* TAKINGS, FOURTH AMENDMENT SEIZURE, AND EIGHTH AMENDMENT EXCESSIVE FINES CLAIMS SHOULD BE REVERSED

Having concluded that the Tree Ordinance was an unconstitutional exaction and taking, there was no reason for the district court to reach F.P.'s other claims. However, because the district court ruled on these separate claims and addressed them separately on the face of its judgment and order, cross appeal is necessary to avoid any *res judicata* effects, and to provide an alternative ground to uphold the court's judgment.

A. The Tree Ordinance is a *Per Se* Taking Under *Horne*, Because it Grants Canton Constructive Possession of F.P.'s Trees

Next to the exaction claims, the most straightforward way the district court could have decided this case was to find a *per se* taking of F.P.'s trees under *Horne v. Dep't of Agric.*, 576 U.S. 351 (2015). Unlike the multi-factor balancing required under *Penn Central*, *per se* takings trigger relief without regard to the claimed public benefit or the economic impact on the owner. *Id*. at 360.

The Tree Ordinance is remarkably similar to the statute the Supreme Court found to be a *per se* taking in *Horne*. The plaintiffs in that case successfully challenged a federal statute that required them to set aside a portion of their raisins for the government to control as a means of restricting the supply of raisins in the national raisin market. The set-aside raisins remained on the plaintiffs' property, 576 U.S. at 361, but the plaintiffs' could not sell, use, or destroy the raisins without being fined their "fair market value." *Id*. at 370. The plaintiffs sold a portion of their set aside raisins and the government fined them the "market value" of the raisins sold. The Court held that this was a *per se* taking. As the Court explained, "[r]aisin growers subject to the reserve requirement thus lose the entire 'bundle' of property rights in the appropriated raisins—'the rights to possess, use and dispose' of them" and that this "gives rise to a taking as clearly 'as if the Government held full title and ownership.'" *Id*. at 362.

In Michigan, trees are a separate property interest that is severable from the underlying estate in the same manner as crops. *See e.g., Groth v. Stillson*, 20 Mich. App. 704, 707 (1969) (trees are severable interests); *State Highway Comm'r v. Green*, 5 Mich. App. 583, 589-90 (1967) (trees separate interest for takings analysis). Just as the statute in *Horne* forbade the property owners from exercising any property right with regard to their raisins, the Tree Ordinance forbids F.P. from exercising any property right with regard to its trees. Like the raisins in *Horne*, the trees remain

on F.P.'s property, but F.P. may not sell, use, or destroy them without paying Canton the "current market value" of the trees. Canton Code of Ordinances, Art. 5A.08(E). And like the plaintiffs in *Horne,* F.P. sold a portion of his trees and the government demanded their "market value." Accordingly, Canton's tree ordinance effectively takes possession of F.P.'s trees without compensation just as the statute in *Horne* effectively took control of raisins. Accordingly, it is a *per se* regulatory taking.

The district court rejected this argument because the government in *Horne* could have taken actual title to the raisins. *F.P. Dev., LLC*, 456 F.Supp.3d at 889. But the possibility of a title transfer of the raisins was not the dispositive fact that created a taking in *Horne*. In fact, the government never took actual possession of the raisins at issue. Rather, *Horne* held that the inability to consume or sell the raisins without paying the government compensation "gives rise to a taking as clearly '***as if*** the Government held full title and ownership.'" *Horne*, 576 U.S. at 362 (emphasis added). In other words, the denial of the ability to consume or sell the raisins without compensating the government would have given rise to a taking whether title was transferred or not. Accordingly, this Court should reverse the district court's impermissibly narrow reading of *Horne*.

B. The Tree Ordinance is a *Per Se* Taking Under *Loretto* Because it Forces F.P. to Maintain Unwanted Objects on its Property

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

Similarly, in *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991) the EPA drilled testing wells on private property in order to monitor groundwater contamination. The court recognized that those wells served an important government interest, but nonetheless held that the physical occupation of private property by an unwanted object constituted a *per se* taking warranting compensation. *Id*. at 137. As that court explained, once a permanent physical occupation is established "…nothing more needed to be shown [to establish a taking]." *Id.*

Here, the physical invasion is far more extensive than the cable box recognized as a taking in *Loretto* or the test wells in *Hendler*. Under the Tree

Ordinance, property owners must maintain potentially thousands of unwanted trees on their property. As these trees inevitably grow and spread over time, the extent of this legally mandated physical occupation increases. Accordingly, the ordinance is a *per se* taking under *Loretto*.

The district court rejected this argument in summary fashion by holding that *Loretto* was not relevant because Canton's agents had not physically invaded the property. *F.P. Dev., LLC*, 456 F.Supp.3d at 889. But there is no support—and the district court cited none—for such a narrow reading of *Loretto*. To the contrary, in *Loretto*, no government agent physically invaded the property—the law simply forbade the owner from altering or removing a cable box that was already on the property when she purchased it. It was the occupation by the cable box, not by a government agent, that created the taking. Similarly, this Court has rejected narrow interpretations of *Loretto* that require "agents" of the government to be "literally occupying" the property. *Montgomery v. Carter Cty.*, 226 F.3d 758, 766 (6th Cir. 2000). This Court should therefore overturn the district court's impermissibly narrow reading of *Loretto*.

C. The Tree Ordinance is an Unreasonable Seizure of F.P.'s Interest in its Trees Because it is a Meaningful Interference with Property Rights that is Neither Justified Nor Compensated

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

To determine whether a seizure is "justified" under the Fourth Amendment, courts "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests

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

Here, the Tree Ordinance constitutes a meaningful interference with F.P.'s property interest in its trees. Under the Ordinance, F.P. may not alter, destroy, move, or sell its trees without permission from, and compensation to, Canton. Accordingly, it is a meaningful interference with F.P.'s property rights for Fourth Amendment purposes, even if it would not rise to the level of a taking. *See e.g.*, *United States v. Gray*, 484 F.2d 352, 356 (6th Cir. 1973) (holding that temporarily removing rifles from a closet to copy down their serial numbers was a seizure.)

This interference violates the Fourth Amendment because it is neither justified nor compensated. Applying the balancing test from *Jacobsen*, 466 U.S. at 125, the significant interference with F.P.'s property interest cannot be justified by any alleged harm to the public. Canton concedes that tree removal does not, of itself, constitute a nuisance at common law and that it has no evidence that tree removal from F.P.'s property has caused an actual nuisance or injured anyone. Dep. of L. Thurston, ECF No. 35-10, Page ID 796-99. Indeed, neither Canton nor the district court put forward any argument that the seizure in this case was justified or

compensated. Rather, all of the discussion in the district court was based on whether the Fourth Amendment applied at all.

The district court ultimately held that F.P.'s Fourth Amendment claims were precluded by the "open fields" doctrine, because any seizure involved property outside the curtilage of a home. But the open fields doctrine addresses searches, not seizures. *United States v. Rapanos*, 115 F.3d 367, 373-74 (6th Cir. 1997)). The doctrine is derived from *Katz's* "reasonable expectation of privacy" standard, which addresses whether a Fourth Amendment *search* has occurred. *See Oliver v. United States*, 466 U.S. 170, 181 (1984) (holding no expectation of privacy in open fields). But unlike searches, the existence of a seizure does not turn on whether privacy has been invaded, but on whether there has been a "meaningful interference" with an interest in property. *Soldal v. Cook Cty.*, 506 U.S. 56, 63 (1992); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1028 (9th Cir. 2012). Thus, this Court has repeatedly made clear that the open fields doctrine "permits only visual inspections (as opposed to seizures) of property." *Rapanos*, 115 F.3d at 373 (*citing Allinder v. Ohio*, 808 F.2d 1180, 1185 (6th Cir. 1987)).

Of course, a law that expanded the "reasonable expectation of privacy" standard to seizures would have disastrous unintended consequences. *See Soldal*, 506 U.S. at 65-66 (providing examples.) For example, examination of items in plain view are usually not considered "searches" for Fourth Amendment purposes because

there is no expectation of privacy. *Id*. If this were applied to seizures, it would give the government carte blanch to permanently seize any item visible to authorities—*e.g.*, tractors left in the field during lunch, backpacks left temporarily on the sidewalk in front of an individual's house after school—without even implicating the Fourth Amendment. *See id.* This Court should therefore overturn the district court's impermissibly narrow interpretation of the Fourth Amendment.

D. The Payment Under the Tree Ordinance Constitutes an Excessive Fine Under the Eighth Amendment

Finally, this Court should find that the fines levied in this case are excessive under the Eighth Amendment. The district court refused to engage in the Eighth Amendment analysis because it held that the payments in this case were mitigation, and therefore not fines. *F.P. Dev., LLC*, 456 F.Supp.3d at 897. However, this Court is free to independently address F.P.'s Eighth Amendment claim in the alternative if it finds that the Tree Ordinance mitigation payments are not, in fact, mitigation for *Dolan* purposes.

1. The Tree Payments are Fines for Eighth Amendment Purposes

The Eighth Amendment's prohibition on excessive fines applies to any payment, whether in cash or in kind, designed at least in part to serve "either retributive or deterrent purposes." *Austin v. United States*, 509 U.S. 602, 610, (1993). The facts in this case indicate that the tree payments are fines, because they are designed, at least in part, for "retributive or deterrent purposes." *See Austin v.*

United States, 509 U.S. at 610. At deposition, Canton's representative conceded that the purpose of requiring after-the-fact payments was to ensure compliance with the Tree Ordinance and to deter individuals from removing trees. Dep. of J. Goulet, ECF 29-2, Page ID 548-49 (compliance); *id.*, at 523 (deterrence). The required payments are therefore punitive in nature. *See WCI, Inc. v. Ohio Dep't of Pub. Safety*, 774 Fed. Appx. 959, 967 (6th Cir. 2019) ("even if only intended partially as a punishment, and partially for other reasons—the protections of the Eighth Amendment apply.").

Canton argues that they are fees, similar to those required of a business who obtains a permit to tap into a municipal water supply or sewer system. But tree fines and tap-fees are fundamentally different. A "fee" is generally understood as a payment "exchanged for a service rendered or a benefit conferred…." *Bolt v. City of Lansing*, 459 Mich. 152, 161 (1998); *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 340-41 (1974) (same). A charge for connecting to the water system is a "fee," because it does nothing more than require owners to pay the rates for receiving the benefit of "water as a commodity, just as similar rates are payable to gas companies, or to private water works, for their supply of gas or water." *Id*. at 162.

F.P. does not receive any benefit or service in exchange for its tree payments. They are penalties that F.P. must pay for exercising its common law right to remove its own trees from its property.

2. The Tree Payments are Excessive

"The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The "amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Madison*, 226 Fed. Appx. 535, 548 (6th Cir. 2011).

In determining proportionality, courts look at several factors—two of which are dispositive here. First, courts look at the actual "harm that respondent caused." *Bajakajian*, 524 U.S. 321. In *Bajakajian*, the Court held that a seizure of $357,144 was "grossly disproportional" to the crime of not reporting the amount of currency leaving the country to federal authorities, because "[t]he harm that respondent caused was …minimal." *Id*. at 339. As the Court explained, the respondent's failure "to report his currency affected only one party, the Government, and in a relatively minor way." *Id*. "There was no fraud on the United States, and respondent caused no loss to the public fisc." *Id*. Given these minimal injuries, the forfeiture of thousands of dollars was excessive. *Id*.

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

The fines assessed under the Tree Ordinance in this case fail both tests. First, there is no public harm at issue in this case. Canton concedes that removing trees from private property does not, of itself, constitute a nuisance and that there is no evidence that the tree removal in this case harmed or otherwise injure F.P.'s neighbors. Dep. of L. Thurston, ECF No. 35-10, Page ID 796. The only harm that Canton argues in this case is that violation of a zoning ordinance is a *per se* public injury. But such an abstract injury cannot justify $47,898 in fines. *See Bajakajian*, 524 U.S. at 339 (government's inherent offense in having its laws violated not sufficient).

Second, the fine in this case is grossly excessive in comparison to the maximum criminal penalties available for the same offense. In *Bajakajian*, a forfeiture of $357,144 was considered "grossly" excessive because it was seventy times larger than the maximum criminal penalty. *Bajakajian*, 524 U.S. at 339. Here, the maximum criminal penalty for violating the Tree Ordinance is $500, but the civil fines sought against F.P. under that same ordinance for removal of only a fraction of

trees on the property are $47,898 - nearly 100-times greater than the maximum criminal penalty. Accordingly, such a level of disproportionality cannot pass under *Bajakajian*.

CONCLUSION

For the foregoing reasons, this Court should (1) affirm the district court's judgment that the Tree Ordinance is an unconstitutional exaction; (2) affirm the district court's judgment that the Tree Ordinance is a regulatory taking under *Penn Central*; (3) reverse the district court's judgment that the Tree Ordinance is not a *per se* taking under *Horne*; (4) reverse the district court's judgment that the Tree Ordinance is not *per se* taking under *Loretto*; (5) reverse the district court's judgment that the Tree Ordinance is not an unreasonable seizure under the Fourth Amendment; and (6) reverse the district court's judgment that payments sought by Canton were not excessive fines under the Eighth Amendment.

In the alternative, should this Court simply affirm on the regulatory takings or exactions claims without reaching F.P.'s cross-claims, this Court should nonetheless vacate the district court's judgment on the *per se* takings, seizure, and Eighth Amendment claims to prevent those unnecessary judgments from having *res judicata* effects. *See Camreta v. Greene*, 563 U.S. 692, 715, (2011) (Breyer and Sotomayor, concurring); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 335 (1980) (noting past practice of finding jurisdiction for the limited purpose of

vacating prejudicial portions of a lower court judgment when the appellant is otherwise a prevailing party)*; Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939) (same).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), the undersigned hereby certifies that this brief complies with the type-volume limitation found at Fed. R. App. P. 32(a)(7)(B). It contains 13,214 words and has been prepared in Microsoft Word, using a proportionally spaced type-face using Times New Roman in 14-point font.

/s/Chance Weldon
CHANCE WELDON

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed on December 4, 2020, with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the CM/ECF system.

/s/Chance Weldon
CHANCE WELDON

Appellee's Appendix 311–356

Correspondence to Sixth Circuit Court Clerk
(Dkt. #82, 6th Cir., June 24, 2021)

Texas Public Policy Foundation

June 24, 2021

Ms. Deborah S. Hunt
Clerk of the Court
U.S. Court of Appeals for the Sixth Circuit
100 E. Fifth Street, Room 540
Cincinnati, OH 45202-3988

RE: Case Nos. 20-1447/20-1466; *F.P. Development, LLC v. Charter Township of Canton*

Dear Ms. Hunt:

Under Federal Rule of Appellate Procedure 28(j), Appellee submits as supplemental authority the Supreme Court's decision in *Cedar Point Nursery v. Hassid,* 594 U.S. ___ (2021) (attached). In *Cedar Point*, the Court held that a regulation requiring that union organizers be permitted limited access to private property was a *per se* taking, even though the regulation did not mandate a permanent occupation or the conveyance of a formal easement.

The opinion contains at least two points relevant to this case. First, the opinion forecloses amici's argument in this case that *per se* takings under *Loretto* or exactions under *Dolan* are limited to formal dedications of property or easements. *See Id*. at 13-14 (*per se* takings); 19-20 (exactions). Indeed, while not a *Dolan* case, the Court noted that the access right at issue in the case and even basic safety inspection requirements would be subject to the "nexus" and "rough proportionality" requirements of *Dolan* if made a condition for a permit, even though neither would be dedications or easements. *Id*. at 19-20.

This rejection of an "easement-only" approach to exactions makes sense. As alluded to by Judge Bush at oral argument, amici's contrary approach would allow

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government to demand virtually *anything* as "mitigation." Permits could be conditioned on planting 500 trees for each tree removal, building a million-dollar stormwater basin, or erecting a 50-foot golden statue of the mayor. All of these would be fine according to amici because none would qualify as a formal easement. *Cedar Point* should put this artificial limitation on exactions to rest once and for all.

Second, the *Cedar Point* opinion directly addressed the concern Judge Nalbandian raised at oral argument regarding whether applying a *per se* takings theory would undermine safety regulations, such as sprinkler requirements. As the Court explained, such legitimate safety requirements would usually not be takings because they could often be justified as nuisance abatement under the police power (*Id*. at 18-19) or roughly proportional permit requirements under *Dolan*. *Id*. at 19-20. Such concerns therefore provide no basis to avoid the exaction or *per se* takings theories in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28(j), I hereby certify that this letter complies with the type-volume limitation and it contains 348 words. It has been prepared in Microsoft Word, using a proportionally spaced type-face using Times New Roman in 14-point font.

/s/Chance Weldon
CHANCE WELDON

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed on June 24, 2021, with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter, who are registered with the CM/ECF system.

/s/Chance Weldon
CHANCE WELDON

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CEDAR POINT NURSERY ET AL. *v.* HASSID ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 20–107. Argued March 22, 2021—Decided June 23, 2021

A California regulation grants labor organizations a "right to take access" to an agricultural employer's property in order to solicit support for unionization. Cal. Code Regs., tit. 8, §20900(e)(1)(C). The regulation mandates that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year. Organizers from the United Farm Workers sought to take access to property owned by two California growers—Cedar Point Nursery and Fowler Packing Company. The growers filed suit in Federal District Court seeking to enjoin enforcement of the access regulation on the grounds that it appropriated without compensation an easement for union organizers to enter their property and therefore constituted an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments. The District Court denied the growers' motion for a preliminary injunction and dismissed the complaint, holding that the access regulation did not constitute a *per se* physical taking because it did not allow the public to access the growers' property in a permanent and continuous manner. A divided panel of the Court of Appeals for the Ninth Circuit affirmed, and rehearing en banc was denied over dissent.

Held: California's access regulation constitutes a *per se* physical taking. Pp. 4–20.

(a) The growers' complaint states a claim for an uncompensated taking in violation of the Fifth and Fourteenth Amendments. Pp. 4–17.

(1) The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." When the government physically acquires private property for a public use, the Takings Clause obligates the government to provide the owner

with just compensation. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 321. The Court assesses such physical takings using a *per se* rule: The government must pay for what it takes. *Id.*, at 322.

A different standard applies when the government, rather than appropriating private property for itself or a third party, instead imposes regulations restricting an owner's ability to use his own property. *Id.*, at 321–322. To determine whether such a use restriction amounts to a taking, the Court has generally applied the flexible approach set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, considering factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. *Id.*, at 124. But when the government physically appropriates property, *Penn Central* has no place—regardless whether the government action takes the form of a regulation, statute, ordinance, or decree. Pp. 4–7.

(2) California's access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties (here union organizers) the owners' right to exclude. The right to exclude is "a fundamental element of the property right." *Kaiser Aetna* v. *United States*, 444 U. S. 164, 179–180. The Court's precedents have thus treated government-authorized physical invasions as takings requiring just compensation. As in previous cases, the government here has appropriated a right of access to private property. Because the regulation appropriates a right to physically invade the growers' property—to literally "take access"—it constitutes a *per se* physical taking under the Court's precedents. Pp. 7–10.

(3) The view that the access regulation cannot qualify as a *per se* taking because it does not allow for permanent and continuous access 24 hours a day, 365 days a year is insupportable. The Court has held that a physical appropriation is a taking whether it is permanent or temporary; the duration of the appropriation bears only on the amount of compensation due. See *United States* v. *Dow*, 357 U. S. 17, 26. To be sure, the Court in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, discussed the heightened concerns associated with "[t]he permanence and absolute exclusivity of a physical occupation" in contrast to "temporary limitations on the right to exclude," and stated that "[n]ot every physical *invasion* is a taking." *Id.*, at 435, n. 12. But the regulation here is not transformed from a physical taking into a use restriction just because the access granted is restricted to union organizers, for a narrow purpose, and for a limited time. And although the

Syllabus

Board disputes whether the access regulation appropriates an easement as defined by California law, it cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state property law.

PruneYard Shopping Center v. *Robins*, 447 U. S. 74, does not cut against the Court's conclusion that the access regulation constitutes a *per se* taking. In *PruneYard* the California Supreme Court recognized a right to engage in leafleting at the PruneYard, a privately owned shopping center, and the Court applied the *Penn Central* factors to hold that no compensable taking had occurred. 447 U. S., at 78, 83. *PruneYard* does not establish that limited rights of access to private property should be evaluated as regulatory rather than *per se* takings. Restrictions on how a business generally open to the public such as the PruneYard may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public. Pp. 10–15.

(4) The Court declines to adopt the theory that the access regulation merely regulates, and does not appropriate, the growers' right to exclude. The right to exclude is not an empty formality that can be modified at the government's pleasure. Pp. 15–17.

(b) The Board's fear that treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property is unfounded. First, the Court's holding does nothing to efface the distinction between trespass and takings. The Court's precedents make clear that isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. Second, many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights, including traditional common law privileges to access private property. See *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1028–1029. Third, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. Under this framework, government health and safety inspection regimes will generally not constitute takings. In this case, however, none of these considerations undermine the Court's determination that the access regulation gives rise to a *per se* physical taking. Pp. 17–20.

923 F. 3d 524, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. KAVANAUGH, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 20–107

CEDAR POINT NURSERY, ET AL., PETITIONERS *v.*
VICTORIA HASSID, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2021]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

A California regulation grants labor organizations a "right to take access" to an agricultural employer's property in order to solicit support for unionization. Cal. Code Regs., tit. 8, §20900(e)(1)(C) (2020). Agricultural employers must allow union organizers onto their property for up to three hours per day, 120 days per year. The question presented is whether the access regulation constitutes a *per se* physical taking under the Fifth and Fourteenth Amendments.

I

The California Agricultural Labor Relations Act of 1975 gives agricultural employees a right to self-organization and makes it an unfair labor practice for employers to interfere with that right. Cal. Lab. Code Ann. §§1152, 1153(a) (West 2020). The state Agricultural Labor Relations Board has promulgated a regulation providing, in its current form, that the self-organization rights of employees include "the right of access by union organizers to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support." Cal. Code

Regs., tit. 8, §20900(e). Under the regulation, a labor organization may "take access" to an agricultural employer's property for up to four 30-day periods in one calendar year. §§20900(e)(1)(A), (B). In order to take access, a labor organization must file a written notice with the Board and serve a copy on the employer. §20900(e)(1)(B). Two organizers per work crew (plus one additional organizer for every 15 workers over 30 workers in a crew) may enter the employer's property for up to one hour before work, one hour during the lunch break, and one hour after work. §§20900(e)(3)(A)–(B), (4)(A). Organizers may not engage in disruptive conduct, but are otherwise free to meet and talk with employees as they wish. §§20900(e)(3)(A), (4)(C). Interference with organizers' right of access may constitute an unfair labor practice, §20900(e)(5)(C), which can result in sanctions against the employer, see, *e.g.*, *Harry Carian Sales* v. *Agricultural Labor Relations Bd.*, 39 Cal. 3d 209, 231–232, 703 P. 2d 27, 42 (1985).

Cedar Point Nursery is a strawberry grower in northern California. It employs over 400 seasonal workers and around 100 full-time workers, none of whom live on the property. According to the complaint, in October 2015, at five o'clock one morning, members of the United Farm Workers entered Cedar Point's property without prior notice. The organizers moved to the nursery's trim shed, where hundreds of workers were preparing strawberry plants. Calling through bullhorns, the organizers disturbed operations, causing some workers to join the organizers in a protest and others to leave the worksite altogether. Cedar Point filed a charge against the union for taking access without giving notice. The union responded with a charge of its own, alleging that Cedar Point had committed an unfair labor practice.

Fowler Packing Company is a Fresno-based grower and shipper of table grapes and citrus. It has 1,800 to 2,500

employees in its field operations and around 500 in its packing facility. As with Cedar Point, none of Fowler's workers live on the premises. In July 2015, organizers from the United Farm Workers attempted to take access to Fowler's property, but the company blocked them from entering. The union filed an unfair labor practice charge against Fowler, which it later withdrew.

Believing that the union would likely attempt to enter their property again in the near future, the growers filed suit in Federal District Court against several Board members in their official capacity. The growers argued that the access regulation effected an unconstitutional *per se* physical taking under the Fifth and Fourteenth Amendments by appropriating without compensation an easement for union organizers to enter their property. They requested declaratory and injunctive relief prohibiting the Board from enforcing the regulation against them.

The District Court denied the growers' motion for a preliminary injunction and granted the Board's motion to dismiss. The court rejected the growers' argument that the access regulation constituted a *per se* physical taking, reasoning that it did not "allow the public to access their property in a permanent and continuous manner for whatever reason." *Cedar Point Nursery* v. *Gould*, 2016 WL 1559271, *5 (ED Cal., Apr. 18, 2016) (emphasis deleted). In the court's view, the regulation was instead subject to evaluation under the multifactor balancing test of *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978), which the growers had made no attempt to satisfy. *Cedar Point Nursery* v. *Gould*, 2016 WL 3549408, *4 (ED Cal., June 29, 2016).

A divided panel of the Court of Appeals for the Ninth Circuit affirmed. The court identified three categories of regulatory actions in takings jurisprudence: regulations that impose permanent physical invasions, regulations that de-

prive an owner of all economically beneficial use of his property, and the remainder of regulatory actions. *Cedar Point Nursery* v. *Shiroma*, 923 F. 3d 524, 530–531 (2019). On the court's understanding, while regulations in the first two categories constitute *per se* takings, those in the third must be evaluated under *Penn Central*. 923 F. 3d, at 531. The court agreed with the District Court that the access regulation did not fall into the first category because it did not "allow random members of the public to unpredictably traverse [the growers'] property 24 hours a day, 365 days a year." *Id.*, at 532. And given that the growers did not contend that the regulation deprived them of all economically beneficial use of their property, *per se* treatment was inappropriate. *Id.*, at 531, 534.

Judge Leavy dissented. He observed that this Court had never allowed labor organizers to enter an employer's property for substantial periods of time when its employees lived off premises. *Id.*, at 536; see *Lechmere, Inc.* v. *NLRB*, 502 U. S. 527, 540–541 (1992); *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 113 (1956). As he saw it, the regulation constituted a physical occupation and therefore effected a *per se* taking. 923 F. 3d, at 538.

The Ninth Circuit denied rehearing en banc. Judge Ikuta dissented, joined by seven other judges. She reasoned that the access regulation appropriated from the growers a traditional form of private property—an easement in gross—and transferred that property to union organizers. *Cedar Point Nursery* v. *Shiroma*, 956 F. 3d 1162, 1168, 1171 (2020). The appropriation of such an easement, she concluded, constituted a *per se* physical taking under the precedents of this Court. *Id.*, at 1168.

We granted certiorari. 592 U. S. ___ (2020).

II

A

The Takings Clause of the Fifth Amendment, applicable

to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). This Court agrees, having noted that protection of property rights is "necessary to preserve freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr* v. *Wisconsin*, 582 U. S. ___, ___ (2017) (slip op., at 8).

When the government physically acquires private property for a public use, the Takings Clause imposes a clear and categorical obligation to provide the owner with just compensation. *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 321 (2002). The Court's physical takings jurisprudence is "as old as the Republic." *Id.*, at 322. The government commits a physical taking when it uses its power of eminent domain to formally condemn property. See *United States* v. *General Motors Corp.*, 323 U. S. 373, 374–375 (1945); *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266, 270–271 (1943). The same is true when the government physically takes possession of property without acquiring title to it. See *United States* v. *Pewee Coal Co.*, 341 U. S. 114, 115–117 (1951) (plurality opinion). And the government likewise effects a physical taking when it occupies property—say, by recurring flooding as a result of building a dam. See *United States* v. *Cress*, 243 U. S. 316, 327–328 (1917). These sorts of physical appropriations constitute the "clearest sort of taking," *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 617 (2001), and we assess them using a simple, *per se* rule: The government must pay for what it takes. See *Tahoe-Sierra*, 535 U. S., at 322.

When the government, rather than appropriating private property for itself or a third party, instead imposes regulations that restrict an owner's ability to use his own property, a different standard applies. *Id.*, at 321–322. Our jurisprudence governing such use restrictions has developed more recently. Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property. See *Horne* v. *Department of Agriculture*, 576 U. S. 351, 360 (2015); *Legal Tender Cases*, 12 Wall. 457, 551 (1871). In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), however, the Court established the proposition that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*, at 415. This framework now applies to use restrictions as varied as zoning ordinances, *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 387–388 (1926), orders barring the mining of gold, *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958), and regulations prohibiting the sale of eagle feathers, *Andrus* v. *Allard*, 444 U. S. 51, 65–66 (1979). To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action. 438 U. S., at 124.

Our cases have often described use restrictions that go "too far" as "regulatory takings." See, *e.g.*, *Horne*, 576 U. S., at 360; *Yee* v. *Escondido*, 503 U. S. 519, 527 (1992). But that label can mislead. Government action that physically appropriates property is no less a physical taking because it arises from a regulation. That explains why we held that an administrative reserve requirement compelling raisin growers to physically set aside a percentage of their crop for the government constituted a physical rather than a regulatory taking. *Horne*, 576 U. S., at 361. The essential question is not, as the Ninth Circuit seemed to think, whether

the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property. See *Tahoe-Sierra*, 535 U. S., at 321–323. Whenever a regulation results in a physical appropriation of property, a *per se* taking has occurred, and *Penn Central* has no place.

B

The access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.

The right to exclude is "one of the most treasured" rights of property ownership. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 435 (1982). According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone, Commentaries on the Laws of England 2 (1766). In less exuberant terms, we have stated that the right to exclude is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna* v. *United States*, 444 U. S. 164, 176, 179–180 (1979); see *Dolan* v. *City of Tigard*, 512 U. S. 374, 384, 393 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 831 (1987); see also Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998) (calling the

right to exclude the "*sine qua non*" of property).

Given the central importance to property ownership of the right to exclude, it comes as little surprise that the Court has long treated government-authorized physical invasions as takings requiring just compensation. The Court has often described the property interest taken as a servitude or an easement.

For example, in *United States* v. *Causby* we held that the invasion of private property by overflights effected a taking. 328 U. S. 256 (1946). The government frequently flew military aircraft low over the Causby farm, grazing the treetops and terrorizing the poultry. *Id.*, at 259. The Court observed that ownership of the land extended to airspace that low, and that "invasions of it are in the same category as invasions of the surface." *Id.*, at 265. Because the damages suffered by the Causbys "were the product of a direct invasion of [their] domain," we held that "a servitude has been imposed upon the land." *Id.*, at 265–266, 267; see also *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327, 330 (1922) (government assertion of a right to fire coastal defense guns across private property would constitute a taking).

We similarly held that the appropriation of an easement effected a taking in *Kaiser Aetna* v. *United States*. A real-estate developer dredged a pond, converted it into a marina, and connected it to a nearby bay and the ocean. 444 U. S., at 167. The government asserted that the developer could not exclude the public from the marina because the pond had become a navigable water. *Id.*, at 168. We held that the right to exclude "falls within [the] category of interests that the Government cannot take without compensation." *Id.*, at 180. After noting that "the imposition of the navigational servitude" would "result in an actual physical invasion of the privately owned marina" by members of the public, we cited *Causby* and *Portsmouth* for the proposition that

"even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." 444 U. S., at 180.

In *Loretto* v. *Teleprompter Manhattan CATV Corp.*, we made clear that a permanent physical occupation constitutes a *per se* taking regardless whether it results in only a trivial economic loss. New York adopted a law requiring landlords to allow cable companies to install equipment on their properties. 458 U. S., at 423. Loretto alleged that the installation of a ½-inch diameter cable and two 1½-cubic-foot boxes on her roof caused a taking. *Id.*, at 424. We agreed, stating that where government action results in a "permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.*, at 434–435.

We reiterated that the appropriation of an easement constitutes a physical taking in *Nollan* v. *California Coastal Commission*. The Nollans sought a permit to build a larger home on their beachfront lot. 483 U. S., at 828. The California Coastal Commission issued the permit subject to the condition that the Nollans grant the public an easement to pass through their property along the beach. *Ibid.* As a starting point to our analysis, we explained that, had the Commission simply required the Nollans to grant the public an easement across their property, "we have no doubt there would have been a taking." *Id.*, at 831; see also *Dolan*, 512 U. S., at 384 (holding that compelled dedication of an easement for public use would constitute a taking).

More recently, in *Horne* v. *Department of Agriculture*, we observed that "people still do not expect their property, real or personal, to be actually occupied or taken away." 576 U. S., at 361. The physical appropriation by the government of the raisins in that case was a *per se* taking, even if a regulatory limit with the same economic impact would not

have been. *Id.*, at 362; see *supra*, at 6. "The Constitution," we explained, "is concerned with means as well as ends." 576 U. S., at 362.

The upshot of this line of precedent is that government-authorized invasions of property—whether by plane, boat, cable, or beachcomber—are physical takings requiring just compensation. As in those cases, the government here has appropriated a right of access to the growers' property, allowing union organizers to traverse it at will for three hours a day, 120 days a year. The regulation appropriates a right to physically invade the growers' property—to literally "take access," as the regulation provides. Cal. Code Regs., tit. 8, §20900(e)(1)(C). It is therefore a *per se* physical taking under our precedents. Accordingly, the growers' complaint states a claim for an uncompensated taking in violation of the Fifth and Fourteenth Amendments.

C

The Ninth Circuit saw matters differently, as do the Board and the dissent. In the decision below, the Ninth Circuit took the view that the access regulation did not qualify as a *per se* taking because, although it grants a right to physically invade the growers' property, it does not allow for permanent and continuous access "24 hours a day, 365 days a year." 923 F. 3d, at 532 (citing *Nollan*, 483 U. S., at 832). The dissent likewise concludes that the regulation cannot amount to a *per se* taking because it allows "access short of 365 days a year." *Post*, at 11 (opinion of BREYER, J.). That position is insupportable as a matter of precedent and common sense. There is no reason the law should analyze an abrogation of the right to exclude in one manner if it extends for 365 days, but in an entirely different manner if it lasts for 364.

To begin with, we have held that a physical appropriation is a taking whether it is permanent or temporary. Our cases establish that "compensation is mandated when a

leasehold is taken and the government occupies property for its own purposes, even though that use is temporary." *Tahoe-Sierra*, 535 U. S., at 322 (citing *General Motors Corp.*, 323 U. S. 373; *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946)). The duration of an appropriation—just like the size of an appropriation, see *Loretto*, 458 U. S., at 436–437—bears only on the amount of compensation. See *United States* v. *Dow*, 357 U. S. 17, 26 (1958). For example, after finding a taking by physical invasion, the Court in *Causby* remanded the case to the lower court to determine "whether the easement taken was temporary or permanent," in order to fix the compensation due. 328 U. S., at 267–268.

To be sure, *Loretto* emphasized the heightened concerns associated with "[t]he permanence and absolute exclusivity of a physical occupation" in contrast to "temporary limitations on the right to exclude," and stated that "[n]ot every physical *invasion* is a taking." 458 U. S., at 435, n. 12; see also *id.*, at 432–435. The latter point is well taken, as we will explain. But *Nollan* clarified that appropriation of a right to physically invade property may constitute a taking "even though no particular individual is permitted to station himself permanently upon the premises." 483 U. S., at 832.

Next, we have recognized that physical invasions constitute takings even if they are intermittent as opposed to continuous. *Causby* held that overflights of private property effected a taking, even though they occurred on only 4% of takeoffs and 7% of landings at the nearby airport. 328 U. S., at 259. And while *Nollan* happened to involve a legally continuous right of access, we have no doubt that the Court would have reached the same conclusion if the easement demanded by the Commission had lasted for only 364 days per year. After all, the easement was hardly continuous as a practical matter. As Justice Brennan observed in

dissent, given the shifting tides, "public passage for a portion of the year would either be impossible or would not occur on [the Nollans'] property." 483 U. S., at 854. What matters is not that the easement notionally ran round the clock, but that the government had taken a right to physically invade the Nollans' land. And when the government physically takes an interest in property, it must pay for the right to do so. See *Horne*, 576 U. S., at 357–358; *Tahoe-Sierra*, 535 U. S., at 322. The fact that a right to take access is exercised only from time to time does not make it any less a physical taking.

Even the Board declines to defend the Ninth Circuit's absolutist stance. It prudently concedes that "a requirement that landowners grant an easement otherwise identical to the one in *Nollan* but limited to daylight hours, might very well qualify as 'a taking without regard to other factors that a court might ordinarily examine.'" Brief for Respondents 25–26 (quoting *Loretto*, 458 U. S., at 432; citation and some internal quotation marks omitted). But the access regulation, it contends, nevertheless fails to qualify as a *per se* taking because it "authorizes only limited and intermittent access for a narrow purpose." Brief for Respondents 26. That position is little more defensible than the Ninth Circuit's. The fact that the regulation grants access only to union organizers and only for a limited time does not transform it from a physical taking into a use restriction. Saying that appropriation of a three hour per day, 120 day per year right to invade the growers' premises "does not constitute a taking of a property interest but rather . . . a mere restriction on its use, is to use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U. S., at 831 (citation and internal quotation marks omitted).

The Board also takes issue with the growers' premise that the access regulation appropriates an easement. In the Board's estimation, the regulation does not exact a true

easement in gross under California law because the access right may not be transferred, does not burden any particular parcel of property, and may not be recorded. This, the Board says, reinforces its conclusion that the regulation does not take a constitutionally protected property interest from the growers. The dissent agrees, suggesting that the access right cannot effect a *per se* taking because it does not require the growers to grant the union organizers an easement as defined by state property law. See *post*, at 4, 11.

These arguments misconstrue our physical takings doctrine. As a general matter, it is true that the property rights protected by the Takings Clause are creatures of state law. See *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164 (1998); *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1030 (1992). But no one disputes that, without the access regulation, the growers would have had the right under California law to exclude union organizers from their property. See *Allred* v. *Harris*, 14 Cal. App. 4th 1386, 1390, 18 Cal. Rptr. 2d 530, 533 (1993). And no one disputes that the access regulation took that right from them. The Board cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law. Under the Constitution, property rights "cannot be so easily manipulated." *Horne*, 576 U. S., at 365 (internal quotation marks omitted); see also *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation").

Our decisions consistently reflect this intuitive approach. We have recognized that the government can commit a physical taking either by appropriating property through a condemnation proceeding or by simply "enter[ing] into physical possession of property without authority of a court order." *Dow*, 357 U. S., at 21; see also *United States* v.

Clarke, 445 U. S. 253, 256–257, and n. 3 (1980). In the latter situation, the government's intrusion does not vest it with a property interest recognized by state law, such as a fee simple or a leasehold. See *Dow*, 357 U. S., at 21. Yet we recognize a physical taking all the same. See *id.*, at 22. Any other result would allow the government to appropriate private property without just compensation so long as it avoids formal condemnation. We have never tolerated that outcome. See *Pewee Coal Co.*, 341 U. S., at 116–117. For much the same reason, in *Portsmouth*, *Causby*, and *Loretto* we never paused to consider whether the physical invasions at issue vested the intruders with formal easements according to the nuances of state property law (nor do we see how they could have). Instead, we followed our traditional rule: Because the government appropriated a right to invade, compensation was due. That same test governs here.

The Board and the dissent further contend that our decision in *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), establishes that the access regulation cannot qualify as a *per se* taking. There the California Supreme Court held that the State Constitution protected the right to engage in leafleting at the PruneYard, a privately owned shopping center. *Id.*, at 78. The shopping center argued that the decision had taken without just compensation its right to exclude. *Id.*, at 82. Applying the *Penn Central* factors, we held that no compensable taking had occurred. 447 U. S., at 83; cf. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 261 (1964) (rejecting claim that provisions of the Civil Rights Act of 1964 prohibiting racial discrimination in public accommodations effected a taking).

The Board and the dissent argue that *PruneYard* shows that limited rights of access to private property should be evaluated as regulatory rather than *per se* takings. See *post*, at 8–9. We disagree. Unlike the growers' properties, the PruneYard was open to the public, welcoming some 25,000 patrons a day. 447 U. S., at 77–78. Limitations on

how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public. See *Horne*, 576 U. S., at 364 (distinguishing *PruneYard* as involving "an already publicly accessible" business); *Nollan*, 483 U. S., at 832, n. 1 (same).

The Board also relies on our decision in *NLRB* v. *Babcock & Wilcox Co.* But that reliance is misplaced. In *Babcock*, the National Labor Relations Board found that several employers had committed unfair labor practices under the National Labor Relations Act by preventing union organizers from distributing literature on company property. 351 U. S., at 109. We held that the statute did not require employers to allow organizers onto their property, at least outside the unusual circumstance where their employees were otherwise "beyond the reach of reasonable union efforts to communicate with them." *Id.*, at 113; see also *Lechmere*, 502 U. S., at 540 (employees residing off company property are presumptively not beyond the reach of the union's message). The Board contends that *Babcock*'s approach of balancing property and organizational rights should guide our analysis here. See *Loretto*, 458 U. S., at 434, n. 11 (discussing *Babcock* principle). But *Babcock* did not involve a takings claim. Whatever specific takings issues may be presented by the highly contingent access right we recognized under the NLRA, California's access regulation effects a *per se* physical taking under our precedents. See *Tahoe-Sierra*, 535 U. S., at 322.

D

In its thoughtful opinion, the dissent advances a distinctive view of property rights. The dissent encourages readers to consider the issue "through the lens of ordinary English," and contends that, so viewed, the "regulation does not *appropriate* anything." *Post*, at 3, 5. Rather, the access regulation merely "*regulates* . . . the owners' right to exclude,"

so it must be assessed "under *Penn Central*'s fact-intensive test." *Post*, at 2, 5. "A right to enter my woods only on certain occasions," the dissent elaborates, "is a taking only if the regulation allowing it goes 'too far.'" *Post*, at 11. The dissent contends that our decisions in *Causby*, *Portsmouth*, and *Kaiser Aetna* applied just such a flexible approach, under which the Court "balanced several factors" to determine whether the physical invasions at issue effected a taking. *Post*, at 9–11. According to the dissent, this kind of latitude toward temporary invasions is a practical necessity for governing in our complex modern world. See *post*, at 11–12.

With respect, our own understanding of the role of property rights in our constitutional order is markedly different. In "ordinary English" "appropriation" means "*taking* as one's own," 1 Oxford English Dictionary 587 (2d ed. 1989) (emphasis added), and the regulation expressly grants to labor organizers the "right to *take* access," Cal. Code Regs., tit. 8, §20900(e)(1)(C) (emphasis added). We cannot agree that the right to exclude is an empty formality, subject to modification at the government's pleasure. On the contrary, it is a "fundamental element of the property right," *Kaiser Aetna*, 444 U. S., at 179–180, that cannot be balanced away. Our cases establish that appropriations of a right to invade are *per se* physical takings, not use restrictions subject to *Penn Central*: "[W]hen [government] planes use private airspace to approach a government airport, [the government] is required to pay for that share no matter how small." *Tahoe-Sierra*, 535 U. S., at 322 (citing *Causby*). And while *Kaiser Aetna* may have referred to the test from *Penn Central*, see 444 U. S., at 174–175, the Court concluded categorically that the government must pay just compensation for physical invasions, see *id.*, at 180 (citing *Causby* and *Portsmouth*). With regard to the complexities of modern society, we think they only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Founders explained. See

supra, at 5.

In the end, the dissent's permissive approach to property rights hearkens back to views expressed (in dissent) for decades. See, *e.g.*, *Nollan*, 483 U. S., at 864 (Brennan, J., dissenting) ("[The Court's] reasoning is hardly suited to the complex reality of natural resource protection in the 20th century."); *Loretto*, 458 U. S., at 455 (Blackmun, J., dissenting) ("[T]oday's decision . . . represents an archaic judicial response to a modern social problem."); *Causby*, 328 U. S., at 275 (Black, J., dissenting) ("Today's opinion is, I fear, an opening wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital national problems."). As for today's considered dissent, it concludes with "Better the devil we know . . . ," *post*, at 16, but its objections, to borrow from then-Justice Rehnquist's invocation of Wordsworth, "bear[] the sound of 'Old, unhappy, far-off things, and battles long ago,'" *Kaiser Aetna*, 444 U. S., at 177.

III

The Board, seconded by the dissent, warns that treating the access regulation as a *per se* physical taking will endanger a host of state and federal government activities involving entry onto private property. See *post*, at 11–14. That fear is unfounded.

First, our holding does nothing to efface the distinction between trespass and takings. Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right. This basic distinction is firmly grounded in our precedent. See *Portsmouth*, 260 U. S., at 329–330 ("[W]hile a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove [the intent to take property]. Every successive trespass adds to the force of the evidence."); 1 P. Nichols, The Law of Eminent Domain §112, p. 311 (1917) ("[A] mere

occasional trespass would not constitute a taking."). And lower courts have had little trouble applying it. See, *e.g.*, *Hendler* v. *United States*, 952 F. 2d 1364, 1377 (CA Fed. 1991) (identifying a "truckdriver parking on someone's vacant land to eat lunch" as an example of a mere trespass).

The distinction between trespass and takings accounts for our treatment of temporary government-induced flooding in *Arkansas Game and Fish Commission* v. *United States*, 568 U. S. 23 (2012). There we held, "simply and only," that such flooding "gains no automatic exemption from Takings Clause inspection." *Id.*, at 38. Because this type of flooding can present complex questions of causation, we instructed lower courts evaluating takings claims based on temporary flooding to consider a range of factors including the duration of the invasion, the degree to which it was intended or foreseeable, and the character of the land at issue. *Id.*, at 38–39. Applying those factors on remand, the Federal Circuit concluded that the government had effected a taking in the form of a temporary flowage easement. *Arkansas Game and Fish Comm'n* v. *United States*, 736 F. 3d 1364, 1372 (2013). Our approach in *Arkansas Game and Fish Commission* reflects nothing more than an application of the traditional trespass-versus-takings distinction to the unique considerations that accompany temporary flooding.

Second, many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights. As we explained in *Lucas* v. *South Carolina Coastal Council*, the government does not take a property interest when it merely asserts a "pre-existing limitation upon the land owner's title." 505 U. S., at 1028–1029. For example, the government owes a landowner no compensation for requiring him to abate a nuisance on his property, because he never had a right to engage in the nuisance in the first place. See *id.*, at 1029–1030.

These background limitations also encompass traditional

common law privileges to access private property. One such privilege allowed individuals to enter property in the event of public or private necessity. See Restatement (Second) of Torts §196 (1964) (entry to avert an imminent public disaster); §197 (entry to avert serious harm to a person, land, or chattels); cf. *Lucas*, 505 U. S., at 1029, n. 16. The common law also recognized a privilege to enter property to effect an arrest or enforce the criminal law under certain circumstances. Restatement (Second) of Torts §§204–205. Because a property owner traditionally had no right to exclude an official engaged in a reasonable search, see, *e.g.*, *Sandford* v. *Nichols*, 13 Mass. 286, 288 (1816), government searches that are consistent with the Fourth Amendment and state law cannot be said to take any property right from landowners. See generally *Camara* v. *Municipal Court of City and County of San Francisco*, 387 U. S. 523, 538 (1967).

Third, the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking. In *Nollan*, we held that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." 483 U. S., at 836. The inquiry, we later explained, is whether the permit condition bears an "essential nexus" and "rough proportionality" to the impact of the proposed use of the property. *Dolan*, 512 U. S., at 386, 391; see also *Koontz* v. *St. Johns River Water Management Dist.*, 570 U. S. 595, 599 (2013).

Under this framework, government health and safety inspection regimes will generally not constitute takings. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1007 (1984). When the government conditions the grant of a benefit such as a permit, license, or registration on allowing access for reasonable health and safety inspections, both the nexus and rough proportionality requirements of the

constitutional conditions framework should not be difficult to satisfy. See, *e.g.*, 7 U. S. C. §136g(a)(1)(A) (pesticide inspections); 16 U. S. C. §823b(a) (hydroelectric project investigations); 21 U. S. C. §374(a)(1) (pharmaceutical inspections); 42 U. S. C. §2201(*o*) (nuclear material inspections).

None of these considerations undermine our determination that the access regulation here gives rise to a *per se* physical taking. Unlike a mere trespass, the regulation grants a formal entitlement to physically invade the growers' land. Unlike a law enforcement search, no traditional background principle of property law requires the growers to admit union organizers onto their premises. And unlike standard health and safety inspections, the access regulation is not germane to any benefit provided to agricultural employers or any risk posed to the public. See *Horne*, 576 U. S., at 366 ("basic and familiar uses of property" are not a special benefit that "the Government may hold hostage, to be ransomed by the waiver of constitutional protection"). The access regulation amounts to simple appropriation of private property.

* * *

The access regulation grants labor organizations a right to invade the growers' property. It therefore constitutes a *per se* physical taking.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 20–107

CEDAR POINT NURSERY, ET AL., PETITIONERS *v.* VICTORIA HASSID, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2021]

JUSTICE KAVANAUGH, concurring.

I join the Court's opinion, which carefully adheres to constitutional text, history, and precedent. I write separately to explain that, in my view, the Court's precedent in *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956), also strongly supports today's decision.

In *Babcock*, the National Labor Relations Board argued that the National Labor Relations Act afforded union organizers a right to enter company property to communicate with employees. Several employers responded that the Board's reading of the Act would infringe their Fifth Amendment property rights. The employers contended that Congress, "even if it could constitutionally do so, has at no time shown any intention of destroying property rights secured by the *Fifth Amendment*, in protecting employees' rights of collective bargaining under the Act. Until Congress should evidence such intention by specific legislative language, our courts should not construe the Act on such dangerous constitutional grounds." Brief for Respondent in *NLRB* v. *Babcock & Wilcox Co.*, O. T. 1955, No. 250, pp. 18–19.

This Court agreed with the employers' argument that the Act should be interpreted to avoid unconstitutionality. The Court reasoned that "the National Government" via the Constitution "preserves property rights," including "the

right to exclude from property." *Babcock*, 351 U. S., at 112. Against the backdrop of the Constitution's strong protection of property rights, the Court interpreted the Act to afford access to union organizers only when "needed," *ibid.*—that is, when the employees live on company property and union organizers have no other reasonable means of communicating with the employees, *id.,* at 113. See also *Lechmere, Inc.* v. *NLRB*, 502 U. S. 527, 540–541 (1992). As I read it, *Babcock* recognized that employers have a basic Fifth Amendment right to exclude from their private property, subject to a "necessity" exception similar to that noted by the Court today. *Ante*, at 19.

Babcock strongly supports the growers' position in today's case because the California union access regulation intrudes on the growers' property rights far more than *Babcock* allows. When this same California union access regulation was challenged on constitutional grounds before the California Supreme Court in 1976, that court upheld the regulation by a 4-to-3 vote. *Agricultural Labor Rel. Bd.* v. *Superior Ct. of Tulare Cty.*, 16 Cal. 3d 392, 546 P. 2d 687. Justice William Clark wrote the dissent. Justice Clark stressed that "property rights are fundamental." *Id.*, at 429, n. 4, 546 P. 2d, at 712, n. 4. And he concluded that the California union access regulation "violates the rule" of *Babcock* and thus "violates the constitutional provisions protecting private property." 16 Cal. 3d, at 431, 546 P. 2d, at 713. In my view, Justice Clark had it exactly right.

With those comments, I join the Court's opinion in full.

SUPREME COURT OF THE UNITED STATES

No. 20–107

CEDAR POINT NURSERY, ET AL., PETITIONERS *v.* VICTORIA HASSID, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 23, 2021]

JUSTICE BREYER, with whom JUSTICE SOTOMAYOR and JUSTICE KAGAN join, dissenting.

A California regulation provides that representatives of a labor organization may enter an agricultural employer's property for purposes of union organizing. They may do so during four months of the year, one hour before the start of work, one hour during an employee lunch break, and one hour after work. The question before us is how to characterize this regulation for purposes of the Constitution's Takings Clause.

Does the regulation *physically appropriate* the employers' property? If so, there is no need to look further; the Government must pay the employers "just compensation." U. S. Const., Amdt. 5; see *Arkansas Game and Fish Comm'n* v. *United States*, 568 U. S. 23, 31 (2012) ("'[W]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner'"). Or does the regulation simply *regulate* the employers' property rights? If so, then there is every need to look further; the government need pay the employers "just compensation" only if the regulation "goes too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922) (Holmes, J., for the Court); see also *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124 (1978) (determining whether a regulation is a taking by

examining the regulation's "economic impact," the extent of interference with "investment-backed expectations," and the "character of the governmental action"); *Arkansas Game and Fish Comm'n*, 568 U. S., at 38–39 (listing factors relevant to the character of the regulation).

The Court holds that the provision's "access to organizers" requirement amounts to a physical appropriation of property. In its view, virtually every government-authorized invasion is an "appropriation." But this regulation does not "appropriate" anything; it regulates the employers' right to exclude others. At the same time, our prior cases make clear that the regulation before us allows only a *temporary* invasion of a landowner's property and that this kind of temporary invasion amounts to a taking only if it goes "too far." See, *e.g., Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, 434 (1982). In my view, the majority's conclusion threatens to make many ordinary forms of regulation unusually complex or impractical. And though the majority attempts to create exceptions to narrow its rule, see *ante*, at 17–20, the law's need for feasibility suggests that the majority's framework is wrong. With respect, I dissent from the majority's conclusion that the regulation is a *per se* taking.

I

"In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area." *Arkansas Game and Fish Comm'n*, 568 U. S., at 31; see also *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979) ("[T]his Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government'"). Instead, most government action affecting property rights is analyzed case by case under *Penn Central*'s fact-intensive test. Petitioners

do not argue that the provision at issue is a "regulatory taking" under that test.

Instead, the question before us is whether the access regulation falls within one of two narrow categories of government conduct that are *per se* takings. The first is when "'the government directly appropriates private property for its own use.'" *Horne* v. *Department of Agriculture*, 576 U. S. 351, 357 (2015). The second is when the government causes a permanent physical occupation of private property. See *Lingle* v. *Chevron U. S. A. Inc.*, 544 U. S. 528, 538 (2005). It does not.

A

Initially it may help to look at the legal problem—a problem of characterization—through the lens of ordinary English. The word "regulation" rather than "appropriation" fits this provision in both label and substance. Cf. *ante*, at 6. It is contained in Title 8 of the California Code of Regulations. It was adopted by a state regulatory board, namely, the California Agricultural Labor Relations Board, in 1975. It is embedded in a set of related detailed regulations that describe and limit the access at issue. In addition to the hours of access just mentioned, it provides that union representatives can enter the property only "for the purpose of meeting and talking with employees and soliciting their support"; they have access only to "areas in which employees congregate before and after working" or "at such location or locations as the employees eat their lunch"; and they cannot engage in "conduct disruptive of the employer's property or agricultural operations, including injury to crops or machinery or interference with the process of boarding buses." §§20900(e), (e)(3), (e)(4)(C) (2021). From the employers' perspective, it restricts when and where they can exclude others from their property.

At the same time, the provision only awkwardly fits the terms "physical taking" and "physical appropriation." The

"access" that it grants union organizers does not amount to any traditional property interest in land. It does not, for example, take from the employers, or provide to the organizers, any freehold estate (*e.g.*, a fee simple, fee tail, or life estate); any concurrent estate (*e.g.*, a joint tenancy, tenancy in common, or tenancy by the entirety); or any leasehold estate (*e.g.*, a term of years, periodic tenancy, or tenancy at will). See J. Dukeminier, J. Krier, G. Alexander, M. Schill, & L. Strahilevitz, Property 215–216, 222–224, 226, 343–345, 443–445 (8th ed. 2014). Nor (as all now agree) does it provide the organizers with a formal easement or access resembling an easement, as the employers once argued, since it does not burden any particular parcel of property. See, *e.g., Balestra* v. *Button*, 54 Cal. App. 2d 192, 197 (1942) (the burden of an easement in gross is appurtenant to "the real property of another"); Restatement (Third) of Property: Servitudes §1.2(3) (1998) ("The burden of an easement or profit is always appurtenant"); see also *ante*, at 13 (acknowledging a "slight mismatch from state easement law"). Compare Pet. for Cert. i (asking the Court to address "whether the uncompensated appropriation of an easement that is limited in time effects a *per se* physical taking under the Fifth Amendment"), with Reply Brief 8 ("[T]he access required here does not bear *all* the hallmarks of an easement").

The majority concludes that the regulation nonetheless amounts to a physical taking of property because, the majority says, it "appropriates" a "right to invade" or a "right to exclude" others. See *ante*, at 7, 12, 14, 15, 16, 20 (right to invade); *ante*, at 7, 8, 10, 13, 16 (right to exclude). It thereby likens this case to cases in which we have held that appropriation of property rights amounts to a physical *per se* taking. See *ante,* at 5–6 (citing *United States* v. *Pewee Coal Co.*, 341 U. S. 114, 115 (1951) (plurality opinion) (seizure and operation of a coal mine by the United States); *United States* v. *General Motors Corp.*, 323 U. S. 373, 375 (1945) (condemnation of a warehouse building by the

United States); *Horne*, 576 U. S., at 361 (transfer of "[a]ctual raisins," and title to the raisins, from growers to the Government)).

It is important to understand, however, that, technically speaking, the majority is wrong. The regulation does not *appropriate* anything. It does not take from the owners a right to invade (whatever that might mean). It does not give the union organizations the right to exclude anyone. It does not give the government the right to exclude anyone. What does it do? It gives union organizers the right temporarily to invade a portion of the property owners' land. It thereby limits the landowners' right to exclude certain others. The regulation *regulates* (but does not *appropriate*) the owners' right to exclude.

Why is it important to understand this technical point? Because only then can we understand the issue before us. That issue is whether a regulation that *temporarily* limits an owner's right to exclude others from property *automatically* amounts to a Fifth Amendment taking. Under our cases, it does not.

B

Our cases draw a distinction between regulations that provide permanent rights of access and regulations that provide nonpermanent rights of access. They either state or hold that the first type of regulation is a taking *per se,* but the second kind is a taking only if it goes "too far." And they make this distinction for good reason.

Consider the Court's reasoning in an important case in which the Court found a *per se* taking. In *Loretto*, the Court considered the status of a New York law that required landlords to permit cable television companies to install cable facilities on their property. 458 U. S., at 421. We held that the installation amounted to a permanent physical occupation of the property and hence to a *per se* taking. See *id.,* at 441 ("affirm[ing] the traditional rule that a permanent

physical occupation of property is a taking"); see also *id.*, at 427 (tracing that rule back to 1872). In reaching this holding we specifically said that "[n]ot every physical invasion is a taking." *Id.*, at 435, n. 12 (emphasis deleted); see also *ante*, at 11 (acknowledging that this "point is well taken"). We explained that the "permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude." *Loretto*, 458 U. S., at 435, n. 12. And we provided an example of a federal statute that did *not* effect a *per se* taking—an example almost identical to the regulation before us. That statute provided "'access . . . limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of the organization activity.'" *Id.*, at 434, n. 11 (quoting *Central Hardware Co.* v. *NLRB*, 407 U. S. 539, 545 (1972)).

We also explained why permanent physical occupations are distinct from temporary limitations on the right to exclude. We said that, when the government permanently occupies property, it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand," "effectively destroy[ing]" "the rights 'to possess, use and dispose of it.'" *Loretto*, 458 U. S., at 435. We added that the property owner "ha[d] no right to possess the occupied space himself, and also ha[d] no power to exclude the occupier from possession and use of the space." *Ibid.* The requirement "forever denie[d] the owner any power to control the use of the property" or make any "nonpossessory use" of it. *Id.*, at 436. It would "ordinarily empty the right" to sell or transfer the occupied space "of any value, since the purchaser w[ould] also be unable to make any use of the property." *Ibid.* The owner could not "exercise control" over the equipment's installation, and so could not "minimize [its] physical, esthetic, and other effects." *Id.*, at 441, n. 19. Thus, we concluded, a permanent physical occupation "is perhaps the

most serious form of invasion of an owner's property interests." *Id.*, at 435.

Now consider *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980). We there considered the status of a state constitutional requirement that a privately owned shopping center permit other individuals to enter upon, and to use, the property to exercise their rights to free speech and petition. See *id.,* at 78. We held that this requirement was not a *per se* taking in part because (even though the individuals may have "'physically invaded'" the owner's property) "[t]here [wa]s nothing to suggest that preventing [the owner] from prohibiting this sort of activity w[ould] unreasonably impair the value or use of th[e] property as a shopping center," and the owner could "adop[t] time, place, and manner regulations that w[ould] minimize any interference with its commercial functions." *Id.*, at 83–84; see also *Loretto*, 458 U. S., at 434 (describing the "invasion" in *PruneYard* as "temporary and limited in nature").

In *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), we held that the State's taking of an easement across a landowner's property did constitute a *per se* taking. But consider the Court's reason: "[I]ndividuals are given a *permanent and continuous* right to pass to and fro." *Id.,* at 832 (emphasis added). We clarified that by "permanent" and "continuous" we meant that the "real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Ibid.*

In *Arkansas Game and Fish Comm'n*, 568 U. S. 23, we again said that permanent physical occupations are *per se* takings, but temporary invasions are not. Rather, they "'are subject to a more complex balancing process to determine whether they are a taking.'" *Id.,* at 36; see also *id.,* at 38–39 (courts should consider the length of the invasion, the "degree to which the invasion is intended or is the fore-

seeable result of authorized government action," "the character of the land at issue," "the owner's 'reasonable investment-backed expectations' regarding the land's use," and the "[s]everity of the interference" (citing, *inter alia*, *Penn Central*, 438 U. S., at 130–131)).

As these cases have used the terms, the regulation here at issue provides access that is "temporary," not "permanent." Unlike the regulation in *Loretto*, it does not place a "fixed structure on land or real property." 458 U. S., at 437. The employers are not "forever denie[d]" "any power to control the use" of any particular portion of their property. *Id.*, at 436. And it does not totally reduce the value of any section of the property. *Ibid.* Unlike in *Nollan*, the public cannot walk over the land whenever it wishes; rather a subset of the public may enter a portion of the land three hours per day for four months per year (about 4% of the time). At bottom, the regulation here, unlike the regulations in *Loretto* and *Nollan*, is not "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U. S., at 539.

At the same time, *PruneYard*'s holding that the taking was "temporary" (and hence not a *per se* taking) fits this case almost perfectly. There the regulation gave nonowners the right to enter privately owned property for the purpose of speaking generally to others, about matters of their choice, subject to reasonable time, place, and manner restrictions. 447 U. S., at 83. The regulation before us grants a far smaller group of people the right to enter landowners' property for far more limited times in order to speak about a specific subject. Employers have more power to control entry by setting work hours, lunch hours, and places of gathering. On the other hand, as the majority notes, the shopping center in *PruneYard* was open to the public generally. See *ante*, at 14–15. All these factors, how-

ever, are the stuff of which regulatory-balancing, not absolute *per se*, rules are made.

Our cases have recognized, as the majority says, that the right to exclude is a "'fundamental element of the property right.'" *Ante*, at 16. For that reason, "[a] 'taking' may *more readily* be found when the interference with property can be characterized as a physical invasion by government." *Penn Central*, 438 U. S., at 124 (emphasis added); see also *Loretto*, 458 U. S., at 426 ("[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause"). But a taking is not inevitably found just because the interference with property can be characterized as a physical invasion by the government, or, in other words, when it affects the right to exclude.

The majority refers to other cases. But those cases do not help its cause. That is because the Court in those cases (some of which preceded *Penn Central* and others of which I have discussed above) did not apply a "*per se* takings" approach. But see *ante*, at 14 (claiming that our "traditional rule" is that when "the government appropriate[s] a right to invade, compensation [i]s due"). In *United States* v. *Causby*, 328 U. S. 256, 259 (1946), for example, the question was whether government flights over a piece of land constituted a taking. The flights amounted to 4% of the takeoffs, and 7% of the landings, at a nearby airport. See *ibid.* But the planes flew "in considerable numbers and rather close together." *Ibid.* And the flights were "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id.*, at 266. Taken together, those flights "destr[oyed] the use of the property as a commercial chicken farm." *Id.*, at 259. Based in part on that economic damage, the Court found that the rule allowing these overflights went "too far." See *id.*, at 266 (" '[I]t is the character of the invasion, not the amount of damage resulting from it, *so long as the damage is substantial*, that

determines the question whether it is a taking' " (emphasis added)).

In *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327, 329 (1922), the Court held that the Government's firing of guns across private property would be a taking only if the shots were sufficiently frequent to establish an "intent to fire across the claimants' land at will." The frequency of the projectiles itself mattered less than whether the Government acted "'with the purpose and effect of subordinating the strip of land . . . to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, *whenever it saw fit*, in time of peace, with the result of depriving the owner of its profitable use.'" *Ibid.* (emphasis added). Again, the Court balanced several factors—permanence, severity, and economic impact—rather than treating the mere fact of entry as dispositive.

In *Kaiser Aetna* v. *United States*, 444 U. S. 164, the Court considered whether the Government had taken property by converting a formerly "private pond" (with a private access fee) into a "public aquatic park" (with free navigation-related access for the public). *Id.*, at 176, 180. The Court held there was a taking. But in doing so, it applied a *Penn Central,* not a *per se,* analysis. The Court wrote that "[m]ore than one factor contribute[d] to" the conclusion that the Government had gone "far beyond ordinary regulation or improvement." 444 U. S., at 178. And it found there was a taking.

If there is ambiguity in these cases, it concerns whether the Court considered the occupation at issue to be *temporary* (requiring *Penn Central*'s "too far" analysis) or *permanent* (automatically requiring compensation). Nothing in them suggests the majority's view, namely, that compensation is automatically required for a *temporary* right of access. Nor does anything in them support the distinction that the majority gleans between "trespass" and "takings."

See *ante*, at 17–18; see also *infra*, at 14.

The majority also refers to *Nollan* as support for its claim that the "fact that a right to take access is exercised only from time to time does not make it any less a physical taking." *Ante*, at 12. True. Here, however, unlike in *Nollan,* the right taken is not a right to have access to the property at any time (which access different persons "exercis[e] . . . from time to time"). Rather here we have a right that does not allow access at any time. It allows access only from "time to time." And that makes all the difference. A right to enter my woods whenever you wish is a right to use that property permanently, even if you exercise that right only on occasion. A right to enter my woods only on certain occasions is not a right to use the woods permanently. In the first case one might reasonably use the term *per se* taking. It is as if my woods are yours. In the second case it is a taking only if the regulation allowing it goes "too far," considering the factors we have laid out in *Penn Central*. That is what our cases say.

Finally, the majority says that *Nollan* would have come out the same way had it involved, similar to the regulation here, access short of 365 days a year. See *ante*, at 11. Perhaps so. But, if so, that likely would be because the Court would have viewed the access as an "easement," and therefore an appropriation. See *Nollan*, 483 U. S., at 828. Or, perhaps, the Court would have viewed the regulation as going "too far." I can assume, purely for argument's sake, that that is so. But the law is clear: A regulation that provides *temporary*, not *permanent*, access to a landowner's property, and that does not amount to a taking of a traditional property interest, is not a *per se* taking. That is, it does not automatically require compensation. Rather, a court must consider whether it goes "too far."

C

The persistence of the permanent/temporary distinction

that I have described is not surprising. That distinction serves an important purpose. We live together in communities. (Approximately 80% of Americans live in urban areas. U. S. Census Bureau, Urban Area Facts (Mar. 30, 2021), https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/ua-facts.html.) Modern life in these communities requires different kinds of regulation. Some, perhaps many, forms of regulation require access to private property (for government officials or others) for different reasons and for varying periods of time. Most such temporary-entry regulations do not go "too far." And it is impractical to compensate every property owner for any brief use of their land. As we have frequently said, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co.*, 260 U. S., at 413; see also, *e.g.*, *Murr* v. *Wisconsin*, 582 U. S. ___, ___–___ (2017) (slip op., at 8–9) (same); *Lingle*, 544 U. S., at 538 (same); *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 335 (2002) (same); *Dolan* v. *City of Tigard*, 512 U. S. 374, 384–385 (1994) (same); *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1018 (1992) (same); *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979) (same); *Penn Central*, 438 U. S, at 124 (same). Thus, the law has not, and should not, convert all temporary-access-permitting regulations into *per se* takings automatically requiring compensation. See, *e.g.*, *Hodel* v. *Irving*, 481 U. S. 704, 713 (1987) ("This Court has held that the Government has considerable latitude in regulating property rights in ways that may adversely affect the owners").

Consider the large numbers of ordinary regulations in a host of different fields that, for a variety of purposes, permit temporary entry onto (or an "invasion of") a property owner's land. They include activities ranging from examination of food products to inspections for compliance with

preschool licensing requirements. See, *e.g.*, 29 U. S. C. §657(a) (authorizing inspections and investigations of "any . . . workplace or environment where work is performed" during "regular working hours and at other reasonable times"); 21 U. S. C. §606(a) (authorizing "examination and inspection of all meat food products . . . at all times, by day or night"); 42 U. S. C. §5413(b) (authorizing inspections anywhere "manufactured homes are manufactured, stored, or held for sale" at "reasonable times and without advance notice"); Miss. Code Ann. §49–27–63 (2012) (authorizing inspections of "coastal wetlands" "from time to time"); Mich. Comp. Laws §208.1435(5) (2010) (authorizing inspections of any "historic resource" "at any time during the rehabilitation process"); Mont. Code Ann. §81–22–304 (2019) (granting a "right of entry . . . [into] any premises where dairy products . . . are produced, manufactured, [or] sold" "during normal business hours"); Neb. Rev. Stat. §43–1303(5) (2016) (authorizing visitation of "foster care facilities in order to ascertain whether the individual physical, psychological, and sociological needs of each foster child are being met"); Va. Code Ann. §22.1–289.032(C)(8) (Cum. Supp. 2020) (authorizing "annual inspection" of "preschool programs of accredited private schools"); Cincinnati, Ohio, Municipal Code §603–1 (2021) (authorizing entry "at any time" for any place in which "animals are slaughtered"); Dallas, Tex., Code of Ordinance §33–5(a) (2021) (authorizing inspection of "assisted living facilit[ies]" "at reasonable times"); 6 N. Y. Rules & Regs. §360.7 (Supp. 2020) (authorizing inspection of solid waste management facilities "at all reasonable times, locations, whether announced or unannounced"); see also *Boise Cascade Corp.* v. *United States*, 296 F. 3d 1339, 1352 (CA Fed. 2002) (affirming an injunction requiring property owner to allow Government agents to enter its property to conduct owl surveys); Brief for Respondents 43–44, 46 (collecting similar regulations); App. to Brief for Local Governments as *Amici Curiae* 1–13

(same); Brief for Virginia et al. as *Amici Curiae* 3–6 (same).

The majority tries to deal with the adverse impact of treating these, and other, temporary invasions as if they were *per se* physical takings by creating a series of exceptions from its *per se* rule. It says: (1) "Isolated physical invasions, not undertaken pursuant to a granted right of access, are properly assessed as individual torts rather than appropriations of a property right." *Ante*, at 17. It also would except from its *per se* rule (2) government access that is "consistent with longstanding background restrictions on property rights," including "traditional common law privileges to access private property." *Ante,* at 18–19. And it adds that (3) "the government may require property owners to cede a right of access as a condition of receiving certain benefits, without causing a taking." *Ante*, at 19. How well will this new system work? I suspect that the majority has substituted a new, complex legal scheme for a comparatively simpler old one.

As to the first exception, what will count as "isolated"? How is an "isolated physical invasion" different from a "temporary" invasion, sufficient under present law to invoke *Penn Central*? And where should one draw the line between trespass and takings? Imagine a school bus that stops to allow public school children to picnic on private land. Do three stops a year place the stops outside the exception? One stop every week? Buses from one school? From every school? Under current law a court would know what question to ask. The stops are temporary; no one assumes a permanent right to stop; thus the court will ask whether the school district has gone "too far." Under the majority's approach, the court must answer a new question (apparently about what counts as "isolated").

As to the second exception, a court must focus on "traditional common law privileges to access private property." Just what are they? We have said before that the govern-

ment can, without paying compensation, impose a limitation on land that "inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U. S., at 1029. But we defined a very narrow set of such background principles. See *ibid.*, and n. 16 (abatement of nuisances and cases of "'actual necessity'" or "to forestall other grave threats to the lives and property of others"). To these the majority adds "public or private necessity," the enforcement of criminal law "under certain circumstances," and reasonable searches. *Ante*, at 19. Do only those exceptions that existed in, say, 1789 count? Should courts apply those privileges as they existed at that time, when there were no union organizers? Or do we bring some exceptions (but not others) up to date, *e.g.*, a necessity exception for preserving animal habitats?

As to the third, what is the scope of the phrase "certain benefits"? Does it include the benefit of being able to sell meat labeled "inspected" in interstate commerce? But see *Horne*, 576 U. S., at 366 (concluding that "[s]elling produce in interstate commerce" is "not a special governmental benefit"). What about the benefit of having electricity? Of sewage collection? Of internet accessibility? Myriad regulatory schemes based on just these sorts of benefits depend upon intermittent, temporary government entry onto private property.

Labor peace (brought about through union organizing) is one such benefit, at least in the view of elected representatives. They wrote laws that led to rules governing the organizing of agricultural workers. Many of them may well have believed that union organizing brings with it "benefits," including community health and educational benefits, higher standards of living, and (as I just said) labor peace. See, *e.g.,* 1975 Cal. Stats. ch. 1, §1 (stating that the purpose of the Agricultural Labor Relations Act was to "ensure peace in the agricultural fields by guaranteeing justice for

all agricultural workers and stability in labor relations"). A landowner, of course, may deny the existence of these benefits, but a landowner might do the same were a regulatory statute to permit brief access to verify proper preservation of wetlands or the habitat enjoyed by an endangered species or, for that matter, the safety of inspected meat. So, if a regulation authorizing temporary access for purposes of organizing agricultural workers falls outside of the Court's exceptions and is a *per se* taking, then to what other forms of regulation does the Court's *per se* conclusion also apply?

II

Finally, I touch briefly on remedies, which the majority does not address. The Takings Clause prohibits the Government from taking private property for public use without "just compensation." U. S. Const., Amdt. 5. But the employers do not seek compensation. They seek only injunctive and declaratory relief. Indeed, they did not allege any damages. See App. to Pet. for Cert. G–16 to G–17. On remand, California should have the choice of foreclosing injunctive relief by providing compensation. See, *e.g.*, *Knick* v. *Township of Scott*, 588 U. S. __, __ (2019) (slip op., at 23) ("As long as just compensation remedies are available—as they have been for nearly 150 years—injunctive relief will be foreclosed").

* * *

I recognize that the Court's prior cases in this area are not easy to apply. Moreover, words such as "temporary," "permanent," or "too far" do not define themselves. But I do not believe that the Court has made matters clearer or better. Rather than adopt a new broad rule and indeterminate exceptions, I would stick with the approach that I believe the Court's case law sets forth. "Better the devil we know . . . ." A right of access such as the right at issue here, a nonpermanent right, is not automatically a "taking." It is

a regulation that falls within the scope of *Penn Central*. Because the Court takes a different view, I respectfully dissent.

Appellee's Appendix 357–359

Correspondence Response to Sixth Circuit Court Clerk
(Dkt. #83, 6th Cir., June 28, 2021)

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U.S. Court of Appeals for the Sixth Circuit
100 E. Fifth Street, Room 540
Cincinnati, OH 45202-3988

Re: *F.P. Development, LLC v. Charter Township of Canton*
Case Nos. 20-1447/20-1466

Dear Ms. Hunt:

Under Fed.R.App.P. 28(j), the following comprises Appellant's Response to Appellee's Additional Citation. (Doc. 82).

Both the majority and dissent in *Cedar Point Nursery v. Hassid*, 594 U.S. ____ (2021) agreed that the first question to address when adjudicating a regulatory takings claim is whether the government compels a landowner to accept a physical invasion or occupation, or otherwise merely regulates the use of that property. The former effects a *per se* taking, while the latter must be analyzed under *Penn Central*. (Slip op., at 6-7; Breyer dissent, slip op., at 1).

The Supreme Court explained that under *Nollan, Dolan, and Koontz*, "the government may require property owners *to cede a right of access* as a condition of receiving certain benefits, without causing a taking" (Slip op., at 19, emphasis added), because of the benefits the landowner receives, if the compelled access passes *Nollan/Dolan* review. But it related *Nollan/Dolan* review *only* to conditional permits demanding access to property, not to every conditional permit.

The Court also clarified that government cannot evade the fundamental distinction between *per se* physical takings and potential *Penn Central* regulatory takings merely by demanding occupation informally versus demanding dedication of an easement or other title interest. It further warned that courts should not rely so formalistically on such a distinction in determining whether the government actually compels a physical occupation. (Slip op., at 13-14, 19-20.) That clarification, however,

does not automatically subject every governmental demand to heightened *Nollan/Dolan* review, as Appellee infers.

Amici MAP/MEC emphasized the need to make a fundamental distinction between a physical taking, implicating *Nollan/Dolan* review, from a regulation, requiring *Penn Central* review. Amici never argued that the mere fact that the township does not demand an easement, by itself, exempts the ordinance from *Nollan/Dolan* review. Appellee misconstrues the *Cedar Point* clarification, asking this Court to approach the issue formalistically in a way directly contrary to the Supreme Court's direction.

Safeguarding a landowner from an unreasonable ouster remains the central consideration when determining whether to apply *Nollan/Dolan* review. Rather than foreclosing amici's arguments, the *Cedar Point Nursery* decision in fact bolsters them.

Respectfully submitted,

s/ *Anne McClorey McLaughlin*
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CERTIFICATE OF CONFORMITY

The undersigned hereby certifies that this letter complies with the type-volume limitation found at Fed.R.App.P. 28(j). It contains 348 words and has been prepared in Microsoft Word, using a proportionally spaced typeface, Garamond, and a 14-point font size.

s/ *Anne McClorey McLaughlin*

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021, I electronically filed the foregoing letter with the Clerk of the Court of the United States Court of Appeals for the Sixth Circuit using the ECF system which will send notification of such filing to all counsel of record.

s/ *Anne McClorey McLaughlin*

Appellee's Appendix 360–381

Response to Defendant/Counter-Plaintiff's
Motion for Partial Summary Disposition,
February 25, 2020

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF CANTON,

Plaintiff/Counter-Defendant,

Case No. 18-014569-CE

-vs-

Hon. Susan L. Hubbard

44650, INC., a Michigan corporation,

Defendant/Counter-Plaintiff,

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& AMTSBUECHLER PC
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RESPONSE TO DEFENDANT/COUNTER-PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY DISPOSITION

The facts as stated here are established by the Verified Complaint (Ex 1), to which Leigh Thurston, the Canton Township Landscape Architect and Planner, has attested under oath. Alphabetical exhibit references are exhibits to the Verified Complaint that Plaintiff has attached here for the Court's convenience. Defendant, 44650, Inc., is a Michigan corporation located at 5601 Belleville Road in Canton Township, Michigan, whose resident agent is Gary Percy. At issue in this case are the actions taken by Defendant with respect to a roughly 16-acre vacant parcel of property located east of Belleville Road and north of Yost Road, parcel identification number 71-135-99-0001-709.

On or about October 27, 2016, Canton Township's Planning Services Division received an application for a lot split of a 40-acre parcel owned by FP Development LLC. The original 40-acre parcel ("Parent Parcel") was proposed to be divided into two child parcels, 28.4 acre Parcel A to the north and 16.1 acre Parcel B to the south. Ex. A. The owner for the 16-acre split parcel ("the Property") was identified in the lot split application as Defendant, 44650, Inc. *Id.*

Notably, in April 2017, the Property was still fully treed and no work had commenced on the Property, as evidenced by aerial photograph. Ex. B. On July 14, 2017, the Township notified Ginger Michalski-Wallace, the engineer for FP Development and Defendant, that the split application was tentatively approved. Ex. C. The letter noted, *inter alia*, that the Property was zoned LI, Light Industrial, that site plan approval must be obtained for *any activities* or development on the property and that a *tree removal permit must be obtained from Planning Services prior to any tree removal activity taking place on the site.* (Emphasis added.)

On August 1, 2017, FP Development by Martin F. Powelson signed a Deed conveying the 16-acre parcel to Defendant. Ex. A. Unbeknownst to the Township, before the lot split was complete, Defendant hired Kilanski Excavating in approximately October 2017 to clear-cut all trees from the Property. Ex. E.; Ex. 2, pp 28-29. Defendant also bulldozed the acreage and

removed the existing stumps – all in an effort to hide the extent of destruction. On November 27, 2017, the Township Planner again notified Ms. Michalski-Wallace that the documents were required, and reminded her, as the agent for the parties, that site plan approval was required before *any activities* or development on the parcel, and *any tree removal required a prior tree removal permit*. Ex. F. The property split was completed thereafter.

In late April of 2018, Township landscape architect and planner Leigh Thurston received a phone call from an individual owning land adjacent to the Property, inquiring why so many trees were permitted to be removed. This was the first notification that the Township had that any trees had been removed from the Property. After viewing the Property from a neighboring parcel, Ms. Thurston several ordinance violations and a woodchipping operation on the Property. Ms. Thurston then contacted Gary Percy, the resident agent for Defendant, to advise him of the violations. Despite a history of violating the Township's ordinances in the past, Mr. Percy disingenuously denied knowledge that a permit was required to remove trees from the Property. Ex. 6, 1994 notice of violation.

The Canton Township Zoning Ordinance, Code of Ordinances, Appendix A governs land use in the Township. The Property in question is zoned LI, Light Industrial. Ex. 2, p. 20. The intent of the LI District is to provide locations for planned industrial development, including planned industrial park subdivisions. Ex. N. Agricultural uses are not a permitted use as of right or a special land use in the LI zoning district. In addition, under the Zoning Ordinance, an agricultural use requires a minimum of 40 acres; the subject property is only 16 acres. Further, the Canton Township Zoning Ordinance requires a permit for tree removal, § 5A.05(A) for the removal or relocation of any tree with a DBH of six inches or greater on any property; the removal, damage or destruction of any landmark tree; removal, damage or destruction of any tree located within a forest; clearcutting or grubbing within the drip line of a forest. Ex. H, Forest Preservation

and Tree Clearing Ordinance. Under Canton's ordinance, a "regulated tree" is "any tree with a DBH [diameter breast height] of six inches or greater" and a "landmark tree" is a defined as "any tree which stands apart from neighboring trees by size, form or species [] which has a DBH of 24 inches or more." Ex. H, §§ 5A.05 and 5A.01. The Township's ordinance requires replacement of regulated trees on a 1:1 ratio, and replacement of landmark trees on a 3:1 ratio. Ex. H, § 5A.08.

Despite numerous requests from Township employees and public officials, staff was denied access to the Property by Gary Percy to analyze the extent of the tree removal. The parties, through counsel, eventually agreed on a date for inspection. On August 22, 2018, Canton Township's deputy planner and landscape architect, Leigh Thurston, along with its Code Enforcement officer and a consulting arborist met representatives of Defendant to walk the Property and the Parent Parcel to conduct a scientific analysis to come up with an estimate of how many trees and what types of trees had been removed from the Property. The analysis included, among other things, identifying six representative plots on the "still treed" Parent Parcel and then counting and identifying the species of the regulated trees within those plots. Using the numbers and types of trees that were identified in the representative plots and taking into consideration soil conditions and topography of the Property, a scientific estimate was made of the number and types of trees that were removed. The analysis concluded that 1,385 "regulated trees" and 100 "landmark" trees were removed. Ex. M. Based upon the requirements in the Township's Tree Ordinance and the Township's analysis of the tree removal, Defendants were required under Township ordinance to plant 1,685 trees in replacement of the 1,485 trees that were removed. § 5A.08(E). On August 29, 2018, Ms. Thurston issued a Notice of Violation. Ex. 3.

In lieu of planting replacement trees, Defendant has the option of paying into the Township's Tree Fund the market value of the number of required replacement trees, in accordance with § 5A.08(E). Current market values for the types of trees required to replace the

1,385 regulated trees removed run between $225 and $300 per tree, and market value of the trees required to replace the 100 landmark trees average $450 per tree. Ex. 4. The ordinance also contains an exemption from the requirement for relocation of trees "if more than 25 percent of the total inventory of regulated trees is removed." § 5A.08(B).

Rather than attempt to resolve the violation in any meaningful way, Defendant claimed that it was now starting a "Christmas tree farm," which Canton learned on October 22, 2018, through a news media report initiated by Defendant, and that Defendant had planted some 1,000 Norway Spruce trees on the Property. As noted above, the Property is zoned LI, Light Industrial, and a Christmas tree farm is not a permitted use. To use the Property for agricultural purposes, Defendant would have to file an application to rezone the Property to RA, Rural Agricultural, and a request for a variance to allow the agricultural use on property smaller than 40 acres. No applications for either had been submitted to the Township.

Defendant repeatedly ignored and continued to flout Township ordinance requirements, even doubling down on the tree removal violation by planting evergreen trees for a "Christmas tree farm" in violation of the Township Code. Given Defendant's general disdain for Township Ordinance, Canton Township filed this action, seeking a declaratory judgment that Defendant has violated the Zoning Ordinance and is responsible for a nuisance *per se* under the Michigan Zoning Enabling Act, MCL 125.3407, injunctive relief preventing Defendant from its continued violations of the ordinance, and a judgment that Defendant is responsible to mitigate its violation of the Ordinance in a manner consistent with the Zoning Ordinance, principally paying an amount into the Township Tree Fund representing the number of trees that were removed.

On November 12, 2018, the Court granted to the Township an Ex-Parte Temporary Restraining Order halting any further Christmas tree plantings on the Property, and an Order to Show Cause requiring Defendant to appear and show cause why a preliminary injunction should

not issue restraining Defendant from conducting any further activities on the Property in violation of the Township's ordinances. The Court modified that Order on November 20, 2018 per Stipulation. The Court then entered an Order Maintaining Status Quo on December 4, 2018, prohibiting Defendant from performing any further work on the property except grass mowing and general maintenance. See Ex. 4. That Order remains in place.

STANDARD OF REVIEW

Defendant/Cross-Plaintiff's motion here is brought pursuant to MCR 2.116(C)(10). A motion under this subrule tests the factual sufficiency of the Complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). A motion under subrule (C)(10) must *specifically* identify the issues as to which the moving party believes there is no genuine issue as to any material fact. MCR 2.116(G)(4). The initial burden on a motion for summary disposition is on the moving party to properly support its motion. The burden shifts to the nonmoving party only after the moving party has met this burden. MCR 2.116(G)(5); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369–370; 775 NW2d 618 (2009). If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); *Id.* at 370, citing *Meyer v Center Line*, 242 Mich App 560, 575; 619 NW2d 182 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

Affidavits supplied in support of a motion for summary disposition must be based upon personal knowledge and must set forth with particularity such *facts* as would be admissible as evidence to establish or deny the grounds stated in the motion. *SSC Associates Limited Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360, 363-364; 480 NW2d 275 (1992)(citation omitted)(emphasis added). Opinions, conclusionary denials, unsworn

averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by *admissible evidence*. *Id.* at 364 (emphasis added). Allegations unsupported by some basis in fact may be viewed as sheer speculation and conjecture and, therefore, ripe for summary disposition. *Id*, citing *Ransburg v Wayne Co*, 170 Mich App 358, 360; 427 NW2d 906 (1988).

Defendant has not complied with any of these requirements on its (C)(10) motion. It has not specifically identified the issues as to which it believes there is no genuine issue of material fact. Although Defendant has submitted the affidavit of Gary Percy (Ex 5 to its motion) in support, the affidavit contains inadmissible hearsay (¶ 5 "I was informed by one of the previous owners …"; ¶ 8.) and other conclusions lacking any foundation. The Affidavit mentions that scrub brush and dead trees were removed from the Property, but does not claim the Property did not contain "regulated trees" or that "regulated trees" were not removed from the Property. The Motion for Partial Summary Disposition challenges only one of the claims alleged in the Verified Complaint, violation of the Township's Forest Preservation and Tree Clearing Ordinance.[1] Rather, Defendant here challenges the ordinance only on constitutional grounds.

Defendant also asserts that it purchased the property for agricultural purposes, which is directly belied by events contemporaneous with the lot split and Defendant's own admissions that it intended to use the property for industrial purposes. On November 20, 2017, Canton Township's Planning Commission conducted a public hearing of the five-year review of its Master Plan, as required by the Michigan Planning Enabling Act, MCL 125.3845(2). At that time, Defendant had applied to change the future zoning classification of the Property from LI-Light Industrial to GI-

[1] Plaintiff Township filed a such a motion under subrule (C)(10), but withdrew it for consideration at the present time due to the parties' previous stipulation that the Defendant's constitutional claims would be decided first. See Stipulated Scheduling Order of 9/19/19.

General Industrial. Ex 7. Furthermore, Matthew Percy attended the hearing on November 20, 2017, and expressly stated that the Percys had purchased the Property for future expansion of their trucking business, A.D. Transport Express. Ex 8, minutes of the 11/20/17 meeting. See also video of the meeting, https://www.youtube.com/watch?v=i-imGSlcn-M (last reviewed February 24, 2020). Mr. Percy's remarks and interaction with the Planning Commission are at 35:44-42:24 of the video's timecode. Indeed, the Percys knew that the Property was not zoned agricultural that would allow for such a use.

ARGUMENT

Despite Defendant's characterization of Canton's ordinance 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*. Similarly, more than a century ago, the Maine Supreme Court was asked to provide an opinion to the state senate whether the Constitution prohibited, "By public general law to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land by the owner thereof without compensation therefor to such owner[,]" to "protect and promote the interests of such owners and the common welfare of the people." *In re Opinion of the Justices*, 103 Me 506; 69 A 627-628 (1908), The Court responded:

> We do not think the proposed legislation would operate to "take" private property within the inhibition of the Constitution. While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product, and increase untouched, and without diminution of title, estate, or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay, but not deprivation. While the use might be restricted, it would not

be appropriated or "taken." *Id.*, 69 A. at 629.

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

Defendant relies on *Horne v Dept of Agriculture*, 135 SCt 2419 (2015), to assert that by the Tree Ordinance, Canton has taken Defendant's property. In *Horne*, raisin farmers were required to set aside a percentage of their raisin crop and turn them over to the Agricultural Committee formed by the U.S.D.A. The Committee there actually required that title (*i.e.*, ownership) of the raisins be transferred to it, and then *the federal Government* would sell or otherwise dispose of the raisins as it pleased. 135 SCt at 2424. Contrary to that situation, however, Canton does not require that Defendant relinquish title to its trees to the Township. Rather, the Ordinance gives Defendant a choice. If Defendant seeks to remove the trees, it may do so, but must obtain a permit. In the context of the permit, Defendant 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. 25% of the tree inventory is also exempt from this requirement.

The case before this Court is also different from *Horne*, as the Township has not taken and does not seek to take Defendant's trees for its own use. The Township did not prevent Defendant from selling the timber produced as a result of the unpermitted tree removal. In *Georgia Outdoor Network, Inc. v Marion County, Ga*, 652 FSupp2d 1355 (MD Ga 2009), a 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. Even so, the District Court there held that the regulation did not amount to a taking requiring compensation.

Defendant 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 US 419 (1982). In *Loretto*, the Court held that a municipal ordinance requiring placement of a cable box on the Defendant's property constituted a taking because it was an actual, permanent, physical invasion of the property. Defendant has not alleged facts to demonstrate that the Township has directly, physically invaded its property, though, a requirement for the application of *Loretto*. Moreover, the trees regulated by the Ordinance here could not have "intruded" onto the property; they were naturally occurring through no human agency whatever, and certainly none of any Township actor. The U.S. Second Circuit came to the same conclusion that there was no direct physical intrusion on property in *Southview Associates, Ltd v Bongartz*, 980 F2d 84, 95; 36 Env't. Rep. Cas. (BNA) 1024, 23 Envtl. L. Rep. 20132 (CA 2 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 US at 436, 102 SCt at 3175.
>
> *Put differently, no absolute, exclusive physical occupation exists*. 980 F2d at 94-95 (emphasis added).

Applying this rationale and the factors under *Loretto*, Defendant 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 Mr. Percy to analyze the extent of tree removal. It was only after some negotiation after Defendant retained counsel that Township personnel were provided access to the property more than four months after Ms. Thurston's first observation of tree removal on Defendant's property. Defendant 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." Ex. 9, p. 25. Defendant can also alienate (lease, sell, etc.) the property in any manner it pleases. In the words of the Second Circuit, "no absolute, exclusive physical occupation exists."

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 holding in *Loretto* does 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 US 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 US 40, 48 (1960). The process for evaluating a regulation's constitutionality involves an examination of the "justice and fairness" of the governmental action. *Andrus*, 444 US 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 US 104 (1978); *Kaiser Aetna v United States*, 444 US 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 US 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 US 528, 539 (2005). If the regulation serves a public interest and is ubiquitous, then a party challenging the regulation 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).

Defendant's challenge under this test fails 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." § 5A.02. This is without question a public interest that is ubiquitous to all residents of the Township. The evidence here does not demonstrate an economic impact or effect on Defendant's investment-backed expectations because of the regulation. First, this regulation had been in effect before Defendant purchased this property, and no more restrictive changes have been made to the Ordinance since Defendant's original purchase/investment. Before purchasing the property, Defendant knew of the tree ordinance requirements, as

demonstrated by Ex. 6. When the lot split occurred in 2016, nearly two years before Defendant undertook any work here, Defendant was expressly reminded of the ordinance requirements *to submit a site plan as a pre-condition to any activities on the Property and to obtain a tree removal permit prior to the removal of any trees from the Property. Id.* Thus, Defendant's investment-backed expectations could not have changed because of this Ordinance.

II. The Fourth Amendment prohibition on unreasonable seizures does not apply.

Defendant argues that Canton has seized its property in violation of the Fourth Amendment. 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." *US v James Daniel Good Real Property,* 510 US 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 Fourteenth Amendments. *Id.*

Defendant relies upon *Severance v Patterson*, 566 F3d 490 (CA 5 2009). There, the Fifth Circuit ostensibly recognized a Fourth Amendment claim where state officials enforced an easement on the 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 US Supreme Court decision in *US v James Daniel Good Real Property, supra*. It also has not been directly endorsed by a published decision of the Sixth Circuit Court of Appeals. The Sixth Circuit did cite *Severance* and *Presley v City of Charlottesville,* 464 F3d 480,

485 (CA 4 2006), in the unpublished case of *Brown v Metropolitan Government of Nashville*, No. 11–5339 (Jan. 9, 2012) 2012 WL 2861593, but without any specific analysis of those claims. They were not central to the issue in that case, in any event.

Importantly, however, the *Severance* rationale does not apply here because Canton Township has not asserted "control" over Defendant's property similar to an easement. It has not asserted even a right to entry on Defendant's property without its consent, much less limiting Defendant's right of access or right to keep others out. It simply does not apply here.

The Court in *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*, *Severance, supra*, the 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 US 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.*

Most significant to the issue of whether the Fourth Amendment applies is the language of the Amendment itself. The Amendment protects "'persons, houses, papers, and effects". It "does not protect possessory interests in all kinds of property." *Soldal v Cook Cnty, Ill.*, 506 US 56, 62 (1992), citing *Oliver v US*, 466 US 170, 176–177 (1984). "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the

common law. *Hester v United States*, 265 US, at 59." (Emphasis added). *Oliver,* 466 US at 176.

The Court in *Golf Village North LLC v City of Powell*, 333 FSupp3d 769 (S.D. Ohio 2018) reiterated the "open fields" doctrine in a case involving land use. In denying a request for a preliminary injunction, the Court there relied on the "open fields" doctrine, holding that, "The Property at issue in this case is neither Plaintiffs' home, nor curtilage; it is presently undeveloped private property that Plaintiffs seek to develop for commercial use. It appears likely that the Property is an 'open field,' and therefore is entitled to no Fourth Amendment protection at all." *Golf Village*, 333 FSupp3d at 776-777. The Property here is similarly situated to that in *Golf Village*: it is neither a home, nor curtilage; it is undeveloped private property that Defendant seeks to develop for commercial use. It therefore is not entitled to protection of the Fourth Amendment.

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 US 595, 612 (2013); *Dolan v City of Tigard*, 512 US 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, Defendant 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 of the proposed use. 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. *HDV–Greektown, LLC v City of Detroit*, 568 F3d 609, 623 (CA 6 2009), citing *Metromedia, Inc v City of San Diego,* 453 US 490, 509–10 (1981); *Berman v Parker*, 348 US 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful").[2] 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." Ex 10, p. 40. Mr. Goulet similarly testified that, "And we replace those trees elsewhere within the community to re-establish that canopy." Ex 9, p 48.

The Ordinance further advances "Protection of natural green open spaces, forests, woodlands, waterways." Ex 10, 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 and saw the clear-cut property herself. With the assistance of an expert in arboriculture, they conducted an investigation and arrived at a number of regulated trees removed (which does not include brush or invasive species). The effect of removal of any individual tree here is inapposite, where the entire property became devoid of anything that could be called a "tree." Ms. Thurston did therefore conduct the individualized

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[2] 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 FSupp3d 706, 742 (ED Mich 2018), quoting *FCC v Beach*, 508 US 307, 313 (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.*"

assessment that Defendant asserts was required.

Defendant 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 was insufficient. *Id.* at 96. This 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 Defendant was not developing the property in a manner in which the effects of tree removal could be mitigated in other ways. Defendant never submitted a tree inventory, and Mr. Percy conceded he never had one prepared before any trees were removed. Ex. 2, p 70.

In *New Jersey Shore Builders Ass'n v Township of Jackson*, 199 NJ 38; 970 A2d 992

(2009), the Court did not squarely consider the tree ordinance in that case under the unconstitutional conditions framework of *Dolan* and *Koontz*, but 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 NJ 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, Ex. 9, 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.

Defendant claims that the fee is not roughly proportional in this case. But that figure is not a random figure; it is derived by the number of regulated trees actually removed from the property. 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. Defendant has not at all addressed the reasonableness

or proportionality of the individual fees, concentrating solely on the total sum resulting from Defendant's removal of well over 1,000 regulated (including landmark) trees. As Mr. Goulet testified, "We do not prevent people from removing all of the trees on their property." Ex. 9 p 13.

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

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

The Eighth Amendment proscriptionsagainst excessive fines is not implicated in this case. This case does not involve Canton's criminal or punitive ordinances; the Forest Preservation and Tree Clearing Ordinance is part of the Township's land use regulations, specifically the zoning ordinance. Although Defendant continually refers to the monies to be paid into the Township's tree fund as a "fine," this is a misnomer in order to persuade the Court that it is, indeed, a "fine" subject to the Eighth Amendment. However, the fine for a criminal violation of the Zoning Ordinance is $500.00. Canton Twp. Ord. § 1.7(c)("Except as otherwise provided by law or ordinance, a person convicted of a violation of this Code shall be punished by a fine not to exceed $500.00, imprisonment for a period of not more than 90 days, or both.")

As stated above, the Excessive Fines Clause applies to the government's penal authority. *Timbs, supra; Bajakajian, supra*. The tree ordinance here imposes the tree fund fee only if the property owner chooses not to replace trees on its own property or elsewhere, and even when

he/she has applied for a permit and there is no violation of the ordinance. § 5A.08. This is not a fine or even penal in nature; it is valid mitigation for costs that the Township would incur to undertake the replacement of removed trees. See, *e.g., Shoemaker v Howell*, 795 F3d 553 (CA 6 2015), validating a user fee for abatement of an ordinance violation.

Even if the Eighth Amendment applies to these fees, "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 US at 334. "Excessive means surpassing the usual, the proper, or a normal measure of proportion." *Id.* (quoting Webster, American Dictionary of the English Language when defines "excessive" as "beyond the common measure of proportion"). The burden of showing disproportionality fall squarely on the party challenging the ordinance. *United States v Jose*, 499 F3d 105, 108 (CA 1 2007); *United States v Ahmad*, 213 F3d 805, n. 1, 816 (CA 4 2000). Courts have found that if a fine is equal to the loss caused by the actions, then it is not excessive in violation of the Eighth Amendment. *US v Blackwell*, 459 F3d 739, 771 (CA 6 2006) (holding that $1,000,000 fine for insider trading was not excessive because it was equal to the loss.). In this case, Canton Township's fees (not fines) are clearly not excessive. The Ordinance lists the specific landmark/historic trees covered under the Ordinance. § 5A.06. The Ordinance does not prohibit tree removal, but merely requires a permit before doing so. Additionally, the Ordinance in no way requires payment to the Township for specific tree removals. Instead, consistent with the purpose of this Ordinance, it requires replacement of the specific tree(s) removed. § 5A.08(E). Since an equivalent replacement of the tree is without question proportionate to the harm caused by its removal, there is absolutely no way Defendant can show the fees are "grossly disproportionate" as required under the Eighth Amendment.

Nor are the fees "retributive and deterrent" under *Austin v United States*, 509 US 602,

610 (1993). The testimony of Jeff Goulet, who termed the tree fund a "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. Thus, the excessive fines clause does not apply here.

CONCLUSION

Defendant has failed to show that the Canton Forest Preservation and Tree Clearing Ordinance is unconstitutional on its face or as applied to Defendant here. Thus, Plaintiff relies upon MCR 2.116(I)(2), which provides that, "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." As Defendant, as Counter-Plaintiff has raised all of these claims in its Amended Counter-Claim, Plaintiff is entitled to summary disposition as to those claims.

RELIEF REQUESTED

WHEREFORE, Plaintiff, CHARTER TOWNSHIP OF CANTON, respectfully requests that this Court deny Defendant's Motion for Partial Summary Disposition as to Defendant's Fourth and Fifth Amendment claims, and enter summary disposition in favor of Plaintiff under MCR 2.116(I)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2020, I electronically filed the foregoing paper with the Clerk of the Court using the MIFile/TrueFiling system which will send notification of such filing to all counsel of record.

/s/ Anne McClorey McLaughlin

STATE OF MICHIGAN
MI Court of Appeals

Proof of Service

Case Title:	Case Number:
CHARTER TOWNSHIP OF CANTON V 44650 INC	354309

1. Title(s) of the document(s) served:

Filing Type	Document Title
Brief	(F) Appellee 44650, Inc.'s BRIEF ON APPEAL - 44650, Inc.
Appendix	VOLUME I APPENDIX FOR APPELLEE
Appendix	VOLUME II APPENDIX FOR APPELLEE

2. On 03-09-2022, I served the document(s) described above on:

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Date

/s/ Zachary Larsen

Signature

Clark Hill PLC