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

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

ORAL ARGUMENT REQUESTED

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INTRODUCTION

Just over four years ago, the Percys cleared blighted vegetation from their property and planted Christmas trees. They did not seek Canton's permission. And when Canton complained, the Percys went to the press. As a result, Canton has spent the better part of half a decade trying to prove a point.

Eighteen separate state and federal judges have now affirmed that Canton's tree ordinance is unconstitutional. And recently a separate federal judge held that the Percys raised plausible claims that Canton's ongoing enforcement activities against them were retaliatory and violated the First Amendment. *Percy v Charter Twp of Canton*, No 19-11727, 2022 US Dist LEXIS 44186 (ED Mich Mar 11, 2022).

Nonetheless, Canton filed a baseless appeal in this Court claiming (in six pages of mostly *ipse dixit* argument) that the lower court committed at least half a dozen reversible errors in striking down the same tree ordinance held unconstitutional by the Sixth Circuit. As more fully explained in the Percys' opening brief, Canton's arguments fail.

After months of questionable extensions, Canton has now filed an extensive reply raising arguments not made in its opening brief. But Canton's sandbagging has not helped its cause. Canton's reply merely underscores the lack of merit in its appeal, and that the lower Court's judgment should be affirmed.

ARGUMENT

I. Canton's Arguments Regarding *Dolan* Are Barred by Collateral Estoppel Because Canton Admits That it Raised Them Unsuccessfully at the Sixth Circuit.

As is more fully explained in the Percys' opening brief, the lower court rightly held that Canton's arguments regarding the Percys' claims under *Dolan v City of Tigard*, 512 US 374; 114 S Ct 2309; 129 L Ed 2d 304 (1994) are barred by collateral estoppel. Canton's sole argument for avoiding collateral estoppel in reply is *dicta* from the Sixth Circuit noting that:

> 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.**

FP Dev, LLC v Charter Twp of Canton, 16 F4th 198, 206 (CA 6, 2021) (emphasis added). But the Sixth Circuit's *dicta* that there was an "interesting question" that was *not raised by the parties* cannot be read as an invitation to relitigate issues that *were* raised and *were* argued in that case.

Here, Canton's only argument against the application of *Dolan* is that *Dolan* allegedly does not apply to demands for anything other than formal title to property. (Cant. Rep. Br. at 5–7.) But that argument was clearly raised, briefed, and argued by Canton in the Sixth Circuit. (App, pp 234–235; App, pp 242–310; App, pp 311–356; App, pp 357–359; App, pp 087–105.) Indeed, Canton strongly advocated in its motion for *en banc* consideration in the Sixth Circuit that it had originally raised the issue before the panel. (App, p 096.) And the court agreed that it had already considered the issue. *FP Dev, LLC*, No 20-1447/1466, 2022 US App LEXIS 3282, at *2 (CA 6, Jan 3, 2022) (*en banc).* Canton cannot contradict its prior statements now. Cf. *Czymbor's Timber, Inc v City of Saginaw*, 269 Mich App 551, 556; 711 NW2d 442, 445 (2006).

Nor could the Sixth Circuit have *sua sponte* ignored the threshold issue of whether *Dolan* applied once that issue was raised. Instead, the most reasonable reading of Sixth Circuit's *dicta* is

that the court refused to reach out and decide an issue that both parties stipulated at oral argument—namely, whether *Dolan* applies to legislative exactions.[1] See also *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) (noting that the interesting question left open in *FP Development* pertained to legislative exactions). Canton's argument to the contrary is not serious. Collateral estoppel therefore applies.

II. Canton's Narrow Reading of *Dolan* Has No Basis in Theory or Precedent.

Even if Canton's argument was not barred by collateral estoppel, it should be rejected because it is clearly wrong. Canton argues that *Dolan* is limited solely to demands title to property, like a demand for a formal easement. (Cant. Rep. Br. at 5–7.) But, as the Percys have already shown, such a cabined reading of *Dolan* conflicts with the theory behind *Dolan* and with this Court's precedent. (Percy Resp. Br., at 10–15.)

Indeed, numerous other courts have applied *Dolan* to mitigation requirements that fell short of demands for a formal dedication of property. See, e.g., *Town of Flower Mound v Stafford Estates Ltd P'ship*, 135 SW3d 620, 636 (Tex 2004) (finding that the *Dolan* analysis is not limited to dedications of land); *Home Builders Assn v Beavercreek*, 89 Ohio St 3d 121; 729 NE2d 349, 356 (Ohio 2000) (applying *Dolan* in evaluating the constitutionality of an impact fee ordinance).

[1] Exchanges from oral argument in the Sixth Circuit are instructive: 15:57–16:45. Available at: https://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=audio/06-102021%20-%20Thursday/201447%201466%20FP%20Development%20LLC%20v%20Charter%20Township%20of%20Canton%20MI.mp3&name=201447%201466%20FP%20Development%20LLC%20v%20Charter%20Township%20of%20Canton%20MI

Canton provides no good faith reason why tree mitigation ordinances should be exempt from this general rule of property law.

Rather, because it has neither law, nor facts, Canton pounds the table.[2] According to Canton, if *Dolan* applies to tree ordinances at all, then "developers could buy up huge parcels of forest property and lay waste to them all, destroying precious natural resources that inure multiple irrefutable benefits to the public, as well as the subject properties, *without any regulation whatsoever.*" (Cant. Rep. Br. at 10.) But the Percys have never made such an absurd argument. Rather, the Percys stand by the modest rule articulated in *Dolan*: if the government claims it is entitled to hundreds of thousands of dollars in "mitigation" for alleged public harms, the government must provide some individualized quantifiable evidence that the demands are roughly proportional to the harm they are allegedly designed to mitigate for.[3] (Percy Resp. Br. at 10.) Canton's ordinance does not provide for such quantification here. *FP Development,* 16 F4th at 207. The lower court's judgment on this issue should be affirmed.

III. Canton's Attempts to Distinguish *Horne* Fail.

As explained in the Percy's opening brief, the lower court also rightly held that Canton's tree ordinance is a *per se* taking under *Horne v Department of Agriculture*, 576 US 351; 135 S Ct 2419; 192 L Ed 2d 388 (2015). That is because it grants Canton constructive possession of the

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[2] See *Kiribati Seafood Co, LLC v Dechert LLP*, 478 Mass 111, 119 n 6; 83 NE 3d 798, 807 (2017) (quoting, C. Sandburg, The People, Yes, in The Complete Poems of Carl Sandburg 551 (1969)) ("If the law is against you, talk about the evidence . … If the evidence is against you, talk about the law . … [A]nd … if the law and the evidence are both against you, then pound on the table and yell like hell.")

[3] Canton is forced to argue against this common-sense standard because it knows it cannot meet it. Canton's own sworn testimony is that the removal of vegetation from the Percys industrially zoned property did not cause a nuisance or harm the Percys' neighbors in any way. (App, pp 032–033; App, p 188; App, pp 191–193.)

Percys' trees. (Percy Resp. Br. at 16–18.) Canton makes two attempts to distinguish *Horne*. Each fails.

First, Canton claims that *Horne* is limited to actual demands for title. (Cant. Rep. Br. at 11.) But, as the Percys and the lower court noted, the government in *Horne* never took actual title or possession of the farmer's raisins in that case. As in this case, the farmers used their raisins and the government demanded the market value of the raisins as mitigation. *Horne*, 576 US at 354–355. Canton's reply brief simply ignores this argument.

Second, Canton claims that the Tree Ordinance differs from the statute in *Horne* because it allegedly allows property owners to use up to 25% of the trees on certain properties before penalties kick in. (Cant. Rep. Br. at 11–12.) This actually hurts Canton's argument. In *Horne*, the farmers were allowed to use as much as 70% of their raisins in some years without triggering penalties—far more than the meager 25% exemption allegedly provided by Canton. *Horne*, 576 US at 355. Yet the Court still found that the set-aside requirement to be a taking. Canton's arguments therefore fail.

IV. Canton's Sole Argument Regarding *Penn Central* is Barred by Supreme Court Precedent That Canton Refuses to Even Address.

As noted in prior briefing, the lower court also rightly held that the Tree Ordinance is a taking under *Penn Central*. See *Penn Central Transp Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). In both its response and reply, Canton counters that the Percys' *Penn Central* claims are barred by the fact that the Tree Ordinance was already in effect when the Percys purchased the property. But this argument was already addressed by the lower court and in the Percys' briefing here. (App, p 068.)

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 S Ct 2448, 2464; 150 L Ed 2d 592 (2001). Canton, tellingly, does not even attempt to address *Palazzolo* in its opening brief or its reply. Canton's stubborn refusal to address binding Supreme Court precedent relied on by the lower court and raised in the briefing should be read as an admission that it has no rebuttal.

V. Canton's Attempts to Distinguish *Loretto* Fail and Potentially Show a Lack of Candor With the Court.

As explained in the Percys' opening brief, the Tree Ordinance is also unconstitutional under *Loretto v Teleprompter Manhattan CATV Corporation*, 458 US 419; 102 S Ct 3164; 73 L Ed 2d 868 (1982), because it mandates a physical occupation of the Percys' property by unwanted objects. Canton raises two arguments in response.

First, Canton claims that *Loretto* does not apply because Canton officials did not occupy the Percy's property. (Cant. Rep. Br. at 14.) But, as the Percys have repeatedly pointed out, *Loretto* itself did not involve physical occupation by government officials. It involved a prohibition on removing a pre-existing cable box from the side of an apartment building. Indeed, the Sixth Circuit has made clear that a *Loretto* claim does not require government officials to be "literally occupying" the property. *Montgomery v Carter Cty*, 226 F3d 758, 766 (CA 6, 2000). Canton has never bothered to respond to this contrary authority.

Second, Canton falsely claims that the United States Court of Appeals for the Second Circuit rejected a claim that a law mandating physical occupation by trees was a *Loretto* taking in *Southview Associates, Limited v Bongartz*, 980 F2d 84, 95 (CA 2, 1992). (Cant. Rep. Br. at 14.) But *Southview* did not involve a claim that trees were a physical occupation subject to *Loretto*. To the contrary, the *Southview* court explicitly noted that the plaintiff could remove trees from its property without a permit, and could engage in "construction for farming, logging or forestry purposes, on the entire 44 acres . . . ." *Id.* (citations omitted). Instead, the plaintiff in *Southview*

argued that the denial of a proposed development permit deprived it "of its right to exclude the *deer* from its property." *Southview*, 980 F2d at 92. (emphasis added). The court disagreed, noting that the plaintiff could exclude and "even hunt deer on this land..." *Id.* at 94. It simply could not build a development with the particular design it wanted. *Id*. Accordingly, the court held that *Loretto* was not implicated. *Id*. at 95 ("foreclosing one configuration of a development plan—represents a regulation of the use of Southview's property, rather than a *per se* physical taking.").

More importantly, Canton appears to have selectively edited a block quote from *Southview* in its brief to obscure its holdings. On page fourteen of its brief, Canton blockquotes over half a page from *Southview* for the proposition that *Southview* "rejected the argument that the refusal to allow the developer there ***to remove the trees*** was a physical taking under *Loretto*." (Cant. Rep. Br. at 14) (emphasis added). Canton curiously removes a sentence from this block quote that directly contradicts its claim that the plaintiff in that case was unable to remove trees. *Id*. The omitted sentence states that "according to the terms of Act 250, ***Southview could engage in*** 'construction for farming, ***logging*** or forestry purposes,' *id.*, ***on the entire 44 acres*** of critical softwood in the deeryard ***without the need to seek a permit*** from the Commission." *Southview*, 980 F2d at 94 (emphasis added).

Canton might argue that this selective omission was merely an oversight. Yet Canton did the same thing in lower court below and in *FP Development*—an error that was repeatedly pointed out by counsel. The Percys' counsel also reached out to Canton's counsel on this issue after Canton filed its brief in this Court and Canton has chosen not to correct the error, despite being on notice that replacing contrary authority with ellipsis can be grounds for sanctions. See *Anchor Sav Bank, FSB v United States*, No. 95-39 C, 2005 US Claims LEXIS 523, at *5–8 n 2 (Fed Cl May 17,

2005); *Am Nat'l Bank & Tr Co v Harcros Chems*, No 95 C 3750, 1997 US Dist LEXIS 9084, at *11–12 (ND 1ll June 16, 1997).

In any event, *Southview* does not support Canton's position that *Loretto* should not apply, and Canton points to no other authority. Canton's arguments therefore fail.

VI. The Lower Court Rightly Held That Collateral Estoppel Does Not Bar the Percys' Fourth Amendment Claims.

The lower court also rightly held that Canton's Tree Ordinance violates the Fourth Amendment, and that collateral estoppel does not apply to the Percys' Fourth Amendment claims. (App, p 070.) The Percys largely stand on their opening briefing on this issue, which Canton does not fully address. The Percys write separately here to emphasize two quick points.

First, it is undisputed that collateral estoppel only applies against a party who participated in the previous case or has privity with a party in that case. *Monat v State Farm Ins Co*, 469 Mich 679, 682–85; 677 NW2d 843 (2004). There is no dispute that the Percys were not parties to the previous case. And, as noted in the Percys' opening brief, Canton argued below that "[t]his case does not involve the same parties or their privies" as *FP Development*. (App, p 083.) Under this Court's case law, Canton's prior argument that the Percys lack privity binds Canton from arguing otherwise on appeal. *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."). Canton's reply does not even address its prior statements, or this Court's relevant authorities—effectively admitting that it has no rebuttal.

Second, 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 v Patterson*, 566 F3d 490, 502 (CA 5, 2009). "As noted before, Canton has never argued that its

application of the tree ordinance is not a meaningful interference with the Percys' possessory interest in their trees or the underlying property. 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." Accordingly, if this Court holds that the Fourth Amendment applies, Canton has effectively waived any argument that the Ordinance is not an unreasonable seizure.

For these reasons and those discussed in the Percys' opening brief, the lower court's judgment that the tree ordinance violates the Fourth Amendment should be upheld.

VII. If This Court Finds That *Dolan* Does Not Apply, Then the Tree Payments Are Excessive Fines Barred by the Eighth Amendment.

Finally, if this Court rejects the Sixth Circuit in finding that the Tree Ordinance mandates mitigation subject to *Dolan*, it should hold that the penalties assessed in this case are excessive fines under the Eighth Amendment. Canton's only meaningful argument in response is that the lower court rightly held that the Eighth Amendment does not apply because the tree payments are designed for mitigation. This ignores the fact that the Percys' Eighth Amendment claims are raised in the alternative. If this Court reaches the Eighth Amendment at all, it is only because it has departed from every other court and found that the tree penalties are *not* mitigation subject to *Dolan*. Canton cannot have it both ways.

CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons and those raised in the Percys' opening brief, the lower court's judgment should be affirmed.

Respectfully submitted,

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