STATE OF MICHIGAN

IN THE COURT OF APPEALS

CHARTER TOWNSHIP OF CANTON,

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

Docket No. 354309

Circuit Court No. 18-014569-CE

v

44650, INC., a Michigan corporation,

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

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CHARTER TOWNSHIP OF CANTON'S CROSS-APPELLEE/REPLY BRIEF

*** ORAL ARGUMENT REQUESTED ***

ISSUES PRESENTED

I. CANTON TOWNSHIP'S APPEAL IS NOT BARRED BY COLLATERAL ESTOPPEL WHERE THE ISSUE PRESENTED WAS NOT DECIDED BY THE SIXTH CIRCUIT BUT EXPRESSLY RESERVED.

II. CONTRARY TO 44650'S ASSERTION, DOLAN DOES NOT APPLY HERE WHERE THE TOWNSHIP WAS NOT IMPOSING AN UNDERLYING EXACTION OF PROPERTY IN EXCHANGE FOR A PERMIT; RATHER ITS TREE ORDINANCE SEEKS TO MITIGATE DEFENDANT'S DAMAGE DONE TO NATURAL RESOURCES THROUGH TREE REPLANTING.

III. THE LOWER COURT ERRED IN GRANTING SUMMARY DISPOSITION TO DEFENDANT ON A REGULATORY TAKINGS ANALYSIS UNDER HORNE AND PENN CENTRAL.

IV. THE LOWER COURT CORRECTLY REJECTED DEFENDANT'S ARGUMENT UNDER LORETTO.

V. RELITIGATION OF WHETHER APPLICATION OF THE TREE ORDINANCE CONSTITUTED AN UNLAWFUL SEIZURE UNDER THE 4TH AMENDMENT IS BARRED BY COLLATERAL ESTOPPEL AND THE REASONING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

VI. BOTH THE LOWER COURT AND THE SIXTH CIRCUIT PROPERLY REJECTED DEFENDANT'S EIGHTH AMENDMENT CLAIM.

COUNTER-STATEMENT OF FACTS

Canton Township relies on the Statement of Facts set forth in its primary Brief on Appeal. However, some facts bear repeating.

In April 2017, the Property was still fully treed and no work had commenced on the Property, as established by aerial photographic evidence. (Exhibit B.)[1] On July 14, 2017, the Township notified Ginger Michalski-Wallace, the engineer for both FP Development and Defendant, that the split application was tentatively approved. (Exhibit 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.* (Id., emphasis added.)

Thereafter, on August 1, 2017, FP Development by Martin F. Powelson signed a Deed conveying the 16-acre parcel to Defendant. (Exhibit 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. (Exhibit E; Exhibit 4, Percy dep., pp. 28-29.) 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*. (Exhibit 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

[1] Alphabetical exhibits referenced herein were attached to the Township's initial Brief on Appeal.

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 observed 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.

The Canton Township Zoning Ordinance, Code of Ordinances, governs land use in the Township. The Property in question is zoned LI, Light Industrial. (Exhibit 4, p. 20.) The intent of the LI District is to provide locations for planned industrial development, including planned industrial park subdivisions. (Exhibit N.) Unless governed by one of the noted exemptions, the Township's Zoning Ordinance requires a permit for tree removal pursuant to §5A.05(A), specifically pertaining to removal or relocation of trees with a DBH (diameter at breast height, as defined by the Ordinance) of six inches or greater; removal, damage or destruction of any landmark tree; removal, damage or destruction of any tree located within a forest; and clearcutting or grubbing within the drip line of a forest. (Exhibit H, Forest Preservation and Tree Clearing Ordinance, §5A.05(A).)

The express purpose of the Ordinance is to promote an increased quality of life through the regulation, maintenance and protection of trees, forests and other natural resources. (Id., §5A.02.) It is elemental that trees are a precious natural resource in that they absorb carbon dioxide, produce oxygen, prevent soil erosion and flooding (which has become an obvious issue in many urban and suburban areas), provide natural habitats for animals, inhibit mosquito infestations, and innumerable other benefits.

Under the Ordinance, a "regulated tree" is "any tree with a DBH 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, 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." (Exhibit H, §§5A.05 and 5A.01.)

Section 5A.08(B) governs relocation or replacement of trees and provides in pertinent part: "Whenever a tree removal permit is issued for the removal of trees, other than landmark/historic trees, with a DBH of six inches or greater … such trees shall be *relocated or replaced* by the permit grantee *if more than 25 percent of the total inventory of regulated trees is removed*." (Id.) It soon became clear that Defendant removed all trees on the Property. 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 of how many – 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 had been destroyed. (Exhibit M.) On August 29, 2018, Ms. Thurston issued a Notice of Violation. (Exhibit 5.)

The Ordinance provides that wherever possible, replacement trees must be located on the same parcel of land on which activity is to be conducted. (Exhibit H, §5A.08(E).) Where tree relocation or replacement is not possible on the same property, the permit grantee can

plant the required trees off site. (Id.) In lieu of planting replacement trees, Defendant also has the option of replacing the market value of the destroyed trees in accordance with §5A.08(E).

Rather than attempt to resolve the violation in any meaningful way, Defendant repeatedly ignored and disregarded 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 and the Property's zoning. Canton Township filed this action, seeking a declaratory judgment that Defendant violated the Zoning Ordinance and was responsible for a nuisance *per se* under the Michigan Zoning Enabling Act, MCL 125.3407, an injunction preventing Defendant from continued violations, and a judgment that Defendant was responsible to mitigate its violation in a manner consistent with the Zoning Ordinance.

The ensuing procedural history was previously set forth. For the reasons already briefed and those detailed herein, the lower court properly dismissed Defendant's 8th Amendment claim and that decision should be affirmed. However, collateral estoppel precludes relitigation of Defendant's 4th Amendment claim, and the lower court erred in granting summary disposition to Defendant on its regulatory takings and unconstitutional conditions arguments. Accordingly, those decisions should be reversed.

ARGUMENT

Defendant asserts that when there are numerous grounds for reversal, there usually are none. Yet, often the number of grounds correlates to the number of errors. Such is the case here.

I. CANTON TOWNSHIP'S APPEAL IS NOT BARRED BY COLLATERAL ESTOPPEL WHERE THE ISSUE PRESENTED WAS NOT DECIDED BY THE SIXTH CIRCUIT BUT EXPRESSLY RESERVED.

Defendant/Appellee/Cross-Appellant, 44650, argues that the lower court properly held that the Township's ordinance enforcement was barred by collateral estoppel. 44650 asserts that the threshold question of whether *Nollan v California Coastal Com'n*, 483 US 825 (1987), *Dolan v City of Tigard*, 512 US 374 (1994), and *Koontz v St. John's River Water Mgmt. Dist.*, 570 US 595 (2013) even apply in this case was decided by the Sixth Circuit in the afffirmative. That assertion is false. Indeed, the panel stated:

> Those cases [*Nollan, Dolan, Koontz*] "'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.

F.P. Dev., LLC v Charter Twp. of Canton, Michigan, 16 F4th 198, 205-206 (6th Cir. 2021), emphasis added.

Clearly, the "interesting question" is whether *Nollan, Dolan, and Koontz* even apply because there is no underlying property demand or exaction here, such as an easement, as there had been in those cases. The panel did not decide that question because it concluded that the parties did not raise it there, so it 'proceeded to do as the parties request, which was to apply the nexus/rough proportionality test provided in those cases.' 44650 purports that the panel was referring to something else altogether in that passage, i.e., a legislative/administrative distinction, which is mentioned *nowhere* in the Opinion. It is beyond cavil that the Sixth Circuit was referencing the threshold question of whether *Nollan, Dolan, and Koontz* even apply. For 44650 to assert collateral estoppel, the allegedly foreclosed issue must have been "actually litigated" in the prior matter. Given that the Sixth Circuit expressly declined to consider the issue, it cannot be legitimately argued that the issue raised here – whether *Nollan/Dolan/Koontz* even apply to this scenario because there is no underlying exaction – was "actually litigated" in the federal appeal. Accordingly, collateral estoppel does not bar review.

44650 points out that this threshold question was not raised in the trial court below and therefore has been waived. However, even where an issue has been waived, our courts "may overlook the preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *LeFever v Matthews*, 336 Mich App 651, 670 n 3; 971 NW2d 672 (2021). This case need only satisfy one of the above, but it satisfies all three. First, manifest injustice will result where an erroneous application of law may be perpetuated and apply to countless other municipal regulations and taking claims. Second, resolution of this threshold question is necessary for a proper determination of the case. Inadvertent concession of a legal issue

should not take precedence over proper review by the court. Finally, whether *Nollan, Dolan,* and *Koontz* even apply is a question of law and the facts necessary for its resolution have been presented in the Township's primary Brief on Appeal and the issue has been fully briefed by the parties here. Review may not be required but it is warranted for the proper resolution of this case and its potential impact and communities throughout the State.

Defendant next argues that a Sixth Circuit Order denying *en banc* review, precludes consideration here. The issue of whether *Nollan*, *Dolan*, and *Koontz* were inapplicable was raised at oral argument, but the Sixth Circuit declined to decide the issue because it had not been briefed on appeal there. The Township petitioned for *en banc* review, which incorporates a request for panel rehearing. The Court denied the request observing that the issues raised in the petition were fully considered upon the original submission and decision of the cases (the cross-appeals). All the Order did was indicate that the panel had fully considered the issues before in its original decision. 44650 conflates "fully considered" with "actually resolved." In its original decision, the Sixth Circuit "fully considered" Amicus's oral argument that *Nollan*, *Dolan*, and *Koontz* do not apply but it nonetheless opted not to resolve that issue, as it had stated in its Opinion, in rendering its decision because their threshold applicability was not raised by the parties. Contrary to 44650's assertion, the Court's Order denying further review did not channel that it had already "resolved" that issue on the merits. Rather, the Court simply advised that it fully considered the issues raised before submission and made its decision, which included declining to resolve the threshold question of whether the cases even apply. That comports with the caveat in the Sixth Circuit's Opinion that it would skip to applying the cases because that is how the issue was briefed there by the parties. The Sixth Circuit decision clearly did not resolve whether *Nollan*, *Dolan*, and *Koontz* are even applicable given there was no physical taking or underlying property exaction. That remains an undecided issue.

44650 cited *Knight v Metro Gov't of Nashville & Davidson Cty*, No. 3:20-cv-00922 (MD Tenn, 2021), which assumed the "interesting question" left open in *F.P. Development* had to do with a legislative/administrative distinction, but that assumption is not rooted in the Sixth Circuit Opinion and was not discussed anywhere therein.

For the above reasons, Canton Township requests that this Court consider the issue left open in the related Sixth Circuit case as it impacts not only this case but other communities throughout the State.

II. CONTRARY TO 44650'S ASSERTION, *DOLAN* DOES NOT APPLY HERE WHERE THE TOWNSHIP WAS NOT IMPOSING AN UNDERLYING EXACTION OF PROPERTY IN EXCHANGE FOR A PERMIT; RATHER ITS TREE ORDINANCE SEEKS TO MITIGATE DEFENDANT'S DAMAGE DONE TO NATURAL RESOURCES THROUGH TREE REPLANTING.

Michigan's Constitution mandates the protection of natural resources:

> Sec. 52. The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

MI CONST Art. 4, §52.

Likewise, MCL 125.3201 codifies that local governments may enact zoning ordinances and regulate land development to promote public health, safety, and welfare:

> (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.

See also, *Three Rivers Metal Recyclers, LLC v Twp. of Fabius*, No. 347583, 2020 WL 3120261, at *5 (Mich. Ct. App. June 11, 2020), *appeal denied*, 507 Mich 930, 957 NW2d 814 (2021).

The lower court erred in finding the exaction test established in *Nollan v California Coastal Com'n*, 483 US 825 (1987) and *Dolan v City of Tigard*, 512 US 374 (1994) even applicable here. As previously briefed, exaction cases involve a government demand that an applicant give up a portion of their property as a condition of the government's issuance of a land use permit. In *Nollan*, the government permit required the property owners to provide an easement across their property. *Id.*, at 827-829. Similarly, in *Dolan*, the city required a property owner to provide easements to obtain a development permit. *Id.*, at 379-380. Both cases demanded *property* from a land use permit applicant and thus triggered a determination as to whether an unlawful exaction occurred.

In *Koontz v St. John's River Water Mgmt. Dist.*, 570 US 595, 612 (2013), the defendant district proposed that the petitioner reduce the size of his development to 1 acre and *deed to the district a conservation easement* on the remaining 13.9 acres. In the alternative, the district told petitioner that he could proceed with the development as proposed, building on 3.7 acres *and deeding a conservation easement to the government on the remainder of the property*, if he also agreed to hire contractors to make improvements to district-owned land several miles away.

In each of these cases, the government was demanding *property*, through title or easements, from the plaintiffs in exchange for permit approvals. Here, the Township did nothing of the sort. Rather, it provided various alternatives to 44650 to mitigate the damage caused by its decimation of natural resources, that are considered by our State Constitution

as being of paramount importance, eminently worthy of protection. In doing so, however, it never suggested that 44650 provide an easement or convey property to the Township.

44650 argues that the Township cannot enforce its tree replacement ordinance because it benefits only the public. Not only is that untrue, but under Defendant's theory, 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. Adopting Defendant's argument would negatively impact regulations pertaining to wetlands preservation, air quality, energy, and other resources simply because 44650 does not consider destroying almost 1,500 trees a direct nuisance to neighboring properties. However, the loss of those resources deleteriously affects communities for years. Defendant would not be in this position if it only properly sought the permit to begin with and worked with the Township to cabin or minimize the destruction. Even after the fact, the Township did not seek full replacement, nor could it given the removal of 100 landmark trees that are essentially irreplaceable in any imminent way. Taking Defendant's position to its logical extreme, literally *any* condition on a property owner's procurement of a permit that might require mitigation could qualify as an unconstitutional exaction. The mitigation here may not have been an exact, scientific replication for the damage caused – indeed, what was requested of 44650 was far less than the destruction done. However, the mitigation sought under the tree replacement ordinance certainly bore an essential nexus and rough proportionality to those impacts.

As the Township's tree regulations are not a demand for property from the owner, there is no exaction and the *Nollan/Dolan/Koontz* analysis is inapplicable. The Township did not require a dedication. Unlike the nonsensical examples offered by 44650 at page 16 of its brief, the Township merely sought to require 44650 to mitigate the destruction *it caused* to a

natural resource. While regulatory takings analysis still applies as discussed *infra*, the purported exaction analysis does not. The lower court erred in applying it and its decision should be reversed.[2]

III. THE LOWER COURT ERRED IN GRANTING SUMMARY DISPOSITION TO DEFENDANT ON A REGULATORY TAKINGS ANALYSIS UNDER *HORNE* AND *PENN CENTRAL*.

44650 argues that the lower court properly found that the tree ordinance is a per se taking under *Horne v Dept of Agriculture*, 135 S Ct 2419 (2015). 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. *Id.*, at 2424. Defendant contends that the within matter is "remarkably similar" to the statute in *Horne*. Remarkably dissimilar is more apt. The Township does not want 44650's timber. They can keep it, sell it, build cabins with it, etc. Unlike the government in *Horne*, the Township is not trying to take title to the timber.

Nor did the Township require that Defendant relinquish title to its trees to the Township. Rather, it required a permit to remove trees so that it could *mitigate damage* caused by the destruction of a natural resource, here well over 1,000 trees, including landmark trees. 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 such that the Township could replace the trees at another location. 25% of the Defendant's tree inventory was exempt

[2] Defendant's citation to *Cedar Point Nursery v Hassid*, 141 S Ct 2063 (2021) is perplexing given that it dealt with a regulation that authorized *physical invasion* onto the agricultural employer petitioner's property so labor organizers could solicit support.

from the requirement.

Next, as previously briefed, 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).

Courts must consider the whole property, both spatially and over time, recognizing that a property owner has the ability to earn income from the property over time even if the short-term impact is substantial. *Palazollo v Rhode Island*, 533 US 606 (2001); *Tahoe-Sierra Preservation Council v Tahoe Regional Planning Agency*, 535 uS 302 (2002). The economic impact 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).

As previously briefed, these factors do not weigh in 44650's favor. Moreover, it is significant to note that the lower court did not account for the actual market value of the subject Property remaining today, the profits or other benefits 44650 might have received from the cut trees, or 44650's ability to use the property and generate income from it for years to come. See e.g., *Cummins v Robinson Twp*, 283 Mich App 677; 714 NW2d 421 (2009).

Nor does the evidence support an effect on 44650's investment-backed expectations because of the regulation. This regulation had been in effect before Defendant purchased this property. Before purchasing the property, Defendant knew of the tree ordinance requirements, as demonstrated by Exhibit 8. 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 and the lower court erred in determining otherwise. The lower court's observation suggesting trees are unnecessary in a light industrial area with industrial park subdivisions is misguided. Trees are just as important in such areas to provide cover, conserve energy, absorb carbon dioxide, and the many other benefits they offer. Not all industrial areas should be unsightly, pollutant-riddled properties, covered by smog, permeating surrounding areas.

IV. THE LOWER COURT CORRECTLY REJECTED DEFENDANT'S ARGUMENT UNDER *LORETTO*.

44650 complains that the lower court rejected its argument premised upon *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419 (1982) in a single sentence. However, not

much more needed to be said with respect to that argument. Defendant claims that the ordinance here requires placement of "unwanted objects" similar to that ruled a taking in *Loretto*. There, the Court held that a municipal ordinance requiring placement of a cable box on the plaintiff's property constituted a taking because it was an actual, permanent, physical invasion of the property. Here, 44650 did not demonstrate that the Township directly, physically invaded its property - a requirement for application of *Loretto*.

In *Southview Associates, Ltd v Bongartz*, 980 F2d 84, 95 (2nd Cir. 1992), 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." (Exhibit 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. The lower court correctly rejected 44650's argument.

V. RELITIGATION OF WHETHER APPLICATION OF THE TREE ORDINANCE CONSTITUTED AN UNLAWFUL SEIZURE UNDER THE 4TH AMENDMENT IS BARRED BY COLLATERAL ESTOPPEL AND THE REASONING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent, different cause of action between the same parties or their privies where the prior proceeding

culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *Leahy v Orion Twp.*, 269 Mich App 527, 530; 711 NW2d 438 (2006); *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990). See also, *Lichon v American Universal Ins* Co, 435 Mich 408, 428 n16; 459 NW2d 288 (1990). A decision is final when all appeals have been exhausted or when the time available for an appeal has passed. *Leahy*, *supra* at 530.

Here, both the federal district court and the United States Court of Appeals for the Sixth Circuit agreed that the Fourth Amendment's prohibition against unlawful seizures did not apply to the Township's tree Ordinance. Contrary to 44650's argument that the rulings were *dicta*, whether there was "meaningful interference with possessory interests" was actually and necessarily determined in that prior matter, which resulted in a final valid judgment. (Exhibit 2, USCOA Opinion, pp. 12-13.) Defendant, though not a party to the federal court action, is in privity with the Plaintiff, F.P. Development. To be in privity is to be so identified in interest with another party that the prior litigant represents the same legal right that the subsequent litigant is trying to assert. *Baraga Co. v State Tax Comm.*, 466 Mich 264, 269-270 (2002). Both 44650 and F.P. Dev. are represented by the same counsel, both have raised the same claims and issues with respect to application of the Township's tree Ordinance to their property, and F.P. owned the parent parcel before the lot split and deeding of the child parcel to Defendant. Given this substantial identity of interests, that were adequately presented and protected by F.P. in the federal matter, privity is established and collateral estoppel applies.

Moreover, even if this Court were to somehow find that collateral estoppel does not apply, the *reasoning* of the federal Court of Appeals in its published decision rejecting the Fourth Amendment arguments advanced by F.P. there apply equally here. (Exhibit 2, pp. 12-13.) Further, like F.P., there is no dispute that Defendant here also was able to sell the timber

it removed from the Property, nor is timber included within the protections afforded by the 4th Amendment to houses, persons, papers, or effects. (Id.) The lower court erred in granting summary disposition to Defendant under the Fourth Amendment, warranting reversal and disposition in the Township's favor.

VI. BOTH THE LOWER COURT AND THE SIXTH CIRCUIT PROPERLY REJECTED DEFENDANT'S EIGHTH AMENDMENT CLAIM.

44650 is precluded from relitigating this issue for the same reasons set forth above regarding the Fourth Amendment. With respect to this issue, the Sixth Circuit held:

> 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, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989)). It guards only "against abuses of [the] government's punitive or criminal-law-enforcement authority." *Timbs v. Indiana*, —— U.S. ——, 139 S. Ct. 682, 686, 203 L.Ed.2d 11 (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, 113 S.Ct. 2801 (quoting *United States v. Ward*, 448 U.S. 242, 254, 100 S.Ct. 2636, 65 L.Ed.2d 742 (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, 100 S.Ct. 2636.
>
> 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.

F.P. Development, *supra* at 208-209, footnote omitted.

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). The Eighth Amendment proscriptions against 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.")

The Excessive Fines Clause applies to the government's penal authority. *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.

Further, 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 (6th Cir. 2006) (holding that $1,000,000 fine for insider trading was not excessive because it was equal to the loss.). 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 lower court and the Sixth Circuit adeptly held that the excessive fines clause does not apply here.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for all of the foregoing reasons, the lower court's denial of summary disposition in favor of the Township and grant in favor of Defendant should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I certify that on June 17, 2022, the foregoing document was served on all parties or their counsel of record through the Court's efile system.

/s/Marcelyn A. Stepanski