**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

**DEFENDANT/COUNTER-PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY DISPOSITION**

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Canton's response either misstates the holdings of cases or relies on cases that have been overturned or otherwise rejected by higher courts. Accordingly, summary disposition in favor of the Percys is proper.[1]

## I. CANTON FAILS TO REFUTE THE PERCYS' TAKINGS CLAIMS

As explained in the Percys' opening brief, the Tree Ordinance constitutes an uncompensated taking of the Percys' property interest in their trees, *Horne v. Dep't of Agric.,* 135 S.Ct. 2419 (2015), a taking of their interest in the property under those trees, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and a taking of the property as a whole, *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Canton responds to these arguments by: 1) citing an out of state advisory opinion to argue that the constitutionality of tree ordinances is well established; and 2) attempting but failing to distinguish *Horne*, *Loretto*, and *Penn Central*. Those arguments are without merit.

### A. *In re Opinion of the Justices* is contrary to a century of Supreme Court precedent

Canton begins its brief by quoting *In re Opinion of the Justices*, 103 Me. 506 (1908) —a non-binding advisory opinion from a state court in Maine, which held that a temporary restriction on harvesting immature timber was likely not a taking under the Fifth Amendment. But *In re* was based on a now defunct view of the takings clause which had held that the clause did not apply unless the government took physical possession of the property through eminent domain. *Id.* at

[1] Canton's statement of facts contains irrelevant, unsupported, and demonstrably false attacks on the Percys' character including that the Percys' purportedly (1) had no intention to farm the property, (2) removed stumps to hide evidence of tree removal, and (3) disingenuously denied knowledge of Canton's tree permitting requirements. These unsupported statements are not relevant to the Percys' constitutional claims and are directly contradicted by the record which shows that (1) prior to purchasing the property, the Percys gave written notice to Canton's supervisor that they intended to farm the property, (2) stump removal was obviously necessary for intended farming activity, and (3) the Percys' reading of the tree ordinance was reasonable where the ordinance and permit application expressly exempts farming from the permit process and where the very deed to the property states that the property is subject to Michigan's Right to Farm Act. (See Exhibits 1-2).

511. That narrow view has been rejected by the Supreme Court. *See, Horne*, 135 S.Ct. at 2427 (discussing the history of the takings clause). It cannot be applied here.[2]

**B. Canton's attempt to distinguish *Horne* fails**

Canton next attempts to distinguish *Horne* by claiming that the Percys had a choice that the farmers in *Horne* did not —*i.e.*, to use their trees and pay mitigation. But the farmers in *Horne* were given the same "choice"—namely, they could set aside their raisins for public benefit or use them and pay the government "market value." *Horne,* 135 S.Ct. at 2421-22. The farmers chose to use their raisins, were fined, and the Court found this constituted a taking. *Id.* The same is true here.[3]

**C. Canton's attempt to distinguish *Loretto* fails**

Canton tries to distinguish *Loretto* by falsely claiming that the Second Circuit rejected a *Loretto* challenge to a decision refusing to allow a developer to remove trees. Resp. at 9 (citing *Southview Associates, Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992)). But the *Southview* plaintiff was not denied the right to remove trees. The court explicitly noted that the plaintiff could remove trees without a permit, and could engage in "construction for farming, *logging* or forestry purposes, on the entire 44 acres." *Id.* (emphasis added and citations omitted). *Southview*, 980 F.2d at 92. (emphasis added).[4] The plaintiff simply could not build the *particular design* of development it wanted because of its impacts on deer. *Id.* at 94. The court held that "foreclosing one configuration

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[2] *In re* is also distinguishable on its facts. The law at issue in *In re* required that property owners allow certain trees to reach maturity before they could be removed. *Id.* at 512. The court thus concluded that any interference with property rights was only temporary and therefore not tantamount to a physical appropriation. *Id.* By contrast, the Percys can never remove their trees without mitigation or penalty. Even on its own terms, *In re* does not apply here.

[3] Canton also points to *Georgia Outdoor v Marion County*, 652 F.Supp.2d 1355 (MD Ga 2009), but that case did not involve a tree ordinance and was decided six-years before *Horne* under the Court's *Lucas* framework. The Court made clear in *Horne* that *Lucas* does not apply to per se takings. *Horne*, 135 S.Ct. at 2429.

[4] Canton conveniently removes the language in *Southview* explicitly stating tree removal was permitted from its block quote of that case and replaces it with an ellipsis.

of a development plan—represents a regulation of the use of Southview's property, rather than a *per se* physical taking" under *Loretto*. *Id*. at 95.

### D. Canton's *Penn Central* Arguments have been rejected by the Supreme Court

Canton argues that the Percys' *Penn Central* claim fails because the Tree Ordinance was in effect when they purchased the property, and because the Ordinance provides public benefits. But a *Penn Central* 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 (2001). And the fact that the Tree Ordinance is designed to provide public benefits makes it more likely to be a taking, not less so. *See, Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).)

## II. CANTON FAILS TO REFUTE THE PERCYS' SEIZURE CLAIM

As explained in the Percys' opening brief, the Tree Ordinance constitutes an unreasonable seizure under *Severance v. Patterson,* 566 F.3d 490, 503–04 (5th Cir. 2009). Canton cites *Scott v. Garrard County Fiscal Ct.*, 2012 WL 176485 (E.D. Ky. 2012) for the proposition that *Severance* does not apply in the Sixth Circuit and, therefore, that land use regulations may only be challenged under the takings clause. But the district court's unpublished opinion in *Scott* was later contradicted by the Sixth Circuit in *Brown v. Metro. Gov't of Nashville & Davidson Cty*, 2012 U.S. App. LEXIS 14553, at *11 (6th Cir. 2012), which held that *Severance* applies in the Sixth Circuit and that "a Fourth Amendment claim is not subsumed under a takings claim." *Id.*

Canton also argues that any seizure claim is precluded by the "open fields" doctrine. But that doctrine addresses "searches, not seizures." *United States v. Fillers*, No. 1:09-CR-144, 2011 U.S. Dist. LEXIS 63311, at *19 (E.D. Tenn. June 14, 2011) (citing, *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. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1028 (9th Cir. 2012).[5]

Canton also argues that a commercial property is not a "house" or "effect," and therefore not protected by the Fourth Amendment. But the Supreme Court has held that the Fourth Amendment applies to commercial properties as well. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978). And "effects," such as trees and crops, are personal property separate from the underlying land under Michigan law (see, *Groth v. Stillson*, 20 Mich. App. 704, 707, 174 N.W.2d 596, 598 (1969)), and are therefore subject to the seizure protections of the Fourth Amendment.

## III. CANTON FAILS TO REFUTE THE PERCY'S UNCONSTITUTIONAL CONDITIONS CLAIM

The Tree Ordinance requires mitigation for the removal of trees from private property. Under *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), any mitigation must be based on a site-specific, evidence-based analysis of the impact of the removal and the ability of the mitigation to address the impact in a "roughly proportional" way. *Id.* Here, that mandatory site-specific analysis did not, and cannot, take place. Under the Tree Ordinance, mitigation payments are based solely on the number of trees removed, regardless of the impact of removal. *Dep. of J. Goulet*, 16:13-25, 17:1-25; 18:1-6. In *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. App.—Dallas, 2013), the court found a similar lack of site-specific evaluation to be fatal to a similar tree ordinance that based mitigation solely on the number and size of trees removed. Canton tries to distinguish *Mira Mar* by claiming that the ordinance did not contain offsets, like the 25% offset

[5] Canton points to *Golf Village North LLC v. City of Powell,* 333 F.Supp.3d 769 (S.D. Ohio 2018), which applied the open fields doctrine to the seizure of an undeveloped commercial lot. That district court decision is at odds with *Oliver, Lavan,* and *Fillers*, and should be rejected as not reflective of Supreme Court precedent.

available under the Ordinance. Contrary to Canton's uncited assertion, the ordinance at issue in *Mira Mar* had offsets that the developer could have advantage of. *Id.* at 95. These offsets were not relevant to the court's analysis. Canton's attempt to distinguish *Mira Mar* therefore fails.

## IV. CANTON FAILS TO REFUTE THE PERCYS' EIGHTH AMENDMENT CLAIM

Canton seeks up to $446,625 from the Percys for violating a local ordinance, despite the fact that the tree removal in this case harmed no one. This is an excessive fine under the Eighth Amendment. Canton responds that these penalties are not "fines" because they are not labeled as such. But the Eighth Amendment is not a servant of municipal labels. It circumscribes the government's power to extract excessive payments, "whether in cash or in kind"[6] that are designed, at least in part, to serve "either retributive or deterrent purposes." *Austin v. United States*, 509 U.S. 602, 610, (1993). It applies whether the law at issue is civil or criminal, *Hudson v. United States*, 522 U.S. 93, 103 (1997), even if there are other criminal fines for the same conduct. *United States v. Bajakajian*, 524 U.S. 321, 340 (1998). It clearly applies here.

Respectfully submitted,

*/s/Chance Weldon*

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[6] *Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019)

**CERTIFICATE OF SERVICE**

I hereby certify that on March 4, 2020, I caused electronic filing of the foregoing document with the Clerk of the Court using the MIFile/TrueFiling System, which will send notification of such filing to all properly registered counsel.

*/s/Chance Weldon*
CHANCE WELDON

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# EXHIBIT 1

## To Defendant/Counter-Plaintiff's Reply in Support of its Motion for Partial Summary Disposition

## Gary Percy

**Subject:** FW: Frank'O Real Estate

**From:** Gary Percy
**Sent:** Sunday, July 16, 2017 9:19 AM
**To:** 'pwilliams@canton-mi.org' <pwilliams@canton-mi.org>
**Subject:** FW: Frank'O Real Estate

Pat, hope all is well. I received the letter on Friday approving the split (Thank You). As you know we are not planning to use the land for a few years but was just wondering if this could be farmed until we need it? I know you and I talked about Richie could farm it.

I would like to talk to you about the Yost road project if you get some time, as I know you have a lot on you plate.

Also again Thank you for all your help.

***Gary A. Percy***
President
A.D. Transport Express Inc.
5601 Belleville Rd.
Canton, Michigan 48188
Office 734-397-7100 X1015
Fax 734-397-0788
Cell 734-748-9950

## Gary Percy

**From:** Gary Percy
**Sent:** Friday, August 4, 2017 5:01 PM
**To:** Patrick Williams
**Subject:** Accepted: Lunch with Frank Powelson and Gary Percy

## Gary Percy

| | |
|---|---|
| **Subject:** | Lunch with Frank Powelson and Gary Percy |
| **Location:** | Roses |
| **Start:** | Tue 8/15/2017 12:00 PM |
| **End:** | Tue 8/15/2017 1:30 PM |
| **Show Time As:** | Out of Office |
| **Recurrence:** | (none) |
| **Meeting Status:** | Accepted |
| **Organizer:** | Patrick Williams |

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# EXHIBIT 2

## To Defendant/Counter-Plaintiff's Reply in Support of its Motion for Partial Summary Disposition

MSD-Percy tree cutting violation

2017 AUG 25 AM 9:42

Barnard J. Youngblood
Wayne County Register of Deeds
2017287260 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
82-17104-B

5-21-3,478.70
WD 3p RD u

[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.

No: 17913 Not Examined
Date 8-1-17 WAYNE COUNTY TREASURER Clerk