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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.

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[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. <u>Eighth Amendment "Excessive Fines" Clause</u>

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.
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> 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