STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

CHARTER TOWNSHIP OF CANTON,

Plaintiff/Counter-Defendant,

Case No. 18-014569-CE

-vs-

Hon. Susan L. Hubbard

44650, INC., a Michigan corporation,

Defendant/Counter-Plaintiff,

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RESPONSE TO DEFENDANT/COUNTER-PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY DISPOSITION

The facts as stated here are established by the Verified Complaint (Ex 1), to which Leigh Thurston, the Canton Township Landscape Architect and Planner, has attested under oath. Alphabetical exhibit references are exhibits to the Verified Complaint that Plaintiff has attached here for the Court's convenience. Defendant, 44650, Inc., is a Michigan corporation located at 5601 Belleville Road in Canton Township, Michigan, whose resident agent is Gary Percy. At issue in this case are the actions taken by Defendant with respect to a roughly 16-acre vacant parcel of property located east of Belleville Road and north of Yost Road, parcel identification number 71-135-99-0001-709.

On or about October 27, 2016, Canton Township's Planning Services Division received an application for a lot split of a 40-acre parcel owned by FP Development LLC. The original 40-acre parcel ("Parent Parcel") was proposed to be divided into two child parcels, 28.4 acre Parcel A to the north and 16.1 acre Parcel B to the south. Ex. A. The owner for the 16-acre split parcel ("the Property") was identified in the lot split application as Defendant, 44650, Inc. *Id.*

Notably, in April 2017, the Property was still fully treed and no work had commenced on the Property, as evidenced by aerial photograph. Ex. B. On July 14, 2017, the Township notified Ginger Michalski-Wallace, the engineer for FP Development and Defendant, that the split application was tentatively approved. Ex. C. The letter noted, *inter alia*, that the Property was zoned LI, Light Industrial, that site plan approval must be obtained for *any activities* or development on the property and that a *tree removal permit must be obtained from Planning Services prior to any tree removal activity taking place on the site.* (Emphasis added.)

On August 1, 2017, FP Development by Martin F. Powelson signed a Deed conveying the 16-acre parcel to Defendant. Ex. A. Unbeknownst to the Township, before the lot split was complete, Defendant hired Kilanski Excavating in approximately October 2017 to clear-cut all trees from the Property. Ex. E.; Ex. 2, pp 28-29. Defendant also bulldozed the acreage and

removed the existing stumps – all in an effort to hide the extent of destruction. On November 27, 2017, the Township Planner again notified Ms. Michalski-Wallace that the documents were required, and reminded her, as the agent for the parties, that site plan approval was required before *any activities* or development on the parcel, and *any tree removal required a prior tree removal permit*. Ex. F. The property split was completed thereafter.

In late April of 2018, Township landscape architect and planner Leigh Thurston received a phone call from an individual owning land adjacent to the Property, inquiring why so many trees were permitted to be removed. This was the first notification that the Township had that any trees had been removed from the Property. After viewing the Property from a neighboring parcel, Ms. Thurston several ordinance violations and a woodchipping operation on the Property. Ms. Thurston then contacted Gary Percy, the resident agent for Defendant, to advise him of the violations. Despite a history of violating the Township's ordinances in the past, Mr. Percy disingenuously denied knowledge that a permit was required to remove trees from the Property. Ex. 6, 1994 notice of violation.

The Canton Township Zoning Ordinance, Code of Ordinances, Appendix A governs land use in the Township. The Property in question is zoned LI, Light Industrial. Ex. 2, p. 20. The intent of the LI District is to provide locations for planned industrial development, including planned industrial park subdivisions. Ex. N. Agricultural uses are not a permitted use as of right or a special land use in the LI zoning district. In addition, under the Zoning Ordinance, an agricultural use requires a minimum of 40 acres; the subject property is only 16 acres. Further, the Canton Township Zoning Ordinance requires a permit for tree removal, § 5A.05(A) for the removal or relocation of any tree with a DBH of six inches or greater on any property; the removal, damage or destruction of any landmark tree; removal, damage or destruction of any tree located within a forest; clearcutting or grubbing within the drip line of a forest. Ex. H, Forest Preservation

and Tree Clearing Ordinance. Under Canton's ordinance, a "regulated tree" is "any tree with a DBH [diameter breast height] of six inches or greater" and a "landmark tree" is a defined as "any tree which stands apart from neighboring trees by size, form or species [] which has a DBH of 24 inches or more." Ex. H, §§ 5A.05 and 5A.01. The Township's ordinance requires replacement of regulated trees on a 1:1 ratio, and replacement of landmark trees on a 3:1 ratio. Ex. H, § 5A.08.

Despite numerous requests from Township employees and public officials, staff was denied access to the Property by Gary Percy to analyze the extent of the tree removal. The parties, through counsel, eventually agreed on a date for inspection. On August 22, 2018, Canton Township's deputy planner and landscape architect, Leigh Thurston, along with its Code Enforcement officer and a consulting arborist met representatives of Defendant to walk the Property and the Parent Parcel to conduct a scientific analysis to come up with an estimate of how many trees and what types of trees had been removed from the Property. The analysis included, among other things, identifying six representative plots on the "still treed" Parent Parcel and then counting and identifying the species of the regulated trees within those plots. Using the numbers and types of trees that were identified in the representative plots and taking into consideration soil conditions and topography of the Property, a scientific estimate was made of the number and types of trees that were removed. The analysis concluded that 1,385 "regulated trees" and 100 "landmark" trees were removed. Ex. M. Based upon the requirements in the Township's Tree Ordinance and the Township's analysis of the tree removal, Defendants were required under Township ordinance to plant 1,685 trees in replacement of the 1,485 trees that were removed. § 5A.08(E). On August 29, 2018, Ms. Thurston issued a Notice of Violation. Ex. 3.

In lieu of planting replacement trees, Defendant has the option of paying into the Township's Tree Fund the market value of the number of required replacement trees, in accordance with § 5A.08(E). Current market values for the types of trees required to replace the

1,385 regulated trees removed run between $225 and $300 per tree, and market value of the trees required to replace the 100 landmark trees average $450 per tree. Ex. 4. The ordinance also contains an exemption from the requirement for relocation of trees "if more than 25 percent of the total inventory of regulated trees is removed." § 5A.08(B).

Rather than attempt to resolve the violation in any meaningful way, Defendant claimed that it was now starting a "Christmas tree farm," which Canton learned on October 22, 2018, through a news media report initiated by Defendant, and that Defendant had planted some 1,000 Norway Spruce trees on the Property. As noted above, the Property is zoned LI, Light Industrial, and a Christmas tree farm is not a permitted use. To use the Property for agricultural purposes, Defendant would have to file an application to rezone the Property to RA, Rural Agricultural, and a request for a variance to allow the agricultural use on property smaller than 40 acres. No applications for either had been submitted to the Township.

Defendant repeatedly ignored and continued to flout Township ordinance requirements, even doubling down on the tree removal violation by planting evergreen trees for a "Christmas tree farm" in violation of the Township Code. Given Defendant's general disdain for Township Ordinance, Canton Township filed this action, seeking a declaratory judgment that Defendant has violated the Zoning Ordinance and is responsible for a nuisance *per se* under the Michigan Zoning Enabling Act, MCL 125.3407, injunctive relief preventing Defendant from its continued violations of the ordinance, and a judgment that Defendant is responsible to mitigate its violation of the Ordinance in a manner consistent with the Zoning Ordinance, principally paying an amount into the Township Tree Fund representing the number of trees that were removed.

On November 12, 2018, the Court granted to the Township an Ex-Parte Temporary Restraining Order halting any further Christmas tree plantings on the Property, and an Order to Show Cause requiring Defendant to appear and show cause why a preliminary injunction should

not issue restraining Defendant from conducting any further activities on the Property in violation of the Township's ordinances. The Court modified that Order on November 20, 2018 per Stipulation. The Court then entered an Order Maintaining Status Quo on December 4, 2018, prohibiting Defendant from performing any further work on the property except grass mowing and general maintenance. See Ex. 4. That Order remains in place.

STANDARD OF REVIEW

Defendant/Cross-Plaintiff's motion here is brought pursuant to MCR 2.116(C)(10). A motion under this subrule tests the factual sufficiency of the Complaint. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). A motion under subrule (C)(10) must *specifically* identify the issues as to which the moving party believes there is no genuine issue as to any material fact. MCR 2.116(G)(4). The initial burden on a motion for summary disposition is on the moving party to properly support its motion. The burden shifts to the nonmoving party only after the moving party has met this burden. MCR 2.116(G)(5); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369–370; 775 NW2d 618 (2009). If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); *Id.* at 370, citing *Meyer v Center Line*, 242 Mich App 560, 575; 619 NW2d 182 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

Affidavits supplied in support of a motion for summary disposition must be based upon personal knowledge and must set forth with particularity such *facts* as would be admissible as evidence to establish or deny the grounds stated in the motion. *SSC Associates Limited Partnership v General Retirement System of the City of Detroit*, 192 Mich App 360, 363-364; 480 NW2d 275 (1992)(citation omitted)(emphasis added). Opinions, conclusionary denials, unsworn

averments, and inadmissible hearsay do not satisfy the court rule; disputed fact (or the lack of it) must be established by *admissible evidence*. *Id.* at 364 (emphasis added). Allegations unsupported by some basis in fact may be viewed as sheer speculation and conjecture and, therefore, ripe for summary disposition. *Id*, citing *Ransburg v Wayne Co*, 170 Mich App 358, 360; 427 NW2d 906 (1988).

Defendant has not complied with any of these requirements on its (C)(10) motion. It has not specifically identified the issues as to which it believes there is no genuine issue of material fact. Although Defendant has submitted the affidavit of Gary Percy (Ex 5 to its motion) in support, the affidavit contains inadmissible hearsay (¶ 5 "I was informed by one of the previous owners …"; ¶ 8.) and other conclusions lacking any foundation. The Affidavit mentions that scrub brush and dead trees were removed from the Property, but does not claim the Property did not contain "regulated trees" or that "regulated trees" were not removed from the Property. The Motion for Partial Summary Disposition challenges only one of the claims alleged in the Verified Complaint, violation of the Township's Forest Preservation and Tree Clearing Ordinance.[1] Rather, Defendant here challenges the ordinance only on constitutional grounds.

Defendant also asserts that it purchased the property for agricultural purposes, which is directly belied by events contemporaneous with the lot split and Defendant's own admissions that it intended to use the property for industrial purposes. On November 20, 2017, Canton Township's Planning Commission conducted a public hearing of the five-year review of its Master Plan, as required by the Michigan Planning Enabling Act, MCL 125.3845(2). At that time, Defendant had applied to change the future zoning classification of the Property from LI-Light Industrial to GI-

[1] Plaintiff Township filed a such a motion under subrule (C)(10), but withdrew it for consideration at the present time due to the parties' previous stipulation that the Defendant's constitutional claims would be decided first. See Stipulated Scheduling Order of 9/19/19.

General Industrial. Ex 7. Furthermore, Matthew Percy attended the hearing on November 20, 2017, and expressly stated that the Percys had purchased the Property for future expansion of their trucking business, A.D. Transport Express. Ex 8, minutes of the 11/20/17 meeting. See also video of the meeting, https://www.youtube.com/watch?v=i-imGSlcn-M (last reviewed February 24, 2020). Mr. Percy's remarks and interaction with the Planning Commission are at 35:44-42:24 of the video's timecode. Indeed, the Percys knew that the Property was not zoned agricultural that would allow for such a use.

ARGUMENT

Despite Defendant's characterization of Canton's ordinance as "reviving" a centuries-old, disfavored regulation, "[o]rdinances that protect trees and vegetation are one of the fastest 'growing' areas of land use law at the local level." 1 Zoning & Plan. Deskbook § 5:47 (2d ed.) (2018). "These ordinances protect existing trees and vegetation and require replacement where preservation isn't feasible. In California, over 80 incorporated cities have such ordinances. (Footnote omitted.) Other states that have such ordinances include Illinois, Missouri, and Texas." *Id.* Similarly, more than a century ago, the Maine Supreme Court was asked to provide an opinion to the state senate whether the Constitution prohibited, "By public general law to regulate or restrict the cutting or destruction of trees growing on wild or uncultivated land by the owner thereof without compensation therefor to such owner[,]" to "protect and promote the interests of such owners and the common welfare of the people." *In re Opinion of the Justices*, 103 Me 506; 69 A 627-628 (1908), The Court responded:

> We do not think the proposed legislation would operate to "take" private property within the inhibition of the Constitution. While it might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product, and increase untouched, and without diminution of title, estate, or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay, but not deprivation. While the use might be restricted, it would not

be appropriated or "taken." *Id.*, 69 A. at 629.

I. The tree clearing ordinance does not constitute a taking.

Defendant relies on *Horne v Dept of Agriculture*, 135 SCt 2419 (2015), to assert that by the Tree Ordinance, Canton has taken Defendant's property. In *Horne*, raisin farmers were required to set aside a percentage of their raisin crop and turn them over to the Agricultural Committee formed by the U.S.D.A. The Committee there actually required that title (*i.e.*, ownership) of the raisins be transferred to it, and then *the federal Government* would sell or otherwise dispose of the raisins as it pleased. 135 SCt at 2424. Contrary to that situation, however, Canton does not require that Defendant relinquish title to its trees to the Township. Rather, the Ordinance gives Defendant a choice. If Defendant seeks to remove the trees, it may do so, but must obtain a permit. In the context of the permit, Defendant can either replace trees on its own site or, if not feasible, it can plant trees on other property, or pay into the tree fund and the Township will replace trees at another location. 25% of the tree inventory is also exempt from this requirement.

The case before this Court is also different from *Horne*, as the Township has not taken and does not seek to take Defendant's trees for its own use. The Township did not prevent Defendant from selling the timber produced as a result of the unpermitted tree removal. In *Georgia Outdoor Network, Inc. v Marion County, Ga*, 652 FSupp2d 1355 (MD Ga 2009), a county regulation required "All trees, shrubs[,] plants, and/or other natural buffers around an Outdoor Recreation Camp shall be preserved for a minimum width of fifty (50) feet. However, brush cutting is allowed to reduce a fire hazard." *Id.* at 1363. In that case, there was no permit process to allow removal of *any* trees within the buffer zone, except brush that would create a fire hazard. Even so, the District Court there held that the regulation did not amount to a taking requiring compensation.

Defendant also claims that the ordinance here requires placement of "unwanted objects" similar to that ruled a taking in *Loretto v Teleprompter Manhattan CATV Corp.,* 458 US 419 (1982). In *Loretto*, the Court held that a municipal ordinance requiring placement of a cable box on the Defendant's property constituted a taking because it was an actual, permanent, physical invasion of the property. Defendant has not alleged facts to demonstrate that the Township has directly, physically invaded its property, though, a requirement for the application of *Loretto*. Moreover, the trees regulated by the Ordinance here could not have "intruded" onto the property; they were naturally occurring through no human agency whatever, and certainly none of any Township actor. The U.S. Second Circuit came to the same conclusion that there was no direct physical intrusion on property in *Southview Associates, Ltd v Bongartz*, 980 F2d 84, 95; 36 Env't. Rep. Cas. (BNA) 1024, 23 Envtl. L. Rep. 20132 (CA 2 1992). There, a developer was denied the right to remove trees by the Vermont Environmental Board in an area serving as a winter habitat for white-tailed deer. The developer sued the Board.

The Second Circuit rejected the argument that the refusal to allow the developer there to remove the trees was a physical taking under *Loretto*:

> First, Southview has not lost the right to possess the allegedly occupied land that forms part of the deeryard. Southview retains the right to exclude any persons from the land, perhaps by posting "No Trespassing" signs. Southview can even exclude the deer, perhaps with a fence, provided it does so under circumstances that do not require it to obtain an Act 250 permit—such as by the planting of an orchard. Second, Southview retains substantial power to control the use of the property. ... In addition, Southview's owners can, to the exclusion of others, walk, camp, cross-country ski, observe wildlife, even hunt deer on this land—irrespective of whether these activities cause the deer to abandon the deeryard. Third, because all of these uses, and many more, are available to any owner of the deeryard land, Southview's right to sell the land is by no means worthless. The Board's denial of Southview's one application for an Act 250 permit can hardly be said to have "empt[ied] ... of any value" Southview's right to dispose of the 44 acres of deeryard. See *Loretto*, 458 US at 436, 102 SCt at 3175.
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> *Put differently, no absolute, exclusive physical occupation exists*. 980 F2d at 94-95 (emphasis added).

Applying this rationale and the factors under *Loretto*, Defendant here has not lost the right to possess its property. It retains the right to exclude persons from the land. Indeed, Leigh Thurston, the Township's Landscape Architect and deputy Planner, and other Township officials were denied access to the property by Mr. Percy to analyze the extent of tree removal. It was only after some negotiation after Defendant retained counsel that Township personnel were provided access to the property more than four months after Ms. Thurston's first observation of tree removal on Defendant's property. Defendant also retains "substantial power" to control the use of the property. As Jeff Goulet, Township Planner, testified, "I'm saying how they maintain their property is up to them, whether or not they maintain the property without any trees on it or whether they maintain the property with portions of the trees on it or all of the trees on it. They decide how many trees they're going to remove and then we determine what the ordinance requires." Ex. 9, p. 25. Defendant can also alienate (lease, sell, etc.) the property in any manner it pleases. In the words of the Second Circuit, "no absolute, exclusive physical occupation exists."

Notably, the Second Circuit in *Southview* made its ruling even in the face of the Vermont regulation that required a permit to keep deer out of the property, unless it took other mitigation action, "such as planting an orchard." *Id.* at 94. In short, the holding in *Loretto* does not apply here, and the Ordinance does not constitute direct, physical possession amounting to a taking.

Government regulation often "curtails some potential for the use or economic exploitation of private property." *Andrus v Allard*, 444 US 51, 65 (1979). Therefore, "not every destruction or injury to property by government action has been held to be a taking in the constitutional sense." *Armstrong v United States*, 364 US 40, 48 (1960). The process for evaluating a regulation's constitutionality involves an examination of the "justice and fairness" of the governmental action. *Andrus*, 444 US at 65. The Supreme Court has provided several factors to consider to determine whether "justice and fairness" require an economic injury caused by public action to be

compensated by the government: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action." *Penn Central Transp Co v New York City*, 438 US 104 (1978); *Kaiser Aetna v United States*, 444 US 164, 175 (1979).

The economic impact of the regulation factor simply compares the value that has been taken from the property with the value that remains in the property. *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 497 (1987). As to the character of the government action, courts look at "whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good" to determine whether a taking has occurred. *Lingle v Chevron USA, Inc*, 544 US 528, 539 (2005). If the regulation serves a public interest and is ubiquitous, then a party challenging the regulation must show that the regulation's economic impact and its effect on investment-backed expectations is the equivalent of a physical invasion upon the property. *K & K Construction, Inc v Department of Environmental Quality*, 267 Mich App 523, 553 (2005).

Defendant's challenge under this test fails as a matter of law. First, zoning regulations are ubiquitous in nature and all property owners bear some burden and some benefit under these schemes. *Id*. at 527 n. 3. The purpose of the Township's Tree Ordinance is "to promote an increased quality of life through the regulation, maintenance and protection of trees, forests and other natural resources." § 5A.02. This is without question a public interest that is ubiquitous to all residents of the Township. The evidence here does not demonstrate an economic impact or effect on Defendant's investment-backed expectations because of the regulation. First, this regulation had been in effect before Defendant purchased this property, and no more restrictive changes have been made to the Ordinance since Defendant's original purchase/investment. Before purchasing the property, Defendant knew of the tree ordinance requirements, as

demonstrated by Ex. 6. When the lot split occurred in 2016, nearly two years before Defendant undertook any work here, Defendant was expressly reminded of the ordinance requirements *to submit a site plan as a pre-condition to any activities on the Property and to obtain a tree removal permit prior to the removal of any trees from the Property. Id.* Thus, Defendant's investment-backed expectations could not have changed because of this Ordinance.

II. The Fourth Amendment prohibition on unreasonable seizures does not apply.

Defendant argues that Canton has seized its property in violation of the Fourth Amendment. The Fourth Amendment applies to searches and seizures in the civil context only "to resolve the legality of these government actions without reference to other constitutional provisions." *US v James Daniel Good Real Property,* 510 US 43, 51 (1993). If the government's action goes beyond the traditional meaning of a search and seizure and other constitutional provisions apply, those provisions should be analyzed instead of the Fourth Amendment. *Id.* In *James Daniel,* the court found that since the government's alleged seizure of property was not to preserve evidence of wrongdoing, but instead to assert control over the property, the actions should be brought under the Due Process Clause of the Fifth and Fourteenth Amendments. *Id.*

Defendant relies upon *Severance v Patterson*, 566 F3d 490 (CA 5 2009). There, the Fifth Circuit ostensibly recognized a Fourth Amendment claim where state officials enforced an easement on the plaintiff's property, restricting her access and right to keep others out. Moreover, the Court there held that the plaintiff's taking claim under the Fifth Amendment was not ripe and affirmed dismissal of that claim, while certifying the question of unreasonable seizure to the Texas Supreme Court. *Id.* at 503-504. The *Severance* decision recognized that its approach had not been endorsed by the US Supreme Court decision in *US v James Daniel Good Real Property, supra*. It also has not been directly endorsed by a published decision of the Sixth Circuit Court of Appeals. The Sixth Circuit did cite *Severance* and *Presley v City of Charlottesville,* 464 F3d 480,

485 (CA 4 2006), in the unpublished case of *Brown v Metropolitan Government of Nashville*, No. 11–5339 (Jan. 9, 2012) 2012 WL 2861593, but without any specific analysis of those claims. They were not central to the issue in that case, in any event.

Importantly, however, the *Severance* rationale does not apply here because Canton Township has not asserted "control" over Defendant's property similar to an easement. It has not asserted even a right to entry on Defendant's property without its consent, much less limiting Defendant's right of access or right to keep others out. It simply does not apply here.

The Court in *Scott v Garrard County Fiscal Ct.*, 2012 WL 176485 (E.D. Ky. 2012) held the same reservation about Fourth Amendment claims brought where a takings claim is available. Referring to, *inter alia*, *Severance, supra*, the Court stated, "But while some courts have recognized Fourth Amendment claims as being separate and independent of takings claims[], this Court is not persuaded that this is the correct analysis in a situation such as Plaintiff's." 2012 WL 176485 at *7. The Court continued:

> To allow Plaintiff to pursue a Fourth Amendment claim for the seizure of Lanham Lane would eviscerate the ripeness requirement for takings claims under the Fifth Amendment. The Court is not convinced that Plaintiff can escape those requirements by asserting a claim that is nearly identical to her takings claim by simply labeling it a Fourth Amendment claim. Further, to establish a claim under the Fourth Amendment, Plaintiff must establish that the seizure of her property was unreasonable. See *Soldal v Cook Cnty., Ill.*, 506 US 56, 62 (1992). Because it is within Defendants' police power to open and establish roads, the Court is not persuaded that Plaintiff has averred facts upon which Defendants' actions could be deemed unreasonable. *Id.*

Most significant to the issue of whether the Fourth Amendment applies is the language of the Amendment itself. The Amendment protects "'persons, houses, papers, and effects". It "does not protect possessory interests in all kinds of property." *Soldal v Cook Cnty, Ill.*, 506 US 56, 62 (1992), citing *Oliver v US*, 466 US 170, 176–177 (1984). "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the

common law. *Hester v United States*, 265 US, at 59." (Emphasis added). *Oliver,* 466 US at 176.

The Court in *Golf Village North LLC v City of Powell*, 333 FSupp3d 769 (S.D. Ohio 2018) reiterated the "open fields" doctrine in a case involving land use. In denying a request for a preliminary injunction, the Court there relied on the "open fields" doctrine, holding that, "The Property at issue in this case is neither Plaintiffs' home, nor curtilage; it is presently undeveloped private property that Plaintiffs seek to develop for commercial use. It appears likely that the Property is an 'open field,' and therefore is entitled to no Fourth Amendment protection at all." *Golf Village*, 333 FSupp3d at 776-777. The Property here is similarly situated to that in *Golf Village*: it is neither a home, nor curtilage; it is undeveloped private property that Defendant seeks to develop for commercial use. It therefore is not entitled to protection of the Fourth Amendment.

III. The tree ordinance does not impose unconstitutional conditions.

"Government exactions as a condition of a land use permit must satisfy requirements that government's mitigation demand have an essential nexus and rough proportionality to the impacts of a proposed development." *Koontz v St. Johns River Water Management Dist.*, 570 US 595, 612 (2013); *Dolan v City of Tigard*, 512 US 374 (1994). "[T]he government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Koontz, supra,* at 606. Under this framework, Defendant argues, the mitigation demand must bear an essential nexus to a legitimate government interest and be "roughly proportional" to the impact the proposed use will have on that interest. This requires an "individualized assessment" of the actual impact of the proposed use. In this case, the legitimate governmental interest advanced by the tree removal ordinance is preservation of aesthetics and abating losses occasioned by tree removal. Aesthetics is among the governmental interests recognized by the courts as not only

legitimate, but significant. *HDV–Greektown, LLC v City of Detroit*, 568 F3d 609, 623 (CA 6 2009), citing *Metromedia, Inc v City of San Diego,* 453 US 490, 509–10 (1981); *Berman v Parker*, 348 US 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful").[2] As Leigh Thurston testified, "It's a goal to create a tree canopy on our major streets. We're only in the process of it because we're a young township, so we haven't completed it." Ex 10, p. 40. Mr. Goulet similarly testified that, "And we replace those trees elsewhere within the community to re-establish that canopy." Ex 9, p 48.

The Ordinance further advances "Protection of natural green open spaces, forests, woodlands, waterways." Ex 10, pp 50-51. Asked if there is a shortage of trees in Michigan, Ms. Thurston responded, "We've cut a lot of trees down. … There is a shortage in many areas," including in Canton. *Id.* Ms. Thurston further testified that, "Continuing to plant trees satisfies one of the goals of the Township to beautify the Township, to improve it socially, culturally, economically, and trees help do that." *Id.* p. 51. One can hardly blame a rural township for its desire not to be the next concrete jungle.

In this case, Ms. Thurston visited and saw the clear-cut property herself. With the assistance of an expert in arboriculture, they conducted an investigation and arrived at a number of regulated trees removed (which does not include brush or invasive species). The effect of removal of any individual tree here is inapposite, where the entire property became devoid of anything that could be called a "tree." Ms. Thurston did therefore conduct the individualized

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[2] Generally, the party challenging an ordinance has the significant burden of overcoming the presumption of constitutionality, and showing that the Ordinance is not rationally related to a legitimate governmental interest. *Dumont v Lyon*, 341 FSupp3d 706, 742 (ED Mich 2018), quoting *FCC v Beach*, 508 US 307, 313 (1993). "'[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.' *Id.* … '[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' *Id.*"

assessment that Defendant asserts was required.

Defendant relies upon *Mira Mar Dev Corp. v City of Coppell*, 421 S.W.3d 74 (Tex. App—Dallas, 2013). In that case, the City required a subdivision developer to pay what the Court called "tree retribution fees," in the amount of $34,500 before the City would approve the subdivision. The Court found the fees to be an exaction, and the burden then shifted to the City to establish the essential nexus/rough proportionality of the fees. *Id.*, 421 S.W.3d at 95. The Court held that the City's stated interests were legitimate and the fees bore an essential nexus to the substantial advancement of those interests. *Id.* The Court held, however, that the evidence proffered by the City in support of summary judgment of the projected impact caused by removal of the trees during the development was insufficient. *Id.* at 96. This case is distinguishable in that the Coppell ordinance required a permit to remove trees and a fee per tree of $100 per inch of trunk diameter. There is no provision, or at least not one that was discussed in the decision, giving the property owner any option to replace trees on site or elsewhere, or take any other type of action to mitigate the effects of the tree removal. The decision also does not mention any exemptions that would decrease the burden to the property owner, like the Canton Ordinance's exemption of 25% of the inventory of regulated trees. Canton's Ordinance differs in these significant respects.

This case also differs from *Mira Mar* in that both the Township Planner and deputy Planner have testified to the aesthetics of a tree canopy, and Ms. Thurston expressly referenced a problem of a shortage of trees in Canton. Logically, where a shortage exists, removal of more trees cannot improve that circumstance. The record evidence here also shows that Defendant was not developing the property in a manner in which the effects of tree removal could be mitigated in other ways. Defendant never submitted a tree inventory, and Mr. Percy conceded he never had one prepared before any trees were removed. Ex. 2, p 70.

In *New Jersey Shore Builders Ass'n v Township of Jackson*, 199 NJ 38; 970 A2d 992

(2009), the Court did not squarely consider the tree ordinance in that case under the unconstitutional conditions framework of *Dolan* and *Koontz*, but did consider a challenge that the ordinance was an improper method of raising revenue. Ruling as to that issue, the Court stated:

> Here, the payment of a fee is only one of three possible approaches to tree replacement. The first two involve replanting one-to-one or pursuant to a tree area replacement/reforestation scheme on the property from which the trees were removed. As the Township's witnesses recognized, replanting on the original site is the scheme of choice. To encourage such replanting, the ordinance makes it the least expensive option for the landowner. If that is not feasible, the tree replacement fee is triggered. According to the testimony of the Township Forester, the fee is calculated based on the cost of replacing a tree of similar size or a number of smaller trees. NJSBA has failed to produce any evidence to suggest that the fee exceeds the Township's cost for administration of the tree replacement program, including the replacement itself. In the absence of such evidence, there is no basis to conclude that the fee is a revenue raiser or that it unreasonably exceeds the cost of regulation. *Id.*, 199 NJ at 60-61 (emphasis added).

The observations of the New Jersey Supreme Court all apply to the case at bar. Like the New Jersey ordinance, payment of the fee under the Canton Ordinance is only one of three possible approaches to tree replacement, and replanting on site is the scheme of choice. Jeff Goulet testimony, Ex. 9, p. 13.

Here, there is also no showing that the fees are not proportional, a parallel consideration to the costs of regulation considered in the New Jersey case. In fact, the testimony of Jeff Goulet and Leigh Thurston establishes that the fees of $300 per regulated tree and $450 for landmark trees (for those required to be removed) are an average market cost, most recently updated in 2006, to replace trees.

Defendant claims that the fee is not roughly proportional in this case. But that figure is not a random figure; it is derived by the number of regulated trees actually removed from the property. Furthermore, there cannot be a better proportionality than a 1:1 replacement of trees removed. The fee of $450 is even less than the $900 it would cost to replace landmark trees on a 3:1 basis, as provided in the ordinance. Defendant has not at all addressed the reasonableness

or proportionality of the individual fees, concentrating solely on the total sum resulting from Defendant's removal of well over 1,000 regulated (including landmark) trees. As Mr. Goulet testified, "We do not prevent people from removing all of the trees on their property." Ex. 9 p 13.

IV. The ordinance does not implicate or violate the Excessive Fines Clause.

The Excessive Fines Clause of the Eighth Amendment bars forfeitures that are grossly disproportionate or excessive in relation to the offense committed. *United States v Bajakajian*, 524 US 321, 323 (1998) (prohibiting forfeitures that are "grossly disproportional to the gravity of a defendant's offense"); *Alexander v United States*, 509 US 544, 558-59 (1993). In *Timbs v Indiana*, ___US___, 139 SCt 682, 687 (2019), the Court held that the Excessive Fines Clause applies to the states through the Fourteenth Amendment. In so holding, the Court recognized that, "the protection against excessive fines guards against abuses of government's punitive or criminal-law-enforcement authority." *Id.*, 139 SCt at 686.

The Eighth Amendment proscriptionsagainst excessive fines is not implicated in this case. This case does not involve Canton's criminal or punitive ordinances; the Forest Preservation and Tree Clearing Ordinance is part of the Township's land use regulations, specifically the zoning ordinance. Although Defendant continually refers to the monies to be paid into the Township's tree fund as a "fine," this is a misnomer in order to persuade the Court that it is, indeed, a "fine" subject to the Eighth Amendment. However, the fine for a criminal violation of the Zoning Ordinance is $500.00. Canton Twp. Ord. § 1.7(c)("Except as otherwise provided by law or ordinance, a person convicted of a violation of this Code shall be punished by a fine not to exceed $500.00, imprisonment for a period of not more than 90 days, or both.")

As stated above, the Excessive Fines Clause applies to the government's penal authority. *Timbs, supra; Bajakajian, supra*. The tree ordinance here imposes the tree fund fee only if the property owner chooses not to replace trees on its own property or elsewhere, and even when

he/she has applied for a permit and there is no violation of the ordinance. § 5A.08. This is not a fine or even penal in nature; it is valid mitigation for costs that the Township would incur to undertake the replacement of removed trees. See, *e.g., Shoemaker v Howell*, 795 F3d 553 (CA 6 2015), validating a user fee for abatement of an ordinance violation.

Even if the Eighth Amendment applies to these fees, "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 US at 334. "Excessive means surpassing the usual, the proper, or a normal measure of proportion." *Id.* (quoting Webster, American Dictionary of the English Language when defines "excessive" as "beyond the common measure of proportion"). The burden of showing disproportionality fall squarely on the party challenging the ordinance. *United States v Jose*, 499 F3d 105, 108 (CA 1 2007); *United States v Ahmad*, 213 F3d 805, n. 1, 816 (CA 4 2000). Courts have found that if a fine is equal to the loss caused by the actions, then it is not excessive in violation of the Eighth Amendment. *US v Blackwell*, 459 F3d 739, 771 (CA 6 2006) (holding that $1,000,000 fine for insider trading was not excessive because it was equal to the loss.). In this case, Canton Township's fees (not fines) are clearly not excessive. The Ordinance lists the specific landmark/historic trees covered under the Ordinance. § 5A.06. The Ordinance does not prohibit tree removal, but merely requires a permit before doing so. Additionally, the Ordinance in no way requires payment to the Township for specific tree removals. Instead, consistent with the purpose of this Ordinance, it requires replacement of the specific tree(s) removed. § 5A.08(E). Since an equivalent replacement of the tree is without question proportionate to the harm caused by its removal, there is absolutely no way Defendant can show the fees are "grossly disproportionate" as required under the Eighth Amendment.

Nor are the fees "retributive and deterrent" under *Austin v United States*, 509 US 602,

610 (1993). The testimony of Jeff Goulet, who termed the tree fund a "disincentive" is not to prevent or deter a violation of the law. It is, as the New Jersey Supreme Court put it, "To encourage replanting," which is a much less expensive endeavor than paying into the tree fund. Furthermore, the tree fund payment does not depend on a violation of the Ordinance. It is part of the permit process, and only becomes relevant if the property owner chooses not to replant trees on site or somewhere else. Ord. § 5A.08.E. Thus, the excessive fines clause does not apply here.

CONCLUSION

Defendant has failed to show that the Canton Forest Preservation and Tree Clearing Ordinance is unconstitutional on its face or as applied to Defendant here. Thus, Plaintiff relies upon MCR 2.116(I)(2), which provides that, "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." As Defendant, as Counter-Plaintiff has raised all of these claims in its Amended Counter-Claim, Plaintiff is entitled to summary disposition as to those claims.

RELIEF REQUESTED

WHEREFORE, Plaintiff, CHARTER TOWNSHIP OF CANTON, respectfully requests that this Court deny Defendant's Motion for Partial Summary Disposition as to Defendant's Fourth and Fifth Amendment claims, and enter summary disposition in favor of Plaintiff under MCR 2.116(I)(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2020, I electronically filed the foregoing paper with the Clerk of the Court using the MIFile/TrueFiling system which will send notification of such filing to all counsel of record.

/s/ Anne McClorey McLaughlin