Supreme Court No. _____ Case #: 1043911
Court of Appeals No. 86814-4

SUPREME COURT
OF THE STATE OF WASHINGTON

EDWARD C. GOKEY,

PETITIONER (APPELLANT),

v.

CITY OF BLACK DIAMOND,

RESPONDENT.

EDWARD GOKEY'S PETITION FOR REVIEW

(RAP 13.4)

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A. IDENTITY OF PETITIONER

Edward C. Gokey, *pro se* ("Gokey"), respectfully asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part B of this Petition.

B. COURT OF APPEALS DECISION

Gokey respectfully asks the Supreme Court to review in full the decision, by unpublished Opinion, of the Court of Appeals, Division I, filed on June 23, 2025. A copy of the decision is in the Appendix at pages A-1 through A-13 (Bates Pages (BP) 28-40).

C. ISSUES PRESENTED FOR REVIEW

Gokey asks the Supreme Court to decide the following issues if review is granted:

1. Whether because the substantive law question of whether attorney fees and costs are awarded pursuant to RCW 4.84.370(1) in a Code Enforcement appeal litigated under the Land Use Petition Act, Chapter 36.70C RCW ("LUPA"), has been decided affirmatively by Division I in one published Opinion and negatively in now three Division I unpublished Opinions and one

Division III unpublished Opinion, the Court of Appeals' summary denial of Gokey's express request for Supreme Court review of this important issue pursuant to RCW 2.06.030(e) (*see also In re Arnold*, 190 Wn.2d 136, 147-54, 410 P.3d 1133 (2018)) was an abuse of discretion, improper, and erroneous as a matter of law? (*See* A-13 (BP 40) n.7.)[1]

2. Whether Gokey is entitled to have this Court review his claim that the City of Black Diamond's ("City") Tree Ordinance is invalid and unconstitutional either facially or as applied because the City's Hearing Examiner has no authority or power to rule on the validity and constitutionality of a City Ordinance and Gokey is legally excused from being required to argue such issue before the Hearing Examiner as there is no administrative remedy and

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[1] Whereas Gokey asserts that the three (now four) unpublished opinions are the correct interpretation of RCW 4.84.370(1) and properly deny an award of attorney fees and costs in a Code Enforcement LUPA appeal, the City sides with the single published opinion of the Court of Appeals, Division I, as the basis for awarding it its attorney fees and costs in this LUPA appeal. This question will continue to raise its chilling head and haunt the public, practitioners, litigants, and jurists until the Supreme Court finally and unequivocally settles this issue once and for all time.

any arguments would be futile?

3. Whether as a Penal Statute, any and all ambiguities in the City's Tree Ordinance and issuance of monetary fines and other sanctions must be weighed and resolved in favor of Gokey?

4. Whether the absence of specific and express definitions of essential words in the Tree Ordinance's Categorical Exemption is unreasonable, a violation of due process stemming from arbitrary and *ad hoc* enforcement, and voids the Ordinance for vagueness?

5. Whether under the Hearing Examiner Rules, Gokey's evidence presented in his administrative appeal was substantial to support his claim of Categorical Exemption and the City Hearing Examiner's decision to deny his appeal and reconsideration were clearly erroneous and errors of law?

6. Whether the U.S. Supreme Court's Opinion in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024), must be duly and fairly considered and applied to judicial deference in RCW 36.70C.130(1)(b)?

D. STATEMENT OF THE CASE

Gokey and his wife, Diane, live in Ellensburg, Washington (Kittitas County). Gokey has owned the property at 25705, 25706, 25710, and 25714 Steiert Street, Black Diamond, Washington (King County; CP, at 238, at ¶ 2)[2] for the past 47 years, including the residences and other buildings located thereon (CP, at 206). Prior to any development on his lots, Gokey personally planted some 52 fir trees along the majority of the perimeter lines of his four lots (CP, at 206; CP, at 208/illustration). Because the fir trees have shallow roots in sandstone, high Cascadia winds on the upper portion of his property caused a total of 21 of his hazardous trees to snap, sever, and blow down; the most recent incident occurring the winter of 2022-23 when one of his trees hit the eastern portion of his mobile residence on Lot 4 (CP, at 206; CP, at 208).[3] Gokey's tenant in the damaged mobile expressed his

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[2] CP, at XX refers to the particular page number of the Clerk's Papers filed with this Court by the King County Superior Court Clerk's Office.

[3] High winds coupled with shallow roots in the sandstone soil (continued...)

concern to Gokey as to other trees that the tenant considered hazardous and posed an imminent threat to life and property (CP, at 206).[4] Knowing the history of his perimeter trees being snapped, severed, and blown down (CP, at 242 - CP, at 243), and in light of the most recent property damage and well-founded concerns expressed by his tenant and next door neighbor (CP, at 206), promptly when the winter weather permitted access, Gokey proceeded to execute the necessary removal of only those perimeter trees he duly and reasonably considered hazardous and an imminent threat to persons and/or property (CP, at 206; CP, at 208).

On March 16, 2023, and during the process of cutting several of his trees for removal from his property and on an anonymous complaint to the City of Black Diamond, City Code Enforcement

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[3](...continued)
lead to his trees being blown down – it's not a matter of 'if' – it's a matter of 'when;' and as the property owner, it's Gokey's responsibility to ensure any imminent threat to persons or property is necessarily and promptly remedied.

[4] Following this most recent occurrence, a neighbor who owns the property adjoining Gokey's Lots 3 and 4 also expressed his concern to Gokey as to additional trees along the property line that posed an imminent threat to his property (CP, at 206).

officials ordered Gokey to cease cutting his trees and issued him a Stop Work Order (CP, at 206 - CP, at 207; CP, at 133 - CP, at 135). The City posted its Stop Work Order only on, and expressly referenced alleged work occurring only on, 25705 Steiert Street (Lot 1) (CP, at 133), but on which Gokey was not cutting any of his trees.[5] The City of Black Diamond ultimately assessed a total monetary penalty against Gokey (CP, at 117) in the amount of $10,000 pursuant to BDMC § 19.30.100(D) (CP, at 198), and an additional $500 monetary penalty pursuant to BDMC § 8.02. 190(A) (CP, at 175).

Although the City's Assistant Planner Ben Persyn's affirmed to Gokey that his tree cutting "would be exempt" (Court of Appeals' Brief of Respondent, at 7),[6] at several subsequent times

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[5] Verbatim Report of Proceedings dated November 16, 2023, re Hearing Examiner Hearing in COD23-0006 (Transcript), CP, at page 57 line 14 *through and including* CP, at 58 line 12. Note also that each of Gokey's four lots has individual street address signs clearly posted thereon, and ignored by City officials.

[6] As exempt under the City's Tree Ordinance, Gokey was under no duty to explain his actions to staff or anyone for that matter; and he was free to continue the removal of those trees he in fact (continued...)

the City nevertheless advised Gokey that he could apply for a permit to cut his trees; however, that would necessarily require the payment of fees and employment of an arborist (CP, at 245; CP, at 244; CP, at 246 - CP, at 250). However, upon inspection of the application forms, Gokey read and clearly understood that the recommended permits applied to the development of property (*see* Appendix B); and as his were existing residential properties that were not undergoing any new construction activities, Gokey was definitely not engaged in any manner of development (CP, at 242-250 (Motion for Reconsideration and Application Forms); Transcript, CP, at 50 line 16 *through and including* CP, at 52 line 23).

At the hearing, Ms Davis admitted to telling Gokey about the requirement for tree replanting and any alternative thereto; such requirements of NOV were thus in the knowledge of both the City and Gokey when he filed his appeal:

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[6](...continued)
considered posed an imminent threat to persons or property. This is the crux of Gokey's actions taken on his private property with his trees and with the LUPA appeal – "exempt" means **exempt**.

> And when Mr. Gokey came in to talk about submitting the exemption, I, um, asked if he planned to remove any more trees. And he told me he did not. And so, you know, I still said, well, you -- in order to close this violation case out, you still need to submit the tree -- Level I tree removal permit and pay the fines and penalties and -- or do the replanting at -- at the very least. Um, and that's when he filed the appeal that brought us here today.

Closing by Ms Davis (Transcript, CP, at 102, lines 12-19) (*see* BP 47 - Level 1 Tree Permit).[7] Gokey appealed the City's Notice of Violation and assessment of monetary penalties (CP, at 143). At the hearing on Gokey's appeal, the Hearing Examiner orally stated his conclusions as to two critically important and outcome determinative issues relevant to Gokey's appeal; namely:

1. Regarding Gokey's well-founded and supported assertions (Transcript, CP, at 54 lines 6-15; CP, at 206 - CP, at 208) that the trees he cut were hazardous and necessary to remedy an imminent threat to persons or property and thus exempt from all

[7] There is no analysis conducted by the City to determine the appropriate number of trees and/or monetary penalty to assess based on the circumstances, the City's Tree Ordinance mandates a set number of replacement trees and a fixed monetary penalty for each tree removed.

permit requirements (BDMC § 19.30.050(A); CP, at 255), the Hearing Examiner erroneously stated at Transcript, CP, at 106 lines 13-24:

> We then come to exemptions, because an exemption would apply. Um, an exemption would -- would avoid this altogether. Um, but the key one is an exemption for this imminent threat. And the problem with that claim is that the notion of imminent threat is not a, uh, what's referred to as subjective standard, but it's an objective standard. It's not -- in other words, it's not what -- what that person believes, but rather what the reasonable -- a reasonable person would believe under the circumstances, as presented objectively, independently. And an objective distance view of this is that this is not imminent.[8]

2. Regarding the undefined yet critically-essential term "imminent", the Hearing Examiner erroneously stated at Transcript, CP, at 106 lines 23-25 - CP, at 107 lines 1-6:

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[8] A purely objective standard is what was clearly erroneously applied by the Hearing Examiner, notwithstanding his also-stated contradictory findings that "I, uh -- it's one of these where, as I go along, I can just see this slow trainwreck coming where, uh, I know people are well intended. Um, but yet, uh, the outcome of this type of hearing is, uh, unfortunate. I know Mr. Gokey was well intended, was well-meaning, but I cannot find, uh, that the notices of violation were not well made." Transcript, CP, at 101 lines 12-18.

> This is, um, eventual, this is likely at some point, these trees are, uh, like most trees at some point, going to reach a point in which they become a -- a problem. But that's not what this ordinance imposes. It requires imminent, which is immediate. Um, and we have, in a situation where this was not immediate, I cannot make that finding. Any objective analysis, um, does not evidence an immediate danger.

And as for the assessment of the maximum monetary penalties of $10,000 (for the cutting of 10 significant trees at $1,000 each) and $500 (for the violation of the Stop Work Order), the City's Community Development Director, Mona Davis, erroneously testified under oath at Transcript, CP, at 101 lines 6-17:

> All of the trees removed were over 16 inches in diameter, therefore, requiring six trees be replaced for each tree. In addition, 19.30.100 (D) states -- and again, I don't have any discretion over this. Monetary penalties shall be subject -- any person found to have removed a significant tree in violation of our tree ordinance shall be subject to monetary penalty in the amount of $1,000 for each such -- for -- yes, each such violation. And so it has been the City's position that each tree removed in violation counts as a separate violation. So 10 trees would, that would count as 10 separate violations at a penalty of $1,000.

Subsequent to close of the hearing the Hearing Examiner issued his Findings of Fact, Conclusions of Law and Decision

Denying [Gokey's] Appeal (Decision, CP, at 229 - CP, at 241), and promptly subsequent to Gokey's timely Motion for Reconsideration (CP, at 242 - CP, at 263) the Hearing Examiner issued his Order Denying [Gokey's] Motion for Reconsideration (CP, at 264). Gokey thereupon on October 23, 2023, timely filed with the Court and delivered to the City of Black Diamond his Land Use Petition for judicial review under and pursuant to Chapter 36.70C RCW (Land Use Petition Act, LUPA).[9]

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Gokey respectfully asks the Supreme Court to grant his Petition for Review for the reasons that: (1) the unpublished decision of the Court of Appeals with respect to the award of attorney fees and costs pursuant to RCW 4.84.370(1) is in conflict with a published decision of the same Court of Appeals; (2) the decision of the Court of Appeals is in conflict with a decision of the Su-

[9] And on October 23, 2023, the City sent Gokey an invoice for the additional amount of $9,355.01 as costs requested under BDMC § 8.02.190(B) (CP, at 175).

preme Court; (3) a significant question of law under the Constitution of the State of Washington and of the United States is involved; and (4) Gokey's Petition involves an issue of substantial public interest that should be determined by the Supreme Court.

1. The Court of Appeals' Summary Denial of Supreme Court Review Pursuant to RCW 2.06. 030(e) Conflicts With Both Statute and Supreme Court Decision Thus Sidestepping an Issue of Substantial Public Interest

The Court of Appeals summarily denied Gokey's specific and express Request for Supreme Court Review of Gokey's appeal and the important and recurring substantive question of law regarding the award of attorney fees and costs in Code Enforcement appeals under LUPA pursuant to RCW 4.84.370(1),[10] and in so doing left an issue of substantial public, practitioner, litigant, and jurist interest and importance hanging over their heads unre-

[10] "We also deny Gokey's request to certify this matter to the Washington Supreme Court as provided for in RCW 2.06.030(e) (providing authority for this court to certify matters to the Washington State Supreme Court based on a 'direct conflict among prevailing decisions of panels of the court or between decisions of the supreme court')." Appendix A, at A-13 (BP 40) n.7.

solved[11] in light of one published opinion of this same Court of Appeals in favor of such award versus three (now four) unpublished opinion of a contrary (negative) view (three decisions from this same Court of Appeals, and one decision from Division III of the Court of Appeals). Such denial is contrary to statute and Supreme Court decision:[12]

> Thus, under the statute creating the Court of Appeals, conflicts are resolved not by stare decisis within that court, but by review in our court.

In re Arnold, 190 Wn.2d 136, 149, 410 P.3d 1133 (2018) (citing RCW 2.06.030(e); RAP 4.2(a)(3); and RAP 13.4(b)(2), at pp. 147-54).

The Court of Appeals has clearly shown its inability, or lack

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[11] Leaving this fundamental issue unresolved has a chilling effect on the public facing a LUPA Code Enforcement action in the due consideration of whether or not to bring an appeal of unfavorable decisions to the Court of Appeals. The added cost of potential attorney fees and expenses poses an unfair burden and risk on litigants who have meritorious grounds for seeking appellate court review.

[12] There may be some options available for reconciling/overruling issues of law decided differently by two or more of the Court of Appeals' Division and/or via unpublished opinions. The option to resolve such conflicts once and for all is transfer to this Court.

of will, to overrule one of its published opinions, but rather demonstrates its lesser will to disavow such ruling via non-precedential, unpublished opinions from the same Division and another. This Court, and only this Court, must unequivocally and precedentially decide this issue and remove this patently unnecessary uncertainty in substantive law hanging over everyone's head and resolve this matter of substantial public interest and importance once and for all time.

2. Gokey's Challenge to the City's Tree Ordinance Presents a Significant Constitutional Issue That Must be Fully Considered and Resolved by the Supreme Court

Underlying Gokey's LUPA appeal is the fundamental fact that this is a City Code Enforcement action against Gokey where, because of constitutional infirmities, he challenges Chapter 19.30 BDMC as unconstitutional, either as applied or facially, and seeks to invalidate it and render it unenforceable (U.S. Const., amends. IV and V, and Wash. Const., art. I, sections 3 and 16). Because "[t]he Hearing Examiner does not have authority to rule on the validity of ordinances" (*see* Black Diamond Hearing Examiner,

Rules of Practice and Procedure § 2.03 (8/11/2014)), Gokey was under no requirement or legal obligation to raise this constitutional/invalidity issue at the Hearing on his appeal before the Hearing Examiner in order to arguably exhaust in futility any meaningful remedy that does not exist.[13] *Nolte v. City of Olympia*, 96 Wn. App. 944, 957, 982 P.2d 659 (1999) (where the Hearing Examiner can give no meaningful remedy, any attempt to argue such issue in that forum is futile and the doctrine of exhaustion of administrative remedies is excused). RCW 34.05.534(3).

This Court, and only the actual judicial branch, has the sole power and authority to determine whether Chapter 19.30 BDMC, or any parts thereof, are unconstitutional either facially or as applied to Gokey in this case. *See* RCW 36.70C.130(1)(f). The Court of Appeals committed a fundamental error of law in holding that Gokey was required to exhaust an administrative remedy that

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[13] Neither the City nor the Hearing Examiner has the power and authority to determine the constitutionality of any enactment. *See Exendine v. City of Sammamish*, 127 Wn. App. 574, 586-87, 113 P.3d 494 (2005) (the City's legislative body cannot delegate a power that it does not have).

did not exist, and committed further error by refusing to consider Gokey's challenge to the City's Tree Ordinance on constitutional grounds.

That the City's Tree Ordinance is invalid on constitutional grounds is obvious in light of the exhaustive opinions rendered by Michigan State and federal courts considering a very similar Tree Ordinance enacted by the Charter Township of Canton. *See Charter Township of Canton v. 44650, Inc.*, ECF No. 83-7, Case No. 18-014569-CE (Wayne Co. Cir. Ct. (Mich.), July 17, 2020);[14]

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[14] For use of unpublished opinions from other jurisdictions, *see* GR 14.1(b). In this instance, *see* Mich. Ct. R. 7.215(C)(1) that provides "[i]f a party cites an unpublished opinion, the party must explain the reason for citing it and how it is relevant to the issues presented . . . [and] must provide a copy of the opinion to the court and to opposing parties with the brief . . . in which the citation appears." (A full copy of this unpublished decision is attached hereto in Appendix C.) In the case of Gokey's appeal and challenge to the City's Tree Ordinance, the in-depth analysis provided by Judge Hubbard is worthy of review and consideration by this Court, and should be found to be a helpful aid as a persuasive and particularly applicable judicial application of well-established constitutional principles to the overreach of local government, under the guise of bestowing a public benefit without any consideration whatsoever as to cost-benefit, directly and adversely affecting private property rights and interests.

Percy v. Charter Township of Canton, No. 19-cv-11727, www.govinfo. gov, at *10 fn.3[15] (E.D. Mich. March 11, 2022; unpublished);[16] *F.P. Development, LLC v. Charter Township of Canton*, 16 F.4th 198 (6th Cir. 2021) (held that Canton's Tree Ordinance's requirement of permits and the payment of fees for removal of certain trees was an unlawful taking in violation of the Fifth Amendment); *F.P. Development, LLC v. Charter Township of Canton,* 456 F.Supp.3d 879 (E.D. Mich. 2020) (holding Canton's Tree Ordinance failed the *Nollan/Dolan*[17] rough proportionality test – as also here the City's Tree Ordinance fails

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[15] "In a July 17, 2020 decision, the Honorable Susan Hubbard of the Wayne County Circuit Court concluded that the Township's application of the tree ordinance as to 44650, Inc. was unconstitutional. (ECF No. 83-7.)" *Id*., at *10 fn.3 (*see* Appendix B of Gokey's Reply Brief of Appellant).

[16] Unpublished federal court opinions may be cited pursuant to Federal Rules of Appellate Procedure (FRAP), Rule 32.1(a). Copy available herein as Hyperlink in the Table of Authorities, and is attached as Appendix B of Gokey's Reply Brief of Appellant (per GR 14.1 and FRAP 32.1(b)).

[17] *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

this test as there is absolutely no analysis of cost vs. impact and the setting of mandatory replanting requirements).

Gokey's challenge to the City's Tree Ordinance when unheard by clear error of the Court of Appeals. Gokey was excused from the exhaustion doctrine in light of the fact that the Hearing Examiner was without authority and powerless to give any meaningful remedy. Had the Court of Appeals considered Gokey's challenge in light of the comparable and very persuasive Michigan court opinions, the Court would have found and concluded that the City's Tree Ordinance suffered the same constitutional infirmaties as did the Canton Tree Ordinance and is invalid and unenforceable against Gokey.

The Supreme Court should grant Gokey's Petition and review his well-founded constitutional challenge that renders the City's Tree Ordinance a nullity.

3. The Court of Appeals Ignored the Fact that Because the City's Tree Ordinance is a Penal Statute, the Absence of Clear and Unambiguous Essential Definitions in the Categorical Exemption Provision and the City's Strict Enforcement of Fixed Monetary Penalties Mean That the Challenges Raising Such Issues Must be Considered and Resolved Against the City and Most Favorably to Gokey

That the City's Tree Ordinance is a penal statute is beyond question, as both civil and criminal penalties may be imposed against an individual. *See* BDMC § 19.30.100(D) and § 8.02.190(A) (monetary penalties); BDMC § 19.30.100(A) (CP, at 197) and § 8.02.030 (CP, at 164) (misdemeanor penalties re Stop Work Order).[18]

> A penal statute must be literally and strictly construed in favor of the accused. . . . The statute must

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[18] "Since a violation of the ordinance is made a misdemeanor and subjects the offender to a fine, Ordinance 48338 is, of course, penal in nature. . . . The other rule is that, as in criminal cases, the burden was on the City to prove that the defendant violated the ordinance. . . . Construing the ordinance strictly against the City, as we must, we cannot agree with the interpretation placed upon it by the City." *City of St. Louis v. Brune Management Co., Inc.*, 391 S.W.2d 943, 946 (Mo. App. 1965) (citations omitted). Washington law is *in accord*; *see*, *e.g.*, *State v. White*, 47 Wn. App. 370, 372-73, 735 P.2d 684 (1987) (citations omitted).

give a definite warning of the prohibited conduct.

State v. Hovrud, 60 Wn. App. 573, 575, 805 P.2d 250 (1991) (citations omitted).

The absence of any definition of essential words and phrases in the Categorical Exemption of the City's Tree Ordinance creates ambiguity and uncertain risks to the public and exposes them to unreasonable, arbitrary, and *ad hoc* decision-making and enforcement by City officials – such as what has happened to Gokey.[19]

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[19] Contrary to the Court of Appeals' findings and conclusions, Gokey presented more than sufficient, competent, and persuasive evidence to make his case and support his reasonable belief that his trees that were removed posed an imminent risk of harm to persons or property, and that his actions were justified and categorically exempt from any and all permit or approval requirements under the City's Tree Ordinance. Gokey's 40 plus years of property and tree ownership made him acutely aware of the hazards posed by weather and soil conditions as evidence by the recent damage to his mobile home. Neighbor and tenant statements recounted by Gokey at the hearing presented competent and persuasive evidence of the imminent threat and danger posed to persons and property; as hearsay is admissible and competent in the hearing before the City's Hearing Examiner. (*See* Hearing Examiner, *Rules of Practice and Procedure* § 2.14(a)). Moreover, Gokey qualifies as an expert with his special knowledge and

(continued...)

The City's Tree Ordinance fails to provide any express definition of the following essential words and phrases: "land alteration"; "emergency removal"; "imminent"; "hazardous"; and "subject to". These words and phrases are absolutely essential in order to provide clarity to ambiguity and provide fair notice to the public the coverage of the Categorical Exemption and other provisions of the Tree Ordinance; else the Ordinance be declared void for vagueness. Due process demands nothing less than clear and express definitions of essential terms of a penal statute; e.g., imminent does not mean immediate; hazardous does not mean diseased, broken, or falling down; and subject to does not mean mandatory – all of which the Hearing Examiner and below courts

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[19](...continued)
experience, and no arborist is necessary to present the evidence Gokey did so competently. Gokey more than made out his case and the Court of Appeals erred as a matter of fact and law concluding otherwise. The two-part test posed by Gokey should be adopted and applied by the Court to determine whether the removal of his trees was Categorically Exempt; *to wit*: whether Gokey's subjective belief that his trees posed an imminent threat of harm to persons or property was objectively reasonable under all the circumstances.

misconstrued and misapplied resulting in erroneous decisions.

> A regulation "penal in character" should be unambiguous. . . . ([it] "should be so clearly expressed that those who may be subject thereto should not have to guess at its meaning"); . . . ("a regulation whose violation is a criminal act is tested by a higher standard of definiteness than a noncriminal regulation"). Definiteness will assist not only the person subject to a regulation, but also the officials charged with its enforcement.

Commonwealth v. Hourican, 85 Mass. App. Ct. 408, 10 N.E.3d 646, 652 (2014) (citations omitted).[20]

It is a matter of substantial public interest that this Court review the City's Tree Ordinance and declare it vague, unenforce-

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[20] Absence of clear definitions in a penal statute puts the public at risk of being arbitrarily and unreasonably subject to enforcement in an *ad hoc* basis in a manner that constitutes an abuse of discretion and is unconstitutional. *Co-Pilot Enterprises, Inc. v. Suffolk County Department of Health*, 239 N.Y.S.2d 248, 251-52, 38 Misc.2d 894, 897 (N.Y.Sup.Ct. 1963) (even regulations intended to bestow a public benefit and protect the general welfare can, if they go too far, constitute an unreasonable restriction on the use of, and the taking of, private property without just compensation and renders the regulation invalid, unenforceable, and unconstitutional); *Harnett v. Board of Zoning, Subdivision and Building Appeals*, 350 F. Supp. 1159, 1161 (D.V.I. 1972) (*ad hoc* rulemaking is arbitrary and violates due process); 1992 AGO No. 17 (discretion must be applied reasonably).

able, and unconstitutional. The burden is on the City to enact ordinances that are clear and afford all fair notice of what is and is not acceptable acts subject to criminal and civil enforcement.

4. Whether the U.S. Supreme Court's Decision in *Loper Bright* Applies to Negate the Judicial Deference Standard of Review in RCW 36.70C.130 (1)(b) Presents an Issue of Substantial Public Interest Which the Court of Appeals Sidestepped

The U.S. Supreme Court's recent opinion in *Loper Bright* changed the manner in which constitutional courts have the duty to properly and finally determine the law, and not defer to what administrative agencies think the applicable law means.

This monumental decision overruled the long-standing judicial policy of deference to administrative agency interpretation of applicable law. LUPA carries forth this policy of judicial deference in RCW 36.70C.130(1)(b). The *Loper Bright* decision makes clear that it is the sole province of the judiciary to determine the law and to itself adjudge the correctness of how legislative enactments are to be construed and applied to specific fact circumstances.

Gokey's case presents a chilling example of what happens when a Hearing Examiner applies what he thinks the law means and have the reviewing courts defer to such clearly erroneous interpretations. It is in the substantial interest of the public to have this Court determine the effect of *Loper Bright* in application of the Washington Administrative Procedure Act (Chapter 34.05 RCW) and LUPA.

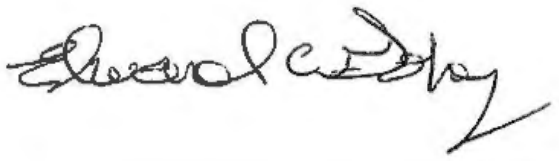
F. CONCLUSION

Petitioner Gokey respectfully asks this Court to: (1) grant his Petition for Review; (2) as a LUPA appeal subject to *de novo* review by this Court, to reverse, vacate, and set aside the Hearing Examiner's Findings of Fact, Conclusions of Law and Decision Denying [Gokey's] Appeal and Order Denying [Gokey's] Motion For Reconsideration, and all monetary penalties and costs assessed against him; (3) determine and declare that Chapter 19.30 BDMC is unconstitutional, invalid, and unenforceable; (4) determine the applicability of *Loper Bright* on RCW 36.70C.130(1)(b); and (5) determine conclusively that attorney fees and costs are not

awarded pursuant to RCW 4.84.370(1) in the LUPA appeal of a Code Enforcement action.

DATED this 16th day of July, 2025.

Respectfully submitted,



EDWARD C. GOKEY
Petitioner *pro se*

Gokey certifies that this Petition for Review has 4,998 words (WordPerfect X3) and complies with RAP 18.17(c)(10).

CERTIFICATE OF SERVICE

Edward C. Gokey, Petitioner *pro se*, affirms that this Petition for Review (RAP 13.4) was e-filed with the Court of Appeals, Division I, on July 16, 2025, and promptly e-served on Respondent City Attorney, David A. Linehan, on July 16, 2025.

DATED this 16th day of July, 2025.

EDWARD C. GOKEY
Petitioner *pro se*

APPENDIX

APPENDIX A

Court of Appeals Unpublished Opinion (Pages 1 - 13)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EDWARD C. GOKEY,

Appellant,

v.

CITY OF BLACK DIAMOND,

Respondent.

No. 86814-4-I

DIVISION ONE

UNPUBLISHED OPINION

BIRK, J. — Edward Gokey appeals from a superior court order denying his appeal under the Land Use Petition Act (LUPA), ch. 36.70C RCW, which challenged a decision affirming penalties imposed after Gokey felled "significant trees"[1] without a permit and continued to do so in violation of a stop work order. Because Gokey fails to establish grounds for relief under LUPA, we affirm.

I

According to undisputed facts established by the Certified Board Record, on March 16, 2023, two City of Black Diamond (City) officials, an inspector/code compliance officer and an assistant planner, went to Edward Gokey's Black Diamond property in response to a complaint and observed that seven trees had been cut down without a permit, as required by local ordinance. See Black Diamond Municipal Code (BDMC) 19.30.040(A). The city officials informed Gokey, who was present, that he needed a permit to remove trees and directed him to

[1] See Black Diamond Municipal Code (BDMC), § 19.30.030.

cease the tree removal work. Following a heated exchange with Gokey, the inspector summoned the police. Gokey told the responding police officer that he " 'd[id]n't have a problem with getting a permit' " or stopping the work until he secured a permit, and he was in the "process" of applying. The officials took photographs to document the trees that had been cut down, posted a red stop work order on a garage near the area where the tree removals had occurred, and instructed Gokey as to the order.[2]

Within an hour after its officials left Gokey's property, the City received a telephone call indicating that "chainsaws were running again." On returning to site, the assistant planner observed that at least three additional trees had been cut down. In his interactions with city employees on the date of the incident and in the days that followed, Gokey provided "conflicting information" about the number and location of trees removed and did not assert that he was removing trees on an emergency basis to address an imminent danger.

On March 20, 2023, the City issued a notice of violation, alleging that Gokey removed a total of ten "significant trees" without a permit, in violation of the permitting requirements of chapter 19.30 BDMC ("Tree Preservation Code"), and violated a stop work order. The City assessed penalties of $10,500 ($1,000 per unlawfully removed tree and $500 for violation of the stop work order). See BDMC

[2] Gokey's property consists of four separate, adjoining parcels with common landscaping, and no distinguishing markers to identify the property lines. Each parcel has a residence and its own street address. The stop work order referenced, and was posted on, the parcel associated with a street address of 25705 Steiert Street, although the felled trees were located on parcels associated with 25706 and 25714 Steiert Street.

8.02.190(A); BDMC 19.30.100(D). The City also required corrective actions of planting a pre-set number of replacement trees for each tree removed, or alternatively, payment into a tree removal mitigation fund, in accordance with City code provisions. See BDMC 19.30.070, .100. When the assistant planner returned to Gokey's property to serve the violation notice, the area had been cleared and graded, removing all evidence of the trees and their condition at the time of removal.

Gokey submitted a written request for a hearing to contest the violation. Gokey also sent an e-mail to the City with an attached permit exemption application. [CP 151] The City's Community Development Director informed Gokey that, although granting an exemption was no longer an option because the trees had already been removed, he could submit an after-the-fact permit and provided instructions for doing so. Gokey did not submit a permit application.

Ten days before the hearing, Gokey submitted a written statement to the hearing examiner, indicating, for the first time, that because the trees were "dangerous and undermined property values" the removal was exempt from permitting requirements under BDMC 19.30.050(A), which applies to the "[e]mergency removal of any hazardous significant trees necessary to remedy an imminent threat to persons or property."

The hearing examiner visited the site, at Gokey's request, convened a hearing, and heard witness testimony on September 18, 2023. During his testimony, Gokey used a hand-drawn map to identify the location of the ten trees

he felled in March 2023 along the southern boundary of his property and other trees on the perimeter of his property that he claimed had been blown down by windstorms in previous years. Gokey admitted that he removed significant trees without a permit, but asserted that no permit was necessary because, among other reasons, the removal was necessary, emergent, and exempt from permitting requirements. Gokey denied violating the stop work order based on a discrepancy between the street address listed on the order and the addresses associated with the parcels where the felled trees were located.

After considering the testimony, documentary evidence, and conditions observed on Gokey's property, the hearing examiner issued a 12-page decision, upholding the City's notice of violation and penalties. The hearing examiner determined that all trees were Douglas Fir and "significant" as defined by the code. And, based on a finding that Gokey presented "[n]o evidence" that the trees "pos[ed] an immediate threat to life or property," the hearing officer concluded that Gokey had not "met his burden of proving that the felled trees were an imminent threat" and his "belief" that the trees had "potential to [someday] cause harm [was] not sufficient to establish their imminent threat." The hearing examiner denied Gokey's subsequent motion for reconsideration.

Gokey filed a LUPA petition in superior court. Gokey challenged the hearing examiner's decision on four grounds under LUPA. See RCW 36.70C.130(1)(b), (c), (d), (f). The superior court denied the petition following a hearing.

Gokey appeals.

II

LUPA provides the exclusive means, with limited exceptions, for judicial review of local land use decisions.[3] Cave Props. v. City of Bainbridge Island, 199 Wn. App. 651, 656, 401 P.3d 327 (2017). On review of a superior court's decision under LUPA, we stand in the same position as the superior court and review the same record that was before the hearing examiner. Miller v. City of Sammamish, 9 Wn. App. 2d 861, 870, 447 P.3d 593 (2019); RCW 36.70C.120(1). On appeal, the party who filed the LUPA petition bears the burden to establish that the land use decision was erroneous. Fuller Style, Inc. v. City of Seattle, 11 Wn. App. 2d 501, 507, 454 P.3d 883 (2019). We view the facts and inferences in a light most favorable to the party that prevailed below. Fams. of Manito v. City of Spokane, 172 Wn. App. 727, 739-40, 291 P.3d 930 (2013).

Gokey's arguments focus on four grounds under RCW 36.70C.130(1), which afford relief if the petitioner demonstrates:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> . . .

[3] Under LUPA, a "Land use decision" includes "a final determination by a local jurisdiction's body or officer with the highest level of authority to make the determination . . . on . . . [t]he enforcement by a local jurisdiction of ordinances regulating the improvement, development, modification, maintenance, or use of real property." RCW 36.70C.020(2)(c).

> (d) The land use decision is a clearly erroneous application of the law to the facts;
>
> . . .
>
> (f) The land use decision violates the constitutional rights of the party seeking relief.[4]

The standards in subsections (a), (b), and (f) are questions of law this court reviews de novo. Cingular Wireless, LLC v. Thurston County, 131 Wn. App. 756, 768, 129 P.3d 300 (2006). A "clearly erroneous" determination under subsection (d) requires that we apply the law to facts. Id. We may reverse the hearing examiner's decision under subsection (d) if we are "left with a definite and firm conviction that a mistake has been committed," while deferring to the hearing examiner's factual determinations. Id.

A

Gokey seeks relief under RCW 36.70C.130(1)(a), arguing that the hearing examiner's decision failed to comply with BDMC 2.30.110, which requires decisions of hearing examiners to be supported by findings of fact and conclusions of law. Specifically, Gokey complains that the hearing examiner's decision includes implicit findings and conclusions that are "incorporated" by reference in the findings of fact and conclusions of law. But the hearing examiner's detailed decision complies with BDMC 2.30.110(A) as it delineates explicit findings of fact and conclusions of law. These include express findings on the critical facts that

[4] Gokey also identifies RCW 36.70C.130(1)(c) as a basis for relief but because he devotes no portion of his argument to that assignment of error, we need not consider it. See RAP 10.3(a)(6) (arguments must be supported by citations to legal authority and references to the record).

(1) Gokey felled "significant trees" as defined by City ordinance without a permit on March 16, 2023, (2) the City issued and posted a stop work order on the same date, and (3) despite awareness of the stop work order, Gokey cut down additional significant trees. The hearing examiner also specifically concluded that Gokey failed to establish that the asserted exemption applied and thus, upheld the violations and penalties.

The hearings examiner's decision thus sufficiently identifies the factual determinations made and the analysis applied. Gokey identifies no prescribed procedure or process that the hearing examiner failed to follow. And given that Gokey's LUPA petition identified and challenged numerous assertions of fact in the hearing examiner's decision, whether or not they were included in numbered factual findings, he fails to demonstrate that any alleged error was prejudicial.

B

Gokey contends that the hearing examiner either erred in interpreting, or misapplied BDMC 19.30.050(A) by using a "purely objective test" to determine whether the exemption for "[e]mergency removal of any hazardous significant trees necessary to remedy an imminent threat" applied.

First, Gokey points to no inconsistency between the hearing officer's decision or the rationale and the language of the code. Gokey's advocacy for a two-part test that requires consideration of the property owner's personal opinion about the necessity of removing trees is not based on the terms of the exemption provision and is otherwise unsupported by legal authority. We must defer to the

hearing examiner's interpretation so long as it is not contrary to the plain language of the code. See Sylvester v. Pierce County, 148 Wn. App. 813, 823, 201 P.3d 381 (2009) ("When we review an asserted error under LUPA, we grant 'such deference as is due the construction of a law by a local jurisdiction with expertise,' so long as that interpretation is not contrary to the statute's plain language.") (quoting RCW 36.70C.130(1)(b)).[5] The evident purpose of the emergency removal exemption under BDMC 19.30.050A is to ensure safety when urgency is required and completing the usual permit process would create a risk to safety. The hearing examiner reasonably construed the provision to require evidence of a current emergency creating a necessity to act without taking the time necessary to secure a permit.

Second, and more importantly, the hearing examiner did not adopt or apply a rule that any particular type of evidence is required to establish that the exemption applies or conclude that a property's owner's opinion is irrelevant. Rather, the hearing examiner was unable to credit Gokey's belated, ad hoc assertion of emergent necessity, when it was uncorroborated by evidence that Gokey referred to, but did not provide, and when weighed against the

[5] Gokey appears to claim that RCW 36.70C.130(1)(b) is at odds with the principles articulated in the United States Supreme Court's recent decision in Loper Bright Enters. v. Raimondo, 603 U.S. 369, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024). Loper Bright held that federal courts must exercise independent judgment when determining whether an agency acted within its statutory authority and not simply defer to an agency interpretation of an ambiguous statute. Id. at 412-13. As a decision interpreting a federal statute under the federal Administrative Procedure Act, 5 U.S.C.S. § 551 et seq., Loper Bright has no application here. And, in any event, we do not conclude that BDMC 19.30.150(A) is ambiguous.

circumstances and the other evidence in the record. For example, Gokey did not present an arborist's report to support his claim that the removed trees were hazardous. And while asserting that his tenant and neighbor expressed concern about his trees, he presented no declaration or live testimony to substantiate those concerns. And Gokey's claim of emergent removal had to be weighed against his own admission that the particular trees removed in March 2023 had survived more than forty years of windstorms. We defer to the hearing examiner's assessment of credibility and weight of the evidence. Friends of Cedar Park Neigh. v. City of Seattle, 156 Wn. App. 633, 641-42, 234 P.3d 214 (2010).

Rather than imposing a specific evidentiary standard for the exemption, the hearing examiner simply rejected Gokey's proof of imminent threat as unpersuasive, as he was entitled to do. In other words, given the longstanding trees and lack of evidence of a current emergency, the hearing examiner concluded that Gokey could have obtained a permit without risking imminent danger to safety or property. Gokey fails to establish error in interpreting or applying BDMC 19.30.050(A).

C

On two separate bases, Gokey claims the City's enforcement of its ordinances violated his constitutional rights. See RCW 36.70C.130(1)(f). Gokey contends that the Tree Preservation Code is unconstitutionally vague because it fails to define certain "essential and dispositive" terms. And Gokey asserts that the "regulatory burdens" stemming from the citations, including conditions of

replanting or contributing to a tree removal mitigation fund, amount to an unconstitutional taking under the Fifth Amendment.

Standing under LUPA requires the petitioner to exhaust administrative remedies. RCW 36.70C.060(2)(d). "In order for a litigant to establish exhaustion of administrative remedies, the litigant must first raise the appropriate issues before the agency." Aho Constr. I, Inc. v. City of Moxee, 6 Wn. App.2d 441, 458, 430 P.3d 1131 (2018). Gokey did not assert his constitutional claims when he appealed the notice of violation to the hearing examiner. However, notwithstanding the exhaustion doctrine, Gokey maintains that his claims are not precluded because the hearing examiner lacked authority under the City's general rules for hearing examiners to determine the "validity" of ordinances. See CITY OF BLACK DIAMOND HEARING EXAMINER, RULES OF PRACTICE AND PROCEDURE, § 2.03 (2014). Gokey argues that challenging the citation and penalties on appeal to the hearing examiner on constitutional grounds would have been futile, as those issues were beyond the scope of the hearing examiner's authority.

Exhaustion of administrative remedies advances a number of sound policies: it avoids prematurely interrupting the administrative process, provides for full development of the facts, and gives agencies the opportunity to correct their errors. Buechler v. Wenatchee Valley Coll., 174 Wn. App. 141, 153, 298 P.3d 110 (2013). Yet, an appellant need not exhaust administrative remedies if doing so would be futile. Stafne v. Snohomish County, 174 Wn.2d 24, 34, 271 P.3d 868 (2012). In view of the significant policies favoring the exhaustion requirement, the

futility exception is "narrowly applied." Id. at 34-35. Futility exists in "rare factual situations" and cannot be based on speculation or "subjective belief." Buechler, 174 Wn. App. at 154.

Gokey's claim of futility is speculative. As the City points out, although Gokey purports to assert a facial challenge to the City's ordinance, where a vagueness challenge to a land use regulatory provision does not implicate the First Amendment, the provision is evaluated as applied, not for facial vagueness. Longview Fibre Co. v. Dep.'t of Ecology, 89 Wn. App. 627, 633, 949 P.2d 851 (1998). Likewise, as to the claim of an unconstitutional taking, the cases from other jurisdictions that Gokey relies on addressed the challenged ordinance as applied to the challengers. See F.P. Dev., LLC v. Charter Twp. of Canton, 16 F.4th 198, 208 (6th Cir. 2021); Charter Twp. of Canton v. 44650, Inc., 346 Mich. Ct. App. 290, 326-27, 12 N.W.3d 56 (2023).[6] And, as Gokey acknowledges, the City's hearing examiners are expressly authorized "to hear and decide issues related to a taking of private property for public use without just compensation," and issues related to conditions imposed and exactions required on constitutional or other

[6] Also, the substantive decisions in both cases arising out of state and federal courts in Michigan hinged on the failure of the local regulatory body to present sufficient evidence demonstrating that the mitigation measures were roughly proportionate to the impact of the property owners' development. F.P. Dev., 16 F.4th at 207-08; Charter Twp. of Canton, 346 Mich. App. at 327-28. The record here is wholly undeveloped as to nexus and rough proportionality because Gokey failed to raise the claim on appeal before the hearing examiner.

legal grounds. BDMC 2.30.080. In these circumstances, Gokey cannot demonstrate futility and we decline to address his constitutional claims.

III

Finally, the City requests attorney fees on appeal under RCW 4.84.370. RCW 4.84.370(1) states, in relevant part,

> Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision.

(Emphasis added.)

The decision before us on appeal is a code enforcement decision. The City does not contend that its citation is equivalent or "similar" to a decision on a "development permit." Under LUPA, decisions on permit applications and decisions regarding the enforcement of land use ordinances are distinct categories of "[l]and use decision[s]." RCW 36.70C.020(2)(a), (c). The City cites Mower v. King County, 130 Wn. App. 707, 720-21, 125 P.3d 148 (2005), wherein this court awarded attorney fees under RCW 4.84.370 after the County prevailed in a LUPA appeal of a code enforcement decision. But the Mower court did so without addressing whether the decision on appeal fell within the scope of RCW 4.84.370(1). Because the City bases its request on RCW 4.84.370, which does

not authorize attorney fees in an appeal of a code enforcement decision, we deny the City's request for appellate attorney fees.[7]

Affirmed.

Birk, J.

WE CONCUR:

Chung, J.

Mann, J.

[7] We also deny Gokey's request to certify this matter to the Washington Supreme Court as provided for in RCW 2.06.030(e) (providing authority for this court to certify matters to the Washington State Supreme Court based on a "direct conflict among prevailing decisions of panels of the court or between decisions of the supreme court").

APPENDIX B

City Master Permit Application and Level 1 Tree

Removal Permit Application

(Pages CR000132 - CR000137)

From: Mona Davis <mdavis@blackdiamondwa.gov>
Sent: Thursday, March 23, 2023 10:12 AM
To: egokey@aol.com
Cc: Ben Persyn <bpersyn@blackdiamondwa.gov>
Subject: FW: Tree Removal Exemption Application

Good morning Mr. Gokey,

I appreciate the information you sent in yesterday for a tree exemption; unfortunately, you don't qualify for a tree exemption permit now that you've already cut the trees and have a violation for removing them without the benefit of having obtained an exemption permit before the trees were removed.

You will need to meet all the submittal requirements outlined for a Level 1 Tree Removal Permit. I've attached the Master Application for you, as well as a Tree Removal Permit application checklist. All submittal items will need to be addressed on this checklist, and a Level 1 application review fee of $267.00 will need to be submitted with the application.

Ben had indicated that you removed 10 trees, so I'd appreciate the two of you discussing that since Ben was present on site. I've copied him for your convenience on this e-mail.

You currently have a code violation case open under COD23-0006, which will remain open until the tree removal permit has been submitted, reviewed, and conditions (around replanting and/or mitigation) have been completed on site.

As a reminder, your request to appeal the tree violation and code violation case cannot be processed without the submitted $25.00 filing fee. Upon receipt of the applicable payment, staff will refer your case to the Hearing Examiner to schedule a hearing on your code case.

Please feel free to reach out to me if I can provide any assistance to help you navigate this process.

Kindest regards,
Mona

Black Diamond Kind!
Mona Davis, Community Development Director
City of Black Diamond | www.blackdiamondwa.gov
24301 Roberts Drive | PO Box 599 | Black Diamond, WA 98010
360-851-4528 DIRECT | 360-851-4447 MAIN | 360-851-4501 FAX
mdavis@blackdiamondwa.gov E-MAIL

MASTER PERMIT APPLICATION

BUILDING, PLANNING, FIRE AND PUBLIC WORKS PERMITS

CITY OF
BLACK DIAMOND
COMMUNITY DEVELOPMENT
PUBLIC WORKS
360-851-4500
www.blackdiamondwa.gov

This master application must be submitted in conjunction with a permit specific checklist form found at www.blackdiamondwa.gov. To submit, please email the application to: permits@blackdiamondwa.gov

PROPERTY OWNER INFORMATION (all fields must be complete)

Name: _____ Company Name (*if applicable*): _____

Address: _____

Phone: _____ Email: _____

APPLICANT/POINT OF CONTACT INFORMATION (all fields must be complete) ☐ Same as owner

Name: _____ Company Name (*if applicable*): _____

Address: _____

Phone: _____ Email: _____

CONSULTANT/ARCHITECT/ENGINEER (all fields must be complete) *A City endorsement to your WA State Business License is required in order to do business within the City. Please visit https://dor.wa.gov/

Name: _____ Company Name (*if applicable*): _____

Address: _____

Phone: _____ Email: _____

Contractor's License Number: _____ UBI: _____

CONTRACTOR (all fields must be complete) *A City endorsement to your WA State Business License is required in order to do business within the City. Please visit https://dor.wa.gov/

Name: _____ Company Name (*if applicable*): _____

Address: _____

Phone: _____ Email: _____

Contractor's License Number: _____ UBI: _____

ADDITIONAL CONTRACTOR/CONSULTANT/OTHER (all fields must be complete) *A City endorsement to your WA State Business License is required in order to do business within the City. Please visit https://dor.wa.gov/

Name: _____ Company Name (*if applicable*): _____

Address: _____

Phone: _____ Email: _____

Contractor's License Number: _____ UBI: _____

OR Owner Affidavit In Lieu of Contractor Registration form submitted with application (*required for a property owner doing all the work under this permit themselves. This form is required for permit issuance).*

PROJECT INFORMATION ☐ Commercial or ☐ Residential ☐ New ☐ Remodel ☐ Alteration ☐ Addition

What **type of permit** are you applying for? (Each permit requires a separate application) _____

Name of Project: _____

Project Address: _____

Parcel number(s): _____ Zoning: _____

Number of Lots: _____ Existing Land Use: _____

Project Valuation: _____ Related Permits or Pre-App #: _____

☐ Well ☐ Septic Water Service Provider_____ Sewer Service provider_____

Scope of proposed work:

Does the site contain any of the following environmentally sensitive areas? Check all that apply:

☐ Flood Hazard ☐ Landslide Hazard Area ☐ Seismic Hazard Area ☐ Wetlands and/or Buffer
☐ Steep Slope Hazard ☐ Coal Mine Hazard Area ☐ Shoreline ☐ Stream and/or Buffer

Complete all applicable information below

Area	Square Footage	
	Existing	Proposed
Main Floor		
2nd Floor		
3rd Floor		
Garage		
Garage 2nd Floor or attic		
Covered Deck		
Covered Porch		
Balcony/Patio		
Basement, unfinished		
Basement, finished		
Storage, unfinished		
Storage, finished		
Other:		

Number of bedrooms:
Number of bathrooms:
Total impervious surfaces on site (sq. ft.): new and existing structures, driveways, walkways, patios, parking areas, etc.
Impervious Coverage (%):
Building Lot Coverage (%):
Building/ Fence/ Wall Height:
Fence or retaining wall (lin. ft.):
Number of dwelling units:
Acres/Sq. Ft.:

PLUMBING FIXTURES – Please provide number count below

Water Closet (Toilet)		Grease Trap		Floor Drain	
Sink		Pressure Release Valve		Other Fixture	
Tub/Shower		Water Service Line		Grease Interceptor	
Dishwasher		Drinking Fountain		Cross Con. Testing	
Hose Bib		Bidet/Urinal		Vent	
Water Heater		Clothes Washer		Lawn Sprinklers	

MECHANICAL/GAS PIPING – Please provide number count below

Furnace up to 100k		Vent/Exhaust Single Duct		**Boilers/Compressors/Absorption**	
Furnace 100k+		Vent System		Less than 3hp or 100k BTU	
Air Handler <10k		Exhaust Hoods		(3-15) HP or (100k-500k) BTU	
Air Handler >10k		Dryer Exhaust		(15-30) HP or (500k-1Mil) BTU	
Appliance Vents		Repair/Addition		(30-50) HP or (1Mil-1.75Mil) BTU	
Gas Piping Outlet #		Misc. Equipment		Over 50 HP or 1.75 Mil BTU	
Chimney/Flue		Wood Stove/Insert			

CERTIFICATIONS AND SIGNATURES

I am/ we are the owner(s) of the property described above and involved in this application. I/we give permission to above listed agent to act as my/our agent on my/our behalf for this application for the subject property within the City of Black Diamond. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and accurate.

Owner Signature:_____ **Date:**_____

I hereby certify under the penalty of perjury of the laws of the State of Washington, that I have read and examined this application and know that the information contained herein is true and correct. I will comply with all provisions of law and ordinances governing this type of construction work, whether specified herein or not. I understand that granting a permit does not authorize me in any way to violate or cancel any of the provisions of Federal, State, or local law regulating the construction or performance of construction sought under this permit.

NOTICE TO APPLICANT:

1. Electrical permits are obtained from the Department of Labor and Industries
2. It is the Applicant's responsibility to call for inspections.
3. Issuance of permits do not authorize any work in a public right-of-way or utility easements.

Owner/Contractor/Agent Signature:_____ **Date:**_____

CITY OF BLACK DIAMOND
Community Development Dept.

Tree Removal Permit Checklist

SUBMITTAL REQUIREMENTS

All Tree Permits

1. ☐ Completed, signed Master Application Form – Planning Division
2. ☐ Tree replacement plan that shows:
    a. The location, species, and size of new tree(s) to be planted
    b. The schedule for replanting
    c. The location of any significant tree(s) to be removed

A tree plan for significant tree removal, when associated with the development or redevelopment of property, shall meet the following requirements and standards, and may be incorporated within the landscaping plan if such a plan is required pursuant to BDMC Chapter 18.72.

Redevelopment – Level I Tree Plan

☐ A Level 1 tree plan is required for changes to existing development, including all residential, commercial, industrial, or institutional sites that involve a land disturbance or expansion of buildings or impervious surface. The following information shall be provided as part of the plan:

a. A site plan showing all proposed development or expansion of structures, parking, driveways, roadways, lanes, sidewalks and pathways, and retaining walls;
b. The site plan will show all significant trees located within the site subject to development and shall depict those significant trees to be retained in order to meet the guidelines of BDMC Section 19.30.040(B); and
c. Planting plan including location, species, size of new trees to be planted and a schedule for replanting.

Development – Level II Tree Plan

☐ A Level II tree plan is required for new development, including residential, commercial, industrial or institutional developments that involve land disturbance, parking areas, roads, buildings, or other construction. The contents of the tree plan must be certified by a certified professional forester, arborist, or landscape architect and must provide the following information:

a. Information required for a Level I plan;
b. Description of off-site trees that could be affected by proposed activity; and
c. In the event that the proposed tree plan will result in retainage of fewer than twenty percent of all significant trees within the site, not including wetlands and sensitive areas and their associated buffers, the tree plan shall include a description of alternative site designs that were evaluated and considered by the applicant to provide greater protection of significant trees and a detailed explanation of why such alternative site designs were rejected.

TREE REMOVAL PERMIT CHECKLIST

CITY OF BLACK DIAMOND
Community Development Dept.
24301 Roberts Drive / PO Box 599
Black Diamond, WA 98010
(360) 851-4447

ABOUT TREE REMOVAL PERMITS:

A permit is required for the removal of significant trees within the City.

"Significant tree" means any healthy tree that is at least six inches diameter at breast height, excepting nonsignificant trees. A tree growing with multiple stems shall be considered significant if at least one of the stems, as measured at a point six inches from where the stems digress from the main trunk, is at least four inches in diameter.

REVIEW PROCESS:

All Tree Permits are a Type 1, Director decision. There are two tree plan classifications.

TREE REPLACEMENT:

A. Each significant tree removed shall be replaced by new trees on a 1:1 ratio.
B. Replacement trees shall be planted on the site from which significant trees are removed. If on-site replacement is not feasible, an off-site location may be approved by the City Administrator.
C. Replacement trees must meet the following criteria:
    1. Native trees are preferred over non-native trees;
    2. New trees shall meet or exceed current American Nursery and Landscape Association or equivalent organization's standards for nursery stock;
    3. New trees shall be planted in locations appropriate to the species' growth habit and horticultural requirements and marked appropriately;
    4. New trees must be located away from areas where damage is likely;
    5. Deciduous replacement trees shall be a minimum of one and one-half-inch in caliper, evergreen trees shall be a minimum of six feet in height; and
    6. The time period for planting of replacement trees shall conform to standards for transplanting trees as set forth in ANSI A300, Part 6, as now exists or may hereafter be amended, or such other comparable standard as may be approved by the Mayor or his/her designee.
    7. Trees shall be watered as necessary to ensure survival and growth during their first two growing seasons after planting. Dead trees shall be replaced within the two-year planting period to ensure survival.
    8. An applicant for a tree removal permit can, at the election of the applicant, pay a tree removal mitigation fee in the amount of $500 for each tree removed into the removal mitigation fund in lieu of replacement. These funds will be maintained by the city and utilized in replanting projects throughout the City.

Unless otherwise provided in a Level I or Level II tree plan, replanting shall take place no later than one year after the tree removal permit is issued. Best management practices shall be applied to protect trees during land alteration and construction activities.

Code References
Zoning and Procedures
Title 18 BDMC

Tree Preservation
Chapter 19.30 BDMC

Resources
King County iMap
Black Diamond Zoning Map

Questions?
Planning Division
Permit Status

City of Black Diamond
24031 Roberts Drive
PO Box 599
Black Diamond, WA 98010
www.blackdiamondwa.gov

APPENDIX C

Charter Township of Canton v. 44650, Inc.,

ECF No. 83-7, Case No. 18-014569-CE

(Wayne Co. Cir. Ct. (Mich.), July 17, 2020)

(Pages 1 - 25)

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.
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> ***
>
> **5A.05. - Tree removal permit.**
>
> A. Required.
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> 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:
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> 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.
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> 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:
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> 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.
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> *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. Eighth Amendment "Excessive Fines" Clause

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.
>
> 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

EDWARD GOKEY - FILING PRO SE

July 16, 2025 - 9:34 AM

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