

2023 MAMA Legal Update

Seeing the Forest for the Trees: Recent Developments in Takings Law

Presented by

Anne McClorey McLaughlin

Rosati Schultz Joppich & Amtsbuechler, PC



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TAKINGS REFRESHER

- 5th Amendment: private property shall not “be taken for public use, without just compensation.”
 - Eminent Domain – government may take property for public use, but it must pay for it – condemnation proceedings
- Inverse Condemnation – property is taken by regulation.
 - Per Se (physical occupation): *Loretto v. Teleprompter Manhattan CATV Corp*, 458 US 491 (1982)
 - Categorical (deprived of all economically beneficial use): *Lucas v. S.C. Coastal Council*, 112 US 2886 (1992)
 - Exactions (conditions) *Nollan v. California Coastal Commission*, 483 US 825 (1987) & *Dolan v. City of Tigard*, 512 US 374 (1994) (Nollan/Dolan) and *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013)
 - Regulation gone too far (economic impact/investment backed expectations): *Penn Central Transportation Co. v. City of New York*, 438 US 104 (1978)

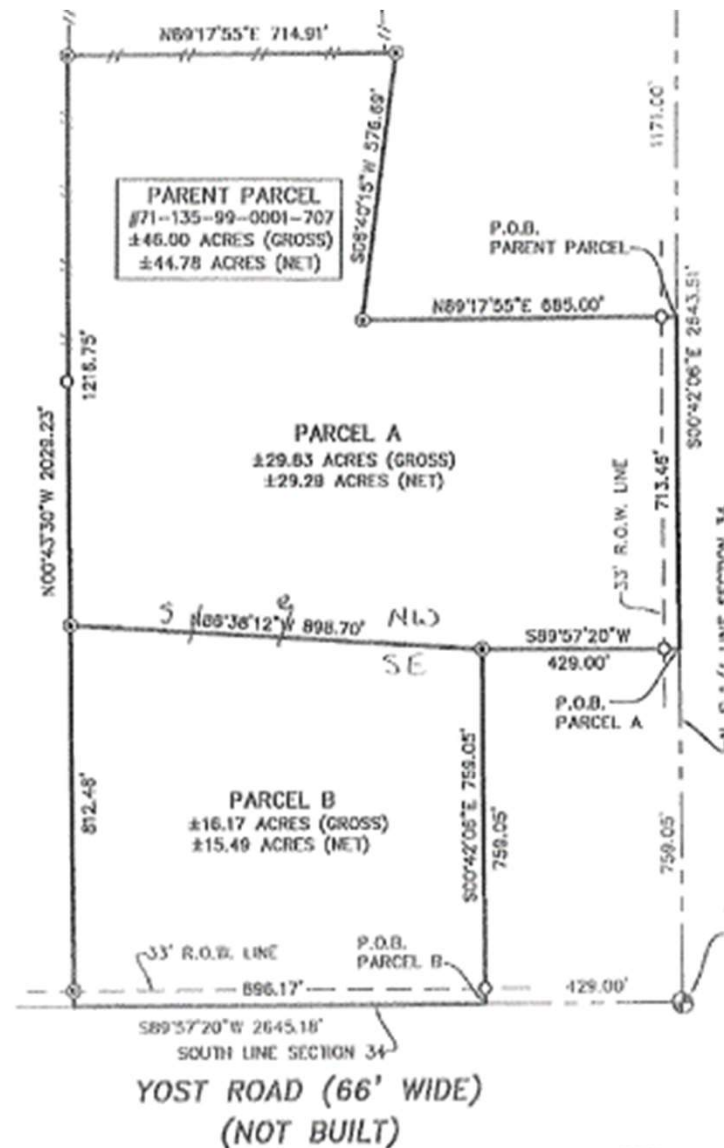


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FEDERAL AND MICHIGAN TAKINGS CASES

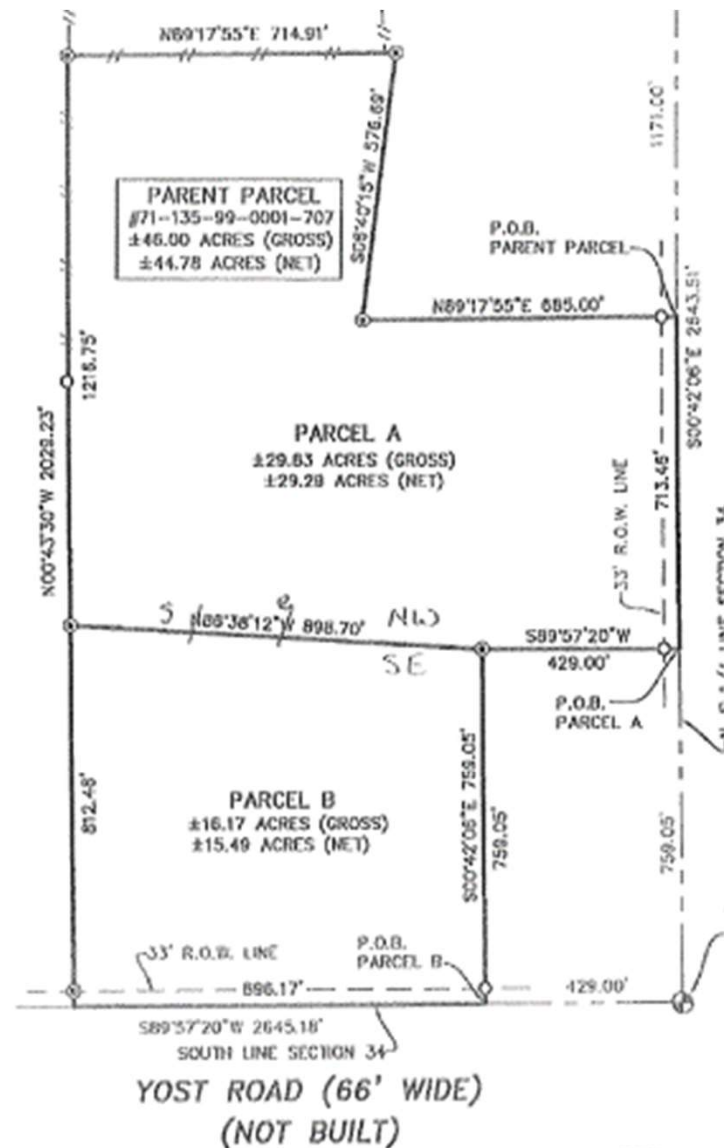
- *F.P. Development, LLC v. Canton Charter Twp.* (6th Cir. 2021)
- *Canton Charter Twp. v. 44650, Inc.* (Mich. App. 2023)
- *Knight v. Metro. Govt. of Nashville & Davidson County* (M.D. Tenn. 2022) and (6th Cir. 2023)





Date: Tue, 18 Apr 2017





Date: Fri, 20 Oct 2017



Canton's Zoning Ordinance

Article § 5A.00 Forest Preservation and Tree Clearing

5A.05. - Tree removal permit.

A. Required.

1. The removal or relocation of any tree with a DBH of six inches or greater on any property without first obtaining a tree removal permit shall be prohibited.
2. The removal, damage or destruction of any landmark tree without first obtaining a tree removal permit shall be prohibited.



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Canton Charter Twp. v. 44650, Inc.
Wayne County Circuit Court, Nov. 2018

- Sued for abatement of nuisance *per se* as zoning violation under MZEA 125.3407
- Sought either replacement of trees on site, elsewhere, or deposit mitigation fee into tree fund



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F. P. Development v. Canton Charter Twp.

U.S. District Court, E.D. Mich., Nov. 2018

Challenges: facial and as applied challenges to ordinance

- 5th Amendment takings
 - *Horne v. Dept. of Agriculture* – taking *per se*
 - *Loretto v. Teleprompter Manhattan CATV* – taking *per se*
 - *Penn Central v. New York* – regulatory taking
 - *Nollan/Dolan/Koontz* – unconstitutional conditions/exactions
- 4th Amendment – unreasonable seizure
- 8th Amendment – Excessive Fines Clause



F.P. Development, LLC v. Charter Township of Canton,
456 F. Supp. 3d 879 (E.D. Mich. 2020)

Township's Motion for Summary Judgment on ripeness grounds denied. Summary judgment granted:

- Ordinance not invalid on its face – Plaintiff did not challenge the requirement of a permit to remove trees
- Not a taking *per se* under *Horne* or *Loretto*
- Not a 4th Amendment violation – open fields doctrine (not “persons, houses and papers”)
- Not an 8th Amendment violation – fees are remedial, not penal in nature



F.P. Development, LLC v. Charter Township of Canton, 456 F. Supp. 3d 879 (E.D. Mich. 2020)

Plaintiff's Motion for Summary Judgment granted:

- As applied to Plaintiff, ordinance is a regulatory taking that “goes too far” under *Penn Central* analysis
- As applied to Plaintiff, ordinance constitutes an unconstitutional condition under *Nollan/Dolan* – mitigation must bear essential nexus and be roughly proportional to the impact of the development/tree removal
 - *Koontz* extended *Nollan/Dolan* to fees/monetary exactions



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Canton Charter Twp. v. 44650, Inc.
Wayne County Circuit Court, July 17, 2020

- Granted Canton's Motion for Summary Judgment on 8th Amendment only
- Granted summary judgment to 44650 as a regulatory taking and unconstitutional condition, (5th Amendment), and 4th Amendment as "meaningful interference" with property and therefore, unreasonable seizure



F.P. Development, LLC v. Charter Township of Canton, 16 F.4th 198 (6th Cir. Oct. 13, 2021)

Affirmed U.S. District Court

- Unconstitutional condition/exaction – monetary exaction – *Nollan/Dolan/Koontz*
 - mitigation must bear *essential nexus* and be *roughly proportional* to the impact of the development/tree removal
 - No contest that permit conditions bear essential nexus to “legitimate” interest in tree preservation
 - Government must make individualized assessment of rough proportionality to meet constitutional scrutiny



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Canton's Forest Preservation and Tree Clearing Ordinance

- Ordinance provides for 1:1 replacement of removed trees (regulated species and size, landmark trees); literature affirms that the only way to mitigate the loss of benefits of a tree is to replace the tree
- Ordinance contains standards for when tree may be removed; Township argued that the individualized assessment is performed on the front end. By considering what trees may be removed, Township considers the impact of the removal



Canton's Forest Preservation and Tree Clearing Ordinance

Ordinance § 5A.05

2. The tree shall be evaluated *for effect on the quality of the area of location*, including tree species, habitat quality, health and vigor of tree, tree size and density. Consideration must be given to scenic assets, wind blocks and noise buffers.



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3. The trees and surrounding area shall be evaluated for the quality of the involved area by considering the following:

Canton's Forest Preservation and Tree Clearing Ordinance

- a. Soil quality as it relates to potential tree disruption.
- b. Habitat quality.
- c. Tree species (including diversity of tree species).
- d. Tree size and density.
- e. Health and vigor of tree stand.
- f. Understory species and quality.
- g. Other factors such as value of the trees as an environmental asset (i.e., cooling effect, etc.).



F.P. Development, LLC v. Charter Township of Canton, 16 F.4th 198 (6th Cir. Oct. 13, 2021)

- Court of Appeals rejected argument that the impact analysis was done in deciding what trees are subject to permit requirements
- “There is an interesting question whether Canton’s application of the Tree Ordinance to F.P. falls into the category of government action covered by *Nollan*, *Dolan*, and *Koontz*. But the parties do not raise it. And we decline to do so on our own accord. So we proceed, as the parties request, and apply the essential nexus and rough proportionality test provided in those cases.”

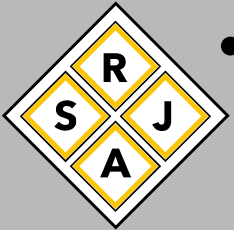


F.P. Development, LLC v. Charter Township of Canton, 16 F.4th 198 (6th Cir. Oct. 13, 2021)

- Petition for rehearing en banc requested Court to revisit whether *Nollan/Dolan/Koontz* applied to fees that are not in lieu of a property dedication, and to apply *Penn Central* factors (economic impact of the regulation, whether it interferes with reasonable investment backed expectations, and the character of the government action).
- Petition for rehearing denied January 3, 2022



Canton Charter Twp. v. 44650, Inc.
---Mich App--- (April 13, 2023)

- Followed Sixth Circuit
 - Reversed SJ for 44650 on 4th Amendment
 - Affirmed 8th Amendment
 - Affirmed unconstitutional condition as taking
- 
- Unnecessary to consider remaining takings theories

Practical application and considerations

- How can governments otherwise conduct an individualized determination of the impact of tree removal?
 - No guidance from Court or indication what acceptable
 - Hire arborist/horticulturist to conduct analysis and articulate basis for determining impact, then apply mitigation standards
 - Conduct analysis similar to wetlands preservation and other environmental regulations



Practical application and considerations

- *Koontz* applied *Dolan* scrutiny to *ad hoc* (administrative, case-by-case) monetary exactions
- Neither 6th Circuit in *F.P. Development* nor U.S. Supreme Court in *Koontz* decided whether legislative determinations are subject to *Nollan/Dolan* test of essential nexus and rough proportionality
- Generally applicable ordinance may evade *Nollan/Dolan/Koontz* scrutiny – like wetlands ordinance (formula)
- Amend ordinances to make them generally applicable to all properties; make specific, evidence-based, legislative findings for foundation of ordinance regarding benefits of trees and impact of tree losses



Knight v. Metropolitan Govt of Nashville and Davidson County, 572 F. Supp.2d 428 (M.D. Tenn. 11/16/2021)

Holding: *Nollan/Dolan/Koontz* do not apply to regulation requiring building permit applicants to grant an easement on their property for installation of sidewalks with new residential construction. Analyzed under *Penn Central*, the ordinance is not a regulatory taking

- Said the “interesting question” in *F.P. Development* was application of *Nollan/Dolan/Koontz* to legislative vs. ad hoc permit requirements



*Knight v. Metropolitan Govt of Nashville and Davidson
County, 67 F.4th 816 (6th Cir., May 10, 2023)*

- Reversed the District Court.
- The answer to the “interesting question” is “Yes.” *Nollan/ Dolan/Koontz* do apply to legislative vs. ad hoc (“adjudicative”) permit requirements.



Questions?

Thank you!

Contact:

Anne McClorey McLaughlin

248.489.4100

amclaughlin@rsjalaw.com



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