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Sixth Circuit: Township Tree Ordinance Violates Fifth Amendment

Recently, the Sixth Circuit Court of Appeals invalidated a local tree replacement ordinance that required property owners to obtain a permit before removing certain trees and to either replace those trees or pay a fee in lieu of replacement. *F.P. Development, LLC v. Charter Township of Canton, Michigan*, 6th Cir. No. 20-1447/1466 (Oct. 13, 2021). Local governments across the Sixth Circuit should use this occasion to review their code provisions to ensure that they do not inadvertently expose themselves to a lawsuit under this new case law.

The Tree Ordinance

The Canton Township, Michigan ordinance required property owners to obtain a permit before removing certain trees or undergrowth. Specifically: (1) trees with a diameter of six inches or more; (2) landmark or historic trees; (3) trees located within a forest with a diameter of three inches or more; and (4) any under-canopy vegetation within the dripline of a forest.

If a property owner wanted to remove any tree that fell under one of those categories, it was required to commission an arborist and apply to the township for a permit. If the permit was issued, the property owner then had to mitigate by replacing the trees elsewhere on the property, replacing the trees elsewhere in the township, or paying a per-tree-fee between \$300 to \$450 to the township tree fund.

Case History

The case began when F.P. Development decided to develop an overgrown parcel of land in Canton, Michigan. The township conditionally approved a development application but stressed that F.P. would need an additional permit to remove any qualifying trees from the property.

As development progressed, F.P. discovered that the parcel was divided by a county drainage ditch clogged with trees and debris. The county refused to clear the ditch, so F.P. hired a company to remove the trees, and to remove several other trees on the property. F.P. did not obtain a permit for these removals.

The township learned of the unpermitted removals and demanded that F.P. either replant 187 trees within the township or deposit \$45,878 into the township tree fund. F.P. decided to sue instead.

Outcome

F.P. raised three claims against the township:

- The ordinance constituted an unconstitutional taking both facially and as applied;
- The ordinance was an unreasonable seizure; and
- The ordinance constituted an excessive fine.

In a minor victory for the township, the Court rejected F.P.'s claims that the tree ordinance and its mitigation fees violated the Fourth Amendment's bar on unreasonable seizures and the Eighth Amendment's bar on excessive fines.

However, the court held that, as applied to F.P., the tree ordinance violated the Fifth Amendment's Takings Clause under an application of that Clause known as the unconstitutional conditions doctrine. The unconstitutional conditions doctrine is the framework used by courts to assess whether governmental conditions on permits required for productive use of property are proportional to the impact of the use of property. Imposing conditions that are disproportionate to impact, or that lack a nexus relating the conditions to the impact, are considered takings of property under the Fifth Amendment.

Here, the parties agreed that there was an essential nexus between preserving natural resources and the required permits, so the court turned to the "rough proportionality" prong of analysis. This prong requires a political subdivision to complete an individualized assessment as to whether the requirements of permit conditions are related both in nature and extent to the impact of the proposed

action. In other words, a municipality cannot impose a standardized rubric for tree replacement or tree fees without considering each property and the effect on the environment of the removal.

The court determined that the township failed to make any individualized assessment here because its ordinance required the formulaic fee “regardless of the specific impact caused by the tree removal.” Thus, the court held that, as applied to the developer, the tree ordinance was unconstitutional.

Conclusion

It is time to review, and likely revise, municipal tree ordinances to ensure compliance with F.P. Development. At minimum, municipalities should assess specific situations and specific impacts of tree removal on certain properties—a one-size-fits-all approach is not going to cut it anymore. Our team at Frost Brown Todd can help townships, counties, and municipalities review their tree preservation and replacement regulations and suggest revisions to ensure that they comply with this new development.

For more information, please contact [Phil Hartmann](#), [Jennifer Readler](#), [Jesse Shamp](#), [MacKenzie Newberry](#), or any member of Frost Brown Todd’s [Government Services](#) practice group.

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