

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

F.P. DEVELOPMENT, LLC,	§	Case No. 2:18-cv-13690
a Michigan corporation	§	
<i>Plaintiff/Counter-Defendant,</i>	§	Honorable George Caram Steeh
	§	
V.	§	
	§	
CHARTER TOWNSHIP OF,	§	
CANTON, MICHIGAN, a	§	
Michigan municipal corporation	§	
<i>Defendant/Counter-Plaintiff.</i>	§	

**PLAINTIFF/COUNTER-DEFENDANT’S ANSWER TO
DEFENDANT/COUNTER-PLAINTIFF’S FIRST AMENDED
COUNTER-COMPLAINT**

Pursuant to Rule 8(b) of the Federal Rules of Civil Procedure, Plaintiff/Counter-Defendant, F.P. DEVELOPMENT, LLC (hereafter, “Plaintiff”), by and through its attorneys, hereby answer the First Amended Counter-Complaint of Defendant/Counter-Plaintiff, CHARTER TOWNSHIP OF CANTON (hereafter “Defendant”) as follows:

PARTIES

1. Plaintiff admits the allegation contained in Paragraph 1.
2. Plaintiff admits the allegation contained in Paragraph 2.
3. Plaintiff admits the allegation contained in Paragraph 3.

4. In response to the allegations in Paragraph 4, Plaintiff lacks information or knowledge sufficient to ascertain the content of the records on file with the State of Michigan but admits that Martin F. (“Frank”) Powelson is the manager and sole member of F.P. Development, LLC.

5. Plaintiff admits the allegation contained in Paragraph 5.

6. Plaintiff admits the allegation contained in Paragraph 6.

JURISDICTION AND VENUE

7. Paragraph 7 is a legal conclusion for which no response is required. Nonetheless, Plaintiff denies that Defendant’s counterclaims constitute compulsory counterclaims under Fed. R. Civ. P. 13.

8. In response to Paragraph 8, Plaintiff admits that the Property is in Wayne County and that venue is proper in this Court. Plaintiff denies that the property is 24 acres.

STATEMENT OF FACTS

9. In response to the allegations in Paragraph 9, Plaintiff admits that the Property at issue was once part of a larger parcel. Plaintiff further admits that the Property is traversed by drain. But Plaintiff lacks sufficient information or knowledge to affirm or deny whether said drain was “established pursuant to the Drain Code of 1956.” Plaintiff also lacks sufficient information or knowledge to

affirm or deny what is meant by “under the jurisdiction of Wayne County.” Plaintiff denies that the parent property was 40 acres.

10. Plaintiff admits that on or about October 27, 2016, Canton Township’s Planning Services Division received an application to split off approximately 16 acres from the 46-acre parent parcel and denies the balance of the allegations because they are untrue.

11. Plaintiff generally admits the allegation contained in Paragraph 11 but denies that the retained ownership parcel was 24 acres and denies that Exhibit B is an accurate copy of the Application referenced, because it contains documents created after October 27, 2016.

12. Plaintiff admits the allegation contained in Paragraph 12 that the parcel was undeveloped, but denies that the parcel was “covered with mature, high quality trees.”

13. Plaintiff responds that the documents referenced in Paragraph 13 speak for themselves.

14. Plaintiff responds that the documents referenced in Paragraph 14 speak for themselves.

15. Plaintiff responds that the documents referenced in Paragraph 15 speak for themselves.

16. Plaintiff admits the allegation contained in Paragraph 16.

17. Plaintiff responds that the documents referenced in Paragraph 17 speak for themselves.

18. Plaintiff responds that the documents referenced in Paragraph 18 speak for themselves.

19. Plaintiff lacks information sufficient to form a belief about the truth of the allegation contained in Paragraph 19.

20. Plaintiff lacks sufficient information or knowledge to form a belief about the truth of the allegation contained in Paragraph 20.

21. Plaintiff lacks sufficient information or knowledge to form a belief about the truth of the allegation contained in Paragraph 21.

22. Plaintiff lacks sufficient information or knowledge to form a belief about the truth of the vague allegations contained in Paragraph 22.

23. Plaintiff responds that the ordinance referenced in Paragraph 23 speaks for itself. Plaintiff responds further that this allegation contains a legal conclusion to which no response is required. Plaintiff nevertheless admits that the language quoted in this paragraph appears in Article 5A, § 5A.05(A) of Canton's Code of Ordinances, but denies that this excerpt is a complete or accurate identification of all pertinent portions of Article 5A and denies that Article 5A is a valid and enforceable ordinance both facially and relative to the Property.

24. Plaintiff admits the allegations contained in Paragraph 24.

25. Plaintiff lacks sufficient information or knowledge to form a belief about the truth of the vague allegations contained in Paragraph 25 regarding Ms. Thurston's claimed observations. Plaintiff admits that vegetation was removed from the property without a tree removal permit. Plaintiff denies the balance of the allegations contained in this paragraph because they are untrue and specifically denies cutting trees "within a county drain and drain easement under the Jurisdiction of Wayne County" or cutting trees within 25 feet of a "watercourse."

26. Plaintiff responds that it lacks sufficient knowledge or information to form a belief about the truth of the allegations contained in Paragraph 26. Plaintiff admits that, Mr. Powelson has spoken to Ms. Thurston on the phone regarding the property.

27. Plaintiff responds that the allegation contained in Paragraph 27 is vague because they do not specify when Ms. Thurston so informed Mr. Powelson. Plaintiff admits that, at some point, Ms. Thurston informed Mr. Powelson that it was her position that Plaintiff's removal of vegetation from its property required a permit from Defendant. Plaintiff denies that Defendant's Tree Removal Ordinance is valid or enforceable or that Mr. Powelson "needed a permit to remove the trees."

28. Plaintiff denies that Paragraph 28 is a complete or accurate representation of Mr. Powelson's statements to Ms. Thurston.

29. Plaintiff lacks information sufficient to form a belief as to the truth of the allegations contained in Paragraph 29. Plaintiff denies that its removal of vegetation from the property caused any impacts to regulated areas.

30. Plaintiff denies the allegation contained in Paragraph 30 because they are untrue.

31. Plaintiff admits the allegation contained in Paragraph 31.

32. Plaintiff denies the vague allegation that “much back and forth” occurred. Plaintiff admits that access was granted to both the Split Parcel and the Property for inspection.

33. Plaintiff lacks information sufficient to form a belief as to the truth of the allegations contained in Paragraph 33.

34. Plaintiff lacks information sufficient to form a belief as to the truth of the allegations contained in Paragraph 34.

35. Plaintiff denies the allegation contained in Paragraph 35.

36. Plaintiff responds that Paragraph 36 contains vague legal conclusions, specifically what “logging activities” entails. Plaintiff responds further that it lacks information sufficient to form a belief as to the truth of the allegations contained in Paragraph 34.

37. Plaintiff admits a “Stop Work” notice and “Written Notice of Violation” were issued to Plaintiff. Plaintiff denies that these notices were necessary to “prevent further Ordinance violations.”

38. Plaintiff admits that a site visit was conducted by Defendants in October of 2018.

39. Plaintiff denies the allegations contained in this paragraph, specifically that 159 regulated trees and 14 landmark trees were, in fact, removed from the property.

40. Plaintiff responds to Paragraph 40 that the Township’s Tree Ordinance speaks for itself.

41. Plaintiff responds to Paragraph 41 that the Township’s Tree Ordinance speaks for itself.

42. Paragraph 42 contains legal conclusions and therefore no response is required. To the extent that a response is required, Plaintiff denies that it is required to replace any trees.

43. Plaintiff responds to Paragraph 43 that the Township’s Tree Ordinance speaks for itself. Plaintiff denies that Defendant’s Tree Ordinance is valid or enforceable.

44. Plaintiff lacks sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 44 regarding the market value of

vegetation removed from Plaintiff's property, and leaves Defendant to its proofs. The remainder of the allegations in Paragraph 44 constitute legal conclusions for which no response is required. Plaintiff denies that Defendant's Tree Removal Ordinance is valid or enforceable.

COUNT I—VIOLATIONS OF THE ZONING ORDINANCE

NUISANCE PER SE

5A.05—Failure to Obtain a Tree Removal Permit

45. Plaintiff hereby incorporates the responses to the preceding paragraphs as though fully set forth herein.

46. Plaintiff responds to Paragraph 46 that the Ordinance speaks for itself.

47. Plaintiff admits that it did not receive a permit from Defendant to conduct the alleged activities on its own property but asserts that it was not required to do so. Plaintiff further admits that, on its face, the Tree Removal Ordinance requires a permit from Defendant before such vegetation can be removed. Plaintiff denies that it is required to comply with an unconstitutional ordinance.

48. Plaintiff responds to Paragraph 48 that no such permit is required because the ordinance at issue is unconstitutional.

49. Plaintiff responds that Paragraph 49 contains legal conclusions for which no response is necessary. Plaintiff further responds that the Tree Removal Ordinance speaks for itself. Plaintiff admits that removing trees without a permit is

a violation of Defendant's Tree Removal Ordinance. Plaintiff denies that the ordinance is valid or enforceable.

50. Plaintiff responds that Paragraph 50 contains legal conclusions for which no response is necessary. To the extent that a response is required, Plaintiff denies the allegations contained in Paragraph 50.

51. Plaintiff responds that Paragraph 51 is a legal conclusion in its entirety for which no response is necessary. To the extent that a response is required, Plaintiff denies the allegations contained in Paragraph 51.

52. Plaintiff responds that Paragraph 52 contains legal conclusions in its entirety for which no response is necessary. To the extent that a response is required, Plaintiff denies the allegations contained in Paragraph 52.

53. Plaintiff responds that Paragraph 53 is a legal conclusion for which no response is necessary. To the extent a response is necessary, Plaintiff denies the allegations contained in Paragraph 53 except that it lacks information or knowledge to form a belief regarding the alleged costs incurred by Defendant.

COUNT II—VIOLATION OF THE ZONING ORDINANCE
NUISANCE PER SE

5A.07—Failure to Erect a Protective Barrier Around a Landmark Tree

54. Plaintiff hereby incorporates the responses to the preceding paragraphs as though fully set forth herein.

55. Plaintiff responds to Paragraph 55 that the Tree Removal Ordinance speaks for itself. Plaintiff Denies that the Tree Removal Ordinance is valid or enforceable.

56. Plaintiff denies Defendant's characterization of Plaintiff's activities in Paragraph 56 as a "callous disregard" for the law. Plaintiff admits that it did not erect barriers around trees on its property, but denies that any such barriers were necessary. Plaintiff also denies that the Tree Removal Ordinance is valid or enforceable.

57. Plaintiff responds that Paragraph 57 is a conclusion of law for which no response is required. To the extent that a response is required Plaintiff denies the allegations that any so-called landmark trees required protective barriers under the unenforceable unconstitutional ordinance.

58. Plaintiff responds that Paragraph 58 is a conclusion of law for which no response is required. To the extent that a response is required, Plaintiff denies the allegations.

59. Plaintiff responds that Paragraph 59 contains legal conclusions for which no response is required. To the extent that a response is required, Plaintiff denies the allegations.

60. Plaintiff responds that Paragraph 60 contains legal conclusions for which no response is required. To the extent that a response is required, Plaintiff denies the allegations.

61. Plaintiff responds that Paragraph 61 contains legal conclusions for which no response is required. To the extent that a response is required, Plaintiff denies the allegations.

62. Plaintiff responds that Paragraph 62 contains legal conclusions for which no response is required. To the extent that a response is required, Plaintiff denies the allegations.

63. Plaintiff responds that Paragraph 63 is a legal conclusion for which no response is necessary. To the extent a response is necessary, Plaintiff denies the allegations contained in Paragraph 63 except that it lacks information or knowledge to form a belief regarding the alleged costs incurred by Defendant.

COUNT III—VIOLATION OF THE ZONING ORDINANCE
NUISANCE PER SE

2.24—Failure to Observe Setback from Wetland Areas and Watercourses

64. Plaintiff hereby incorporates the responses to the preceding paragraphs as though fully set forth herein.

65. Plaintiff responds to Paragraph 65 that the ordinance speaks for itself.

66. Plaintiff responds that Paragraph 66 is a legal conclusion for which no response is necessary. To the extent a response is necessary, Plaintiff denies the allegations in Paragraph 66.

67. Plaintiff responds that Paragraph 67 is a legal conclusion for which no response is necessary. To the extent a response is necessary, Plaintiff denies the allegations in Paragraph 67.

68. Plaintiff responds that Paragraph 68 is a legal conclusion for which no response is necessary. To the extent a response is necessary, Plaintiff denies the allegations in Paragraph 68.

69. Plaintiff responds that Paragraph 69 is a legal conclusion for which no response is necessary. To the extent a response is necessary, Plaintiff denies the allegations in Paragraph 69 except as set forth in the next sentence of this Paragraph 69. Plaintiff admits that it did not have a permit to perform “work” in the drain, but denies the remainder of the allegation and denies that such a permit would be necessary for any activities that occurred on the Property.

70. Plaintiff responds that Paragraph 70 is a legal conclusion for which no response is necessary. To the extent a response is necessary, Plaintiff denies the allegations contained in Paragraph 70.

71. Plaintiff responds that Paragraph 71 is a legal conclusion for which no response is necessary. To the extent a response is necessary, Plaintiff denies the

allegations contained in Paragraph 71. Plaintiff responds further that Defendant cites to the entire Zoning Enabling Act, without pointing to any particular provision or section of the Act.

72. Plaintiff responds that Paragraph 72 is a legal conclusion for which no response is necessary. To the extent a response is necessary, Plaintiff denies the allegations contained in Paragraph 72.

73. Plaintiff responds that Paragraph 73 is a legal conclusion for which no response is necessary. To the extent a response is necessary, Plaintiff denies the allegations contained in Paragraph 73 except that it lacks information or knowledge to form a belief regarding the alleged costs incurred by Defendant.

PRAYER & CONCLUSION

The remainder of Defendant's Counter-Complaint constitutes Defendant's requests for relief, to which no response is required. To the extent that a response is required, Plaintiff denies that Defendant is entitled to the relief requested or to any relief whatsoever.

GENERAL DENIAL

Plaintiff denies any allegations of Defendant's Counter-Complaint, whether express or implied, that are not otherwise expressly admitted, qualified, or denied herein.

PLAINTIFF'S AFFIRMATIVE DEFENSES

Plaintiff/ Counter-Defendant, F.P. DEVELOPMENT, LLC (hereafter, "Plaintiff"), by and through its attorneys, hereby assert the following affirmative and other defenses to the Counter-Complaint of Defendant/Counter-Plaintiff, CHARTER TOWNSHIP OF CANTON (hereafter "Defendant"):

1. Defendant's counter-complaint fails, in whole or in part, to state a claim upon which relief may be granted;

2. Defendant's counter-complaint alleges state-law claims for which this Court lacks subject matter jurisdiction;

3. Defendant's counter-complaint raises state-law claims for which this Court lacks supplemental jurisdiction;

4. Defendant's counter-complaint alleges state-law claims based on an ordinance that is unconstitutional and unenforceable;

5. Defendant's counter-complaint raises state-law claims which are barred by the doctrine of abstention;

6. Defendant's counter-complaint seeks relief that is beyond the equitable authority of this Court;

7. Defendant's counter-complaint and the relief sought therein are barred, in whole or in part, for reason that Article 5A of Canton's Code of Ordinances does not comply with Section 21 of the Michigan Charter Township Act, MCL 42.21,

which, among other things, requires that a township board “shall provide in each ordinance a sanction for violation of the ordinance.”

8. Defendant’s counter-complaint and the relief sought therein are barred, in whole or in part, on the basis that it is attempting to impose a fine upon Owner in excess of \$500 and therefore in violation of Chapter 1, § 7(c) of Canton’s Code of Ordinances and state law, including, but not limited to, Section 21 of the Michigan Charter Township Act, MCL 42.21, which, among other things requires that “punishment for a violation of the ordinance shall not exceed a fine of \$500.00.”

9. Defendant’s counter-complaint and the relief sought therein are barred, in whole or in part, for reason that Article 5A of Canton’s Code of Ordinances and amendments do not comply with the form, passage, amendment, recording, authentication, compilation, and publication requirements of the Michigan Charter Township Act.

10. Defendant’s counter-complaint and the relief sought therein are barred, in whole or in part, for reason that they have been brought for the malicious purpose of retaliating against, harassing, and otherwise defaming Plaintiff.

11. Defendant’s counter-complaint and the relief sought therein are barred, in whole or in part, for reason that at all relevant times the Property was not a regulated wetland.

12. Defendant's counter-complaint and the relief sought therein are barred, in whole or in part, for reason that at all relevant times any activities performed on the Property did not constitute regulated earth changes.

13. Defendant's counter-complaint and the relief sought therein directly conflict with and are preempted by state law, including, but not limited to, the Right to Forest Act, MCL 320.2031 et seq.

14. Defendant's counter-complaint and the relief sought therein are barred, in whole or in part, for reason that any removal of noxious weeds, invasive species, destructive vegetation, debris, and other nuisances from the Property was consistent with and actually mandated by Canton's Code of Ordinances, including Article II, 34-31 and 32 and Article III, 34-61, 62, 65, and 66, as well as state and federal law.

15. Defendant's counter-complaint and the relief sought therein are barred, in whole or in part, for reason that the Article 5A of Canton's Code of Ordinances directly conflicts with and is preempted by state and federal laws, including, but not limited to the Insect Pest and Plant Disease Act, MCL 286.201 et seq., and the Michigan Insect Pest and Plant Diseases Law, MCL 286.251 et seq.

16. Defendant's counter-complaint and the relief sought therein are barred, in whole or in part, by the Act of God defense where the numerous dead, diseased, and windblown trees on the property died from causes out of the control of Plaintiff.

17. Defendant's counter-complaint and the relief sought therein are barred, in whole or in part, by the common enemy doctrine.

18. Defendant's counter-complaint and the relief sought therein are barred, in whole or in part, for reason that damages, attorneys' fees, and costs are not recoverable under applicable law.

19. Plaintiff reserves the right to assert any additional affirmative or other defense that may become known during the course of this lawsuit.

Respectfully submitted,

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By: /s/Chance Weldon
 CHANCE WELDON

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2019, I caused electronic filing of the foregoing document with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to all properly registered counsel.

/s/Chance Weldon

CHANCE WELDON