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STATE OF MICHIGAN

IN THE SUPREME COURT

TOWNSHIP OF FRASER,

Plaintiff/Appellant,

and

HARVEY HANEY and
RUTH ANN HANEY,

Defendants/Appellees.

_____/

MSC Case No.: 160991
Court of Appeals Case No.: 337842
Lower Court Case No.: 16-003272-CH

AMICUS CURIAE BRIEF BY THE MICHIGAN LAKES & STREAMS ASSOCIATION, INC. IN SUPPORT OF PLAINTIFF/APPELLANT FRASER TOWNSHIP

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction pursuant to MCR 7.303(B)(1) and 7.305(B)(2) and (3).

The Michigan Lakes & Streams Association, Inc. ("MLSA") respectfully asserts that the issues in this case have statewide significance and also involve legal principles of major significance to Michigan's jurisprudence. MLSA believes that countless lakefront and riverfront property owners throughout Michigan will be affected by the ultimate appellate decision in this case, including likely hundreds of individual or group members of MLSA.

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AMICUS CURIAE'S STATEMENT OF QUESTIONS PRESENTED

I. DOES THE 6-YEAR STATUTE OF LIMITATIONS FOUND IN MCL 600.5813 APPLY TO MICHIGAN MUNICIPAL ORDINANCE ENFORCEMENT PROCEEDINGS?

FRASER TOWNSHIP ANSWERED -	"NO"
HANEYS ANSWERED -	"YES"
AMICUS CURIAE ANSWERS -	"NO"
THE CIRCUIT COURT ANSWERED -	"NO"
THE MICHIGAN COURT OF APPEALS ANSWERED -	"YES"

II. DOES ANY STATUTE OF LIMITATIONS APPLY TO MICHIGAN MUNICIPAL ORDINANCE ENFORCEMENT PROCEEDINGS?

FRASER TOWNSHIP ANSWERED -	"NO"
HANEYS ANSWERED -	"YES"
AMICUS CURIAE ANSWERS -	"NO"
THE CIRCUIT COURT ANSWERED -	"NO"
THE MICHIGAN COURT OF APPEALS ANSWERED -	"YES"

III. IS ANY STATUTE OF LIMITATIONS THAT MAY APPLY TO A MICHIGAN MUNICIPAL ORDINANCE ENFORCEMENT PROCEEDING "TOLLED" OR "RESET" BASED ON THE "CONTINUING WRONG DOCTRINE?"

FRASER TOWNSHIP ANSWERED -	"YES"
HANEYS ANSWERED -	"NO"

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AMICUS CURIAE ANSWERS -	"YES"
THE CIRCUIT COURT ANSWERED -	"YES"
THE MICHIGAN COURT OF APPEALS ANSWERED -	"NO"

IV. IS ANY STATUTE OF LIMITATIONS THAT MAY BE APPLICABLE TO A MICHIGAN MUNICIPAL ORDINANCE ENFORCEMENT PROCEEDING SUBJECT TO THE "DISCOVERY RULE?"

FRASER TOWNSHIP ANSWERED -	"YES"
HANEYS ANSWERED -	"NO"
AMICUS CURIAE ANSWERS -	"YES"
THE CIRCUIT COURT ANSWERED -	"YES"
THE MICHIGAN COURT OF APPEALS ANSWERED -	"NO"

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STATEMENT OF FACTS

MLSA adopts the Statement of Facts as set forth in the briefs of the parties filed with this Court.

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IDENTITY OF THE AMICUS CURIAE

MLSA is a Michigan nonprofit corporation. MLSA is a membership organization. It is comprised of lake associations, individual members, businesses and corporations from throughout Michigan.

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STATEMENT OF THE INTEREST OF THE AMICUS CURIAE

MLSA is an organization with state-wide interests and contacts. Over 215 lake associations throughout Michigan are members of MLSA. In addition, MLSA has approximately 526 individual members (although, indirectly, MLSA represents thousands of individuals through their lake associations) and many corporate and business members. Many of MLSA's members have properties on lakes and rivers in Michigan.

The legal issues in this case will not only have significant impacts upon MLSA and its members, but will also have state-wide real property and riparian rights impacts in general.

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DISCUSSION

I. INTRODUCTION

A. The MLSA's Interests in this Case.

What is MLSA's specific interest in this case? MLSA and waterfront or riparian property owners throughout Michigan will likely be adversely affected if the decision by the Michigan Court of Appeals in this case below is not overturned (or modified) for at least five different reasons. First, there are many local municipal ordinances that protect lake communities, riparian rights and waterfront areas. Those include zoning ordinances, dock and boat ordinances, environmental ordinances, junk ordinances, fertilizer regulation ordinances, septic tank ordinances, and building codes. Second, as the Michigan Court of Appeals implied earlier in *People v Yeo,* 103 Mich App 418; 302 NW2d 883 (1981), applying a relatively short statute of limitations and implying that abolishing the continuing wrong or violation doctrine for ordinance proceedings would effectively grant a "variance" to lawbreakers, who would be treated differently and specially as opposed to their neighbors who have complied or will comply with local ordinance requirements. Or, put another way, no vested right to violate an ordinance should be acquired by continuing violations. Third, allowing lawbreakers to "get away with" ordinance violations would likely breed increased public contempt, suspicion and anger with the law. Fourth, negative impacts upon the neighbors of a violator could be significant, and it is not fair to make the neighbors suffer literally forever if a violator on an adjoining property "beats the system" by concealing the ordinance violation until the 6-year statute of limitations runs or is able to permanently violate the ordinance because the local municipality did not have the time, resources or knowledge to prosecute the ordinance violation within six years. Fifth and finally, municipal ordinance violations on one property can decrease property values on an adjoining property. That is often the case with regard to waterfront properties in Michigan.

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B. The Municipal Ordinances Affected.

There are likely tens of thousands of local municipal regulatory, building code and safety ordinances that will be directly affected by this Court's decision in the current case. Those ordinances include, but are not limited to, the following:

a. Zoning ordinances.

b. Environmental ordinances.

c. The building codes, including the plumbing, mechanical and electrical codes.

d. Handicap access codes.

e. Sewer and water ordinances.

f. Fire codes.

g. Property maintenance codes.

h. Safety codes.

i. Obnoxious weeds ordinances.

j. Sidewalk and snow clearing ordinances.

k. Sign ordinances.

l. Junk ordinances.

m. Blight ordinances.

n. Junk and inoperable motor vehicle ordinance.

o. Mining ordinances.

p. Attractive nuisances ordinances.

Applying a "hard" 6-year statute of limitations to ordinance enforcement proceedings, barring the "discovery rule" and abolishing the continuing wrong doctrine would make those and other ordinances "dead letter law" in many circumstances.

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C. The Practical and Unintended Consequences of a 6-Year Limitation.

Applying a 6-year statute of limitations to municipal ordinance and code enforcement proceedings (as held by the Court of Appeals below) will likely lead to many unintended and unforeseen negative consequences. The following are just a few examples.

a. A person drives without the state-mandated car insurance (as enacted locally by the Uniform Traffic Code) for over six years and is not caught until the seventh year. The police are simply out of luck.

b. A property owner runs a small machine shop illegally in an out-garage in a residential neighborhood in violation of the local zoning ordinance and is not discovered until the eighth year. The local municipality and the neighbors can do nothing.

c. Out in the country on a parcel with heavy woods, a property owner creates a junkyard (complete with leaking batteries and tire piles) which violates not only the local zoning ordinance, but also the township's junk ordinance, zoning ordinance and junk tire ordinance, but the operation is not discovered until seven years after it was commenced and just over six years at its present scope or intensity. Nothing can be done by the local municipality or the neighbors.

d. A house addition is built by the homeowner without obtaining a building permit and in violation of the electric and plumbing codes. The construction is unsafe and endangers the occupants. If six years passes without municipal discovery or enforcement, the unsafe condition can last forever.

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e. A septic tank leaks or junk batteries stored outdoors leak acid onto the ground, both in violation of a local ordinance. After 6 years, the leaking can continue without sanction.

Overall, the decision below would lead to the absurd situation of two similar ordinance violations being treated dramatically differently. Assume that two adjoining lots each have unlawful accumulations of junk located outdoors. The accumulation of junk on both lots started at about the same time, a little over six years ago. Parcel A has had the same amount of junk in place for just over six years. The owner of Parcel B removed all of the junk in year 3 for a month or so, but brought the same amount of junk back onto the property again after one month. Pursuant to the Court of Appeals' decision below, the owner of Parcel A is "immunized" and can keep the same amount of junk outdoors on that property forever. However, the owner of Parcel B did not have a continuous, uninterrupted 6-year presence of the outdoor junk (due to the one month absence) and will have to comply with the municipality's junk ordinance if the municipality promptly pursues enforcement proceedings.

Allowing these unfair and often unsafe consequences is simply unthinkable to the MLSA and its members.

II. ARGUMENTS

A. The General Lack of Existing Applicable Michigan Appellate Case Law.

There is an amazing lack of existing Michigan appellate case law regarding the applicability of any statute of limitations to a municipal ordinance enforcement proceeding. Perhaps this is a situation of the "dog that does not bark", because municipal legal experts have almost universally taken it for granted for over a century that there is no statute of limitations

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applicable to most municipal ordinance proceedings (or that the continuing violation doctrine applies).[1]

MLSA respectfully submits that the historical view of statutes of limitations for municipal ordinance enforcement proceedings is important, as it has been almost universally accepted within municipal communities in Michigan that there has been no statute of limitations for the enforcement of almost all local municipal regulatory ordinances (or if there is, that the continuing wrong doctrine would apply). And, apparently, the courts have agreed, at least implicitly. The lack of express appellate case law to the contrary for over the last 150 years (before *Haney v Fraser Township*) confirms the historical understanding. To now assert that a "hard" 6-year statute of limitations applies to all local municipal ordinance violations would be a radical departure from past historical practice.

A somewhat analogous situation was involved in *Lyon Charter Township v Petty*, 317 Mich App 482 (2016); 500 Mich 100 (2017), partially modified on other grounds. That Michigan appellate decision did not involve a statute of limitations for enforcing township ordinances *per se*, but rather addressed the issue of whether township ordinance enforcement efforts can be subject to a laches defense by a property owner. And, the Michigan Court of Appeals set a very high bar for laches barring an ordinance prosecution. The Court noted:

> The enforcement of the township's zoning ordinance will work an inconvenience to defendants, who have operated their businesses for years without the expense of owning or leasing commercial property. That inconvenience, however, does not overcome the township's

[1] One of the rare exceptions is for village ordinance enforcement proceedings under MCL 66.6, a portion of the Michigan General Law Village Act.

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> statutory authority to ensure that neighboring parcels maintain compatible uses. 317 Mich App 482, 484 – 485.

Had the parties in *Petty* (and even the Michigan Court of Appeals itself) believed that a "hard" 6-year statute of limitations would have applied in that case, it is highly likely that the issue would have been expressly raised. It was not raised; at least not in the appellate decision. It would be odd indeed if over 30 years of an ordinance violation would not be subject to a laches defense, but a much shorter statute of limitations would bar prosecution.

When *Petty* is combined with the Michigan "rule of municipal non-estoppel" found in *Fass v City of Highland Park*, 326 Mich 6; 39 NW2d 336 (1949) and *Pittsfield Township v Malcolm*, 375 Mich 135; 134 NW2d 166 (1965), it is a pretty strong indication that the Michigan appellate courts over the years believed that municipal ordinances should be enforceable notwithstanding the mere passage of time or even erroneous actions by municipal officials.

It appears that the Michigan Court of Appeals has already dealt with the ordinance statute of limitations issue (although admittedly, only fleetingly) in *People v Yeo*, 103 Mich App 418; 302 NW2d 883 (1981). In that case, the district court found that the defendant had violated a municipal ordinance for keeping 11 dogs in and around her home for a period exceeding six months in violation of the ordinance. The defendant alleged that the case should have been barred based on the two-year statute of limitations applicable for village ordinance offenses. The Court of Appeals stated in relevant part:

> Defendant next alleges that the prosecution should have been barred from charging defendant for violating the ordinance, due to its failure to

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> commence criminal proceedings within the two-year statute of limitations prescribed in MCL 66.6; MSA 5.1276.[2]
>
> Defendant admits a continuing violation extending over 18 years prior to the instant complaint, but argues that by virtue of this extended period a variance of the zoning ordinance by prescription was acquired.
>
> As the reviewing circuit court properly noted in its opinion, there is no support in the law for acquisition of a variance by prescription. The general rule is that the zoning authority will not be estopped from enforcing its zoning ordinances absent exceptional circumstances. *Township of Pittsfield v Malcolm*, 375 Mich 135, 146; 134 NW2d 166 (1965). Clearly, there are no exceptional equities favoring defendant in the case at bar save the mere passage of time. *Yeo* at p. 886 – 887.

People v Yeo is important for two reasons. First, there was an unusual express 2-year statute of limitations for ordinance violations contained in the Michigan General Law Village Act. Accordingly, the Michigan Legislature knows how to enact specific municipal ordinance statutes of limitations and did not do so in the current case. Second, the Court of Appeals in *Yeo* effectively held that the continuing wrong doctrine does apply to municipal ordinance violations to "reset" the applicable village 2-year statute of limitations should an ordinance violation continue.

---

[2] The statute provides:

> "Prosecutions for violation of the village ordinances shall be commenced not more than 2 years after the commission of the offense, and shall be brought in the district court or municipal court in the judicial district in which the village is located. That court may hear, try, and determine all causes and actions arising under the ordinances of the village, and inflict punishment for violations of those ordinances as provided in the ordinances."

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People v Yeo is a published opinion, but was not mentioned by the Michigan Court of Appeals panel in this case below. Nevertheless, the point in *People v Yeo* should be well taken – to accord an ordinance violator blanket immunity after 6 years (where the violation was unknown to the municipality or was even actively covered up by the property owner) would be to improperly accord the property owner a permanent *de facto* variance from the ordinance involved. Violators should not obtain vested rights due to their wrongdoing and the mere passage of time.

The decision by the Michigan Court of Appeals below is particularly erroneous in the zoning ordinance context. The Michigan Zoning Enabling Act (MCL 125.3101 *et seq*) ("MZEA") already has somewhat of a *de facto* statute of limitations in the nonconforming use, lot and structure provisions of MCL 125.3208. Pursuant to that statutory provision and Michigan appellate case law, no structure, lot or use can be lawful under a municipality's zoning regulations if not in compliance with the current zoning regulations unless the lot, structure, building or use was lawful at the time the relevant zoning regulations went into effect. Pursuant to the reasoning of the Michigan Court of Appeals below, every zoning violation after six years would become the equivalent of a lawful nonconforming use, structure or lot. That would violate the regulatory scheme of the MZEA.

B. The Applicability of the 6-Year General Statute of Limitations found in MCL 600.

The general, residual or "default" statute of limitations is found at MCL 600.5813. That statutes states in relevant part:

> Sec. 5813. All other **personal actions** shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes (Emphasis added).

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By its structure, it appears that MCL 600.5813 generally applies to actions that are predominantly civil and not criminal, regulatory or penal in nature. The case law history of the 6-year statute of limitations indicates that it was not intended to apply to municipal ordinance violations or state regulatory statutes. MLSA believes and respectfully asserts that municipal ordinance enforcement proceedings should not be considered "personal actions."

In the amicus curiae brief submitted to this Honorable Court by the Michigan Townships Association ("MTA") of February, 2021, MTA asserts that ordinance enforcement proceedings are not "personal actions", but rather are "*in rem*" proceedings for which no applicable Michigan statute of limitations applies. MLSA agrees with MTA's persuasive arguments regarding *in rem* jurisdiction. Whether this Court considers ordinance enforcement proceedings to be *in rem* proceedings or something else, MLSA respectfully asserts that such municipal enforcement efforts should not be considered "personal actions" for purposes of MCL 600.5813.

C. The Continuing Wrong Doctrine and Municipal Ordinance Enforcement.

Clearly, Michigan has generally abolished the "continuing wrongs doctrine" for torts.[3] However, MLSA respectfully asserts that it should not be abolished for municipal ordinance prosecution or enforcement purposes. And, in fact, the appellate courts in many other states under similar situations have held that where a municipal ordinance violation continues, a statute of limitations does not prevent prosecution or ordinance enforcement proceedings given that the violation is continuing or ongoing. See *County of Sonoma v Jensen*, 2018 WL 2127011 (unpublished decision by the California Court of Appeals, 1st Division; decided on May 9, 2018)

[3] As the Court of Appeals noted below in footnote 4 of its December 20, 2018 written opinion:

> This is sometimes also referred to as the "continuing violations doctrine," "continuing-wrongful-acts doctrine," and "continuing tort doctrine." *Marilyn Froling Revocable Trust v Bloomfield Hills Country Club,* 283 Mich App 264, 282; 769 NW2d 234 (2009). Slip opinion at page 6.

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(Case No. A151828); *Village of Franklin Grove v Suski*, 2017 IL App (2d) 160137-U, 2017 WL 1097429 (unpublished decision by the Appellate Court of Illinois, 2nd Division, decided on March 23, 2017); *Town of Clear Lake v Hoagland Family Limited Partnership*, 75 NE3d 1081, 1087 (Ind. Ct. App., 2017); *Commonwealth v Capitol Theatre, Inc.*, 325 Mass 146, 148; 89 NE2d 344, 345 (Mass. 1949); *State v Loomis*, 1997 WL 118251, at *1-2 (unpublished decision by the Minnesota Court of Appeals; decided on March 18, 1997) (Case No. C6-96-1278); *State v Coffey*, 2011 WL 1584370, at *3-4 (unpublished decision by the Superior Court of New Jersey, Appellate Division; decided on April 28, 2011); *People v Fletcher Gravel Co. Inc.*, 82 Misc 2d 22, 28-31; 368 NYS 2d 392, 401-403 (Onondaga County Court, 1975); *Richland County v Kaiser*, 351 S.C. 89, 95; 567 SE2d 260, 263 (Ct. App. 2002); *Brown County v Meidinger*, 271 NW2d 15, 19 (S.D. 1978); and *Douglass v City of Spokane*, 25 Wash App 823, 829; 609 P2d 979, 983 (Wash. Ct. App., 1989).

Why should the continuing wrong document apply to torts and other situations but not in ordinance prosecution or enforcement cases? Quite simply, one situation involves a private harm or remedy while the other constitutes a public offense, and the abatement of an ordinance violation protects the public health, safety and welfare. Also, a tort is a private civil matter while enforcing an ordinance is a criminal or quasi-criminal prosecution or enforcement proceeding.

It is understandable why the "continuing wrong doctrine" may not apply to torts, contractual disputes, civil matters, etc., as those involve private individuals or entities. The courts do not want people to "sit on" their rights. However, where the enforcement of a municipal ordinance (or state law akin to an ordinance) is involved, it is a matter of public interest, public welfare, etc. For public welfare ordinance violations, the "continuing wrong doctrine" should apply to "toll" or "reset" the statute of limitations.

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As a matter of practicality, why should a municipal ordinance proceeding be treated differently than a private tort or contract for purposes of the continuing wrong or continuing violation doctrine? There are multiple reasons. First, ordinance proceedings protect the public and are in the public interest which is not generally the case for private tort or contract actions (at least not directly in most cases). Second, the private versus public causes of action and proceedings are inherently different. Third and finally, with most torts and contracts, there is a one-time violation or infraction, whereas the majority of ordinance violations are continuing. Of course, that is a generalization and is not always the case. Nevertheless, it is true often enough that there should be a distinction between private and public actions.

Even if this Court were to hold that the 6-year statute of limitations generally applies to municipal ordinance violations, the "continuing wrong doctrine" should still be available (and make the 6-year statute of limitations "reset") if there is a continuing or new violation of the ordinance involved. With respect, MLSA asserts that this Court's abolition of the continuing wrong doctrine should be limited to private civil cases and non-municipal matters, not ordinance enforcement proceedings that are in the public interest.

Not applying the continuing wrong doctrine to permanent or continuing ordinance violations will undoubtedly create additional municipal litigation and generate more work for Michigan courts. Why? Because there will be endless disputes after six years regarding whether or not a particular ordinance violation ceased and recommenced within the six year time period, whether the violation has expanded in scope or intensity, whether a new violation is substantially different than the older violation, etc.

D. The Nature of Municipal Ordinance Enforcement Proceedings.

There are generally two types of municipal ordinances, and enforcement proceedings pursuant thereto. Some municipal ordinances are inherently criminal or penal in nature. Those

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include local municipal disorderly conduct ordinances (which, for example, prohibit trespassing, indecent exposure, disturbing the peace, etc.). Rarely do these have constantly continuing violations. However, many other municipal ordinances are inherently regulatory and not penal or criminal in nature. Such ordinances could include a municipal zoning ordinance, environmental ordinance, building code, fire code, sanitary sewer ordinance and handicap access code. Even if this Court were to determine that the 6-year residual statute of limitations found in MCL 600.5813 should apply to municipal criminal or penal ordinances, it should not apply to municipal regulatory ordinances (or State of Michigan regulatory statutes absent an express statute of limitations contained therein).

It is very common for the violations and penalty sections of municipal ordinances through Michigan to have a provision indicating that each day on which a violation of the ordinance involved occurs is deemed to be a separate violation. Hence, that may be why virtually all municipalities and most municipal legal experts have long believed that the continuing wrong doctrine (or the equivalent) applies to municipal ordinance enforcement proceedings such that any potential applicable statute of limitations would not be a bar to enforcement efforts for continuing violations. Whether such language in a municipal ordinance can "bootstrap" and otherwise cause the continuing wrong doctrine to be applicable is, of course, a different legal issue.

E. The Dilemmas to Municipal Officials.

The following are some of the many problems that will arise for municipal officials throughout Michigan if this Court applies a 6-year "hard" statute of limitations (without a discovery rule or the application of the "continuing wrong doctrine") to ordinance violations:

1. If this case is not overturned or modified, it will essentially immunize a violator of an ordinance (or certain state regulatory statutes) after six years forever.

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2. One of the unintended consequences of the decision will be that municipalities will have to practice hyper-intensive ordinance enforcement efforts right away. However, many municipalities could not afford that as budgets are limited. Otherwise, if a municipality does not discover and prosecute an ordinance violation within the first six years, the ordinance violation can continue forever thereafter.
3. The decision will encourage active concealing of lawbreaking by violators.
4. In many cases, the absolute 6-year statute of limitations without a discovery rule or a continuing violation rule will punish not only the municipality involved and the general public, but also owners of neighboring properties as well.
5. This decision is contrary to well over a century of common practice and almost unanimous legal understanding regarding municipal ordinances and similar state laws.
6. It will set up a two-tier system of justice – those who obey the laws will have to continue to obey the laws while those who violated a law or an ordinance for six consecutive years or longer will be immunized and can continue to violate the ordinance forever with impunity.
7. It's a "get out of jail free" card for certain violations.

F. Other Practical Difficulties.

What if an ordinance violation continues constantly for four years, ceases for one week and then recommences for another two years – does the statute of limitations run to bar a municipal ordinance enforcement action after six years? What if junk is stored outdoors on the north half of a lot in violation of a municipal ordinance for six years, but then the junk is moved to the south portion of the lot thereafter? Does the 6-year statute of limitations bar an ordinance

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enforcement effort after six years or does the moving of the junk to a different location but on the same property "reset" the statute of limitations?

If the Michigan Court of Appeals' decision in *Haney v Fraser Township* is upheld by this Court, does the benefit of a statute of limitations "run with the land"? If the Smith family violates the local municipal zoning ordinance by maintaining an illegal accessory building for over six years and the property is purchased by the Jones family who continues to maintain and use the accessory building, does the statute of limitations start over again or is the Jones family able to "tack" onto the over six years of violation by the Smith family beforehand?

The Court of Appeals decision below opens a literal Pandora's Box for municipalities throughout Michigan.

CONCLUSION

For the above-mentioned reasons, MLSA respectfully urges this Honorable Court to reverse the portion of the *Haney v Fraser Township* decision below pertaining to the statute of limitations and hold that:

(1) There is no applicable statute of limitations for Michigan municipal ordinance violations; or

(2) If the 6-year statute of limitations applies to ordinance violations, then the "discovery rule" applies and the continuing wrong doctrine also extends or "resets" the applicable statute of limitations.

MLSA thanks this Honorable Court for its careful consideration of these matters.

Respectfully submitted,

BLOOM SLUGGETT, PC

Dated: February 22, 2021

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