STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM PUBLISHED DECISIONS OF THE COURT OF APPEALS

Swartzle, P.J., and Sawyer and Ronayne Krause, JJ

TOWNSHIP OF FRASER,

Plaintiff/Appellant,

v

HARVEY HANEY, and
RUTH ANN HANEY,

Defendants/Appellees.

_____/

MSC Case No.: 160991
Court of Appeals Case No.: 337842
Lower Court Case No.: 16-3272-CH

BRIEF OF AMICUS CURIAE MICHIGAN TOWNSHIPS ASSOCIATION IN SUPPORT OF TOWNSHIP OF FRASER

Robert E. Thall (P46421)
T. Seth Koches (P71761)
BAUCKHAM, SPARKS, THALL,
SEEBER & KAUFMAN, P.C.
Attorneys for Amicus Curiae
Michigan Townships Association
470 W. Centre Ave, Suite A,
Portage, MI 49024
269-382-4500
thall@michigantownshiplaw.com

Submitted: February 17, 2021

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGES**

STATUTES

OTHER

STATEMENT OF JURISDICTION

In this case, Fraser Township timely sought Leave to Appeal the published Court of Appeals opinion, decided January 21, 2020 (*Fraser Twp II*).[1] *Fraser Twp II* was on remand from the Michigan Supreme Court[2] following consideration of Application for Leave to Appeal in *Fraser I*.[3] The Court of Appeals opinion in *Fraser Twp II* reaffirmed the opinion in *Fraser Twp I*, thereby reversing the Bay County Circuit Court's denial of the Haneys' motion for summary disposition and remanding the same to allow the Haneys to move to amend their responsive pleading to include the statute of limitations in their affirmative defenses in accordance with MCR 2.118(C)(1).[4] The Michigan Supreme Court, by order dated November 25, 2020, granted leave to appeal *Fraser Twp II* and directed that "[t]he parties shall address whether MCL 600.5813 applies to municipalities seeking to enjoin zoning ordinance violations".[5]

---

[1] Appendix Exhibit A, *Township of Fraser v Haney*, 331 Mich App 96; 951 NW2d 97 (2020) (Docket No. 337842) (hereafter also referred to as *Fraser Twp II*).
[2] *Township of Fraser v Haney*, 504 Mich 968, 933 NW2d 42 (Mem) (2019) (Docket No.159181)
[3] *Township of Fraser v Haney*, 327Mich App 1; 932NW2d 239 (2018) (Docket No. 337842) (hereafter referred to as *Fraser Twp I* or Court of Appeals Opinion).
[4] *Fraser Twp I*, 237 Mich App at 15.
[5] *Township of Fraser v Haney*, ___Mich ___, 950 NW2d 748 (Mem) (Mich, 2020) (Docket No.160991).

STATEMENT OF QUESTION PRESENTED

WHETHER TOWNSHIP ENFORCEMENT TO ABATE A PRESENT VIOLATION OF A ZONING ORDINANCE CAN BE BARRED BY THE GENERAL STATUTE OF LIMITATIONS UNDER MCL 600.5813?

TOWNSHIP OF FRASER ANSWERED	"NO"
HANEYS ANSWERED	"YES"
AMICUS CURIAE ANSWERS	"NO"
THE CIRCUIT COURT ANSWERED	"NO"
THE COURT OF APPEALS ANSWERED	“YES”

STATEMENT OF AMICUS CURIAE INTEREST AND INTRODUCTION

Amicus Curiae, Michigan Townships Association, is a Michigan non-profit corporation whose membership consists of over 1,235 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, exchange of information, and guidance to and among township officials to enhance the more efficient and knowledgeable administration of township government services under Michigan laws. The Michigan Townships Association was established in 1953, and is widely recognized for its years of experience and knowledge regarding township issues. Through its legal defense fund, the Michigan Townships Association has participated as amicus curiae in numerous state and federal cases presenting issues of statewide significance to Michigan townships. In so doing, the Michigan Townships Association has edified and assisted the courts in their understanding of township law. The Michigan Townships Association has authorized the filing of this Amicus Curiae brief. The interest of the Michigan Townships Association in this case is evident from the following.

This case presents issues of major jurisprudential significance to municipalities and their citizens state-wide, involving whether the six year statute of limitations to bring personal actions pursuant to MCL 600.5813 applies to a municipality's action to abate a present violation of a zoning ordinance established pursuant to the Michigan Zoning Enabling Act.[6] Zoning ordinances have been adopted in almost every municipality in this State and are intended to effectuate planned development and regulation of land uses within a municipality to ensure the public health, safety,

[6] Appendix, Exhibit B MCL 125.3101, et. seq.; MZEA. The MZEA provides current statutory authority for townships, cities, villages, and counties to engage in zoning. In 2006 the MZEA was adopted and consolidated the statutory authority for zoning instead of individualized statutes based upon the type of municipality. Prior zoning authority for townships was contained in the Township Rural Zoning Act, 1943 PA 184.

and welfare.[7] Zoning is accomplished by a comprehensive scheme of dividing a municipality into various zoning districts (i.e. commercial, industrial, residential, high density residential, agricultural, recreational, etc.) and then providing for the regulation of specified land uses within these certain districts.[8] These districts and regulations provide, among other public health, safety and welfare purposes, for the protection from nuisances by creating compatibility between neighboring land uses. By limiting incompatible neighboring uses, property values are also protected. It is not hyperbole to state that applying the six-year statute of limitations to municipal attempts to abate *current* zoning ordinance violations (i.e., violations of the law) will completely undermine the planned development under the MZEA and wreak havoc on the public interests being protected. The statewide significant public interest in this case involving enforcement of local government zoning regulations is incontrovertible.

In the over 75 years of township zoning there have been numerous zoning abatement actions that have moved through the court system. Interestingly and for good reason, over that extensive case history we could locate no other published case that bars a municipality's zoning violation abatement action by operation of a statute of limitations. There are numerous cases that address equitable defenses to municipal enforcement actions, such as laches and estoppel, but none regarding the statute of limitations.[9] Never before has a published court case ruled that the statute of limitations applies to enforcement against a current zoning violation. The Court of Appeals Opinion, in a jurisprudential seismic shift, erroneously creates a new application of the statute of

[7] MCL 125.3203(1), Appendix Exhibit B.
[8] MCL 125.3201, Appendix Exhibit B.
[9] For example, *Fass v Highland Park*, 326 Mich 19, 30-31; 39 NW2d 336 (1949) *Township of Farmington v Scott*, 374 Mich 536; 132 NW2d 607 (1965); *Township of Pittsfield v Malcom*, 375 Mich 135; 134 NW2d 166 (1965); *People v Yeo*, 103 Mich App 418; 302 NW2d 883 (1981); and more recently *Lyon Charter Township v Petty*, 317 Mich App 482, 487; 896 NW2d 477 (2016); *Township of Williamston v Sandalwood Ranch, LLC,* 325 Mich App 541; 927 NW2d 262 (2018).

limitations[10] that will operate to block abatement of *current* zoning violations and defeat the established purposes of zoning. This erroneous Court of Appeals determination is further compounded by holding that the statute of limitations begins to run when the violation first takes place rather than when a municipality learns of the zoning ordinance violation.[11] A municipality cannot possibly be aware of every zoning violation that exists within its municipal boundaries; therefore, this holding essentially grants an individual the ability to circumvent a zoning ordinance by avoiding detection for six years. If the violator can conceal the violation for six years, they can then continue to violate the law without abatement. This provides incentive for those so inclined to avoid seeking a zoning compliance permit and instead do whatever they want in violation of a zoning ordinance. This potential outcome highlights the erroneous nature of applying the general statute of limitations to zoning enforcement and is exactly what the Court of Appeals set in motion when it held that:

> **Importantly, the accrual of the plaintiff's claim is also not subject to tolling simply because plaintiff may not have been aware that defendants were keeping pigs on the subject property in violation of the plaintiff's ordinance.** The Michigan Supreme Court, *Trentadue*, 479 Mich. At 391-392, 738 N.W.2d 664, held that the common-law discovery rule was not available as a means of tolling the accrual period prescribed by MCL 600.5827. **What is relevant, then, is not when plaintiff learned of defendants' violation, but when the violation first took place**. See *Trentadue*, 479 Mich. At 391-392, 738 N.W.2d 664.[12] [Emphasis added.]

The Court of Appeals Opinion failed to properly accord the Township's attempt to abate a *present-day* violation of the law rather than issuing a citation for a 2006 violation. Although the Township's Code of Ordinances, Section 1-10(a) provides that "each act of violation [of the code] and every day upon which any such violation shall occur shall constitute a separate offense", the Court of Appeals ignored case precedent and held such provision invalid by erroneously conflating

[10] *Fraser Twp I*, 327 Mich App at 15.
[11] *Id.*, 11.
[12] *Id.*

this provision with the continuing wrongs doctrine," which has since been abrogated.[13] To support its decision, the Court of Appeals reasoned that:

> Further, neither party presented evidence suggesting that defendants were adding new swine to the subject property. Therefore, no new wrongs established a newly accrued cause of action that could salvage plaintiff's argument. Accordingly, plaintiff's contention in this regard is meritless.[14]

The fact that no evidence was submitted establishing that new pigs were brought on the property since 2006 is irrelevant. The Court of Appeals interpretation ignores the plain language of Section 1-10(a) stating that each day a violation exists constitutes a separate violation. In other words, every day a pig exists on the subject property is a separate violation of the law and the pigs on the property currently in violation must be removed. For example, consider the case where unbeknownst to a municipality, a property owner decides to store 100 motor vehicle tires in his backyard in violation of a zoning ordinance. Seven years later, a neighbor moves next door and complains to the local unit that his neighbor is storing these tires on the property next door in violation of the zoning ordinance. Pursuant to the reasoning in the Court of Appeals decision, the municipality is time barred from compelling compliance with its zoning ordinance because the illegal tires were brought on the property over six years ago. [15] This misapplication of the law should have been specifically nullified by the common zoning ordinance language that makes each day the violation exists on a property a separate violation of the zoning ordinance. Such language allows the municipality to enforce its zoning ordinance for a *present-day* violation regardless of when the violation first occurred. As will be discussed herein, the validity of such language

[13] *Id.*, 11, 12.
[14] *Id.*, 12.
[15] It should be noted at this point that MZEA already contains a specific legal bar to enforcement for lawful nonconforming uses in MCL 125.3208. As will be analyzed herein this law requires that the use be *lawful* when it is first established and later becomes nonconforming because of changes in the zoning ordinance. The Court of Appeals Opinion improperly abrogates this law by not requiring that the use first be lawful.

contained within a zoning ordinance was upheld in *Joy Management Company v City of Detroit*, 183 Mich App 334, 342; 455 NW2d 55 (1990).

The Court of Appeals Opinion is not based upon prior zoning precedent and in this regard ignores the comprehensive scheme presented by the MZEA regarding land use, the existing statutory process in the MZEA for handling nonconforming uses and buildings under MCL 125.3208; the "in rem" nature of zoning ordinance restrictions[16]; the import of equitable defenses; and the distinctions to be drawn in analysis of the case law addressing application of the statute of limitations to other non-zoning causes of action and continuing harms.

Additionally, as discussed herein, the Court of Appeals Opinion is clearly erroneous and will cause material injustice if not reversed. The Circuit Court in this case was correct to dismiss the Haneys' summary motion requesting application of the statute of limitations to the Township's abatement action. The Township attempted to enjoin the use of the Haneys' property in current violation of the Township zoning ordinance prohibiting the location of pigs on the commercially zoned property. Even if the Haneys began to bring pigs onto the commercially zoned parcel longer than six years ago, the Township is not seeking to cite the Haneys for a violation from that time, but rather to abate a present-day violation. Every day that the ordinance is violated constitutes a separate offense and a new cause of action against the property. The Court of Appeals' erroneous creation of this new statute of limitations defense to current violations of the law will cause catastrophic results by endangering the public health, safety and welfare of the citizens of this State through the elimination of a municipality's ability to abate such violations if they first began more than six years ago. It is not logical that application of the statute of limitations can provide protection for future violations of the law. Jurisprudence must avoid the specious path that would

[16] As will be discussed herein, a zoning ordinance regulates the use of land independent of personal ownership.

accept the argument that because someone brought pigs onto a property in violation of the ordinance six years ago, they can continue to violate the law by maintaining those pigs on the property forever.[17]

Application of this false analysis would have a wide-ranging deleterious impact on municipal enforcement of public health, safety and welfare laws. For instance, a municipality would have to sit back and hope no one dies from an apartment building that was built six years ago with faulty electrical wiring because the inspector failed to perform their duty and inspect the property at time of construction. Moreover, consider if the builder never applies for a building or zoning permit (i.e., tries to slip by for six years)? Would the owners get to keep renting the apartments, faulty wiring and all, with no ability of the municipality to abate the violation? Such outcome is what the Court of Appeals Opinion endorses. What about a property owner that maintains a dilapidated in-ground pool installed without a permit and without safety fencing as required in the zoning ordinance? Seven years later, a new neighbor moves next door and complains to the municipality of the unfit pool and the dangers it presents to their small children. The Township would be powerless to compel compliance with the zoning ordinance and require fencing because the "wrong", as defined by the Court of Appeals decision, occurred seven years ago and the municipality would be time barred under MCL 600.5813 from bringing an abatement action. Additionally, consider the City of Detroit's laudable efforts to revitalize certain neighborhoods by tearing down large areas of dilapidated homes. These homes may have sat substandard and uninhabitable for years (more than six), but their current status as violators allows the City to abate and tear down these dangerous structures. Based upon the Court of Appeals

[17] This argument also renders nugatory MCL 125.3208 regarding lawful nonconforming uses. "Courts will not interpret statutes, … in a manner that leads to absurd results." *Brandon Charter Township v Tippett,* 241 Mich App 417, 424; 616 NW2d 243 (2000).

Opinion material injustice would occur because the statute of limitations would bar the current abatement of these dangerous structures.

Consider also that case law precedent has previously held a zoning ordinance enforceable even under the extreme circumstances where the zoning administrator approved (ultra vires) a use that was in violation of the ordinance.[18] A zoning administrator has no authority or ability to approve a land use not allowed by zoning ordinance for a particular property or to otherwise authorize a violation of the terms of the zoning ordinance; yet this is exactly what could happen if the statute of limitations barred future enforcement. Abatement actions are however equitable actions to enjoin current and future use and therefore enforcement is tempered by equitable defenses rather than a set period of time.

The list of real public health, safety, and welfare concerns is endless. Material injustice is palpable in application of this clearly erroneous Court of Appeals Opinion. Amicus Curiae prays that this Honorable Court reverse the Court of Appeals Opinion.

STATEMENT OF FACTS

The Haneys purchased a ten-acre parcel (hereinafter "subject property") within Fraser Township in 1986.[19] It is undisputed that the subject property is located within the Township's Commercial District Zoning Classification, which has been in effect since 1976.[20] The Haneys claim they continuously operated a piggery on the subject property since 2006 and therefore, the Township is barred from obtaining a permanent injunction precluding the farming operations on the subject property.[21]

[18] *Fass,* 326 Mich at 30-31.
[19] Township's *Fraser I* Court of Appeals Brief, Attachment A, page 5.
[20] Township's *Fraser I* Court of Appeals Brief, Attachment A, page 5.
[21] Haneys' *Fraser I* Court of Appeals Brief, page 1.

A. Background.

In 1990, the Haneys applied for and received a permit to allow them to keep wild animals within a fenced area on the subject property.[22] Raising cervidae[23] is an agricultural use under the Township Zoning Ordinance.[24] For whatever reason, the permit received by the Michigan Department of Natural Resources (hereinafter "DNR") claimed the Township approved the keeping of such animals on the subject property and the State believed the subject property was zoned Agricultural, when the property was actually located in the Township's Commercial District Zoning Classification.[25] In 2002, the Haneys submitted an application to the DNR for their first registration indicating the subject property was zoned Agricultural, but then drew a line over that box.[26] Moreover, in 2002, the Haneys received a building permit for a pole barn, but once the DNR learned that the subject property was not zoned Agricultural, the DNR told the Haneys that they needed to obtain variance approval so the facility would be in compliance with the Township Zoning Ordinance.[27] The Haneys never applied for a variance.[28]

In regards to the Haneys' application, an Administrative Law Judge (hereinafter "ALJ") concluded that an applicant must "accurately identify the zoning of the property where the facility is located and the DNR can rely on that information in processing the application."[29] On July 29, 2010, the ALJ "revoked Appellant's [Haney] privately owned cervidae facility registration and preclude issuance of a registration until he receives a zoning variance, or the property where the

[22] Township's *Fraser I* Court of Appeals Brief, Attachment A, page 5-6.
[23] "Cervidae" means: deer, elk, reindeer and caribou. See MCL 287.952(f).
[24] Township's *Fraser I* Court of Appeals Brief, Attachment A, page 5.
[25] Township's *Fraser I* Court of Appeals Brief, Attachment A, page 6.
[26] Township's *Fraser I* Court of Appeals Brief, Attachment A, page 6.
[27] Township's *Fraser I* Court of Appeals Brief, Attachment A, page 6.
[28] Township's *Fraser I* Court of Appeals Brief, Attachment B, page 2.
[29] Township's *Fraser I* Court of Appeals Brief, Attachment A, page 12.

facility is located is rezoned agricultural."[30] The ALJ concluded that a "registration cannot be issued unless the property where the facility is located is zoned agricultural. MCL 287.956(3)."[31] The ALJ further determined a farm is not an allowed use in the Township's Commercial District Zoning Classification and ruled that the facility on the subject property is a violation of the Township Zoning Ordinance and had been since its inception in 1990.[32] The ALJ held that the Haneys did not seek to obtain a variance from the Township to keep cervidae in the Commercial District Zoning Classification.[33]

In 2015, the DNR brought a suit against the Haneys, claiming they continued a cervidae operation on their property despite the DNR's registration revocation.[34] This case was settled and the Haneys had to "de-populate" their herd of cervidae.[35]

B. Circuit Court and Court of Appeals Opinions.

The Township claims that the Haneys brought illegal pigs on the subject property.[36] The Township maintains it had no notice of any pigs on the subject property prior to an independent State inspection which revealed the presence of these pigs in 2009.[37] On May 3, 2016, the Township filed a complaint for permanent injunction against the Haneys in the 18th Circuit Court attempting to bar the Haneys from, among other things, raising hogs or other animals on the subject property in violation of the Township Zoning Ordinance.[38] [39] On March 21, 2017, the Circuit Court

[30] Township's *Fraser I* Court of Appeals Brief, Attachment A, page 13; See also Final Determination and Order, dated September 27, 2010 attached to Township's Brief, Attachment A.
[31] Township's *Fraser I* Court of Appeals Brief, Attachment A, page 12.
[32] Township's *Fraser I* Court of Appeals Brief, Attachment A, page 12.
[33] Township's *Fraser I* Court of Appeals Brief, Attachment A, page 9.
[34] Township's *Fraser I* Court of Appeals Brief, Attachment B, page 3.
[35] Township's *Fraser I* Court of Appeals Brief, Attachment B, page 3.
[36] Township's *Fraser I* Court of Appeals Brief, page 1.
[37] Township's *Fraser I* Court of Appeals Brief, page 1.
[38] Township's *Fraser I* Court of Appeals Brief, Attachment B, page 2.
[39] Haneys' *Fraser I* Court of Appeals Brief, Attachment L, see page 3.

issued an order denying both parties cross motions for summary judgment.[40] Within that Order, the Circuit Court denied the Haneys' motion for summary disposition on the basis of statute of limitations.[41]

On appeal to the Court of Appeals, the Haneys contended that the Township is barred from enforcing its Zoning Ordinance. The Haneys argued the six-year statute of limitations (MCL 600.5813) expired because they operated a piggery on the subject property continuously since 2006 and therefore the Township could no longer enforce its Zoning Ordinance.[42] The Township, among other arguments, claimed its complaint for permanent injunction was an in rem proceeding pertinent to zoning and therefore, the statute of limitations did not apply.[43]

The Court of Appeals, in a trailblazing opinion, held that the six-year statute of limitations under MCL 600.5813 is applicable to municipal enforcement of zoning violations.[44] Consequently, the Court of Appeals reversed the Circuit Court's decision to dismiss the Haneys' request for summary judgment and remanded the same to allow the Haneys to amend their pleadings to include the statute of limitations as a defense in accordance with MCR 2.118(C)(1).[45]

On Application for Leave to Appeal to the Michigan Supreme Court, this Honorable Court vacated the decision of the Court of Appeals in *Fraser I*, remanding the case back for the Court of Appeals to determine whether its original opinion was consistent with *Baker v Marshall*, 323 Mich App 590 (2018).[46]

---

[40] Haneys' *Fraser I* Court of Appeals Brief, Attachment M.
[41] Haneys' *Fraser I* Court of Appeals Brief, Attachment M.
[42] Haneys' *Fraser I* Court of Appeals Brief, pages 1-2.
[43] Township's *Fraser I* Court of Appeals Brief, page 6.
[44] *Fraser Twp I*, 327 Mich App at 15.
[45] *Id*.
[46] *Township of Fraser*, 504 Mich 968 (2020).

On remand, the Court of Appeals upheld its original decision as being consistent with the holding in *Baker*.[47] The Court found that whereas the Plaintiff in *Baker* objected to the affirmative defense of fraud when it was raised by the Defendant, on grounds that the defense was not asserted in the Defendant's responsive pleading, no such objection was made in this case by Plaintiff.[48] The Court maintained that because Plaintiff failed to object, the Circuit Court had tried the merits of the statute of limitations defense with the Plaintiff's implied consent.[49] Thus, the Court of Appeals again reversed the Circuit Court's decision to deny defendants' motion for summary disposition and remanded the case to allow the Haneys to amend their pleadings to include the statute of limitations as a defense.[50]

[47] *Fraser Twp II*, 331 Mich App at 96.
[48] *Id.* at 2.
[49] *Id.*
[50] *Id.* at 3.

ARGUMENT[51]

I. THE COURT OF APPEALS ERRED WHEN IT HELD THAT ABATEMENT OF A PRESENT VIOLATION OF A ZONING ORDINANCE IS BARRED BY THE SIX YEAR GENERAL STATUTE OF LIMITATIONS UNDER MCL 600.5813.[52]

A. STANDARD OF REVIEW

Issues of statutory interpretation are questions of law that are reviewed *de novo*.[53] The issues in this case involve review of statutory language contained in the general six-year statute of limitations on personal actions contained in MCL 600.5813 and applicability of this limitation to the abatement of a zoning violation pursuant to the MZEA.

B. STATUTORY CONSTRUCTION

When considering statutory interpretation, it is important to keep in mind the applicable general rules that this Honorable Court has succinctly indicated for determining the intent of the Legislature:

> … The words used in the statute are the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the context within which they are used in the statute. In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory. 'As far as possible, effect should be given to every phrase, clause, and word in the statute.' Moreover, the statutory language must be read and understood in its grammatical context. When considering the correct interpretation, the statute must be read as a whole, unless something different was clearly intended. Individual words and phrases, while important, should be read in the context of the entire legislative scheme.[54]

As we will see, the plain language of the MZEA and the statute of limitations shows a clear legislative intent that the statute of limitations not apply to municipal zoning violation abatement

---

[51] See also introductory comments to be incorporated herein as contained in the Statement of Amicus Curiae Interest and Introduction, supra.
[52] *Fraser Twp I*, 327 Mich App at 14-15.
[53] *People v Hartwick*, 498 Mich 192, 209; 870 NW2d 37 (2015).
[54] *MDEQ v Worth Twp*, 491 Mich 227, 237-38 (footnotes omitted); 814 NW2d 646 (2012).

and instead the relevant limitations on abatement are contained in MCL 125.3208 of the MZEA and in equitable defenses.

C. SPECIAL RULE OF CONSTRUCTION WHEN CONSIDERING MUNICIPAL AUHORITY.

It must also be considered that the Michigan Constitution of 1963 grants to counties, townships, cities and villages *liberal construction of their statutory powers in their favor*. The Michigan Constitution of 1963, Art. VII, §34, provides that:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.

This Constitutional mandate militates in favor of a finding that a township's specific zoning authority under the MZEA should be liberally construed in a manner that does not subject current abatement actions to operation of the general six-year statute of limitations for personal actions under MCL 600.5813. A review of the authority under the MZEA should be liberally construed in favor of the Township to effectuate the powers granted to it under the law and supports the Township's zoning authority with regard to abating present violations and nonconforming uses. To find otherwise would constitute a very narrow reading of the MZEA's intended comprehensive legislative scheme.

D. THE STATUTE OF LIMITATIONS IN MCL 600.5813 DOES NOT EXPRESSLY LIMIT MUNICIPAL ACTIONS OR ZONING ABATEMENT PROCEEDINGS.

Published Michigan case law has a long-held principle that periods of limitations *do not operate against the State in the absence of a statute otherwise expressly so providing*.[55]

> "The United States Supreme Court long ago explained the concept of the sovereign shield from periods of limitations:

[55] *City of Detroit v 19675 Hasse*, 258 Mich App 438, 445; 671 NW2d 150, 161 (2003).

> The rule *quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations—appears to be a vestigial survival of the prerogative of the Crown.[56]

Statutes of limitations are regulated by Chapter 58 – Limitation of Actions – contained within the Revised Judicature Act of 1961, MCL 600.5801, *et seq*. The *general* catch-all statute of limitations applied by the Court of Appeals Opinion is contained in MCL 600.5813, which provides that:

> 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.

MCL 600.5813 contains unambiguous language. "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed and judicial construction is neither required nor permissible."[57] In this regard, MCL 600.5813 does not apply to municipalities because it is not expressly indicated as required. There is no express indication that this language prescribes a limitation on municipal zoning ordinance abatement actions.[58] The Court of Appeals Opinion clearly was in error in applying this general statute of limitation to the Township's zoning violation abatement action.

E. THE COURT OF APPEALS OPINION WAS IN CLEAR ERROR WHEN IT HELD THAT THE TOWNSHIP'S INJUNCTIVE ACTION WAS AN ACTION *IN PERSONAM* SUBJECT TO THE STATUTE OF LIMITATIONS UNDER MCL 600.5813.[59]

The language in MCL 600.5813 clearly relates to *personal actions*. An action by the Township to abate the use of a property in violation of the Zoning Ordinance is not a personal

---

[56] *Id.*, 445; citing *Guaranty Trust Co. v United States,* 304 US 126, 132–133; 58 SCt 785, 82 LEd 1224 (1938).
[57] *In re: MCI Telecommunications,* 406 Mich 396, 411; 596 NW2d 164 (1999).
[58] Again, it should be noted that MCL 125.3208 of the MZEA provides a limitation against abating *lawful* non-conforming uses. This is the only specific statutory limitation on abatement in any law with regard to zoning.
[59] *Fraser Twp I,* 327 Mich App at 12-13.

action. The action is "in rem" to compel that the property is used in conformance with the zoning ordinance. The Court of Appeals erred when it rejected the Township's argument that its injunctive action against Appellee was an action "in rem."[60] The Court of Appeals reasoned that the injunctive action is not "an action against the subject property…Rather, it is an action seeking injunctive relief against specific, natural persons to force those persons – and only those persons – to come into compliance with a local zoning ordinance."[61] It is undisputed that the keeping of pigs on the subject property is not an allowed use in the Township's Commercial District Zoning Classification and the Haneys never obtained a variance to use the property in such a way. [62] The permitted and special land uses contained within the Township's Commercial District *regulate the use of land*, not the property owner or occupant. The property owner or occupant is irrelevant. The Township's injunction seeks to enjoin a certain use of the property, not a particular person. The abatement will apply to the property regardless of the owner.

The Court of Appeals decision further noted that "[n]o Michigan court has ever held that a claim seeking the abatement of a public nuisance constitutes an action in rem."[63] However, in the unpublished case of *Clay Township*[64] defendants appealed an order granting the plaintiff's petition for injunctive relief to enforce its zoning ordinance. In *Clay Township*, defendant never applied for a building permit for construction of their house and the township filed an action compelling defendant to comply with the Clay Township Zoning Ordinance.[65] The defendant argued, among

---

[60] *Id*.
[61] *Id*.
[62] Township's Court of Appeals Brief, Attachment A, page 12.
[63] *Fraser Twp I*, 327 Mich App at 13.
[64] *Clay Twp v Hotchkiss*, unpublished decision of the Court of Appeals issued July 3, 2003 (Docket No. 236688). Appendix Exhibit C. It is acknowledged that unpublished decisions should not normally be used however this is the only case found directly on point and it is persuasive. *Dep't of Envtl Quality v Waterous Co*, 279 Mich. App. 346, 383-84, 760 NW2d 856, 876 (2008) (Holding that "[t]his Court may follow that [unpublished] decision if it finds the reasoning persuasive.)
[65] *Id.* at 1.

other things, that the "township has no authority to enforce its ordinance and Michigan courts have no jurisdiction over them…"[66] In *Clay Township* the Court of Appeals *concluded that the trial court had "in rem" jurisdiction*, which is the court's power "to hear a case regarding an item of property located within the geographic borders of the state."[67]

In reaching this decision, the panel in *Clay Township* relied on the Michigan Supreme Court case of *Bowermand v Sheehan*, 242 Mich 95, 99-100; 219 NW 69 (1928), which held that,

> It is not disputed that the state may regulate the use of private property, when the health, morals or welfare of the public demands it. Such laws have their origin in necessity.
>
> It is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. [Citations omitted.]

In *Clay Township*, the Court of Appeals further indicated that:

> Michigan has delegated this authority to its sub-units of government. The TZA, gives a township the authority to regulate land uses within the township through a zoning ordinance.[68]

The Legislature enacted the MZEA which authorizes a municipality to regulate the development and use of land and to provide for the adoption of zoning ordinances to promote the public health, safety, and welfare of its inhabitants. *Clay Township* is extremely persuasive to the case at bar because it holds that an injunctive action compelling compliance with a zoning ordinance is an "in rem" proceeding. This determination directly supports the Circuit Court's ruling that the Township's injunctive action against the use of the Haneys' property in violation of the zoning ordinance is an "in rem" proceeding not subject to the general statute of limitations for

[66] *Id.* at 2.
[67] *Id.* at 2-3.
[68] *Id.* at 3.

personal actions (in personam). Accordingly, the Circuit Court's decision to dismiss the Haneys' motion for summary judgment was proper.

The Court of Appeals Opinion holding that the Township's action is *in personam* is misguided.[69] In addition to the *Clay Township* case, it might be helpful to define the differences between personal actions and "in rem" actions. In *City of Detroit v 19675 Hasse*, 258 Mich App 438, 439; 671 NW2d 150, 161 (2003), the Court had to decide whether a statute of limitations precluded the City of Detroit's actions to foreclose tax liens on real property owned by the defendant. The Court in *City of Detroit* held that the statute of limitations does not toll against local municipalities because the Legislature has not enacted a statute of limitations for "in rem" foreclosure actions.[70] The Court in *City of Detroit* concluded that:

> In sum, because the only claims at issue here seek foreclosure rather than damages, we conclude that these appeals involve in rem actions and not personal actions. **Therefore, given the lack of a statute of limitations on in rem actions by the state or the city, its subdivision, we conclude that the trial court correctly declined to find the city's actions time-barred** and properly granted the city summary disposition with respect to this claim as a matter of law.[71] [Emphasis added.]

Black's Law Dictionary provides further guidance and defines an action *in personam* as one that,

> seeks to enforce an obligation imposed on the defendant by his contract or delict; that is, it is the contention that he is bound to transfer some dominion or to perform some service or to repair some loss. In common law, an action brought for the recovery of some debt or for damages for some personal injury, in contradistinction to the old real actions, which related to real property only.[72]

The Court in *City of Detroit* determined that "personal actions are those brought for the recovery of personal property, for the enforcement of a contract or to recover for its breach, or for the recovery of damages for an injury to the person or property."[73] These circumstances are clearly

[69] *Fraser Twp I*, 327 Mich App at 13.
[70] *City of Detroit*, 258 Mich App at 439.
[71] *Id.* at 524.
[72] *Id.* at 447–48.
[73] *Id.* at 449.

not applicable in the case at bar. *City of Detroit* held that an action "in rem" is a proceeding taken "directly against property, and has for its object the disposition of property, without reference to the title of individual claimants."[74] Furthermore, an "in rem" action is "entirely distinct" from "in personam" actions.[75] The Court in *City of Detroit* further explained the differences between an action "in personam" and actions "in rem" as follows:

> [A]ctions in personam differ from actions in rem in that actions or proceedings in personam are directed against a specific person, and seek the recovery of a personal judgment, while actions or **proceedings in rem are directed against the thing or property itself**, the object of which is to subject it directly to the power of the state, to establish the status or condition thereof, or determine its disposition, and procure a judgment which shall be binding and conclusive against the world. The distinguishing characteristics of an action in rem is its local rather than transitory nature, and its power to adjudicate the rights of all persons in the thing.[76] [Emphasis added.]

Fraser Township's preliminary injunction action against the Haneys seeks compliance with its zoning ordinance. The Township is not seeking damages or seeking a personal judgment against the Haneys. Instead, the purpose of the injunction is to preclude the use of the subject property in a manner that violates the Township Zoning Ordinance. Therefore, Fraser Township's action is an "in rem" proceeding. Enforcement of the Township Zoning Ordinance precludes anyone from using real property in a manner that violates the zoning ordinance. The specific owner or occupant of the property in question is irrelevant. The abatement is against the unlawful property use. No one may operate a piggery on the Subject Property in the Township Commercial District Zoning Classification. The preliminary injunction filed by Fraser Township attempts to compel compliance with the Zoning Ordinance's use requirements; it does not seek damages from the Haneys. The abatement would not follow the Haneys if they sold the property, but would instead

[74] *Id.* at 449-450.
[75] *Id.* at 449-450.
[76] *Id.* at 448.

remain with the property, as a lien. Because this type of action is completely local, townships are often times permitted to abate the nuisance and place the costs of such action on the land.

As previously indicated, townships have statutory authority to enact and enforce zoning ordinances for the orderly planning of their communities. MCL 125.3203 authorizes Fraser Township to adopt a zoning ordinance designed to:

> promote the public health, safety, and general welfare, to encourage the use of lands in accordance with their character and adaptability, to limit the improper use of land… (Emphasis Added).

A use of land that is in violation of a zoning ordinance is a nuisance per se.[77] The Township seeks to enjoin the use of land that violates its Zoning Ordinance; therefore, the *in personam* statute of limitations in MCL 600.5813 is not applicable.

F. ANALYSIS OF THE MZEA DEMONSTRATES THAT THE GENERAL STATUTE OF LIMITATIONS IS INAPPLICABLE.

Zoning is a very unique area of the law. The MZEA is the sole authority for a township to exercise zoning authority.[78] Under the MZEA a township may adopt a "zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare."[79]

---

[77] MCL 125.3407, infra, 20.
[78] *Maple BPA, Inc v Bloomfield Twp,* 302 Mich App 505, 515; 838 NW2d 915 (2013).
[79] MCL 125.3201.

This zoning authority is broad and to be liberally construed in favor of the local municipality.[80] Zoning governs land uses while a person's activities may also be regulated by other general police power ordinance authority.[81] Abatement of a zoning land use regulation in circuit court is "in rem"[82] and therefore not subject to the personal ("in personam") statute of limitation contained in MCL 600.5813.

A violation of a zoning ordinance provision is subject to abatement pursuant to MCL 125.3407, which provides in relevant part that:

> Except as otherwise provided by law, a use of land or a dwelling, building, or structure, including a tent or recreational vehicle, used, erected, altered, razed, or converted in violation of a zoning ordinance or regulation adopted under this act is a nuisance per se. The court shall order the nuisance abated, and the owner or agent in charge of the dwelling, building, structure, tent, recreational vehicle, or land is liable for maintaining a nuisance per se. … (Emphasis added)

As indicated by the plain language of the statute, if a violation of the zoning ordinance occurs, such as using land to house pigs in a commercial zoning district, the court shall order the nuisance abated.[83] It is the land that cannot be used for this purpose and the present use creates a present cause of action for abatement; to find otherwise would undermine zoning itself. People could just build and use land in a zoned community regardless of the zoning and then try to sneak by with a six-year waiting period (MCL 600.5813), after which they could use their property forever in an unlawful manner. This is not the intent and certainly is not a liberal construction in favor of municipalities.

---

[80] *Frens Orchards, Inc v Dayton Township*, 253 Mich App 129, 132; 654 NW2d 346 (2002).
[81] See *Square Lake Hills Condo Ass'n v Bloomfield Twp*, 437 Mich 310, 323-325; 471 NW2d 321 (1991) and *Natural Aggregates Corp v Brighton Twp*, 213 Mich App 287, 300-302; 539 NW2d 761 (1995).
[82] *Clay Twp*, at *2.
[83] Even where a municipal employee fails to apply the ordinance requirements, a municipality cannot be bound by such an *ultra vires* act. *Fass*, 326 Mich at 30-31.

The Court of Appeals Opinion applying the general six-year statute of limitations effectively and improperly renders the nonconforming use provision in MCL 125.3208 nugatory. In this regard the Court of Appeals erred when it rejected Amicus Curiae's argument that:

> if defendants are allowed to continue to keep and raise hogs on the subject property because the applicable statute of limitations has barred plaintiff's complaint, it would effectively render null the government's power to regulate nonconforming uses of zoned land, MCL 125.3208, and its authority to abate violations of zoning ordinances as nuisances, MCL 125.3407.[84]

In rejecting this argument, the Court of Appeals ignored the unique and comprehensive nature of the statutory zoning authority municipalities are provided in the MZEA. The appropriate location for restrictions on municipal enforcement of land use zoning regulations can be expected to be found in the comprehensive MZEA.[85] To this end, the MZEA does in fact contain its own specific and unique limitation on enforcement as contained in MCL 125.3208 regarding the impact of nonconforming structures and uses of land. The special nature of zoning is reflected in this provision. With regard to nonconforming uses MCL 125.3208 provides that:

> (1) If the use of a dwelling, building, or structure or of the land is ***lawful*** at the time of enactment of a zoning ordinance or an amendment to a zoning ordinance, then that use may be continued although the use does not conform to the zoning ordinance or amendment. This subsection is intended to codify the law as it existed before July 1, 2006 in section 16(1) of the former county zoning act, 1943 PA 183, section 16(1) of the former township zoning act, 1943 PA 184, and section 3a(1) of the former city and village zoning act, 1921 PA 207, as they applied to counties, townships, and cities and villages, respectively, and shall be construed as a continuation of those laws and not as a new enactment.
>
> (2) The legislative body may provide in a zoning ordinance for the completion, resumption, restoration, reconstruction, extension, or substitution of nonconforming uses or structures upon terms and conditions provided in the zoning ordinance. In establishing terms for the completion, resumption, restoration, reconstruction, extension, or substitution of nonconforming uses or structures, different classes of nonconforming uses may be established in the zoning ordinance with different requirements applicable to each class.

[84] *Fraser Twp I*, 327 Mich App at 14.
[85] See attached MZEA, Appendix Exhibit B.

> (3) The legislative body may acquire, by purchase, condemnation, or otherwise, private property or an interest in private property for the removal of nonconforming uses and structures. The legislative body may provide that the cost and expense of acquiring private property may be paid from general funds or assessed to a special district in accordance with the applicable statutory provisions relating to the creation and operation of special assessment districts for public improvements in local units of government. Property acquired under this subsection by a city or village shall not be used for public housing.
>
> (4) The elimination of the nonconforming uses and structures in a zoning district is declared to be for a public purpose and for a public use. The legislative body may institute proceedings for condemnation of nonconforming uses and structures under 1911 PA 149, MCL 213.21 to 213.25. (Emphasis added.)

As evidenced by paragraph 1 above, the Legislature specifically expressed its intent to protect lawful nonconforming uses. In doing so, the specific language does not protect uses that were illegal when they began. These types of illegal land uses, similar to the Haneys' keeping of pigs on commercial property, are still subject to abatement and do not receive protection as lawful nonconforming uses.

In discussion of the intent of this statutory provision this Court has indicated that "[i]t is the policy of this state and a goal of zoning that uses of property not conforming to municipal zoning ordinances be gradually eliminated."[86] This is a very strong statement of intent. These uses, even when originally lawful, do not get to continue forever into the future. The nonconforming use provisions in MCL 125.3208 would be rendered nugatory or, at least absurd, if the six-year general statute of limitations applied to illegal nonconforming uses. In other words, the Township would have no authority to gradually eliminate or limit an illegal nonconforming use in light of the Court of Appeals Opinion. This outcome does not reflect the legislative intent.

> A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date. **To be protected, the nonconforming use must have been legal at one time; a use that violates the zoning ordinances since its inception does not draw such protection**.[87] [Emphasis added.]

[86] *Lyon*, 317 Mich App at 488.
[87] *Id.* at 489.

Furthermore, the Court in *Lyon* noted that:

> **historical failure to enforce a particular zoning ordinance, standing alone, is insufficient to preclude enforcement in the present**.[88] [Emphasis added.]

A review of the facts in *Lyon* highlights the erroneous nature of the Court of Appeals Opinion. In *Lyon*, the defendant purchased property within the township's R-1 district zoning classification.[89] It is undisputed that the defendants operated their business without township interference for several decades despite that such a use was never permitted under the zoning ordinance.[90] Township officials even visited the property and never expressed any concern regarding the use of property in violation of the zoning ordinance.[91] In 2013, neighbors began to complain about noise and general business activity taking place on the property.[92] The Township wrote warning letters to the defendant indicating that the business was not permitted in the residential zoning district, even though portions of the business existed for years.[93] Eventually, the township sought judicial intervention to force the defendant to cease business operations on the property.[94] The circuit court ordered the defendant to comply with the zoning restrictions on their land, which was subsequently affirmed by the Court of Appeals.[95] The panel in *Lyon* rejected the defendant's defense of laches and equitable estoppel.

The *Lyon* case is binding, published case law that presents a situation where the plaintiff township unequivocally *knew* that the defendants were violating the use restrictions contained in the zoning ordinance. Clearly, the accrual date of when the wrong initially occurred was years, if

---

[88] *Id.*
[89] *Id.* at 485.
[90] *Id.*
[91] *Id.* at 486.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at 496.

not decades, before the township mailed the defendants a warning letter stating the property's use as a commercial enterprise was in violation of the zoning ordinance. Regardless, the Court of Appeals explicitly ruled that the township could enforce its zoning ordinance and "order an end to defendant's commercial uses, which had always been prohibited on their R-1.0 Residential Agricultural land."[96]

In the case at bar, the Court of Appeals Opinion ignored the precedence set in *Lyon* without even a mention. In *Lyon*, the township expressly knew the defendant was violating the zoning ordinance for decades. Similar to the defendants in *Lyon*, the Haneys' use of the subject property *never* conformed to the Township Zoning Ordinance. It is undisputed that the keeping of pigs or operating a piggery is an agricultural use that is not permitted in the Township's Commercial District Zoning Classification. The only way for the Haneys to maintain the current use of the property for pigs is if that use was a lawful nonconforming use. However, because the use was never lawfully established, it has not and *cannot* earn lawful nonconforming status. This specific nonconforming provision controls over the general statute of limitations contained in MCL 600.5813.[97]

As discussed above, a municipality cannot possibly be aware of every zoning violation existing within its borders. The panel in *Lyon* clearly recognized and understood this because it never applied the six-year statute of limitations defense when it ruled that the plaintiff township could still enforce its zoning ordinance. The Court of Appeals Opinion holding that the six-year statute of limitations begins to run "when the violation first took place"[98] places an impossible

---

[96] *Id*.

[97] "[W]here there is an apparent conflict between two statutes, a fundamental rule of statutory construction requires that the specific statute control over the general and that the specific statute be viewed as an exception to the general rule." *In re Johnson Estate*, 152 Mich App 200, 205; 394 NW2d 136 (1986).

[98] *Fraser Twp I*, 327 Mich App at 11.

burden on municipalities. Municipalities will be unable to abate current zoning violations that remain hidden for six or more years. For example, a municipality will be powerless to abate a violation for an unfenced pool if the violation was not realized, and acted upon, until more than six years after the pool is installed. The pool could just remain in its current state as a dangerous safety hazard. Many other examples were referenced in the Introduction. To this end, the Court of Appeals decision wholly undermines the specific spirit and intent of the MZEA to grant a municipality the power to adopt and enforce a zoning ordinance to regulate the use of land within its borders including the power to abate nonconforming uses.

Moreover, in *Susan Reaume v Township of Spring Lake*, 328 Mich App 321; 937 NW2d 734 (2019), affirmed in part and vacated in part by ____ Mich _____; 943 NW2d 394 (Mem)(Mich, 2020)[99], the Court of Appeals followed the holding in *Lyon*, when it held, that historical failure to enforce a zoning ordinance does not preclude enforcement in the present.[100] In *Susan Reaume*, a township employee allegedly told the plaintiff there were no restrictions on short-term or long-term rentals.[101] Thereafter, the plaintiff made significant improvements to her property located in the R-1 district and rented it out as a seasonal short-term vacation rental.[102] The township subsequently passed an ordinance regulating short-term rentals.[103] The plaintiff applied for a short-term rental license, which was denied by the township.[104] The plaintiff appealed the township's denial to the Zoning Board of Appeals, which denied her appeal.[105] The plaintiff sought

[99] The part of Opinion vacated does not impact argument herein.
[100] *Susan Reaume*, 328 Mich App at 327; citing *Lyon*, 317 Mich App at 489.
[101] *Id.* at 324.
[102] *Id.*
[103] *Id.* at 325.
[104] *Id.*
[105] *Id.*

leave to appeal to the Court of Appeals, which was granted, but the same ultimately affirmed the township's decision to deny the plaintiff's request for a short-term vacation license.[106]

On appeal, plaintiff argued, in part, that the use of her property as a short-term rental was a lawful nonconforming use.[107] In *Susan Reaume* the Court of Appeals concluded that,

> Plaintiff's use of the property for short-term rentals was never permitted under the Township's R-1 zoning…. Plaintiff's use of the property for short-term rental was not a prior non-conforming use because it was never lawful under the Spring Lake Township Zoning Ordinance. The Township's prior failure to enforce the ordinance does not confer upon plaintiff a right to continue violating the ordinance.[108]

This Honorable Court affirmed this conclusion on application for leave. Similar to *Susan Reaume*, the Haneys' use of the subject property was never lawful. *Susan Reaume* echoed the holding in *Lyon* by recognizing a municipality's authority to enforce a particular zoning ordinance for a present violation. This case must be in accord and Fraser Township must be provided the same authority. Fraser Township attempted to enforce its zoning ordinance for a present-day violation against a use that was never lawful within the Commercial District Zoning Classification. Under the reasoning presented in *Lyon* and *Susan Reaume*, Fraser Township's failure to previously enforce should not preclude enforcement for a present-day violation. Application of the six-year statute of limitations is clearly not intended.

G. EVEN IF MCL 600.5813 WAS APPLICABLE, IT WOULD NOT BAR THE TOWNSHIP'S ABATEMENT ACTION

MCL 600.5827 states, in part, that the claim accrues at the time *provided in sections 5829 to 5838*. Nowhere in Sections 5829 to 5838 is a limitation set for zoning enforcement. MCL 600.5827 further states that in cases not covered by these sections, "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."

---

[106] *Susan Reaume*, 328 Mich App at *325*-36.
[107] *Id.* at 332.
[108] *Id.* at 335 (emphasis added).

The keeping of pigs and/or operating a piggery on the subject property violates the Township Zoning Ordinance each and every day because such a use is prohibited within the Township's Commercial Zoning District. This use violates the Township Zoning Ordinance every day until the use stops. The Township can simply file suit to abate the most recent claimed violation; the abatement is not to stop damages but instead to stop a current violation of the law.

In other words, Fraser Township is attempting to enjoin the use of the land in violation of the zoning ordinance today, not back in 2006 or 2009. Every day the Haneys keep pigs or operate a piggery on the subject property constitutes a separate violation of the Township's Code of Ordinances, Section 1-10(a).

In *Joy Management Company v City of Detroit*, 183 Mich App 334, 336; 455 NW2d 55 (1990) the plaintiff brought an action challenging the City of Detroit's point-of-sale ordinance. The plaintiff argued, in part, that the ordinance exceeded the City's authority by providing each day in violation as a separate offense.[109] The Court in *Joy Management* specifically upheld the statutory authority for the City to punish for violations of its ordinance by providing that each day of violation constitutes a separate offense.[110]

The same analysis can be applied to the Township's zoning enforcement scheme. The Township's Code of Ordinances, Section 1-10(a) similarly provides that each day of violation constitutes a separate offense. Further MCL 125.3407 allows for a municipality to impose a penalty for violations. The Township is attempting to enjoin the current use of the property and each day a violation exists is a separate offense. The Township is not seeking damages for improper use of the property dating back to 2006.

[109] *Joy Management Company*, 183 Mich App, 341-342.
[110] *Id.*

H. THE COURT OF APPEALS ERRED WHEN IT RELIED ON MARILYN FROLING REVOCABLE TRUST V BLOOMFIELD HILLS COUNTRY CLUB, 283 MICH APP 264; 769 NW2D 234 (2009).

The Court of Appeals erred by relying on *Marilyn Froling Revocable Trust v Bloomfield Hills Country Club*, 283 Mich App 264; 769 NW2d 234 (2009), when it rejected the Township's argument that it should be able to enforce its zoning ordinance because Section 1-10(a) of the Township Code of Ordinances states that "each act of violation [of the code] and every day upon which any such violation shall occur shall constitute a separate offense."[111] The Court of Appeals reasoned that no evidence was presented suggesting new pigs were added to the subject property; and therefore "no new wrongs established a newly accrued cause of action."[112]

The *Marilyn Froling* case is drastically different than the case at bar. In *Marilyn Froling*, the defendant built a home on their property in 1989.[113] Before construction began, a swale was in place on defendant's property that served to move water away from plaintiff's property.[114] During construction of the defendant's house the swale was eventually filled in, which prevented the natural runoff of water from the corner of the plaintiff's property.[115] In April, 1989, the plaintiffs experienced significant flooding on their property that continued in June 1996, June 1997, June 2001, and May 2004 and January 2005.[116] In 2004, the plaintiff filed a suit for claims of nuisance and trespass against the neighbors.[117] The defendant moved for summary disposition, arguing that the three-year period of limitations, which began to run at the time the plaintiff first noted flooding on their property in 1989, barred plaintiff's trespass and nuisance claims because the "continuing

---

[111] *Fraser Twp I*, 327 Mich App at 11.
[112] *Id.* at 12.
[113] *Marilyn Froling*, 283 Mich App at 267.
[114] *Id.* at 268.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 241.

wrongs" doctrine had been abrogated in Michigan.[118] The trial court ruled that the claim for flooding accrues at the time the land was first visibly damaged, and held that "damages that accrue at a later date do not renew the limitations period or give rise to a new cause of action."[119] Plaintiff appealed this decision. On appeal, the Court of Appeals concluded that:

> … according to the accrual statute, a period of limitations begins to run from the time the claim accrues, which is "the time the wrong upon which the claim is based was done regardless of the time when damage results."[120]

The panel in *Marilyn Froling* reviewed a civil action between property owners; the panel never contemplated violations of ***zoning laws*** enforced by a municipality. Moreover, the "wrong" in *Marilyn Froling* occurred in 1989, when the swale was filled in. Although the 1989 "wrong" was never corrected and caused the flooding for many years, it was the only singular "wrong". In the case at bar, Section 1-10(a) of the Township Code of Ordinances is violated each and every day a pig remains on the subject property, this is a critical difference. Fraser Township seeks to abate a violation of its zoning ordinance for a violation that is occurring presently, not from 2006.[121] Contrarily, in *Marilyn Froling*, the singular "wrong" (filling in the swale) occurred in 1989 and the plaintiff filed suit in 2004, well beyond the three-year statute of limitations. Despite the clear factual differences between *Marilyn Froling* and the case at bar, the Court of Appeals erred when it focused its analysis on when the violation first took place, instead of when the Township learned of the violation.[122]

The case at bar is clearly distinguishable from *Marilyn Froling* because there is a clear distinction between a single wrong that results in continued damages and continuing *conduct* that

---

[118] *Id.* at 241-42.
[119] *Id.* at 242.
[120] *Id.* at 289.
[121] Abatement actions may also prohibit future use of the property in violation of the zoning ordinance.
[122] *Fraser Twp I.*, 327 Mich App at 11.

violates the law. In other words, the Haneys are improperly engaging in a wrongful act every day the pigs remain on their property in violation of the zoning ordinance. This is not a case of damages that flow from the wrong. In the case at bar, the wrong action – the keeping of pigs – occurs each day a pig remains on the subject property. The case at bar is not a single tortious action that can be time barred. Violating the law once cannot serve as a free pass to keep violating it.

To put it another way, a recreational trespass under Part 731 of the Natural Resources and Environmental Protection Act, 1994 PA 451, shall be prosecuted "within 1 year from the time the offense charged was committed."[123] Anyone who violates a provision of Part 731 shall be guilty of a misdemeanor.[124] The one-year statute of limitations to prosecute a recreational trespass runs from when the recreational trespass violation was committed. In other words, someone may violate Part 731 every day for seven years and each day a violation occurs is a separate offense under MCL 324.73106(1). Despite the hundreds of previous trespasses, a violator may be held criminally liable for a recreational trespass for a present-day violation because enforcement of a violation of a recreational trespass from five years ago is not being sought. This same type of reasoning applies to the case at bar.

Section 1-10(a) of the Township Code of Ordinances specifically provides that, "each act of violation [of the code] and every day upon which any such violation shall occur shall constitute a separate offense." Therefore, every day a pig remains on the subject property is a violation of Section 1-10(a) and is subject to abatement. The Township seeks to enforce its zoning ordinance for the *present-day* violation of keeping pigs on the subject property. Even if the six-year statute of limitations under MCL 600.5813 applies to zoning enforcement matters, the Township is well within that time frame to enforce a present-day violation. Section 407 of the MZEA authorizes a

[123] MCL 324.73106(1).
[124] MCL 324.73110.

municipality to provide a penalty for a violation of a zoning ordinance.[125] Section 1-10(a) provides the penalty.

I. ZONING ABATEMENT DEFENDANTS ARE NOT WITHOUT ANY DEFENSE.

Zoning abatement actions are subject to limitation if the use is lawful nonconforming under MCL 125.3208 or because of equitable defenses. These defenses are separate from the claimed statute of limitations. They exist and are ever-present in case law[126] because the general statute of limitations is inapplicable; the void of any prior cases asserting the statute of limitations defense in municipal zoning enforcement cases speaks volumes.

> A township may be equitably estopped from enforcing a zoning ordinance when:
>
> (1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts....
>
> Just as with a laches defense, prejudice is a mandatory element. The prejudice necessary to establish a laches or estoppel defense cannot be a *de minimis* harm. As described in 83 Am. Jur. 2d, § 937, p. 894, the party fighting the zoning enforcement must show that he or she "made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he or she ostensibly had acquired." Courts have also held that the property owner must establish "a financial loss ... so great as practically to destroy or greatly to decrease the value of the ... premises for any permitted use."[127]

Furthermore, the Court in *Lyon* noted that these defenses are,

> "judicially disfavored because they invite judicial interference into an area of local "public interest" and are "rarely applied in the zoning context except in the clearest and most compelling circumstances."[128]

[125] MCL 125.3407(a).
[126] See Fn. 9 on pg. 2.
[127] *Lyon*, 317 Mich App, 490–591.
[128] *Lyon*, 317 Mich App, 489; citing 83 Am. Jur. 2d, § 937, page 894.

However, these equitable defenses are often litigated. One example of this alternative defense that could have been asserted in this case is typified in *People v Yeo*, 103 Mich App 418 (1981). In that case, defendant was prosecuted under a village ordinance prohibiting people from maintaining more than three dogs on a premise for a period exceeding six months. In *Yeo*, the defendant claimed that the village was estopped from enforcing its ordinance because the applicable statute of limitations had passed (MCL 66.6), and because the defendant claimed to have acquired a variance by prescription because the violation had been continuing for 18 years.[129] The Court ignored the statute of limitations argument, and ruled against the defendant noting that there was no legal support for the theory of a variance by prescription.[130] The Court held that, generally, a zoning authority will not be estopped from enforcing its zoning ordinance absent "**exceptional circumstances**."[131] Similarly, the Court in the case at hand should find that the general statute of limitations, MCL 600.5813, does not bar the Township from enforcing its zoning ordinance, despite the passage of time, when the nature of the offense is continuous. However, the defendant could have challenged the abatement action on the grounds that the action was inequitable and "exceptional circumstances" warranted relief.

[129] *Yeo*, 103 Mich App 424.
[130] *Id.* at 425-26.
[131] *Id.*

CONCLUSION

For the reasons stated above, Amicus Curiae respectfully request that this Honorable Court reverse the decision of the Court of Appeals based upon improper application of the six-year general statute of limitations provided for in MCL 600.5813.

Dated: February 17, 2021

BAUCKHAM, SPARKS, THALL, SEEBER & KAUFMAN, P.C.

By: _____

Robert E. Thall (P46421)
Attorneys for Amicus Curiae, Michigan Townships Association