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STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Swartzle, P.J., and Sawyer and Ronayne Krause, JJ.

TOWNSHIP OF FRASER,	
Plaintiff/Appellant,	MSC No. 160991
v.	COA No. 337842
HARVEY HANEY, AND RUTH ANN HANEY,	Trial Ct. No. 16-003272-CH
Defendants/Appellees.	

AMICUS CURIAE BRIEF OF THE REAL PROPERTY LAW SECTION OF THE STATE BAR OF MICHIGAN

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Table of Contents

Index of Authorities iii

Statement of the Basis for This Court's Jurisdiction vi

Statement Amicus Curiae's Interest vii

Statement of the Question Presented viii

I. Introduction 1

II. Statement of Facts 3

III. Standard of Review 3

IV. Discussion 3

A. The ZEA Authorizes Abatement of a "Use" of Property that Violates a Zoning Ordinance 4

1. "Use" is in the Present Tense 4

2. "Use" is Inherently Ongoing 5

3. Because a "Use" is a Present Activity, a Limitations Period Should Not Bar an Action to Abate a Use in Violation of a Zoning Ordinance 6

4. The ZEA Does Not Limit Enforcement to Municipalities 9

B. Allowing a Use that Violates a Zoning Ordinance to Avoid Abatement Because the Use has Been in Place Longer than the Limitations Period Would Introduce a Series of Problems Into Michigan Law 11

1. Protecting Uses that Violate a Zoning Ordinance and that Arose After the Zoning Ordinance Went Into Effect is Contrary to the Legislature's Express Policy in the ZEA 12

2. Allowing a Use that Violates a Zoning Ordinance to Continue Because the Limitations Period has Run Since the Use Began Introduces Problems in the Law Governing Valid Nonconforming Uses 13

3. Permitting Super Nonconforming Uses Creates Incentive for Users to Conceal Their Conduct 14

4. Permitting Super Nonconforming Uses Creates a Disproportionate Incentive for Municipalities to Inspect 15

5. Permitting Super Nonconforming Uses Renders Property Ownership in Michigan Less Desirable for Persons Other than the Super Nonconforming User 15

V. Conclusion and Request for Relief 16

RECEIVED by MSC 3/12/2021 11:04:26 AM

RECEIVED by MSC 3/12/2021 11:04:26 AM

Index of Authorities

Michigan Public Acts

1921 PA 207 10

Michigan Statutes

MCL 125.587 10

MCL 125.3101 1

MCL 125.3201 5

MCL 125.3206 ..... 5, 6

MCL 125.3208 12

MCL 125.3407 ..... *passim*

MCL 125.3501 5

MCL 125.3702 10

MCL 600.5813 ..... vi, viii, 6

MCL 600.5827 ..... viii, 3, 7

Michigan Court Rules

MCR 7.303 vi

MCR 7.312 1

Michigan Decisions

Austin v Older,
283 Mich 667; 278 NW 727 (1938) 12, 15

Baura v Thomasma,
321 Mich 139; 32 NW2d 369 (1948) 10

Bigelow v Walraven,
392 Mich 566; 221 NW2d 328 (1974) 14

Burt Twp v Dep't of Nat Resources,
459 Mich 659; 593 NW2d 534 (1999) 3

Bisio v City of Clarkston,
506 Mich 37; 933 NW2d 36 (2020) 4

City of Holland v Consumers Energy Co,
308 Mich App 675, 685; 866 NW2d 871 (2015) 4

City of Mt Pleasant v State Tax Comm'n,
477 Mich 50; 729 NW2d 833 (2007) 6

Cook v Bandeen,
356 Mich 328; 96 NW2d 743 (1959) 10

Edward C Levy Co v Marine City Zoning Bd of App,
293 Mich App 333, 810 NW2d 621 (2011) 13, 14

Garg v Macomb County Cmty Mental Health Servs,
472 Mich 263; 696 NW2d 646 (2005) 8

Honigman Miller Schwartz & Cohn, LLP v City of Detroit,
505 Mich 284; 952 NW2d 358 (2020) 5

Horvath v Delida,
213 Mich App 620; 540 NW2d 760 (1995) 8, 9

Houghton-Portage Twp Schs v Petrelius,
281 Mich App 520; 761 NW2d 395 (2008) 13

Indian Village Assoc'n v Shreve,
52 Mich App 35; 216 NW2d 447 (1974) 10

In re MU,
264 Mich App 270; 690 NW2d 495 (2004) 4

Ins Comm'r v Aageson Thibo Agency,
226 Mich App 336; 573 NW2d 637 (1997) 3

Jones v DeVries,
326 Mich 126; 40 NW2d 317 (1949) 10

Kircher v City of Ypsilanti,
269 Mich App 224; 712 NW2d 738 (2005) 15

RECEIVED by MSC 3/12/2021 11:04:26 AM

Livonia Hotel, LLC v City of Livonia,
259 Mich App 116; 673 NW2d 763 (2003) 12

Marilyn Froling Revocable Trust v Bloomfield Hills Country Club,
283 Mich App 264; 769 NW2d 234 (2009) 7

Papadimas v Mykonos Lounge,
176 Mich App 40; 439 NW2d 280 (1989) 16

Rhoades v Finn,
288 Mich 262; 284 NW 720 (1939) 16

Terlecki v Stewart,
278 Mich App 644; 754 NW2d 899 (2008) 8, 9

Traverse City v East Bay Twp,
190 Mich 327; 157 NW 85 (1916) 6

Wolff v Steiner,
350 Mich 615; 87 NW2d 85 (1957) 10

Federal Decisions

Village of Euclid v Ambler Realty,
272 US 365 (1926) 1

Other Authorities

The Appraisal Institute,
The Appraisal of Real Estate (15th ed, 2020) 16

Random House Webster's College Dictionary (2007) 5

RECEIVED by MSC 3/12/2021 11:04:26 AM

RECEIVED by MSC 3/12/2021 11:04:26 AM

Statement of the Basis for This Court's Jurisdiction

This Court possesses jurisdiction over this case under MCR 7.303(B)(1), based on the Court's November 25, 2020 Order granting leave to appeal from the Court of Appeals' decisions. That Order directed that the parties address whether MCL 600.5813 applies to municipalities seeking to enjoin zoning ordinance violations. It also invited the Real Property Law Section of the State Bar of Michigan to submit an amicus curiae brief.

RECEIVED by MSC 3/12/2021 11:04:26 AM

Statement of Interest of the Real Property Law Section

Amicus curiae the Real Property Law Section of the State Bar of Michigan (the "RPLS") is a voluntary membership society of the State Bar of Michigan. Membership in the RPLS is open to all members of the State Bar of Michigan, but the RPLS membership generally consists of attorneys that practice and are interested in real property law. One mission of the RPLS is to promote the accurate and efficient administration of real property law in Michigan. The Court of Appeals decision that a property's use that violates a zoning ordinance, which arose after the zoning ordinance's adoption, may remain in place if the limitations period expired since the use began, notwithstanding that it is an ongoing use, is an issue of interest to the membership of the RPLS. That issue may affect practice concerning zoning, and more broadly, property ownership in Michigan in general. Because the Court of Appeals decision has potentially wide impact, the RPLS has an interest in the correct resolution of the issue in this case, and on this Court's invitation, the RPLS's Council voted to authorize this amicus curiae brief.

RECEIVED by MSC 3/12/2021 11:04:26 AM

Statement of the Question Presented

Under MCL 600.5813, a personal claim not addressed in another limitations statute must be asserted within six years after the claim accrues. MCL 600.5827 provides that a claim accrues at the time the wrong on which the claim is based was "done." Under MCL 125.3407, a "use" of property that violates a zoning ordinance is a nuisance per se, and thus a wrong, that may be abated. Is an ongoing use of property that violates a zoning ordinance nevertheless "done" on the date that the use began, such that a claim to abate the use must be asserted within six years of that date?

The trial court answered "no."

The Court of Appeals answered "yes."

Plaintiff/Appellant answers "no."

Defendants/Appellees answer "yes."

The RPLS answers "no."

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I. Introduction

Justice Sutherland once wrote for the United States Supreme Court that municipalities may enact zoning ordinances to prevent what might otherwise be out-of-place uses, "like a pig in the parlor instead of the barnyard." *Village of Euclid v Ambler Realty*, 272 US 365, 388 (1926). Here, the issue is more akin to whether Michigan law allows a pig to refuse to be shooed to the barnyard if the pig has been in the parlor long enough. The Court of Appeals held that if a pig is in the parlor for the limitations period, then it can continue to stay in the parlor regardless of whether the zoning ordinance identifies it as out of place. But that is inconsistent with Michigan law and good policy.[1]

The inconsistency with Michigan law arises out of the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.* (the "ZEA"). That Act allows municipalities to adopt zoning ordinances to implement their visions of productive and harmonious property uses. It provides that a use of property that does not conform to a zoning ordinance is lawful if it was in place at the time of the ordinance's adoption. *See* MCL 125.3208(1). If a use was not in place at that time, then the ZEA provides that the use is a nuisance that may be abated. *See* MCL 125.3407. It is the "use" – a present-tense term, and a term that refers to something that happens each day – that subjects a nuisance to abatement. To return to Justice Sutherland's pig, the point is not that a pig was once in the parlor, and the parlor thus continues to smell bad. Rather, it is

[1] No counsel for any party authored this Brief in whole or in part, and no counsel or party made any monetary contribution intended to fund the preparation or submission of this Brief. No person made any monetary contribution to this Brief's preparation. *See* MCR 7.312(H)(4).

RECEIVED by MSC 3/12/2021 11:04:26 AM

the pig's continuing presence in the parlor – its "use" of the parlor – that is a new wrong each instance it happens, and that is subject to abatement.

Because of that, applying MCL 600.5813's six-year limitations period, from the time that a "use" began, is inappropriate. The Court of Appeals analyzed a claim to abate a use that violates a zoning ordinance presuming that the abatement claim accrued when the use began. Under the accrual statute, MCL 600.5827, a claim accrues when it is "done." But a "use" is ongoing and is not complete, or "done," until it is discontinued. Treating a "use" as "done" when the use began fails to account for the ZEA's language and the nature of a "use" of property.

The Court of Appeals' decision creates negative consequences and incentives for municipalities and property owners, and that is inconsistent with good policy. A decision that a use of property for six years in violation of a zoning ordinance renders the use immune from enforcement would create a kind of "super nonconforming use." That not only contradicts MCL 125.3407's policy that such uses are generally subject to abatement, but it would also alter the body of law governing "grandfathered" valid non-conforming uses that existed when a zoning ordinance was adopted. This would be contrary to the policy that the Legislature set forth in the ZEA. *See* MCL 125.3208(4). Further, such a holding would create incentive for property owners to hide information, which in turn would require municipalities to increase inspection and enforcement, ultimately at the cost of property owners across Michigan. These and other factors interfere with the use and enjoyment of property overall, and weigh against the Court of Appeals' conclusion that the six-year limitations period prohibits abatement of a use that violates a zoning ordinance.

RECEIVED by MSC 3/12/2021 11:04:26 AM

For these and other reasons, the RPLS requests that this honorable Court issue an opinion clarifying that the ZEA permits abatement of an ongoing "use" that violates a zoning ordinance.

II. Statement of Facts

The RPLS agrees with the Statement of Facts that Fraser Township set forth in its Brief to this Court.

III. Standard of Review

The issues in this case involve interpretation of the ZEA and the applicability of a statute of limitations. These are issues of law that Michigan courts review de novo. *See Burt Twp v Dep't of Nat Resources*, 459 Mich 659, 662, 665; 593 NW2d 534 (1999) (applying de novo review to interpretation of zoning statutes and ordinances); *see also Ins Comm'r v Aageson Thibo Agency*, 226 Mich App 336, 340-41; 573 NW2d 637 (1997) ("The applicability of a statute of limitations is a question of law that we review de novo").

IV. Discussion

The ZEA authorizes abatement of a use of property that violates a zoning ordinance. A "use" of property is different from a wrong that is "done" in that a use is, by its nature, continuing, whereas Michigan law establishes a time when a wrong is "done." *See* MCL 600.5827. Therefore, there is no point when a limitations period expires and a continuing "use" of property that violates a zoning ordinance cannot be abated because abatement is time-barred. Such a limitation on abatement would introduce a host of problems into Michigan law, and ultimately render property ownership in Michigan less desirable.

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A. The ZEA Authorizes Abatement of a "Use" of Property that Violates a Zoning Ordinance

First and most fundamentally, the ZEA provides that a use of land or a structure in violation of a zoning ordinance is a nuisance per se that may be abated:

> 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.

MCL 125.3407. This Court must apply this language to implement the Legislature's intent, using the plain meaning of the language that the Legislature chose. *See Bisio v City of Clarkston,* 506 Mich 37, 44; 933 NW2d 36 (2020). Under the ZEA's plain language, it is the "use" of land or a structure in violation of a zoning ordinance or regulation that is a nuisance per se.

1. "Use" is in the Present Tense

The ZEA provides that a "use" – a present tense term – is a nuisance that may be abated. Plain statutory language must be enforced as written, including the Legislature's choice of tense. *City of Holland v Consumers Energy Co*, 308 Mich App 675, 685; 866 NW2d 871 (2015). When the Legislature uses present tense terms, it requires a court to examine the circumstances at the time that an action is filed. *See, e.g., In re MU*, 264 Mich App 270, 278-79; 690 NW2d 495 (2004). Here, this would require examining the "use" of property at the time that a person seeks abatement. Under MCL 125.3407, if the present "use" is in violation of the zoning ordinance, then

RECEIVED by MSC 3/12/2021 11:04:26 AM

it shall be abated. The ZEA does not focus on when the use began, only on the "use" that is happening at the time that a party seeks abatement.

2. "Use" is Inherently Ongoing

Relatedly, "use" is something that is ongoing, not something that starts and is at that point done. The ZEA does not define "use," so this Court should give that term its plain and ordinary meaning. One source for a term's plain meaning is a dictionary. *See Honigman Miller Schwartz & Cohn, LLP v City of Detroit,* 505 Mich 284, 305-06; 952 NW2d 358 (2020). There are several dictionary definitions of "use," with the applicable definition identified as being from "law." That is "the enjoyment of property, as by occupation or employment of it." Random House Webster's College Dictionary (2007), p 1347.

The ZEA applies "use" consistently with that definition. For example, it authorizes municipalities to adopt zoning ordinances to "regulate the use of land and structures to meet the needs of the state's citizens" for shelter, livelihood, recreation, and so forth. MCL 125.3201(1). It also identifies the types of activities and structures on properties that qualify as "residential use of property for the purposes of zoning." MCL 125.3206. And it allows municipalities to require submission "of a site plan before authorization of a land use or activity regulated by a zoning ordinance." MCL 125.3501(1). All of these instances of "use" relate to the enjoyment or occupation of property, whether for some "use" for the people's needs or identifying which "use" is "residential use."

The enjoyment and occupation of property is not something that is "done" at some discrete point in time. Rather, "use" is ongoing, until there is no use. For

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example, the ZEA identifies a state-licensed residential facility as a "residential use" of property. MCL 125.3206(1). A property that is occupied and employed as a state-licensed residential facility each day is therefore "used" for residential purposes each day. The "use" is not done on the day that the last nail is driven, or the last resident moves in. "Use" of property is a present occupation or employment of the property, and is only "complete" when the property is no longer employed or occupied.[2]

3. Because a "Use" is a Present Activity, a Limitations Period Should Not Bar an Action to Abate a Use in Violation of a Zoning Ordinance

Because a "use" of property is present and ongoing, efforts to analyze "use" under a statute of limitations go astray. Under MCL 600.5813, all personal actions not accounted for in some other statute "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." Presuming that an action to abate a use that violates a zoning ordinance is a personal action and not an in rem action, the ongoing "use" makes the limitations period irrelevant. A claim accrues under MCL 600.5827 "at the time the wrong upon which the claim is based was done regardless of the time when damage results." In the instance of a property use that violates a zoning ordinance, the use is never "done" until it is discontinued. Each day that the use continues, to the extent

[2] This Court's decision in *Traverse City v East Bay Twp*, 190 Mich 327, 330; 157 NW 85 (1916), illustrates an instance when a property was not "used." There, the city owned land. It sought a tax exemption available for land "used for public purposes." But the city was not engaged in any activity on the land, which was completely vacant; the city had "no plans for the vacant land," and "the land was not part of any plan with a broader vision." This Court held that the city therefore did not "use" the property. On the other hand, in *City of Mt Pleasant v State Tax Comm'n*, 477 Mich 50, 58; 729 NW2d 833 (2007), the Court considered whether that city's efforts to promote economic development on certain property was "use for public purposes." The Court identified the city's preparation of concept plans and site plans, and its marketing, as "use" of the property.

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that the accrual date applies at all, accrual is pushed six years into the future. And if the use were somehow "done," then there would be no use and nothing to abate.

Accordingly, analyzing the time frame when a person can seek abatement of a use of property in violation of a zoning ordinance the way the Michigan courts have analyzed the time frame that may apply to damages arising from an alleged wrong does not work. This is the error that the Court of Appeals made in relying on *Marilyn Froling Revocable Trust v Bloomfield Hills Country Club*, 283 Mich App 264; 769 NW2d 234 (2009). There, the country club constructed a swale that later caused flooding on the trust's property. But the courts dismissed the trust's nuisance claim against the country club because the trust did not assert the claim until after the limitations period had run, calculated from the time that the country club constructed the swale. The construction of the swale was the "wrong upon which the claim is based was done" under MCL 600.5827. But with a use of property in violation of the zoning ordinance, there is no single instance when the use is "done." A "use" of property is something happening in the present, and MCL 125.3407 provides that the use is a nuisance per se that is subject to abatement.

Moreover, because a "use" is something that is ongoing, this Court's abolition of the "continuing wrongs" doctrine does not affect whether a "use" that violates a zoning ordinance may be abated. Michigan courts have struggled with continuing wrongs in nuisance cases, but several cases have identified that a continuing activity, that pushes out the accrual date, is different from continuing damages. *Terlecki v Stewart,* 278 Mich App 644; 754 NW2d 899 (2008), illustrates this. There, plaintiff sued defendants alleging claims including nuisance, based on defendants replacing a

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spillway to a lake, causing the lake level to rise and flood plaintiff's property. Defendants responded that the limitations period had run since they installed the spillway, so plaintiff's nuisance claim was time-barred. Plaintiff argued that the flooding was a continuing wrong, but the Court of Appeals concluded that *Garg v Macomb County Cmty Mental Health Servs*, 472 Mich 263; 696 NW2d 646 (2005), applied, such that the continuing wrong doctrine was unavailable, and plaintiff's claim was time-barred. In doing so, the Court of Appeals cited to *Horvath v Delida*, 213 Mich App 620; 540 NW2d 760 (1995), which explained the difference between continued wrongful conduct and the continued consequences of some past wrongful act. The former does not implicate limitations concerns or the continuing wrongs doctrine, while the latter does:

> [A] continuing wrong is established by continual tortious *acts,* not by continual harmful effects from an original, completed act. *See, e.g., Defnet* [*v City of Detroit,* 327 Mich 254; 41 NW2d 539 (1950)] (the continuing-wrongful-acts doctrine applied where the defendants' maintenance of an *active* sewer on the plaintiffs' property for nearly thirty years constituted a continuing trespass); *Difronzo v Port Sanilac* 166 Mich App 148; 419 NW2d 756 (1988) (the defendants' building of a harbor and necessary facilities on Lake Huron bottom land adjacent to the plaintiff's property constituted an ongoing nuisance); *Moore* [*v City of Pontiac*, 143 Mich App 610; 372 NW2d 627 (1985)] (operation of a sanitary landfill constituted a continuing nuisance); *Oakwood Homeowners Ass'n, Inc* [*v Ford Motor Co,* 77 Mich App 197; 258 NW2d 475 (1977)] (operation of manufacturing plants that caused air pollution constituted a continuing tort); *Hodgeson v Genesee Co Drain Comm'r,* 52 Mich App 411; 217 NW2d 395 (1974) (maintenance of storm sewer drain under the plaintiffs' property, which caused periodic flooding, constituted a continuing nuisance). Here, defendants are alleged to have committed a single tortious act in 1982 when they dredged the lake, and from that single act plaintiffs' property suffered noticeable permanent damage beginning as early as 1985 and intensifying over time. Accordingly, because plaintiffs have only established aggravated ill effects from a single tortious act, their reliance on the continuing-wrongful-acts doctrine is misplaced.

RECEIVED by MSC 3/12/2021 11:04:26 AM

Horvath, 213 Mich App at 627-28. In *Terlecki*, 278 Mich App at 656-57, the Court of Appeals concluded that, presuming that defendants replacing the spillway was a wrong, the limitations period had run since that wrong was done. There was no continuing act that might have pushed the timeline forward.

Under the ZEA, the wrongful act is the "use," and every day it happens, the limitations period is pushed into the future. Justice Sutherland's pig again provides an example. If the pig is in the parlor, that is a use of the parlor. The date that the pig first entered the parlor does not matter, because the use is not "done" upon the pig's entry. The use is still happening so long as the pig is still in the parlor. And if the local zoning ordinance forbids a pig in the parlor, then the pig is a nuisance per se that can be abated. Whether the pig has been in the parlor for the limitations period cannot permit the pig to continue to stay in the parlor.

4. The ZEA Does Not Limit Enforcement to Municipalities

When this Court granted leave to appeal, it asked whether the limitations period in MCL 600.5813 applies to municipalities seeking to enforce zoning ordinances. But the Court should note that the ZEA's declaration that a use of property that violates a zoning ordinance is a nuisance per se that is subject to abatement does not limit abatement to municipalities. Rather, MCL 125.3407 provides that a "use of land or a dwelling, building, or structure" in "violation of a zoning ordinance or regulation adopted under [the ZEA] is a nuisance per se." It then provides that a "court shall order the nuisance abated . . ."

Nothing in the ZEA's text limits the persons who may seek abatement to municipalities, meaning that the same analysis concerning the timing of an

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abatement should apply to private parties that may seek to abate nuisances per se under MCL 125.3407. In fact, Michigan courts have long recognized a private party's ability to abate a use that is declared a nuisance per se under Michigan zoning law. For example, in *Indian Village Assoc'n v Shreve*, 52 Mich App 35; 216 NW2d 447 (1974), plaintiffs sought to enjoin defendants' use of property that violated a zoning ordinance. They relied on the ZEA's predecessor, which like the ZEA provided that "uses carried on in violation of any provision of local ordinances or regulations made under the authority of this act are hereby declared to be a nuisance per se."[3] Defendants argued that only public officials could seek abatement. The Court of Appeals, citing this Court's decisions in *Baura v Thomasma,* 321 Mich 139; 32 NW2d 369 (1948); *Jones v DeVries,* 326 Mich 126; 40 NW2d 317 (1949); *Wolff v Steiner,* 350 Mich 615; 87 NW2d 85 (1957); and *Cook v Bandeen,* 356 Mich 328; 96 NW2d 743 (1959), held that "this state has long recognized the propriety of private citizens bringing an action to abate public nuisances arising out of violations of zoning ordinances." Indeed, the court held that there was "nothing to indicate that the Legislature intended to limit a private person's right to invoke the circuit court's jurisdiction to abate a public nuisance arising out of the violation of a zoning ordinance." *Indian Village Assoc'n*, 52 Mich App at 38.

The ZEA's language likewise does not limit a private person's right to abate a nuisance per se arising out of the use of property that violates a zoning ordinance.

[3] *Id.* at 38. This language is *Indian Village Assoc'n* quoting MCL 125.587, which was a provision in the City and Village Zoning Act, 1921 PA 207. The ZEA repealed this Act and substantively replaced this provision with MCL 125.3407. *See* MCL 125.3702(1) (repealing prior zoning enabling acts).

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And because the ZEA declares that a present-tense "use" of property that violates a zoning ordinance is a nuisance per se, the timing of a private person's abatement action should be analyzed in the same manner as any action by a municipality to abate a nuisance. Regardless of who seeks abatement, as long as there is an ongoing "use" of property that violates a zoning ordinance, there is no reason to focus on the time that the use began. In other words, if the pig is still in the parlor, in violation of a zoning ordinance, that is a nuisance per se, and the ZEA does not impose any limitations on the persons who may seek abatement.[4]

B. Allowing a Use that Violates a Zoning Ordinance to Avoid Abatement Because the Use has Been in Place Longer than the Limitations Period Would Introduce a Series of Problems into Michigan Law

This Court should also issue an opinion clarifying that the ZEA permits abatement of an ongoing "use" that violates a zoning ordinance because holding otherwise would create confusion and problems in Michigan law. Such a holding would impact Michigan zoning law, and may render it more expensive, and less desirable, to own property in this State.

[4] The Court should note that this analysis concerns only abatement. The ZEA does not address a party seeking damages and the RPLS expresses no position on whether damages may be available. But the ZEA is clear that a present "use" is a nuisance per se that may be abated and does not limit the ability to abate a nuisance per se to public entities.

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1. Protecting Uses that Violate a Zoning Ordinance and that Arose After the Zoning Ordinance Went Into Effect is Contrary to the Legislature's Express Policy in the ZEA

Uses of property that violate a zoning ordinance are known as "nonconforming uses." If such a use was in place "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." MCL 125.3208(1). These uses are commonly known as "valid non-conforming uses," and sometimes as "grandfathered uses." A nonconforming use that arises after a zoning ordinance went into effect is known as an invalid nonconforming use. *See, e.g., Livonia Hotel, LLC v City of Livonia,* 259 Mich App 116, 126, 127; 673 NW2d 763 (2003).

Invalid nonconforming uses are generally subject to abatement under MCL 125.3407, while zoning law protects but aims for the gradual elimination of valid nonconforming uses. Indeed, the gradual elimination of nonconforming uses is a long-recognized goal of Michigan zoning law. *See Austin v Older*, 283 Mich 667, 675; 278 NW 727 (1938). The Legislature included this goal as an explicit policy in the ZEA, providing that 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." MCL 125.3208(4).

A decision that an invalid nonconforming use, which arose after a zoning ordinance's adoption, may remain in place if the limitations period expired since the use began, notwithstanding that it is an ongoing use, would be contrary to this policy. Granting this status to such nonconforming uses would create a kind of "super nonconforming use." Valid nonconforming uses can be gradually eliminated, and invalid nonconforming uses are subject to abatement. But if a nonconforming use

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arose after the zoning ordinance went into effect, and continued for longer than the limitations period, and for that reason could remain, it would be superior to both the valid and other invalid nonconforming uses that Michigan law already addresses. A holding that an invalid nonconforming use cannot be eliminated because it continued for longer than the limitations period, notwithstanding that it is an ongoing use, would upend the expressed policy in favor of eliminating nonconforming uses overall. Michigan courts must not undermine the Legislature's policy choices. *See Houghton-Portage Twp Schs v Petrelius,* 281 Mich App 520, 524; 761 NW2d 395 (2008).

2. Allowing a Use that Violates a Zoning Ordinance to Continue Because the Limitations Period has Run Since the Use Began Introduces Problems in the Law Governing Valid Non-Conforming Uses

Next, a decision that an invalid nonconforming use, which arose after a zoning ordinance's adoption, may remain in place if the limitations period expired since the use began, notwithstanding that it is an ongoing use, would require the courts to determine whether any of the rules that Michigan courts have established for nonconforming uses apply. A number of principles govern valid nonconforming uses, which permit them to remain, but not be expanded, with the goal of their gradual elimination. The Court of Appeals summarized some of these principles in *Edward C Levy Co v Marine City Zoning Bd of App*, 293 Mich App 333, 810 NW2d 621 (2011). The court there mentioned some of the principles that apply to establishment, expansion, and termination of valid nonconforming uses:

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> An existing 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. Nonconforming uses may not generally be expanded, and one of the goals of local zoning is the gradual elimination of nonconforming uses. The policy of the law is against the extension or enlargement of nonconforming uses, and zoning regulations should be strictly construed with respect to expansion. The continuation of a nonconforming use must be substantially of the same size and the same essential nature as the use existing at the time of passage of a valid zoning ordinance. Moreover, the nonconforming use is restricted to the area that was nonconforming at the time the ordinance was enacted. Nonconforming use involves the physical characteristics, dimensions, or location of a structure, as well as the use of the premises.

Id. at 341-42 (footnotes omitted). If this Court permits creation of a "super nonconforming use" that is subject to neither gradual elimination nor abatement, Michigan courts would have to wrestle with whether any or all of these principles apply, as well as other questions like whether a super nonconforming use can continue if the property is conveyed to a new user that intends to carry on the same use. Instead, the Court should apply MCL 125.3407's plain language to clarify that the ZEA permits abatement of an ongoing "use" of property that violates a zoning ordinance.

3. Permitting Creation of Super Nonconforming Uses Creates Incentive for Users to Conceal Their Conduct

If a person can use a property for the limitations period in a manner that violates the zoning ordinance, and thus achieve a right to that use that can never be abated, that creates incentive for such persons to conceal their violations. This is a perverse result that has nothing to do with the general purpose of statutes of limitations, which are to ensure that courts and defendants do not have to address stale claims. *See, e.g., Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974).

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An effort to abate an ongoing "use" of property is never stale, because the use is ongoing. But the prospect of achieving a super nonconforming use creates incentive for users willing to violate zoning laws to do so, and to conceal their activity, to achieve that status.

4. Permitting Super Nonconforming Uses Creates a Disproportionate Incentive for Municipalities to Inspect

Relatedly, if a person can use a property for the limitations period in a manner that violates the zoning ordinance, and thus achieve a right to that use that can never be abated, that creates incentive for municipalities to conduct more intense and more frequent inspections. These inspections would be necessary to ensure that no person using property in a manner that violates a zoning ordinance, who would already have incentive to conceal its use, could do so for the limitations period. This would strain municipal budgets and possibly result in inspection costs that would be passed on to property owners and taxpayers. *See, e.g., Kircher v City of Ypsilanti*, 269 Mich App 224, 231-32; 712 NW2d 738 (2005) (approving a city's property inspection fees).

5. Permitting Super Nonconforming Uses Renders Property Ownership in Michigan Less Desirable for Persons Other than the Super Nonconforming User

Finally, if a person can use a property for the limitations period in a manner that violates the zoning ordinance, and thus achieve a right to that use that can never be abated, that would render property ownership in Michigan less desirable overall. This results from all the factors discussed, but examples include that law-abiding owners would forever be subject to uses that would otherwise be nuisances, and thus never receive the "maximum benefit" of the local zoning ordinance. *Austin v Older*,

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283 Mich at 675 ("the maximum benefit of zoning ordinances cannot be obtained as long as nonconforming businesses remain").

Related to that, in many contexts Michigan law permits persons to rely on other persons complying with the law. *See, e.g.*, *Rhoades v Finn,* 288 Mich 262, 265; 284 NW 720 (1939) ("One can rely on the right of way and may assume that another will obey the law"); *Papadimas v Mykonos Lounge*, 176 Mich App 40, 47; 439 NW2d 280 (1989) ("the actor may reasonably proceed upon the assumption that others will obey the criminal law" (internal quotation omitted)). Property owners, tenants, and others decide to buy, rent, or otherwise use property in reliance on factors that may include the zoning of adjacent and nearby property. If a person can use a property in violation of a zoning ordinance, and establish an effective right to continue that use indefinitely, that undermines the reliability of zoning ordinances overall, and renders an owner, tenant, or user selecting a site in Michigan that much more risky.

Ownership may also become more expensive as municipalities approve fees or taxes to finance the inspection and abatement activity that would be necessary to combat the creation of super nonconforming uses. A property that is subject to more expense will, all other things being equal, be less desirable to own. *See, e.g.,* The Appraisal Institute, The Appraisal of Real Estate (15th ed, 2020), p 135, 425-26.

V. Conclusion and Request for Relief

To avoid these unfortunate consequences, and to ensure that Michigan courts are faithfully implementing the Legislature's intent set forth in the ZEA, the RPLS

respectfully requests that this honorable Court issue an opinion clarifying that the ZEA permits abatement of an ongoing "use" that violates a zoning ordinance.

Respectfully Submitted,

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