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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

Trial Court No. 16-003272-CH
Court of Appeals No. 337842
Supreme Court No. 160991

TOWNSHIP OF FRASER,

Plaintiff-Appellant,

vs.

HARVEY HANEY AND RUTH ANN HANEY,

Defendants-Appellees.
_____/

BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT SUBMITTED BY THE MICHIGAN MUNICIPAL LEAGUE AND THE STATE BAR GOVERNMENT LAW SECTION

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STATEMENT OF THE BASIS OF JURISDICTION

This matter is properly before the Court based on leave granted by the Court on November 25, 2000 for the purpose of reviewing the published decision in this case of the Court of Appeals, dated December 20, 2018, vacated and remanded by the Supreme Court September 27, 2019, and decision of the Court of Appeals dated January 21, 2020 following remand. The Supreme Court directed in its order granting leave to appeal, dated November 25, 2020, that the parties are to address whether MCL 600.5813 applies to municipalities seeking to enjoin zoning ordinance violations. MCR 7.303(B)(1).

STATEMENT OF AMICUS CURIAE INTEREST

The Michigan Municipal League (MML) is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of approximately 566 Michigan cities and villages, many of which are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a board of directors, which is broadly representative of its members. The purpose of the MML-Legal Defense Fund is to represent the member cities and villages in litigation of statewide significance.

The Government Law Section of the State Bar of Michigan (GLS) is a voluntary membership section of the State Bar of Michigan, comprising approximately 1,040 attorneys who generally represent the interests of government corporations, including cities, villages, townships and counties, boards and commissions, and special

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authorities. Although the Section is open to all members of the State Bar, its focus is centered on the laws, regulations, and procedures relating to public law. The Government Law Section provides education, information, and analysis about issues of concern to its membership and the public through meetings, seminars, the State Bar of Michigan website, public service programs, and publications. The Government Law Section is committed to promoting the fair and just administration of public law. In furtherance of this purpose, the Government Law Section participates in cases that are significant to governmental entities throughout the State of Michigan. The Section has filed numerous *amicus curiae* briefs in state and federal courts. The position expressed in this *Amicus Curiae Brief* is that of the Government Law Section only and is not the position of the State Bar of Michigan.

The governing bodies of the MML and GLS have authorized and directed the attorneys appearing on this brief to file an *amicus curiae* brief in this case in support of the plaintiff-appellant township, and MML and GLS will be solely responsible for compensating these attorneys.[1]

STATEMENT OF QUESTIONS PRESENTED

For purposes of responding to the question directed by the Court (whether MCL 600.5813 applies to municipalities seeking to enjoin zoning ordinance violations), the following questions are addressed in this Brief:

---

[1] This brief was written in its entirety by amicus counsel listed below, and no monetary contribution intended to fund the preparation or submission of this brief was made by a party or any other person aside from the amicus parties for whom this brief was written, as identified in the text accompanying this footnote.

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I. WHETHER, ASSUMING THE COURT FINDS THAT THE STATUTE OF LIMITATIONS SHOULD APPLY FOR THE PURPOSE OF MEASURING THE DURATION OF THE TOWNSHIP'S RIGHT TO ENFORCE ITS ZONING REGULATIONS ON DEFENDANTS' PROPERTY, THE STATUTE DOES NOT BAR A CASE SEEKING TO PROSPECTIVELY ABATE THE CAUSE OF A VIOLATION WHICH OCCURS TODAY.

Plaintiff-Appellant says 'yes'

Amici say 'yes'

The Trial Court said 'yes'

The Court of Appeals said 'no'

II. WHETHER THE DOCTRINES OF LACHES AND ESTOPPEL, AND NOT A ROTE APPLICATION OF THE STATUTE OF LIMITATIONS, PROVIDE THE APPROPRIATE RULES FOR IMPOSING TIME LIMITATIONS FOR ENFORCEMENT CONSISTENT WITH THE EQUITIES OF THE CASE.

Plaintiff-Appellant says 'yes'

Amici say 'yes'

The Trial Court did not answer this question

The Court of Appeals did not answer this question

III. WHETHER, EVEN IF THE COURT DETERMINES THAT THE STATUTE OF LIMITATIONS RATHER THAN LACHES SHOULD BE APPLIED, THE DEFENDANTS' ACTION OF INEQUITABLY LULLING THE TOWNSHIP INTO BELIEVING THAT THE STATE HAD PROPERLY AUTHORIZED THE MAINTENANCE OF ANIMALS ON

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THE PROPERTY SHOULD RESULT IN THE EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS UNTIL 2015 WHEN THE STATE SUED TO TERMINATE THE AUTHORIZATION OBTAINED BY DEFENDANTS' MISREPRESENTATION.

Plaintiff-Appellant says 'yes'

Amici say 'yes'

The Trial Court did not answer this question

The Court of Appeals did not answer this question

IV. WHETHER THERE WAS A WELL-SUPPORTED BASIS FOR THE TRIAL COURT'S RULING THAT IN REM JURISDICTION APPLIES TO THIS ACTION, WHICH IS ESSENTIALLY AN ACTION AGAINST THE PROPERTY RATHER THAN AN ACTION AGAINST THE DEFENDANTS AS INDIVIDUALS.

The Trial Court said 'yes'

The Court of Appeals said 'no'

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STATEMENT OF FACTS

These Amici incorporate the following statements of fact:

1. The recitation of facts by the Court of Appeals in its 2018 decision, 327 Mich. App. at 3-4, as well as footnote 2 of the opinion in that case [Referred to in this Brief as **"Footnote 2"**].
2. The recitation of facts contained in the brief of plaintiff-appellant in this appeal.
3. The recitation of facts contained in the brief of the amicus curiae Michigan Townships Association in this appeal, with particular focus on the recitation in Part A, "Background" of the Statement of Facts.
4. The Findings and Conclusions of the Administrative Law Judge (following a hearing at which defendants were represented by Counsel) in the Proposal for Decision dated July 29, 2010, accepted and adopted in a Final Determination and Order dated October 4, 2010, in the Department of Natural Resources and Environment in the matter of the Revocation of the Privately Owned Cervidae Facility, File No. 3409-0200, all of which was attached as Exhibit A to plaintiff's Brief on Appeal to the Michigan Court of Appeals in this case, dated February 8, 2018. A copy of such materials accompany this Brief as the 'Appendix for Brief Amicus Curiae Filed in Support of Plaintiff Appellant by the Michigan Municipal League and the State Bar Government Law Section.' (**Such Findings and Conclusions are referred to in this Brief as the "2010 Administrative Findings and Conclusions"**).

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5. Extracted from all of the above, for efficiency and clarity purposes, these Amici recite the following bullet points of fact which are relevant to the arguments made in this Brief and will be referred to in this Brief as the "***Summary of Facts***":

Summary of Facts

- The Privately Owned Cervidae Producers Marketing Act, MCL 287.951, *et seq*. ("the Act") regulates the licensing of livestock facilities that are capable of holding animals of a variety known as "cervidae," which include but are not limited to deer, elk, moose, reindeer, and caribou. Authorizing the right to maintain such a cervidae facility is under the jurisdiction of the Michigan Department of Natural Resources and Environment ("DNRE"), and *not within the jurisdiction of local zoning*. MCL 287.951, *et seq*. [2010 Administrative Findings and Conclusions, p 6].
- Michigan law prohibits DNRE from permitting a facility for the keeping of cervidae on property that has not been zoned for agricultural use. MCL 287.951, *et seq*., 284.956, [2010 Administrative Findings pp 5, 8].
- Accordingly, DNRE regulations under the Act do not permit the issuance of a permit for the keeping of cervidae in a commercial zoning district. [2010 Administrative Findings and Conclusions, p 8].
- The property at issue has for all times relevant been zoned for commercial use, and not agricultural use. [2010 Administrative Findings and Conclusions, p 5]

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- Nevertheless, in 1990, defendants secured a DNRE permit authorizing the property to be utilized as a facility to keep cervidae. [2010 Administrative Findings and Conclusions, p 6].
- The facility, granted a permit by DNRE, was in violation of the Township zoning ordinance since 1990, including when it was initially authorized by the DNRE [Conclusion of Law ¶ 11, Administrative Findings and Conclusions].
- DNRE granted the permit authorizing animals on the property based on a *representation by defendants to the DNRE* "incorrectly identifying the zoning of the property as agricultural instead of commercial," [Footnote 2].
- DNRE relied on defendants' representation of the zoning on the property, and as a result did not seek a determination of the zoning by the Township. [Conclusion of Law ¶ 13, Administrative Findings and Conclusions]. Specifically, the application was not sent to the Township because defendants stated the property was zoned agricultural, and DNRE relied on defendants' representation concerning zoning as contained in the application and did not seek confirmation from the Township. [Administrative Findings and Conclusions, p 8].
- While the DNRE permit was in place, the Township was preempted by DNRE authority and could not as a matter of law have sought a zoning enforcement action to remove the animals permitted by the DNRE.
- Township representatives are not required as a condition to holding office, and rarely have, the expertise of knowing or otherwise discerning a

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distinction between any particular type of animal within facilities approved by DNRE as being "capable of holding cervidae species" under MCL 287.952(f).

- Consequently, at the point in time that defendants brought onto the property animals not within the classification of "cervidae," the Township could not have reasonably known that such animals were not within DNRE's exclusive jurisdiction.
- The circumstances were offensive on defendants' property as a result of the presence of all of the animals due to what the Township characterized as a nuisance caused by stench from, and flies drawn by, the animals and their waste on the property. [2018 Court of Appeals Statement of Facts, pp 3-4].
- In 2010, there were proceedings at the state (before an administrative law judge) on the issue of the zoning and permitted land use on the property, resulting in findings by the state that:
  - The Township zoning did not include the agricultural authorization.
  - The DNRE determines whether zoning is agricultural based on information provided in the application. [Administrative Findings and Conclusions, p 8].
- The defendants' application was not sent to Fraser Township for verification of the zoning because defendant Haney stated the property was zoned agricultural, and for purposes relating back to 1990, the DNRE

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relied on that representation by defendants because agricultural zoning was required for the permit to be issued to keep animals on the property.

- The conclusion of the state in 2010 was that, in order to retain the animals, defendants would need to seek and obtain zoning permission from the Township. [Administrative Findings and Conclusions, p 6].
- Although considerable time expired following notice by the state in 2010 that defendants would have the opportunity to seek a zoning variance from the Township, defendants never sought the necessary zoning permission from the Township [Footnote 2; Administrative Findings and Conclusions, p 9], but took advantage of the situation by retaining the animals on the property for an additional period of time. Accordingly, in 2015, the DNRE finally initiated litigation against defendants to enforce the requirement that the keeping of animals as part of a DNRE licensed facility could not be conducted on the property due to its commercial zoning. Nonetheless, agricultural animals remained on the property.
- In the very next year, 2016, after learning of the DNRE revocation and lawsuit in 2015, which meant that the state was no longer exercising its exclusive jurisdiction to authorize the keeping of animals on the property, the Township initiated the present case seeking to abate the unlawful agricultural use. [2018 Court of Appeals Statement of Facts, pp 3-4].
- The Township's expeditious action after learning of the state's revocation and lawsuit shows that, prior to 2015, the Township had been lulled away from active enforcement of the zoning requirement sought in the present

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case by the deceptive actions of the defendants in their representations to the DNRE.

ARGUMENT

Standard of Review

For purposes of all issues presented, this case involves an interpretation of the Michigan Zoning Enabling Act, MCL 125.3101, *et seq*., and the applicability of the statute of limitations, MCL 600.5813, including whether MCL 600.5813 applies to municipalities seeking to enjoin zoning ordinance violations. These matters present issues of statutory and case law interpretation, and are reviewed by the Court *de novo*. *People v. Hartwick,* 498 Mich. 192, 870 N.W.2d 37 (2015).

In addition, review of this case is governed by the directive in Const 1963, Art 7, § 34, which 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."

INTRODUCTION

There are two underlying currents that flow throughout this case. Recognizing the strength and importance of these currents will assist the Court in reaching the ultimate conclusion on the rights of the parties. These currents are also relevant to the functioning of Michigan communities in carrying out their constitutional and statutory missions. One current is the ongoing protection of public and private quality of life

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through the existence and successful enforcement of zoning. The other current is the dual nature of the Michigan court system, which sits and rules jointly "at law" and "in equity." The distinction between law and equity controls the availability of particular claims and defenses, with both systems proving at times necessary to achieve fairness, justice, and a well-ordered society. This introduction provides a brief summary of these two underlying currents, which provide an important foundation for deciding the issues in this case, leading to the conclusion that the statute of limitations does not impede enforcement of the local government laws in this matter.

A. The Underlying Current of Zoning Law Relevant to This Case

A background introduction of zoning law provides an important context in which to examine this case. The entire case arises from an effort by Fraser Township to maintain the integrity of the community's duly adopted zoning districts and abate a per se nuisance to protect the public.

Zoning is at the heart of local land use policy that strikes at one of the most important reasons for the existence of state and local government. The Supreme Court of the United States has emphasized that the "regulation of land use is perhaps the quintessential state activity."[2] Justice Thurgood Marshall put it this way: Local zoning "is one of the primary means by which we protect that sometimes difficult to define concept of quality of life."[3] A local government's land use decisions physically, functionally and aesthetically impact the community in the most fundamental ways – often for the long term.

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[2] *Fed Energy Regulatory Comm v Mississippi,* 456 US 742, 767, n 30; 102 S Ct 2126; 7 L Ed 2d 532 (1982).
[3] *Village of Belle Terre v Boraas,* 416 US 1, 13; 94 S Ct 1536; 39 L Ed 2d 797 (1974).

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The Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., ("MZEA") authorizes the exercise of the zoning authority by providing that "A local unit of government may provide by 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 . . . ."[4] In the 2010 opinion in *Kyser v. Kasson Township,* the Court pointed out that:

> The exercise of the zoning authority under [MZEA] is an empowerment of local legislative bodies (e.g., township boards) to plan and zone for a broad range of purposes. These provisions reveal the comprehensive nature of the [M]ZEA. It defines the fundamental structure of a zoning ordinance by requiring a zoning plan to take into account the interests of the entire community and to ensure that a broad range of land uses is permitted within that community. These provisions empower localities to plan for, and regulate, a broad array of land uses, taking into consideration the full range of planning concerns that affect the public health, safety, and welfare of the community.[5]

The protections which are put into place by zoning begin with the division of a municipality into separate, uniform zoning use districts, including residential, commercial, agricultural, and industrial. These use districts are established based on a master plan intended to provide for the arrangement of land uses in a way that separates conflicting uses. In this manner, residential neighborhoods are insulated from industrial and agricultural uses, commercial traffic, and adverse impacts such as noise, smoke, traffic, and odor. The districts must be strategically located as part of a dynamic balance, with the uses in one district directly impacting the health, safety, and welfare of

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[4] MCL 125.3201(1).
[5] 486 Mich 514, 518, 535-542 (2010).

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property owners in other districts. This delicate balance must be maintained by ongoing enforcement.

In *Hess v West Bloomfield Township*, this Court recognized the dynamic balance established by the arrangement of land uses, and that weakening the right of a municipality to regulate a specific land use – particularly an impactful one -- could erode the efficacy of zoning in the overall dynamic balance within the community.[6] More recently, the Court observed that "[a]ll property is held subject to the right of the government to regulate its use . . . so that it shall not be injurious to the rights of the community or so that it may promote its health, morals, safety and welfare," and that, accordingly, the local government "has a *cognizable compelling interest to enforce its zoning laws*."[7]

Within the MZEA, the Michigan Legislature included MCL 125.3407, which provides local governments an extraordinary enforcement power. Specifically, any use undertaken in violation of a zoning ordinance has been deemed to be a *nuisance as a matter of law* and is to be *abated by the court*. The fact that the legislature granted *matter of law* nuisance status to zoning violations is an extremely consequential legislative policy statement that zoning compliance is crucial to the success of land use regulation in a community.

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[6] 439 Mich 550, 565; 486 NW2d 628 (1992). In *Hess*, the Court recognized the need to regulate *water-related* uses in order to achieve the scheme of regulation intended as part of exercising the zoning authority.

[7] *Greater Bible Way v City of Jackson*, 478 Mich 373, 403; 733 NW2d 734 (2007), citing *Austin v Older*, 283 Mich 667, 677; 278 NW 727 (1938). (Emphasis supplied).

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B. The Underlying Current of "Law" vs. "Equity"

Michigan law has long recognized the distinction between "law" and "equity." Originally, cases were brought separately "at law" or "in equity," with two discrete sides of the court to process them. For the most part, parties filed cases "at law" seeking money damage relief. Cases at law were structured by the requirement to prove strictly enforced elements. If the elements were demonstrated, the plaintiff won. Otherwise, the defendant won. In contrast, parties filed cases "in equity" seeking *fairness and justice*, with the outcome being predominantly governed by equitable doctrine, overseen under the discretion of the court, rather than strict rules. In courts of law, parties were entitled to have facts determined by a jury, and in courts of equity the chancellor (the judge) made rulings directly on the facts.

In 1963, the Michigan Constitution abolished the separation in the courts of law and equity.[8] Yet, the substantive distinctions in terms of rules and doctrines have been to a great degree preserved. In an injunction action only a few years after 1963, the Court noted that "[t]his is a chancery [equity] case. The constitutional provision (Const. 1963, art. 6, § 5) abolishes the distinctions between law and equity proceedings. It did not abolish the historic difference between law and equity. We note this because it is as a Court of Equity we sit in the case at bar."[9] In a similar respect, it was observed that "Long ago, we recognized that '[t]he right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury.' . . . and '[t]he cognizance of

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[8] Const 1963, Art. 6, § 5.
[9] *School District for City of Holland, Ottawa and Allegan Counties v. Holland Ed. Association,* 380 Mich. 314, 319, 157 N.W.2d 206 (1968).

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equitable questions belongs to the judiciary as a part of the judicial power, and under our Constitution must remain vested where it always has been vested heretofore.'"[10]

A hypothetical application of law and equity would be helpful, and for this it is relevant to examine a case in which an aggrieved party seeks to stop a neighbor from violating a *deed restriction* requiring property to be used solely for residential purposes. Historically, the aggrieved party may seek enforcement "at law" by filing an action seeking money damages for the harm resulting from the violation. The plaintiff would be required to prove the strict elements of the case, including the existence of a written deed restriction in the neighbor's title to the property in order to satisfy the statute of frauds. However, in equity, enforcement under this hypothetical is more direct. The plaintiff would seek to enjoin further violation of the deed restriction through application of the equitable doctrine of estoppel. The technicalities of "law" would not necessarily apply. As Justice Cooley wrote many years ago, an estoppel "does not depend upon technicalities, but rests in broad principles of justice."[11] Consequently, in the enforcement of a deed restriction by seeking to enjoin the violation in equity, the plaintiff may not be required to prove the existence of a written deed restriction in the defendant's record title. Rather, where fairness and justice dictate, equity can imply the applicability of the restriction from other facts and circumstances.[12]

The essential point is that, even where a rule of law would prevent relief to a party, a doctrine of equity may apply to provide such relief if required by fairness and

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[10] *Madugula v. Taub*, 496 Mich. 685, 705, 853 N.W.2d 75 (2014).
[11] Justice Cooley's opinion in *Fifield v. Edwards*, 39 Mich. 264, was more recently quoted to this effect in *Mertz v. Mertz*, 311 Mich. 46, 55, 18 N.W.2d 271 (1945).
[12] One of the lead cases in the country for the proposition that the court of equity may find a "negative reciprocal" restriction is: *Sanborn v McLean*, 233 Mich 227, 206 N.W. 496 (1925).

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justice. "A court of equity molds its relief according to the character of the case; once a court of equity acquires jurisdiction, it will do what is necessary to accord complete equity and to conclude the controversy."[13] As explained below, the essence of this case is an effort on the part of the Township to seek equitable relief to protect the public. In other words, this case is fundamentally equitable in nature. Amici argue in Issues II and III that the period of limitations on the Township's claim *should be determined based on equitable doctrine rather than the statute of limitations provided by law*. Moreover, the most basic facts in the case paint a picture of significant *inequities attributable to defendants,* and under the equitable doctrine of "unclean hands," these facts should directly impact the period in which the township should be permitted to pursue equitable relief in this matter.

[13] *Walworth v. Wimmer*, 200 Mich.App. 562, 564, 504 N.W.2d 708 (1993).

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I.

IF THE COURT FINDS THAT THE STATUTE OF LIMITATIONS SHOULD APPLY FOR THE PURPOSE OF MEASURING THE DURATION OF THE TOWNSHIP'S RIGHT TO ENFORCE ITS ZONING REGULATIONS ON DEFENDANTS' PROPERTY, THE STATUTE DOES NOT BAR A CASE SEEKING TO PROSPECTIVELY ABATE THE *CAUSE* OF A VIOLATION WHICH OCCURS TODAY.

The Township seeks to enjoin defendants from keeping agricultural animals on the property at issue. The property is zoned for commercial use, and keeping agricultural animals is permitted only in districts which are zoned for agricultural use. Thus, the Township seeks to abate a violation of the township zoning ordinance. The Court of Appeals *did not conclude* that keeping the animals on defendants' property today *complies* with the zoning ordinance due to the passage of time, or that the use has become a lawful "nonconforming use" which is permitted to remain.[14] Rather, the Court of Appeals held that the violation has occurred for more than the statutory period, and the Township is no longer permitted by law to protect the surrounding property owners from the effects of a *currently existing* violation that *causes a nuisance today*. This conclusion is not based on a fair reading of the Michigan law which, on close analysis, dictates that actions which *cause a violation today* are clearly within the statute of limitations time period and may now be abated.

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[14] The keeping of animals on the property has been *unlawful* at all times relevant to this case. As stated in *Drysdale v Beachnan,* 359 Mich 152, 154 (1960), "This Court, of course, recognizes that a use maintained in the face of a lawful prohibition cannot become a legal nonconforming use."

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Let us assume for purposes of this issue that the statute of limitations must be applied as provided by "law." Embracing this assumption, the question presented is whether any wrongdoing by defendants in this case is within the statutory period, thus permitting township enforcement. In considering this question, it is important to focus on the specific relief being sought. First, the Township does *not* seek punishment or money damages for violations which have occurred *in the past*. Nor does the Township rely on evidence of defendants' actions which *caused* a violation *in the past*. Rather, the singular objective of the Township, and the exclusive relief sought, is an injunction of the actions which *cause a violation today*, and which give *effect* to new harm and damage today. With this focus in mind, there should be no doubt that relief sought with regard to the events of today fall squarely within the statute of limitations.

The Township and supporting amicus (Michigan Townships Association) advocated to the Court of Appeals that each day a violation occurs represents a new violation. The Court of Appeals rejected this argument as follows:

> Plaintiff additionally argues that each day that defendants have continued to keep pigs on the property constitutes a separate violation for which the accrual period begins anew. The Fraser Code of Ordinances, § 1-10(a), codifies this assertion by stating that "[e]ach act of violation [of the code] and every day upon which any such violation shall occur shall constitute a separate offense." However, this Court has "completely and retroactively abrogated" the continuing-wrongs doctrine in Michigan, including in nuisance cases. Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club, 283 Mich.App. 264, 288, 769 N.W.2d 234 (2009) (holding that the Michigan Supreme Court's decision in Garg v. Macomb Co. Community Mental Health Servs., 472 Mich. 263; 696 N.W.2d 646 (2005), amended 473 Mich. 1205, 699 N.W.2d 697 (2005), and its progeny rendered the common-law continuing-wrongs doctrine inapplicable in all cases within the state). 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.

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The conclusions stated by the Court of Appeals that "no new wrongs" were occurring on the property, and that the abrogation of the "continuing-wrongs" doctrine forecloses relief to the Township, represent giant unexplained leaps which are not supported by a close reading of either the facts or applicable law.

The *cause* of the violation occurring on defendants' property which the Township seeks to abate is defendants' *current and prospective activity* of keeping animals on the property today, and from day-to-day in the future, in violation of the zoning ordinance. The act, referred to by the court, of "adding new swine to the subject property," while itself a violation, is not the nuisance the Township seeks to abate. Adding new swine on the property would be likely to exacerbate the problems associated with atrocious odors, risk of contaminated waste runoff and other resulting concerns. But the real target of the Township's concern is basically the current act of *keeping* pigs on the property *today*, which creates a fresh, fragrant swine stench on each new day it is undertaken, and brings a new risk of pig-waste rivers with every new rainfall. As mentioned, the Township does not seek a punishment or money damages for the days and years the animals were *previously* on the property; it seeks only to prevent the *new* manifestations of a pig-keeping nuisance that freshly and inescapably arise on every new day -- precisely the "pig in a parlor" phenomenon that zoning exists to address.[15]

Going beyond the conclusions stated by the Court of Appeals, and analyzing the substance of the issue, reveals that there is in fact a "new wrong" which occurs on the property each day, rendering the so-called "continuing-wrongs" doctrine entirely

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[15] This is a reference made in the 1926 landmark Supreme Court case, *Village of Euclid v Ambler Realty,* 272 U.S. 365, 388 (1926) characterized in sustaining zoning as a regulatory tool: "A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."

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inapplicable to the claim of the Township in this case.

The "continuing-wrongs" doctrine addressed situations where a *past completed act* (not a new act or even a newly recurring act) of wrongdoing produced a long-lasting harmful effect. The doctrine allowed a plaintiff (predominantly a plaintiff seeking money damage relief) to admit into evidence a long-ago act of wrongdoing – which occurred at a time technically barred by the statute of limitations -- as the root *cause* of an ongoing harm that is still felt within the statutory period. Under the continuing-wrong doctrine, such past evidence of wrongdoing was permitted to be considered as part of the claim for harm and damages suffered by the plaintiff within the statute of limitations. In other words, the doctrine allowed a plaintiff to conflate the *cause* and *effects* of the wrongdoing where only the *effects* occurred within the statutory period. Thus, the doctrine allowed the plaintiff to reach back in time and bring past wrongdoings into a case even though they occurred solely outside the statutory period.

Michigan adopted the continuing violation doctrine in *Sumner v. Goodyear Tire & Rubber Co.*[16] The *Sumner* case joined the claims of two separate plaintiffs, involving two factual scenarios having a common statute of limitations theme. The case brought by one of the plaintiffs, Sumner, provides a good illustration of the continuing violation doctrine. While plaintiff Sumner was employed at Goodyear, he was subjected to harassment of a menacing and racially discriminatory nature by his shift foreman and other supervisors associated with the foreman. The harassment occurred over an extended period of time, even after Sumner changed positions in an attempt to avoid it. Ultimately, Sumner was provoked to physically attack his supervisor and others present,

[16] 427 Mich. 505, 398 N.W.2d 368 (1986).

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and Sumner was discharged from his job based on this attack. A ninety-day limitations period applied under the then applicable labor law, and Sumner's complaint was filed exactly ninety days after his discharge, but ninety-four days after the *last alleged incident* of harassment. Sumner's claim was that he was subjected to a continuous course of discriminatory conduct, i.e. racial harassment, culminating in his dismissal. The Court adopted the "continuing violation approach"[17] and allowed the plaintiff to reach back to the harassment which would otherwise be *barred by the statute*, and link it with the *effect* of the harassment, namely the discharge. The Court summarized its holding: "while the discharge, the only occurrence within the period of limitation, was ordered by parties not themselves possessing discriminatory intent, it renders the action for harassment timely if the harassment was engaged in for the purpose of causing the discharge."[18]

The application of this continuing violation approach was overruled in the Court's decision in *Garg v. Macomb County Community Mental Health Services,* which included the following analysis:

> *Sumner* . . . found persuasive the United States Supreme Court's decision in United Air Lines, Inc. v. Evans, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). In *Evans,* the United States Supreme Court for the first time addressed the "continuing violations" doctrine that had been created by the lower federal courts in order to overcome the statute of limitations. The employee in *Evans,* a flight attendant with United Air Lines, was fired in 1968 on the basis of a "no marriage" rule that was later found to violate Title VII. She was rehired by the airline in 1972, but was not credited for her pre–1968 service and, therefore, was treated as a new hire for seniority purposes. *The employee argued that the airline's refusal to recognize her past service constituted a "present effect to the past illegal act and therefore perpetuates the consequences of forbidden discrimination.*" Therefore, she alleged that the "continuing violations" doctrine should be applied to allow her to obtain relief for the now-untimely 1968 firing. However, the United

[17] *Id.* at 510.
[18] *Id.* at 547.

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> States Supreme Court held that *merely demonstrating a "present effect to a past act of discrimination" is insufficient to create a continuing violation.* "[T]he emphasis should not be placed on mere continuity; *the critical question is whether any present violation exists*." (Emphasis supplied).[19]

The *Garg* decision, in overturning the continuing violation rule, held that the *cause* of wrongdoing must occur within the statutory period in order to support a claim based on a later alleged *effect* of that cause. The Court determined that the continuing violation doctrine "has no continued place in the jurisprudence of this state. Accordingly, *Sumner* is overruled."[20]

It is important to note that, based on the explanation and ruling in *Garg,* had the discrimination against the plaintiffs in *Garg* and *Sumner* continued to occur up to and including the day of the filing of the complaints in those cases, *Sumner* would not have been overruled and *Garg* would have been decided differently. In other words, this Court, in *Garg,* did *not* establish that the law in Michigan allows a person who engages in acts of discrimination against another person for the statutory period to continue with new discriminatory wrongs so long as he or she wishes to do so into the future. This is, essentially, what this Court would be allowing if it applies *Garg* in the manner urged by the defendants in this case.

Following *Garg,* there were a series of cases decided in the Michigan Court of Appeals relating to this subject. These cases are analyzed at length in *Marilyn Froling Revocable Living Trust v. Bloomfield Hills*[21] In that case, the plaintiff was suffering damages from flooding on residential property as a result of changes in the grades that

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[19] 472 Mich. 263, 279-280, 696 N.W.2d 646; amended 473 Mich. 1205, 699 N.W.2d 697 (2005). (citations and footnotes deleted).
[20] *Garg, at* 290.
[21] 283 Mich.App. 264, 769 N.W.2d 234 (2008).

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had been undertaken on nearby properties, which had the effect of directing water to plaintiff's property. The Court explained that, in order for plaintiff's claim to be within the statute of limitations in the post-*Garg* setting, there must be evidence that the actions representing the *cause* of the flooding occurred within the statute of limitations. The Court also correctly pointed out that *after the continuing violation rule was overruled,* "the plaintiffs' claim was barred when the last cognizable tortious act occurred more than three years before the plaintiffs filed their lawsuit, regardless of any subsequent harmful *effects*.[22] (Emphasis supplied). The Court made the distinction between flooding on the Trust's property (the *effect* of the wrongdoing) and the *modification* of the grade on defendant's property that *caused* the flooding, and concluded that once the *cause* of the flooding was completed, and *harm was suffered,* the statute of limitations started to run. The fact that subsequent effects (flooding) occurred *as a result of the earlier cause* (outside the statute) would not result in extending the limitations period back to the cause.[23]

The present case is entirely distinct from the "continuing violation" doctrine (relied on by the Court of Appeals). Under the continuing violation doctrine, the *cause* of the problem occurs *outside the limitation period, with no cause of the problem within the limitation period*. In the present case, no past cause of a problem is relied upon for the Township's cause of action. The Township is not objecting to the past act of "adding new swine to the subject property." The Township objects to the new act by defendants, every day of the year, of *maintaining* swine on the property. The pigs on the

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[22] *Id,* at 285, referring to the post-*Garg* opinion in *Terlecki v. Stewart*, 278 Mich. App. 644, 754 N.W.2d 899 (2008).
[23] *Id.* at 291.

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defendants' property do not currently stink because they were on the property at some time in the past. The pigs on the defendants' property stink because the defendants daily feed and otherwise keep them alive on their property. The defendants take *affirmative actions each day* to create a new condition that *causes* a nuisance to the surrounding property owners. The past presence of the animals does not harm the neighboring property owners today. It is only the presence of the animals, alive, on the property today that *causes* the harm.

Stated another way, the Township does not seek to enjoin the past act of bringing swine onto the property; the Township seeks to enjoin the present, daily acts of maintaining the swine by feeding and sheltering them. The wrongdoing of today is causing new ordinance violations and creating new nuisance.

As touched upon above, in *Sumner v. Goodyear*, the acts of harassment all occurred outside the 90-day period of the statute of limitations. But suppose individual, identifiable acts of harassment had been ongoing at the time of Sumner's dismissal. The court would have needed no doctrine of "continuing violation" to connect the harassment with the dismissal. Who could even imagine a court attempting to reason that because Sumner's supervisor had *begun* a pattern of harassment at a time outside the period of the statute of limitations, all later acts of harassment occurring within the statute were merely ongoing "effects" of initiating that pattern of harassment in the past -- leaving Sumner barred by the statute of limitations from seeking an injunction against *further* acts of harassment in the present? By that reasoning, to obtain an injunction against further harassment, Sumner would have had to act within the first 90 days from when the harassment began – an absurd result. Yet that would be the unintended consequence of concluding that the Township is barred by the statute of limitations

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from protecting the public from defendants' actions of newly producing a nuisance each day. The fact that wrongdoing has been ongoing for a particular period in the past simply cannot be held to result in the grant of immunity from *causing the same type of wrongdoing* in the future.

In reality, the effect of pig-keeping in a commercial district is a *cause* of public harm in much the same way as harassment of a company employee is a cause of private harm. Just as every fresh act of harassment is an identifiable cause of new harm to the individual, each daily act of feeding and sheltering pigs in a commercial zone is an identifiable cause of new harm to the public.

The Township asks the Court to enjoin defendants from *presently and in the future* maintaining pigs or other farm animals on a property zoned commercial. The Township seeks to enforce its zoning ordinance on a *present and prospective basis*, which means that there is no attempt to reach back to a cause of wrongdoing occurring outside the statutory period as a basis for seeking equitable relief to prevent the current nuisance. Both *cause* and *effect* are presently occurring. The remedy sought by the Township, perfectly consistent with *Garg* and *Marilyn Froling*, is to prevent the *cause* of new harm that occurs each day the animals are present. Unlike the one-time, completed property grading in *Marilyn Froling*, pig-keeping is an active, participatory process. Pigs don't create an ongoing nuisance if brought onto a property and left to die. Defendants' pigs are only able to create the ongoing nuisance that harms the public because of defendants' ongoing present-day acts of *maintaining* the pigs on the property. It is this keeping and maintaining of farm animals that is subject to abatement

under the Zoning Enabling Act contemporaneous with its occurrence.[24] Each day of this violation creates a fresh basis under the statute to bring an action to enjoin and abate the *cause of a nuisance*.

The suit by the Township is within the statute of limitations, and is not barred.

[24] MCL 125.3407.

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II.

THE DOCTRINES OF LACHES AND ESTOPPEL, AND NOT A ROTE APPLICATION OF THE STATUTE OF LIMITATIONS, PROVIDE THE APPROPRIATE RULES FOR IMPOSING TIME LIMITATIONS FOR ENFORCEMENT CONSISTENT WITH THE EQUITIES OF THE CASE.

This case is an equitable action in which the Township seeks to protect the public from harm by bringing defendants' property into conformance with the zoning ordinance. The remedy sought is equitable in nature, and not of legal cognizance. Moreover, defendants come to court with unclean hands. Accordingly, this is fundamentally a case "in equity," to be governed by equitable doctrine, and the time period for enforcement should be determined by the doctrines of laches and estoppel, and not the defense provided "at law" by the statute of limitations.

A. Facts Relevant to This Case Implicate a Need for Equitable Governance

The task of creating and enforcing zoning district regulations has been delegated to local governments. In situations in which a violation of zoning regulations adversely impacts surrounding property owners, local government enforcement generally takes the form of an equitable action, seeking to achieve prospective compliance so as to protect the public from harm. In terms of broad jurisprudence, where a local government or other plaintiff seeks equitable relief *to protect the public from harm*, as in the present matter, the period of limitations on the claim *should be determined based on equitable doctrine rather than the statute of limitations provided by law*.

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Facts critically relevant of the present issue are recited in the Summary of Facts, stated in paragraph number 5 of the Statement of Facts above. These facts paint a picture of significant *inequities attributable to defendants* which, under the equitable doctrine of "unclean hands," should directly impact the period in which the township should be permitted to pursue equitable relief in this matter.[25]

B. Michigan Case Law Confirms that the Well-Established Equitable Doctrines of Laches and Estoppel Apply to Determine the Time Period for Ordinance Enforcement Where the Plaintiff Seeks an Equitable Remedy.

Viewed broadly, the several doctrines of equity are intended to prevent a party from taking unconscionable advantage of wrongdoing by asserting strict legal rights.[26] The factual record available in this case shows that defendants were given a permit by the state to maintain animals on the property based on *defendants' deceptive representations* to the Department of Natural Resources and Environment (DNRE) regarding the zoning on their property. The state had exclusive authority to approve the animal facility on the property, and thus the permit given to defendants could not be countermanded by the Township. However, once the Township learned that the state's

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[25] The Court may conclude that it is necessary to further develop the record in order to make a full and fair evaluation. If the Court agrees that a further development of the record is necessary and justified, it is presumed that this would require a remand to the trial court. The issue of the statute of limitations, an affirmative defense, was not pleaded by the defendants as required by the court rules. However, the Court of Appeals determined that the case should be remanded back to the trial court to permit the defendants to amend the pleadings to add this affirmative defense. The record may be satisfactory as developed now to substantiate the relief sought by the Township. However, considering that the Township did not have defendants' affirmative defense pleading in advance of the hearings in the trial court, it would certainly be fair to permit the Township to likewise amend if needed, in conformance with the ultimate determination of this Court, to address the relevance of defendants' inequities in relation to the timing imposed on the Township to seek abatement of a nuisance per se.

[26] American Jurisprudence, Second Edition, § 28 Estoppel, Basis, function, and purpose, Romualdo P. Eclavea, J.D.; Eric C. Surette, J.D. (accessed January, 2021).

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permit had been improperly issued, the Township acted quickly to abate the zoning violation. The mere passage of time (relevant to application of the statute of limitations), without considering defendants' wrongdoing, would result in an *inequitable windfall benefit to defendants*, and an *inequitable detriment to the residents of Fraser Township*. It is results such as these that the doctrine of equity exists to cure.

In Michigan, MCL 600.5815 is implicated by the facts. This statute, enacted by Act 236 of the public acts of 1961, succinctly specifies that:

> The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought. *The equitable doctrine of laches shall also apply in actions where equitable relief is sought*. (Emphasis supplied).

In terms of providing clarity, this statute does not represent the legislature's finest work. However, in 1982, the Court handed down *Romulus City Treasurer v. Wayne County Drain Commissioner,* which contains the following brief statement in a private fraud case in equity:

> Laches is the controlling doctrine when determining the timeliness of the landowner plaintiffs' claim that they are entitled to the funds in escrow because of defendant's constructive fraud. Although courts will look to analogous statutes of limitations when determining the timeliness of equitable proceedings, it is laches and not the statute of limitations which bars stale claims . . .[27]

In the same year as *Romulus City Treasurer* (but in the next volume of Michigan Reports), the applicable limitation period in an equity case was discussed at greater length in *Lothian v City of Detroit*.[28] *Lothian* explained the mechanics of the "laches" doctrine as being "the corresponding judicially-imposed equitable principle, [which]

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[27] 413 Mich. 728, 322 N.W.2d 152 (1982).
[28] 414 Mich 160, 324 N.W.2d 9 (1982).

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denotes 'the passage of time *combined with a change in condition which would make it inequitable to enforce a claim against the defendant*'."[29] (Emphasis supplied).

Therefore, in equity, a dimension is added to the statute of limitations. In addition to the passage of time, the court considers whether the amount of time which has passed has resulted in harm or prejudice to the defendant so as to make it inequitable to now permit enforcement. Importantly, the change of circumstances which would result in harm to the defendant might result in a *shorter* limitations period, or it might be longer, as dictated by the equities.

Following a lengthy and detailed legal analysis, *Lothian* arrived at the following two-part formulation:

> [L]aches might be viewed from two different perspectives in the traditional context: (1) in cases which are "purely equitable" or which display "compelling equities", laches may be invoked by a defendant to bar a plaintiff's claim without reference to any statutory limitations period, i.e., a claim may be held barred by laches early in the lawsuit, or long after all available statutory limitations provisions have expired; or (2) in equity cases in which corresponding relief is available at law, the existence of laches generally will be ascertained with reference to an analogous statute of limitations. (citation omitted).[30]

The relevant point is that *Lothian* held that, where "compelling equities are shown", or "where the relief is in its nature one of equitable and not of legal cognizance, and the remedy is of an equitable nature, *equity follows its own rules*." In such cases, "*laches will stand on its own as the controlling doctrine*." (Emphasis supplied, and citations omitted).[31]

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[29] *Id.* at 168, citing *Tray v. Whitney*, 35 Mich.App. 529, 536, 192 N.W.2d 628 (1971).
[30] *Id.* at 170.
[31] *Id.*.

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The *Lothian* holding aligns well with the facts in the present case, as understood in the Summary of Facts stated above. The laches mechanism, rather than the statute of limitations, should apply in this matter to equitably adjust the rights and interests of the general public with those of the defendants.

The Court of Appeals applied equitable considerations in a similar zoning enforcement case in 2016, even though the delay in enforcement occurred for *several decades*. In *Lyon Charter Township v Petty*,[32] two owners made use of large acreage residential-only parcels for both their respective residences and their commercial businesses. Defendants "operated their businesses without township interference for several decades despite that their uses were never permitted under their zoning classification."[33] As the township matured and developed over time, and more houses were built in the area, the uses on defendants' properties became the "last local vestiges of the rural era," and "neighbors began complaining about noise and early morning activity."[34] Parallel to the present case, the defendants in *Lyon Township* contended that the township's delay in enforcement of their zoning ordinance, coupled with the investments they made in their businesses, precluded the township from taking enforcement action.

The case was analyzed based on laches and estoppel considerations rather than the statute of limitations, citing earlier Michigan cases for the proposition that "the application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the

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[32] 317 Mich App 482; 896 NW2d 477 (2016).
[33] *Id.* at 485.
[34] *Id.* at 486.

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defendant . . . To merit relief under this doctrine, the complaining party must establish prejudice as a result of the delay."[35] And with estoppel, "just as with a laches defense, prejudice [to the defendant] is a mandatory element."[36] After carefully reviewing the facts in *Lyon Township*, the Court of Appeals concluded that the evidence did not establish the prejudice necessary to allow the continuation of commercial enterprises on land surrounded by quiet residential property.

It is important to point out that Michigan legal history includes a share of cases in which the equities cut in favor of the property owner, with the result that government enforcement was precluded.[37] The valuable lesson of the *Lyon Township* case is that, where the local government is seeking an equitable remedy attempting to enforce a zoning ordinance, the fair and equitable resolution is best ascertained based on an analysis of whether the failure to timely enforce the ordinance resulted in "prejudice as a result of the delay."

Not only are the defendants in the present case unable to show any prejudice or extraordinary circumstances relative to their claim of delay in Fraser Township's enforcement, but the actions of defendants represent the quintessential example of "unclean hands." When the public interest may be harmed by the party with unclean

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[35] *Id.* at 490.
[36] *Id.* at 491.
[37] In order to estop ordinance enforcement, the defendant must demonstrate "extraordinary circumstances." Examples of cases in which local government enforcement was estopped can be found in *Pittsfield v Malcolm*, 375 Mich 135, 134 NW2d 166 (1965), and *Grand Haven Township v. Brummel*, 87 Mich App. 442, 274 N.W.2d 814 (1978). The cases suggest the following as some of the considerations relevant to determining the equities: whether the parties were acting in good faith and without collusion, whether the property owner was forthright in its representation of the use of the property, the amount of money expended in reliance on any approvals that were given, and the amount of time that has elapsed between the structure's being built or the use commencing and the municipality's attempt to enforce the ordinance.

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hands, the existence of unclean hands generally becomes even more important in determining the rights of the parties.

> The unclean hands doctrine is founded on public policy, and the purpose of invoking the clean hands doctrine is to protect the interest of the public on grounds of public policy. In fact, where a suit in equity *concerns the public interest as well as the private interests of the litigants*, the doctrine *of clean hands assumes a greater significance*, since it not only prevents a wrongdoer from enjoying the fruits of a transgression, but also averts an *injury to the public*.[38] (Emphasis supplied).

In summary, this case is predominantly equitable in nature. The essential structural quality of zoning is the division of a community into uniform zoning districts with the objective of arranging and separating uses so as to proactively avoid nuisance conditions from arising, and to otherwise promote the public interest. This case involves a fundamental violation of the Township's zoning ordinance based on defendants' use of the property in the commercial zoning district for the keeping of animals not permitted in the district. Thus, the Township seeks to prohibit defendants from continuing the unlawful and inconsistent use, and the remedy sought is an injunction, the most basic form of equitable relief.

In addition, the sole reason for the extensive appellate litigation in this matter relates to the timing of initiation of this action. This timing, in turn, arose out of defendants' misrepresentation to DNRE that the property was zoned for agricultural use when in fact it was zoned for commercial use.[39] Such inequitable action on the part of defendants moves this case more deeply into the equitable realm. The timing of the

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[38] AMJUR EQUITY § 20,"Clean-hands" maxim, considerations of public policy, Noah J. Gordon, J.D.; and Glenda K. Harnad, J.D. American Jurisprudence, Second Edition (Accessed January, 2021).

[39] See Summary of Facts.

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Township's action was directly related to the issuance of the DNRE permit for the agricultural facility which was exclusively within the jurisdiction of the state, and not within the control of the Township. Defendants then extended the time for keeping the animals on the property for as long as possible, requiring the DNRE to pursue litigation against defendants to terminate the inequitably secured permit, both at the state administrative level in 2010, and then in court in 2015.[40] While defendants now assert the defense of statute of limitations (although not contained in defendants' pleadings), this case is replete with equitable character, and the delay in bringing the action by the Township should be reviewed based on the doctrines of unclean hands and laches, and not the statute of limitations.

As in *Lyon Township,* there would be no apparent prejudice to the defendants in this case due to an enforcement of the zoning ordinance at this time. After all, the defendants had lulled the Township into deferring its enforcement action, and defendants acted in a manner to extend the deferral for as long as possible.

Equity is intended to prevent a party from taking unconscionable advantage of wrongdoing by asserting strict legal rights. The doctrines of laches and estoppel should govern this matter and permit the grant of injunctive relief to abate the nuisance on defendants' property. The application of equitable doctrine in this case is necessary to preserve rights of the public against unreasonable infringement by defendants, and will not prejudice or do injustice to defendants who have already had had the windfall benefit of operating an unlawful facility on the property for many years.

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[40] *Id.*

The determination of the Court of Appeals should be reversed, and the case sent back to the trial court to enter judgment consistent with equity, fairness, and good conscience.

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III.

EVEN IF THE COURT DETERMINES THAT THE STATUTE OF LIMITATIONS RATHER THAN LACHES SHOULD BE APPLIED, THE DEFENDANTS' ACTION OF INEQUITABLY LULLING THE TOWNSHIP INTO BELIEVING THAT THE STATE HAD PROPERLY AUTHORIZED THE MAINTENANCE OF ANIMALS ON THE PROPERTY SHOULD RESULT IN THE *EQUITABLE TOLLING* OF THE STATUTE OF LIMITATIONS UNTIL 2015 WHEN THE STATE SUED TO TERMINATE THE AUTHORIZATION OBTAINED BY DEFENDANTS' MISREPRESENTATION.

Even if the Court determines that the statute of limitations should apply in this equitable action rather than the doctrine of laches, the limitation period for Township zoning enforcement should be deemed tolled during the period in which the DNRE exercised exclusive jurisdiction over the authorization of keeping animals on the property. DNRE jurisdiction was taken over the property as a direct result of defendants' misrepresentation that the zoning classification of the property was agricultural, when in fact it was commercial.[41] Once the misrepresentation was discovered, and DNRE terminated its jurisdiction, the Township acted in a timely manner to seek an abatement of the zoning ordinance violation on the property.

The Summary of Facts, above, shows that the delay of the Township in seeking to remove animals from the property at issue was the direct result of defendants' misrepresentation to DNRE, and that there was no delay in the Township's attempt to enforce its zoning ordinance once the improper exercise of DNRE exclusive jurisdiction, permitting animals on the property, was rectified. The Summary of Facts is clear enough to provide the basis for tolling the statute of limitations until 2015.[42]

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[41] *Id.*

[42] If the Court concludes that the record is insufficient, the case should be remanded to expand the factual base, and resolve the case in accordance with the guidance provided in this appeal.

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This analysis represents an alternative equitable theory to the arguments in Issue II, but should in no respect be considered to be an indication of any weakness in the sound Michigan law presented in the preceding issue. Both of these issues, II and III, are presented as being well-supported by Michigan jurisprudence.

This issue will be introduced by providing a statement of general rules from a national treatise on law, Corpus Juris Secundum[43] (the "black-letter law"), followed by a discussion of relevant Michigan law.

A. The Black-Letter Law

The available facts in this case reveal that defendants acted in an unconscionable manner, with no concern for the interests of neighbors, to lull the Township into the belief that the State of Michigan had properly issued a permit to keep and maintain animals on the real property in question. Facilities for maintaining the animals authorized in the DNRE permit, including cervidae, are *under the jurisdiction of the DNRE*, and not within the jurisdiction of local zoning. MCL 287.951, *et seq*. The facts also reflect that the Township acted to abate the animals on the property as soon as it learned that the state was suing the defendants to remove the animals after it had been determined that defendants deceptively misrepresented applicable zoning on the property in order to secure the DNRE permit. As a result of the issuance of the permit, defendants subjected their neighbors to stench from, and flies drawn by, the animals and their waste on the property over the period of years.

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[43] Estoppel to assert limitations defense, generally, CJS, Limitation § 56, James Buchwalter, J.D.; John Kimpflen, J.D.; Sally J.T. Necheles, J.D., LL.M.; and Karl Oakes, J.D.. (Accessed January, 2021).

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The delay on the part of the Township in seeking enforcement of the zoning ordinance was attributable to the inequitable action of defendants themselves. Given such inequities "a court may apply the doctrine of estoppel to preclude a defendant from utilizing the expiration of the statute of limitations period as a bar, even in the absence of an express statutory basis for tolling the period."[44]

Thus, even if the Court concludes that equity should not fully supersede the statute of limitations in light of the equitable remedy being sought in this case,

> Estoppel precludes a defendant from asserting a statute of limitations defense when the defendant's actions have wrongfully, fraudulently, or inequitably caused the plaintiff to delay commencing an action until the relevant statute of limitations period has expired, or when the defendant has done anything that would tend to lull the plaintiff into inaction. "Lulling," for the purposes of avoiding a statute of limitations defense, only occurs when a defendant has done something that amounted to an affirmative inducement to plaintiffs to delay bringing action ***
> "Equitable estoppel" prevents a party from asserting expiration of the statute of limitations as a defense when that party's improper conduct has induced the other into failing to file within the statutory period.

In this case, the available facts indicate that the defendants made deceptive representations to the State of Michigan, as confirmed by a state Administrative Law Judge in 2010 following an evidentiary hearing at which defendants were represented by counsel, and the subsequent lawsuit filed in 2015 by the state to terminate the keeping of animals due to the zoning classification of the property. Defendants' misrepresentation had the effect of lulling the Township into inaction on the filing of a suit to abate the zoning violation on the property in light of what was apparently the exclusive jurisdiction in the DNRE to allow defendants' property to be utilized as a

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[44] *Id.*

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facility for keeping animals. This circumstance serves as the underpinning to estop the defendants from asserting the statute of limitations to prevent the Township's otherwise timely action to protect the public from the source of harm on the property.

B. Michigan Law

The law in Michigan accords with the black-letter law. As a preliminary matter, Michigan has recognized that some limitation periods are subject to suspension by estoppel and some are not. The general statute of limitations determined to be relevant in this case by the Court of Appeals is subject to being suspended by estoppel, as explained in *Hughes v. City of Detroit*:

> [C]ases in which the limitation of time for bringing suit is contained in the statute which creates the liability and right of action and general statutes of limitations of the rights of action existing under other statutes or under the common law. In the former the limitation of time is a limitation of the right, and, as has been said, the suit cannot be maintained if not brought within the time limited. In the latter the limitation of time for bringing suit is a limitation of the remedy only, and it has been held that *under such general statutes of limitation the defendant may be estopped from the benefit of the statute* by an agreement waiving it, or by concealment or by fraud.[45] (Emphasis supplied).

In other words, if the legislature had placed a time limitation for seeking injunctive relief within the section of the MZEA authorizing abatement actions for zoning ordinance violations, a serious question might be presented on whether suspension of the period of limitations would be permitted. However, the statute of limitations applicable in this case is part of the general statutory scheme of limitations. Accordingly, the claim of suspension based on defendants' unconscionable actions is appropriately before the Court.

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[45] 336 Mich 457, 463, 58 N.W.2d 144 (1953).

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On the substantive standards for granting a suspension of the limitations period, the opinion in *Lothian v. City of Detroit,* cited earlier, is again instructive.[46] Citing a number of older cases, *Lothian* observed that the statute of limitations normally does not stop running. However, the Court pointed out that there are a number of reasons that may justify suspending the statutory period, and one of the permissible grounds is "conduct which estops the defendant from interposing it."[47] One of the older cases cited in *Lothian, Renackowsky v. Board of Water Commissioners of City of Detroit,* dates back to 1900. The *Renackowsky* opinion has language closely aligned with the propositions quoted above from the black-letter law:

> The meritorious question involved in the case is whether the plaintiff may meet the defense of the statute by showing that, before the time fixed by statute for the bar, the defendant, by its course of conduct, led the plaintiff to believe that a suit to enforce his rights would be unnecessary, and thereby lulled him into a feeling of security. . . . the claim of the present plaintiff is not that a cause of action once barred has been revived by a new promise, but that the conduct of the defendant has induced the plaintiff to refrain from bringing action within the period fixed by statute, and that such conduct should estop the defendant. . . . If, therefore, [plaintiff] relied upon this promise,—if she was thereby lulled into security, and allowed six years to go by before she commenced her suit,—with what grace can the defendant now set up the statute? The promise operated . . . by way of estoppel [and] . . . has all the elements of an estoppel."[48]

More recently, in *Cincinnati Ins. Co. v. Citizens Ins. Co.*, the Court also recognized that the running of the statutory period could be estopped, confirming that *Lothian* "emphasized that the doctrine of equitable estoppel is a judicially created exception to the general rule that statutes of limitation run without interruption."

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[46] 414 Mich at 167.
[47] *Id.*
[48] 122 Mich. 613, 616, 81 N.W. 581 (1900).

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Estoppel is essentially based on the doctrine of waiver that extends the applicable period for filing a lawsuit by precluding the defendant from raising the statute of limitations as a bar.[49]

In this case, the available facts reflect that the actions of the defendants in securing a state permit included the deception of state officials. This in turn resulted in the DNRE exercising its exclusive jurisdiction to permit defendants the right to keep animals on the property. The scheme by defendants was continued for an extensive period of time, and due to the exclusive jurisdiction of the DNRE, the Township was lulled into remaining on the sideline. This action by defendants satisfies the requirement for the application of estoppel.

As recently as 2010, when the state was clearly aware of the zoning deficiency for state approval of the animals, defendants further compounded the earlier deception by securing an additional number of years to maintain the animals on the property. Specifically, after determining the material zoning deception, the state allowed defendants the opportunity to seek zoning permission from the Township. Remarkably, defendants made no effort to seek zoning approval, but merely continued to maintain animals on the property until forced by the state to remove them. In sum, until the state filed its lawsuit in 2015, defendants manipulated the circumstances in order to extend the Township's deferral in bringing a technically-timely suit. Based on the factual record as it now appears, equitable grounds exist for granting an equitable suspension of the statute of limitations in order to allow the Township's abatement action.

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[49] 454 Mich. 263,270, 562 N.W.2d 648 (1997).

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IV.

THERE WAS A WELL-SUPPORTED BASIS FOR THE TRIAL COURT'S RULING THAT *IN REM* JURISDICTION APPLIES TO THIS ACTION, WHICH IS ESSENTIALLY AN ACTION AGAINST THE PROPERTY RATHER THAN AN ACTION AGAINST THE DEFENDANTS AS INDIVIDUALS.

The Court of Appeals held that the action initiated with regard to the property in this case was an action *in personam* subject to the statute of limitations. The Township argued, and the trial court held, that the case was an action *in rem,* which is not subject to the statute of limitations.

In addressing this issue, perhaps the best starting place is the meaning of the words "*in rem*" and "*in personam*." The Township's action is effectively against the property which is the subject of this case, regardless of the identity of its owners. So, this case is *in rem*, or against the thing, rather than *in personam,* or against the person.

It may certainly be a valid point that no Michigan court has ever held that a claim seeking the abatement of a public nuisance constitutes an action in rem.[50] However, this jurisdictional issue should not be resolved based on this limited observation. Indeed, the doctrine of laches has been applied in similar fact situations,[51] and not the statute of limitations, and thus it can be concluded that this issue is a matter of first impression.

The MZE**A** addresses land usage and is not concerned with the particular individuals who own property.[52] For example, under the MZEA, a zoning ordinance could not condition the approval of a proposed development on the age or land

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[50] See *Township of Fraser v. Haney*, 327 Mich.App. at 13.
[51] See e.g., *Lyon Township, supra.*
[52] MCL 125.3101, *et seq.*

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development skills of an applicant. A reading of the MZEA reflects that its focus is entirely on land use standards and not personal standards.[53] Similarly, if developer "Doe" has received a local government's zoning approval for a proposed development on a property, and then Doe transfers ownership of the property to developer "Roe," the local government could not withhold a building permit from Roe on the ground that the approval was given to one person – and only that person – to undertake the development of the property. Zoning relates to the property, and criteria applicable to that property, not to the particular person who happens to own the property.

The Court of Appeals opinion in this case, in overturning the lower court's ruling that the Township's case was an action *in rem,* cited a helpful case, *City of Detroit v. 19675 Hasse*.[54] In *City of Detroit,* the City filed a series of property tax foreclosure cases, each relating to an individual property with delinquent property taxes. The delinquency in property taxes often dated back to 1990 or 1991, but the cases weren't filed until 2001, a period exceeding the statute of limitations.

In both the *City of Detroit* case as well as the present case the suits were filed to seek relief based on what the owners or parties in interest had done or failed to do with regard to the property at issue. In this case, it was what the owners had done with the property contrary to local ordinance, and in *City of Detroit* case*,* it was what the owners or parties in interest had failed to do (pay the taxes) contrary to tax laws. The two cases are parallel, with the issues in both focusing on the property itself.

It was held that *City of Detroit* was an action *in rem*. The same should apply to this case.

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[53] *Id.*
[54] 258 Mich.App. 438, 448, 671 N.W.2d 150 (2003).

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CONCLUSION

The available facts in this case give rise to the conclusion that the Township's action was timely in seeking to enforce its zoning ordinance for the protection of the public from a nuisance condition on defendants' property. This conclusion follows the law governing the statute of limitations, particularly as construed in light of Const 1963, Art 7, Sec 34, which provides that the law applicable to the statute of limitations must be liberally construed in favor of the Township. A *de novo* review of the analysis by the Court of Appeals manifestly results in the conclusion that the violations occurring on defendants' property amount to a *present cause* of the *violation* of the zoning ordinance. The Township does not rely on past uses of the property which are outside the limitations period. Nor is it relevant that the past use of the property is similar to the use now occurring on the property. The decisive point is that there is a *cause* of violation occurring on the property today, and that such cause results in contemporary harm, all within the statute of limitations.

The conclusion that the Township's case is timely also follows applicable equitable doctrine. Because this case is fundamentally equitable in nature, and considering the record shows that defendants arrived in court with unclean hands, the doctrines of laches and estoppel should govern the timeliness of the Township's action rather than the statute of limitations. Alternatively, even if the statute of limitations is found to be applicable, the inequitable action of defendants in lulling the Township into deferring its enforcement action should be determined to result in an equitable tolling of the statute of limitations until 2015, making the Township's action timely.

Finally, there is a reasonable basis for determining that this case amounts to an

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action *in rem,* which would mean that the statute of limitations is inapplicable.

For any and all of these reasons, the decision of the Court of Appeals should be overturned, with this case being remanded back to the trial court for further proceedings consistent with the opinion of the Court.

Dated: February 16, 2021

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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

Trial Court No. 16-003272-CH
Court of Appeals No. 337842
Supreme Court No. 160991

TOWNSHIP OF FRASER,

Plaintiff-Appellant,

vs.

HARVEY HANEY AND RUTH ANN HANEY,

Defendants-Appellees.
_____/

APPENDIX FOR BRIEF AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT SUBMITTED BY THE MICHIGAN MUNICIPAL LEAGUE AND THE STATE BAR GOVERNMENT LAW SECTION

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EXHIBIT A:

Findings and Conclusions of the Administrative Law Judge (following a hearing at which defendants were represented by Counsel) in the "Proposal for Decision" dated July 29, 2010, accepted and adopted in a "Final Determination and Order" dated October 4, 2010, in the Department of Natural Resources and Environment in the matter of the Revocation of the Privately Owned Cervidae Facility, File No. 3409-0200, all of which was attached as Exhibit A to plaintiff's Brief on Appeal to the Michigan Court of Appeals in this case, dated February 8, 2018

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EXHIBIT A

(to MML-GLS Amicus Curiae Brief)

Administrative Law Judge "Proposal for Decision" dated July 29, 2010, accepted and adopted in a "Final Determination and Order" dated October 4, 2010, concerning Department of Natural Resources and Environment "Revocation of the Privately Owned Cervidae Facility," File No. 3409-0200

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Dept. of Attorney General
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NATURAL RESOURCES
DIVISION

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

In the matter of	Statute:	Privately Owned Cervidae Producer Marketing Act, MCL 287.951, et seq.
Harvey Haney – Privately Owned Cervidae Facility Registration /	Agency:	Department of Natural Resources and Environment
	Case Type:	Wildlife Division

PROPOSAL FOR DECISION

This case involves a registration issued to Harvey Haney under the Privately Owned Cervidae Producers Marketing Act (Act). MCL 287.951, *et seq*. Based on an alleged violation of the Act, the Department of Natural Resources and Environment (DNRE), which administers the Act, seeks to revoke the registration.[1] MCL 287.952(g).

JURISDICTION

The Act provides for the issuance of registrations that allow for the possession of cervidae and the operation of a cervidae livestock facility. MCL 287.952(c) and MCL 287.955. Revocation of a registration can only be effectuated "[a]fter...administrative hearing...." under the Administrative Procedures Act (APA). MCL 287.964(1), (3). The APA sets forth a four step process when an agency seeks to revoke a license. MCL 24.291(1) and MCL 24.292(1); *Rogers v Board of Cosmetology*, 68 Mich App 751, 244 NW2d 20 (1976). First, the agency must issue a personal or written notice stating facts or conduct that constitutes the alleged violations. Second, the agency must provide the licensee with an informal opportunity to show compliance (*Rogers* hearing). Third, assuming compliance is not shown, the agency must issue a notice of a contested case hearing consistent with § 71 of the APA. MCL 24.271(2). Fourth, a contested case hearing must be conducted under the relevant provisions of the APA.

[1] While this case was pending, the Department of Natural Resources and Department of Environmental Quality were merged to create the DNRE under Executive Order 2009-45, effective January 17, 2010. MCL 324.99919.

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In this case, an administrative complaint and notice of compliance conference were issued to Mr. Haney on February 6, 2009, and again on March 9, 2009. That notice had two Counts:

I. Mr. Haney provided fraudulent information concerning the zoning of the property where the facility is located.

II. Mr. Haney failed to provide a correct property description of the facility.

The *Rogers* hearing was held on March 26, 2009, and a Compliance Conference Memorandum (Complaint), which concluded the violation in Count I warranted the revocation of the registration, was issued by the DNRE on April 14, 2009. The DNRE filed a Request for an Administrative Hearing on April 17, 2009.

On April 21, 2009, this Tribunal entered a Notice of Hearing that placed the burden of production and the burden of proof on the DNRE. After adjournments at the parties request, a hearing commenced on August 5, 2009. At that time, the DNRE's request to amend the Complaint to remove the allegation of fraud in Count I, and replace it with the allegation Mr. Haney provided incorrect information regarding the zoning of the facility, was granted. Mr. Haney was provided the opportunity to brief the legal effect of the amendment of the Complaint, and the DNRE the opportunity to file a Response, prior to the resumption of the hearing on December 9, 2009. The due process argument contained in the brief is addressed below, and the analysis of that argument applies equally here. For the purpose of this inquiry, this Tribunal has jurisdiction over the Request for an Administrative Hearing filed by the DNRE on April 17, 2009.

PARTIES

The DNRE is represented by Darryl J. Paquette, Department of Attorney General.[2] During the hearing it called Thomas Fouchea, Sally Sherman, George Augustyniak, Sharon Hanna, and Mr. Haney.[3] The DNRE did not offer any exhibits.

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[2] Subsequent to the close of the record, Mr. Paquette substituted for William C. Campbell, who appeared for the DNRE at the hearing.

[3] Mr. Haney was called as an adverse witness, and Mr. Fouchea was called during DNRE's case-in-chief and as a rebuttal witness. T., pp. 57, 109.

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Mr. Haney is represented by Jonathan C. Martin, Smith Martin, Powers & Knier, P.C., and Geoffrey D. Harrison, Fraser, Trebilcock, Davis & Dunlap, P.C. During the hearing Mr. Haney testified on his own behalf. The six exhibits Mr. Haney entered were marked as P-2, P-5, P-6, P-7, P-9, and P-13(a)-(o).

Under an agreed schedule, which was subsequently extended, the parties filed written closing arguments, and Mr. Haney filed a rebuttal.

COMPLIANCE WITH MCL 24.292(1)

There is no dispute that the registration at issue in this case is a "license." See MCL 24.205(1). As such, any attempt to limit the registration, including its revocation, implicates due process considerations. See US Const, Am XIV; Const 1963 art 1, § 17. See also *Goldberg v Kelly*, 397 US 254; 90 S Ct 1011; 25 L Ed2d 287 (1970); *Bundo v City of Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976). The APA was enacted to ensure due process protections are afforded to the holder of a license that the State is seeking to diminish. See *Georgetown Place Cooperative v City of Taylor*, 226 Mich App 33; 572 NW2d 232 (1997). As noted, the APA sets forth a two-part notice/hearing process. MCL 24.292(1); *Rogers, supra*. The issue is whether the DNRE's amendment of the complaint to allege Mr. Haney incorrectly, as opposed to fraudulently, identified the zoning of the property covered by the registration violated his due process rights.

In his pre-hearing Motion alleging a due process violation, Mr. Haney contends his entire defense was based on refuting the fraud charge. See also T., pp. 8-14. Thus he contends the amendment precluded him from "the opportunity to prepare for, respond to or engage in the meaningful examination of the evidence necessary to determine his rights...." Motion, p. 6; See also Rebuttal Brief, p. 7. This contention goes to the second notice/hearing requirement of the APA, i.e. the contested case hearing. In this regard, the amendment of the Complaint was allowed on August 5, 2009, and confirmed in an Order and Notice of Hearing entered on the same date, and the hearing resumed on December 9, 2009. The four months between the amendment of the Compliant and resumption of the hearing was sufficient for Mr. Haney to have notice of the basis of the

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DNRE's action and prepare accordingly for the contested case hearing. It is important to note that even before the amendment Mr. Haney was aware of the basis for the DNRE's action, as evidenced by his amended petition filed on June 3, 2009, which states: "[t]he only basis asserted by the [DNRE] in support of its refusal to issue the certification is...there may be a zoning issue with the facility." Both of these factors clearly establish that Mr. Haney had notice of the issue at hearing, and ample time to prepare for the contested case hearing. Therefore, I conclude, as a Matter of Law, the second notice/hearing requirement in *Rogers* was satisfied in this matter.

The other issue is whether the amendment of the Complaint in August 2009 served to defeat the first notice/hearing requirement in *Rogers*.[4] The record does not include the administrative complaint and notice of compliance conference the DNRE issued on February 6, 2009. However, the Complaint issued on April 14, 2009 following the compliance conference indicates the basis of the DNRE's action was Count I (Mr. Haney fraudulently provided false information concerning the parcel's zoning), and Count II (Mr. Haney failed to provide a correct property description of the parcel). Once it was determined that the property description was accurate, Count II was dismissed. However, Count I was deemed sufficient for the matter to proceed to a contested case hearing. Based on the Complaint, Mr. Haney had notice in February 2009, that the DNRE was seeking to revoke his registration based on the allegation the parcel was not zoned agricultural. Further, Mr. Haney had the opportunity to refute the allegation during the *Rogers* hearing on March 26, 2009. The fact that fraud was alleged is immaterial because the basis for the DNRE's action was unchanged: the facility authorized under the registration was located on property not zoned agricultural. Mr. Haney knew the issue was zoning, and was given the opportunity to establish he complied with the Act's requirement in this regard.[5] Therefore, I conclude, as a Matter of Law, consistent with the requirements of MCL

[4] "Finally, the four-step interpretation [of MCL 24.292] is preferable because we believe that the Legislature intended to delay the revving up of formal bureaucratic machinery. The delay of formal proceedings, and concomitant provision of informal procedures for problem resolution, implement the legislative intent to allow a licensee to improve its operations without the stigma of formal proceedings." *Rogers*, 68 Mich App at 757; 244 NW2d at 23.

[5] Mr. Haney advances a number of factual and legal arguments concerning zoning that are addressed below. For the purposes of this inquiry, the issue is not whether the DNRE's position that the parcel had to be zoned agricultural is correct. Rather, the issue is whether the DNRE provided notice that it had taken that position.

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of MCL 24.292, Mr. Haney had adequate notice of the basis of the DNRE's action and the opportunity to show compliance.

Based on the foregoing, I conclude, as a Matter of Law, the process utilized in this case fully complied with MCL 24.292(1). I also conclude, as a Matter of Law, the process utilized in this case did not violate Mr. Haney's due process rights.

FINDINGS OF FACT

The Act, which went into effect on June 1, 2001, is intended to "define, develop, and regulate privately owned cervidae as an agricultural enterprise in this state; to provide powers and duties of certain state agencies and departments; and to provide for certain penalties and remedies." Preamble, 2000 PA 190; MCL 287.969. A component of the Act entails licensing cervidae livestock facilities that are capable of holding cervidae species, which include "deer, elk, moose, reindeer, and caribou." MCL 287.952(f) and MCL 287.955(1). A facility must comply with and/or be permitted under any other applicable local, state or federal regulation. MCL 287.955(1) and MCL 287.956(4)(c). In regards to local regulation, notice of an application must be provided to the local unit of government where the facility is located, unless it can be ascertained from the application that the property is zoned agricultural. MCL 287.956(3). If notice is sent, i.e. a determination on zoning cannot be made from the application, the local unit of government has 30 days to indicate whether the facility violates an ordinance. *Id.* A registration issued under the Act is valid for three years. MCL 287.958(1). Renewal of a registration is presumed if the operator timely submits an application and fee. MCL 287.958(8). The Act sets forth a comprehensive scheme for the DNRE to enforce its provisions, including revoking a registration, and pursuing criminal charges or administrative fines. MCL 287.964, MCL 287.966, MCL 287.967 and MCL 287.968.

Mr. Haney testified that in 1986 he purchased a 10 acre parcel in Fraser Township, Bay County. T., p. 67. Since 1976, when the Township's zoning ordinance went into effect, the parcel was zoned C2 Commercial. *Id.*, p. 16 (Fouchea). Raising cervids is considered an agricultural use under Fraser Township zoning. *Id.*, pp. 16-17. In 1990, Mr. Haney applied for and received a permit "To hold Wild Animals in Captivity" within a fenced area

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fenced area consisting of 7.5 acres. Exhibit P-2. The permit, under the section completed by the DNRE, states the pen or enclosure for holding the animals had township approval. *Id.* Mr. Haney testified he did not complete this section, and thus cannot be responsible for that representation. Irrespective of who checked the box, or provided the information to that person, the DNRE proceeded under the belief the property was zoned agricultural. T., p. 47 (Hanna). The 1990 permit was issued under the authority of 1988 PA 256 and 1929 PA 191, and allowed Mr. Haney to hold only whitetail deer. Exhibit P-2. Mr. Haney purchased adjoining property to the west and north in 1999, bringing the subject parcel to approximately 17 acres. *Id.*

In 2002, Mr. Haney submitted an application for his first registration under the Act, and checked a box that the property was zoned agricultural, but drew a line over the section containing that box. Exhibit P-5. He testified he did so under the belief the section, and particularly the parcel's zoning, was irrelevant because he was renewing his permit, as opposed to applying for new operation. T., pp. 70-71. Also in 2002, Mr. Haney was issued a building permit for a pole barn that indicated the parcel was zoned C2. Exhibit P-7. Subsequently, the DNRE learned the parcel was not zoned agricultural and informed Mr. Haney he needed to obtain a variance to bring the facility into compliance. T., pp. 47-48 (Hanna). Mr. Haney examined the process for obtaining a variance, but never submitted an application. T., p. 19 (Fouchea). Ultimately, in 2008 the DNRE concluded the registration could not be renewed without a variance, and initiated the process to revoke the registration based on the zoning classification. Id., p. 49 (Hanna). Based on the foregoing, I find, as a Matter of Fact, the subject parcel was never zoned agricultural. The issue is whether that constitutes a violation of the Act that warrants revocation of the registration under MCL 287.964(1).

The DNRE contends that the Act requires a facility be located on property that is zoned agricultural, and the issuance or renewal of a registration is prohibited if it is otherwise classified. In this regard, it relies on two provisions of the Act. The first, which is quite general, states:

> If the activity in which the cervidae livestock facility is engaged is required to be regulated under any other act, registration under this act does not exempt

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> the person or cervidae livestock facility from requirements imposed under any local, state, or federal regulation.
> MCL 287.955(1).

In conjunction with this provision, the Act sets forth a specific requirement:

> (4) The department shall not issue an initial cervidae livestock facility registration or modification unless the application demonstrates all of the following:
> ***
> (c) The applicant has…any other permits or authorizations that may be required by law.
> MCL 287.956.

Under this provision, a registration cannot be issued, as a matter of law, until all other legal requirements are satisfied. Zoning is an authorization required by law, meaning a facility that does not comply with a zoning ordinance cannot be licensed under MCL 287.956(4)(c). Similarly, because of the parcel's zoning, the facility is not in compliance with Fraser Township's ordinance on odor and manure disposal. T., p. 20 (Fouchea). Mr. Haney contends § 6(4)(c) does not apply to his facility because its scope is limited to initial registrations, while he was seeking the renewal of his registration in 2002. However, the Act went into effect on June 1, 2001, and instituted a new regulatory scheme. MCL 287.969. Irrespective of when the operation first came into existence, or whether it was licensed under another regulatory scheme, the first registration issued under the Act after June 1, 2001, was an initial registration for a cervidae livestock operation. Therefore, in 2002 Mr. Haney was seeking an initial registration, and the fact the facility did not comply with local zoning and regulations concerning odor and manure disposal means the issuance of that registration was prohibited under MCL 287.956(4)(c).

The DNRE also argues the following provision of the Act also mandates a facility comply with local zoning:

> (3) Upon receipt of an application, the department shall send a written notice to the local unit or units of government within which the proposed cervidae livestock facility will be located unless the department determines, from information provided in the application, that the local unit of government has a zoning ordinance under which the land is zoned agricultural. The local unit or units of government may respond, within 30 days of receipt of the written notice, indicating whether the

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> applicant's cervidae livestock facility would be in violation of any ordinance.
>
> MCL 287.956.

This provision expressly requires the property upon which the facility is located be zoned agricultural, and is not limited to initial registrations.[6] Further, this provision, in conjunction with §4(c), prohibits the issuance of a registration for any facility located on property that is not zoned agricultural. Finally, the 2002 application was not sent to Fraser Township because Mr. Haney stated the property was zoned agricultural. Exhibit P-5. Rather, the DNRE relied on the representation concerning zoning contained in the application and did not seek confirmation from Fraser Township. See T., pp 45-46 (Hanna). This was entirely proper under MCL 287.956(3).

Based on the foregoing, the property has been zoned C2 Commercial since 1976, and the Act requires a facility be located on property zoned agricultural. Mr. Haney advances a number of arguments that attempt to diminish this fact and its legal effect. First, he contends the DNRE is barred from seeking to revoke the registration under laches, which is dependent on "unreasonable delay that results in 'circumstances that would render inequitable any grant of relief to the dilatory plaintiff.' [citation omitted]." *Township of Yankee Springs v. Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004). Laches is grounded in the principles of equity, i.e. what is just and fair, and such relief is available from the courts of this state under very limited circumstances. See MCL 600.601; See also *Devillers v Auto Club Insurance Association*, 473 Mich 562, 589; 702 NW2d 539 (2005). Conversely, an agency's authority is limited to that delegated to it from the Legislature by way of statute. See *York v Detroit*, 438 Mich 744, 475 NW2d 346 (1991). Thus an Administrative Tribunal has no common law or equitable powers. See *Coffman v State Board of Examiners in Optometry*, 331 Mich 582; 50 NW2d 322 (1951); *Wikman v City of Novi*, 413 Mich 617; 322 NW2d 103 (1982). Accordingly, this Tribunal cannot provide the relief sought under the doctrine of laches.

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[6] Mr. Haney argues the reference in § 6(1) to initial applications applies equally to §6(3). As discussed, the first application submitted under the Act is an application for initial registration. Even if this is not the case, §6(1), (2), (4), and (5) refer to initial applications and/or registrations, while the other sections pertain to applications. Therefore, the reference to initial applications in §6(1) does serve to modify the term applications in other sections of MCL 287.956.

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Mr. Haney also contends he received township approval for his deer farm from Frank Gibala, who was the Fraser Township Supervisor in 1990, during a discussion in the Township office. T., p. 83. To accept this argument requires a determination that Mr. Haney received a "verbal variance" from the C2 Commercial zoning that covered the parcel since 1976. Additionally, acceptance of this argument requires a determination that Mr. Gibala possessed the authority to grant a variance in the manner Mr. Haney described. Quite simply, Mr. Haney's testimony in this regard is not credible.[7] Rather, the credible evidence indicates a variance was neither sought or granted in 1990. In this regard, nothing in the Township's records going back to the early 1970s, including those maintained by Mr. Gibala in his role on the planning commission, indicate the facility was approved or a zoning variance granted. *Id.*, pp. 18, 32 (Fouchea); pp. 36-38 (Sherman). Understandably, it was not the practice of Fraser Township to grant "verbal variances." To obtain a variance a property owner must submit the necessary paperwork, followed by the Township issuing a public notice of the request. The matter is first considered by the Planning Commission, which issues a recommendation. The Township Board then issues the ultimate decision on the request. *Id.*, p. 32 (Fouchea); pp. 39-42 (Augustyniak).

Based on this record, I find, as a Matter of Fact, Mr. Haney did not seek a zoning variance through proper channels. I further find, as a Matter Fact, Mr. Haney's contention that he received a "verbal variance" in 1990 from Mr. Gibala is not credible based on the testimony of Ms. Sherman, Mr. Fouchea, and Mr. Augustyniak.

Mr. Haney also contends the DNRE is, in effect, seeking to enforce the Township's zoning ordinance through its authority under the Act. Concomitantly, Mr. Haney contends the Township's objection to the facility is untimely given that it has been in operation for 20 years. In this regard, Mr. Haney asserts the Township had actual knowledge of his operation during the course of its existence. However, none of this diminishes the fact that Mr. Haney knew, or should have known, the parcel's zoning classification since at least

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[7] Along the same lines, Mr. Haney maintains he first learned the parcel was zoned C2 Commercial in 2008. T., p. 99. However, Mr. Haney went to the Township in 1990 to seek approval of his deer enclosure, which is an indication that he knew the proposed use did not conform to property's zoning. Irrespective of when he had actual notice of the zoning, Mr. Haney was responsible for providing accurate information in his application. To excuse Mr. Haney from this responsibility would be contrary to the principle that ignorance of the law is no defense. *Young v. Young*, 211 Mich App 446, 448; 536 NW2d 254 (1995).

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April 11, 2002, the date of a zoning permit authorizing the construction of a pole barn that states the parcel was zoned C2. Just six weeks after receiving that permit he indicated on his initial application for a registration under the Act the zoning was agricultural. Exhibits P-2 and P-5. Consistent with § 6(3), the DNRE accepted the representation on that application as true and issued the registration. The DNRE acted only when it subsequently learned the actual zoning classification, and then it offered Mr. Haney the opportunity to obtain a variance. When Mr. Haney declined to seek a variance, the DNRE undertook its obligation to revoke the license. Given this, the contention that the DNRE is acting as the Township's stalking horse cannot be accepted. The contention that the Township is precluded from enforcing its ordinance in this matter misses the point. The sole issue under the Act is whether the parcel is zoned agricultural. Any claim Mr. Haney has against the Township regarding its zoning ordinance must be pursued in a court of competent jurisdiction.

The final issue pertains to Mr. Haney's argument that the facility is protected from nuisance actions under the Right to Farm Act (RTFA). MCL 286.471, *et seq.* The DNRE argues the RTFA does not protect Mr. Haney because his land was operated as an excavation business and dump prior to the enactment of the Fraser Township zoning ordinance. On this point, § 3 of the RTFA is a defense against a public or private nuisance claim provided the land was farmed *before* any change in the land use. [8] As the record establishes, the subject parcel was not a farm before the ordinance was enacted in 1976. Rather, since at least 1962 the parcel was used as a dump and then for an excavation business. T., pp. 15-16 (Fouchea). Mr. Haney's contention that the property was used as a farm when he purchased the original parcel in 1986 is simply not credible. Based on the testimony on Mr. Fouchea, I find, as a Matter of Fact, the parcel was not used for farming when Fraser Township enacted its zoning ordinance. Further, this case is not a nuisance action, but rather a license revocation action initiated by a state agency against a licensee. The protection against a nuisance claim in § 3 does not excuse a licensee from complying

[8] "A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation existed before a change in the land use or occupancy of land within 1 mile of the boundaries of the farm land, and if before that change in land use or occupancy of land, the farm or farm operation would not have been a nuisance." MCL 286.473(2).

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with a state regulatory scheme, or prohibit a state agency from exercising its authority to revoke a license under that scheme.

Mr. Haney also cites to §4(6), which provides the RTFA serves to "preempt any local ordinance...that purports to extend or revise in any manner the provisions of this act or generally accepted agricultural and management practices developed under this act." MCL 286.473(6). However, this case does not turn on, or seek to determine, the validity of the Fraser Township zoning ordinance, or deem the facility a nuisance. Rather, the case turns on the fact that the facility has always been located in an area zoned C2 Commercial, and that zoning precludes issuance of a registration under the Act. The result would have been the same had Mr. Haney accurately disclosed the parcel's zoning in the initial application he submitted in 2002: a registration cannot be issued because of the zoning. If Mr. Haney were to obtain a variance to the zoning ordinance, or have the parcel re-zoned, he would comply with the requirements of the Act. Having said that, the RTFA does not have the effect Mr. Haney claims.

CONCLUSIONS OF LAW

Based on the Findings of Fact, I conclude, as a Matter of Law:

1. A registration for a cervidae livestock facility is a license. MCL 24.205(1).

2. An attempt to revoke a registration for a livestock facility implicates due process protections. US Const, Am XIV; Const 1963 art 1, § 17; *Goldberg v Kelly*, 397 US 254; 90 S Ct 1011; 25 L Ed2d 287 (1970): *Bundo v City of Walled Lake*, 395 Mich 679; 238 NW2d 154 (1976).

3. The process required to revoke a license consists of notice of the facts alleged by the agency, an opportunity for the licensee to show compliance, a notice of hearing and a contested case hearing. MCL 24.271(2), MCL 24.292(1) and *Rogers v Board of Cosmetology*, 68 Mich App 751, 244 NW2d 20 (1976). These requirements were satisfied in this matter, and this Tribunal has jurisdiction to render a final agency decision.

4. The amendment of the Complaint that replaced the allegation that Mr. Haney fraudulently completed his application for a registration with the allegation the information was incorrect, did not violate his due process rights.

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5. A cervidae livestock facility is required to posses a registration under the Act. MCL 287.952(c) and MCL 287.955(1).

6. Irrespective of whether a facility was licensed under other statute(s), the first application submitted and registration issued under the Act, which went into effect on June 1, 2001, is an initial application and registration. MCL 287.969.

7. The Act requires a facility comply with all other legal requirements. MCL 287.955(1).

8. A registration cannot be issued for a facility that lacks permits or authorizations required by law. MCL 287.956(4)(c).

9. A registration cannot be issued unless the property where the facility is located is zoned agricultural. MCL 287.956(3).

10. A farm is not a use allowed on property zoned C2 Commercial in Fraser Township.

11. The facility at issue in this case has constituted a violation of a local ordinance since it was started in 1990, including when it was issued its initial registration under the Act in 2002, and as a result it cannot receive a registration under the Act. MCL 287.955(1), MCL 287.956(3) and MCL 287.956(4)(c).

12. Any claim Mr. Haney has pertaining to the Fraser Township zoning ordinance must be pursued before a court of competent jurisdiction.

13. An applicant is obligated to accurately identify in the application the zoning of the property where the facility is located, and the DNRE can rely on that information in processing the application. If the zoning is not provided by the applicant, the DNRE must forward the application to the local unit of government so it can report on whether the facility complies with local ordinances. MCL 287.956(3).

14. Laches is an equitable remedy that is not available from an administrative tribunal in a contested case hearing under the APA. *Coffman v State Board of Examiners in Optometry*, 331 Mich 582; 50 NW2d 322 (1951); *Wikman v City of Novi*, 413 Mich 617; 322 NW2d 103 (1982).

15. The facility is not covered by the Right to Farm Act because it was not used for farming when the Fraser Township zoning ordinance, which classified the property as C2 Commercial, was enacted in 1976. MCL 286.473(2).

16. The Right to Farm Act does not pre-empt the requirements of the Act, or negate compliance with the licensing provisions of the Act.

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PROPOSAL FOR DECISION

Based upon the Findings of Fact and Conclusions of Law, it is proposed the Final Determination and the Order be issued that serves to REVOKE Mr. Haney's privately owned cervidae facility registration, and precludes issuance of a registration until he receives a zoning variance, or the property where the facility is located is rezoned agricultural.

EXCEPTIONS

The parties have until **August 20, 2010**, to file written Exceptions to this Proposal for Decision. MCL 24.281(1). Director Rebecca Humphries will issue the Final Determination and Order in this case after the filing date. The filings shall be sent to: Dennis W. Mack, State Office of Administrative Hearings and Rules, Constitution Hall, South Tower Atrium, 525 West Allegan Street, P.O. Box 30473, Lansing, Michigan 48909-7973.

Dated: July 29, 2010

Dennis W. Mack
Administrative Law Judge

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PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by first class mail at their respective addresses as disclosed by the file on the 29th day of July, 2010.

Bev Hague
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STATE OF MICHIGAN
DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENT

SUBJECT: Privately Owned Cervidae Producers Marketing Act, 190 PA 2000, as amended, MCL 287.951, *et seq.*

Petition of the Department of Natural Resources and Environment (DNRE), Wildlife Division for the Revocation of the Privately Owned Cervidae Facility Registration issued to Harvey Haney
File No. 3409-0200

FINAL DETERMINATION AND ORDER

This matter was the subject of a contested case hearing resulting in the issuance of a Proposal for Decision (PFD) dated July 29, 2010. The PFD, after making Findings of Fact and Conclusions of Law, recommends that the Privately Owned Cervidae Facility Registration issued to Harvey Haney be revoked. The Wildlife Division filed Exceptions in support of the PDF. Mr. Haney filed Exceptions objecting to the PFD. Neither party requested oral argument. The matter is now before the Director of the DNRE for a final agency decision. MCL 324.99909(7); 2003 MR 2, R 324.74.

The decision in this case is based solely on the PFD, the transcripts, exhibits, pleadings, and arguments. Upon the consideration of the entire record in this matter, the PFD, including its Findings of Fact and Conclusions of Law, is adopted and affirmed in its entirety. Based upon those Findings of Fact and Conclusions of Law, it is DETERMINED the Privately Owned Cervidae Facility Registration issued to Mr. Haney should be revoked under the criteria of the Privately Owned Cervidae Producers Marketing Act. MCL 287.951, *et seq.*

NOW, THEREFORE, IT IS ORDERED:

1. The PFD of July 29, 2010, is adopted and incorporated by reference into this Final Determination and Order.

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2. The Wildlife Division's Petition to revoke the Privately Owned Cervidae Facility Registration issued to Mr. Haney is GRANTED.

3. The Privately Owned Cervidae Facility Registration issued to Mr. Haney is hereby REVOKED, effective as of the day of this Final Determination and Order.

Dated: 9/27/2010

Rebecca Humphries, Director
Department of Natural Resources and Environment

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