STATE OF MICHIGAN

IN THE SUPRPEME COURT

FRASER TOWNSHIP,

Plaintiff-Appellant,

v

Supreme Court No.:
Court of Appeals No.: 337842
Lower Court No.: 16-3272-CH

HARVEY HANEY and,
RUTH ANN HANEY,

Defendants-Appellees.
_____/



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PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL FROM A DECISION OF THE COURT OF APPEALS

Dated: February 20, 2020

(a) Statement identifying the judgement or order appealed from and the date of entry.

Plaintiff-Appellant applies under MCR 7.303 for leave to appeal from a published decision of the Court of Appeals dated January 21, 2020 [Copy attached]

(b) Questions presented for review related in terms of the facts of the case.

1. CAN AN ILLEGAL ACTIVITY BECOME A LEGAL ACTIVITY MERELY BY THE PASSAGE OF TIME?
2. DOES MCL 600.5813 PROHIBIT ZONING ENFORCEMENT AGAINST PROPERTY OWNERS WHERE THERE IS A CONTINUING VIOLATION?
3. CAN AN UNASSERTED AFFIRMATIVE DEFENSE BE THE SUBJECT OF A MOTION FOR SUMMARY DISPOSITION?

A zoning violation is a nuisance per se. That is well established law. In this case, Defendant Haney placed about Five Hundred (500) deer and elk on a relatively small parcel zoned commercial. By law, such a herd would have to be placed on an agriculturally zoned parcel that would be large enough to accommodate such a large number. In 2009 there was an inventory taken (See Exhibit A) which was filed as an exhibit in the trial court and it noted Fifty (50) wild boar. It noted no pigs. The State of Michigan ordered Defendant Haney to remove all the wild boar, Russian boar, and feral hogs that he had after the deer and elk were removed by Court Order. The maintenance of the wild boar, Russian boar, and feral hogs was illegal on any property. After the herd of deer and elk were removed and the wild boar, Russian boar, and feral hogs were removed, it appeared to Plaintiff Township Defendant Haney brought regular pigs on the property. The raising of farm animals would not be allowed on commercially zoned property under the Fraser Township Zoning Ordinance.

At the Trial Court level Defendants Haney brought a Motion for Summary Disposition based on an unasserted affirmative defense. Defendants' Counsel acknowledged the Statute of Limitations was not pled as an affirmative defense and the Trial Court, the Honorable Harry P. Gill, acknowledged the affirmative defense of the Statute of Limitations was not pled.

Defendant Haney argued the six year statute of limitations (MCL 600.5813) would bar zoning enforcement. The Trial Court decided to hear the Motion and decided it was not a bar. Haney's Affidavit indicated he had pigs on the property since 2006 which was refuted by Exhibit A from 2009 which noted no pigs on the property.

The Court of Appeals decided MCL 600.5813 could be a bar to zoning enforcement.

This Court vacated the Court of Appeals opinion in *Fraser Township v Haney* Mich Ct of App January 17, 2019 opinion and remanded to the Court of Appeals to address whether its opinion in *Fraser Township v Haney #1* was consistent with the Court of Appeals opinion *Baker v Marshall* 323 Mich App 590 (2018). The opinion in *Fraser Township v Haney* #2 did not change *Fraser Township v Haney #1*.

(d) Concise statement of material facts and proceedings

In this case, Defendant Haney placed about Five Hundred (500) deer and elk on a relatively small parcel zoned commercial. By law, such a herd would have to be placed on an agriculturally zoned parcel that would be large enough to accommodate such a large number. In 2009 there was an inventory taken (See Exhibit A) which was filed as an exhibit in the trial court and it noted Fifty (50) wild boar. It noted no pigs. The State of Michigan ordered Defendant Haney to remove all the wild boar, Russian boar, and feral hogs that he had after the deer and elk were removed by Court Order. The maintenance of the wild boar, Russian boar, and feral hogs was illegal on any property. After the herd of deer and elk were removed and the wild boar, Russian boar, and feral hogs were removed, it appeared to Plaintiff Township Defendant Haney brought regular pigs on the property. The raising of farm animals would not be allowed on commercially zoned property. The Township sued to abate the zoning violation.

Defendants Haneys brought a Motion for Summary Disposition based on the Statute of Limitations which was an unasserted affirmative defense. Counsel for Defendants acknowledged the Statute of Limitations was an unasserted affirmative defense and so did the Trial Court, the Honorable Harry P. Gill. The Trial Court decided to hear the Motion anyway and denied it.

Defendant Haney argued the six year statute of limitations (MCL 600.5813) would bar zoning enforcement. The Trial Court decided it was not a bar. Haney's Affidavit indicated he had pigs on the property since 2006 which was refuted by Exhibit A from 2009 which noted no pigs on the property.

The Court of Appeals decided MCL 600.5813 could be a bar to zoning enforcement.

(e) Concise Argument

1. AN ILLEGAL ACTIVITY CANNOT BECOME A LEGAL ACTIVITY MERELY BY THE PASSAGE OF TIME

A. Standard of Review

The Court reviews de novo equitable defenses *Mason v Menonminee* 282 Mich App 525, 527 (2009).

B. No case in the State of Michigan has ever decided that illegal activity can become legal merely by the passage of time

No case in Michigan has decided that an illegal activity can become legal merely by the passage of time and yet the Court of Appeals is saying exactly that. Let us compare a man illegally making liquor in his house which is in a residentially zoned area. Let us assume he delivers his product by car and sells it. Let us assume seven years later he starts selling it from his house and the neighbors complain about the number of cars stopping at his house for five minutes. Let us assume the municipality investigates and finds out what is going on. Let us assume the municipality files suit to enjoin the business operation. Following the Court of Appeals logic, the liquor manufacturer wins because he started more than six years ago. Each day of operation is not a new violation and merely by passage of time, an illegal activity has become legal.

This decision is important to every municipality in the State and thus is important to the jurisprudence of the State of Michigan.

The Court of Appeals has applied private nuisance law to zoning violation law. The private nuisance law says that the second there is a hint of nuisance or trespass the Statute of Limitations starts ticking. See *Henry v Dow Chemical* 501 Mich 965 (2018). There is no prior case that says that about zoning law. The Court of Appeals has made a new law with no analysis or foundational history.

The Court of Appeals also inferentially overruled a 2016 decision of the Court of Appeals *Charter Township of Lyon v Petty and Hoskins*, Docket Nos. 327685 & 327686 (Mich Ct App Oct 13, 2016). In that case a construction company had been operating for (20) years on residentially zoned property. Neighbors complained about the noise and truck traffic. The Township sued to abate the nuisance. It was allowed. The Court stated:

> To achieve these goals, "[i]t is the policy of this state and a goal of zoning that uses of property not conforming to municipal zoning ordinances be gradually eliminated." *Jerome Twp v Melchi*, 184 Mich App 228, 231; 457 NW2d 52 (1990). Whether and when to enforce its zoning ordinance to effectuate this gradual elimination is a matter within a township's discretion. 83 Am Jur 2d, Zoning and Planning, § 936, p 893; *Randall v Delta Charter Twp*, 121 Mich App 26, 32; 328 NW2d 562 (1982) ("[D]ecisions of a planning commission, or other similar local agency,

concerning whether to enforce zoning ordinances are decisions which are so basic to the operation of a municipality that any attempt to create liability with respect thereto would constitute an unacceptable interference with [the municipality's] ability to govern.") (quotation marks and citation omitted; second alteration in original). "[A]bsent extraordinary circumstances," courts will not interfere with such decisions. 2 Cameron, Michigan Real Property Law, § 23.30 p 1367.

The instant Court of Appeals decision ignores the *Lyon Township* case even though it was cited to them in Fraser Township's Appellate Brief. How can you ignore a case that is being overruled?

2. WHEN THERE IS A CONTINUING VIOLATION, MCL 600.5813 CANNOT PROHIBIT ZONING ENFORCEMENT AGAINST PROPERTY OWNERS

A. Standard of Review

The Court reviews de novo equitable defenses *Mason v Menonminee* 282 Mich App 525, 527 (2009).

B. As stated previously the Court of Appeals has applied private nuisance and trespass law to zoning enforcement actions citing *Henry v Dow Chemical* 501 Mich 965 (2018). Every zoning ordinance in the State probably states that each day a violation exists is a new violation or a fine can be imposed for each day of a continuing violation. The Court of Appeals discards such a policy in relation to zoning enforcement. No case has previously done so.

Additionally, MCL 600.5813 deals with personal actions. It says nothing about zoning violation abatement. One could just as easily argue that the Fifteen (15) year Statute of Limitations applies contained in MCL 600.5801(4) assuming one is arguing a Statute of Limitations applies at all. At least MCL 600.5801(4) deals with real estate. MCL 600.5813 does not.

3. AN UNASSERTED AFFIRMATIVE DEFENSE CANNOT BE THE SUBJECT OF A MOTION FOR SUMMARY DISPOSITION.

A. Standard of Review

The Court reviews de novo equitable defenses *Mason v Menonminee* 282 Mich App 525, 527 (2009).

B. In the instant case the unasserted affirmative defense of the Statute of Limitations became the subject of a Motion by Defendant for Summary Disposition. The Trial Court by the Honorable Harry P. Gill acknowledged the Statute of Limitations was not asserted as an affirmative defense. Counsel for the Defendants acknowledged the Statute of Limitations was not asserted as an affirmative defense. If, at that point, Counsel for the Plaintiff had chimed in with a statement that the Statute of Limitations was not asserted as an affirmative defense the Court might well have asked Plaintiff's Counsel if he had his hearing checked recently. In any event, the Trial Court decided to hear the Motion and denied it. The Michigan Court of Appeals reversed. The Supreme Court remanded to the Court of Appeals to address whether the published opinion is consistent with the Court of Appeals opinion in *Baker v Marshall* 323 Mich App 590 (2018).

In *Baker v Marshall,* an unasserted affirmative defense of fraud formed the basis of a Motion for Summary Disposition. The *Baker v Marshall* Court decided an unasserted affirmative defense could not form the basis of a Motion for Summary Disposition. The opinions of the Court of Appeals in both *Fraser Township v Haney* decisions do not follow the published *Baker v Marshall* opinion. Apparently when the Court of Appeals feels like it they do not have to follow their own published decisions.

The opinion in *Fraser Township v Haney* #2 even recognizes that an issue is preserved if recognized sua sponte by the Court citing *In Re Gach* 315 Mich App 83, 97 (2016) and MCR 2.517(A)(7) See footnote 2 on page 4 of the opinion.

How the Court of Appeals can recognize that and not apply it to Judge Gill's acknowledgement on the record that the Statute of Limitations was not raised in Haneys' affirmative defenses is bothersome and not logical. It leads this author to believe the Court of Appeals opinion in *Fraser Township v Haney #2* is even more outcome orientated without a solid foundation that *Fraser Township v Haney #1.* It also leads this author to believe that *Fraser Township v Haney #2* is a bold but legally unsupported defense of *Fraser Township v Haney #1* by the Court of Appeals.

(f) Statement of the relief sought

Fraser Township requests reversal of the Court of Appeals decision and reinstatement of the Trial Court's Order. This case is important to every municipality in the State.

Respectfully Submitted;

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February 20, 2020

Court of Appeals Decision Dated 1/21/2020

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF FRASER,

Plaintiff-Appellee,

v

HARVEY HANEY and RUTH ANN HANEY,

Defendants-Appellants.

FOR PUBLICATION
January 21, 2020
9:15 a.m.

No. 337842
Bay Circuit Court
LC No. 16-003272-CH

ON REMAND

Before: SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

This matter is again before us, now on remand from the Supreme Court. We again reverse the decision of the trial court and remand for further proceedings consistent with this opinion.

In our original opinion, we concluded that the trial court erred in denying defendants' motion for summary disposition under MCR 2.116(C)(7) (claim barred by statute of limitations). *Twp of Fraser v Haney*, 327 Mich App 1, 3; 932 NW2d 239 (2019). The trial court had concluded that, because it was an action in rem, the statute of limitations did not apply. We disagreed and remanded the matter to allow defendants to raise the defense. *Id.* Thereafter, the Supreme Court vacated this Court's judgment and remanded the case to this Court "to address whether the published opinion in this case is consistent with the published opinion in *Baker v Marshall*, 323 Mich App 590[; 919 NW2d 407] (2018)." *Fraser Twp v Haney*, ___ Mich ___; 933 NW2d 42 (2019). We then permitted the parties to file supplemental briefs on remand. After due consideration, we conclude that our original opinion is consistent with this Court's opinion in *Baker*.

In *Baker*, the defendant asserted numerous affirmative defenses, but not one of fraud. *Baker*, 323 Mich App at 593. Rather, fraud was raised for the first time in a motion for summary disposition, which the trial court granted. *Id.* On appeal, the plaintiff argued that the trial court erred in granting summary disposition on the basis of fraud because the defense was waived by the failure to raise it as an affirmative defense. 323 Mich App at 594-595. The *Baker* Court

ultimately concluded that "[b]ecause the fraud defense is an affirmative defense, the failure to raise it constitutes a waiver of that defense." *Id.* at 598.

There is a crucial distinction between *Baker* and the present case. In *Baker*, when the issue of the plaintiff's fraud was raised in the motion for summary disposition, the plaintiff argued that the fraud defense was waived because it had not been pled as an affirmative defense as required by MCR 2.111(F). In the present case, when defendants moved for summary disposition on the basis of the statute of limitations, plaintiff did not argue that defendants had waived the statute-of-limitations defense. It was only after defendants filed their appeal that plaintiff claimed that defendants had waived the statute-of-limitations defense because the defense was not raised in defendants' responsive pleading. *Fraser Twp*, 327 Mich App at 6-7. Because of this distinction, we conclude that our published opinion in this case is consistent with *Baker*.

MCR 2.111(F)(3) provides: "Affirmative defenses must be stated in a party's responsive pleading, *either as originally filed or as amended in accordance with MCR 2.118*" (emphasis added). "When issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings." MCR 2.118(C)(1). In *Baker*, because the plaintiff argued when she responded to the motion for summary disposition that the fraud defense had been waived, the plaintiff did not expressly or impliedly consent to try the fraud issue. In contrast, in our case, because plaintiff responded to the merits of defendants' claim that its request for injunctive relief was barred by the six-year limitations period of MCL 600.5813, without claiming that defendants had waived the statute-of-limitations defense, plaintiff impliedly tried the statute-of-limitations defense. *Fraser*, 327 Mich App at 6-7. Although defendants did not raise the statute of limitations in their responsive pleading, because the statute-of-limitations defense was tried by the express or implied consent of the parties, the defense is treated as if it had been raised by the pleadings. MCR 2.118(C)(1). Additionally, we note that, because MCR 2.117(F)(3) permits an affirmative defense to be raised by way of amendment, it cannot be concluded that failure to initially raise it in the affirmative defenses forever bars it from being raised.

Finally, we briefly address a point raised in plaintiff's supplemental brief on remand. Plaintiff suggests that it is excused from raising the issue precisely because the trial court chose to address it. In its brief, plaintiff argues as follows:

> Since the Court decided to hear the Motion, Plaintiff's Counsel did not have much choice other than to participate. Telling the Circuit Judge "Gee Judge you should not be hearing this Motion so I am leaving..." [w]ould be disrespectful, stupid, and likely to encourage the Circuit Judge to hold Counsel in contempt. That seems to be what Appellant is saying should have been done. Easy for them to say.

We would agree that walking out of the courtroom in the middle of the motion hearing would indeed be disrespectful and stupid, and possibly lead to a finding of contempt. But the same could not be said of raising the argument that the issue of the statute of limitations was not properly before the trial court. Plaintiff could, respectfully, raise the argument that defendants had not properly pled the defense. Indeed, it is an argument that plaintiff could well have put in its response

to the motion for summary disposition and led with at the motion hearing.[1] If the trial court chose to address the issue anyway, then plaintiff could continue with the hearing and raise the issue again on appeal if necessary, this time having properly preserved the argument rather than waive it.[2]

For these reasons, we conclude that our original opinion was consistent with *Baker* and we reaffirm our original opinion.

The matter is again reversed and remanded to the trial court for further proceedings consistent with this opinion and our original opinion. We do not retain jurisdiction. Defendants may tax costs.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Amy Ronayne Krause

[1] Not only did plaintiff first raise this issue on appeal to this Court, it did not raise it in its application to the Supreme Court, nor did it raise any issue regarding a conflict with the decision in *Baker*. Rather, the Supreme Court sua sponte raised the issue.

[2] Conversely, a party is generally not obligated to specifically preserve an objection to an issue raised sua sponte by a court. See MCR 2.517(A)(7); *In re Gach*, 315 Mich App 83, 97; 889 NW2d 707 (2016).

Court of Appeals Decision Dated 1/17/2019

STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF FRASER,

Plaintiff-Appellee,

v

HARVEY HANEY and RUTH ANN HANEY,

Defendants-Appellants.

UNPUBLISHED
December 20, 2018

No. 337842
Bay Circuit Court
LC No. 16-003272-CH

Before: SWARTZLE, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff filed this suit seeking injunctive relief to abate a public nuisance. Plaintiff claimed that defendants' piggery violated the zoning ordinance applicable to their property (the land was zoned as "commercial" and not "agricultural"). Defendants filed a motion for summary disposition under MCR 2.116(C)(7) (claim barred by statute of limitations). The trial court denied defendants' motion, holding that this was an action in rem and that the statute of limitations therefore did not apply. Defendants appeal by leave granted.[1] We reverse the decision of the trial court and remand the case in order to allow defendants to amend their responsive pleading to include the statute of limitations as an affirmative defense.

I. FACTS

On May 3, 2016, plaintiff filed this action against defendants, alleging that defendants were raising approximately 20 domestic hogs on their property in violation of plaintiff's zoning laws and that they were creating a nuisance due to the stench and flies drawn by deer[2] and hog

[1] See *Township of Fraser v Haney*, unpublished order of the Court of Appeals, Docket No. 337842 (September 18, 2017).

[2] Defendant Harvey was previously sued by the Michigan Department of Natural Resources (DNR) in 2015 under the Privately Owned Cervidae Producers Marketing Act (POC Act), MCL 287.951 *et seq.*, when it was discovered that he improperly registered his private cervidae (deer) facility—which was apparently located at the same address as the hog raising operation at issue in the instant case—by incorrectly identifying the zoning of the property as "agricultural" instead of "commercial." Defendant failed to seek a variance and his registration was ultimately

waste. Defendant Harvey Haney testified that privately owned deer or elk were no longer on the subject property, but admitted that he began raising hogs on the property in 2006. Plaintiff offered no evidence that defendants continued to bring new hogs onto the property after 2006 or that defendants had actually began to raise hogs on the property after 2006. Plaintiff sought an injunction precluding defendants from continuing to raise hogs (or other animals that would violate plaintiff's zoning ordinance) on the subject property.

Defendants filed a motion for summary disposition, arguing that plaintiff's claim was time-barred by the six-year general period of limitations under MCL 600.5813. The trial court denied defendants' motion, reasoning that the statute of limitations did not apply against plaintiff because the case constituted an action in rem.

II. STANDARD OF REVIEW

This Court reviews motions for summary disposition under MCR 2.116(C)(7), the applicability of a statute of limitations to a cause of action, and questions of statutory interpretation, de novo. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007).

III. ANALYSIS

A motion for summary disposition under MCR 2.116(C)(7) may be raised on the ground that a claim is barred by the statute of limitations. In support of a motion under subrule (C)(7), a party may provide affidavits, pleadings, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Unlike a motion brought under subrule (C)(10), "a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). However, the substance of this material, if provided, must be admissible in evidence. *Id.* When reviewing motions under subrule (C)(7),

> this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dextrom v Wexford Co*, 287 Mich App 406, 429; 789 NW2d 211 (2010) (citations omitted).]

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revoked. The DNR sought to permanently enjoin defendant Harvey from possessing cervidae or operating a cervidae livestock operation without a permit and to require him to submit his animals for disease testing. However, the case was ultimately dismissed pursuant to a settlement agreement.

"[O]nly factual allegations, not legal conclusions, are taken as true under MCR 2.116(C)(7)." *Davis v City of Detroit*, 269 Mich App 376, 379 n 1; 711 NW2d 462 (2005).

A. WAIVER OF THE STATUTE OF LIMITATIONS DEFENSE

Plaintiff argues that defendants cannot prevail on any statute of limitations defense because defendants failed to assert a limitations period in their first responsive pleading. However, this case presents the unusual situation where the trial court made an express holding with respect to the applicability of the asserted statute of limitations defense notwithstanding defendants' untimely invocation. The parties briefed and presented their arguments concerning the applicability of the statute of limitations against plaintiff's claim, though plaintiff did not argue that defendants failed to properly assert the statute of limitations defense in their responsive pleading until after this appeal was filed. Under these circumstances, we hold that the trial court tried the merits of defendants' statute of limitations defense with plaintiff's implied consent. The issue may therefore be treated as if it had been raised in defendants' pleadings, and it is appropriate to remand the case to allow defendants' to move to amend their responsive pleading accordingly.

"[T]he running of the statute of limitations is an affirmative defense." *Dell v Citizens Ins Co of America*, 312 Mich App 734, 752; 880 NW2d 280 (2015). Affirmative defenses "must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118." MCR 2.111(F)(3). Pursuant to MCR 2.118(C)(1),

> [w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they are treated as if they had been raised by the pleadings. In that case, amendment of the pleadings to conform to the evidence and to raise those issues may be made on motion of a party at any time, even after judgment.

In order for an issue to be "tried" for purposes of MCR 2.118(C)(1), it must be analyzed on its merits by the trial court. *Amburgey v Sauder*, 238 Mich App 228, 247-248; 605 NW2d 84 (1999). The trial court in this case clearly addressed the merits of defendants' untimely assertion of their statute of limitations defense, and the parties were given ample opportunity to brief and argue the issue. The issue of the period of limitation's applicability was therefore "tried." Moreover, a party may give implied consent to the adjudication of an issue by failing to object to the issue before the trial court. *Zdrojewski v Murphy*, 254 Mich App 50, 61; 657 NW2d 721 (2002); *Grebner v Clinton Charter Twp*, 216 Mich App 736, 744; 550 NW2d 265 (1996). In this case, plaintiff did not object to defendants' failure to allege a statute of limitations defense in their responsive pleading until after this appeal was filed. Plaintiff briefed arguments against the applicability of the statute of limitation and presented its case to the trial court. Ergo, plaintiff has impliedly consented to the adjudication of the issue. See *Zdrojewski*, 254 Mich App at 61.

MCR 2.118(C)(1) is "liberal and permissive . . . . The only requirement is that the party seeking amendment move to have the court amend the pleadings . . . ." *Zdrojewski*, 254 Mich App at 61. Here, defendants have not moved to amend their affirmative defenses. Typically, this would constitute a binding waiver of the defense. *Geisland v Csutoras*, 78 Mich App 624, 630; 261 NW2d 537 (1977). Importantly, however, the text of MCR 2.118(C)(1) expressly allows for motions to amend the pleadings to be made by a party "at any time, *even after*

defendants' affirmative defenses would not be sufficient to warrant denying such amendment. See *id.*; *Amburgey*, 238 Mich App at 247.

B. THE APPLICABLE PERIOD OF LIMITATIONS

Having determined that defendants' attempted assertion of the statute of limitations is proper, it becomes necessary to determine the period of limitations applicable to plaintiff's claim. Plaintiff's claim is for the abatement of a public nuisance.[3] In *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 383; 760 NW2d 856 (2008), this Court held that an abatement of a public nuisance claim filed by a governmental entity seeking injunctive relief was subject to the six-year general period of limitations under MCL 600.5813. Ergo, the applicable period of limitations in this case is six years. See *id.*

Under MCL 600.5827, "the period of limitations runs from the time the claim accrues." Because there is no statutory provision holding otherwise, this claim "accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." *Id.* Plaintiff's suit is for an abatement of a public nuisance that stemmed from the piggery kept on the subject property in violation of a local ordinance. Thus, the wrong alleged for purposes of accrual occurred when defendants first began to keep hogs on the subject property, regardless of when it began to result in recoverable damage. See *id.* Defendants presented undisputed evidence that they had kept hogs on the property since 2006. Plaintiff filed this suit in 2016, and therefore plaintiff's case was time-barred. See MCL 600.5813.

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[3] Michigan has historically recognized public nuisance and private nuisance as two distinct violations. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). "A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. It evolved as a doctrine to resolve conflicts between neighboring land uses . . . . The gist of a private nuisance action is an interference with the occupation or use of land or an interference with servitudes relating to land." *Id.* at 302-303. A public nuisance, in contrast, "involves the unreasonable interference with a right common to all members of the general public." *Id.* at 304 n 8. Plaintiff, a governmental entity, did not specify which type of nuisance it was claiming against defendants in its complaint. Notably, the mere fact that a condition violates a local ordinance does not render that condition a public nuisance. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 277-278; 761 NW2d 761 (2008). However, plaintiff's language regarding the stench and flies drawn by deer and hog waste suggests that plaintiff was suing defendants not because they interfered with plaintiff's enjoyment of its own land, but because defendants' piggery interfered with the general public's "health, safety, peace, comfort, or convenience." See *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). The distinction is material, as an action for the abatement of a private nuisance is subject to the three-year statute of limitations under MCL 600.5805(10). *Terlecki v Stewart*, 278 Mich App 644, 652-654; 754 NW2d 899 (2008) (simultaneously rejecting the application of the 15-year period of limitations under MCL 600.5801(4) to a claim of private nuisance).

It is important to note that the accrual of plaintiff's claim is also not subject to tolling simply because plaintiff may have been unaware that defendants were keeping pigs on the subject property in violation of plaintiff's ordinance. The Michigan Supreme Court, in *Trentadue*, 479 Mich at 391-392, held that the common-law discovery rule was not available as a means of tolling the accrual period prescribed by MCL 600.5827. What is relevant, then, is not when plaintiff learned of defendants' violation, but when the violation first took place. See *Trentadue*, 479 Mich at 391-392.

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[4] in Michigan, including in nuisance cases. *Marilyn Froling Revocable Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 288; 769 NW2d 234 (2009) (holding that the Michigan Supreme Court's decision in *Garg v Macomb Co Community Mental Health Servs (Amended Opinion)*, 472 Mich 263, 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), and its progeny rendered the common-law continuing wrongs doctrine inapplicable in all cases within the state). Further, no evidence was presented by either party suggesting that defendants were adding new swine to the subject property. Therefore, no new wrongs establishing a newly accrued cause of action can salvage plaintiff's argument. Accordingly, plaintiff's contention in this regard is meritless.[5]

Plaintiff next argues that its claim requesting the abatement of a public nuisance is an action in rem, and therefore the six-year period of limitations is not applicable. This Court, in *City of Detroit*, 258 Mich App at 448, outlined the distinction between actions in personam and actions in rem:

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

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

[5] Amicus curiae, the Michigan Townships Association, cites to *Joy Mgt Co v City of Detroit*, 183 Mich App 334, 342; 455 NW2d 55 (1990), for the proposition that continuing wrongs doctrine has been applied in the context of local ordinance violations. However, *Joy Mgt Case* was published years before *Garg* or *Marilyn Froling Revocable Trust*, and so its holding—to the extent that it applied the continuing wrongs doctrine—is no longer valid.

transitory nature, and its power to adjudicate the rights of all persons in the thing. [Quotation marks and citation omitted.]

No Michigan court has ever held that a claim seeking an abatement of a public nuisance constitutes an action in rem. This is not an action against the subject property, itself, to determine its fate. Rather, it is an action against specific, natural persons seeking injunctive relief to force them—and only them—to come into compliance with a local zoning ordinance. Ergo, plaintiff's claim is an action in personam subject to the statute of limitations. See *id.*

Plaintiff next argues that if statutes of limitation applied to actions for the abatement of a public nuisance in violation of a local zoning ordinance, this Court would have stated as much in *Jerome Twp v Melchi*, 184 Mich App 228; 457 NW2d 52 (1990). The fact that a court does not discuss a potentially relevant argument in its written opinions does not bear on the merit of the argument. As previously discussed, the statute of limitations is an affirmative defense that must be raised in a defendant's responsive pleading. MCR 2.111(F)(3). It is entirely possible that the statute of limitations was simply not raised before the trial court in *Jerome Twp*, or that the issue was not pursued on appeal. In either situation, the statute of limitations defense—though it may have been meritorious or, at least, applicable—would not have been analyzed by this Court. Plaintiff cannot prevail based on the fact that an argument was not raised in another case, especially where it is unclear whether such an argument had any bearing on its outcome.

Defendants also contend that the trial court improperly relied on *City of Detroit*, 258 Mich App 438, to apply the doctrine of quod nullum tempus occurrit regi against the six-year period of limitations. As an initial note, the trial court did not appear to rely on this doctrine in any meaningful way when outlining its reasons for ruling against defendants. Regardless, *City of Detroit* is the only published decision of any Michigan court to discuss this doctrine. It merely stands for the notion that the sovereign is exempt from the operation of statutes of limitation absent statutory authority stating otherwise. *Id.* at 445-446. As discussed above, the Legislature has enacted MCL 600.5813, which applies to claims by government plaintiffs seeking injunctive abatement of a public nuisance. See *Dep't of Environmental Quality*, 279 Mich App at 383. Accordingly, the government plaintiff in this case is no longer exempt from the statute of limitations under quod nullum tempus occurrit regi. See *City of Detroit*, 258 Mich App at 445-446.

C. EFFECT ON THE MICHIGAN ZONING ENABLING ACT (MZEA)

Amicus curiae Michigan Townships Association argues that, if defendants are allowed to continue to keep and raise hogs on the subject property pursuant to the applicable statute of limitations, it would effectively render the government's power to regulate nonconforming uses of zoned land, MCL 125.3208, and its authority to abate violations of zoning ordinances as nuisances, MCL 125.3407, null. This logic is flawed. The preceding authorities do not indicate that defendants may engage in further willful violations of plaintiff's zoning ordinances with impunity. They merely stand for the notion that if plaintiff is to file a cause of action against these—or any—defendants, it must do so within the prescribed period of limitations. While it may appear that plaintiff has a good claim against defendants for violating a local ordinance, the legislation of statutes of limitation represents a "public policy about the privilege to litigate." See *Chase Securities Corp v Donaldson*, 325 US 304, 314; 65 S Ct 1137; 89 L Ed 1628 (1945).

These statutes exist as a matter of necessity, pragmatism, and convenience. *Id.* "They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay." *Id.* Additionally, contrary to amicus curiae's contention, there is no provision in MCL 125.3208 that time-bars claims against any defendant. Any implication that the six-year period of limitation under MCL 600.5813 conflicts with a limitation period prescribed by MCL 125.3208 is therefore meritless.

We reverse the trial court's denial of defendants' motion for summary disposition and remand the case in order to allow defendants to move to amend their responsive pleading to include the statute of limitations in their affirmative defenses in accordance with MCR 2.118(C)(1). We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Amy Ronayne Krause

EXHIBIT A

JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF AGRICULTURE
LANSING

May 15, 2009

Thomas Fouchea, Fraser Township
1474 North Mackinaw Road
Linwood, MI 48634

Dear Mr. Fouchea:

On August 13, 2008, the Michigan Department of Agriculture (MDA) received a formal complaint for investigation regarding the captive cervidae facility owned and operated by Mr. Harvey Haney located at 515 North Huron Road in Fraser Township of Bay County, Michigan. This environmental complaint concerned excessive odors and flies from feces and urine buildup on the surface of the soil inside an eight acre enclosure and noise from elk bugling.

On August 21, 2008, staff from the MDA Right to Farm program conducted an on-site inspection at the Haney captive cervidae facility in response to this complaint. At the time of the inspection, MDA staff observed approximately 300 whitetail deer, approximately 50 elk, and approximately 50 wild boars being kept at this facility. Our August 26, 2008 letter to Mr. Haney requested that he submit a Manure Management System Plan (MMSP) to MDA for review and approval and install measures to minimize odors along the fence line where this facility is in close proximity to neighboring homes.
As outlined in the April 21, 2009 MDA letter to Mr. Haney, which you have referenced, MDA made considerable efforts to gain Mr. Haney's cooperation to develop and implement an MMSP for his captive cervidae facility. Mr. Haney submitted an MMSP for his facility to MDA on March 9, 2009, however, upon review MDA determined that this MMSP had significant deficiencies, and as such, was not acceptable.

Therefore, pursuant to the interagency Memorandum of Understanding (MOU) between the MDA and Michigan Department of Environmental Quality (MDEQ), the complaint file was transferred to the MDEQ Air Quality Division for investigation under their standard pollution investigation process, and our file has been closed. You may wish to contact Mr. Chris Hare in the MDEQ Air Quality Division regarding the application of Michigan's Natural Resources and Environmental Protection Act to this facility.

Administration of Public Act 190, including the registration requirements for a privately-owned cervidae facility is handled by the Michigan Department of Natural Resources (MDNR). You may wish to contact Ms. Shannon Hanna in the MDNR Wildlife Division regarding captive wildlife permits and registration requirements that apply to this facility.

Sincerely,

Don Koivisto
Director

cc: Chris Hare, MDEQ, Air Quality Division
Shannon Hanna, MDNR, Wildlife Division
Kristin Linderman, MDA, Environmental Stewardship Division
Angela Butler, D.V.M., MDA, Animal Industry Division

Lower Court
Order On Hearing Held July 27, 2017

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

FRASER TOWNSHIP
Plaintiff,

v.

HARVEY HANEY and
RUTH ANN HANEY,
Defendants
_____/

Case No.: 16-3272-CH
Honorable Harry P. Gill

ORDER

MARK J. BRISSETTE (P26982)
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STATE OF MICHIGAN
COUNTY OF BAY
I HEREBY ATTESTED
A TRUE COPY
CYNTHIA A. LUCZAK
CLERK OF CIRCUIT COURT
By _____ Deputy

AT A SESSION OF THE ABOVE-COURT HELD IN THE COURTHOUSE
IN THE CITY OF BAY CITY, COUNTY OF BAY
ON AUGUST 9, 2017.
PRESENT: Honorable Harry P. Gill, Circuit Court Judge

ORDER ON HEARING HELD JULY 27, 2017

Before the Court on July 27, 2017 was Fraser Township's third (3rd) motion for summary disposition; Defendants' cross-request for summary disposition pursuant to MCR 2.116(I)(2) and conditional leave to file counter-claims; and Defendants' motion to compel discovery on four interrogatories propounded on March 6, 2017.

Having reviewed the papers and having oral argument, the Court DENIES both motions for summary disposition and GRANTS Defendants' motion to compel discovery for the reasons stated on the record. The Court did not rule upon Defendants' motion for conditional leave to file counter-claims.

The Court requires that by October 2, 2017, Fraser Township shall—

1. provide Defendants' counsel with written notice of all expert witnesses it intends to call at trial; and

2. answer, in full and with specificity, the four (4) interrogatories propounded by Defendants' counsel on March 6, 2017 (a copy of which is attached hereto).

If for any reason the October 2, 2017 deadline cannot be met, an extension must be formally requested from the court with proof of good cause. Over Defendants' objection placed on the record on July 27, 2017, the Court also directs that extended discovery is warranted, which includes (but is not limited to) the ability for Fraser Township to inspect the Haney property, with reasonable notice and in the presence of Defendants' counsel, see MCR 2.310, and also includes the right for Defendants' counsel to audio-video record the inspection (provided no interference with the inspection).

Further, the Court orders that the trial scheduled for September 11, 2017 shall be adjourned to March 8 and 9, 2018 at 8:30a.m. Trial briefs shall be filed with the court and served upon the opposing party on or before March 1, 2018.

IT IS SO ORDERED.

Date: 08-09-17

FOR Honorable Harry P. Gill, Circuit Court Judge

Order prepared by: Phillip L. Ellison (P74117)

OUTSIDE LEGAL COUNSEL PLC
www.olcplc.com

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF BAY

FRASER TOWNSHIP
Plaintiff,

v.

HARVEY HANEY and
RUTH ANN HARVEY,
Defendants
/

Case No.: 16-3272-CH
Honorable Harry P. Gill

DISCOVERY

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DISCOVERY REQUEST – MARCH 6, 2017

TO: Plaintiff FRASER TOWNSHIP

As used within this request:

A. "Identify" when referring to an individual, corporation, or other entity shall mean to set forth the name, address, and telephone number, and if a corporation or other entity, its principle place of business, or if an individual, the present or last known home address, his or her job title or titles, by whom employed and address of the place of employment.

B. Where knowledge or information in possession of a party is requested, such request includes knowledge of the party's principals, employees, staffers, agents, insurance companies, representatives, and unless privileged, his, her, or its attorney or attorneys. When an answer/response is made by a corporate or other non-individual party, state the name, address and title of person(s) supplying the information and list the source of his or her information.

C. The pronoun "you" refers to the party this request is directed at as well as to the individuals and entities mentioned in subsection (B) above.

Kindly answer, respond, and/or produce, in full, all discovery items/requests propounded below pursuant to MCR 2.309, MCR 2.310, and/or MCR 2.312 of the Michigan Court Rules:

1. INTERROGATORY: Based upon the Court's decision to allow this case to continue to trial, identify by name, home and business address, and telephone number, each and every person you or your attorney will or may call as a witness at trial for this matter. You are directed that a response which defers or refers to a witness list (or like-kind document) is insufficient and shall be treated as an evasive answer pursuant to MCR 2.313(A)(4).

2. INTERROGATORY: For each witness listed in the preceding interrogatory, please provide a specific and complete itemization of all factual or legal testimony (in specific detail) you or your attorney may seek to elicit from those witnesses and how those persons gained the information regarding the facts or law; and list the contents of any evidence (including written materials or computer data) that you or your attorney may seek to introduce through those witnesses, or attach copies to your answers to these discovery requests.

3. INTERROGATORY: Explain precisely and in detail each and every reason why it is your position that Defendants' farm and/or farming operation does not conform to the 2016 *Generally Accepted Agricultural and Management Practices* (GAAMPs) in full. Be specific and provide the complete itemization of all factual or legal basis for your assertions; for all legal basis, provide a full and complete citation to the relevant statute, case, regulation, ordinances, and/or law.

4. INTERROGATORY: Identify all persons with whom you consulted and/or checked with to investigate actual or possible answers to these discovery requests; for each person, itemize each discovery request the person contributed information which became your answer in response thereto.

Date: March 6, 2017

RESPECTFULLY SUBMITTED:

Philip L Ellison

OUTSIDE LEGAL COUNSEL PLC
BY PHILIP L. ELLISON (P74117)
Attorney for Defendants
PO Box 107 · Hemlock, MI 48626
(989) 642-0055
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pellison@olcplc.com

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing document(s) was served on parties or their attorney of record by mailing the same via US mail to their respective business address(es) as disclosed by the pleadings of record herein with postage fully prepaid, on the

6th day of March, 2017.

Philip L Ellison

PHILIP L ELLISON
Attorney at Law

OUTSIDE LEGAL COUNSEL PLC
www.olcplc.com

Case

Charter Township of Lyon v Petty and Hoskins

Docket Nos. 327685 & 327686 (Mich Ct App October 13, 2016)

family purchased their five-acre lot in 1969. The land was vacant, and the family quickly constructed a single-family residence. In 1970, the Hoskins family erected a 30-foot by 50-foot pole barn valued at $3,300. Their building permit application indicated, "Building to be used for storage." In 2012 and 2013, the Hoskins family built additions to the pole barn, each valued at $3,500. The Hoskins family asserts that they have always used the pole barn to store equipment and material for their landscaping business: Hoskins Landscaping, formerly known as Paul Hoskins Landscaping.

The Petty family bought a 13-acre lot neighboring the Hoskins family in 1977. The previous owners ran Nunday Trenching and Power Washing Company from the property and stored trucks and commercial equipment on site. The Petty family currently operates a truck-storage facility on the land—Petty Trucking—and also stores materials such as brick pavers. They have conducted other commercial enterprises in the past. Although James Petty contends that his family has made "significant investments" and "improvements to the business," he provided no further detail in connection with this lawsuit.

It is undisputed that the Hoskins and Petty families operated their businesses without township interference for several decades despite that their uses were never permitted under their zoning classification. Defendants claim that township officials have visited their property several times over the years and never raised any concerns. Moreover, each presented commercial personal property tax bills connected with their Belladonna addresses. In the early days, other property owners on Belladonna Road put their land to similar uses. It is also undisputed, however, that the neighborhood's character has changed over time. Satellite images reveal that a large residential subdivision now runs along the properties' western borders. On Belladonna Road, simple farm houses have given way to modern homes of vast square footage on large lots. It appears that Hoskins Landscaping and Petty Trucking are the last local vestiges of the rural era.

Neighbors began complaining about noise and early morning activity at the landscaping and truck-storage businesses. On October 14, 2013, the township sent identical "township zoning ordinance warning notice[s]" to Marlene Hoskins and James Petty. The township advised defendants that their business uses were not permitted in a residential zoning district and that defendants had been in violation of the ordinance since the inception of their commercial enterprises. The notices continued, "Although portions of your business activities have existed for years, the Township would like to meet with you to discuss options available to bring your property into compliance with the Zoning Ordinance." Ultimately, the township sought judicial intervention to force the Hoskins and Petty families to cease their business operations in their current locations. Defendants filed a joint motion for summary disposition contemporaneous with their answers, and the township responded with a summary disposition motion of its own. The circuit court agreed with the township's position and ordered the Pettys' and Hoskinses' compliance with the zoning restrictions on their land. The Pettys and Hoskinses now appeal.

II. STANDARD OF REVIEW

We review de novo a circuit court's grant of summary disposition. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013).

> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. [*Zaher*, 300 Mich App at 139-140.]

We review de novo the applicability and merit of the equitable defenses raised by the Hoskins and Petty families. See *Mason v Menominee*, 282 Mich App 525, 527; 766 NW2d 888 (2009).

III. ANALYSIS

Townships have statutory authority to enact and enforce zoning ordinances for the orderly planning of their communities. See Michigan Zoning Enabling Act, MCL 125.3101 *et seq*. Zoning ordinances must be reasonable and promote "the public health, safety, morals, or general welfare." *Euclid v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926). Indeed, MCL 125.3201(1) of the Michigan Zoning Enabling Act provides:

> 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 to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, *to ensure that use of the land is situated in appropriate locations and relationships*, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and *to promote public health, safety, and welfare*. [Emphasis added.]

To achieve these goals, "[i]t is the policy of this state and a goal of zoning that uses of property not conforming to municipal zoning ordinances be gradually eliminated." *Jerome Twp v Melchi*, 184 Mich App 228, 231; 457 NW2d 52 (1990). Whether and when to enforce its zoning ordinance to effectuate this gradual elimination is a matter within a township's discretion. 83 Am Jur 2d, Zoning and Planning, § 936, p 893; *Randall v Delta Charter Twp*, 121 Mich App 26, 32; 328 NW2d 562 (1982) ("[D]ecisions of a planning commission, or other similar local agency, concerning whether to enforce zoning ordinances are decisions which are so basic to the operation of a municipality that any attempt to create liability with respect thereto would constitute an unacceptable interference with [the municipality's] ability to govern.") (quotation marks and citation omitted; second alteration in original). "[A]bsent extraordinary circumstances,"

courts will not interfere with such decisions. 2 Cameron, Michigan Real Property Law, § 23.30, p 1367.

One such "extraordinary circumstance[]" is the presence of a preexisting "nonconforming use." "A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993). To be protected, the nonconforming use must have been legal at one time; a use that violates the zoning ordinances since its inception does not draw such protection. 1 Anderson, American Law of Zoning 3d, § 6.14, p 481. Defendants concede that their commercial activities have never conformed to the uses approved for their properties' zoning classification. Accordingly, defendants were required to find other extraordinary circumstances to demand the continuation of their businesses from their R-1.0 Residential Agricultural properties.

In defense of the township's enforcement actions, the Hoskins and Petty families contended that the township's decades-long pattern of ignoring their zoning violations and the investments they made in their businesses as a result, precluded the township from taking enforcement action now. To this end, the Hoskins and Petty families asserted laches and estoppel defenses. These defenses "are judicially disfavored" because they invite judicial interference into an area of local "public interest" and are "rarely applied in the zoning context except in the clearest and most compelling circumstances." 83 Am Jur 2d, § 937, p 894. And relevant to both, a historical failure to enforce a particular zoning ordinance, standing alone, is insufficient to preclude enforcement in the present. Anno: *Right of Municipality or Other Public Authority to Enforce Zoning or Fire Limit Regulations as Affected by its Previous Conduct in Permitting or Encouraging Violation Thereof*, 119 ALR 1509, 1511, § IIIa. See also *Marzo v Abington Twp Zoning Hearing Bd*, 30 Pa Commw 225, 230; 373 A2d 463 (1977) ("[M]ere delay in enforcement does not create a vested right to use property in violation of zoning regulations.") (quotation marks and citation omitted).

"The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right." *Boston-Edison Protective Ass'n v Teahen*, 337 Mich 353, 360; 60 NW2d 162 (1953) (quotation marks and citation omitted). "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 defendant." *Yankee Springs Twp v Fox*, 264 Mich App 604, 612; 692 NW2d 728 (2004). To merit relief under this doctrine, the complaining party must establish prejudice as a result of the delay. *Id.*; *Gallagher v Keefe*, 232 Mich App 363, 369-370; 591 NW2d 297 (1998); *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 96-97; 572 NW2d 246 (1997). Proof of prejudice is essential.

A township can be equitably estopped from enforcing a zoning ordinance when:

> "(1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts. . . ." [*Howard Twp Bd of Trustees v Waldo*, 168 Mich App 565, 575; 425 NW2d 180 (1988), quoting *Cook v Grand*

business. As such, the Pettys created no question of fact on the element of prejudice, and their claim fails as a matter of law.

The Hoskins family presented building permits for their original pole barn construction as well as two additions. These documents recite $10,300 in improvements. We first note that the issuance of building permits in this case did not establish knowledge on the part of the township. Marlene Hoskins and her now-deceased husband applied for the original building permit only one year after erecting a single-family home on the property. The application indicated merely that the pole barn would be used for storage. The later permit applications for the additions include even less information. Accordingly, township officials had no reason to believe the pole barn would be used for commercial purposes. The documents reflect the construction of a pole barn for storage uses incident to a residential structure. Compare *Fass v Highland Park*, 326 Mich 19, 27-28; 39 NW2d 336 (1949), citing *Building Comm'n of the City of Detroit v Kunin*, 181 Mich 604; 148 NW 207 (1914) (in which the property owners sought city approval of their land use but then extended their uses to ones prohibited in the zoning district); *Valparaiso Bd of Zoning Appeals v Beta Tau Housing Corp*, 499 NE2d 780 (Ind Ct App, 1986) (holding that because the defendant's 1971 variance application and 1973 and 1974 official discussions with city officials notified the city that the defendant intended to use the subject properties for a fraternity house and the defendant thereafter expended $15,000 to remodel, the city was estopped from preventing the use); *Utah Co v Young*, 615 P2d 1265 (Utah, 1980) (allowing the county to enforce its zoning ordinance when the defendants applied for a permit to construct a "barn" on their agricultural property valued at $1,600 but then expended $23,000 to outfit the building as a public auction house).[1]

Moreover, neither set of defendants made any allegation that their property cannot be used for other purposes allowed under the zoning classification. A pole barn can be used for any number of activities, including serving as a garage for a residential structure. Similarly, a dirt parking area, like that on the Petty property, can be put to various uses. Accordingly, neither can establish that their expenditures were wasted or that their property is unfit for any use within the zoning classification. See *Mazo v Detroit*, 9 Mich App 354, 361; 156 NW2d 155 (1968) (holding that the defendant would not be estopped from enforcing the zoning ordinance when the plaintiff spent $6,500 in reliance on erroneous approval from city officers, but there were no allegations that "her expenditures have rendered her premises useless except as a bar").

The Hoskins family also presented no evidence that they expended $10,300 on their pole barn as a result of the township's inaction. In her affidavit submitted with the summary disposition motion, Marlene Hoskins averred, "We built a pole barn with Lyon Township's building permits specifically for our landscaping business and there was no problem with

[1] Both sets of defendants also presented personal property tax assessments in an attempt to establish the township's knowledge of their commercial uses of their property. These assessments merely show that the taxpayer who lives at a particular address owns commercial personal property, not that the taxable personal property is located or used at the taxpayer's address.

building inspections or the building's use." This statement contradicts the 1970 building permit application, which indicated simply that the pole barn would be used for storage. Given this plain and clear documentary evidence, the Hoskins family cannot show that they consulted with township officials regarding the legality of running their business from their property before its inception and, therefore, cannot establish a causal relationship for their initial investment.

In relation to the 2012 and 2013 additions, Ms. Hoskins alleged that "various Township Officials," including a former township supervisor, "have visited the property for a host of reasons" over the decades and yet raised no concerns regarding the Hoskins family's commercial enterprise or its compliance with the zoning ordinance. Ms. Hoskins contends that this complacency lulled her into believing it would be acceptable to extend the pole barn to create more room for Hoskins Landscaping's equipment. This case is distinguishable from *Papadelis (On Remand)*, 226 Mich App 90, in that no intervening cause, such as road construction, appears to have influenced the Hoskins family's recent expansion.

Moreover, as a matter of law, $7,000 worth of additions to a storage barn falls short of the "substantial change in position" or "extensive obligations and expenses" necessary for equity to overcome a township's zoning authority. 83 Am Jur 2d, § 937, p 984. The 2012 and 2013 additions and their attendant costs are not comparable to the construction of a business facility open to the public as in *Malcolm*, 375 Mich at 137, or the planning and construction of an entire neighborhood like in *Oliphant*, 381 Mich at 637. See also *North Miami v Marguilies*, 289 So 2d 424 (Fl App, 1974) (finding a $650,000 investment sufficient to estop the city from enforcing its zoning ordinance). The enforcement of the township's zoning ordinance will work an inconvenience to defendants, who have operated their businesses for years without the expense of owning or leasing commercial property. That inconvenience, however, does not overcome the township's statutory authority to ensure that neighboring parcels maintain compatible uses.

Ultimately, both sets of defendants chose to pursue summary disposition based on their laches and estoppel defenses. Their evidence did not establish the prejudice necessary to continue their commercial enterprises on land surrounded by quiet residential property. Therefore, the circuit court properly determined that Lyon Township could enforce its zoning ordinance and order an end to defendants' commercial uses, which had always been prohibited on their R-1.0 Residential Agricultural land.

We affirm.

/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien

STATE OF MICHIGAN

IN THE SUPRPEME COURT

FRASER TOWNSHIP,

Plaintiff-Appellant,

v

Supreme Court No.:
Court of Appeals No.: 337842
Lower Court No.: 16-3272-CH

HARVEY HANEY and,
RUTH ANN HANEY,

Defendants-Appellees.
_____/

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RECEIVED
FEB 21 2020
LARRY S. ROYSTER
CLERK SUPREME COURT

PROOF OF SERVICE

STATE OF MICHIGAN)
)SS
COUNTY OF BAY)

LAURA SCHERZER, being duly sworn, deposes and says:

1. That she is a legal assistant in the law firm of BIRCHLER, FITZHUGH, PURTELL & BRISSETTE, PLC, attorneys for the above-named Plaintiff-Appellant.

2. That on February 20, 2020, she sent a copy of the Plaintiff-Appellant's Application for Leave to Appeal From a Decision of the Court of Appeals and this Proof of Service in the above matter by first class mail, with full postage prepaid thereon to:

MR. PHILIP L. ELLISON ATTORNEY AT LAW PO BOX 107 HEMLOCK MI 48626	MICHIGAN COURT OF APPEALS LANSING OFFICE 925 W OTTAWA ST, PO BOX 30022 LANSING MI 48909
MR. SETH KOCHES ATTORNEY AT LAW 470 W CENTRE AVE SUITE 1A PORTAGE MI 49024	BAY COUNTY CIRCUIT COURT CLERK 1230 WASHINGTON AVE BAY CITY MI 48708

Further, deponent says not.

LAURA SCHERZER

Signed and sworn to before me in Bay County, Michigan on February 20, 2020, by Laura Scherzer.

MARY J. LEARY
Notary Public
Saginaw acting in Bay County, Michigan
My Commission Expires: 06/16/2023

Prepared By:
BIRCHLER, FITZHUGH, PURTELL & BRISSETTE, PLC
BY: MARK J. BRISSETTE (P26982)
900 Center Avenue
Bay City, Michigan 48708
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Supreme Court Case

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D. KEITH BIRCHLER
WALTER P. FITZHUGH
J. JOSEPH PURTELL
MARK J. BRISSETTE

ROBERT D. SAROW
Emeritus

L.W. BARTLETT (1906-1972)
D.L. KING (1908-1982)
ROBERT H. JOHNSON (1914-1951)
WILLIAM E. PETERS (1936-2019)

February 20, 2020

Michigan Supreme Court
Clerk
925W Ottawa St
PO Box 30022
Lansing MI 48909-7522



RE: *Fraser Township v Harvey Haney and Ruth Ann Haney*
Court of Appeals: 337842
Lower Court No.: 16-3272-CH

Dear Clerk:

Enclosed please find the original plus one (1) copy of the following regarding the above referenced matter:

1. Plaintiff/Appellant's Application for Leave to Appeal From a Decision of the Court of Appeals;
2. Proof of Service; and
3. Filing fee.

Please file and mail an attested true copy back to me in the envelope provided. Thank you.

Please do not hesitate to contact Mr. Brissette if you have any questions or concerns.

Regards,

BIRCHLER, FITZHUGH,
PURTELL & BRISSETTE, PLC

Laura Scherzer
Assistant to Mark J. Brissette

Enclosure

cc: Philip Ellison, Esq.
Fraser Township
Michigan Court of Appeals
Bay County Circuit Court
Seth Koches, Esq.

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