

CITY OF MANISTEE PLANNING COMMISSION

WORKSESSION AGENDA

**Thursday, October 28 2010 7:00 p.m.
Council Chambers, City Hall
70 Maple Street, Manistee, Michigan**

I Call to Order.

II Worksession Items:

1. Medical Marihuana
2. Misc.

III Adjourn.

All Planning Commission Meetings and Worksessions are open to the Public.

Worksessions are scheduled to allow the Planning Commission the opportunity to discuss in a less formal manner than a regular meeting. No motions or decisions can be made during a worksession.



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MEMORANDUM

TO: Planning Commissioners

FROM: Denise Blakeslee 

DATE: October 18, 2010

RE: October 28, 2010 Worksession

Commissioners, the Planning Commission rescheduled the October Worksession to Thursday, October 28, 2010 at 7:00 p.m. in the Council Chambers. Jon Rose and I will be attending the Michigan Association of Planners Conference October 20th - October 22nd.

Included in your packet is a copy of the "*White Paper A Local Government View of the Michigan Medical Marihuana Act by Gerald A. Fisher, Consultant*" Dated October 5, 2010. This report was prepared at the request of the Michigan Municipal League and Michigan Township Association and is intended to assist local governments.

I have also enclosed information about the Planning for the New Economy workshop that will be held here at City Hall on December 8, 2010. If you wish to attend the City will cover the cost.

If you are unable to attend the worksession please call me at 398-2805. See you Thursday!!

:djb

WHITE PAPER
A LOCAL GOVERNMENT VIEW
OF THE
MICHIGAN MEDICAL MARIHUANA ACT

BY

GERALD A. FISHER, CONSULTANT*

October 5, 2010

**WHITE PAPER
A LOCAL GOVERNMENT VIEW
OF THE MICHIGAN MEDICAL MARIHUANA ACT**

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* This White Paper was prepared at the request of the Michigan Municipal League and Michigan Townships Association to be a resource for Michigan local governments. The views and conclusions expressed are those of the author and do not necessarily represent the positions of either the Michigan Municipal League or Michigan Townships Association. Gerald A. Fisher is a professor of law at the Thomas M. Cooley Law School, Auburn Hills, Michigan. Prior to becoming a professor, he served as counsel for Michigan cities, villages and townships for some thirty years.

I. INTRODUCTION

Michigan's "medical marihuana" law was proposed and enacted based on the "initiative" process established in the Michigan Constitution, and is known as Initiated Law 1 of 2008, the Michigan Medical Marihuana Act ("the Act"). The passage of the Act would appear to reflect a sentiment by many in the state that assistance should be provided to those truly suffering, and for this purpose a defined medical use exception should be made to the general policy that activities involving marihuana must be treated exclusively as criminal acts. Based on the decisive approval of the Act by the electorate, this report will take the predominant theme of permitting the fundamental intent of the Act to be carried out.¹ However, an examination of this subject from the standpoint of local government should not ignore the point that certain provisions and omissions in the Act give rise to a legitimate basis for local government concern for the protection of important public interests.

This report provides a view of the Act primarily in terms of alternative responses available to local government. A number of criminal law issues that need to be considered, as well as issues germane to this report, were identified in a published decision of the Michigan Court of Appeals entitled *People v Redden*.²

The essence of the Act involves the creation of a relatively loose procedure by which a "qualifying patient" (referenced as "patient" in this report) may obtain a certification from a physician and a "registry identification card" from the State Department of Community Health, which will authorize the patient to avoid prosecution and other penalty for cultivating up to twelve marihuana plants and consuming marihuana. The Act also contains an even looser process by which a "primary caregiver" (referenced as "caregiver" in this report) can obtain a "registry identification card" authorizing such person to lawfully cultivate and distribute to patients marihuana from up to twelve marihuana plants per each patient with whom the caregiver is formally associated. A caregiver may cultivate marihuana for, and sell to, not more than five patients (i.e., not more than 60 plants). If a caregiver has been issued a registry identification card as a patient, he or she may cultivate up to an additional twelve plants, with such plants being theoretically restricted for personal consumption.

¹ The primary exception to this theme is a suggestion in part V of this report that consideration could be given to the initiation of a federal declaratory judgment action in order to clarify whether the Act violates the Supremacy Clause of the United States Constitution, and is thus invalid.

² The *Redden* case was joined with *People v Clark*, case numbers 295809 and 295810, respectively, released for publication on September 14, 2010 (WL 3611716). The decision includes a two-judge majority opinion as well as a concurring opinion representing a unique effort by the concurring judge to provide what he perceived to be needed guidance and in which he intended to establish a "framework for the [medical marihuana] law and address those issues not resolved by the majority opinion." Slip Opinion, p 5. References below to the opinions in this Court of Appeals decision will be made to "*Redden* majority" and "*Redden* concurrence." While the *Redden* concurrence will be referenced several times in this report with regard to certain important insights, it must be recognized that it is the opinion of one judge and thus may not be relied upon as precedent.

A reading of the Act as a whole reveals a design for a close relationship between the caregiver and the patient, with the caregiver “assisting” the patient. Of critical importance to municipalities, while the Department of Community Health maintains the name and address of both the caregiver and the patient on a confidential registry, such names and addresses must all be withheld from disclosure by the Department – even to law enforcement. Thus, it would seem fair to say that the fundamental purpose of the Act is the creation of a private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes.

The long status quo in both Michigan and the United States is to classify marihuana as a Schedule 1 controlled substance, and to treat its cultivation, sale, and use as serious criminal offenses. The Act carves out from this long status quo an exception for purposes of Michigan law. To the extent marihuana is cultivated, sold, and used in conformance with the Act, neither a patient nor a caregiver is subject to criminal prosecution or other penalty under state law. However, there is no counterpart exception carved out from the laws of the United States, and therefore all cultivation, distribution, and use of marihuana for any purpose – medical or otherwise – is unlawful under federal law.³ This direct conflict between state and federal law is an issue that will ultimately need to be addressed in some manner, and this subject will be discussed at greater length below.

In the *Redden* concurrence, it is reported that an affidavit filed in that case disclosed that the Act “is based on model legislation provided by the Marijuana Policy Project (MPP), a Washington, D.C.- based lobbying group organized to decriminalize both the medical *and* recreational uses of marijuana. The statutory language of the [Act] was drafted by Karen O’Keefe, the Director of State Policies at the MPP in Washington D.C.”⁴ In addition, at a Michigan Townships Association/Michigan Municipal League symposium, held on July 20, 2010, credit for at least part of the Act’s authorship was claimed by the Michigan Medical Marihuana Horticultural Institute. A representative of this group appeared at the symposium and announced that the Michigan Medical Marihuana Horticultural Institute became involved in the initiated Act, and remains interested, with the specific purpose of acquiring warehouses in various locations of the State, with the view to dividing each warehouse into a number of condominium units that would be sold to caregivers for the distribution of marihuana to patients. Seemingly consistent with the motives espoused by these two groups, a substantial portion of the Act is devoted to the goal of insulating patients and caregivers from criminal prosecution or the imposition of other penalties. Accordingly, patients and caregivers are very well protected under the Act. On the other hand, there are important provisions and omissions in the Act that suggest that local government and the general public are not as clearly protected; this point is addressed in greater detail in section III of this report.

³ There is an exception under federal law for strictly controlled research, not relevant to this discussion.

⁴ Slip Opinion, p 5 (Emphasis in original). By footnote 6, a website is provided:
<http://www.mpp.org/about/history.html>.

Given the approval of the Act, and the premise of permitting its fundamental intent to be carried out, the challenge for local government is determining how to best represent the interests of the public, recognizing that each community will need to evaluate this question within the context of its own policies and unique circumstances. One option available to local government is to take no action.⁵ Other options are also available, and several will be discussed in this report.

Specifically, this report will present for consideration the prospect that one or more local governments or other interested parties may determine to seek a declaratory determination under the Supremacy Clause of the United States Constitution with regard to the apparent direct conflict between the law in Michigan and that of the United States concerning the cultivation, distribution, and use of marihuana within the framework of the Act. In addition, the Act was promulgated by the initiative process, and consequently was not forged in a process that exposed its terms to the scrutiny of competing interests. The public would be served if the Legislature would make certain adjustments that would render the Act more workable for local government. Such adjustment would be particularly challenging, however, given the rigors required in the Michigan Constitution for altering an act approved by the initiative process. Finally, local government must be able to carry out its legitimate mission of protecting the public health, safety, and welfare in connection with medical marihuana which may involve the enactment of local regulations to, among other things, protect children, facilitate safe and efficient law enforcement efforts, and provide for inspections of electrical and plumbing installations.

⁵ If policy-makers in certain local governments conclude that the concerns found in the Act represent an acceptable trade-off for a movement away from the criminalization of marihuana, a decision on their part to take no action may be determined to be the right course, notwithstanding the risks associated with that position. On the other hand, this report identifies a number of issues that may lead many local government policy-makers to conclude that one or more of the responses outlined in this report may be appropriate. The *Redden* concurrence expresses that the Act badly needs a response in order to avoid "an untoward risk for Michiganders," (Slip opinion, p 7) however the Court in this concurring opinion focuses on a response at the state level. In this regard, the Court noted that state officials "can either clarify the law with legislative refinements and a comprehensive set of administrative rules, or they can do nothing," and suggests that if no decision is made, this would be, "in fact, a decision to do nothing." *Redden* concurrence, Slip opinion, p 29.

II. SUMMARY OF RELEVANT PORTIONS OF THE MICHIGAN MEDICAL MARIHUANA ACT

Under the long-standing provisions of both Michigan and Federal law, the cultivation, distribution, and use of marihuana are criminal acts.

However, the Act carves out certain acts of cultivation, distribution, and use of marihuana to be lawful. Thus, in Michigan, as in several other states⁶ the general law is that the acts of cultivation, distribution, and use of marihuana are all unlawful, with the concurrent carve-out of exceptions that cause the same acts by certain individuals to be lawful under specified circumstances.

The Act defines a “debilitating medical condition” of a patient, describing the condition to include a number of alternative specified conditions. While some of the conditions relate to very specific diseases, a fair reading may allow that “severe and chronic pain” arising out of a “medical condition” will suffice as a basis for having a debilitating medical condition. A physician is authorized by the Act to sign a “written certification,” which specifies the patient’s debilitating condition, and states that, in the physician’s professional opinion, the medical use of marihuana will (in simple terms) help the patient’s condition or the symptoms associated with the condition.⁷ The written certification *need not* specify the quantity of marihuana the patient is to consume, and *need not* specify the frequency of consumption recommended. In other words, the physician is not *prescribing* the medical use of marihuana in the customary sense, but merely stating that marihuana will help the patient with the debilitating condition or its symptoms.⁸

Having a certification in hand, the patient may then secure a “registry identification card” (“ID Card”) by filing an application with the State Department of Community Health (“Department”), presenting the certification, a fee, and providing the

⁶ It appears that some fourteen states and the District of Columbia now permit the medical use of marihuana by certain individuals, generally described as patients: Alaska, California, Colorado, Hawaii, Maine, Michigan, Montana, New Jersey, New Mexico, Nevada, Oregon, Rhode Island, Vermont, and Washington.

⁷ In section 2 of the Act, MCL 333.26422(a), the “people of the State of Michigan find and declare” that a March 1999 report of the National Academy of Sciences’ Institute of Medicine concluded that marihuana has beneficial uses in treating or alleviating pain, nausea, and other symptoms associated with a variety of debilitating medical conditions. As described by the ACLU, the report also “strongly recommended moving marijuana to the status of a schedule II drug, available for prescription by doctors” and identified several supposed ill affects that are “false or unsubstantiated by scientific evidence”. On the other hand, Marihuana is classified as a Schedule 1 substance in Michigan, and the Public Health Code specifies that, “The administrator shall place a substance in schedule 1 if it finds that the substance has high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision.” MCL 333.7211, 333.7212(1)(c). In addition, *Gonzales v. Raich*, 545 U.S. 1, 14 and 27, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) explained that, Congress concluded that marihuana “lack[s] any accepted medical use, and [that there is an] absence of any accepted safety for use in medically supervised treatment.” But, see footnote 37, 545 U.S. at 28.

⁸ The *Redden* majority and concurrence send a signal that the basic physician-patient relationship intended to support the certification will be scrutinized by the courts for legitimacy.

patient's name, address, and date of birth – unless the patient is homeless, in which case no address is required.⁹ In addition, the patient must provide to the Department the name, address and phone number of the patient's physician,¹⁰ the name, address, and date of birth of the patient's "caregiver," if any, and also specify whether it will be the patient or the caregiver that will be permitted to cultivate marihuana plants for the patient's use. *None* of the information submitted for the ID Card is provided, *nor may it be disclosed*, to state, county or local law enforcement.

The full extent of information that may be disclosed to law enforcement involves a *verification* provided by the Department to law enforcement on whether an ID Card is valid, "without disclosing more information than is reasonably necessary to verify the authenticity of the ID Card." In other words, law enforcement must first have an encounter with a person believed to be engaged in the cultivation, distribution or use of marihuana, have an ID Card presented, and then attempt to verify whether the ID Card is valid.

A minor under the age of 18 may be a patient with the certification of two physicians submitted by the minor's parent or guardian along with the parent or guardian's consent both to allow the minor's medical use of marihuana and to serve as the minor's caregiver.

A caregiver is defined in the Act as a person who is at least 21 years old who has agreed to assist with a patient's medical use of marihuana, and who has never been convicted of a felony involving illegal drugs – although the Department has acknowledged that when it does its check on a prospective caregiver, it does not check out-of-state records on past convictions. The Department issues an ID Card to the caregiver named in a patient's application. A patient can have only one caregiver, and a caregiver may "assist" no more than 5 patients with their medical use of marihuana. Again, the information concerning the identity and address of the caregiver is *not* provided, and *may not be disclosed*, to state, county or local law enforcement.

A caregiver is expressly authorized under the statute to receive "compensation for costs associated with assisting" a patient. While many terms and actions are carefully defined and described in the Act, the terms "compensation" and "costs" are not defined, and such ambiguity will undoubtedly require judicial construction.¹¹

⁹ Both the *Redden* majority (Slip opinion, pp 6-11) and concurrence (Slip opinion, pp 18-19, 21) have established as precedent, at least for the present, that there is a distinction between a "qualifying patient" addressed in § 4 of the Act, and a "patient" addressed in § 8 of the Act, holding that the defenses set forth in the latter section are available to a person who has not acquired a registry identification card. It is suggested by the author that this conclusion is worthy of further review. First, no separate definition is provided in the Act for "patient" independent of the definition of "qualified patient." Second, when rights are set forth for a "patient" in § 8 of the Act, the critical phraseology relates to rights that may be asserted by "a patient and a patient's primary caregiver," and under § 4 only a "qualified patient" may have a primary caregiver.

¹⁰ The statute is not clear on whether the "patient's physician" must be the certifying physician.

¹¹ The *Redden* concurrence expresses the view that the Act does not authorize the "sale" of marihuana in Michigan (Slip opinion, pp 14, 21), indicating that a caregiver is authorized only to recover costs, and that there is no permission for a caregiver to financially profit.

Theoretically, a caregiver may cultivate for, and distribute/sell marihuana to not more than five patients (i.e., not more than 60 plants). Absent local regulation on this subject, the five-patient/60 plant limitation is not subject to effective verification and enforcement. The gap in regulation under the Act arises out of the withholding from law enforcement of the names and addresses of both patients and caregivers, information expressly prohibited from Department disclosure. Officers may only secure a verification of the validity of the ID Card.

The Act does not expressly make provision for a use or operation that some have referred to as a “dispensary” or “marihuana store.” The absence of such reference in the Act has led to controversies. This subject will be addressed further in part III of this report, below.

Nor does the Act make any provision with respect to the manner in which a patient or caregiver may lawfully acquire marihuana plants or seeds. However, once acquired, plants must be kept in an “enclosed, locked facility,” which means “a closet, room, or other enclosed area equipped with locks or other security devices that permit access only by” a registered caregiver or registered patient. This definition has ambiguities which, if not legislatively clarified, may require judicial interpretation, including: the meaning of “security device;” and whether access is limited only to *the* caregiver cultivating it, and limited only to *the* patient for whom it is being grown.¹²

The fundamental thrust of the Act is to create a right on the part of registered patients to use medical marihuana for help with a debilitating condition or its symptoms, and the right on the part of registered caregivers to cultivate and distribute medical marihuana to patients for their use. This two-party relationship is a constant throughout the Act, with one exception. One provision of the Act, subsection (i) of section 4,¹³ contains a provision that would appear to be disconnected from all of the concise terms establishing the exclusive relationship between patients and caregivers. This subsection ignores the reference to caregiver, and declares that “a person” shall not be subject to arrest or other penalty *for assisting a patient with using or administering marihuana*. The intent of this subsection is quite unclear. The work of a caregiver is to “assist patients,” including the cultivation and distribution of medical marihuana. Subsection (i) allows “a person” to assist patients. A fair reading of the Act as a whole would suggest that this “person” must be a caregiver. Yet, there is little question that a non-caregiver “person” being prosecuted will offer this provision in his or her defense. Was this subsection (i) intentionally inserted to expand the authorization of the Act?¹⁴ Without suggesting that a court would do so, concern has been expressed by some that this provision, along with other ambiguities in the Act, could be read to broaden the authorization of the Act in a manner that approaches the legalization of marihuana

¹² Also see footnote 9, above.

¹³ MCL 333.26424

¹⁴ Perhaps this subsection (i) was included in the Act to cover a particular circumstance that was foreseeable by the drafters. If this was the case, it would have been beneficial to spell out the particular circumstance.

cultivation and distribution,¹⁵ an authorization well-beyond the fundamental intent reflected throughout the Act as a whole.¹⁶

¹⁵ This concern was expressed at a symposium presented on July 20, 2010 in Ypsilanti by the MTA, MML, and MAC.

¹⁶ It is not suggested here that the provision at issue was intentionally inserted for nefarious purposes. Indeed, the fundamental intent of the Act, gleaned from a reading of the Act as a whole is, as noted in the text of this report, to create a private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes.

III. THE ACT EXPOSES LOCAL GOVERNMENT TO PROBLEMS THAT NEED TO BE ADDRESSED

The Act was promulgated based on the process of “initiative,” rather than through the customary legislative process. Electors were presented with the following language on the ballot:¹⁷

<p style="text-align: center;">PROPOSAL 08-1</p> <p style="text-align: center;">A LEGISLATIVE INITIATIVE TO PERMIT THE USE AND CULTIVATION OF MARIHUANA FOR SPECIFIED MEDICAL CONDITIONS</p> <p>The proposed law would:</p> <ul style="list-style-type: none">• Permit physician approved use of marihuana by registered patients with debilitating medical conditions including cancer, glaucoma, HIV, AIDS, Hepatitis C, MS, and other conditions as may be approved by the Michigan Department of Community Health.• Permit registered individuals to grow limited amounts of marihuana for qualifying patients in an enclosed, locked facility.• Require Department of Community Health to establish an identification card system for patients qualified to use marihuana and individuals qualified to grow marihuana.• Permit registered and unregistered patients and primary caregivers to assert medical reasons for using marihuana as a defense to any prosecution involving marihuana. <p style="text-align: center;">Should this proposal be adopted?</p> <p style="text-align: center;">Yes <input type="checkbox"/></p> <p style="text-align: center;">No <input type="checkbox"/></p>
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¹⁷ Taken from House Legislative Staff material placed online before the election. See: http://www.procon.org/sourcefiles/Michigan_Ballot_Proposal_2008.pdf

Subject to certain issues that will be discussed below, the fundamental intent of the Act must be recognized, namely, the creation of a *private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes*. There is a sentiment by many in the state that assistance should be provided to those truly suffering, and for this purpose a defined medical use exception should be made to the general policy that activities involving marihuana are to be treated as criminal acts. It must also be recognized, however, that this exception from the general policy of illegality creates a parallel system in which the same conduct is deemed both lawful and unlawful depending on whether the engaged persons have ID Cards. The problems inherent in such a parallel system are exacerbated by the mandate of the Act that the identity and address of those having ID Cards are not to be disclosed – even to law enforcement.¹⁸

A reading of the detailed language of the Act reveals that this parallel system gives rise to critical issues that would justify local regulation to at least mitigate certain problems within the purview of local government. In addition to the issues outlined below, the Act as a whole creates the question whether state and local governments, and their respective officials, risk federal prosecution or other punishment by affirmatively authorizing the activities that purport to be permitted under the Act. Similarly, it would be inappropriate to ignore the issue of private rights that could be created and vested by local governments granting approval of activities permitted under the Act. If the Act is found to be invalid, what private claims might be asserted against local governments by persons who have acted in reliance upon these approvals, or by neighboring property owners, arguing that damages were caused due to government action taken without lawful authority?

A discussion of at least some of the issues that affect local government follows.

- 1) Law enforcement officers are required to investigate and pursue prosecution with regard to the *unlawful* cultivation, distribution or consumption of marihuana. Yet, the Act concurrently authorizes as lawful undertakings the same actions by those who meet the terms of the Act. Although this places a burden on law enforcement to make a distinction relating to very similar conduct, the Act expressly denies law enforcement officials advanced access to the identity and location of those authorized to lawfully engage in the cultivation, distribution or consumption of marihuana – critical information needed to distinguish unlawful undertakings from lawful ones, particularly at critical investigatory stages. The experience of law enforcement indicates that the presence of significant quantities of *unlawful* controlled substances is often accompanied by large quantities of cash, and by weapons

¹⁸ The confusion and problems created by this dual system are discussed throughout the *Redden* concurrence. It is appropriate to note that there are also parallel systems relating to the sale and consumption of alcohol and prescription drugs, however, considering the significant state licensing and regulation applicable to these activities, law enforcement issues are quite distinct.

used to protect the controlled substances and cash. Thus, confrontations between law enforcement and persons engaged in unlawful drug enterprises can be extremely dangerous, and there is a need to use the element of surprise in order to protect the lives of officers and members of the public. Under the Act, before the occurrence of a direct confrontation between law enforcement and persons engaged in cultivation and distribution of marihuana, law enforcement officers are prevented from securing the information necessary to determine whether such activities are being conducted by persons authorized under the Act or by persons engaged in criminal enterprise. This in turn leads to the condition that, if there is a suspicion that an unlawful enterprise is being perpetrated, officers may need to seek a voluntary entry into premises, and may be met by a weapons-based confrontation without being permitted to utilize the element of surprise. Moreover, if an unlawful enterprise is not involved, substantial resources can easily be expended by law enforcement on a baseless investigation. Accordingly, the licensure of facilities used for cultivation and distribution of medical marihuana in compliance with the Act, which need not undermine the privacy and confidentiality of the patient-caregiver relationship, could be important to law enforcement in order to identify and distinguish sites of lawful activity from sites of unlawful activity.

- 2) The experience in the State of California, a state that approved the medical use of marihuana more than a decade ago, is that concentrations of marihuana distribution activity lead to the following significant and serious secondary effects:
 - i. California law enforcement reported in 2009 (White Paper),¹⁹ that nonresidents in pursuit of marihuana, and *out of area criminals in search of prey*, are commonly encountered just outside marihuana dispensaries, as well as drug-related offenses in the vicinity—like *resales of products just obtained inside*—since these marihuana centers regularly attract marihuana growers, drug users, and drug traffickers. *Sharing just purchased marihuana* outside dispensaries also regularly takes place. *There have been increased incidents of crime including murder and armed robbery.*

¹⁹ See:

http://www.californiapolicechiefs.org/nav_files/marijuana_files/files/MarijuanaDispensariesWhitePaper_042209.pdf

- ii. In a 2009 California law enforcement presentation (Power Point),²⁰ referring again to the existence of a concentration of distribution activities, the Los Angeles Police Department reported:
 - (1) 200% increase in robberies,
 - (2) 52.2% increase in burglaries,
 - (3) 57.1% rise in aggravated assaults,
 - (4) 130.8% rise in burglaries from autos near cannabis clubs in Los Angeles.
 - (5) Use of armed gang members as armed “security guards”
 - iii. California law enforcement reported in 2009 (White Paper) that the dispensaries or “pot clubs” are often used as *a front by organized crime* gangs to traffic in drugs and launder money.
 - iv. California law enforcement reported in 2009 (White Paper) that besides fueling marihuana dispensaries, some monetary proceeds from the sale of harvested marihuana derived from plants grown inside houses are being used by *organized crime syndicates* to fund other legitimate businesses for profit and the *laundering of money*, and to *conduct illegal business operations like prostitution, extortion, and drug trafficking*.
 - v. California law enforcement reported in 2009 (White Paper) that *other adverse secondary impacts* from the operation of marihuana dispensaries include street dealers lurking about dispensaries to offer a lower price for marihuana to arriving patrons; marihuana smoking in public and in front of children in the vicinity of dispensaries; acquiring marihuana and/or money by means of robbery of patrons going to or leaving dispensaries; an increase in burglaries at or near dispensaries; a loss of trade for other commercial businesses located near dispensaries.
- 3) *Secondary effects with regard to children*: Presumably it is agreed that children should not be encouraged by example to undertake uses and activities which are unlawful. However, considering that marihuana possession and use is generally prohibited criminal activity, but the Act authorizes an undisclosed group of individuals to possess and use marihuana, and because children are not capable

²⁰ See:

http://www.californiapolicechiefs.org/nav_files/marijuana_files/files/DispensarySummitPresentation.ppt

of making distinctions between lawful and unlawful use and possession by individuals based upon the intricacies of the Act, there is a need to insulate children from the narrowly permitted use and possession activity permitted under the Act. California law enforcement reported in 2009 (White Paper) that minors exposed to marihuana at dispensaries or residences where marihuana plants are grown may be subtly influenced to regard it as a generally legal drug, and inclined to sample it.

- 4) Local regulation of marihuana distribution activities is implicitly contemplated under the Act in view of the glaring gaps opened by the terms of the Act which would, absent local regulation, render it impossible for law enforcement to investigate and pursue criminal activity not protected by the Act. By way of example:
 - i. While the Act limits a caregiver from distributing marihuana to more than five patients, because the Act withholds direct advanced information that would allow a connection to be made by law enforcement between a caregiver and particular patients (without regard to specific name and address), especially if caregivers operate in the same facility or in close proximity, the five-patient limit upon a person acting as a caregiver would be practically impossible to investigate or enforce.
 - ii. While the Act limits the number of plants a caregiver may cultivate on behalf of patients, because the Act withholds direct advance information that would allow a connection to be made by law enforcement between a caregiver and particular grow locations, the limitation on the number of plants cultivated at multiple sites would be practically impossible to investigate and enforce.
- 5) The Act, by necessary implication, invites the clarification that can be provided by local regulation which is feasible without undermining the fundamental intent of the Act. The inability of law enforcement officials to access relevant and often critical information needed to investigate violations of the Act amounts to a material barrier to the effective investigation/enforcement model. Without information necessary for distinguishing those operating under the Act from those engaged in illegal trafficking, law enforcement is precluded from undertaking adequate operational planning, again exposing law enforcement and innocent third parties to substantial and unnecessary risks.

- 6) The Act leaves a substantial gap in terms of preventing dangerous plumbing and electrical installations which are unlawful under applicable construction codes. No provision is made for inspection of a premises at which substantial facilities are installed to facilitate the cultivation of marihuana plants, including plumbing and electrical facilities, and there have been reports of such violations as unauthorized power lines that by-pass meters. These installations represent unlawful activity and create a threat to public safety, and result in a fire risk. Reports from California are similar, and also note that other unintended circumstances have resulted from the employment of facilitating installations, such as the creation of mold.

- 7) Although expressly authorized in certain other states that permit medical marihuana use,²¹ the Act does not expressly define or authorize “marihuana stores,” “dispensaries,” “compassion centers,” or “medical marihuana business.” It has been reported to the author by several sources²² that there have been requests to establish this type of use or operation in Michigan communities. Given the absence of definition or express authorization in the Act, such communities have struggled with these requests. The *Redden* concurrence comments that, “[m]any Michiganders are faced with the often unwelcome intrusion of medical marijuana (sic) dispensaries in their communities, and local governments are faced with the difficult task of determining whether they are obliged to allow such dispensaries to operate in their communities.”²³ To some degree, the controversy is definitional in nature. On the one hand, an operation in which marihuana is being dispensed with no regard for caregiver relationships with particular patients would undoubtedly fall outside the intent of the Act. Likewise, a reading of the Act as a whole would suggest that a violation issue arises when a patient dispenses medical marihuana to another patient. On the other hand, a location at which one or more caregivers *each* acts to dispense medical marihuana to not more than five patients who have formally designated that person as their “primary

²¹ Under its statutes, Title 21, §21-28.6-3(2), Rhode Island, permits the following: “Compassion center” means a not-for-profit entity registered under § 21-28.6-12 that acquires, possesses, cultivates, manufactures, delivers, transfers, transports, supplies or dispenses marijuana, or related supplies and educational materials, to registered qualifying patients and their registered primary caregivers who have designated it as one of their primary caregivers. Also see footnote 76, setting out a Boulder, Colorado provision defining “medical marijuana business.” “Dispensaries” are referenced prominently in the White Paper of the California Police Chiefs, reference above.

²² Sources include municipal attorneys, community planners, and building officials. This subject may also be found in local newspaper stories that report on medical marihuana activities.

²³ Slip Opinion, p 12, fn 15; the *Redden* concurrence continued in the same line to express that, under a reading of the Act, “the dispensary would have to be operated entirely by one individual, and could have, at most, five customers.” Also see footnote 11, above.

caregiver” would not appear to be in contravention of the Act. In terms of bricks and mortar, caregivers may raise an issue with regard to the permissible size of a building and the number of caregivers who may occupy that building. Issues such as these should be subject to regulation within local government’s customary scope of zoning and other regulatory authority. Indeed, it is suggested that many issues that arise under the Act, including whether more than one caregiver should as a matter of local policy be permitted to occupy a specified premises, are proper subjects for communities to address by ordinance. There is an important role for local regulation to play in bringing stability and providing clarity with regard to several areas in which the Act contains provisions and omissions that promise to create unnecessary controversy.

In summary, provisions and omissions of the Act open the door to:

- ◆ Potential serious adverse influence of children;
- ◆ Substantial increases in criminal activity;
- ◆ Danger to law enforcement and other members of the public;
- ◆ Discouragement and impairment of effective law enforcement with regard to unlawful activity involving the cultivation, distribution, and use of marihuana;
- ◆ The creation of a lawful commercial enterprise involving the cultivation, distribution, and use of marihuana that is not reasonably susceptible of being distinguished from serious criminal enterprise;
- ◆ Uninspected installations of plumbing and electrical facilities that may create dangerous health, safety, and fire conditions;
- ◆ Downgrading of areas in which concentrations of marihuana distribution exist.
- ◆ Regulatory gray areas that signal the need for local regulation to establish clarity and stability.

These shortcomings are in addition to two other considerations: (1) the legal uncertainty that exists with regard to whether state and local governments, and their officials, are susceptible to federal prosecution or other penalty under federal law for affirmatively authorizing the cultivation, distribution, and use of marihuana permitted under the Act; and (2) the potential for private rights to be created and vested as a result

of local governments approving authorizations of activities permitted under the Act, and for these rights to be asserted as a basis for private claims against local governments if the Act is ultimately held to be invalid. For both of these considerations, a complete analysis would require examination of complex legal and circumstantial matters that are beyond the scope of this report.

While there are many details in the Act, there does not appear to be language reflecting the intent to preempt local regulations reasonably calculated to clarify ambiguities and fill gaps inherent in the Act. If an ordinance goes further in its regulation than a statute, but not counter to it, and where a municipality does not attempt to authorize by ordinance that which the legislature has forbidden or forbid that which the legislature has expressly licensed, authorized, or required, there should be nothing contradictory between the provisions of statute and ordinance that would prevent both from coexisting. In the Act, there does not appear to be a clearly articulated intent to restrict local regulation with regard to matters on which the Act has provided insufficient guidance. Thus, it would appear that local regulation can be accomplished without undermining the fundamental intent of the Act: the permission for a private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes.

IV. PROSPECT OF A STATE LEGISLATIVE SOLUTION

The Act was promulgated by the initiative process. It was thus not fashioned in the crucible of the customary legislative process that would have exposed its terms to the scrutiny of competing interests. The Act could become more workable for local government if certain adjustments were made. Accomplishing this task requires a reference to the provisions of the Michigan Constitution governing the initiative process.

The Michigan Constitution²⁴ provides that, “[t]he people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative.” It was under this constitutional provision that the Act was proposed and approved.

The approval of an initiative ballot gives rise to the constitutional directive that, “no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or by **three-fourths of the members elected to and serving in each house of the legislature.**” (Emphasis supplied).

In light of the fact that the Act was firmly approved by the electors, it is presumed that members of the State Legislature would be hesitant to broadly amend the Act, and the three-fourths vote requirement poses an additional challenge.

On the other hand, there are a few areas of concern that may be considered in terms of a legislative solution:

1. Anecdotal discussions would suggest that the public is not generally aware that the Act would authorize children to be patients, and thus cultivate and use marihuana lawfully. While minors are not immune from certain chronic pain that might be relieved by the consumption of marihuana, it may be appropriate for the Legislature to conduct hearings in order to weigh this potential benefit against the potential harm that may befall children and society by permitting marihuana usage as permitted in the Act.
2. Likewise, there appears to be no public awareness that law enforcement and citizens will be endangered, and that the terms of the Act would effectively tie at least one hand of law enforcement behind its back in attempting to investigate and prosecute Michigan law relating to the cultivation, distribution, and use of marihuana – both in terms of effectively enforcing the terms of the Act and enforcing the general laws of the state under which all of such activity is unlawful. Thus, it may be appropriate for the Legislature to consider requiring the licensure and regulation of sites used by caregivers for cultivation and distribution of

²⁴ Art 2, § 9.

marihuana. (the provisions of the licensure and regulation ordinance attached as Appendix 1 to this report may provide ideas for consideration).

3. It could not have been imagined by those drafting the Act that plumbing, electrical, and fire inspections might be by-passed, thus endangering the health and safety of many. Therefore, expressly requiring permits and inspections would be appropriate.
4. The public is becoming aware – by billboard and other advertising – that the process of certifying patients is questionable at best. Providing clarity in the following would lend more credibility to the use of medical marihuana: a realistic definition and clear limitation of the debilitating diseases that would serve as the bases for certification; a physician-stated duration of ID Card effectiveness; and, a physician-stated dosage and frequency of marihuana consumption for each patient.

In these particular areas of public interest, if the Legislature and citizens are educated to a sufficient degree on the shortcomings now present in the Act, it may be feasible to secure at least a partial solution by way of legislation. The author has been advised that informal and/or preliminary discussions are taking place in the legislative arena. Representatives of both the Municipal League and Townships Association are involved, as are representatives of various medical marijuana proponent groups, local law enforcement and prosecutors. Although it is too soon to know if these discussions will form a basis for drafting what would be a consensus-driven improvement over the current Act, discussions of this sort have led to legislative revisions on controversial subjects in the past, e.g., casino gambling. Perhaps the uncertainty on whether the Act would be upheld in the face of a Supremacy Clause challenge would provide the motivation for all parties to enter a consent judgment providing for a consensus for a legislative revision of the Act, including a resolution of the legitimate concerns of law enforcement.

As a final note on the concept of amendatory legislation, the *Redden* concurrence makes reference to the prospect of amending the Michigan Public Health Code to make marihuana a Schedule 2 or Schedule 3 substance, which would then enable marihuana to be prescribed “if, in the prescriber’s professional opinion, this drug would effectively treat the pain, nausea, and other symptoms associated with certain debilitating medical conditions.”²⁵ Establishing a system based on this concept, or other arrangement such as state licensure for distribution, would presumably require hearings to determine whether marihuana has “high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision,” and thus must remain classified as a Schedule 1 substance.²⁶ If it is found

²⁵ Slip opinion, p 6. Reference here is made to MCL 333.7303a, which provides that, “A prescriber who holds a controlled substances license may administer or dispense a controlled substance listed in schedules 2 to 5 without a separate controlled substances license for those activities.” This may be a complicated matter, particularly if a change in federal law schedules is also required.

²⁶ MCL 333.7211.

that good science justifies it, a revision of the Act could be made to allow and require the distribution of medical marihuana to occur on prescription or licensure basis.

V. CONSIDERATION OF FEDERAL DECLARATORY JUDGMENT ACTION

One or more local governments may wish to consider the institution of a federal declaratory judgment action to determine the validity of the Act under the Supremacy Clause of the United States Constitution. It is the opinion of the author that the decision to do so might be motivated by the following:

- ◆ The concern about the Act's authorization for marihuana usage by minors, and the associated implications relating to performance in school, employment, and social contexts.²⁷
- ◆ The conclusion that law and code enforcement issues²⁸ emanating from the provisions and omissions in the Act create significant health, safety, and quality of life problems not fully curable by local regulation.
- ◆ The concern that private individuals who are unaware of the risks associated with the Supremacy Clause issue may rely on the Act in making choices and investments to use marihuana and establish caregiver facilities and equipment, and that such choices could lead to prosecutions or render investments useless.²⁹
- ◆ The risk that exists, albeit slight at present, that state and local government and officials are susceptible to prosecution or other liability under federal law for affirmatively authorizing the cultivation, distribution, and use of marihuana permitted under the Act.³⁰

²⁷ The indication that long-term use of marihuana leads to addiction is supported by many on-line sources, and *Gonzales v. Raich*, 545 U.S. 1, 14 (2005), referring to the federal classification of marihuana as a Schedule 1 Controlled Substance, noted the decision of Congress to include marihuana as a Schedule I drug was based, in part, on its high potential for abuse, and the absence of any accepted safety for use in medically supervised treatment. To the same effect, see also, MCL 333.7211, 333.7212(1)(c).

²⁸ See part III of this report, above.

²⁹ The *Redden* concurrence indicates that both the prosecutor and defense counsel in that case expressed that the Act does not provide the guidance necessary to adequately inform clients, including prospective defendants as well as municipalities, police, and others. Slip opinion, p 4.

³⁰ The risk involved here can be illustrated by a hypothetical: assume the federal government significantly changes its current policy (see footnote 40, below) and prosecutes a caregiver who has complied with the Michigan Act. At the time of arrest, the defendant asserts to the arresting federal officers that he has established his cultivation and distribution operation in reliance on the affirmative approval granted by the local community. Again acting based on its newly changed policy, the federal government then joins the local community and officials in the prosecution, alleging that they aided and abetted the defendant in violating federal law. See 18 U.S.C.A. § 2(a) which provides that (a) [w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. The U.S. Code provisions on Drug Abuse Prevention and Control, 21 U.S.C.A. § 846, provide that, [a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy. Although not related to public officials, § 846 was unsuccessfully challenged in an indictment that charged a person with conspiracy, possession with intent to distribute and aiding and abetting unlawful distribution of cocaine (which, like marihuana, is a Schedule 1 controlled

Should a community determine to pursue a Supremacy Clause action, the following material would be relevant.

“Under the Commerce Clause of the United States Constitution, Congress may ban the use of cannabis even where states approve its use for medical purposes.”³¹ Indeed, Congress has included marihuana on its schedule of unlawful controlled substances.³²

In the Act,³³ it is acknowledged that federal law prohibits any use of marihuana except under very limited circumstances. However, the Act then states, without citation of authority, that states are not required to enforce federal law. It does appear that the federal government may not compel the states to implement, by legislation or executive action, federal regulatory programs.³⁴ And, it will be assumed for purposes of this report that a State official or local government is not required to enforce the federal prohibition on the cultivation, distribution, and use of marihuana.

However, the juxtaposition of the Act and the federal prohibition on the activities permitted in the Act raises the question whether a State may affirmatively authorize specified acts, such as the cultivation, distribution, and use of marihuana, when the same acts are expressly prohibited under federal law. This question directly presents an issue under the Supremacy Clause of the United States Constitution.

The Supremacy Clause³⁵ provides as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The history of this clause is interesting and insightful, as recounted by the Supreme Court:

substance). *U.S. v. Kremetis*, 903 F.Supp. 250 (New Hampshire, 1995). An official may attempt to seek shelter under 21 USC 885(d), which provides immunity to officials who are “lawfully engaged” in the enforcement of any law or municipal ordinance relating to controlled substances. However, a federal court in California, in *United States v. Rosenthal*, 266 F Supp 2d 1068, 1078 (2003), affirmed, 454 F 3rd 943 (9th Cir, 2006), held that, for an official to be “lawfully engaged” in the enforcement of a law relating to controlled substances, and therefore entitled to immunity, the law which the municipal official is “enforcing” must itself be consistent with federal law.

³¹ *Gonzales v Raich*, at 14.

³² 21 U.S.C. § 812(c).

³³ MCL 333.26422(c).

³⁴ *Printz v United States*, 521 U.S. 898, 926 (1997).

³⁵ Article VI, Clause 2.

Enforcement of federal laws by state courts did not go unchallenged. Violent public controversies existed throughout the first part of the Nineteenth Century until the 1860's concerning the extent of the constitutional supremacy of the Federal Government. During that period there were instances in which this Court and state courts broadly questioned the power and duty of state courts to exercise their jurisdiction to enforce United States civil and penal statutes or the power of the Federal Government to require them to do so. But after the fundamental issues over the extent of federal supremacy had been resolved by war, this Court took occasion in 1876 to review the phase of the controversy concerning the relationship of state courts to the Federal Government. *Clafin v. Houseman*, 93 U.S. 130, 23 L.Ed. 833. The opinion of a unanimous court in that case was strongly buttressed by historic references and persuasive reasoning. It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any-thing in the Constitution or Laws of any State to the contrary notwithstanding.'³⁶

In terms of the breadth and application of the Supremacy Clause, the Supreme Court has more recently had occasion to observe that:

Article VI, cl. 2, of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Consistent with that command, we have long recognized that **state laws that conflict with federal law are "without effect."** *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981).

Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963)). . . . Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an **actual conflict between state and federal law.** *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S.Ct. 1483, 131 L.Ed.2d 385 (1995).³⁷ (Emphasis supplied)

As it may relate to the conflict between state and federal law in terms of drug enforcement, the Supreme Court has also clarified that, "[t]he purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would

³⁶ *Testa v. Katt*, 330 U.S. 386, 390-391, 67 S.Ct. 810, 172 A.L.R. 225, 91 L.Ed. 967 (1947).

³⁷ *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 543, 172 L.Ed.2d 398 (2008).

follow if the Government's general authority were subject to local controls.”³⁸ As it relates to marihuana, the Court has held that:

[L]imiting the activity to marijuana possession and cultivation “in accordance with state law” cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is “ ‘superior to that of the States to provide for the welfare or necessities of their inhabitants,’ ” however legitimate or dire those necessities may be.³⁹

In the present matter, we have a Michigan initiated statute that permits the cultivation, distribution, and use of marihuana as an exception to the generally applicable criminal prohibition under state law. More importantly for the present consideration, the permission of such activities in the Act has every appearance of being an actual and direct conflict with federal law, which specifies that such activities are all unlawful, without the counterpart exception provided by Michigan in the Act.

On its face, this conflict would appear to be irreconcilable. Yet, the United States Justice Department has not initiated or even threatened litigation against Michigan or any of the other thirteen states that have created this conflict by the enactment of medical marihuana laws. Moreover, this position has been in place for a considerable period, and the Justice Department has indicated that it presently does not intend to prosecute medical marihuana activities that occur in accordance with state law.⁴⁰ Although the federal-state conflict created by these laws has every appearance of being direct, thus giving rise to Supremacy Clause preemption of state laws, it is worth questioning whether the Justice Department's position and inaction might undermine a Supremacy Clause preemption claim. The answer to this question may raise the issue whether the Executive Branch of the federal government, by its inaction, may influence the meaning and interpretation of a federal statute enacted by the Legislative Branch.⁴¹

³⁸ *U.S. v. Allegheny County, Pa.*, 322 U.S. 174, 183, 64 S.Ct. 908, 88 L.Ed. 1209 (1944).

³⁹ *Raich*, 545 U.S. at 29. See also the cases cited in the *Redden* concurrence, p 2.

⁴⁰ By letter dated October 19, 2009, the Deputy Attorney General provided a Memorandum to United States Attorneys in those states in which laws authorizing medical marihuana have been enacted. In this carefully worded memo, the Justice Department affirms its commitment to efficiently enforce the federal controlled substances Act in all states, and also confirms that marijuana (sic) is a dangerous drug and that its illegal distribution and sale is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. However, the memo also directs that, as a general matter, “pursuit of . . . priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing states laws providing for the medical use of marijuana.”

⁴¹ This issue would appear to have similar qualities as the state law issue of whether a municipality may be estopped in the enforcement of lawful enacted ordinances due to the actions and inactions of local officials. See, generally, *Fass v. City of Highland Park*, 326 Mich. 19, 39 N.W.2d 336 (1949), *Township of Pittsfield v. Malcolm*, 375 Mich. 135, 134 N.W.2d 166 (1965). The general rule of nonestoppel of enforcement of a duly enacted law may be stronger in the present context considering that the law that might be estopped prohibits acts constituting felony offenses.

The Supremacy Clause issue was addressed earlier this year in the State of Oregon in a case in which an employer sought review of an administrative decision concluding that such employer had engaged in disability discrimination when it discharged an employee based on medical marijuana use. The employer contested the validity of the state act. In *Emerald Steel Fabricators, Inc v Bureau of Labor and Industries*,⁴² the Supreme Court of Oregon faced the Supremacy Clause issue head-on in connection with that state's medical marijuana exception. The Court's analysis, which has relevance to the Michigan situation, started with a review of the federal Controlled Substances Act, reciting that,

The central objectives of that act "were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." . . . To accomplish those objectives, Congress created a comprehensive, closed regulatory regime that criminalizes the unauthorized manufacture, distribution, dispensation, and possession of controlled substances classified in five schedules.

* * *

Schedule I controlled substances lack any accepted medical use, federal law prohibits *all* use of those drugs "with the sole exception being use of [Schedule I] drug[s] as part of a Food and Drug Administration preapproved research project." . . . Congress has classified marijuana as a Schedule I drug, 21 U.S.C. § 812(c), and federal law prohibits its manufacture, distribution, and possession, 21 U.S.C. § 841(a)(1).⁴³

This analysis led the Oregon Supreme Court to the conclusion that, "[t]o the extent that [the state statute] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it 'without effect.'"⁴⁴

A dissent was filed in *Emerald Steel* asserting that "[n]either the Oregon Medical Marijuana Act nor any provision thereof permits or requires the violation of the Controlled Substances Act or affects or precludes its enforcement. Therefore, neither the Oregon act nor any provision thereof stands as an obstacle to the federal act."⁴⁵

⁴² 348 Or. 159, 230 P.3d 518 (2010).

⁴³ *Id* at 173-174.

⁴⁴ *Id* at 178.

⁴⁵ *Id* at 190-191. For a more detailed California state court discussion that is consistent with the dissent's position in *Emerald Steel*, see, *County of San Diego v San Diego NORML*, 165 Cal App 4th 798 (2008).

The legal analysis presented here is certainly not complete, and further investigation of this issue will be required. In all events, seeking an ultimate answer to the underlying question whether a state may affirmatively authorize the cultivation, distribution, and use of marihuana when the same acts are expressly prohibited under federal law may cause one or more communities to seek a judicial clarification. There is a likelihood that litigation filed by proponents of medical marihuana use will ensue soon after the enactment of local ordinances.⁴⁶ Until the Supremacy Clause issue is resolved, those who are cultivating, distributing, and using marihuana in compliance with the Act cannot consider themselves immune from federal prosecution and forfeiture. On the other side of the regulatory issue, until the Supremacy Clause issue is resolved, state and local governments in Michigan, and their respective officials, cannot consider themselves immune from federal prosecution to the extent they affirmatively authorize the cultivation, distribution, or use of marihuana.⁴⁷ Even though it is unlikely that the United States Attorney General now in office would pursue actions of local officials taken in compliance with state law (the Act), the presence of a Supremacy Clause issue will continue to have a haunting existence until it is resolved.

⁴⁶ This likelihood has been demonstrated by July 29, 2010 letters sent by the ACLU to the cities of Bloomfield Hills and Birmingham alleging that their local ordinances violate the Act. In both cities, ordinances implicitly respect the federal law prohibition on the cultivation, distribution and use of marihuana, and prohibit activities contrary to federal, state or local law.

⁴⁷ See footnote 30, above.

VI. LOCAL ORDINANCE STRATEGY

A. Introduction

Again for purposes of this section of the report, the dichotomy created by the Act must be recognized. On the one hand, the approval of the Act is the manifestation of a fundamental intent on the part of many in the state that assistance should be provided to those truly suffering, and for this purpose a defined medical use exception should be made to the general policy that activities involving marihuana must be treated as criminal acts. On the other hand, this exception from the general policy of illegality creates a parallel system in which the same conduct is at once deemed lawful and unlawful depending on whether the engaged persons have ID Cards.

It would appear that many communities perceive the need to respond to the Act in some manner.⁴⁸ Some communities have recognized the prohibition under federal law and have adopted the view that the Act's authorization for the cultivation, distribution and use of medical marihuana is insufficient to countermand federal law. Other communities have seen fit to regulate the activities permitted in the Act by way of an exercise of the zoning authority provided in the Zoning Enabling Act,⁴⁹ or by way of a regulatory enactment.⁵⁰

The discussion in this section of the report will focus on the types of ordinances most frequently enacted to date, and for each type identify the legal basis for regulating, followed by an examination of basic ordinance concepts. In addition, a new concept of a licensing and regulation ordinance will be presented. Because a large number of communities have enacted or are considering the establishment of a "moratorium" on the establishment of medical marihuana uses, this subject will also be examined. Finally, a suggestion will be made for consideration of local government initiation of a state declaratory judgment action relative to the validity of enacted ordinances.

An important introductory point on the subject of establishing ordinances is the need on the part of community officials to bear in mind the potential consequences of ordinance authorizations in light of alternative future scenarios with regard to the Act. This admonishment covers significant ground, and requires consideration that the Act may remain intact, it may be amended, or it may be found to be invalid under the Supremacy Clause of the United States Constitution. Thought should be given to minimizing the creation of any adverse outcome based upon steps taken to respond to the Act. Thus, communities should not only take into account those in pain who were understood to be the real beneficiaries of the Act, but should also attempt to protect the

⁴⁸ This report has discussed the need for regulation, and it is worth noting that the Detroit Free Press (L.L. Brasier, Staff Writer) reported on September 26, 2010, that Oakland California, where distribution is licensed by both state and local authorities, has had success in regulating.

⁴⁹ MCL 125.3101, et seq. This act provides enabling authority for cities, villages, townships, and counties.

⁵⁰ A large number of communities have adopted moratoria in order to provide the time and opportunity to study the most appropriate response to the issues generated by the Act.

present and future interests of children, consider property owners who will be neighbors to persons granted medical marihuana authorizations, and endeavor to avoid, to the extent feasible, the creation of private vested land use rights that could later be undermined.

B. Recognition of Federal Law

1. Legal Basis

For communities opting to recognize the prohibition under federal law, and not accept the Act's authorization as a countermand of federal law, the legal issue is straightforward. Whether a state has the *obligation* to enforce federal law is not the issue. Rather, the question is whether a local government may recognize the applicable mandate of federal law, even in the face of contrary state law.

In discussions on this subject, some have indicated that public officials taking the oath of office commit to federal law enforcement. This proposition would require interpretation of a constitutional oath to extend not only to the United States Constitution itself, but also to statutes enacted by the Congress. The oath of office for legislative, executive, and judicial officers specified in the Michigan Constitution requires support for the United States and Michigan Constitutions, but does not expressly specify support for federal laws.⁵¹ Consistent with this constitutional model, the oath specified by the Michigan Townships Association, the Secretary of State for notary publics, and that specified for school board purposes, requires support of the United States Constitution, but not of federal law.⁵² Thus, to be successful, the argument on this point would require the conclusion that the requirement to support the Constitution includes the recognition of the Supremacy Clause which, in turn, prohibits enactments in direct conflict with federal law.

⁵¹ Art XI, § 1 of the Michigan Constitution provides: "Sec. 1. All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust."

⁵² The MTA material suggests: "I do solemnly swear (*or affirm*) that I will support the Constitution of the United States, and the Constitution of this State, and that I will faithfully perform the duties of the office of _____ in and for the Township of _____, County of _____ and the State of Michigan, according to the best of my ability, so help me God." See: http://www.michigantownships.org/downloads/oath_of_office_revised_nov_2008.doc. The Secretary of State prescribes the following: "Do you solemnly swear that you will support the Constitution of the United States and the Constitution of this State, and that you will discharge the duties of the office of Notary Public in and for said County to the best of your ability?" See: http://www.michigan.gov/sos/0,1607,7-127-1638_8736-85768--,00.html. For school board purposes, it appears that the oath prescribed for notary purposes is utilized: "I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of this State, and that I will faithfully discharge the duties of the office of Member of the Board of Education of _____ according to the best of my ability." See: http://www.michigan.gov/documents/sos/Accept_of_Off_New_299490_7.pdf.

The questions concerning the extent of a state's authority to enforce federal law (even in the absence of federal enforcement of the same law within the state), and whether the federal law must be deemed to be preemptive in order to give rise to such state authority, are beyond the scope of this report. However, for some communities these issues may become important. Certainly a legitimate argument for refusing to *affirmatively grant rights* to parties who are in violation of federal law (which would include all individuals who cultivate, distribute, and use marihuana) would be that, although unlikely, such action might subject the community and the officials involved to prosecution under federal law for participating in a criminal enterprise.⁵³

However, a challenge likely to be asserted against this regulatory approach would be that it is "exclusionary." The customary "exclusion" case arises under MCL 125.3207 with regard to an exercise of the zoning authority. This section of the ZEA provides:

A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located or the use is unlawful.

At least some of the communities that have recognized federal law as the basis for withholding affirmative approvals permitting medical marihuana use have done so under general regulatory authority, rather than using the zoning power. There is no apparent counterpart to MCL 125.3207 applicable to general regulatory ordinances.

In all events, however, one fact is clear: under state law, the Act is on the books as a viable state authorization. Its validity has not been challenged at this point, and the Justice Department has apparently not threatened or initiated a claim against the Department to cease issuance of, or revoke ID Cards. Nor is there any expectation for the Justice Department to alter this course.⁵⁴ Particularly considering that the Act is an initiated law passed by the people, it would not be out of the question for a state court judge to hold that, based on an outstanding law on the State books, patients and caregivers are entitled to proceed as permitted under the Act subject to the right of the federal government to initiate injunction actions or prosecutions, and subject to the successful pursuit of a Supremacy Clause action.

2. Ordinance Provisions

Ordinances of this type simply make reference to federal law, and either prohibit uses that are contrary to federal law, or make it unlawful to engage in an activity that is contrary to federal law.

⁵³ See footnote 30, above.

⁵⁴ See footnote 40, above.

As noted above, aside from being simple, and easily understood by the public, the positive aspect of this type of ordinance is that it avoids the prospect that the community or its officials who are engaged in implementing the ordinance will be charged or implicated by the federal government for violating the federal statutes that prohibit the activities permitted under the Act. On the other hand, litigation is very likely to follow the enactment of an ordinance of this character.

C. Zoning and Regulatory Enactments

1. Legal Basis

The Michigan Zoning Enabling Act⁵⁵ is a powerful and well recognized basis of local authority.⁵⁶ Communities may use this authority to classify uses, and allocate them to particular use districts, provided that such classification and allocation rationally advance a legitimate government interest.⁵⁷

Likewise, the authority to regulate for the purpose of generally protecting the public health, safety, and general welfare, founded upon statute in townships⁵⁸ and upon home rule authority in cities and villages,⁵⁹ is well understood and supported by the courts.

Communities regulating on the basis of such zoning and regulatory authority will undoubtedly be challenged to present the legitimate governmental interests being advanced by restricting what challengers will assert to be patient and caregiver rights authorized in the Act.

a. The Preemption Issue

The first argument presented by challengers will be that the Act grants the Department exclusive jurisdiction, and that local regulation restricting activities of patients and caregivers is preempted by the Act. If the claim is that the Department has exclusive jurisdiction, the challengers would have to show “a clear expression of the

⁵⁵ MCL 125.3101, et seq. This act provides enabling authority for cities, villages, townships, and counties.

⁵⁶ See, *Kyser v Kasson Township*, 486 Mich 514, 2010 WL 3566907, Mich., July 14, 2010 (NO. 136680). The Majority Opinion declares as follows:

“To assess the myriad factors that are relevant to land-use planning in hundreds of communities across the state requires a decision-making process for which the judicial branch is the least well-equipped among the branches of government. Such decision-making entails the solicitation of a broad range of disparate views and interests within a community, premised upon widely different visions of that community’s future and widely varying attitudes toward ‘quality of life’ considerations, and then balancing of these views and interests in ways that are not easily susceptible to judicial standards.” Slip Opinion, p 22.

⁵⁷ *Kirk v Tyrone Township*, 398 Mich. 429, 247 N.W.2d 848 (1976).

⁵⁸ MCL 41.181 (general law townships) and MCL 42.15 and 42.17 (charter townships); See *Square Lake Hills Condominium Ass’n v Bloomfield Twp*, 437 Mich 310; 471 NW2d 321 (1991).

⁵⁹ See, e.g., MCL 117.3(j), MCL 117.4.j.(3).

Legislature's intent to vest the department with complete jurisdiction" over the subject matter.⁶⁰ If the claim is that the Act preempts local regulation, a four-factor test applies, as discussed in *Rental Property Owner's Association of Kent County v City of Grand Rapids*.⁶¹ The *Rental Property Owner's Association* case made it clear, however, that:

The mere fact that the state, in the exercise of the police power, has made certain regulations does not prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal ordinance are not in themselves pernicious, as being unreasonable or discriminatory, both will stand. *The fact that an ordinance enlarges upon the provisions of a statute by requiring more than the statute requires creates no conflict therewith unless the statute limits the requirement for all cases to its own prescription.* Thus, where both an ordinance and a statute are prohibitory, and the only difference between them is that the ordinance goes further in its prohibition but not counter to the prohibition under the statute, and the municipality does not attempt to authorize by the ordinance what the legislature has forbidden or forbid what the legislature has expressly licensed, authorized, or required, there is nothing contradictory between the provisions of the statute and the ordinance because of which they cannot coexist and be effective. Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not deemed inconsistent because of mere lack of uniformity in detail.⁶²

Of course, as local regulations are enacted, enforced, and challenged, the statute will require interpretation, and no outcome can be assured. Yet, there is certainly no clear indication in the Act that a more restrictive ordinance that does not conflict with the Act should not be permitted and could not coexist.

b. The Right to Farm Act Issue

An additional argument reported to have been raised already in various public meetings held to date is that the Michigan Right to Farm Act⁶³ precludes local regulation of medical marihuana cultivation. This challenge will be resolved based on an interpretation of that act. "Whether a state statute preempts a local ordinance is a question of statutory interpretation—a question of law that this Court reviews de novo."⁶⁴

Because interpretation of a statute turns primarily on intent, it is appropriate to examine the Act on this point. Two particular aspects of the Act are

⁶⁰ *Burt Township v Department of Natural Resources*, 459 Mich. 659, 663, 593 N.W.2d 534 (1999).

⁶¹ 455 Mich. 246, 257, 566 N.W.2d 514 (1997).

⁶² *Id.*, at 262. (Emphasis in text of case).

⁶³ MCL 286.471, *et seq.*

⁶⁴ *Charter Township of Shelby v. Papesh*, 267 Mich.App. 92, 704 N.W.2d 92 (2005).

important in this regard: The basic regulatory structure of the Act which places administration into the hands of the Department of Community Health; and the specific mandate that marihuana plants are to be maintained in an “enclosed, locked facility,” which means “a closet, room, or other enclosed area.” Both of these provisions would appear to suggest the very basic intent to place this subject on a regulatory path distinct from the Right to Farm Act.

A defined term in the Right to Farm Act would also appear to be relevant: The very basic definition of “farm” in MCL 286.472(a):

“Farm” means the land, plants, animals, buildings, structures, including ponds used for agricultural or aquacultural activities, machinery, equipment, and other appurtenances used in the **commercial production** of farm products. (Emphasis supplied).

It will certainly be argued that this is a very broad definition that clearly encompasses the cultivation of marihuana plants by caregivers for distribution to patients. In spite of its apparent breadth, there are important issues that are presented. First, the “enclosed, locked facility,” (which means a “closet, room, or other enclosed area”) where marihuana plants are to be kept, will in most cases be situated in an existing structure that was built for a principal use for other purposes, e.g., a single family dwelling. This would be relevant in ascertaining whether the intent of the Act would be to prohibit the application of ordinance codes within the structure.

In addition, it is clear that patients are not engaged in “commercial production,” and thus their cultivation activities would not involve a “farm.” A caregiver is authorized under the statute to receive “compensation for costs associated with assisting” a patient. It has been held that, for purposes of the Right to Farm Act, “‘commercial production’ is the act of producing or manufacturing an item intended to be marketed and sold at a profit” and “there is no minimum level of sales that must be reached before the RTFA is applicable.”⁶⁵ An interpretation that caregiver activity amounts to a commercial farm operation would certainly cast a glaringly different light on the meaning and intent of the Act, which reveals no purpose of creating a new Michigan agri-business for a crop that is subject to felony punishment outside the narrow scope of the Act.⁶⁶ Indeed, such an interpretation would contradict the concept of a private and confidential relationship between patient and caregiver, and suggest a relationship with the character of a mere commercial transaction. This, in turn, would raise a significant question of any public interest served in shielding the identity and address of a caregiver. The express language of the Act does not suggest that marihuana plants are to be grown in a “farm operation,” but mandates that they are to be kept exclusively in an “enclosed, locked facility.” Undoubtedly, the courts will be requested to weigh-in on this issue.

⁶⁵ *Id.*, at p 101; and fn 4.

⁶⁶ See footnote 11, above.

The Right to Farm Act also appears to be cognizant of the need to comply with federal law. Although not directly addressing the issue concerning whether marihuana cultivation should be considered to be within its purview, the statute provides that:

(7) A local unit of government may submit to the director a proposed ordinance prescribing standards different from those contained in generally accepted agricultural and management practices if adverse effects on the environment or public health will exist within the local unit of government. A proposed ordinance under this subsection shall not conflict with existing state laws or **federal laws**. . . An ordinance enacted under this subsection shall not be enforced by a local unit of government until approved by the commission of agriculture. (Emphasis supplied).

If an ordinance “shall not conflict with . . . federal law,” presumably the Department of Agriculture must consider that if it creates an “accepted agricultural and management practice for cultivating marihuana, it would be implicitly promoting an activity that is a criminal violation under federal law.

The need for judicial interpretation is also found in the current position expressed by the Michigan Department of Agriculture. In an informal telephone inquiry on August 30, 2010, a Department representative in the Right to Farm office indicated that no formal position on this issue had been taken, and the Department intends to await the decision of the courts. While providing little in the way of comfort for either side of the issue, this position does not suggest an immediate interest in, or advocacy for regulation.

c. Would an Ordinance Conflict with the Act

This leads to the question of the extent of local regulation that may be permitted without reaching the point at which it must be concluded that the Act and the ordinance “conflict” in their regulatory effect. For this question, a reference is respectfully suggested to the analysis applied to local ordinance regulation of adult entertainment uses protected by the First Amendment. The relevance of this reference may be demonstrated by making a comparison between the magnitude or legal importance associated with free speech rights in the adult entertainment arena and the individual rights protected by the Act, and then examining this result in light of the remarkably similar “secondary effects” that occur when there are concentrations of adult entertainment establishments and medical marihuana distribution facilities.

There is little need for citation of authority for the proposition that First Amendment free speech rights are among the most closely guarded in the United States. The United States Supreme Court has found that adult entertainment activities such as adult movie theaters and topless dancing facilities fall within this First Amendment protection. On the other hand, the activities protected under the Act, the rights to cultivate, distribute, and use marihuana, have long been classified as criminal acts, only permitted under the Act within a narrow framework. In addition, such activities remain criminal acts under federal law regardless of whether they fall within the protective scope

of the Act. On balance, then, there would appear to be no question that the First Amendment protected free speech rights associated with adult entertainment uses must be deemed of greater magnitude and legal importance than the rights protected under the Act, which were created by a statutory exception to the generally applicable criminal law.

Given this prioritization of rights, it should be fair to conclude that, if adult entertainment activities are subject to regulation on the basis of protecting certain interests of the public, then the rights which are protected by the Act should easily be deemed to be subject to regulation in order to protect the same type of public interests. Thus, this analysis would represent a fair gauge of whether the regulation of rights to cultivate, distribute, and use marihuana should be deemed to be in “conflict” with the terms of the Act. That is, if the regulation of free speech rights associated with adult entertainment does not conflict with the First Amendment, then similar regulation of the cultivation, distribution, and use of marihuana should not be considered a conflict with the rights established under the Act.

Turning to local ordinances that have been permitted to apply to adult entertainment activities, two approaches to regulation have been permitted – even in the face of a challenge that regulation has the effect of limiting free speech and expression protected by the First Amendment. These approaches are represented in *Young v American Mini Theatres, Inc*⁶⁷ and *City of Renton v Playtime Theatres, Inc*,⁶⁸ and are premised on the point that the “predominate concerns” addressed in the ordinances were with the *secondary effects* of adult theaters, and not with content of speech and expression. In other words, the regulations must be justified without reference to the content of the regulated speech. In *Renton*, the Court referred to the Court’s earlier opinion in *American Mini Theatres*:

Justice Stevens, writing for the plurality, concluded that the city of Detroit was entitled to draw a distinction between adult theaters and other kinds of theaters “without violating the government’s paramount obligation of neutrality in its regulation of protected communication,” 427 U.S., at 70, 96 S.Ct., at 2452, noting that “[i]t is th[e] secondary effect which these zoning ordinances attempt to avoid, not the dissemination of ‘offensive’ speech,” *id.*, at 71, n. 34, 96 S.Ct., at 2453, n. 34.⁶⁹

Referring again to *American Mini Theatres*, the *Renton* Court noted:

As a majority of this Court recognized in *American Mini Theatres*, a city’s “interest in attempting to preserve the quality of urban life is one that must be accorded high respect.” 427 U.S., at 71, 96 S.Ct., at 2453 (plurality opinion); see *id.*, at 80, 96 S.Ct., at 2457 (Powell, J., concurring) (“Nor is there doubt that the interests furthered by this ordinance are both

⁶⁷ 427 U.S. 50 (1976).

⁶⁸ 475 U.S. 41 (1986).

⁶⁹ *Id.* at 49.

important and substantial”). Exactly the same vital governmental interests are at stake here.

In terms of the “secondary effects” that were the focus of the valid regulations applicable to adult entertainment, it was determined by the cities that “a concentration of ‘adult’ movie theaters causes the area to deteriorate and become a focus of crime, effects which are not attributable to theaters showing other types of films.”⁷⁰ In its recognition that these were legitimate and important objectives to address by ordinance, the Court further pointed out in *Renton* that a community may rely on the experiences of other communities in enacting their ordinances, and that, “[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.”⁷¹

More recently, the Court has confirmed that,

... we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, see *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-51, 106 S.Ct. 925, 930-931, 89 L.Ed.2d 29 (1986); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584-585, 111 S.Ct. 2456, 2469-2470, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in judgment), or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and “simple common sense,” *Burson v. Freeman*, 504 U.S. 191, 211, 112 S.Ct. 1846, 1858, 119 L.Ed.2d 5 (1992).⁷²

The two approaches in *American Mini Theatres* and *Renton*, and the deference of the Court to the efforts of the communities, are embraced in the following statement contained in the *Renton* opinion:

Cities may regulate adult theaters by **dispersing them**, as in Detroit, or by effectively **concentrating them**, as in Renton. “It is not our function to appraise the wisdom of [the city’s] decision to require adult theaters to be separated rather than concentrated in the same areas.... [T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.”⁷³ (Emphasis supplied).

In summary, the Court has held that:

⁷⁰ *American Mini Theatres*, p 71. (Emphasis supplied).

⁷¹ *Renton*, pp 51-52.

⁷² *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995).

⁷³ *Renton*, at p 52,

- ◆ It is permissible to regulate First Amendment protected adult entertainment activity in order to preserve the quality of urban life, including attempts to address the important and substantial secondary effects in the form of crime and urban deterioration;
- ◆ Evidence of the anticipated secondary effects may be drawn from the experiences of other communities rather than conducting new studies; and,
- ◆ Because of the significance of the secondary effects, the Court has shown deference to methods devised by communities to preserve their quality of life. Two approved methods of curbing the secondary effects are by concentrating the regulated activities or by dispersing them. These two methods would not appear to represent the entire list of alternatives, allowing communities to fashion methods reasonably related to combating the particular secondary effects.

Returning to a focus on the cultivation, distribution, and use of marihuana permitted under the Act, there is evidence from the experience in California that there are important and substantial secondary effects that result from a concentration of medical marihuana cultivation and distribution activities. As noted above, these secondary effects include significant increases in criminal activity and a general undermining of an area, secondary effects which have a strikingly close resemblance to those at stake in *American Mini Theatres* and *Renton*. Moreover, there are additional secondary effects that result from applying the Act in the absence of local regulation, specifically including adverse influence of children; danger to law enforcement and other members of the public; discouragement and impairment of effective law enforcement with regard to unlawful activity involving the cultivation, distribution, and use of marihuana; the creation of a purportedly lawful commercial enterprise involving the cultivation, distribution, and use of marihuana that is not reasonably susceptible of being distinguished from serious criminal enterprise; and the uninspected installation of unlawful plumbing and electrical facilities that create dangerous health, safety, and fire conditions.

Applying the model approved for the regulation of highly protected First Amendment protected rights, a community should be permitted to enact regulations in order to address the secondary effects caused by a concentration of medical marihuana cultivation and distribution activities, provided that the regulation is primarily intended to focus upon addressing the secondary effects and not on undermining the fundamental intent of the Act: the creation of a *private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes*. And, just as this type of regulation is not deemed to be in conflict with the First Amendment, regulation of medical marihuana in a manner reasonably aimed at restricting the occurrence of materially adverse secondary effects while allowing the fundamental intent of the Act to be carried out should not be deemed to be in conflict with the authorization contained in the Act.

In order to preserve quality of community life, including attempts to address important and substantial secondary effects such as serious crime and associated activity, and drawing from the experiences in California, communities have a well-substantiated position that they should be permitted to regulate marihuana cultivation, distribution, and use activities.

2. Types of Zoning and Regulatory Ordinances

Any enactment needs to be tailored to a community's particular policies and needs. As noted above, following the model of adult entertainment regulation, local regulations seeking to address the serious secondary effects facilitated by the Act may take various forms. As the Supreme Court noted in *Renton*,

Cities may regulate adult theaters by **dispersing** them, as in Detroit, or by effectively **concentrating** them, as in Renton. "It is not our function to appraise the wisdom of [the city's] decision to require adult theaters to be separated rather than concentrated in the same areas.... [T]he city must be **allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.**"⁷⁴ (Emphasis supplied)

Zoning and regulatory ordinances that authorize medical marihuana activities under specified circumstances come in a variety of forms, including (by way of example): authorizing medical marihuana activities in specified nonresidential districts; authorizing caregiver activities as a home occupation in residential districts with detailed regulations; requiring a caregiver to obtain use approval for a home occupation in the form of a special land use permit; authorizing medical marihuana dispensaries by zoning use permit, with minimum distance requirements from other dispensaries and from churches, schools, and from residential districts; requiring a permit to engage in the business of performing medical marihuana assessments and certifications; requiring a caregiver premises to be used by a single caregiver, establishing minimum distance requirements between a caregiver and a drug free school zone, and prohibiting marihuana consumption in the location where it is cultivated.

Clearly, ordinances that have been enacted to date, and ordinances likely to be enacted in the foreseeable future, are diverse in policy and objective. The two options expressly noted in *Renton* – disbursement and concentration – have been employed most frequently. A strength of these approaches is that they do not entirely exclude medical marihuana use. They do not generally restrict patient cultivation or use, with the exception of minor requirements such as indoor use, and the like. Subject to obtaining permits, most ordinances allow caregiver activity in some location(s) of the community.

a. Disbursement Ordinances

⁷⁴ *Renton*, at p 52,

Because the fundamental intent of the Act is to create a *private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes*, and considering that a concentration of medical marihuana activity has been seen to be the cause of serious secondary effects, ordinances establishing limitations on such concentrations are rationally related to the achievement of legitimate police power objectives. The experience in California would suggest that the concentration issue applies to cultivation (large cultivations are more closely associated with unlawful activity), distribution, as well as use. To the extent that the experiences and reports are transferable to this subject matter, the same concentration/secondary effects model that was approved in the First Amendment adult entertainment cases should be fully applicable.⁷⁵ Accordingly, the effort to control crime and maintain quality of life would be supported by regulations seeking to avoid concentrated activities in cultivation, distribution, as well as use.

Along with other regulations, the essence of the disbursement model focuses on the activity being regulated, e.g., caregiver distribution, and prohibits such activity from being located within a minimum distance of one or more other uses.

For example, a zoning ordinance approach, after defining terms, and specifying the manner of review and approval (such as special land use approval), might provide that:

- 1) *No property at which a caregiver distributes marihuana to a patient shall be situated within 1,000 feet of any other property at which a caregiver distributes marihuana to a patient; and,*
- 2) *No property at which a caregiver distributes marihuana to a patient shall be situated within 1,000 feet of any of the following uses:*
 - a) *A church*
 - b) *A school, public or private, including pre-school through high school.*
 - c) *A park*

A regulatory ordinance approach, after defining terms, and specifying the manner of review and approval (such as discretionary review and approval based on appropriate standards), might provide that:

- 1) *The location from which a caregiver grows, cultivates or otherwise provides services to a patient shall not be used by another caregiver.*

⁷⁵ See subsection 1.c., above.

- 2) *The location from which a caregiver provides services to a qualifying patient shall not be within 1,000 feet of a drug-free school zone.*
- 3) *Cultivation or distribution of marihuana shall not occur in connection with or at a location at which any other commodity, product or service is offered for sale.*

A question that may arise in requiring this type of disbursement relates to the legal basis for permitting cultivation and use of marihuana by a *patient* in a residential zoning district, while concurrently restricting cultivation of marihuana by a caregiver to a nonresidential zoning district. One response to this question is based on the rationale for protecting residential neighborhoods recognized in *Village of Euclid v Ambler Realty Co.*,⁷⁶ and in many cases since.⁷⁷ The activity of a patient within his or her home is distinguishable from a land use standpoint from the significantly more intense activity of up to five patients frequenting the home of a caregiver. A person's private activities are distinct from a broader service use involving others, replete with traffic, noise, and the potential for related secondary effects reported in connection with experiences in California.⁷⁸

There have also been anecdotal reports that suggest that, even when caregiver locations are disbursed, and transactions occur on a one-to-one basis between caregiver and patient, there have been instances of violence. One explanation for this might be interpreted from the reports from California and other drug-related circumstances. It is not new that illegal activity involving the distribution of marihuana has been associated with gangs or organized crime.⁷⁹ There have long been indications that violence occurs between gangs or criminal enterprises based on competition over the right to distribute drug products within specified markets of users. Particularly considering that the Act mandates that those engaged in lawful cultivation, distribution and use of medical marihuana must remain anonymous, those involved in criminal enterprise are, like law enforcement, unable to distinguish between lawful transactions and those representing competition within the unlawful market. This, in turn, creates the potential for violence: lawful distribution of medical marihuana by individual caregivers may merely represent the basis for a "turf-battle" for those who perceive the caregivers as "competition" in the marketplace. This would seem to be inherent in a system with a parallel classification of activities relating to marihuana, where there are criminal elements acting side-by-side with those under the shield of the Act – particularly considering that the Act mandates that those engaged in lawful cultivation, distribution, and use of medical marihuana must remain anonymous.

⁷⁶ 272 U.S. 365; 47 S.Ct. 114; 71 L.Ed. 303 (1926).

⁷⁷ See, e.g., *Greater Bible Way Temple v City of Jackson*, 478 Mich. 373, 403-404, 733 N.W.2d 734 (2007) (the use of zoning to protect a residential neighborhood is considered to be a compelling government interest).

⁷⁸ See text accompanying footnotes 12 and 13, above.

⁷⁹ See, e.g., Subsection 2) iv. of this report, taken from a California Police Chiefs' White Paper.

b. Concentration Ordinances

A concentration ordinance contemplates the authorization of a targeted activity, e.g., caregiver distribution, in concentrated proportions within a relatively confined area. This regulatory action would theoretically result in a greater degree of serious secondary effects. However, if the regulatory action is combined with the off-setting assignment of more law enforcement personnel and resources to the confined area, the conceptual end-result is a *management* of the secondary effects within the relatively small area by increased patrol.

Ordinances compelling the concentration of marihuana activities may be designed in a variety of ways. One model would expressly permit the respective activity in a particular zoning district, or specified portion of a zoning district based upon performance or related standards. Another model, fashioned after the *Renton* ordinance, would require the targeted marihuana activity to be situated a minimum distance from, say, any dwelling, church, park, or school – and thus indirectly restrict the use to a concentrated area.

Similar to the disbursement model, a concentration ordinance would generally specify various other regulations applicable to the particular use in question, e.g., caregiver distribution, and prohibit such activity from being located within a minimum distance of other specified uses. For comparison to the disbursement zoning ordinance example highlighted above, the concentration model may define terms, and specify the manner of review and approval (such as special land use approval), and provide that:

No property at which a caregiver distributes marihuana to a patient shall be situated within 1,000 feet of any of the following uses:

- a) A church*
- b) A school, public or private, including pre-school through high school.*
- c) A park*
- d) A single family or multi-family zoning district*

Considering that the residential zoning districts of a community generally represent the bulk of the area on the zoning map, adding the minimum distance requirement from residential districts has a significant concentrating effect. The concentration could become more confining by restricting the targeted activity to a single zoning district, e.g., office or commercial; or even more focused by restricting the activity to a particular area within a district, e.g., property on which medical offices would be permitted.

In the use of the concentration approach, some communities have found it to be consistent with their respective policies to authorize a “dispensary” within the targeted area. This and similar terms have been employed in the regulations of other states. For example, in the City of Boulder, Colorado, there is an authorization for “medical marijuana (sic) business,” and in Rhode Island there are “compassion centers.”⁸⁰ The Michigan Act limits caregivers to the service of five patients, and a reading of the statute as a whole paints a picture of a private and confidential relationship between caregiver and patient. There is no authorization for “marihuana stores,” “dispensaries,” “compassion centers,” or “medical marihuana business” that may market to a wide customer base.⁸¹ Thus, it would seem that there is a legitimate question whether ordinances should permit such facilities, particularly in light of the experience in California that strongly points to the conclusion that such facilities lead to serious crime and to the downgrade of areas in which they are situated. Nonetheless, some communities may decide that a “concentration” policy that permits this type of activity would be appropriate.⁸²

If and to the extent such terms are employed, it is of great importance to provide definitions of the terms within the ordinance. Moreover, in light of the fact that such terms are used in other states, it would be worthy of consideration to select and define an entirely different term for the intended activity, to apply in those instances where a community desires to authorize or expressly prohibit the activity.

3. Home Occupation Ordinances

Home occupation ordinances can be tailored to apply to the products and services of a caregiver, and prohibit caregiver activities in other zoning districts. In a very real sense, such ordinances recognize the fundamental intent of the

⁸⁰ *Medical marijuana business* means any patient that cultivates, produces, sells, distributes, possesses, transports or makes available marijuana in any form to another patient or to a primary caregiver for medical use, or a primary caregiver that cultivates, produces, sells, distributes, possesses, transports or makes available medical marijuana in any form to more than one patient. Possession of more than six marijuana plants and two ounces of a usable form of marijuana by a patient or primary caregiver shall be considered a medical marijuana business. The term *medical marijuana business* shall include a medical marijuana production facility. The term *medical marijuana business* shall not include the private possession, production, distribution and medical use of marijuana by an individual patient or an individual caregiver for one patient in the residence of the patient or caregiver to the extent permitted by Article XVIII, Section 14 of the Colorado Constitution and any other applicable state law or regulation. Medical Marijuana Local Licensing Authority means the city manager. The city manager shall be the local licensing authority for the purpose of any state law that requires the city to designate a local licensing authority. Also see footnote 21, above.

⁸¹ See footnote 11, above.

⁸² See footnote 21, and accompanying text on pages 15-16, above, for additional discussion on this issue. A community could attempt to allow a concentration of caregivers, but restrict them to distributing medical marihuana only to the patients who have formally registered them as their caregiver, recognizing that this would be very challenging to enforce.

Act. That is, by restricting the activity to residential districts, these ordinances implicitly carve out space fit for a *private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes.*

For a specified purpose unrelated to this report, the Zoning Enabling Act *requires* the authorization of a home occupation in a single family residence.⁸³ Most communities permit other home occupations for various uses that are not deemed to be inconsistent with the preservation of a residential zoning district. Key among the regulations generally applicable to home occupations would include restrictions on: signage; traffic and parking; visits by customers; amount of space allocated to the use; who may conduct the use (generally, the requirement that the use be accessory to the use of the premises for residential purposes by the owner of the business); and, hours of occupation.

A home occupation for caregiver use may also have provisions for: a minimum distance from specified places frequented by children; restriction upon number of caregivers per residence; restriction upon the number of patients that may be served at the residence; requirement for code inspections.

At least one ordinance requires business licensure in addition to meeting the home occupation requirements of the ordinance, thus permitting a process for suspension and revocation in the event of violation.

4. Sample Licensing and Regulation Ordinance Concept

Licensing and regulation is uniformly permitted in all communities. An important consideration that favors this type of approach relates to the absence of strict nonconforming use rights. Under the Zoning Enabling Act,⁸⁴ once improvements are established for a particular use based on a zoning approval, the property owner can claim to have a “vested right” in such use.⁸⁵ While the Constitution does not permit a decision under a regulatory ordinance to cause a “taking” of private property rights, the statutory nonconforming use rule does not strictly apply.⁸⁶

The ordinances enacted to date have generally addressed serious issues consistent with local policy. The sample licensing and regulation ordinance set out in Appendix 1 has been prepared with a general disbursement format, together with

⁸³ MCL 125.3204 provides : “A zoning ordinance adopted under this act shall provide for the use of a single-family residence by an occupant of that residence for a home occupation to give instruction in a craft or fine art within the residence. This section does not prohibit the regulation of noise, advertising, traffic, hours of operation, or other conditions that may accompany the use of a residence under this section.”

⁸⁴ MCL 125.3208

⁸⁵ *Heath Township v Sall*, 442 Mich. 434, 502 N.W.2d 627 (1993).

⁸⁶ *Norton Shores v Carr*, 81 Mich.App. 715, 265 N.W.2d 802 (1978).

provisions calculated to afford greater protection, efficiency, and capability for law enforcement by requiring information about sites used for caregiver cultivation and distribution activities, and requiring inspections of facilities used for cultivation. While some communities have focused on these issues, it would appear that further emphasis might be worth considering in order to meet head-on the point that, in the absence of local regulation, law and code enforcement may be unfairly and dangerously restricted under the terms of the Act. There are several deficiencies in this regard, including the following:

a. Law enforcement officers do not have access to information disclosing locations at which lawful cultivation and distribution is occurring. Officers will thus have a more difficult challenge in attempting to distinguish lawful activities permitted under the Act from unlawful ones; this, in turn, may endanger law enforcement officers and members of the public when confrontations occur, and will certainly lead to unnecessary investigatory inefficiencies. Although law enforcement is expressly precluded under the Act from access to names and addresses of patients and caregivers, securing the identification of the *locations* where marihuana cultivation and distribution has been permitted under the Act by caregivers would undoubtedly represent important assistance to law enforcement.

b. The same lack of information will prevent law enforcement from gaining an understanding with regard to the connection between a caregiver and particular patients (without regard to specific name and address), especially if caregivers operate in the same facility or in close proximity. How will the five-patient limit upon a person acting as a caregiver be enforced as a practical matter? Again, securing the identification of the *locations* where marihuana cultivation and distribution is lawful would be helpful in the enforcement of the Act.

c. The same location information would be indispensable in the enforcement of the Act's limits on the number of plants a caregiver may cultivate on behalf of patients.

d. Given the prohibition upon the disclosure of the name and address of caregivers, and the right of these individuals to cultivate up to sixty marihuana plants, discovering, much less preventing, dangerous plumbing and electrical installations which are unlawful under applicable construction codes is not feasible. In the interest of health and safety, it would be helpful, and consistent with nearly all other situations, to require inspection of a premises at which substantial facilities are installed to facilitate the cultivation of marihuana plants for others, including plumbing and electrical facilities.

A detailed sample concept of a licensing and regulation ordinance is presented for consideration in Appendix 1 of this report. Following is a general outline of the sample ordinance:

1. Intent

2. Definitions
3. Requirement for license
 - a. The restrictions in this section are based on the following findings:
 - b. Licensure requirements:
4. Restriction on Distribution
 - a. The restrictions in this section are based on the following findings:
 - b. Restrictions:
5. Inspection of Patient Cultivation
6. Penalty for Violation
7. No Vested Rights
8. Severance Clause

As in all areas of regulation in general, there is no “one size fits all” ordinance. The alternative set forth in attached Appendix 1 may provide ideas that could be considered by communities in their existing or future ordinances, with the caveat that provisions must be fashioned to fit each respective community taking into account such things as administration, existing ordinance format, community priorities, and the like. Moreover, it is not suggested that any of the provisions in this sample should be expected to escape challenge.

D. State Declaratory Judgment Action

Once an ordinance regulating caregivers has been enacted by a community, there will be two alternative scenarios that could unfold: One would be for the community to wait for a legal challenge to be initiated, and defend the suit; the other alternative would be for the community – prior to restricting rights, incurring the inevitable costs of administration, and before the initiation of suit by parties claiming to be aggrieved by the ordinance – to explore whether it would be appropriate to initiate a state court declaratory judgment action.

It has recently been reiterated that,

The purpose of a declaratory judgment is to enable the parties to obtain adjudication of rights before an actual injury occurs.... The plaintiff in a

declaratory judgment action bears the burden of establishing the existence of an actual controversy, as well as the burden of showing that ... it has actually been injured or that the threat of imminent injury exists.⁸⁷

Of course, circumstances and stakes will be different among communities. However, particularly if there are several communities that have common issues that could be presented to a court in conformance with the legitimate purposes of the declaratory judgment remedy, a public purpose could be served by an adjudication of rights for the benefit of all concerned. In such circumstances, it is recommended that the availability and propriety of a state declaratory judgment action be investigated.

E. The Enactment of Moratoria

Many communities have enacted, or may enact, moratoria on activities related to the Act. The nature and purpose of a moratorium on specified land use activity within a community has been described as follows:

As a legitimate public purpose for police power regulation of the use of land, courts have held that interim zoning and building moratoria serve to effectuate the purposes of zoning enabling acts by **maintaining the land use status quo within a community pending final adoption** of a proposed zoning plan or zoning change. Interim zoning or building moratoria, by freezing land uses within an area, prevent the "race for diligence" leading to acquisition of "vested rights" and establishment of "nonconforming uses" that might otherwise be inconsistent with land uses permitted under a proposed zoning plan or zoning change. Maintenance of the status quo pending final adoption of a zoning plan or zoning change has been held to support, for example, moratoria on specific land uses that were the subject of pending zoning changes. This same rationale has been relied on by courts to uphold zoning moratoria pending adoption or revision of comprehensive zoning plans.⁸⁸

1. Legal Basis

In Michigan, *Central Advertising Co v St. Joseph Township*⁸⁹ includes the following relevant language addressing a deferral in processing approvals within the zoning context:

⁸⁷ *Wolf v. Detroit*, 287 Mich.App. 184, --- N.W.2d ---- (2010).

⁸⁸ 1 Rathkopf's *The Law of Zoning and Planning* § 13:8 (4th ed.) Maintenance of status quo pending decision.

⁸⁹ 125 Mich App 548, 554-555 (1983).

Plaintiff additionally claims that the trial court should have granted an injunction forcing defendant to issue the permit based on a combination of factors. First, the court had invalidated defendant's off-premises sign ordinance. Second, plaintiff had filed an application for a permit. Third, defendant, approximately one week later, adopted a moratorium, which would last until they had adopted a new ordinance with respect to off-premises signs, against the issuance of permits. . . . defendant's failure during this time to issue the sign permit within 30 days after plaintiff had filed an application would ordinarily result in the application's being deemed approved based on defendant's ordinance. However, defendant's adoption of the moratorium would alleviate the problem. Although moratoria are not regarded favorably by the courts, this moratorium was to last only until a new ordinance relating to off-premises signs was adopted and presented to the court. . . . With these considerations in mind, we do not find that the trial court's decision not to issue an injunction mandating that defendant issue the permit was erroneous.

Similarly, a “moratorium on the issuance of building permits in a particular district of a city for a reasonably limited time” was not voided by the court. *Heritage Hill v Grand Rapids*,⁹⁰ Nor did the Court of Appeals find it to be legally offensive for a township to declare a “brief moratorium on all sewer connections...” *BPA II v Harrison Township*.⁹¹

One of the most important cases on this subject, in which the fundamental lawfulness of a moratorium was challenged head-on, is the United States Supreme Court decision in *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*.⁹² In *Tahoe*, two moratoria were established by an intergovernmental Planning Agency, banning most new development in a specified area from 1981 until 1984, in order to adopt environmental standards and incorporate them into the agency’s regional development plan. In the face of a challenge by numerous property owners, the Supreme Court held that such action did not amount to a categorical taking of private property interests. The Court cautioned, however, that government entities should not generally assume that such lengthy moratoria (more than two years) would receive the same favorable treatment.

2. Method of Adoption

For the adoption of a moratorium, two alternative enactment vehicles have most frequently been utilized: resolution or ordinance. On which to employ in a given situation, the McQuillin treatise is instructive:

⁹⁰ 48 Mich App 765, 768 (1973).

⁹¹ 73 Mich App 731, 733-734 (1977). Cf. *Cummins v. Robinson Township*, 283 Mich.App. 677, 770 N.W.2d 421 (2009).

⁹² 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002).

A resolution in effect encompasses all actions of the municipal body other than ordinances. Whether the municipal body should do a particular thing by resolution or ordinance depends on the forms to be observed in doing the thing and on the proper construction of the charter. In this connection it may be observed that a resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of conduct or government, to continue in force until the ordinance is repealed. . . . Thus, it may be stated broadly that all acts that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters on which the municipal corporation desires to legislate must be put in the form of ordinances.⁹³

Of course, if a municipal charter requires an ordinance to take action in the nature of a moratorium, this rule would govern. However, it is suggested that if a community anticipates the enactment of moratoria on a regular basis, thought should be given to establishing an ordinance procedure for such purpose. On the other hand, if putting a moratorium into place in the present context is expected to be a rarely used exercise, perhaps action by resolution would suffice. If time is available, and if all other things are equal, it is recommended here that the use of an ordinance should be considered.

If an ordinance is utilized, an expected question would be whether there must be compliance with the more rigorous ordinance adoption procedure prescribed in the Zoning Enabling Act. On this question, no authority was found. Generally speaking, however, the character of the action being taken in the establishment of a moratorium relates to the administration and effect of ordinances; the action only *enables* the establishment of land use policy. Therefore, the use of the regulatory ordinance enactment process should suffice.

When a moratorium is established, a property owner may claim, as in the *Tahoe* case, that its effect results in a regulatory taking of private property, that it violates due process, or that it amounts to an abuse of discretion. In order to reduce the likelihood of such an adverse judgment against the community, it is recommended that the enacting ordinance or resolution contain an administrative process permitting a claim, to be considered based upon notice and hearing, describing and substantiating that the moratorium results in the violation being alleged. The administrative process should also include the opportunity on the part of the legislative body to cure the violation and fashion relief under the circumstances in the event it determines that, absent relief, a violation will result.

⁹³ McQuillin, *The Law of Municipal Corporations*, §15.2

VII. CONCLUSION

An approved initiative ballot has put into place Michigan's "medical marijuana" law. This law creates a defined medical use exception to the general policy that treats activities involving marijuana as criminal acts.

Clearly the new law is a challenge for local governments. However, each community must determine whether it needs to make a regulatory response to the new Michigan Act. This determination will ultimately be made based on deliberations that take into consideration the community's policies and unique circumstances. As noted above, a federal declaratory judgment action may be considered for the purpose of determining whether the Supremacy Clause of the United States Constitution should apply to invalidate Michigan's authorization. In the legislative forum, it appears that many will encourage the Michigan Legislature to make certain adjustments that would render the Act more workable for local government.

In all events, it must be recognized that the vote to approve the Michigan Act represents an expression of the opinion that the restricted use of medical marijuana should be permitted for the purpose of helping to ease chronic pain being suffered by citizens in this state due to certain debilitating diseases. Based on such recognition, this report has focused on the means of permitting the fundamental intent of the Act to be carried out, while simultaneously examining the task of local government in the protection of the public health, safety, and welfare from the ills that are now very predictable.

The Michigan Act creates a parallel system in which the same conduct – cultivation, distribution, and use of marijuana – is at once lawful and unlawful depending on whether the engaged persons have ID Cards. In creating this parallel system, the Act throws a proverbial curveball to local government by mandating that the identity and address of those having ID Cards not be disclosed – even to law enforcement. Looking to the experiences in California, and to local anecdotal experiences in the short time following approval of the Michigan Act, this report has detailed adverse effects of the parallel system. The challenge presented to local government is determining how to most effectively represent the health, safety, and welfare interests of the public, while permitting the implementation of the fundamental intent of the Act, which is the creation of a private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marijuana strictly for medical purposes.

Many communities perceive the need to respond with local regulation to address certain provisions and omissions of the Act. This report has described some of these diverse regulatory responses, and has provided a review with regard to several of the foreseeable legal arguments associated with such responses. By early to mid-2011, many communities will have local regulations in place. Some proponents of the Act will resist regulatory interference, and litigation will undoubtedly ensue, and thus widespread litigation appears to be in the making. In addition, as a result of criminal prosecutions anticipated to arise due to the confusion within the statute, the liberty of many is likely to

be jeopardized. We could be in for a long slog. The *Redden* concurrence aptly characterized this as the prospect of piecemeal litigation, “leaving defendants, prosecutors, law enforcement, entrepreneurs, cities, municipalities, townships, and others in a state of confusion for a very, very long time.”⁹⁴ Moreover, in such litigation, it is unlikely that the judicial system will produce results that might be characterized as “victorious” in any sort of broad sense. With the number of people on each of the respective sides, a “win” in a typical court battle will mean a loss to many – all at great expense. Given this set of circumstances, this report will conclude with a recommendation.

It is unfortunate indeed that, in the current economic climate, significant time and resources will be devoted to emotional court battles that have a low probability of producing a comprehensive and lasting solution, and that many unsuspecting criminal defendants will have been caught in the statute’s web of uncertainty. This state of affairs provides a sound basis for the pursuit of negotiated solutions to the gathering legal conflicts. The proponents of medical marihuana could come to the bargaining table with legitimate evidence that a sufficient proportion of the public is in support of a defined use of medical marihuana. Local government could come to the table with equally good evidence that the system devised by the Michigan Act compels local regulation in order to avoid serious problems, including an increase in crime, unnecessary adverse impact on children, and safe and effective law enforcement.

In the interest of the state’s population at large, it is suggested that the best solution would be to replace the existing statute, and have all sides work with the State Legislature on a statutory arrangement that permits medical marihuana use on relatively narrow terms that would facilitate assistance to those who are truly suffering, and also provide a more organized method of medical marihuana distribution.

There is simply no legitimate reason why the process of negotiation, with all parties at the table in good faith, could not reach a sufficient consensus to avoid most of the litigation that is now very predictable once ordinances are enacted. While neither party should be of the view that its position lacks support, it would be appropriate to make a good faith effort to pursue lasting negotiated solutions that could ultimately be supported by all. A critical step necessary to even commence discussions would be the identification of the key parties, and the willingness on the part of those parties to come to the table. Considering the public interest and geographic breadth of this problem, the magnitude of resources at stake, and the likely adverse impact upon the lives of so many, once ordinances are in place and litigation begins as anticipated, perhaps the Governor could utilize the “bully pulpit” of that office for the purpose seating the appropriate parties at the table. The creation of an *ad hoc* committee by the leadership in the Legislature, with public and private interests represented, could also provide an appropriate a productive forum.

If good faith negotiations are commenced, an attempt should be made to concurrently establish uniform, fair, and non-prejudicial terms for maintaining the status

⁹⁴ Slip opinion, p 4.

quo in order permit a reasonable opportunity for negotiations to take place. If negotiations were successful in building a consensus, even on some of the more important issues, this would provide a reasonable basis for optimism that the State Legislature could muster the three-fourths vote needed to amend the Act in a manner consistent with the agreement of the parties.

Respectfully submitted,

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APPENDIX 1

SAMPLE CONCEPT OF LICENSING AND REGULATION ORDINANCE FOR
CONSIDERATION

STATE OF MICHIGAN

CITY / VILLAGE / TOWNSHIP OF _____

ORDINANCE TO REGULATE AND LICENSE CERTAIN ASPECTS OF MEDICAL
MARIHUANA CULTIVATION, USE AND DISTRIBUTION

1. Intent

It is the intent of this ordinance to give effect to the intent of Initiated Act 1 of 2008, MCL 333.26421, *et seq*, (the Act) as approved by the electors, and not to determine and establish an altered policy with regard to marihuana. The act authorizes a narrow exception to the general rule and state policy that the cultivation, distribution, and use of marihuana amount to criminal acts. It is the further intent of this ordinance to protect the public health, safety, and general welfare of persons and property, and to license certain locations as specified below. It is the further intent of this ordinance to comply with the Act while concurrently attempting to protect the health, safety, and welfare of law enforcement officers and other persons in the community, and also to address and minimize reasonably anticipated secondary effects upon children, other members of the public, and upon significant areas of the community, that would be reasonably expected to occur in the absence of the provisions of this ordinance. This ordinance is designed to recognize the fundamental intent of the Act to allow the creation and maintenance of a private and confidential patient-caregiver relationship to facilitate the statutory authorization for the limited cultivation, distribution, and use of marihuana for medical purposes; and to regulate around this fundamental intent in a manner that does not conflict with the Act so as to address issues that would otherwise expose the community and its residents to significant adverse conditions, including the following: adverse and long-term influence on children; substantial serious criminal activity; danger to law enforcement and other members of the public; discouragement and impairment of effective law enforcement with regard to unlawful activity involving the cultivation, distribution, and use of marihuana; the creation of a purportedly lawful commercial enterprise involving the cultivation, distribution, and use of marihuana that is not reasonably susceptible of being distinguished from serious criminal enterprise; and, the uninspected installation of unlawful plumbing and electrical facilities that create dangerous health, safety, and fire conditions.

This ordinance permits authorizations for activity based on the Act. Nothing in this ordinance shall be construed as allowing persons to engage in conduct that endangers others or causes a public nuisance, or to allow use, cultivation, growth, possession or control of marihuana not in strict accordance with the express

authorizations of the Act and this ordinance; and, nothing in this ordinance shall be construed to undermine or provide immunity from federal law as it may be enforced by the federal or state government relative to the cultivation, distribution, or use of marihuana. Thus, the authorization of activity, and the approval of a license under this ordinance shall not have the effect of superseding or nullifying federal law applicable to the cultivation, use, and possession of marihuana, and all applicants and grantees of licenses are on notice that they may be subject to prosecution and civil penalty, including forfeiture of property.

2. Definitions

- ◆ *Act* means Initiated Law of 2008, MCL 333.26421, *et seq.*, and Michigan Administrative Rules, R 333.101, *et seq.*
- ◆ *Department* means the State of Michigan Department of Community Health
- ◆ *Qualifying patient or patient* means a person as defined under MCL 333.26423(h) of the Act.
- ◆ *Primary caregiver or caregiver* means a person as defined under MCL 333.26423(g) of the Act, and who has been issued and possesses a Registry Identification Card under the Act.
- ◆ *Registry Identification Card* means the document defined under MCL 333.26423(i) of the Act.
- ◆ *Distribution* means the physical transfer of any amount of marihuana in any form by one person to any other person or persons, whether or not any consideration is paid or received.
- ◆ *Distributor* means any person, including but not limited to a caregiver, patient or any other person, who engages in any one or more acts of Distribution.
- ◆ *Facility or Premises* means one commercial business premises having a separate or independent postal address, one private office premises having a separate or independent postal address, one single family residence having a separate or independent postal address, one apartment unit having a separate or independent postal address, one condominium unit having a separate or independent postal address, or one free-standing industrial building having a separate or independent postal address.
- ◆ *Marihuana* means the substance or material defined in section 7106 of the public health code, 1976 PA 368, MCL 333.7106.
- ◆ *Principal residence* means the place where a person resides more than half of the calendar year.

3. Requirement for license

- c. The restrictions in this section are based on the following findings:
 - 1) Law enforcement officers are required to investigate and pursue prosecution with regard to the *unlawful* cultivation, distribution or consumption of marihuana. Yet, the Act concurrently authorizes as lawful undertakings the same actions by those who meet the terms of the Act. Although this places a burden on law enforcement to make a distinction relating to very similar conduct, the Act expressly denies law enforcement officials advanced

access to the identity and location of those authorized to lawfully engage in the cultivation, distribution or consumption of marihuana – critical information needed to distinguish unlawful undertakings from lawful ones, particularly at critical investigatory stages. The experience of law enforcement dictates that the presence of significant quantities of unlawful controlled substances are often accompanied by large quantities of cash, and by weapons used to protect the controlled substances and cash. Thus, confrontations between law enforcement and persons engaged in unlawful drug enterprises can be extremely dangerous, and there is a need to use the element of surprise in order to protect the lives of officers and members of the public. Under the Act, before the occurrence of a direct confrontation between law enforcement and persons engaged in cultivation and distribution of marihuana, law enforcement officers are prevented from securing the information necessary to determine whether such activities are being conducted by persons authorized under the Act or by persons engaged in criminal enterprise. This in turn leads to the condition that, if there is a suspicion that an unlawful enterprise is being perpetrated, officers may need to seek a voluntary entry into premises, and may be met by a weapons-based confrontation without being permitted to utilize the element of surprise. Moreover, if an unlawful enterprise is not involved, substantial resources can easily be expended by law enforcement on a baseless investigation. Accordingly, the licensure of a particular Facility as the site of cultivation and distribution, which need not undermine the privacy and confidentiality of the patient-caregiver relationship, could be critical to law enforcement in order to identify and distinguish sites of lawful activity from sites of unlawful activity.

- 2) The experience in the State of California, a state that approved the medical use of marihuana more than a decade ago, is that concentrations of marihuana distribution activity lead to the following significant and serious secondary effects:
 - i. California law enforcement reported in 2009 (White Paper),⁹⁵ that nonresidents in pursuit of marihuana, and out of area criminals in search of prey, are commonly encountered just outside marihuana dispensaries, as well as drug-related offenses in the vicinity—like resales of products just obtained inside—since these marihuana centers regularly attract marihuana growers, drug users, and drug traffickers. Sharing just purchased marihuana outside dispensaries also regularly takes place. There

⁹⁵ See: http://www.californiapolicechiefs.org/nav_files/marijuana_files/files/MarijuanaDispensariesWhitePaper_042209.pdf

have been increased incidents of crime including murder and armed robbery.

- ii. In a 2009 California law enforcement presentation (Power Point),⁹⁶ referring again to the existence of a concentration of distribution activities, the Los Angeles Police Department reported:
 - (1) 200% increase in robberies,
 - (6) 52.2% increase in burglaries,
 - (7) 57.1% rise in aggravated assaults,
 - (8) 130.8% rise in burglaries from autos near cannabis clubs in Los Angeles.
 - (9) Use of armed gang members as armed "security guards"
 - iii. California law enforcement reported in 2009 (White Paper) that the dispensaries or "pot clubs" are often used as a front by organized crime gangs to traffic in drugs and launder money.
 - iv. California law enforcement reported in 2009 (White Paper) that besides fueling marihuana dispensaries, some monetary proceeds from the sale of harvested marihuana derived from plants grown inside houses are being used by organized crime syndicates to fund other legitimate businesses for profit and the laundering of money, and to conduct illegal business operations like prostitution, extortion, and drug trafficking.
 - v. California law enforcement reported in 2009 (White Paper) that other adverse secondary impacts from the operation of marihuana dispensaries include street dealers lurking about dispensaries to offer a lower price for marihuana to arriving patrons; marihuana smoking in public and in front of children in the vicinity of dispensaries; loitering and nuisances; acquiring marihuana and/or money by means of robbery of patrons going to or leaving dispensaries; an increase in burglaries at or near dispensaries; a loss of trade for other commercial businesses located near dispensaries.
- 3) Secondary effects with regard to children: Presumably it is agreed that children should not be encouraged by example to undertake uses and activities which are unlawful. However, considering that marihuana possession and use is a generally prohibited criminal activity, but the Act authorizes an undisclosed group of individuals to possess and use marihuana, and because children are not

⁹⁶ See:

http://www.californiapolicechiefs.org/nav_files/marijuana_files/files/DispensarySummitPresentation.ppt

capable of making distinctions between lawful and unlawful use and possession by individuals based upon the intricacies of the Act, there is a need to insulate children from the narrowly permitted use and possession activity permitted under the Act. California law enforcement reported in 2009 (White Paper) that minors exposed to marijuana at dispensaries or residences where marijuana plants are grown may be subtly influenced to regard it as a generally legal drug, and inclined to sample it.

- 4) The Act requires that information concerning identity and location of caregivers is to be confidential, and that caregivers authorized under the Act are not to be punished. However, the Act does not expressly or implicitly specify an intent to pre-empt all local enforcement efforts. Analogously, persons performing in adult entertainment have been held to be engaged in activity involving free expression, protected under the First Amendment, and thus direct local regulation that restricts such activity has been deemed to be prohibited content restriction of free speech. Nonetheless, where it can be shown that there are adverse secondary effects that result from the concentration of adult entertainment establishments (and other related adult uses), including criminal activity closely associated with that reported above in connection with concentrations of medical marijuana Distribution, reasonable regulation, and requirements for the disbursement of locations of adult entertainment uses have been permitted under the First Amendment, and have been authorized in order to mitigate against the secondary effects.
- 5) Considering the reports from California, and based upon the limited experience already reported in Michigan, it is found that there is a rational basis for concern that a concentration of Distribution activities, conduct that would be criminal outside the narrow exception provided in the Act, will have adverse secondary effects, particularly where law enforcement personnel have no information-base to distinguish lawful from unlawful activities at the scene of such activities. Therefore, it is the intent of this ordinance to regulate and disburse Distribution activities in order to mitigate the reasonably anticipated adverse secondary effects.
- 6) Local regulation of Distribution activities is implicitly contemplated under the Act in view of the glaring gaps opened by the terms of the Act which would, absent local regulation, render it impossible for law enforcement to investigate and pursue criminal activity not protected by the Act. By way of example:
 - i. While the Act limits a caregiver from distributing marijuana to more than five patients, because the Act withholds direct advanced information that would allow a connection to be made by law enforcement between a caregiver and particular patients (without regard to specific name and address), especially if caregivers operate in the same

facility or in close proximity, the five-patient limit upon a person acting as a caregiver would be practically impossible to investigate or enforce.

- ii. While the Act limits the number of plants a caregiver may cultivate on behalf of patients, because the Act withholds direct advanced information that would allow a connection to be made by law enforcement between a caregiver and particular grow locations, the limitation on the number of plants cultivated at multiple sites would be practically impossible to investigate and enforce.
- 7) The inability of law enforcement officials to access relevant and often critical information concerning those cultivating, distributing and consuming marijuana amounts to a material barrier to the effective investigation/enforcement model. Without critical information to distinguish those operating under the Act from those engaged in illegal trafficking, law enforcement is impeded in the effort of undertaking adequate operational planning, and this, in turn, exposes law enforcement, and innocent third parties, to substantial and unnecessary risks.
 - 8) Absent the requirement for an application and inspection of a premises at which substantial facilities have been installed to facilitate the cultivation of marijuana plants, including plumbing and electrical inspections, there have been reports that unauthorized installations relating to the cultivation of marijuana plants have been made, including unauthorized power lines that by-pass meters. These installations create a threat to public safety, and result in a fire risk.
 - 9) The fundamental intent of the Act is the creation of a *private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marijuana strictly for medical purposes.*
 - 10) It is the intent of this ordinance that the requirements for licensure shall be administered by law enforcement, and that the information acquired by law enforcement shall be deemed *per se* confidential, and not subject to public disclosure by law enforcement, by FOIA or otherwise.
 - (11) The requirement to identify sites at which marijuana is cultivated for and distributed to others, while not requiring identification of names and addresses of caregivers, is not in conflict with the terms of the act, and is deemed to be the minimum requirement necessary in order to protect the public and permit safe and effective enforcement of the act and the general laws relating to marijuana. To the extent that such identification impacts upon confidentiality, such confidentiality must be strictly construed as an exception to the general criminality of marijuana cultivation,

distribution, and use, and must be weighed in relation to impacts upon the health, safety, and welfare of the general public at large and the feasibility of enforcing applicable law in the absence of site identification. It is found that the adverse effects of identifying and disclosing such sites to law enforcement officials is minimal in relation to the severe and certain adverse effects upon a significantly greater number of people and the rule of law if such site identification and disclosure to law enforcement were not required.

b. Licensure requirements:

- 1) The cultivation of marihuana by a caregiver or any other person permitted under the Act, and the provision of caregiver services relating to medical marihuana use, shall be permitted in accordance with the Act. No cultivation, distribution, and other assistance to patients shall be lawful in this community at a location unless and until such location for such cultivation, distribution, and assistance shall have been licensed under this ordinance. Licensure shall be subject to and in accordance with the following:
 - a) The location of a Facility used for the cultivation of marihuana by caregivers or by other persons permitted under the Act;
 - b) The location of a Facility used for distribution;
 - c) The location of a Facility used to provide any other assistance to patients by caregivers or any other person permitted under the Act relating to medical marihuana;
 - d) By way of exception, it is not the intent of this ordinance to require a license for the principal residence of a patient where marihuana is cultivated or used exclusively for such patient's personal consumption, however, a location other than a patient's principal residence where a patient cultivates or uses marihuana shall be subject to the licensure requirements of this ordinance.
- 2) Application for license
 - a) The requirement of this ordinance is to license a location, and not to license persons. A confidential application for a license under this section shall be submitted to the person designated as the medical marihuana officer of the city/village/township/county police department, and shall conform to the following specifications. An application shall:

- i. Not require the name, home address, or date of birth of a patient or caregiver.
 - ii. Include the address and legal description of the precise premises, other than a patient's principal residence, at which there shall be possession, cultivation, distribution or other assistance in the use of marihuana. The fact that a caregiver or other person providing assistance to patients also has an ID Card as a patient shall not relieve the obligation to provide this information.
 - iii. Specify the name and address of the place where all unused portions of marihuana plants cultivated in connection with the use of marihuana or caregiver activity at the premises shall be disposed.
 - iv. Describe the enclosed, locked facility in which any and all cultivation of marihuana is proposed to occur, or where marihuana is stored, with such description including: location in building; precise measurements in feet, of the floor dimensions and height; the security device for the facility.
 - v. Describe all locations in the premises where a caregiver or other person authorized under the Act shall render assistance to a qualifying patient.
 - vi. Specify the number of patients to be assisted, including the number of patients for whom marihuana is proposed to be cultivated, and the number of patients to be otherwise assisted on the premises, and the maximum number of plants to be grown or cultivated at any one time. If the location at which patients will be assisted is different from the licensed premises, the application shall provide the address of all such other locations (other than the address of a patient being assisted).
 - vii. For safety and other code inspection purposes, it shall describe and provide detailed specifications of all lights, equipment, and all other electrical, plumbing, and other means proposed to be used to facilitate the cultivation of marihuana plants as such specifications relate to the need for the installation of facilities.
- b) Requirements and standards for approval of licensure and for the activity permitted

- i. Locations used for the cultivation of marihuana by caregivers and any other person permitted under the Act, and the location used for the provision of assistance to patients by caregivers or any other person authorized under the Act relating to medical marihuana use, including distribution or other assistance, but in all events not including a patient's principal residence which is not used to cultivate marihuana or assist in the use of medical marihuana for persons other than the patient at such residence, shall be prohibited:
 - o Within 1,000 feet from sites where children are regularly present, and specifically: a daycare facility, a church, synagogue, mosque, or other religious temple, and from a recreational park and a public community center, a public or private pre-school, elementary school, middle school, high school, community college, and all other schools that have different name references but serve students of the same age.⁹⁷
 - o Within 1,000 feet of an adult use, as defined in this [or the zoning] ordinance [*if applicable*]. (*attach appendix if not stated or incorporated*).
 - o Within 1,000 feet from the site at which any other caregiver or any other person cultivates marihuana, or assists in the use of marihuana, not including a patient's principal residence which is not used to cultivate marihuana or assist in the use of medical marihuana for persons other than the patient at such residence.

Measurements for purposes of this sub-section shall be made from property boundary to property boundary.

- ii. The location of the Facility at which a caregiver or any other person permitted under the Act cultivates marihuana, or assists a patient in the use of

⁹⁷ Compare., MCL 333.7410(2), which provides: (2) An individual 18 years of age or over who violates section 7401(2)(a)(iv) by delivering a controlled substance described in schedule 1 or 2 that is either a narcotic drug or described in section 7214(a)(iv) to another person on or within 1,000 feet of school property or a library shall be punished, subject to subsection (5), by a term of imprisonment of not less than 2 years or more than 3 times that authorized by section 7401(2)(a)(iv) and, in addition, may be punished by a fine of not more than 3 times that authorized by section 7401(2)(a)(iv).

marihuana shall not be the same Facility at which any other caregiver or person cultivates marihuana, or assists a patient in the use of marihuana.⁹⁸ Accordingly, at a patient's principal residence used by such patient to cultivate marihuana for his or her personal use as permitted under the Act, there shall be not more than twelve marihuana plants being cultivated at any one time; only at a licensed Facility may there be more than twelve marihuana plants being cultivated at any one time; and, at a Facility at which a caregiver or any other person permitted under the Act cultivates marihuana for use by patients, there shall not be more than twelve marihuana plants being cultivated at any one time per patient, and in no event more than sixty marihuana plants being cultivated at any one time (which assumes cultivation for five patients, plus an additional twelve plants if the caregiver is also a patient that has not designated a caregiver to assist in providing medical marihuana).

- iii. In order to insulate children and other vulnerable individuals from such actions, all medical marihuana cultivation, and all assistance of a patient in the use of medical marihuana by a caregiver, shall occur within the confines of a building licensed under this section, and such activities shall occur only in locations not visible to the public and adjoining uses, provided, this subsection shall not prohibit a caregiver from assisting a patient at the patient's principal residence or at a hospital.
- iv. The electrical and plumbing inspectors (and other inspector(s) within whose expertise an inspection is needed) must, after inspection, provide a report confirming that all lights, plumbing, equipment, and all other means proposed to be used to facilitate the growth or cultivation of marihuana plants is in accordance with applicable code.
- v. Considering that the distribution of marihuana is generally unlawful, and that the Act authorizes "caregivers," and does not authorize any activity such as a "dispensary" (authorized by statutes in

⁹⁸ Although expressly authorized in certain other states that permit medical marihuana use, the Act does not expressly define or authorize "marihuana stores," "dispensaries," "compassion centers," or "medical marihuana business." While some may argue that the absence of authorization does not, as a matter of law, mean that the use may not be permitted, this sample ordinance is intended to fill any ambiguity in the Act by clarifying that such activity is not permitted.

other states), and reading the Act as a whole, the activities of caregivers are interpreted as being limited to private and confidential endeavors. Moreover, the location and identity of a caregiver is known to patients. Accordingly:

- o There shall be no signage identifying a caregiver use or a place at which medical marihuana is distributed.⁹⁹
 - o Unless conducted as part of a related licensed professional medical or pharmaceutical practice, caregiver activity shall not be advertised as a "clinic," "hospital," "dispensary," or other name customary ascribed to a multi-patient professional practice.¹⁰⁰
- 3) An approval of licensure may include reasonable conditions requested in writing by the applicant during the application and review process.
- 4) Use of land in accordance with approved application
- If approved, all use of property shall be in accordance with an approved application, including all information and specifications submitted by the applicant in reliance on which the application shall be deemed to have been approved.
- 5) A Facility that exists on the effective date of this ordinance must make application for and receive approval to continue to operate; provided, an application shall be filed within fifteen days following the effective date of this ordinance. If an application for licensure under this ordinance is denied due to the minimum distance requirement standards, and a timely application has been filed seeking licensure under this ordinance, such Facility shall have sixty days from the date of application denial to cease operating at the denied site.

4. Restriction on Distribution

- a. The restrictions in this section are based on the following findings:
- 1) The Act was passed by the initiative process. The ballot containing the proposal did not include, and as a practical matter could not have included, the full statute. Thus, electors approved the initiative proposal based upon a reading of a mere summary of

⁹⁹ This provision is offered with the caution that it may be confronted by a First Amendment challenge.

¹⁰⁰ This provision is also offered with the caution that it may be confronted by a First Amendment challenge.

the Act. Both the summary and the Act as a whole reflect the intent to a *private and confidential patient-caregiver relationship to facilitate the lawful cultivation, distribution, and use of marihuana strictly for medical purposes, that is*, an authorization for confidential and private use of marihuana by patients, and for confidential and private assistance in such use by caregivers with whom individual patients are connected through the Department's registration process. That is, the Act does not authorize the broad legalization of the cultivation, distribution, or use of marihuana, and a reading that permits such broad legalization is inconsistent with the fundamental intent of the Act read as a whole in context with generally applicable Michigan law. Thus, it would be reasonable to expect and require that all undertakings of caregivers and other persons in assisting a patient are intended to occur on a confidential and private one-to-one basis.

- 2) The Act does not reflect the intent for distributions of marihuana by more than one caregiver or other person to one patient, or by one or more caregivers or other persons to more than one patient at any given time and place.
 - 3) The confidentiality provisions of the Act reflect the intent for all caregivers and patients to remain anonymous in terms of their name and address, thus further reflecting the private and confidential nature of the activities contemplated between a caregiver and the patient he or she is assisting.
 - 4) In view of the fact that the Act effectively requires law enforcement officers to seek to prevent unlawful cultivation, distribution or consumption of marihuana, while concurrently permitting substantially the same actions by those who meet the terms of the Act, and considering that law enforcement officials are prohibited from having access to important information that could be used to distinguish unlawful and lawful actors, it is deemed necessary by the legislative body of the community to maintain by licensure and restriction an environment that seeks to promote the protection, efficiency, and effectiveness of law enforcement officers and their work performed in connection with the cultivation, distribution or consumption of marihuana.
 - 5) All of the findings stated in subsection 3.a, above, in support of the requirement for licensure are incorporated by reference to this subsection of the ordinance.
- b. Restrictions:
- 1) A caregiver and any other person authorized under the Act to assist patients, if any, shall distribute medical marihuana only on a confidential, one-to-one, basis with no other caregiver being present at the same Facility at the same time, and no other patient or other person being present at the same Facility at the same

time, provided, that a patient's immediate family members or guardian may be present within the patient's private residence, and one family member or guardian may be present in any Facility other than the patient's private residence. For purposes of this subsection, the phrase "same time" shall mean and include concurrently as well as within a time interval of one hour.

- 2) Considering the health issues presented, no food shall be sold from the facility used for the distribution of medical marihuana.

5. Inspection of Patient Cultivation

Upon the request of a patient who is cultivating medical marihuana, the medical marihuana officer of the community shall confidentially coordinate electrical and plumbing inspectors (and other inspector(s) within whose expertise an inspection is needed) with regard to site of such cultivation for the purpose of determining whether all lights, plumbing, equipment, and all other means used to facilitate the cultivation of marihuana plants is in accordance with applicable code. In carrying out the provisions of this subsection, community officials shall not require the name and address of the patient. Rather, the intent of this subsection is to focus on the premises, and to insure fire, electrical, plumbing, and other safety for the benefit of the resident of the premises and others who may be affected by one or more code violations.

6. Penalty for Violation

Civil Infraction, with penalty of \$1,000 (or the maximum permitted by law if less than \$1,000) for each violation

In the event of two or more violations, increased civil penalty (if permitted by law), and grounds for revocation, following hearing.

7. No Vested Rights

A property owner shall not have vested rights or nonconforming use rights that would serve as a basis for failing to comply with this ordinance or any amendment of this ordinance.

8. Severance Clause

NOTICE
City of Manistee
Planning Commission Worksession
Rescheduled

The City of Manistee Planning Commission Worksession for Thursday, October 21, 2010 has been **rescheduled to** Thursday, October 28, 2010 at 7:00 p.m. in the Council Chambers, City Hall, 70 Maple Street, Manistee, Michigan.

This notice was posted by Denise J. Blakeslee to comply with Sections 4 & 5 of the Michigan Open Meetings Act (P.A. 267 of 1976) at 12:00 noon, Monday, October 11, 2010 on the on the bulletin board at the south entrance to City Hall.

Signed: 
Denise J. Blakeslee



PLANNING AND ZONING
COMMUNITY DEVELOPMENT
231.398.2805
FAX 231.723-1546
www.ci.manistee.mi.us

MEMORANDUM

TO: Planning Commissioners
FROM: Denise Blakeslee 
DATE: October 12, 2010
RE: Rescheduled October Worksession

REMINDER -

The October Worksession has been rescheduled to Thursday, October 28, 2010 at 7:00 p.m. in the Council Chambers.

:djb

Denise Blakeslee

From: Michelle Wright
Sent: Monday, October 18, 2010 2:30 PM
To: Denise Blakeslee; Jon Rose; Julie Beardslee
Subject: FW: METRO Act Application
Attachments: metro act.pdf; METRO Act Permit Application - Merit Network.pdf

According to our City Ordinance Sec. 810 and our City Attorney, a copy of the METRO Act application we received from Merit Network Inc. is to be forward to the Planning Commission and the City Assessor also. A copy is attached.

Michelle Wright

Michelle Wright CMC/CPFA, MiCPT
City Clerk/Deputy Treasurer

CITY OF MANISTEE
70 Maple Street
Manistee MI 49660-0358
231.398-2803
231.723-5410 fax
www.ci.manistee.mi.us

From: George Saylor [mailto:gvs@gwsh.com]
Sent: Wednesday, October 06, 2010 10:10 AM
To: Michelle Wright
Cc: Mitch Deisch
Subject: RE: METRO Act Application

Michelle:

Attached is a copy of the Metropolitan Extension Telecommunications Rights-of-way Oversight Act ("Act"). I have reviewed the proposed Permit documents and found them to be clear and unambiguous. Therefore, the agreements should not be subject to challenge based upon confusion over the language. The Act provides for the payment of fees for the use of the road-right-of-way in some instances, although it does not appear that is included in the documents submitted by Merit Network. I assume that the terms of the documents have been reviewed by City Staff and the City is satisfied with the conditions and terms of the proposed documents, including financial obligations of the Applicant.

I reviewed Ordinance 810.13, which deals with use of funds, and suspect that you were referencing all of Section 810 as Section 810 appears to have been adopted to address the METRO Act. Pursuant to 810.04, in addition to filing a copy of the Application with your office, the City Manager, and my office, you are to forward a copy to the City Assessor and the City Planning Commission.

As to approval of the Permit request, in addition to the Charter Provision you have cited, I think that the applicable provision for this circumstance is Ordinance 810.05. That Ordinance delegates the decision making on the Permit request to the City Manager.

Let me know if there is any request for a review of the specific terms of the documents. At this point, I have reviewed the documents for purposes of clarity and enforceability, but not as to the specific terms and whether additional restrictions could be inserted under the Act.

George

From: Michelle Wright [mailto:mwright@ci.manistee.mi.us]
Sent: Tuesday, October 05, 2010 4:59 PM
To: 'BRUCE C GOCKERMAN'; George Saylor
Subject: METRO Act Application

Good afternoon –

Ed Bradford asked that I forward this information to you for your approval to proceed with it. The METRO Act is covered by our Ordinance 810.13 Telecommunications. Ed thought this didn't need to go to City Council for their approval since it is a routine/operational item. Mitch has the authority under Charter Sec. 7.13 to approve routine or operational items.

Please review these documents and let us know if it is ok to proceed with them. Also let us know if you also consider it to be routine and does not need Council's approval. Thank you☺

Michelle Wright

Michelle Wright CMC/CPFA
City Clerk/Deputy Treasurer

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**METROPOLITAN EXTENSION TELECOMMUNICATIONS RIGHTS-OF-WAY OVERSIGHT
ACT
Act 48 of 2002**

AN ACT to create a telecommunication rights-of-way oversight authority; to provide for fees; to prescribe the powers and duties of municipalities and certain state agencies and officials; to provide for penalties; and to repeal acts and parts of acts.

History: 2002, Act 48, Eff. Nov. 1, 2002.

The People of the State of Michigan enact:

484.3101 Short title; purpose of act.

Sec. 1. (1) This act shall be known and may be cited as the "metropolitan extension telecommunications rights-of-way oversight act".

(2) The purpose of this act is to do all of the following:

(a) Encourage competition in the availability, prices, terms, and other conditions of providing telecommunication services.

(b) Encourage the introduction of new services, the entry of new providers, the development of new technologies, and increase investment in the telecommunication infrastructure in this state.

(c) Improve the opportunities for economic development and the delivery of telecommunication services.

(d) Streamline the process for authorizing access to and use of public rights-of-way by telecommunication providers.

(e) Ensure the reasonable control and management of public rights-of-way by municipalities within this state.

(f) Provide for a common public rights-of-way maintenance fee applicable to telecommunication providers.

(g) Ensure effective review and disposition of disputes under this act.

(h) Allow for a tax credit as the sole means by which providers can recover the costs under this act and to insure that the providers do not pass these costs on to the end-users of this state through rates and charges for telecommunication services.

(i) Promote the public health, safety, welfare, convenience, and prosperity of this state.

(j) Create an authority to coordinate public right-of-way matters with municipalities.

History: 2002, Act 48, Eff. Nov. 1, 2002.

Compiler's note: For transfer of powers and duties of the director of the metropolitan extension telecommunication rights-of-way oversight authority to the director of the department of labor and economic growth, see E.R.O. No. 2003-1, compiled at MCL 445.2011.

484.3102 Definitions.

Sec. 2. As used in this act:

(a) "Authority" means the metropolitan extension telecommunications rights-of-way oversight authority created in section 3.

(b) "Broadband internet access transport services" means the broadband transmission of data between an end-user and the end-user's internet service provider's point of interconnection at a speed of 200 or more kilobits per second to the end-user's premises.

(c) "Commission" means the Michigan public service commission in the department of consumer and industry services.

(d) "Exchange" means that term as defined under section 102 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2102.

(e) "Incumbent local exchange carrier" means that term as defined under section 251(h) of title II of the communications act of 1934, chapter 652, 110 Stat. 61, 47 U.S.C. 251.

(f) "Metropolitan area" means 1 or more municipalities located, in whole or in part, within a county having a population of 10,000 or more or a municipality that enacts an ordinance or resolution electing to be classified as part of a metropolitan area under this act.

(g) "Municipality" means a township, city, or village.

(h) "Person" means an individual, corporation, partnership, association, governmental entity, or any other legal entity.

(i) "Public right-of-way" means the area on, below, or above a public roadway, highway, street, alley, easement, or waterway. Public right-of-way does not include a federal, state, or private right-of-way.

(j) "Telecommunication facilities" or "facilities" means the equipment or personal property, such as copper

and fiber cables, lines, wires, switches, conduits, pipes, and sheaths, which are used to or can generate, receive, transmit, carry, amplify, or provide telecommunication services or signals. Telecommunication facilities or facilities do not include antennas, supporting structures for antennas, equipment shelters or houses, and any ancillary equipment and miscellaneous hardware used to provide federally licensed commercial mobile service as defined in section 332(d) of part I of title III of the communications act of 1934, chapter 652, 48 Stat. 1064, 47 U.S.C. 332 and further defined as commercial mobile radio service in 47 C.F.R. 20.3, and service provided by any wireless, 2-way communications device.

(k) "Telecommunication provider", "provider", and "telecommunication services" mean those terms as defined in section 102 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2102. Telecommunication provider does not include a person or an affiliate of that person when providing a federally licensed commercial mobile radio service as defined in section 332(d) of part I of the communications act of 1934, chapter 652, 48 Stat. 1064, 47 U.S.C. 332 and further defined as commercial mobile radio service in 47 C.F.R. 20.3, or service provided by any wireless, 2-way communication device. For the purposes of this act only, a provider also includes all of the following:

(i) A cable television operator that provides a telecommunication service.

(ii) Except as otherwise provided by this act, a person who owns telecommunication facilities located within a public right-of-way.

(iii) A person providing broadband internet transport access service.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3103 Metropolitan extension telecommunications rights-of-way oversight authority; establishment within department of consumer and industry services; director of authority; appointment; duties; power of authority to assess fees; annual report; rules.

Sec. 3. (1) Pursuant to section 27 of article VII of the state constitution of 1963 and any other applicable law, the metropolitan extension telecommunications rights-of-way oversight authority is established as an autonomous agency within the department of consumer and industry services. The director of the authority shall be appointed by the governor for a 4-year term. The director of the authority shall report directly to the governor. The department of consumer and industry services shall provide the authority all budget, procurement, and management-related functions. The department of consumer and industry services shall also provide suitable offices, facilities, equipment, staff, and supplies for the authority in the city of Lansing.

(2) The director of the authority is responsible for carrying out the powers and duties of the authority under this act.

(3) The authority shall coordinate public right-of-way matters with municipalities, assess the fees required under this act, and have the exclusive power to assess fees on telecommunication providers owning telecommunication facilities in public rights-of-way within a municipality in a metropolitan area to recover the costs of using the rights-of-way by the provider.

(4) The authority shall file an annual report of its activities for the preceding year with the governor and the members of the legislative committees dealing with energy, technology, and telecommunications issues on or before March 1 of each year.

(5) The authority may promulgate rules for the implementation and administration of this act under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3104 Enactment of local laws; limitation; existing rights.

Sec. 4. (1) Except as otherwise provided by this act, after the effective date of this act, a municipality in a metropolitan area shall not enact, maintain, or enforce an ordinance, local law, or other legal requirement applicable to telecommunication providers that is inconsistent with this act or that assesses fees or requires other consideration for access to or use of the public rights-of-way that are in addition to the fees required under this act.

(2) This act shall not affect any existing rights that a provider or municipality may have under a permit issued by a municipality or contract between the municipality and the provider related to the use of the public rights-of-way.

(3) Obtaining a permit or paying the fees required under this act does not give a provider a right to use conduit or utility poles.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3105 Use of public rights-of-way; providers subject to permit and fee requirements; facilities located in public right-of-way at effective date of act; permit application.

Sec. 5. (1) A provider using or seeking to use public rights-of-way in a metropolitan area for its telecommunication facilities shall obtain a permit under section 15 from the municipality and pay all fees required under this act. Authorizations or permits previously obtained from a municipality under section 251 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2251, satisfy the permit requirement of this section.

(2) A provider asserting rights under 1883 PA 129, MCL 484.1 to 484.10, is subject to the permit and fee requirements of this act.

(3) Within 180 days from the effective date of this act, a provider with facilities located in a public right-of-way as of the effective date of this act that has not previously obtained authorization or a permit under section 251 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2251, shall submit an application for a permit to each municipality in which the provider has facilities located in a public right-of-way. A provider submitting an application under this subsection is not required to pay the administrative fee required under section 6(4).

(4) The authority may, for good cause, allow a provider up to an additional 180 days to submit the application required under subsection (3).

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3106 Applications and permits issued after effective date of act; form and process; disagreement on terms; appointment of mediator; determination by commissioner; extension; request for emergency relief; filing permit application with municipality; route maps; maintenance of website by commission.

Sec. 6. (1) For applications and permits issued after the effective date of this act, the commission shall prescribe the form and application process to be used in applying to a municipality for a permit under section 15 and the provisions of a permit issued under section 15. The initial application forms and, unless otherwise agreed to by the parties, permit provisions shall be those approved by the commission as of August 16, 2001.

(2) If the parties cannot agree on the requirement of additional information requested by the municipality or the use of additional or different permit terms, either the municipality or the provider shall notify the commission, which shall appoint a mediator within 7 days from the date of the notice to make recommendations within 30 days from the date of the appointment for a resolution of the dispute. The commission may order that the permit be temporarily granted pending resolution of the dispute. If any of the parties are unwilling to comply with the mediator's recommendations, any party to the dispute may within 30 days of receipt of the recommendation request the commission for a review and determination of a resolution of the dispute. Except as provided in subsection (3), the determination by the commission under this subsection shall be issued within 60 days from the date of the request to the commission. The interested parties to the dispute may agree to an extension for up to 30 days of the 60-day requirement under this subsection.

(3) A request for emergency relief under section 18(1) shall have the same time requirements and procedures as under section 203 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2203.

(4) Except as otherwise provided by this act, a provider shall file an application for a permit and pay a 1-time \$500.00 application fee to each municipality whose boundaries include public rights-of-way for which access or use is sought by the provider.

(5) An application for a permit under this section shall include route maps showing the location of the provider's existing and proposed facilities in the format as required by the authority under subsection (8). Except as otherwise provided by a mandatory protective order issued by the commission, information included in the route maps of a provider's existing and proposed facilities that is a trade secret, proprietary, or confidential information is exempt from the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(6) A municipality shall notify the commission when it grants or denies a permit, including information regarding the date on which the application was filed and the date on which the permit was granted or denied. The commission shall maintain on its website a listing showing the length of time required by each municipality to grant an application during the immediately preceding 3 years.

(7) Within 90 days after the substantial completion of construction of new facilities in a municipality, a provider shall submit route maps showing the location of the telecommunication facilities to both the commission and the affected municipalities.

(8) The commission shall, after input from providers and municipalities, require that the route maps required under this section be in a paper or electronic format as the commission may prescribe.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3107 Inability of provider and municipality to agree; appointment of mediator by commission; determination by commission; issuance; extension.

Sec. 7. If a provider and 1 or more municipalities are unable to agree on arrangements for coordinating and minimizing the disruption of public rights-of-way, ensuring the efficient construction of facilities, restoring the public rights-of-way after construction or other activities by a provider, protecting the public health, safety, and welfare, and resolving disputes arising under this act, the commission shall appoint a mediator within 7 days from the date of the notice to make recommendations within 30 days from the date of the appointment for a resolution of the dispute. If any of the parties are unwilling to comply with the mediator's recommendations, any party to the dispute may within 30 days of receipt of the recommendation request the commission for a review and determination of a resolution of the dispute. The determination by the commission under this section shall be issued within 60 days from the date of the request to the commission. The commission shall issue its determination within 15 days from the date of the request if a municipality demonstrates that the public health, safety, and welfare require a determination before the expiration of the 60 days. The interested parties to the dispute may agree to an extension for up to 30 days of the 60-day requirement under this section.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3108 Maintenance fee.

Sec. 8. (1) Except as otherwise provided by this act, a provider shall pay to the authority an annual maintenance fee as required under this act.

(2) The authority shall determine for each provider the amount of fees required under this section. April 1 to March 31 shall be the annual period covered by each assessment and April 29 the date due for payment. The authority shall prescribe the schedule for the allocation and disbursement of the fees under this act. The authority shall disburse the annual maintenance fee to each municipality as provided under sections 10, 11, and 12 on or before the last day of the month following the month of receipt of the fees by the authority. The authority may authorize the department of treasury to collect and make the allocations and disbursements of fees required under this act. Any interest accrued on the revenue collected under this act shall be used only as provided by this act.

(3) Except as otherwise provided under subsection (6), for the period of November 1, 2002 to March 31, 2003, a provider shall pay an initial annual maintenance fee to the authority on April 29, 2003 of 2 cents per each linear foot of public right-of-way occupied by the provider's facilities within a metropolitan area, prorated for the period specified in this subsection.

(4) Except as otherwise provided under subsection (6), for each year after the initial period provided for under subsection (3), a provider shall pay the authority an annual maintenance fee of 5 cents per each linear foot of public right-of-way occupied by the provider's facilities within a metropolitan area.

(5) The fee required under this section is based on the linear feet occupied by the provider regardless of the quantity or type of the provider's facilities utilizing the public right-of-way or whether the facilities are leased to another provider.

(6) In recognition of the need to provide nondiscriminatory compensation to municipalities for management of their rights-of-way, the fees required under this section shall be the lesser of the amounts prescribed under subsections (3) and (4) or 1 of the following:

(a) For a provider that was an incumbent local exchange carrier in this state on January 1, 2002, the fees within the exchange in which that provider was providing basic local exchange service on January 1, 2002, when restated by the authority on a per access line per year basis, shall not exceed the statewide per access line per year fee of the provider with the highest number of access lines in this state. The authority shall annually determine the statewide per access line per year fee by dividing the amount of the total annual fees the provider is required to pay under subsections (3) and (4) by the provider's total number of access lines in this state.

(b) For all other providers in an exchange, the fee per linear foot for the provider's facilities located in the public rights-of-way in that exchange shall be the same as that of the incumbent local exchange carrier.

(7) If the provider with the highest number of access lines in this state is unable to provide the exact number of linear feet for a determination under subsection (6), the provider shall no later than February 1, 2003 make a good faith estimate, in consultation with the staff of the authority, of the number of linear feet of rights-of-way in which facilities owned by the provider are located in a metropolitan area and pay an annual maintenance fee to the authority based upon the estimate.

(8) If an estimate of the linear feet is made under subsection (7), the statewide per access line per year cost shall be determined by the authority based on that provider's good faith estimate. Upon the true up of the

estimated linear feet under subsection (9), the authority shall adjust the fees of all providers affected by subsection (6).

(9) Within 360 days of the effective date of this act, a provider making an estimate under subsection (8) shall true up the estimated amount of linear feet of the provider's facilities in rights-of-way in a metropolitan area to the actual amount of linear feet of rights-of-way in a metropolitan area owned by the provider. If the actual amount of linear feet of rights-of-way in which facilities owned by the provider are located exceeds the estimated amount, the provider shall pay the authority the difference within 30 days of the true up. If the actual amount of linear feet of rights-of-way in which facilities owned by the provider are located is less than the estimated amount, the provider shall receive a corresponding credit from the authority against the annual maintenance fee due for payment in the succeeding year.

(10) The authority may prescribe the forms, standards, methodology, and procedures for assessing fees under this act. Each provider and municipality shall provide reasonably requested information regarding public rights-of-way that is required to assist the authority in computing and issuing the assessments under this section.

(11) Notwithstanding any other provision of this act, a provider possessing a franchise or operating with the consent of a municipality to provide and that is providing cable services within a metropolitan area is subject to an annual maintenance fee of 1 cent per linear foot of public right-of-way occupied by the provider's facilities within the metropolitan area. An affiliate of such a provider shall not pay any additional fees to occupy or use the same facilities in public rights-of-way as initially constructed for and used by a cable provider. The fee required under this subsection is in lieu of any other maintenance fee or other fee except for fees paid by the provider under a cable franchise or consent agreement. A cable franchise or consent agreement from a municipality that allows the municipality to seek right-of-way related information comparable to that required by a permit under this act and that provides insurance for right-of-way related activities shall satisfy any requirement for the holder of the cable franchise or consent agreement or its affiliates to obtain a permit to provide information services or telecommunications services in the municipality.

(12) The cable provider may satisfy the fee requirement under subsection (11) by certifying to the authority that the provider's aggregate investment in this state, since January 1, 1996, in facilities capable of providing broadband internet transport access service exceeds the aggregate amount of the maintenance fees assessed under subsection (11).

(13) The fees collected under this act shall be used only as provided by this act and shall be subject to an audit by the state auditor general.

(14) A provider may apply to the commission for a determination of the maximum amount of credit available under section 13b(5) of 1905 PA 282, MCL 207.13b. Each application shall include sufficient documentation to permit the commission to accurately determine the allowable credit. Except as otherwise provided under subsection (15), the commission shall issue its determination within 45 days from the date of the application. Upon certification by the commission of the documentation provided in subdivisions (a) and (b), a provider shall qualify for a credit equal to the costs paid under this act, less the amount of any credit determined under section 13b(1) of 1905 PA 282, MCL 207.13b, and shall not be subject to subsection (16) if the provider files the following documentation under this subsection:

(a) Verification of the costs paid by the provider under this act.

(b) Verification that the provider's rates and charges for basic local exchange service, including revenues from intrastate subscriber line or end-user line charges, do not exceed the commission's approved rates and charges for those services.

(15) If the commission finds that it cannot make a determination based on the documentation required under subsection (14), it may require the provider to file its application under section 203 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2203.

(16) The maximum credit allowed under subsection (14) or (15) shall be the lesser of the following:

(a) The costs paid under this act, less the amount of any credit determined under section 13b(1) of 1905 PA 282, MCL 207.13b.

(b) The amount that the costs paid under this act, together with the provider's total service long run incremental cost of basic local exchange service, exceeds the provider's rates for basic local exchange service plus any additional charges of the provider used to recover its total service long run incremental cost for basic local exchange service. "Total service long run incremental cost" means that term as defined in section 102 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2102.

(17) The tax credit allowed under subsections (14) and (15) shall be the sole method of recovery for the costs required under this act. A provider shall not recover the costs required under this act through rates and charges to the end-users for telecommunication services.

(18) An educational institution is not required to pay the fees and charges or fulfill the mapping requirements required under this act for facilities that are constructed and used as provided under applicable provisions of section 307 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2307. To the extent that an educational institution provides services beyond that allowed by section 307 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2307, the educational institution shall obtain a permit, pay the fees and charges, and fulfill the mapping requirement required under this act for each linear foot of public right-of-way used in providing telecommunication services to residential or commercial customers. An educational institution shall notify the commission if it provides telecommunication services beyond that allowed by section 307 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2307, to a residential or commercial customer for compensation.

(19) An electric or gas utility, or an affiliate of a utility, or an electric transmission provider is not required to obtain a permit, pay the fees and charges, or fulfill the mapping requirements required under this act for facilities located in the public rights-of-way that are used solely for electric or gas utility services including internal utility communications and customer services such as billing or load management. The electric or gas utility, or an affiliate of a utility, or an electric transmission provider shall only obtain a permit, pay the fees and charges, and fulfill the mapping requirements required under this act for each linear foot of public right-of-way containing facilities leased or otherwise provided to an unaffiliated telecommunication provider or used in providing telecommunication services to a person other than the utility, or its affiliate, for compensation. An electric or gas utility, or an affiliate of a utility, or an electric transmission provider shall notify the commission if the electric or gas utility, or an affiliate of a utility, or an electric transmission provider provides or leases telecommunication services to a person other than the utility or its affiliate for compensation. For the purposes of this subsection, electric and gas utility services include billing and metering services performed for an alternative electric supplier, an alternative gas supplier, electric utility, electric transmission provider, natural gas utility, or a water utility.

(20) A state, county, municipality, municipally owned utility, or an affiliate is not required to obtain a permit, pay the fees and charges, or fulfill the mapping requirements required under this act for facilities located in the public rights-of-way that are used solely for state, county, municipality, or governmental entity, or utility services including internal state, county, municipality, governmental entity, or utility communications and customer services such as billing or load management. The state, county, municipality, municipally owned utility, or an affiliate shall only obtain a permit, pay the fees and charges, and fulfill the mapping requirements required under this act for each linear foot of public right-of-way containing facilities leased or otherwise provided to an unaffiliated telecommunication provider or used in providing telecommunication services to a person other than the state, county, another governmental entity, municipality, municipally owned utility, or its affiliate for compensation. A state, county, municipality, municipally owned utility, or an affiliate shall notify the commission if the state, county, municipality, municipally owned utility, or an affiliate provides or leases telecommunication services to a person other than the state, county, another governmental entity, municipality, municipally owned utility, or its affiliate for compensation. For the purposes of this subsection, utility services include billing and metering services performed for an alternative electric supplier, an alternative gas supplier, electric utility, electric transmission provider, natural gas utility, or a water utility.

(21) The authority may grant to a provider a waiver of the fee requirement of this section for telecommunication facilities located in underserved areas as identified by the authority if 2/3 of the affected municipalities approve the granting of a waiver. If a waiver is granted under this subsection, the amount of the waived fees shall be deducted from the fee revenue the affected municipalities would otherwise be entitled under sections 11 and 12. A waiver granted under this subsection shall not be for more than 10 years. As used in this subsection, "underserved area" means that term as defined under section 7 of the Michigan broadband development authority act.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3109 Fee discount.

Sec. 9. (1) If 2 or more providers implement a shared use arrangement and meet the requirements of this section, each provider participating in the arrangement is entitled to a discount of the fees required under section 8 as provided under this section.

(2) To qualify for the shared use discount, each participating provider shall do all of the following:

(a) To the extent permitted by the safety provisions of the applicable electrical code, occupy and use the same poles, trenches, conduits, ducts, or other common spaces or physical facilities jointly with another provider.

(b) Coordinate the construction or installation of its own facilities with the construction schedules of

another provider so that any pavement cuts, excavation, construction, or other activities undertaken to construct or install the facilities occur contemporaneously and do not impair the physical condition, or interrupt the normal uses, of the public rights-of-way on more than 1 occasion.

(c) Enter the shared use arrangement after the effective date of this act.

(3) This section does not apply to the utilization or attachment to poles, trenches, conduits, ducts, or other common facilities that were placed in the public rights-of-way before the effective date of this act.

(4) Two or more providers that qualify for a shared use discount are entitled to a 40% discount of the fees imposed by section 8 for each linear foot of public right-of-way in which the shared use occurs.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3110 Fee-sharing payments.

Sec. 10. (1) Except as reduced by the amount provided for under subsection (2), the authority shall allocate the annual maintenance fees collected under this act to fund the fee-sharing mechanism under section 11.

(2) To the extent that fees exceed \$30,000,000.00 in any year and are from fees for linear feet of rights-of-way in which telecommunication facilities are constructed by a provider after the effective date of this act, the authority shall allocate that amount to fund the fee-sharing mechanism under section 12.

(3) To be eligible to receive fee-sharing payments under this act, a municipality shall comply with this act. For the purpose of the distribution under sections 11 and 12, a municipality is considered to be in compliance with this act unless the authority finds to the contrary in a proceeding against the municipality affording due process initiated by a provider, the commission, or the attorney general. If a municipality is found not to be in compliance, fee-sharing payments shall be held by the authority in escrow until the municipality returns to compliance. A municipality is not ineligible to receive fee-sharing payments for any matter found to be a good faith dispute or matters of first impression under this act or other applicable law.

(4) The amount received under sections 11 and 12 shall be used by the municipality solely for rights-of-way related purposes. Rights-of-way purposes does not include constructing or utilizing telecommunication facilities to serve residential or commercial customers.

(5) A municipality receiving funds under sections 11 and 12 with a population of less than 10,000 may file and a municipality receiving funds under sections 11 and 12 with a population of 10,000 or more shall file an annual report with the authority on the use and disposition of the funds. The authority shall prescribe the form of the report to be filed under this subsection, which report shall be in a simplified format.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3111 Fee sharing; allocation of fund under section 10(1); excluded municipalities.

Sec. 11. (1) The authority shall allocate the funding provided for fee sharing under section 10(1) as follows:

(a) 75% to be disbursed to cities and villages in a metropolitan area on the basis of the distribution to each city or village under section 13 of 1951 PA 51, MCL 247.663, for the most recent year as a proportion of the total distribution to all cities and villages located in metropolitan areas under section 13 of 1951 PA 51, MCL 247.663, for the most recent year.

(b) 25% to be disbursed to townships in a metropolitan area on the basis of each township's proportionate share of the total linear feet of public rights-of-way occupied by providers within all townships located in metropolitan areas.

(2) Except as otherwise provided under sections 13 and 14, municipalities that are ineligible under section 13 or 14 shall be excluded from the computation, allocation, and distribution of funding under this section.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3112 Fee sharing; allocation of fund under section 10(2); weighted linear feet; excluded municipalities.

Sec. 12. (1) The authority shall allocate the funding provided for fee sharing under section 10(2) as follows:

(a) The amount available under this section multiplied by the percentage of weighted linear feet attributable to cities and villages, as compared to the total weighted linear feet attributable to cities, villages, and townships, shall be disbursed to cities and villages in a metropolitan area on the basis of the distribution to each city or village under section 13 of 1951 PA 51, MCL 247.663, for the most recent year as a proportion of the total distribution to all cities and villages located in metropolitan areas under section 13 of 1951 PA 51, MCL 247.663, for the most recent year.

(b) The amount available under this section multiplied by the percentage of weighted linear feet attributable to townships, as compared to the total weighted linear feet attributable to cities, villages, and

townships, shall be disbursed to townships on the basis of each township's proportionate share of the total unweighted linear feet of public rights-of-way in or on which providers' facilities are located within all townships located in metropolitan areas.

(2) The following shall be used under this section in determining the weighted linear feet in which telecommunications facilities are first placed by any telecommunications provider after the effective date of this act:

(a) All underground linear feet shall receive a weight of 3.0.

(b) All linear feet in a city, village, or township with a population in excess of 5,000 and not covered under subdivision (a) shall receive a weight of 2.0.

(c) All other linear feet shall receive a weight of 1.0.

(3) Except as otherwise provided under sections 13 and 14, municipalities that are ineligible under section 13 or 14 shall be excluded from the computation, allocation, and distribution of funding under this section.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3113 Modification of fees by municipality.

Sec. 13. (1) A municipality is not eligible to receive funds under sections 11 and 12 unless by December 31, 2007 the municipality has modified to the extent necessary any fees charged to providers after the effective date of this act relating to access to and usage of the public rights-of-way to an amount not exceeding the amounts of fees and charges required under this act.

(2) To the extent a telecommunications provider pays fees to a municipality that have not been modified as required by this section, both of the following apply:

(a) The provider may deduct the fees paid from the fee required to be paid under section 8 for those rights-of-way.

(b) The amounts received shall be deducted from the amounts the municipality is eligible to receive under sections 11 and 12.

(3) The authority may allow a municipality in violation of this section to become eligible to receive funds under sections 11 and 12 if the authority determines that the violation occurred despite good faith efforts and the municipality rebates to the authority any fees received in excess of those required under section 8, including any interest as determined by the authority.

(4) A municipality is considered to have modified the fees under subsection (1) if it has adopted a resolution or ordinance, effective no later than January 1, 2008, approving the modification so that providers with telecommunication facilities in public rights-of-way within the municipality's boundaries pay only those fees required under section 8. The municipality shall provide each provider affected by the fee a copy of the resolution or ordinance passed under this subsection.

(5) Except as otherwise provided by a municipality, if section 8 is found to be invalid or unconstitutional, a modification of fees under this section is void from the date the modification was made.

(6) To be eligible to receive fee-sharing payments under this act, a municipality shall not hold a cable television operator in default or seek any remedy for failure to satisfy an obligation, if any, to pay after the effective date of this act a franchise fee or other similar fee on that portion of gross revenues from charges the cable operator received for cable modem services provided through broadband internet transport access services.

(7) If a municipality adopts a resolution as required under this section but adopts it after the distribution of funds under sections 11 and 12 for 2007, the municipality shall be eligible to receive funds for 2007 from funds available after the 2007 distribution date.

History: 2002, Act 48, Eff. Nov. 1, 2002;—Am. 2008, Act 130, Imd. Eff. May 9, 2008.

484.3114 Telecommunication or cable modem service through broadband internet access transport service; requirements; exceptions; violation; complaint.

Sec. 14. (1) Except as otherwise provided by subsection (2), a county, municipality, or an affiliate, shall comply with all of the following requirements:

(a) Before the passage of any ordinance or resolution authorizing a county or municipality to either construct telecommunication facilities or provide a telecommunication or cable modem service provided through a broadband internet access transport service, a county or municipality shall conduct at least 1 public hearing. A notice of the public hearing shall be provided as required by law.

(b) Not less than 30 days before the hearing required under subdivision (a), the county or municipality shall prepare reasonable projections of at least a 3-year cost-benefit analysis. This analysis shall identify and disclose the total projected direct costs of and the revenues to be derived from constructing the telecommunication facilities and providing the telecommunication or cable modem service through a

broadband internet access transport service. The costs shall be determined by using accounting standards developed under the uniform budgeting and accounting act, 1968 PA 2, MCL 141.421 to 141.440a.

(c) A county or municipality shall prepare and maintain accounting records in accordance with accounting standards developed under the uniform budgeting and accounting act, 1968 PA 2, MCL 141.421 to 141.440a. The accounting records required under this subdivision are subject to the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(d) Charges for telecommunication service and cable modem services provided through a broadband internet access transport service shall include all of the following:

(i) All capital costs attributable to the provision of the service.

(ii) All costs attributable to the provision of the service that would be eliminated if the service was discontinued.

(iii) The proportionate share of costs identified with the provision of 2 or more county or municipal services including telecommunication services.

(e) A county or municipality that provides a telecommunication service or cable modem service provided through a broadband internet access transport service shall not adopt an ordinance or a policy that unduly discriminates against another person providing the same service. Subject to other requirements of this section, this subsection shall not be construed as precluding a county or municipality from establishing rates different from those of another person providing the same service.

(f) In providing a telecommunication or cable modem service provided through a broadband internet access transport service, a municipality shall not employ terms more favorable or less burdensome than those imposed by the municipality upon other providers of the same service within its jurisdiction concerning access to public rights-of-ways.

(g) A municipality shall not impose or enforce against a provider any local regulation with respect to public rights-of-way that is not also applicable to the municipality in its provision of a telecommunication or cable modem service provided through a broadband internet access transport service.

(h) In providing a telecommunication or a cable modem service provided through a broadband internet access transport service, a municipality shall not employ terms more favorable or less burdensome than those imposed by the municipality upon other providers of the same service within its jurisdiction concerning access to and rates for pole attachments.

(2) Subsection (1) does not apply to either of the following:

(a) Telecommunication facilities constructed and operated by a county, municipality, or an affiliate, to provide telecommunication service or a cable modem service provided through a broadband internet access transport service that is not provided to any residential or commercial premises.

(b) Telecommunication facilities that are owned or operated by a county, municipality, or an affiliate for compensation, and that are located within the territory served by the county, municipality or its affiliate that provided a telecommunications service or a cable modem service provided through broadband internet access transport service before December 31, 2001 or that allowed any third party to use the county's or municipality's telecommunication facilities for compensation before December 31, 2001, to provide such a service.

(3) If a complaint is filed under section 18 alleging a violation of this section, the commission shall allow a county or municipality to take reasonable steps to correct a violation found by the commission before the commission imposes any penalties.

(4) The commission, in reviewing a complaint under subsection (3), shall consider, in determining whether charges imposed by a county or municipality are in compliance with subsection (1), the applicable federal, state, county, and local taxes and fees paid by the complainant or providers serving that county or municipality.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3115 Provider access to and use of public rights-of-way.

Sec. 15. (1) Except as otherwise provided in this section, a municipality shall, upon application, grant to providers a permit for access to and the ongoing use of all public rights-of-way located within its municipal boundaries. A municipality shall act reasonably and promptly on all applications filed for a permit involving an easement or public place.

(2) This section shall not limit a municipality's right to review and approve a provider's access to and ongoing use of a public right-of-way or limit the municipality's authority to ensure and protect the health, safety, and welfare of the public.

(3) A municipality shall approve or deny access under this section within 45 days from the date a provider files an application for a permit for access to a public right-of-way. A provider's right to access and use of a

public right-of-way shall not be unreasonably denied by a municipality. A municipality may require as a condition of the permit that a bond be posted by the provider, which shall not exceed the reasonable cost to ensure that the public right-of-way is returned to its original condition during and after the provider's access and use.

(4) Any conditions of a permit granted under this section shall be limited to the provider's access and usage of any public right-of-way.

(5) A provider undertaking an excavation or constructing or installing facilities within a public right-of-way or temporarily obstructing a public right-of-way, as authorized by the permit, shall promptly repair all damage done to the street surface and all installations on, over, below, or within the public right-of-way and shall promptly restore the public right-of-way to its preexisting condition. The authority shall also have the jurisdiction to require the repair and restoration of any right-of-way, including state right-of-way, which has not been repaired or restored after installation.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3116 Cable franchise.

Sec. 16. This act does not affect the requirement of a cable operator to obtain a cable franchise from a municipality.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3117 Review of decision or review.

Sec. 17. A decision or assessment of the authority is subject to a de novo review by the commission upon the request of an interested person. A decision or order of the commission issued under this act is subject to review as provided under section 26 of 1909 PA 300, MCL 462.26.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3118 Complaint; proceeding; remedies and penalties.

Sec. 18. (1) Except as otherwise provided by this act, the time requirements and procedures governing a complaint proceeding under this act shall be the same as those under section 203 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2203.

(2) If after notice and hearing the commission finds that a person has violated this act, the commission shall order remedies and penalties to protect and make whole persons who have suffered an economic loss as a result of the violation, including, but not limited to, 1 or more of the following:

(a) For failure to pay an undisputed fee assessed by the authority under this act, order the provider to pay a fine of not more than 1% of the amount of the unpaid assessment for each day that the assessment remains unpaid. For each subsequent offense under this subdivision, a fine of not more than 2% for each day the assessment remains unpaid.

(b) For a violation under section 14, order the suspension or termination of all or a portion of the fee-sharing payments to the municipality provided for under section 11 or 12.

(c) Order the person who violated this act to pay a fine of not less than \$200.00 or more than \$20,000.00 per day that the person is in violation. For each subsequent offense, a fine of not less than \$500.00 or more than \$40,000.00 per day that the person is in violation of this act.

(d) If the person is a provider, order that the provider's permit allowing access to and use of a municipality's public right-of-way be conditioned or amended.

(e) Issue cease and desist orders.

(f) Order the person who violates this act to pay attorney fees and actual costs of a person that is not a provider of telecommunication services to 250,000 or more end-users.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3119 Provisions found invalid or unconstitutional; effect.

Sec. 19. (1) If the application of any provision of section 8 to a certain person is found to be invalid or unconstitutional, that provision and sections 3 and 15 shall not apply to any person.

(2) If section 15 does not apply under subsection (1), the permit process for access to and use of public rights-of-way shall be as follows:

(a) Except as provided in subdivisions (b) and (c), a local unit of government shall grant a permit for access to and the ongoing use of all rights-of-way, easements, and public places under its control and jurisdiction to providers of telecommunication services.

(b) This section shall not limit a local unit of government's right to review and approve a provider's access to and ongoing use of a right-of-way, easement, or public place or limit the unit's authority to ensure and

protect the health, safety, and welfare of the public.

(c) A local unit of government shall approve or deny access under this section within 90 days from the date a provider files an application for a permit for access to a right-of-way, easement, or public place. A provider's right to access and use of a right-of-way, easement, or public place shall not be unreasonably denied by a local unit of government. A local unit of government may require as a condition of the permit that a bond be posted by the provider, which shall not exceed the reasonable cost, to ensure that the right-of-way, easement, or public place is returned to its original condition during and after the provider's access and use.

(d) Any conditions of a permit granted under this subsection shall be limited to the provider's access and usage of any right-of-way, easement, or public place.

(e) Any fees or assessments made under this subsection shall be on a nondiscriminatory basis and shall not exceed the fixed and variable costs to the local unit of government in granting a permit and maintaining the rights-of-way, easements, or public places used by a provider.

(f) A provider using the highways, streets, alleys, or other public places shall obtain a permit as required under this subsection.

(3) If section 15 does not apply under subsection (1), it is the intent of the legislature in enacting subsection (2) to return to the status quo prior to the effective date of this act for the granting of permits for access to and the use of all rights-of-way. Subsection (2) shall have the same construction and interpretation as sections 251 to 254 of the Michigan telecommunications act, 1991 PA 179, MCL 484.2251 to 484.2254, had prior to the repeal of these sections by this act.

(4) Except as provided under subsection (1), if any other provision or the application of any provision of this act to a certain person is found to be invalid or unconstitutional, the remaining provisions or application of a provision to other persons shall not be affected and will remain in full force and effect.

History: 2002, Act 48, Eff. Nov. 1, 2002.

484.3120 Supreme court opinion; request by legislature or governor.

Sec. 20. Pursuant to section 8 of article III of the state constitution of 1963, either house of the legislature or the governor may request the opinion of the supreme court on important questions of law as to the constitutionality of this act.

History: 2002, Act 48, Eff. Nov. 1, 2002.



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Suite 200
Ann Arbor, MI 48104-6794

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Fax: 734-527-5790
www.merit.edu

September 22, 2010

City of Manistee
PO Box 358
70 Maple St.
Manistee, MI 49660

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SEP 30 2010
MANISTEE

Greetings!

Merit Network, Inc. is in the process of building fiber-optic infrastructure throughout the state of Michigan, and the path we hope to take runs through your municipality. We hope that you will grant us access to your municipality's rights-of-way by approving our application for a METRO Act Permit.

We have enclosed:

- Information about the METRO Permit process
- A check for the \$500 application fee
- Additional information about Merit Network and our Broadband Project, REACH-3MC

Merit Network, Inc. is a non-profit organization committed to providing Internet access – including Internet2 access – to the educational, governmental, health care, and research needs of the state of Michigan. As part of this effort, Merit has a sincere commitment to serving the educational, government, and not-for-profit communities via our statewide network.

I am on the road much of the time, so I'd like to invite you to contact our Grant Administrator, Ryan Kunzelman at kunzelr@merit.edu or 734-527-5739 if you need any assistance or additional information. For more information about Merit, please refer to the enclosed materials or visit our web site at www.merit.edu. Thank you for your support of Merit Network, Inc.

Sincerely,

Robert Stovall
VP, Network Operations and Engineering
Merit Network, Inc.



The METRO Act: Your Responsibilities

The METRO Act streamlines the process for authorizing access to and use of public rights-of-way. This ensures that telecommunications providers can improve opportunities for economic development in Michigan by encouraging competition and delivering new technologies.

Each municipality has the right to approve or deny a provider access to their public rights-of-way, but your municipality is required by law to make this decision within 45 days.

1

Merit Sends Permit Packet to You

Merit Network begins the permitting process by sending you an application for access to your municipality's rights-of-way. This packet contains:

- Three (3) copies of the Application Form
- Two (2) copies of the Bilateral Agreement



2

Approval

To approve our application, please sign and return one copy of the Bilateral Agreement using the envelope provided. It is not necessary to return the Application Forms; those are for your records.

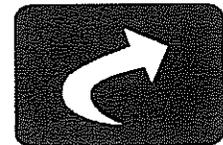


3

Send Letter

Next, send a letter to the Michigan Public Service Commission, indicating:

- who the permit is with (Merit Network);
- the date of application (the date you received the packet);
- date of approval/denial, and;
- a contact person and phone number for your municipality.



This letter should be sent to the attention of:

Ms. Robin Ancona, Director
 Telecommunications Division
 Michigan Public Service Commission
 6545 Mercantile Way
 P.O. Box 30221
 Lansing, MI 48909

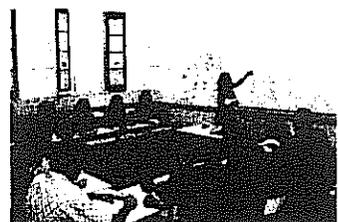


About Merit and REACH-3MC

The REACH Michigan Middle Mile Collaborative (REACH-3MC) project proposes to foster economic development and growth in underserved areas of Michigan that lack widely available and affordable broadband services.

REACH-3MC will add over 2,000 miles of advanced fiber-optic technology in underserved counties in Michigan to serve institutions, businesses, and households, with fiber services and speeds from 1.5 megabits-per-second to 10 gigabits-per-second. The project will extend Merit's 1600 miles of existing network and intends to directly connect anchor institutions, including libraries, universities, community colleges, and community health care centers. Merit Network will collaborate with its partners to offer broadband Internet, voice, and video services to households and businesses.

Merit Network, Inc., a not-for-profit broadband service provider, has built and run networks for anchor institutions throughout the state for over 40 years, supporting the education and not-for-profit community.



RECEIVED
SEP 30 2010
CITY OF MANISTEE
CLERK OF COURSE

**METRO Act Permit Application Form
Revised 12/06/02**

**City of Manistee
Name of Local Unit of Government**

**APPLICATION FOR
ACCESS TO AND ONGOING USE OF PUBLIC WAYS BY
TELECOMMUNICATIONS PROVIDERS
UNDER
METROPOLITAN EXTENSION TELECOMMUNICATIONS
RIGHTS-OF-WAY OVERSIGHT ACT
2002 PA 48
MCLA SECTIONS 484.3101 TO 484.3120**

BY

**Merit Network, Inc.
("APPLICANT")**

Unfamiliar with METRO Act?--Assistance: Municipalities unfamiliar with Michigan Metropolitan Extension Telecommunications Rights-of-Way Oversight Act ("METRO Act") permits for telecommunications providers should seek assistance, such as by contacting the Telecommunications Division of the Michigan Public Service Commission at 517-241-6200 or via its web site at http://www.michigan.gov/mpsc/0,1607,7-159-16372_22707---,00.html.

45 Days to Act—Fines for Failure to Act: The METRO Act states that "A municipality shall approve or deny access under this section within 45 days from the date a provider files an application for a permit for access to a public right-of-way." MCLA 484.3115(3). The Michigan Public Service Commission can impose fines of up to \$40,000 per day for violations of the METRO Act. It has imposed fines under the Michigan Telecommunications Act where it found providers or municipalities violated the statute.

Where to File: Applicants should file copies as follows [municipalities should adapt as appropriate—unless otherwise specified service should be as follows]:

- Three (3) copies (one of which shall be marked and designated as the master copy) with the Clerk at 70 Maple St., PO Box 358, Manistee, MI 49660.

City of Manistee
Name of local unit of government

APPLICATION FOR
ACCESS TO AND ONGOING USE OF PUBLIC WAYS BY
TELECOMMUNICATIONS PROVIDERS

By
Merit Network, Inc
("APPLICANT")

This is an application pursuant to Sections 5 and 6 of the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act, 2002 PA 48 (the "METRO Act") for access to and ongoing usage of the public right-of-way, including public roadways, highways, streets, alleys, easements, and waterways ("Public Ways") in the Municipality for a telecommunications system. The METRO Act states that "A municipality shall approve or deny access under this section within 45 days from the date a provider files an application for a permit for access to a public right-of-way." MCLA 484.3115(3).

This application must be accompanied by a one-time application fee of \$500, unless the applicant is exempt from this requirement under Section 5(3) of the METRO Act, MCLA 484.3105(3).

1 GENERAL INFORMATION:

- 1.1 Date: July, 2010
- 1.2 Applicant's legal name: Merit Network, Inc
Mailing Address: 1000 Oakbrook Drive, Suite 200
Ann Arbor, MI 48104-6794
Telephone Number: 734-527-5700
Fax Number: 734-527-5790
Corporate website: http://www.merit.edu/

Name and title of Applicant's local manager (and if different) contact person regarding this application:

Robert (Bob) Stovall, Vice President, Network Operation & Engineering

Mailing Address: Same as above

Telephone Number: 734-476-2288

Fax Number: Same as above

E-mail Address: bes@merit.edu

1.3 Type of Entity: (Check one of the following)

- Corporation
- General Partnership
- Limited Partnership
- Limited Liability Company
- Individual
- Other, please describe: private non-profit 501(c)(3) corporation

1.4 Assumed name for doing business, if any: Merit Network, Inc.

1.5 Description of Entity:

- 1.5.1 Jurisdiction of incorporation/formation; Michigan
- 1.5.2 Date of incorporation/formation; October 17, 1966
- 1.5.3 If a subsidiary, name of ultimate parent company; N/A
- 1.5.4 Chairperson, President/CEO, Secretary and Treasurer (and equivalent officials for non-corporate entities).
Chairman, David Gift, Michigan State University
President: Donald J. Welch
Secretary: Brenda Helminen, Michigan Technology University
Treasurer: James Gilchrist, Western Michigan University

1.6 Attach copies of Applicant's most recent annual report (with state ID number) filed with the Michigan Department of Consumer and Industry Services and certificate of good standing with the State of Michigan. For entities in existence for less than one year and for non-corporate entities, provide equivalent information. **State ID: 38-2210903**

Is Applicant aware of any present or potential conflicts of interest between Applicant and Municipality? If yes, describe: **No**

1.7 In the past three (3) years, has Applicant had a permit to install telecommunications facilities in the public right of way revoked by any Michigan municipality?

Circle: Yes No

If "yes," please describe the circumstances.

1.8 In the past three (3) years, has an adverse finding been made or an adverse final action been taken by any Michigan court or administrative body against Applicant under any law or regulation related to the following:

1.8.1 A felony; or

Circle: Yes No

If "yes," please attach a full description of the parties and matters involved, including an identification of the court or administrative body and any proceedings (by dates and file numbers, if applicable), and the disposition of such proceedings.

1.9 If Applicant has been granted and currently holds a license to provide basic local exchange service, no financial information needs to be supplied.] If publicly held, provide Applicant's most recent financial statements. If financial statements of a parent company of Applicant (or other affiliate of Applicant) are provided in lieu of those of Applicant, please explain. **Not Applicable, Merit Network is a non-profit corporation governed by Michigan's public universities.**

1.9.1 If privately held, and if Municipality requests the information within 10 days of the date of this Application, the Applicant and the Municipality should make arrangements for the Municipality to review the financial statements.

If no financial statements are provided, please explain and provide particulars.

Merit Network, Inc. is privately held. Latest financial statement is attached. See Exhibit A.

2 DESCRIPTION OF PROJECT:

2.1 Provide a copy of authorizations, if applicable, Applicant holds to provide telecommunications services in Municipality. If no authorizations are applicable, please explain.

No authorizations are applicable. Merit Network is only offering data services for schools, government organizations, health care organizations, businesses, and households.

2.2 Describe in plain English how Municipality should describe to the public the telecommunications services to be provided by Applicant and the telecommunications facilities to be installed by Applicant in the Public Ways.

A fiber optic network working to improve broadband in the State of Michigan.

2.3 Attach route maps showing the location (including whether overhead or underground) of Applicant's existing and proposed facilities in the public right-of-way. To the extent known, please identify the side of the street on which the facilities will be located. (If construction approval is sought at this time, provide engineering drawings, if available, showing location and depth, if applicable, of facilities to be installed in the public right-of-way).

See Exhibit B

See Exhibit B

2.4 Please provide an anticipated or actual construction schedule.

The project is scheduled for completion by December 2012

2.5 Please list all organizations and entities which will have any ownership interest in the facilities proposed to be installed in the Public Ways.

Merit Network, Inc., LYNX Network Group, LLC, KEPS Technologies, Inc. (ACD.net)

2.6 Who will be responsible for maintaining the facilities Applicant places in the Public Ways and how are they to be promptly contacted? If Applicant's facilities are to be installed on or in existing facilities in the Public Ways of existing public utilities or incumbent telecommunications providers, describe the facilities to be used, and provide verification of their consent to such usage by Applicant.

Merit Network, Inc.

See Exhibit C for Emergency call out list.

Construction will primarily aerial on existing power poles. Merit Network, Inc. will provide copies of joint use agreements upon request.

3 TELECOMMUNICATION PROVIDER ADMINISTRATIVE MATTERS:

Please provide the following or attach an appropriate exhibit.

3.1 Address of Applicant's nearest local office;

Merit Network, Inc.

1000 Oakbrook

Suite 200

Ann Arbor, MI 48104-6794

3.2 Location of all records and engineering drawings, if not at local office;
Local office will have a copy of all records and engineering drawings.

3.3 Names, titles, addresses, e-mail addresses and telephone numbers of contact person(s) for Applicant's engineer or engineers and their responsibilities for the telecommunications system;
see local contact information above

3.4.1 Worker's compensation;
See Exhibit E, a letter from the University of Michigan Risk Management Services office regarding Merit's converge under the University of Michigan.

3.4.2 Commercial general liability, including at least:

3.4.2.1 Combined overall limits;

3.4.2.2 Combined single limit for each occurrence of bodily injury;

3.4.2.3 Personal injury;

3.4.2.4 Property damage;

3.4.2.5 Blanket contractual liability for written contracts, products, and completed operations;

3.4.2.6 Independent contractor liability;

3.4.2.7 For any non-aerial installations, coverage for property damage from perils of explosives, collapse, or damage to underground utilities (known as XCU coverage);

3.4.2.8 Environmental contamination;

3.4.3 Automobile liability covering all owned, hired, and non-owned vehicles used by Applicant, its employee, or agents.

Merit Network is covered by the University of Michigan's policy for automobile coverage. No non-UM vehicles will be used.

3.5 Names of all anticipated contractors and subcontractors involved in the construction, maintenance and operation of Applicant's facilities in the Public Ways.

Contractors to be determined.

4 CERTIFICATION:

All the statements made in the application and attached exhibits are true and correct to the best of my knowledge and belief.

Merit Network, Inc.

Signature: RT Stovall

Print: Robert Stovall

Title: Vice President,
Network Engineering & Operations

Date: AUG 27 2010

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Merit Network, Inc.

Financial Report
June 30, 2009

Merit Network, Inc.

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Plante & Moran, PLLC
Suite 300
750 Trade Centre Way
Portage, MI 49002
Tel: 269.587.4500
Fax: 269.587.4501
plantemoran.com

Independent Auditor's Report

To the Board of Directors
Merit Network, Inc.

We have audited the accompanying balance sheet of Merit Network, Inc. (the "Organization") as of June 30, 2009 and 2008 and the related statements of activities and changes in net assets, functional expenses, and cash flows for the years then ended. These financial statements are the responsibility of the Organization's management. Our responsibility is to express an opinion on these financial statements based on our audits.

We conducted our audits in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audits to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of Merit Network, Inc. at June 30, 2009 and 2008 and the changes in its net assets and its cash flows for the years then ended, in conformity with accounting principles generally accepted in the United States of America.

Plante & Moran, PLLC

November 16, 2009

Merit Network, Inc.

Balance Sheet

	<u>June 30, 2009</u>	<u>June 30, 2008</u>
Assets		
Cash and cash equivalents	\$ 5,239,445	\$ 5,305,736
Accounts receivable (Note 2)	713,361	562,165
Prepaid expenses and other:		
Prepaid expenses	332,989	400,745
Bond financing fees - Net of amortization of \$50,605 in 2009 and \$40,484 in 2008	101,203	111,324
Property and equipment - Net (Note 3)	8,886,916	8,219,532
Software licenses - Net	467,294	-
Total assets	<u>\$ 15,741,208</u>	<u>\$ 14,599,502</u>
Liabilities and Net Assets		
Liabilities		
Accounts payable	\$ 420,525	\$ 378,048
Accrued liabilities and other:		
Accrued wages and other liabilities	517,226	480,640
Deferred revenue	1,051,148	824,467
Debt (Note 4)	3,797,933	4,524,551
Total liabilities	5,786,832	6,207,706
Net Assets		
Unrestricted	9,954,376	8,391,453
Temporarily restricted net assets	-	343
Total net assets	<u>9,954,376</u>	<u>8,391,796</u>
Total liabilities and net assets	<u>\$ 15,741,208</u>	<u>\$ 14,599,502</u>

Merit Network, Inc.

Statement of Activities and Changes in Net Assets

	Year Ended				
	June 30, 2009		June 30, 2008		
	Unrestricted	Temporarily Restricted	Total	Unrestricted	Temporarily Restricted
Revenue and Support					
Grant revenue	\$ 616,946	\$ -	\$ 616,946	\$ 140,359	\$ -
Membership fees	6,348,520	-	6,348,520	6,348,519	-
MichNet affiliate and service fees	6,618,567	-	6,618,567	6,266,162	-
Global routing and operations	607,647	-	607,647	455,885	-
NANOG fees	881,052	-	881,052	972,798	-
Other service revenue	997,429	-	997,429	757,625	-
Merit email services	489,550	-	489,550	-	-
Interest income	82,153	-	82,153	293,949	13,662
Miscellaneous income	650	-	650	-	-
Total revenue and support	16,642,514	-	16,642,514	15,235,297	13,662
Net Assets Released from Restrictions	343	(343)	-	161,807	(161,807)
Total revenue, support, and net assets released from restrictions	16,642,857	(343)	16,642,514	15,397,104	(148,145)
Expenses					
Program services	13,045,902	-	13,045,902	12,142,196	-
Management and general	2,034,032	-	2,034,032	1,696,537	-
Total expenses	15,079,934	-	15,079,934	13,838,733	-
Increase (Decrease) in Net Assets	1,562,923	(343)	1,562,580	1,558,371	(148,145)
Net Assets - Beginning of year	8,391,453	343	8,391,796	6,833,082	148,488
Net Assets - End of year	\$ 9,954,376	\$ -	\$ 9,954,376	\$ 8,391,453	\$ 343
					\$ 8,391,796

See Notes to Financial Statements.

Merit Network, Inc.

Statement of Functional Expenses

	Year Ended June 30, 2009		
	Program Services	Management and General	Total
Salaries, wages, and fringe benefits	\$ 5,530,737	\$ 592,560	\$ 6,123,297
Data circuits	4,323,776	-	4,323,776
Office phones	33,729	3,336	37,065
Materials and services	528,356	16,341	544,697
Travel and professional development	192,137	-	192,137
Host agreement fees	-	75,432	75,432
Other expenses	1,149,482	10,883	1,160,365
Rental expense	-	856,755	856,755
Interest expense	-	155,788	155,788
Amortization of bond fees	-	10,121	10,121
Depreciation and amortization	1,287,685	311,803	1,599,488
Bad debt	-	1,013	1,013
Total functional expenses	<u>\$ 13,045,902</u>	<u>\$ 2,034,032</u>	<u>\$ 15,079,934</u>

	Year Ended June 30, 2008		
	Program Services	Management and General	Total
Salaries, wages, and fringe benefits	\$ 4,710,087	\$ 486,190	\$ 5,196,277
Data circuits	4,511,947	-	4,511,947
Office phones	37,433	3,864	41,297
NOC	482,127	-	482,127
Materials and services	582,482	18,015	600,497
Travel and professional development	207,710	-	207,710
Host agreement fees	-	74,390	74,390
Other expenses	487,467	9,948	497,415
Rental expense	-	688,007	688,007
Interest expense	-	184,866	184,866
Amortization of bond fees	-	10,121	10,121
Depreciation and amortization	1,122,943	221,136	1,344,079
Total functional expenses	<u>\$ 12,142,196</u>	<u>\$ 1,696,537</u>	<u>\$ 13,838,733</u>

Merit Network, Inc.

Statement of Cash Flows

	Year Ended	
	June 30, 2009	June 30, 2008
Cash Flows from Operating Activities		
Increase in net assets	\$ 1,562,580	\$ 1,410,226
Adjustments to reconcile increase in net assets to net cash from operating activities:		
Depreciation	1,477,677	1,344,079
Amortization of Intangible assets	121,811	-
Amortization of debt costs	10,121	10,121
Changes in operating assets and liabilities that provided (used) cash:		
Accounts receivable	(151,196)	(133,850)
Prepaid expenses	67,756	(194,148)
Accounts payable	42,477	(313,752)
Accrued wages and other liabilities	36,586	100,177
Deferred revenue	226,681	(29,839)
Net cash provided by operating activities	<u>3,394,493</u>	<u>2,193,014</u>
Cash Flows from Investing Activities		
Purchase of property and equipment	(2,113,393)	(2,672,861)
Purchases of software licenses	(589,105)	-
Net cash used in investing activities	<u>(2,702,498)</u>	<u>(2,672,861)</u>
Cash Flows from Financing Activities		
Proceeds from debt	722,551	-
Payments on debt	(1,480,837)	(2,035,701)
Net cash used in financing activities	<u>(758,286)</u>	<u>(2,035,701)</u>
Net Decrease in Cash and Cash Equivalents	<u>(66,291)</u>	<u>(2,515,548)</u>
Cash and Cash Equivalents - Beginning of year	<u>5,305,736</u>	<u>7,821,284</u>
Cash and Cash Equivalents - End of year	<u>\$ 5,239,445</u>	<u>\$ 5,305,736</u>
Supplemental Disclosure of Cash Flow Information - Cash paid for interest	<u>\$ 155,788</u>	<u>\$ 184,866</u>

Merit Network, Inc.

Notes to Financial Statements June 30, 2009 and 2008

Note 1 - Nature of Business and Significant Accounting Policies

Nature of Organization - Merit Network, Inc. (the "Organization") is a not-for-profit organization serving more than one million people within Michigan. The Organization's mission is to develop and promote advanced Internet services for research and education. The Organization's network connects universities, community colleges, K-12 schools, libraries, state agencies, and cultural organizations.

Method of Accounting and Basis of Presentation - The accompanying financial statements of the Organization have been prepared on the accrual basis of accounting. The Organization's significant accounting policies are presented below.

Revenue Recognition - Merit Network, Inc.'s main source of funding comes from the membership fees of the 12 governing member universities as well as service fees from other member organizations. Governing members include Central Michigan University, Eastern Michigan University, Ferris State University, Grand Valley State University, Lake Superior State University, Michigan State University, Michigan Tech, Northern Michigan University, Oakland University, University of Michigan, Wayne State University, and Western Michigan University. Merit Network, Inc. reports this funding as unrestricted support.

Merit Network, Inc. also receives grants related to certain projects. These grants are exchange-type grants, therefore revenue is recognized as services are provided.

Deferred revenue represents unused portions of Internet service agreements, which will be recognized in subsequent years as services are rendered.

Equipment - Purchased equipment is stated at cost. Depreciation is provided on a straight-line basis over the estimated useful lives of the assets. The assets of the Organization are estimated to have useful lives of 3, 6, and 20 years.

Intangible Assets - Intangible assets consist of \$589,105 software licenses. These costs are being amortized on a straight-line basis over the term of the licenses. Amortization expense and accumulated amortization was \$121,811 for 2009.

Use of Estimates - The preparation of financial statements in conformity with accounting principles generally accepted in the United States of America requires management to make estimates and assumptions that affect the reported amounts and disclosures in the financial statements. Actual results could differ from these estimates.

Hosting Agreement with University of Michigan - Merit Network, Inc. has a hosting agreement with the University of Michigan (the "University"), in which the University will provide general and administrative services such as billing, collections, accounts payable, and payroll services to the Organization for an annual fee. As part of this agreement, the University will assign employees and provide facilities and other support to the Organization as necessary to perform operating activities.

Merit Network, Inc.

Notes to Financial Statements June 30, 2009 and 2008

Note 1 - Nature of Business and Significant Accounting Policies (Continued)

Employees are covered under the University's retirement plan and Merit Network, Inc. is charged 10 percent of the employees' annual salary to fund the plan. If the hosting agreement were to terminate, the University would negotiate in good faith a settlement covering net retirement costs. The settlement would determine a schedule of payments to cover the anticipated future costs of retirement benefits that the University will pay to staff who retire from University employment while working at Merit Network, Inc. At June 30, 2009, there are no plans to terminate the agreement and it is not feasible to estimate what the future retirement costs would be.

Cash Equivalents - Merit Network, Inc.'s cash is held at the University and is commingled with other University cash. The Organization has unlimited access to this cash and, therefore, considers the balance as cash and cash equivalents.

Accounts Receivable - The Organization's accounts receivable are stated at the net invoice amount. Management reviews accounts receivable balances greater than 90 days from invoice date and, based on an assessment of current creditworthiness, estimates the portion, if any, of the balance that will not be collected as well as a general valuation allowance for those accounts based on historical experience. All accounts or portions thereof deemed to be uncollectible are written off to the allowance for bad debts.

Tax Status - Merit Network, Inc. is a nonprofit tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code and is exempt from income taxes.

Functional Allocation of Expenses - The cost of providing the various programs and other activities has been summarized on a functional basis in the statement of activities and changes in net assets. Accordingly, certain costs have been allocated among the programs and support services benefited. The basis used is considered appropriate; however, other methods could be used that would produce different results.

Net Assets - For financial statement purposes, the Organization distinguishes between unrestricted net assets, temporarily restricted net assets, and permanently restricted net assets. The Organization reports net assets that are not subject to imposed stipulations as unrestricted net assets. Net assets subject to stipulations that may or will be met by actions of the Organization and/or the passage of time are recorded as temporarily restricted net assets. Temporarily restricted net assets at June 30, 2009 was zero. Temporarily restricted net assets at June 30, 2008 totaled \$343, that was restricted for the purchase of fiber optic lines.

Subsequent Events - The financial statements and related disclosures include evaluation of events up through and including November 16, 2009, which is the date the financial statements were available to be issued.

Merit Network, Inc.

Notes to Financial Statements June 30, 2009 and 2008

Note 1 - Nature of Business and Significant Accounting Policies (Continued)

Reclassification - Certain reclassifications were made to amounts in the 2008 financial statements conform to the classifications used in 2009. The reclassifications did not impact the overall change in net assets for 2008.

Note 2 - Accounts Receivable

The details of accounts receivable are as follows:

	2009	2008
Accounts receivable	\$ 550,650	\$ 560,429
Due from member organizations	162,711	5,911
Less allowance for doubtful accounts	-	(4,175)
Total	<u>\$ 713,361</u>	<u>\$ 562,165</u>

Note 3 - Property and Equipment

The cost of property and equipment is summarized as follows:

	2009	2008
Office equipment	\$ 1,263,420	\$ 1,104,329
Capital lease equipment	1,924,814	1,893,146
Field equipment	5,850,571	8,675,524
Field equipment - Fiber optic lines	6,037,692	5,214,345
Leasehold improvement	735,365	735,365
Total cost	15,811,862	17,622,709
Accumulated depreciation	<u>(6,924,946)</u>	<u>(9,403,177)</u>
Net carrying amount	<u>\$ 8,886,916</u>	<u>\$ 8,219,532</u>

Depreciation for capital lease equipment was \$375,785 for 2009 and \$373,610 for 2008. Total depreciation expense was \$1,477,677 for 2009 and \$1,344,079 for 2008.

Merit Network, Inc.

Notes to Financial Statements June 30, 2009 and 2008

Note 4 - Debt

The following is a summary of debt at June 30:

	<u>2009</u>	<u>2008</u>
Note payable to Michigan Information Technology Center (MITC), a related party, in annual installments of \$82,000 through 2010. There is no interest on this note	\$ 64,746	\$ 239,167
Capital lease at 3.336 percent with Cisco Systems, due in annual installments ranging from \$90,224 to \$183,547, including interest, through 2011. The note is collateralized by the equipment	171,800	343,863
Michigan Strategic Fund Limited Obligation Revenue Bonds Series 2005 in the amount of \$4,204,000, which have an original maturity date of March 1, 2012. The bonds bear interest at 3.87 percent annually. Annual principal payments began in 2007, ranging from \$533,474 to \$926,120, and are due on the first day of each month. The bonds are collateralized by all equipment and assets of the Organization	2,412,305	3,227,871
Capital lease at 2.035 percent with Steelcase Financial Services, Inc., due in monthly installments of \$8,135, including interest, through 2010. The note is collateralized by the equipment	47,672	137,391
Note payable at 6.86 percent with United Bank & Trust - Washtenaw, due in monthly installments of \$8,719, including interest, through 2013. The note is collateralized by the equipment	336,027	414,646
Note payable at 6.95 percent with United Bank & Trust - Washtenaw, due in monthly installments of \$6,962, including interest, through 2010. The note is collateralized by the equipment	86,947	161,613
Capital lease at 8.15 percent with Key Group, due in monthly installments of \$1,074, including interest, through 2012. The note is collateralized by the equipment	31,018	-

Merit Network, Inc.

Notes to Financial Statements June 30, 2009 and 2008

Note 4 - Debt (Continued)

	<u>2009</u>	<u>2008</u>
Note payable at 1.5 percent over prime rate (5.00 percent at June 30, 2009) with United Bank & Trust - Washtenaw in the amount of \$722,551, due in monthly installments of \$21,674, including interest, through 2012. The note is collateralized by the equipment	\$ 647,418	\$ -
Total	<u>\$ 3,797,933</u>	<u>\$ 4,524,551</u>

The debt service requirements of the long-term debt based on the terms of the bonds and notes payable for the succeeding years are as follows:

<u>Years Ending June 30</u>	<u>Principal</u>	<u>Interest</u>
2010	\$ 1,595,690	\$ 133,295
2011	1,327,372	73,533
2012	809,701	19,289
2013	65,170	1,629
Total	<u>\$ 3,797,933</u>	<u>\$ 227,746</u>

Note 5 - Related Party Transactions

The Organization receives revenue and purchases services from various organizations that are members of the board of directors. Following is a summary of transactions and balances with member organizations:

	<u>2009</u>	<u>2008</u>
Revenue from member organizations	\$ 7,659,216	\$ 6,652,444
Due from member organizations (included in accounts receivable)	162,711	7,163
Services purchased from member organizations	702,166	1,122,765

In addition to transactions with member organizations, Merit Network, Inc. has a note payable of \$57,912 and \$232,333 due to MITC, a related party, as of June 30, 2009 and 2008, respectively.

Merit Network, Inc. also has a rental agreement for office space with MITC. Rental payments made to MITC totaled \$825,011 and \$702,434 for the years ended June 30, 2009 and 2008, respectively.

Merit Network, Inc.

Notes to Financial Statements June 30, 2009 and 2008

Note 5 - Related Party Transactions (Continued)

Future rental obligations related to this agreement are as follows:

2010	\$ 617,834
2011	636,369
2012	636,369
2013	636,369
2014	655,460
2015-2019	3,336,293
2020 and thereafter	<u>1,043,067</u>
Total	<u>\$ 7,561,761</u>

Note 6 - Operating Leases

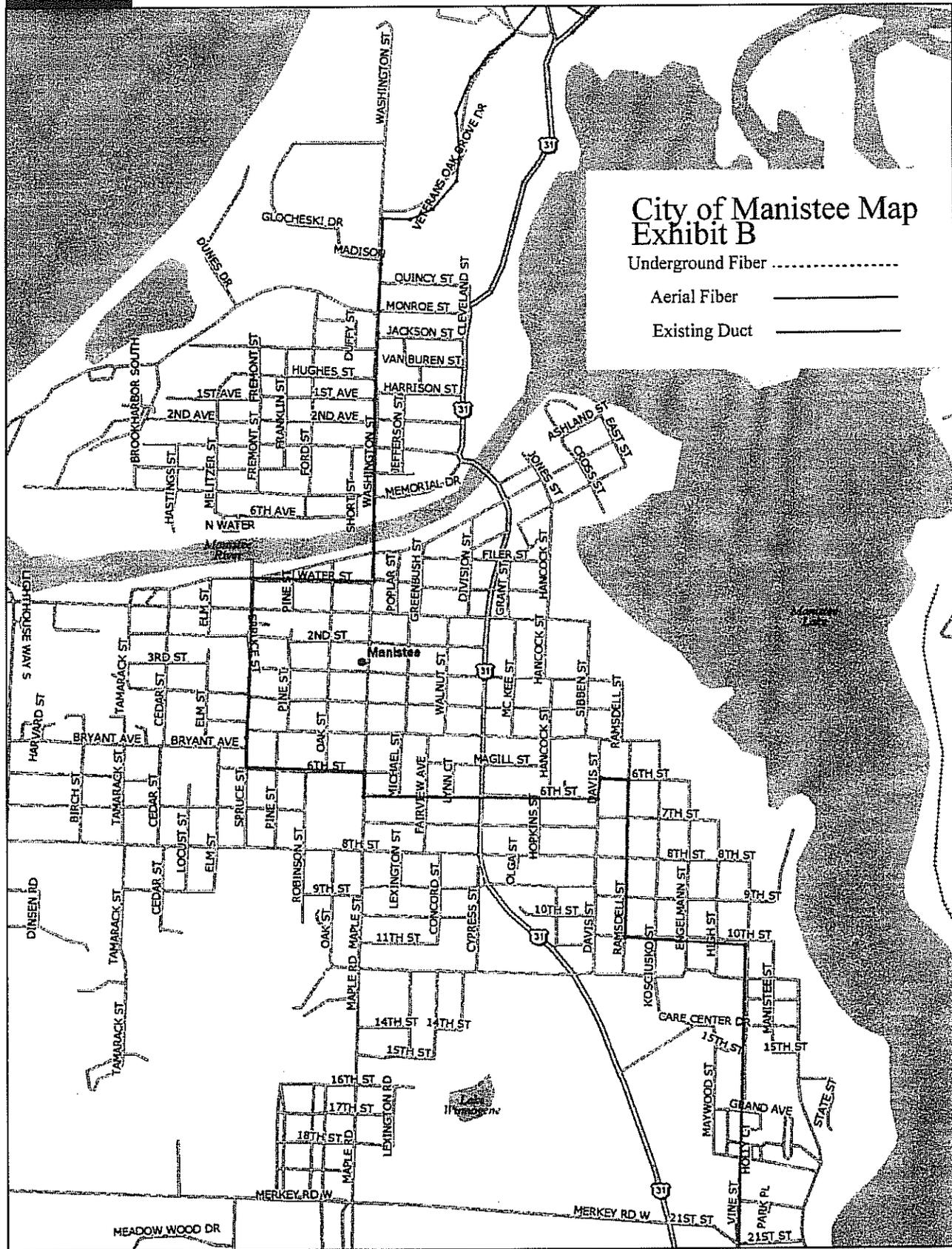
The Organization leases various circuits and telecommunication lines under operating leases that include provisions for ongoing maintenance expiring at various dates through June 2030. The following is a schedule of future minimum rental payments for the years ending June 30:

2010	\$ 1,878,853
2011	1,367,824
2012	717,292
2013	586,643
2014	409,826
2015 and thereafter	<u>5,185,503</u>
Total	<u>\$ 10,145,941</u>

Total rent expense on these leases for 2009 and 2008 was \$2,179,644 and \$2,902,130, respectively.

Note 7 - Cash Flows

During the year ended June 30, 2009, Merit Network, Inc. entered into a capital lease resulting in a noncash transaction in the amount of \$31,668.



City of Manistee Map Exhibit B

- Underground Fiber (dotted line)
- Aerial Fiber _____ (solid line)
- Existing Duct _____ (thick solid line)

Data use subject to license.

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www.delorme.com

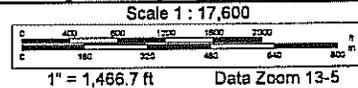


Exhibit C
Merit Network, Inc.
1000 Oakbrook Dr.
Ann Arbor, MI 48104

Bob Stovall

Title: Vice President, Network Operations and Engineering

Role: Oversee the issuance of permits and an overall overseer of the Project(s).

Email Address: bes@merit.edu

Phone Number: 734-476-2288

Pete Empie

Title: Project Manager

Role: On the road working directly with Turnkey, the construction company, and the pole utilities overseeing the work done on the ground. Will be reviewing and submitting permits as well.

Email Address: ictpete@aol.com or pempie@merit.edu

Phone Number: 517-420-1600

Robert Duncan

Title: Network Engineering Director

Role: Pole engineering and planning on overall infrastructure.

Email Address: rduncan@merit.edu

Phone Number: 734-527-5700

Glenn Wiltse

Title: DNS and IP Registration Administration

Role: Assist in developing maps and general consultation.

Email Address: iggy@merit.edu

Phone Number: 734-527-5700

Ryan Kunzelman

Title: Grant Compliance Manager

Role: General oversight of compliance as well as a liaison for flow of information throughout the company concerning the REACH-3MC and REACH-3MC II. Will be reviewing and submitting permits as well.

Email Address: kunzelr@merit.edu

Phone Number: 734-527-5739

Karen Smith

Title: Vice President, Finance & Administration/CFO

Email Address: ksmith@merit.edu

Phone Number: 734-527-5700

Don Welch

Title: President and CEO

Email Address: djwelch@merit.edu

Phone Number: 734-527-5700

ACORD™ CERTIFICATE OF LIABILITY INSURANCE		DATE (MM/DD/YYYY) 7/1/2010
PRODUCER Aon Private Risk Management - Detroit 3000 Town Center, Suite 3000 Southfield MI 48075	THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.	
INSURED Merit Network, Inc. 1000 Oakbrook Drive Ann Arbor MI 48104	INSURERS AFFORDING COVERAGE	NAIC #
	INSURER A: Travelers Property Casualty Co INSURER B: Travelers Indemnity Company of INSURER C: Travelers Property Casualty Co INSURER D: INSURER E:	25674 25682 25674

COVERAGES

THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

INSR LTR	ADD'L INSRD	TYPE OF INSURANCE	POLICY NUMBER	POLICY EFFECTIVE DATE (MM/DD/YY)	POLICY EXPIRATION DATE (MM/DD/YY)	LIMITS	
A		GENERAL LIABILITY	TT02100371	12/1/2009	12/1/2010	EACH OCCURRENCE	\$ 1,000,000
		<input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY				DAMAGE TO RENTED PREMISES (Ea occurrence)	\$ 300,000
		<input type="checkbox"/> CLAIMS MADE <input checked="" type="checkbox"/> OCCUR				MED EXP (Any one person)	\$ 10,000
						PERSONAL & ADV INJURY	\$ 1,000,000
						GENERAL AGGREGATE	\$ 2,000,000
						PRODUCTS - COMP/DP AGG	\$ 2,000,000
						GEN'L AGGREGATE LIMIT APPLIES PER: <input type="checkbox"/> POLICY <input type="checkbox"/> PRO-JECT <input type="checkbox"/> LOC	
B		AUTOMOBILE LIABILITY	BA0557P42609TRC	12/1/2009	12/1/2010	COMBINED SINGLE LIMIT (Ea accident)	\$ 1,000,000
		<input type="checkbox"/> ANY AUTO				BODILY INJURY (Per person)	\$
		<input type="checkbox"/> ALL OWNED AUTOS				BODILY INJURY (Per accident)	\$
		<input checked="" type="checkbox"/> SCHEDULED AUTOS				PROPERTY DAMAGE (Per accident)	\$
		<input checked="" type="checkbox"/> HIRED AUTOS					
		<input checked="" type="checkbox"/> NON-OWNED AUTOS					
		GARAGE LIABILITY				AUTO ONLY - EA ACCIDENT	\$
		<input type="checkbox"/> ANY AUTO				OTHER THAN EA ACC	\$
						AUTO ONLY: AGG	\$
C		EXCESS/UMBRELLA LIABILITY	TT05802955	12/1/2009	12/1/2010	EACH OCCURRENCE	\$ 9,000,000
		<input type="checkbox"/> OCCUR <input type="checkbox"/> CLAIMS MADE				AGGREGATE	\$ 9,000,000
							\$
							\$
		DEDUCTIBLE				\$	
		<input checked="" type="checkbox"/> RETENTION \$ 10,000				\$	
		WORKERS COMPENSATION AND EMPLOYERS' LIABILITY				WC STATUTORY LIMITS	OTH-ER
		ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/MEMBER EXCLUDED?				E.L. EACH ACCIDENT	\$
		If yes, describe under SPECIAL PROVISIONS below				E.L. DISEASE - EA EMPLOYEE	\$
						E.L. DISEASE - POLICY LIMIT	\$
		OTHER					

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES / EXCLUSIONS ADDED BY ENDORSEMENT / SPECIAL PROVISIONS

Certificate Holder, per attached contract, is an additional insured under the above general liability policy with respect to liability arising out of work performed.

Description: The REACH Michigan Mile Collaborative (REACH-3MC) is a partnership led by Merit-Michigan's education network - which engages Merit with 4 commercial providers to share a 1017

CERTIFICATE HOLDER Per attached contract	CANCELLATION SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL <u>30</u> DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES. AUTHORIZED REPRESENTATIVE <i>Aon Private Risk Management Insurance Agency, Inc.</i>
--	--

IMPORTANT

If the certificate holder is an **ADDITIONAL INSURED**, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

If **SUBROGATION IS WAIVED**, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

DISCLAIMER

The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.

DESCRIPTION OF OPERATIONS SECTION CONTINUED

DATE
7/1/2010

CERTIFICATE HOLDER:

Per attached contract

INSURED:

Merit Network, Inc.

1000 Oakbrook Drive
Ann Arbor MI 48104

DESCRIPTION OF OPERATIONS CONTINUED:

mile extension of Merit's advanced fiber optic network to serve anchor institutions, households and businesses. REACH-3MC is an ARRA funded project that is designed to improve broadband infrastructure throughout the state.

Note per conditions of GL policy: Certificate Holder is added as an Additional Insured excluding Workers' Compensation and Employers' Liability as required by written contract but limited to the operations of the Insured under said contract, and always subject to the policy terms, conditions and exclusions. Cancellation Provision shown herein is subject to shorter or longer time periods depending on the jurisdiction of, and reason for, the cancellation.

City of Monroe

120 E. First St.
Monroe, MI 48161

Monroe Charter Township

4925 E. Dunbar Rd.
Monroe, MI 48161

Raisinville Township

96 Ida-Maybee Rd.
Monroe, MI 48161

Dundee Township

179 Main St.
Dundee, MI 48131

Village of Dundee

350 W. Monroe St.
Dundee, MI 48131

Summerfield Township

PO Box 98
Petersburg, MI 49270

City of Petersburg

24 E. Center St.
Petersburg, MI 49270

Deerfield Township

468 Carey St.
Deerfield, MI 49238

Village of Deerfield

101 W. River St.
Deerfield, MI 49238

Blissfield Township

PO Box 58
Blissfield, MI 49228

Village of Blissfield

408 E. Adrian St.
Blissfield, MI 49228

Palmyra Township

PO Box 97
Palmyra, MI 49268

Madison Charter Township

4008 S. Adrian Hwy
Adrian, MI 49221

City of Adrian

135 E. Maumee St. 2nd Floor
Adrian, MI 49221

Dover Township

7712 W. Carleton Rd.
Clayton, MI 49235

Hudson Township

1221 Kiel Hwy
Hudson, MI 49247

City of Hudson

121 N. Church St.
Hudson, MI 49247

Pittsford Township

12011 Hudson Rd.
Pittsford, MI 49271

Jefferson Township

2837 Bird Lake Rd. S
Osseo, MI 49266

Cambria Township

7287 Cambria Rd.
Hillsdale, MI 49242

Hillsdale Township

PO Box 181
Hillsdale, MI 49242

City of Hillsdale

97 North Broad St.
Hillsdale, MI 49242

Fayette Township

211 North St.
Jonesville, MI 49250

Village of Jonesville

265 E. Chicago St.
Jonesville, MI 49250

Allen Township

8181 Arkansaw Rd.
Allen, MI 49227

Village of Allen

7800 Arkansaw Rd.
Allen, MI 49227

Quincy Township
884 Dery St.
Quincy, MI 49082

Village of Quincy
47 Cole St.
Quincy, MI 49082

Coldwater Township
319 Sprague Rd.
Coldwater, MI 49036

City of Coldwater
One Grand St.
Coldwater, MI 49036

Batavia Township
402 N. Snow Prairie Rd.
Coldwater, MI 49036

Bethel Township
453 Hatmaker Rd.
Bronson, MI 49028

Bronson Township
766 Kosmerick Rd.
Bronson, MI 49028

City of Bronson
141 S. Matteson St.
Bronson, MI 49028

Burr Oak Township
PO Box 241
Burr Oak, MI 49030

Fawn River Township
71209 S. Lakeview St.
Sturgis, MI 49091

City of Sturgis
130 N. Nottawa
Sturgis, MI 49091

Sherman Township
63108 W. Fish Lake Rd.
Sturgis, MI 49091

Colon Township
PO Box 608
Colon, MI 49040

Nottawa Township
PO Box 68
Centreville, MI 49072

Village of Centreville
221 W. Main St
Centreville, MI 49032

Lockport Township
56270 Buffalo Dr.
Three Rivers, MI 49093

City of Three Rivers
333 W. Michigan Ave.
Three Rivers, MI 49093

Fabious Township
PO Box 455
Three Rivers, MI 49093

Newberg Township
59950 County Line Rd.
Three Rivers, MI 49093

Penn Township
61273 Alexander Dr.
Vandalia, MI 49095

Vandalia Village
18035 W. State St.
Vandalia, MI 49095

Cassopolis Village
117 S. Broadway St. Suite 100
Cassopolis, MI 49031

LaGrange Township
24745 Cass St.
Cassopolis, MI 49031

City of Dowagiac
241 S. Front St.
Dowagiac, MI 49047

Silver Creek Township
PO Box 464
Dowagiac, MI 49047

Pokagon Township
30683 Peavine St.
Dowagiac, MI 49047

Berrien Township
PO Box 61
Berrien Center, MI 49102

Pipestone Township
PO Box 291
Eau Claire, MI 49111

Village of Eau Claire
6625 E. Main St.
Eau Claire, MI 49111

Oronoko Charter Township
4583 E. Snow Rd.
Berrien Springs, MI 49103

Village of Berrien Springs
PO Box 177
Berrien Springs, MI 49103

Royalton Township
980 Miners Rd.
St. Joseph, MI 49085

City of Benton Harbor
200 Wall St.
Benton Harbor, MI 49022

Benton Charter Township
1725 Territorial Rd.
Benton Harbor, MI 49022

Hagar Township
PO Box 135
Riverside, MI 49084

Coloma Charter Township
4919 Paw Paw Lake Rd.
Coloma, MI 49038

City of Coloma
119 N. Paw Paw St.
Coloma, MI 49038

Covert Township
PO Box 35
Covert, MI 49043

South Haven Charter Township
09761 Blue Star Memorial Hwy
South Haven, MI 49090

City of South Haven
539 Phoenix St.
South Haven, MI 49090

Casco Township
7104 107th Ave.
South Haven, MI 49090

Ganges Township
1904 64th St.
Fennville, MI 49408

Saugatuck Township
3461 Blue Star Memorial Hwy.
Saugatuck, MI 49453

Clyde Township
PO Box 671
Fennville, MI 49408

City of Fennville
222 S. Maple St.
Fennville, MI 49408

Manlius Township
3134 57th St.
Fennville, MI 49408

Fillmore Township
4219 52nd St.
Holland, MI 49423

Overisel Township
A-4307 144th Ave.
Holland, MI 49423

Zeeland Charter Township
6582 Byron Rd.
Zeeland, MI 49464

City of Zeeland
21 S. Elm St.
Zeeland, MI 49464

Holland Charter Township
PO Box 8127
Holland, MI 49422

Olive Township
6480 136th Ave.
Holland, MI 49424

Robinson Township
12010 120th Ave.
Grand Haven, MI 49417

Grand Haven Charter Township
13300 168th Ave.
Grand Haven, MI 49417

City of Grand Haven
519 Washington Ave.
Grand Haven, MI 49417

City of Ferrysburg
408 Fifth St.
Ferrysburg, MI 49409

Spring Lake Township
106 S. Buchanan St.
Spring Lake, MI 49456

City of Norton Shores
4814 Henry St.
Norton Shores, MI 49441

Muskegon Charter Township
1990 E. Apple Ave.
Muskegon, MI 49442

City of Muskegon
933 Terrace St.
Muskegon, MI 49440

Dalton Township
1616 E. Riley Thompson Rd.
Muskegon, MI 49445

Fruitland Township
4545 Nestrom Rd.
Whitehall, MI 49461

Whitehall Township
7644 Durham Rd.
Whitehall, MI 49461

City of Whitehall
405 E. Colby St.
Whitehall, MI 49461

City of Montague
8778 Ferry St.
Montague, MI 49437

Montague Township
3125 Weesies Rd.
Montague, MI 49437

Grant Township
7140 S. Oceana Dr.
Rothbury, MI 49452

Shelby Township
PO Box 215
Shelby, MI 49455

Benona Township
7169 W. Baker Rd.
Shelby, MI 49455

Hart Township
3437 W. Polk Rd.
Hart, MI 49420

Weare Township
6295 N. 88th Ave.
Hart, MI 49420

Pentwater Township
PO Box 512
Pentwater, MI 49449

City of Pentwater
327 S. Hancock St.
Pentwater, MI 49449

Summit Township
4560 W. Anthony Rd.
Ludington, MI 49431

Pere Marquette Charter Township
1699 S. Pere Marquette Hwy
Ludington, MI 49431

City of Ludginton
400 S. Harrison St.
Ludington, MI 49431

Amber Township
221 N. Gordon Rd.
Scottville, MI 49454

City of Scottville
105 North Main St.
Scottville, MI 49454

Custer Township
2888 E. Wilson Rd.
Custer, MI 49405

Branch Township
PO Box 304
Walhalla, MI 49548

Victory Township
4118 N. Victory Corner Rd.
Ludington, MI 49431

Sherman Township
PO Box 67
Fountain, MI 49410

Grant Township
8969 N. US Hwy 31
Free Soil, MI 49411

Free Soil Township
497 E. Free Soil Rd.
Free Soil, MI 49411

Sweetwater Township
7438 W. Wingleton Rd.
Baldwin, MI 49304

Webber Township
PO Box 939
Baldwin, MI 49304

Peacock Township
4480 W. 4 Mile Rd.
Irons, MI 49644

Newkrick Township
520 N. Kings Hwy
Luther, MI 49646

Ellsworth Township
PO Box 113
Luther, MI 49656

Village of Luther
PO Box 9
Luther, MI 49646

Filer Charter Township
2505 Filer City Rd.
Manistee, MI 49660

City of Manistee
70 Maple St.
Manistee, MI 49660

Manistee Township
410 Holden St.
Manistee, MI 49660

Brown Township
9763 Coates Hwy
Manistee, MI 49660

Bear Lake Township
8644 Maidens Rd.
Bear Lake, MI 49614

Village of Bear Lake
PO Box 175
Bear Lake, MI 49614

Pleasanton Township
8958 Lumley Rd.
Bear Lake, MI 49614

Joyfield Township
6393 Joyfield Rd.
Frankfort, MI 49635

Benzonia Township
PO Box 224
Benzonia, MI 49616

Village of Benzonia
PO Box 223
Benzonia, MI 49616

Village of Beulah
7228 Commercial St.
Beulah, MI 49617

Homestead Township
PO Box 315
Honor, MI 49640

Village of Honor
10922 Platte St.
Honor, MI 49640

Inland Township
19668 Honor Hwy
Interlochen, MI 49643

Green Lake Township
PO Box 157
Interlochen, MI 49634

Blair Township
2121 Co. Rd. 633
Grawn, MI 49637

Garfield Township
3848 Veterans Dr.
Traverse city, MI 49684

City of Traverse City
400 Boardman Ave.
Governmental Center, 1st Floor
Traverse City, MI 49684

East Bay Township
1965 3 Mile Rd. N
Traverse City, MI 49686

Acme Township
6042 Acme Rd.
Williamsburg, MI 49690

Whitewater Township
PO Box 159
Williamsburg, MI 49690

Clearwater Township
PO Box 1
Rapid City, MI 49676

Kalkaska Township
PO Box 855
Kalkaska, MI 49646

Village of Kalkaska
200 Hyde St.
Kalkaska, MI 49646

Rapid River Township
1010 Phelps Rd.
Kalkaska, MI 49646

Custer Township
PO Box 814
Mancelona, MI 49659

Mancelona Township
PO Box 332
Mancelona, MI 49659

Village of Mancelona
PO Box 648
Mancelona, MI 49659

Chestonia Township
PO Box 295
Alba, MI 49611

Jordan Township
5577 St. Johns Rd.
East Jordan, MI 49727

Echo Township
2876 Finkton Rd.
East Jordan, MI 49727

South Arm Township
Po Box 304
East Jordan, MI 49727

City of East Jordan
201 Main St.
East Jordan, MI 49727

Eveline Township
PO Box 454
Charlevoix, MI 49720

Marion Township
01362 Matchett Rd.
Charlevoix, MI 49720

City of Charlevoix
210 State St.
Charlevoix, MI 49720

Boyne City
319 North Lake St.
Boyne City, MI 49712

Evangeline Township
PO Box 396
Boyne City, MI 49712

Bay Township
05045 Boyne City Rd.
Boyne City, MI 49712

Hayes Township
9195 Old 31 N
Charlevoix, MI 49720

Melrose Township
PO Box 189
Walloon Lake, MI 49796

Bear Creek Township
373 N. Division
Petoskey, MI 49770

City of Petoskey
101 E. Lake St.
Petoskey, MI 49770

Little Traverse Township
8288 S. Pleasantview Rd.
Harbor Springs, MI 49740

Littlefield Township
PO Box 188
Alanson, MI 49706

Village of Alanson
PO Box 425
Alanson, MI 49706

Maple River Township
3989 US Hwy 31
Brutus, MI 49716

McKinley Township
PO Box 262
Pellston, MI 49769

Village of Pellston
125 Milton Rd.
Pellston, MI 49769

Carp Lake Township
10471 N. Hayes Lane
Carp Lake, MI 49718

Wawatam Township
PO Box 38
Mackinaw City, MI 49701

Munro Township
11637 Heilman Rd.
Levering, MI 49755

City of Mt. Pleasant
320 W. Broadway St.
Mt. Pleasant, MI 48858

Union Charter Township
2010 S. Lincoln Rd.
Mt. Pleasant, MI 48858

Isabella Township
3929 E. Rosebush Rd.
Rosebush, MI 48878

Village of Rosebush
3876 E. Rosebush Rd.
Rosebush, MI 48878

Vernon Township
10877 N. Lincoln Rd.
Clare, MI 48617

City of Clare
202 W. Fifth St.
Clare, MI 48617

Grant Township
8490 S. Grant Ave.
Clare, MI 48617

Sheridan Township
8110 Washington Rd.
Clare, MI 486147

Beaverton Township
5700 N. Lewis Rd.
Coleman, MI 48618

City of Beaverton
124 W. Brown St.
Beaverton, MI 48612

Grout Township
5134 Plude Rd.
Gladwin, MI 48624

City of Gladwin
1000 West Cedar Ave.
Gladwin, MI 48624

Gladwin Township
2001 Wagarville Rd.
Gladwin, MI 48624

Butman Township
5005 N. Hockady Rd.
Gladwin, MI 48624

Nester Township
7855 Maple Valley Rd.
St. Helen, MI 48656

Backus Township
3888 S. Maple Valley Rd.
St. Helen, MI 48686

Richfield Township
PO Box 128
St. Helen, MI 48656

Higgins Township
PO Box 576
Roscommon, MI 48653

Markey Township
4974 E. Houghton Lake Dr.
Houghton Lake, MI 48629

Gerrish Township
2997 E. Higgins Lake Dr.
Roscommon, MI 48653

Beaver Creek Township
8888 S. Grayling Rd.
Grayling, MI 49738

Grayling Charter Township
PO Box 521
Grayling, MI 49738

City of Grayling
1020 City Blvd.
Grayling, MI 49738

Frederic Township
PO Box 78
Frederic, MI 49733

Maple Forest Township
2520 W. Marker Rd.
Grayling, MI 49738

Otsego Lake Township
PO Box 99
Waters, MI 49797

Bagley Township
PO Box 52
Gaylord, MI 49735

City of Gaylord
305 E. Main St.
Gaylord, MI 49735

Chester Township
1737 Big Lake Rd.
Gaylord, MI 49735

Charlton Township
PO Box 367
Johannesburg, MI 49751

Vienna Township
2734 M-32
Atlanta, MI 49709

Briley Township
PO Box 207
Atlanta, MI 49709

Hillman Township
PO Box 25
Hillman, MI 49746

Village of Hillman
211 E. Second St.
Hillman, MI 49746

City of Midland
333 W. Ellsworth St.
Midland, MI 48640

Williams Charter Township
1080 W. Midland Rd.
Auburn, MI 48611

City of Auburn
113 E. Elm St.
Auburn, MI 48611

Monitor Township
2483 Midland Rd.
Bay City, MI 48706

Bay City
301 Washington Ave.
Bay City, MI 48708

Bangor Township
180 State Park Dr.
Bay City, MI 48706

Kawkawlin Township
1836 E.Parish Rd.
Kawkawlin, MI 48631

Fraser Township
1474 N. Mackinaw Rd.
Linwood, MI 48634

City of Pinconning
PO Box 628
Pinconning, MI 48650

Pinconning Township
PO Box 58
Pinconning, MI 48650

Standish Township
4997 Arenac Rd.
Standish, MI 48658

Lincoln Township
4641 Duprie Rd.
Standish, MI 48658

City of Standish
399 East Beaver St.
Standish, MI 48658

Deep River Township
525 E. State St.
Sterling, MI 48659

Arenac Township
438 W. Huron Rd.
Omer, MI 48749

City of Omer
201 E. Center St.
Omer, MI 48749

AuGres Township
1865 Swenson Rd.
AuGres, MI 48703

Mason Township
1199 N. Black Rd.
Twining, MI 48766

Turner Township
PO Box 22
Twining, MI 48766

Village of Twining
311 W. Main St.
Twining, MI 48766

Sherman Township
3165 Alabaster Rd
Tawas City, MI 48763

Alabaster Township
1716 S. US Hwy 23
Tawas City, MI 48763

Grant Township
4049 W. Indian Lake Rd.
National City, MI 48748

Tawas Township
27 S. McArdle Rd.
Tawas City, MI 48763

Tawas City
PO Box 568
Tawas City, MI 48764

Wilber Township
3120 Sherman Rd.
East Tawas, MI 48730

Au Sable Township
311 5th St. N
Au Sable, MI 48750



The University of Michigan

Risk Management Services

Argus II Building
400 S. Fourth Street
Ann Arbor, MI 48103-4816
Office: 734-764-2200
Facsimile: 734-763-2043

November 9, 2009

Re: Evidence of Insurance as respects sponsored activities of the University of Michigan
(including Merit Network)

To Whom It May Concern:

The following is provided as evidence of the University of Michigan Workers Compensation self-insurance program. This program is a fully funded, non-cancelable plan with the following limits.

Workers' Compensation Insurance	Statutory Limits
Employers Liability Insurance	\$1,000,000 each accident
	\$1,000,000 disease each employee
	\$1,000,000 disease policy limit

This letter constitutes our certificate of insurance as it applies to the sponsored activities of The University of Michigan.

Please let me know if you have any questions.

Best Regards,

A handwritten signature in black ink, appearing to read "Chip Hartke".

Chip Hartke
Risk Management Services
ehartke@umich.edu

SEP 30 2010

**RIGHT-OF-WAY
TELECOMMUNICATIONS PERMIT**

TERMS AND CONDITIONS

1 Definitions

- 1.1 Company shall mean Merit Network Incorporated organized under the laws of the State of Michigan whose address is 1000 Oakbrook Drive, Suite 200, Ann Arbor, MI 48104.
- 1.2 Effective Date shall mean the date set forth in Part 13.
- 1.3 Manager shall mean Municipality's Clerk or his or her designee.
- 1.4 METRO Act shall mean the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act, Act No. 48 of the Public Acts of 2002, as amended.
- 1.5 Municipality shall mean City of Manistee, a Michigan municipal corporation.
- 1.6 Permit shall mean this document.
- 1.7 Public Right-of-Way shall mean the area on, below, or above a public roadway, highway, street, alley, easement, or waterway, to the extent Municipality has the ability to grant the rights set forth herein. Public right-of-way does not include a federal, state, or private right-of-way.
- 1.8 Telecommunication Facilities or Facilities shall mean the Company's equipment or personal property, such as copper and fiber cables, lines, wires, switches, conduits, pipes, and sheaths, which are used to or can generate, receive, transmit, carry, amplify, or provide telecommunication services or signals. Telecommunication Facilities or Facilities do not include antennas, supporting structures for antennas, equipment shelters or houses, and any ancillary equipment and miscellaneous hardware used to provide federally licensed commercial mobile service as defined in Section 332(d) of Part I of Title III of the Communications Act of 1934, Chapter 652, 48 Stat. 1064, 47 U.S.C. 332 and further defined as commercial mobile radio service in 47 CFR 20.3, and service provided by any wireless, 2-way communications device.
- 1.9 Term shall have the meaning set forth in Part 7.

2 Grant

- 2.1 Municipality hereby grants a permit under the METRO Act to Company for access to and ongoing use of the Public Right-of-Way to construct, install and maintain Telecommunication Facilities in those portions of the Public Right-of-Way identified on Exhibit A on the terms set forth herein.
- 2.1.1 Exhibit A may be modified by written request by Company and approval by Manager.
- 2.1.2 Manager shall not unreasonably condition or deny any request for a modification of Exhibit A. Any decision of Manager on a request for a modification may be appealed by Company to Municipality's legislative body.
- 2.2 Overlashing. Company shall not allow the wires or any other facilities of a third party to be overlashed to the Telecommunication Facilities without Municipality's prior written consent. Municipality's right to withhold written consent is subject to the authority of the Michigan Public Service Commission under Section 361 of the Michigan Telecommunications Act, MCL § 484.2361.
- 2.3 Nonexclusive. The rights granted by this Permit are nonexclusive. Municipality reserves the right to approve, at any time, additional permits for access to and ongoing usage of the Public Right-of-Way by telecommunications providers and to enter into agreements for use of the Public Right-of-Way with and grant franchises for use of the Public Right-of-Way to telecommunications providers, cable companies, utilities and other providers.

3 Contacts, Maps and Plans

- 3.1 Company Contacts. The names, addresses and the like for engineering and construction related information for Company and its Telecommunication Facilities are as follows:
- 3.1.1 The address, e-mail address, phone number and contact person (title or name) at Company's local office (in or near Municipality) is Robert Duncan, 1000 Oakbrook, Suite 200, Ann Arbor, MI 48104. Ph# 734-527-5700. Email rduncan@merit.edu.
- 3.1.2 If Company's engineering drawings, as-built plans and related records for the Telecommunication Facilities will not be located at the preceding local office, the location address, phone number and contact person (title or department) for them is _____.

3.1.3 The name, title, address, e-mail address and telephone numbers of Company's engineering contact person(s) with responsibility for the design, plans and construction of the Telecommunication Facilities is Merit Network, Inc., Robert Duncan, 1000 Oakbrook, Suite 200, Ann Arbor, MI 48104. Ph# 734-527-5700. Email rduncan@merit.edu.

The address, phone number and contact person (title or department) at Company's home office/regional office with responsibility for engineering and construction related aspects of the Telecommunication Facilities is Merit Network, Inc., Robert Duncan, 1000 Oakbrook, Suite 200, Ann Arbor, MI 48104. Ph# 734-527-5700. Email rduncan@merit.edu.

3.1.4 Company shall at all times provide Manager with the phone number at which a live representative of Company (not voice mail) can be reached 24 hours a day, seven (7) days a week, in the event of a public emergency. Phone number: 734-763-3448.

3.1.5 The preceding information is accurate as of the Effective Date. Company shall notify Municipality in writing as set forth in Part 12 of any changes in the preceding information.

3.2 Route Maps. Within ninety (90) days after the substantial completion of construction of new Facilities in a Municipality, a provider shall submit route maps showing the location of the Telecommunication Facilities to both the Michigan Public Service Commission and to the Municipality, as required under Section 6(7) of the METRO Act, MCLA 484.3106(7).

3.3 As-Built Records. Company, without expense to Municipality, shall, upon forty-eight (48) hours notice, give Municipality access to all "as-built" maps, records, plans and specifications showing the Telecommunication Facilities or portions thereof in the Public Right-of-Way. Upon request by Municipality, Company shall inform Municipality as soon as reasonably possible of any changes from previously supplied maps, records, or plans and shall mark up maps provided by Municipality so as to show the location of the Telecommunication Facilities.

4 Use of Public Right-of-Way

4.1 No Burden on Public Right-of-Way. Company, its contractors, subcontractors, and the Telecommunication Facilities shall not unduly burden or interfere with the present or future use of any of the Public Right-of-Way. Company's aerial cables and wires shall be suspended so as to not endanger or injure persons or property in or about the Public Right-of-Way. If Municipality reasonably determines that any portion of the Telecommunication Facilities constitutes an undue burden or interference, due to changed circumstances, Company, at its sole expense, shall modify the Telecommunication Facilities or take such other actions

burden, and Company shall do so within a reasonable time period. Municipality shall attempt to require all occupants of a pole or conduit whose facilities are a burden to remove or alleviate the burden concurrently.

- 4.2 No Priority. This Permit does not establish any priority of use of the Public Right-of-Way by Company over any present or future permittees or parties having agreements with Municipality or franchises for such use. In the event of any dispute as to the priority of use of the Public Right-of-Way, the first priority shall be to the public generally, the second priority to Municipality, the third priority to the State of Michigan and its political subdivisions in the performance of their various functions, and thereafter as between other permit, agreement or franchise holders, as determined by Municipality in the exercise of its powers, including the police power and other powers reserved to and conferred on it by the State of Michigan.
- 4.3 Restoration of Property. Company, its contractors and subcontractors shall immediately (subject to seasonal work restrictions) restore, at Company's sole expense, in a manner approved by Municipality, any portion of the Public Right-of-Way that is in any way disturbed, damaged, or injured by the construction, installation, operation, maintenance or removal of the Telecommunication Facilities to a reasonably equivalent (or, at Company's option, better) condition as that which existed prior to the disturbance. In the event that Company, its contractors or subcontractors fail to make such repair within a reasonable time, Municipality may make the repair and Company shall pay the costs Municipality incurred for such repair.
- 4.4 Marking. Company shall mark the Telecommunication Facilities as follows: Aerial portions of the Telecommunication Facilities shall be marked with a marker on Company's lines on alternate poles which shall state Company's name and provide a toll-free number to call for assistance. Direct buried underground portions of the Telecommunication Facilities shall have (1) a conducting wire placed in the ground at least several inches above Company's cable (if such cable is nonconductive); (2) at least several inches above that, a continuous colored tape with a statement to the effect that there is buried cable beneath; and (3) stakes or other appropriate above ground markers with Company's name and a toll-free number indicating that there is buried telephone cable below. Bored underground portions of the Telecommunication Facilities shall have a conducting wire at the same depth as the cable and shall not be required to provide the continuous colored tape. Portions of the Telecommunication Facilities located in conduit, including conduit of others used by Company, shall be marked at its entrance into and exit from each manhole and handhole with Company's name and a toll-free telephone number.
- 4.5 Tree Trimming. Company may trim trees upon and overhanging the Public Right-of-Way so as to prevent the branches of such trees from coming into

contact with the Telecommunication Facilities, consistent with any standards adopted by Municipality. Company shall dispose of all trimmed materials. Company shall minimize the trimming of trees to that essential to maintain the integrity of the Telecommunication Facilities. Except in emergencies, all trimming of trees in the Public Right-of-Way shall have the advance approval of Manager.

- 4.6 Installation and Maintenance. The construction and installation of the Telecommunication Facilities shall be performed pursuant to plans approved by Municipality. The open cut of any Public Right-of-Way shall be coordinated with the Manager or his designee. Company shall install and maintain the Telecommunication Facilities in a reasonably safe condition. If the existing poles in the Public Right-of-Way are overburdened or unavailable for Company's use, or the facilities of all users of the poles are required to go underground then Company shall, at its expense, place such portion of its Telecommunication Facilities underground, unless Municipality approves an alternate location. Company may perform maintenance on the Telecommunication Facilities without prior approval of Municipality, provided that Company shall obtain any and all permits required by Municipality in the event that any maintenance will disturb or block vehicular traffic or are otherwise required by Municipality.
- 4.7 Pavement Cut Coordination. Company shall coordinate its construction and all other work in the Public Right-of-Way with Municipality's program for street construction and rebuilding (collectively "Street Construction") and its program for street repaving and resurfacing (except seal coating and patching) (collectively, "Street Resurfacing").
- 4.7.1 The goals of such coordination shall be to encourage Company to conduct all work in the Public Right-of-Way in conjunction with or immediately prior to any Street Construction or Street Resurfacing planned by Municipality.
- 4.8 Compliance with Laws. Company shall comply with all laws, statutes, ordinances, rules and regulations regarding the construction, installation, and maintenance of its Telecommunication Facilities, whether federal, state or local, now in force or which hereafter may be promulgated. Before any installation is commenced, Company shall secure all necessary permits, licenses and approvals from Municipality or other governmental entity as may be required by law, including, without limitation, all utility line permits and highway permits. Municipality shall not unreasonably delay or deny issuance of any such permits, licenses or approvals. Company shall comply in all respects with applicable codes and industry standards, including but not limited to the National Electrical Safety Code (latest edition adopted by Michigan Public Service Commission) and the National Electric Code (latest edition). Company shall comply with all zoning and land use ordinances and historic preservation ordinances as may exist or may

hereafter be amended. This section does not constitute a waiver of Company's right to challenge laws, statutes, ordinances, rules or regulations now in force or established in the future.

- 4.9 Street Vacation. If Municipality vacates or consents to the vacation of Public Right-of-Way within its jurisdiction, and such vacation necessitates the removal and relocation of Company's Facilities in the vacated Public Right-of-Way, Company shall, as a condition of this Permit, consent to the vacation and remove its Facilities at its sole cost and expense when ordered to do so by Municipality or a court of competent jurisdiction. Company shall relocate its Facilities to such alternate route as Municipality and Company mutually agree, applying reasonable engineering standards.
- 4.10 Relocation. If Municipality requests Company to relocate, protect, support, disconnect, or remove its Facilities because of street or utility work, or other public projects, Company shall relocate, protect, support, disconnect, or remove its Facilities, at its sole cost and expense, including where necessary to such alternate route as Municipality and Company mutually agree, applying reasonable engineering standards. The work shall be completed within a reasonable time period.
- 4.11 Public Emergency. Municipality shall have the right to sever, disrupt, dig-up or otherwise destroy Facilities of Company if such action is necessary because of a public emergency. If reasonable to do so under the circumstances, Municipality shall attempt to provide notice to Company. Public emergency shall be any condition which poses an immediate threat to life, health, or property caused by any natural or man-made disaster, including, but not limited to, storms, floods, fire, accidents, explosions, water main breaks, hazardous material spills, etc. Company shall be responsible for repair at its sole cost and expense of any of its Facilities damaged pursuant to any such action taken by Municipality.
- 4.12 Miss Dig. If eligible to join, Company shall subscribe to and be a member of "MISS DIG," the association of utilities formed pursuant to Act 53 of the Public Acts of 1974, as amended, MCL § 460.701 et seq., and shall conduct its business in conformance with the statutory provisions and regulations promulgated thereunder.
- 4.13 Underground Relocation. If Company has its Facilities on poles of Consumers Energy, Detroit Edison or another electric or telecommunications provider and Consumers Energy, Detroit Edison or such other electric or telecommunications provider relocates its system underground, then Company shall relocate its Facilities underground in the same location at Company's sole cost and expense.
- 4.14 Identification. All personnel of Company and its contractors or subcontractors who have as part of their normal duties contact with the general public shall wear

on their clothing a clearly visible identification card bearing Company's name, their name and photograph. Company shall account for all identification cards at all times. Every service vehicle of Company and its contractors or subcontractors shall be clearly identified as such to the public, such as by a magnetic sign with Company's name and telephone number.

5 Indemnification

- 5.1 Indemnity. Company shall defend, indemnify, protect, and hold harmless Municipality, its officers, agents, employees, elected and appointed officials, departments, boards, and commissions from any and all claims, losses, liabilities, causes of action, demands, judgments, decrees, proceedings, and expenses of any nature (collectively "claim" for this Part 5) (including, without limitation, attorneys' fees) arising out of or resulting from the acts or omissions of Company, its officers, agents, employees, contractors, successors, or assigns, but only to the extent such acts or omissions are related to the Company's use of or installation of facilities in the Public Right-of-Way and only to the extent of the fault or responsibility of Company, its officers, agents, employees, contractors, successors and assigns.
- 5.2 Notice, Cooperation. Municipality shall notify Company promptly in writing of any such claim and the method and means proposed by Municipality for defending or satisfying such claim. Municipality shall cooperate with Company in every reasonable way to facilitate the defense of any such claim. Municipality shall consult with Company respecting the defense and satisfaction of such claim, including the selection and direction of legal counsel.
- 5.3 Settlement. Municipality shall not settle any claim subject to indemnification under this Part 5 without the advance written consent of Company, which consent shall not be unreasonably withheld. Company shall have the right to defend or settle, at its own expense, any claim against Municipality for which Company is responsible hereunder.

6 Insurance

- 6.1 Coverage Required. Prior to beginning any construction in or installation of the Telecommunication Facilities in the Public Right-of-Way, Company shall obtain insurance as set forth below and file certificates evidencing same with Municipality. Such insurance shall be maintained in full force and effect until the end of the Term. In the alternative, Company may satisfy this requirement through a program of self-insurance, acceptable to Municipality, by providing reasonable evidence of its financial resources to Municipality. Municipality's acceptance of such self-insurance shall not be unreasonably withheld.

- 6.1.1 Commercial general liability insurance, including Completed Operations Liability, Independent Contractors Liability, Contractual Liability coverage, railroad protective coverage and coverage for property damage from perils of explosion, collapse or damage to underground utilities, commonly known as XCU coverage, in an amount not less than Five Million Dollars (\$5,000,000).
 - 6.1.2 Liability insurance for sudden and accidental environmental contamination with minimum limits of Five Hundred Thousand Dollars (\$500,000) and providing coverage for claims discovered within three (3) years after the term of the policy.
 - 6.1.3 Automobile liability insurance in an amount not less than One Million Dollars (\$1,000,000).
 - 6.1.4 Workers' compensation and employer's liability insurance with statutory limits, and any applicable Federal insurance of a similar nature.
 - 6.1.5 The coverage amounts set forth above may be met by a combination of underlying (primary) and umbrella policies so long as in combination the limits equal or exceed those stated. If more than one insurance policy is purchased to provide the coverage amounts set forth above, then all policies providing coverage limits excess to the primary policy shall provide drop down coverage to the first dollar of coverage and other contractual obligations of the primary policy, should the primary policy carrier not be able to perform any of its contractual obligations or not be collectible for any of its coverages for any reason during the Term, or (when longer) for as long as coverage could have been available pursuant to the terms and conditions of the primary policy.
- 6.2 Additional Insured. Municipality shall be named as an additional insured on all policies (other than worker's compensation and employer's liability). All insurance policies shall provide that they shall not be canceled, modified or not renewed unless the insurance carrier provides thirty (30) days prior written notice to Municipality. Company shall annually provide Municipality with a certificate of insurance evidencing such coverage. All insurance policies (other than environmental contamination, workers' compensation and employer's liability insurance) shall be written on an occurrence basis and not on a claims made basis.
- 6.3 Qualified Insurers. All insurance shall be issued by insurance carriers licensed to do business by the State of Michigan or by surplus line carriers on the Michigan Insurance Commission approved list of companies qualified to do business in Michigan. All insurance and surplus line carriers shall be rated A+ or better by A.M. Best Company.

- 6.4 Deductibles. If the insurance policies required by this Part 6 are written with retainages or deductibles in excess of \$50,000, they shall be approved by Manager in advance in writing. Company shall indemnify and save harmless Municipality from and against the payment of any deductible and from the payment of any premium on any insurance policy required to be furnished hereunder.
- 6.5 Contractors. Company's contractors and subcontractors working in the Public Right-of-Way shall carry in full force and effect commercial general liability, environmental contamination liability, automobile liability and workers' compensation and employer liability insurance which complies with all terms of this Part 6. In the alternative, Company, at its expense, may provide such coverages for any or all its contractors or subcontractors (such as by adding them to Company's policies).
- 6.6 Insurance Primary. Company's insurance coverage shall be primary insurance with respect to Municipality, its officers, agents, employees, elected and appointed officials, departments, boards, and commissions (collectively "them"). Any insurance or self-insurance maintained by any of them shall be in excess of Company's insurance and shall not contribute to it (where "insurance or self-insurance maintained by any of them" includes any contract or agreement providing any type of indemnification or defense obligation provided to, or for the benefit of them, from any source, and includes any self-insurance program or policy, or self-insured retention or deductible by, for or on behalf of them).

7 Term

- 7.1 Term. The term ("Term") of this Permit shall be until the earlier of:
- 7.1.1 Fifteen years (15) from the Effective Date; provided, however, that following such initial term there shall be three subsequent renewal terms of five (5) years. Each renewal term shall be automatic unless Municipality notifies Company in writing, at least twelve (12) months prior to the end of any term then in effect, that due to changed circumstances a need exists to negotiate the subsequent renewal with Company. Municipality shall not unreasonably deny a renewal term; or
- 7.1.2 When the Telecommunication Facilities have not been used to provide telecommunications services for a period of one hundred and eighty (180) days by the Company or a successor of an assign of the Company; or
- 7.1.3 When Company, at its election and with or without cause, delivers written notice of termination to Municipality at least one-hundred and eighty (180) days prior to the date of such termination; or

7.1.4 Upon either Company or Municipality giving written notice to the other of the occurrence or existence of a default by the other party under Sections 4.8, 6, 8 or 9 of this Permit and such defaulting party failing to cure, or commence good faith efforts to cure, such default within sixty (60) days (or such shorter period of time provided elsewhere in this Permit) after delivery of such notice; or

7.1.5 Unless Manager grants a written extension, one year from the Effective Date if prior thereto Company has not started the construction and installation of the Telecommunication Facilities within the Public Right-of-Way and two years from the Effective Date if by such time construction and installation of the Telecommunication Facilities is not complete.

8 Performance Bond or Letter of Credit

8.1 Municipal Requirement. Municipality may require Company to post a bond (or letter of credit) as provided in Section 15(3) of the METRO Act, as amended [MCL § 484.3115(3)].

9 Fees

9.1 Establishment; Reservation. The METRO Act shall control the establishment of right-of-way fees. The parties reserve their respective rights regarding the nature and amount of any fees which may be charged by Municipality in connection with the Public Right-of-Way.

10 Removal

10.1 Removal; Underground. As soon as practicable after the Term, Company or its successors and assigns shall remove any underground cable or other portions of the Telecommunication Facilities from the Public Right-of-Way which has been installed in such a manner that it can be removed without trenching or other opening of the Public Right-of-Way. Company shall not remove any underground cable or other portions of the Telecommunication Facilities which requires trenching or other opening of the Public Right-of-Way except with the prior written approval of Manager. All removals shall be at Company's sole cost and expense.

10.1.1 For purposes of this Part 10, "cable" means any wire, coaxial cable, fiber optic cable, feed wire or pull wire.

10.2 Removal; Above Ground. As soon as practicable after the Term, Company, or its successor or assigns at its sole cost and expense, shall, unless waived in writing by Manager, remove from the Public Right-of-Way all above ground elements of

its Telecommunication Facilities, including but not limited to poles, pedestal mounted terminal boxes, and lines attached to or suspended from poles.

10.3 Schedule. The schedule and timing of removal shall be subject to approval by Manager. Unless extended by Manager, removal shall be completed not later than twelve (12) months following the Term. Portions of the Telecommunication Facilities in the Public Right-of-Way which are not removed within such time period shall be deemed abandoned and, at the option of Municipality exercised by written notice to Company as set forth in Part 12, title to the portions described in such notice shall vest in Municipality.

11 Assignment. Company may assign or transfer its rights under this Permit, or the persons or entities controlling Company may change, in whole or in part, voluntarily, involuntarily, or by operation of law, including by merger or consolidation, change in the ownership or control of Company's business, or by other means, subject to the following:

11.1 No such transfer or assignment or change in the control of Company shall be effective under this Permit, without Municipality's prior approval (not to be unreasonably withheld), during the time period from the Effective Date until the completion of the construction of the Telecommunication Facilities in those portions of the Public Right-of-Way identified on Exhibit A.

11.2 After the completion of such construction, Company must provide notice to Municipality of such transfer, assignment or change in control no later than thirty (30) days after such occurrence; provided, however,

11.2.1 Any transferee or assignee of this Permit shall be qualified to perform under its terms and conditions and comply with applicable law; shall be subject to the obligations of this Permit, including responsibility for any defaults which occurred prior to the transfer or assignment; shall supply Municipality with the information required under Section 3.1; and shall comply with any updated insurance and performance bond requirements under Sections 6 and 8 respectively, which Municipality reasonably deems necessary, and

11.2.2 In the event of a change in control, it shall not be to an entity lacking the qualifications to assure Company's ability to perform under the terms and conditions of this Permit and comply with applicable law; and Company shall comply with any updated insurance and performance bond requirements under Sections 6 and 8 respectively, which Municipality reasonably deems necessary.

11.3 Company may grant a security interest in this Permit, its rights thereunder or the Telecommunication Facilities at any time without notifying Municipality.

12 Notices

12.1 Notices. All notices under this Permit shall be given as follows:

12.1.1 If to Municipality, to 70 Maple St., PO Box 358, Manistee, MI 49660

12.1.2 If to Company, to Merit Network, Inc., Robert Duncan, 1000 Oakbrook, Suite 200, Ann Arbor, MI 48104. Ph# 734-527-5700. Email rduncan@merit.edu.

12.2 Change of Address. Company and Municipality may change its address or personnel for the receipt of notices at any time by giving notice thereof to the other as set forth above.

13 Other items

13.1 No Cable, OVS. This Permit does not authorize Company to provide commercial cable type services to the public, such as "cable service" or the services of an "open video system operator" (as such terms are defined in the Federal Communications Act of 1934 and implementing regulations, currently 47 U.S.C. §§ 522 (6), 573 and 47 CFR § 76.1500).

13.2 Duties. Company shall faithfully perform all duties required by this Permit.

13.3 Effective Date. This Permit shall become effective when issued by Municipality and Company has provided any insurance certificates and bonds required in Parts 6 and 8, and signed the acceptance of the Permit.

13.4 Authority. This Permit satisfies the requirement for a permit under Section 5 of the METRO Act [MCL 484.3105].

13.5 Amendment. Except as set forth in Section 2.1 this Permit may be amended by the written agreement of Municipality and Company.

13.6 Interpretation and Severability. The provisions of this Permit shall be liberally construed to protect and preserve the peace, health, safety and welfare of the public, and should any provision or section of this Permit be held unconstitutional, invalid, overbroad or otherwise unenforceable, such determination/holding shall not be construed as affecting the validity of any of the remaining conditions of this Permit. If any provision in this Permit is found to be partially overbroad, unenforceable, or invalid, Company and Municipality may nevertheless enforce such provision to the extent permitted under applicable law.

13.7 Governing Law. This Permit shall be governed by the laws of the State of Michigan.

City of Manistee

Attest:

By: _____
Clerk

Signature: _____
Print: _____
Title: _____
Date: _____

“Company accepts the Permit granted by Municipality upon the terms and conditions contained therein.”

Merit Network, Inc.

Signature: RT Stovall

Print: Robert Stovall

Title: Vice President, Network Engineering &
Operations

Date: AUG 27 2010

RECEIVED
SEP 30 2010
CITY OF HOUSTON
METRO AUTHORITY

Additional Information

Request that Municipalities Expedite Permitting Processes

Letter to Municipalities from Melvin Farmer, Director of the METRO Authority
(includes Attachment A, Additional Information about the METRO Act)

Exemption from METRO Act Fees

Letter to Merit Network, Inc. from Melvin Farmer, Director of the METRO Authority



STATE OF MICHIGAN

DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
LANSING

JENNIFER M. GRANHOLM
GOVERNOR

STANLEY "SKIP" PRUSS
DIRECTOR

March 12, 2010

RE: Merit Network Inc., American Reinvestment and Recovery Act Project

High speed Internet access is coming to your community thanks to the designation of Round 1 stimulus dollars to fund a broadband infrastructure project authored by **Merit Network, Inc.** For the citizens you serve and the businesses and schools within your community, this is a game changing opportunity and I urge you to give this your full attention. Since these monies need to be spent within a certain timeframe or they will be lost, I ask that you pay special attention to any communications you may receive from Merit Network, Inc. It is important to your community that you expedite any permitting process you may have in place, including, but not limited to, the Metropolitan Extension Telecommunication Rights-of-Way Oversight Act (METRO Act) for this effort. For further details, please see Attachment A. Should you have any questions regarding this matter, do not hesitate to contact:

Name	Agency	Phone Number	Email
Ms. Susana Woolcock	Michigan Public Service Commission	(517) 241-6240	woolcocks1@michigan.gov
Mr. Melvin Farmer, Jr.	METRO Authority	(517) 373-0194	farmerm@michigan.gov
Mr. Bob Stovall	Merit Network, Inc.	(734) 527-5704	bes@merit.edu

For a close-up look at how Merit's plan touches your community, please visit their Web site at <http://www.merit.edu/meritformichigan/>. Your municipality's cooperation and assistance in expediting this project will be greatly appreciated.

Sincerely,

Melvin Farmer, Jr., Director
METRO Authority

Attachment

cc: Susana Woolcock, MPSC
Michigan Municipal League
Michigan Township Association
Merit Network, Inc.

DELEG is an equal opportunity employer/program.
Auxiliary aids, services and other reasonable accommodations are available upon request to individuals with disabilities.

METRO AUTHORITY / CENTRAL FOIA OFFICE
611 W. OTTAWA • 4th Floor • LANSING, MICHIGAN 48909
www.michigan.gov/metro • Ph: (517) 373-0194 • Fax: (517) 335-4037

Attachment A

I. Merit Network, Inc. Broadband Infrastructure Grant

The federal National Telecommunications and Information Administration (NTIA) has awarded a \$33.3 million infrastructure grant to Merit Network, Inc. (a Michigan telecommunication provider) with an additional \$8.3 million in matching funds to build a 955-mile advanced fiber-optic network through 32 counties in Michigan's Lower Peninsula, including the municipality of (City/Twp/Village). This project, commencing May 2010, intends to directly connect 44 community anchor institutions and serve an area covering 886,000 households, 45,800 businesses, and an additional 378 anchor institutions.

Funded by the American Recovery and Reinvestment Act, this grant will support the deployment of broadband infrastructure in unserved and underserved areas, enhance and expand public computer centers, and encourage sustainable adoption of broadband service in your municipality.

II. Construction Permits

In order to build the infrastructure, Merit Network, Inc., and its subcontractors, may need to obtain the following type of permits for which the State requests your assistance and cooperation to expeditiously facilitate this monumental project:

I. METRO Act Public Rights-of-Way Permits, covered under the state's METRO Act (PA 48 of 2002) and administered by the Michigan Public Service Commission (MPSC), provides:

- Per Section 15, Merit Network, Inc. obtain a permit from each affected municipality to install its facilities and pay all required fees and that your municipality approves or denies its permit application for access to and/or use of your municipality's public rights-of-way within 45 days from the date of application.
- As a governmental entity, educational institution, or utility that does not provide telecommunication service to outside third parties, as specified in Sec. 8(18,19,20), Merit Network is exempt from filing a permit, or paying the maintenance fee.

- Telecommunication provider permits, prescribed by the MPSC, can be located at <http://www.michigan.gov/mpsc> under Telecommunications>METRO Act/Right-of-Way>Forms; and consist of Bilateral (5-30 year) and Unilateral (5 or less years) agreements between municipalities and telecommunication providers for permits for access to and ongoing use of public rights-of-way to construct, install, and maintain telecommunication facilities as identified in the permit. Unilateral permits are most commonly used.

2. Municipality Construction Permits/Fees

Merit Network Inc., and its construction contractors, per Section 5(1) of the METRO Act, are required to obtain local construction permits from your municipality to install/maintain their facilities (existing or new) in your municipality's public right-of-way; and pay applicable local construction permit fees.

However, as the maintenance fee paid by providers **replaced** municipal administrative fees, municipalities, per Section 13, **cannot charge Merit Network, Inc.**, any administrative fees related to permits obtained for work being done to their telecommunication facilities in the municipality's public right-of-way, including permits for street openings; curb openings (driveway); alley openings; street/margin openings; borings; wells; inspections; maintenance; other Merit Network, Inc. work related to access to and on-going use of existing and/or new telecommunication facilities.

NOTE: Private, non-telecommunication providers contractors hired by Merit Network, Inc to perform such work **are required** to pay reasonable, required local construction permit fees.

For additional information regarding broadband/internet activities in Michigan, you may visit the following websites:

www.michigan.gov/broadband
www.broadbandusa.gov
www.michigan.gov/broadbandmapping
www.ConnectMi.org
www.michigan.gov/metro



ORIGINAL

JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
LANSING

DAVID C. HOLLISTER
DIRECTOR

August 10, 2005

Mr. Elwood J. Downing
Manager, Member & Affiliate Services
Merit Network, Inc.
1000 Oakbrook Drive
Suite 200
Ann Arbor, MI 48104-6794

RE: Merit Network, Inc. Telecommunication Provider Status

Dear Mr. Downing:

The purpose of this correspondence is to provide the METRO Authority's determination of your organization's (Merit Network, Inc.) telecommunication provider status under the METRO Act (P.A. 48 of 2002) pursuant to an inquiry by the City of Detroit Cable Communications Commission. As you may be aware, Sections 8(2) and 8(18) of the METRO Act authorizes the METRO Authority to determine any telecommunication provider fees due and/or exemption under the Act.

Section 8(18) of the METRO Act specifically exempts an educational institution from the payment of fees/charges, and mapping pursuant to facilities constructed and used under applicable provisions of Section 307 of the Michigan Telecommunications Act (P.A. 179 of 1991). This exemption is applicable so long as the "educational institution" does not provide telecommunication services to residential or commercial customer for compensation.

Based on copies of Merit Network, Inc. documents received from the City of Detroit Cable Communications Commission, it appears that Merit Network, Inc. is owned and governed by a cooperative of "State Public Universities" as a 501c3 non-profit corporation. The stated primary purpose of the organization is to serve as the operator of the leading high-speed research and education network solely for Michigan public universities.

Therefore, as long as the Merit Network, Inc. does not provide, lease, or sell telecommunication services to residential, commercial, or private sector customers for compensation, the METRO Authority deems it to be an educational institution exempt from the payment of state maintenance fees/charges and the mapping requirements of Section 8(18) of the METRO Act. However, pursuant to Sections 5(1) and 15 of the METRO Act, permits from municipalities for access to and ongoing use of public rights-of-way are required.

OTTAWA BUILDING
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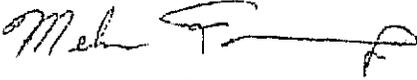
Mr. Downing
August 10, 2005
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A decision or assessment of the Authority is subject to a de novo review by the Michigan Public Service Commission upon the request of an interested person pursuant to Section 17 of the METRO Act.

I can be reached at (517) 373-0194 regarding any questions about this matter.

Sincerely,



Melvin Farmer, Jr.
Director, METRO Authority

cc: Celeste McDermott, City of Detroit Cable Communications Commission
James Smiertka, Special Assistant, DLEG