

**STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
STATE BOUNDARY COMMISSION**

In the Matter of the Petition
for Annexation of Territory
in Clam Lake Township to the
City of Cadillac in Wexford County

Docket No. 13-AP-2

**30-DAY SUBMISSIONS OF CLAM LAKE TOWNSHIP AND
HARING CHARTER TOWNSHIP**

I. INTRODUCTION

The Township of Clam Lake (“Clam Lake”) and the Charter Township of Haring (“Haring”) (collectively, the “Townships”), by and through their attorneys, Mika Meyers Beckett & Jones, PLC, respectfully present these 30-day Submissions to the State Boundary Commission (“SBC”). The purpose of these 30-day Submissions is to provide the SBC with additional information and supporting documentation relative to the October 23, 2013 public hearing (“Public Hearing”).

The principal issue the SBC will be considering in these proceedings is the validity of the Act 425 Agreement between Clam Lake and Haring that covers the same lands (and more) that are the subject of the annexation petition. *See* **Exb. 1** (Act 425 Agreement); *see* also, **Exb. 2** (First Amendment to Act 425 Agreement)¹. The SBC must consider this issue *first* because, if the Act 425 Agreement is valid (and it is), the proposed annexation “shall not take place” under MCL 124.29. In other words, if the Act 425 Agreement is deemed valid, these annexation proceedings must terminate; the annexation petition (and its merits or lack thereof) is not even relevant to the SBC in those circumstances. That is the result mandated by our Legislature.

¹ The Townships recently amended the Act 425 Agreement to revise the mixed-use planned unit development (“PUD”) regulations that can be applied to Petitioners’ property. This was done to alleviate certain concerns that Petitioners and the Haring Planning Commission had about the PUD regulations, as they were reflected in the original agreement.

On that point, the Townships will demonstrate below, in Sections II, III and IV, that the Act 425 Agreement is valid, and that these annexation proceedings must therefore terminate under MCL 124.29. Alternatively, and even though the SBC does not need to reach this issue (i.e., because the Act 425 Agreement is valid), the Townships will demonstrate in Section V that the annexation petition should be denied, for failure to meet the requisite statutory criteria.

II. THE ACT 425 AGREEMENT IS VALID UNDER THE SBC'S OWN PRIOR DECISION

Consideration of the Township's 2013 Act 425 Agreement cannot begin without the predicate understanding that it is modeled – with several important distinguishing characteristics – upon the Township's 2011 Act 425 Agreement, which the SBC found was invalid, based on a finding that it “was not being used to promote economic development.” See **Exb. 3** (SBC's 08/08/12 Findings of Fact at p. 2, as upheld by the Director of LARA on 10/03/12). Importantly, however, the SBC made that determination on the basis that the 2011 Act 425 Agreement had only five discrete deficiencies. As demonstrated below, each of those five deficiencies has been remedied in the 2013 Agreement, such that the 2013 Agreement must be deemed valid, based on the SBC's own reasoning.

A. The Five Identified Deficiencies In The 2011 Agreement

In support of its finding that the 2011 Agreement “was not being used to promote economic development,” the SBC made only five discrete conclusions, as follows:

- “a. No clearly defined economic development project is named.
- “b. Clam Lake received no benefit from the agreement, i.e., there is no revenue sharing included.
- “c. Copies of emails obtained by the petitioner through a [FOIA] request . . . between Clam Lake Township and the Charter Township of Haring discuss the 425 Agreement as a means to deny the Commission jurisdiction over the proposed annexation.

- “d. Concern over the Charter Township of Haring’s ability to effectively and economically provide the defined public services. No cost study was proven [sic?] to analyze the differential of connecting the area to public services from the Charter Township of Haring versus connecting to services from the City of Cadillac.
- “e. The timing of the Act 425 Agreement. The agreement was executed more than three months after the annexation request was filed.”

Id. at p. 3, finding of fact 6a through 6e.

Provided below is a discussion of how each of these issues has been remedied in the Townships’ 2013 Act 425 Agreement. That discussion is predicated, however, by a summary of why and when the 2013 Agreement came into being, following the conclusion of the 2011-2012 annexation proceedings.

B. Events Leading to Approval of the 2013 Act 425 Agreement

In setting the stage for the events that transpired from October 2012 (i.e., when the prior annexation proceedings were terminated) until now, it is important to remember that the SBC and the Director of LARA had already determined that Petitioners’ property should *not* be annexed into the City of Cadillac. **Exb. 3.** In that predicate context, a series of events thereafter unfolded that led Clam Lake and Haring to enter another Act 425 Agreement for the purpose of facilitating the sharing of utility services that would promote economic development, and which would, at the same time, ensure that the long-established residential populations that exist around Exit 180 would be protected from unrestricted, large-scale commercial development.

Most significantly, any contingency that had previously existed, with respect to the ability of Haring to provide wastewater services to Clam Lake, was eliminated in 2013. Specifically, the following events occurred in the 2012 to 2013 timeframe:

- All financing for the new Haring wastewater treatment plant (“WWTP”) was approved. In addition to the \$1 million letter of credit that Wal-Mart had previously issued (through Chase Bank) to help finance the construction of the new WWTP (**Exb. 4**), Haring was approved for a Rural Development (“RD”) grant in the amount of \$595,000, and a low-interest RD loan in

the amount of \$2,931,000 (**Exb. 5**), thus providing the total sum of \$4,526,000 needed to construct the new WWTP.

- After the Haring Board published, on March 26, 2013, its Notice of Intent to issue bonds for repayment of the RD loan, the 45-day referendum period expired with no petition having been filed, thus allowing Haring to issue bonds and proceed with construction. **Exb. 6**.
- Haring submitted its administratively complete application for an NPDES permit for the new WWTP, and said permit was subsequently issued. **Exb. 7**.

In short, the Haring WWTP became a “sure thing” in 2013. Given this new development, and given the City of Cadillac’s rigid adherence to a policy of refusing wastewater service to the surrounding townships without permanent acquisition of the served township lands², the Townships approved a second Act 425 Agreement on May 8, 2013³ (covering Petitioners’ property and also some adjacent lands – the “Transferred Area”), through which Haring water and wastewater services are *required* to be extended to Petitioners’ property to facilitate an economic development project thereon. **Exb. 1**, Act 425 Agreement, Art. I, §§ 3 and 4(a). And, for the longer term, the Townships also included provisions in the 2013 Act 425 Agreement to facilitate the extension of Haring sewer services to the Clam Lake Downtown Development Authority District, to also facilitate economic development on those lands. *Id.* at Art. I, §4(b).

Also, being mindful of the SBC’s findings with respect to the 2011 Act 425 Agreement (**Exb. 3** at p. 3, finding of fact 6a through 6e), the Townships ensured that all concerns the SBC had about the content of the 2011 Act 425 Agreement were remedied in the 2013 Agreement, as follows.

² The City’s policy on this subject, which is euphemistically referred to as the City’s “equity in taxation” policy, is attached at **Exb. 8**. As the policy expressly provides, the City will not provide sewer services to a landowner unless the landowner pays City sewer rates *and* City property taxes for the sewer service. And the only way this can be accomplished is by the City’s permanent acquisition of the lands in question – either by annexation or by an Act 425 Agreement that provides for the lands to remain permanently in the City at the conclusion of the Agreement.

³ See **Exb. 9** for a copy of the May 8, 2013 approving resolutions from each Township.

C. All Five Deficiencies Have Been Remedied In The 2013 Agreement

1. There is a clearly defined economic development project.

Not only are Haring water and wastewater services *required* to be extended to the Transferred Area (**Exb. 1**, Act 425 Agreement, Art. I, §§ 3 and 4(a)), the 2013 Agreement also provides that the owners of the undeveloped portion of the Transferred Area (i.e., Petitioners) may seek rezoning to a mixed-use commercial/residential planned unit development (“PUD”) district, to allow high-quality, commercial development, nearby to the intersection of Highway M-55 and Highway U.S.-131, while still being protective of the surrounding residential populations.

Each of these two aspects of the Act 425 Agreement – (a) the provision of public sewer/water, and (b) the provision of mixed-use commercial/residential development – constitute an independent economic development project for purposes of Act 425. In that regard, Act 425 defines an “economic development project” as follows:

Land and existing or ***planned improvements suitable for use by an industrial or commercial enterprise, or housing development, or the protection of the environment, including, but not limited to, groundwater or surface water.*** Economic development project includes necessary buildings, improvements, or structures suitable for and intended for or incidental to use as an industrial or commercial enterprise or housing development; and includes industrial park or industrial site improvements and port improvements or housing development incidental to an industrial or commercial enterprise; and includes the machinery, furnishings, and equipment necessary, suitable, intended for, or incidental to a commercial, industrial, or residential use in connection with the buildings or structures. MCL 124.21(a) [emphasis added].

There is no doubt that the “planned improvements” authorized by the Act 425 Agreement meet this statutory definition. It cannot be questioned that the provision of public sewer and water services protects “groundwater or surface water,” and that is exactly what the Agreement does. Indeed, as pointed out at the Public Hearing, the City of Cadillac’s legal counsel recently took the position, in open court, that the provision of public sewer service is an “economic development project.” See **Exb. 10** (Transcript of July 1, 2013 court hearing in *Haring Twp v Cadillac*, Case No.

13-24606-CH (Wexford County Circuit Court) at p. 44). Thus, the City cannot be heard to claim otherwise. By the City's own admission, the Agreement is valid.

The same conclusion must necessarily be reached with regard to the mixed-use commercial/residential development that is expressly allowed by the Act 425 Agreement. The Legislature has decided that either "commercial enterprise, or housing development" constitute a valid economic development project. And once again, that is exactly what the Agreement allows: mixed-use commercial/residential housing development. There is no room for any conclusion other than that the Townships' Act 425 Agreement promotes an economic development project.

However, based on the comments made at the Public Hearing, it seems that Petitioners and the City will no doubt attempt to argue otherwise. Provided below is a response to some of their Public Hearing comments.

a. Haring Sewer and Water Services Will Be Provided To the Transferred Area

At the Public Hearing, Petitioners and the City attempted to undermine the Act 425 Agreement by suggesting that Clam Lake might not really intend to have Haring sewer and water services extended to the Transferred Area.⁴ They also criticized the fact that the Haring WWTP will not be available until the spring-summer of 2015. Neither of these arguments undermines the validity of the Act 425 Agreement, as demonstrated below.

As the Townships mentioned at the Public Hearing, the Clam Lake and Haring Boards each adopted, on October 9, 2013 and October 14, 2013, respectively, a resolution of intent to make the sewer/water improvements and extensions from Haring that are necessary to serve Petitioners'

⁴ In support of this theory, Petitioners and the City pointed to the provision of the Act 425 Agreement, stating that the Haring sewer and water extensions are to be constructed at such time when the Clam Lake Board adopts a "certified resolution," directing that the extensions be made. **Exb. 1**, Act 425 Agreement at Art. I, §4(a). It is Petitioners' and the City's apparent theory that such a resolution might never be adopted, thus rendering Haring's requirement to extend sewer and water services illusory. The Petitioners' and the City's theory is simply incorrect, as demonstrated below.

property, pursuant to the terms of a development agreement between the Townships and Petitioners. *See Exbs. 10 and 11.* Thus, contrary to the unfounded comments that Petitioners and the City made at the Public Hearing, there is no speculative component about if and/or when Clam Lake will direct Haring to extend water and sewer infrastructure to Plaintiffs' property by resolution; this has already been done. *Id.* Also, as demonstrated at the Public Hearing, engineering plans have already been developed for the route to extend Haring water and sewer to the Transferred Area. **Exbs. 13 and 14.** The Townships' engineer, Douglas A. Coates, P.E., specifically testified at the Public Hearing that the Haring water system has capacity and pressure to serve the Transferred Area, and that the Haring WWTP will have capacity to serve the Transferred Area. In further reinforcement of these points, **Exb. 13** includes an Affidavit from Mr. Coates, attesting to the same matters, and attesting to the certainty that Haring public water and wastewater services can and will be provided to the Transferred Area, and the anticipated schedule for doing so.

All that now needs to happen is for Petitioners to enter the requisite development agreement with the Townships, which is something that obviously will not occur until these proceedings have been terminated – either by the SBC's decision or by Petitioners' voluntary withdrawal of their meritless petition. Either way, however, the Townships have made sure – by certified resolutions – that the extension of Haring water and sewer services to Petitioners' property is a sure thing, after the Act 425 Agreement is upheld by the SBC and when the Petitioners have entered an appropriate development agreement with the Townships.

Petitioners and the City are also legally incorrect when they argue that the availability of the Haring WWTP in the spring/summer of 2015 undermines the validity of the Agreement. The plain language of Act 425 demonstrates that they are wrong. Act 425 specifically refers to “*planned* improvements” in defining an “economic development project” (*see* MCL 124.21(a)), which clearly

contemplates a *future* improvement, not an existing one. Moreover, there is nothing in Act 425 that requires the “planned improvements” to be available within a fixed period of time – there is no such requirement in Act 425. The SBC would have to re-write Act 425 to impose such a temporal requirement, which, of course, the SBC cannot do. *See People v Burton*, 252 Mich App 130, 135 (2002) (it is impermissible to write into a statute language not already included in its plain text).

That said, based on the schedule the SBC has established for these proceedings, the spring/summer 2015 availability of the Haring WWTP is only a nominal temporal consideration. As the Chairman of the SBC discussed at the Public Hearing, the SBC’s adjudicative session will not occur until February or March of 2014. This means that the SBC will not issue its Report and Recommendation until March or April of 2014. Assuming that the Director of LARA then takes about two months to issue a final decision⁵, these proceedings will not have terminated until May or June of 2014, at the earliest. In other words, the spring/summer 2015 availability of the Haring WWTP will be only a year after the termination of these proceedings.

This modest period of time is meaningless when the SBC properly considers the larger temporal issues involved in the development of Petitioners’ property. Petitioners will have to undergo a process of obtaining approvals for zoning (township), drainage (drain commissioner), earth-moving and soil sedimentation control (county), and roadway modification (MDOT), among others, before they can develop their property. Given these other factors, it is quite possible that the Haring WWTP will come on-line at a time that is nearly contemporaneous with when Petitioners are finally ready to develop their property, so they probably will not suffer any delay, at all.

Aside from that, the Townships also point out the hypocrisy embedded in the City’s criticism of the Act 425 Agreement, based on the spring/summer 2015 availability of the Haring WWTP. As

⁵ Approximately two months transpired between the SBC’s report and the Director’s final decision in the prior 2011-2012 annexation proceedings.

the Townships mentioned at the Public Hearing, the City has entered an Act 425 Agreement with Haring, covering the so-called “Boersma property.” **Exb. 15.** Significantly, the Boersma Act 425 Agreement provides that the City was not required to extend City water and/or City sewer services to the Boersma property for **10 years!** after the effective date of that agreement. *Id.*, Boersma Act 425 Agreement at Art. V, §5.3.⁶ Given this, the City can hardly be heard to criticize the mere one-year period that will likely elapse between the termination of these proceedings and the date when Petitioners’ property can be connected to the Haring WWTP. The fact is that the City – just like the Townships – recognizes that Act 425 imposes no temporal requirement on when “planned improvements” must be provided, and so the City knows that the Townships’ Act 425 Agreement cannot be invalidated on that basis. The SBC should reach that same conclusion, and thus decide that the planned extension of Haring sewer and water services to the Transferred Area in spring/summer 2015 is a stand-alone economic development project, and that the Act 425 Agreement is therefore valid.

b. The PUD Regulations Allow Reasonable Development

Petitioners will no doubt argue that the PUD regulations are so restrictive that they allegedly prevent commercial development of the property. But they are wrong about that. As discussed at the Public Hearing, these types of PUD regulations were originally developed by the respected Michigan planning firm, LSL Planning. The same regulations are in effect (with some variation) in several communities across Michigan, including, for example, in Grand Haven Charter Township, Michigan. **Exb. 17.** As the photos presented at the Public Hearing demonstrate, high-quality commercial development can occur – and *has* occurred – under these zoning regulations. **Exb. 18**

⁶ Notably, the Wexford County Circuit Court has held that the City breached this requirement, and so the portion of the Boersma property lying east of US-131 has reverted back to Haring, effective May 5, 2013. *See Exb. 16.* The City is, however, appealing the circuit court’s decision, and has obtained a stay pending appeal.

(photos of commercial development in Grand Haven Township, Michigan, along US-31 corridor, where PUD Overlay regulations apply). If Petitioners are unwilling to invest in the community to the degree required by these PUD zoning regulations, then this ought to be a red warning sign to the SBC, concerning Petitioners true intentions. The community does not need a bunch of “Big Box” and “Mid Box” stores to clutter-up the Exit 180 intersection, which is exactly what Petitioners are promising to bring to their property. *See* **Exb. 19** (TeriDee billboard sign for the so-called “Cadillac Junction”). “Big Box” and “Mid Box” stores do not become any less ugly and unsightly because they masquerade under the fancy, made-up name of “Cadillac Junction.” That name is just a façade, developed to conceal an actual intention to develop ugly, box-like development, which would be a detriment to the community.

With regard to the content of the mixed-use PUD regulations, the Townships also point out that the Petitioners made a material misrepresentation to the SBC at the Public Hearing, when they claimed not to have been consulted by the Townships about the content of the mixed-use PUD regulations. That is false. Petitioners were expressly invited to provide their comments on the PUD development regulations while they were being reviewed and revised by the Haring Planning Commission and Township Board. **Exb. 20**. Also, the minutes of the July 16, 2013 Haring Planning Commission (**Exb. 21**) show that Petitioners did, in fact, attend that meeting and provide input on the content of the PUD development regulations. Moreover, *changes were made in direct response to Petitioners’ input. Id.* In addition, Petitioners’ attorney received periodic status reports on the changing content of the PUD development regulations as they were being revised by the Haring Planning Commission, and Petitioners were always invited to attend those meetings. *See* **Exbs. 22, 23 and 24**. Thus, the Townships closely consulted with Petitioners regarding the final

content of the PUD regulations. Petitioners cannot be heard to complain to the contrary, or to argue that the zoning regulations are somehow invalid for lack of an opportunity to provide their input.

Finally, the Townships feel the need to address the meritless accusation levied by the City at the Public Hearing, to the effect that the Townships' PUD zoning regulations are too "vague" to be considered a valid economic development project. The City cannot be serious about this. Petitioners have *never* been able to produce a site plan for their so-called "Cadillac Junction." All they have made are empty promises. Moreover, Petitioners' own advertising billboard (**Exb. 19**) states that they intend to deliver a bunch of "Big Box" and "Mid Box" stores to clutter-up the Exit 180 interchange, much to the community's detriment. Petitioners' empty promises about a certain quality of development mean *nothing* unless they are backed-up by firm and definite zoning regulations. And that is exactly what the Townships have provided in their Act 425 Agreement: firm and definite zoning regulations that ensure high-quality commercial development that will be protective of surrounding residential populations. This should be contrasted with what the City has provided, which is *nothing*. The Townships submitted a Freedom of Information Act ("FOIA") request to the City, asking the City to produce the zoning regulations that are intended to apply to Petitioners' property. **Exb. 25**. The City's response? Such regulations do not exist. **Exb. 26**. The City also admitted in its FOIA response that Petitioners have never provided the City with any documents or site plan showing how the property will be developed; the City's response was that such documents do not exist. *Id.*

So, the City is offering absolutely nothing about the type or quality of commercial development that the City will allow on Petitioners' property. Given this, neither the City nor Petitioners can be taken seriously when they complain about the Townships' planned development being "vague." The Townships are the *only* parties who are offering concrete plans for how the

Transferred Property will be developed, because the Townships are the only parties that have committed to *enforceable* development regulations for the Transferred Area.

The fact is that the PUD zoning regulations are valid. They allow for “commercial enterprise” and “housing development,” and therefore promote a standalone economic development project under Act 425. For this reason, the Act 425 Agreement is valid, and bars the annexation.

2. Clam Lake will receive financial benefit under the Agreement.

In the 2011-2012 annexation proceedings, the SBC held that the Townships’ 2011 Agreement was invalid, in part, because Clam Lake received no financial benefit (i.e., revenue sharing) from the agreement. The Townships will address this factor below, as it concerns the 2013 Agreement. But as a predicate matter, it must be pointed out – with all due respect to the SBC – that this particular prior finding was without logical foundation and was not supported by law.

This particular finding (lack of revenue sharing) was ostensibly offered to support the SBC’s determination that the 2011 Agreement was “not being used to promote economic development.” But there is no logical connection between the former and the latter. Whether an economic development project exists is a standalone consideration that is not affected, *at all*, by the presence, lack of, or degree of revenue sharing. They are totally separate concepts. If the Townships entered an Act 425 agreement that allowed, for example, Petitioners to construct a large housing development on their property, that would be, *ipso facto*, an economic development project, without any consideration of revenue sharing. One has nothing to do with the other.

Moreover, the decision to engage or not to engage in revenue sharing under an Act 425 agreement is a purely discretionary decision that is non-reviewable. Which is to say that Act 425 provides no standards by which to gauge whether revenue sharing should or should not occur. Parties to an Act 425 agreement must state in the agreement *whether* they intend to share revenue, but they are not required to share to any particular degree, or at all. *See* MCL 124.27. As such, there

is no court, no judge, and certainly no administrative agency, which has any legal authority to invalidate an Act 425 agreement on the basis of there not being revenue sharing or not enough revenue sharing. This is a matter which the Legislature has delegated to the sole discretion of the municipal parties to an Act 425 agreement, and so judicial or administrative review is precluded, as this would violate the separation of powers doctrine. *See Warda v City Council of City of Flushing*, 472 Mich 326, 339-340; 696 NW2d 671 (2005) (explaining that judicial review of a discretionary decision of a governmental agency is precluded, where the statute provides no standard to guide that discretion).

Notwithstanding the fact that revenue sharing is a non-reviewable, discretionary decision, logic dictates that there is no degree of revenue sharing that is necessarily “good” or “bad.” The logical question is whether the parties’ degree of revenue sharing is *proportional* to the degree of governmental services that are actually transferred and assumed under the agreement. And on that point, the Townships’ Act 425 Agreements (both the 2011 and 2013 versions) provide that Haring is to provide “*all* municipal services and facilities” to the Transferred Area (**Exb. 1**, Act 425 Agreement at Art. I, §4(a)), including, without limitation, building and zoning services, sewer and water services, assessing and taxation, special assessment, and voting. Therefore, it is only logical that Haring receive all *property tax revenue* from the Transferred Area.

That said, now is the point for the Townships to demonstrate that the SBC’s prior concern about lack of revenue sharing has nonetheless been addressed in the 2013 Agreement. Under the 2013 Agreement, the Townships have agreed that when Haring utilities are extended into the Transferred Area, they will amend the Agreement, as necessary, to share the revenues from those utilities, to enable Clam Lake to pay and finance the cost of constructing wastewater and water infrastructure, and the cost of providing wastewater services and public water services to the

Transferred Area.⁷ **Exb. 1**, Act 425 Agreement at Art II. Once again, this is logical, because Haring will also receive a benefit from the utility extensions to the Transferred Area. This is so because the Haring utility extensions must necessarily pass by several Haring properties on their way to the Transferred Area (**Exbs. 13 and 14**), thus conferring a benefit on those properties – a benefit that will generate additional sewer/water revenue (e.g., connection fees) that can be proportionally shared. Thus, there is a proper and logical amount of revenue sharing provided for under the 2013 Agreement.

3. There are no e-mails or other communications showing improper motive

In connection with the Act 425 Agreement, the Petitioners and the City can point to no e-mails or other communications between Haring and Clam Lake officials, suggesting that there was a motive to interfere with annexation. They do not exist. And while the Petitioners and the City might just want to accuse the Townships of being “smarter” this time, this should fall on deaf ears, given the objective evidence that shows the Township acted with proper motives.

These proper motives are evidenced by the public information sheet the Townships distributed in connection with the May 8, 2013 joint public hearing on the Act 425 Agreement. **Exb.**

27. That sheet explains the purpose of the Agreement, as follows:

“Why are the Townships entering this Agreement? There are two principal reasons the Township desire to enter the Act 425 Agreement:

1. “The Townships intend to engage in regional cooperation with regard to the provision of utility services, and extending Haring sewer and water services to the Transferred Area is an important first step in ensuring that other portions of Clam Lake are able to obtain utility services from Haring, including the Clam Lake Downtown Development Authority District, and perhaps other Clam Lake lands. Preserving this property as the pathway for utilities to be extended from Haring to Clam Lake is essential to ensure that this can be done cost effectively.

⁷ This subject is properly a matter of a future amendment to the Agreement, because until the financing arrangements have been finalized, the Townships cannot definitively state how the revenue stream will be apportioned.

2. “Clam Lake does not have its own zoning ordinance, and so the Transferred Area is subject to County zoning, and is currently zoned in the F-R zoning district. The F-R zoning district allows a variety of commercial uses, including motels and lodging, restaurants, retail stores, kennels and other uses^{18]}, but the County zoning regulations are believed to be inadequate to properly regulate this type of development at this location, where residential housing is located nearby. Haring Township, because it has its own zoning ordinance, is in the best position to develop and apply high-quality PUD development regulations to the area, to protect surrounding residential populations. The Agreement ensures that such regulations will be applied to the Transferred Area.”

The plain language of the Act 425 Agreement bears out these stated intentions. The Agreement *requires* the provision of Haring sewer and water services to the Transferred Area. And the Agreement replaces and improves the current County F-R zoning scheme by allowing for a reasonable amount of high-quality commercial development near the US-131 interchange, while at the same time protecting surrounding residential populations by providing for adequate buffering and open space between the commercial and residential aspects of the project. These plain terms of the Agreement are the best indicia of the Townships’ true intent, and that intent should be respected by way of the SBC holding that the Agreement is valid.

4. Haring Will Effectively and Economically Provide Utility Services, As Proven By A Cost Study

As noted above, the 2013 Agreement *requires* that Haring sewer and water services be extended to the Transferred Area. And, as demonstrated at the Public Hearing, the Townships have performed a cost study to show that Haring sewer and water services can be provided to the Transferred Area at a cost that is *less* than the cost of providing City sewer and water services to the Transferred Area. *See Exbs. 29 and 30.* It is true that the Townships’ cost study takes into account the additional cost of City taxes, which are 15.0473 mills *higher* than Haring property taxes (over 750% higher!), but this is entirely proper. This is so because the City has adopted a policy document

⁸ A copy of the County F-R zoning regulations are attached at **Exb. 28**, showing the various commercial uses that are permitted by conditional use approval or special use approval.

expressly providing that the full cost that must be paid for City sewer and water services is the service fees *plus* City property taxes. **Exb. 8.** Indeed, the City’s policy on this subject (*id.*) contains the following express admission:

“Similarly, it is often argued that outlying areas should be able to tap into City utilities by paying a rate that is more than that paid by City residents. Some have suggested that rates double those paid by City customers is fair. Again, **it is the City’s position that the additional rate that should be paid for water and sewer services is equal to the City’s full millage rate . . .**”

Accordingly, to accurately compare the true cost of providing City utility services vs. Haring utility services to the Transferred Area, one must account for the huge additional tax burden on the property that necessarily accompanies City services. In that regard, as was demonstrated at the Public Hearing, the true cost of providing Haring utility services to the Transferred Area is actually \$163,420 *less* expensive on a 10-year basis, when looking at (a) Petitioners’ own projected 10-year build-out for their property (**Exb. 31**), and (b) the additional tax burden that would necessarily accrue to the property under the City’s tax regime (17.0473 mills), as compared to the Haring tax regime (2.0 mills) (**Exbs. 29 and 30**). Thereafter (i.e., after the tenth year), the disparity would grow by about \$300,946/year, such that it would become even more and more economical to rely on Haring utility services, as compared to City services. *Id.*

In short, Haring *will* provide sewer and water services to the Transferred Area, and the Townships’ cost study proves that this is the most economical option, as compared to City services, when looking at the broader picture of costs that necessarily accompany City utilities. And while the Townships do not, as a matter of law, have to prove that Haring services are more economical than City services⁹, the Townships’ cost study goes a long way to demonstrate that the Townships have acted in good faith to promote an economic development project on the property.

⁹ There is nothing in Act 425 that suggests that public utility services must be provided at a certain cost in order to be part of a valid economic development project. The SBC would have to re-write Act 425 to impose such a

5. The timing of the 2013 Agreement was proper.

There is nothing wrong with the timing of the Act 425 Agreement. To the contrary, its timing was entirely proper. As a threshold matter, the Act 425 Agreement was approved by each Township on May 8, 2013, at a time when no annexation petition had even been filed with the SBC, covering the Transferred Area. And on that point, it is of course not possible to interfere with an annexation that does not exist. Moreover, the Agreement was approved at a time when the SBC and the Director of LARA had already determined – just eight months earlier – that Petitioners’ property should *not* be annexed into the City. The Townships submit that it is not possible to interfere with an annexation petition that – just eight months earlier – had already been adjudicated, *by the SBC and the Director of LARA*, to be something that should not occur.

Perhaps more importantly, the SBC should take careful note of its prior admonition to the Townships in connection with the SBC’s invalidation of the 2011 Act 425 Agreement. In that regard, the SBC invalidated the 2011 Agreement because the Haring WWTP was considered too speculative at that time. So, what did the Townships do with that prior admonition? They listened to the SBC: they waited until the Haring WWTP was no longer speculative, and that is when they entered a new Agreement. As shown above, in mid-2013 is when the Haring WWTP became a “sure thing” – it was no longer speculative because (a) financing had been secured, (b) a discharge permit was issued by the MDEQ, and (c) there was no chance of voter disapproval, because the referendum period on the revenue bonds had expired without a petition being filed. When these events transpired, it was the ideal time to enter a new Act 425 Agreement, and that is exactly what the Townships did. They approved an Act 425 Agreement that is a model of regional cooperation. It allows for regional sharing of Haring utilities, and allows reasonable, high-quality commercial

requirement, which, of course, the SBC cannot do. *See People v Burton, supra*, (it is impermissible to write into a statute language not already included in its plain text).

development at the Exit 180 interchange, while still ensuring that the longstanding residential populations in this same area are protected by open space, buffers and residential use.

The timing of the Townships' 2013 Agreement cannot be faulted simply because Petitioners filed another annexation petition within a month after the Townships' Agreement had been approved. The Townships have no control over the fact that Petitioners chose to file another meritless annexation petition, which is identical to the one that had already been rejected by the SBC and by the Director of LARA, as being inappropriate, just eight months earlier.

D. The Act 425 Agreement Is Valid, Based On The SBC's Own Reasoning

As demonstrated above, the only five deficiencies that the SBC identified in the 2011 Agreement have been completely remedied in the Townships' 2013 Agreement. The SBC is thus compelled to find that the 2013 Agreement is valid, and that the proposed annexation "shall not take place," as provided by the plain language of MCL 124.29.

III. THE ACT 425 AGREEMENT IS VALID UNDER THE REASONING OF THE CASCO TWP DECISION

The SBC's authority to review the validity of an Act 425 Agreement (in the context of an annexation proceeding) was confirmed by the Michigan Court of Appeals' decision in *Twp of Casco v State Boundary Comm*, 243 Mich App 392 (2000). Although the SBC has the authority to review the Act 425 Agreement in this annexation proceeding, the *Casco Twp* case involved factual circumstances that are radically different from this case, as shown below. The Act 425 Agreement between Haring and Clam Lake meets the tests for a valid agreement stated in the *Casco Twp* case.

A. Unlike the Situation in *Casco Twp*, There Has Been A Full Transfer of Governmental Services, Benefits and Responsibilities

Casco Twp involved a situation where the Act 425 Agreement under consideration did not provide for anything even close to a full transfer of governmental services, benefits and

responsibilities. Rather, the *Casco Twp* Act 425 Agreement provided only for the sharing of certain limited services, such as fire and library services.

In contrast, under the Townships' Act 425 Agreement there is a *complete* transfer of governmental services, benefits and responsibilities from Clam Lake to Haring, encompassing the entire Transferred Area. The Transferred Area is already a part of Haring "for all purposes" (**Exb. 1**, Agreement at Art I, §2), including for the purpose of the following governmental authority and services, among others:

- All municipal facilities and services afforded to property owners within Haring (*id.*, p. 4).
- Public wastewater and water service (*id.*, pp. 4-7).
- Enforcement of ordinances, codes, rules and regulations (*id.*, p. 7).
- Zoning and building ordinances and regulations (*id.*, pp. 7-18).
- Real and personal property tax assessing and taxation (*id.*, p. 18).
- Special assessments (*id.*).
- Rates and charges for governmental services (*id.*, pp. 18-19).
- Liens for services, special assessments and property taxes (*id.*, p. 19).
- Voting, suffrage and elections (*id.*).
- Revenues from taxes, revenue sharing and all other sources (*id.*, pp. 19-20).

In furtherance of this complete transfer of governmental authority, Clam Lake transferred to Haring the entire taxing and assessing jurisdiction over 99 parcels, having an assessed value of \$3,577,100 and a taxable value of \$2,599,659. All property tax records for the Transferred Area have already been transferred to Haring. *See Exb. 32*, Affidavits of Sharon Zakrajsek, Haring Township Assessor, and Molly Whetstone, Clam Lake Township Assessor.

In addition, Clam Lake transferred the entire population within the Transferred Area to Haring. During the entire length of the Agreement, these new Haring residents will be counted towards Haring's population for census and all other purposes. These same persons have already

had their voting records transferred to Haring and they have already voted in a Haring election. *See Exb. 33* (Clam Lake notice sent to residents of Transferred Area, regarding change of voter status) and (Affidavit of Lynn Nixon, Haring Deputy Clerk, regarding change in voter registration).

The last two of the above points (transfer of tax records and voting records) are of particular significance, because the SBC held in *Casco Twp* that “[a] transfer of land has not occurred in this case . . . evidence of such transfer . . . minimally could have included a showing of a transfer to Lenox Township of property tax records and voting records of any residents in the Act 425 area.”

Exb. 34, SBC Decision in Docket #96-AP-10 at p. 5. Thus, the Haring-Clam Lake Act 425 Agreement has accomplished a valid transfer of land under the minimum standards that the SBC itself established in *Casco Twp*. Moreover, the Townships’ Act 425 Agreement goes far above and beyond the SBC’s minimum “valid-transfer” standards by also providing for a complete transfer of all governmental authority, all governmental services, and all state revenue-sharing benefits.

The proper conclusion, therefore, is that the Townships’ Agreement is valid under the SBC’s own standards, as articulated in the *Casco Twp* case. The Agreement has accomplished a valid transfer of land under Act 425, which means that annexation of the territory in question “shall not take place,” as mandated by MCL 124.29. The SBC should therefore deny the proposed annexation.

B. The Act 425 Agreement Is Not a “Sham” Like In *Casco Twp*

Not only does the Act 425 Agreement implement a valid, multi-faceted economic development project, there are many other factors showing that Haring and Clam Lake did not enter into the Act 425 Agreement as a “sham,” as the SBC and Court found in *Casco, supra*.

Act 425 requires that the local units consider “land area and land uses” and “past and probable future growth.” Here, a portion of the Transferred Area has already developed for residential use, and the property in Haring immediately north of the Transferred Area has also developed for residential uses. However, the County F-R zoning that previously applied would have

allowed a variety of commercial uses on the balance of the Transferred Area, without proper regulation on these more-impacting uses. It is no “sham” for the Townships to promote an economic development project that would allow reasonable-scale, high-quality commercial development at the highway interchange, while still being adequately protective of surrounding residential populations. That is exactly what the Act 425 Agreement accomplishes, by way of applying the mixed-use commercial/residential PUD regulations to the Transferred Area.

Act 425 further mandates that the local units consider the “need for organized community services,” such as public sewer and water. The Act 425 Agreement demonstrates, on its face, that Haring and Clam Lake devoted considerable attention to this criterion in formulating the Agreement. Indeed, the Act 425 Agreement includes detailed provisions, setting forth the means and methods by which Haring wastewater and water services will be provided to the Transferred Area during the term of the Agreement, as well as thereafter, when the Transferred Area has reverted back to Clam Lake, in 2033. **Exb. 1**, Act 425 Agreement at Art. I, §§4 and 17. Also, within the Act 425 Agreement, the Townships have even made long-term plans to engage in further regional cooperation with regard to the provision of utility services, by way of the possible extension of Haring wastewater services to other portions of Clam Lake, including the Clam Lake Downtown Development Authority District, and perhaps other Clam Lake lands. *Id.* at Art. 1, §4(b). As designed, the Act 425 Agreement is a proper vehicle for ensuring that the Transferred Area is preserved as a primary pathway for utilities to be extended from Haring to Clam Lake, in a cost-effective manner.

These provisions demonstrate that the Act 425 Agreement is not “illusory,” and is not simply being used as “shark repellent,” as in *Casco Twp.* Instead, the 425 Agreement is an effective and good faith contract that will promote an economic development project on the Transferred Area that

is consistent with the established land uses. Moreover, there exists an actual plan for the *required* provision of public water and wastewater services for the Act 425 area, to support the designated economic development project. The Act 425 Agreement is a model of good-faith regional cooperation, in the fields of both utility planning and land-use planning. It is valid, and so the proposed annexation “shall not take place,” as provided by the plain language of MCL 124.29.

IV. THE ACT 425 AGREEMENT IS VALID UNDER THE ACT 425 STATUTORY CRITERIA

As noted above, Act 425 identifies certain criteria that local units of government are to consider when formulating such an agreement. A consideration of these criteria further supports the conclusion that the Act 425 Agreement is valid, as shown below.

A. Economic Development Project

The Townships have already demonstrated above that the Act 425 Agreement promotes a multifaceted economic development project. In considering that economic development project, the Townships repeat the suggestion they made to the SBC at the Public Hearing: they ask that the SBC be mindful of its limited jurisdiction when it considers the Act 425 Agreement.

More specifically, an important point for the SBC to keep in mind when considering the Townships’ specific type of planned economic development project (i.e., mixed-use commercial/residential PUD), is that it is *not* the SBC’s role to subjectively weigh the relative benefits or drawbacks of this type of development, as compared to the alternative type of development being proposed by the Petitioner (high-intensity commercial). That type of comparison – whether favorable to the Townships or to the Petitioners – is irrelevant to the validity of the Act 425 Agreement. In determining whether the Act 425 Agreement is valid, the only permissible consideration is whether it fulfills the statutory criteria of Act 425. *Casco Twp, supra* at 398. That is, does the Act 425 Agreement promote **an** economic development project – not a particular type of

development that might have the subjective favor of the SBC, the City or the Petitioners. And does the Agreement otherwise reflect consideration of the identified criteria that local units of government are to consider when formulating a conditional transfer agreement, as stated in Act 425? If the Townships' Agreement satisfies these two criteria (and it does), and these two criteria alone, then the Act 425 Agreement is valid, and the SBC must dismiss the annexation petition, as a matter of law, as required by MCL 124.29.

As shown above, the Townships are properly promoting an economic development project on the Transferred Area, and so they have satisfied the first criterion. For the additional reasons shown below, the Townships' Agreement is predicated upon proper consideration of the other factors stated in Act 425, thus satisfying the second criterion.

B. Other Act 425 Criteria

Act 425 identifies certain criteria that local units of government are to consider when formulating a conditional transfer agreement. These factors include:

The need for organized community services; the present cost and adequacy of governmental services in the area to be transferred; the probable future needs for services; the practicability of supplying such services in the area to be transferred; the probable effect of the proposed transfer and of alternative courses of action on the cost and adequacy of services in the area to be transferred and on the remaining portion of the local unit from which the area will be transferred; the probable change in taxes and tax rates in the area to be transferred in relation to the benefits expected to accrue from the transfer; and the financial ability of the local unit responsible for services in the area to provide and maintain those services. MCL 124.23(b)

A review of the relevant facts show that Haring and Clam Lake properly weighed these criteria in determining that they should enter their Act 425 Agreement, as shown below¹⁰:

¹⁰ The minutes of the April 30, 2013 and May 1, 2013 meetings of the Clam Lake and Haring Boards are attached at **Exbs. 35 and 36**, respectively. These minutes document that the Township Boards considered each of the Act 425 criteria at these meetings.

1. Density and Composition of Population

The Transferred Area and all of the surrounding township lands to the north, east and south are either occupied by a population of single-family residences or are vacant. Thus, an Act 425 Agreement that (a) allows reasonable-scale, high-quality commercial development nearby to the highway interchange, but (b) also ensures protection of surrounding residential populations through buffering, open space and additional residential use, is appropriate, as being consistent with the surrounding population.

2. Land Area and Uses

The Transferred Area and all of the surrounding township lands to the north, east and south are now used for low-density residential housing or forest recreation purposes. Thus, an Agreement that (a) allows reasonable-scale, high-quality commercial development nearby to the highway interchange, but (b) also ensures protection of surrounding residential populations through buffering, open space and additional residential use, is appropriate, as being consistent with the surrounding land area and uses.

3. Topography and Natural Boundaries

These factors do not weigh heavily in the consideration of the Agreement, at least as between Haring and Clam Lake, because the Transferred Area does not have any unique topographical features or natural boundaries that would isolate it from either Township. However, the fact that the Transferred Area lies on the east side of US-131 strongly counsels that these lands should remain as Township lands – not City lands – because US-131 has long established a logical and consistent boundary between the City and the Townships.

The City is confined only to the west side of US-131, whereas it is only township lands to the east.¹¹ The Act 425 Agreement properly continues that same alignment of municipal boundaries, and rightly precludes the City from having an irregular, 20-sided, isolated and tenuously-connected piece of pistol-shaped territory extending across the highway to the east side of US-131.

4. Assessed Valuation

The Townships evaluated this criterion but did not consider it to be a significant factor in considering the propriety of the Act 425 Agreement, except to the extent that it affects the amount of tax revenue generated from the Transferred Area. That issue is addressed below in subsection 9.

5. Drainage and Soil Erosion

The Townships considered this factor, but it was not considered to be important. Any drainage or erosion issues can be dealt with in connection with the development of the property.

6. Both Proposed and Possible Future Commercial and Industrial Development and Growth

The Townships considered this factor and determined that limited, high-quality commercial development would be appropriate only for that portion of the Transferred Area that is nearby to the US-131/M-55 interchange. Doing so ensures that the long-established residential populations that exist in this area are protected from the harmful effects of commercial development, through requirements for appropriate open space, buffers and additional residential development.

The Townships further determined that unrestricted commercial use should instead continue to be promoted on lands that are already planned or zoned for that purpose, including at and around the US-131 exits to the south in Clam Lake (Exits 176 and 177, within the Clam Lake DDA) and to the north, within Haring, at the Exit 183 interchange (Boon Road), and also upon vacant or semi-

¹¹ The sole exception to this east-west division was the Boersma property, which lies, in part, on the east side of US-131. However, as explained in footnote 6, *supra*, the Boersma property has now reverted back to Haring, effective May 5, 2013.

developed commercial properties located within the City or Haring. The Townships also took into consideration the fact that Township and County legislatures, as well as the Clam Lake voters, had repeatedly rejected unrestricted commercial zoning for the Transferred Area.

In considering the Townships' decision to promote large-scale commercial development at the Exit 176/177 interchanges (the DDA) and the Exit 183 interchange (Boon Road), the Townships point out that Petitioners are incorrect in their claim (as made at the Public Hearing) that Exit 180 is the busiest US-131 intersection in the Cadillac area. That information is wrong. The 2012-2013 MDOT traffic counts for Exit 176 (M-115), Exit 180 (M-55) and Exit 183 (Boon Road) show that Exit 180 is the *least* busy of these three intersections. Specifically, the 2012-2013 MDOT Annual Average Daily Traffic Report for these three intersections provides as follows:

- | | | | |
|----|---------------------|----------|------------------------|
| 1. | Boon Road at US-131 | Exit 183 | 9582 vehicles per day |
| 2. | M-115 at US-131 | Exit 176 | 8651 vehicles per day |
| 3. | M-55 at US-131 | Exit 180 | 6356 vehicles per day. |

See **Exb. 37**.

Clearly, therefore, the Townships made the correct regional planning decision when they decided to steer large-scale commercial development to Exits 176 and 183 (where traffic counts are highest), and not Exit 180 (where traffic counts are the lowest).

7. Residential Development and Growth

For the reasons already discussed above, the Townships determined that a residential development buffer is necessary to protect the long-established residential housing developments near Exit 180, and so included this requirement within the mixed-use PUD zoning regulations that are included in the Act 425 Agreement, and which are now part of the Haring zoning ordinance.

8. The Need for Organized Community Services; the Present Cost and Adequacy of Governmental Services, the Future Need of those Services and the Ability to Provide those Services

The Townships considered this factor and concluded that Haring could provide all of the organized governmental services that are required for the planned economic development project. In particular, only Haring (not Clam Lake) could provide public water and public sewer services, because Clam Lake does not have its own public water system or wastewater treatment plant. In addition, the Townships determined that Haring was best suited to provide zoning services, because Clam Lake has not yet adopted its own zoning ordinance, and the existing County F-R zoning was not adequately protective of surrounding residents.

9. The Practical Effect of Transferring Property from one Township to Another, Including the Impact on Taxes and Tax Rates in Relation to the Benefits Expected to Accrue from the Transfer

The Townships considered this issue and concluded that the additional tax revenue to be received by Haring was reasonably proportional to the additional costs it would incur as a result of taking responsibility for the Transferred Area. The Townships further determined that the Act 425 Agreement would be beneficial to the taxpayers in the Transferred Area, because their local tax rate would *decrease* from 2.8115 mills (Clam Lake's 2013 rate) to 2.0 mills (Haring's 2013 rate). By way of comparison, the annexation petition, if approved, would result in the affected Clam Lake residents paying City taxes that are 15.0473 mills *higher* than Haring's millage rate – over a 750% increase.

10. The General Effect Upon Local Units Involved and the Relationship of such an Agreement to Established City, Village, Township, County or Regional Land Use Plans.

The Townships closely considered this factor and determined that the mixed-use commercial/residential PUD designation was appropriate for the Transferred Area, in order to allow

reasonable-scale, high-quality commercial development near the interchange, while still protecting the long-established residential populations in this area through requirements for buffers, open space and additional residential development.

CONCLUSION: THE ACT 425 AGREEMENT IS VALID

This is not the *Casco Twp* case. The differences are innumerable and striking. Moreover, the SBC should not use its recognized authority to consider the validity of Act 425 Agreements as a basis for subjectively picking winners and losers between two proffered types of development, where one type is being offered through an Act 425 Agreement and the other is being offered through annexation. Whenever an annexation petition attempts to compete with an existing Act 425 Agreement in this context, the Legislature has mandated, by way of MCL 124.29, that the annexation “shall not take place,” provided only that the Act 425 Agreement promotes **an** economic development project (not the one the SBC might subjectively prefer). As demonstrated above, the Townships’ Act 425 Agreement easily passes that test. Moreover, the Townships have remedied each and every defect that the SBC identified in the 2011 version of the Townships’ agreement, and so under the SBC’s own reasoning, the SBC is compelled to find that the 2013 Agreement is valid.

V. THE ANNEXATION PETITION SHOULD BE DENIED.

The SBC should not even reach the merits of the annexation petition, for the reason that the Townships’ Act 425 Agreement is valid, thus making the annexation petition void and irrelevant. However, if the SBC reaches a decision to invalidate the Act 425 Agreement, the Townships will demonstrate below that the annexation petition should nonetheless be denied, for lack of merit. This is the same decision the SBC and the Director of LARA reached just over a years ago, and there is no reason why Petitioners’ current petition should not meet the same fate.

In that regard, it needs to be remembered that the current Petition is *identical* to the former annexation petition that was already denied for the exact same lands. And absolutely nothing

changed with respect to the annexation property in the short period of eight months that had passed since the Director's previous denial. The Petitioners are simply trying to take a second bite at the exact same apple, hoping that the SBC will arbitrarily and capriciously reverse its prior denial of annexation for the exact same lands, even though there has been no change in the underlying facts or circumstances. For the reasons explained below, denial of the petition remains the correct result.

A. The 18 Statutory Criteria Control the SBC's Decision

As in every case before the SBC, the focus of the SBC's review and decision must be on the 18 statutory criteria that by law guide each of the SBC's decisions. Pursuant to Section 9 of Act 191, MCL 123.1009, the "*criteria* to be considered by the Commission in arriving at a determination *shall be*" the 18 objective "*criteria*" listed in that statute. MCL 123.1008 reiterates that: "The commission *shall review* proposed incorporations considering *the criteria established by section 9.*" It also mandates that: "At the public hearing the reasonableness of the proposed incorporation based on *the criteria established in this act shall be considered.*" [Emphasis added].

The Legislature repeated the word "shall" three times in describing the 18 statutory criteria and the SBC's duty to review and consider those criteria in connection with each of its determinations. As the Michigan Supreme Court has recently reiterated, in the construction of statutes: "'Shall' is a mandatory term, not a permissive one." *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006). "The Legislature's use of the word 'shall' indicates a mandatory and imperative directive." *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005).

Consistent with these principles, our Supreme Court held, in *Midland Township v Stale Boundary Comm*, 401 Mich 641 (1977), that the 18 criteria contained in Section 9 provide the statutory standards that made the delegation of power to the SBC lawful and constitutional:

"The 1968 act, as incorporated in the home rule cities act by the 1970 amendment, provides for a public hearing at which *the Commission shall consider the*

“reasonableness” of the proposed annexation based upon *the “criteria” set forth in § 9 of the 1968 act*:

“*Criteria to be considered by the commission* in arriving at a determination shall be:

“(a) Population; population density; land area and land uses; assessed valuation; topography, natural boundaries and drainage basins; the past and probable future urban growth, including population increase and business, commercial and industrial development in the area. Comparative data for the incorporating municipality, and the remaining portion of the unit from which the area will be detached shall be considered.

“(b) Need for organized community services; the present cost and adequacy of governmental services in the area to be incorporated; the probable future needs for services; the practicability of supplying such services in the area to be incorporated; the probable effect of the proposed incorporation and of alternative courses of action on the cost and adequacy of services in the area to be incorporated and on the remaining portion of the unit from which the area will be detached; the probable increase in taxes in the area to be incorporated in relation to the benefits expected to accrue from incorporation; and the financial ability of the incorporating municipality to maintain urban type services in the area.

“(c) The general effect upon the entire community of the proposed action; and the relationship of the proposed action to any established city, village, township, county or regional land use plan.” 1968 PA 191; MCLA 123.1009.” (Emphasis added).

Based on these statutory criteria, the Court concluded that “‘reasonableness,’ determined based on the statutorily enumerated criteria, is a sufficient guideline for the exercise of commission discretion.” *Id.* [Emphasis added]. Following the Court’s decision in *Midland*, the Court of Appeals addressed the Section 9 criteria in *Chase v State Boundary Commission*, 103 Mich App 193 (1981), wherein the Court concluded that “consideration of the statutory criteria of § 9 is critical in reviewing all valid petitions for annexation [Court’s emphasis] . . . ***By not examining the evidence in light of the statutory criteria of § 9, the commission’s decision was arbitrary, capricious and clearly in violation of law.***” [Emphasis added].

As a matter of administrative interpretation, the SBC has observed the importance of the statutory criteria by making them the central focal point of its decisions. These criteria are addressed in the “Criteria Questionnaires” that the SBC requires all parties to file in annexation and

incorporation proceedings. Traditionally, the SBC's decisions address all the relevant criteria in each decision the SBC renders.

B. Request for Specific Findings of Fact and Conclusions of Law

Because of the importance of the 18 statutory criteria, the Townships present the following discussion of the controlling criteria in this case as part of its 30-day submissions. Additional information is also contained in Clam Lake's and Haring's Criteria Questionnaires, the Clam Lake DDA's letter (submitted separately by the DDA), and other supporting materials regarding the DDA, which are attached as **Exbs. 38 through 42**. Based upon the record before the SBC, the Townships offer the following findings of fact and conclusions of law. The Townships request, pursuant to MCL 24.285, that the SBC make a ruling on each of the following proposed findings:

1. Criteria 1 - 2. Population; Population Density.

1. The population (approximately 20) and population density of the annexation area and the immediately surrounding areas in Cadillac, Clam Lake and Haring are principally single family residential in character.

2. The Petitioners are requesting this annexation allegedly in order to permit an unspecified, intensive commercial development (including "Big Box" and "Mid Box" stores) to locate within the annexation area. Such a use would not be consistent with the population and population density within the annexation area or within the immediately surrounding area.

3. The Act 425 Agreement between Clam Lake and Haring is designed to accommodate reasonable-scale, high-quality commercial development near the highway interchange, while still ensuring that existing residential populations in this same area are protected by appropriate buffers, open space and additional residential housing. This would be consistent with the population and population density within the annexation area and within the immediately surrounding area.

4. As demonstrated by the testimony at the Public Hearing, the vast majority of the residents immediately surrounding the annexation area oppose the requested annexation to Cadillac.

2. Criteria 3 - 4. Land Area and Land Uses.

5. The proposed annexation area consists of 241.31 acres, including existing single family residential homes, vacant land and road rights-of-way.

6. The proposed annexation area has for many years been planned and zoned by Wexford County for residential uses, and it is currently used for residential purposes. The long-established City, Township, County and State land use plans for this interchange (Exit 180) have consistently determined that the proposed annexation area should *not* be used for intensive commercial purposes, as Petitioners are proposing. Specifically:

a. The County land use plan was updated in the early 1990's, in cooperation with the US-131 Corridor Study Committee and Michigan Department of Transportation ("MDOT"), leading to a strategic master plan in 1994 finding that Exit 180 should be established as a "soft interchange" in a residential area. Much thought and many reasons were given for this planning designation, including that the land had been deemed residential for many years, and a residentially-oriented exit at this location would allow access within less than 3 miles by residentially-zoned developments to a major hospital, fire department, EMS service, shopping and medical/dental services, and schools. The planners also envisioned this as an area of moderately-priced, privately-owned homes on smaller neighborhood lots (as opposed to larger, more expensive homes on large lots) with lower property taxes but with access to all needed municipal and community services.

b. The Wexford County Comprehensive Plan was updated in 2004 (the full County Plan was filed with Clam Lake's Questionnaire), and the County continued the same plan for Exit 180. In response to a written concern of a subdivision resident who lived near Exit 180, about commercialization of this area, the County responded by emphasizing that the 1994 Plan was *not*

changing, and that the area would continue to be planned for rural residential and/or agricultural-forest production uses, and that this area was outside the designated urban growth boundary. **Exb. 43.**

c. The City of Cadillac's own 1994 Long Range Comprehensive Plan (**Exb. 44**) states that unrestricted commercial development should be discouraged at the US-131/M-55 interchange, and encourages the County and the Townships to implement this same strategy on their side (east) of the highway interchange. Thus, the annexation petition is inconsistent with the City's own long-range land use planning.

d. Consistent with its land use plan, Wexford County denied a request for unrestricted commercial zoning at Exit 180 in 2001.

e. In 2002, the City of Cadillac advised the local transit authority that the City territory immediately west of Exit 180 is residential, and anything other than residential zoning would be inconsistent with the City's master plan.

f. In 2003, the County received a request to change the master plan designation for the proposed annexation area to commercial. The County denied that request for a number of good reasons, including the existing residential uses in the immediate area, the City's residential and light office zoning west of Exit 180, the findings of the Cadillac Area Corridor Study, and the desire to direct commercial development to the interchanges located south and north of Exit 180.

g. In April 2008, the Clam Lake DDA passed a resolution not to support commercial development at Exit 180, as was then proposed by the Petitioner in this case. The reason for this opposition was that the development did not fit in with the community's desires and needs as outlined in the current Wexford County Plan. Even though the Clam Lake DDA is highly supportive of commercial development within Clam Lake, it believes that it is essential to follow the County's

master plan, as well as the master plan update prepared for the DDA and approved in 2008. The DDA also strongly believes that commercial opportunities in the area should be directed to the planned commercial area around Exits 176 and 177, and not to Exit 180.

h. Clam Lake's DDA is actively looking for development in commercial, office/service, and highway commercial within the DDA District. The Clam Lake DDA District has approximately 100 undeveloped acres throughout the DDA District, from the south border of the City to Exit 177, and west along Mackinaw Trail to the M-115 intersection. Exit 177 is approximately 3 miles south of the proposed annexation area, and Exit 176 is approximately 4 miles south of the proposed annexation area. The DDA District encompasses both of these expressway interchanges, as well as the properties between these well-located, prime areas for commercial development. The Clam Lake DDA District has substantial room for additional commercial development on land that has already been zoned and master planned for commercial development.

i. In December 2010, the Clam Lake DDA adopted a resolution to formally welcome the Petitioners in this case to develop their desired commercial project within the DDA District, rather than in the proposed annexation area.

j. Haring has designated the lands around Exit 183 (Boon Road), located three miles to the north, for large-scale commercial development. Haring has recently rezoned several very large, vacant parcels of land at this intersection to Commercial, leaving ample opportunity for large-scale commercial development at this intersection. **Exb. 45** (Haring zoning map)

7. The immediately surrounding areas within Cadillac, Haring and Clam Lake have been planned, zoned and used principally for residential purposes.

8. The proposed annexation area is not regular or compact, and is not substantially connected to Cadillac. Instead, the annexation area is of an irregular shape, roughly resembling a

“pistol” with 20 separate sides. The proposed annexation area would be connected to Cadillac only by the narrow “barrel” of the “pistol,” which is about 836 feet wide along Crosby Court. In similar cases, the Michigan Supreme Court has held that such irregularly shaped parcels with only narrow connections to a city are not sufficiently “contiguous” to permit annexation of the property to the city. *Owosso Twp v City of Owosso*, 385 Mich 587, 590-91; 189 NW2d 421 (1971); *Genesee Twp v Genesee County*, 369 Mich 592, 601 -05; 120 NW2d 759 (1963). The SBC should similarly find that the annexation area is not sufficiently contiguous to Cadillac, that the proposed annexation would create an improper and irregular city boundary, and deny the proposed annexation.

3. Criterion 5. Assessed Valuation.

9. Cadillac’s property tax millage rate (17.0473 mills) is substantially higher than either Haring’s (2.0 mills) or Clam Lake’s (2.8115 mills) millage rates.

10. Based on the SEV of the annexation area, the *additional* property tax that would be paid within the annexation area if it were (a) developed as Petitioners propose and (b) annexed to Cadillac, would be approximately **\$300,946 more per year**, as compared to Haring taxes under the Act 425 Agreement.

4. Criteria 6 - 7. Topography and Natural Boundaries and Drainage Basins.

11. The US-131 expressway separates the annexation area from Cadillac. This is consistent with the boundary line that exists in the entire Cadillac region: the City is located solely to the west of the highway, and the Townships are located to the east.

12. The annexation area is immediately adjacent and contiguous to each Township.

5. Criteria 8 - 9. The Past and Probable Future Urban Growth, Including Population Increase and Business, Commercial and Industrial Development in the Area; Comparative Data for the Annexing Municipality, And the Remaining Portion of the Unit from which the Area will be detached.

13. Wexford County has consistently planned the annexation area for residential uses since 1994 (see finding 6 above).

14. The County rejected a rezoning of the annexation area to commercial in 2001, and rejected a master plan change of the annexation area to commercial in 2003.

15. In 2008, the voters of Clam Lake rejected an Act 425 agreement with Cadillac that would have allowed unrestricted commercial development of the annexation area.

16. The Cadillac zoning ordinance and land use plan calls for residential development of the property immediately west of the annexation area in the City.

17. The Wexford County zoning ordinance and land use plan have established residential zoning and uses within the areas immediately south and east of the annexation area.

18. The Haring zoning ordinance and land use plan have established residential zoning and uses within the areas immediately north of the annexation area.

19. The expressway interchanges that are at a distance of 3-4 miles north and south of the annexation area have been designated and are being developed for intensive commercial uses.

6. Criteria 10 - 14. Need for Organized Community Services; the Probable Needs for Services; the Practicability of Supplying such Services in the Area to be Annexed; and the Probable Effect of the Proposed Annexation and of Alternative Courses of Action on the Costs and Adequacy of Services in the Area to be Annexed and on the Remaining Portion of the Unit from which the Area will be Detached.

20. There is no need for additional public services to the proposed annexation area that cannot already be provided by Haring or Clam Lake.

21. Prior to commencing this annexation proceeding, the Petitioners did not contact either Township to determine whether the Townships could provide any needed municipal services.

22. Haring can provide public sewer and water services to the annexation area.

23. The opportunity for Haring to provide sanitary sewer service to the annexation area would be consistent with Clam Lake's planned long-term needs for sanitary sewer service further south to Berry Lake and the Clam Lake Downtown Development Authority District.

24. The Clam Lake DDA area is located at Exits 176 and 177, which has long been planned as the commercial gateway to the Cadillac area. Substantial commercial development has already occurred there, even without sewers, but Clam Lake plans to serve that area with sewers extended from Haring when there is a demand for sewer service in that area.

25. In 1999, Clam Lake hired Wilcox and Associates to plan a sewer system to serve the DDA. The engineers recommended in 2003 that Clam Lake cooperate with Haring as the most feasible way to provide sewers to the DDA.

26. Berry Lake residents inquired about sanitary sewers in 2006 because of concerns about lake water quality. Clam Lake hired another consultant, Richard Pierson, who similarly recommended in 2007 that Clam Lake cooperate with Haring to install sewers to that area.

27. Haring sewer lines can be provided to Berry Lake and the Clam Lake DDA by an extension south from Haring that would go right through this annexation area.

28. If the annexation area is annexed to Cadillac, it would become substantially more difficult to extend Haring's sanitary sewer services south to those areas, since the annexation could effectively block those extensions.

29. In order for Cadillac to extend sanitary sewer and water service to the annexation area, it would be necessary to bore under the US-131 expressway.

30. The annexation area currently receives fire protection from Haring and police protection from the County Sheriff, neither of which have been suggested to be inadequate in any way to meet the service needs of the annexation area.

31. The roads in the City immediately west of the annexation area and the expressway interchange are designed purely for residential uses. Those roads are narrow, and there is a steep grade between Cadillac and the annexation area.

7. Criterion 15. The Probable Increase in Taxes in the Area to be Annexed in Relation to the Benefits Expected to Accrue from Annexation.

32. Cadillac's property tax millage rate (17.0473 mills) is substantially higher than either Haring's (2.0 mills) or Clam Lake's (2.8115 mills) millage rates.

33. Based on the SEV of the annexation area, the *additional* property tax that would be paid within the annexation area if it were (a) developed as Petitioners propose and (b) annexed to Cadillac, would be approximately **\$300,946 more per year**, as compared to Haring taxes under the Act 425 Agreement.

34. Even though there would be an approximately 750% increase in property taxes on the proposed annexation area if it was added to the City, the area would not receive any additional public services that cannot already be provided by Haring and/or Clam Lake.

8. Criterion 16. The Financial Ability of the Annexing Municipality to Maintain Urban Type Services in the Area.

35. Cadillac has not designated this area or the area immediately to the west in the City for anything but residential uses. The road in the City west of the annexation area (M-55) is not designed to accommodate intensive commercial development; it is designed for residential use.

9. Criterion 17. The General Effect upon The Entire Community of the Proposed Action.

36. Approval of the annexation request would have negative effects on the entire community, including within Cadillac, Haring and Clam Lake, as demonstrated by the comments at the public hearing. The community does not need ugly “Big Box” and “Mid Box” stores to clutter-up the Exit 180 area, as Petitioners are specifically proposing.

10. Criterion 18. The Relationship of the Proposed Annexation to Any Established City, Village, Township, County, or Regional Land Use Plan.

37. The annexation area has been designated for residential development in the County’s land use plan and zoning ordinance since 1994.

38. The County rejected a rezoning of the annexation area to commercial in 2001, and rejected a master plan change of the annexation area to commercial in 2003.

39. In 2008, the voters of Clam Lake rejected an Act 425 agreement with Cadillac that would have allowed unrestricted commercial development of the annexation area.

40. The Cadillac zoning ordinance and plan calls for residential development of the property immediately west of the annexation area in the City. The City’s land use plan does not designate commercial development at this interchange.

41. The County zoning ordinance and land use plan have also designated the areas immediately south and east of the annexation area for residential purposes.

42. The Haring zoning ordinance and land use plan have designated the areas immediately north of the annexation area for residential purposes.

43. The Clam Lake DDA has aggressively and consistently planned the expressway interchange at Exit 177 (which is 3 miles south of the annexation area) as the commercial gateway to Cadillac, and is encouraging future commercial development to locate in that area, in cooperation with Cadillac and Wexford County. Commercial development has already occurred at Exit 177.

44. Haring has large amount of vacant, commercial-zoned land that is available for development near the Exit 183 interchange.

45. Petitioners are trying to overturn the existing land use plans and zoning on their property, as established by all the existing local planning and zoning authorities, and are improperly trying to turn the SBC into a super-zoning board.

CONCLUSION: THE ANNEXATION PETITION SHOULD BE DENIED

This proposed annexation does not comply with or advance any of the essential statutory 18 criteria that the SBC must use to make its decisions. When examining the facts and the record under those 18 criteria, the SBC should conclude that this annexation must be denied.

The annexation area has never been planned or zoned for the type of large-scale, unrestricted commercial development that Petitioners propose. Petitioners seek to overturn decades of planning and zoning by state and local agencies, including the County, the City, the Townships, and MDOT. In essence, Petitioners are improperly asking the SBC to sit in judgment as a super zoning board of appeals. Petitioners' annexation request not only violates the 18 statutory criteria, but improperly encourages the SBC to exercise zoning and planning authority that is outside the SBC's jurisdiction.

All necessary public services to the annexation area can be provided most economically and efficiently by Haring, under the Act 425 Agreement. The two Townships have joined in the Act 425 Agreement to assure that only reasonable-scale, high quality commercial development can occur in immediate proximity to the highway interchange, but in a manner that is protective of existing residential populations, through requirements for buffers, open space and additional residential use.

Petitioners have numerous local alternatives for their desired commercial development, including available land within the Clam Lake DDA District, and undeveloped commercial property near Exit 183 (Boon Road) in Haring. This annexation is not necessary, and it should be denied.

REQUEST FOR RELIEF

As a principal matter, the Townships respectfully request that the SBC determine that the Townships' Act 425 Agreement is valid, and hold that the annexation "shall not take place," as required by MCL 124.29. That is the result mandated by our Legislature in these circumstances.

Alternatively, if the Act 425 Agreement is not upheld, the Townships respectfully request that the SBC make findings of fact and conclusions of law in accordance with the proposed findings stated above, in Section V. Based on those findings and the 18 mandatory statutory criteria, the annexation petition should be denied. This is the same decision the SBC reached with respect to Petitioners' 2011 annexation petition, and that same result should be reached now, because nothing has changed that would compel a different result.

Respectfully submitted,

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Attorneys for The Township of Clam Lake and The
Charter Township of Haring

Dated: November 22, 2013

By: 

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EXHIBITS TO CLAM LAKE/HARING 30-DAY SUBMISSIONS

1. The Townships' 2013 Act 425 Agreement
2. First Amendment to the Townships' 2013 Act 425 Agreement
3. Final Decision in 2011-2012 Annexation Proceedings
4. Wal-Mart Letter of Credit
5. Rural Development Loan/Grant Approval
6. Notice of Intent and Related Documentation For Bond Issuance
7. NPDES Permit for Haring WWTP
8. City of Cadillac "Equity in Taxation" Policy
9. Township Resolutions Approving 2013 Act 425 Agreement
10. Transcript from *Haring Twp v Cadillac*, Case. No. 13-24606-CH (excerpt)
11. Clam Lake Resolution of Intent for Sewer/Water Extensions
12. Haring Resolution of Intent for Sewer/Water Extensions
13. Township Engineer's Map of Planned Sewer Extension Route/Coates Affidavit
14. Township Engineer's Map of Planned Watermain Extension Route
15. Boersma Act 425 Agreement
16. Opinion and Orders Holding that City Breached Boersma Act 425 Agreement
17. Grand Haven Charter Township Overly District Zoning Regulations
18. Photos of Development in Grand Haven Charter Township
19. Photo of "Cadillac Junction" Billboard
20. May 9, 2013 Letter to Petitioners' Attorney
21. July 16, 2013 Haring Planning Commission Meeting Minutes
22. July 22, 2013 Letter, Copied to Petitioners' Attorney
23. July 31, 2013 Letter to Petitioners' Attorney

EXHIBITS TO CLAM LAKE/HARING 30-DAY SUBMISSIONS
(cont'd)

24. August 27, 2013 Letter to Petitioners' Attorney
25. FOIA Request to City of Cadillac
26. Cadillac Response to FOIA Request
27. Pubic Information Sheet on Act 425 Agreement
28. Wexford County F-R Zoning Regulations
29. Projection of City Property Taxes
30. Comparison of Infrastructure Capital Cost and Property Taxes
31. Petitioners' Projected 10-Year Property Build-Out
32. Affidavits of Township Assessors
33. Clam Lake Notice of Change in Voter Status/Affidavit of Maria Lynn Nixon (Haring Deputy Clerk)
34. SBC Decision in Docket No. 96-AP-10
35. Minutes of April 30, 2013 Clam Lake Township Board Special Meeting
36. Minutes of May 1, 2013 Haring Township Board Special Meeting
37. MDOT Traffic Counts for 2012-2013
38. Overview of Clam Lake DDA
39. DDA Current Zoning Map
40. DDA Master Plan Update – 2008
41. DDA District Map
42. DDA Future Land Use Plan Map.
43. Wexford County Comprehensive Plan (excerpt)
44. Cadillac 1994 Long Range Comprehensive Plan (excerpts)
45. Haring Charter Township Zoning Map