POSITION PAPER OF THE MICHIGAN LAKE & STREAM ASSOCIATIONS, INC. ("ML&SA") REGARDING PROPOSED PUBLIC ROAD ENDS AT LAKES LEGISLATION

(September 7, 2005)

1. What are these road ends?

Many inland lakes in Michigan have public roads (whether developed or undeveloped) which end perpendicular at the lake. These are public roads and, hence, public property. Theoretically, both the county road commission and local township government where a given road end is located has certain jurisdiction over such public roads. The rights-of-way or easements for these public roads vary anywhere from being only 10 feet wide to 66 feet wide or even wider in a few cases.

2. The Problem.

People who own properties near inland lakes, but without lake frontage, are often referred to as the owners of backlots or "backlotters." Some backlotters at many inland lakes throughout Michigan (particularly at Higgins Lake) are misusing these public road ends at the lakes. How? In a variety of fashions. Some backlot owners are attempting to seize or appropriate these public properties for their own private and exclusive use. They are doing this by installing private docks, shorestations and boat cradles in the water adjacent to these public ways, and are permanently storing, anchoring and mooring their boats at such docks, shorestations or other structures at these public road ends. This not only "junks up" the water at the public road ends, but also prevents other members of the public from utilizing the road ends for what they were intended for—that is, public travel to and from the water and for such permissible public activities as swimming, fishing and temporarily pulling boats up to shore.

3. Why are backlotters allowed to seize and abuse these public properties?

Obviously, local governments would never allow anyone to misuse, seize or appropriate for their own private and exclusive use the front yard of a township or city hall, a public park or other public way or property. Unfortunately, with public road ends at lakes, county road commissions and local governments (such as townships) have generally abdicated their responsibility to properly regulate activities at such public ways. In many cases, these governmental units fear the political clout and stridency of some of the backlotter groups. In this vacuum of governmental abdication, it has been left up to area lakefront (riparian) property owners or lake associations to stop backlotter abuse of public road ends by the filing of expensive and time-consuming civil lawsuits. That is an inefficient way to vindicate public rights regarding these public road ends.

4. Rights of usage to public road ends under real estate or property law.

The Michigan appellate courts have universally held on numerous occasions that virtually every public road end which terminates at an inland lake in Michigan can be used only for travel purposes such as walking to and from the lake, swimming, fishing, temporarily pulling a boat up to shore to let off people or pick them up and similar nonsedentary purposes. The courts have consistently ruled that non-travel activities and uses such as sunbathing, lounging, picnicking, the permanent mooring of boats and the use of shorestations, boat cradles and similar items are prohibited at public road ends and the waters adjacent thereto. Depending upon the width of the public road right-of-way, the courts have usually allowed the installation of one limited dock to aid in navigability, but have also held that permanent boat mooring at any such dock is prohibited. Furthermore, if an individual installs such a dock, it becomes public and anyone has the right to use the dock for fishing, swimming and temporary boat pull-ups.

For this long-settled Michigan case law, please see *Jacobs* v *Lyon Twp*, 199 Mich App 667 (1993); *Thies* v *Howland*, 424 Mich 282 (1985); and *Higgins Lake Property Owners Ass'n* v *Gerrish Twp*, 255 Mich App 83 (2003), *lv to appeal denied* by the Michigan Supreme Court in 469 Mich 907 (2003).

These cases are based on the common law regarding real estate or property principles. In other words, when the public road ends were created, these are the only activities they were intended to be used for (*i.e.*, access only) and those uses cannot be exceeded or contradicted. These court cases (which prohibit private dockage, permanent boat moorage, lounging, sunbathing, etc. at public road ends) have been the law in Michigan for over a century. Contrary to the claims by some backlotters that all of the cases simply represent the views of "activist" judges, the cases were decided by appellate judges from across the political spectrum and have been settled real property law for many generations.

Unfortunately, without appropriate state legislation, vindicating these matters requires private civil lawsuits which can be time-consuming and expensive. Many responsible parties, including the Michigan Townships Association and MUCC, desire to see state legislation implemented which would allow any police officer or sheriff deputy to write a simple enforcement ticket (similar to a traffic ticket) regarding anyone doing anything illegal at a public road end. That would constitute a cheap, quick and efficient way of not only enforcing the law, but also clearing the public road ends of prohibited uses, structures and activities so that responsible members of the public can use the public road ends for lawful lake access purposes.

5. The rights of the lakefront/riparian lot owners who adjoin public road ends at lakes.

People who own lakefront properties next to public road ends are suffering in these situations in at least two ways. First, illegal dockage and boat moorage on the bottomlands at public road ends quite often spill over onto their riparian bottomlands. Also, the intense

dockage and boating activity in the vicinity of public road ends endangers the adjoining riparian landowners and their families.

Second, in almost every public road end case, the adjoining riparian property owners actually own to the center of the public road end subject to the limited public access easement for travel purposes to and from the lake. To the extent that the public road ends are being abused by backlotters, that is a violation of the property rights of the adjoining riparian landowners who own the land under the public road right-of-way or easement. See *Shell Oil* v *Village of Kalkaska*, 433 Mich 348 (1989); *Morrow* v *Bolt*, 203 Mich App 324 (1994); *Loud* v *Brooks*, 241 Mich 452 (1928); *Thies* v *Howland*, 424 Mich 282 (1985).

6. Some of the extreme examples.

The abuse by some backlotters of certain road ends at lakes around the state is truly amazing. Contrary to what some of the backlotters at Higgins Lake have asserted, this problem is occurring statewide with increased frequency and is not limited solely to Higgins Lake. In the past, some of the public road ends have resembled floating marinas (with multi-stage docks, 30 or 40 boats being permanently moored and dozens of families claiming a road end as their own exclusive property)! Some backlotters have even chased other members of the public away from public road ends and their docks.

7. Recent legislative attempts at responsible legislation.

During the last session of the Michigan Legislature (which lasted until the end of 2004), reasonable and common sense legislation was introduced to bring sanity back to the situation involving public road ends at lakes. HB 4141 made it clear that public road ends could not be used for private docks, shorestations and boat cradles or for permanent boat mooring and similar uses. While that legislation would have precluded private shorestations and boat cradles, it would have allowed one modest dock for temporary use by everyone. HB 4141 was entirely consistent with the Michigan common law and real estate law, and would have allowed any police officer to write a simple ticket for enforcement. Of course, the backlotters went ballistic, misrepresented HB 4141 and attempted to defeat it. Many backlotters also argued that if HB 4141 were to be enacted, any backlotter who had illegally used a road end in the past should be "grandparented" and not be subject to the statute. Ultimately, HB 4141 was not enacted. HB 4141 was supported by, among other organizations, MUCC, the DEQ/DNR, the Michigan Townships Association, and the Michigan Municipal League. The only organized opposition to HB 4141 was some individual backlotters and the organized backlotters group at Higgins Lake.

8. Current proposed responsible legislation.

HB 4141 was recently re-introduced in the current Michigan legislative session as HB 4576. Not surprisingly, the backlotters have prompted the introduction of rival legislation in the form of HB 4578. The backlotters' proposed legislation would do three

main things. First, it attempts to make lawful the illegal uses by backlotters which have occurred in the past and allow such activities to occur permanently (*i.e.*, extensive dockage, permanent boat mooring, lounging, etc.). Second, it falsely advertises the legislation as pro-local control. It purports to allow local governmental units not only to regulate road ends, but also to actually expand the scope of usage rights to allow extensive dockage, permanent boat mooring, shorestations, lounging, sunbathing and other structures and uses which are prohibited by the Michigan common law and real estate law. Finally, it seeks to take away riparian rights from lakefront landowners on "parallel" roadways. (Please see item 16 below for a discussion of this often overlooked provision.)

9. The backlotters' claim (that their proposed legislation is "pro-local control") is false and patently misleading.

First of all, local governments already have full authority to regulate road ends at lakes. See *Square Lake Hills Condominium Assn* v *Bloomfield Twp*, 437 Mich 310 (1991); *Jacobs* v *Lyon Twp*, 199 Mich App 667 (1993), *app den'd*, 444 Mich 906 (1994); *Robinson Twp* v *Ottawa County Bd of Road Commissioners*, 114 Mich App 405 (1982) and Article 7, Section 29 of the Michigan Constitution of 1963. In actuality, the backlotters' bill would hurt local control by municipalities in at least two ways. First, the bill is deceptive and illusory—it purports to give local governments the authority to expand scope of usage rights at public road ends to allow extensive dockage, permanent boat moorage, shorestations, lounging, sunbathing, picnicking and other activities which are clearly not permissible under long-standing Michigan property principles. Any municipality which would take advantage of the legislation would be subject to extensive lawsuits, since the municipality would be effectively taking private property without due process and without just compensation (*i.e.*, a "taking"). Second, the backlotters' bill would expressly remove the ability of local governments to regulate by ordinance activities occurring at road ends in all plats.

10. Why "grandparenting" illegal and bad behavior would be both unlawful and unwise.

In past versions of the backlotters' legislation, the backlotters attempted to expressly "grandparent" past illegal uses at public road ends by backlotters. Although the backlotters do not expressly use the concept of "grandparenting" in their current proposed legislation, HB 4578 would have the same effect.

Why would *de facto* "grandparenting" for backlotters who illegally used these public road ends in the past be a bad idea? There are many reasons, including the following:

(a) It would reward illegal behavior.

(b) It would likely be unconstitutional.

(c) It would prove unworkable—how could one prove who used the road ends illegally, when and for what specific uses?

(d) One cannot obtain a "grandparent" right as to a public property!

(e) It would make many of the public road ends at lakes unusable by members of the general public through extensive use by backlot owners who would effectively be "grandparented" as to their formerly illegal dockage, shorestations, permanent boat mooring, etc.

(f) It would set a bad precedent regarding other statutes and public properties.

(g) What message would this send to the people of the state of Michigan—engage in illegal conduct, lobby the government for an exemption and ultimately you will not only benefit by your past illegal conduct, but you will be able to continue to engage in the formerly illegal conduct forever!

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Michigan law has recognized for well over 100 years that private individuals cannot obtain "squatters rights" (often legally referred to as "adverse possession" or "prescriptive easement rights") as to public roads or public road rights-of-way.

11. The legislation proposed by the backlotters would be unconstitutional.

Representative Sheltrown (who is the main sponsor of the backlotter bill) has stated that any Michigan appellate court decision can be overturned by the Michigan Legislature. Of course, that is incorrect. While it is true that the Legislature can effectively "overturn" court decisions involving existing statutes by amending the statute, the Legislature cannot take away property rights and deprive a person or entity of property without due process and without paying compensation—that would be unconstitutional. Presumably, Representative Sheltrown is familiar with (or should be familiar with) the relevant portions of both the Michigan Constitution and the United States Constitution. The numerous Michigan Court of Appeals and Michigan Supreme Court cases which Representative Sheltrown talks about "overturning" by the backlotters' proposed legislation involve basic property rights. Any attempt to overturn those appellate court decisions or seize private property rights by legislative fiat will almost certainly be struck down by the courts.

What long-standing property rights would be effectively taken away by the backlotters' proposed legislation? With most of the public road ends at lakes in Michigan, they constitute only an easement and the adjoining riparian property owners normally own to the center of the public road right-of-way subject to a limited easement for public access use. See *Shell Oil* v *Village of Kalkaska*, 433 Mich 348 (1989); *Morrow* v *Bolt*, 203 Mich App 324 (1994); *Loud* v *Brooks*, 241 Mich 452 (1928); *Thies* v *Howland*, 424 Mich 282 (1985). The extent or burden of that easement cannot be increased by the Michigan Legislature or a local government without due process and without paying the adjoining property owners for the additional burden on their underlying soil. Additionally, the property rights as to dedicated properties within a plat cannot be changed by legislative fiat. Does the

Legislature really want to pass unconstitutional legislation? Is it wise to enact illusory legislation which will cause some local governments to act in a particular way, thus drawing them into protracted expensive litigation with adjoining riparian property owners who will ultimately likely succeed in having the statute and the local government's actions be declared unconstitutional and be awarded damages?

12. What is the ultimate goal of the backlotters?

It sometimes appears that many of these backlot owners resemble a dog chasing a car. What happens when the dog actually catches the car? To the extent that the backlot owners have a right to utilize public road ends for uses such as extensive dockage, permanent boat moorage and shorestations, every other member of the public must have the same right—governments and the courts cannot discriminate against members of the general public (whether they be backlot owners or people who do not even own property near the lake involved). If one takes the logic (or illogic) of the backlotters' arguments to their inevitable conclusion, do we have to allow 30 permanent boat moorings at a public road end? 60? 100? Who would decide how many boats is too much? How would limited, scarce boat mooring sites at public road ends be allocated? First come, first served? By a lottery? Who would police these issues? As you can see, the backlotters' permanent goals are simply unreasonable and unworkable. Essentially, the backlotters' view would lead to chaos and anarchy at these public road ends.

Recently, in a document entitled "*Frequently Asked Question About Road Ends*," Representative Sheltrown (who is working with the backlotters) has attempted to present a supposedly more moderate view and has suggested that perhaps permits or an annual lottery system could be used for road end boat docking, similar to what he asserts is done for public campgrounds. However, public campground permits are for relatively short periods of time (usually days or a week at most), and are not for an entire summer season! Furthermore, any member of the public would have just as much right to a temporary permit or to enroll in a lottery for permits for road end boat mooring as would a nearby backlot owner—government cannot discriminate against general members of the public (including those who do not even own property in the area) and in favor of backlotters. Finally, short-term public camping is appropriate for a public park or campgrounds (which are specifically designed for such sedentary or stationary uses) – long-term boat mooring and private boat hoists are not appropriate for public roads (which are for travel only)! In reality, a more appropriate analogy which Representative Sheltrown should be utilizing would involve public parking. Quite simply, public parking spots along a public street (in those areas where parking is allowed, and whether or not parking meters are involved) cannot be monopolized by one group of people. Furthermore, one person cannot "hog" a parking spot for weeks or months at a time without being ticketed and being required to move his/her car. No person can have "grandparented" public parking! On a public street where parking is allowed, no one can get a permit or enroll in a lottery where they are allowed to utilize the same parking spot along the public street for months at a time to the exclusion of other members of the public—rather, parking must be very temporary. Finally,

parking along public streets is normally only allowed where the public street is wide enough to accommodate parking safely in light of the primary purpose—the movement of traffic. Under the proper parking analogy, Representative Sheltrown's arguments break down totally.

13. Many backlotters utilize only emotional and baseless arguments.

Among lawyers, there is an old saying that if you have the law at your side, argue the law in front of the jury. If you don't have the law on your side but you have the facts on your side, argue the facts before the jury. If you have neither the law nor the facts on your side, "obfuscate" or use emotion. The backlotters have lost every major court case brought regarding public road ends at lakes in the state of Michigan. When the issues involved are explained to the average Michigan resident, that person is almost always appalled that a group of backlotters could seize public property for their own private use. Accordingly, the only argument or tactic left to the backlotters is to make emotional arguments.

The website for the backlotters group at Higgins Lake is a series of "talking points" which backlotters are urged to utilize when attempting to make their case to legislators or members of the public. These talking points include claiming that lakefront property owners simply desire to close these public access sites and urging backlot owners to make emotional arguments about how their families have utilized these road ends for generations and similar emotional claims. People should not be swayed by these hollow appeals.

Backlotters have also raised the specter of difficulty involving seniors and handicapped persons having to remove boats from the water at these public road ends each night if HB 4576 is enacted. What about handicapped individuals and seniors who desire to use the public road ends for the purposes for which the road ends were intended (for wading into the water, fishing, and swimming), but who cannot do so practically or safely due to the myriad number of docks, shorestations, and watercraft constituting an obstacle course at the road ends? Some backlotters assert that the proposed legislation would hurt their property values, but have provided no definitive proof of that argument. What about the negative impact on property values (and local taxes) for adjoining riparian properties due to the presence of huge, illegal floating marinas kept by backlotters? Clearly, the backlotters' arguments are strained and effectuated.

14. This is not simply a situation of lakefront property owners versus backlotters.

Some of the backlotters love to paint this controversy as between wealthy, elitist lakefront property owners versus the supposed victims (*i.e.*, backlot owners, who are afraid of losing their lake access rights). Of course, that is absurd. Certainly, riparian property owners have a major interest in ensuring that public road ends are properly used in order to prevent the "spilling over" effect which results in trespassing on adjoining private bottomlands and also to prevent the "overburdening" of the property underlying the public road right-of-way or easement. Ultimately, however, this is primarily a public interest

issue—these limited public access sites must remain free and clear of clutter and obstructions and be available for use by everyone, not just a few pushy backlotters.

Some backlotters falsely claim that the ultimate goal of lakefront property owners is to close the public road ends at lakes forever. That is simply a scare tactic. Most lakefront property owners have no problem with public road ends as public access sites at lakes so long as they are reasonably and properly used. Furthermore, Michigan statute makes it virtually impossible for a public road end at a lake to be closed, abandoned or vacated.

15. No one has advocated closing the public road ends.

The way that some of the backlot owners are squealing about the court decisions and the reasonable road end bill (HB 4576) advocated by ML&SA (and numerous other responsible organizations), you would think that the public road ends are being shut off. HB 4576 will not shut or close off any public road end. Furthermore, the assertion by many backlotters that lakefront property owners are attempting to close or vacate public road ends is untrue in all but the rarest of situations (for example, where a particular public roadway never truly existed). In actuality, the past conduct of some backlotters has been an impediment to public access and removing the "floating marinas" illegally installed by some backlot owners will greatly help public access to lakes. These road ends can be used for a variety of lawful purposes and uses, including, but not limited to, walking to and from the lake, fishing, hand-launching of small watercraft (so long as boats are removed when not being used and are not kept there), swimming and ice fishing. Such activities are consistent with the uses normally allowed for the public at most waterfront public parks.

16. The "sleeper" provision in the backlotters' bill—depriving riparian property owners on parallel roadways at lakes of their riparian rights.

Over the past several decades, the public road issue at lakes has focused almost exclusively on public road ends which are perpendicular to lakes and terminate at the lakes. There are just as many situations (if not more) throughout the state of Michigan whereby a public road right-of-way runs parallel along the lakeshore. The Michigan appellate courts long ago held that in the situation of parallel public roadways along the shore, the first tier of lots are deemed to be riparian properties, subject to an easement for the parallel road right-of-way. See *Croucher* v *Wooster*, 271 Mich 337 (1935); *McCardel* v *Smolen*, 404 Mich 89 (1978). The Michigan courts have long held that the owners of the first tier of lots can utilize dockage, permanent boat moorage, lounge, sunbathe, etc., on the shore and at the lake, while members of the general public cannot engage in those activities—rather, the rights of the public are probably limited to stepping off the public road right-of-way and into the water for swimming or fishing purposes.

Section 3 of the bill introduced in the Michigan Legislature by the backlotter groups (HB 4578) contains a little-noticed provision which would effectively overturn *Croucher* and *McCardel* and would permit members of the public to install dockage and shorestations, as

well as permanently moor boats, sunbathe, lounge and picnic anywhere they desire along the shoreline of these parallel road rights-of-way. This radical and probably unconstitutional provision would literally make tens of thousands of lakefront lots around the state of Michigan lose their riparian rights!

17. The need for respect for the law.

Unfortunately, some backlotters have flagrantly disregarded the law, including the clear mandates of the Michigan Court of Appeals in *Jacobs* v *Lyon Twp*, 199 Mich App 667 (1993), and *Higgins Lake Property Owners Ass'n* v *Gerrish Twp*, 255 Mich App 83 (2003), by continuing to maintain private docks, permanent boat moorings, shorestations, and other prohibited uses and activities at public road ends at lakes. Such flagrant and open violation of law should not be permitted by the state of Michigan, let alone rewarded! HB 4576 is a simple, straightforward way to enforce and maintain the law.

18. This is Primarily an Inland Lakes Issue.

The problems associated with public road ends at lakes involving docks, boat moorings and similar matters relate primarily to inland lakes, not the Great Lakes. Accordingly, the decision by the Michigan Supreme Court in the "beach walker" case this past July regarding walking along the shore of the Great Lakes applies only to the Great Lakes and does not change any of the case law or controversies regarding public road ends at inland lakes in Michigan.

19. Summary.

To the overwhelming majority of people (including those who are not directly involved in this controversy), once all of the facts are known, this issue is a "no brainer"—a few strident backlotters simply should not be able to junk up and seize public property for their own private use, the common law and real estate or property law as clearly identified by the Michigan appellate courts should be upheld and past illegal behavior should not be "grandparented" for anyone. This is a situation where a small group of people (some backlotters) have used a good deal of energy spreading falsehoods in an attempt to stop needed legislation. Michigan Lake & Stream Associations hopes that everyone will carefully review the merits of HB 4576 (the bill supported by ML&SA, as well as many other responsible groups) versus HB 4578 (the backlotters' bill).