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Mayor Steven Rzeppa
City Council Members
City of Trenton
2800 3rd Street
Trenton, MI 48183

RE: Proposed Zoning Ordinance Amendments

Dear Mayor Rzeppa and Council Members:

The City of Trenton retained our firm to provide information about potential legal issues posed by adoption of the proposed Zoning Ordinance as relates to the McLouth Steel waterfront area. The Zoning Ordinance that is before the City Council is a complete revision of the existing ordinance and is applicable to all properties within the city. The ordinance was not specifically drafted to address the former McLouth Steel facility ("McLouth"), although the city would have been remiss if it did not consider the specific circumstances related to the McLouth site; it is those changes that are the subject of this letter.

In preparing our legal analysis to the City Council, we reviewed substantial background information, including the following:

1. Records related to the McLouth operation on the 272-acre site from 1950 to 1995.
2. The designation of a deepwater port on the site over which the city does not have legal authority.
3. Detroit Steel Company Ltd.'s ("DSC") unsuccessful attempt to resume steel production in 1988.
4. The Comprehensive Action and Remedial Consent Order entered into between the MDEQ and DSC on December 17, 1999 to address the contamination existing on numerous areas on the McLouth property.
5. Information showing DSC's failure to complete remediation as required by the 1999 Consent Order.
6. The 2000 sale by DSC of the 76-acre northern portion of the McLouth site, which ultimately ended up being titled to the Riverview Trenton Railroad Company ("RTRC"). The RTRC land encompass approximately one-half of the river frontage of the McLouth property.
7. The files related to RTRC's petition to the Department of Transportation Surface Transportation Board ("STB") for an exemption under 49 USC §10502 to acquire and operate rail lines, Trenton and Riverview's objections to the petition, and the May 15, 2003 exemption that was granted conferring the right to operate the rail lines. STB,

- which has exclusive jurisdiction over the rail lines, found that the proposed use was a legitimate rail transportation service that would meet a public need.
8. The files covering the rejection by the STB in 2007 of Riverview's petition to revoke RTRC's exemption, wherein Riverview asserted that RTRC had yet to complete the rehabilitation of the tracks or start any operations of the rails, and also asserting a nuisance based on the storage of unsightly containers.
 9. Correspondence in 2018 from the City of Riverview confirming the M-2 designation for the RTRC property and the contamination present on the site. The M-2 classification is the most intense industrial classification in Riverview.
 10. Historical documents on the severe contamination existing on the McLouth property, and the 2009 EPA fund-led removal activities removing hazardous substances (e.g., PCB capacitors and gallons of PCB oils).
 11. The files related to the May 2019 EPA designation of the southern portion of the site on the National Priorities List ("NPL") due to the extensive contamination. The NPL is the list of the most serious sites of national priority among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States and its territories which are known to require extensive and long-term clean-up.
 12. The 2020 "Settlement Agreement and Covenant Not to Sue" entered into between the EPA, Crown Enterprises, Inc. ("Crown"), and MSC Land Company, LLC ("MSC"). Under the terms, MSC was required to perform cleanup and assessment activities on the southern portion of the site. In exchange, MSC and Crown, who are parties that were not responsible for the contamination, received covenants not to sue. The covenants enabled MSC to take title to the former McLouth facility from the Wayne County Land Bank. The settlement was also intended to foster redevelopment by allowing MSC and Crown to clarify their cleanup responsibilities while the EPA continued to investigate and address existing contamination on the property.
 13. Records related to the remediation work performed by MSC pursuant to the Settlement Agreement showing MSC has invested substantial amounts of money (reportedly in excess of \$20 million) demolishing the structures on site and working on environmental cleanup. MSC provides regular reports to the EPA of the progress of remediation.
 14. The "Corrective Action Consent Order" (CACO) entered into between the MDEQ and RTRC to undertake corrective actions on the 76 acres that comprise the northern portion of the land.
 15. REI's option in late 2004/early 2005 to purchase the 183-acre southern portion of the MSC land to develop a mixed-use development slated to include commercial/retail space, up to 3,000 residential units, and up to 30 acres of park land and open space, including a 100-slip public marina.
 16. REI's petition to rezone the 183-acre southern portion of the site from I-3, to MD, Mixed Use, for its proposed development. The application was recommended for approval by the Planning Commission and approved by the City Council on April 18, 2005.

17. Documents related to the 2005 negotiations between the city, Wayne County and REI during which REI initially agreed to complete and pay for all costs of the environmental cleanup and project build. In exchange, the city and the county would agree under a development agreement to be drafted to establish a brownfield authority to capture all the new taxes and use the money to reimburse REI for the usual brownfield expenses per a work plan. The city also tentatively agreed to bond for certain public infrastructure.
18. Records related to the negotiations of a development agreement and brownfield work plan between REI, the city and the county. The draft work plan noted that the property was a facility under Part 201 of the NREPA (Part 201) based on the presence of surplus PCB materials, potential historical PCB releases, asbestos in the buildings, as well as known areas of soil and groundwater contamination. According to the 2006 draft plan, it was estimated that the cleanup costs eligible for payment through a brownfield were approximately \$68 million. It was contemplated that the city's brownfield redevelopment authority would issue bonds in the amount of \$40 million, and repayment would occur until expenses were reimbursed, but no longer than 30 years. The remainder would be funded by grants, loans, or paid directly by REI.
19. The breakdown of negotiations with REI after REI changed course and insisted that the city and county be on the hook to pay for a portion of the environmental cleanup and any shortfall in TIF capture needed to pay the bond debt service. In March of 2007, REI requested that the city participate to the tune of \$10 million toward the cleanup, which request was denied by the City Council. REI did not proceed with the purchase of the property, and a mixed-use project was never pursued by REI or any other developer to date.
20. Information on the 2015 lawsuit between the city as Plaintiff and Trenton Land Holdings, LLC, Detroit Steel Company, LLC, and Trenton Marine Terminal, LLC as Defendants alleging violations of the city's Zoning Ordinance and Building Codes. The parties entered into a Settlement Agreement and Release of Claims on March 2, 2015. In the settlement, the city agreed that it would not restrict the industrial activities taking place on the property so long as the defendants owned the property. Defendants were given 45 days to apply for permits and certificates of occupancy for the uses permitted by the city Resolution.
21. The city passed Resolution 2015-4, in which the city recognized the use of the site for an integrated steel mill and attendant activities associated with that nonconforming use. The city acknowledged that the property could be used as a deepwater port, for manufacturing, for the import and export of machinery equipment and specified materials (such as metals, salt, plastic, steel), and the lease of the space for the various permitted uses. Prohibited uses included a truck depot, use of the site as a rail yard, storage of certain materials, long-term parking of rail cars within 150 feet of Jefferson Avenue, storage of petroleum coke, and any storage of hazardous materials.

22. The extensive records related to the foreclosure of 183 acres of the property for nonpayment of property taxes, and the Wayne County Land Bank's acquisition of the property.¹
23. The county's issuance of an RFQ for redevelopment of the 183 acres. The county received four proposals, all of which were for *industrial uses* consistent with the historical use of the property. The county interviewed all the bidders. Following the interviews, the county gave the four bidders two weeks to submit their "last and best" offer. Ultimately, the county selected Crown.
24. The negotiations that took place between the county and Crown in which Crown would purchase 183 acres of the 197-acre southern portion of the land, rehabilitate the property and redevelop the property because the property was a blight and depressing the value and vitality of surrounding properties. Although the city was not involved in the actual drafting of the Purchase and Development Agreement, representatives of the city attended meetings during the negotiations. In fact, as a result of that attendance, the city was able to obtain a commitment from Crown to contribute \$250,000 for philanthropic contributions. The city expressed a need for further industrial facilities and employment opportunities for the community during the discussions.
25. The September 18, 2017, the Purchase and Development Agreement was entered into between the Land Bank and Crown. The recitals noted that the Land Bank was "facilitating the City and County's ROR [right of first refusal]." In summary, the Purchase and Development Agreement provided as follows:
 - a. The property was to be sold to Crown for \$4 million dollars.
 - b. The project contemplated under the Purchase and Development Agreement was the rehabilitation and *industrial* development of the property.
 - c. Crown was required to make a minimum investment of \$20 million (excluding the purchase price) to remediate the land. Crown has already expended this amount based on information available.
 - d. The project would move forward in two phases:
 - (i) Phase I required the performance of asbestos abatement and demolition of the structures and taking to grade the existing buildings adjacent to Jefferson Avenue.
 - (ii) Phase II required the construction of an industrial development on the property, to take place after the completion of Phase I activities and within five years of the initial closing. The Purchase and Development Agreement noted that the development could consist of "a vehicle mixing center, logistics park containing multiple buildings, fulfillment center, manufacturing plant, or any other use as Property zoning allows

¹ Presently, 76 acres of the land remains zoned I-3 (RTRC's land). Another 14 acres of the southern section, zoned I-3, is still owned by DSC and did not go to foreclosure. Only 183 acres of the land was foreclosed upon for nonpayment of taxes.

or to which the parties agree. Seller and Purchaser acknowledge that the type of industrial development for Phase II is presently undetermined, however under no circumstance will said development include the storage or processing of petroleum coke. It is the intention of Purchaser to develop an intermodal transportation type logistics facility to support rail, shipping and truck transportation and logistics.” Sec. 1.13.

- (iii) Crown was given the opportunity to conduct its due diligence to determine the costs associated with remediating the property.
- (iv) Crown agreed to make certain philanthropic contributions.
- (v) If Crown did not comply with all its obligations, it would pay damages of \$1 million.

26. The July 24, 2017 letter sent by the city to the Wayne County Commission stating its “unequivocal” support for the sale of the land to Crown pursuant to the Purchase and Development Agreement. The letter, which was signed by the individual Council members present that evening, stated that, in its present form, the McLouth site posed “a blight and danger to the Trenton community” and that the “deteriorated condition depresses market values and created environmental risks, and it offers no revenue for the city or employment opportunities for our residents.” The letter also confirmed that the city had worked closely with the county and Crown with a shared goal to create employment opportunities. Notably, the July 24, 2017 letter from the city to the Wayne County Commission also stated the city worked in “close collaboration” with the county to pursue a redevelopment of the site, and that the RFQ was issued by the county on behalf of the city as well. The letter concluded the sentiments of the city as follows:

“Tonight, along with my fellow members of the Trenton City Council, I have reviewed the two final Purchase and Settlement Agreements. Based upon this review, I echo the County and Treasurer’s conclusion that the Agreement reached with Crown Enterprises is in the best interests of the people of the [sic] Trenton, and I write today to lend my enthusiastic support for this Agreement, a copy of which is attached as **Exhibit B**, to become reality. The Agreement will ensure an industrial development on the McLouth Steel site that creates jobs, employs local residents, maintains and remediates the property, and pays taxes to the City. Crown has further agreed to make philanthropic contributions to the Trenton community as part of the Agreement – and owe damages if its obligations are not met.” (Bold in original).

27. The history of the city’s Master Plan, and the 2017 Trenton Coast Resiliency Master Plan. The Master Plan designations for the property were consistent with the current zoning classifications – part I-3 and the remainder MD (from the REI rezoning) – which coincides with the existing Zoning Map. The plan notes that the city is focused on redevelopment – especially the McLouth site, the former Riverside Hospital and the challenged downtown. According to the Master Plan, industrial land represents only 10.7% of the total land area of the city. Although one of the stated goals is to convert industrial properties into such

things as “ed & med” facilities and mixed-use developments, the plan states that the extreme contamination on the McLouth property, and its designation on the NPL makes the property extremely expensive to cleanup and difficult to redevelop for other than industrial use. And the need for heavy industry is articulated in the plan as desired to contribute to the city and regional economy. The Master Plan, when discussing the reasoning behind the various land use classifications, concludes with the wish to redevelop the city’s waterfront with environmentally sound commercial and light industrial uses.

28. The November 1, 2018, application by Crown to rezone the southern portion of the land from MD, Mixed Use, back to I-3. As the city was working on the new Zoning Ordinance, the city requested, and Crown agreed, although not legally required to do so, to hold processing the rezoning application until the new Zoning Ordinance was adopted.
29. The files related to the amendment to the entire Zoning Ordinance which began in 2016. A committee, comprised of representatives of city departments, and elected/appointed officials, was established to study proposed overall changes to the Zoning Ordinance and make a recommendation to the Planning Commission. The committee recognized that the city’s waterfront was predominately zoned I-3, the most intense industrial, and that active industrial uses still existed. The committee also took note of the fact that there had not been any credible commercial or residential development proposals along the waterfront. The committee’s goal, therefore, was to remove the most intensive industrial uses from the waterfront and to increase buffering to minimize impacts from industrial use on adjacent properties and the Detroit River. The committee recommended that of the current three industrial classifications, only I-1 and I-2 would remain. A new classification, I-W, Industrial Waterfront, would be established to address the redevelopment of the sites like McLouth. I-W would be the medium industrial classification.
30. Minutes of the meetings of the Planning Commission as well as City Council meetings were reviewed which detailed the objections of some of the residents in the city to maintain the former McLouth site for any industrial zoning. The residents emphasized the McLouth property in particular even though the Zoning Ordinance is a comprehensive rewrite that will apply to all property in the community. Objections made were noted.
31. The reports of the city planner explaining the changes in the proposed I-W classification from former uses allowed under the I-3, as well as the city planner’s observations that the millions of dollars required to remediate the property to just industrial cleanup standards justified deviation from the existing Master Plan in certain circumstances such as the McLouth site.

The amended Zoning Ordinance was recommended for approval by the Planning Commission on July 22, 2020. The matter is now before the City Council. The issue of the I-W zoning, in particular as applied to the McLouth site, has become contentious. Residents have raised issues related to the lack of conformity with the Master Plan and Map, possible environmental impacts from new industrial development on surrounding properties, and a general desire to see the McLouth site redeveloped from something other than industrial.

I have spent my career representing governmental entities, with a specialty in land use litigation, and have gained an understanding of the matters the courts consider in these cases. I

have reviewed the background information and considered the applicable law. In addition to being a former resident of Trenton, I personally viewed the McLouth site and surrounding land uses, and drove through the community. An extensive attorney-client privileged communication was prepared outlining the potential claims that could be raised by Crown in litigation if the city were to rezone the property in question to something other than industrial, and in particular to another classification that would prohibit the uses that were previously contemplated in the 2017 Purchase and Development Agreement. Without disclosing the substance of the analysis, my conclusion is that the City Council should adopt the proposed Zoning Ordinance with the changes relating to the property at issue. In addition to the legal problems with acting in a contrary manner, the city likely does not have insurance coverage that would either defend or indemnify the city in the event of litigation, leaving the possibility that the city would have to spread any judgment, including potentially millions of dollars in defense costs and damages, against the properties in the city for payment.

I met with the City Council on two occasions to review the legal pitfalls noted in my letter, and to discuss the proposed ordinance and concerns raised by the residents. As a result of those meetings, and in conjunction with the city planner and City Council, certain amendments have been made to the prior draft Zoning Ordinance that will be presented by the city planner. Of particular note is the fact that the concept of an Industrial-Waterfront district has been abandoned and replaced with a Waterfront-Revitalization district. The new W-R district opens the door for additional uses other than industrial for the properties along the waterfront that will be rezoned to this new classification.

In addition, a new section has been included in the ordinance that will require the submission of an impact assessment for every use proposed in the PD, W-R, I-1 and I-2 districts. As noted, the purpose of the impact assessment is to evaluate the developmental, ecological, environmental, social, economic, and physical impact that a proposed development may have on and surrounding the property. This will permit the city to evaluate the concerns raised by the residents during any approval process for redevelopment of any properties in these districts.

In conclusion, I fully acknowledge that it is not easy to make an unpopular decision. I applaud the city administration and City Council for all their efforts in tackling this difficult situation and coming up with a solution that will address the best interests of all the residents of the city while acting within the law.

Very truly yours,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC



Carol A. Rosati

December 1, 2020

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cc: Scott D. Church, City Administrator
Alan Ackerman, Esq.