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Via Pdf E-mail – Clerk@metamoratownship.com

Mr. David Best, Township Supervisor
Ms. Jennie Dagher, Township Clerk

Re: Objections to Proposed Amendments to Metamora Township Gravel Mining Ordinance

Mr. Best and Ms. Dagher:

As you know, this Firm represents Edw. C. Levy Co. and its related affiliates and divisions, including American Aggregates of Michigan, Inc. (together, "Levy"). We are writing to formally notify Metamora Township (the "Township") of Levy's objections to the proposed amendments to the Township gravel mining ordinances (the "Proposed Amendments") and to urge the Township to reject them. This objection letter is to be included as part of the record of the Township Planning Commission and Township Board meetings that may occur in connection with the Proposed Amendments.

As discussed below, the Proposed Amendments should be rejected. Despite their purported purpose, they are intended to evade—not align with—Public Act 113 of 2011 ("PA 113"). The Proposed Amendments emanate from an improper moratorium that was part of the Township's reaction to Levy's application to mine the D-bar-A property. Levy has filed a separate petition/appeal seeking annulment of the moratorium. Unfortunately, the moratorium and the Proposed Amendments stem from the long history of intense public opposition to mining at the D-bar-A property and represent the latest efforts to prevent mining.

Background

The Proposed Amendments are a reaction to Levy's application seeking approval to mine the D-bar-A property which it submitted on November 10, 2015 (the "Application"). Efforts to obtain approval to mine the D-bar-A property date back to at least the 1980s. All of the efforts have been met by intense and sustained opposition, particularly from the Metamora Land Preservation Alliance ("MLPA"). This opposition has resulted in extensive and costly litigation on multiple occasions, and appears poised to do so once more.

Unfortunately, rather than review the Application and provide comments and input as it has for other applicants, the Township instead immediately halted the process,

passed a new resolution, and imposed a moratorium. Levy promptly challenged the moratorium and filed, under protest and with reservation of rights, a petition with the Township invoking the so-called administrative remedy contained in the resolution that established the moratorium. Since that time, the Township has essentially ignored Levy's petition and only recently asked Levy if it wants to proceed with a public hearing.

Concurrently with imposing the moratorium, the Township hired Gerald Fisher as its outside counsel. Mr. Fisher has represented numerous municipalities and established himself as an opponent to sand and gravel mining efforts in Michigan. Through Mr. Fisher's guidance, he and the Township have developed and put forth the Proposed Amendments. Although explained as an attempt to address the "complexities" created by PA 113 and to "clarify" the process; the Proposed Amendments are in fact a new framework that expands the scope of the Township's authority and involvement beyond the limits imposed by state law. They also erect new obstacles to sand and gravel mining and amount to *changing the rules* after submission of, and as a reaction to, the Application. As discussed herein, the Proposed Amendments violate PA 113 and should be rejected.

The Proposed Amendments are Based on a False Premise

Township attorneys contend that PA 113 made the analysis of mining rights and the Township's role "overly complicated" and "created confusion." As a result, they argue that the Township "needs" to amend its mining ordinances to "align" with PA 113.

In reality, PA 113 is simple and clear and had just two principal effects. First, it restored, after a brief interruption, the standard that had applied for the prior thirty years to zoning decisions involving sand and gravel. There is no basis to contend that a new process suddenly is needed. Second, PA 113 clarified that municipalities do not, in the guise of exercising their zoning authority, have the power to prevent mining when that standard is not met. However, rather than "aligning" the Township with PA 113, the Proposed Amendments are designed to undermine and evade PA 113, and ultimately give the Township license to disregard it—all under a thin veneer of purported compliance.

This latter point cannot be overstated. PA 113 is a restriction of power, not a grant. It states that an ordinance "shall not prevent" mining "unless very serious consequences would result." The Proposed Amendments are not authorized by any reading of the relevant zoning enabling legislation and constitute a clear abuse of the Township's legislative power that will not survive judicial review. First, the Proposed Amendments are ultra vires in their attempt to impose a "heavy burden" on applicants to

overcome a presumption of denial. They do so by ignoring the limits of the Township's zoning authority through the creation of new definitions and standards, and setting artificially and baselessly high thresholds to meet them. Second, they attempt to construct a bifurcated process for the review of mining applications which is intended only to delay and impose greater costs by forcing a multiplicity of actions challenging the inevitable denials. The Township's poorly hidden intent is to prevent mining through an unauthorized process meant solely to manipulate the applicable standards of review by recasting legislative actions as administrative. The Township apparently believes that by such manipulation it can insulate its decision making from the level of judicial review that PA 113 requires in order to combat the prevention of mining on arbitrary and illusory grounds.

In short, the unauthorized Proposed Amendments are transparently designed to make it easier for the Township to deny applications and to wear down applicants by delaying the process and stringing out subsequent legal challenges.

The Definitions Contained in the Proposed Amendments Violate PA 113

The Proposed Amendments purport to expand and redefine terms in PA 113 relating to "need" and "valuable natural resources." The new proposed definitions are styled as "need for natural resources," "commercial need," "commercially meaningful quantity," "commercial market," "sufficiency of applicant's property interest" and other terms. All of them are accompanied by heightened standards, elements, requirements and criteria, all designed to tilt the scale and increase the baseless "heavy burden" on the applicant. This, despite that these terms as used in PA 113 have well-established meanings set forth and applied in dozens of judicial decisions following *Silva*.

The Township obviously lacks authority to impose definitions that differ from those used in PA 113, or to impose additional restrictions and burdens. This is particularly so where, as here, the terms arise in a part of the statute that indisputably imposes substantial limitations on the Township's authority.

The Legal Support for the Proposed Amendments is also Flawed

Ironically, much of the supposed support for the Proposed Amendments is based on the nullified decision in *Kyser v Kasson Township*, 486 Mich 514 (2010) ("Kyser"). Kyser is not relevant here. At bottom, it is a case addressing the "separation of powers" between the State's legislative and judicial branch. The Supreme Court there held that the legislature, not the judiciary, was responsible for establishing zoning policy. As all are aware - - the legislature did precisely that - - by enacting PA 113 and adopting the

standards set forth in *Silva v Ada Township*, 416 Mich 153 (1982) ("Silva"). Any further focus on Kyser is simply an invitation for the Township to ignore the actual limits on its zoning authority under PA 113.

Indeed, the Proposed Amendments actually commit the same type of error that Kyser forbade, only in the reverse. PA 113 sets forth initial burdens—not "heavy burdens"—that an applicant must meet when "challenging a zoning decision" by a municipality. MCL 125.3205(4). This explains what a court is to look at when faced with a petition from an aggrieved applicant, after a "zoning decision" has been made. The Proposed Amendments purport to create a framework in which the Township can make itself the almost unchallengeable sole fact-finder about "need" and "value" in a two-step process designed to avoid ever getting to "very serious consequences."

Moreover, PA 113 and the *Silva* standards it adopts recognize that mining is an activity that has tremendous public value, but is a regular target for influential local opposition. Municipalities have a long history of attempting to use zoning as a way to preclude mining. The notion that a municipality has the power to expand its fact-finding role into areas in which it has no inherent competence—such as questions of regional need, supply and demand, and commercial alternatives—and simultaneously insulate itself from judicial review, is nonsense. This is particularly so when it attempts to do so under the guise of "aligning" its ordinances with a statute that actually imposes a restriction on municipal power.

The Attempt to Amend the Ordinance in Two Parts Further Violates PA 113

Even if the Township had the authority under the zoning enabling act to enact the Proposed Amendments, they would still be an abuse of any legitimate power based upon their substantive and procedural deficiencies. In addition to being deficient in their substance, the Proposed Amendments are also procedurally deficient in that they are being offered piecemeal, in what can only be explained as an effort to stall and obfuscate. There is no legitimate reason for amending the zoning ordinance in stages, first with a "Part I" that has been submitted for public hearing, and then again shortly with a "Part II" that has not yet been proposed. Certainly the delay cannot be explained by the need to draft each part in turn. We understand that Kasson Township, which we are informed was also guided by Mr. Fisher, adopted an ordinance that is substantially similar to the Proposed Amendments. Even in that case, we understand there was no bifurcation into two separate and distinct "Parts".

In any event, the Township has now extended its moratorium, to enable approval of the Proposed Amendments, and for consideration of a "Part II". Presumably, Part Two

will also have to wind its way through the process for eventual adoption; all of which will have to happen before Levy's nearly six-month old Application can even begin going through the extended process of consideration under a new standard patently designed to lead to denial under Part I.

Conclusion

There is no substance to the argument that PA113 created an "overly-complicated regulatory scheme". PA 113 is simple and clear and represents more than 30 years of a stable legal framework. As discussed above, the Proposed Amendments violate PA 113 in numerous ways and on multiple levels. Given the long history of litigation and intense public opposition to mining the D-bar-A property, we contend the Proposed Amendments represent a reaction to Levy's Application and an effort to establish a more protective vehicle to deny it. If adopted, they will simply move the Township farther down the path it appears to have already chosen and would likely lead to more time consuming and expensive litigation.

As discussed above, we urge the Township to reject the Proposed Amendments. We look forward to supplementing the record and our submission as part of the public hearing process involving the Proposed Amendments and the disputed moratorium.

Sincerely,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

J. Patrick Lennon

cc: Michael Nolan Esq. (via e-mail)
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L. Steven Weiner
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