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September 14, 2023

Darlene Turner, Powell Township Supervisor  
Powell Township Board  
Powell Township Planning Commission  
P.O. Box 319  
Big Bay, MI 49808

*via Email: [supervisor@powelltownship.org](mailto:supervisor@powelltownship.org)*

Dear Supervisor Turner, Township Board and Planning Commission:

I have examined all materials you have provided and have performed considerable additional investigation and research in response to your inquiry whether Powell Township should amend its Zoning Ordinance to completely prohibit rocket launching facilities at any location within any Powell Township Zoning District. After carefully analyzing this matter, I recommend against adopting this proposed zoning ordinance amendment. I will explain my reasoning in this opinion.

The materials generated by the Conservation Law Center of Bloomington, Indiana, are thought-provoking, and may be highly useful when or if an actual proposal is received from Michigan Aerospace Manufacturers Association (MAMA), or some other entity. This does not necessarily support the conclusion that a zoning ordinance with an absolute prohibition on launch facilities is the best alternative from a legal perspective, however,

**Assumptions**

It is necessary to preface this opinion with some underlying assumptions. First, although local officials have received no updated information in a couple years, it is assumed that MAMA remains interested in pursuing a rocket launch site in Powell Township. An area at or near Granot Loma property was previously identified. At this point, I am not aware of any actual proposal having been made.

The second assumption is that when or if a proposal is received, it will be made by the Michigan Aerospace Manufacturers Association. Although information disseminated by MAMA indicates that its mission includes “encouraging public-private partnerships to develop a space ecosystem that will positively affect the standard of living for all residents,” it appears that the Association is a private entity comprised of approximately 200 members. If the project envisions a public rather than private component, the conclusions contained herein may need to be revisited.

Additionally, this opinion primarily addresses Powell Township's zoning responsibilities. It does not address, for example, any role the Michigan Aeronautics Commission or the Federal Aviation Administration may have in determining or approving a potential aeronautical facility site.

Finally, this opinion recognizes and acknowledges that few persons having even general familiarity with the particular location of this proposed site would likely conclude that the location is appropriate.

### **Applicable Zoning Principles**

Townships and other units of government have no inherent powers, but possess only those granted by the Michigan Constitution, the Legislature, or fairly implied from either. *Hughes vs. Almena Township*, 284 Mich App 50; 771 NW2d 453 (2009). Townships derive their authority to create zoning districts and regulate land use within their boundaries pursuant to the Zoning Enabling Act, MCL 125.3101, et seq., and prior to that, under the substantially similar Township Zoning Act.

Section 207 of the Zoning Enabling Act adopted in 2006 provides:

A zoning ordinance or zoning decision shall not have the effect of totally prohibiting the establishment of a land use within a local unit of government in the presence of a demonstrated need for that land use within either that local unit of government or the surrounding area within the state, unless a location within the local unit of government does not exist where the use may be appropriately located, or the use is unlawful. MCL 125.3207.

The zoning ordinance amendment proposed in this case would totally prohibit use of land as a rocket launch site. Michigan cases have frequently upheld the proposition that “a zoning ordinance that totally excludes an otherwise legitimate use carries with it a strong taint of unlawful discrimination and a denial of equal protection of the law with regard to the excluded use.” See, e.g., *English vs. Augusta Township*, 204 Mich App 33, 37; 514 NW2d 172, 174 (1994), citing *Kropf vs. City of Sterling Heights*, 391 Mich 139; 215 NW2d 179 (1974), with approval. Rocket launching is clearly not an “unlawful” use within the meaning of MCL 125.3207. Unlawful uses might include houses of prostitution or illicit drug manufacturing or distribution facilities. A township’s zoning authority does not extend to illegal or unlawful activities.

While MCL 125.3207 and the cases discussing exclusionary zoning acknowledge that certain limited exceptions exist, the cases unequivocally hold that any municipality that enacts a zoning provision totally prohibiting a use faces a difficult challenge to uphold the validity of such a provision. *English vs. Augusta Township*, *supra*. Additionally, a zoning ordinance need not completely exclude a use on its face to violate the Zoning Enabling Act, but may merely make the use a practical impossibility in order to run afoul of statutory and constitutional due process prohibitions. *Landon Holdings, Inc., vs. Grattan Township*, 257 Mich App 154; 667 NW2d 93 (2003).

The courts have often distinguished between facial challenges and as-applied challenges to a zoning ordinance. Facial challenges allege that the very existence of a zoning ordinance provision is invalid and unenforcible, whereas an as-applied challenge is specific to the facts and circumstances applying to a particular property owner. *Hendee vs. Putnam Township*, 486 Mich 556; 786 NW2d 521 (2010). Most cases involving total exclusion of a property use are characterized as facial challenges. An example of an as-applied zoning challenge might include an ordinance allowing the mooring or launching of boats only in a zoning districts having no navigable bodies of water.

Zoning ordinances are generally presumed valid, and the burden of proof rests on the party challenging the ordinance. *Kyser vs. Kasson Township*, 486 Mich 514; 786 NW2d 543 (2010). *Kirk vs. Tyrone Township*, 398 Mich 429; 247 NW2d 848 (1976). Countless other cases have reached this conclusion, as well. In contrast, however, when a zoning ordinance totally excludes a use, the “strong taint of unlawful discrimination and a denial of equal protection” is invoked, and the burden of proof shifts to the municipality to demonstrate that its zoning ordinance is valid. *Kropf vs. City of Sterling Heights*, 391 Mich 139; 15 NW2d 179 (1974). *Landon Holdings, Inc., vs. Grattan Township*, *supra*, pp. 173 – 174; NW2d at 104

– 105. *Countrywalk Condominiums, Inc., vs. City of Orchard Lake*; 221 Mich App 19; 561 NW2d 405 (2010).

Additionally, those cases shifting the burden of proof to the municipality to argue the validity of its own ordinance also indicate that the “rule of finality,” or the need to exhaust administrative rights and remedies under the zoning ordinance does not typically apply in a facial challenge when the zoning ordinance contains an absolute exclusion of a particular use. The above-cited cases also stand for this proposition. Both of these nuances are adverse to a township who adopts an absolute prohibition of a particular use.

These principles must next be applied to Powell Township’s Zoning Ordinance. Section 306(B) of the Zoning Ordinance provides:

- B. Uses are permitted by right only if specifically listed as uses permitted by right in the various Zoning Districts. Where not specifically permitted, either by right or conditionally, uses are thereby prohibited unless constructed (*sic., construed*) to be similar to an expressly permitted use. The Zoning Administrator shall determine if a use is similar to an expressly permitted use. Any appeals to the Zoning Administrator's interpretation shall be to the Zoning Board of Appeals.

The property for the proposed rocket launch site appears to be zoned Timber Production - 40. The permitted principal uses include growing and harvesting of timber, sawmills, wood yards, mineral extraction subject to other statutory and ordinance provisions, and recreational structures. Conditional uses include extraction of sand and gravel from pits not exceeding 20 acres in size, public utility substations, and alternative energy. None of the permitted principal uses or the conditional uses specified in Section 321 of the Zoning Ordinance appear remotely similar to a rocket launch facility. Consequently, this use is already prohibited anywhere in the TP - 40 Zoning District.

The Ordinance is cautious to list those uses that are permitted, rather than listing uses that are prohibited. Prohibited uses are covered under Section 306(B), wherein it indicates that if they are not listed and are not analogous to permitted uses, they are prohibited. In my 39 years of practice, I have rarely seen a zoning ordinance that takes the reverse approach, by listing specific excluded uses. This is generally considered unnecessary and redundant when the ordinance already excludes uses not expressly permitted.

A zoning amendment to prohibit rocket launch facilities is unnecessary because this land use is already prohibited. Furthermore, amending the Zoning Ordinance to absolutely exclude rocket launch facilities would not only be redundant, but will subject the Ordinance to a reversal of the burden of proof, requiring Powell Township to defend and prove the validity of its own Ordinance, rather than bestowing it with a presumption of validity. If the Ordinance enjoys a presumption of validity, a challenger must prove that there is no reasonable rational governmental interest in excluding rocket launches. In short, amending the Ordinance to absolutely exclude this or any other use would make it much easier for a party challenging the Ordinance to prevail. The amendment would also allow a challenging party to proceed directly to an appeal, rather than requiring it to explore administrative remedies. Protections for the benefit of Powell Township existing under the current Zoning Ordinance would be weakened by the proposed amendments, in my opinion.

While a developer could theoretically apply to rezone a parcel to allow rocket launch facilities where they are not currently allowed, this would arguably amount to spot zoning, at least on the parcels currently under consideration. A zoning ordinance or amendment "creating a small zone of inconsistent use within a larger zone is commonly designated as 'spot zoning.'" *SBS Builders, Inc., vs. City of Madison Heights*, 389 Mich 323; 206 NW2d 437 (1973). Spot zoning is highly disfavored and closely scrutinized by the courts. In my experience, the greater the disparity in land use intensities between a proposed rezoning use and existing uses, the greater the likelihood that such an amendment would be struck down as unlawful spot zoning. *Penning vs. Owens and Plainfield Township*, 340 Mich 355; 65 NW2d 831 (1954).

The materials shared by the Conservation Law Center of Bloomington, Indiana, would likely carry considerable weight in considering and potentially defeating a rezoning request to allow rocket launch facilities in this location. Powell Township's Master Plan is also instructive, as such a rezoning would arguably not fit within the overall plan within this area of the Township.

When considering any zoning ordinance amendment, one primary consideration is whether it would likely be upheld within the trial and appellate court systems. Disallowance of a rocket launch facility under Section 306(B) will withstand greater judicial scrutiny than if a facial challenge is made pursuant to an absolute exclusion under the proposed amendment, in my opinion.

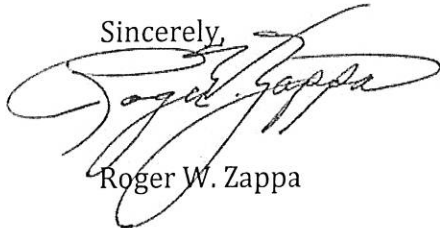
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### **Conclusion**

In conclusion, it is my opinion that it would not be in Powell Township's best legal interest to adopt the proposed zoning ordinance amendment creating a blanket absolute exclusion to completely prohibit rocket launch facilities at any location within any zoning district in Powell Township. I do not believe the amendment being proposed accomplishes the objectives of those persons proposing it in the best available manner from a legal perspective. It is also likely to subject Powell Township to future legal challenges if it is adopted.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger W. Zappa", written over a horizontal line.

Roger W. Zappa

RWZ/nz