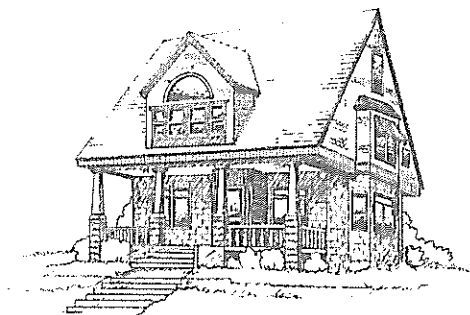


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November 9, 2022

Teri Grout, Supervisor
Rock River Township
P.O. Box 195
Chatham, MI 49816

via email: rockrivertwpsupervisor@outlook.com

Dear Supervisor Grout:

I am responding to your request for legal input regarding possible adoption of a diversity, equity, and inclusion statement, either within Rock River Township's Master Plan or as a separate resolution. You also forwarded a copy of the DEI Statement being proposed. Diversity, equity, and inclusion policies have become a highly politicized topic across the United States over the past couple years. Whether a township "should" or "should not" adopt a DEI policy is not strictly a legal question, and nothing in this correspondence should be construed as a recommendation for or against adoption of a DEI policy or statement. I do have a few comments and recommendations if Rock River Township decides to move forward with the proposed DEI policy, however.

First, if the Township does not already have a diversity, equity, and inclusion policy, inserting one into the legislatively-mandated Master Plan amendments is not the preferred method of adopting one. The Master Plan and its periodic amendments serve an important but narrowly-focused purpose. Section 31 of the Michigan Planning Enabling Act requires a planning commission to "make and approve a master plan as a guide for development within the planning jurisdiction" subject to a number of criteria with regard to anticipated development of the township. For example, MCL 125.3833(1) provides:

A master plan shall address land use and infrastructure issues and may project 20 years or more into the future. A master plan shall include maps, plats, charts, and descriptive, explanatory, and other related matter and shall show the planning commission's recommendations for the physical development of the planning jurisdiction.

This section further requires the master plan to include an allocation of land for agriculture, residences, commerce, industry, recreation, public transportation facilities, public buildings, schools, soil conservation, forests, among other planned uses. By means of additional example, the master plan must address the location and character of existing and possible future transportation systems, streets, bridges, public transit, bicycle routes, pedestrian paths, freight facilities, railroads, airports, and other mechanisms “for the safe and efficient movement of people and goods in a manner that is appropriate to the context of the community...” MCL 125.3833(2)(b). Other mandatory items when developing or amending a master plan include consideration of waterways and waterfront developments, sanitary sewers and water supply systems, flood prevention, drainage, pollution prevention, redevelopment or rehabilitation of blighted areas, and in municipalities that have adopted a zoning ordinance, consistency with that zoning ordinance. In short, as set forth in MCL 125.3833(1), a master plan is concerned primarily with “the physical development of the planning jurisdiction” and associated land uses. Similarly, a planning commission is created by legislative authority, and has highly important but limited functions and authority. Although it could be appropriate to insert a diversity, equity, and inclusion statement in a master plan, if such a statement has already been adopted by the township, a DEI policy should not originate with the planning commission or the master plan, in my opinion.

Michigan Courts have repeatedly held that townships have no inherent powers, and possess only those powers and authority expressly granted to them by the legislature, the Michigan Constitution, or those which can be fairly implied from either. *Hughes vs. Almena Township*, 284 Mich App 50, 61; 771 NW2d 453, 461 (2009); *Hess vs. Cannon Township*, 265 Mich App 582, 590; 696 NW2d 742 (2005). The township board, as the chief legislative body of a township, is expressly authorized to adopt ordinances protecting or regulating the public health, safety, and general welfare of persons and property. MCL 41.181. This authority has also been held to include the right to adopt resolutions and policies protecting the public health, safety, and welfare, e.g. *Hess vs. Cannon Township*, supra, pp. 748-749; NW2d at 593. Adoption of a policy promoting diversity, equity, and inclusion within the Township falls within those powers possessed by the Township Board. If Rock River Township wishes to enact a DEI policy or statement, the Township Board should adopt a resolution. Once this has occurred, it would be permissible but not required for the Planning Commission to include the content of the DEI statement in the Master Plan. Inclusion of the DEI within the Master Plan would be optional, at that point.

It is my understanding that a question was raised whether a DEI statement is redundant, given federal and state civil rights laws. Michigan’s civil rights laws are broader and include more protected classes of persons than federal civil rights statutes. For example, Michigan civil rights statutes generally apply to any employer having 1 or more employee, while the federal Title VII Civil Rights Act covers employers with 15 or more employees. Michigan civil rights protections arise under the Elliott-Larsen Civil Rights Act, MCL 37.2101, et seq., the Persons with Disabilities Civil Rights Act, MCL 37.1101, et seq., and a couple other statutory provisions, as well as in cases interpreting each of these statutes. Michigan law generally prohibits discrimination based on

religion, race, color, national origin, sex, age, height, weight, marital or familial status, disability, and genetic information. These prohibitions protect the opportunity to obtain employment, housing, other real estate, and the full and equal utilization of public accommodations, public services, and educational facilities. Most or all business conducted by Rock River Township would likely fall within the categories of public accommodations and public services.

Countless court cases have interpreted both federal and state civil rights laws to better determine who falls under each protected category, and what actions or conduct are prohibited. For example, you may already be familiar with one of the more recent Michigan Supreme Court cases that addressed whether Michigan's Elliott-Larsen Civil Rights Act, prohibiting discrimination based on sex, extends to sexual orientation and gender identity. In a 5 to 4 opinion issued July 28, 2022, the Michigan Supreme Court concluded that it does. In the consolidated cases of *Rouch World, LLC, and Uprooted Electrolysis, LLC, vs. Department of Civil Rights*, Docket No. 162482; WL 3007805 (2022), a hair removal business refused to provide services to a transgender customer, and a baker refused to make a wedding cake for a homosexual couple. The majority opinion held that both businesses had violated Michigan's civil rights laws, and reversed prior cases holding that discrimination based on sex did not extend to these types of situations.

To this extent, Michigan law vigorously promotes equal opportunity and protects against discrimination based a broad spectrum of classifications. These protections exist and are enforceable regardless of whether an employer or municipal body adopts a DEI statement. Based on this analysis, an argument could be made that there is some inherent redundancy in adopting a DEI policy. A counter-argument could be made, however, that despite these laws, discrimination continues to exist, and that a DEI statement may help reinforce an entity's commitment to take a stance on this issue.

A question was also raised as to whether adopting a diversity, equity, and inclusion policy can result in liability exposure. This can occur in a poorly-worded DEI statement, especially if it promises protections that the entity cannot lawfully give, or that it cannot ultimately comply with. There are few potential liabilities, however, with a carefully and innocuously-worded DEI policy.

If the Township finds the terms "diversity," "equity," and "inclusion" troubling due to the perceived political connotations, these could be replaced by synonyms without altering the overall intent.

If Rock River Township chooses to adopt a diversity, equity, and inclusion policy, it should do so by a written resolution and roll call vote. I have a few comments regarding Paragraphs 1 and 2 of the Implementation Strategies found in the DEI sample you forwarded to me for my review. First, I recommend striking the word "language" from Paragraph 1 of the Implementation Strategies. This term could have broader implications than anticipated. For example, this could be interpreted to promote foul or obscene language during public comment at Board meetings, or in

other contexts. While this might initially appear to be an absurd interpretation, many imaginative arguments have been made in civil rights cases and other litigation. If the intent was to protect people who speak a foreign language, this is probably already covered under the "culture" category or the "national origin" protections afforded by the Elliott-Larsen Civil Rights Act.

The first sentence of Implementation Strategy No. 2 states, "commit to working actively to challenge and respond to bias, harassment, and discrimination." This is an exceptionally broad statement. This sentence should either be deleted or modified to restrict its application to circumstances that Rock River Township can legally control or become involved in. Adding language such as "by Rock River Township" could help correct this problem, making the sentence read: "commit to working actively to challenge and respond to bias, harassment, and discrimination by Rock River Township."

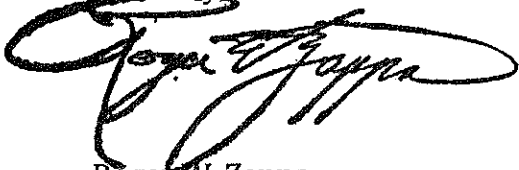
Without this modification, it might be argued that Rock River Township promises to take an official position on private disputes involving perceived bias, harassment, or discrimination, regardless of whether it is the result of conduct precipitated by the Township Board, employees, or representatives. Expenditure of time and funds on non-public disputes in which the Township is not otherwise involved could in many instances exceed the scope of authority granted to a township under the Michigan Constitution of 1963, the State Legislature, or that could fairly be implied from either.

Aside from these revisions, I have no particular legal concerns regarding the remainder of the Implementation Strategies.

I reiterate that the decision whether to adopt a diversity, equity, and inclusion statement or policy rests entirely with the Township Board. This correspondence is intended solely to answer the legal questions surrounding that decision. It is not intended to sway the Township Board toward either approving or rejecting a DEI policy.

If I have failed to address all of your questions or if additional questions arise regarding this interesting issue, please do not hesitate to contact me. This correspondence is subject to the attorney-client privilege and is exempt from disclosure under the Freedom of Information Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Roger W. Zappa". The signature is stylized with large, sweeping loops and a long horizontal tail.

Roger W. Zappa

RWZ/nz