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September 18, 2008

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Anne K. Quinlan
Acting Secretary
Surface Transportation Board
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Washington, D.C. 20423



Subject: Finance Docket No. 35133 – Milwaukee Industrial Trade Center, LLC, d.b.a.
Milwaukee Terminal Railway-Acquisition and Operation Exemption-Private
Trackage at Milwaukee, WI

Dear Acting Secretary Quinlan:

Enclosed for filing in the above identified application are an original and ten copies of the
Petition to Revoke Exemption on Behalf of The Redevelopment Authority of The City of Milwaukee
along with the filing fee of \$200 as required by 49 U.S.C. 10502(d). Please date stamp the extra
copy of this filing and return to our messenger for our files.

Also enclosed is a compact disc containing the text of the filing.

Sincerely yours,

Robert P. vom Eigen

FILING FEE WAIVED

RVE:dmo

Encls:

cc: Thomas F. McFarland (w/Petition)
Thomas O. Gartner (w/Petition)
Gregg C. Hagopian (w/Petition)

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WASHINGTON, D.C.

**Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Finance Docket No. 35133

**Milwaukee Industrial Trade Center, LLC, d.b.a. Milwaukee Terminal Railway—
Acquisition and Operation Exemption—Private Trackage at Milwaukee, WI**

**PETITION TO REVOKE EXEMPTION ON BEHALF OF
THE REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE**

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Filed: September 18, 2008

**Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Finance Docket No. 35133

**Milwaukee Industrial Trade Center, LLC, d.b.a. Milwaukee Terminal Railway—
Acquisition and Operation Exemption—Private Trackage at Milwaukee, WI**

**PETITION TO REVOKE EXEMPTION ON BEHALF OF
THE REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE**

The Redevelopment Authority of the City of Milwaukee (hereinafter “RACM”) files this Petition to Revoke the exemption published by the Milwaukee Industrial Trade Center, LLC, d/b/a Milwaukee Terminal Railway (“MITC”) because the Corrected Notice of Exemption filed April 16, 2008 contains false and misleading information rendering the exemption void *ab initio*; MITC’s filing was intended to avoid RACM regulation and possible RACM acquisition of MITC’s real estate, and the proposed uses claimed by MITC to be inherent in its rail carrier operation violate the restrictions imposed in the Federal Register Notice. Thus, revocation of the exemption is appropriate because it was filed as a “device to acquire or retain property for non-rail purposes using federal preemption as a shield.”¹

¹ This language is used in *Jefferson Terminal Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.* STB Finance Docket No. 33950, Mar. 15, 2001 at 11.

I. Summary of Argument

MITC acquired in November 2006 an 84 acre parcel located in the West Capitol and North 35th Street Redevelopment Project Area (the “Project Area”) of Milwaukee, that was and is subject to a Redevelopment Plan. MITC acquired the property (the “MITC Parcel”) subject to restrictions on the permissible uses to those authorized by the Redevelopment Plan.² *See* Hagopian V.S. at ¶ 3. The City of Milwaukee’s (“City”) Common Council designated the Project Area in March 2005, and the Project Area is part of a larger Urban Reinvestment Zone, called the 30th Street Industrial Corridor Redevelopment Initiative (the “Redevelopment Initiative”), which extends nearly five miles between Congress Avenue in the north and Highland Boulevard to the south and 35th Street on the west and 27th Street on the East. *See* Timm V.S. at ¶ 6. The Redevelopment Initiative and its Urban Reinvestment Zone were established by Wisconsin’s Governor Doyle in 2005. The principal objectives of both the Redevelopment Plan and the Redevelopment Initiative are to eliminate blight, and to redevelop and reinvigorate the area so that it attracts businesses that will bring a large number of family supporting jobs into the surrounding neighborhoods. RACM has condemnation powers to acquire properties that contribute to the blighted character of the Redevelopment area. *See* Timm V.S. at ¶ 2. RACM will show that this project has, for several years, been amongst the highest redevelopment priorities within the State of Wisconsin and the City of Milwaukee. *See*

² The material facts relevant to this Petition are set forth in the Verified Statement of the Commissioner for the Department of City Development, Rocky Marcoux (“Marcoux V.S.”), the Verified Statement of the Project Manager for the Department of City Development, Benjamin Timm (“Timm V.S.”), and the Verified Statement of Attorney for the City of Milwaukee, Greg Hagopian (“Hagopian V.S.”), which are attached to this Petition, and are summarized in Part II of this Petition, *infra*.

Marcoux V.S. at ¶ 2 and Letter of Support from Mayor Thomas Barrett, attached to this Petition to Revoke Exemption.

MITC and the companies affiliated with it (“MITC Companies”) began filing applications through routine City procedures for occupancy permits at the MITC Parcel in February 2007 and continued doing so through April 2008. *See Timm V.S. at ¶ 11.* Some of the permits were granted, some were granted in part and others were rejected because the planned uses were not permitted by the Redevelopment Plan. *See Id. at ¶ 12.* Those proposed tenants which are not engaged in scrapping and the processing of construction and demolition waste (“C&D”) have received certificates of occupancy from RACM. *See Id. at 13.*

During the period when the certificates of occupancy were being processed, there was no communication with RACM or the City by MITC or any of its principals or representatives in which they described any intention to provide common carrier rail transportation services. It was not until a meeting of counsel on June 5, 2008 that attorneys for MITC informed RACM of the publication of the Corrected Notice of Exemption filing of April 16th (the “Corrected Notice”). The June 5th meeting was originally scheduled to explore a resolution to a dispute pending in state court between the parties over whether RACM could gain access to the MITC Parcel in order to conduct environmental testing of the site under a provision of Wisconsin law. At the meeting, counsel for MITC provided a letter to City Attorneys Gartner and Hagopian informing them “that RACM’s right of access under Wis. Stat. §66.1333 is pre-empted by the federal Interstate Commerce Commission Termination Act (“ICCTA”). .” *See June 5th Letter to Messrs. Hagopian and Gartner from Murn & Martin, S.C. (the “June 5th Letter”), attached to Hagopian V.S. at Exhibit F.* The letter then proceeds to explain that:

On May 16, 2008, the STB *granted* MITC d/b/a Milwaukee Terminal Railway, the authority to acquire and operate approximately 2 miles of rail line on the Property in

Milwaukee [defined in the letter as the 84 acre MITC Parcel]. ...As a result of this *approval*, MITC and the Property are now subject to regulation by the STB pursuant to 49 U.S.C. §10501. This federal law pre-empts state and local authority to regulate railroad property, including RACM's authority to obtain access to the Property under §66.13333 Wis. Stat."

Id., emphasis added.³

MITC's local counsel clearly overstates the Board's active scrutiny of MITC's Corrected Notice,⁴ and RACM submits this Petition to Revoke to ensure that it receives the scrutiny it so richly deserves. RACM will show in this Petition to Revoke that:

1. MITC's corrected notice of exemption is false and misleading;
2. MITC's proposed lease to one of the MITC Companies, Midwest Rail & Dismantling ("MRD"), a C&D processing facility, and some of MITC's proposed uses constitute collection, storage, transfer, separation and processing of solid waste, and authorization of such activities is not within the jurisdiction of the Board by virtue of the Consolidated Appropriations Act of 2008;
3. MITC's action to create a railroad as a tactic in the context of discussion of sale, litigation, and possible condemnation by the City, places this case firmly within the precedent of the *Jefferson Terminal* case;

³ The June 5 letter also reminds counsel for RACM of an earlier letter from his firm notifying RACM that all offers by MITC to sell the MITC parcel to RACM had been "rescinded and/or withdrawn." *See also* letter, dated May 30, 2008, from J. Michael Long of Mr. Murn's firm to RACM attached to Timm V.S. at Exhibit D.

⁴ However, the STB did amend the draft *Federal Register* Notice provided by MITC counsel to include a disclaimer on the preemptive effect of the exemption in connection with transferring or processing solid waste as required by the Consolidated Appropriations Act of 2008.

4. the transloading of bulk commodities, even when performed on railroad-owned property does not in and of itself constitute rail common carrier service; and where the property is a former shipper industrial site, the presumption against defining the operator as a rail carrier should be even stronger;

5. *New England Transrail* describes a process of distinguishing carrier from non-carrier activities, under which standard, the processing and manufacturing that will occur at the MITC Parcel does not constitute rail transportation under ICCTA;

6. *Effingham & Bulkmatic* are distinguishable from the instant case; and

7. the Board's regulations permitting use of its notice of exemption procedures under 49 CFR §1150.31 for conversions of industry switching track to regulated rail lines are arbitrary and capricious, and deprive the city and RACM of their constitutional due process rights.

MITC's charade of pretending that it is in the rail transportation business began 17 months after acquiring the MITC Parcel, and it should be identified by the Board for what it is – an abuse of the Board's Notice of Exemption procedures for acquiring lines of railroads.⁵

⁵ RACM objects to the use of the Board's Notice of Exemption procedures under 49 C.F.R. §1150.31, *et seq* under the circumstances of this case where, without any advance notice or service of pleadings on State or local officials, a non-carrier acquires an industrial site with rail tracks, which for nearly 100 years have been operated as private industry spurs (beyond the STB or FRA jurisdiction). The new entity that seeks to provide what it alleges to be common carrier rail service, should be entitled no special presumptions. Conversion of spur tracks into a line of railroad is not the same as acquiring an existing line of railroad upon which common carrier rail service has been provided in the past. There are no notice of exemption procedures applicable to construction of new rail lines, and STB regulations require advanced service of construction applications upon State agencies and newspaper publication of notices of the application in the county where the new line is to be constructed are required. *See* 49 C.F.R. §1150 10 (e) and (f). The same service and public notice provisions should apply to requests to convert former shipper-owned spurs to lines of railroad, and there should be no presumption that the new service constitutes rail transportation within the jurisdiction of the STB.

II. Factual Background

A. The Parties

RACM is “an independent, separate and distinct public body and a body corporate and politic” with authority to exercise public powers, including the power of eminent domain. Wis. Stat. §66.1333(3)(f). RACM’s purposes include “carrying out blight elimination, slum clearance, and urban renewal programs and projects...” Wis. Stat. §66.1333(3)(a)1.

MITC and the MITC Companies, Midwest Rail & Dismantling (“MRD”), West Milwaukee Recycling (“WMR”), and Knapp Railroad Builders (“Knapp”) all have common ownership, and all operate at a common facility at 4777 W. Lincoln Ave., West Milwaukee, Wisconsin. *See* McFarland Opinion Letter at 4, Hagopian V.S. at Exhibit H. MITC has indicated that it wishes to move MRD, WMR, Knapp, and its own offices from the Lincoln Avenue facility to the MITC Parcel. *See* Timm V.S. at ¶ 11.

At the Lincoln Avenue facility, MRD is a heavy-construction-wrecking and demolition contractor,⁶ WMR is a metal-recycling facility⁷ per the WDNR website. Knapp is a heavy-construction company that deals with construction and maintenance of rail infrastructure. Hagopian V S. at ¶ 8.

The Lincoln Avenue Facility is immediately adjacent to a line owned by Union Pacific Railroad, with at least one spur onto the facility, but for whatever reason, MITC did not find it

⁶ Available at www.manta.com.

⁷ Available at WDNR website:
http://www.dnr.wi.gov/Runoff/stormwater/industrial/ind_detail.asp?offset=2480&FID=9980741
10.

necessary to create a rail carrier to use this facility, presumably because the zoning permitted their current uses.

Before April 16, 2008, MITC did not operate as a railroad, nor claim to be subject to STB jurisdiction. According to a letter from MITC's own attorney, "[MITC's own] businesses are rail-related, but they do not require rail service." See McFarland Opinion Letter at 4, Hagopian V.S. at Exhibit H.

B Prior Use of MITC Parcel

From approximately 1920 through 1996, the MITC Parcel was part of a 156-acre site owned by A.O. Smith. (Redevelopment Plan for the W. Capitol Drive and N. 35th Street "Century City" Project Area, RACM, June 2005 at 4) (the "Redevelopment Plan"). The site under A.O. Smith was a state of the art manufacturing facility, a hive of activity with more than 5,000 workers earning living wages, producing water heaters, glass lined tanks, agricultural silos, gas pumps, air craft parts, bomb casings, nuclear reactor components, DC power sources, railroad components, welding machines, and other industrial equipment. See Timm V.S. at ¶ 4. The site was not just functional, but also somewhat aesthetically pleasing in its heyday. It was dominated by the Research and Engineering Building, a seven-story curtain of glass, cut into zigzag bays that even drew Frank Lloyd Wright's admiration. See MILWAUKEE JOURNAL SENTINEL, "Tower Automotive Building Has A Beauty That's Rarely Seen or Appreciated," (Apr. 22, 2002), available at <http://www.jsonline.com/story/index.aspx?id=37092>. The trackage

now in question was used by A.O. Smith for its own switching operation⁸. See *Timm V S.* at ¶ 10.

In 1996, A.O. Smith sold the 156 acres to Tower Automotive. Tower used the campus almost entirely as a motor vehicle frame manufacturing site, but it already had slipped far below its potential; under Tower Automotive, no more than 1,000 workers were employed. See *THE BUSINESS JOURNAL OF MILWAUKEE*, “City to Redevelop Tower Automotive Site,” Oct. 3, 2003, available at <http://www.bizjournals.com/milwaukee/stories/2003/10/06/story2.html>. The rail service at Tower Automotive, like that at A.O. Smith, was industry switching service provided by a contract(s) with the Wisconsin & Southern Railroad Co. and Canadian Pacific. See *Timm V.S.* at ¶ 10.

C. Description of RACM’s Process in Creating the Redevelopment Plan as a Part of the 30th Street Redevelopment Initiative

In 2005, Tower went bankrupt after a long struggle for profitability. See *Timm V.S.* at ¶ 5. RACM and the City foresaw the bankruptcy, and were ready to act when it occurred. See *Id.* RACM and the City declared the 156-acre site legally blighted under Wis. Stat. §66.1333(2m), and in need of redevelopment. See *Id.* at ¶ 6. On March 16, 2005, the City Common Council adopted Resolution File No. 041510 approving the boundary for the Project Area and authorized RACM to prepare a plan in accordance with Wis. Stat. §66.1333. See *Redevelopment Plan, infra* at 4. RACM created the “Redevelopment Plan for the W. Capitol Drive and N. 35th Street ‘Century City’ Project Area” (the “Redevelopment Plan”) for the 156 acre Project Area. See

⁸ McFarland’s Opinion Letter has this reversed – that Tower had its own switching operation, and that A.O. Smith was served by the predecessor to Wisconsin Southern. Both sides agree, however, that the trackage has only ever been used for industry switching.

Timm V.S. at ¶ 6. As required under Wis. Stat. §66.1333, the City Common Council adopted the plan by at least a 2/3 majority, and RACM and the Mayor approved it. RACM Resolution 9718 and City Council Resolution 050190. On December 9, 2005, RACM recorded the Redevelopment Plan against title to the Project Area in the Milwaukee County Register of Deeds Office, giving notice of RACM's rights and interest in the property according to Wis. Stat. §66.1333(9)(a)1.c. *See* Milw. Co. Reg. of Deeds Office Doc. No. 914506, Redevelopment Plan Evidence of Recordation, Timm V.S. at Exhibit C.

The primary goal of the Redevelopment Plan is to promote the attractive, productive, and efficient reuse of land and buildings, where possible, in a manner that provides high quality sites for business and industry, while benefiting the surrounding community. *See* Redevelopment Plan at 5, Timm V.S. at Exhibit B. The Redevelopment Plan aims to encourage the creation of a high density of family supporting jobs⁹ within its boundaries, as well as to mitigate environmental contamination in the soil and buildings that would tend to interfere with investment in, and use or reuse of, the involved properties. *Id.* The Redevelopment Plan proposes to fight blight by the efficient use of the site for business development. *Id.* To accomplish this, it places certain restrictions on the Project Area.¹⁰ Locating businesses within the Project Area, including within the MITC Parcel, requires occupancy permits in accordance with local law for uses that are permitted under the Redevelopment Plan.

⁹ This goal is defined as a minimum of 15 jobs per acre, at no less than \$11.58 per hour, measured in 2005 dollars, consistent with the Governor's Initiative. As a goal, it is not enforced as a regulatory minimum for a certificate of occupancy. *See* Timm V.S. at ¶ 3

¹⁰ For example, under the Redevelopment Plan, recycling-collection facilities and mixed-waste processing facilities are "conditional uses" requiring RACM approval, and material reclamation facilities, indoor or outdoor salvage operations, and truck-freight terminals are not permitted uses, but railroad switching, classification yards, or freight terminals are permitted uses.

Also in 2005, Wisconsin Governor Jim Doyle announced his Urban Reinvestment Initiative, which set as a state priority the cleanup of urban neighborhoods in economically and environmentally distressed areas. *See* WISCONSIN DEPARTMENT OF NATURAL RESOURCES, “Wisconsin’s Urban Reinvestment Initiative and the 30th Street Industrial Corridor Project,” *available at* <http://www.dnr.state.wi.us/org/aw/rr/brownfields/uri-30th-street.htm>. The Governor knew that too often urban redevelopment efforts stall due to fears of environmental contamination, liability issues, safety issues from dilapidated buildings, and lack of adequate space for new buildings. *Id.* Therefore, the Governor’s Initiative committed state agencies to partner with cities and community leaders to identify and investigate contaminated properties, known as brownfields, and then to work together to secure resources for the cleanup and eventual redevelopment of these blighted areas. *Id.* Thus, the Governor’s Initiative lent state support to efforts such as that undertaken by the Redevelopment Plan. Moreover, when one of the first targeted areas for the Governor’s Initiative became the 30th Street Industrial Corridor (the “Corridor”)¹¹, the Governor’s Initiative came to physically embrace the Project Area. *Id.*

The Project Area is of the highest priority in the eyes of both state and local governments. *See* Marcoux V.S. at ¶ 2. According to the most recent census data for the Corridor, neighborhood unemployment is at 19 percent and at least 15 percent of the housing units are vacant. *See* “Wisconsin’s Urban Reinvestment Initiative and the 30th Street Industrial Corridor Project,” *supra*. Approximately 34 percent of the population in the corridor live in poverty, and

¹¹ Located in the north central part of the city, the Corridor stretches for approximately five miles south to north, and much of the area lies within five blocks of 30th Street. (“Wisconsin’s Urban Reinvestment Initiative and the 30th Street Industrial Corridor Project,” *supra*). The Corridor is bounded by Highland Boulevard to the south and Congress Avenue to the north, 35th Street to the west and 27th Street to the east. *Id.* Portions of the five-mile corridor are included in eleven different neighborhoods. *Id.*

97 percent of residents are considered minority. *Id.* The non-residential buildings are largely abandoned, a great share of the jobs are gone, and with the long history of industrial use, contamination is a major issue in the Corridor. *Id.* The Redevelopment Plan and 30th Street Initiative both aim to remove health and environmental hazards, and eventually to restore a vibrant economy to the community. *See Marcoux V S.* at ¶ 3. The Project Area is a major investment project for the City. *See Id.* at ¶2.

When MITC eventually bought its parcel on November 10, 2006, it consisted of vacant buildings and property. *See Bjodstrup Testimony* at 6 (Aug. 12, 2008), *Hagopian V.S.* Exhibit D; Redevelopment Plan at 4, *Timm V.S.* at Exhibit B. The MITC Parcel hosts known environmental contamination problems involving both soil and buildings, but the extent of these problems is currently unknown. *See Redevelopment Plan* at 4, *Timm V.S.* at Exhibit B. The Canadian Pacific line of railroad, operated by Wisconsin & Southern Railroad Co., runs through the area, roughly in the north-south direction. *See Id.* The track spurs on MITC's property have been used exclusively as industry switching track in the past, and even that use ended entirely in March 2006. *See Timm V.S.* at ¶ 10. The trackage on the MITC Parcel consists of 31 spurs, the longest of which is 2214 feet or 0.41 miles. *Id.* Thirteen of these spurs, or more than one-third of them, are each shorter than a football field. *Id.* All past use of the land has been heavy industrial, and this is still permitted, though limited, under the Redevelopment Plan, with the stipulation that industry must comply with environmental regulations and the goal that the jobs produced are of a high density and at a living wage. *See Redevelopment Plan, Timm V.S.* at Exhibit B.

D. MITC's Acquisition of the Property and Proposed Tenants

On November 10, 2006, MITC acquired its parcel of 84 acres on the east side of the Project Area. *See Hagopian V.S. at ¶ 3.* When it acquired the property, MITC knew it was subject to, and that it was taking title subject to, the recorded RACM Redevelopment Plan. *Id.* When the City wished to remove buildings on another part of the Project Area in 2005, MRD was hired to remove the structures and pavement from 24 acres of the Project Area. *See Gantenbein, Barry, Ed., "In Control: Midwest Rail & Dismantling leads demolition of former A.O. Smith plant in Milwaukee," WESTERN BUILDER (Apr. 21, 2005), available at http://www.acppubs.com/index.asp?layout=article&articleid=CA526445&article_prefix=CA&article_id=526445.* As a purchaser subsequent to the recording of the Redevelopment Plan on December 9, 2005, MITC was on notice of the recordation, including the fact that permissible uses of the land are only those authorized by the Redevelopment Plan. Also, MRD is one of the partners in the business that is MITC, so whether or not MITC chose to check restrictions on use before its purchase of the Parcel, MITC had actual notice of the Redevelopment Plan through MRD's contract with RACM and participation in the redevelopment in 2005. MITC paid \$2.1 million for the parcel, which is roughly \$25,000 per acre, a purchase price that reflected the restrictions on its use. *See Hagopian V.S. at ¶ 3.*

The MITC Companies and MITC's proposed tenants began filing applications for occupancy permits in February 2007, following routine City procedures. *See Timm V.S. at ¶ 11.* Most of MITC's proposed tenants appear to be affiliates of MITC. *Id.* Proposed uses of the MITC Parcel according to the permit applications include office space, indoor scrap processing, indoor recycling collection, office/cold storage, contractors' shop and yard, indoor/outdoor storage, and "research and development." *See Id. at ¶ 12.* None of the permit applications involve rail transportation. *Id.* The office space permits were approved, the indoor scrap

processing permit was denied, and the other applications were approved or partially approved pending further information. *Id.* The partially and/or wholly denied permits were denied when the uses articulated by MITC were not permitted uses for the MITC Parcel under the Redevelopment Plan. *Id.* Some businesses apparently decided not to locate on the Parcel immediately, despite receiving occupancy permits. *See Id.* at ¶ 13. Currently there are three small offices onsite (occupying less than 3,000 square feet of the entire 84-acre parcel), and MITC's headquarters has not yet moved to the Parcel. *Id.*

E. Negotiations for Possible Sale of MITC Parcel and State Court Litigation

In August of 2007, the Milwaukee Economic Development Corporation ("MEDC"), a corporation that shares space and economic-development functions with RACM, offered to buy the MITC Parcel from MITC for \$1.9 million. *See Marcoux V.S.* at ¶ 4. This led to negotiations between RACM and MITC for possible sale of the MITC Parcel to RACM. *See Id.* at ¶5. During January, 2008, there were frequent negotiations regarding this possible transaction. *Id.* On January 14 and 30, 2008, MITC made offers to sell the Parcel or portions thereof to RACM. *See Timm V.S.* at ¶ 16. RACM believed the offer price to be unrealistic, and took the position that if a negotiated transaction could not be arrived at, eventually RACM would be prepared to use the condemnation powers afforded it under Wisconsin Statute §66.1333(5). *See Marcoux V.S.* at ¶ 5. On February 5, 2008 MITC sued the City and RACM in the Milwaukee County Circuit Court by filing a Petition for Writ of Mandamus seeking a court order to require the City to issue occupancy permits to MITC and the MITC Companies and proposed tenants *Milwaukee Industrial Trade Center, LLC v. City of Milwaukee, et al.*, Cir. Ct., Milw. Cty., WI, Case No. 2008-CV-001772 (Judge Kahn) (the "State Lawsuit") In MITC's Petition, it describes its

principal place of business as the Lincoln Avenue property. *See* Petition for Writ of Mandamus in State Lawsuit at 1, Hagopian V.S. at Exhibit B. MITC states that it bought the MITC Parcel to use its “extensive industrial infrastructure, to relocate and expand several existing businesses operated by MITC’s owners, and to redevelop and lease portions of the [MITC Parcel] to suitable third party tenants.” *Id.* at 10. MITC acknowledged that when it bought the MITC Parcel, it was subject to the Redevelopment Plan, and alleged that the occupancy permits should have been issued because they indicated use of the MITC Parcel as “an office, contractor’s shop and contractor’s yard,” and as “an indoor recycling collection facility.” *Id.* at 11, 14-15, 17, 19, 23-24, 26, 32. MITC did not mention any intention to engage in railroad operations in its Petition, nor did it mention the STB or ICCTA. *See Id.* The State Lawsuit is still pending.

Approximately one week after MITC filed the State Lawsuit, it filed an additional \$32 million inverse condemnation claim against RACM and the City. *See* Hagopian V.S. at ¶ 5. MITC’s Claim recites that certain occupancy permits had not yet been issued, and indicates that RACM, the City, and MITC were engaged in negotiations for sale of the MITC Parcel, and that in the context of those negotiations, “representatives of RACM and the City have indicated that if MITC is not willing to sell at a price agreeable to RACM, that RACM and/or the City will exercise its eminent domain powers to condemn the [MITC Parcel].” *See* Claim at 6, Hagopian V.S. at Exhibit E. The Claim alleges that the City’s refusal to issue certain occupancy permits is contrary to the Redevelopment Plan, and that MITC suffered a regulatory taking as a result. *See Id.* at 7. Again, MITC did not claim to be engaged in railroad operations, nor did it mention the STB or ICCTA. *See generally Id.* Rather, on March 6 and 25, 2008, MITC offered once again to sell the MITC Parcel to RACM. *See* Timm V.S. at ¶ 16

In the State Lawsuit, on April 15, 2008, RACM filed a motion under Wis. Stat. §66.1333(5)(a)3 requesting a court order allowing RACM to enter the MITC Parcel to undertake environmental investigation and to appraise the MITC Parcel due to RACM's independent interests under the Redevelopment Plan, and Wis. Stat. §66.1333, and RACM's interest in possibly acquiring the MITC Parcel.

F. MITC's Filing with the Surface Transportation Board

On April 16, 2008, MITC filed its Corrected Notice of Exemption with the Surface Transportation Board. MITC's filing provided no notice to the Board regarding RACM's Redevelopment Plan, the State Lawsuit, the Claim for inverse condemnation, nor of its ongoing negotiations with RACM regarding RACM's possible acquisition of the Parcel. Significantly, although MITC filed an objection on May 8, 2008 in the State Lawsuit to RACM's April 15th Motion to inspect and appraise the MITC Parcel, MITC did not mention the STB, ICCTA, nor any sort of rail activities or federal jurisdiction in that objection.

G. MITC Provided No Actual Notice of its Corrected Notice of Exemption Until After it Became Effective

Although MITC's Corrected Notice of Exemption was filed on April 16, 2008, and although MITC was certainly aware of RACM's and the City's interest in the site, neither RACM nor the City was informed of the Corrected Notice until a meeting between RACM and MITC representatives on June 5, 2008. *See Hagopian V.S.* at ¶ 7. Because RACM and the City do not retain counsel to monitor the Federal Register routinely, RACM and the City did not receive actual notice until June 5, 2008, more than 30 days after the Corrected Notice was filed. *See Id.* at ¶ 8.

On June 5, 2008, MITC attorneys attended a meeting with RACM and City representatives. The meeting was scheduled to discuss RACM's environmental testing rights. At the beginning of the meeting, the MITC attorneys delivered a letter to the RACM and City representatives. See June 5th Letter, Hagopian V.S. at Exhibit F. It stated, in part:

On May 16, 2008, the STB granted MITC d/b/a Milwaukee Terminal Railway, the authority to acquire and operate approximately 2 miles of rail line on the Property in Milwaukee...As a result of this approval, MITC and the Property are now subject to regulation by the STB pursuant to 49 U.S.C. §10501. This federal law pre-empts state and local authority to regulate railroad property, including RACM's authority to obtain access to the Property under §66.1333 Wis. Stat.

* * *

As you can see, the City's limited regulation over MITC and the Property and RACM's total lack of authority renders RACM's pending Motion for Special Inspection Warrant and Order moot. MITC hereby demands that this motion be withdrawn.

* * *

Federal pre-emption may also eliminate the need for MITC to pursue its Mandamus action against the City and RACM provided the City is willing to now issue (sic) the requested occupancy permits to MITC's tenants.

Id., emphasis added.

H. MITC's Actions After RACM and the City Received Actual Notice of its Exemption

On June 17, 2008, MITC sent a letter to RACM and City representatives to "offer additional information" concerning MITC's plans for the property. See June 17th Letter to Messrs. Hagopian and Gartner from Murn & Martin, S.C., Hagopian V.S. at Exhibit H. These plans include:

...the expansion of its affiliates, including Knapp Railroad Builders, Inc. ("Knapp"), Midwest Rail and Dismantling, Inc. ("Midwest") and West Milwaukee Recycling ("WMR"). Knapp has been engaged in the railroad construction business for approximately 80 years. Its core function is to build and maintain railroad track lines. Midwest dismantles railroad tracks and dismantles, refurbishes, assembles rolling stock and deals with the resale of rolling stock parts. WMR deals in railroad scrap and recycling. After expanding to the Property, WMR will ship extensively by rail to markets throughout the United States and Canada.

* * *

MITC has been contacted by a Michigan based entity that is interested in **proccessing railroad ties** at the Property. Once processed, these railroad ties would be shipped via rail to power plants to be used in the electrical generation process.

* * *

Another cntity is interested in receiving raw materials via rail at the Property for processing and packaging. Once packaged, these goods would be shipped via rail out to its customers. Another business has been in discussions with MITC to convert building 36 into a state of the art locomotive repowering facility.

Id., emphasis added.

MRD has indicated on more than one occasion that it intends to expand its operations on the MITC Parcel, which operations include processing of Construction and Demolition waste (“C&D”) and scrap-metal processing notwithstanding the denial of the permit to MRD for indoor scrap proccessing based on the Redevelopment Plan’s prohibition of such use of the land. *See* Timm V.S. at ¶ 14.

When the City’s Department of Public Works (“DPW”) wished to remove buildings on another part of the Project Area in 2005, to build its DPW building, MRD was hired to remove the structures and pavcment on 24 acres. *See* Gantenbein, *supra*. During that demolition project, 450,000-square-feet of buildings were taken down. *Id.* Demolition debris included approximately 8,000 tons of steel and an estimated 70,000 tons of concrete. *Id.* The steel that was recovered was sold as scrap, and bricks from the demolished buildings were recycled as much as possible. That work evidences that MRD is engaged in C&D processing. At the same time, another proposed MITC tenant, Great Lakes Asbestos Abatement of Milwaukee (“Great Lakes Asbestos”), removed a total of 25,000 window panes because caulking around the windows contained asbestos, which is a carcinogen when airborne. *Id.* Participating in the 2005 demolition project may have given MRD and Great Lakes Asbestos the idea to operate more permanently elsewhere on the Project Area. However, there is a vast difference between

temporary participation in demolition for the express purpose of furthering the goals of the Redevelopment Plan, and permanent operation of a C&D processing facility to facilitate demolition that is taking place offsite.

MITC also has indicated that a tenant on a non-MITC part of the Project Area, Milwaukee Materials, LLC¹², which is currently operating an cement-crushing operation that is impermissible under the Redevelopment Plan, can move to the MITC Parcel as a tenant, and thus likewise be shielded by federal railroad preemption from the state and local laws restricting such operations. *See Timm V.S. at ¶ 14.*

Following MITC's announcement to RACM and the City of its STB filing, the sale of the MITC Parcel was discussed informally in the hallways of the Courthouse following a hearing in the State Lawsuit. *See Timm V.S. at ¶ 17.* During the hearing testimony, Benji Timm from RACM testified that there was approximately \$7 million that might be available for purchase of the Parcel. *See Timm Testimony in State Lawsuit at 57 (July 8, 2008), attached to Hagopian V.S. as Exhibit K.* At a later meeting, Gerry Blomberg indicated, for the first time, that MITC now believed the scrap and recycling value of the buildings on the MITC Parcel to be worth approximately \$15 million, so the parties would not be able to agree on \$7 million as a price. *See Timm V.S. at ¶ 17.*

I. MITC Has Not Begun Railroad Operations as of September 17, 2008.

MITC has not begun railroad operations. MITC states that it owns 28 open top "hopper" railcars and has an interest in a switching locomotive for the Property. *See Blomberg Testimony*

¹² This business is currently located at 3600 N. 35th St. just west of the tracks from MITC. Its registered agent is Richard Hawkins, who is President of Knapp (one of the MITC Companies) and who is one of the owners of MITC.

at 79-82 (June 30, 2008), Hagopian V.S. at Exhibit J. It also claims to be acquiring flat cars and box cars. *Id.* As of Sept. 3, 2008, it has obtained no reporting marks. See www.railinc.com. As part of the application process for obtaining reporting marks, a new carrier must become a signatory to the AAR interchange agreements. MITC apparently has not taken that step. MITC does have one locomotive on-site, with mark MRAX 1501, which according to the UMLER contact list found at the Railinc website is owned by Mineral Range, Inc. of Hancock, MI. *Id.* Mineral Range, Inc. is leasing the locomotive to MITC. Bloomberg Testimony at 81 (June 30, 2008), Hagopian V.S. at Exhibit J. As of August 11, 2008 all windows of the only locomotive visible onsite were boarded up, so that locomotive does not appear to be functional. See Timm V.S. at ¶ 15. As of September 17, 2008, MITC's services as listed on its website do not indicate rail carrier services.¹³

III. Legal Argument

A. MITC's Corrected Notice of Exemption is False and Misleading.

1. The Acquisition of the MITC Parcel Occurred More Than 17 Months Prior to MITC's Filing of the Corrected Notice.

The Corrected Notice states that the trackage is "to be acquired" by MITC. 73 Fed. Reg. 24115 (May 1, 2008). MITC acquired the trackage as part of the 84 acre MITC Parcel it purchased November 10, 2006. See Timm V.S. at ¶ 9. It only filed the Corrected Notice on April 16, 2008. As this suggests, MITC's original plan did not involve becoming a rail carrier. It was not until MITC found that some of its most profitable intended uses for the site were not

¹³ The website does refer to "loading" and "unloading," but these can be performed as industry switching.

acceptable under the Redevelopment Plan¹⁴ that “railroad” became a part of MITC’s intended uses.

2. The Corrected Notice Fails to Accurately Disclose MITC’s Intended Uses for the MITC Parcel as Described in the June 17, 2008 Letter.

The Corrected Notice states:

Raw materials would be received by rail by tenants of the buildings at the plant site for processing and/or manufacturing and for transloading onto trucks for distribution in the local area. The tenants would also load processed raw materials and finished goods onto railcars at the plant site for rail transportation to destination. In addition, locomotives and railcars would be transported by rail to the plant site for repair, cleaning, storage and other rail-related uses for independent companies operating at buildings in the plant site.

Corrected Notice at 3.

According to the June 17th Letter, the intended uses for the MITC Parcel include at least “railroad construction,” dismantling, refurbishing, and assembling rolling stock parts, and railroad scrap and recycling. *See* June 17th Letter, Hagopian V.S. at Exhibit I. These types of businesses do not fit within the description provided in the Corrected Notice above. As discussed below, an even bigger problem for MITC is that these businesses are not rail transportation, and are subject to land use regulations (notwithstanding the representations MITC made in the June 5th Letter regarding all operations on the MITC Parcel) and further, that some of these operations involve processing solid waste, as is discussed more fully in Part B, *infra*

¹⁴ Since MITC had notice of the Redevelopment Plan, it should not have been a surprise to MITC when the City deemed some proposed uses unacceptable.

3. The Corrected Notice Fails to Disclose the Negotiations between MITC and RACM for Sale of the MITC Parcel and the Preparations by the City and/or RACM for Condemnation of the MITC Parcel.

Nowhere in MITC's Corrected Notice, did MITC inform the Board that MITC was negotiating and considering sale of the MITC Parcel to RACM and/or the City, nor that when MITC acquired title to the MITC Parcel, it took title subject to restrictive covenants recorded in the Milwaukee County Register of Deeds Office on December 9, 2005 as Document No. 9145406- RACM's Wis. Stat. § 66.1333 Redevelopment Plan. *See Timm V.S. at ¶ 6.*

MITC did not disclose in its Corrected Notice—in April 2008—its theory, as alleged in February 2008, that it believed RACM was preparing to exercise eminent domain. Nor did MITC disclose that RACM is seeking environmental testing rights on the site for at least four alternative reasons: (a) in preparation for purchase of the site, (b) in preparation for possible eminent-domain acquisition of the site, (c) in the interests of the health and safety of the surrounding community¹⁵, and/or (d) in furtherance of RACM's interests and rights under the Redevelopment Plan. Apparently, MITC did not wish the Board to be aware of any of these circumstances.

4. The Corrected Notice Fails to Disclose the On-Going Litigation between MITC and RACM over the Issuance of the Certificates of Occupancy and for Access by RACM to Investigate Environmental Conditions at the Site.

Nowhere in MITC's Corrected Notice did MITC inform the Board that MITC is litigating against RACM and the City regarding Certificates of Occupancy and RACM's environmental testing rights. Nor did MITC disclose to the Board that it expected RACM's environmental

¹⁵ RACM's specific concerns include possible groundwater contamination from industrial waste left behind by previous owners, possible asbestos contamination of the air due to building collapse and/or demolition, and possible migration of waste and contamination off-site

testing rights would be rendered moot by virtue of the exemption it sought. The Board states that it will not permit its processes to be misused to insulate property from state and local authority. *See Jefferson Terminal Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.* STB Finance Docket No. 33950, Mar. 15, 2001 at 11. MITC’s filing for an exemption is just such an effort to insulate its property.

5. The Corrected Notice Misstates the Revenue that MITC Apparently Expects as a Result of its Operation.

In MITC’s Corrected Notice, MITC “certifies that its projected annual revenues as a result of this transaction will not exceed those that would qualify it as a Class III rail carrier and will not exceed \$5 million.” 73 Fed. Reg. 24115 (May 1, 2008). MITC’s Claim against RACM and the City for \$32 million in damages for six months¹⁶ of waiting for occupancy permits was filed as a claim for inverse condemnation via regulatory taking. Claim at 7, *see Hagopian V.S.* at Exhibit E. This amount must either be for past damages or present value of future earnings; which is unclear because MITC does not specify. However, MITC asks for both the issuance of the permits and the \$32 million, rather than \$32 million in the alternative to the issuance of the permits, which strongly suggests that MITC is calculating the sum as past damages. *Id.* If MITC calculated the \$32 million as lost profits from operations that MITC alleges would consist entirely of railroad transportation, operating revenues for MITC must be substantially higher than \$5 million.

¹⁶ MITC’s first proposed tenant who filed for an occupancy permit and whose permit was allegedly delayed, filed on August 9, 2007; MITC filed suit against the City and RACM for \$32 million dollars in “lost profits” in February, 2008. *See generally* Claim, Hagopian V.S. at Exhibit E.

6. The Corrected Notice Misstates the Nature of the Trackage Involved in the Proposed Operation.

MITC used misleading language in the portion of its Corrected Notice pertaining to the trackage it owns. According to MITC's statement to the Board, "The *rail line* consists of approximately two miles of trackage at the plant site of MITC." Corrected Notice at 4, emphasis added. There is no one "rail line," but rather 31 spurs, the longest of which is 2214 feet or 0.41 miles. See *Timm V.S.* at ¶ 10. Thirteen of these spurs, or more than one-third of them, are each shorter than a football field. See *Id.* It is true that the trackage was used previously by Tower Automotive and by A.O. Smith, but it has never been used as anything but industry switching track. See *Id.*

B. MITC's Proposed Lease to One of the MITC Companies, Midwest Rail & Dismantling ("MRD"), a C&D Processing Facility, and Some of MITC's Proposed Uses Constitute Collection, Storage, Transfer, Separation and Processing of Solid Waste, and Authorization of Such Activities Is Not within the Jurisdiction of the Board by Virtue of the Consolidated Appropriations Act of 2008

The Board modified MITC's Proposed Notice of Exemption to clarify what rail operations were being authorized when it published its Notice in the Federal Register, to read that:

Pursuant to the Consolidated Appropriations Act 2008, Public Law 110–161 section 193, 121 Stat. 1844 (2007), nothing in this decision authorizes the following activities at any solid waste rail transfer facility: Collecting, storing, or transferring solid waste outside of its original shipping container; or separating or processing solid waste (including baling, crushing, compacting, and shredding). The term "solid waste" is defined in section 1004 of the Solid Waste Disposal Act, 42 U.S.C. 6903.

See 73 Fed. Reg. 24115 (May 1, 2008).

Yet MITC and its tenants, including MITC Companies MRD and WMR, intend to process solid waste in the form of C&D onsite,¹⁷ and MITC even claims in its June 5th Letter that federal preemption protects all operations on the MITC Parcel from local land use regulation. *See Hagopian V.S* at Exhibit F. The Board should revoke MITC's exemption on this ground alone.

A similar situation to MITC's proposed operations involving C&D processing was presented to the Board in the *JP Rail* case in late 2007. *JP Rail, Inc – Lease and Operation Exemption – Nat Industries, Inc.* STB Finance Docket No. 35090 (Jan. 17, 2008) at 1. JP Rail, Inc. ("JP Rail") filed a Notice of Exemption with the Board contemplating the transportation of C&D originating at its Pleasantville, NJ facility over its Line and transloading the C&D to truck for ultimate transport to Westmoreland Waste's landfill. *Id.* at 3-4. The Board found that C&D fell under the definition of "solid waste" and, because JP Rail had not submitted any written assurance of agreement to comply with state and local public health, safety, and environmental regulations from the Governor of Pennsylvania, or the Governor's designee, nor had JP Rail shown that its proposed activities would consist of transferring C&D in "original shipping containers," the Board referred to the Consolidated Appropriations Act of 2008, and revoked the exemption. *Id.* MITC's proposed operations include not only C&D transloading, but also C&D processing, and for these reasons, as well as because of MITC's misrepresentations, the Board should revoke MITC's exemption.

¹⁷ Timm V.S. at ¶ 14.

C MITC's Action to Create a Railroad as a Tactic in the Context of Discussion of Sale, Litigation, and Possible Condemnation by the City, Places this Case Firmly within the Precedent of the Jefferson Terminal Case.

As the Board will recall, in the *Jefferson Terminal* case, Jefferson Terminal Railroad ("Jefferson") filed its Notice of Exemption without mention to the Board that the City had begun condemnation action against its property seven months before. *Jefferson Terminal Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.* STB Finance Docket No. 33950 (Mar. 15, 2001) at 2. Additionally, there was "ample basis" to question whether what Jefferson acquired was a rail line, because rail service had not been provided over the track for 13 years. *Id.* at 9. The Board revoked Jefferson's exemption, so that any further proceedings (if Jefferson pursued its proposal) would be handled under a more searching process designed to elicit a more complete record, either through a petition for an individual exemption under 49 C.F.R. §1121, or a full application under 49 C.F.R. §1150. *Id.* at 10.

MITC's case fits squarely within this precedent. MITC filed its Notice of Exemption without mention to the Board of its negotiations with RACM and the City to sell the property, nor of its litigation against RACM and the City, nor of its allegations of the City's inverse condemnation of the property, nor of its complete plans for its operations. Further, MITC's trackage has *never* been a rail line under federal jurisdiction; it was always industry switching track, and for the past 28 months, it has not been used at all. MITC's decision after 17 months of ownership to adopt the mantle of rail carrier was an effort to avoid the processes of local law and perhaps to increase its leverage with the City and RACM in negotiating a sale. This theory regarding increased leverage is supported by the fact that before MITC filed its Notice of Exemption, it was willing to sell the MITC Parcel for \$8.5 million. *See Marcoux V.S.* at ¶ 5. Following MITC's announcement to RACM and the City of its filing of the Notice of

Exemption, in June 2008, MITC suddenly believed that the buildings themselves were worth approximately \$15 million for scrap and salvage value. *See Timm V.S.* at ¶ 17. The only thing that had changed during this time period was that MITC believed that it was untouchable by RACM and the City.

MITC alleges that this case does not fit the fact pattern of *Jefferson Terminal*, but on the key points above, it clearly does. In *Jefferson Terminal*, the timing and failure to inform the Board of the condemnation proceedings suggested an effort to use the exemption process to insulate the property from the condemnation process by invoking federal jurisdiction and putting the property beyond the reach of much state or local authority. *Id.* at 11. The Board asserts, “We will not permit our processes to be misused in that manner.” *Id.* We believe that revocation of the MITC exemption is necessary to protect the integrity of the Board’s processes in the instant case.

The McFarland Opinion Letter attempts to fit MITC’s factual situation into the *Riverview Trenton* rather than the *Jefferson Terminal* case. *See* McFarland Opinion Letter at 8, Hagopian V.S. at Exhibit H. This analysis is flawed. First, the parent company of Riverview Trenton Railroad Company (“RTR”), CenTra, Inc., was already in the interstate transportation business; it held a number of transportation companies, one of which was a large motor carrier. *Riverview Trenton* at 10. RTR proposed to operate an intermodal transloading terminal, which it contended would provide more capacity for CenTra, Inc., and would provide more efficiency in its overall transportation business *Id.* Second, in the *Riverview Trenton* docket, there is no evidence of the local government initiating condemnation proceedings. *Riverview Trenton Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc.*, STB Finance Docket Nos. 34040 & 33980. RTR simply was not trying to insulate its property from condemnation.

This case differs because MITC is not in the transportation business; it is in the demolition business. Moreover, RACM and the City were engaged in negotiations for MITC to sell the property. MITC itself alleges a threat of condemnation, if MITC did not agree to terms of sale to RACM and the City. Finally, MITC never proposed to become a railroad until 17 months after it acquired the Parcel, when it became apparent that MITC did not agree with RACM on a sale price and when it became apparent that MITC would have to obey land use restrictions that applied to the property. It is clear that MITC both feared condemnation and hoped to avoid land use restrictions; while RTR was legitimately attempting to become a railroad, MITC's Corrected Notice is nothing more than an attempt to insulate the Parcel from both condemnation and state and local laws.

D. The Transloading of Bulk Commodities, Even When Performed on Railroad-owned Property, Does Not in and of Itself Constitute Rail Common Carrier Service, and Where the Property is a Former Shipper Industrial Site the Presumption against Defining the Operator as a Rail Carrier Should Be Even Stronger.

MITC appears to be operating under a misapprehension. It appears not to understand that suppliers and service providers to the railroad industry do not engage in transportation as carriers, and the fact that they are adjacent to the railroad does not convert them to carriers except to the extent that they provide transportation services to that railroad on that very site.

In *Florida East Coast Railway Company v. City of West Palm Beach*, 266 F. 3d 1324, 1327 (11th Cir. 2001), the railroad ("FEC") leased part of its property to one of its clients, an aggregate distribution business. The controversy arose because the distribution business was operating in violation of pre-existing zoning and other ordinances. *Id.* The aggregate was brought into the yard by FEC's rail service, and it was distributed directly from the leased site in the yard. *Id.* at 1326. The Court found that the lessee's use of the property at the yard and the

activities there performed by the lessee served no public function and provided no valuable service to FEC's customers; rather, the arrangement between FEC and the lessee merely facilitated the lessee's operation of a private distribution facility for its own customers on FEC-owned premises. *Id.* at 1336. Therefore, the lessee's activities at the yard were not "rail transportation" despite taking place on railroad property. *Id.*

MITC proposes for MITC affiliates and tenants to conduct activities on MITC property including C&D processing, scrapping and recycling, and possibly even cement crushing. *See Timm V.S.* at ¶ 14. Like the FEC activities in *Florida East Coast*, these proposed operations serve only a commercial purpose, and are not integral to any transportation purpose. These activities cannot be deemed "rail transportation" simply because they are proposed to take place on railroad property, even if MITC were accorded railroad status.

In *Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34824 (Aug. 9, 2006), the petitioners, Tri-State Brick and Stone of New York, Inc. and Tri-State Transportation, Inc., who operated a transloading facility in the 65th Street Yard in New York City, argued that the Yard itself was part of the national railway network because it was a common carrier railroad facility used by a rail carrier. *Id.* at 5. The petitioners' transloading activities used line haul service from Canadian Pacific and then from the New York & Atlantic Railroad. *Id.* at 4. Because the petitioners did not wish to relocate after New York City acquired the Yard, they claimed that their transloading facility was subject to federal jurisdiction. *Id.* at 3. The Board found that the petitioners' transloading activities did not rise to the status of a rail carrier, and that, "[I]t is clear that the Board does not have jurisdiction over rail/truck transloading activities that are not performed by a rail carrier or under the auspices of a rail carrier holding itself out as providing

those services. The broad Federal preemption of 49 U.S.C. 10501(b) does not apply to activities over which the Board does not have jurisdiction.” *Id.* The Board also stated that even if a rail carrier owned the Yard, the analysis would remain the same. *Id.* at 7.

MITC’s proposed tenants would be similarly situated to the petitioners in *Tri-State*, if they were to be engaged in transloading or other business but were not themselves rail carriers or agents of MITC, even if MITC were a railroad. Therefore, even if MITC were a railroad, its tenants should be subject to state and local jurisdiction, including the Redevelopment Plan restrictions.

In *Hi Tech Trans, LLC – Petition for Declaratory Order – Newark, NJ*, STB Finance Docket No. 34192 (Aug. 14, 2003), the petitioner (“Hi Tech”), operated a C&D transloading facility on property leased from Canadian Pacific Railroad (“CP”), where it also processed the C&D. *Id.* at 3. Hi Tech sought federal preemption to shield its operations from New Jersey state law prohibiting the processing of solid waste. *Id.* at 5. The Board found that Hi Tech was not a rail carrier, nor acting under the auspices of a rail carrier, because it did not have an agency relationship with CP. *Id.* at 6. As a footnote, the Board also commented, that although there are procedures by which a company can be recognized as a rail carrier, “[e]ven if such procedures are followed, the Board will not approve rail carrier authority that is a sham or intended solely to avoid local regulations.” *Id.* at n. 12.

Even if MITC were to structure its relationships with its tenants as agency relationships, it is clear from the statement in the *Hi Tech* footnote that this should not pass muster with the Board. The footnote is particularly pertinent here; MITC is engaging in a sham intended solely to allow it to avoid local regulations which it originally agreed to follow.

E. *New England Transrail Describes a Process of Distinguishing Carrier from Non-carrier Behavior, under Which Standard, the Processing and Manufacturing that Will Occur at the MITC Parcel Does Not Constitute Rail Transportation under ICCTA.*

New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway (“NET”), sought the Board’s authority to acquire and construct a combined total of approximately 7500 feet of track on and adjacent to a parcel of land it had acquired, and to become a rail carrier to facilitate other of its operations on the site. *New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway – Construction, Acquisition and Operation Exemption – in Wilmington and Woburn, MA*, STB Finance Docket No. 34797 (June 29, 2007) at 1. In its December 2005 petition to the Board, NET stated that it planned to segregate pieces of wood and metal from C&D, shred the C&D, and bale solid waste that it would receive by truck, and then load the materials to transport to a connection with another rail carrier. *Id.* at 3. NET argued that all of these activities would facilitate the transportation of the C&D, and therefore would be integrally related to rail transportation and preempted from most state and local regulation pursuant to section 10501(b). *Id.*

The Board determined that although NET would become a rail carrier if it granted the petition, “intermodal transloading operations and activities involving loading and unloading materials from rail cars and temporary storage of materials are part of rail transportation that would come within the Board’s jurisdiction. However, manufacturing and commercial transactions that occur on property owned by a railroad that are not part of or integral to the provision of rail service are not embraced within the term ‘transportation.’”¹⁸ *Id.* at 12.

¹⁸ The activities involving C&D that were integrally related to transportation were: (a) unloading, storing, and reloading the C&D; (b) baling and wrapping the C&D for more efficient packing of the cars; and (c) separation of refrigerators, which can be hazardous when discarded. *Id.* at 14.

Particularly, the proposed separation of wood and metal from the C&D and shredding the debris likely had a commercial motivation; the Board doubted that NET would fail to recycle the valuable materials, which it estimated at \$50,000 per ton of pass-by. *Id.* at 15. Because of the commercial potential, the Board found that the separation and shredding activities were not integrally related to transportation, and therefore that these activities, should NET choose to conduct them, “would be subject to the full panoply of state and local regulation.” *Id.*

According to *New England Transrail, Florida East Coast, Tri State, and Hi Tech*, even if some of MITC’s operations ultimately were found to constitute rail carrier operations, that would not in and of itself insulate non-carrier operations of tenants and MITC affiliates at locations within the MITC Parcel from the lawful restrictions of local land use plans. Indeed, MITC’s tenants seem indistinguishable from shippers along main lines of railroad all over the country. Furthermore, the MITC Parcel is 84 acres. In any event, federal preemption, if it were to apply (and it does not), would only extend to that portion of the 84 acres actually used in conjunction with legitimate rail activities subject to ICCTA and the Board’s jurisdiction – not to the entire site.

F. Effingham & Bulkmatic are Distinguishable from the Instant Case.

MITC’s Corrected Notice and the McFarland Opinion Letter both rely on the *Effingham* and *Bulkmatic* cases¹⁹, but the text of the *Bulkmatic* decision shows that this reliance is misplaced:

¹⁹ *Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL*, STB Finance Docket No. 41986, Sept. 8, 1997; *Bulkmatic Railroad Corporation*

In *Effingham*, 2 S.T.B. at 609-10, we discussed the intended use test and determined that our authorization would be required prior to commencement of rail operations in circumstances that were similar to those in the instant proceeding. There, we determined that a new carrier created to serve an industrial park was subject to our licensing authority under 49 U.S.C. 10901, notwithstanding the small size of its planned operations, because: (1) the larger purpose and effect of the transaction were to create a new railroad *that would be competing with other carriers in territory that it had not previously served*; (2) the track would constitute the new carrier's entire line of railroad; and (3) the new railroad would interchange traffic with the national rail system. Here, as in *Effingham*: (1) the larger purpose and effect of the transaction are to create a new railroad (BRC) *that will provide a competitive alternative to UP* for rail service to the Bulkmatric Distribution Center; (2) the track of the new railroad (BRC) will constitute its entire line of railroad; and (3) the new railroad (BRC) will be interchanging traffic with the national rail system.

Bulkmatric at 7.

Here, there is no competition between rail carriers, because every carload must travel over the Canadian Pacific Railroad lines, providing business to the Wisconsin & Southern Railroad. This is just a replacement of one industry switching operation with another. There is no invasion of another carrier's territory. *See Texas & Pac. Ry. v. Gulf, Etc., Ry.*, 270 U.S. 266, 278 (1926). (Where proposed trackage extends into territory not previously served by the carrier, and particularly where it extends into territory already served by another carrier, its purpose and effect are of national concern, because invasion through new construction of territory adequately served by another carrier may be inimical to the national interest.) Here, both sides agree that the trackage MITC proposes to operate has always been nothing but industry switching track, and there is no suggestion of invasion of the territory of another railroad.

– *Acquisition and Operation Exemption – Bulkmatric Transport Company*, S.T.B. Finance Docket No. 34145, Nov. 19, 2002, emphasis added.

MITC would not be competing with other carriers in its newly acquired territory, if it were allowed to operate as a railroad. In effect, it would be conducting a switching operation, such as has historically existed on the site during the past century, with the exception of the past two years. Competition strongly affects interstate commerce, so it is not surprising that the Board felt jurisdiction proper for the railroads in *Bulkmatic* and *Effingham* based on the parallel descriptions in the *Bulkmatic* quote above. MITC's proposed operation is similar to those proposed by the carriers in *Bulkmatic* and *Effingham*, but it does not involve competition with another carrier. It has little to do with interstate commerce, and everything to do with a desire to avoid state and local regulation.

G. The Board's Regulations Permitting Use of Its Notice of Exemption Procedures under 49 CFR §1150.31 for Conversions of Industry Switching Track to Regulated Rail Lines Are Arbitrary and Capricious, and Deprive the City and RACM of Their Constitutional Due Process Rights.

When industry switching track has never been used for common carrier service, as in the instant case, and where the Board's regulations allow for acquisition under the Notice of Exemption procedures of 49 CFR §1150.31, the track can suddenly become the property of a railroad, with the federal preemption of local and state law as a consequence. This can happen, as it has here, with no actual notice to state or local officials that their jurisdiction is about to be constrained to narrow health and safety police powers. As a consequence of the only notice being Federal Register publication, communities are not given the opportunity to participate in the decision to convert the track to carrier track, nor to voice any concern regarding the severe curtailment of the powers of their local government that results from that decision.

The regulations allowing for the notice of exemption procedure when applied to track not previously owned and operated by a rail carrier are arbitrary and capricious because they draw no distinction between this type of transaction, and the other types of transactions that have no such draconian impacts upon a community.²⁰ The notice of exemption procedure for private industry switching track conversion transactions stand in stark contrast to the regulations requiring STB approval for any entity planning to construct lines of railroad, which construction similarly causes a zone of federal preemption to appear where none previously existed. When an entity wishes to construct track, the Board requires that entity to seek permission; it recognizes that Federal Register notice does not suffice. Track construction will create federal preemption of local law, and local communities are given an opportunity to have input before their local government's powers are usurped. 49 CFR §1150.10 (e)-(g). The notice of exemption procedure of 49 CFR §1150.31 allows for entities to acquire the existing lines of railroad without much ado. This makes sense, because in that situation, there is also no sudden conversion of use triggering federal preemption; the trackage being acquired was already under federal jurisdiction, and local governments were already constrained. It does not make sense in the present context.

The record of the initial rulemaking by the Interstate Commerce Commission in 1986 reflects no consideration of the potential of converting industry switching track to rail lines by use of these regulations.²¹ See Ex Parte No. 392 (Sub. No. 1), *Class Exemption*, 1 I.C.C. 2d. 810

²⁰ Additionally, these regulations generally apply to transactions that have not yet occurred, so perhaps that is the reason for MITC counsel's reference to the trackage acquisition in the future tense, when in actuality, the transaction had occurred 17 months previous to the filing.

²¹ Some states did comment that they were concerned about the brevity of the (at that time) 7-day notice and comment period. The Board responded, "We note that, as a practical matter, State and local governments receive actual notice well before the proposal is filed." See

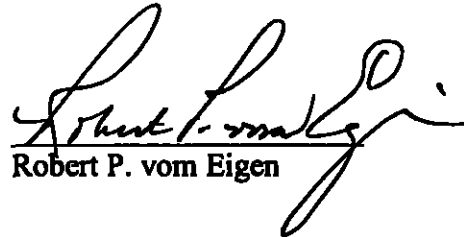
(1985). Therefore, the regulation that allows application of notice of exemption to this type of a situation is arbitrary and capricious under 5 USC §706(2)(A).

Additionally, the application of the notice of exemption procedures to the instant case deprived the state and local governments of their constitutional due process rights. RACM and the City should not have had their powers confiscated without actual notice. "In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414, 415 (1971). The construction regulations do not rely solely on *Federal Register* published notices and this class of transactions converting non-regulated industry switching track to a line of railroad should not either. At the time MITC made its filings with the Board, and when the Board was considering the same, neither RACM nor the City was afforded notice of MITC's filings or of the Board proceedings, thus denying RACM and the City their constitutional due process rights, including notice, opportunity to be heard, and opportunity to object.

IV. Conclusion

For all of the foregoing reasons, MITC's exemption should be revoked.

Id. at 816. However, in the instant case, the governments whose powers were curtailed by the action received no actual notice.



Robert P. vom Eigen

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Counsel to the Redevelopment Authority of the City of Milwaukee

Dated and filed this 18th day of September, 2008



Tom Barrett
Mayor, City of Milwaukee

September 17, 2008

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W., Suite 101
Washington, D.C. 20423-0001

Subject: Finance Docket No. 35133 – *Milwaukee Industrial Trade Center, LLC d.b.a. Milwaukee Terminal Railway – Acquisition and Operation Exemption – Private Trackage at Milwaukee, WI*

Dear Acting Secretary Quinlan:

I am writing on behalf of the City of Milwaukee to express my strong support for the Petition to Revoke Exemption filed by the Redevelopment Authority of the City of Milwaukee (RACM). The Tower Automotive site, a portion of which was acquired in 2006 by the Milwaukee Industrial Trade Center (MITC), is located in the West Capitol and North 35th Street Redevelopment Project Area (which in turn was designated as a priority redevelopment area for the City of Milwaukee and the State of Wisconsin as early as 2005).

As Mayor I launched the 30th Street Industrial Corridor Reinvestment Zone and the Governor named the 30th Street Industrial Corridor a priority under his Urban Reinvestment Initiative. The City of Milwaukee has no more important redevelopment objective than to promote attractive, productive and efficient uses in this project area to generate a large number of family-supporting jobs.

The MITC's notice of exemption filed with this Board came 17 months after it acquired the property fully aware of the use restrictions imposed on the Tower Automotive property and after lengthy and contentious discussions with RACM over permissible uses for the site. MITC's last gasp attempt to pre-empt the City's and RACM's authority to exercise its authority under the redevelopment plan should be recognized for what it is – a sham. By seeking to have industry spur trackage treated as lines of railroad, MITC is attempting to classify processing of construction and demolition debris, scrap and storage operations as rail transportation. Those uses in this case are not rail transportation, and I request that the Board make that determination.

The Honorable Anne K. Quinlan

Page 2

September 17, 2008

The City of Milwaukee recognizes the benefits of rail transportation service to the economic well being of its citizens and businesses. Our redevelopment plans for the 30th Street Industrial Corridor contemplate continuation of that service by the Wisconsin & Southern Railroad over the right-of-way owned by the Canadian Pacific Railway. However, that rail service is in no way dependent upon endorsing MITC's characterization of its transportation operations.

I respectfully urge the Board to grant RACM's Petition to Revoke the MITC exemption.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Barrett", with a stylized flourish at the end.

Tom Barrett

Mayor

TB:bt:pk

**Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Finance Docket No. 35133

**Milwaukee Industrial Trade Center, LLC, d.b.a. Milwaukee Terminal Railway—
Acquisition and Operation Exemption—Private Trackage at Milwaukee, WI**

**VERIFIED STATEMENT OF
ROCKY MARCOUX
IN SUPPORT OF PETITION TO REVOKE EXEMPTION ON BEHALF OF
THE REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE**

1. My name is Rocky Marcoux. I am the Executive Director of the Redevelopment Authority of the City of Milwaukee ("RACM") and the Commissioner of the Department of City Development ("DCD") of the City of Milwaukee (the "City"). My office address is 809 North Broadway, 2nd Floor, Milwaukee, Wisconsin, 53202. Part of my job responsibilities include engaging and assisting the City and RACM with blight elimination and real estate projects in an effort to make the City and its neighborhoods better.
2. Redevelopment of the former Tower Automotive Site, contained within the Redevelopment Plan (recorded in the Register of Deeds Office as No. 9145406), is one of the highest priorities for the City and RACM and the State of Wisconsin. The site is within a legally blighted area, and in a neighborhood that desperately needs family-supporting jobs and redevelopment. The City itself invested about \$24 million in the Project Plan Area (as defined in the Redevelopment Plan) by moving a Dept. of Public Works Facility there, which move involved the construction of a new building, demolition of old buildings, and environmental cleanup.

3. RACM and its Redevelopment Plan intend to remove health and environmental hazards (through testing and cleanup) and to restore a vibrant economy to the community through the environmental remediation, the tear down of blighted and unused and underused buildings, and the renovation of the site for use by employers who can produce a high density of family-supporting jobs. Besides zoning under state and local law, the Redevelopment Plan controls the type of industry that can move onsite through use restrictions. For example, storage does not generally produce a high density of jobs, although indoor storage can be aesthetically well-designed, and environmentally neutral. Therefore, outdoor storage is not permitted, and indoor storage facilities must seek special permission.

4. I know that the Milwaukee Economic Development Corporation ("MEDC") offered to buy the MITC Parcel from MITC for \$1.9 million in August of 2007.

5. Following the MEDC offer, I personally negotiated and communicated with MITC principals and agents (including Gerry Blomberg and Broker Sam Dickman) for months about RACM acquisition of the MITC Parcel. We discussed various purchase prices, how the price should be calculated, various scenarios under which RACM would acquire the entirety, various scenarios under which RACM would acquire a portion of the MITC Parcel, the possibility of MITC doing the building-demolition work at the site if RACM were to buy, and value of scrap/salvage material from buildings to be razed at the site. I did mention at a meeting among RACM, City and MITC personnel words to the effect that I was prepared to seek RACM approval to use eminent domain if need be, if a voluntary purchase and sale agreement could not be reached. In a letter dated January 14, 2008, from the Dickman Company, Inc. ("Dickman"), the broker representing MITC, Dickman offers the City the MITC Parcel for \$8.5M, citing the "threat of condemnation" as one of several reasons that the MITC Parcel might not fetch what

Dickman considered to be market value. *See* attached Exhibit A (Dickman January 14th Letter).

All of these discussions and meetings and negotiations I refer to here predated June 5, 2008.

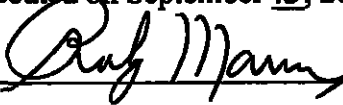
Whether RACM were to acquire by purchase and sale agreement, or by eminent domain, RACM Board approval is required.

6. RACM employee Benji Timm attended a July 15, 2008 meeting at which MITC's Gerry Blomberg was present. I recall that Mr. Timm relayed to me what transpired at that meeting, and that Mr. Timm told me that – according to Mr. Blomberg – a \$7 million purchase price for the MITC Parcel was far too low a price, because MITC believed that the scrap salvaged from the buildings would be worth approximately \$15 million.

7. We are not attempting to prevent industry switching at the site. However, certain industries are not “transportation,” although MITC has attempted to claim that they are. It should not be possible for a company to immunize the manufacturing and/or processing of materials from state and local land-use restrictions, or from RACM Redevelopment Plans and RACM rights under Wis. Stat. § 66.1333, by claiming that such manufacturing and processing operations constitute transportation because the materials used or processed are transported by rail. Manufacturing and processing in some forms may be acceptable on the MITC Parcel, if such businesses were compliant with all state and local environmental restrictions, as well as with the Redevelopment Plan. But MITC is trying to evade all state and local control that could be applied to any of its operations by calling itself a railroad, and this should not be allowed.

I, Rocky Marcoux, declare under penalty of perjury that the foregoing is true and correct.
Further, I certify that I am qualified and authorized to file this verified statement

Executed on September 16, 2008.



Rocky Marcoux

EXHIBIT A

DICKMAN

CUBANY INC

REAL ESTATE

1998年12月15日

826 EAST WISCONSIN AVE.
SUITE 1020

MILWAUKEE, WI 53202

(414) 271-8100

FAX (414) 271-5125

WWW.DICKMANREALSTATE.COM

Mr. Rocky Marcoux
Commissioner
City of Milwaukee, Department of City Development
809 North Broadway
2nd Floor
Milwaukee, WI 53202

Re: **MITC Property in Milwaukee, Wisconsin**

Dear Commissioner Marcoux

This firm represents MITC in the sale of property consisting of approximately 2,000,000 sq. ft. of improved buildings on a site of approximately 76 acres. This property is bounded by Capitol Dr. on the North, Townsend St. on the South, a railroad main line on the West and N. Hopkins and N. 27th Street on the East. In addition to those boundaries there are four out lots on the East side of Hopkins and 27th Street totaling approximately 8 acres. In discussions with the principals of MITC regarding the valuation of their property, the principals have determined that a fair sale price for the properties as they currently stand is \$8,500,000.

The valuation is based on four criteria:

1. Comparable sales
2. Capitalization of anticipated rents
3. Nicholson Appraisal
4. City of Milwaukee Redevelopment Plan

1. Comparable Sales. There are four relevant sales to consider.

1. Building 101 - 3420 N. 35th Street, Milwaukee, Wisconsin - This property of approximately 200,000 sq. ft. on a site of approximately 13 acres sold in 2007 for \$3,900,000, which is approximately \$19.50 per sq. ft.
2. Buildings 104 & 106 - 3522 - 3620 N. 35th Street, Milwaukee, Wisconsin, containing approximately 180,000 sq. ft. on approximately 10 acres of land. These buildings are under contract for \$1,750,000, which is approximately \$9.72 per sq. ft.
3. Simet building - 3282 N. 35th Street, Milwaukee, Wisconsin - This property of approximately 100,000 sq. ft. on 10 acres of land is under contract for \$1,700,000, which is approximately \$17.00 per sq. ft.
4. Vacant Property - 2744 W. Hopkins and 3627 N. 27th Street, Milwaukee, Wisconsin - These parcels (totaling one-acre) were sold by MITC to Most Precious Possessions III for \$100,000.

Taking the ranges of value of \$9.72 - \$19.50 per sq. ft. and applying it to the approximately 2,000,000 sq. ft. of industrial space owned by MITC, provides a range of value between \$18,000,000 and \$39,000,000. Additionally, a sale of the four out-lots at \$100,000 per acre would realize an additional \$800,000.

THE COUNSELORS-
OF REAL ESTATE



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2. Capitalization of Anticipated Rents. If we assume a rental rate of at least \$1.50 per sq. ft. per year on a triple net basis and also assume a vacancy rate of 25%, this would leave us with 1,500,000 sq. ft at \$1.50 per sq. ft. which equals \$2,250,000 of income per year on a net, net, net basis. If we use the capitalization rate range of 12% - 15% and apply it to the annual net income, we arrive at a value of \$15,000,000 - \$18,750,000.

3. Nicholson Appraisal. In 2005 Nicholson Company performed an appraisal for Tower Automotive for the properties in question. At that time their valuation was \$7,500,000. It is our belief that considering the comparable sales and the value based on projected income that an updated appraisal today would yield a considerably higher number than the \$7,500,000.

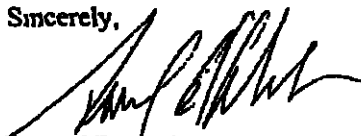
4. Redevelopment Plan. In June of 2005 the Redevelopment Authority of the City of Milwaukee prepared a Redevelopment Plan for the then Tower Automotive Property. Exhibit A of that document is an Assessment of the Property's Present Values (as of June 2005). Based on the Redevelopment Plan the Parcels currently owned by MITC had a 2005 sum value of \$7,040,107.00.

There are factors which effect this negotiation, namely, the threat of condemnation, the cost of litigation, and the attraction of a relatively quick closing. In light of those factors the Owner's of the properties believe a fair price for a sale to the city, would be \$8,500,000. This offer is only for the puposes of this letter and in no way reflects what the owners believe to be the real value of the property.

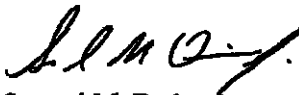
Additionally, the owners are willing to discuss a "value-added" proposal where demolition of the buildings on the property would be conducted as part of the agreement. This option would be possible based with a number of contingencies, the most significant being. All City of Milwaukee Permit Fees would be waived, the City would take responsibility for all re-powering and protection of Buildings 65 and 1A, the buildings would be removed to two feet below existing grade with all roads, parking areas and existing fencing will be left in place. The property would be delivered in several phases over the course of 12 months. Under this option the City would obtain the property with buildings removed for a total price of \$17,000,000.

We will make ourselves available to you to discuss the above at your convenience.

Sincerely,



Samuel D. Dickman
President



Samuel M. Dickman
Vice President

SDD/als

**Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Finance Docket No. 35133

**Milwaukee Industrial Trade Center, LLC, d.b.a. Milwaukee Terminal Railway—
Acquisition and Operation Exemption—Private Trackage at Milwaukee, WI**

**VERIFIED STATEMENT OF
BENJAMIN TIMM
IN SUPPORT OF PETITION TO REVOKE EXEMPTION ON BEHALF OF
THE REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE**

1. My name is Benjamin Timm, and I am Project Manager for the Department of City Development ("DCD") of the City of Milwaukee, Wisconsin. I am employed by the Redevelopment Authority of the City of Milwaukee ("RACM"), which the Commissioner of DCD oversees. In that capacity, I analyze potential redevelopment plans, aid in the design of these plans, and help to implement them. I also assist DCD in other real estate and Brownfield matters. I have been employed by RACM for seven years, during which time I have worked closely with the United States Environmental Protection Agency ("EPA") and Wisconsin Department of Natural Resources ("DNR") on the environmental aspects of several projects. I have a Bachelors degree in history and anthropology, with an emphasis in urban planning, and I have taken graduate-level coursework in urban development. My business address is Milwaukee Department of City Development, 809 N. Broadway, Milwaukee, WI 53202.
2. My job responsibilities include working with DCD and RACM in eliminating blight and encouraging urban renewal in and along the 30th Street Industrial Corridor of the City. RACM and the City would like to see neighborhoods improved, urban decay, poverty and crime

lessened, family-supporting jobs created, environmental problems remediated, and the tax-base enhanced and expanded. This, in turn, would promote human health, safety and welfare. RACM is a statutory entity created under Wis. Stat. § 66.1333, with the power to acquire parcels under eminent domain, as part of redevelopment and blight elimination projects. Wis. Stat. § 66.1333 (5)(a)3 and (5)(b).

3. The term “family-supporting jobs” is a goal, which aims for a minimum of 15 jobs per acre, at no less than \$11.58 per hour, measured in 2005 dollars. The job creation goal is consistent with the Governor’s Initiative, as explained on the DNR’s website. As a goal, it is not enforced as a regulatory minimum prerequisite for occupancy permits.

4. Within the 30th Street Industrial Corridor, one of the primary targets for redevelopment is a 156-acre site that originally belonged to A.O. Smith. Under A.O. Smith, the site housed a state of the art manufacturing facility, a hive of activity with more than 5000 workers earning living wages, producing water heaters, glass lined tanks, agricultural silos, gas pumps, air craft parts, bomb casings, nuclear reactor components, DC power sources, welding machines, and other industrial equipment. *See* attached Exhibit A (A.O. Smith Menu of Products). Many of the workers lived in neighborhoods near the A.O. Smith campus. The A.O. Smith jobs paid well enough to support a family, and there were jobs on the site even during the Depression and through both World Wars.

5. After A.O. Smith sold its property in 1996, the site was acquired by Tower Automotive (“Tower”), which struggled to survive. Tower employed only one-fifth as many workers as A.O. Smith had, since by the time Tower bought the site, the American auto industry had fallen on hard times. Tower was forced into bankruptcy in February, 2005, although it did keep a small operation going on the property even after that. During the time that Tower fought to make a

profit, the City could see that the property was in danger of becoming part of the landscape of abandoned industrial buildings that contributes to urban blight. When Tower declared bankruptcy, RACM moved to create a Redevelopment Plan for the area encompassing the Tower Automotive site. In this way, RACM could promote its interest in blight removal and ensure that new businesses coming to the site would be subject to urban renewal and land use requirements.

6. During 2005, the City and RACM adopted a Redevelopment Plan (the “Redevelopment Plan”) for the West Capitol and North 35th Street Redevelopment Project Area (the “Project Area”) within the 30th Street Industrial Corridor. *See attached Exhibit B (Redevelopment Plan).* This Project Area is comprised of the former A.O. Smith 156-acre property. The City’s Common Council approved a resolution authorizing RACM to write a Redevelopment Plan for the Project Area, by a unanimous vote on March 16, 2005, and the Mayor signed the resolution into law on March 23, 2005 RACM Resolution 9718 and Council Resolution 041510. RACM then prepared the Redevelopment Plan pursuant to Wis. Stat. §66.1333, and released the Redevelopment Plan on June 14, 2005. The Redevelopment Plan was recorded in the Milwaukee County Register of Deeds Office on December 9, 2005 as Document No. 9145406. *See attached Exhibit C (Redevelopment Plan Evidence of Recordation).*

7. Much of the Project Area is zoned for heavy industrial use, but the Redevelopment Plan (in accordance with Wis. Stat. §66.1333) also imposes additional restrictions on permissible uses of the land. A “conditional use” is permitted only if RACM formally approves the conditional use, because it finds that certain requirements of the Plan will be met:

1. Protection of Public Health, Safety and Welfare. The use will be designed, located and operated in a manner so that the public health, safety and welfare are protected.
2. Protection of Property. The use, value and enjoyment of other property in the neighborhood will not be substantially impaired or diminished by the establishment, maintenance or operation of the special use.

3. Traffic and Pedestrian Safety. Adequate measures have been or will be taken to provide safe pedestrian and vehicular access.

4. Consistency with Comprehensive Plan. The special use will be designed, located and operated in a manner consistent with all applicable elements of the city's comprehensive plan.

[Additional c]onditions of approval may be imposed by the Authority to prevent or minimize adverse impacts upon the public and the city's neighborhoods and to ensure compatibility of land uses and consistency with the purposes and intent of [the Redevelopment Plan]. Conditions of approval may include, but shall not be limited to: limitations on size, bulk and location; standards for landscaping, buffering and lighting; limitations on emissions of odors, dust, smoke, refuse matter, vibration, noise and other factors affecting the comfort, enjoyment, health or safety of residents, workers or visitors in the surrounding area; adequate ingress and egress; and other on-site improvements.

Redevelopment Plan at 7.

Under the Redevelopment Plan, recycling collection and mixed-waste processing would only be conditionally permitted, and material reclamation, indoor or outdoor salvage operations, outdoor storage facilities, and intense manufacturing are completely barred.

8. On November 10, 2006, Milwaukee Industrial Trade Center, LLC ("MITC") acquired a parcel of land (the "MITC Parcel") that occupies more than half of the acreage of the Project Area, which is and was subject to the Redevelopment Plan. MITC paid \$2.1 million for the parcel, which is roughly \$25,000 per acre, a purchase price that reflected the restrictions on its use and environmental conditions. In conversations I have had with Brian Bjodstrup of MITC, it was clear to me that MITC, prior to its purchase, was fully aware of the Redevelopment Plan recorded against title and that MITC knew it was taking title subject to that plan. Also, I reviewed the "Petition for Writ of Mandamus" that MITC filed in Milwaukee County Circuit Court in Case No. 08-CV-001772 (the "State Lawsuit"), and in ¶ 11 of that Petition, MITC says that "At the time MITC purchased the Property it was subject to The Redevelopment Plan..."

9. The MITC Parcel consisted of about 85 acres at the time MITC purchased it in 2006, but MITC sold two small outer lots, so now the MITC Parcel consists of about 84 acres of property with numerous vacant buildings in poor condition. There are buildings comprising 2,100,000 square feet of industrial space currently at the MITC Parcel, and to my knowledge, and based on my review of Occupancy Permit filings by MITC and its affiliates, and based upon statements I have heard from MITC's Brian Bjodstrup, only about 3,000 s.f. of those 2.1 million square feet are being occupied (only .0014 of the total square footage) for office space. Thus, the overwhelming majority of the building space is vacant, unoccupied, and industrial. The MITC Parcel lies directly east of a line of railroad owned by Canadian Pacific ,and operated by the Wisconsin & Southern Railroad. The MITC Parcel has an industry lead from that line that connects to 31 spurs on the property³. In some cases, industry tracks run into the buildings so that trains may be loaded and unloaded undercover. There are also some cranes onsite for this purpose. The property has known environmental contamination problems, both in the buildings and on the property; it was held by private industry and used for heavy industrial manufacturing for approximately a century. The environmental issues are acknowledged in the Tower bankruptcy documents and DNR records.

10. I have conducted interviews with former A.O. Smith and Tower Automotive employees to verify the use of the rail trackage in the Project Area. The industrial spur tracks on the property which are now at issue in this Petition have always only been used as industry switching track, and were last used in March 2006 by Tower. There is no single "rail line" on the Parcel. Of the 31 spurs, the longest is 2214 feet or 0.41 miles. Thirteen of these spurs, or more than one-third of them, are each shorter than a football field. This trackage now in question was used by

³ Source: RACM's consultant Earth Tech calculated the number of spurs tracks and spur

A.O. Smith for its own industry switching operation.⁴ Later, when Tower owned the property, it contracted for the railroad to run an industry switching operation on the site.

11. MITC applied for occupancy permits with the City for its affiliated companies⁵ (the “MITC Companies”) and for MITC’s proposed tenants through the spring and summer of 2007, and during April 2008. MITC has indicated that it wishes to move MRD, WMR, and Knapp, as well as its own offices from its Lincoln Avenue facility to the MITC Parcel.

12. When MITC, the MITC Companies, and MITC’s proposed tenants applied for occupancy permits on the MITC Parcel, some of the permits were granted, some were granted in part, and others were rejected because the planned uses were not permitted by the Redevelopment Plan. MITC itself, and Great Lakes Asbestos Abatement, LLC both applied for office space, and these permits were granted. Shea/Kenny applied to operate a contractor’s shop, and this permit was granted also. Shea/Kenny has since vacated the MITC Parcel and no longer operates there. MITC additionally applied to operate indoor and outdoor storage facilities. The indoor storage is permitted under the Redevelopment Plan, but the outdoor storage is not, so the outdoor storage occupancy permit was denied. (In any event, MITC submitted one application for both uses which is not permitted. Separate occupancy permit application would have to be presented for each). Midwest Rail & Dismantling, LLC (“MRD”) and West Milwaukee Recycling, LLC (“WMR”) applied to run an indoor scrap processing business. This is not a permitted use under

lengths based on maps provided by MITC and Tower using Computer Aided Design software

⁴ McFarland’s Opinion Letter (*see* Hagopian V.S. attached Exhibit H) has this reversed – that Tower had its own switching operation, and that A O. Smith was served by the predecessor to Wisconsin Southern. Both sides agree, however, that the trackage has always been used exclusively for industry switching.

⁵ The MITC “partner” companies have common ownership and include Midwest Rail and Dismantling, LLC (“MRD”); West Milwaukee Recycling, LLC (“WMR”); and Knapp Railroad Builders, Inc. (“Knapp”). These companies also share a common office at 4777 West Lincoln Avenue, West Milwaukee, Wisconsin.

the Redevelopment Plan, so that permit was denied. The same businesses filed a separate application to operate an office, contractor's shop, and contractor's yard, which are permitted uses. City Permit Staff requested a Plan of Operation and site plan, which have not yet been submitted. Belly Commodity Trading, LLC applied to operate an indoor recycling collection facility, which is a conditional use under the Redevelopment Plan, so more information was required. Belly never followed up. Nodemart, which refurbishes industrial equipment, applied for office space and to have a cold storage facility. The office space application was granted, and Nodemart has not followed up on its permit request for cold storage or light industrial use. Knapp Railroad Builders, Inc. applied for an office, contractor's shop, and contractor's yard. This permit is in review and is expected to be issued after inspections required under local law. Cappy's Concepts, LLC applied for a permit to do research and development. This permit also is in the process of review, pending inspection reports.

13. As described above, those proposed tenants which are not engaged in scrapping and the processing of construction and demolition waste ("C&D") either have received certificates of occupancy (or authorization for occupancy) from the City, or have permits which are in the process of review. However, some companies did not move into the space they applied to occupy. It is our understanding that only MITC, Nodemart, and Great Lakes Asbestos have moved onsite, into office space, and it is those entities that occupy approximately 3,000 s.f. of Building 8.

14. Following the publishing of MITC's Notice in the Federal Register, MITC has stated that it intends to process and allow tenants to process Construction and Demolition waste ("C&D") onsite, notwithstanding the denial of the permit for indoor scrap processing based on the Redevelopment Plan's prohibition of such use of the land. I was present at meetings at which

Gerry Blomberg of MITC stated words to the effect that he was expecting to receive contracts or jobs from Canada that would involve importing C&D to the MITC Parcel for separating and salvage operations. Also, during his testimony in the State Lawsuit, MITC's Brian Bjodstrup said that MRD is "primarily a demolition contractor." See Bjodstrup Testimony at 74 (Aug. 12, 2008), Hagopian Exhibit K, State Lawsuit Transcript at 74 (Aug. 12, 2008). Blomberg and Bjodstrup both have indicated at different meetings that they are considering moving a concrete crushing operation (Milwaukee Materials) that is currently located across the Canadian Pacific line, immediately west of the MITC Parcel at 3600 North 35th Street, onto the MITC Parcel. Richard Hawkins, who is part owner of MITC, is the registered agent for Milwaukee Materials. The current concrete crushing operation does not have an occupancy permit and would require Board of Zoning Appeals (BOZA) approval under the Redevelopment Plan.

15. I have been around the MITC Parcel and on that parcel over the last six months. In June 2008, I noted rail "open-top hopper" cars being moved onto the northern portion of the site. I have seen a single locomotive parked on the south end of the property. That locomotive has been on-site for some time and was described to me by MITC's Bjodstrup as a hobby restoration project by Hawkins, registered agent for Knapp Railroad Builders, and part owner of MITC. In his State Lawsuit testimony on August 12, 2008, MITC's Bjodstrup said that the locomotive has been on-site about one year. See *Id.* at 90. When I visited the site on August 11, 2008, all windows of this locomotive were boarded over, and the locomotive has not moved as long as I have known it to be on-site.

16. I am aware that the Milwaukee Economic Development Corporation ("MEDC") made one offer, and RACM made several offers, to acquire all or portions of the MITC Parcel. There have also been numerous counter offers, or offers to sell, from MITC for the whole property as well as

portions of the property. August 2007 is when MEDC offered to buy the whole MITC Parcel. On January 14 and January 30, 2008, MITC offered to sell the Parcel to RACM. Based on my review of records in the City's and RACM's file, I am aware that MITC filed a claim against RACM and City on or about February 11, 2008 for \$32 million alleging inverse condemnation. I am aware that RACM sent a letter to MITC's broker on February 29, 2008, suggesting that RACM purchase a portion of the property. On March 6 and March 25, 2008, MITC offered to sell a portion of the property to RACM. On May 30, 2008 MITC's attorneys sent a letter to RACM's attorneys indicating that any and all offers written and verbal had been rescinded and/or withdrawn. *See* attached Exhibit D (May 30th Letter). In a June 17, 2008 letter, however, MITC's attorneys again indicated willingness to sell to RACM. *See* Hagopian V.S. attached Exhibit I. In the RACM file is an August, 2008 email from MITC's Bjodstrup to the Mayor's Chief of Staff indicating that he is the person that can get "everyone (at least some of) what they want in regard to my employer's property. My phone is always on." During the period from August 2007 through about July 2008, I am aware that RACM (and my boss, Rocky Marcoux) had been in various discussions with MITC about RACM acquisition. I was present at some of the meetings where these discussions took place.

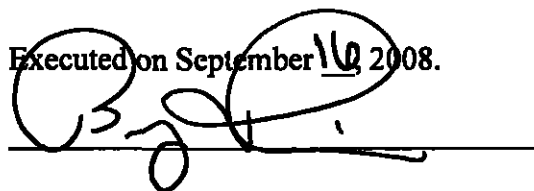
17. On July 8, 2008, I was present when MITC and RACM discussed, in the Courthouse hallway, the possibility of RACM acquiring the MITC Parcel for \$7 million. Subsequent to that discussion, MITC declined to sell for \$7 million, with Blomberg stating that the salvage and demolition value of the material in the vacant buildings was at least \$15 million. \$15 million was the largest number I ever heard mentioned by MITC in these negotiations, and they only came to the conclusion that the parcel was worth that much after filing their Notice of Exemption with the STB.

VERIFICATION

I, Benjamin Timm, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this verified statement.

Executed on September 16, 2008.

A handwritten signature in black ink, appearing to be "B. Timm", is written over a horizontal line.

Benjamin Timm

EXHIBIT A

Serving up a healthy diet for Wisconsin...

A.O. Smith Menu

Products Under Glass

- Glass-lined water heaters
- Glass/fiber pipe
- Glass-lined industrial storage units
- Glass-lined brewery tanks
- Glass-lined Harvesters
- Glass-lined equipment for chemical processing
- Glass-lined smokestacks
- Glass-lined pipe

Body Builders

- Automotive components
- Aircraft and missile parts
- Refined components

Rich in Iron

- Manual and automatic welding equipment
- Welding machines
- Welding electrodes

For Liquid Diets

- Gasoline-dispensing pumps
- Truck and industrial meters
- Bulk, line and high-pressure meters
- Control and block valves
- Line pipe and casing

High-Energy Items

- Nuclear reactor components
- Electric motors
- Powdered-iron electrical components
- D-C power sources

Pressure-Cooked

- Multilayer vessels
- Solid-wall and alloy-lined pressure vessels
- Heat exchangers
- Feed water heaters

Something to go with the beer and cheese!

Cheese and beer are, when most people think of the Badger State they conjure up visions of frosty steins of Milwaukee beer or slices of rich, golden Dairylease cheese. We admit that a quick way to a person's thoughts is through his stomach. But we'd like to remind you that this great state of ours requires a much more balanced diet than this to maintain its present state of prosperity. And part of these requirements are met by A. O. Smith Corporation. Arriving on the Wisconsin scene way back in 1874, the company has produced the wide variety of quality products listed on our menu above. A. O. Smith is proud of these contributions just as it is proud of its 87 year history of serving Wisconsin in Wisconsin.

Through research  a better way

A.O. Smith

Milwaukee 1, Wisconsin
A. O. Smith International S. A.
Milwaukee 1, Wisconsin, U. S. A.

EXHIBIT B

**REDEVELOPMENT PLAN
FOR THE
W. CAPITOL DRIVE AND N. 35TH STREET
"CENTURY CITY"
PROJECT AREA**

**Redevelopment Authority
Of The
City of Milwaukee**

Prepared by:

**Department of City Development
Milwaukee, Wisconsin**

June 14, 2005

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LEGAL DESCRIPTION

1.1) 3940 N 35th ST

Lot 1 of the lands described as parcels 1.1 - 1.4 below.

1.2) 3700 N 35th ST

Lot 2 of the lands described as parcels 1.1 - 1.4 below.

1.3) 3600 N 35th ST

Lot 3 of the lands described as parcels 1.1 - 1.4 below.

1.4) 3420 N 35th ST

Lot 4 of the lands described as parcels 1.1 - 1.4 below.

1.1-1.4) Four parcels listed individually immediately above composing lands along the east side of N. 35th St. between Capital Drive on the north and Townsend Avenue on the south, described as follows,

LANDS AND ALL OF BLOCKS 1 AND 2 IN THEODORE ZILLMER'S SUBDIVISION AND VACATED STREETS AND ALLEYS IN AND ADJACENT TO SAID BLOCKS, IN THE NORTHWEST ¼ AND THE SOUTHWEST ¼ OF THE NORTHEAST ¼ AND THE NORTHWEST ¼ OF THE SOUTHEAST ¼, ALL BEING IN SECTION 12, TOWNSHIP 7 NORTH, RANGE 21 EAST, IN THE CITY OF MILWAUKEE, COUNTY OF MILWAUKEE, WISCONSIN, BOUNDED AND DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF THE NORTHEAST 1/4 OF SECTION 12, TOWNSHIP 7 NORTH, RANGE 21 EAST; THENCE N 88°28'13" E ALONG THE NORTH LINE OF SAID 1/4 SECTION 837.61 FEET TO A POINT ON THE WESTERLY RIGHT OF WAY LINE OF THE SOO LINE RAILROAD COMPANY AND ITS EXTENSION THEREOF; THENCE S 03°54'37" E 68.30 FEET TO A POINT ON THE SOUTH RIGHT OF WAY LINE OF WEST CAPITOL DRIVE AND THE POINT OF BEGINNING OF THE LAND TO BE DESCRIBED; THENCE CONTINUING S 03°54'37" E ALONG THE WEST RIGHT OF WAY OF SAID RAILROAD RIGHT OF WAY 3,085.76 FEET TO A POINT ON THE NORTH LINE OF WEST TOWNSEND STREET; THENCE S 88°24'26" W ALONG SAID RIGHT OF WAY LINE 958.69 FEET TO A POINT ON THE EAST RIGHT OF WAY LINE OF NORTH 35TH STREET; THENCE N 00°44'10" W ALONG SAID RIGHT OF WAY LINE 430.34 FEET TO A POINT ON THE NORTH LINE OF THE SOUTHEAST 1/4 OF SECTION 12, TOWNSHIP 7 NORTH, RANGE 21 EAST; THENCE N 00°48'48" W ALONG SAID RIGHT OF WAY LINE 2,456.49 FEET; THENCE NORTHEASTERLY 77.81 FEET ALONG THE ARC OF A CURVE WHOSE CENTER LIES TO THE SOUTHEAST WHOSE RADIUS IS 88.00 FEET WHOSE CHORD BEARS N 24°30'59" E 75.30 FEET; THENCE N 49°50'46" E 28.40 FEET; THENCE NORTHEASTERLY 60.28 FEET ALONG THE ARC OF A CURVE WHOSE CENTER LIES TO THE SOUTHEAST WHOSE RADIUS IS 88.00 FEET WHOSE CHORD BEARS N 69°28'15.50" E 59.11 FEET; THENCE N 89°05'45" E 240.00 FEET; THENCE N 79°10'20" E 292.35 FEET; THENCE N 89°05'45" E 153.52 FEET TO THE POINT OF BEGINNING.

CONTAINING 2,673,002 SQUARE FEET AND/OR 61.364 ACRES

2) 3533 N 27TH ST modified to reflect the division of lands described as parcels 1.1 - 1.4 above

LANDS IN NE 1/4 SEC 12-7-21 LAND BETW W CAPITOL DR N 31ST ST
DESCRIPTION - W HOPKINS - 1241 90'S OF SEC LINE & RY R O W
LANDS IN NE & SE 1/4 SECS OF SD SECTION, THEO ZILLMER'S SUB,
BLK 12 CONT OF GRAND VIEW, BLK 4 CONRAD-THOMA SUBD NO 1 &
VAC STS & ALLEYS LYING BETW W CAPITOL DR-N 31ST ST-W HOPKINS ST-N 27TH ST-
W TOWNSEND ST & C M ST P & P RY ROW & ELY TRIA (COM W LI N 31ST ST & 447.26' S
OF S LI W CAPITOL DR-TH SELY 64.48'-TH W 37 88'-TH N 52.93' TO BEG)
SUBJ TO ROW EASEMENTS

3) 2926 THRU 2926ADJ W MELVINA ST

GARDEN ACRE CONTINUATION IN NE 1/4 SEC 12-7-21
DESCRIPTION BLOCK 7 PART LOT 6 COM 29' W OF NE COR LOT 6-TH S 90.49'-TH
NWLY 94.14'-TH E 27.52' TO BEG

4) 3010 THRU 3024 W HOPKINS ST

GARDEN ACRE CONTINUATION IN NE 1/4 SEC 12-7-21
DESCRIPTION BLOCK 7 LOTS 1-2 & 3

5) 2900 W HOPKINS ST

GARDEN ACRE CONTINUATION IN NE 1/4 SEC 12-7-21
DESCRIPTION BLOCK 6 LOTS 1 THRU 18 & VAC ST & ALLEY ADJ & LOTS 4 & 5 BLK
7 EXC PART OF E FOR ST

6) 3871 N 35TH ST

ROOSEVELT DRIVE SUBD IN NW 1/4 SEC 12-7-21
DESCRIPTION BLOCK 3 LOTS 1 THRU 3

7) 3817 THRU 3847 N 35TH ST

ROOSEVELT DRIVE SUBD IN NW 1/4 SEC 12-7-21
DESCRIPTION BLOCK 3 LOTS 7 TO 12 INCL

8) 2823 W VIENNA AV

GARDEN ACRE SUBD IN NE 1/4 SEC 12-7-21
DESCRIPTION BLOCK 2 LOTS 1 THRU 6 EXC ST

9-10) 2744 W HOPKINS ST

GARDEN ACRE SUBD IN NE 1/4 SEC 12-7-21
DESCRIPTION BLOCK 1 BLK 1 EXC E 100' & S 38' (LOTS 11-12-13-14) EXC
ALLEY BLK 3 & PART VAC ST ADJ

11) 3627 N 27TH ST

LANDS IN NE 1/4 SEC 12-7-21
DESCRIPTION LAND BETW N 27TH ST-W HOPKINS ST & BLK 1 GARDEN ACRES SUBD

12) 3525 N 35TH ST

WEST POINT HEIGHTS IN NW 1/4 SEC 12-7-21
DESCRIPTION BLOCK 1 LOTS 1 TO 15 INCL

13) 2642 W HOPKINS ST

ERBACHER & BANHOLZER'S SUBD IN NW 1/4 SEC 7-7-22
DESCRIPTION BLOCK 2 LOTS 16 THRU 27 & S 26' LOT 28

14) 3424 N 27TH ST

PEOPLE'S BLDG & LOAN ASS'N SUBD NO 3 NW & SW 1/4 SEC 7-7-22
DESCRIPTION BLOCKS 3 & 4 VAC (STS & ALLEYS) ADJ

15) 2537 W HOPKINS ST

PEOPLE'S BLDG & LOAN ASS'N SUBD NO 3 NW & SW 1/4 SEC 7-7-22
DESCRIPTION BLOCK 2 LOTS 1-2-3-21-22-23-24-25 & LOT 26 & PART VAC ST
ADJ EXC ALLEY CUL DU SAC

17) 2871 THRU 2871R W HOPKINS ST

LANDS IN NE 1/4 SEC 12-7-21
DESCRIPTION 100' ROW THRU W 1/2 OF SD 1/4 SEC & THAT PART OF SD 1/4 SEC COM AT
INTERSECTION OF ELY LI CMSTP&P RR ROW & S LI OF W CAPITOL DR-TH SELY ALG
ELY LI SD ROW 100.13'-TH E 69 38' TH N 100' TO S LI W CAPITOL DR-TH W ALG S LI SD
DR 75' TO BEG

18) 3201 W TOWNSEND

LANDS IN SE 1/4 SEC 12-7-21
DESCRIPTION R.O.W. ACROSS S E 1/4 SEC.12

19) 3061 W HOPKINS ST

LANDS IN NE 1/4 SEC 12-7-21 LAND BETW W CAPITOL DR N 31ST ST
DESCRIPTION - W HOPKINS - 1241.90'S OF SEC LINE & RY R O W
S 52.93' OF E 37 88' TRJA

A. INTRODUCTION

On March 16, 2005, the Common Council adopted resolution file no. 041510 approving the boundary for the West Capitol and North 35th Street Redevelopment Project Area and authorized the Redevelopment Authority of the City of Milwaukee (RACM) to prepare a Plan in accordance with Section 66.1333, Wisconsin Statutes. The Mayor signed the resolution on March 23, 2005.

This redevelopment plan is prepared pursuant to Section 66.1333(6)(b)(2), formerly a subsection of Section 66.431, Wisconsin Statutes, which requires, "Approval by the authority and by two-thirds of the local legislative body of the redevelopment plan of the project area which has been prepared by the authority. The redevelopment plan shall conform to the general plan of the city and shall be sufficiently complete to indicate its relationship to definite local objectives as to appropriate land uses, improved traffic, public transportation, public utilities, recreational and community facilities, and other public improvements in the project area. The redevelopment plan shall include a statement of the boundaries of the project area; a map showing existing uses and conditions of the real property; a land use plan showing proposed uses of the area; information showing the standards of population density, land coverage and building intensity in the area after redevelopment; present and potential equalized value for property tax purposes; a statement of proposed changes in zoning ordinances or maps and building codes or ordinances; a statement as to the kind and number of site improvements and additional public utilities which will be required to support the new land uses in the area after redevelopment; and a statement of a feasible method proposed for the relocation of families to be displaced from the project area".

B. DESCRIPTION OF THE PROJECT

The 35th St. and Capitol Dr. Project Area (also known as Tower Automotive and previously known as A. O. Smith) was entirely in use as a motor vehicle frame manufacturing site. The southern portion of the Project Area continues to be used for that purpose. The rest of the site consists of vacant buildings and property. The Canadian Pacific (Soo Line) railroad runs through the Project Area in a roughly north-south direction. The portion of the site west of the railroad has recently been re-subdivided and two parcels sold, one for a city maintenance facility and the other for use by two small industrial companies.

The Project Area comprises 156.25 net acres and 20 parcels. It is a prominent location in the north central area of the city and provides an opportunity to develop attractive and productive business sites, thus providing jobs for surrounding communities. Two large central contiguous areas of 61.36 and 74.04 acres are separated from each other by the railroad and from nearby smaller parcels by arterial streets. These smaller parcels could be used for a number of purposes, but are currently parking lots or vacant. The site has known environmental contamination problems regarding both soils and buildings. The extent of these problems is not entirely known, creating a disincentive to market re-investment and master planning for the site's redevelopment.

The City of Milwaukee has an agreement to purchase 24.64 acres of the Project Area for the future home of the Department of Public Works Field Headquarters. Demolition and site preparation is underway. The City's existing Traser Yard facilities and the Milwaukee Water Works' Lincoln Avenue and Cameron Avenue distribution facilities will be combined in a newly constructed modern \$24 million complex between Nash and Melvina Streets on N. 35th St. More than 480 city workers will work out of the facility.

Capitol Drive has seen significant reinvestment one mile west and two miles east of the site in the form of the \$53 million Midtown Center and the Riverworks mixed-use commercial area, respectively.

1. Plan Objectives

The primary goal of this Project is to promote the attractive, productive and efficient use or reuse of land and buildings (where possible) in the Project Area in a manner that provides high quality sites for business and industry while benefiting the surrounding community.

- a. Promote land uses in the project area that tend to lead to relatively more capital investment and more family-supporting jobs by restricting land uses that tend not to do so.
- b. Promote development that provides a minimum job density of 15 jobs per acre and compensation of \$11.58 or more per hour in 2005 dollars. (This level of pay permits two working people to support a family of four according to the Wisconsin Women's Network in partnership with Wider Opportunities for Women, a national women's employment organization. See <http://www.isonline.com/news/state/apr04/222099.asp> for more information.)
- c. Develop a detailed master plan for the Project Area or encourage current and future owners, developers and lessees to develop and implement individual redevelopment plans that remodel, adaptively reuse or enlarge existing buildings, or build new buildings.
- d. Mitigate environmental contamination in the soils and buildings that interfere with investment in and the use/reuse of land and buildings in the Project Area through state-of-the-art means.
- e. Avoid buildings and land being vacant and unused for long periods of time, which results in a blighting influence on the surrounding community.
- f. Assure that all of the project area is platted in a manner that optimizes business development. Encourage use of the site by businesses and industries that require large sites.

- g. **Assure that the project's developer provides necessary transportation and utility improvements to support the productive and efficient use of land in the Project Area.**
- h. **Assure that any new development in the Project Area presents attractive massing, form, materials, and landscaping to major streets from which the development is visible, appropriate to its zoning.**
- i. **Assure that all development complies with all storm water regulations and contemporary practices.**

RACM will use these objectives in its review of all development proposals.

2. Proposed Renewal Actions

To accomplish the objectives of this plan the Redevelopment Authority may exercise any or all of the powers provided to it under Section 66.1133 (4) Wisconsin Statutes.

- a. **Further limit permitted land uses within the portion of the Project Area now zoned Industrial Heavy. RACM reserves the right to recommend future zoning changes pursuant to the above primary goal and objectives.**
- b. **Work with the owner/developer to design and implement new street and parcel configurations if necessary to support redevelopment of the project area.**
- c. **Work with the owner/developer to attract development projects that provide the desired recommended job density and pay levels.**
- d. **All proposals and plans for new construction within the project area, including substantial remodeling, conversion or rebuilding, enlargement, or extension of major structural improvements on existing buildings or structures, and for any related improvements on the subject site, shall be referred to and reviewed by RACM to determine conformance with the objectives of the Plan. Proposals and plans not in conformance shall not be approved for permit.**

3. Land Use Provisions

Any new tax-exempt use in the Project Area must be approved by both the Authority and the Common Council before a building and/or occupancy permit will be issued by the City of Milwaukee.

Currently the Project Area is mostly zoned IH, with smaller but substantial areas of LB2 and IO2, as shown on Map No. 2. (A remnant parcel is also zoned RT3.) The purposes of these zoning districts are explained in Exhibit B at the end of this Plan.

This Plan places further restrictions on permitted land uses on the portions of the Project Area zoned Industrial Heavy (IH) as indicated below. The following use table indicates how land currently zoned IH will be regulated by the adoption of this Redevelopment Plan for the 35th St. and Capitol Dr. Project Area. The column headed "Current IH Use Classification" shows how land uses are classified by Chapter 295 of the City of Milwaukee Zoning Code for the IH zoning district. The column headed "Additional Use Restrictions" indicates restrictions added by this Redevelopment Plan for 35th St. and Capitol Dr. Project Area to the uses classified in IH.

- a. "Y" indicates a permitted use. This use is permitted as a matter of right subject to all development standards in this plan.
- b. "L" indicates a limited use for 35th St. and Capitol Dr. Project Area. This use is permitted only when the commissioner finds that the use will meet the standards of this table. If the use cannot meet these standards, it shall be permitted only if the Board of Zoning Appeals approves a special use permit pursuant to s. 295-305-2 of the Milwaukee Code, unless otherwise prohibited by the use table.
- c. "C" indicates a conditional use wherein the use is permitted only if the Redevelopment Authority formally approves the conditional use, after due notice to the parties of interest, finds that the following facts and conditions exist, and so indicates in the minutes of its proceedings or its decision:
 1. Protection of Public Health, Safety and Welfare. The use will be designed, located and operated in a manner so that the public health, safety and welfare are protected.
 2. Protection of Property. The use, value and enjoyment of other property in the neighborhood will not be substantially impaired or diminished by the establishment, maintenance or operation of the special use.
 3. Traffic and Pedestrian Safety. Adequate measures have been or will be taken to provide safe pedestrian and vehicular access.
 4. Consistency With Comprehensive Plan. The special use will be designed, located and operated in a manner consistent with all applicable elements of the city's comprehensive plan.

Conditions Of Approval. Conditions of approval may be imposed by the Authority to prevent or minimize adverse impacts upon the public and the city's neighborhoods and to ensure compatibility of land uses and consistency with the purposes and intent of this chapter. Conditions of approval may include, but shall not be limited to: limitations on size, bulk and location; standards for landscaping, buffering and lighting; limitations on emissions of odors, dust, smoke, refuse matter, vibration, noise and other factors affecting the comfort, enjoyment, health or safety of residents, workers or visitors in the surrounding area; adequate ingress and egress; and other on-site improvements.

d. "S" indicates a special use wherein the use is permitted only if the Board of Zoning Appeals approves a special use permit pursuant to s. 295-305-2 of the Milwaukee Code.

e. "-" indicates no change from IH.

Table 1: Use Classification

A. Uses	B. Current IH Use Classification	C. Additional Use Restrictions
<i>Residential Uses</i>		
Single-family Dwelling	N	-
Two-family Dwelling	N	-
Multi-family Dwelling	N	-
Attached Single-Family Dwelling	N	-
Live-work Unit	N	-
Mobile Home	N	-
Watchman/Service Quarters	Y	-
Family Day Care Home	N	-
<i>Group Residential</i>		
Rooming House	N	-
Convent, Rectory, or Monastery	N	-
Dormitory	N	-
Fraternity or Sorority	N	-
Adult Family Home	N	-
<i>Foster Homes</i>		
Family Foster Home	N	-
Small Foster Home	N	-
Group Home or Group Foster Home	N	-
<i>Shelter Care Facilities</i>		
Family Shelter Care Facility	N	-
Small Group Shelter Care Facility	N	-
Large Group Shelter Care Facility	N	-
Community Living Arrangement	N	-
Transitional Living Facility	N	-
<i>Educational Uses</i>		
Day Care Center	S	-
School, Elementary or Secondary	N	-
College	N	-
School, Specialty or Personal Instruction	N	-
<i>Community-Serving Uses</i>		
Library	N	-
Cultural Institution	N	-
Community Center	N	-

Religious Assembly	N	-
Cemetery or Other Place of Interment	N	-
Public Safety Facility	Y	-
Correctional Facility	N	-
<i>Commercial and Office Uses</i>		
General Office	L	-
Government Office	L	-
Bank or Other Financial Institution	N	-
Currency Exchange, Payday Loan Agency, or Title Loan Agency	N	-
Retail Establishment, General	N	-
Garden Supply or Landscaping Center	N	-
Home Improvement Center	N	-
Secondhand Store	N	-
Outdoor Merchandise Sales	N	-
Artist Studio	N	-
Adult Retail Establishment	N	-
<i>Health Care and Social Assistance Uses</i>		
Medical Office	N	-
Health Clinic	N	-
Hospital	N	-
Medical Research Laboratory	N	-
Medical Service Facility	N	-
Social Service Facility	N	-
Emergency Residential Shelter	N	-
Nursing Home	N	-
<i>General Service Uses</i>		
Personal Service	N	-
Business Service	N	-
Building Maintenance Service	N	-
Catering Service	N	-
Funeral Home	N	-
Laundromat	N	-
Dry Cleaning Establishment	N	-
Furniture and Appliance Rental and Leasing	N	-
Household Maintenance and Repair Service	N	-
Tool/Equipment Rental Facility	N	-
<i>Animal Services</i>		
Animal Hospital/Clinic	Y	-
Animal Boarding Facility	Y	-
Animal Grooming or Training Facility	Y	-
<i>Light Motor Vehicle</i>		
Sales Facility	S	N
Rental Facility	S	N
Repair Facility	L	-
Body Shop	L	-

Outdoor Storage	Y	C
Limited Wholesale Facility	Y	C
<i>Heavy Motor Vehicle</i>		
Sales Facility	Y	C
Rental Facility	Y	C
Repair Facility	L	-
Body Shop	L	-
Outdoor Storage	Y	C
<i>General Motor Vehicle</i>		
Filling Station	S	N
Car Wash	S	N
Drive-through Facility	S	N
<i>Parking</i>		
Parking Lot, Principal Use	Y	N
Parking Lot, Accessory Use	Y	-
Parking Structure, Principal Use	Y	-
Parking Structure, Accessory Use	Y	-
Heavy Motor Vehicle Parking Lot, Principal Use	Y	N
Heavy Motor Vehicle Parking Lot, Accessory	Y	-
<i>Accommodation and Food Service Uses</i>		
Bed and Breakfast	N	-
Hotel, Commercial	N	-
Hotel, Residential	N	-
Tavern	L	-
Assembly Hall	N	-
Restaurant, Sit-down	L	-
Restaurant, Fast-food / Carry-out	L	-
<i>Entertainment and Recreation Uses</i>		
Park or Playground	S	-
Festival Grounds	N	-
Recreation Facility, Indoor	N	-
Recreation Facility, Outdoor	N	-
Health Club	N	-
Sports Facility	N	-
Gaming Facility	N	-
Theater	N	-
Convention and Exposition Center	N	-
Marina	Y	-
Outdoor Racing Facility	S	N
Adult Entertainment Establishment	N	N
<i>Storage, Recycling, and Wholesale Trade Uses</i>		
Recycling Collection Facility	Y	C
Mixed-waste Processing Facility	L	C
Material Reclamation Facility	L	N
Salvage Operation, Indoor	L	N

Salvage Operation, Outdoor	S	N
Wholesale and Distribution Facility, Indoor	Y	-
Wholesale and Distribution Facility, Outdoor	Y	C
<i>Storage Facilities</i>		
Indoor	Y	-
Outdoor	Y	N
Hazardous Materials	S	N
<i>Transportation Uses</i>		
Ambulance Service	Y	-
Ground Transportation Service	Y	-
Passenger Terminal	Y	-
Helicopter Landing Facility	S	-
Airport	N	-
Ship Terminal or Docking Facility	Y	-
Truck Freight Terminal	L	N
Railroad Switching, Classification Yard, or Freight Terminal	Y	-
<i>Industrial Uses</i>		
Manufacturing, Light	Y	-
Manufacturing, Heavy	Y	C
Manufacturing, Intense	S	N
Research and Development	Y	-
Processing or Recycling of Mined Materials	S	-
Contractor's Shop	Y	-
Contractor's Yard	Y	-
<i>Agricultural Uses</i>		
Plant Nursery or Greenhouse	Y	-
Raising of Crops or Livestock	Y	N
<i>Utility and Public Service Uses</i>		
Broadcasting or Recording Studio	S	-
Transmission Tower	L	N
Water Treatment Plant	Y	-
Sewage Treatment Plant	Y	-
Power Generation Plant	Y	-
Substation/Distribution Equipment, Indoor	Y	-
Substation/Distribution Equipment, Outdoor	Y	-
<i>Temporary Uses</i>		
Seasonal Market	L	N
Temporary Real Estate Sales Office	L	N
Concrete Batch Plant, Temporary	L	C
Live Entertainment Special Event	L	N

4. General Development Standards

Any proposed action is subject to all applicable City of Milwaukee codes and requirements and the primary goal and objectives listed in sub-section B.1. of this Plan.

This Plan seeks a pattern of private development, public rights-of-way, and open space that represents the optimal redevelopment of the entire Project Area. Subdivision of parcels may be allowed if appropriate to this end, although the Plan emphasizes the unique opportunity to locate businesses and industries here that need larger parcels than typically found in the city. Additional public rights-of way may be introduced into the Project Area if they contribute to the optimal redevelopment of the site or enhance traffic circulation of the surrounding community.

A number of public rights-of-way at locations to be determined may be added to the Project Area as necessary by RACM Area without modification of this Plan.

Site and building design standards may be adopted as amendments to this Plan, provided that such standards benefit the surrounding community and land use, do not adversely affect the original primary goal and objectives of this Plan, as determined by RACM,

5. Duration of Land Use Provisions and Development Standards

The provisions and guidelines enumerated above shall be in full force and effect from the date this plan is certified to the Common Council of the City of Milwaukee as provided by section 66.1133 (5)(a) 1, Wisconsin Statutes. They will continue to be in full force and effect for a period of twenty years unless earlier terminated by a record of instrument of the Authority.

6. Land Acquisition

All parcels to be acquired now for private or public redevelopment in accordance with the objectives, land use provisions, and building requirements set forth in this Plan are identified on Map No. 5, titled "Acquisition Map," and on the "Schedule of Lands and Interests to be Acquired" attached thereto. No parcels are identified for acquisition now.

C. CONFORMANCE TO STATE AND LOCAL REQUIREMENTS

1. Conformance to the Comprehensive Plan of the City of Milwaukee

This plan was reviewed by the City Plan Commission of the City of Milwaukee and determined to be in conformance with the City's Comprehensive Plan.

2. Conformance to Local Objectives

This plan has been prepared to conform to the following local objectives:

a. Appropriate Land Use

Any rezoning of property will be made by in accordance with applicable state and local regulations and procedures.

b. Public Improvements

Any future public improvements will be consistent with all City of Milwaukee Codes and Ordinances.

3. Present and Potential Equalized Value for Property Tax Purposes

See Exhibit A for worksheet.

4. Standards of Population Density

Not applicable.

5. Land Coverage and Building Density

These objectives shall be achieved according to the zoning provisions and Section 4, General Development Standards, in this Plan.

6. Statement of a Feasible Method Proposed for Relocation of Displaced Families

Not applicable.

D. PROCEDURE FOR CHANGES IN THE APPROVED PLAN

At any time after this project area plan has been approved by the Authority and the Common Council of the City of Milwaukee, it may be amended in accordance with the provisions and procedures established in the applicable subsections of section 66.1333(6)(d), Wisconsin Statutes.

Exhibit A

Table of Present and Potential Equalized Value for Property Tax Purposes

Rec	Taxkey	Parcel Address	Current Total Assessment	Parcel Area (Sq. Ft.)	Potential Equalized Value
1.1*		3940 N 35 ST	\$1,229,429	597,823	\$4,330,729
1.2*		3700 N 35 ST	\$2,208,087	1,073,347	\$24,000,000
1.3*		3600 N 35 ST	\$885,191	430,290	\$5,300,000
1.4*		3420 N 35 ST	\$1,176,186	571,742	\$4,143,180
2*	2699993100	3533 N 27TH ST	\$6,634,507	3,225,022	\$23,370,412
3	2690261100	2926 W MELVINA ST	\$2,000	1,245	\$2,000
4	2690259000	3010 W HOPKINS ST	\$10,000	9,278	\$111,100
5	2690252112	2900 W HOPKINS ST	\$62,700	75,446	\$903,433
6	2681224110	3871 N 35TH ST	\$17,300	14,331	\$259,152
7	2681228000	3817 N 35TH ST	\$34,500	28,662	\$518,305
8	2690305111	2823 W VIENNA AV	\$78,000	61,855	\$740,667
9	2690302110	2744 W HOPKINS ST	\$0	0	\$0
10	2690302110	2744 W HOPKINS ST	\$31,400	23,958	\$277,380
11	2699986100	3627 N 27TH ST	\$23,100	19,820	\$229,472
12	2681701000	3625 N 35TH ST	\$129,000	72,397	\$1,309,178
13	2700144111	2842 W HOPKINS ST	\$44,600	42,515	\$492,229
14	2851724111	3424 N 27TH ST	\$154,900	178,901	\$2,071,276
15	2851704110	2537 W HOPKINS ST	\$53,400	37,070	\$429,188
17	2699990000	2871 W HOPKINS ST	\$0	278,459	\$0
18	2669991000	3201 W TOWNSEND ST	\$0	65,224	\$0
19	2699989000	3061 W HOPKINS ST	\$0	990	\$0

* Prorated as a percentage of area before subdivision

Source: Assessor's Office web site, City of Milwaukee, Apr 2005

DCD Worksheets: c:\mm\05\capitol and 35theqld value.xls and c:\mm\05\capitol and 35thPot-values.xls

Exhibit B

Explanation of Land Use Categories

INDUSTRIAL-HEAVY (IH). This district accommodates high-intensity industry and often includes very large structures, extensive exterior storage, exterior mechanical operations, or heavy truck or equipment operations. It also accommodates uses that require large or isolated sites or harbor, airport or rail service. This district includes the historic industrial core of the city. It has a strong relationship to shipping and rail services and includes the port of Milwaukee, the Menomonee valley and various railroad corridors. Most sites within the IH district have already been developed or redeveloped. These sites seldom have excess land to provide buffer areas. Where possible, the IH district should be separated from residential neighborhoods with less intensive, non-residential districts.

INDUSTRIAL-OFFICE (IO). This district provides sites for modern, clean industry and supporting, non-residential land uses that complement industrial uses or require an industrial environment. Older portions of this zoning district (IO2) often form corridors which provide a buffer between residential areas and more intensive industrial districts. The newer portions of this district (IO1) are in the form of office-industrial parks or business parks with campus-style layouts and designs. The IO district has a performance-oriented transition area where it adjoins residential neighborhoods. Buffering and other requirements in the transition area are intended to protect the character of such neighborhoods.

LOCAL BUSINESS DISTRICTS (LB1-LB2). These districts provide a wide range of goods and services to a large consumer population coming from an extensive area. Within these districts, motor-vehicle-related activities are of major significance. Good access by motor vehicle or public transit is important to local business districts, which are often located adjacent to intersections of major thoroughfares and in close proximity to bus transfer locations. The LB1 district is characterized by a more suburban development pattern, with larger lots and deeper setbacks, while the development pattern in the LB2 district tends to be more urban, with smaller lots and smaller setbacks.

RT3 District. The purpose of the RT3 district is to promote, preserve and protect neighborhoods intended primarily for two-family dwellings with a traditional urban character. This district, much like the RT4 district, allows smaller lots, smaller setbacks and a higher lot coverage than the RT1 and RT2 districts. Unlike the RT4 district, this district does not allow traditional corner commercial establishments. Nor does it allow the establishment of new, small multi-family buildings. The neighborhoods in this district were platted and developed, in large part, in the early 1900s and tend to be more uniform than those of the RT4 district.

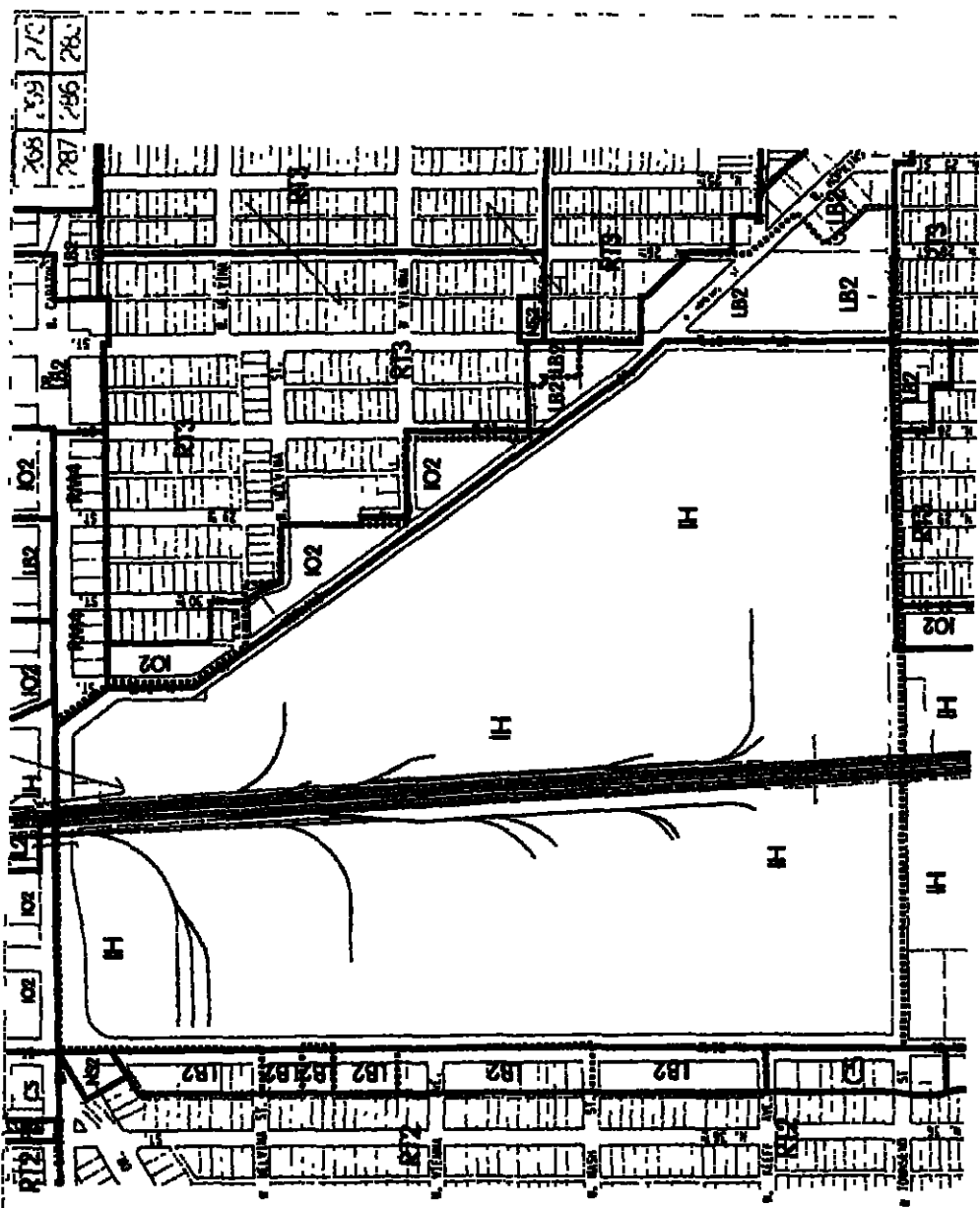
LEGEND

NO CHANGE TO EXISTING ZONING

RENEWAL PROJECT
FOR NORTH 35TH STREET
AND WEST CAPITAL DRIVE

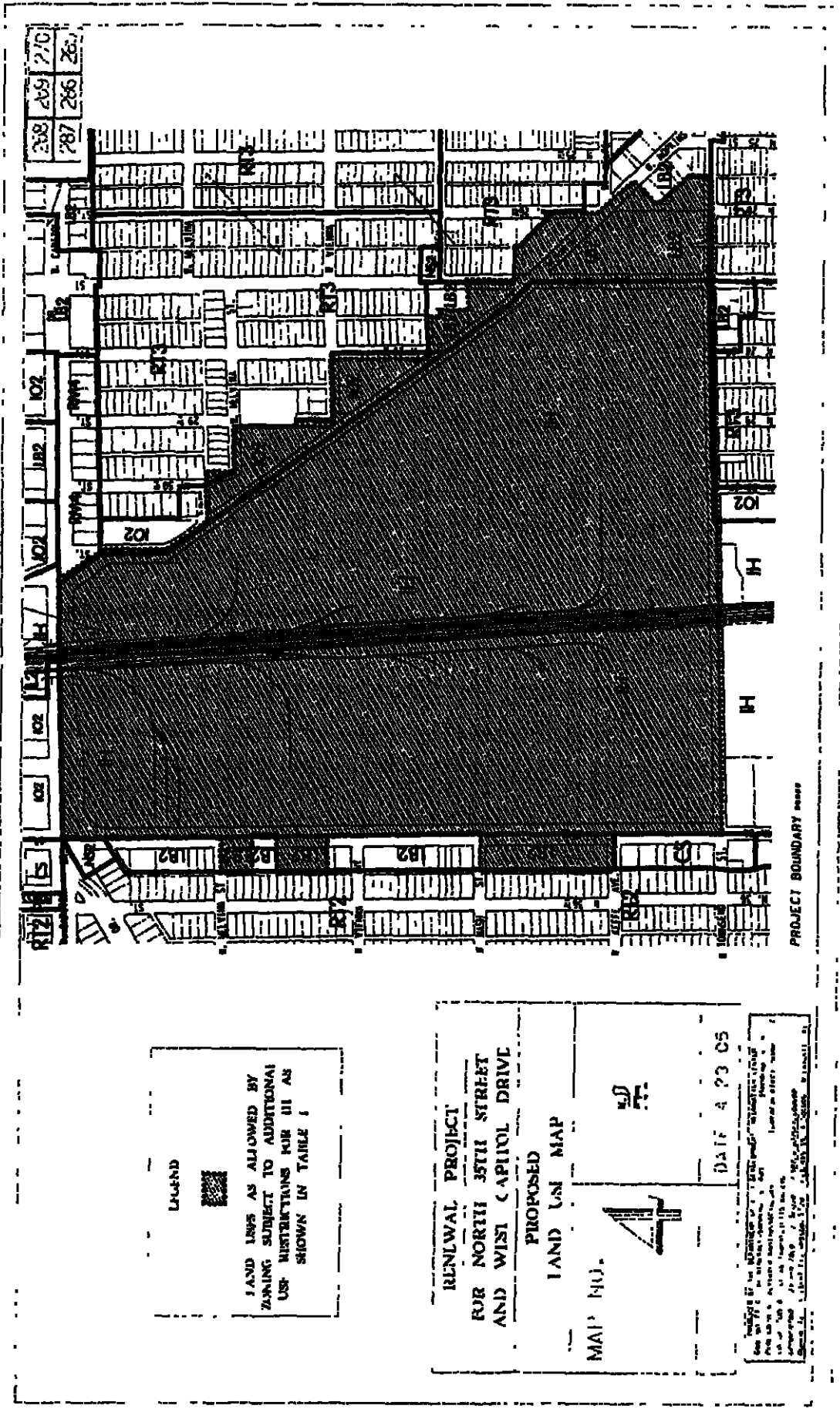
PROPOSED ZONING
MAP

DATE 4 JUL 64



PROJECT BOUNDARY

Map No. 100-3
City of Minneapolis
Planning Department
400 Hennepin Avenue
Minneapolis, Minnesota 55401



LAND LINES AS ALLOWED BY ZONING SUBJECT TO ADDITIONAL USE RESTRICTIONS FOR III AS SHOWN IN TABLE I

RENEWAL PROJECT
FOR NORTH 35TH STREET
AND WEST CAPITOL DRIVE

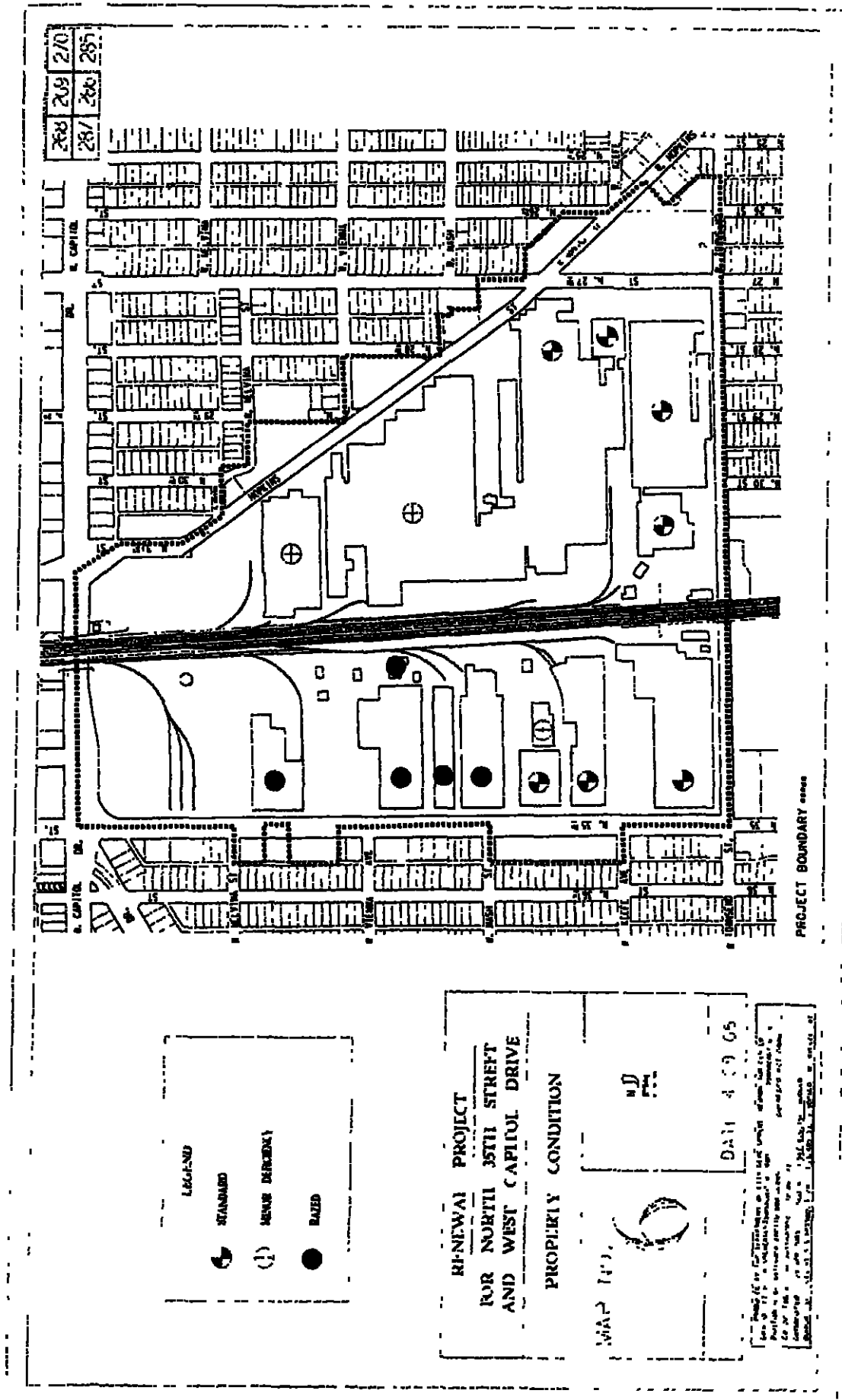
PROPOSED
LAND USE MAP

MAP NO. 4

DATE 4-23-65

PROJECT BOUNDARY

THIS MAP IS A PRELIMINARY MAP AND IS NOT TO BE USED FOR ANY PURPOSE OTHER THAN THAT FOR WHICH IT WAS PREPARED. IT IS NOT TO BE USED FOR ANY PURPOSE OTHER THAN THAT FOR WHICH IT WAS PREPARED. IT IS NOT TO BE USED FOR ANY PURPOSE OTHER THAN THAT FOR WHICH IT WAS PREPARED.



LEGEND

- STANDARD
- ⊕ NEED REPAIR
- RAISED

RE-NEWAL PROJECT
FOR NORTH 35TH STREET
AND WEST CAPITOL DRIVE

PROPERTY CONDITION

DATE 4-19-65

Map of City of St. Paul, Minnesota, showing the location of the project area. The map is a reproduction of a map published by the City of St. Paul, Minnesota, in 1964. The project area is located in the northwest corner of the block bounded by North 35th Street to the north, West Capitol Drive to the west, and East Capitol Drive to the east. The project area is shown in black on the map.

11

11

EXHIBIT C

32

Redevelopment Plan
WEST CANTON DRIVE AND NORTH 15TH STREET "CITY"
CITY PROJECT AREA
RESOLUTION NUMBER 050190

Document Number

Name and Return Address:
Michael J. Maurie
Department of City Development
Strategic Planning
809 N. Broadway
Milwaukee, WI 53202



DOC.# 09145406

REGISTER'S OFFICE 1 SS
Milwaukee County, WI

RECORDED 12/08/2005 10:08AM

JOHN LA FAVE
REGISTER OF DEEDS

AMOUNT 50.00

Recording Area

RACM
REDEVELOP PLAN

**Certificate of Recording Officer
WEST CAPITOL DRIVE AND NORTH 35TH STREET "CENTURY CITY" PROJECT AREA**

I, Joel Brennan, Assistant Executive Director-Secretary of the Redevelopment Authority of the City of Milwaukee, do certify that the attached Redevelopment Plan for the West Capitol Drive and North 35th Street "Century City" Project Area is a true and exact copy of the redevelopment plan as adopted and approved for recording by, respectively, the Redevelopment Authority of the City of Milwaukee on May 18, 2005, in Resolution Number 9716, and by the Common Council of the City of Milwaukee on June 14, 2005 in Resolution Number 050190, on file and record, pursuant to Section 66.113, Wisconsin Statutes.

In Testimony Whereof, for and on behalf of the Redevelopment Authority of the City of Milwaukee, I have hereunto sent my hand and caused the seal of said authority to be affixed this 2nd day of Nov., 2005.


Joel Brennan
Assistant Executive Director-Secretary
Redevelopment Authority of the City of Milwaukee

STATE OF WISCONSIN)
) ss
COUNTY OF MILWAUKEE)

Personally came before me this 2nd day of November, 2005, Joel Brennan, who acknowledged himself to be the Assistant Executive Director-Secretary of the Redevelopment Authority of the City of Milwaukee, a Corporation, and that he, as such officer of said Corporation, being authorized so to do, executed the foregoing instrument as such officer of said Redevelopment Authority, by its authority.

This document was drafted by the City of Milwaukee, Department of City Development.



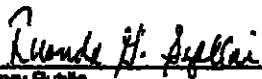

Notary Public
My commission expires 11-2-2008

EXHIBIT D

MURN & MARTIN, S.C.

J. MICHAEL LONG
jmlong@murnlaw.com

N20 W22961 Watertown Road
Waukesha, WI 53186

Phone (262) 524-8500
Fax (262) 524-9200
www.murnlaw.com

May 30, 2008

VIA E-MAIL AND U.S. MAIL

City of Milwaukee & Redevelopment Authority
of the City of Milwaukee
c/o Gregg Hagopian
Milwaukee City Attorneys Office
200 E. Wells Street, #800
Milwaukee, WI 53202-3515

Re: Milwaukee Industrial Trade Center, LLC

Dear Mr. Hagopian:

On behalf of the Milwaukee Industrial Trade Center, LLC ("MITC"), please be advised that any and all offers (written or verbal) for the sale of MITC's Tower Automotive facility to the Redevelopment Authority of the City of Milwaukee ("RACM") or the City of Milwaukee are hereby rescinded and/or withdrawn. This includes, but is not limited to, the offer made to RACM which was transmitted by Dickman Real Estate on March 6, 2008.

We look forward to meeting with you and Mr. Gartner on June 5, 2008 to discuss access and related issues regarding the Tower Automotive facility.

Very truly yours,

MURN & MARTIN, S.C.



J. Michael Long

JML/krm

Enclosures

cc: Jerry Blomberg, MITC, LLC
Samuel D. Dickman, Dickman Real Estate

**Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C.**

Finance Docket No. 35133

**Milwaukee Industrial Trade Center, LLC, d.b.a. Milwaukee Terminal Railway—
Acquisition and Operation Exemption—Private Trackage at Milwaukee, WI**

**VERIFIED STATEMENT OF
GREGG HAGOPIAN
IN SUPPORT OF PETITION TO REVOKE EXEMPTION ON BEHALF OF
THE REDEVELOPMENT AUTHORITY OF THE CITY OF MILWAUKEE**

1. My name is Gregg Hagopian. I am an Assistant City Attorney for the City of Milwaukee ("City"). My office address is 841 North Broadway, 7th Floor, Milwaukee, Wisconsin, 53202. I am licensed to practice law in the State of Wisconsin and my job duties include representing the City and the Redevelopment Authority of the City of Milwaukee ("RACM"). In that capacity, I have been representing the City and RACM in a Wisconsin lawsuit (the "State Lawsuit") commenced by Milwaukee Industrial Trade Center, LLC ("MITC") against the City and RACM (Milwaukee County Circuit Court Case No. 2008-CV-001772, Judge Kahn).
2. In 2005, the City and RACM adopted a Redevelopment Plan (the "Redevelopment Plan") for the West Capitol and North 35th Street Redevelopment Project Area (the "Project Area") within the 30th Street Industrial Corridor. This Project Area is comprised of the former A.O. Smith 156-acre property. The City's Common Council and the City's Mayor approved Resolution 050190, and thus approved the Redevelopment Plan for the Project Area, in June, 2005. RACM had also approved the Redevelopment Plan pursuant to Wis. Stat. §66.1333, and RACM Resolution 9718 in May, 2005. The Redevelopment Plan was recorded in the

Milwaukee County Register of Deeds Office on December 9, 2005 as Document No. 9145406.

See Timm V.S. attached Exhibits for copy of Redevelopment Plan.

3. On November 10, 2006, Milwaukee Industrial Trade Center, LLC (“MITC”) acquired a parcel of land (the “MITC Parcel”) that occupies more than half of the acreage of the Project Area, which is and was subject to the Redevelopment Plan. MITC paid \$2.1 million for the parcel, which is roughly \$25,000 per acre. *See MITC Deed attached as Exhibit A.* In Wisconsin, one can calculate the purchase price by taking the Transfer Fee and dividing by .003. Since the Deed shows a \$6300 Transfer Fee, the purchase price was \$2,100,000. When MITC principal Gerry Blomberg bought the property, he knew he was buying (and taking title) subject to the Redevelopment Plan and to existing environmental conditions, which he agreed to remediate. *See Exhibit B (MITC Petition in the State Lawsuit at ¶ 11), and see Exhibit C (Bankruptcy Motion to Sell to MITC at 4 and Exhibit B to Bankruptcy Motion at B-4), and see Exhibit D (Brian Bjodstrup Testimony Transcript from State Lawsuit on August 12, 2008, at 8-10).*

4. On February 5, 2008 MITC sued the City and RACM in the Milwaukee County Circuit Court by filing a Petition for Writ of Mandamus seeking a court order to require the City to issue occupancy permits to MITC and the MITC Companies and proposed tenants. *Milwaukee Industrial Trade Center, LLC v City of Milwaukee, et al*, Cir. Ct., Milw. Cty., WI, Case No. 2008-CV-001772 (Judge Kahn) (the “State Lawsuit”).

5. On February 11, 2008, MITC filed a \$32 million claim against the City and RACM, which alleges a taking of the MITC Parcel by regulation. *See attached Exhibit E (Claim at 7).*

6. On April 15, 2008, in the State Lawsuit, RACM moved the Court for a Special Inspection Warrant under Wis. Stat. § 66.1333 to enter and appraise the MITC Parcel and to conduct Phase II Environmental Testing at the MITC Parcel.

7. On June 5, 2008 Assistant City Attorney Tom Gartner and I had a meeting with MITC's attorneys in the State Lawsuit, Don Murn, Jack Bode and Mike Long. That meeting was encouraged by Judge Kahn, and the purpose of it was to discuss whether MITC and RACM could reach a compromise on RACM's Motion for a Special Inspection Warrant whereby RACM would be allowed entry rights to appraise and test. However, instead of discussing a compromise resolution, MITC's attorneys – for the very first time – notified RACM and the City of MITC's positions that (i) MITC was a "railroad" that had obtained an exemption from the Surface Transportation Board ("STB"), (ii) that, according to MITC, the STB regulations and ICCTA preempted City or RACM attempts to regulate MITC or the MITC Parcel, preempted RACM rights under the Redevelopment Plan and Wis. Stat. § 66.1333, and also would preempt any RACM attempt to use eminent domain, and (iii) given MITC's rail status and preemption protection, RACM could not enter the MITC Parcel to test or appraise. These MITC positions came as a giant surprise to me.

8. Also at the June 5th meeting, MITC's lawyers gave us the following additional information: (i) that Knapp refurbishes rail cars and Midwest Rail and Dismantling ("MRD") repairs, and tears down and scraps railroad items; (ii) that Gerry Blomberg, a principal of MITC wanted MRD to become a railroad because under the Redevelopment Plan, operation of a railroad is a permitted use (while scrap recycling is not); (iii) that we could expect to receive an opinion letter from MITC's other attorney, Thomas McFarland, and that McFarland's letter would indicate that MITC became a railroad as of May 16, 2005; (iv) that MITC was expecting big contracts soon for rail delivery of scrap and salvage, due to the increased cost of gas and trucking; and (v) that MITC would still consider selling certain portions of the MITC Parcel to RACM. MITC presented the City and RACM with a letter dated June 5, 2008, further

articulating their “preemption” position. *See* attached Exhibit F (June 5th Letter). Prior to June 5, 2008, neither the City nor RACM was ever informed about or made aware of MITC’s STB/ICCTA preemption arguments or of the Federal Register notice regarding the MITC exemption. Neither the City nor RACM retains counsel to routinely monitor the Federal Register especially for rail related issues, and MITC made no mention of their notice of exemption until June 5, 2008 - after 30 days had passed following publication.

9. On June 10, 2008, MITC raised for the first time before Judge Kahn in the State Lawsuit its STB/ICCTA preemption arguments, in the form of a letter to the Judge. *See* attached Exhibit G (June 10th Letter), and *see* attached Exhibit H (McFarland Opinion Letter).

10. On June 12, 2008, MITC’s lawyer Don Murn called me, and said MITC would be willing to sell a portion of the MITC Parcel to RACM.

11. On June 17, 2008, I received a copy of the promised opinion letter from MITC’s attorney Thomas McFarland, which is dated June 6, 2008. *See* attached Exhibit H, (McFarland Opinion Letter), *supra*. I also received the letter dated June 17th, 2008 soon thereafter; it is from Murn & Martin, S.C., and explains MITC’s plans for the Parcel. *See* attached Exhibit I (June 17th Letter).

12. As part of the State Lawsuit proceedings, I cross-examined Gerry Blomberg on June 30, 2008, and asked him questions regarding MITC’s rail operations at the MITC Parcel. Attached hereto as Exhibits D (Bjodstrup), J (Blomberg), and K (Timm) are copies of the portions of Transcripts of Proceedings that are relevant to this Petition, which the City and RACM received from Judge Kahn’s Court Reporters. The Exhibits contain testimony from June 30 (J), July 8 (K), and August 12, 2008 (D), respectively.

13. On July 15, 2008, I attended a meeting among Gerry Blomberg and Brian Bjodstrup of MITC, their lawyer Don Murn, Asst. City Attorney Tom Gartner, RACM employee Benji Timm

and Earthtech employee Doug Graham. We discussed the fact that RACM and MITC were far apart on a purchase price for the MITC Parcel and that, according to MITC, STB approval would be needed for MITC to sell. During the meeting, my recollection is that one reason why RACM and MITC were so far apart on purchase price was because of the different values the parties were placing on the scrap and salvage value from buildings on the MITC Parcel that could be demolished.

VERIFICATION

I, Gregg Hagopian, declare under penalty of perjury that the foregoing is true and correct.

Further, I certify that I am qualified and authorized to file this verified statement.

Executed on September 16 2008.

Gregg Hagopian

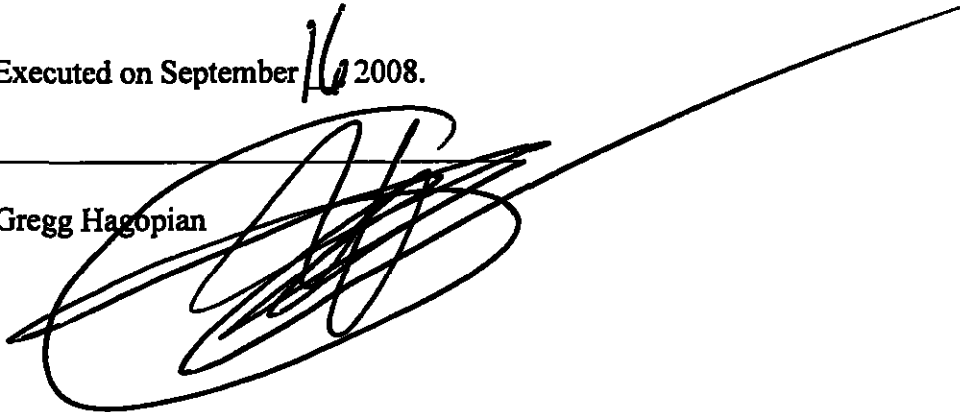
A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is highly cursive and loops, extending significantly to the right of the line.

EXHIBIT A

4. TOWER → MITC



DOC.# 09341266

REGISTER'S OFFICE | SS
Milwaukee County, WI

RECORDED 11/17/2006 02:29PM

JOHN LA FAVE
REGISTER OF DEEDS

AMOUNT: 17.00

State Bar of Wisconsin Form 1-2003

WARRANTY DEED

Document Number

Document Name

THIS DEED, made between
TOWER AUTOMOTIVE PRODUCTS COMPANY, INC., a Delaware
Corporation, as DEBTOR IN POSSESSION IN CASE NO. 05-10578
(ALG)

("Grantor," whether one or more), and
MILWAUKEE INDUSTRIAL TRADE CENTER, LLC, a Wisconsin
Limited Liability Company

("Grantee," whether one or more)

Grantor, for a valuable consideration, conveys to Grantee the following described real
estate, together with the rents, profits, fixtures and other appurtenant interests, in
MILWAUKEE County, State of Wisconsin ("Property") (if more space is
needed, please attach addendum)

PARCEL A:

All except the East 100 feet of Block 1, together with the
South 1/2 of vacated West Nash Street abutting on the
North, and the South 38 feet of Lots 11, 12, 13 and 14,
together with that portion of vacated West Nash Street
abutting on the South and the vacated alley abutting on
the East, in Block 3, all in Garden Acre Subdivision,
being a part of the Northeast 1/4 of Section 12, in

Recording Area

Name and Return Address

Milwaukee Industrial Trade Center
4777 W. LINCOLN AVE
WEST MILWAUKEE, WI 53219

269-9993-110-2

Parcel Identification Number (PIN)

This is not homesteaded property
(u)(s not)

continued

Grantor warrants that the title to the Property is good, indefeasible in fee simple and free and clear of encumbrances except
municipal and zoning ordinances and agreements entered under them, recorded easements for the distribution of utility and municipal services, recorded
building and use restrictions and covenants, and general taxes levied in the year of closing

Dated NOVEMBER 10, 2006

Tower Automotive Products Company, Inc.

TRANSFER

$\$6300^{00} \div .003 = \$2,100,000$
FEE

STEVE MORREN
Notary Public, State of Michigan
County of Kent
My Commission Expires October 2, 2011
Acting in the County of Kent

Frank Miceli (SEAL)
Frank Miceli, Authorized Agent

_____ (SEAL)

_____ (SEAL)

AUTHENTICATION

Signature(s) _____

authenticated on _____

ACKNOWLEDGMENT

STATE OF WISCONSIN MICHIGAN

KENT COUNTY } ss.

Personally came before me on November 10, 2006
the above named Frank Miceli

to me known to be the person(s) who executed the foregoing
instrument and acknowledged the same.

Steve Morren
Steve Morren
Notary Public, State of Wisconsin Michigan
My commission (is permanent)(expires 10/02/2011)

TITLE MEMBER STATE BAR OF WISCONSIN

(If not, _____
authorized by Wis. Stat. §706.06)

THIS INSTRUMENT DRAFTED BY:
Skye C. Wickland, Esq.

(Signatures may be authenticated or acknowledged. Both are not necessary.)

NOTE THIS IS A STANDARD FORM. ANY MODIFICATIONS TO THIS FORM SHOULD BE CLEARLY IDENTIFIED
WARRANTY DEED 2003 STATE BAR OF WISCONSIN FORM NO 1-2003
Type name below signatures

revised 8/05

Legal Description Continued

Order No 1219681

Township 7 North, Range 21 East, in the City of Milwaukee, County of Milwaukee, State of Wisconsin. Excepting therefrom that part thereof described in Deed recorded as Document No. 5420872.

Tax Key No. 269-0302-110-0

ADDRESS: 2744 W. HOPKINS STREET

PARCEL B:

Lots 1, 2, 3, 4, 5 and 6 in Block 2 in Garden Acre Subdivision of a part of the North East 1/4 of Section 12 in Township 7 North, Range 21 East, in the City of Milwaukee, County of Milwaukee, State of Wisconsin. Excepting therefrom that part thereof described in Deed recorded as Document No. 5420870.

Tax Key No. 269-0305-111-5

ADDRESS: 2823 W. VIENNA AVENUE

PARCEL C:

Lots 1, 2 and 3 in Block 7 in Garden Acre Continuation, in the North East 1/4 of Section 12, in Township 7 North, Range 21 East, in the City of Milwaukee, County of Milwaukee, State of Wisconsin.

Tax Key No. 269-0259-4

ADDRESS: 3010-3024 W. HOPKINS STREET

PARCEL D:

Lot 6 except the East 29 feet thereof in Block 7 in Garden Acre Continuation, in the North East 1/4 of Section 12, in Township 7 North, Range 21 East, in the City of Milwaukee, County of Milwaukee, State of Wisconsin. Excepting therefrom that part thereof described those lands conveyed to the City of Milwaukee in Deed recorded as Document No. 5420871.

Tax Key No. 269-0261-100-2

ADDRESS: 2926 W. MELVINA STREET

PARCEL E:

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, in Block 6, and Lots 4 and 5, in Block 7, in Garden Acre Continuation, being a part of the Northeast 1/4 of Section 12, in Town 7 North, Range 21 East, in the City of Milwaukee, County of Milwaukee, State of Wisconsin. TOGETHER with the vacated alley abutting said lots and that portion of vacated West Melvina Street abutting Lot 5, in Block 7 and Lot 1, in Block 6. EXCEPTING THEREFROM that part described in a Deed recorded as Document No. 5420871 and further excepting all of vacated 29th Street abutting on the East.

Tax Key No. 269-0252-112-6

ADDRESS: 2900 W. HOPKINS STREET

PARCEL F:

Legal Description Continued

Order No. 1219681

INTENTIONALLY OMITTED

PARCEL G:

INTENTIONALLY OMITTED

PARCEL H

INTENTIONALLY OMITTED

PARCEL I:

Lots 16 to 27, inclusive, and the South 26 feet of Lot 28, in Block 2 in Erbacher and Banholzer's Subdivision, being a part of Lots 48 and 57, and all of Lots 49, 50, 51, 52, 53, 54, 55 and 56 in Pease's Subdivision, in the Northwest 1/4 of Section 7, in Township 7 North, Range 22 East, in the City of Milwaukee, County of Milwaukee, State of Wisconsin.

Tax Key No. 270-0144-111-1

ADDRESS: 2642 W. Hopkins Street

PARCEL J:

All that part of the Northeast 1/4 and the Southeast 1/4 of Section 12, Town 7 North, Range 21 East, in the City of Milwaukee, County of Milwaukee, State of Wisconsin, described as follows:

Commencing at the Northwest corner of the Northeast 1/4 of Section 12, Town 7 North, Range 21 East; thence North 88° 28' 13" East, 937.70 feet along the North line of said 1/4 Section to a point on the East right of way line of the Soo Line Railroad and its extension thereof; thence South 03° 54' 38" East, 169.59 feet to the point of beginning; thence North 89° 00' 40" East, 69.90 feet; thence North 00° 59' 20" West, 100.00 feet to the South line of West Capitol Drive, thence North 89° 00' 40" East along said South line, 95.59 feet; thence North 89° 04' 08" East along said South line 94.57 feet; thence South 37° 53' 44" East, 217.77 feet to a point on the West line of North 31st Street; thence South 00° 35' 01" East along said West line, 273.31 feet to a point on the West line of North Hopkins Street; thence South 36° 25' 17" East along said West line 2045.90 feet; thence South 44° 07' 45" East, 176.96 feet to a point on the West line of North 27th Street; thence South 00° 35' 35" East along said West line 339.73 feet to a point on the South line of the Northeast 1/4 of Section 12, Town 7 North, Range 21 East; thence South 00° 37' 51" East along said West line, 479.98 feet to a point on the North line of West Townsend Street; thence South 88° 23' 15" West along said North line 1538.66 feet to a point on the East right of way line of the Soo Line Railroad; thence North 03° 54' 38" West along said East line 2983.97 feet to the point of beginning.

Tax Key No. 269-9993-110-2

ADDRESS: 3533 North 27th Street

PARCEL K: INTENTIONALLY OMITTED

PARCEL L:

All that part of the Northeast 1/4 of Section 12, in Township 7 North, Range 21 East, in the City of Milwaukee, County of Milwaukee, State of Wisconsin, bounded and described as follows, to-wit: Commencing at a point which is 33.00

Legal Description Continued

Order No 1219681

feet West of the East line and 660.00 feet North of the Southeast corner of said 1/4 Section; running thence South 88° 59' 30" West 176.95 feet to a point in the Northeasterly lot line of West Hopkins Street; thence South 35° 51' East 181.45 feet to a point, thence South 43° 37' East 102.30 feet to a point at the intersection of North 27th Street and West Hopkins Street; thence North along the West line of North 27th Street 224.25 feet to the place of commencement.

Tax Key No. 269-9986-100-7

ADDRESS: 3627 N. 27TH STREET

PARCEL M:

Lots 1, 2, 3, 21, 22 23, 24, 25 and 26, together with the East 1/2 of vacated North 26th Street adjoining said lots on the West in Block 2 in Peoples Building and Loan Association Subdivision No. 3, being a part of the Southwest 1/4 of Section 7, in Township 7 North, Range 21 East, in the City of Milwaukee, County of Milwaukee, State of Wisconsin. Excepting therefrom that part thereof described in Quit Claim Deed recorded as Document No. 5023903.

Tax Key No. 285-1704-110-8

ADDRESS- 2537 W. HOPKINS STREET

PARCEL N:

Blocks 3 and 4 together with vacated West Keefe Avenue, the West 1/2 of vacated North 26th Street adjoining said Block 3 on the East and the vacated alley in said Blocks, in Peoples Building and Loan Association No. 3, being a part of the Southwest 1/4 and Northwest 1/4 of Section 7, in Township 7 North, Range 22 East, in the City of Milwaukee, County of Milwaukee, State of Wisconsin.

Tax Key No. 285-1724-111-5

ADDRESS: 3424 N. 27TH STREET

EXHIBIT B

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

08CV001772

MILWAUKEE INDUSTRIAL TRADE CENTER, LLC

4777 West Lincoln Avenue

West Milwaukee, Wisconsin 53219,

Petitioner,

Case No. _____

Case Code: 30952

v.

CITY OF MILWAUKEE

Attn.: City Clerk

200 East Wells Street

Room 205

Milwaukee, Wisconsin 53202,

and

REDEVELOPMENT AUTHORITY of the City of Milwaukee

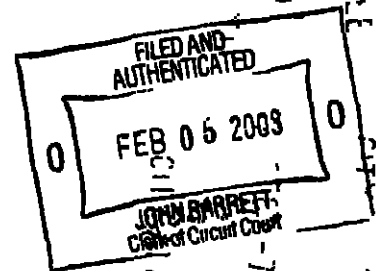
ATTN: Rocky Marcoax, Commissioner

Department of City Development

809 North Broadway

Milwaukee, Wisconsin 53202,

Respondents.



PETITION FOR WRIT OF MANDAMUS

1 The Petitioner, Milwaukee Industrial Trade Center, LLC (hereinafter referred to as "MITC"), is a Wisconsin limited liability company with its principal place of business located at 4777 West Lincoln Avenue, West Milwaukee, Wisconsin 53219.

2 The Respondent, City of Milwaukee (hereinafter "the City"), is a Wisconsin municipal corporation with its City Hall located at 200 East Wells Street, Milwaukee, Wisconsin 53202

3 The Department of City Development (hereinafter "DCD") is an administrative department of the City which is responsible for, among other things, the regulation of business

and real estate development, land use planning and construction and occupancy permitting within the confines of the City's borders.

4. The Respondent, the Redevelopment Authority of the City of Milwaukee (hereinafter "RACM"), is an agency of the State of Wisconsin, created pursuant to Sec. 66.1333, Wis Stats, and pursuant to Sec. 66.1333, Wis. Stats., RACM may be sued in its own name. RACM's principal place of business is 809 North Broadway, Milwaukee, Wisconsin 53202 and upon information and belief, its commissioner is Rocky Marcoux.

5. RACM's chief responsibilities are to eliminate blighting conditions that inhibit neighborhood reinvestment, to foster and promote business expansion and job creation, and to facilitate new business and housing development. Toward that end, RACM prepares and implements comprehensive redevelopment plans, assembles real estate for development, is empowered to borrow money and may condemn property in furtherance of its redevelopment objectives.

6. RACM relies on DCD for its professional, technical and administrative support to carry out its objectives.

7. One of the functions of DCD is to issue Certificates of Occupancy to individuals and businesses which desire to occupy certain properties within the City of Milwaukee that are either new commercial construction, buildings that have a change of use or buildings that have been vacant for some time and are reopened for business or use.

8. Under the provisions of City ordinance, Subchapter 8, Section 200-42, the Commissioner of DCD has a duty to and shall issue a Certificate of Occupancy after an application has been filed by the owner or tenant of a property after it is found by DCD that the

building, structure or premises in question complies with all City regulations applicable to the proposed occupancy.

9 That on or about November 10, 2006, MITC purchased several properties located in the City of Milwaukee (hereinafter the "Property"). The Property originally consisted of ten (10) parcels, however, two (2) were sold by MITC. The Property is bordered by Capitol Drive, West Hopkins Street, West Townsend Street, and North 27th Street. The remaining eight (8) parcels owned by MITC are identified by tax key numbers 269-9993-110-2, 269-0261-100-1, 269-0305-111-5, 270-0144-111-1, 285-1704-110-8, 285-1724-111-5, 269-0252-112-6, 269-0259-4. Collectively, these parcels consist of approximately eight-four (84) acres of industrial property. These parcels were previously owned by Tower Automotive Corporation, which operated offices and a large manufacturing facility on the Property.

10. MITC purchased the Property for the purpose of utilizing the Property's extensive industrial infrastructure, to relocate and expand several existing businesses operated by MITC's owners, and to redevelop and lease portions of the Property to suitable third party tenants.

11. At the time MITC purchased the Property it was subject to The Redevelopment Plan for the West Capitol Drive and North 35th Street "Century City" Project Area (hereinafter "the Redevelopment Plan") which was developed by RACM and upon information and belief is administered by DCD.

12. The primary goal of the Redevelopment Plan was to promote the attractive, productive and efficient use or reuse of land and buildings in the Project Area, which includes the Property, in a manner that provides high quality sites for businesses and industry while benefiting the surrounding community.

13. Included in the Redevelopment Plan was a table (hereinafter "the Table") which set forth those land uses which were allowed in the Project Area and on the Property

14. That on or about August 9, 2007, Midwest Rail and Dismantling, Inc., (hereinafter "Midwest"), a prospective tenant of MITC, applied to DCD for a Certificate of Occupancy to occupy a portion of the Property. Midwest, pursuant to its application, intended to use a portion of the Property as an office, contractor's shop and contractor's yard.

15. Pursuant to the Table in the Redevelopment Plan, contractor's shops and contractor's yards were permitted uses as a matter of right and offices are considered limited uses. Limited uses are defined in the Redevelopment Plan as uses that are permitted only when the commissioner of RACM finds that the use will meet certain standards defined in the Table.

16. That DCD did not process Midwest's application for a Certificate of Occupancy and to date, despite several inquiries by MITC, DCD and RACM have failed to act upon said application.

17. That the use of the Property proposed by Midwest is in full compliance with the Redevelopment Plan, and the occupancy of the Property by Midwest will not violate any of the laws of the State of Wisconsin or any ordinances of the City.

18. DCD and RACM's refusal to issue the Certificate of Occupancy has damaged MITC

19. That on or about August 9, 2007, Knapp Railroad Builders, Inc., (hereinafter "Knapp") a prospective tenant of MITC, applied to DCD for a Certificate of Occupancy to occupy a portion of the Property. Knapp, pursuant to its application, intended to use a portion of the Property as an office, contractor's shop and contractor's yard.

20. That after making inquiries with DCD, representatives of MITC learned that DCD and RACM ordered that certain building and electrical inspections were not to be completed as part of the normal course of confirming compliance with City regulations which in turn prevented the Certificate of Occupancy from being issued.

21. To date, the necessary inspections have not been performed and Knapp has not been issued a Certificate of Occupancy to occupy the Property.

22. The inspections of the Property that were required for issuing Knapp's permit were delayed intentionally by DCD and RACM.

23. Pursuant to the Table in the Redevelopment Plan, contractor's shops and contractor's yards were permitted uses as a matter of right and offices are considered limited uses. Limited uses are defined in the Redevelopment Plan as uses that are permitted only when the commissioner of RACM finds that the use will meet certain standards defined in the Table.

24. That the use of the Property proposed by Knapp is in full compliance with the Redevelopment Plan and but for DCD and RACM's decision to not commence the required inspections on the Property, the occupancy of the Property by Knapp would not violate any of the laws of the State of Wisconsin or any ordinance of the City.

25. DCD and RACM's failure to issue the Certificate of Occupancy has damaged MITC.

26. On or about August 15, 2007, Belly Commodity Trading, LLC, (hereinafter "Belly") a prospective tenant of MITC, applied to DCD for a Certificate of Occupancy to occupy a portion of the Property. Belly, pursuant to its application, intended to use a portion of the Property as an indoor collection recycling facility

27. To date, neither Belly nor MITC has received any input from either DCD or RACM as to the status of said application, nor has the Certificate of Occupancy been issued to Belly.

28. On or about December 13, 2007, the City produced a letter as part of an open records request submitted by MITC. Said letter was addressed to representatives of both MITC and Belly. This letter advised both parties that Belly would be required to obtain a conditional use permit from RACM for its proposed use of the Property.

29. Neither MITC nor Belly ever received said letter, despite the fact that it was a part of the public record produced by the City.

30. A conditional use permit was required by Belly to receive a Certificate of Occupancy.

31. That DCD and RACM's failure to properly notify Belly that a conditional use permit was required for its proposed use of the Property has unreasonably delayed Belly's right to occupy the Property and has damaged both Belly and MITC.

32. That sometime in July, 2007, Nodemart, LLC, (hereinafter "Nodemart") a prospective tenant of MITC, submitted an application for a Certificate of Occupancy to DCD to occupy space at the Property.

33. On December 13, 2007, the City produced a document dated September 10, 2007, from DCD to representatives of both MITC and Nodemart. This letter advised both parties that DCD would require a plan of operation from Nodemart so that a use determination could be made by DCD for purposes of issuing a Certificate of Occupancy.

34. Neither Nodemart nor MITC received this September 10, 2007 letter from DCD.

35. To date neither Nodemart nor MITC have received any response from DCD or RACM about the status of Nodemart's application for a Certificate of Occupancy.

36. Nodemart's application is in full compliance with all City building and zoning regulations, and the occupancy of the Property by Nodemart will not violate any of the laws of the State of Wisconsin or any ordinance of the City

37. That DCD and RACM's failure to properly notify Nodemart that a plan of operation was required for its proposed use of the Property has unreasonably delayed Nodemart's right to occupy the Property and has damaged both Nodemart and MITC.

38. MITC has a direct interest in this action because the refusal of DCD and RACM to process and issue Certificates of Occupancy for MITC's tenants deprives MITC of the ability to lease the Property in a lawful and authorized manner.

39. MITC and its tenants have a legal right to the Certificates of Occupancy at issue, and DCD and RACM have a duty to process and issue the Certificates of Occupancy where applicable

40. MITC has no other adequate remedy of law, and unless the requested Certificates of Occupancy are lawfully processed and issued by DCD and RACM, MITC will suffer irreparable harm.

WHEREFORE, Petitioner, Milwaukee Industrial Trade Center, LLC, requests that this Court enter a Writ of Mandamus

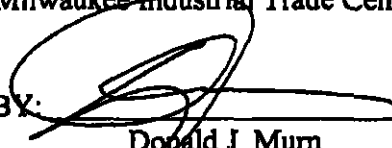
1. Directing the Respondents, the City of Milwaukee and RACM, to process Petitioner's applications for Certificates of Occupancy and, where applicable, issue said certificates,

2. Grant such additional relief as is just and appropriate under the circumstances; and

3 Grant an award of costs of bringing this action, including Petitioner's actual attorney's fees.

Dated this 5th day of February, 2008 at Waukesha, Wisconsin.

MURN & MARTIN, S.C.
Attorneys for Petitioner,
Milwaukee Industrial Trade Center, LLC

BY: 

Donald J. Murn
State Bar No.: 1013371
J. Michael Long
State Bar No.: 1024915

P.O. ADDRESS.

W20 N22961 Watertown Road
Waukesha, WI 53186-1184
(262) 524-8500
FAX: (262) 524-9200

EXHIBIT C

Hearing Date & Time: August 16, 2006 at 11:00 a.m. (ET)
 Objection Deadline August 11, 2006 at 4:00 p.m. (ET)

Richard M. Cieri (RC-6062)
 KIRKLAND & ELLIS LLP
 Citigroup Center
 153 East 53rd Street
 New York, New York 10022-4611
 Telephone: (212) 446-4800
 Facsimile: (212) 446-4900

and

Anup Sathy (AS-4915)
 KIRKLAND & ELLIS LLP
 200 East Randolph Drive
 Chicago, Illinois 60601
 Telephone: (312) 861-2000
 Facsimile: (312) 861-2200
 Attorneys for the Debtors and Debtors in Possession

**UNITED STATES BANKRUPTCY COURT
 SOUTHERN DISTRICT OF NEW YORK**

IN RE

TOWER AUTOMOTIVE, INC., ET AL.
 DEBTORS.

)
) CHAPTER 11
)
)
) CASE NO. 05-10578 (ALG)
) JOINTLY ADMINISTERED
)
)

**NOTICE OF MOTION FOR AN ORDER PURSUANT TO 11 U.S.C. § 363 APPROVING
 THE SALE OF CERTAIN REAL PROPERTY FREE AND CLEAR OF LIENS,
CLAIMS AND ENCUMBRANCES**

PLEASE TAKE NOTICE, that on August 4, 2006, Tower Automotive Products Company, Inc. ("Tower Products" or the "Debtor"), as one of the debtors and debtors in possession in the above-captioned cases, filed a motion (the "Motion") with this Court for entry of an order pursuant to 11 U.S.C. § 363 approving a purchase agreement for the sale of certain real property free and clear of liens, claims and encumbrances.

PLEASE TAKE FURTHER NOTICE that a hearing will be held before the Honorable Allan L. Gropper, United States Bankruptcy Judge, on August 16, 2006 at 11:00 a.m., or as soon thereafter as counsel may be heard, in Courtroom 617, United States Bankruptcy Court for the Southern District of New York, One Bowling Green, New York, New York 10004, to consider the Motion.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the relief requested in the Motion must comply with the Federal Rules of Bankruptcy Procedure and the Local Rules of the United States Bankruptcy Court for the Southern District of New York, must be set forth in a writing describing the basis therefor and must be filed with the Court electronically in accordance with General Orders M-182 and M-193 by registered users of the Court's electronic case filing system (the User's Manual for the Electronic Case Filing System can be found at www.nysb.uscourts.gov, the official website of the Bankruptcy Court) and, by all other parties in interest, on a 3¹/₂ inch disk, preferably in Portable Document Format (PDF), Word Perfect or any other Windows-based word processing format (with a hard copy delivered directly to Chambers) and served in accordance with General Order M-182 or by first-class mail upon each of the following: (i) Judge Gropper's Chambers, Room 517, United States Bankruptcy Court, One Bowling Green, New York, New York 10004; (ii) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, New York 10004, Attn: Alicia M. Leonhard; (iii) attorneys for the Debtors, Kirkland & Ellis LLP, AON Building, 200 East Randolph Drive, Chicago, Illinois 60601, Attn: Anup Sathy; (iv) attorneys for the Official Committee of Unsecured Creditors, Akin Gump Strauss Hauer & Feld LLP, 590 Madison Avenue, New York, New York 10022-2524, Attn: Daniel H. Golden and Ira S. Dizengoff; (v) attorneys for the Debtors' prepetition secured lenders, Milbank, Tweed, Hadley &

McCloy LLP, 1 Chase Manhattan Place, New York, New York 10005, Attn: Luc Despina and James Tecce; and (vi) attorneys for the administrative agent for the Debtors' postpetition secured lenders, Morgan, Lewis & Bockius LLP, 101 Park Avenue, New York, New York 10178-0060, Attn: Leonard Klingbaum and Jay Teitelbaum; so as to be received no later than 4:00 p.m. on August 11, 2006.

PLEASE TAKE FURTHER NOTICE that the Hearing may be continued or adjourned from time to time without further notice other than an announcement of the adjourned date or dates at the Hearing or at a later hearing.

PLEASE TAKE FURTHER NOTICE that unless objections are received by that time, the relief may be granted as requested in the Motion without a hearing.

New York, New York
Dated: August 4, 2006

Respectfully submitted,
Richard M. Cieri (RC-6062)
KIRKLAND & ELLIS LLP
Citigroup Center
153 East 53rd Street
New York, New York 10022
(212) 446-4800
and
/s/ Anup Sathy
Anup Sathy (AS-4915)
KIRKLAND & ELLIS LLP
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000
Attorneys for the Debtors and Debtors in Possession

Hearing Date & Time: August 16, 2006 at 11:00 a.m. (ET)
Objection Deadline: August 11, 2006 at 4:00 p.m. (ET)

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Telephone: (312) 861-2000
Facsimile: (312) 861-2200
Attorneys for the Debtors and Debtors in Possession

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE	)	CHAPTER 11
	)	
TOWER AUTOMOTIVE, INC., <u>ET AL.</u>	)	CASE NO. 05-10578 (ALG)
	)	JOINTLY ADMINISTERED
DEBTORS.	)	
	)	

**MOTION FOR AN ORDER PURSUANT TO 11 U.S.C. § 363 APPROVING THE SALE
OF CERTAIN REAL PROPERTY FREE AND CLEAR OF LIENS,
CLAIMS AND ENCUMBRANCES**

Tower Automotive Products Company, Inc. ("Tower Products" or the "Debtor"), one of the debtors and debtors in possession in the above-mentioned chapter 11 proceedings (collectively, the "Debtors"), hereby submits this motion (the "Motion") for entry of an order, substantially in the form attached hereto as Exhibit A (the "Sale Order"), pursuant to section 363 of title 11 of the United States Code (the "Bankruptcy Code") and Rule 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), approving a purchase agreement by

and among Tower Products and Gerald Blomberg (the "Purchaser"), substantially in the form attached hereto as Exhibit B (the "Purchase Agreement"), for the sale of certain real property located at and around 3500 W Capitol Drive, Milwaukee, Wisconsin (the "East Milwaukee Facility"), to the Purchaser free and clear of liens, claims and encumbrances. In support of this Motion, Tower Products respectfully represents as follows:

JURISDICTION

This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2). Venue of this proceeding and this Motion is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

The statutory bases for the relief requested herein are section 363 of the Bankruptcy Code and Rule 6004 of the Bankruptcy Rules.

BACKGROUND

On February 2, 2005 (the "Commencement Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "Reorganization Cases"). The Debtors continue in possession of their properties and are operating and managing their businesses as debtors and debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee or examiner has been appointed in these Reorganization Cases.

On February 14, 2005, the Office of the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Creditors Committee") in these Reorganization Cases.

RELIEF REQUESTED

By this Motion, Tower Products seeks approval of the Purchase Agreement and authority to sell the East Milwaukee Facility to the Purchaser for \$2,000,000 in cash, subject to the terms and conditions of the Purchase Agreement.¹ Because the expected proceeds from the proposed sale exceed \$1,000,000, the sale is not subject to this Court's Order Authorizing and Approving Expedited Procedures for the Sale or Abandonment of De Minimis Assets (Docket No. 249).

¹ The factual representations contained herein are supported by the Affidavit of Frank Miceli, a copy of which is attached hereto as Exhibit C.

THE EAST MILWAUKEE FACILITY

The East Milwaukee Facility is a manufacturing facility located on 86 acres of land in an industrial park located at and around 3500 West Capitol Drive, Milwaukee, Wisconsin. The East Milwaukee Facility contains on-site improvements totaling approximately 2,150,290 square feet. The 86-acre East Milwaukee Facility is part of a larger, 148 acre parcel of land (together with the East Milwaukee Facility, the "Property") also owned by the Debtors. The Debtors acquired the Property as part of their acquisition of the automotive products group of A. O. Smith Corporation in 1997. The East Milwaukee Facility was primarily engaged in stamping and frame assembly.

In early 2005, in connection with the Debtors' overall restructuring strategy to reduce fixed costs by reducing and consolidating the Debtors' operating locations, Tower Products determined that the work being performed at the East Milwaukee Facility could be better accommodated in existing floor space at Tower Products' other manufacturing plants. Therefore, the decision was made to relocate such work to other facilities in an effort to achieve such operating and cost improvements. On March 31, 2006, Tower Products ceased all operations at the East Milwaukee Facility. The estimated monthly costs associated with holding the inactive East Milwaukee Facility (e.g., utility expenses, property taxes and miscellaneous maintenance) are approximately \$25,000 per month.

The East Milwaukee Facility also requires substantial environmental remediation, including the removal of asbestos.

MARKETING HISTORY

Tower Products initially marketed the East Milwaukee Facility in 2001 as part of a contemplated sale/leaseback transaction for the entire Property. At such time, Tower Products intended to continue its manufacturing operations at the East Milwaukee Facility. Tower Products retained the commercial real estate firm of The Dickman Company, Inc. (the "Broker") to market this transaction.²

In 2001, the Broker mailed a Request for Proposals for the proposed transaction to approximately 200 local investors. The Broker also listed the Property on the Dickman Company website and two commercial real estate listing services (Xceligent and Loopnet). Advertisements for the Property were also placed in the *Milwaukee Journal Sentinel* and the *Wall Street Journal*. Despite these extensive efforts, Tower Products received only two responses and no offers.

In 2003, the Broker sent Requests for Proposal to over 190 potential buyers across the country. These efforts also generated no offers for the Property.

² A copy of Tower Products' agreement with the Broker (the "Listing Agreement") is attached hereto as Exhibit D

In 2005, it was determined that the Debtors would attempt to sell pieces of the Property as portions were vacated after previous efforts to generate any significant buyer interest in the Property as a whole failed. The Broker consequently initiated an extensive marketing campaign (the "Marketing Campaign") for the sale of the East Milwaukee Facility. Specifically, the Marketing Campaign included, but was not limited to, the following initiatives by the Broker on Tower Products' behalf:

Aerial photographs, building plans, demographic and economic data, area maps, power plant information, and building details were developed and assembled in order to create a comprehensive information package to elicit interest in the East Milwaukee Facility;

Approximately 180 information packets were distributed to known investors, users, and industrial real estate brokers in a Request for Proposals;

The Property was advertised in the Commercial Real Estate/National Coverage edition of the Wall Street Journal; and

Information relating to the East Milwaukee Facility on the commercial real estate listing sites, Xceligent (www.xceligent.com) and Loopnet (www.loopnet.com), as well as the Dickman Company website (www.dickmanrealestate.com) was updated, and the East Milwaukee Facility was added to the Wisconsin economic development website (www.ForwardWisconsin.com).

Despite the extensive Marketing Campaign undertaken on behalf of Tower Products, the East Milwaukee Facility generated interest from only three potential buyers, including two brownfield developers and the Purchaser.³ Ultimately, the Purchaser made the only firm offer for the East Milwaukee Facility. The Purchaser's initial offer was for \$1,800,000 and the assumption of all environmental liabilities associated with the site. Over the course of negotiations, the Purchaser increased the cash component of its bid to \$2,000,000 (the "Purchase Price"). The Purchaser has also agreed to post a \$1,000,000 letter of credit to secure its obligations to remediate the site.

PURCHASE AGREEMENT

Following arm's-length negotiations, Tower Products agreed to sell the East Milwaukee Facility to the Purchaser for the Purchase Price and the remediation of the site on which the facility is located, pursuant to the terms and conditions of the Purchase Agreement and subject to Court approval.

The Debtors determined that the Purchaser's offer presented the best opportunity to realize substantial value for the East Milwaukee Facility. Despite the extensive marketing

³ An appraisal conducted in September 2005 indicated that \$7,500,000 would be a fair value for the East Milwaukee Facility. However, such valuation assumed that the site was free and clear of any existing environmental issues, which it is not. As noted above, the East Milwaukee Facility requires significant environmental remediation, including asbestos removal. The fact that, prior to the Marketing Campaign, the property had been marketed extensively since 2001 without any offers at any price further undermines this appraisal.

efforts undertaken on behalf of the Debtors, the sole bid received for the East Milwaukee Facility was that of the Purchaser for \$1,800,000. The Purchase Price represents a \$200,000 increase from the Purchaser's initial offer for the East Milwaukee Facility. In addition, the Purchaser has agreed to undertake the environmental remediation of the East Milwaukee Facility. This remediation confers substantial value to Tower Products given the significant degree to which environmental issues have impaired the value of the East Milwaukee Facility. Consequently, Tower Products believes that the Purchase Price represents fair value for the East Milwaukee Facility.

In addition, pursuant to the Purchase Agreement and Listing Agreement, upon closing, Tower Products is responsible for paying a one-time fee to the Broker (the "Broker Fee") equal to 4% of the Purchase Price in consideration for the Broker's postpetition services rendered to Tower Products in connection with marketing the East Milwaukee Facility.

Tower Products submits that this transaction, as embodied in the Purchase Agreement, is highly favorable and is in the best interests of its estate and creditors.

BASIS FOR RELIEF

I. THE SALE UNDER THE TERMS OF THE PURCHASE AGREEMENT IS A SOUND EXERCISE OF TOWER PRODUCTS' BUSINESS JUDGMENT.

Section 363 of the Bankruptcy Code provides that a debtor, "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate..." 11 U.S.C. § 363(b)(1). To approve the use, sale or lease of property outside of the ordinary course of business, this Court need only determine that Tower Products' decision to enter into the Purchase Agreement is supported by an articulated business justification. In re Schipper, 933 F.2d 513, 515 (7th Cir. 1991); Institutional Creditors of Continental Air Lines v. Continental Air Lines (In re Continental Air Lines, Inc.), 780 F.2d 1223, 1226 (5th Cir. 1986); Stephens Indus., Inc. v. McClung, 789 F.2d 386, 389-90 (6th Cir. 1986); Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1070 (2d Cir. 1983); In re Enron Corp., 335 B.R. 22, 27-28 (S.D.N.Y. 2005); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 175-76 (D. Del. 1991). A transaction has a sound business justification where:

There is a valid business reason for the transaction;

The interested parties received adequate notice, including full disclosure of the terms of the deal;

The property is sold at a fair and reasonable price; and

The proposed buyer proceeds in good faith.

In re Taylor, 198 B.R. 142, 157 (Bankr. D.S.C. 1996); In re Delaware & Hudson Ry., 124 B.R. at 176; Titusville Country Club v. Pennbank (In re Titusville Country Club), 128 B.R. 396, 399 (Bankr. W.D. Pa. 1991); see also Stephens Indus., 789 F.2d at 389-90; Lionel Corp. 722

F.2d at 1071; In re Angelika Films 57th, Inc., Nos. 97 Civ. 2239(MBM), 97 Civ. 2241(MBM), 1997 WL 283412, at *6-*9 (S.D.N.Y. May 29, 1997) In re Phoenix Steel Corp., 82 B.R. 334, 335-36 (Bankr. D. Del. 1987).

Once a debtor has articulated a valid business justification for a sale under section 363, the business judgment rule arises as a presumption that the sale would be in the best interest of the estate. See In re Global Crossing, Ltd., 295 B.R. 726, 743-45 & n.58 (Bankr. S.D.N.Y. 2003); see also In re Integrated Res., Inc., 147 B.R. 650, 656-57 (S.D.N.Y. 1992). Indeed, courts will show great deference to a debtor's business decisions when applying the business judgment standard. See Global Crossing, 295 B.R. at 744 n.58 ("[T]he Court does not believe that it is appropriate for a bankruptcy court to substitute its own business judgment for that of the Debtors and their advisors, so long as they have satisfied the requirements articulated in the caselaw.").

Where there is no objection after notice, a proposed disposition of assets under section 363 may be effective without judicial review. In re Telephere Commc'ns, Inc., 179 B.R. 544, 552 (Bankr. N.D. Ill. 1994). An objecting party must also present evidence challenging the sale in question. Lionel Corp., 722 F.2d at 1071. Thus, a court may properly dismiss an objection not supported by evidence challenging a debtor's exercise of business judgment to sell property under section 363. See Enron Corp., 335 B.R. at 28-29.

1. Tower Products Has Sound Business Reasons for Entering Into the Purchase Agreement.

Tower Products respectfully submits that there are a number of sound business reasons to enter into the Purchase Agreement. First, the East Milwaukee Facility is inactive and obsolete. Second, the proposed sale will eliminate hundreds of thousands of dollars in annual maintenance costs and taxes. Third, the proposed sale will generate significant proceeds for the benefit of the Debtor's estate and creditors. Fourth, the proposed sale allows Tower Products to rid itself of the burdensome and costly environmental remediation associated with the East Milwaukee Facility.

As discussed above, the Debtors are undergoing a significant consolidation of their North American operations. The Debtors are thereby eliminating duplicative operating costs associated with maintaining operations at multiple facilities. This Court has already recognized the compelling interest in divesting outdated manufacturing facilities by permitting the Debtor to sell its facility in Bowling Green, Kentucky. See Order Approving Asset Purchase Agreement For The Sale Of Certain Real Property And Equipment Free And Clear Of Liens, Claims And Encumbrances (Docket No. 764, dated September 21, 2005).

Like its previous decision to cease operations in Bowling Green, Tower Products' determination to transfer the work formerly performed at the East Milwaukee Facility is part of its ongoing consolidation and restructuring efforts. Courts have recognized that the disposal of unnecessary assets under section 363 may be a vital stride towards

reorganization. "[W]here a transaction would free assets for distribution, and circumvent no Chapter 11 right, it may be approved as a necessary step toward, or building block of, a plan of reorganization." In re Crowthers McCall Pattern, Inc., 114 B.R. 877, 885 (Bankr. S.D.N.Y. 1990) (citation omitted). Indeed, this Court has already approved the first step in the Debtors' plan to divest itself of the burdensome costs associated with maintaining the East Milwaukee Facility when it authorized the Debtors to sell certain equipment located at and around the East Milwaukee Facility. See Order Authorizing the Debtor to Enter into an Asset Purchase Agreement for the Sale of Certain Personal Property and Equipment Free and Clear of Liens, Claims and Encumbrances (Docket No. 1507, dated June 21, 2006).

Tower Products desires to eliminate the maintenance and carrying costs associated with holding this inoperative asset and generate cash proceeds for the benefit of its estate. Tower Products neither manufactures any products at the East Milwaukee Facility, nor does Tower Products intend to manufacture any products at the East Milwaukee Facility in the future. Tower Products possesses modern and more efficient manufacturing facilities in other locations which perform identical tasks on a more cost-efficient basis.

Furthermore, the sale of the East Milwaukee Facility relieves Tower Products of the expensive and burdensome remediation of the site. The East Milwaukee Facility requires significant environmental remediation, including asbestos removal. The impact of these environmental issues on the value of the East Milwaukee Facility suggests the substantial costs that Tower Products may incur were it to retain the East Milwaukee Facility. The Purchaser has agreed to remediate the site as a condition of sale, thereby relieving Tower Products of this potentially burdensome obligation. Indeed, the Purchaser's willingness to remediate the site constitutes substantial value for the estate.

Tower Products further submits that the circumstances surrounding its efforts to market and sell the East Milwaukee Facility warrant approval of the sale to the Purchaser without requiring an independent auction process. The Debtors have been attempting to sell the East Milwaukee Facility for over five years. Prior to the recent Marketing Campaign, these efforts generated no meaningful interest in the Property. Tower Products' recent Marketing Campaign generated a single bid for the East Milwaukee Facility. As a result, Tower Products believes it unlikely that there would be a higher bidder than the Purchaser, given the extent of its previous efforts and the Marketing Campaign and the significant environmental issues associated with the East Milwaukee Facility. Further, there is no guarantee that Tower Products could obtain value equal or greater to the Purchase Price, compounded by the costs imposed by maintaining the inoperative facility. Declining to assume the risks associated with such a process is a valid exercise of the Debtors' considered business judgment. Global Crossing, 295 B.R. at 746.

The East Milwaukee Facility also represents a negligible proportion of the estate's total value. A court may consider the size of the asset in question when considering a motion for sale under section 363(b). Continental Air Lines, 780 F.2d at 1226; Stephens Indus., 789 F.2d at 389; Lionel Corp., 722 F.2d at 1071. A court may show greater deference to a debtor's business decision to sell assets of negligible value because there is no concern that a debtor has attempted to circumvent safeguards otherwise available in chapter 11 to

protect the overall value of the estate. See, e.g., In re Burke Mountain Recreation Co., 56 B.R. 72, 73-74 (Bankr. D. Vt. 1985); see also In re Au Natural Rest., Inc., 63 B.R. 575, 580 (Bankr. S.D.N.Y. 1986). The Debtors remain in possession of a multi-billion dollar estate. The Purchase Price of this transaction is \$2,000,000. The sale constitutes valid exercise of the Debtors' business judgment to realize value from a relatively minor component of its estate.

In Tower Products' considered business judgment, immediate execution of the Purchase Agreement is the best way to realize value on account of the East Milwaukee Facility and to avoid the costs associated with retaining the property.

2. The Purchase Price is Fair and Reasonable.

Section 363(b) requires that any sale of corporate assets outside of the ordinary course of business be at a fair and reasonable price. See In re Apex Oil Co., 92 B.R. 847, 866 (Bankr. E.D. Mo. 1988); see also Lionel Corp., 722 F.2d at 1071. As discussed above, the Purchase Agreement is the product of the thorough and active marketing efforts conducted on behalf of Tower Products by the Broker. The Marketing Campaign resulted in a single competitive bid for the East Milwaukee Facility. Though prior appraisals initially indicated a higher value for the East Milwaukee Facility, all prior valuations were contingent on an environmentally clean site. Consequently, the Purchase Price of \$2,000,000, coupled with the Purchaser's agreement to remediate the site, represents a fair and reasonable purchase price. All available information, including but not limited to Tower Products' previous efforts to sell the East Milwaukee Facility and the results of the Marketing Campaign, indicate that the Purchase Price is the best offer for the facility.

3. The Purchase Agreement Has Been Negotiated in Good Faith.

Under section 363(b), a purchaser's good faith may be established where the sale was the product of arm's length negotiations between parties. See Apex Oil, 92 B.R. at 870. Lack of good faith is typically determined by conduct that involves fraudulent conduct, collusion, or an attempt to take unfair advantage of other bidders during the sale proceedings. In re Exennium, Inc., 715 F.2d 1401, 1404-05 (9th Cir. 1983); Angelika Films 57th, Inc., 1997 WL 283412 at *7.

The Purchase Agreement is the product of good faith negotiations between Tower Products and the Purchaser. The proposed sale is the result of an extensive marketing campaign, during which the East Milwaukee Facility was marketed to hundreds of potential purchasers. Moreover, the Purchase Price represents a \$200,000 increase in value from the initial bid received for the facility. The Purchaser also posted a \$1,000,000 letter of credit in order to secure its obligation to remediate the East Milwaukee Facility. Tower Products, therefore, requests that the Court find that Purchaser is a "good faith purchaser" under section 363(m) of the Bankruptcy Code with respect to the Purchase Agreement.

NOTICE

Notice of this Motion has been given to (a) the "Notice List," as set forth in that certain Order Establishing Notice Procedures, dated February 4, 2005 (docket no. 72), (b) the Purchaser, (c) those additional parties identified by Tower Products as possibly having a use for the East Milwaukee Facility, (d) those parties known to have asserted a lien against Tower Products or the East Milwaukee Facility, and (e) the applicable local and state taxing and governmental authorities. In light of the nature of the relief requested, Tower Products submits that no further notice is required.

NO PRIOR REQUEST

No previous motion for the relief requested herein has been made to this or any other court.

WHEREFORE Tower Products respectfully requests that the Court enter an order

(i) approving the Purchase Agreement for the sale of the East Milwaukee Facility to the Purchaser, and (ii) granting such other relief as the Court finds fair and just.

THE SALE SATISFIES THE REQUIREMENTS OF BANKRUPTCY CODE SECTION 363(F) FOR A SALE FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND INTERESTS.

Under section 363(f) of the Bankruptcy Code, a debtor-in-possession may sell property free and clear of any lien, claim, or interest of an entity in such property if:

applicable nonbankruptcy law permits sale of such property free and clear of such interest,

such entity consents;

such interest is a lien and the price at which the property is sold is greater than the aggregate value of all liens on such property;

such interest is in bona fide dispute; or

such entity could be compelled, in a legal or equitable proceeding, to accept money satisfaction of such interest.

Because section 363(f) of the Bankruptcy Code is drafted in the disjunctive, satisfaction of any one of its five requirements is sufficient to permit the sale of the East Milwaukee Facility free and clear of liens, claims, encumbrances, pledges, mortgages, security interests, charges, options, and other interests (collectively, the "Interests" or the "Claims"). Section 363(f) of the Bankruptcy Code is satisfied in this instance because all holders of Interests could be compelled to accept a money satisfaction of their Interests in legal or equitable proceedings in accordance with section 363(f)(5) of the Bankruptcy Code. "Such legal or equitable proceedings" under section 363(f)(5) of the Bankruptcy Code include proceedings to confirm a plan of reorganization, under which the holder of a lien may be compelled to accept payment in satisfaction of its lien pursuant to section 1129(b)(2)(a) of the Bankruptcy Code.

In fact, section 1129(b)(2)(A) of the Bankruptcy Code specifically allows a debtor to sell property subject to a lien free and clear if such lien attaches to the net proceeds of the sale, subject to any claims and defenses the debtor may possess with respect thereto. Tower Products proposes that any security interests in the East Milwaukee Facility immediately attach to the net proceeds of the sale, thus satisfying the requirement of section 363(f).

MEMORANDUM OF LAW

This Motion includes citations to the applicable authorities and a discussion of their application to this Motion. Accordingly, the Debtor respectfully submits that such citations and discussion satisfy the requirement that the Debtor submit a separate memorandum of law in support of this Motion pursuant to Rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York.

New York, New York
Dated: August 4, 2006

Respectfully submitted,
Richard M. Cieri (RC-6062)
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(212) 446-4800

and

/s/ Anup Sathy

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Attorneys for the Debtors and Debtors in
Possession

EXHIBIT A
PROPOSED SALE ORDER

A-1

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE

TOWER AUTOMOTIVE, INC., ET AL.,

DEBTORS.

CHAPTER 11

CASE NO. 05-10578 (ALG)

JOINTLY ADMINISTERED

**ORDER APPROVING THE SALE OF CERTAIN REAL PROPERTY FREE
AND CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES**

Upon the motion (the "Motion")¹ of Tower Automotive Products Company, Inc., a debtor and debtor in possession in the above-captioned chapter 11 proceedings ("Tower Products" or the "Debtor"), for entry of an order (this "Sale Order") pursuant to section 363 of title 11 of the United States Code (the "Bankruptcy Code") and Rule 6004 of the Federal Rules of Bankruptcy Procedure, approving a purchase agreement by and among Tower Products and Gerald Blomberg (and including any assigns, the "Purchaser"), substantially in the form attached to the Motion as Exhibit B (the "Purchase Agreement"), to sell certain real property located in Milwaukee, Wisconsin (collectively, the "East Milwaukee Facility") to the Purchaser free and clear of liens, claims and encumbrances, and it appearing that the relief requested is in the best interest of the Debtor's estate, its creditors, and other parties in interest; and it appearing that this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and it appearing that this proceeding is a core proceeding pursuant to 28 U.S.C. § 157; and it appearing that venue of this proceeding and this Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and notice of this Motion and the opportunity for a hearing on this Motion was appropriate under

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion or the Purchase Agreement, as the case may be.

the particular circumstances and that no other or further notice need be given; and after due deliberation and sufficient cause appearing therefor, it is hereby

ORDERED that good and sufficient reasons for approval of the sale to Purchaser under the terms of the Purchase Agreement have been articulated, and the relief requested in the Motion is in the best interests of the Debtor, its estate, its creditors and other parties in interest; and it is further

ORDERED that Tower Products may sell the East Milwaukee Facility free and clear of all Claims and Interests pursuant to section 363 of the Bankruptcy Code; and it is further

ORDERED that, pursuant to the terms of the Purchase Agreement and Listing Agreement, Tower Products is authorized to pay the Broker Fee to the Broker; and it is further

ORDERED that Tower Products has demonstrated both: (a) good, sufficient and sound business purposes and justification; and (b) compelling circumstances for the sale other than in the ordinary course of business, pursuant to section 363(b) of the Bankruptcy Code; and it is further

ORDERED that Purchaser is a good faith purchaser under section 363(m) of the Bankruptcy Code and, as such, is entitled to all of the protections afforded thereby; and it is further

ORDERED that the consideration provided by Purchaser pursuant to the Purchase Agreement: (i) is fair and reasonable; (ii) is the highest and best offer for the East Milwaukee Facility; (iii) will provide a greater recovery for the Debtor's estate than would be provided by any other practical, available alternative, and (iv) constitutes reasonably equivalent value and fair consideration for the East Milwaukee Facility; and it is further

ORDERED that the transfer of the East Milwaukee Facility to Purchaser pursuant to the Purchase Agreement will be a legal, valid, and effective transfer of the asset, and vests with or will vest in Purchaser all right, title, and interest of Tower Products in the East Milwaukee Facility, free and clear of liens, mortgages, security interests, conditional sales or other title retention agreements, pledges, claims, judgments, demands, encumbrances including, without limitation, claims, and encumbrances that purport to give to any party a right or option to effect any forfeiture, modification or termination of the Debtor's or Purchaser's interests in the East Milwaukee Facility, with all such Interests to attach to the Debtor's interest, if any, in the proceeds of the Sale (the "Sale Proceeds") in order of priority, subject to any rights, claims and defenses of the Debtor or other parties in interest; and it is further

ORDERED that the Purchaser has consented to this form of Sale Order; and it is further

ORDERED that any objections to the entry of this Sale Order or the relief granted herein and requested in the Motion that have not been withdrawn, waived or settled, and all reservations of rights included therein, are hereby denied and overruled on the merits with prejudice; and it is further

ORDERED that the Debtor is (i) authorized to execute, deliver, perform under, consummate and implement, the Purchase Agreement (subject to the applicable closing conditions set forth in the Purchase Agreement), collectively with all additional instruments and documents that may be reasonably necessary or desirable to implement the Purchase Agreement, and (ii) authorized to take all further actions as may be requested by Purchaser for the purpose of transferring the East Milwaukee Facility to Purchaser or as may be necessary or appropriate to the performance of the obligations contemplated by the Purchase Agreement; and it is further

ORDERED that on closing the sale of the East Milwaukee Facility to Purchaser (the "Closing"), this Sale Order shall be construed and shall constitute for any and all purposes a full and complete general assignment, conveyance and transfer of the East Milwaukee Facility or a bill of sale transferring good and marketable title in the East Milwaukee Facility to Purchaser. Each and every federal, state, and local governmental agency or department is hereby directed to accept any and all documents and instruments necessary and appropriate to consummate the transactions contemplated by the Purchase Agreement; and it is further

ORDERED that subject to the occurrence of the Closing, this Sale Order: (a) is and shall be effective as a determination that all Interests and Claims of any kind or nature whatsoever existing as to the East Milwaukee Facility prior to the Closing have been unconditionally released, discharged and terminated, and that the conveyances described herein have been effected; and (b) shall be binding upon and shall govern the acts of all entities, including without limitation all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, secretaries of state, federal, state and local officials, and all other persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to the East Milwaukee Facility; and it is further

ORDERED that upon the granting of this Sale Order, with respect to the Purchase Agreement, Purchaser shall be entitled to protection under section 363(m) of the Bankruptcy Code. The transactions contemplated by the Purchase Agreement are undertaken by the Purchaser in good faith, as that term is used in section 363(m) of the Bankruptcy Code and, accordingly, the reversal or modification on appeal of the authorization provided herein to

consummate the sale shall not affect the validity of the sale to Purchaser, unless such authorization is duly stayed pending such appeal; and it is further

ORDERED that this Court retains jurisdiction to enforce and implement the terms and provisions of this Sale Order and the Purchase Agreement, all amendments thereto, any waivers and consents thereunder, and of each of any agreements executed in connection therewith in all respects, including, but not limited to, retaining jurisdiction to: (a) resolve any disputes arising under or related to the Purchase Agreement, except as otherwise provided therein; and (b) interpret, implement and enforce the provisions of this Sale Order; and it is further

ORDERED that each of the Debtor's creditors is authorized and directed on or before the Closing to execute such documents and take all other actions as may be necessary to release its Interests in or Claims against the East Milwaukee Facility, if any, as such Interests or Claims may have been recorded or otherwise exist; and it is further

ORDERED that the Purchase Agreement and any related agreements, documents or other instruments may be modified, amended or supplemented by the parties thereto, in a writing signed by such parties, and in accordance with the terms thereof, without further order of the Court, provided that any such modification, amendment or supplement does not have a material adverse effect on the Debtor's estate; and it is further

ORDERED that the failure specifically to include any particular provisions of the Purchase Agreement in this Sale Order shall not diminish or impair the effectiveness of such provisions, it being the intent of the Court that the Purchase Agreement be authorized and approved in its entirety. Likewise, all of the provisions of this Sale Order are nonseverable and mutually dependent, and it is further

ORDERED that notwithstanding the provisions of Fed. R. Bankr. P. 6004(g) and Rule 62(a) of the Federal Rules of Civil Procedure, this Sale Order shall not be stayed for ten (10) days after the entry hereof, but shall be effective and enforceable immediately upon issuance hereof.

New York, New York
Dated: August __, 2006

Hon. Allan L. Gropper
United States Bankruptcy Judge

EXHIBIT B
PURCHASE AGREEMENT

WB-18 COMMERCIAL OFFER TO PURCHASE

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1 BROKER DRAFTING THIS OFFER ON 05/15/2006 (DATE) IS (AGENT OF SELLER) (AGENT-OF-BUYER) (DUAL-AGENT) ~~(STRIKE TWO)~~
2 ~~(GENERAL PROVISIONS)~~ The Buyer, Gerald Blomberg and/or Assignee
3 ~~desires to purchase the Property known as (Street Address)~~ Tower East Facility, 2,200,000 S.F. in the
4 CITY of Milwaukee, County of Milwaukee, Wisconsin. (Insert additional
5 description, if any, at lines 293 - 297 or attach as an addendum per line 298), on the following terms:
6 ~~■ PURCHASE PRICE: Two Million~~
7 Dollars (\$2,000,000.00)
8 ~~■ EARNEST MONEY of \$5,000.00~~ accompanied this Offer and earnest money of \$
9 will be paid within 5 days of acceptance.
10 ~~■ THE BALANCE OF PURCHASE PRICE will be paid in cash or equivalent at closing unless otherwise provided below.~~
11 ~~■ ADDITIONAL ITEMS INCLUDED IN PURCHASE PRICE:~~ Seller shall include in the purchase price and transfer, free and clear of encum-
12 brances, all fixtures, as defined at lines 117 - 120 and as may be on the Property on the date of this Offer, unless excluded at lines 15 - 16, and
13 the following additional items: Cranes, electrical equipment, buses bars and any equipment/fixtures necessary to operate the buildings on
14 the premises.
15 ~~■ ITEMS NOT INCLUDED IN THE PURCHASE PRICE: CAUTION: Address rented fixtures or trade fixtures owned by tenants, if~~
16 ~~applicable. Dodge Ram and Ranger lines and Hydroform equipment~~
17 All personal property included in purchase price will be transferred by bill of sale or
18 ~~(ACCEPTANCE)~~ Acceptance occurs when all Buyers and Sellers have signed an identical copy of the Offer, including signatures on separate
19 but identical copies of the Offer. CAUTION: Deadlines in the Offer are commonly calculated from acceptance. Consider whether short term
20 deadlines running from acceptance provide adequate time for both binding acceptance and performance.
21 ~~(BINDING ACCEPTANCE)~~ This Offer is binding upon both Parties only if a copy of the accepted Offer is delivered to Buyer on or before
22 May 19, 2006. CAUTION: This Offer may be withdrawn prior to delivery of the accepted Offer.
23 ~~(DELIVERY OF DOCUMENTS AND WRITTEN NOTICE)~~ Unless otherwise stated in this Offer, delivery of documents and written notices
24 to a Party shall be effective only when accomplished by one of the methods specified at lines 25 - 34.
25 (1) By depositing the document or written notice postage or fees prepaid in the U.S. Mail or fees prepaid or charged to an account with a com-
26 mercial delivery service, addressed either to the Party, or to the Party's recipient for delivery designated at lines 28 or 30 (if any), for delivery to
27 the Party's delivery address at lines 28 or 31.
28 Seller's recipient for delivery (optional): Samuel D. Dickman, The Dickman Company, Inc.
29 Seller's delivery address: 626 East Wisconsin Avenue, Suite 1020, Milwaukee, WI 53202
30 Buyer's recipient for delivery (optional): Samuel D. Dickman, The Dickman Company, Inc.
31 Buyer's delivery address: 626 East Wisconsin Avenue, Suite 1020, Milwaukee, WI 53202
32 (2) By giving the document or written notice personally to the Party or the Party's recipient for delivery if an individual is designated at lines 28 or 30.
33 (3) By fax transmission of the document or written notice to the following telephone number:
34 Buyer: (414) 271-5125 Seller: (414) 271-5125
35 ~~(LEASED PROPERTY)~~ If Property is currently leased and lease(s) extend beyond closing, Seller shall assign Seller's rights under said lease(s)
36 and transfer all security deposits and prepaid rents hereunder to Buyer at closing. The terms of the written lease(s) ~~(STRIKE ONE)~~ lease(s), if any,
37 are
38 ~~(RENTAL WEATHERIZATION)~~ This transaction (a) (a-not) ~~(STRIKE ONE)~~ exempt from State of Wisconsin Rental Weatherization Standards
39 (Wisconsin Administrative Code, Comm 67). If not exempt, (Buyer) (Seller) ~~(STRIKE ONE)~~ will be responsible for compliance, including all costs.
40 If Seller is responsible for compliance, Seller shall provide a Certificate of Compliance at closing.
41 ~~(PLACE OF CLOSING)~~ This transaction is to be closed at the place designated by Buyer's mortgagee or the title company
42 no later than _____, unless another date or place is agreed to in writing.
43 ~~(CLOSING PROVISIONS)~~ The following items shall be prorated at closing: real estate taxes, rents, water and sewer use charges, garbage pick-
44 up and other private and municipal charges, property owner's association assessments, fuel, payments under governmental agricultural programs
45 and _____. Any income, losses or expenses shall accrue to Seller and be prorated through
46 the day prior to closing. Net general real estate taxes shall be prorated based on (the net general real estate taxes for the current year, if known,
47 otherwise on the net general real estate taxes for the preceding year) (+30 days after satisfaction or waiver of
48 control provisions). ~~(STRIKE AND COMPLETE AS APPLICABLE)~~ CAUTION: If Property has not been fully assessed for
49 tax purposes (for example, recent land division or completed/pending reassessment) or if proration on the basis of net general real
50 estate taxes is not acceptable (for example, changing mill rate), insert estimated annual tax or other basis for proration.
51 ~~(PROPERTY CONDITION PROVISIONS)~~
52 ~~■ PROPERTY CONDITION REPRESENTATIONS:~~ Seller represents to Buyer that as of the date of acceptance Seller has no notice or
53 knowledge of conditions affecting the Property or transaction other than those identified in Seller's Real Estate Condition Report
54 dated _____, which was received by Buyer prior to Buyer signing this Offer and which is made a part of this Offer by reference
55 ~~(COMPLETE DATE OR STRIKE AS APPLICABLE)~~ and (INSERT CONDITIONS NOT ALREADY INCLUDED IN THE CONDITION REPORT)
56

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57 A "condition affecting the Property or transaction" is defined as follows:

58 (a) planned or commenced public improvements which may result in special assessments or otherwise materially affect the Property or the

59 present use of the Property;

60 (b) government agency or court order requiring repair, alteration or correction of any existing condition;

61 (c) completed or pending assessment of the Property for property tax purposes;

62 (d) structural inadequacies which if not repaired will significantly shorten the expected normal life of the Property;

63 (e) any land division involving the Property, for which required state or local approvals were not obtained;

64 (f) construction or remodeling on the Property for which required state or local approvals were not obtained;

65 (g) any portion of the Property being in a 100 year floodplain, a wetland or shoreland zoning area under local, state or federal regulations;

66 (h) that a structure on the Property is designated as a historic building or that any part of the Property is in a historic district;

67 (i) material violations of environmental laws or other laws or agreements regulating the use of the Property;

68 (j) conditions constituting a significant health or safety hazard for occupants of the Property;

69 (k) underground or aboveground storage tanks for storage of flammable, combustible or hazardous materials including but not limited to gasoline

70 and heating oil, which are currently or which were previously located on the Property. NOTE: The Wisconsin Administrative Code contains

71 registration and operation rules for such underground storage tanks.

72 (l) high voltage electric (100 KV or greater) or steel natural gas transmission lines located on but not directly serving the Property;

73 (m) material levels of hazardous substances located on Property or previous storage of material amounts of hazardous substances on Property;

74 (n) other conditions or occurrences which would significantly reduce the value of the Property to a reasonable person with knowledge of the

75 nature and scope of the condition or occurrence.

76 **PROPERTY DIMENSIONS AND SURVEYS:** Buyer and Seller acknowledge that any Property, building or room dimensions, or total acreage

77 or building square footage figures, provided to Buyer or Seller may be approximate because of rounding or other reasons, unless verified by

78 survey or other means. Buyer also acknowledges that there are various formulas used to calculate total square footage of buildings and that total

79 square footage figures will vary dependent upon the formula used. CAUTION: Buyer should verify total square footage formulas, Property,

80 building or room dimensions, and total acreage or square footage figures, if material to Buyer's decision to purchase.

81 **INSPECTIONS:** Seller agrees to allow Buyer's inspectors reasonable access to the Property upon reasonable notice if the inspections are

82 reasonably necessary to satisfy the contingencies in this Offer. Buyer agrees to promptly provide copies of all such inspection reports to Seller, and

83 to listing broker if Property is listed. Furthermore, Buyer agrees to promptly restore the Property to its original condition after Buyer's inspections are

84 completed, unless otherwise agreed with Seller. An "inspection" is defined as an observation of the Property which does not include testing of the

85 Property, other than testing for leaking carbon monoxide, or testing for leaking LP gas or natural gas used as a fuel source, which are hereby authorized.

86 **TESTING:** Except as otherwise provided, Seller's authorization for inspections does not authorize Buyer to conduct testing of the Property. A

87 "test" is defined as the taking of samples of materials such as soils, water, air or building materials from the Property and the laboratory or other

88 analysis of those materials. If Buyer requires testing, testing contingencies must be specifically provided for at lines 233 - 237 or in an addendum

89 per line 298. Note: Any contingency authorizing such tests should specify the areas of the Property to be tested, the purpose of the test, (e.g., to

90 determine if environmental contamination is present), any limitations on Buyer's testing and any other material terms of the contingency (e.g.,

91 Buyer's obligation to return the Property to its original condition). Seller acknowledges that certain inspections or tests may detect environmental

92 pollution which may be required to be reported to the Wisconsin Department of Natural Resources.

93 **PRE-CLOSING INSPECTION:** At a reasonable time, pre-approved by Seller or Seller's agent, within 3 days before closing, Buyer shall have the

94 right to inspect the Property to determine that there has been no significant change in the condition of the Property, except for ordinary wear and

95 tear and changes approved by Buyer, and that any defects Seller has elected to cure have been repaired in a good and workmanlike manner.

96 **ENVIRONMENTAL SITE ASSESSMENT:** An "environmental site assessment" (also known as a "Phase I Site Assessment") (see lines 279 to

97 283) may include, but is not limited to: (1) an inspection of the Property; (2) a review of the ownership and use history of the Property, including a

98 search of title records showing private ownership of the Property for a period of 80 years prior to the visual inspection; (3) a review of historic and

99 recent aerial photographs of the Property, if available; (4) a review of environmental licenses, permits or orders issued with respect to the Property;

100 (5) an evaluation of results of any environmental sampling and analysis that has been conducted on the Property; and (6) a review to determine

101 if the Property is listed in any of the written compilations of sites or facilities considered to pose a threat to human health or the environment includ-

102 ing the National Priorities List, the Department of Natural Resources' (DNR) Registry of Abandoned Landfills, the DNR's Registry of Leaking

103 Underground Storage Tanks, the DNR's most recent remedial response site evaluation report (including the Inventory of Sites and Facilities Which

104 May Cause or Threaten to Cause Environmental Pollution). Any "environmental site assessment" performed under this Offer shall comply with

105 generally recognized industry standards (e.g. current American Society of Testing and Materials' "Standards for Environmental Site Assessments for

106 Commercial Real Estate"), and state and federal guidelines, as applicable. CAUTION: Unless otherwise agreed on

107 "environmental site assessment" does not include subsurface testing of the soil or groundwater or other testing of the Property for

108 environmental pollution.

109 **PROPERTY DAMAGE BETWEEN ACCEPTANCE AND CLOSING:** Seller shall maintain the Property until the earlier of closing or occupancy

110 of Buyer in materially the same condition as of the date of acceptance of this Offer, except for ordinary wear and tear. If, prior to closing, the

111 Property is damaged in an amount of not more than five per cent (5%) of the selling price, Seller shall be obligated to repair the Property and

112 restore it to the same condition that it was on the day of this Offer. If the damage shall exceed such sum, Seller shall promptly notify Buyer in writ-

113 ing of the damage and this Offer may be canceled at the option of Buyer. Should Buyer elect to carry out this Offer despite such damage, Buyer

114 shall be entitled to the insurance proceeds relating to the damage to the Property, plus a credit towards the purchase price equal to the amount of

115 Seller's deductible on such policy. However, if this sale is financed by a bank contract or a mortgage to Seller, the insurance proceeds shall be

116 held in trust for the sole purpose of restoring the Property.

117 **FIXTURES:** A "Fixture" is an item of property which is physically attached to or so closely associated with land and improvements so as to be

118 treated as part of the real estate, including, without limitation, physically attached items not easily removable without damage to the Property. Items

119 specifically attached to the Property, and items customarily treated as fixtures. A "Fixture" does not include trade fixtures owned by tenants of the

120 Property. See Lines 11 to 17.

121 **OCCUPANCY:** Occupancy of the entire Property shall be given to Buyer at time of closing unless otherwise provided in this Offer at lines 233 -

122 237 or in an addendum per line 298. Occupancy shall be given subject to tenant's rights, if any.

123 **SPECIAL ASSESSMENTS:** Special assessments, if any, for work actually commenced or invited prior to date of this Offer shall be paid by Seller

124 no later than closing. All other special assessments shall be paid by Buyer. CAUTION: Consider a special agreement if any assessments, prop-

125 erty owner's association assessments or other expenses are contemplated. "Other expenses" are one-time charges or ongoing use fees for pub-

126 lic improvements (other than those resulting in special assessments) relating to curb, gutter, street, sidewalk, sanitary and stormwater and storm

127 sewer (including all sewer mains and hook-up and interceptor charges), parks, street lighting and street trees, and impact fees for other public

128 facilities, as defined in Wis. Stat. § 65.55(1)(c) & (d).

129 PROPERTY ADDRESS: Tower East Facility, 2,200,000 S.F., Milwaukee, Wisconsin (page 3 of 6, WB-18)

130 OPTIONAL FINANCING CONTINGENCY: THE CONTINGENCY AT LINES 132 THROUGH 160 IS A PART OF THIS OFFER IF MARKED, SUCH

131 AS WITH AN "X," AT LINE 132. IT IS NOT PART OF THIS OFFER IF IT IS MARKED N/A OR LEFT BLANK.

132 ☒ **FINANCING CONTINGENCY:** This Offer is contingent upon Buyer being able to obtain: **CHECK APPLICABLE FINANCING BELOW**

133 ☐ land contract financing from Seller at closing as further described at lines 138 to 153 and 161 to 165.

134 ☐ **_____** **INSERT LOAN PROGRAM** (fixed) (adjustable) **STRIKE ONE** rate first mort-

135 gage loan commitment as further described at lines 138 to 148 and 154 to 175, within _____ days of acceptance of this Offer.

136 The financing selected shall be in an amount of not less than \$ _____ for a term of not less than _____ years, amortized

137 over not less than _____ years. If the purchase price under this Offer is modified, the financed amount, unless otherwise provided, shall be

138 adjusted to the same percentage of the purchase price as in this contingency and the monthly payments shall be adjusted as necessary to maintain the term and amortization stated above.

139 IF FINANCING IS **FIXED RATE** the annual rate of interest shall not exceed _____ % and monthly payments of principal and interest shall

140 not exceed \$ _____.

141 IF FINANCING IS **ADJUSTABLE RATE** the initial annual interest rate shall not exceed _____ %. The initial interest rate shall be fixed for

142 _____ months, at which time the interest rate may be increased not more than _____ % per year. The maximum interest rate during the

143 mortgage term shall not exceed _____ %. Initial monthly payments of principal and interest shall not exceed \$ _____. Monthly

144 payments of principal and interest may be adjusted to reflect interest changes.

145 **MONTHLY PAYMENTS MAY ALSO INCLUDE** 1/12th of the estimated net annual real estate taxes, hazard insurance premiums, and private

146 mortgage insurance premiums. The mortgage may not include a prepayment premium. Buyer agrees to pay a loan fee in an amount not

147 to exceed _____ % of the loan. (Loan fee refers to discount points and/or loan origination fee, but DOES NOT include Buyer's other closing

148 costs.) Note: Unless otherwise agreed, Buyer's delivery of any document labeled a loan commitment will satisfy this contingency.

149 IF FINANCING IS **BY LAND CONTRACT** \$ _____ shall be paid at closing (in addition to earnest money), interest rate following payment

150 default shall be _____ %, the default period shall be _____ days for payments and _____ days for performance of any other

151 obligations. Interest shall be calculated on a prepaid basis. Any amount may be prepaid on principal without penalty at any time. Buyer understands that if the term of the land contract is shorter than the amortization period a balloon payment will be due at the end of the term.

152 **LOAN COMMITMENT:** Buyer agrees to pay all customary financing costs (including closing fees), to apply for financing promptly, and to provide

153 evidence of application promptly upon request by Seller. If Buyer qualifies for the financing described in this Offer or other financing acceptable

154 to Buyer, Buyer agrees to deliver to Seller a copy of the written loan commitment no later than the deadline for loan commitment at line 135.

155 Buyer's delivery of a copy of any written loan commitment (even if subject to conditions) shall satisfy the Buyer's financing contingency

156 unless accompanied by a notice of unacceptability. **CAUTION: BUYER, BUYER'S LENDER AND AGENTS OF BUYER OR SELLER**

157 **SHOULD NOT DELIVER A LOAN COMMITMENT TO SELLER WITHOUT BUYER'S PRIOR APPROVAL OR UNLESS ACCOMPANIED BY A**

158 **NOTICE OF UNACCEPTABILITY.**

159 **LAND CONTRACT:** If this Offer provides for a land contract both Parties agree to execute a State Bar of Wisconsin Form 11 Land Contract, the

160 terms of which are incorporated into this Offer by reference. Prior to execution of the land contract Seller shall provide the same evidence of marketable title as required above and written proof, at or before execution, that the total underlying indebtedness, if any, is not in excess of the proposed balance of the land contract, that the payments on the land contract are sufficient to meet all of the obligations of Seller on the underlying indebtedness, and that all creditors whose consent is required have consented to the land contract sale. Seller may terminate this Offer if creditor approval cannot be obtained. Seller may terminate this Offer if Buyer does not provide a written credit report which indicates that Buyer is credit worthy based upon reasonable underwriting standards within 15 days of acceptance. Buyer shall pay all costs of obtaining creditor approval and the credit report. Seller shall be responsible for preparation and the expense of preparation of all closing documentation, including the land contract.

161 **FINANCING UNAVAILABILITY:** If financing is not available on the terms stated in this Offer (and Buyer has not already delivered an acceptable loan commitment for other financing to Seller), Buyer shall promptly deliver written notice to Seller of same including copies of lender's rejection letter(s) or other evidence of unavailability. Unless a specific loan source is named in the financing contingency, Seller shall then have 10 days to give Buyer written notice of Seller's decision to finance this transaction on the same terms set forth in the financing contingency, and this Offer shall remain in full force and effect, with the time for closing extended accordingly. If Seller's notice is not timely given, this Offer shall be null and void. Buyer authorizes Seller to obtain any credit information reasonably appropriate to determine Buyer's credit worthiness for Seller financing.

162 **SELLER TERMINATION RIGHTS:** If Buyer does not make timely delivery of the loan commitment, Seller may terminate this Offer provided that Seller delivers a written notice of termination to Buyer prior to Seller's actual receipt of a copy of Buyer's written loan commitment.

163 **NOTE: IF PURCHASE IS CONTINGENT ON BUYER OBTAINING FINANCING FOR OPERATIONS OR DEVELOPMENT CONSIDER ADDING**

164 **A CONTINGENCY FOR THAT PURPOSE.**

165 **TITLE EVIDENCE**

166 **CONVEYANCE OF TITLE:** Upon payment of the purchase price, Seller shall convey the Property by warranty deed (or other conveyance as provided herein) free and clear of all liens and encumbrances, except municipal and zoning ordinances and agreements entered under them, recorded assessments for the distribution of utility and municipal services, recorded building and use restrictions and covenants, general taxes levied in the year of closing and _____ (provided none of the

167 foregoing prohibit present use of the Property), which constitutes marketable title for purposes of this transaction. Seller further agrees to complete and execute the documents necessary to record the conveyance. **WARNING: If Buyer contemplates improving or developing Property, or a change in use, Buyer may need to address municipal and zoning ordinances, recorded building and use restrictions, covenants, and assessments which may prohibit some improvements or uses. The need for building permits, zoning variances, environmental audits,**

etc., may need to be investigated to determine feasibility of improvements, development or use changes for Property. Contingencies for investigation of these issues may be added to this Offer. See lines 293 to 296.

FORM OF TITLE EVIDENCE: Seller shall give evidence of title in the form of an owner's policy of title insurance in the amount of the purchase price on a current ALTA form issued by an insurer licensed to write title insurance in Wisconsin. **CAUTION: IF TITLE EVIDENCE WILL BE GIVEN BY ABSTRACT, STRIKE TITLE INSURANCE PROVISIONS AND INSERT ABSTRACT PROVISIONS.**

PROVISION OF MERCHANTABLE TITLE: Seller shall pay all costs of providing title evidence. For purposes of closing, title evidence shall be acceptable if the commitment for the required title insurance is delivered to Buyer's attorney or Buyer not less than 3 business days before closing, showing title to the Property as of a date no more than 15 days before delivery of such title evidence to be merchantable, subject only to liens which will be paid out of the proceeds of closing and standard abstract certificate limitations or standard title insurance requirements and exceptions, as appropriate. **CAUTION: BUYER SHOULD CONSIDER UPDATING THE EFFECTIVE DATE OF THE TITLE COMMITMENT PRIOR TO CLOSING, A "GAP ENDORSEMENT" TO THE TITLE COMMITMENT OR AN ESCROW CLOSING.**

TITLE ACCEPTABLE FOR CLOSING: If title is not acceptable for closing, Buyer shall notify Seller in writing of objections to title by the time set for closing. In such event, Seller shall have a reasonable time, but not exceeding 15 days, to remove the objections, and the time for closing shall be extended as necessary for this purpose. In the event that Seller is unable to remove the objections, Buyer shall have 5 days from receipt of notice thereof, to deliver written notice waiving the objections, and the time for closing shall be extended accordingly. If Buyer does not waive the objections, this Offer shall be null and void. Providing title evidence acceptable for closing does not extinguish Seller's obligation to give merchantable title to Buyer.

DELIVERY/RECEIPT: Unless otherwise stated in this Offer, any signed document transmitted by facsimile machine (fax) shall be treated in all manner and respects as an original document and the signature of any Party upon a document transmitted by fax shall be considered an original signature. Personal delivery to, or actual receipt by, any named Buyer or Seller constitutes personal delivery to, or actual receipt by Buyer or Seller. Once received, a notice cannot be withdrawn by the Party delivering the notice without the consent of the Party receiving the notice. A Party may not unilaterally reinstate a contingency after a notice of a contingency waiver has been received by the other Party. The delivery/receipt provisions in this Offer may be modified when appropriate (e.g., when mail delivery is not desirable (see lines 25 - 31)). Buyer and Seller authorize the agents of Buyer and Seller to distribute copies of the Offer to Buyer's lender, appraisers, title insurance companies and any other settlement service providers for the transaction.

DATE AND DEADLINES: Deadlines expressed as a number of "days" from an event, such as acceptance, are calculated by excluding the day the event occurred and by counting subsequent calendar days. The deadline expires at midnight on the last day. Deadlines expressed as a specific number of "business days" exclude Saturdays, Sundays, any legal public holiday under Wisconsin or Federal law, and other day designated by the President such that the postal service does not receive registered mail or make regular deliveries on that day. Deadlines expressed as a specific number of "hours" from the occurrence of an event, such as receipt of a notice, are calculated from the exact time of the event, and by counting 24 hours per calendar day. Deadlines expressed as a specific day of the calendar year or as the day of a specific event, such as closing, expire at midnight of that day.

DEFAULT: Seller and Buyer each have the legal duty to use good faith and due diligence in completing the terms and conditions of this Offer. A material failure to perform any obligation under this Offer is a default which may subject the defaulting party to liability for damages or other legal remedies.

If Buyer defaults, Seller may:

- (1) sue for specific performance and request the earnest money as partial payment of the purchase price; or
- (2) terminate the Offer and have the option to: (a) request the earnest money as liquidated damages; or (b) direct Broker to return the earnest money and have the option to sue for actual damages.

If Seller defaults, Buyer may:

- (1) sue for specific performance; or
- (2) terminate the Offer and request the return of the earnest money, sue for actual damages, or both.

In addition, the Parties may seek any other remedies available in law or equity.

The Parties understand that the availability of any judicial remedy will depend upon the circumstances of the situation and the discretion of the courts.

If either Party defaults, the Parties may renegotiate the Offer or seek nonjudicial dispute resolution instead of the remedies outlined above. By agreeing

to binding arbitration, the Parties may lose the right to litigate in a court of law those disputes covered by the arbitration agreement. **NOTE: IF**

ACCEPTED, THIS OFFER CAN CREATE A LEGALLY ENFORCEABLE CONTRACT. BOTH PARTIES SHOULD READ THIS DOCUMENT

CAREFULLY. BROKERS MAY PROVIDE A GENERAL EXPLANATION OF THE PROVISIONS OF THE OFFER BUT ARE PROHIBITED BY LAW

FROM GIVING ADVICE OR OPINIONS CONCERNING YOUR LEGAL RIGHTS UNDER THIS OFFER OR HOW TITLE SHOULD BE TAKEN AT

CLOSING. AN ATTORNEY SHOULD BE CONSULTED IF LEGAL ADVICE IS NEEDED.

EARNEST MONEY:

HELD BY: Unless otherwise agreed, earnest money shall be paid to and held in the trust account of the listing broker (Buyer's agent if Property is not listed or seller if no broker is involved), until applied to purchase price or otherwise disbursed as provided in the Offer. **CAUTION: Should persons other than a broker hold earnest money, an escrow agreement should be drafted by the Parties or an attorney. If someone other than Buyer makes payment of earnest money, consider a special disbursement agreement.**

DISBURSEMENT: If negotiations do not result in an accepted offer, the earnest money shall be promptly disbursed (after clearance from payor's depository institution if earnest money is paid by check) to the person(s) who paid the earnest money. At closing, earnest money shall be disbursed according to the closing statement. If this Offer does not close, the earnest money shall be disbursed according to a written disbursement agreement signed by all Parties to this Offer (Note: Wis. Adm. Code § 18.09(1)(d) provides that an offer to purchase is not a written disbursement agreement pursuant to which the broker may disburse). If the disbursement agreement has not been delivered to broker within 60 days after the date set for closing, broker may disburse the earnest money: (1) as directed by an attorney who has reviewed the transaction and does not represent Buyer or Seller; (2) into a court hearing a lawsuit involving the earnest money and all Parties to this Offer; (3) as directed by court order; or (4) any other disbursement required or allowed by law. Broker may retain legal services to direct disbursement per (1) or to file an interpleader action per (2) and broker may deduct from the earnest money any costs and reasonable attorneys fees, not to exceed \$250, prior to disbursement.

LEGAL RIGHTS/ACTION: Broker's disbursement of earnest money does not determine the legal rights of the Parties in relation to this Offer.

Buyer's or Seller's legal right to earnest money cannot be determined by broker. At least 30 days prior to disbursement per (1) or (4) above, broker

shall send Buyer and Seller notice of the disbursement by certified mail. If Buyer or Seller disagrees with broker's proposed disbursement, a lawsuit

may be filed to obtain a court order regarding disbursement. Small Claims Court has jurisdiction over all earnest money disputes arising out of the

sale of residential property with 1-4 dwelling units and certain other earnest money disputes. The Buyer and Seller should consider consulting attor-

neys regarding their legal rights under this Offer in case of a dispute. Both Parties agree to hold the broker harmless from any liability for good faith

disbursement of earnest money in accordance with this Offer or applicable Department of Regulation and Licensing regulations concerning earnest

money. See Wis. Adm. Code Ch. 18. **NOTE: WISCONSIN LICENSE LAW PROHIBITS A BROKER FROM GIVING ADVICE OR OPINIONS CONCERNING**

THE LEGAL RIGHTS OR OBLIGATIONS OF PARTIES TO A TRANSACTION OR THE LEGAL EFFECT OF A SPECIFIC CONTRACT OR

CONVEYANCE. AN ATTORNEY SHOULD BE CONSULTED IF LEGAL ADVICE IS REQUIRED.

1. **1.0000** 00 01 0000

ADDENDUM A

1. FINANCING:

This Offer to Purchase and Buyer's obligations hereunder are contingent upon procurement by Buyer of a commitment for a first mortgage loan in an amount of not less than 80 percent of the purchase price plus development costs with initial interest not to exceed 7 percent per annum without prepayment penalty amortizable in equal monthly installments of principal and interest over a period of not less than 20 years (exclusive of any amounts required to be escrowed for real estate taxes or insurance) for a term of not less than 5 years with a loan fee not to exceed 1 percent of the principal amount of the loan. If Buyer does not waive or satisfy this contingency within 30 days from the date of acceptance of this Offer to Purchase, by Buyer sending written notice to Seller within such period, this Offer to Purchase shall be deemed null and void, all earnest money paid hereunder shall be returned promptly to Buyer and neither party shall have any further obligations to the other hereunder.

2. INSPECTION:

The closing of this Offer to Purchase and Buyer's obligations hereunder are contingent upon inspections by Buyer or its agents of the property which is the subject of this Offer to Purchase and the building and other improvements located thereon. If such inspections disclose physical conditions which are unsatisfactory to Buyer, in Buyer's sole judgment and discretion, this Offer to Purchase shall be null and void, all earnest money shall be returned promptly to Buyer, and thereafter neither party shall have any further liability to the other, unless Buyer waives or satisfies this contingency within 30 days after Seller's acceptance of this Offer to Purchase by delivering written notice to Seller within such period. Seller shall furnish Buyer and its agents with access to the property which is the subject of this Offer to Purchase and the building and other improvements located thereon at all reasonable times for the purposes of such inspections, and Buyer agrees to indemnify Seller and hold Seller harmless from and against any claims, demands, causes of action, costs or expenses arising out of any such inspections and shall repair and restore any damage to the property which is the subject of this Offer to Purchase caused by any such inspections if the transaction contemplated under this Offer to Purchase does not close.

3. LICENSES, PERMITS:

The closing of this Offer to Purchase and Buyer's obligations hereunder are contingent upon Buyer obtaining, at Buyer's sole expense, all licenses, permits and other governmental approvals necessary or convenient for Buyer's proposed construction and/or use of the property which is the subject of this Offer to Purchase. The closing of this Offer to Purchase and Buyer's obligations hereunder are contingent upon there being, between the date of this Offer to Purchase and the date of closing, no adverse change, or threatened or contemplated change, in the zoning or building regulations affecting the property which is the subject of this Offer to Purchase. If Buyer does not waive or satisfy this contingency within 30 days from the date of acceptance of this Offer to Purchase by written notice to Seller within such period, this Offer to Purchase shall be null and void, all earnest monies paid hereunder shall be returned promptly to Buyer and neither party shall have any further obligations to the other hereunder.

4. **ENVIRONMENTAL:**

Seller shall provide Buyer, within five (5) days of the date of Seller's acceptance of this Offer to Purchase, all information and documentation in Seller's possession relating to the environmental condition of the property which is the subject of this Offer to Purchase and surrounding property. The closing of this Offer to Purchase and Buyer's obligations hereunder are contingent upon the Buyer obtaining, at Buyer's sole cost and expense, environmental reports (Phase I and Phase II Studies) after which Buyer shall decide, in Buyer's sole judgment and discretion, whether to assume any and all environmental issues or liabilities. If Buyer does not waive or satisfy this contingency within 30 days from the date of Seller's acceptance of this Offer to Purchase by written notice to Seller within such period, this Offer to Purchase shall be null and void, all earnest money shall be promptly returned to Buyer, and neither party shall have any further obligations to the other hereunder.

5. **SURVEY:**

The closing of this Offer to Purchase and Buyer's obligations hereunder are contingent upon Seller, at its sole cost and expense, providing Buyer within 21 days after acceptance of this Offer to Purchase, a current survey (dated within six (6) months of the date of this Offer to Purchase) of the property which is the subject of this Offer to Purchase, certified by a Wisconsin registered land surveyor, in form and substance sufficient to cause the title insurance company furnishing the title insurance commitment hereunder to eliminate its standard survey exceptions, showing the easements and other exceptions set forth in the title insurance commitment and showing the property to be free from encroachments, rights of third parties, or other survey defects and prepared in accordance with the Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys as adopted by the American Land Title Association and the American Congress on Surveying and Mapping for an urban survey. If Buyer does not waive or satisfy this contingency within 30 days from Seller's acceptance of this Offer to Purchase by written notice to Seller within such period, this Offer to Purchase shall be null and void, all earnest money paid hereunder shall be returned promptly to Buyer and neither party shall have any further obligations to the other hereunder.

EXHIBIT C
MICELI AFFIDAVIT

C-1

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE	)	CHAPTER 11
TOWER AUTOMOTIVE, INC., <u>ET AL.</u>	)	CASE NO. 05-10578 (ALG)
DEBTORS.	)	JOINTLY ADMINISTERED
	)	

**AFFIDAVIT OF FRANK MICELI IN SUPPORT OF MOTION FOR ORDER
PURSUANT TO 11 U.S.C. § 363 APPROVING THE SALE OF CERTAIN REAL
PROPERTY FREE AND CLEAR OF LIENS, CLAIMS AND ENCUMBRANCES**

STATE OF MICHIGAN)
)
KENT COUNTY)

I, Frank Miceli, being duly sworn, deposes and states:

BACKGROUND

1. I am a Vice President of Real Estate and Risk Management for Tower Automotive, Inc. ("Tower"), indirect corporate parent of Tower Automotive Products Company, Inc. ("Tower Products") and one of the debtors and debtors in possession (collectively, the "Debtors") in the above-captioned chapter 11 cases. I am authorized to and hereby submit this affidavit (the "Affidavit") in support of that certain motion (the "Motion")¹ requesting approval of the Purchase Agreement and the sale of the East Milwaukee Facility to the Purchaser free and clear of liens, claims and encumbrances. All facts set forth in this Affidavit are based upon my personal knowledge, information supplied to me by others at the Debtors, my review of relevant documents or my opinion based on my experience and knowledge of the Debtors' operations, financial condition and present financial outlook. If called upon to testify, I could and would competently testify to the facts set forth herein.

In my capacity as Vice President, I am familiar with the Debtors' day-to-day business affairs and operations.

THE EAST MILWAUKEE FACILITY

The East Milwaukee Facility is a manufacturing facility located on 86 acres of land in an industrial park located at and around 3500 West Capitol Drive, Milwaukee, Wisconsin. The East Milwaukee Facility contains on-site improvements totaling approximately

¹ Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

2,150,290 square feet. The 86-acre East Milwaukee Facility is part of a larger, 148 acre parcel of land (together with the East Milwaukee Facility, the "Property") also owned by the Debtors. The Debtors acquired the Property as part of their acquisition of the automotive products group of A. O. Smith Corporation in 1997. The East Milwaukee Facility was primarily engaged in stamping and frame assembly.

In early 2005, in connection with the Debtors' overall restructuring strategy to reduce fixed costs by reducing and consolidating the Debtors' operating locations, Tower Products determined that the work being performed at the East Milwaukee Facility could be better accommodated in existing floor space at Tower Products' other manufacturing plants. Therefore, the decision was made to relocate such work to other facilities in an effort to achieve such operating and cost improvements. On March 31, 2006, Tower Products ceased all operations at the East Milwaukee Facility. The estimated monthly costs associated with holding the inactive East Milwaukee Facility (e.g., utility expenses, property taxes and miscellaneous maintenance) are approximately \$25,000 per month.

The East Milwaukee Facility also requires substantial environmental remediation, including the removal of asbestos.

MARKETING HISTORY

Tower Products initially marketed the East Milwaukee Facility in 2001 as part of a contemplated sale/leaseback transaction for the entire Property. At such time, Tower Products intended to continue its manufacturing operations at the East Milwaukee Facility. Tower Products retained the commercial real estate firm of The Dickman Company, Inc. (the "Broker") to market the transaction.²

In 2001, the Broker mailed a Request for Proposals for the proposed transaction to approximately 200 local investors. Tower Products received two responses despite these extensive efforts. The Broker also listed the Property on the Dickman Company website and two commercial real estate listing services (Xcellgent and Loopnet). Advertisements for the Property were also placed in the Milwaukee Journal Sentinel and the Wall Street Journal. Despite these extensive efforts, Tower Products received only two responses, and no offers.

In 2003, the Broker sent Requests for Proposal to over 190 potential buyers across the country. These efforts generated no offers for the Property.

In 2005, it was determined that the Debtors would sell pieces of the Property as portions were vacated after the failure of previous efforts to generate any significant buyer interest in the Property as a whole. The Broker consequently initiated an extensive marketing campaign (the "Marketing Campaign") for the sale of the East Milwaukee Facility.

² A copy of Tower Products' agreement with the Broker (the "Listing Agreement") is attached hereto as Exhibit D.

Specifically, the Marketing Campaign included, but was not limited to, the following initiatives by the Broker on Tower Products' behalf:

Aerial photographs, building plans, demographic and economic data, area maps, power plant information, and building details were developed and assembled in order to create a comprehensive information package to elicit interest in the East Milwaukee Facility;

Approximately 180 information packets were distributed to known investors, users, and industrial real estate brokers in a Request for Proposals;

The Property was advertised in the Commercial Real Estate/National Coverage edition of the Wall Street Journal; and

Information relating to the East Milwaukee Facility on the commercial real estate listing sites, Xceligent (www.xceligent.com) and Loopnet (www.loopnet.com), as well as the Dickman Company website (www.dickmanrealestate.com) was updated, and the East Milwaukee Facility was added to the Wisconsin economic development website (www.ForwardWisconsin.com).

An appraisal conducted in September 2005 indicated that \$7,500,000 would be a fair value for the East Milwaukee Facility. However, such valuation assumed that the site was free and clear of any existing environmental issues, which it is not. As noted above, the East Milwaukee Facility requires significant environmental remediation, including asbestos removal.

Despite the extensive Marketing Campaign undertaken on behalf of Tower Products, the East Milwaukee Facility generated interest from only three potential buyers, including two brownfield developers and the Purchaser. The Purchaser made the only firm offer for the East Milwaukee Facility. The Purchaser's initial offer was for \$1,800,000 and the remediation of all environmental liabilities associated with the site. Over the course of negotiations, the Purchaser increased the cash component of its bid to \$2,000,000 (the "Purchase Price"). The Purchaser has also agreed to post a \$1,000,000 letter of credit to secure its obligations to remediate the site.

PURCHASE AGREEMENT

Following arm's-length negotiations, Tower Products agreed to sell the East Milwaukee Facility to the Purchaser for the Purchase Price and the remediation of the site on which the facility is located, pursuant to the terms and conditions of the Purchase Agreement and subject to Court approval.

The Debtors determined that the Purchaser's offer presented the best opportunity to realize substantial value for the East Milwaukee Facility. Despite the extensive marketing efforts undertaken on behalf of the Debtors, the sole bid received for the East Milwaukee Facility was that of the Purchaser for \$1,800,000. The Purchase Price represents a \$200,000 increase from the Purchaser's initial offer for the East Milwaukee Facility. In addition, the Purchaser has agreed to undertake the environmental remediation of the East Milwaukee Facility. This remediation confers substantial value to Tower Products given the significant degree to which environmental issues have impaired the value of the East

Milwaukee Facility. Consequently, Tower Products believes that the Purchase Price represents fair value for the East Milwaukee Facility.

In addition, pursuant to the Purchase Agreement and Listing Agreement, upon closing, Tower Products is responsible for paying a one-time fee to the Broker (the "Broker Fee") equal to 4% of the Purchase Price in consideration for the Broker's postpetition services rendered to Tower Products in connection with marketing the East Milwaukee Facility.

For the reasons stated herein, I believe that the Purchase Agreement and sale of the East Milwaukee Facility to the Buyer is the best available outcome for the Debtor, its estate, creditors and parties in interest.

**Dated: August 3, 2006
Grand Rapids, Michigan**

**Respectfully Submitted,
/s/ Frank Miceli
Frank Miceli
Vice President, Tower Automotive, Inc.**

**Sworn to and subscribed before me
this 3rd day of August, 2006.**

**[Dawn E. Nelson]_____
Notary Public, Kent County, State of Michigan
My Commission Expires March 21, 2006**

EXHIBIT D
LISTING AGREEMENT

WB-5 COMMERCIAL LISTING CONTRACT - EXCLUSIVE RIGHT TO SELL

Page 1 of 4, WB-5

- 1 SELLER GIVES BROKER THE EXCLUSIVE RIGHT TO SELL THE PROPERTY ON THE TERMS SET FORTH IN THIS LISTING.
- 2 **PROPERTY DESCRIPTION:** Street address is Tower Automotive/East Complex
- 3 In the City of Milwaukee, County of Milwaukee, Wisconsin.
- 4 Insert additional description, if any, at lines 218 - 224 or attach as an addendum per line 225.
- 5 **TERMS OF LISTING: LIST PRICE:** Two Million
- 6 Dollars (\$ 2,000,000.00)
- 7 **TERMS:** Cash or equivalent at closing or _____
- 8 **OCCUPANCY DATE:** Negotiable **OCCUPANCY CHARGE:** (\$ Seller occupies after closing) \$ Negotiable per day or part thereof.
- 9 **PROPERTY INCLUDED IN LIST PRICE:** Seller agrees to include in the list price all fixtures as defined at lines 145 to 148, unless excluded at
- 10 lines 14 to 15 **CAUTION:** Exclude fixtures not owned by Seller such as rented fixtures and tenant's trade fixtures. The Offer's terms will
- 11 determine what property is included or excluded.
- 12 **ADDITIONAL ITEMS INCLUDED IN THE LIST PRICE:** None
- 13
- 14 **ITEMS NOT INCLUDED IN THE LIST PRICE:** Trade fixtures, manufacturing equipment and tools
- 15
- 16 Seller shall convey the personal property by Bill of Sale, free and clear of all liens and encumbrances except _____
- 17 **CONDITION OF TITLE:** Upon payment of the purchase price, Seller shall convey the Property by warranty deed (or other conveyance as
- 18 provided herein) free and clear of all liens and encumbrances, except municipal and zoning ordinances and agreements entered under them,
- 19 recorded assessments for the distribution of utility and municipal services, recorded building and use restrictions and covenants, general taxes levied
- 20 in the year of closing and None other
- 21 _____ (provided none of the foregoing prohibit present use of the Property).
- 22 **TITLE EVIDENCE:** Seller shall provide evidence of the condition of Seller's title in the form agreed to in the offer to purchase.
- 23 **SELLER REPRESENTATIONS REGARDING PROPERTY CONDITIONS:** Seller represents to Broker that as of the date of this Listing, Seller
- 24 has no notice or knowledge of any conditions affecting the Property or transaction (as defined at lines 428-444) other than those identified in the
- 25 attached seller's disclosure report (see lines 400 to 424 regarding seller's disclosure reports) dated _____
- 26 and _____
- 27 **WARNING: IF SELLER REPRESENTATIONS ARE INCORRECT, SELLER MAY BE LIABLE FOR DAMAGES AND COSTS.**
- 28 **SELLER AUTHORITY TO SELL:** Seller represents that Seller has authority to convey the Property. If the Property's owner is a business
- 29 entity, Seller agrees, within ten days of the execution of this Listing, to provide Broker with a copy of documents evidencing that the sale of the
- 30 Property has been properly authorized
- 31 **MARKETING:** Broker agrees to use reasonable efforts to procure a purchaser for the Property, including, but not limited to, the
- 32 following: advertising; "Cold Calling" Signs.
- 33 Seller agrees that Broker may market other properties during the term of this Listing. SEE LINES 81 - 88 AND 228 - 231 REGARDING SELLER'S
- 34 DUTY TO NOTIFY BROKER OF ANY POTENTIAL PURCHASER OF WHICH SELLER HAS KNOWLEDGE, SELLER'S DUTY TO COOPERATE
- 35 WITH BROKER'S MARKETING EFFORTS AND PROVISIONS REGARDING BROKER'S ROLE AS MARKETING AGENT
- 36 **OTHER BROKERS:** The parties agree that Broker will work and cooperate with other brokers in marketing the Property, including brokers from
- 37 other firms acting as subagents (agents of Seller retained by Broker) and brokers representing buyers, except None
- 38
- 39 **CAUTION: LIMITING BROKER'S COOPERATION WITH OTHER BROKERS MAY REDUCE THE MARKETABILITY OF THE PROPERTY.**
- 40 **EXCLUSIONS:** All persons whose purchase, exchange or exercise of grant of option would earn a prior listing broker a commission under a
- 41 prior listing contract are excluded from this Listing to the extent of the prior broker's legal rights, unless otherwise agreed to in writing. Within one
- 42 week of this Listing, Seller agrees to deliver to Broker a list of all persons whose procurement as purchaser would earn another broker a
- 43 commission under a prior listing contract. **CAUTION:** Contact previous listing broker if the identity of potential potential buyers from pre-
- 44 vious listings is uncertain. The following other buyers are excluded from this Listing until (INSERT DATE) None
- 45
- 46 These other buyers are no longer excluded from this Listing after the specified date unless, on or before the specified date, Seller has either
- 47 accepted an offer from the buyer or sold the Property to the buyer.
- 48 **COMMISSION:** Seller shall pay Broker's commission, which shall be earned if, during the term of this Listing:
- 49 1) Seller sells or accepts an offer which creates an enforceable contract for the sale of all or any part of the Property;
- 50 2) Seller grants an option to purchase all or any part of the Property which is subsequently exercised;
- 51 3) Seller exchanges or enters into a binding exchange agreement on all or any part of the Property;
- 52 4) A transaction occurs which causes an effective change in ownership or control of all or any part of the Property; or
- 53 5) A purchaser is procured for the Property by Broker, by Seller, or by any other person, at the price and on substantially the same
- 54 terms set forth in this Listing and in the standard provisions of the current WB-15 COMMERCIAL OFFER TO PURCHASE,
- 55 even if Seller does not accept this purchaser's offer (See lines 183-196 regarding procurement.)
- 56 Broker's commission shall be 4.000 % or 6% in the event of a co-broke, whichever is greater.

57 The percentage commission, if applicable, shall be calculated based on the purchase price if commission is earned under 1) or 2) above, or calculated based on the list price (including all property included in the list price, including personal property and equipment) under 3) (if an exchange of the entire Property), 4) or 5). If less than the entire Property is exchanged, the percentage commission shall be calculated on the fair market value of the Property exchanged. Once earned, Broker's commission is due and payable in full at the earlier of closing or the date set for closing, unless otherwise agreed in writing. Broker's commission also shall be earned if, during the term of the Listing, one owner of the Property sells, exchanges or options an interest in all or any part of the Property to another owner, except by divorce judgment.

58 **III. EXTENSION OF LISTING:** The Listing term is extended for a period of one year as to any buyer who personally or through any person acting for such buyer either negotiated to acquire an interest in the Property or submitted a written offer to purchase, exchange or option during the term of this Listing (protected buyer). If the extension is based on negotiation, the extension shall be effective only if the buyer's name is delivered to Seller, in writing, no later than three days after the expiration of the Listing, unless Seller was directly involved in discussions of the potential terms upon which buyer might acquire an interest in the Property. The requirement of this Listing to deliver the buyer's name in order to make the extension of the Listing term effective also may be fulfilled as follows: 1) If the Listing is effective only as to certain individuals who are identified in the Listing (One Party Listing), the identification of the individuals in the Listing shall fulfill the delivery of the buyer's name requirement and 2) if buyer has requested that buyer's identity remain confidential, delivery of a notice identifying the broker with whom the buyer negotiated and the date(s) of any showings or other negotiations shall fulfill the delivery of the buyer's name requirement. "Negotiated" for the purposes of this paragraph means to discuss the potential terms upon which buyer might acquire an interest in the Property or to attend an individual showing of the Property. "Submitted" for the purposes of this paragraph means that a written offer has been delivered to Seller or Broker. Upon receipt of a written request from Seller or a broker who has listed the Property, Broker agrees to promptly deliver to Seller a written list of those buyers known by Broker to whom the extension period applies. Should this Listing be terminated by Seller prior to the expiration of the term stated in this Listing, this Listing is extended, on the same terms, for one year after the Listing is terminated for "protected buyers."

59 **IV. TERMINATION OF LISTING:** Neither Seller nor Broker have the legal right to unilaterally terminate this Listing absent a material breach of contract by the other Party. Seller understands that the Parties to the Listing are Seller and the Broker (firm). Agents (salespersons) for Broker (firm) do not have the authority to enter into a mutual agreement to terminate the Listing, amend the commission amount or shorten the term of this Listing, without the written consent of the agent's supervising broker.

60 **V. SELLER COOPERATION WITH MARKETING EFFORTS:** Seller agrees to cooperate with Broker in Broker's marketing efforts and to provide Broker with all records, documents and other material in Seller's possession or control which are required in connection with the sale. Seller authorizes Broker to do those acts reasonably necessary to effect a sale and Seller agrees to cooperate fully with these efforts which may include use of a multiple listing service, the internet or a key lockbox system on Property. Seller shall promptly notify Broker in writing of any potential purchasers with whom Seller negotiates during the term of this Listing and shall promptly refer all persons making inquiries concerning the Property to Broker.

61 **VI. ATTORNEY FEES:** SHOULD LITIGATION ARISE BETWEEN THE PARTIES IN CONNECTION WITH THIS LISTING, THE PREVAILING PARTY SHALL HAVE THE RIGHT TO RECOVER REASONABLE ATTORNEY FEES.

62 **VII. DISCRIMINATION:** SELLER AND BROKER AGREE THAT THEY WILL NOT DISCRIMINATE AGAINST ANY PROSPECTIVE PURCHASER ON ACCOUNT OF RACE, COLOR, SEX, SEXUAL ORIENTATION AS DEFINED IN WISCONSIN STATUTES, SECTION 111.32 (13M), DISABILITY, RELIGION, NATIONAL ORIGIN, MARITAL STATUS, LAWFUL SOURCE OF INCOME, AGE, ANCESTRY, FAMILIAL STATUS, OR IN ANY OTHER UNLAWFUL MANNER.

63 **VIII. EARNEST MONEY:** If Broker holds trust funds in connection with the transaction, they shall be retained by Broker in Broker's trust account. Broker may refuse to hold earnest money or other trust funds. Should Broker hold the earnest money, Seller authorizes Broker to disburse the earnest money pursuant to the terms of the offer to purchase, option or exchange agreement used in the transaction. If the transaction fails to close and the earnest money is disbursed to Seller, then upon disbursement to Seller the earnest money shall be paid first to reimburse Broker for cash advances made by Broker on behalf of Seller and one half of the balance, but not in excess of the agreed commission, shall be paid to Broker as Broker's full commission in connection with said purchase transaction and the balance shall belong to Seller. This payment to Broker shall not terminate this Listing.

64 **IX. SELLER'S DISCLOSURE REPORT:** Wisconsin Administrative Code Chapter RL 24 requires listing brokers to make inquiries of the Seller on the condition of the Property and to request that Seller provide a written response to Broker's inquiry. Seller agrees to complete the seller's disclosure report provided by Broker to the best of Seller's ability. Seller agrees to promptly amend the report to include any defects (as defined in the report) which Seller learns of after completion of the report. Seller authorizes Broker to distribute the report to all interested parties and their agents and to disclose all adverse material facts as required by law.

65 **X. SHOWING RESPONSIBILITIES:** Seller is aware that there is a potential risk of injury, damage or theft involving persons attending a showing of the Property. Seller agrees to accept responsibility for preparing the Property to minimize the likelihood of injury, damage or loss of personal property. Seller agrees to hold Broker harmless for any losses or liability resulting from personal injury, property damage or theft occurring during showings other than those caused by Broker's negligence or intentional wrongdoing. Seller acknowledges that showings may be conducted by licensees other than Broker, that appraisers and inspectors may conduct appraisals and inspections without being accompanied by Broker or other licensees unless otherwise provided for at lines 216-224 or in an addendum per line 225.

66 **XI. LEASED PROPERTY:** If Property is currently leased and lease(s) will extend beyond closing, Seller shall assign Seller's rights under the lease(s) and transfer all security deposits and prepaid rents (subject to agreed upon provisions) thereunder to Buyer at closing. Seller acknowledges that Seller remains liable under the lease(s) unless released by tenants. *CAUTION: Seller should consider obtaining an indemnification agreement from buyer for liabilities under the lease(s) unless released by tenants.*

67 **XII. DEFINITIONS:**

68 **ADVERSE FACT:** An "adverse fact" means any of the following:

69 (a) A condition or occurrence that is generally recognized by a competent licensee as doing any of the following:

70 1) Significantly and adversely affecting the value of the Property 2) Significantly reducing the structural integrity of improvements to real estate.

71 3) Presenting a significant health risk to occupants of the Property.

72 (b) Information that indicates that a party to a transaction is not able to or does not intend to meet his or her obligations under a contract or agreement made concerning the transaction.

73 **MATERIAL ADVERSE FACT:** A "material adverse fact" means an adverse fact that a party indicates is of such significance, or that is generally recognized by a competent licensee as being of such significance to a reasonable party, that it affects or would affect the party's decision to enter into a contract or agreement concerning a transaction or effects or would affect the party's decision about the terms of such a contract or agreement.

74 **CONDITIONS AFFECTING THE PROPERTY OR TRANSACTION:**

75 A condition affecting the Property or transaction is defined as follows:

76 (a) planned or commenced public improvements which may result in special assessments or otherwise materially affect the Property or the

128 present use of the Property;

129 (b) government agency or court order requiring repair, alteration or correction of any existing condition;

130 (c) completed or pending reassessment of the Property for property tax purposes;

131 (d) structural inadequacies which if not repaired will significantly shorten the expected normal life of the Property;

132 (e) any land division involving the Property, for which required state or local approvals were not obtained;

133 (f) construction or remodeling on the Property for which required state or local approvals were not obtained;

134 (g) any portion of the Property being in a 100-year floodplain, a wetland or otherwise zoning area under local, state or federal regulations;

135 (h) a structure on the Property is designated as a historic building or that any part of the Property is in a historic district;

136 (i) material violations of environmental laws or other laws or agreements regulating the use of the Property;

137 (j) conditions constituting a significant health or safety hazard for occupants of the Property;

138 (k) underground or aboveground storage tanks for storage of flammable, combustible or hazardous materials including but not limited to gasoline and heating oil, which are currently or which were previously located on the Property; **NOTE:** The Wisconsin Administrative Code contains registration and operation rules for such underground storage tanks.

140 (l) high voltage electric (400 kV or greater) or steel natural gas transmission lines located on but not directly serving the Property;

142 (m) material levels of hazardous substances located on Property or previous storage of material amounts of hazardous substances on Property;

143 (n) other conditions or circumstances which would significantly reduce the value of the Property to a reasonable person with knowledge of the nature and scope of the condition or occurrence.

144 **EXCISES:** A "Fixture" is an item of property which is physically attached to or so closely associated with land and improvements so as to be treated as part of the real estate, including, without limitation, physically attached items not easily removable without damage to the Property, items specifically adapted to the Property, and items customarily treated as fixtures. A "Fixture" does not include trade fixtures owned by tenants of the Property. See Lines 9 to 15.

146 **DELIVERY:** Unless otherwise stated, delivery of documents or written notices related to this Listing may be accomplished by 1) giving the document or written notice personally to the Party; 2) depositing the document or written notice postage or fees prepaid or charged to an account in the U.S. Mail or a commercial delivery system, addressed to the Party, at the Party's address (See lines 242, 246.); 3) electronically transmitting the document or written notice to the Party's fax number (See lines 242, 246.).

150 **PROCEDURE:** A purchaser is procured when a valid and binding contract of sale is entered into between the Seller and the purchaser or when a ready, willing and able purchaser submits a written offer at the price and on substantially the terms specified in this Listing. A purchaser is ready, willing and able when the purchaser submitting the written offer has the ability to complete the purchaser's obligations under the written offer (See lines 53 - 55.)

152 **■ AGENCY DISCLOSURE PROVISIONS:**

153 **■ AGENCY DISCLOSURE AND CONSENT TO MULTIPLE REPRESENTATION:** Wisconsin Statute § 462.135(2) requires Broker to disclose that Seller is Broker's client. Broker's duties to Seller can be found at lines 178 - 187. Broker's duties to all parties can be found at lines 162 - 177. The confidentiality rights of all parties can be found at lines 200 - 207. See lines 208 - 211 for information regarding identification of confidential and non-confidential information at lines 212 - 215. If a multiple representation relationship is consented to and does occur, both parties will be Broker's clients.

162 **■ DUTIES OWED TO ALL PARTIES:** Wisconsin Statute § 462.133(1) states that in providing brokerage services to a party to a transaction (including both clients and customers), a broker shall do all of the following:

164 (a) Provide brokerage services to all parties to the transaction honestly, fairly and in good faith.

165 (b) Diligently exercise reasonable skill and care in providing brokerage services to all parties.

166 (c) Disclose to each party all material adverse facts that the broker knows and that the party does not know or cannot discover through reasonably vigilant observation, unless the disclosure of a material adverse fact is prohibited by law.

168 (d) Keep confidential any information given to the broker in confidence, or any information obtained by the broker that he or she knows a reasonable party would want to be kept confidential, unless the information must be disclosed under par. (c) or Wis. Stat. § 462.23 (information contradicting third party inspection or investigation reports), or is otherwise required by law to be disclosed or the party whose interests may be adversely affected by the disclosure specifically authorizes the disclosure of particular confidential information. A broker shall continue to keep the information confidential after the transaction is complete and after the broker is no longer providing brokerage services to the party.

172 (e) Provide accurate information about market conditions that affect a transaction, to any party who requests the information, within a reasonable time of the party's request, unless disclosure of the information is prohibited by law.

174 (f) Account for all property of the parties coming into the possession of a broker within a reasonable time of receipt.

176 (g) When negotiating on behalf of a party, present contract proposals in an objective and unbiased manner and disclose the advantages and disadvantages of the proposals.

178 **■ DUTIES OWED TO CLIENTS ONLY:**

179 Wisconsin Statute § 462.133(2) states that in addition to his or her duties under lines 162 - 177, a broker providing brokerage services to his or her client shall do all of the following:

181 (a) Loyally represent the client's interests by placing the client's interests ahead of the interests of any other party, unless loyalty to a client violates the broker's duties under lines 162 - 177 or Wis. Stat. § 462.137(2) (duties to all clients in multiple representation situations).

183 (b) Disclose to the client all information known by the broker that is material to the transaction and that is not known by the client or discoverable by the client through reasonably vigilant observation, except for confidential information (see lines 168 - 172) and other information, the disclosure of which is prohibited by law.

185 (c) Fulfill any obligation required by the agency agreement, and any order of the client that is within the scope of the agency agreement, that are not inconsistent with another duty that the broker has under Wis. Stat. Chapter 462 or any other law.

187 **■ MULTIPLE REPRESENTATION (DUAL AGENCY):** Wisconsin Statute § 462.137 states that Broker may represent both parties in the same transaction only with the written consent of both parties. A multiple representation relationship would exist if Broker was the buyer's agent for a buyer seeking to acquire an interest in the Property. In a multiple representation relationship, Broker will provide the marketing and other services agreed upon in this Listing. Broker will continue to provide information and advice to both parties, but is not allowed to place the interests of either party ahead of the other in negotiations. During negotiations, Broker will prepare approved forms to accomplish the intent of the party making the proposal. Broker will present the proposal in an objective and unbiased manner, disclosing the proposal's advantages and disadvantages. Broker shall not disclose confidential information of either party unless required by law. **(NOTE: Wisconsin Administrative Code section AT 34.07 requires disclosure of adverse material facts to all interested parties). If Seller consents to the multiple representation relationship, Seller is indicating that Seller understands Broker's duties to all parties to a transaction (see lines 162 - 177) and Broker's duties to a client (see lines 178 - 187) and that if a multiple representation relationship arises, Broker will owe the same duties to buyer that Broker owes to Seller. (See lines 178 - 187.)**

199 SELLER (DOES) (DOES NOT) STRIKE ONE CONSENT TO A MULTIPLE REPRESENTATION RELATIONSHIP (DUAL AGENCY).

200 ■ **CONFIDENTIALITY NOTICE:**

201 A BROKER IS REQUIRED TO MAINTAIN THE CONFIDENTIALITY OF ALL INFORMATION GIVEN TO THE BROKER IN CONFIDENCE AND OF
202 ALL INFORMATION OBTAINED BY THE BROKER THAT HE OR SHE KNOWS A REASONABLE PARTY WOULD WANT TO BE KEPT
203 CONFIDENTIAL, UNLESS THE INFORMATION IS REQUIRED TO BE DISCLOSED BY LAW. THE FOLLOWING INFORMATION IS REQUIRED
204 TO BE DISCLOSED BY LAW:

205 1) MATERIAL ADVERSE FACTS AS DEFINED IN § 452.01 (5g) OF THE WISCONSIN STATUTES. (See lines 116 to 124)

206 2) ANY FACTS KNOWN BY THE BROKER THAT CONTRADICT ANY INFORMATION INCLUDED IN A WRITTEN INSPECTION REPORT
207 ON THE PROPERTY OR REAL ESTATE THAT IS THE SUBJECT OF THE TRANSACTION

208 TO ENSURE THAT THE BROKER IS AWARE OF WHAT SPECIFIC INFORMATION YOU CONSIDER CONFIDENTIAL, YOU MAY LIST THAT
209 INFORMATION AT LINES 212 - 213. AT A LATER TIME, YOU ALSO MAY PROVIDE THE BROKER WITH OTHER WRITTEN NOTIFICATION
210 OF WHAT INFORMATION YOU CONSIDER TO BE CONFIDENTIAL. YOU MAY IDENTIFY INFORMATION WHICH MIGHT OTHERWISE BE
211 CONSIDERED CONFIDENTIAL (SUCH AS SELLER'S MOTIVATION TO SELL) AS NON-CONFIDENTIAL AT LINES 214 - 215.

212 ■ **CONFIDENTIAL INFORMATION:** None

213

214 ■ **NON-CONFIDENTIAL INFORMATION:** None

215

Notice: You may obtain information about the sex offender registry and persons registered with the registry by contacting the Wisconsin Department of Corrections on the Internet at <http://www.widocoffenders.org> or by phone at 877-234-0088.

216 ■ **ADDITIONAL PROVISIONS:** Persons signing this contract as "Seller" represent and warrant
217 that he/she/they are the sole seller(s) of the property. This listing contract shall
218 automatically renew for succeeding terms equal to the original term unless either party
219 sends written notice to the other terminating this contract within 30 days prior to the
220 end of the original or any renewal term.

221 This will confirm our agreement that in the event broker's commission as calculated at
222 lines 56-60 of this listing contract is less than \$340,000.00, The Dickman Company, Inc.
223 shall be paid a minimum commission of \$340,000.00 upon the conveyance of the Property
224 (as defined in this listing contract) to any other person or entity.

225 ■ **ADDENDA:** The attached None were made part of this Listing.

226 CAUTION: IF SIGNED, THIS LISTING CAN CREATE A LEGALLY ENFORCEABLE CONTRACT. BROKERS MAY PROVIDE A GENERAL
227 EXPLANATION OF THE PROVISIONS OF THIS LISTING OR OTHER REAL ESTATE CONTRACTS, BUT ARE PROHIBITED BY LAW FROM
228 GIVING ADVICE OR OPINIONS CONCERNING YOUR LEGAL RIGHTS UNDER THIS LISTING OR ANY OTHER REAL ESTATE CONTRACT.
229 AN ATTORNEY SHOULD BE CONSULTED IF LEGAL ADVICE IS NEEDED. SELLER SHOULD CONSULT OTHER EXPERTS AS
230 APPROPRIATE, FOR EXAMPLE, APPRAISERS, TAX ADVISORS, OR ENVIRONMENTAL INSPECTORS OR TESTERS IF SERVICES
231 BEYOND BROKER'S MARKETING SERVICES ARE REQUIRED.

232 ■ **TERM OF CONTRACT:** FROM THE 1st DAY OF March, 2005, UP TO AND
233 INCLUDING MIDNIGHT OF THE 28th DAY OF February, 2006.

234 NOTE: A SALE, OPTION, EXCHANGE OR PROCUREMENT OF A PURCHASER FOR A PORTION OF THE PROPERTY DOES NOT
235 TERMINATE THE LISTING AS TO ANY REMAINING PROPERTY INCLUDED IN THE LIST PRICE, INCLUDING PERSONAL PROPERTY AND
236 EQUIPMENT. SEE LINES 8 TO 15 AND 232 TO 233.

237 Dated this 1st day of March, 2005.

TOWER AUTOMOTIVE

238 (x) By [Signature] 3/4/05
239 Seller's Signature & Print Name Here: Frank McNeil Social Security No. or FEIN (Optional) _____ Date _____

240 (x) _____
241 Seller's Signature & Print Name Here: _____ Social Security No. or FEIN (Optional) _____ Date _____

242 3533 North 27th Street
243 Milwaukee WI 53216
243 Seller's Address _____ Phone # _____ Fax # _____

244 (x) [Signature]
245 Agent for Broker & (Print Name) Samuel Dickman The Dickman Company, Inc.
Broker/Firm Name _____

246 606 West Mason Street, Suite 302
247 Milwaukee WI 53208 (414) 271-6160 (414) 271-5125
247 Broker/Firm Address _____ Phone # _____ Fax # _____

EXHIBIT D

1 STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
2 BRANCH 24
3 -----

4 MILWAUKEE INDUSTRIAL
5 TRADE CENTER, LLC,
6 Plaintiff, CASE NO. 08-CV-001772
7 vs.
8 CITY OF MILWAUKEE, et al,
9 Defendant.
10 -----

11 MOTION HEARING
12 -----

13 BEFORE THE HONORABLE CHARLES F. KAHN, JR.,
14 CIRCUIT COURT JUDGE PRESIDING
15 AUGUST 12, 2008

16 A P P E A R A N C E S:

17 JOHN THEILER BODE, Attorney at Law, appeared on behalf
18 of Milwaukee Industrial Trade Center.

19 GREGG HAGOPIAN and THOMAS GARTNER, Assistant City
20 Attorneys, appeared on behalf of the City of Milwaukee
21 and its Redevelopment Authority.

22 ALSO APPEARING: Brian Bjodstrup, Benjamin Timm and
23 Douglas Graham.

24 BONNIE H. DOMASK
25 Official Court Reporter

I N D E X

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3		Page
4	BRIAN PAUL BJODSTRUP	
5		
6	Direct Examination by Mr. Bode	4

7

8 E X I B I T I N D E X

9	Exhibits Marked for Identification:	
10	Nos.	
11	14 - Indemnification Agreement	9
12	15 - disposal records	11
13	16 - access agreement	14
14	17 - Building 18 demolition permit	22
15	18 - Building 65A demolition permit	23
16	19 - 2-28-08 email	29
17	20 - boring locations	37

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1 T R A N S C R I P T O F P R O C E E D I N G S

2 THE COURT: Let's have the appearances again.

3 This is MITC versus The Redevelopment Authority in the

4 City of Milwaukee and the City of Milwaukee itself.

Page 2

5 Good afternoon. Appearances, please.

6 MR. BODE: Good afternoon, your Honor.

7 Attorney Jack Bode from Murn & Martin on behalf of
8 MITC. With me here in court, is Brian Bjodstrup, the
9 general manager of MITC.

10 MR. HAGOPIAN: The Redevelopment Authority and
11 The City of Milwaukee appear by Assistant City
12 Attorneys Gregg Hagopian and Tom Gartner and with us
13 are Benji Kim from the Department of City Development
14 and Doug Graham from Earth Tech.

15 THE COURT: Good afternoon, Mr. Hagopian, Mr.
16 Gartner, Mr. Kim, Mr. Graham, Mr. Bode and Mr.
17 Bjodstrup.

18 Mr. Bjodstrup, please raise your right hand.

19 BRIAN PAUL BJODSTRUP, is first duly sworn to
20 tell the truth, the whole truth, and nothing but the
21 truth, testified as follows.

22 THE WITNESS: Yes, sir.

23 THE COURT: Please have a seat. Tell us your
24 name, and spell your first name and spell your last
25 name.

1 THE WITNESS: My name is Brian Paul Bjodstrup,
2 Brian, B as in boy, R-I-A-N, B as in boy, J-O-D, as in
3 dog, S as in Sam, T as in Tom, R-U-P, as in Peter.

4 THE COURT: Okay, Mr. Bode.

5 DIRECT EXAMINATION BY MR. BODE:

6 Q Where do you reside?

7 A I'm a resident of the City of Milwaukee.

8 Q What is your occupation?

9 A I'm general manager of Milwaukee Industrial Trade
10 Center.

11 Q Can you briefly resume for the Court your educational
12 background?

13 A I have an associate's degree from Milwaukee Area
14 Technical College in printing and publishing. I've got
15 a bachelor's degree from the University of Wisconsin
16 Milwaukee, and my major is geology. I am a
17 hydro-geologist by definition in the Wisconsin State
18 statutes. I'm a registered professional geologist in
19 the State of Wisconsin. I've got an asbestos inspector
20 card from the Department of Health and Family Services.
21 I've got an asbestos supervisor card from the
22 Department of Health and Family Services.

23 In the past, I was a registered tank assessor,
24 although that's lapsed. I've previously been a ***
25 PEKKA consultant, but that's also lapsed. I've also

1 been OSHA 500 certified -- it's not certified. They
2 don't use that word. They use authorized trainer,
3 although that's more than a few years old as well. I
4 have worked as a professional archeologist. I've got
5 about nine years of experience working as an
6 environmental consultant.

7 Q Let's go back. You graduated from college. Give us
8 your job background.

9 A I worked for a company called Fluid Management, which
10 was primarily an underground storage tank removal and

11 cleanup company. I worked there for about three years.
12 They changed names a couple of times, but I sat at the
13 same desk doing the same job. Then I worked for a
14 company called Environmental Associates for another six
15 or so years. Then I started work for a company called
16 Renovation Consultants, which provides services to
17 Midwest Rail and dismantling, and then when MITC was
18 formed, I took that position.

19 Q What basically do you do at MITC?

20 A Well, I'm the general manager. I oversee
21 subcontractors, environmental consultants,
22 electricians. I oversee the project managers that do
23 different tasks for us that are directly employed by
24 MITC. I work with potential tenants for the site. At
25 the moment, I've been spending a lot of time working

1 with other railroads negotiating agreements for rail
2 activities. I report directly to the owners. So if my
3 guys that work directly on the site need something or
4 there's something that has to go up to the owners, I
5 talk to the owners as opposed to the people underneath
6 talking to the owners.

7 Q What is MITC? What does it do?

8 A MITC stands for Milwaukee Industrial Trade Center, LLC.
9 We do business as Milwaukee Terminal Railroad. We're
10 authorized by the Surface Transportation Board of the
11 railroad.

12 MR. HAGOPIAN: Can you speak a little louder?

13 THE WITNESS: Sorry.

14 BY MR. BODE:

15 Q You mentioned Milwaukee Terminal Railroad?

16 A Milwaukee Terminal Railroad, yes, registered with the
17 Surface Transportation Board as a railroad. It's a
18 turn-around railroad, Class 3 railroad.

19 Q When did MITC acquire the property in question,
20 approximately 88 acres of the MITC site?

21 A On November 10, 2006.

22 Q And from whom was it acquired?

23 A We bought it from Tower Automotive through the
24 bankruptcy court. We bought it from Tower Automotive,
25 but it had to be approved by the bankruptcy court.

1 Q And approximately when did MITC take occupancy?

2 A Well, we took possession of the property November 10th,
3 but actually Tower largely operated it for the next
4 month after that.

5 Q And after Tower operated it for that additional month,
6 did MITC have exclusive control over all the property
7 and all the possessions on it?

8 A After Tower took -- yes.

9 Q Were there any things left over from the Tower
10 Automotive move?

11 A Thousands of things.

12 Q And what was involved with that? In other words, whose
13 was it?

14 A We took possession of the property, but because Tower
15 had gone into bankruptcy, there were several companies
16 or banks that owned Wells Fargo, Bank of America and

17 some other smaller private entities that had bought
18 things from auctions during the course of the
19 bankruptcy that were still on-site. So we had to enter
20 into agreements, particularly with Martin Ria who had
21 bought things from Wells Fargo, so they could continue
22 to remove their property. Bank America sold some stuff
23 to Laturno. They also retained some things on the
24 property that they were trying to sell. So we had to
25 get into agreements with them to allow them access to

7

□

1 remove their property. They had liens against the
2 property that required us to come to an agreement with
3 them to remove property that had been foreclosed on
4 during the bankruptcy.

5 Q Did MITC do any investigations with respect to prior
6 issues at the time they acquired the property?

7 A Prior to the closing on the property, we got access to
8 Tower's document. There's a Phase I and a Phase II
9 from the previous year. We did additional ground
10 water, installed additional ground water, monitoring
11 wells, installed additional borings. We did some
12 building evaluations of what we believed the conditions
13 were.

14 THE COURT: Excuse me. Can I ask a question
15 here?

16 MR. BODE: Yes, your Honor.

17 THE COURT: Has MITC provided that Phase II
18 from 2005 that Tower Automotive obtained to the City of
19 Milwaukee?

20 THE WITNESS: Yes. Benji Timm got a copy of
21 it shortly after we took possession of the property,
22 and then again when we entered into access agreement in
23 November. Again, Earth Tech was given copies of that.
24 THE COURT: Thank you.
25 BY MR. BODE:

0

1 Q Were there any special issues with respect to Tower
2 that had to be resolved as part of the purchase?
3 A We have an irrevocable line of credit with them
4 requiring us to clean up. Initially, there were eight.
5 Now there are seven that are still open. Two of them
6 are up for foreclosure, BRRTS sites that were open on
7 property at the time that Tower went bankrupt or turned
8 the property over to us. So we have a line of credit
9 that requires us to complete the investigation and
10 cleanups to the satisfaction of the DNR on those parts
11 of the property. We also have an indemnification for
12 Tower for the rest of the property.
13 (Exhibit No. 14, Indemnification and Assumption of
14 Environmental Liability Agreement, marked for
15 identification.)
16 BY MR. BODE:
17 Q I'm showing what's been marked as Exhibit No. 14 and
18 ask you to identify that document, please.
19 A Yes. This is the Indemnification and Assumption of
20 Environmental Liability Agreement that we entered into
21 with Tower Automotive as approved by the bankruptcy
22 court when we purchased the property.

23 Q I noticed on here that I don't see a signature for
24 MITC. Was this document physically executed?
25 A This document was physically executed, yes.

0

1 Q Briefly, what are you required to do? I just want the
2 Reader's Digest version.
3 A We indemnify and hold the seller harmless from any
4 environmental obligations.
5 Q Essentially, you had to close up the open sites, right?
6 A Yes. We had to close up the open sites. It gives them
7 additional indemnification as well.
8 Q Since you have acquired the site and by you I mean
9 MITC, what has taken place with respect to the site
10 itself and what's been going on?
11 A Well, we have --
12 Q Maybe I can direct it a little bit more.
13 Environmentally, what has happened?
14 A We applied for and obtained one foreclosure on one of
15 the BRRTS' sites we applied for, and currently it's a
16 condition of closure. It's just a matter of completing
17 some relatively small tasks. We've also applied for
18 two additional closures.
19 We've met with the DNR and worked with them on
20 what our strategy is to deal with the rest of the open
21 sites. We've also met with the DNR and provided them
22 at least the opportunity to review the other
23 information we had.
24 At the time that I met with the DNR, they didn't
25 know that we had done additional work as far as

□

1 installing or monitoring wells and borings. So we met
2 with them about that, although there hasn't been a
3 formal report given to them about it. We've cleaned
4 out, pumped out and cleaned out and filled dozens of
5 pits on the property.

6 We've removed about 200,000 gallons of oily water,
7 about 20,000 gallons of oil from a variety of different
8 containers and machines. We've removed asbestos in
9 Building 18. We have a permit, an O and M operating
10 and maintenance permit to deal with the asbestos that's
11 damaged; or when we go to redo plumbing, sometime
12 there's asbestos on the pipes. So we need to remove
13 the asbestos in order to let the plumbers do their
14 work. We have removed as of the beginning of July, we
15 have removed 710 tons of -- excuse me -- it was 610
16 tons of debris. I'm not sure how much we've removed in
17 the month since then. We demolished several small
18 buildings that were unnecessary and potentially
19 unsightly. I've disposed of hazardous wastes, special
20 waste.

21 Q You were asked about some of the disposal products
22 yesterday at the site?

23 A Yes.

24 Q And we've indicated to the Court we would supply
25 records of those?

□

4 need some rebuttal witness after Mr Marcoux testifies,
5 but otherwise, we have put on our witnesses

6 THE COURT Okay And MITC previously had
7 Mr Blomberg, and we have the one witness for this
8 afternoon, and that's all, is that right?

9 MR. BODE Correct With the exception of
10 Mr Marcoux adversely

11 THE COURT Right. Okay And it's possible
12 that we will not be done this afternoon after we go at
13 it for a few hours So in that case, we still have some
14 time tomorrow available So thanks We will see
15 everyone at 1 45

16 MR HAGOPIAN Thank you, Your Honor

17 (Whereupon, proceedings were adjourned until
18 1 45 p m At which time, Court Reporter Bonita Domask
19 took down the proceedings starting with the testimony of
20 Brian Bjodstrup)

21 THE COURT Mr Bode, you are still examining
22 this witness

23 MR BODE Thank you, Your Honor.

24 CONTINUED DIRECT EXAMINATION

25 BY MR. BODE

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1 Q What current business is MITC carried on on the property
2 in question?

3 A Well, we are a railroad, and we are currently in the
4 businesses of conducting interstate trade, and
5 additionally, we are leasing excess reale state or
6 pursuing the leasing of excess real estate

7 Q What equipment do you have on the property related to
8 your business?

9 A Well, there is 31 rail cars There is a locomotive
10 There is two excavators, a front-end loader, two skid
11 steers , several forklifts, building components,

12 overhead cranes.

13 Q In addition to MITC, what other businesses are being
14 located on the premises?

15 A Well, Great Lakes Asbestos Abatement has an office
16 Nordmark has an office Shea Kenny Joint Venture leased
17 some space for refurbishing a deep tunnel machine
18 Knapp Railroad Builders has a contractor yard and an
19 office

20 Q What do they do?

21 A They build railroad sidings

22 Q Okay. Who else?

23 A A company called Cap Ends Concepts has some interest in
24 putting their shop on the property. Those are the
25 primary people that are on the site now

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1 Q Is there another company that's owned by similar
2 ownership to MITC?

3 A Well, Midwest Rail is owned by MITC, and when we bought
4 the property, most of the reason for buying the property
5 was to relocate Midwest Rail there

6 Q And what is Midwest Rail?

7 A Midwest Rail is primarily a demolition contractor, but
8 we do other general contracting as well

9 Q Did you meet with the City prior to starting the
10 business on the property in question?

11 A Yeah In September of 2006 when we first put in an
12 offer on the property because we, Midwest Rail, had done
13 the demolition on the other side of the tracks, Midwest
14 Rail has been doing work on the property for 30 years
15 So prior to purchasing the property, one of the things
16 that we did was we went and met with City officials to
17 make sure they knew who we were We gave them tours of
18 our facility on Lincoln Avenue Rocky Marcoux came,
19 Martha Brown, Benji Timm In September of 2006 Mayor

20 Barrett came and toured our facility on Lincoln Avenue,
21 and, you know, the purpose of giving those tours and
22 communicating to the City prior to buying the property
23 was to make sure that they knew who we were and what
24 kind of businesses we were in and what we intended to do
25 so that we wouldn't end up surprising them or getting

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1 chased out right after buying the property
2 Q And what did the City officials tell you?
3 A Well, they were supportive of our buying the property
4 and redeveloping it and bringing jobs and business
5 there. Actually, we discussed their participation in
6 helping us deal with some of the problems with the
7 property or redeveloping the property and how that would
8 go about

9 Q What is the current attitude of the City officials with
10 respect to the property in question?

11 A According to Benji Timm's testimony they want to own it
12 or nothing

13 Q So you are no longer desirable?

14 A We are no longer desirable.

15 MR BODE Thank you That's all the
16 questions I have.

17 Your Honor, I would offer the exhibits into
18 evidence that are marked

19 THE COURT Any objection to the exhibits?

20 MR HAGOPIAN I just have some questions on
21 the Exhibit 20, but otherwise, no

22 THE WITNESS Is 20 the remarked Exhibit 8?

23 MR HAGOPIAN No objection, Your Honor

24 THE COURT And 20 is the large display, is
25 that correct?

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1 MR HAGOPIAN- Yes

2 THE COURT Okay So you have decided you are

3 not objecting to that?

4 MR HAGOPIAN- I decided I am not objecting

5 THE COURT Okay All of these exhibits then

6 are admitted into evidence That is the set of exhibits

7 identified by this witness during direct examination

8 Okay Mr Hagopian

9 MR HAGOPIAN Thank you, Your Honor

10 CROSS-EXAMINATION

11 BY MR HAGOPIAN

12 Q Looking at Exhibit 8--

13 A Exhibit 8 or Exhibit 20?

14 Q Well, let's look at Exhibit 20 since it's up there. All

15 right. We will look at Exhibit 8 We will look at

16 Exhibit 8 Looking at Exhibit 8, which buildings at the

17 MITC parcel are currently occupied?

18 A Are currently occupied to what extent?

19 Q Occupied as in being used

20 A Building 8 is being used

21 Q For what?

22 A There is general offices in there for several different

23 companies

24 Q What are the offices in there?

25 A Great Lakes Asbestos Abatement has offices in there

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1 Nordmark has got an office in there MITC's general

2 office is in there Knapp may or may not move stuff

3 into there They have got some equipment on site We

4 are working on Building 70

5 Q What do you mean working on Building 70?

1 MR HAGOPIAN Okay

2 Q You testified about having 31 rail cars on the property,

3 correct?

4 A Yes

5 Q How long have they been there?

6 A Some have been there for about two months Some have

7 been there for two or three weeks Locomotive has been

8 there for about a year We got two rail cranes coming

9 in a couple of weeks I have got an offer out on

10 another 20 intermodal cars.

11 Q Intermodal rail cars?

12 A Intermodal cars are the cars that you put shipping

13 containers on

14 Q Now, if RACM has a proposed boring in or near the

15 vicinity of a railroad track, it would be possible,

16 would it not, for MITC to coordinate its testing

17 activities with RACM and Earth Tech so as not to

18 interfere with the use of that track, correct?

19 A It may be I would have to know which boring you were

20 talking about and where you were going to put it and

21 when you were going to do it

22 Q If you sat down with Doug Graham or Benji Timm and got

23 all of the answers to those questions, that would help a

24 lot with the cooperation, wouldn't it?

25 A It's not my understanding that RACM is all that

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1 interested in cooperating with us

2 Q That doesn't answer my question though Communication

3 like that could minimize any potential interference,

4 correct?

5 A It would certainly take my time

6 Q That doesn't answer the question either

7 THE COURT Mr Nagopian, if there is an order
8 for testing that comes from this Court, I will certainly
9 expect full cooperation among the parties and certainly
10 expect that the City and Earth Tech or whoever the City
11 employs will work diligently to minimize the intrusion
12 in terms of the amount of time involved and will
13 minimize the intrusion with respect to interference of
14 the operations. Similarly, I certainly would expect the
15 property owner to do the same in order to reduce the
16 difficulty and time consumption involved, and it would
17 benefit everyone I am sure that's how everyone sees
18 it I just can't imagine that there would be any
19 incentive on the part of either party to interfere with
20 the process

21 Now, in particular, I would expect Mr Bjodstrup to
22 be particularly helpful in that respect as well as
23 Mr Graham I don't mean to be saying that I think
24 there is going to be an order for boring or for any
25 intrusion I don't know that yet because the testimony

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1 isn't closed and I have not sufficiently studied the
2 law, but I do know that if there would be such an order
3 coming from this Court that both parties would cooperate
4 and get this done in an efficient manner

5 Is my hunch on that correct, Mr Bjodstrup?

6 THE WITNESS: Yes

7 THE COURT Good

8 Q Benji Timm did provide to you the Phase 1 analysis for
9 the MITC parcels, correct?

10 A Yeah After he already asked for a warrant to do a
11 Phase 2

12 Q I am sorry Can you do speak into the microphone?

13 A Yes After he asked for a Phase 2, we did get the

EXHIBIT E

TO: VIA PERSONAL DELIVERY

Redevelopment Authority of the City of Milwaukee
Attn: Rocky Marcoux, Commissioner
Department of City Development
809 North Broadway
Milwaukee, Wisconsin 53202

VIA PERSONAL DELIVERY

City of Milwaukee Clerk
Attn: Ronald D. Leonhardt, City Clerk
City Hall, Room 205
200 East Wells Street
Milwaukee, Wisconsin 53202

DEPARTMENT OF CITY DEVELOPMENT

Date: 2-12-08

Time: 11:00 AM

Rec'd by: Teddy Bemo

RE: Notice of Circumstances of Claim and Claim – Milwaukee Industrial Trade Center, LLC

PLEASE TAKE NOTICE that Milwaukee Industrial Trade Center, LLC (hereinafter "MITC"), hereby makes a claim against the Redevelopment Authority of the City of Milwaukee (hereinafter "RACM") and the City of Milwaukee (hereinafter "the City").

In November, 2006, MITC purchased several parcels of real estate ("the Property") located in the City of Milwaukee. The Property was previously owned by Tower Automotive Corporation and was purchased from the trustee appointed in the Tower Automotive bankruptcy proceedings. The Property consists of approximately 84 acres and is bordered by Capitol Drive, West Hopkins Street, West Townsend Street, and North 27th Street. The Property contains eight (8) parcels with the following tax identification numbers 269-9993-110-2, 269-0261-100-1, 269-0305-111-5, 270-0144-111-1, 285-1704-110-8, 285-1724-111-5, 269-0252-112-6, 269-0259-4. The largest parcel (tax key 269-9993-110-2) is approximately 76 acres, is improved with approximately 2.2 million square feet of buildings and is zoned Heavy Industrial (IH). The remaining seven (7) parcels are vacant lots.

Approximately 200,000 square feet of improvements on the Property were designed and constructed as office space. The remaining 2 million square feet of buildings on the Property

were designed and constructed for heavy industry and manufacturing. The Property is located on an active rail line. The existing rail infrastructure on the Property includes a rail scale, dock level sidings and indoor track under overhead cranes.

Approximately 1 million square feet of the industrial improvements was updated in the late 1990's. Improvements made at that time included upgrades to the electrical infrastructure, improvements to the sprinkler systems, the replacement of roofs on several buildings and the construction of an annex to one of the buildings.

During the summer of 2006, representatives of MITC met with officials of the City and RACM on several occasions to discuss MITC's proposed use of the Property. The meetings were attended by City officials including, Mayor Thomas Barrett, Rocky Marcoux, the Commissioner of RACM and Department of City Development ("DCD"), Martha Brown, the Deputy Commissioner of DCD, Patrick Walsh, the President of the Milwaukee Economic Development Corporation ("MEDC"), Milwaukee Aldermen Willie Wade and Ashanti Hamilton, and other representatives of the City of Milwaukee.

Two of these meetings, including one attended by Mayor Barrett, were conducted at MITC's facility located at 4777 W Lincoln Ave, West Milwaukee, Wisconsin. The purpose of the visits to the Lincoln Ave. Property was to give the Mayor and other City representatives an opportunity to tour the current operations of Knapp Railroad Builders, Inc. ("Knapp"), Midwest Rail & Dismantling, Inc. ("Midwest") and West Milwaukee Recycling, LLC ("WMR"), all prospective tenants of the Property. During these meetings, City and RACM officials indicated support for MITC's plans to relocate and expand Knapp, Midwest and WMR to the Property. The major concern expressed by the City officials during these meetings was the preservation of

the main office building on the Property and the expectation that the northernmost portion of the Property which borders Capitol Drive would be developed for "mixed use"

RACM's chief responsibilities are to eliminate blighting conditions that inhibit neighborhood reinvestment, to foster and promote business expansion and job creation, and to facilitate new business and housing development. Toward that end, RACM prepares and implements comprehensive redevelopment plans, assembles real estate for development, is empowered to borrow money and may condemn property in furtherance of its redevelopment objectives. RACM relies on DCD for its professional, technical and administrative support to carry out its objectives

DCD is an administrative department of the City which is responsible for, among other things, the regulation of business and real estate development, land use planning and construction and occupancy permitting within the City's. One of the functions of DCD is to issue *Certificates of Occupancy* to individuals and businesses which desire to occupy certain properties within the City of Milwaukee that are either new commercial construction, buildings that have a change of use or buildings that have been vacant for some time and are reopened for use. Under the provisions of City ordinance, Subchapter 8, Section 200-42, the commissioner of DCD has a duty to and shall issue a Certificate of Occupancy after an application has been filed by the owner or tenant of a property after it is found by DCD that the building, structure or premises in question complies with all City regulations applicable to the proposed occupancy.

The Property is subject to The Redevelopment Plan for the West Capitol Drive and North 35th Street "Century City" Project Area (hereinafter "the Redevelopment Plan") which was drafted by RACM. The primary goal of the Redevelopment Plan is to promote the attractive, productive and efficient use or reuse of land and buildings in the Project Area, which includes

the Property, in a manner that provides high quality sites for businesses and industry while benefiting the surrounding community. The Redevelopment Plan set forth the policy of encouraging future and current owners, developers and lessees to develop and implement individual redevelopment plans for the Property. MITC prepared such a plan and submitted it to DCD and RACM in the summer of 2007. The plan included an evaluation of development potentials including an analysis of employee earnings on a jobs-per-acre basis under three different development scenarios. DCD refused to discuss this plan with MITC due to the City and RACM's desire to acquire the Property and redevelop it.

In furtherance of its intent to utilize the industrial amenities on the Property and lease it to third-parties, MITC and its prospective tenants began applying for Certificates of Occupancy. On July 6, 2007, DCD issued a Certificate of Occupancy to Great Lakes Asbestos Abatement, LLC, a tenant of MITC to occupy one of the buildings on the Property. This Certificate of Occupancy was for general office use.

On August 9, 2007, Midwest, a prospective tenant of MITC, applied to DCD for a Certificate of Occupancy to occupy a portion of the Property and paid the required fee. Midwest's intent was to use the Property as an office, contractor's shop and contractor's yard. Pursuant to the Redevelopment Plan, contractor's shops and contractor's yards are permitted uses as a matter of right and offices are considered limited uses. DCD has not issued Midwest's Certificate of Occupancy, despite the fact that Midwest's proposed use is in compliance with the Redevelopment Plan.

On August 9, 2007, Knapp, a prospective tenant of MITC, applied to DCD for a Certificate of Occupancy to occupy a portion of the Property and paid the required fee. Knapp, pursuant to its application, intended to use the Property as an office, contractor's shop and

contractor's yard. After making inquiries with DCD, representatives of MITC learned that DCD and RACM ordered that certain building and electrical inspections were not to be completed as part of the normal course of confirming compliance with City regulations which in turn prevented issuance of the Certificate of Occupancy. To date, the necessary inspections have not been performed and Knapp has not been issued a Certificate of Occupancy to occupy the Property. The inspections of the Property that were required for issuing Knapp's permit were delayed intentionally by DCD and RACM to prevent Knapp from occupying the Property and to prevent MITC from leasing the Property despite the fact that the use of the Property proposed by Knapp was in full compliance with the Redevelopment Plan.

On or about August 15, 2007, Belly Commodity Trading, LLC, (hereinafter "Belly") a prospective tenant of MITC, applied to DCD for a Certificate of Occupancy to occupy a portion of the Property and paid the required fee. Belly, pursuant to its application, intended to use a portion of the Property as an indoor collection recycling facility. To date, neither Belly nor MITC has received any input from either DCD or RACM as to the status of said application, nor has the Certificate of Occupancy been issued to Belly. On or about December 13, 2007, the City produced a letter as part of an open records request submitted by MITC. Said letter was from DCD and was addressed to representatives of both MITC and Belly. This letter advised both parties that Belly would be required to obtain a conditional use permit from RACM for its proposed use of the Property. Neither MITC nor Belly ever received this letter. DCD and RACM's failure to properly notify Belly that a conditional use permit was required for its proposed use of the Property has unreasonably delayed Belly's Certificate of Occupancy application and MITC's right to lease the Property.

In July, 2007, Nodemart, LLC (hereinafter "Nodemart") a prospective tenant of MITC, submitted an application for a Certificate of Occupancy to DCD to occupy space at the Property and paid the required fee. On December 13, 2007, the City produced a document dated September 10, 2007, from DCD to representatives of both MITC and Nodemart. This letter advised both parties that DCD would require a plan of operation from Nodemart so that a use determination could be made by DCD for purposes of issuing the Certificate of Occupancy. Neither Nodemart nor MITC received this September 10, 2007 letter from DCD. To date, neither Nodemart nor MITC has received any response from DCD or RACM about the status of Nodemart's application for a Certificate of Occupancy. DCD and RACM's failure to properly notify Nodemart that a plan of operation was required for its proposed use of the Property and to take further action in processing Nodemart's application has unreasonably interfered with MITC's right to lease the Property.

RACM and the City have had negotiations with MITC to purchase the Property. In the course of these negotiations, representatives of RACM and the City have indicated that if MITC is not willing to sell at a price agreeable to RACM, that RACM and/or the City will exercise its eminent domain powers to condemn the Property. By denying the applications for Certificates of Occupancy, RACM and the City has diminished the value of the Property in an attempt to acquire the Property at a reduced price. The City and RACM have further damaged MITC's ability to market and develop the Property by undermining MITC's credibility with potential tenants and purchasers by refusing to issue the duly applied for Certificates of Occupancy.

MITC and its tenants have a legal right to the Certificates of Occupancy, and DCD and RACM have a duty to process and issue the Certificates of Occupancy where applicable. RACM and DCD's failure to process the applications for the requested Certificates of Occupancy and to

issue said Certificates when necessary is arbitrary and capricious as several of the applications are permitted uses under the Redevelopment Plan

Pursuant to this Notice of Circumstances of Claim and Claim, MITC is respectfully requesting that DCD and RACM reverse their decisions and process said applications and issue the Certificates of Occupancy where applicable. In addition, MITC is seeking damages of \$32,000,000.00 for RACM and the City's refusal to process and issue the Certificates of Occupancy, as the refusal is contrary to the Redevelopment Plan, the City's Ordinances, the Wisconsin Statutes and applicable case law. Consequently, MITC has suffered a regulatory taking of the Property by the City and RACM and has continuing damages. In addition, the City has violated Article 13 of the Wisconsin Constitution by engaging in conduct necessarily designed to deprive MITC of the fair market value of the Property.

MITC hereby makes a claim against the City and RACM for money damages in an amount set forth above and makes this Notice of Circumstances of Claim and Claim pursuant to Section 893.80, Wis. Stats.

Dated this 11th day of February, 2008.

MURN & MARTIN, S C
Attorneys for Claimant
Milwaukee Industrial Trade Center, LLC

By: _____

Donald J. Murn
State Bar No. 1013371
J. Michael Long
State Bar No. 1024915

EXHIBIT F

MURN & MARTIN, S.C.

DONALD J. MURN
ALSO LICENSED IN TEXAS
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Waukesha, WI 53186

Phone: (262) 524-8500
Fax: (262) 524-9200
www.murnlaw.com

June 5, 2008

VIA HAND DELIVERY

Mr. Gregg Hagopian
Assistant City Attorney
Milwaukee City Hall
200 E. Wells Street, #800
Milwaukee, WI 53202-3515

Mr. Thomas O. Gartner
Assistant City Attorney
Milwaukee City Hall Suite 800
200 East Wells Street
Milwaukee, WI 53202-3551

Re: Milwaukee Industrial Trade Center, LLC/RACM Access
Milwaukee County Case No. 08-CV-1772

Dear Messrs. Hagopian and Gartner:

The Redevelopment Authority of the City of Milwaukee ("RACM") has a motion pending before Judge Kahn to obtain access to Milwaukee Industrial Trade Center, LLC's ("MITC") 84 acre property ("Property") which was once the Tower East Facility. RACM seeks this access pursuant to §66.1333 Wis. Stat., which is Wisconsin's Blight Elimination and Slum Clearance Act. In addition to the reasons set forth in its brief filed with the Court on May 8, 2008, MITC further maintains that RACM's right to access under Wis. Stat. §66.1333 is pre-empted by the federal Interstate Commerce Commission Termination Act ("ICCTA") and therefore RACM is without authority to access the Property to perform the work set forth in its motion.

In 1996, the ICCTA revised rail transportation in the United States. The ICCTA abolished the Interstate Commerce Commission and replaced it with the Surface Transportation Board ("STB"). Under the ICCTA, the STB has exclusive jurisdiction over rail carriers and rail facilities. The ICCTA contains an express preemption clause which provides "Except as otherwise provided in this part, the remedies provided under this part with respect to the regulation of rail transportation are exclusive and pre-empt remedies provided under Federal or State law." 49 U.S.C. §10501(b)(2). "Transportation" is broadly defined in the ICCTA and includes:

A. a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail.

B. services related to that movement including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling and interchange of passengers and property.

Mr Gregg Hagopian
Mr Thomas O. Gartner
June 5, 2008
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49 U.S.C. §10102(9)

On May 16, 2008, the STB granted MITC d/b/a Milwaukee Terminal Railway, the authority to acquire and operate approximately 2 miles of rail line on the Property in Milwaukee. (See attached document.) As a result of this approval, MITC and the Property are now subject to regulation by the STB pursuant to 49 U.S.C. §10501. This federal law pre-empts state and local authority to regulate railroad property, including RACM's authority to obtain access to the Property under §66.1333 Wis. Stat.

As you know, MITC has withdrawn all offers to sell the Property to either RACM or the City. In order to acquire the Property, RACM must now attempt to condemn it. However, RACM's right to condemn the Property is pre-empted under the ICCTA. There is federal case law to support this position.

The Federal District Court, Western District of Wisconsin, has ruled that "condemnation" is "regulation", and is the most extreme type of control over rail transportation as it is defined in the ICCTA. See *Wisconsin Central, Ltd. v. The City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000). Any effort by RACM or the City to now condemn the Property would be "impermissibly attempting to subject to state law property that Congress specifically put out of reach." *Id.* at 1014. This issue has also been considered by the United States Court of Appeals for the 6th Circuit. See *City of Riverview vs. Surface Transportation Board*, 398 F.3d 434 (6th Cir. 2005).

The legislative history of the ICCTA makes it clear that local governments may exercise certain police powers over the development of railroad property which protect public health and safety, provided such regulations are settled and defined, can be obeyed with reasonable certainty, entail no extended or open ended delays, and can be approved without the exercise of discretion. For example, courts have found it permissible for a local government to apply its building and electrical codes as long as they do so without discrimination. See *Flynn v Burlington N Santa Fe Corp*, 98 F. Supp.2d 1186, 1189-90 (E.D. Wash. 2000). But states and municipalities are not free to impose any requirements that they wish on a railroad in the name of police power.

Likewise, the City of Milwaukee's regulatory authority over the Property is limited. The City may perform electrical, plumbing inspections, etc., on the Property. However, RACM does not have the authority to gain access to the Property under Wis. Stat. §66.1333 in order to perform environmental inspections, surveys and other testing. These actions under Wis. Stat. §66.1333 are in contemplation of RACM condemning the Property, a course of action RACM is barred from pursuing under the ICCTA due to the fact that such an action would directly interfere with MITC's ability to operate a railroad on the Property.

As you can see, the City's limited regulation over MITC and the Property and RACM's total lack of authority renders RACM's pending Motion for Special Inspection Warrant and Order moot. MITC hereby demands that this motion be withdrawn. If RACM refuses to withdraw its motion, MITC shall file an additional objection and brief asserting federal pre-emption of the

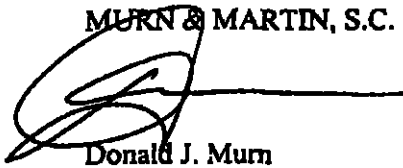
Mr. Gregg Hagopian
Mr. Thomas O. Gartner
June 5, 2008
Page 3

matter and issues involved in RACM's motion. Federal pre-emption may also eliminate the need for MITC to pursue its Mandamus action against the City and RACM provided the City is willing to now issue the requested occupancy permits to MITC's tenants.

Please advise as soon as possible as to whether RACM will voluntarily withdraw its motion and whether the City will proceed with granting the occupancy permits in question

Very truly yours,

MURN & MARTIN, S.C.

A handwritten signature in black ink, appearing to be "Donald J. Murn", is written over a horizontal line. The signature is stylized with a large, looping initial "D".

Donald J. Murn

DJM.krm

Enclosures

cc. Jerry Blomberg, MITC, LLC

EXHIBIT G

CAP rec'd 6-11-08 @ 11:36 AM

MURN & MARTIN, S.C.

JOHN THEILER BODE
jbode@murnlaw.com

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Waukesha, WI 53186

Phone (262) 524-8500
Fax (262) 524-9200
www.murnlaw.com

6-10-08

June 10, 2008

Clerk for the
Honorable Charles F. Kahn, Jr.
Milwaukee County Courthouse
901 North 9th Street
Milwaukee, WI 53233

MITC RR BRIEF
(Tom McFarland)

Re: Milwaukee Industrial Trade Center, LLC v. City of Milwaukee, et al.
Case No. 08-CV-001772

Dear Judge Kahn:

Enclosed for filing please find Milwaukee Industrial Trade Center, LLC's Additional Objection to Jurisdiction Regarding RACM's Motion and the verified opinion letter of Thomas F. McFarland which we are hereby filing with the Court in the above-entitled action. These filings pertain to RACM's Motion which has been previously filed with the Court and which is currently scheduled to be heard by the Court on June 30, 2008 at 1:45 p.m.

MITC reserves the right to file additional supporting materials and an additional supplementary brief prior to the time of the hearing on the matters in question.

By copy of this letter, all counsel of record are also being served with the enclosed documents. Please date stamp the enclosed copy of this letter and return to me in the envelope provided.

Thank you for your attention to this matter.

Very truly yours,

MURN & MARTIN, S.C.


John Theiler Bode

JTB/ah
Enclosure

cc: Jerry Blomberg, MITC (w/encl.)
Mr. Brian Bjodstrup, MITC (w/encl.)
Gregg Hagopian, Esq. (w/encl.)
Tom Gartner, Esq. (w/encl.)

EXHIBIT H

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THOMAS F. McFARLAND

June 6, 2008

By e-mail to dmurn@murnlaw.com

Donald J. Murn, Esq.
Murn & Martin, S.C.
N20 W22961 Watertown Road
Waukesha, WI 53186

Re: Milwaukee Industrial Trade Center, d.b.a. Milwaukee Terminal Railway

Dear Don:

This responds to your request that I provide a legal opinion as to whether State or local land-use and/or environmental regulations would be federally preempted if attempted to be applied by the City of Milwaukee (the City) to the railroad facilities or operations of the Milwaukee Industrial Trade Center, d.b.a. Milwaukee Terminal Railway (MITC) at the former A.O. Smith plant site at Milwaukee, WI.

OVERVIEW

For the reasons explained herein, it is my opinion that any such laws or regulations would be federally preempted if they were attempted to be applied in a manner that would prevent or to materially delay railroad operations being conducted, or to be conducted, by MITC. That federal preemption would apply specifically to a requirement by the City that MITC obtain an occupancy permit before conducting rail operations. Any attempt by the City to assert eminent

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domain to condemn the property on which MITC will conduct rail operations would also be federally preempted.

QUALIFICATIONS TO RENDER OPINION

I am highly qualified to render the opinion that you have requested. I have been actively engaged in the practice of law for the past 43 years. Throughout that long career, my specialty in practice has been railroad law. From 1965 to 1970, I was a Commerce Attorney in the Law Department of Illinois Central Railroad in Chicago. From 1970 to 2001, I was a member of the Chicago Law Firm of Belnap, Spencer, Hardy & Freeman and successor firms, engaged exclusively in the practice of railroad law. From 2001 to the present, I have been a sole practitioner, also engaged exclusively in the practice of railroad law.

I have been actively involved in cases in which the status of an entity as a rail carrier subject to the jurisdiction of the Surface Transportation Board (STB) has been determined. I have closely followed decisions of the STB and the Courts on the scope of federal preemption of State and local regulation of activities of rail carriers. I have rendered a number of legal opinions on that subject matter.

I represented MITC in obtaining authority from the STB to acquire and operate railroad trackage as a rail common carrier on the former site of the A.O. Smith Corp. manufacturing operations at Milwaukee, WI. I was the principal attorney for Bulkmatic Railroad Corporation (BRC), which was one of the first entities to acquire and operate over trackage as a rail common carrier that theretofore had been owned and operated by a private, non-railroad entity.

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I have signed this opinion and have had my signature notarized to provide assurance that the facts and the law stated in this opinion are personally known to me to be true and correct.

FACTUAL BACKGROUND

In November, 2006, MITC purchased approximately 84 acres of industrial land in Milwaukee, WI bordered by Capitol Drive, West Hopkins Street, West Townsend Street, and North 27th Street (the property). The purchase was made from the Trustee in bankruptcy of Tower Automotive Corp. (Tower). Tower had acquired that property from A.O. Smith Corp. (Smith) in 1997. Tower declared bankruptcy in 2005. Smith had used the property since approximately 1920 for the manufacture of undercarriages for automobiles.

The property is zoned heavy industrial. It is improved with approximately 2.2 million square feet of buildings. There are approximately two miles of railroad trackage that serves buildings on the property. That trackage is connected at the edge of the property to an active rail line that is leased by Wisconsin & Southern Railroad Co. (WSOR) from Canadian Pacific Railway Company (CP). Existing rail infrastructure on the property includes a rail scale, dock-level sidings, and indoor track under overhead cranes.

In view of that extensive rail infrastructure, the property is highly conducive to use as a rail terminal and/or rail-truck transloading facility. When Tower owned the property, it operated over the railroad trackage in conjunction with its own manufacturing operations. When Smith owned the property, Milwaukee Road, predecessor of CP and WSOR, operated over that trackage as private track pursuant to private sidetrack agreement with Smith.

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After MITC refurbished the property, the owners of MITC proposed to relocate their own businesses onto the property. Those businesses are rail-related, but they do not require rail service. The City took the position that relocation of those businesses requires occupancy permits in accordance with a Redevelopment Plan for the West Capitol Drive and North 35th Street "Century City" Project Area. After the City failed to issue those occupancy permits, MITC filed a Petition for Writ of Mandamus to force the City to do so. *See Milwaukee Industrial Trade Center, LLC v. City of Milwaukee, et al.*, Cir. Ct., Milw. Cty., WI, No. 2008-CV-001772. That action is pending.

Recently, business opportunities for the property that would require rail service became available to MITC, i.e.:

- (1) transloading of commodities from railcars to trucks for local distribution in the Milwaukee and Chicago areas. Some of those commodities would be transloaded directly from railcars to trucks. Other commodities would be unloaded from railcars, stored in warehouses on the property for varying periods, and would later be loaded onto trucks;
- (2) similar transloading as described in (1) above, except that the commodities would be processed, packaged or repackaged on the property before being loaded onto trucks for local distribution. Specific prospects for that type of transloading are salt, granulated clay (kitty litter), decorative stone, railroad ballast and concrete; and
- (3) repair, cleaning, and assembly of railcars, and powering of locomotives.

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MITC intends to perform rail transportation within the property as a rail common carrier in conjunction with the above activities. MITC intends to do business in that respect as Milwaukee Terminal Railway (MTR). Accordingly, on April 16, 2008, MITC-MTR filed at the STB a Notice of Exemption from 49 U.S.C. § 10901 for its acquisition and operation of the railroad trackage on the property as a rail common carrier.^{1/} That Notice was docketed by the STB as Finance Docket No. 35133, *Milwaukee Industrial Trade Center, LLC, d.b.a. Milwaukee Terminal Railway – Acquisition and Operation Exemption – Private Trackage at Milwaukee, WI*. Attached hereto as Appendix 1 is a copy of the Corrected Verified Notice of Exemption under 49 C.F.R. § 1150.31 filed by MITC-MTR on April 16, 2008.

On May 1, 2008, the STB issued a notice to the public of the filing of MITC-MTR's Notice of Exemption. That STB notice was published in the Federal Register on May 1, 2008. Attached hereto as Appendix 2 is a copy of the STB's notice as published in the Federal Register on May 1, 2008 at page 24115.

It is provided in 49 C.F.R. § 1150.32(b) that a Notice of Exemption for acquisition and operation of a rail line by an entity not theretofore having carrier status (i.e., MITC-MTR) shall become effective 30 days after the filing of the Notice at the STB.

No protest nor petition for stay of the exemption for MITC-MTR's rail line acquisition and operation was filed. Inasmuch as the MITC-MTR Notice of Exemption was filed on April 16, 2008, the exemption for MITC-MTR's acquisition and operation of the trackage on the

^{1/} The STB has adopted a class exemption from the application requirements of 49 U.S.C. § 10901 for acquisition and operation of rail lines by entities who were not theretofore rail carriers. See 49 C.F.R. §§ 1150.31, *et seq.*

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property thus became effective on May 16, 2008. As of that date, MITC-MTR became a rail carrier subject to the jurisdiction of the STB. However, the authority conferred by the exemption is permissive, not mandatory. Therefore, MITC-MTR can implement that authority by beginning rail operations at any time on or after May 16, 2008.

APPLICATION OF THE LAW

There is an express statutory federal preemption of State and local regulation of rail activities that are subject to STB regulation. That express preemption is contained in 49 U.S.C. § 10501(b), as follows (emphasis added):

(b) The jurisdiction of the Board over--

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

There are several legal requirements that must be met for that federal preemption to apply. First, in order to be considered to be "rail" transportation as that term is used in 49 U.S.C. § 10501(b), the transportation at issue must be performed by a legitimate "rail carrier" who is subject to STB regulation. The term "rail carrier" is defined in 49 U.S.C. § 10102(5) as follows:

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'rail carrier' means a person providing common carrier railroad transportation for compensation, but does not include street, suburban, or interurban electric railways not operated as part of the general system of rail transportation . . .

Secondly, in order to be considered to be rail "transportation" as that term is used in 49 U.S.C. § 10501(b), the railroad facility or activity at issue must constitute "transportation" subject to STB regulation. The term "transportation" is defined quite broadly in 49 U.S.C. § 10102(9) as follows:

(9) "transportation" includes--

(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

(B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property;

Thirdly, in order to be considered to be "regulation" of rail transportation as that term is used in 49 U.S.C. § 10501(b), the State or local action to be federally preempted must be applied to prevent or to materially delay rail operations subject to STB jurisdiction. The term "regulation" is not statutorily defined, but its meaning is reasonably clear as a result of case law.

For the reasons explained below, I am firmly of the opinion that land-use and/or environmental regulations or laws, including specifically a requirement of an occupancy permit or condemnation of the property on which MITC-MTR will operate, would be federally preempted if they were attempted to be applied by the City in a manner that would prevent or

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materially delay MITC-MTR's rail operations because such application would constitute regulation of rail transportation subject to the express federal preemption provided for in 49 U.S.C. § 10501(b).

1. **MITC-MTR Is A Legitimate Rail Carrier Subject To STB Regulation**

The issue with respect to the status of MITC-MTR as a legitimate rail carrier is whether it obtained authority from the STB in good faith in order to provide rail service in response to a legitimate public need, or instead obtained such authority solely in order to assert federal preemption available to rail carriers in regard to land-use, environmental and/or eminent domain authority available to the City. If the former, MITC-MTR qualifies as a rail carrier for the purpose of application of federal preemption; if the latter, MITC-MTR would not be treated as a legitimate rail carrier qualified to assert such federal preemption.

In my opinion, the series of decisions of the Courts and the STB in the *Riverview-Trenton* case, identified below, are squarely on point in regard to that issue, and unequivocally support a determination that MITC-MTR is a legitimate rail carrier subject to STB regulation, and thus is able to successfully assert federal preemption in regard to State and local regulation of its rail transportation activities.

As in the case at hand, the *Riverview-Trenton* case involved railroad trackage within industrial plant property that had been operated as private track for many years, and which more recently had been acquired to be operated as common carrier track subject to STB jurisdiction. The track at issue in that case was located on a parcel of land of approximately 271 acres along the Detroit River in the towns of Riverview and Trenton in Wayne County, Michigan. The

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parcel was used for many years for steel production by McLouth Steel Company (McLouth). The trackage on that parcel connected at two points with tracks owned by Grand Trunk Western Railroad (GTW), a subsidiary of Canadian National Railway Company (CN). Pursuant to an agreement with McLouth, GTW operated over McLouth's private plant trackage in conjunction with providing rail service to McLouth.

McLouth ceased operating at the plant and sold the property to DSC Steel Company (DSC). Thereafter, DSC discussed potential sale and development of a 76-acre segment of the property along the River with officials of the towns of Riverview and Trenton and Wayne County (the Local Governments). The Local Governments wanted to acquire that property in order to convert it to a public use so that the public would have improved access to the area, and to make the area more aesthetically pleasing.

However, DSC instead sold that 76-acre parcel to Crown Enterprises, Inc. (Crown). Crown is a real estate development subsidiary of CenTra, Inc. (CenTra). CenTra is a holding company that own several transportation companies, including Mason Dixon Lines, Inc., a large motor carrier.

Crown incorporated a railroad subsidiary, Riverview Trenton Railroad Company (RTR), to whom it conveyed the 76-acre parcel. Realizing that Crown was not going to sell the parcel to them, the Local Governments began to investigate the possibility of condemning the parcel under Michigan eminent domain law. The attorney for Wayne County sent a letter to Crown requesting information relevant to the proposed condemnation of the parcel.

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RTR thereupon took two actions: (1) it filed a Notice of Exemption at the STB to acquire the railroad trackage on the parcel, and to operate it as a rail common carrier; and (2) it filed a motion for a preliminary injunction in Federal District Court to enjoin the Local Governments from proceeding with condemnation of the parcel.

In *Riverview Trenton R. Co. v. County of Wayne*, (E.D., Mich., No. 01-70078, entered on April 10, 2001), the Court granted RTR's motion for preliminary injunction. The Court took note of RTR's contention that it acquired the parcel for the "express purpose of providing additional intermodal terminal and cargo transfer capacity for Centra (sic.) transportation subsidiaries and other carriers operating in interstate commerce in the Detroit area" (slip op. at 5). The Court also noted RTR's contention that its activities would also include "interchange between motor carrier(s) and rail carriers and transportation to ports throughout the United States . . . (and) a near-by deep-water marina for the interchange of containers between deep-water ships and rail carriers" (*id.*) Emphasizing that Wayne County had not challenged the types of activities that RTR intended to conduct, the Court held that (slip op. at 6):

... (I)t is clear to the Court that these projected activities by the RTTR (RTR) fall squarely within the jurisdiction of the STB, and are preempted (by 49 U.S.C. § 10501(b) . . .).

No protests or petitions for stay were filed at the STB in response to RTR's Notice of Exemption for acquisition and operation of the trackage on the 76-acre parcel. Consequently, authority for that acquisition and operation became effective on the 30th day after that Notice was filed. However, the Local Governments filed petitions under 49 U.S.C. § 10502(d) to revoke the exemption for that authority primarily on the ground that RTR obtained rail carrier status for the

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sole purpose of shielding the 76-acre parcel from local condemnation, with the result that RTR is not a legitimate rail carrier able to take advantage of federal preemption of local regulation of rail carrier activities. During the course of the proceedings on revocation of the class exemption, RTR filed a petition for an individual exemption of its acquisition and operation of the involved trackage.

The STB revoked the class exemption, but in *Riverview Trenton R. Co. - Petition for Exemption from 49 U.S.C. 10901 to Acquire and Operate A Rail Line in Wayne County, MI*, 2003 STB LEXIS 251 (STB Finance Docket No. 34040, decision served May 15, 2003), the STB granted RTR's petition for an individual exemption, subject to certain environmental conditions. The STB summarized its action as follows (*id.* at *14-15):

We find that we have jurisdiction over the transaction, and we will grant the requested exemption, subject to mitigation conditions developed during the environmental review process. We understand the desire by some opponents to enhance the recreational and aesthetic nature of RTR's parcel, but our statutory responsibility is to assess the transportation merits. Nonetheless, in response to the concerns of the opponents, we will impose on RTR a monitoring and reporting condition designed to ensure that we are kept advised of RTR's progress in implementing its project and to allow us to reopen and revisit the matter and take appropriate action if RTR does not follow through on the representations it has made in this proceeding regarding the development of rail service on this property. To facilitate future interaction between RTR and local communities, we will also impose a condition requiring RTR to designate a community liaison.

The STB first determined that it had jurisdiction over RTR's acquisition and operation because the trackage in the 76-acre parcel constitutes a "railroad line" over which it has jurisdiction and authority under 49 U.S.C. § 10901(a)(4), rather than "spur, industrial, team, switching or side tracks" over which it does not have authority to approve acquisition or

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operation by virtue of 49 U.S.C. § 10906. There is no question that inasmuch as this was RTR's initial acquisition and operation of trackage, such jurisdictional determination was legally correct. *See Effingham R.R. Co. - Pet. for Declaratory Order*, 2 S.T.B. 606 (1997), *reconsideration denied*, 1998 STB LEXIS 253 (STB Docket No. 41986, decision served Sept. 18, 1998), *aff'd sub nom. United Transp. Union v. STB*, 183 F.3d 606 (7th Cir. 1999); *Bulkmatic R. Corp. - Acq. & Oper. Exempt. - Bulkmatic Transport Co.*, 2002 STB LEXIS 691 (STB Finance Docket No. 34145, decision served Nov. 19, 2002), *reconsideration denied*, 2003 STB LEXIS 256 (decision served May 15, 2003).

Having asserted jurisdiction over the matter, the STB denied the Local Governments' petition to revoke the exemption for RTR's acquisition and operation of the rail trackage. Set forth below is the STB's reasoning in support of that action (2003 STB LEXIS 251 at *21-25, emphasis added):

Because RTR's transaction is subject to our jurisdiction, we proceed to consider the exemption request. Section 10502(a) provides that, to the "maximum extent" consistent with the rail provisions of our governing statute, we "shall exempt" a transaction from the requirements of the statute, including section 10901, if we find that: (1) regulation is not necessary to carry out the transportation policy of 49 U.S.C. 10101; and (2) either (A) the transaction is of limited scope or (B) regulation is not needed to protect shippers from abuse of market power. For the reasons discussed below, we find that the requirements of section 10502 have been met.

Rail Transportation Policy. Wayne County argues that we should deny the petition for exemption because regulation under 49 U.S.C. 10901 is necessary to carry out the rail transportation policy of 49 U.S.C. 10101 (footnote omitted). Basically, the County does not want to have the property used for rail or industrial purposes, preferring other uses that would enhance "the recreational and aesthetic nature of the parcel," (footnote omitted) and better comport with surrounding communities' quality of life, public health, safety, and welfare. We recognize that the County and the local communities have a different vision for this property

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than RTR, and the parties have debated whether opponents' plans are achievable. But, while we understand the communities' concerns, our statutory responsibility is to look at the transportation merits of RTR's proposal.

Here, RTR has developed specific plans for constructing an intermodal facility for which there is evidence of a current demand, thereby furthering the development of a rail transportation system that meets the needs of the public [§ 10101(4)]. RTR has taken reasonable steps to prepare for the commencement of rail operations, such as purchasing the necessary property and commissioning a rail engineering firm (footnote omitted). There is evidence that the Detroit area needs increased intermodal development and that RTR's project will help to meet this need (footnote omitted). The proposed Detroit Intermodal Freight Terminal (DIFT), relied on by opponents, is currently little more than a concept, and there are reasons to believe that the DIFT and RTR's project would both serve a transportation need. See RTR's reply filed on March 7, 2002, at 7-9 (footnote omitted).

RTR also has submitted statements from shippers supporting its project (footnote omitted). RTR's opponents criticize these statements, arguing that: (a) they are merely form letters; (b) some of them incorrectly purport to represent the views of the entire company rather than the lower-level officers signing them; and (c) they express weak commitment to use of the terminal. RTR responds, however, that its efforts to elicit support have been hindered by the intense controversy connected with its transportation project. On balance, we believe that the statements show that the project is sound enough to attract some significant support under difficult circumstances.

Accordingly, we find that, based on careful consideration of the entire record, this is a legitimate rail transportation project, which should be allowed to go forward. By creating an additional rail intermodal terminal facility, the transaction will promote competition and reasonable rates [§§ 10101(1), (4), (5), (6), and (12)]. The competitive benefits of independent terminals like the one planned by RTR are documented in RTR's reply filed on March 7, 2002, v.s. of Richard J. Schiefelbein. The exemption will also minimize the need for federal regulatory control [§ 10101(2)] and reduce regulatory barriers to entry [§ 10101(7)]. The promotion of energy conservation, by the development of an intermodal rail service like RTR's that can substitute for truck movements, is another rail transportation policy that supports granting the exemption [§ 10101(14)].

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On appeal by the Local Governments, the United States Court of Appeals for the Sixth Circuit affirmed that STB decision. *See City of Riverview v. STB*, 398 F.3d 434 (6th Cir. 2005). In doing so, the Court said (*id.* at 440):

The cities and county assert that the Board erred in approving RTR's application to operate as a common carrier because, they allege, RTR merely wanted to prevent eminent domain proceedings from advancing. The Board found that "based on careful consideration of the entire record, this is a legitimate rail transportation project, which should be allowed to go forward." It observed that "RTR has developed specific plans for constructing an intermodal facility for which there is evidence of a current demand . . . [and] taken reasonable steps to prepare for the commencement of rail operations." Further, RTR "has submitted statements from shippers supporting its project."

The Board's decision to grant RTR an individual exemption was not arbitrary or irrational. The record before it provided sufficient evidence for it to conclude that RTR proposes a legitimate operation. RTR developed specific plans to create its railroad operations. In June 2000, it purchased a railway easement for "rail ingress and egress to and from the Crown Parcel." It also hired an engineering firm "to evaluate the suitability of the proposed site of the RTR[] shortline and intermodal facility in the Detroit area and to design the track layout within the facility." The engineering firm prepared a "feasibility engineering review and layout" of the operations. Further, RTR hired URS Corporation to prepare an environmental report on the effects of its proposal for submission to the Board.

Along with undertaking these preliminary steps, RTR submitted a significant amount of information in support of its proposal. For example, it submitted a detailed environmental report, documenting the potential environmental effects of the project and proposed mitigation efforts. It also submitted evidence showing that its rail operations would benefit various types of transportation companies. Approximately fifty companies sent letters to the Board indicating that RTR's project would fill a need for an intermodal transportation facility. Three experts testified that the Detroit area needed an intermodal facility.

Thus, the Board had before it substantial evidence that RTR had taken the preliminary steps necessary to establish its facility and that there was a need in the area for such a facility. Given this evidence, it was rational for the Board to conclude that RTR proposed a bona fide rail operation. In our opinion, these findings are not arbitrary or irrational in violation of the requirements of the APA, 5 U.S.C. § 701 *et seq.*

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The Court distinguished the STB's decision in *Jefferson Terminal Railroad Co. - Acquisition and Operation Exemption - Crown Enterprises, Inc.*, 2001 STB LEXIS 267 (STB Finance Docket No. 33950, decision served March 19, 2001), in which the STB revoked a class exemption for acquisition and operation of trackage where the City of Detroit had already commenced condemnation of the property on which the trackage was located at the time that the notice of exemption for acquisition and operation of the trackage was filed (389 F.3d at 441):

Petitioners rely on the Board's decision in *Jefferson Terminal Railroad Company* as evidence that RTR sought an exemption only to prevent condemnation proceedings from advancing. *Jefferson Terminal Railroad Co. - Acquisition and Operation Exemption - Crown Enterprises, Inc.*, 2001 STB LEXIS 267, STB Finance Docket No. 33950 (March 19, 2001). In *Jefferson Terminal*, Jefferson, a subsidiary of Crown Enterprises,¹ invoked class exemption procedures to acquire and operate 1.2 miles of rail line in Detroit. At the time Jefferson filed its notice with the Board, Detroit had already initiated condemnation proceedings. Jefferson did not indicate to the Board that there was an ongoing condemnation action. The Board revoked Jefferson's class exemption, because it felt that "a more searching process" under a petition for an individual exemption or a full application was necessary. In so doing, the Board stated that it was "troubled by Jefferson's failure to disclose that the property was about to be condemned." In the Board's view, Jefferson's failure to mention this fact bolstered the "City's allegation that the proposal that Jefferson submitted to this Board was merely a device to acquire or retain property for non-rail purposes using federal preemption as a shield."

¹ Crown Enterprises is also the parent company of RTR.

Jefferson, however, does not require us to find that the Board's decision that RTR proposed a legitimate operation was arbitrary or capricious. Unlike in *Jefferson*, the Board here was well aware that the local governments were considering condemnation proceedings on this property. In its decision granting an individual exemption, the Board recognized that "the County and the local communities have a different vision for this property than RTR." More specifically, in its earlier decision denying a class exemption, the Board explicitly acknowledged the concerns of the local governments that RTR was seeking an exemption to prevent eminent domain proceedings from commencing. In that decision, the Board stated:

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"Wayne County and the other opponents claim that RTR's proposal is merely an attempt to preclude the condemnation of some or all of the involved property for public purposes. To date, no evidence has been submitted that shows with any specificity what property may be condemned, who would condemn it, under what authority, and for what specific purpose. Nor has Wayne County or any other public body submitted any timetable for condemnation."

Thus, it is clear that the Board was cognizant of the local governments' concerns when it reached its decision that RTR proposed a bona fide railroad operation.

Further, unlike in *Jefferson*, the local governments had not commenced condemnation proceedings by the time RTR requested an exemption from the Board. The local governments admitted that they had just taken the preliminary steps of investigating the possibility of condemning the land and that the "County had not at that time and has not at this time decided to take this parcel."

We agree with the Board that the *Jefferson Terminal* case is different from the present case and does not overcome the Board's conclusion that RTR's proposal is made in good faith [footnote omitted].

It is evident that the case at hand is governed by the *Riverview Trenton* case, not by the *Jefferson Terminal* case. As in the *Riverview Trenton* case, MITC-MTR has developed specific plans for establishing an intermodal facility to be served by the rail trackage under consideration, for which there is evidence of a current demand, and MITC-MTR has taken reasonable steps to prepare for the commencement of rail operations. Further, like RTR, MITC-MTR is able to produce numerous letters from shippers in support of the proposed transloading operation.

Unlike the *Jefferson Terminal* case, the City had not commenced condemnation proceedings when MITC-MTR filed its Notice of Exemption at the STB for acquisition and operation of the trackage as a rail common carrier. In fact, the City had not taken any preliminary steps to condemn the property, as had been taken in the *Riverview Trenton* case at

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the time of the STB filing. No court action was pending when MITC-MTR filed at the STB except MITC's mandamus action directed at the City's failure to have issued occupancy permits for certain non-railroad businesses. It certainly cannot be rationally found that MITC-MTR's filing at the STB to become a rail carrier was intended to undermine MITC's own judicial action dealing with non-railroad activities.

In summary, there is substantial evidentiary support for a determination that MITC-MTR is a legitimate STB-regulated rail common carrier, and no persuasive evidence to the contrary.

2. The Intermodal Transloading Facilities And Service To Be Operated By MITC-MTR Constitutes Rail Transportation Within The Meaning Of 49 U.S.C. § 10501(b)

There is no doubt that the intermodal transloading facilities and service to be operated by MITC-MTR on the property under consideration constitutes "rail transportation" within the meaning of 49 U.S.C. § 10501(b). It is provided in 49 U.S.C. §§ 10102(9)(A) and (B) as follows:

'transportation' includes —

... property ... of any kind related to the movement of ... property ... by rail ... and services related to that movement, including ... transfer in transit ...

It is evident that the term "transfer in transit" encompasses transloading of commodities from rail to truck, or from truck to rail, at an intermediate point prior to arrival at their ultimate destination. That is precisely what will occur at the property under consideration.

Transloading of commodities from rail to truck or from truck to rail has been consistently determined to constitute "rail transportation" within the meaning of 49 U.S.C. § 10501(b). *See,*

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e.g., *New York, Susquehanna & Western R. Corp. v. Jackson*, 500 F.3d 238, 248 (3rd Cir. 2007) ("Thus, we hold that transloading operations are 'transportation' under the Termination Act [49 U.S.C. §§ 10102[9] and 10501[b)]; *Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638, 644 (2d Cir. 2005) (. . . the proposed transloading and storage facilities are integral to the railroad's operation and are easily encompassed within the Transportation Board's exclusive jurisdiction over 'rail transportation' . . ."); *Canadian National Ry. Co. v. City of Rockwood*, 2005 U.S. Dist. LEXIS 40131, (ED, Mich., S.D., 2005); *Grafton & Upton R.R. Co. v. Town of Milford*, 337 F.Supp.2d 233, 239 (D, Mass., 2004); *Norfolk Southern Ry. Co. v. City of Austell*, 1997 U.S. Dist. LEXIS 17236 at *6 (N.D., Ga., 1997).

3. State Or Local Laws Or Regulations Attempted To Be Applied In A Manner That Would Preclude Or Materially Delay MITC-MTR's Transloading Operations Would Be Federally Preempted By Virtue Of 49 U.S.C. § 10501(b)

It is clear that State or local land-use and/or environmental regulations that would require an STB-regulated rail carrier to obtain a State or local permit as a prerequisite to conducting rail operations are federally preempted under 49 U.S.C. § 10501(b). Thus, in upholding an STB decision that invalidated the application of State environmental regulations to railroad operations under federal preemption, the Court of Appeals for the Ninth Circuit in *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), said (at 1031):

. . . (I)f local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line.

THOMAS F. MCFARLAND

Donald J. Murn, Esq.

June 6, 2008

Page 19

In accordance with that principle, local zoning laws have been federally preempted as attempted to be applied to require compliance by rail carriers as a condition to conducting rail operations. *See, e.g., Norfolk Southern Ry. Co. v. City of Austell, supra.* It follows that other land-use regulations, such as a requirement to obtain an occupancy permit, that would require rail carriers to obtain permits as a condition for them to operate would also be federally preempted.

It has been consistently held that condemnation of rail carrier property is quintessentially regulation of rail transportation, such that State eminent domain laws are federally preempted by virtue of 49 U.S.C. § 10501(b) if attempted to be applied to such rail property. *See, e.g., City of Lincoln v. STB*, 414 F.3d 858, 862 (8th Cir. 2005); *Columbiana County Port Authority v. Boardman Township Park District*, 154 F.Supp.2d 1165, 1181-1182 (N.D., Ohio, ED, 2001); and *Wisconsin Central, Ltd. v. City of Marshfield*, 160 F.Supp.2d 1009, 1013-1014 (W.D. Wisc., 2000).

SUMMARY

Inasmuch as application of State or local land-use, environmental, and/or eminent domain laws or regulations by the City in a manner that would prevent or materially delay MITC-MTR's transloading operations on the involved property would constitute "regulation of rail transportation," any such application would be federally preempted by virtue of 49 U.S.C. § 10501(b).

THOMAS F. McFARLAND

Donald J. Murn, Esq.

June 6, 2008

Page 20

AFFIRMATION

I hereby certify that the facts stated in the foregoing document are true and correct, and that the law stated therein is accurately represented, to the best of my information, knowledge, and belief.

Thomas F. McFarland

THOMAS F. McFARLAND

TMcf:kl.enc:wp8.0\1294\emDJM2

SUBSCRIBED and SWORN to
before me this 6th day of
June, 2008.

Kathleen Lenhan

Notary Public



APPENDIX 1

BEFORE THE
SURFACE TRANSPORTATION BOARD

MILWAUKEE INDUSTRIAL TRADE)
CENTER, LLC, d.b.a. MILWAUKEE) FINANCE DOCKET
TERMINAL RAILWAY -- ACQUISITION) NO. 35133
AND OPERATION EXEMPTION --)
PRIVATE TRACKAGE AT MILWAUKEE,)
WI

CORRECTED VERIFIED NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31

MILWAUKEE INDUSTRIAL TRADE CENTER, LLC
d.b.a. MILWAUKEE TERMINAL RAILWAY
4777 West Lincoln Ave.
West Milwaukee, WI 53219

Applicant

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street
Suite 1890
Chicago, IL 60604-1112
(312) 236-0204
(312) 201-9695 [fax]
mcfarland@aol.com

Attorney for Applicant

DATE FILED: April 16, 2008

BEFORE THE
SURFACE TRANSPORTATION BOARD

MILWAUKEE INDUSTRIAL TRADE	)	
CENTER, LLC, d.b.a. MILWAUKEE	)	FINANCE DOCKET
TERMINAL RAILWAY -- ACQUISITION	)	NO. 35133
AND OPERATION EXEMPTION --	)	
PRIVATE TRACKAGE AT MILWAUKEE,	)	
WI		

**CORRECTED VERIFIED NOTICE OF EXEMPTION
UNDER 49 C.F.R. § 1150.31**

Pursuant to 49 C.F.R. § 10502(a) and 49 C.F.R. § 1150.31, *et seq.*, MILWAUKEE INDUSTRIAL TRADE CENTER, LLC, d.b.a. MILWAUKEE TERMINAL RAILWAY ("MITC"), a noncarrier, hereby provides corrected verified notice of its exemption from 49 U.S.C. § 10901 for its acquisition and operation as a common carrier of approximately two miles of trackage that is located within an 84-acre plant site at 2725 North Hopkins Street, Milwaukee, WI 53216, formerly owned and operated by A.O. Smith Corp. and later by Tower Automotive, Inc. (the rail line). The Corrected Notice adds a request for exemption of acquisition of the trackage in addition to its operation, inasmuch as the trackage is being acquired for the first time as common carrier property.

The rail line to be acquired and operated is shaded in yellow on a Site Base Plan that is attached to this Notice as Appendix 1. Shaded in pink on that Plan is a rail line owned by Canadian Pacific Railway Company (CP), which is operated by Wisconsin & Southern Railroad Co. (WSOR), and which is connected to the rail line proposed to be acquired and operated by MITC as a common carrier. Not shown on the Plan is Burma Road, which separates the

CP-WSOR rail line from the rail line within the MITC plant site. The Plan shows the numerous buildings within the 84-acre plant site, all of which are located east of Burma Road.

Heretofore, the rail line proposed to be acquired and operated by MITC has been privately-owned track, owned first by A.O. Smith, then by Tower, and now by MITC. MITC now proposes to acquire and operate that trackage as a common carrier. Raw materials would be received by rail by tenants of the buildings at the plant site for processing and/or manufacturing and for transloading onto trucks for distribution in the local area. The tenants would also load processed raw materials and finished goods onto railcars at the plant site for rail transportation to destination. In addition, locomotives and railcars would be transported by rail to the plant site for repair, cleaning, storage and other rail-related uses for independent companies operating at buildings in the plant site.

Under the principle of the *Effingham* and *Bulkmatic* cases,¹¹ the rail line to be acquired and operated by MITC constitutes a line of railroad for which an exemption from the Board is required because it is MITC's initial rail acquisition and operation, notwithstanding that it might otherwise be considered to be spur, industrial and/or switching track exempt from the Board's acquisition and operation authority by virtue of 49 U.S.C. § 10906.

INFORMATION REQUIRED BY 49 C.F.R. § 1150.33

(a) The full name and address of the applicant;

¹¹ *Effingham RR Co. - Pet. for Declaratory Order*, 2 S.T.B. 606 (1997), *aff'd sub nom, United Transp. Union v. STB*, 183 F.3d 606 (7th Cir. 1999), and *Bulkmatic R. Corp. - Acq. & Oper. Exempt. -- Bulkmatic Transport Co.*, 2002 STB LEXIS 691 (Finance Docket No. 34145, served Nov. 19, 2002), *recons. denied*, 2003 STB LEXIS 256 (served May 15, 2003).

The full name and address of the applicant is Milwaukee Industrial Trade Center, LLC,
d.b.a. Milwaukee Terminal Railway, 4777 West Lincoln Avenue, West Milwaukee, WI 53219.

(b) The name, address, and telephone number of the representative of the applicant who should receive correspondence;

MITC's representative is Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1890, Chicago, IL 60604-1112, (312) 236-0204, (312) 201-9695 fax, mcfarland@aol.com.

(c) A statement that an agreement has been reached or details about when an agreement will be reached;

No agreement with a third party is required for the proposed operation because the acquirer and operator, MITC, owns the trackage as private track.

(d) The operator of the property;

MITC will be the operator of the property.

(e) A brief summary of the proposed transaction, including:

(1) The name and address of the railroad transferring the subject property,

The rail property is currently private track. It is being acquired and will be operated for the first time as common carrier track.

(2) The proposed time schedule for consummation of the transaction,

The operation is proposed to be consummated no earlier than 30 days after the filing of this corrected notice of exemption.

(3) The mile-posts of the subject property, including any branch lines, and

The rail line is not described by milepost numbers. The rail line consists of approximately two miles of trackage at the plant site of MITC. The rail line connects with CP-WSOR.

(4) The total route miles being acquired;

A total of approximately two miles of trackage is to be acquired and operated.

(f) A map that clearly indicates the area to be served, including origins, termini, stations, cities, counties, and States;

The required map is attached to this Notice as Appendix 1.

(g) A certificate that applicant's projected revenues do not exceed those that would qualify it as a Class III carrier.

The required certificate is attached to this Notice as Appendix 2.

CAPTION SUMMARY

A caption summary required by 49 C.F.R. § 1150.34 is attached to this Notice as Appendix 3.

ENVIRONMENTAL AND HISTORIC REPORT

The proposed acquisition and operation does not require environmental and historic reporting. See 49 C.F.R. § 1105.6(e)(2)(i) and 49 C.F.R. § 1105.8(b)(1).

LABOR PROTECTION

Pursuant to 49 U.S.C. § 10901(c), labor protection requirements do not apply to this transaction.

VERIFICATION

The verification of Thomas F. McFarland in behalf of MITC is attached to this Notice as Appendix 4.

PROJECTED ANNUAL REVENUES

The verification of Thomas F. McFarland in behalf of MITC is attached to this Notice as Appendix 5 certifying that the projected annual revenues of MITC will not exceed \$5 Million.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, the Director of the Board's Office of Proceedings should publish notice in the *Federal Register* of the filing of this corrected notice of exemption. See 49 C.F.R. § 1150.32(b), as amended.

Respectfully submitted,

MILWAUKEE INDUSTRIAL TRADE CENTER, LLC
d.b.a. MILWAUKEE TERMINAL RAILWAY
4777 West Lincoln Ave.
West Milwaukee, WI 53219

Applicant

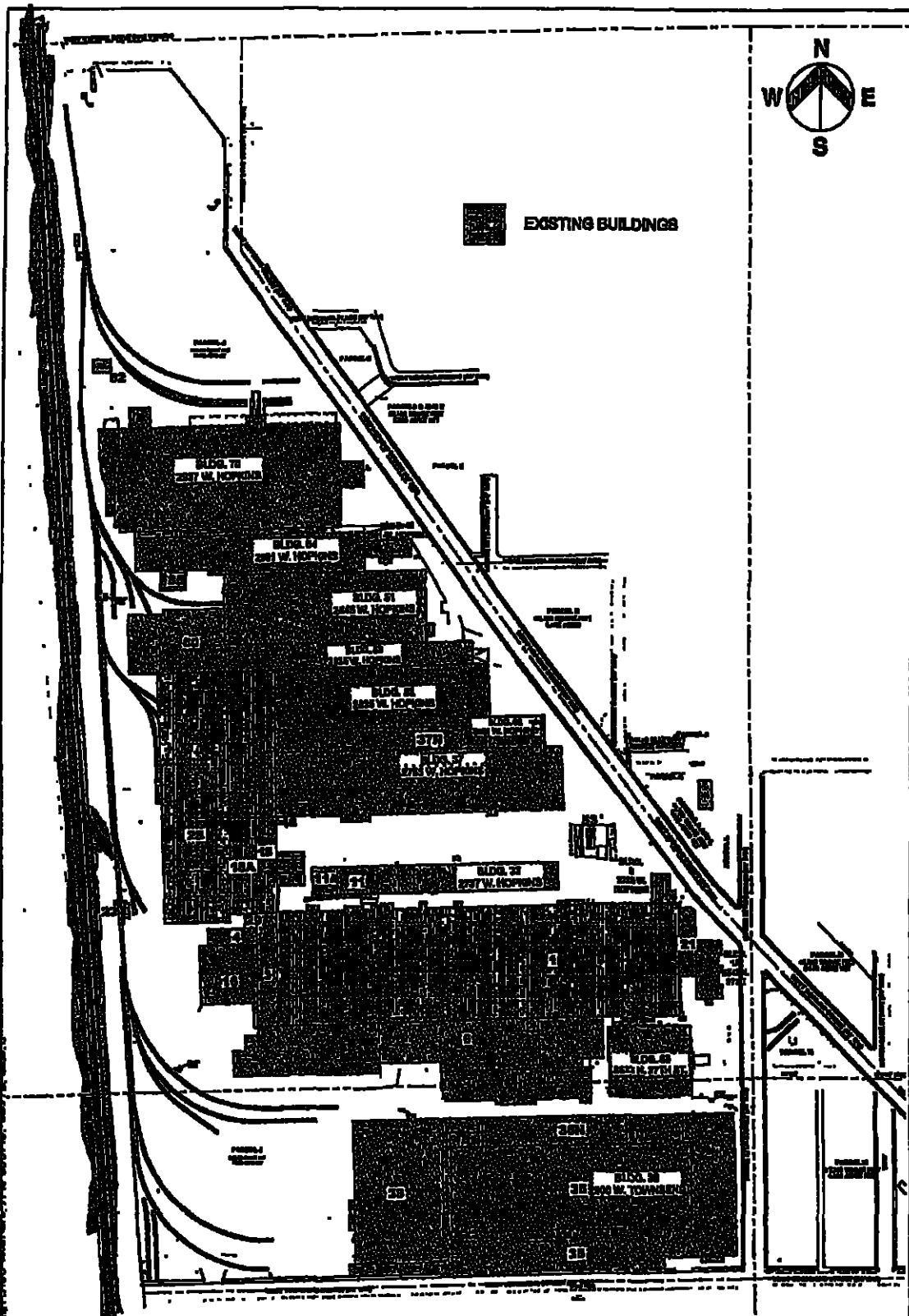
Thomas F. McFarland

THOMAS F. McFARLAND
THOMAS F. McFARLAND, P.C.
208 South LaSalle Street
Suite 1890
Chicago, IL 60604-1112
(312) 236-0204

Attorney for Applicant

DATE FILED: April 16, 2008

APPENDIX 1



SITE BASE PLAN

APPENDIX 2

CERTIFICATION UNDER 49 C.F.R. § 1150.33(g)

The undersigned, Thomas F. McFarland, hereby certifies under 49 C.F.R. § 1150.33(g), that the projected revenues of Milwaukee Industrial Trade Center, d.b.a. Milwaukee Terminal Railway, do not exceed those that would qualify it as a Class III rail carrier.

Thomas F. McFarland

Thomas F. McFarland
*Authorized Representative of
Milwaukee Industrial Trade Center, LLC,
d.b.a. Milwaukee Terminal Railway*



SUBSCRIBED and SWORN to
before me this 16th day of
April, 2008.

Kathleen Lenihan
Notary Public

APPENDIX 3

CAPTION SUMMARY

SURFACE TRANSPORTATION BOARD

Notice of Exemption

FINANCE DOCKET NO. 35133,

***MILWAUKEE INDUSTRIAL TRADE CENTER, LLC,
d.b.a. MILWAUKEE TERMINAL RAILWAY
- ACQUISITION AND OPERATION EXEMPTION -
PRIVATE TRACKAGE AT MILWAUKEE, WI***

Milwaukee Industrial Trade Center, LLC, d.b.a. Milwaukee Terminal Railway (MITC), a noncarrier, has filed a Corrected Notice of Exemption to acquire and to operate as a common carrier, approximately two miles of rail line located within its own plant site at Milwaukee, Wisconsin. The rail line connects with a rail line owned by Canadian Pacific Railway Company and operated by Wisconsin & Southern Railroad. Comments must be filed with the Board and be served on MITC's representative, Thomas F. McFarland, Thomas F. McFarland, P.C., 208 South LaSalle Street, Suite 1890, Chicago, IL 60604-1112, (312) 236-0204, (312) 201-9695 fax, mcfarland@aol.com.

The Corrected Notice is filed under 49 C.F.R. § 1150.31. If the Corrected Notice contains false or misleading information, the exemption is void *ab initio*. Petitions to revoke the exemption under 49 U.S.C. § 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

By the Board

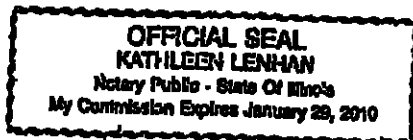
(SEAL)

Anne K. Quinlan, Acting Secretary

VERIFICATION

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

Thomas F. McFarland, being duly sworn, states that he is attorney for Milwaukee Industrial Trade Center, LLC, d.b.a. Milwaukee Terminal Railway (MITC); that he is familiar with the factual allegations made in the foregoing Corrected Notice of Exemption in behalf of MITC; and that such allegations are true as stated.



Thomas F. McFarland

Thomas F. McFarland

SUBSCRIBED and SWORN to
before me this 16th day of
April, 2008.

Kathleen Lenhan

Notary Public

APPENDIX 5

CERTIFICATION

Pursuant to 49 C.F.R. § 1150.32(e), the undersigned, on oath, states that the projected revenues of Milwaukee Industrial Trade Center, LLC, d.b.a Milwaukee Terminal Railway, as a result of the acquisition and operation in this docket, will not exceed \$5 Million per year.



Thomas F. McFarland
Thomas F. McFarland

SUBSCRIBED and SWORN
to before me this 16th day
of April, 2008.

Kathleen Lenhan
Notary Public

My commission expires: 1/29/2010

APPENDIX 2

Federal Aviation Administration,
National Headquarters, Planning and
Environmental Division, APP-400,
800 Independence Avenue, SW.,
Room 621, Washington, DC 20591.
Federal Aviation Administration
Western-Pacific Region Office,
Airports Division, Room 3012, 15000
Aviation Boulevard, Hawthorne,
California 90281.
Federal Aviation Administration,
Western Pacific Region, San Francisco
Airports District Office, 831 Mitten
Road, Suite 210, Burlingame,
California 94010.
City of Fresno, Mr. Kevin Mafkle,
Airports Planning Manager, 4985 East
Clinton Way, Fresno, CA 93727-1525.
Questions may be directed to the
individual named above under the
heading, FOR FURTHER INFORMATION
CONTACT.

Issued in Hawthorne, California on April
18, 2008.

Mark A. McClardy,
Manager, Airports Division, AWP-600,
Western-Pacific Region.
[FR Doc. E8-8592 Filed 4-30-08; 8:45 am]
BILLING CODE 4910-12-M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 35133]

Milwaukee Industrial Trade Center,
LLC, d/b/a Milwaukee Terminal
Railway—Acquisition and Operation
Exemption—Line Owned by Milwaukee
Industrial Trade Center, LLC, d/b/a
Milwaukee Terminal Railway

Milwaukee Industrial Trade Center,
LLC, d/b/a Milwaukee Terminal
Railway (MITC), a noncarrier, has filed
a verified notice of exemption under 49
CFR 1150.31¹ to acquire and operate
approximately 2 miles of rail line² that
is located within MITC's 84-acre plant
site in Milwaukee, WI.

MITC states that the line connects
with a rail line owned by Canadian
Pacific Railway Company, which is
operated by Wisconsin & Southern
Railroad Co. MITC further states that the
rail line to be acquired and operated by
MITC constitutes a line of railroad for
which an exemption from the Board is
required because it is MITC's initial rail

acquisition and operation,
notwithstanding that it might otherwise
be considered to be spur, industrial,
and/or switching track exempt from the
Board's acquisition and operation
authority under 49 U.S.C. 10906.³

The transaction is expected to be
consummated no sooner than 30 days
after the filing of the amended notice of
exemption, or after the May 16, 2008
effective date of the exemption.

MITC certifies that its projected
annual revenues as a result of this
transaction will not exceed those that
would qualify it as a Class III rail carrier
and will not exceed \$5 million.

If the verified notice contains false or
misleading information, the exemption
is void *ab initio*. Petitions to revoke the
exemption under 49 U.S.C. 10502(d)
may be filed at any time. The filing of
a petition to revoke will not
automatically stay the effectiveness of
the transaction. Petitions for stay must
be filed no later than May 9, 2008 (at
least 7 days before the exemption
becomes effective).

Pursuant to the Consolidated
Appropriations Act, 2008, Public Law
110-161 section 183, 121 Stat. 1844
(2007), nothing in this decision
authorizes the following activities at any
solid waste rail transfer facility:
Collecting, storing, or transferring solid
waste outside of its original shipping
container; or separating or processing
solid waste (including baling, crushing,
compacting, and shredding). The term
"solid waste" is defined in section 1004
of the Solid Waste Disposal Act, 42
U.S.C. 6903.

An original and 10 copies of all
pleadings, referring to STB Finance
Docket No. 35133, must be filed with
the Surface Transportation Board, 395 E
Street, SW., Washington, DC 20423-
0001. In addition, one copy of each
pleading must be served on Thomas F.
McFarland, Thomas F. McFarland, P.C.,
208 South LaSalle Street, Suite 1890,
Chicago, IL 60604-1112.

Board decisions and notices are
available on our Web site at <http://www.stb.dot.gov>.

Decided: April 23, 2008.

By the Board, David M. Konschnik,
Director, Office of Proceedings.

Anne K. Quinlan,
Acting Secretary.

[FR Doc. E8-8558 Filed 4-30-08; 8:45 am]
BILLING CODE 4910-01-P

¹ The notice of exemption in this proceeding
originally was filed on April 14, 2008, but was
amended on April 18, 2008. Therefore, the official
filing date for the notice of exemption is April 18,
2008.

² The rail line proposed to be acquired and
operated by MITC has been privately owned track,
which was formerly owned by A.O. Smith Corp.,
then by Tower Automotive, Inc., and now by MITC.

³ See *Effingham RR Co.—Pet. for Declaratory
Order*, 2 S.T.B. 608 (1997), *aff'd sub nom. United
Transp. Union—III. Legislative Bd. v. Surface
Transp. Bd.*, 183 F.3d 608 (7th Cir. 1999); See also
*Bulkmetal RR—Acquire and Operate—Bulkmetal
Transport*, 6 S.T.B. 481 (2002).

DEPARTMENT OF THE TREASURY

United States Mint

Notification of 2008 American Eagle Platinum Proof Coin Pricing

SUMMARY: The United States Mint is
setting prices for the 2008 American
Eagle Platinum Proof Coins.

Pursuant to the authority that 31
U.S.C. 5111(a) and 5112(k) grant the
Secretary of the Treasury to mint and
issue platinum coins, and to prepare
and distribute numismatic items, the
United States Mint mints and issues
2008 American Eagle Platinum Proof
Coins in four denominations with the
following weights: One-ounce, one-half
ounce, one-quarter ounce, one-tenth
ounce. The United States Mint also
produces American Eagle Platinum
Proof four-coin sets that contain one
coin of each denomination. In
accordance with 31 U.S.C. 9701(b)(2)(B),
the United States Mint is setting the
price of these coins to reflect increases
in the market price of platinum.

Accordingly, the United States Mint
will commence selling the following
2008 American Eagle Platinum Proof
Coins according to the following price
schedule:

Description	Price
2008 American Eagle Plat- inum Proof Coins:	
One-ounce platinum coin	\$2,299.95
One-half ounce platinum coin	1,174.95
One-quarter ounce plat- inum coin	608.95
One-tenth ounce platinum coin	269.95
Four-coin platinum set	4,119.95

FOR FURTHER INFORMATION CONTACT:
Gloria C. Bakridge, Associate Director
for Sales and Marketing, United States
Mint, 801 Ninth Street, NW.,
Washington, DC 20220; or call 202-354-
7500.

Authority: 31 U.S.C. 5111, 5112 & 9701.

Edmund C. Moy,
Director, United States Mint.
[FR Doc. E8-8429 Filed 4-30-08; 8:45 am]
BILLING CODE 4810-02-P

EXHIBIT I

LAO Rec'd 6-18-08
1135AM

MURN & MARTIN, S.C.

J MICHAEL LONG
jmlong@murnlaw.com

N 201 W 22nd Watertown Road
Waukesha, WI 53186

Phone (262) 524-8300
Fax (262) 524-9200
www.murnlaw.com

June 17, 2008

Mr. Gregg Hagopian
Assistant City Attorney
Milwaukee City Hall
200 E. Wells Street, Suite 800
Milwaukee, WI 53202

Mr. Thomas O. Gartner
Assistant City Attorney
Milwaukee City Hall
200 E. Wells Street, Suite 800
Milwaukee, WI 53202

Re: Milwaukee Industrial Trade Center, LLC/RACM Access
Milwaukee County Case No. 08-CV-1772

Dear Gregg and Tom.

As a follow up to our meeting of June 5, 2008, we offer this additional information regarding MITC's future plans for the Tower Automotive Facility ("the Property") as it relates to a railroad facility.

MITC has considered a redevelopment plan for the Property. This plan evaluates which buildings will remain and which buildings will be demolished. Pursuant to this plan, MITC intends to take down buildings 38, 1, 18, 18A, 3, 4, 10, 10A, 65A and 85. Buildings 65 and 52 may also be demolished. Building 65 is the former A. O. Smith headquarters. (See the attached Site Plan.) Given this building's condition, it is not economically feasible to keep it, however, MITC is willing to discuss additional alternatives with the City about its fate. As you may know, demolition permits have already been issued by the City for buildings 65A and 18 and 18A.

MITC's plan includes the expansion of its affiliates, including Knapp Railroad Builders, Inc. ("Knapp"), Midwest Rail and Dismantling, Inc. ("Midwest") and West Milwaukee Recycling ("WMR"). Knapp has been engaged in the railroad construction business for approximately 80 years. Its core function is to build and maintain railroad track lines. Midwest dismantles railroad tracks and dismantles, refurbishes, assembles rolling stock and deals with the resale of rolling stock parts. WMR deals in railroad scrap and recycling. After expanding to the Property, WMR will ship extensively by rail to markets throughout the United States and Canada. All three entities intend on hiring additional workers upon expanding to the Property. The total number of new jobs anticipated for these three (3) entities is 50.

In addition to these companies, MITC has had negotiations with several additional rail related businesses interested in conducting operations at the Property. MITC has been contacted by a Michigan based entity that is interested in processing railroad ties at the Property. Once processed, these railroad ties would be shipped via rail to power plants to be used in the electrical

Mr. Gregg Hagopian
Mr. Thomas O. Gartner
June 17, 2008
Page 2

generation process. MITC anticipates that a large volume of railroad ties will be shipped to and from the Property via rail.

Another entity is interested in receiving raw materials via rail at the Property for processing and packaging. Once packaged, these goods would be shipped via rail out to its customers. Another business has been in discussions with MITC to convert building 36 into a state of the art locomotive repowering facility. Locomotive repowering is a growing industry in the United States due to increased emission regulations by the Environmental Protection Agency. The location of these railroad related businesses to the Property will create additional new jobs, many of which could be filled by residents in the neighborhood. Increased activity at the Property would also have a positive effect on security in the area.

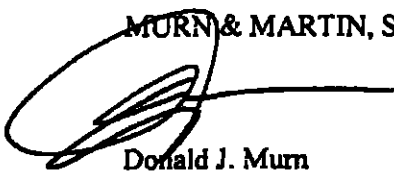
At our meeting of June 5, 2008, you questioned whether MITC owned any rolling stock. MITC owns 28 open top "hopper" railcars and is in negotiations for the purchase of a similar number of gondola cars. In addition to these railcars, MITC has an interest in a switching locomotive for the Property as well as an additional locomotive on site.

We have also discussed with our clients which parcels they may be interested in selling to the City. At this time, MITC is willing to sell several parcels along the north side of Hopkins St., the parcel that fronts Capitol Drive (3533 N. 27th St.) and the parcels directly east of Building 36 (3424 N. 27th St., 2537 W. Hopkins St. and 2642 W. Hopkins St.) We hope to have additional discussions with your office about the sale of these properties.

If you have any questions about this matter, please feel free to contact me at 262-524-8500.

Very truly yours,

MURN & MARTIN, S.C.



Donald J. Murn

DJM:krm

Enclosures

cc. Jerry Blomberg, MITC, LLC
Brian Bjodstrup, MITC, LLC

Milwaukee Industrial Trade Center

414.873.2721
Fax 414.873.2752

2725 W Hopkins St., Milwaukee WI 53216
www.micgroup.com

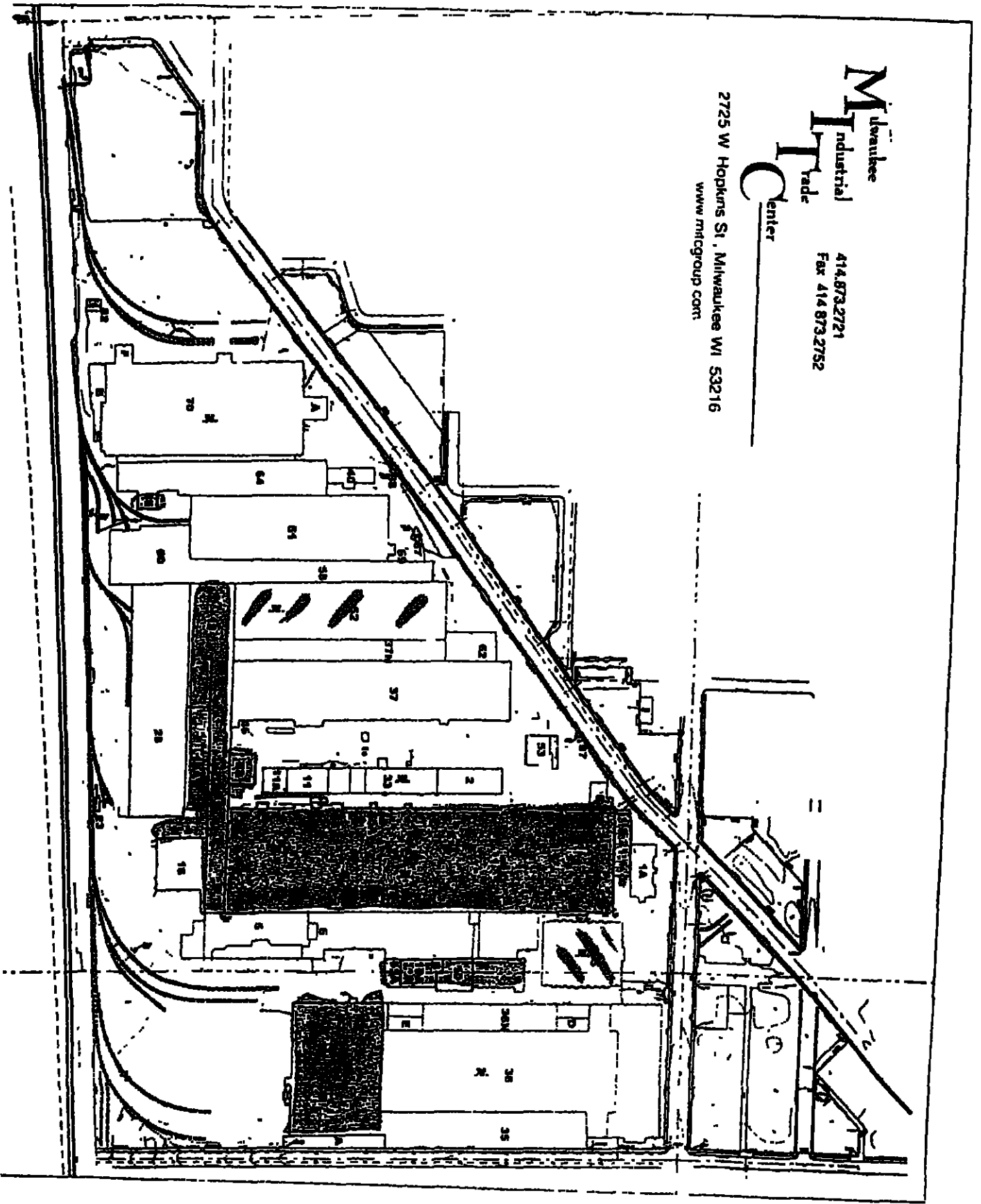


EXHIBIT J

1 STATE OF WISCONSIN :CIRCUIT COURT: MILWAUKEE COUNTY
2 BRANCH 24

3 -----
4 MILWAUKEE INDUSTRIAL TRADE CENTER LLC,
5 Plaintiff,

6 -vs-

Case No. 08-CV-1772

7 CITY OF MILWAUKEE ET AL,
8 Defendant.

9 -----
10 MOTION HEARING

11 -----
12 June 30, 2008

13 Proceedings held before the
14 Honorable CHARLES F. KAHN, JR.,
15 Circuit Court Judge, presiding.

16 A P P E A R A N C E S:

17 DONALD J. MURN and JOHN THEILER BODE, Attorneys at
18 Law, appeared on behalf of Milwaukee Industrial Trade
19 Center.

20 GREGG HAGOPIAN and THOMAS GARTNER, Attorneys at Law,
21 appeared on behalf of the City of Milwaukee and the
22 Redevelopment Authority of the City of Milwaukee.

23 AMY DE LA ROSA
24 Court Reporter

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TRANSCRIPT OF PROCEEDINGS

THE CLERK: This is the case of Milwaukee
Industrial Trade Center LLC v. City of Milwaukee et al;
Case No. 08-CV-001772.

Appearances.

MR. MURN: Attorney Donald J. Murn and John
Theiler Bode appear on behalf of Milwaukee Industrial
Trade Center LLC.

MR. HAGOPIAN: Good afternoon, Your Honor.
The City of Milwaukee and the Redevelopment
Authority of the City of Milwaukee appear by Assistant
City Attorneys Gregg Hagopian and Tom Gartner, and with
us at the table today is Benji Timm, T-I-M-M, of the
Redevelopment Authority.

THE COURT. Okay. Good afternoon, Mr. Timm,
Mr. Gartner, Mr. Hagopian, Mr. Bode, Mr. Murn Welcome
back.

Here is what you think we have to cover today, and
I am going to ask for you to confirm this or correct me
that the primary purpose of the hearing today is to deal
with the City's request for a special inspection
warrant, and that the issues we have include the I think
four specific objections that Milwaukee Industrial Trade
Center LLC has raised. I am going to try to recall them
or get some help from these briefs here.

7 questioning.

8 THE COURT: Okay. So the objection is
9 withdrawn.

10 Now, do you remember the question?

11 THE WITNESS: No.

12 Q Is there open access to this property?

13 A No, it's restricted.

14 Q And restricted in what way?

15 A We have 24-hour, seven-day-a-week guard service there,
16 and we have a crew of eight or 10 people, five to 10
17 people working there every day normal work hours doing
18 remediation work.

19 Q Is the property completely fenced?

20 A It's not 100 percent fenced. There is an open area
21 along the Canadian Pacific railroad track that allows us
22 access for trains.

23 MR. MURN: I have nothing further, Your Honor.

24 THE COURT: Okay. Thank you.

25 Mr. Hagopian.

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1 CROSS-EXAMINATION

2 BY MR. HAGOPIAN:

3 Q What does MITC currently do at the property,
4 Mr. Blomberg?

5 A We are currently removing obsolete equipment, taking out
6 old pipelines, old obsolete leftover stuff from the

7 Tower Automotive operations. We are filling in pits.
8 We are pouring concrete in floors. We are redoing the
9 electrical system. We are redoing some of the plumbing
10 and the sprinkler systems. We are actively in asbestos
11 abatement. In one building we are rebuilding some track
12 right now and pouring new floors getting ready for a new
13 tenant.

14 Q MITC isn't actually engaged in any railroad operations
15 at the parcels now though, is it?

16 A Yes, it is.

17 Q What activities are those?

18 A We have 28 open top hoppers that we purchased that are
19 sitting there waiting to come in. Those will be
20 refurbished. We have a locomotive on site that we will
21 be using to switch cars soon. We have other equipment
22 on its way. We have maintenance equipment and track
23 equipment in the facility at Lincoln Avenue that we own
24 that will be moved up there.

25 Q Let me ask a question again Is MITC currently engaged

79

1 in real activities at the property?

2 A Could you explain that?

3 Q Well, you said you have 28 open hoppers waiting to come
4 in. Have they come in?

5 A They are on the site right now.

6 Q On the MITC parcels?

7 A No, they are on the access road that we have with the

8 railroad. They need to be switched in, and because they
9 are in trouble out west and all their tracks are under
10 water, all of their switching equipment is currently
11 busy.

12 Q Are those hoppers on MITC owned property or CP Rail
13 controlled property?

14 A I am not sure. It could be CP or it could be WSOR.

15 Q But it's not MITC parcel, is it?

16 A No.

17 Q So those 28 open hoppers aren't on MITC parcels now, are
18 they?

19 A They will be tonight.

20 Q What has been the delay getting them on your site?

21 A The WSOR hasn't got them all lined up and taken out the
22 cars that are in between that need to be switched out to
23 other railroads.

24 Q Who is WSOR?

25 A Wisconsin Southern.

80

1 Q And they control the movement, don't they?

2 A They are moving them on site, yes.

3 Q MITC isn't moving them?

4 A No. We could do that though.

5 Q Your locomotive there now, is your locomotive being used
6 to switch those?

7 A It's a lease we have with Mineral Range Railroad.

8 Q Mineral Range Railroad?

9 A Yes.

10 Q You don't own any part of Mineral Range Railroad, do

11 you?

12 A No.

13 Q So that's not an MITC locomotive, is it?

14 A No, but it's under lease to MITC. It's under lease to

15 the Milwaukee Terminal Railroad.

16 Q But that's not MITC, is it?

17 A Yes, it is.

18 Q All right. So that locomotive is leased to MITC?

19 A I am not exactly sure of the language. It may say

20 Milwaukee Terminal Railroad doing business as one or the

21 other.

22 Q Now, you said other equipment is on the way. What's the

23 other equipment on the way?

24 A We have six flat cars and an unknown number of box cars

25 that are on their way at this point I have just been

81

1 notified.

2 Q Are those on the way for MITC purposes?

3 A The actual cars will be. The car numbers approved by

4 the Surface Transportation Board will be MITC. I am

5 pretty sure it's four letters. MITC will be on the side

6 of those cars once we are done painting them.

7 Q Isn't it true that the test borings that RACM has

8 proposed aren't in any of the tracks on which any of

9 these cars will operate?

10 A I don't know that. I looked at the map briefly. I
11 think Brian would be a better expert at that.

12 Q But so far as you know, as far as you personally know,
13 RACM-proposed testing won't interfere with your rail
14 operations, will it?

15 MR. BODE: Objection, Your Honor.

16 MR. MURN: Objection, Your Honor. He
17 testified he does not know. He has no way of answering
18 that question.

19 THE COURT: Okay. Just a minute.

20 Do you know where RACM intends to test?

21 THE WITNESS: I saw a map, Your Honor, but I
22 would have to overlay it with our rail plans.

23 THE COURT: Well, let me ask you this Would
24 you have railroad operations anyplace that there is not
25 currently a track, let's say within the next three

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1 months? Between now and three months from now will
2 there be any rail operations in a location in which
3 there is no tracks today?

4 THE WITNESS: I would think there could be.

5 THE COURT: Can you describe under what
6 circumstances that would happen?

7 THE WITNESS: I think across Hopkins and
8 across 27th Street, I can't see that we would ever put

9 track in there or where that would be a property we
10 would want to be in part of the system.

11 THE COURT: But let's say 20 feet to the east
12 or west of a track that's in your facility now or on the
13 premises, would boring 20 feet from the track interfere
14 with the railway operations?

15 THE WITNESS: I don't know.

16 THE COURT: Okay. Could you describe a
17 circumstance in which that would interfere?

18 THE WITNESS: When switching operations are
19 going on, if the operator of those rigs wasn't sure of a
20 blue flag or a certain whistle or a red flag or an area
21 and they crossed that track at the wrong time, they
22 could create a real safety issue.

23 THE COURT: Okay.

24 THE WITNESS: If they are drilling within a
25 certain distance, I don't know.

83

1 THE COURT: In the past let's say two months,
2 can you describe about how much of the day in an average
3 day in the past two months there have been switching
4 operations going on?

5 THE WITNESS: We haven't had any in the last
6 two months, Your Honor.

7 THE COURT: As a matter of fact, there haven't
8 been any since you purchased the property.

9 THE WITNESS: No. Since we purchased the

EXHIBIT K

.

1 STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

BRANCH 24

2 -----

3 MILWAUKEE TRADE CENTER, LLC,
4 Plaintiff, CASE NO. 08-CV-001772
5 vs.

6 THE CITY OF MILWAUKEE,
7 Defendant.

8 -----

9 **MOTION HEARING**

10 _____

11 _____

12 BEFORE THE HONORABLE CHARLES F. KAHN, JR.,
13 CIRCUIT COURT JUDGE PRESIDING
 JULY 8, 2008

14
15 **A P P E A R A N C E S:**

16 JACK BODE, Attorney at Law, appeared on behalf of MITC.
17
18 GREGG HAGOPIAN and THOMAS GARTNER, Assistant City
Attorneys, appeared on behalf of The City of Milwaukee
and the Redevelopment Authority.

20 ALSO APPEARING, Brian Bjodstrup, Benjamin Timm and
Douglas Graham.

23 BONNIE H. DOMASK
Official Court Reporter

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1 T R A N S C R I P T O F P R O C E E D I N G S
2 THE CLERK: This is the case of Milwaukee
3 Trade Center, LLC, versus The City of Milwaukee, Case
4 No. 08-CV-001772. Appearances.
Page 2

- 6 A Various city departments, yes.
- 7 Q And RACM doesn't do that type of work, correct?
- 8 A Well, what type of work?
- 9 Q Issue zoning violations, citations, code violations,
- 10 etcetera?
- 11 A Under the redevelop plan, we can enforce certain codes
- 12 certain and occupancy restrictions, and it's up to the
- 13 other departments to enforce those.
- 14 Q Correct. So the enforcement is actually through the
- 15 City and it's other departments, correct?
- 16 A For zonings and things like that, yes.
- 17 Q Your knew before that RACM would like to buy the entire
- 18 parcel, correct?
- 19 A We're interested, yes.
- 20 Q Does RACM got the money to do it?
- 21 A We've lined up money.
- 22 Q Do you have enough money?
- 23 A I don't know what enough money is.
- 24 Q How much money is going to be available to buy this
- 25 property, if you know?

56

□

- 1 A I would have to add it up. There are various sources.
- 2 Q Well about.
- 3 A A couple million.
- 4 Q Like two or three?
- 5 A I'll say five to seven.
- 6 Q Are you sure about that?
- 7 A Yes.
- 8 Q You held a license with respect to asbestos inspector,

9 was it?
10 A Yes.
11 Q And therefore, you're aware that if asbestos is not
12 disturbed, you don't have to do anything about it,
13 correct?
14 A Yes.
15 Q And if you intended to disturb it, you need to get the
16 proper permits, correct?
17 A Theoretically.
18 Q And with respect to cleaning up the property and
19 demolition projects, are you not aware that MITC has
20 sought the proper permit for asbestos?
21 A If they were granted, the demo permits they requested,
22 if the City grants it, I believe they are, yes.
23 Q You have no knowledge that they're doing anything wrong
24 with respect to the asbestos abatement argument, do
25 you?

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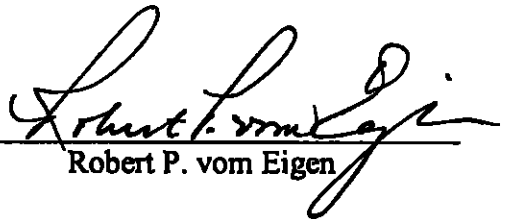
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1 A Not to my knowledge, no.
2 Q Thank you. Has RACM done any investigation as to what
3 if any special obligations it might have to undertake
4 with respect to the proposed inspections because the
5 property has operations on it?
6 A I don't understand the question.
7 Q Do you know whether or not any special rules or
8 regulations apply to workers on that work on or near
9 the railroad tracks that you have to take into account
10 with respect to your proposed drillings on the
11 property?

CERTIFICATE OF SERVICE

I hereby certify that I have caused the foregoing Petition to Revoke Exemption on Behalf of The Redevelopment Authority of The City of Milwaukee to be served by first class mail, postage pre-paid, this 18th day of September 2008, on

Thomas F. McFarland
Thomas F. McFarland, P.C.
208 South LaSalle Street
Suite 1890
Chicago, IL 60604


Robert P. vom Eigen