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September 27, 2018

**VIA HAND-DELIVERY**

Jefferson County Commission  
Nathan P. Cochran, Esq.  
Attorney for Jefferson County Commission  
124 E. Washington Street, P.O. Box 2509  
Charles Town, WV 25414

***Re: Roxul USA, Inc.'s Threat of Lawsuit to Recover Monetary  
Damages Against Government Entities and Representatives***

Dear Mr. Cochran:

The undersigned is legal counsel for Jefferson County Vision, Inc. This letter is written in response to claims made by counsel for Roxul, USA, Inc., and attorney William Rohrbaugh, Esq., asserting that our local government entities and their elected officials and/or volunteer representatives will be exposed to significant monetary damages if any steps are taken to frustrate Roxul's plan to construct a factory in Jefferson County, West Virginia.

Specifically, I reference counsel for Roxul, USA, Inc., James Walls' letter to Stephanie Grove, Jefferson County Administrator (and copied to various municipalities and other political subdivisions), dated September 12, 2018, and William Rohrbaugh's letter to the JCDA Executive Director, dated a day later - September 13, 2018. We disagree with the self-serving legal conclusions asserted in both letters, which were clearly intended to persuade government officials to toe the line under threat of legal action for monetary damages. Our government representatives should be fully informed of their rights and obligations and should not be left with the misperception that they are subject to substantial financial liability should they choose to vote on any ordinance, resolution or other legislation that Rockwool does not favor. The above letters have had a chilling effect on our government representatives' lawful deliberative process and must be appropriately addressed with sound legal counsel for each impacted entity.

#### **A. Governmental Tort Claims and Insurance Reform Act (the “Act”)**

As a threshold matter, political subdivisions are generally immune from liability for claims resulting from their legislative or quasi-legislative functions, including a political subdivision’s adoption of an ordinance, resolution, rule or written policy. *See* W.Va. Code § 29-12A-5(a)(1) and (4). Moreover, political subdivisions are specifically immune from liability from the issuance or refusal to issue revenue bonds. *Id* at (a)(17). These immunities were enacted by the West Virginia Legislature to shield political subdivisions from liability arising from discretionary policy-making acts. Similarly, the Act provides that individual employees or members of the political subdivisions are immune from liability unless: he/she acted manifestly outside the scope of his/her official responsibilities; acted with malicious purpose; or acted in bad faith or in a wanton or reckless manner. *See* W.Va. Code § 29-12A-5(b).

Contrary to these unambiguous provisions of the Act, attorney Rorhbaugh asserted that elected officials or volunteer members of these political subdivisions owed a “fiduciary” duty or otherwise to vote a particular way on an ordinance resolution. Such a suggestion is dangerous to our political process, is absurd and must be corrected. Indeed, if the members of JCDA are without discretion on how to vote on the water bond issue, then why is there a vote scheduled at all? JCDA members are under no fiduciary obligation to vote yes on the water bond issue and any suggestion otherwise is a strong-arm tactic to intimidate members to vote affirmatively.<sup>1</sup>

#### **B. Claims of Contractual Liability**

In support of his lawsuit threat for millions of dollars in damages against our County, Rockwool’s counsel asserted that the parties made certain binding promises to each other, citing the October 3, 2017 Payment in Lieu of Taxes Agreement (hereinafter “PILOT”) and the JCDA’s Memorandum of Understanding (hereinafter JCDA MOU), dated October 17, 2017.

With respect to the PILOT and its enforceability, one need only look to Section 4.10 which makes clear the entire agreement (and the obligations contained therein) are contingent on the parties following through with the completion of the Project. Section 4.10 Conditions to Agreement Becoming Effective, provides as follows:

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<sup>1</sup> It is notable that Rockwool’s counsel did not raise the issue of individual liability against JCDA members. Rather, this concept was raised by attorney Rorhbaugh, who was purportedly writing at the behest of the JCDA Board. It certainly appears as though the purpose of requesting such a letter was to influence the voting members on the pending water bond vote.

Notwithstanding any other provision herein, this Agreement shall not become effective unless and until Company acquires the Land and title, constructs the Project and transfers ownership in and to the Project to the JCDA. In the event that the Company does not acquire the Land, or construct the Project, or transfer ownership of the Project to the JCDA, it is expressly agreed that this Payment in Lieu of Taxes Agreement shall terminate and be null and void.

Thus, Rockwool is disingenuously claiming that it justifiably relied on an agreement that was clearly contingent upon the completion of the Project and other contingencies that had not and have not occurred to date. Clearly, Rockwool contemplated that if the Project failed (for any reason) then the PILOT was null and void. Rockwool's claims of contractual obligations and promises on a contingent agreement, therefore, ring hollow.

It should also be noted that Rockwool has recognized the contingent nature of this Project in some of its other agreements with other government entities. For example, the MOU between Rockwool and the City of Ranson from July 18, 2017, included multiple provisions establishing that commitments in the MOU were non-binding. Paragraph 6 of the MOU expressly provides: "The Parties understand that Company is not bound to proceed with the Project... the Parties understand that the Project may change as it proceeds through the public process, and based on these changes, **or for any other reason**, Company may decline to proceed with the Project. The MOU further provides "In no case, shall this MOU be the basis for either Party to suffer any penalty as a consequence for any decision to decline to proceed with this Project or to alter the Project[.]" Further the MOU delineated six (6) specific contingencies, including that Rockwool will obtain all necessary permits, some of which have not yet been obtained.<sup>2</sup>

Similar to the PILOT and Ranson MOU, the MOU between Rockwool and the JCDA contained numerous "Conditions Precedent," any one of which would independently cause the MOU to expire and have no force and effect. *See* JCDA MOU Para. 4. Conditions such as: should the Company fail or refuse to execute the User Agreement or begin construction on the Water Line Extension; if the JCDA does not close on the WVWDA Loan; or JUI or JCDA fail to obtain required permits, right of ways and easements; all of which must occur to give force and effect to JCDA MOU. Some of these Conditions Precedent have not occurred. If they do not, the MOU by its own terms is of no force and effect.

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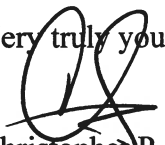
<sup>2</sup> The Ranson MOU also contained an express provision that stated any claims arising out of the MOU were to be governed by the West Virginia Governmental Tort Claims and Insurance Reform Act, which limits the liability claimed by Rockwool. *See* MOU, para. 11.

These contingencies and protections reserved by Rockwool in its agreements illustrate that the company understood the ultimate viability of this Project was conditioned upon (among other things) the “public process,” which is outside the control of all of the parties involved. Rockwool is well aware that plans that involve the political process and government approval through the deliberative process are subject to contingencies. Rockwool recognized the contingent nature of this Project and reserved the right in its agreements to pull out for any reason. Rockwool simply seeks to deny Jefferson County and its political subdivisions the same option.

With all of these contemplated contingencies still unaccomplished, assertions by Rockwool that it will be entitled to recover \$25 - \$100 million dollars in damages against the government entities involved, should the Project fail, seems an attempt to snuff out any political challenge to the Project. **Moreover, Rockwool has been on notice that any further work on this project under the circumstances is being done at its own peril given its duty to mitigate any damages it claims to have incurred.** If Rockwool ultimately followed through with its threat of lawsuit, the citizens of Jefferson County would sit as jurors to consider breaches, reasonable reliance and damages claimed by Rockwool.

In conclusion, it is imperative that our municipalities, Jefferson County and its political subdivisions and all of our County-wide elected officials and volunteers be armed with sound legal advice regarding their rights and obligations when threatened with legal process. Each of these entities should seek independent legal counsel, and individual members may do so as well. As it stands, there remains a misperception amongst many of our elected leaders and in the general public, that there exists no political or legal solution to the Rockwool Project and that any act, statement or vote in opposition to the Rockwool Project is unlawful and/or will result in personal financial exposure to our volunteer representatives and our elected officials. This must be corrected to protect the political process in our community.

Very truly yours,



Christopher P. Stroeck, Esq.  
Arnold & Bailey, PLLC

cc: Jefferson County Vision, Inc.  
City of Ranson  
City of Charles Town  
Jefferson County Board of Education  
James A. Walls, Esq. for Roxul USA, Inc.  
William F. Rohrbaugh, Esq. for Jefferson County Development Authority