

JOELLEN SHORTLEY
jshortley@rsjalaw.com

27555 Executive Drive, Suite 250
Farmington Hills, Michigan 48331
P 248.489.4100 | F 248.489.1726
rsjalaw.com



ROSATI | SCHULTZ
JOPPICH | AMTSBUECHLER

MEMORANDUM ATTORNEY-CLIENT COMMUNICATION

TO: Mayor Gatt and Novi City Council

FROM: Joellen Shortley, Assistant City Attorney

DATE: June 22, 2023

SUBJECT: MEDC Development Projects Advisor Confidentiality Agreement

At the request of Mike McCready, we have reviewed the proposed Confidentiality Agreement provided to the City from the Michigan Economic Development Corporation ("MEDC"). We proposed several recommended changes to the Agreement, which by and large were accepted by the MEDC. **The proposed Agreement is acceptable as to form, but we would like to highlight certain provisions.**

Generally, the Agreement governs any use of "confidential exempt information" the City receives from the MEDC concerning a company considering a potential MEDC development project for a period of ten (10) years after that information is given to the City. The term "confidential exempt information" is defined as information, which may include commercial information, trade secrets and/or financial information that are non-public in nature. Under Paragraph 1 of the Agreement, the City will be required to treat the information in the same manner that it treats its own confidential information and may only use the information provided by the MEDC for a specific project for purposes of that project. The Agreement also requires that the City follow the procedures under the Freedom of Information Act under MCL 15.243(1)(f) to protect trade secrets, commercial and financial information provided under the Agreement. This includes a promise of confidentiality of the records by the City Manager or Mayor and maintaining a written description of the confidential records in a central place and made available upon request.

More specifically, pursuant to Paragraph 2, the City will be required to use its best efforts to keep confidential the fact that the MEDC has given any confidential information related to a project to the City, the fact that the MEDC may be discussing a specific project, the status of that project, and the identity of a company considering the project.

Paragraph 3 allows for the potential release of confidential information as required by law (for example, pursuant to the Freedom of Information Act) or by a subpoena or a court order. However, prior to disclosing any information in response to a legal request, the City will be required to notify the MEDC of the request, so that the MEDC and/or the company may take action independent of the City to protect their respective interests. If the MEDC and/or the

company do attempt to maintain the confidentiality of the information, the City will be required to cooperate with them in their efforts. We had asked for clarification to this paragraph that once the City notifies the MEDC of a FOIA request, it will provide the information that is required in response to the request, within the time-period provided by law, unless the MEDC obtains a Court order prohibiting the disclosure. The MEDC did not agree to this modification.

Pursuant to Paragraph 4, within ten (10) days of receipt of a written request from the MEDC, or upon termination of the Agreement, the City will be required to destroy all confidential information and provide written confirmation to the MEDC. If any of the confidential information is incorporated into documents prepared by the City such as in an analysis, that information must continue to remain confidential.

If for some reason confidential information is disclosed to a third party in violation of the Agreement, Paragraph 5 provides that the MEDC or Company may be entitled to seek an injunction to prevent disclosure.

Paragraph 11 does provide that each company connected with the proposed project will be a third-party beneficiary under the Agreement. However, the only right given to a company as a third-party beneficiary is to protect its confidential information. The Agreement would not provide a company with the right to pursue a claim for monetary damages directly against the City for the release of any confidential information.

The remainder of the Agreement is fairly standard contract language. If you have any specific questions regarding any of its terms, please contact our office.

If one is not already in place, we would recommend that the City consider establishing a policy or procedure regarding the distribution and disclosure of information concerning MEDC development projects. This would minimize the chances of an unintentional violation of the terms of the Agreement. The City will also need to maintain a written summary of any confidential information received from the MEDC in a central place, such as the Clerk's office, and make the summary available upon request.

cc: Victor Cardenas, City Manager
Mike McCready, Director, Economic Development
Thomas Schultz, Esquire