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December 5, 2024

**CONFIDENTIAL CORRESPONDENCE
ATTORNEY-CLIENT PRIVILEGE**

Mayor Fischer and City Council
City of Novi
45175 Ten Mile Road
Novi, MI 48375

RE: Homeowner Woodland Ordinance Appeal – 21111 Meadowbrook Road
(Opong-Owusu)

Dear Mayor Fischer and Council Members:

This letter is about an appeal to the City Council under the Woodlands Ordinance by a homeowner who constructed a single home on a lot on Meadowbrook Road just north of Eight Mile. It will be on the December 16th meeting agenda, but this letter is a “heads up” as it involves a threat of litigation to challenge the Woodlands Ordinance.

The homeowner secured the necessary woodland permit before constructing the home. However, during the construction of the home the contractors apparently ignored the tree protection requirements in the ordinance for trees to remain, and significantly impacted the critical root zone (CRZ) of 21 regulated trees that were not proposed to be removed and have to be protected against damage during construction. From the City Staff’s perspective, that is an unusual number of trees to be affected during the construction process—normally the impact beyond the approved area is limited to one or two or a few trees.

Under the ordinance, when these tree protection provisions are violated, the City will go out to the property to make the determination as to which trees might survive the damage and which are not likely to:

Sec. 37-9. - Tree protection during construction

- (b) It shall be unlawful for any person to conduct any activity within the critical root zone (CRZ) of any tree designated to be retained, including but not limited to the placing of any solvents, material, construction machinery, or soil within the CRZ.

- (c) The parks and forestry operations manager, community development department director, or his or her designee shall make a determination as to those trees which can reasonably be expected to survive the permitted activity. Particular consideration shall be given to the impact of changes in grade, deposition of storm water, duration of storm water encroachment, oil leaks, species of the impacted trees, soil types, soil compaction, the distance of earth moving activities from individual trees, and other construction or developmental activities which impact the area around the trees, irrespective of whether the activity is in the immediate vicinity of the affected trees. Trees which cannot be reasonably expected to survive shall be removed. Those trees which are removed pursuant to this section shall be considered in the calculation of replacement trees under section 37-8.

As you can see from the attached materials, the City's landscape architect (Rick Meader) and woodlands consultant (Merjent) are skeptical that any of the 21 affected trees will survive. The homeowner was essentially told that the appropriate course of action would be for him to go ahead and pay for the replacement, which would require 31 replacement credits.

The homeowner doesn't believe that the trees will actually die (though he doesn't appear to have any expertise in this area), and doesn't believe that the approach in the City's Woodlands Ordinance is fair. His proposal is that the City hold a small amount of what's left of the bond he posted at the beginning of his construction project to address the trees in the future if they do in fact die or are compromised. More specifically, the City is still holding \$12,400 of the original bond posted by the homeowner at the beginning of the project. His proposal is that 75% of the bond be returned now, and if at the end of the two years the trees are fine, the remainder of the bond can be released to him. (It's not entirely clear what his proposal is if the trees in fact die or experience other damage.)

The City Council thankfully does not get a lot of woodland appeals. As mentioned above, there are usually not as many trees affected during the construction process for any single home, and most developers apparently pay more attention to tree protection requirements and/or treat the additional replacement requirement as the cost of doing business. Here the homeowner is acting as the "contractor" for his home construction (which is allowed but not exactly encouraged given the lack of sophistication of most homeowners) and the actual work was likely done by others—who have likely been paid and moved on.

The current appeal puts the City Council in a bit of a quandary. In this case it is a homeowner, rather than an actual developer or builder, who is appealing. As the homeowner indicates, some trees are not a particularly valuable species (e.g., black locust). At the same time, the homeowner does not disagree that the tree protection requirements were ignored and the critical root zone area was heavily disturbed. The City's experts are suggesting that long-term damage to the roots and therefore the trees is likely.

There is also no doubt that builders/developers in the City will take note of any relaxation that the City gives in this situation. If the City Council grants relief in this matter, it seems likely that you will see an uptick in these sorts of appeals and/or more substantial violations of the tree protection

provisions of the Woodlands Ordinance. It's safe to say that the City staff do not have the time or the "bandwidth" to administer a widely-applicable program of holding financial guarantees or bonds every time this issue comes up in the building of a new home. This is one lot owned by one homeowner. There are many, many more lots under construction in the City at any given time.

Weighed against that, however, is the fact that the applicant has threatened to sue the City alleging that the Woodlands Ordinance is unconstitutional. His prior correspondence to staff has indicated that he is aware of the Canton Township case and the state and federal court decisions that have cast doubt on these sorts of environmental ordinances. As we've indicated before, we are in the process of working on amendments to the City's Woodlands Ordinance (and likely Wetlands Ordinance) in light of these sorts of amendments and the courts' general turn toward a pro-property rights perspective at the expense of environmental protection-type regulations. A homeowner plaintiff challenging the City's Woodlands Ordinances presents an interesting dynamic for the court and these sorts of ordinances generally.

The Woodlands Ordinance does allow an appeal from the decision of the Planning Commission on the woodland permit request. Here the Planning Commission's decision was technically to grant the applicant the ability to remove the 21 impacted trees, with eh 31 required replacement credits. However, the applicant is coming to you for the alternate partial bonding relief, which the Commission can't grant and only the Council can:

Sec. 37-31. - Appeal from granting or denial.

A permit approved by the planning commission shall not be issued until ten (10) calendar days following the date of the approval. Any interested person who is aggrieved by the granting or denying of a use permit required by this article or other decision hereunder may request an appeal of the decision to the council. A request for appeal must be filed within ten (10) calendar days following the grant or denial. If an appeal is requested during such ten-day period, the issuance of any permit shall be suspended pending the outcome of the appeal. The council, upon review, may reverse, affirm or modify the determination and/or permit issued by the planning commission.

Note that the section doesn't provide you with any standards for deciding whether to grant relief or not. We suggest that the Council consider the 3-part test from Chapter 1 of the City Code, which you will have seen in other contexts:

A variance may be granted by the city council from regulatory provisions of this Code when all of the following conditions are satisfied:

- (1) A literal application of the substantive requirement would result in exceptional, practical difficulty to the applicant;
- (2) The alternative proposed by the applicant will be adequate for the intended use and shall not substantially deviate from the performance that would be obtained by strict enforcement of the standards; and

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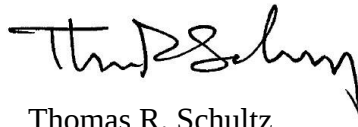
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- (3) The granting of the variance will not be detrimental to the public health, safety or welfare, nor injurious to adjoining or neighboring property, nor contrary to the overall purpose and goals of the chapter or article containing the regulation in question.

This matter will be on the City Council's agenda for December 16, 2024. The motion sheet in the case will lay out the Council's options, none of which are likely to be perfectly satisfactory here. If you have any questions in the meantime, feel free to call.

Very truly yours,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

A handwritten signature in black ink, appearing to read "Th R Schultz", written over the printed name.

Thomas R. Schultz

TRS/jah

cc: Victor Cardenas, City Manager
Cortney Hanson, City Clerk