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***Privileged and Confidential Correspondence
from City Attorney***

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

RE: Data Center Ordinance

Dear Mayor Fischer and Councilmembers:

The enclosed draft ordinance is proposed to amend the Zoning Ordinance to add and clarify the regulations relating to the development of data centers. As you may know, data center developers have been given sales tax incentives to locate in Michigan. But the type of data center that is now being proposed in other communities is a new type of land use that was not conceived at the time that most local zoning ordinances regulating “data processing” or “data entry” were adopted 20 or more years ago. Back then regulations on data processing were written the typical office use where people sat at computers entering data in mind.

The new form of data center is essentially a warehouse for computing facilities with outdoor utility yards to house generators and other mechanical equipment necessary to keep the internal equipment cooled and continuously operating—all with very little to no oversight by workers. The impacts on the surroundings are significantly different from the old office-style data entry use and can involve the heavy use of electricity and water, as well as continuous 24-hour, 7-day noise output from the mechanical yards surrounding the data center. As a result, current regulations aimed at those old uses do not adequately address the impacts that data centers as we now think of them are making on surrounding properties.

You have no doubt read or seen or heard about some of the data center issues being felt in other communities in our area. There was a rush not too long ago to put moratoriums on data centers in place while new ordinances were created, or to try to immediately fix the hole in their zoning regulations to address hyperscale or warehouse-style data centers. Novi’s approach was not to do a moratorium but to start to work on ordinance at a brisk but careful pace, taking as much opportunity to learn about what the City’s options are and what other communities are doing.

From there the proposed ordinance sets up an application process that attempts to get some early input by surrounding users. Ultimately, the formal application process is the same as for

any special land use with a required public hearing at the Planning Commission. But probably the most important part of the proposed language treats data centers somewhat differently from other special land uses by detailing information that the City needs to know about things like water use, electricity use, potential pollution, and of course noise. The ordinance also highlights that, as a special land use, conditions may be applied by the Planning Commission.

Councilmembers have probably heard about the lawsuit recently filed against the City of Wixom (which our office also represents) by a data center. For many months Wixom has been working on, but hasn't yet settled on, a data center ordinance; the work has been done while a moratorium is in place. The lawsuit includes a claim to invalidate or lift the moratorium, but it also seeks to have the court require the city to process the landowner's application under the existing ordinance, before the new ordinance passes.

Wixom's Planning Commission produced an ordinance that, while it might have had some issues, potentially could have withstood a challenge by a data center operator. That version did not fare well once it reached the City Council there. The Council has been getting anywhere from 200-250 members of the public coming in to comment on the regulations at each meeting. The public, after having seen the impacts that some of these hyperscale data centers have made on electrical utilities and ground water in other communities (Dowagiac for example), has a lot to say about what types of regulations it would like local government to place on data centers. However, as we have advised Wixom, local governments are limited as to the types of regulations that they may place on data centers. Regulations raised at the meetings relating to things like electric rates, sewer discharge, eminent domain, and water use are in many instances pre-empted by state or federal law or are unconstitutional as proposed. Other public suggestions, such as collecting an "impact" fee to address impacts on property values, are outright unlawful. Local governments are limited adopting the types of regulations that the City has adopted with respect to all other zoning districts in the City—those types of issues authorized by the Michigan Zoning Enabling Act—which include choosing the appropriate districts (without being exclusionary), regulating setbacks (particularly from incompatible uses such as residential), limiting noise, vibration, and other performance standards, and collecting performance guarantees to ensure that public improvements are constructed in accordance with the approved site plan.

As noted above, the enclosed draft ordinance was prepared by staff after substantial research and reviewed by our office after working on the same types of regulations in Wixom for the past 9 months. This is a version that we think encompasses all of the things that City Council and the Planning Commission can likely regulate on—and the things that you're likely to hear about from the public that we think the law allows you to accommodate. We are hopeful that by presenting a complete (in our view) ordinance to Council (and before that the Planning Commission) it might be possible to avoid some of the prolonged public conversations happening elsewhere. In our view, the place to address things you are particularly concerned about—and frankly that the public is concerned about—is actually during the special land use review process and not in the ordinance itself. We think, in other words, that it is safer to get an ordinance in place that can withstand a challenge by a data center that it is unlawful or unconstitutional "on its face" so that you can (a) deal with specific proposals with specific responses and/or conditions and (b) can continue to consider updating the ordinance over time as the impacts of data centers become clearer. Getting stuck where some communities are—having either no ordinance in place or

having an ordinance that isn't likely to withstand a court challenge—is to us less preferable than having to defend a specific decision as to a specific property and proposal under a special land use approval.

In sum, while we are certainly not saying the ordinance is perfect and can't be improved upon, we are saying that it's frankly pretty close to the line already. So, if this ordinance moves forward, and as you hear public comments and suggestions or (more likely) demands for more and more regulatory provisions that are intended to make data centers impossible to approve in the community no matter what, please keep in mind that, to put it bluntly, that is likely simply not possible.

We'll be happy to discuss your questions and concerns as this moves forward. But, knowing that if the City gets targeted by a data center every public conversation will be scrutinized, we're also expecting to have some further confidential legal letters/discussion as well.

Please feel free to contact me with any questions or concerns regarding this matter.

Very truly yours,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC



Elizabeth Kudla Saarela

EKS

C: Victor Cardenas, City Manager
Cortney Hanson, Clerk
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