



MONTGOMERY COUNTY PLANNING BOARD
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB No. 20-020
Forest Conservation Plan No. H135
ELP at Rock Spring
Date of Hearing: March 26, 2020

APR 03 2020

RESOLUTION

WHEREAS, under Montgomery County Code Chapter 22A, the Montgomery County Planning Board is authorized to review forest conservation plan applications; and

WHEREAS, on December 20, 2019, ELP Bethesda at Rock Spring LLC ("Applicant") filed an application for approval of a forest conservation plan on approximately 36.02 acres of land located at 10400 Fernwood Road ("Subject Property") in the North Bethesda Policy Area and Rock Spring Sector Plan ("Sector Plan") area; and

WHEREAS, Applicant's forest conservation plan application was designated Forest Conservation Plan No. H135 ELP at Rock Spring ("Forest Conservation Plan" or "Application"); and

WHEREAS, following review and analysis of the Application by Planning Board Staff ("Staff") and other governmental agencies, Staff issued a memorandum to the Planning Board dated March 16, 2020, setting forth its analysis and recommendation for approval of the Application, subject to certain conditions ("Staff Report"); and

WHEREAS, on March 26, 2020, the Planning Board held a public hearing on the Application at which it heard testimony and received evidence submitted for the record on the Application; and

WHEREAS, at the hearing, the Planning Board approved the Application subject to certain conditions, by the vote certified below.

Approved as to
Legal Sufficiency:

Christina Donato by MTM

M-NCPPC Legal Department
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NOW, THEREFORE, BE IT RESOLVED that the Planning Board APPROVES Forest Conservation Plan No. H135 on the Subject Property, subject to the following conditions:¹

1. The Applicant must obtain approval of a Final Forest Conservation Plan (FFCP), for the entire Property, concurrently with the first Site Plan approval.
2. The Final Forest Conservation Plan must:
 - a. be consistent with the approved Preliminary Forest Conservation Plan;
 - b. show the planting locations of at least 36.1 total inches caliper of native shade trees, each at least three inches caliper, to mitigate the removal of variance trees number 15, 16, 17, and 18;
 - c. include measures to enhance the stream buffer function, including restoring areas where impervious surfaces are being removed, managing invasive species, and planting buffer areas with native species where not in conflict with other easements; and
 - d. include a new variance request to determine the disposition of the remaining variance trees
3. The Limits of Disturbance (LOD) on the FFCP must be consistent with the LOD on the Sediment and Erosion Control Plan.
4. Prior to the start of any clearing, grading, or demolition on the Property, the Applicant must record a Category I Conservation Easement over all areas of forest planting, as specified on the approved FFCP. The Category I Conservation Easement approved by the M-NCPPC Office of the General Counsel must be recorded in the Montgomery County Land Records by deed and the Book and Page for the easement must be referenced on the record plat.
5. The Applicant must schedule the required site inspections by M-NCPPC Staff per Section 22A.00.01.10 of the Forest Conservation Regulations.
6. Prior to any demolition, clearing, grading or construction on the project site, the Applicant must provide financial surety to the M-NCPPC Planning Department for the 0.41 acres of new forest planting and for the variance mitigation trees credited toward meeting the requirements of the FFCP on the Property.
7. Prior to release of the first Use and Occupancy Permit from the Montgomery County Department of Permitting Services for this Property, the Applicant must install the plantings for the required on-site afforestation of 0.41 acres as shown on the FFCP or as directed by the M-NCPPC Forest Conservation Inspection staff.
8. Prior to any demolition, clearing, grading or construction on the Property, the Applicant must submit a two-year Maintenance and Management Agreement (MMA) approved by the M-NCPPC Office of General Counsel. The MMA is required for all forest planting areas and landscape plantings credited toward meeting the requirements of the FFCP.

¹ For the purpose of these conditions, the term "Applicant" shall also mean the developer, the owner, or any successor in interest to the terms of this approval.

9. The Applicant must comply with all tree protection and tree save measures shown on the approved FFCP. Tree save measures not specified on the FFCP may be required by the M-NCPPC forest conservation inspector.
10. At the direction of the M-NCPPC forest conservation inspector, the Applicant must install permanent conservation easement signage along the perimeter of the conservation easements. Exact locations of the signs to be determined by the M-NCPPC forest conservation inspector to best define the limits of the conservation easement.
11. No clearing, grading, or any demolition may occur prior to receiving approval of the FFCP and satisfying any off-site planting requirements.
12. The Applicant must amend the Preliminary Forest Conservation Plan prior to certification to reflect the variance approval for only tree numbers 15, 16, 17 and 18.

BE IT FURTHER RESOLVED that having given full consideration to the recommendations and findings of its Staff as presented at the hearing and as set forth in the Staff Report, which the Board hereby adopts and incorporates by reference (except as modified herein), and upon consideration of the entire record, the Planning Board FINDS, with the conditions of approval, that:

1. *The Application satisfies all the applicable requirements of the Forest Conservation Law, Montgomery County Code Chapter 22A, and ensures the protection of environmentally sensitive features.*

A. Forest Conservation

The Board finds that as conditioned, the Forest Conservation Plan complies with the requirements of the Forest Conservation Law.

The Net Tract Area is 34.18 acres, and there is no forest on the Property. The afforestation threshold for the CR zone is 15% of the Net Tract Area, or 5.13 acres. The Applicant proposes to establish an afforestation area of 0.41 acres in the stream buffer north of the stream and south of the entrance road adjacent to Fernwood Road. Final determination of how the remaining afforestation requirement of 4.72 acres will be met will be determined at the Final Forest Conservation Plan.

B. Forest Conservation Variance

Section 22A-12(b)(3) of the Forest Conservation Law identifies certain individual trees as high priority for retention and protection ("Protected Trees"). Any impact to these Protected Trees, including removal or any disturbance within a Protected Tree's critical root zone ("CRZ"), requires a

variance under Section 22A-12(b)(3) ("Variance"). Otherwise such resources must be left in an undisturbed condition.

This Application will require the removal or CRZ impact to four Protected Trees as identified in the Staff Report. In accordance with Section 22A-21(a), the Applicant requested a Variance, and the Board agrees that the Applicant would suffer unwarranted hardship by being denied reasonable and significant use of the Subject Property without the Variance. Denying the variance request would deny the Applicant reasonable and significant use of the Property because removal of trees 15, 16, 17 and 18 is necessary to relocate a portion of the southern access road out of the buffer, as required by the Environmental Guidelines, while also providing safe and efficient access to the Property. Relocating the road will significantly reduce the amount of existing stream valley buffer encroachment. For these reasons, the Applicant has an unwarranted hardship to consider a variance request.

The Board makes the following findings necessary to grant the Variance:

1. *Granting the Variance will not confer on the Applicant a special privilege that would be denied to other applicants.*

The proposed design is necessary to relocate an existing road out of the stream buffer. The design responds to the multiple site constraints and is consistent with both the zoning and Sector Plan recommendations; thus, granting the variance will not confer a special privilege to the Applicant.

2. *The need for the Variance is not based on conditions or circumstances which are the result of the actions by the Applicant.*

The requested variance is based on the constraints of the Property, access requirements and engineering challenges, rather than on conditions or circumstances which are the result of actions by the Applicant.

3. *The need for the Variance is not based on a condition related to land or building use, either permitted or non-conforming, on a neighboring property.*

The requested variance is a result of the proposed design and constraints on the Subject Property and not as a result of land or building use on a neighboring property.

4. *Granting the Variance will not violate State water quality standards or cause measurable degradation in water quality.*

The Protected Trees requested for removal are not located in an environmental buffer or special protection area. This approval is conditioned on mitigation that approximates the form and function of the trees removed. Therefore, their removal will not violate State water quality standards or cause measurable degradation in water quality.

Mitigation for the Variance is at a rate that approximates the form and function of the Protected Trees removed. The Board approves replacement of Protected Trees at a ratio of approximately one-inch diameter replaced for every four inches diameter removed, as measured four and one-half feet above the ground, using replacement trees of no less than three inches caliper. No mitigation is required for Protected Trees impacted but retained.

BE IT FURTHER RESOLVED that this Resolution constitutes the written opinion of the Planning Board in this matter, and the date of this Resolution is APR 03 2020 (which is the date that this Resolution is mailed to all parties of record); and

BE IT FURTHER RESOLVED that any party authorized by law to take an administrative appeal must initiate such an appeal within thirty days of the date of this Resolution, consistent with the procedural rules for the judicial review of administrative agency decisions in Circuit Court (Rule 7-203, Maryland Rules).

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CERTIFICATION

This is to certify that the foregoing is a true and correct copy of a resolution adopted by the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission on motion of Vice Chair Fani-González seconded by Commissioner Cichy, with Chair Anderson, Vice Chair Fani-González, and Commissioners Cichy, Patterson, and Verma voting in favor at its regular meeting held on Thursday, March 26, 2020, in Silver Spring, Maryland.



Casey Anderson, Chairman
Montgomery County Planning Board