

## ATTACHMENT F - VARIANCE REQUEST



August 20, 2024

Steve Findley, Planner Area 2  
M-NCPPC  
2425 Reddie Drive  
Wheaton, MD 20902

Re: ELP Bethesda at Rock Spring – Phase 2  
Final Forest Conservation Plan – Specimen Tree Variance Request

Dear Mr. Findley,

On behalf of Erickson Living Management, LLC, Soltesz is requesting a variance for the critical root zone (CRZ) impact and removal of five additional specimen trees. Previous approved were twenty-seven (27) specimen trees 30 inches or greater in DBH, as required under Section 22A-21 of Montgomery County's Forest Conservation Law. Four of these specimen trees were approved during the Preliminary Forest Conservation Plan Approval associated with H-135. This variance request is additionally pursuant to recent revisions to the State Forest Conservation Law enacted by State Bill 666, where it notes that the variance pertains to "trees having a diameter measured at 4.5 feet above the ground of 30 inches diameter or 75% of the diameter of the current state champion tree of that species as designated by the department". The impact to these trees results from a demolition project located in Bethesda. These trees are within the proposed LOD and will be removed or impacted due to conflicts with grading and demolition of an existing building.

### **Project Information**

The site is located east of Dwight D. Eisenhower Highway (I-270), north of Democracy Boulevard, and bounded by Fernwood Road. The net tract area is approximately 33.64 acres, including offsite disturbance. The current zone is CR-1.5, C-0.75, R-0.75, H-150, and the proposed zoning classification is CRF-1.5, C-0.75, R-1.5, H-150.

The Preliminary Plan proposes 1,300 independent living units, 160-210 assisted living and memory care units, 30-50 skilled nursing care units, and 5,300 s.f. of retail. The proposed site plan and variance request will include a proposed marketing center, improvements to Thomas Branch Road, and linear park improvements.

### **Critical Root Impacts**

A NRI-FSD (#420200260) has been approved by MNCPPC. The trees below that will be removed or impacted as a result of this plan of development are shown on the NRI/FSD and are numbered

## ATTACHMENT F - VARIANCE REQUEST

accordingly for reference purposes. Eight (8) specimen trees will be removed per this plan. Previously 19 trees were proposed to be removed.

ELP BETHESDA SPECIMEN ( $\geq 30''$ DBH) TREE LIST TO BE IMPACTED BUT SAVED (8 TREES) - <i>previously approved variance</i>					
Tree #	COMMON NAME	BOTANICAL NAME	DBH	CONDITION	IMPACTS
Existing Tree along Fernwood Road					
7 (Ph1A)	Willow Oak	<i>Quercus phellos</i>	40.1	Fair	Save (prev. approved. Final impact agreed with Parks)
Existing Tree within Stream Valley Buffer					
45 (Ph1B)	Red Mulberry	<i>Moras rubra</i>	36, 24, 18, 26	Fair	Save 11% Impact
55 (Ph1B)	Willow Oak	<i>Quercus phellos</i>	40.5	Good	Save (prev. approved)
56 (Ph1A)	Willow Oak	<i>Quercus phellos</i>	30.5	Fair	Save (prev. approved)
Existing Tree within Stream Valley Buffer					
22 (Ph1A)	Black Cherry	<i>Prunus serotina</i>	32.5	Fair	Save (prev. approved)
64 (Ph1A)	Willow Oak	<i>Quercus phellos</i>	34.1	Fair	Save 5% Impact

ELP BETHESDA SPECIMEN ( $\geq 30''$ DBH) TREE LIST TO BE REMOVED (Five (5) Phase 2 Trees and twenty-seven (27) previously approved for removal)					
Tree #	COMMON NAME	BOTANICAL NAME	DBH	CONDITION	IMPACTS
Group 1: Existing Trees in Parking Lot Fronting Drive where plan proposed Building RB2.3 and RB2.4					
1(PH1B)	Willow Oak	<i>Quercus phellos</i>	37.6	Good	100%
2(PH1B)	Willow Oak	<i>Quercus phellos</i>	31	Fair	100%
3(PH1B)	Willow Oak	<i>Quercus phellos</i>	33.1	Fair	100%
4(PH1B)	Willow Oak	<i>Quercus phellos</i>	41.8	Good	100%
5(PH1B)	Willow Oak	<i>Quercus phellos</i>	35.6	Fair	100%
6(PH1B)	Willow Oak	<i>Quercus phellos</i>	34.2	Fair	100%
6(PH1B)	Willow Oak	<i>Quercus phellos</i>	33.9	Fair	100%
Group 2: Existing Trees in Courtyard South of the Existing Marriott Building					
15(H135)	Willow Oak	<i>Quercus phellos</i>	39.6	Good	100%
16(H135)	Willow Oak	<i>Quercus phellos</i>	35	Good	100%
17(H135)	Willow Oak	<i>Quercus phellos</i>	33.3	Good	100%
18(H135)	Willow Oak	<i>Quercus phellos</i>	36.4	Good	100%
19(H135)	Willow Oak	<i>Quercus phellos</i>	36.8	Good	100%
20(H135)	Willow Oak	<i>Quercus phellos</i>	35.6	Good	100%
Group 3: Existing Trees west of demolished Building where plan proposes Building RB1.1, RB1.2					
33(Ph1A)	Northern Red Oak	<i>Quercus rubra</i>	31.8	Poor	100%

## ATTACHMENT F - VARIANCE REQUEST

Group 4: Existing Trees along Fernwood Road					
33(Ph1A)	Northern Red Oak	<i>Quercus rubra</i>	31.8	Poor	100%
49(Ph1A)	Willow Oak	<i>Quercus phellos</i>	39.6	Good	100%
51(Ph1A)	Willow Oak	<i>Quercus phellos</i>	35	Good	100%
52(Ph1A)	Willow Oak	<i>Quercus phellos</i>	33.3	Good	100%
53(Ph1A)	Willow Oak	<i>Quercus phellos</i>	36.4	Good	100%
54(Ph1A)	Willow Oak	<i>Quercus phellos</i>	36.8	Good	100%
<b>55(Ph2)</b>	<b>Willow Oak</b>	<b><i>Quercus phellos</i></b>	<b>35.6</b>	<b>Good</b>	<b>100%</b>
<b>56(Ph2)</b>	<b>Willow Oak</b>	<b><i>Quercus phellos</i></b>	<b>39.6</b>	<b>Good</b>	<b>100%</b>
57(Ph1A)	Willow Oak	<i>Quercus phellos</i>	35	Good	100%
58(Ph1A)	Willow Oak	<i>Quercus phellos</i>	33.3	Good	100%
61(Ph1A)	Willow Oak	<i>Quercus phellos</i>	36.4	Good	100%
62(Ph1A)	Willow Oak	<i>Quercus phellos</i>	36.8	Good	100%
63(Ph1A)	Willow Oak	<i>Quercus phellos</i>	35.6	Good	100%
<b>64(Ph2)</b>	<b>Willow Oak</b>	<b><i>Quercus phellos</i></b>	<b>36.6</b>	<b>Good</b>	<b>100%</b>
<b>65(Ph2)</b>	<b>Willow Oak</b>	<b><i>Quercus phellos</i></b>	<b>37.6</b>	<b>Good</b>	<b>100%</b>
<b>66(Ph2)</b>	<b>Willow Oak</b>	<b><i>Quercus phellos</i></b>	<b>38.6</b>	<b>Good</b>	<b>100%</b>
Group 5: Existing Stream Valley Buffer Trees					
13 (Ph1B)	Red Maple	<i>Acer rubrum</i>	30.7	Good	100%
13 (Ph1B)	Red Maple	<i>Acer rubrum</i>	38.4	Good	100%
<b>Total DBH Previously Removed - Tree 15, 16, 17, and 18 (H135)</b>			<b>144.3</b>		
<b>Total DBH Previously Removed - Ph. 1A</b>			<b>572.3</b>		
<b>Total DBH Previously Removed - Ph. 1B</b>			<b>282.4</b>		
<b>Total DBH Previously Removed - Ph. 2</b>			<b>169.7</b>		
<b>Total DBH Removed</b>			<b>1168.7</b>		
<b>Total Trees Removed</b>			<b>32</b>		
<b>Total Caliper Replacement Required (1" cal / 4" DBH)</b>			<b>293</b>		
<b>Total 3.5" Cal. Trees Planted</b>			<b>84</b>		

**Note: All trees except Trees 55, 56, 64, 65, and 66 have been previously approved for removal during the Preliminary Forest Conservation Plan approval H-135, 820210190, and 820220120.**

### Mitigation

All thirty-two (32) of the trees listed above to be removed are outside of forest stand areas and equate to a conglomerated DBH of 1006. This yields a requirement of seventy-two (72) 3.5" caliper trees for mitigation at a rate of 1" caliper replacement for every 4" DBH removed. All of these replacement trees are provided onsite as indicated on the Forest Conservation Plan throughout the site as street trees and within linear park. The following table lists the proposed mitigation trees for the site:

## ATTACHMENT F - VARIANCE REQUEST

ELP Bethesda - Mitigation Planting Schedule							
Qty #	Code	Botanical Name	Common Name	Size	Spacing	B&B / Cont.	Remarks
3	FG	<i>Fagus grandifolia</i>	American Beech	3½-4" Cal.	As Shown	B&B	Full, Limb to 7' from ground
3	LS	<i>Liquidambar styraciflua</i>	Sweetgum	3½-4" Cal.	As Shown	B&B	Full, Limb to 7' from ground
7	PA	<i>Platanus x acerifolia</i>	London Plane Tree	3½-4" Cal.	As Shown	B&B	Full, Limb to 7' from ground
30	QB	<i>Quercus bicolor</i>	Swamp White Oak	3½-4" Cal.	As Shown	B&B	Full, Limb to 7' from ground
1	QI	<i>Quercus lyrata</i>	American Basswood	3½-4" Cal.	As Shown	B&B	Full, Limb to 7' from ground
1	QL	<i>Quercus imbricaria</i>	Shingle Oak	3½-4" Cal.	As Shown	B&B	Full, Limb to 7' from ground
25	QP	<i>Quercus phellos</i>	Willow Oak	3½-4" Cal.	As Shown	B&B	Full, Limb to 7' from ground
14	UJ	<i>Ulmus americana</i>	American Elm	3½-4" Cal.	As Shown	B&B	Full, Limb to 7' from ground
84		Total 3.5" Cal. Trees					
294		Total Cal. Replaced (293 Cal. Inches required)					

### Additional Application Requirements

Per Montgomery County's Forest Conservation Law Section 22A-21(b) of the *Application Requirements* states that the applicant must:

- (1) describe the special conditions peculiar to the property which would cause the unwarranted hardship;
- (2) describe how enforcement of these rules will deprive the landowner of rights commonly enjoyed by others in similar areas;
- (3) verify that state water quality standards will not be violated or that a measurable degradation in water quality will not occur as a result of the granting of the variance; and
- (4) provide any other information appropriate to support the request.

#### **(1) Pursuant to "(1) describe the special conditions peculiar to the property which would cause the unwarranted hardship":**

The recommendations for the Project site as stipulated in the applicable Master Plan (Rock Spring Sector Plan) and as supplanted by the Rock Spring and White Flint 2 Design Guidelines provide guidance that in turn restricts development on the site and necessitates the removal and impact of thirty-two (32) specimen trees.

The sixteen (16) trees in Group 4 fronting Fernwood Road are to be removed because of master planned road improvements. During the preliminary plan review, MCDOT and MNCPPC have requested that the sidewalk in front of the building be shifted away from the bike lane to enhance pedestrian safety which also further impacts the existing trees. The addition of a wider sidewalk shifted onto the property and a bike lane under this application will cause insurmountable impacts to the critical root zone of these sixteen (16) trees.

In consultation with Don Zimar, RPF #377, RCA #446, it was determined that the canopies of the trees located on the Fernwood Road frontage extend 30-40 feet into the site requiring significant pruning in order to construct the proposed buildings. Even with a high level of commitment and attention to detail, the high level of activity caused by development will cause substantially high risk. He concluded that

## ATTACHMENT F - VARIANCE REQUEST

given the level of effort required, high risk of failure, and effect on design objectives, it is not recommended to preserve these trees.

Thirteen (13) trees in Group 1, Group 2, and Group 3 are to be removed due to the removal of the existing parking lot, existing building, and site landscaping areas, along with the new infrastructure required for roads, utilities and stormwater, where the Sector Plan and Design Guidelines recommend that new development be located.

Two (2) trees in Group 5 are to be removed due to the removal of the existing structural stormwater features. These features are being removed in the stream valley buffer to naturalize the stream and reduce erosion per the Sector Plan and Design Guidelines.

This phase of the plan is the construction of the marketing center and linear park along the stream. Future phases are to construct additional buildings on-site. Other trees will be impacted or removed in later phases.

As these development guidelines are recommended by the County, **it would cause an unwarranted hardship** to the developer to both maintain the thirty-two (32) specimen trees without impact and meet the requests of the applicable Master Plan and Design Guidelines.

***(2) Pursuant to “(2) describe how enforcement of these rules will deprive the landowner of rights commonly enjoyed by others in similar areas”:***

Enforcement of a prohibition of impacting the specimen trees would **deprive the applicant of the rights commonly enjoyed by others** who are in similar areas that have many of the same features as the subject property. The recommendations of the Master Plan and Design guidelines apply to the Rock Spring Central area, which is characterized by office buildings containing similar form and planting patterns.

The fourteen (14) trees in Group 1, Group 2, and Group 3 are all within the existing office building and parking lot which, according to the new Design Guidelines, new development should be supported (Urban Design Guidelines for Rock Spring and White Flint 2 Sector Plans, p. 44). These trees are also impacted by shifting the Shared Entrance Drive to enhance and expands the open space network and greenway connector link through the Rock Spring neighborhood in order to improve open spaces and the environment per the master plan and design guidelines. (Rock Spring Sector Plan pg. 42-48, 54-57, and 60).

The sixteen (16) trees in Group 4 fronting Fernwood Road are to be removed because of master planned road improvements, a relocated water line, and proposed buildings required to front onto Fernwood Road per the above master plan and guidelines (see Figure 3.19 Rock Spring Central Concept Diagram on page 57 and Figure 3.21 Illustrative Plans of Marriott International Headquarters Site Showing a Potential Redevelopment Scenario). During the preliminary plan review, MCDOT and MNCPPC have requested that the interim Fernwood Road cross section (Urban Design Guidelines for Rock Spring and White Flint 2 Sector Plans p. 75) be constructed from the centerline to the property line with the

## ATTACHMENT F - VARIANCE REQUEST

addition of the sidewalk in front of the building be shifted away from the bike lane to enhance pedestrian safety which also further impacts the existing trees. Fire and Rescue also asked for an additional 1' of lane width for travel per code as well. The addition of a wider sidewalk shifted onto the property, a bike lane, a wider drive lane, the removal of a water line, and buildings fronting the street which are all recommended in the Urban Design Guidelines for Rock Spring and White Flint 2 Sector Plans will cause insurmountable impacts to the critical root zone of these sixteen (16) trees.

### **(3) Pursuant to “(3) verify that state water quality standards will not be violated or that a measurable degradation in water quality will not occur as a result of the granting of the variance”:**

The applicant recognizes that the Cabin John Creek Watershed is in poor health and that in concept, the removal of fourteen (14) specimen trees in Groups 1, 2, and 3 may arouse concern for the potential further degradation of its waters, specifically of Thomas Branch. As part of the mitigation of these removals, the entrance drive is being shifted away from the stream and parking removed in the stream valley buffer as well which will enhance the water quality of the stream. New stormwater devices are proposed as well to enhance the water quality of the stream. All other trees proposed to be removed are outside the stream valley buffer in areas recommended for development or required as part of master plan improvements for stream renovation. Stormwater regulations have revolutionized since the 1980's when the thirty existing trees were planted. The applicant is confident that the stormwater facilities installed in conjunction with the new development will not just protect the current water quality, but enhance it, and that **granting this variance will not violate state water quality standards.**

Two (2) trees in Group 5 are to be removed to improve water quality standards for the project through stream renovation. These trees are being removed in the stream valley buffer in order to remove a concrete structure conveying water, naturalize the stream, and reduce erosion per the Sector Plan and Design Guidelines. See drawings 32-SWR-820220120-001 through 007 for stream renovation design details. This area will be placed in a category I conservation easement with new reforestation.

### **(4) Pursuant to “(4) provide any other information appropriate to support the request”:** While the proposed development necessitates the impact to twenty-seven specimen trees, it will mitigate a for those trees on-site.

#### **Minimum criteria for Variance**

As further basis for its variance request, the applicant can demonstrate that it meets the Section 22A-21(d) *Minimum criteria*, which states that a variance must not be granted if granting the request:

- (1) *will confer on the applicant a special privilege that would be denied to other applicants;*
- (2) *is based on conditions or circumstances which are the result of actions by the applicant;*
- (3) *arises from a condition relating to land or building use, either permitted or nonconforming, on a neighboring property; or*
- (4) *will violate State water quality standards or cause measurable degradation in water quality*

Pursuant to “**(1) will confer on the applicant a special privilege that would be denied to other applicants**”:

The use of this site for a continuing care retirement community (CCRC) is a permitted and approved use in the underlying CR zone for this project site. The Design Guidelines recommend acceptance of new

## ATTACHMENT F - VARIANCE REQUEST

development in the Rock Spring Central area, including infill buildings, adaptive reuse, and tear downs. In addition, the neighboring Montgomery Row property was approved to remove specimen trees in order to construct new development in accordance with the Rock Spring Sector Plan. As such, development of the site and the subsequent tree impact is **not a special privilege** to be conferred upon the applicant.

Pursuant to “**(2)** is based on conditions or circumstances which are the result of actions by the applicant; and **(3)** arises from a condition relating to land or building use, either permitted or nonconforming, on a neighboring property”

The applicant has taken no **actions leading to the conditions or circumstances** that are the subject of this variance request. Furthermore, the surrounding land uses do not have any **inherent characteristics that have created** this particular need for a variance.

Pursuant to “**(4)** will violate State water quality standards or cause measurable degradation in water quality”

Per the previous response, the applicant restates its confidence that granting this variance request **will not violate State water quality standards or cause measurable degradation in State water quality standards.**

For these reasons listed above, we believe it is appropriate to grant this request for a variance. Should you have any questions or require additional information, please do not hesitate to contact me.

Sincerely,  
SOLTESZ  
Keely D. Lauretti