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RESOLUTION NO. R-16-21

RESOLUTION OF THE MAYOR AND CITY COUNCIL APPROVING A WAIVER OF THE ENVIRONMENTAL STANDARDS FOR DEVELOPMENT REGULATION TO PERMIT 3,264 SQUARE FEET OF CUMULATIVE DISTURBANCE WITHIN THE STREAM VALLEY BUFFER AT 700 NORTH FREDERICK AVENUE

ENV-8657-2020

WHEREAS, the *Environmental Standards for Development Regulation* was adopted by the Mayor and City Council on April 5, 2010, providing the Mayor and City Council the authority to grant a waiver; and

WHEREAS, Vika on behalf of MFV 700 NFA, LLC & DNIP4 700 NFA, LLC (Matan Inc.), submitted SDP-8957-2020 which requires the Applicant to obtain approval of an environmental waiver from the Mayor and City Council for intrusions into the stream buffer, as required by the *Environmental Standards for Development Regulation;* and

WHEREAS, included as part of SDP-8957-2020 is Environmental Waiver application ENV-8657-2020 requesting approval of waivers granted by the Mayor and City Council for intrusions into the stream buffer, 100-year flood plain, and 50-foot wetland buffer as required by the *Environmental Standards for Development Regulation;* and

WHEREAS, the cumulative disturbances arise from three purposes. The first, the removal of an existing paved foot path currently within overlapping environmental buffers: the 100-year floodplain, the stream valley buffer, and the 50-foot wetland buffer. The requested disturbance would impact 1,423 square feet of the 100-year floodplain and the stream valley buffer but only 1,400 square feet of the 50-foot wetland buffer. The second requested disturbance proposes to impact 1,644 square feet of the stream valley buffer for a stormwater drain outfall. The third proposed disturbance is for a 197 square feet of impacts for grading and removal of non-native fill; and

WHEREAS, the Applicant has submitted a waiver justification request based upon the findings required under Sections 25 and 38 of the *Environmental Standards for Development Regulation;* and

WHEREAS, the submitted justification request includes the following findings:

A. *Completion of required approvals, rulings, permits, or waivers from all appropriate State and Federal findings agencies.*

Applicant has obtained a Letter of Authorization (the “LOA”) for an exemption from a permit for temporary, minimal impacts to the 100-Year Floodplain and 25-foot state wetland buffer through a joint MDE/USACE application process. The proposed work was field-reviewed by the Maryland Department of the Environment (the “MDE”)

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on November 23, 2020, and a LOA issuance from MDE was received on January 29, 2021 and a copy sent to the City of Gaithersburg.

B. *A showing of good and sufficient cause and meeting the criteria outlined in Article III of this regulation.*

Applicant's Project seeks to replace the Project's obsolete and single-user office park campus with the Project, which will provide an employment hub containing multiple commercial/employment/industrial uses with attractive landscaped open spaces at a highly visible intersection. The Project will provide area residents with significant job opportunities, bring considerable economic investment to the Frederick Avenue corridor, and offer uses that complement nearby commercial and residential areas and that are consistent with the current character of the Northern Employment District. Such redevelopment will advance long-standing City planning recommendations for the Property from the 1997 Master Plan, which are carried forward in the 2001 Corridor Plan and the Land Use Element of the 2009 Master Plan. In addition to advancing the City's master planning vision for the Property, the Project has been intentionally designed to minimize stream buffer impacts, preserve forest, and redevelop previously improved areas. Grading and other design considerations were reviewed to minimize stream buffer impacts to the extent practicable. In addition to the Section 38 regulations, all of the Recommended Standards for Stream Buffers listed in Article III, Section 25 of the Environmental Standards for Development will be met. Only storm drain outfall, a minimal amount of necessary grading impact, and temporary impact for path removal are proposed in the stream buffer.

Applicant addresses the factors below for consideration of granting this waiver according to Article III Section 25.1.b.:

1. *Reasonable alternatives for avoidance of the buffer are not available*

These activity footprints were minimized to the extent possible and are found to be necessary and unavoidable for this development. The maximum allowable stormflow will be directed to the existing stormwater pond at the northwest of the site; the remainder of the stormflow will be treated with onsite stormwater structures, and the storm drain outfall location extending into the stream buffer was unavoidable due to the required grade tie-out to minimize erosive velocity. As part of the grading required at the west end of the site the approximately 197 s.f. of grading into the stream buffer was unavoidable. Alternatives were considered to avoid removal of the existing pedestrian path; a portion of the southern end of the path will be unavoidably removed due to site construction and grading; reconstruction of access to the remaining portion within the stream buffer is not feasible due to grade constraints. Therefore, removal of the entire path is proposed because the undisturbed portion of the path is not allowed to remain without a connecting access path.

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2. *Encroachment into the buffer has been minimized.*

The storm drain outfall extension into the stream buffer was terminated at the shortest distance possible while meeting grade requirements. The grading into the stream buffer was minimized to the extent possible. The path removal limit of disturbance (L.O.D.) width was minimized to two feet on either side of the path, with removal of the path to be accomplished with light-duty machinery and manual removal to minimize ground disturbance.

3. *Existing sensitive areas have been avoided (forest, headwaters, and wetlands and their designated buffers, floodplains, steep slopes, and habitat for rare, threatened, and endangered species and their associated protection buffers).*

Existing sensitive areas have been avoided for the permanent impacts from a small area of grading and storm drain outfall except for the stream buffer. No floodplain, wetland, wetland buffer, stream, RTE species or habitats will be impacted from these activities. Only temporary and minimal impacts for removal of the existing pedestrian path are proposed to stream buffer, 100-Year Floodplain, and wetland buffer.

4. *The proposed use is consistent with the preferred use of the buffer (e.g., pervious areas such as tie-outs to existing grades, slope stabilizing BMPs, etc.).*

The storm drain outfall is required infrastructure for the purpose of implementing stormwater management onsite to protect stream water quality, and the necessary tie-out of the storm drain structure to the required elevation in the stream buffer is consistent with the preferred use of the buffer. The small areas of grading within the buffer and removal of the existing path will be planted with trees and placed in a Forest Conservation easement, and therefore consistent with the preferred use of the buffer.

5. *The plan design provides compensation for the loss of buffers.*

After removal of the path, forest plantings will be installed, and the path area will be included in a Category I Forest Conservation easement. No mitigation is proposed expressly for encroachment into the stream buffer for grading and storm drain outfall installation, or temporary impacts for the path removal; however, the proposed afforestation and naturalized forest understory within and immediately adjacent to the existing stream buffer will expand the currently forested area and more than compensate for the loss of buffer function, significantly enhancing the existing stream buffer function overall. The additional forested area will be much larger than the stream buffer impact for the storm drain outfall and grading. The path removal impacts will be temporary with the previously described methods to minimize ground disturbance within the stream buffer, 100-Year Floodplain, and wetland buffers. This area will also be planted and allowed to naturalize within a Forest Conservation easement.

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C. *A determination that failure to grant a waiver would result in unnecessary or undue hardship to the applicant.*

Failure to grant a waiver would result in unnecessary or undue hardship to Applicant. The land that abuts the Property to the northwest (800 North Frederick Avenue) has been improved with a FedEx transit warehouse facility. Furthermore, sites within the Property's vicinity, including those along the Frederick Avenue and Montgomery Village Avenue corridors, have been considerably improved with a wide variety of commercial development. This includes warehouses, offices, retail, personal services, restaurants, hotels, and car dealerships. The Project seeks to provide employment and accompanying retail commercial uses on the Property consistent with the existing character of the surrounding neighborhood and in close proximity to established residential communities and retail/commercial development, offer compatible buildings and uses, and advance the intent of the Property's MXD zoning. Strict enforcement of the City Code will unfairly prevent the redevelopment of the Property to the same extent as similarly situated properties along Frederick Avenue, Montgomery Avenue, and Interstate 270. Approval of the waiver will allow Applicant to create an employment hub with a flexible range of jobs, as well as synergistic retail commercial uses, all of which is consistent with the rights enjoyed by nearby property owners. This includes the ability to improve the Property in a manner comparable to the present composition of the adjacent commercial corridors, as well as in harmony with the City's long-established planning goals. The required grading and storm drain outfall at the west end of the development were minimized to the extent practical while meeting the design standards required. The storm drain outfall was required to extend into the stream buffer in order to meet elevation requirements and minimize erosive velocity. All of the 2.86 acres of required Forest Conservation plantings for the entire site (including Phase 1) are proposed to be met onsite in Forest Conservation easements along Route MD 355 and the western end of the site, providing a forested buffer extending well beyond the delineated stream buffer. For the Phase 1 development, the Green Area provided covers 41.55% of the Phase 1 portion of the site, which is in excess of the required 25% per the master plan, Green Areas provided are from afforestation in the required linear park along Route MD 355, and sensitive environmental areas on the western portion of the site. Strict enforcement and not granting the waiver would provide unnecessary hardship for Applicant by further reducing the developable area of the site.

D. *A determination that the granting of the waiver will not result in increased flood heights, additional threats to public safety, extraordinary public expenses, or the creation of nuisances.*

The granting of the waiver will not result in increased flood heights, additional threats to public safety, extraordinary public expenses, or the creation of nuisances. A floodplain study has been approved for this development which modeled the run-off from the entire site as entering at the high end of the on-site stream. This proposed storm drain out fall will in reality convey less than 50% of the site run-off to the stream at the proposed outfall. The remaining site run-off will outfall to the existing pond in the northwest corner of the site. It was determined to be infeasible to route all the site run-

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off to the existing pond because the proposed development increases the impervious area for the site and would result in a run-off volume that exceeds the design volume of the pond.

E. A determination that there are no conflicts with existing local and State laws or ordinances.

No conflicts with existing local and State laws or ordinances have been determined. The required permit exemption (Letter of Authorization) for impacts to Maryland and USACE regulated features have been obtained through the MDE/USACE joint permit process. After State and federal requirements are met, the granting of the Environmental Standards waiver by the City of Gaithersburg would comply with State and federal requirements. The granting of Applicant's waiver request will not result in a violation or State water quality standards, nor will a measurable degradation in water quality occur as a result. On the contrary, the Project will implement measures to improve water quality. A significant area within and adjacent to the stream buffer (SB) will be placed into a Category I Forest Conservation Easement and allow for an increase in the width of forested area buffering the onsite stream. In addition, a Category II Forest Conservation Easement is proposed along the Route MD 355 road frontage in order to allow for afforestation of this area in a manner that would be consistent to include public pathways. The Project also integrates current state-of-the-art stormwater management practices, which will improve upon the Property's previous stormwater management system and enhance water quality; and

WHEREAS, staff has reviewed the Applicant's waiver request and justification findings and concurs with the findings noting disturbances within the environmental buffers are necessary and have been minimized to the maximum extent possible. This justification is founded upon the demonstrated need to construct a stormwater outfall and complete grading, both of which are necessary in order to accomplish project completion. In addition, the stream valley buffer, 100-year floodplain buffer, and the 50-foot wetland buffer, will return to a naturalized state due to the removal of impervious surfaces; the proposed plantings within the environmental buffer; and the effective management of stormwater runoff. The proposed mitigation measures will compensate for the disturbance to the stream valley buffer through the proposed restoration efforts and tree planting to be placed in a conservation easement; and

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NOW, THEREFORE, BE IT RESOLVED, by the Mayor and City Council of Gaithersburg, that the request for a waiver of the *Environmental Standards for Development Regulation* to permit 3,264 square feet of cumulative disturbance within the stream valley buffer at 700 North Frederick Avenue project including one stormwater management outfall, grading, and removal of impervious surfaces is hereby approved with the following conditions:

1. The Applicant will provide final engineering and construction details as part of the approval process of the final forest conservation plan, final stormwater management plan, and/or sediment and erosion control plans for any Final Site Plan application; and

2. Storage or deposition of equipment, trucks, materials, waste, or debris within the stream buffer is prohibited.

ADOPTED by the Mayor and City Council this 15th day of March, 2021.

DocuSigned by:
Jud Ashman
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JUD ASHMAN, MAYOR and
President of the Council

THIS IS TO CERTIFY that the foregoing Resolution was adopted by the City Council in a public meeting assembled on the 15th day of March, 2021.

DocuSigned by:
Tanisha Briley
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Tanisha Briley, City Manager