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Planning Commission  
City of Saint Paul  
15 Kellogg Blvd. West  
St. Paul, MN 55102

RE: Variance, Site Plan and Rezoning Applications of Trellis Treehouse Acquisition, LLC  
Unaddressed Property North of 2319 West 7<sup>th</sup> Street  
City Planning File Nos. 22-104-395; 22-116-859; and 22-104-315  
Our File No. 3737.001

Dear Members of the Planning Commission:

I represent Chad Cutshall, Jolene Cutshall, Rick Johnson and Mary Johnson, the owners of homes on Lower St. Dennis Road. I write this letter in connection with the application for a zoning variance; for site plan review approval; and for rezoning submitted by Trellis Treehouse Acquisition, LLC (“Trellis”) relating to certain property without an assigned street address located to the north of 2319 West 7<sup>th</sup> Street (the “Property”). Trellis proposes to develop a five-story apartment building on a steeply sloped, heavily wooded parcel which does not even have existing public street frontage. To do so, Trellis requests that the Property be rezoned from R1 to R2. Trellis also requests a variance from 63.111(b) of the City’s zoning ordinance, which prohibits extensive grading on steep slopes. My clients’ homes are located at the top of the steep slope on which Trellis proposes to construct its five-story building following extensive grading.

The development proposed by Trellis is inconsistent with the City’s comprehensive plan; does not satisfy the criteria for site plan approval established by the City’s zoning ordinance; and does not satisfy multiple statutory requirements necessary for the granting of a zoning variance. I therefore respectfully request that the Planning Commission vote to deny the Trellis variance application; deny the Trellis site plan approval application; and recommend denial of the Trellis rezoning application.

## **I. THE PLANNING COMMISSION SHOULD DENY TRELLIS’ REZONING VARIANCE APPLICATION.**

The Trellis proposal requires extensive grading of steep slopes and construction of excessively tall retaining walls. These activities are strictly prohibited by the City’s zoning ordinance. Accordingly, Trellis seeks a variance from Section 63.111(b) of the City’s zoning ordinance. This provision reads in relevant part as follows:

In reviewing residential development on slopes of greater than twelve (12) percent, the zoning administrator shall... consider the following requirements and standards:

...Buildings should be designed to fit into the hillside without significant regrading to protect the stability of the slope and preserve existing trees while preventing excessively tall retaining walls and unattractive trough-shaped yards between buildings and retaining walls.

City Code § 63.111(b). The City lacks authority to approve the variance sought by Trellis, for two reasons. First, the requested variance is an unlawful “use variance” of the sort that is clearly prohibited under Minnesota law. Second, the Trellis variance application fails to satisfy at least three of the requirements necessary for the granting of a zoning ordinance under Minnesota’s municipal zoning enabling statute and the City’s own zoning ordinance. I address both reasons separately below.

**a. Trellis Seeks an Unlawful “Use” Variance.**

Trellis seeks a variance to conduct activities (extensive grading of steep slopes and construction of excessively tall retaining walls) that are strictly prohibited by the City’s zoning ordinance. The City may not lawfully grant variances of this type, which are known as “use” variances. To the contrary, the City may only grant so-called “area” variances, or variances that relate to dimensional or distance requirements (*e.g.*, building height requirements, setback requirements, lot coverage requirements, and the like). The Minnesota Supreme Court has described the distinction between “use” and “area” variances as follows:

There are two types of variances: use variances and area variances. A use variance ‘permits a use or development of land other than that prescribed by zoning regulations.’ ... An area variance controls ‘lot restrictions such as area, height, setback, density, and parking requirements.

*In re Stadsvold*, 754 N.W.2d 323, 329 (Minn. 2008), quoting *In re Appeal of Kenney*, 374 N.W.2d 271, 274 (Minn. 1985). Minnesota law allows “area” variances but prohibits “use” variances. *Id.* This prohibition on “use” variances is expressly memorialized in both the Minnesota municipal zoning enabling statute and the City’s own zoning ordinance. See Minn. Stat. § 462.362, subd. 6(2) (2022) (a municipality “may not permit as a variance any use that is not allowed under the zoning ordinance for property in the zone where the affected person's land is located”); and City Code § 61.601(e) (a variance may “not permit any use that is not allowed in the zoning district where the affected land is located”).

The provision of the zoning ordinance at issue, Section 63.111(b), is not a dimensional or area requirement of the sort zoning variances are intended to address. Rather, it is a categorical prohibition of particular uses or activities: Extensive grading of steep slopes and construction of excessively high retaining walls. If the Planning Commission believes that these activities should be allowed, it can advise the City Council to amend the City’s zoning ordinance to remove the prohibitions established by Section 63.111(b) for all properties within residential zoning districts. However, it cannot and should not grant a variance that allows a single applicant to engage in an activity (*i.e.*, extensive grading of steep slopes) that is prohibited of everyone else.

b. **Trellis Fails to Satisfy the Requirements for Variance Approval Established by Statute and Ordinance.**

In addition to seeking an unlawful “use” variance, Trellis also fails to satisfy the statutory and ordinance requirements necessary for variance approval. Minnesota’s municipal zoning statute authorizes a municipality to provide for variances from strict application of the municipality’s zoning ordinance upon satisfaction of certain criteria. *See* Minn. Stat. § 462.357, subd. 6(2) (2022). Pursuant to this authority, the City’s zoning ordinance allows the City to grant variances if an application satisfies criteria that mirror the criteria established by the statute. *See* City Code § 61.601.

The Trellis variance application fails to satisfy at least three of the criteria necessary for variance approval established by statute and ordinance. I address each of these criteria below as follows:

1. *The requested variance is not consistent with the comprehensive plan.* An applicant must show a requested variance to be consistent with the City’s comprehensive plan. *See* City Code § 61.601(b). Here, the City’s comprehensive plan repeatedly promotes a “healthy” and “sustainable” environment, though “environmentally ... efficient, resilient land use development”. *See* Policy LU-7, 8, Comprehensive Plan, pp. 38-40. It requires the City to “preserve, protect and, where possible, restore natural resources and habitat throughout the city.” *See* Policy LU-21, Comprehensive Plan, p. 40. It also states that the City is to prioritize measures to achieve a long-term increase in tree canopy coverage and, indeed, devotes almost an entire page to extolling the virtues and benefits of the “Urban Forest.” *See* Policy LU-19, Comprehensive Plan, pp. 38, 40. Needless to say, allowing an applicant like Trellis to destroy a heavily wooded steep slope through the improper granting of a zoning ordinance would not be consistent with these policy goals.<sup>1</sup> For this reason, Trellis fails to satisfy the requirement that its requested variance be consistent with the City’s comprehensive plan.
2. *The plight of the landowner is due to circumstances unique to the property not created by the landowner.* An applicant for a variance must show there to be practical difficulties in complying with the zoning ordinance due to “circumstances unique to the property.” *See* City Code § 61.601(c), (d). There is nothing unique about the Property here. It is steeply sloped, but it is no different than any other property with similarly steep slopes protected by Section 63.111(b) of the ordinance. The “circumstance” at issue here is therefore the requirements of the City’s zoning ordinance prohibiting grading of steep slopes, not the property itself. However, the zoning ordinance itself cannot be a “circumstance unique to the property” sufficient to justify the granting of a zoning variance, as the Minnesota Court of Appeals recently recognized in a case that is strikingly similar to the present one. *See Tulien v. City of Minneapolis*, No. A20-0542, 2021 WL 79526, at \*4 (Minn. Ct. App. Jan. 11, 2021) (holding that the fact that “the current zoning code ... makes it difficult to create a contemporary apartment building on this site” is not a “circumstance unique to the property”), *review denied* (Mar. 30, 2021). If the City wants to allow extensive grading on

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<sup>1</sup> It is true that, in addition to encouraging protection of natural resources, the Comprehensive Plan also promotes the development of affordable housing. However, these goals need not be in tension. The City can and should encourage Trellis and other developers to pursue affordable housing developments on one or more of the many other available sites throughout the City which do *not* require destruction of a heavily wooded steep slope.

steep slopes, the proper way to accomplish this is through amendment of its zoning ordinance to eliminate Section 63.111(b).<sup>2</sup> It is not to allow a single developer to bypass the requirements of Section 63.111(b) that apply to everyone else through the granting of an improper zoning variance.

3. *The variance, if granted, would not alter the essential character of the locality.* An applicant must show that a requested variance does not “alter the essential character of the surrounding area.” See City Code § 61.601(f). The defining topographical feature of this area of the City is the heavily wooded steep slope that overlooks segments of West 7<sup>th</sup> Street, St. Paul Avenue and other City streets. This wooded steep slope obviously can never be replaced. Allowance of the Trellis development through the granting of an improper zoning variance would therefore alter the essential character of the area surrounding the Property. The Planning Commission should not allow that.

As the variance requested by Trellis fails to establish at least three of the necessary requirements for variance approval established by Section 61.601 of the City’s zoning ordinance and by Section 462.357, subd. 6(2) of the Minnesota Statutes, the Planning Commission should deny the Trellis variance application.

## **II. THE PLANNING COMMISSION SHOULD DENY TRELLIS’ APPLICATION FOR SITE PLAN APPROVAL.**

In order to approve a site plan, the Planning Commission must find, among other things, that the proposed site plan is consistent with 1) the City’s comprehensive plan; 2) “[p]reservation of unique geologic ... characteristics of the city and environmentally sensitive areas;” and 3) “[p]rotection of adjacent and neighboring properties.” City Code § 61.402(c)(1), (3)-(4). It is impossible for the Planning Commission to make those findings here. First, the Trellis proposal is not consistent with the City’s comprehensive plan for the reasons set forth above. Second, the Trellis proposal is manifestly inconsistent with the protection of environmentally sensitive areas, as it proposes extensive grading on a heavily wooded steep slope (something that would only be possible through the granting of an improper variance). Finally, the Trellis proposal does not adequately protect adjacent property owners, particularly those like my clients who reside at the top of the steep slope proposed to be removed to accommodate Trellis’ five-story apartment building. For these reasons, I respectfully ask that you vote to deny Trellis’ site plan approval application.

## **III. THE PLANNING COMMISSION SHOULD RECOMMEND DENIAL OF TRELLIS’ REZONING APPLICATION.**

A rezoning decision by a municipality that is inconsistent with the municipality’s comprehensive plan lacks a rational basis as a matter of law and is therefore unlawful. See *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 174 (Minn. 2006). Here, approval of the Trellis application to rezone the Property would be inconsistent with the City’s comprehensive plan which, as set forth above, requires sustainable development that preserves and protects the City’s natural resources and habitats. The

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<sup>2</sup>To be clear: My clients would be opposed to elimination of 63.111(b) or any other ordinance amendment that endangers steep slopes. The point of the above statement is that use and activity restrictions in a zoning ordinance can only be modified through ordinance amendment. They cannot be waived for individual applicants through abuse of the variance process.

rezoning proposed by Trellis will result in destruction of a heavily wooded steep slope and is therefore inconsistent with the City's comprehensive plan. *See* Policy LU-7, 8, 19, and 21, Comprehensive Plan, pp. 38-40. For these reasons, I respectfully ask that you recommend denial of Trellis' rezoning application.

#### **IV. CONCLUSION.**

There are many other sites in Saint Paul on which Trellis could build a five-story apartment building. On the other hand, steep wooded slopes are in short supply and can never be replaced. Destroying steep wooded slopes to make way for an apartment building that can easily be constructed elsewhere is a spectacularly bad and shortsighted idea. Moreover, it is flatly unlawfully, as it would require the City to ignore multiple provisions of its comprehensive plan and zoning ordinance relating to the protection of sensitive habitats and steep slopes. For this reason and the others set forth above, I respectfully ask that the Planning Commission deny the Trellis variance application; deny the Trellis site plan approval application; and recommend denial of the Trellis rezoning application.

Representatives of the Cutshall and Johnson families will be in attendance at the public hearing on these applications and will be happy to answer any questions you may have about their objections to the Trellis proposal. I thank you in advance for your thoughtful consideration of this letter.

Very Truly Yours,

**MALKERSON GUNN MARTIN LLP**

*/s/Patrick B. Steinhoff*

Patrick B. Steinhoff

PBS/ksk

c: Clients