

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS**  
**Stella B. Werner Council Office Building**  
**Rockville, Maryland 20850**  
**(240) 777-6660**

**IN THE MATTER OF:**

**FLOURNOY DEVELOPMENT  
GROUP, LLC**

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OZAH Case No. CU 20-09  
Minor Modification)

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By: Lynn Robeson Hannan, Hearing Examiner

**ORDER ADMINISTRATIVELY APPROVING A MINOR AMENDMENT TO  
CONDITIONAL USE CU 20-09**

**I. BACKGROUND**

On December 21, 2020, the Hearing Examiner approved the above-referenced conditional use for a residential care facility for more than sixteen (16) persons (a 125-bed residential care facility with assisted living and memory care units) at 19115 Liberty Mill Road in Germantown, Maryland. The conditions of approval included the following:

1. Physical improvements to the Subject Property are limited to those shown on the Applicant's conditional use site plan, landscaping plan, and lighting plan that are part of the submitted Application.
2. The maximum number of residential care units is limited to 125 beds in accordance with Montgomery County Zoning Ordinance Section 59.3.3.2.E (Residential Care Facility).
3. The maximum number of employees is limited to 35 persons on-duty at one-time.
4. Prior to the issuance of any building permit for the subject conditional use, the Applicant must amend or obtain approval of a Preliminary Plan of Subdivision and Record Plat pursuant to Chapter 50 of the Montgomery County Code.
5. The Applicant must comply with or amend the Final Forest Conservation Plan No. 120170210 in accordance with the approval or amendment of a Preliminary Plan of Subdivision and Record Plat pursuant to Chapter 50 of the Montgomery County Code.

6. At the time of Preliminary Plan of Subdivision, the Applicant must demonstrate compliance with the 2018 Bicycle Master Plan recommendations for a minimum 10-foot-wide shared-use side- path along the west side of Liberty Mill Road, or an alternative method of compliance as acceptable by Planning Department staff.
7. At the time of Preliminary Plan of Subdivision, the Applicant must demonstrate compliance with requirements to provide a minimum 5-ft. wide sidewalk along the frontage of the Subject Property with Liberty Mill Rd.
8. The testing of any on-site generator or similar equipment shall be conducted during weekday afternoon hours as to mitigate any disturbance to community members and residents alike.

## **II. First Amendment Request**

On August 23, 2021, OZAH approved the Applicant's request for a minor amendment to the approved conditional use (First Amendment). The First Amendment requested changes to the site design, architecture, amenities, and interior of the approved 125-bed residential care facility. Exhibit 50. Flournoy stated: "construction costs continued to escalate and market demands continued to evolve due to the COVID-19 global pandemic, prompting the Petitioner to reevaluate the project's economic viability, resident unit mix and design, and amenities, which culminated in the following proposed minor amendments" (Exhibit 50):

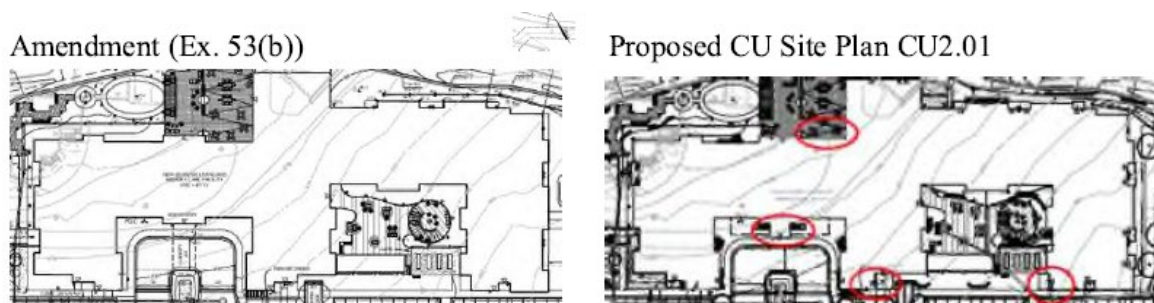
- Exclusively providing surface parking in lieu of structured parking
- Reconfiguring the loading space, service entrance and dumpster locations
- Enhancing the landscaping and parking facility screening along the southern Property boundary
- Reallocating the 125-beds to 123 units instead of 119 units
- Changing the unit mix to add 2-bedroom units and more 1-bedroom units, instead of studios
- Adding private balconies to certain units
- Reserving the building third floor for memory care
- Adding a lower building level
- Revising the floor plans
- Relocating the generator to the north side of the lower level
- Enhancing resident amenities by adding a dog park, partitioned outdoor dining, memory care terrace on the 3rd floor, canopy covered main entrance

- Enhancing the exterior architectural features, decreasing building height and lot coverage, tweaking the footprint shape and reducing its size
- Updating the stormwater management plan to treat the additional surface parking, the utility plan, forest conservation plan and fire access plan to reflect the parking facility amendment.

After referral to Planning Staff, who found the amendments (after some revision) to be minor, the Hearing Examiner concluded that the changes constituted a “minor amendment” under Section 59.7.3.1.K.2 of the Zoning Ordinance that could be approved administratively.

### III. Current (Second) Amendment Request

Flournoy Development Group, LLC (Applicant or Flournoy) filed a second request for a minor amendment to the conditional use on March 7, 2022. In support of its request, Flournoy advises that it proceeded with an application for a preliminary plan after approval of the First Amendment, but during final design and construction, it became apparent that additional changes were necessary to “achieve the envisioned high-quality design, refined interior layout and enhanced operational features.” Exhibit 58. The specific changes requested include a “slight variation” in the footprint (*Id.*, shown below):



Flournoy states that the newer footprint consists of a “bump-out” of the wall on the north building face to (*Id.*):

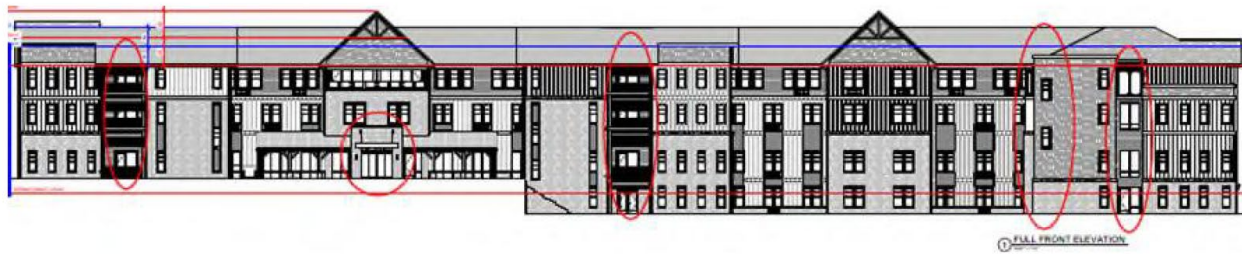
... expand the kitchen service area for proper internal circulation and operations, a vestibule at the main entrance on the front (southern) building façade for the

protection of residents, visitors and staff from the weather during pick-up and drop-off, the expansion of the service entrance at the middle wing of the front (southern) building façade for the enhanced internal mobility and the expansion of the stair depth in the stair shaft of the eastern building wing on the front façade. These modifications increase the lot coverage from 21.3% (33,330 square feet) to 22.5% (35,324 square feet) and increase the gross floor area of the building from 117,976 square feet to 118,564 square feet...

Flournoy also proposed to increase the height of the roof by five feet (from 42 feet to 47 feet (*Id.*):

The original approved building height was 42 feet, which was mistakenly noted on the development table of the Conditional Use Plan (Exhibit 53(b)) as being reduced to 40 feet as part of the Approved Amendment. However, the residential care building depicted on the architectural plans submitted as part of the Approved Amendment (Exhibit 56 plans) was designed at 47 feet in height, though the elevations did not reveal that height. As such, an increase in building height from 42 feet to 47 feet is requested to retain the building design, retain the pitch of the roof for adequate space for mechanical equipment and retain the gabled elements of the architectural design, which reduce building massing, provide visual interest and ensure compatibility with the neighborhood.

Finally, Flournoy also requests changes to the floor plans and architectural drawings submitted with the original conditional use. Flournoy states that the floorplans are being changed to add electrical rooms to the north ends of the western and eastern corridors (except for the lower and third floors). There are some exterior architectural changes due to the final design of the interior units and operational features. Flournoy describes these changes as “removal of the pole in the center of the balconies, addition of the main entrance vestibule, additional windows and a wider stair shaft on the east wing (as mentioned above), which also relocated the door on the side of that wing facing interior to the courtyard....” An elevation pinpointing these changes is shown on the following page (Exhibit 58):



Flournoy also proposes to reduce the size of a gabled element on the rear façade to be able to expand the rooftop patio. It also proposes to remove windows from the north façade to align the design of the corner units (Exhibit 58, shown below):



Finally, Flournoy proposes to add doors to the north façade (facing Dawson Farm Road) for additional access to the main patio, change the window style for two windows, and remove three windows on the third floor to align with the design of the corner unit. Exhibit 58 (shown on the next page).

The Applicant believes that these changes represent a minor amendment under Section 7.3.1.K.2 of the Zoning Ordinance because the intensity of this use is measured by “beds” (*i.e.*, the number of residents). Therefore, the amendment will not change the number of residents

or employees needed to staff the facility. Exhibit 58. The Applicant further contends that the proposed height will not have a significant impact because the building is below the grade of Dawson Farm Road and will not be “visually observable”. Flournoy also points out that the 47-



foot height results only from the gabled architectural elements; the remainder of the building is only 44-feet in height. Further, the height is required because construction of the retaining wall along Dawson Farm Road lowers the existing grade, thereby “increasing” the height. The gabled elements and residential-type materials chosen contribute to the compatibility of the use with the surrounding area.

The Hearing Examiner referred these changes to Staff of the Montgomery County Planning Department (Planning Staff or Staff) for a recommendation on whether they constituted a “minor” amendment under Section 59.7.3.1.K.2 of the Zoning Ordinance that may be approved administratively. Exhibit 63. After analysis, Staff responded (*Id.*):

While technically, a change in height and/or floor area would be considered a major amendment, these minor changes in gross floor area and a correction in the height of the proposed building do not seem to truly rise to the level of a major amendment. The applicant is only increasing the gross floor area by 588 square feet, which does not increase the number of beds or footprint of the building. It is only increasing due to the requested change from unusable area to usable area in common areas of the building for better circulation. As for the height increase, the change appears to be correcting what was originally approved. The height of

the building, as shown on the plans, does not appear to be changing. It appears the applicant originally calculated and notated the height incorrectly. The original approved plans calculate and scale to the requested “increased height” of 47 feet. Thus, the footprint and height of the building are not actually increasing.

The window change is acceptable, and is also considered minor in nature. Therefore, from a strict interpretation, a major amendment could be required, however, given the truly minor changes and correction, we believe a minor amendment is acceptable in this case.

### **III. The Governing Law**

Requests to amend a conditional use are governed by §59.7.3.1.K of the Zoning Ordinance, which distinguishes between “minor” and “major” amendments. A “minor” amendment is one that “does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.” *Zoning Ordinance*, §59.7.3.1.K.a.2. A “major” amendment is one that “changes the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected when considered in combination with the underlying conditional use.” Major amendments must follow the same procedures as the original conditional use while minor amendments may be approved administratively by the Hearing Examiner. *Id.*

### **IV. Opinion and Decision**

The Hearing Examiner agrees with Staff that the modifications proposed will not significantly change the nature, character or intensity of the original conditional use and may be approved administratively. Most of the changes stem from minor modifications made during final design and construction to make operations more efficient and safer for residents and employees. The Hearing Examiner finds that the increase of slightly more than 1% of the existing lot coverage

will have little impact on the surrounding area. This slight increase enables safer and more efficient operations for residents and employees and the Hearing Examiner finds that the change will not significantly alter the existing approval.

The record also supports Staff's finding that the "additional" five feet in height stems from a mistaken notation in the original plan. In addition, the Hearing Examiner finds that the height will not have a significant visual impact because the building sits below the grade and the height was "increased" by the need to lower the grade to construct the retaining wall. More importantly, the height accommodates the gabled roof, lending significantly to compatibility with residential uses in the surrounding area. The amendments to the façade are also quite minor and do not significantly alter the architectural characteristics of the use that was originally approved.

Based on this record, the Hearing Examiner agrees with the Applicant and Planning Staff that the proposed amendments are "minor" as that term is defined under §59.7.3.1.K.2 of the Zoning Ordinance because they do not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.

### **ORDER**

Based on the foregoing, it is, this 17<sup>th</sup> day of March 2022:

**ORDERED**, that the request for a minor amendment to Conditional Use No. CU 20-09, allowing changes to the previously approved residential care facility and in conformance with the Applicant's representations in Exhibit 58 is hereby administratively **APPROVED**; and it is further

**ORDERED**, that physical improvements to the subject property are limited to those shown on the Applicant's Revised Conditional Use Site Plan (Exhibit 54(a) and (b)) and Landscape and Lighting Plan (Exhibits 54(d) through (f)), as amended by Exhibit 58. The Applicant must file copies with OZAH of any plans modified after subdivision of the property, and it is further



**ORDERED**, that this amendment and the continued use of the conditional use are subject to all terms and conditions imposed in connection with the initial approval as specifically amended First Amendment and this Opinion and Order; and it is further

**ORDERED**, that pursuant to Section 59.7.3.1.K.2.b. of the Zoning Ordinance, any party may request a public hearing on the Hearing Examiner's action within 15 days after this decision is issued. **The request for public hearing must be in writing and must specify the reason for the request and the nature of the objection or relief desired.** If a request for a hearing is received, the Hearing Examiner must suspend his administrative amendment and conduct a public hearing to consider whether the amendment substantially changes the nature, character, or intensity of the conditional use or its effect on the immediate neighborhood. If the Hearing Examiner determines that such impacts are likely, then the amendment application must be treated as a major amendment application. A decision of the Hearing Examiner may be appealed on the basis of the Hearing Examiner's record to the Board of Appeals.



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Lynn Robeson Hannan  
Hearing Examiner

NOTICES TO:

Casey Cirner, Attorney for Applicant

Flournoy Development Group, LLC

Barbara Jay, Executive Director

Montgomery County Board of Appeals

Patrick Butler, Planning Department

All parties entitled to notice at the time of the original filing:

Abutting and Confronting Property Owners (or a condominium's council of unit owners or renters, if applicable)

Civic, Renters' and Homeowners' Associations within a half mile of the site

Any Municipality within a half mile of the site