

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

Stella B. Werner Council Office Building

Rockville, Maryland 20850

(240) 777-6660

<https://www.montgomerycountymd.gov/ozah>

IN THE MATTER OF:

SPECTRUM RETIREMENT COMMUNITIES LLC

DEVELOPMENT CENTER, INC.

Applicant

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OZAH Case No. CU 20-05

Before: Lynn Robeson Hannan, Hearing Examiner

**ORDER ADMINISTRATIVELY APPROVING A MINOR AMENDMENT
AND EXTENDING VALIDITY PERIOD FOR ONE YEAR**

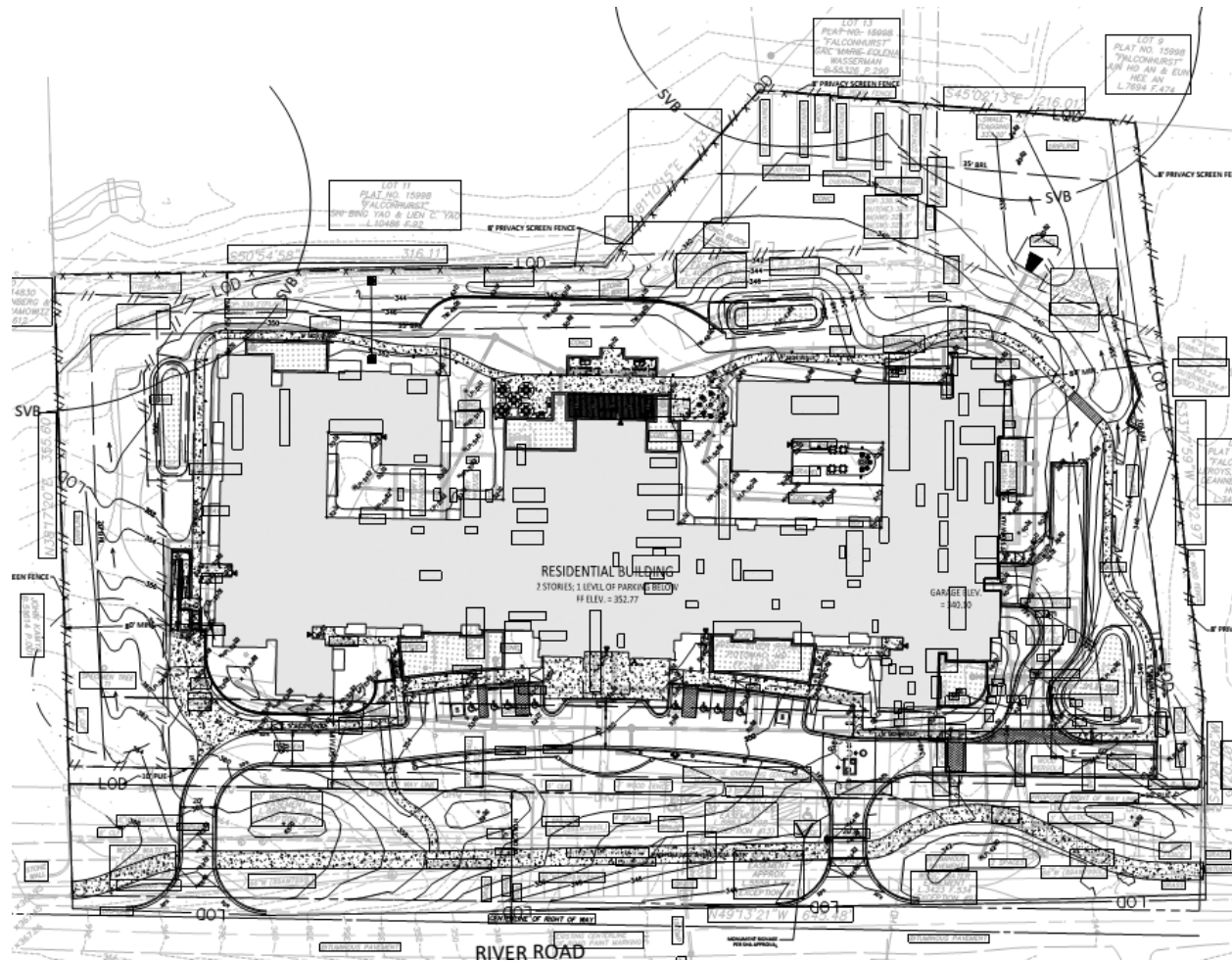
I. BACKGROUND

On February 25, 2021, the Hearing Examiner approved a conditional use filed by Spectrum Retirement Communities LLC (Applicant or Spectrum), to operate a residential care facility (over 16 persons) on property located at 9545 River Road, Potomac, Maryland. The property is further identified as Parcel 786 (Tax Account Nos. 10-00855533) and is zoned RE-2.

The approved residential care facility permits 100 units with a total of 130 beds, comprised of independent dwelling units, assisted living units, and memory care units. The approval is subject to sixteen conditions (*Hearing Examiner's Report and Recommendation*, February 25, 2021, pp. 40-41. A copy of the original conditional use plan is shown on the next page (Exhibit 125(b)).

Spectrum now requests minor amendments to the conditional use plan approved in 2021 and an extension of time to implement the conditional use. According to Spectrum, none of the amendments proposed affect the conditions originally approved. Exhibit 1, p. 1. Spectrum states:

...Spectrum is not proposing any changes to the approved use or conditions of approval. Rather, Spectrum is seeking minor modifications that are reflective of the natural design progression and refinements that occur between schematic level design (e.g., level of design customary at the time of Conditional Use approval) and full construction drawings. Spectrum is excited to be in a position to submit for building permits in the very near term, as the record plat process is almost complete (as discussed further below). However, as a result of the significant coordination required on the building permit plans and lengthy record plat process, Spectrum is concurrently seeking a 12-month extension of the time necessary to implement the



**Approved Conditional Use Plan
Exhibit 125(b)**

Conditional Use. It certainly is Spectrum's intention to continue moving expeditiously through the building permit process, and ultimately to construction.

A. Extension Request

In support of its extension request, Spectrum states (Exhibit 130):

1. During the past two years Spectrum has undertaken additional tests of the property including but not limited to Phase I Environmental.
2. The Record Plat application for the Property was submitted on January 30, 2022...the Record Plat is a pre-condition to the issuance of any building permits. The Record Plat involves numerous agency reviews (including SHA due to the Property's location on a State Highway), which necessitate [sic] time to complete. Spectrum has been diligently pursuing the Record

Plat approval and is please to report that the Record Plat has been approved by all agencies and is being circulated for necessary signatures. Spectrum anticipates that the Record Plat will be scheduled for a Planning Board hearing, for approval, in late-February or early-March, with recordation occurring shortly thereafter.

3. Spectrum also has been working closely with its architect; civil, mechanical and structural engineers; landscape architect; and interior designer to prepare the construction drawings. The interior design...has taken additional time, as Spectrum has been thoughtfully incorporating necessary refinements to its program and design, as a result of its Staff and residents' experiences during COVID. These interior changes require close coordination with all the other disciplines, as one design modification will influence another. However, Spectrum is pleased that the final construction drawings, resulting from this significant coordination, are almost complete. Spectrum currently anticipates submitting the building permit application to the Department of Permitting Services by the beginning of February.

After the extension request was filed, Spectrum received record plat approval on February 23, 2023 and submitted its building permit package to the Montgomery County Department of Permitting Services on February 14, 2023. Exhibit 134.

B. Amendments

The minor amendments to the conditional use plan, according to Spectrum, arise from changes made to the interior layout due to "refinements to its program and design" that arose from Staff and residents' experiences during COVID. Exhibit 130, p. 2. Spectrum states that the changes proposed do not change the setbacks originally approved, the square footage of the structure, or the perimeter screening and forest conservation areas. The amendments requested are listed below (Exhibit 130, pp. 3, 4 (emphasis in original)):

1. **Modification to Footprint.** The Petitioner is proposing minor modifications to the building footprint to accommodate changes to the interior programming and layout. The square footage of the building footprint remains unchanged; however, there are minor adjustments that push and pull the building footprint in select locations. Importantly, the Petitioner is not proposing any changes [sic] the minimum building setbacks approved by the Hearing Examiner. Additionally, the architectural character and design remains essentially unchanged.
2. **Associated Modifications to Stormwater Management.** The slight modifications in the building footprint has resulted in minor adjustments to the location of the bioretention facilities proposed in connection with the Project's stormwater management. No changes are proposed to the overall method of treatment for stormwater management on-site or the overall stormwater capacity of these facilities.

3. **Redesign of the pedestrian access on the northern end of the building.** The previously approved plans proposed a switch back ramp and stairs in the northeast quadrant of the Property. Due to fire access and grading refinements, the Petitioner has been able to replace the previously approved ramp and stairs with a sidewalk. This modification provides an accessible means of access for all and results in a reduction of imperviousness at this location. This change also reduces the number of lights needed for safe use after dark.
4. **Reorientation of Trash Enclosure and Associated Reduction in Truck Turn Around.** The Petitioner has reoriented the trash and generator enclosure in the southeast portion of the site, due to code restrictions on locations of certain equipment that was only determined at later design phases. Notably, this has allowed the Petitioner to shorten the truck turnaround space previously required. This results in a further reduction in imperviousness, as the Petitioner is proposed to replace the previously approved paving in this area with additional green area. The trash and generator will remain enclosed by masonry walls and screened by plantings.
5. **Adjustment to Residential Amenity Patio.** The rear residential amenity patio has been redesigned to have a curvilinear edge, as opposed to a rectangular terraced design. Importantly, the proposed exterior patio will be located no closer to the rear property boundary, as compared to the prior approval. The size of the patio is also roughly the same.
6. **Revised Grading and Screening.** The side yard grades have been raised by approximately 12 to 18 inches to accommodate the drainage and pedestrian circulation refinements. This change positively impacts screening of the Project from the adjacent residential neighbors, as the increased grades result in corresponding increases in the Plant height. The Petitioner is also proposing to provide additional plantings/screening along the eastern/southeastern proportion of the property. Collectively, these modifications will only further promote the compatibility of the project with the surrounding neighborhood.
7. **Slight Adjustment of Emergency Access Path.** The underlying Conditional Use approved a path, to be used by emergency access vehicles only, in the northwest corner of the building (accessed via a mountable curb from the semi-circular drive). As a result of final coordination with the Fire Marshall, this emergency access path has shifted approximately two feet to the northwest, to accommodate required vehicular movements. Importantly, this modification does not have any impacts on the adjacent Forest Conservation Easement area.

8. **Reconfiguration of Memory Care Amenity.** As a result of coordination with the final interior design and layout, the Petitioner is proposing to reconfigure the outdoor memory care courtyard. The memory care courtyard remains located within the southeast building courtyard, enclosed on three sides. However, the secured memory care courtyard has been flipped 90 degrees to better relate to the building interior. The memory care courtyard will continue to be fully screened from view by the building, which wraps around it.
9. **Associated Modifications to landscaping, hardscape, lighting and building architecture.** As a result of the changes discussed herein, the Petitioner is proposing minor, associated modifications to the landscape, hardscape, lighting, and building architecture. These design elements will be closely coordinated. Importantly, the overall character and design intent of the landscaping, lighting, and architectural design will remain unchanged.

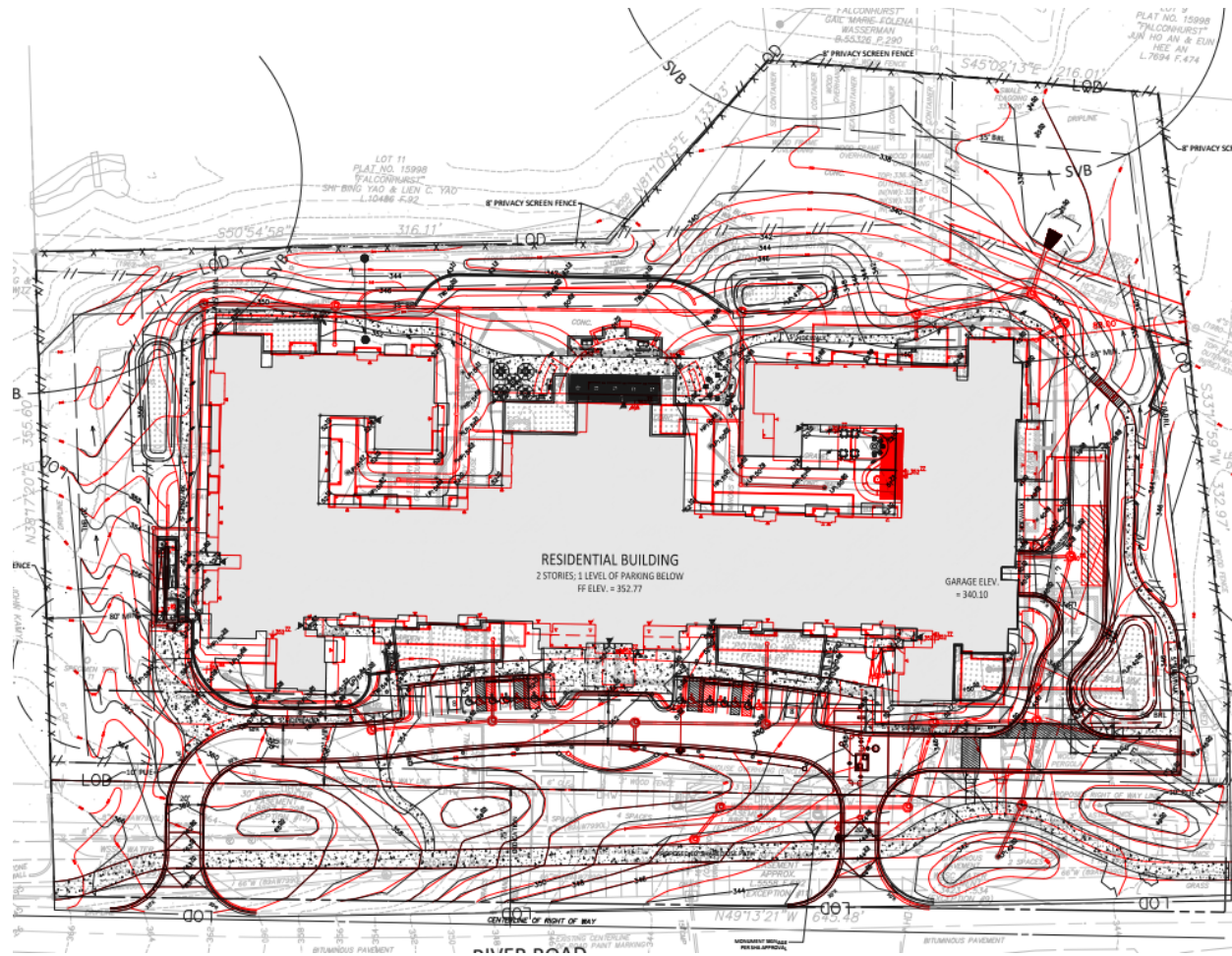
In response to questions from the Hearing Examiner, the Applicant advised that the Montgomery County Department of Fire and Rescue Services had approved the amended design of the Emergency Access Path. With regard to the revised landscaping, the Applicant responded (Exhibit 135):

... all landscape screening, forest plantings and additional evergreen plantings remain unchanged (they were just elevated slightly give the grade changes on the northwest property boundary, which increases the effectiveness of the screening). The modification proposes only to reconfigure the plantings closer to the building, around the patios and sidewalks, with similar quantities and species.

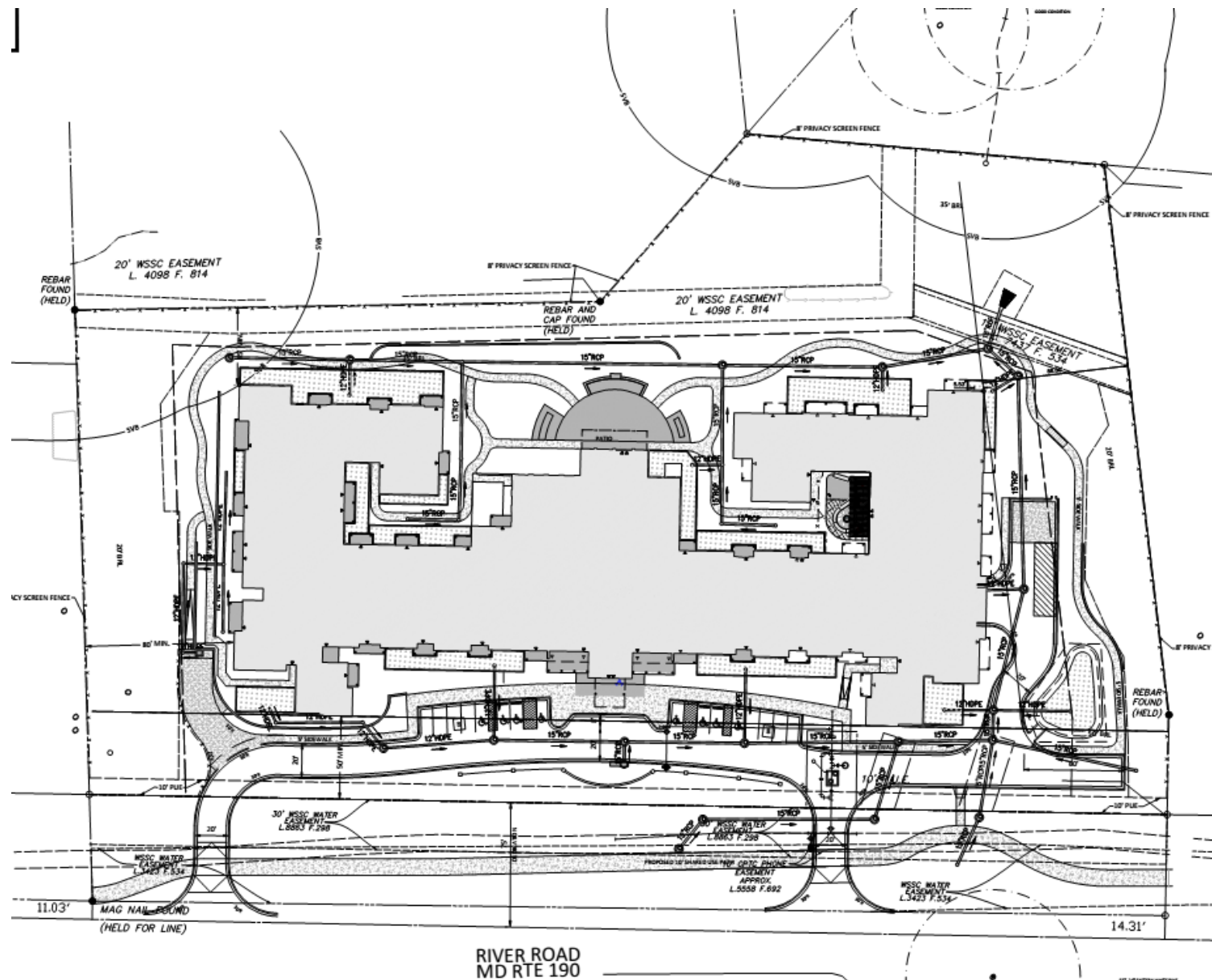
The Hearing Examiner referred the amendments to Staff of the Montgomery County Planning Department as to whether they should be considered “minor” or “major” amendments. Staff replied (Exhibit 133):

According to the plans submitted to the Hearing Examiner, the applicant is modifying the footprint but not increasing square footage, proposing slight modifications to the stormwater management, minor redesigning and altering of site elements such as pedestrian and emergency access paths, trash enclosure, a patio, minor grading and screening, the memory care amenity and landscaping, hardscaping lighting and building architecture. We feel these changes would be a Minor Amendment because the proposed changes are minor in nature, and do not significantly alter the character or intensity of the Conditional Use and will not have adverse effects on the surrounding neighborhood per Section 59.7.3.1.K.2.a.

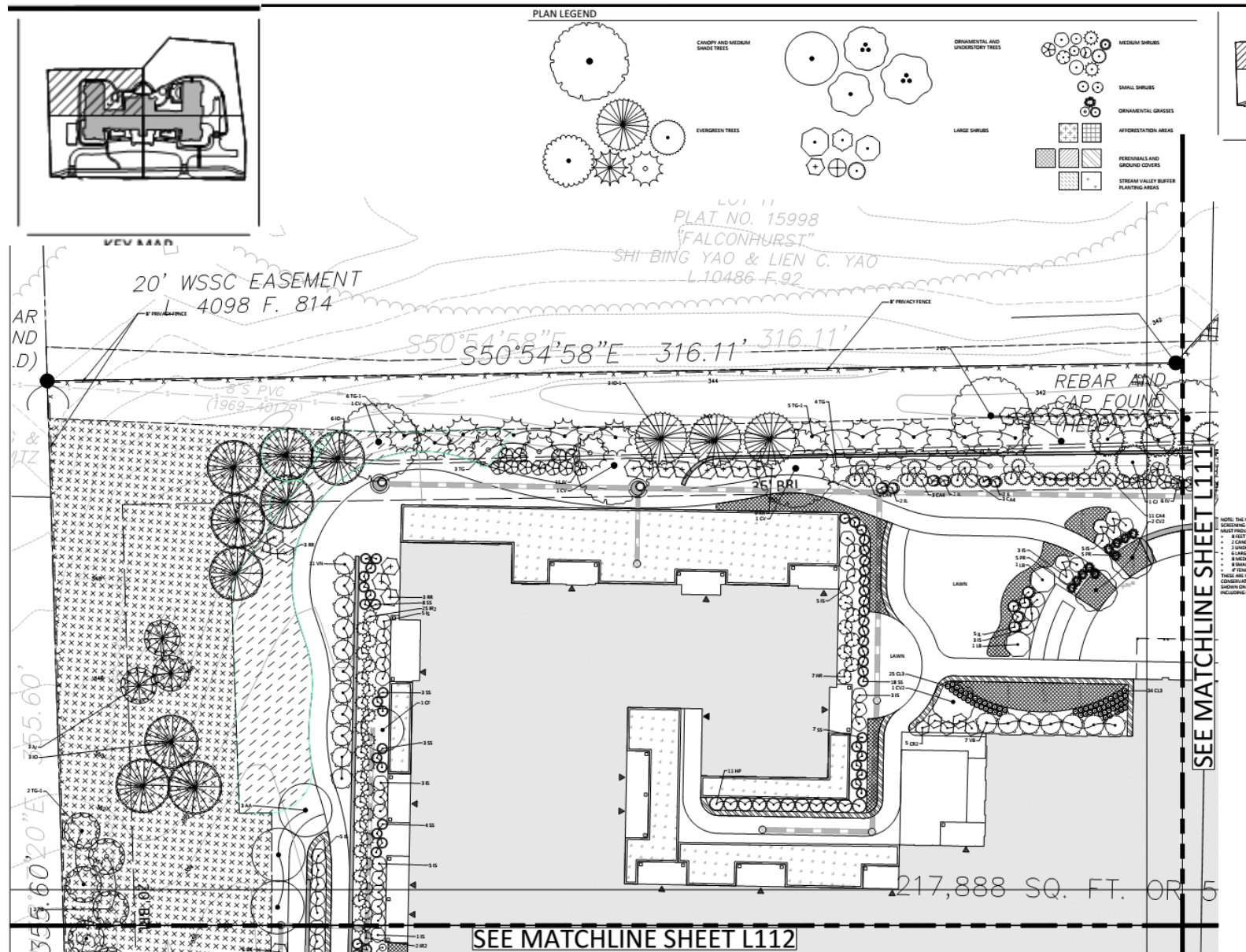
A conditional use plan redlined to show the difference in building footprint, topography, drives, a clean version of the plan with proposed amendments (Exhibits 130(a), 131(b), 132) are on the following pages, and the revised landscape plan are on the following pages.



**Proposed Amendments to Approved
Conditional Use Plan showing
changes to building footprints,
topography, drives (Exhibit 130(a))**

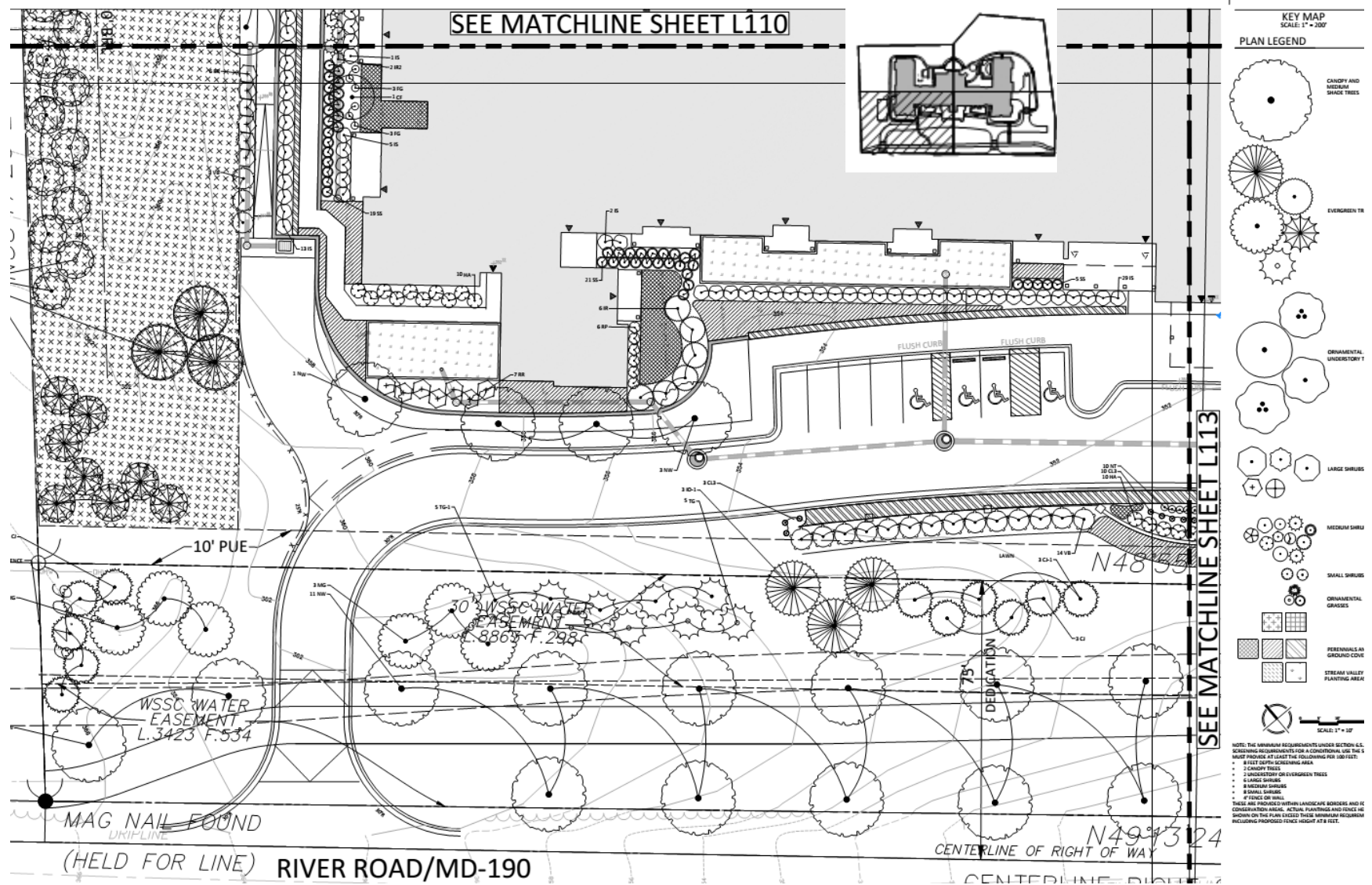


Clean Version of Proposed Amendments to Conditional Use
Plan (Exhibit 131(b))

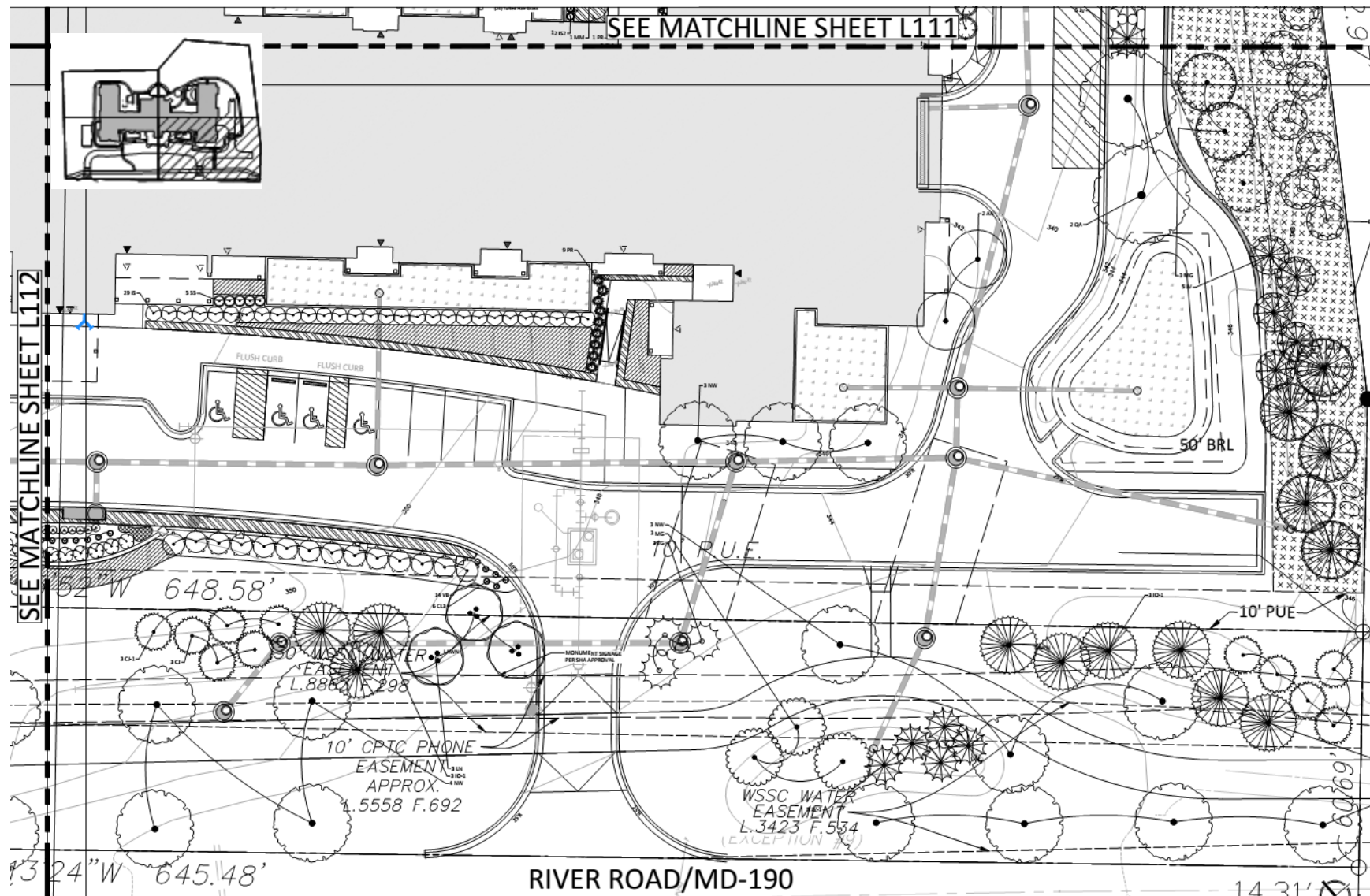


Landscape Plan Sheet L-110 (Ex. 132(d))





Landscape Plan Sheet L-112
Exhibit 132(f)



Landscape Plan Sheet L-113
(Exhibit 132(g))

II. GOVERNING LAW AND ANALYSIS

A. Request for Extension of Validity Period

Conditional use approvals remain valid for a period of two years. *Zoning Ordinance*, §59.7.3.1.I.1. The Hearing Examiner may extend the validity period by one year if:

... if the evidence of record establishes that drawing of architectural plans, preparation of the land, or other factors involved in the particular use will delay the start of construction or the establishment of the use beyond the period of validity.

Id., §59.7.3.1.I.2.

The Hearing Examiner finds that the Applicant has met the standard necessary to approve a 1-year extension of the conditional use. The record demonstrates clearly that the Applicant has actively pursued the steps necessary to obtain a building permit and recently filed its building permit application. It has also received approval of a record plat.

According to the Applicant, some of the changes have been driven by operational adjustments caused by COVID. This conditional use was approved on February 25, 2020, shortly before government buildings in Montgomery County were closed to the public due to the pandemic. The minor alterations to the footprint are, in part, due to operational responses to the pandemic. These changes in turn impacted the other aspects of the conditional use plan.

The purpose of the 2-year validity period is to prevent stale approvals. The documented activity on this application makes clear that it will, in fact, move forward.

B. Request for Minor Amendments

Requests to amend a conditional use are governed by Zoning Ordinance §59.7.3.1.K.

Whether an amendment request is characterized as a major amendment or for a minor amendment is significant because a *major amendment* application must “*follow the same procedures, must meet the same criteria, and must satisfy the same requirements as the original conditional use application . . .*” Zoning Ordinance §59.7.3.1.K.1.b. However, an application for a *minor amendment* need not go through those extensive procedures. Rather, “*. . . it may be approved administratively by the Hearing Examiner.*” Zoning Ordinance §59.7.3.1.K.2.a.

Zoning Ordinance Section 59.7.3.1.K. also defines major and minor amendments:

§59.7.3.1.K.1.a. *A major amendment to a conditional use 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.*

§59.7.3.1.K.2.a. *A minor amendment to a conditional use 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.

The Hearing Examiner agrees with Planning Staff that the amendments proposed by the Applicant fall within the definition of “minor” amendment. Most of the amendments affect items located within the site’s interior. The Hearing Examiner finds it significant that the forested areas and landscape screening along the perimeter will remain unchanged, except that portions of the screening will be slightly (*i.e.*, 12”-18”) elevated due to grade changes. She agrees that the increased elevation of the landscaping will enhance the screening originally approved and block more views of the building. More plantings will be on the southern and eastern portion of the property, again enhancing compatibility rather than reducing it.

Also important to this determination, is that the size of the footprint (although slightly reconfigured), setbacks, and conditions of approval remain unchanged. The original Hearing Examiner’s Report indicated that Spectrum had worked with the community on these items, and none of the changes proposed significantly impact those aspects.

IV. ORDER

Based upon the foregoing, it is hereby,

ORDERED, that the minor amendment to CU 20-05, Application of Spectrum Retirement Communities to operate a residential care facility on property located at 9545 River Road, Potomac, Maryland, be, and hereby is, approved, and it is further

ORDERED, that the validity period of the conditional use approved shall be extended to March 9, 2024, and it is further,

ORDERED, that Condition No. 1 of the original conditional use is hereby amended as follows:

1. Physical improvements to the Subject Property are limited to those shown on the Amended Conditional Use Site Plan and Landscape and Lighting Plan (Exhibits 131,132); 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, except as specifically amended by the Hearing Examiner in this Opinion and Order.

Issued this 7th day of March, 2023.



Lynn Robeson Hannan
Hearing Examiner

NOTICE OF RIGHT TO REQUEST HEARING

Under §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 her administrative approval and conduct a public hearing to consider whether the amendment is a major amendment or a minor amendment under the Zoning Ordinance. A decision of the Hearing Examiner may be appealed based on the Hearing Examiner's record to the Board of Appeals.

COPIES TO:

Steve Robins, Esq.

Elizabeth C. Rogers, Esq.

Attorneys for the Applicant

Barbara Jay, Executive Director

Board of Appeals

Victor Salazar, Dept. of Permitting Services

Patrick Butler, Planning Department

Mark Beall, Planning Department

Michael Coveyou, Dir. Of Finance

Cliff Royalty, Esq., Office of the County Attorney

Current abutting and confronting property owners

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.