

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

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

IN THE MATTER OF:

FREDERICK ROAD SENIOR 4%

OWNER LLC

Applicant

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OZAH Case No. CU 20-02

Before: Kathleen E. Byrne, Hearing Examiner

ORDER APPROVING A SECOND MINOR AMENDMENT

I. BACKGROUND

On July 1, 2020, the Hearing Examiner approved a conditional use filed by Edmonson and Gallagher Property Services, to operate an Independent Living Facility for Seniors with up to 111 dwelling units under Section 59.3.3.2.C of the Zoning Ordinance. *Hearing Examiner's Report and Decision*, CU 20-02, issued July 1, 2020 (HE Report). The Hearing Examiner confirmed the transfer of the conditional use to "Frederick Road 4% Owner, LLC" (Applicant or Frederick Road) on September 14, 2022. Condition No. 11 of the original approval required the Applicant to obtain approval of a preliminary plan of subdivision and to "report to OZAH" any changes required. *Id.*, p. 47.

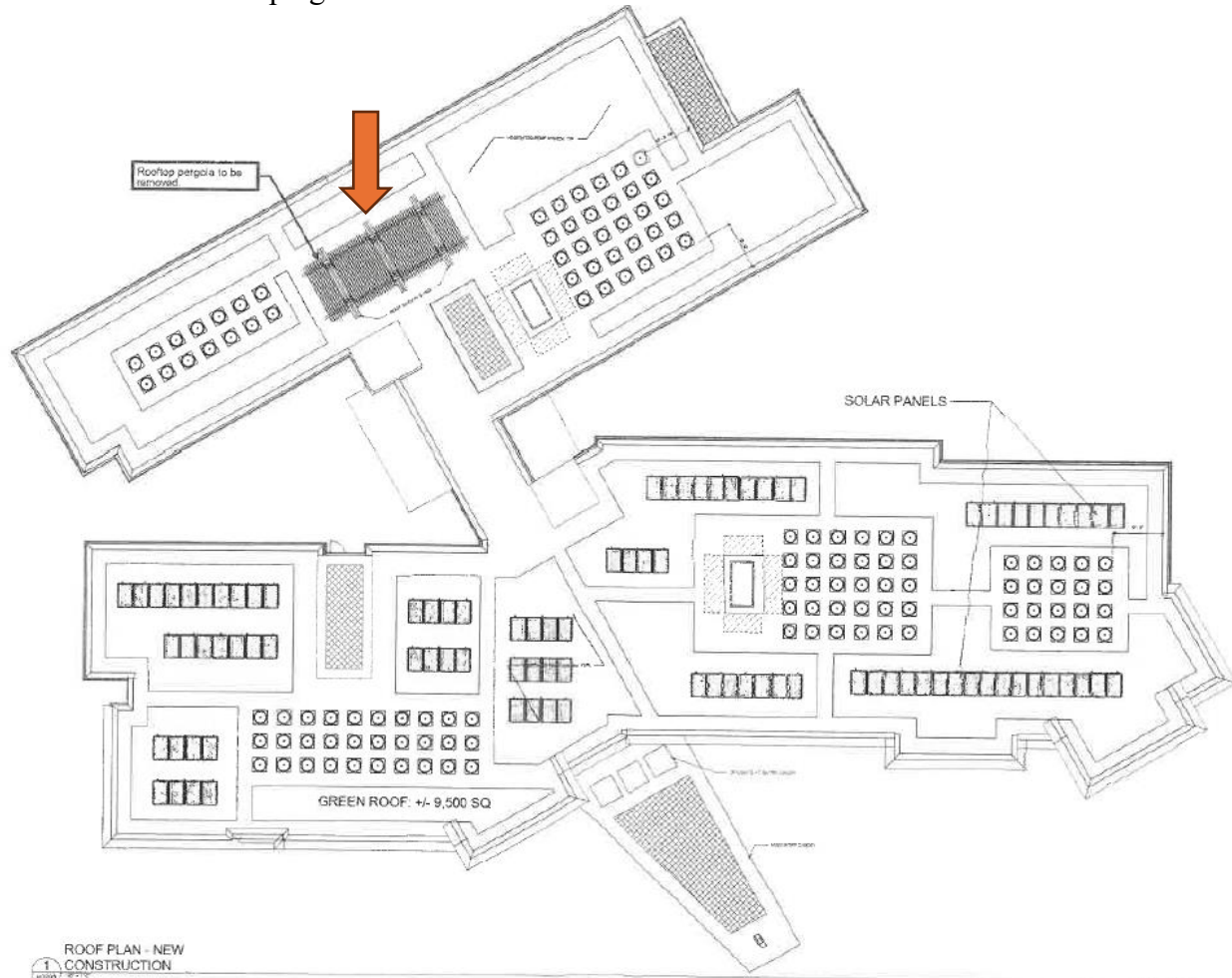
August 14, 2023, the Hearing Examiner approved a request for a Minor Amendment for the above referenced matter. The Hearing Examiner granted the all changes proposed by the Applicant, the majority of which were required to satisfy the preliminary plan requirement to create a 10-foot wide Public Utility Easement running parallel to Frederick Road. See *Order Approving a Minor Amendment*, CU 20-02, issued August 14, 2023. Additionally, the Hearing Examiner ordered that the name of the conditional use holder be corrected to accurately reflect the name of the conditional use holder as "Frederick Road **Senior** 4% Owner, LLC. *Id.* p. 11.

A. Request for Minor Amendment – Removal of Pergola

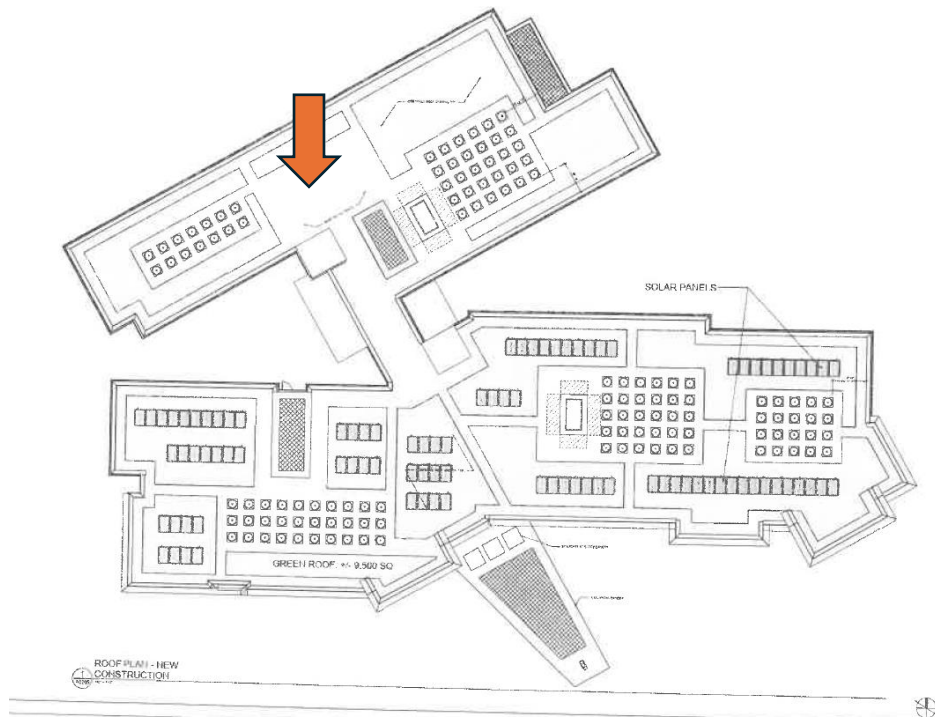
On November 19, 2024, the Office of Zoning and Administrative Hearings (OZAH) received a request for a second minor amendment to the approved conditional use plan.¹ See

¹ On October 10, 2024, the Applicant requested to supplement the record detailing its plans regarding the permanent removal of the pergola from the rooftop. On November 5, 2024, the Hearing Examiner responded requesting that the Applicant submit a request for a minor amendment because she could find no mechanism in the Zoning Code or OZAH Rules by which she could grant a request to supplement the record that changed a fixture approved by the original conditional use.

Second Minor Amendment Request, p. 1. The Applicant notes in the request that approved residential building has been constructed and is now occupied by residents. Pursuant to the architectural drawings submitted during the conditional use public hearing the Applicant's contractor installed a pergola structure on the roof consistent with the plans as approved by the Montgomery County Department of Permitting Services (DPS). When the Applicant learned that the contractor did not properly secure the pergola structure to the roof making it vulnerable during high wind events, the Applicant requested the contractor remove the pergola structure and store it. In the second minor amendment request, the Applicant provided a series of drawings as attachments showing the exterior of the structure from various sides and showing the elevation with and without the pergola.



Applicant's Second Request for a
Minor Amendment, pg. 21
Identifying Pergola Location
Sheet A0205



Applicant's Second Request for a Minor
Amendment, pg. 25; Revision without Pergola
Sheet A0205

PERSPECTIVE - NORTH
ELEVATION



Applicant's Second Request for a Minor
Amendment, pg. 28; North Elevation without the
Pergola - Sheet A0307

The Applicant states that the removal of the pergola does not “meaningfully effect the appearance and compatibility of the existing structure”, nor will the removal “change the nature, character, or intensity of the approved conditional use.” Considering these facts, the Applicant believes the request to remove the pergola can be granted by the Hearing Examiner as a minor amendment. *See* Second Minor Amendment Request, pg. 2.

B. Fee Waiver Request

Because the request to remove the pergola is so modest, the Applicant seeks a waiver of the required filing fee of \$1,776.00 for the submitted application.

II. OPINION AND ANALYSIS

A. Governing Law

Amendments to previously approved conditional uses are governed by Section 59.7.3.1.K of the Zoning Ordinance. 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*, Section 59.7.3.1.K.2.a. 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.” *Id.*, Section 59.7.3.1.K.1.a.

B. Opinion

Based on this record, the Hearing Examiner finds that the change requested is a minor amendment to the conditional use plan originally approved and subsequently amended on August 14, 2023. The Applicant is requesting the removal of the pergola due to safety concerns. The pergola represented a small portion of the actual structure, and the removal creates no negative visual impact to the overall project. Additionally, the pergola itself was not a significant structural feature, improvement or amenity for the overall project. The removal will have very little, if not no, impact at all on the surrounding areas, nor does it change the intensity, character or nature of the use.

The Hearing Examiner agrees with the Applicant that the minor modification request is indeed modest, and the fees normally associated with the submittal of a minor modification would be hardship considering the circumstances. The Hearing Examiner finds the Applicant’s actions to remove the pergola to avoid a hazard more than reasonable and also the Applicant’s desire to avoid potentially damaging the integrity of the roof deck a more than valid reason not to reinstall the pergola.

III. ORDER

Based on the foregoing, it is this 23rd day of January, 2025, hereby

ORDERED, the second minor amendment proposed to CU 20-02, Application of Frederick Road Senior 4% Owner, LLC, to remove and not replace the pergola by and hereby APPROVED, and it is further

ORDERED, that the OZAH fee for the submittal of this second minor amendment be hereby waived, and it is further

ORDERED, that all remaining conditions of approval set forth in the Hearing Examiner's Report dated July 1, 2020, and Minor Amendment dated August 14, 2023, remain in full force and effect.



Kathleen E. Byrne
Hearing Examiner

NOTICE

Under §59.7.3.1.K.2.b of the Zoning Ordinance, any party may object by requesting 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 minor amendment is one that does not "substantially changes the nature, character, or intensity of the conditional use or its effect on the immediate neighborhood." A major amendment is one that does substantially change the nature, character, or intensity of the conditional use on the immediate neighborhood. If the Hearing Examiner determines, after an objection, that the impact will be major, then the application must be treated as a major amendment. A decision of the Hearing Examiner may be appealed based on the Hearing Examiner's record to the Board of Appeals.

COPIES TO:

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