

State of Florida
Department of Elder Affairs

December 28, 2018

IN RE: GAHC4 Balmoral FL TRS Sub, LLC d/b/a Balmoral Assisted Living

**PETITION FOR EMERGENCY TEMPORARY VARIANCE,
OR IN THE ALTERNATIVE, PETITION FOR TEMPORARY VARIANCE
FROM THE IMPLEMENTATION DEADLINE OF RULE 58A-5.036**

Petitioner, GAHC4 Balmoral FL TRS Sub, LLC d/b/a Balmoral Assisted Living (“Balmoral”), through its counsel, respectfully requests an emergency temporary variance to Rule 58A-5.036(4)(b), Florida Administrative Code (the “Rule”) pursuant to Section 120.542, Florida Statutes and Rule 28-104.004, Florida Administrative Code in order to allow Petitioner more time to comply with the Rule. In support of this request, Petitioner states the following:

Party Requesting Emergency Temporary Variance

1. Petitioner’s name, address, telephone number, and fax number are:

Balmoral Assisted Living

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2. Counselors for Petitioner are:

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The Rule and Authority to Grant a Variance

3. Rule 58A-5.036(1)(a)3a provides that “an assisted living facility in an evacuation zone under Chapter 252, F.S., must maintain an alternative power source and fuel as required by this subsection at all times when the assisted living facility is occupied but is permitted to utilize a mobile generator(s) to enable portability if evacuation is necessary.”

4. Further, Rule 58A-5.036(1)(b) requires “the acquisition of sufficient fuel, and safe maintenance of that fuel at the facility, to ensure that in the event of the loss of primary electrical power there is sufficient fuel available for the alternate power source to maintain ambient temperatures at or below 81 degrees Fahrenheit for a minimum of ninety-six (96) hours after the loss of primary electrical power during a declared state of emergency.”

5. Pursuant to Rule 58A-5.036(4)(a), “each assisted living facility licensed prior to the effective date of this rule shall, no later than June 1, 2018, have implemented the plan required under this rule.”

6. However, Rule 58A-5.036(4)(b) allows that the Agency grant extensions to the deadline and provides in relevant part: “The Agency shall allow an extension up to January 1, 2019 to providers in compliance with subsection (c), below, and who can show delays caused by necessary construction, delivery of ordered equipment, zoning or other regulatory approval processes.”

7. Additionally, Section 120.542 of Florida Statutes authorizes agencies to grant variances or waivers to the requirements of their rules when strict application of rule requirements can lead to unreasonable, unfair, and unintended results.

8. Under Section 120.542(2), “variances or waivers shall be granted... when application of the rule would create a substantial hardship.” A “substantial hardship” is

defined as a “demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance.” Fla. Stat. § 120.542(2).

9. Rule 28-104.004 of the Florida Administrative Code allows agencies to grant petitions for emergency variances. The petitioner is required to specify (1) the specific facts that make the situation an emergency, and (2) the specific facts that show that the petitioner will suffer an immediate adverse effect unless the variance is used more expeditiously than the timeframes provided in Section 120.542 of Florida Statutes.

An Emergency Temporary Variance from the Rule is Necessary

10. Rule 58A-5.036 requires compliance by June 1, 2018 and provides that any violation of the Rule allows the Agency for Health Care Administration (the “Agency”) to seek any remedy authorized by Chapter 429, Part I, F.S., or Chapter 408, Part II, F.S., including, but not limited to, license revocation, license suspension, and the imposition of administrative fines.

11. On May 12, 2018, the Agency approved Petitioner’s request for an extension to the implementation of the Rule through January 1, 2019 (see “Extension Approval” and “Meridian Senior Living, LLC’s Request for Extension” attached). Further, Petitioner has timely filed Quarterly Reports as required by the Agency (see “Quarterly Reports” attached).

12. However, despite its best efforts, Petitioner is unable to fully implement the plan by the January 1, 2019 deadline due to circumstances beyond its control. The increased demand in Florida for generator services, fuel tanks, and other necessary equipment has made timely compliance impossible.

13. Accordingly, Petitioner seeks this emergency variance to avoid suffering an immediate risk of costly fines or loss of licensure. Unless this variance is issued more

expeditiously than the timeframes provided in Section 120.542, Florida Statutes, Petitioner will be subject to potential penalties for failure to comply with the Rule by January 1, 2019.

Petitioner's Actions in Furtherance of Compliance with the Rule

14. Petitioner, through its management company, Meridian Senior Living, LLC ("Meridian"), sought out multiple contractors to submit estimated budgets and potential scopes of work while legislation was still pending. Meridian also hired an engineering company to determine Balmoral's needs based on the Agency's expected guidelines. Once the Agency released the final guidelines, contractors submitted their finalized bids according to requirements of the new Rule. Meridian executed contracts with the selected contractors and issued checks for the purchase of custom equipment pursuant to those contracts.

15. Most of the above-described process could not be completed until the Rule was finalized. For example, contracts for custom-made fuel containers and generators could not be executed without knowing Petitioner's specific needs or final budgets.

16. Due to the significant need for similar generator requirements across the State, the required equipment was not readily available. As such, shipping and construction times have taken longer than normal.

17. As of December 2018, Petitioner and its contractors have been working diligently to comply with the Rule.

18. Currently, Petitioner has a generator in place. However, tanks to fulfill the 96-hour requirement are scheduled to ship on December 27, 2018 and will require county/city inspections prior to fueling. This is expected to be completed by mid- to late- January 2019, provided that there are no further delays in shipment or local government inspections.

Type of Action Requested

19. Petitioner is requesting an emergency temporary variance from the restrictions imposed by the Rule that require compliance by the last extension date of January 1, 2019. As previously mentioned, due to permitting, construction, and delivery timelines, implementation will not be complete by January 1, 2019.

20. A temporary variance will allow Petitioner to comply with the Rule as permitted by Rule 58A-5.036(4)(b) and Florida Statutes section 120.542 without exposing Petitioner to substantial hardship.

An Emergency Temporary Variance to the Rule is Justified

21. An emergency temporary variance to the Rule is justified because strict application of the Rule is unreasonable. First, Petitioner has made a good faith effort to comply with Rule in the timeframe required by the Rule as explained above. Circumstances outside of Petitioner's control are what have caused Petitioner's delay in completion. Further, Petitioner is among many other assisted living facilities in the State that are experiencing similar delays. Thus, Petitioner seeks this variance in order to comply with the Rule and will suffer substantial hardship if it is not granted.

The Temporary Variance will serve the Purpose of the Underlying Statute

22. The purpose of the emergency Rule is to establish a process for certain assisted living facilities to obtain sufficient equipment and resources in the event of the loss of primary electrical power. Specifically, the purpose of the Rule is to ensure that facilities are equipped so that ambient air temperatures are maintained at or below 81 degrees Fahrenheit for a minimum of ninety-six (96) hours.

23. As detailed in Petitioner's current standard operating procedures in its

hurricane disaster plan and the procedures in place during the current extension period, **Petitioner currently has a generator that powers** F.S. 119.071(3)(a)2.b. [REDACTED]

24. F.S. 119.071(3)(a)2.b. [REDACTED] Petitioner will follow its evacuation Protocol (see “Evacuation Plan” attached). F.S. 119.071(3)(a)2.b. [REDACTED]

25. Approval of this variance will actually serve the purpose of the Rule and underlying Statute. As detailed above, Petitioner has procedures in place that ensure its residents F.S. 119.071(3)(a)2.b. [REDACTED]

[REDACTED]. If this variance is granted, Petitioner’s residents will continue to receive safe assisted living services and will be available to other citizens who may need assisted living services in Florida. Thus, approval of this Petition will not be injurious to the public health, safety, morals, or general welfare of the community.

26. As previously noted, the purpose of the Rule is to ensure ambient air temperatures remain at or below 81 degrees. If granted, this variance will be in effect during Florida’s cooler months, which means that ambient air temperatures would likely remain cool even without power.

Conclusion

27. Petitioner seeks this emergency temporary variance from the Rule in order to permit sufficient time for the installation of fuel tanks at its facility. Alternatively, if the Department does not find that the facts underlying this Petition are an emergency, Petitioner requests a temporary variance under the time frames proscribed in Section 120.542 of Florida Statutes.

of June 2019, to comply with the Rule. If the department deems that the amount of time requested is not acceptable per the Rule, Petitioner would request an amount of time that the Department believes is reasonable under the circumstances.

Respectfully submitted this 27th day of December 2018.



/s/ Kurt M. Spengler

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