

**STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS**

**IN RE: LARKIN COMMUNITY HOSPITAL
II, LLC d/b/a FLORIDIAN GARDENS
ASSISTED LIVING FACILITY'S
EMERGENCY PETITION FOR
VARIANCE FROM RULE 58A-5.036
FLORIDA ADMINISTRATIVE CODE**

DOEA Case No.

**EMERGENCY PETITION FOR VARIANCE
FROM RULE 58A-5.036, F.A.C.**

Larkin Community Hospital II, LLC d/b/a Floridian Gardens Assisted Living Facility (“Petitioner”) by and through its undersigned counsel, hereby petitions the Florida Department of Elder Affairs (“DOEA”) for an emergency variance from Rule 58A-5.036, F.A.C.

1. Petitioner is a 180-bed assisted living facility (“ALF”), License No. 12489, located at 17250 SW 137th Avenue, Miami, (Miami-Dade County) Florida, that is licensed pursuant to Chapters 429, Part I, and 408, Part II, Florida Statutes, and Chapter 58A-5, Florida Administrative Code. The facility administrator is Grettel Arzola. For purposes of this proceeding, the address and telephone number of Petitioner for all communications concerning this matter are that of undersigned counsel.

2. The Agency affected by this petition is the Florida Department of Elder Affairs, 4040 Esplanade Way, Tallahassee Florida 32399, (850) 414-2096.

3. Rule 58A-5.036 is implementing 429.19 and 429.41, Florida Statutes.

4. This Emergency Petition is filed pursuant to section 120.542 Florida Statutes and Chapter 28-104.004, F.A.C.

5. Petitioner requests an emergency temporary variance from the provision in Rule 58A-5.036, F.A.C. (“the Rule”) which sets out a completion deadline for implementing the environmental control project.

6. Rule 58A-5.036 provides as follows:

(4) IMPLEMENTATION OF THE PLAN. (b) 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. Assisted living facilities shall notify the Agency that they will utilize the extension and keep the Agency apprised of progress on a quarterly basis to ensure there are no unnecessary delays. If an assisted living facility can show in its quarterly progress reports that unavoidable delays caused by necessary construction, delivery of ordered equipment, zoning or other regulatory approval processes will occur beyond the initial extension date, the assisted living facility may request a waiver pursuant to Section 120.542, F.S.

7. The Extension Notification was submitted on May 29, 2018. (See Exhibit A attached hereto and incorporated by reference.)

8. On July 31, 2018, the Agency for Health Care Administration (“AHCA”) issued a Notice of Apparent Violation of Rule 58A-5.036 (“Notice”). (See Exhibit B attached hereto and incorporated by reference.)

9. On August 9, 2018, Petitioner sent its Response to the Notice wherein it was explained that the Petitioner did submit the extension notification and also answered a follow-up question in response to the submission of the extension notification, and therefore was not in violation of Rule 58A-5.036. (See Exhibit C attached hereto and incorporated by reference.)

10. On August 9, 2018, AHCA issued approval of the extension request, providing notice that the first quarterly report would be due within 90 days of said date. (See Exhibit D attached hereto and incorporated by reference.)

11. On November 1, 2018, Petitioner filed its first quarterly report as required. (See Exhibit E attached hereto and incorporated by reference.)

12. The Petitioner's next quarterly report is due before January 30, 2019, subsequent to the January 1, 2019 implementation deadline.

13. Petitioner has made good faith efforts to timely implement the plan, however due to circumstances beyond its control, the Petitioner will be unable to implement the plan by the January 1, 2019 deadline. This creates a hardship for Petitioner in that the DOEA and/or the Agency for Health Care Administration could impose various penalties for noncompliance.

14. Section 120.542(2), Florida Statutes, provides that variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. *See* § 120.542(2), F.S. As discussed below, the application of Rule 58A-5.036, F.A.C. creates a substantial hardship on Petitioner and violates principles of fairness.

15. Specifically, the Petitioner has completed the following towards plan implementation:

- a. Determined the appropriate method of meeting the residents' comfort and clinical needs, including maintaining a temperature which does not exceed 81 degrees.
- b. Retained the services of Architect Luis Naya and engineering team to design a plan for a permanent generator project. (See Exhibit F attached hereto and incorporated by reference.)

- c. The completed designs were submitted to Miami Dade County for permitting on May 30, 2018. (See Exhibit G attached hereto and incorporated by reference.)
 - d. The drawings were processed by Miami Dade County for permit review and revisions. The review process, requiring several revisions was finally completed by the county on September 13, 2018. (See Exhibit G referenced above.)
 - e. A permit for the project was issued and the permit drawings were collected from the county to begin the bidding/sourcing process by the Contractor of Record, and said process lasted until the end of October 2018. (Exhibit A, pg. 3 referenced above.)
 - f. The process required that Petitioner's contractor had to source the generator model specified in the drawings and also to price the ancillary work from several sub-contractors and providers.
16. The Petitioner will be unable to implement the plan by January 1, 2019, for the following reasons:
- a. At the completion of the bidding and sourcing period in October 2018, the Petitioner received an estimate of a total project cost of approximately \$340,000. (See Exhibit H attached hereto and incorporated by reference.)
 - b. The project cost of \$340,000 is substantially more than the Petitioner can afford to pay and would cause serious financial duress at this time.
 - c. The Petitioner has submitted all information to a new contractor, Ebergy, Inc., for new project plans and an estimate.
 - d. The Petitioner's new contractor has determined that the most expeditious and financially realistic option for compliance with the rule is to continue the current

contract of temporary power service that was entered into by the Petitioner on June 1, 2018, whereby a temporary generator is to be on the premises within 24 hours prior to any emergency. (See Exhibit I attached hereto and incorporated by reference.)

- e. The Petitioner's contractor will proceed with designing a modified scope of the project requiring some electrical and construction modifications by way of a new permitted plan of design, allowing for the installation of infrastructure that can host the use of the temporary generator service when needed.
 - f. The new contractor has visited the property with his electrical subcontractors and is currently preparing the new scope of work around the temporary generator.
 - g. A new financially feasible project shall be finalized allowing for Floridian Gardens to comply with the Rule and allow for the infrastructure foundation to be constructed which would allow for installation of the permanent generator project at a later time when the funds can be sourced.
 - h. The recovery efforts from both Hurricane Florence and Hurricane Michael have driven up costs and taken available resources from the Miami Dade County area and it is unknown when the generator prices will return to previous prices and availability.
17. The granting of a variance at this time is not unreasonable.
18. If the emergency variance is not granted, Petitioner will suffer an immediate adverse effect.
19. Petitioner may be subject to revocation of license, fines or sanctions. Any fines imposed will reduce the capability of the Petitioner to comply with the rule. Furthermore, the

possibility of license revocation for noncompliance would irreparably injure the Petitioner, as well as its residents and their families.

20. Principles of fairness are violated in this instance although the Petitioner is not the only ALF affected by the rule. The significant differences in how the rule affects the Petitioner versus other ALFs is exhibited by the fact that the Petitioner cannot afford to pay the \$340,000 estimated to comply with the rule and has been forced to find another viable option in order to comply with the rule and implement the plan. The Petitioner has hired a new contractor to complete alternate design plans that will allow for a financially feasible option for the Petitioner to comply with the rule and implement the plan. Additionally, the availability of the equipment has become scarce because of both Hurricane Florence and Hurricane Michael.

21. The literal application of the rule will thus create a substantial hardship for Petitioner and it violates principles of fairness. Additionally, the Petitioner will suffer an immediate adverse effect unless the variance is granted. Accordingly, the variance should be granted.

22. Section 429.19, Florida Statutes, was enacted to provide for imposition of administrative fines for violations of Chapter 429 Part I, Florida Statutes. *See* § 429.19 (1) F.S.

23. Section 429.41, F.S. was enacted to provide reasonable and consistent quality of resident care and quality of life, and to ensure a safe and sanitary residential environment accommodating the needs and preferences of residents. *See* Section 429.41(1), F.S. Furthermore, this section ensures the preparation and annual update of a comprehensive emergency management plan that provides for emergency power. *See* § 429.41(1)(b), F.S.

24. A variance from the rule will not impair the purpose of the statutes, which is to require that assisted living facilities provide for the safety, care, and comfort of its residents on a

regular basis, as well as during emergencies. This purpose is accomplished by setting requirements that must be met by each emergency management plan, including provision of emergency power, as well as penalties for violations of those requirements.

25. The Facility Emergency Power Plan was reviewed and approved by Miami Dade County Emergency Management on May 17, 2018 and therefore has been found to be compliant with the underlying purpose of the statutes. (See Exhibit J, attached hereto and incorporated by reference.)

26. Petitioner's Comprehensive Emergency Management Plan (CEMP) was reviewed and approved by Miami Dade County Emergency Management on May 17, 2018 and therefore has been found to be compliant with the underlying purpose of the statutes. (See Exhibit K, attached hereto and incorporated by reference.)

27. Petitioner's approved CEMP provides for evacuation of its residents to alternate facilities in the event that a mandatory evacuation is ordered.

28. Facility Emergency Power Plan provides as follows in the event of a power outage:

- a. **Cooling Area** - The cooling area of the facility will be the entire facility, which is a total of 56,826 square feet. Floridian Gardens is licensed for 180 residents. With staff, we estimate the area will house about 150 people during a power emergency. Staff will remain with residents during a prolonged outage and the temperature will be monitored hourly.
- b. **Emergency Power & Fuel** – As explained in paragraph 16 above, due to the unforeseen exorbitant cost of the originally submitted generator plan, the temporary plan will remain in place while the new contractor, Christian Berthin of Eberg,

Inc. develops a new project and design process that will allow Floridian Gardens to be in compliance with the Rule.

c. Therefore, Floridian Gardens will continue the current contract of temporary power service that was entered into by the Petitioner on June 1, 2018, whereby a temporary generator is to be on the premises within 24 hours prior to any emergency. (See Exhibit I referenced above.)

d. If power is lost to the building, staff will make rounds to ensure residents have a light source and to check on the safety of all residents. Staff on duty will do the following:

i. Notify the power company of the loss of electrical services by calling Florida Power & Light (800) 468-8243. Staff will NOT assume it has been reported.

ii. Staff will check all breaker panels and reset if necessary.

iii. Staff will contact the manager. Additional staff may be called in to assist.

iv. If temperature is not an issue, staff will regularly patrol the building every 60 minutes for wellness checks to determine the needs of residents and to check for the evidence of smoke or a fire.

v. F.S. 119.071(3)(a)2.b. [Redacted]

vi. F.S. 119.071(3)(a)2.b. [Redacted]

29. Petitioner will implement the rule, however will not be able to do so by January 1, 2019. A variance serves the purpose of the underlying statutes by enabling the Petitioner to continue to perform essential services for residents without the threat of disruption or termination, while implementing the requirements of the rule.

30. The facts herein demonstrate a substantial hardship to Petitioner and principles of fundamental fairness justify the granting of the variance for Petitioner. There has been a plethora of generator projects begun and implemented under both the ALF and nursing home rules, and already stretched resources are now close to extinct due to Hurricane Florence and Hurricane Michael.

31. It must be noted that Petitioner is not seeking a variance from implementation of the rule, but rather from the substantial hardship and immediate adverse effect it is facing based on the deadline within which the rule requires implementation. It would be fundamentally fair to grant the Petitioner the time it requires to implement this project.

32. The deadline for implementation under the approved extension is January 1, 2019. Under 120.542, F.S., the Agency has up to 30 days to review the Petition and submit a request for additional information if necessary. Within 30 days after receipt of such additional information, the Agency shall review such information, and may request information to clarify the additional information if necessary. Ultimately, the Agency has up to 90 days within which to grant or deny this Petition. Although the request for additional information may not be made by the Agency, in an abundance of caution, the undersigned has titled this an Emergency Petition.

33. The Petitioner will suffer an immediate adverse effect unless the variance is granted before January 1, 2019 since the Agency may choose to impose sanctions or fines for noncompliance with the rule.

34. For the foregoing reasons, Petitioner requests that the DOEA grant its Emergency Petition for Variance from Rule 58A-5.036, F.A.C. allowing Petitioner until June 1, 2019 for full implementation of the rule, and to stay imposition of fines throughout the extension period provided by the variance. Additionally, Petitioner requests that they not be prohibited from seeking an additional extension if implementation of the rule is unavoidably delayed through no fault of Petitioner.

Respectfully submitted this 28th day of November 2018.

/s/ Geoffrey D. Smith
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Emergency Petition for Variance has been provided to the Agency Clerk, Office of the General Counsel of the Florida Department of Elder Affairs, by submission through its website at: <http://elderaffairs.org/doea/rulemaking.php> and a true copy furnished by Federal Express, to the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400 this 28th day of November 2018.

/s/ Geoffrey D. Smith
GEOFFREY D. SMITH