

**STATE OF FLORIDA  
DEPARTMENT OF ELDER AFFAIRS**

**In Re: Petition for Variance from  
Rule 58a-5.036, Florida Administrative Code,  
Filed by Larkin Community Hospital II, LLC  
d/b/a Floridian Gardens Assisted Living Facility**

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**DOEA No. 2019-\_\_\_\_\_**

**EMERGENCY PETITION FOR TEMPORARY 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 a temporary variance from Rule 58A-5.036, F.A.C. On December 27, 2018, the DOEA issued a Final Order for Case No. 2018-0725 granting Petitioner a Conditional Temporary Variance through June 1, 2019 (the Emergency Petition, all exhibits and additional information provided to the DOEA, and the Final Order for Case No. 2018-0725 are made a part hereof and incorporated by reference).

1. Petitioner is a 180-bed assisted living facility (“ALF”), License No. 12489, located at 17250 SW 137<sup>th</sup> 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. 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 conditional temporary variance deadline of June 1, 2019. This creates a hardship for Petitioner in that the DOEA and/or the Agency for Health Care Administration could impose various penalties for noncompliance.

8. 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.

9. 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 to Emergency Petition Case No. 2018-0725 made a part hereof and incorporated by reference.)
- c. The completed designs were submitted to Miami Dade County for permitting on May 30, 2018. (See Exhibit G to Emergency Petition Case No. 2018-0725 made a part hereof 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 to Emergency Petition Case No. 2018-0725 made a part hereof and incorporated by reference.)
- 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.

10. The Petitioner will be unable to implement the plan by June 1, 2019, for the following reasons:

- a. The Petitioner is currently under contract for sale with an expected closing date in June 2019. (A copy of the purchase and sale agreement will be provided to the DOEA upon request if necessary.)
- b. The contract for sale has now entered “hard” status with a substantial amount of money in escrow that is now non-refundable. Therefore, there are no longer any contingencies whatsoever on the contract, making the deposit non-refundable, and clearing for an imminent closing in the month of June. Time is now of the essence towards closing.
- c. The prospective owners require time to potentially modify, or simply proceed with the current dry-run permit drawings, in consideration of their business model and operational requirements for the facility.
- d. Ebergy, Inc., the contractor for Petitioner, has been working with the prospective owners to facilitate moving forward with the plans for the generator project. In their discussions it is the understanding of Ebergy that the prospective owners intend to proceed with the current plans that were designed by Architect Luis Naya and engineering for the permanent generator project. This is the same design process that started in the first quarter of 2018, resulting in the completion of the design drawings for permit submittal at the end of May 2018. The same design and drawings were processed by Miami Dade County for permit review and revisions. The dry run review process, and its several revisions were completed by

the County on September 2018. (Exhibits to Emergency Petition Case No. 2018-0725 made a part hereof and incorporated by reference.)

- e. During this time of transition, the prospective owner is sourcing the specified generator and may need to develop a new scope of work per their prospective operational needs. The process may require a different model of generator (same specifications as the one referenced in the permit drawings) depending on the timeline of availability and delivery of product to the site.
- f. Additionally, the prospective owner intends to value engineer the project by way of their General Contractor, at pricing that could yield savings below estimated project cost of \$340,000. Nonetheless, the priority is to commence the project at the earliest availability.
- g. It is imperative that the current deadline of June 1, 2019 be extended as the remaining available time would not allow for the transition of ownership and implementation of the plan.
- h. It is estimated that the prospective owner's project and design process will require another extension of time from the DOEA until February 1, 2020.
- i. The Petitioner's current owner shall remain involved in facilitating the transition towards the extension and until the sale of the facility is finalized.
- j. **F.S. 119.071(3)(a)2.b.** [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (See Exhibit A made a part hereof and incorporated by reference.)

11. The granting of a variance at this time is not unreasonable.

12. If the emergency variance is not granted, Petitioner will suffer an immediate adverse effect.

13. The sale of Petitioner may be interfered with or delayed if a variance is not granted.

14. The 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.

15. 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 is currently under contract for sale and if the variance is not granted, the sale may fall through or be delayed. The Petitioner's prospective owner will need time to determine whether the current plans and designs will work for their intended use of the facility or if they will require changes and possible new approvals for altered plans.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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 to Emergency Petition Case No. 2018-0725 made a part hereof and incorporated by reference.)

21. 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 to Emergency Petition Case No. 2018-0725 made a part hereof and incorporated by reference.)

22. **F.S. 119.071(3)(a)2.b.** [REDACTED]

[REDACTED]

23. **F.S. 119.071(3)(a)2.b.** [REDACTED]

a. **F.S. 119.071(3)(a)2.b.** [REDACTED]

[REDACTED]

[REDACTED]

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

[Redacted]

b. Emergency Power & Fuel – the temporary plan will remain in place while the prospective new owner works towards implementation of the plan.

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

[Redacted]

[Redacted]

[Redacted] (See Exhibit A referenced above.)

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

[Redacted]

[Redacted]

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

[Redacted]

[Redacted]

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

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

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

[Redacted]

[Redacted]

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

[Redacted]

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

[Redacted]

S. 119.071(3)(b)2.b. [REDACTED]

24. Petitioner will implement the rule, however will not be able to do so by June 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.

25. The facts herein demonstrate a substantial hardship to Petitioner and principles of fundamental fairness justify the granting of the variance for Petitioner.

26. 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 conditional temporary variance from the rule requires implementation. It would be fundamentally fair to grant the Petitioner the time it requires to implement this project.

27. The deadline for implementation under the granted conditional temporary variance is June 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.

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

29. 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 February 1, 2020 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 3<sup>rd</sup> day of May 2019.

/s/ Sabrina B. Dieguez  
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Attorney for Petitioner

### **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 3<sup>rd</sup> day of May 2019.

/s/ Sabrina B. Dieguez  
**SABRINA B. DIEGUEZ**

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