

**STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS**

**IN RE: PARKLAND COMMONS
SUBTENANT, LLC d/b/a THE INN AT
ASTON GARDENS' EMERGENCY
PETITION FOR TEMPORARY
VARIANCE FROM RULE 58A-5.036
FLORIDA ADMINISTRATIVE CODE**

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

Parkland Commons Subtenant, LLC d/b/a The Inn at Aston Gardens (“**Petitioner**”) by and through its undersigned counsel, hereby petitions the Florida Department of Elder Affairs (“**DOEA**”) for an emergency temporary variance from Rule 58A-5.036, F.A.C. (the “**Rule**”) allowing Petitioner until June 30, 2019, for full implementation of the Rule, and to stay any imposition of sanctions or fines throughout the extension period provided by the temporary variance.

Petitioner is currently operating pursuant to a Final Order Granting Conditional Temporary Variance from Rule 58A-5.036, Florida Administrative Code ordered by the DOEA on January 14, 2019, (the “**Final Order**”) attached hereto as Exhibit A and incorporated by reference. The Final Order granted Petitioner a conditional temporary variance until March 31, 2019, to implement the Rule. Due to unforeseeable delays caused by zoning and other regulatory approval processes beyond Petitioner’s control, and due to the inability to extend the Final Order, Petitioner has filed this Petition.

The Final Order was ordered pursuant to Petitioner’s Emergency Petition for Temporary Variance from Rule 58A-5.036, F.A.C. filed with the DOEA on December 14, 2018 (the “**December Petition**”), and Petitioner’s Response to DOEA Request for Additional Information

submitted to the DOEA on December 28, 2018 (the “December Response”). Both the December Petition and the December Response, and their respective exhibits and attachments, are incorporated by reference, however due to the large size of both submissions they are not attached to this Petition but can be provided upon request. The information provided to the DOEA in the December Petition and the December Response remains accurate and in full force and effect.

1. Petitioner operates a 100-bed assisted living facility, License No. 10316, located at 9423 Aston Gardens Court, Parkland, FL 33076, that is licensed pursuant to Chapters 429, Part I, and 408, Part II, Florida Statutes, and Chapter 58A-5, Florida Administrative Code.

2. Petitioner provides safe housing, exceptional services, and a supportive environment for older adults who may otherwise be unable to live on their own.

3. Petitioner is in the process of installing a permanent onsite power generator capable of powering the entire facility for a minimum of ninety-six (96) hours in the event of the loss of primary electrical power thus going above and beyond the requirements of the Rule to ensure the safety of its residents. See Exhibit A to the December Petition.

4. For purposes of this proceeding, the address and telephone number of Petitioner for all communications concerning this matter are that of undersigned counsel.

5. The Agency affected by this petition is the DOEA, 4040 Esplanade Way, Tallahassee Florida 32399, (850) 414-2096.

6. The Rule implements Sections 429.19 and 429.41, Florida Statutes.

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

8. Petitioner requests an emergency temporary variance from the provision in the Rule which sets out a completion deadline for implementing the Rule.

9. 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.

10. Petitioner filed a notice of extension on May 24, 2018. *See* Exhibit A to the December Petition.

11. On June 22, 2018, the Agency for Healthcare Administration (“AHCA”) granted the extension request. *See* Exhibit D to the December Response.

12. On August 31, 2018, Petitioner filed its first quarterly report as required. *See* Exhibit B to the December Petition.

13. On December 14, 2018, Petitioner filed with the DOEA its December Petition seeking an Emergency Petition for Temporary Variance until June 1, 2019, to implement the Rule.

14. On December 28, 2018, Petitioner submitted to the DOEA its December Response providing additional supporting materials to the DOEA.

15. Pursuant to conversations with the DOEA, and in good faith reliance upon written assurances received from Quinco Services, Inc. (“**Quinco**”), the installer of Petitioner’s new onsite fuel tank and generator, indicating that the expected completion date of the installation would be no later than April 1, 2019 (*see* Email from Quinco dated January 8, 2018, attached hereto as **Exhibit B** and incorporated by reference), Petitioner agreed to shorten its request for the temporary variance to March 31, 2019, and to give its best efforts to comply with this

deadline.

16. On January 14, 2019, the DOEA ordered the Final Order granting Petitioner until March 31, 2019, to comply with the Rule.

17. During the variance period, Petitioner has complied with the conditions imposed by the Final Order:

a. **F.S. 119.071(3)(a)2.b.**

F.S. 119.071(3)(a)2.b. attached

hereto as Exhibit C and incorporated by reference.

b. Petitioner's emergency environmental control plan was approved by the local emergency management agency. *See* Exhibits B and C to the December Response.

c. Petitioner is able to effectively and immediately activate, operate and maintain its alternative power source and any fuel required for the operation of its alternative power source pursuant to **F.S. 119.071(3)(a)2.b.**

d. Petitioner maintains written policies and procedures that address the care of residents occupying the facility during a declared state of emergency. *See* Exhibit A to the December Petition and Exhibit F to the December Response.

e. Petitioner has contracted with **F.S. 119.071(3)(a)2.b.**

F.S. 119.071(3)(a)2.b.

F.S. 119.071(3)(a)2.b.

See Exhibit A to

the December Petition and responses (5) and (6) to the December Response.

18. Petitioner has made good faith efforts to timely implement the Rule and to comply with the Rule by March 31, 2019, however due to circumstances beyond its control related to zoning and other regulatory approval processes, Petitioner will be unable to fully implement the Rule by the March 31, 2019, deadline. This creates a substantial hardship for Petitioner in that the DOEA and/or AHCA could impose various sanctions and/or penalties for noncompliance.

19. Section 120.542(2), Florida Statutes, provides that “[v]ariations 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 the Rule creates a substantial hardship on Petitioner and violates principles of fairness.

20. In addition to maintaining the conditions of the Final Order discussed *supra*, Petitioner has completed the following in a good faith effort to meet the March 31, 2019, deadline to implement the spirit of the Rule and the technical requirements of the Rule:

a.

F.S. 119.071(3)(a)2.b.

F.S. 119.071(3)(a)2.b.

attached as Exhibit A to the December Petition.

- b. Maintains a Comprehensive Emergency Preparedness Plan (“CEMP”) that has been approved by the appropriate authorities. As such, there will continue to be safe, accessible, and quality assisted living services provided by Petitioner in accordance with the CEMP. See Exhibit A to the December Petition.
- c. Engaged MPS Engineering, Inc. (“MPS”) to develop a plan for the installation of the new generator and fuel tank. MPS submitted a completed site plan to the Petitioner on February 2, 2018. See Exhibit A of the December Petition.
- d. On April 11, 2018, TAW Power Systems (“TAW”) submitted a purchase order for the generator, fuel tank and materials necessary for installation. A copy of the TAW submittal package is attached to Exhibit A of the December Petition.
- e. On May 7, 2018, Petitioner contracted with Quinco for the installation of the new generator and fuel tank. A copy of the Petitioner’s contract with Quinco is attached to Exhibit A of the December Petition and further explanation is provided at response number four (4) in the December Response.
- f. The completed designs were timely submitted to Broward County for permitting.
- g. On December 27, 2018, Quinco followed up with Broward County regarding updates to remove an existing generator and fuel tank from the facility. See Quinco Timeline attached hereto as Exhibit D and incorporated by reference.
- h. On January 23, 2019, the new generator that is to be installed at the facility completed administrative review and the information was forwarded to technical review at Broward County for approval. See Exhibit D.

- i. On February 1, 2019, Petitioner received its Hazardous Material Management Facility License required to remove the existing fuel tank, and to install the new fuel tank. *See Exhibit E* attached hereto and incorporated by reference.
- j. On February 6, 2019, Petitioner received a Certificate of Approval to Modify Storage Tank License, and Storage Tank License Modification Certificate, which are both required to remove the existing fuel tank and to install the new fuel tank. *See Exhibit F* attached hereto and incorporated by reference.
- k. On February 13, 2019, Broward County informed Quinco that it requires a licensed hazardous waste removal company to prepare the existing fuel tank for removal. This required Quinco to hire EPAC, an environmental consultant, to meet the requirements of Broward County to prepare the existing fuel storage tank for removal. EPAC submitted the necessary forms and authorizations to Broward County. *See Exhibit D.*
- l. On March 15, 2019, Quinco hired World Petroleum to pump the existing fuel tank and dispose of the fuel. *See Exhibit D.*
- m. On March 15, 2019, EPAC provided additional supporting information to Broward County for the removal of the existing fuel tank. *See Exhibit D.*
- n. On March 20, 2019, Broward County requested yet more additional information regarding the existing fuel tank. *See Email from EPAC to Quinco dated March 20, 2019, attached hereto as Exhibit G* and incorporated by reference.
- o. Roy Wilder, Vice President of Estimating for Quinco, and the person coordinating the Petitioner's installation of the new fuel tank and generator, has committed to traveling to Broward County to have an in-person meeting with the regulators

during the week of March 25, 2019, to work through any outstanding issues.

21. The Petitioner will be unable to fully implement the Rule by March 31, 2019, for the following reasons:

- a. Broward County has been unwilling to allow Petitioner to simultaneously proceed with removing the existing fuel tank and the existing generator, and to proceed with installing the new fuel tank and the new generator. Broward County has insisted that the existing fuel tank and existing generator be fully permitted and removed before Broward County will issue the permits for the installation of new fuel tank and new generator.
- b. Quinco has commented that it has not run across this issue or had this level of difficulty in other Florida jurisdictions. The Petitioner, Quinco, and Quinco's subcontractors continue to work in good faith with Broward County to expedite this project.
- c. The new fuel tank and generator have been purchased. Once Broward County issues the permit to install the new fuel tank and new generator, then the fuel tank can be tested, EPA registration can be completed, the tank can be fueled, the new generator can be tested, and AHCA can carry out its inspections. However, these steps cannot take place before Broward County issues a permit for the installation of the new fuel tank and generator.
- d. Finally, it should be noted that contractors like Quinco have been under increased demand and pressure due to the implementation of the Rule. This increased demand has caused a strain on Quinco's resources, however Quinco remains committed to this project as evidenced by Mr. Wilder's commitment to have an

in-person meeting with Broward County regulators during the week of March 25, 2019.

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 CEMP that provides for emergency power. *See* Section 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 the provision of emergency power. As discussed above, Petitioner has taken precautions to ensure temporary safeguards are in place to carry out the purpose of the Rule during the requested variance period. Petitioner will continue to adhere to all other requirements set forth in the Rule while the installation of the new fuel tank and generator is completed.

25. The granting of a temporary variance at this time is not unreasonable considering that Petitioner has made good faith and consistent progress to meet the purpose of the Section 429.41, of the Florida Statutes and to meet the March 31, 2019, deadline for full implementation.

26. If the emergency variance is not granted, Petitioner will suffer an immediate adverse effect as Petitioner may be subject to revocation of license, fines or sanctions. Any fines, sanctions or license revocation may further delay Petitioner's compliance with the Rule and place its residents at unnecessary risk. This would cause Petitioner and its residents substantial

economic hardship. A revocation of Petitioner's license could result in the closure of the facility and the displacement of the Residents whom are entrusted to Petitioner's care. Such disruptions can be detrimental to the health and mental state of the elderly residents at an assisted living facility.

27. Should Petitioner be subject to fines or license revocation then the principles of fairness would be violated because Petitioner has timely hired outside specialists to assist Petitioner in complying with the Rule and through no fault of Petitioner the necessary work has been delayed due to unforeseen permitting issues with Broward County and the increased demand on Quinco's services. Thus the literal application of the Rule will affect Petitioner in a manner significantly different than those entities which did not encounter such unforeseen delays.

28. Petitioner will implement the Rule, however will not be able to do so by March 31, 2019. A temporary 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.

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

30. The Petitioner will suffer an immediate adverse effect unless the variance is granted before March 31, 2019, since the DOEA may choose to impose sanctions or fines for noncompliance with the Rule.

31. Petitioner is requesting a temporary variance until June 30, 2019, to ensure that it meets all requirements of the Rule.

32. For the foregoing reasons, Petitioner requests that the DOEA grant Petitioner's Emergency Petition for Temporary Variance from Rule 58A-5.036, F.A.C. allowing Petitioner

until June 30, 2019, for full implementation of the Rule, and to stay imposition of sanctions and fines throughout the extension period provided by the temporary variance.

Respectfully submitted this 26th day of March 2019.

/s/ Ryan Wierenga
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Emergency Petition for Temporary 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 via email to agencyclerk@elderaffairs.org and to silvers@elderaffairs.org this 26th day of March 2019.

/s/ Ryan Wierenga
RYAN WIERENGA