

**IN THE DEPARTMENT OF ELDER AFFAIRS
STATE OF FLORIDA**

In re Petition for Variance relating to
Presbyterian Retirement Communities,
Inc. d/b/a Westminster Oaks

Case No. _____

License No. AL 6119

**VERIFIED PETITION TO AMEND AND EXTEND PRIOR VARIANCE GRANTED TO
EMERGENCY POWER RULE 58A-5.036(4)(b)**

Petitioner, Presbyterian Retirement Communities, Inc., d/b/a Westminster Oaks, requests that the Department of Elder Affairs (“DOEA” or “Department”) amend and extend the prior variance granted to Petitioner of Emergency Rule 58AER17-1, F.A.C., the predecessor to Rule 58A-5.036, F.A.C. (“Emergency Power Rule”), under Fla. Stat. § 120.542 and Rules 28-104.002, 28-104.004 and 104.005, F.A.C., and approve additional time of 90 days (until September 1, 2019) for compliance by Petitioner with subsection 4(b) of the Emergency Power Rule. Petitioner shows:

1. Presbyterian Retirement Communities, Inc. d/b/a Westminster Oaks (hereafter Petitioner or the facility), is a Florida corporation with its principal place of business in Leon County, Florida. For purposes of this proceeding, its address is in care of its undersigned counsel.

2. Petitioner is licensed by the Agency for Health Care Administration to provide assisted living services (license no. AL 6119). Petitioner has 100 approved beds. Resident quarters and common areas that residents occupy have an area totaling 95,650 square feet.

3. Respondent, Department of Elder Affairs (DOEA), located at 4040 Esplanade Way, Tallahassee, FL 32399-7000, ph. (850) 414-2096, promulgated Emergency Rule 58AER17-1, F.A.C on September 16, 2017.



4. On October 25, 2017, Petitioner submitted a Verified Petition for Emergency Variance from Emergency Rule 58AER17-1, F.A.C. Said petition was granted on November 27, 2017. A copy of the granted variance is attached as Exhibit "A."

5. On March 26, 2018, DOEA adopted the Emergency Power Rule, which purports to implement Fla. Stat. §§ 429.19 and 429.41. The Emergency Power Rule preempts 58AER17-1, F.A.C.

6. The Emergency Power Rule requires all licensed assisted living facilities to implement emergency power source cooling measures, by acquiring one or more alternative power sources, and sufficient on-site fuel storage to cool the facility to a temperature of 80 °F for 96 hours. The Emergency Power Rule also requires inspections and approvals; development and implementation of policies and procedures to safely activate, operate and maintain the equipment and alternate fuel; and staff training.

7. Petitioner has made good faith efforts to protect residents from the concerns that the Emergency Power Rule seeks to address. However, under principles of fairness, Petitioner needs an additional extension to comply to avoid substantial hardship as shown below.

8. The requested extension is through September 1, 2019.

9. Petitioner has an existing approved Emergency Power Plan for residents in case of a power outage.

10. Full compliance by the dates specified in the Emergency Power Rule is impossible and impractical, due to circumstances beyond Petitioner's control, such as shortages and delays due to abnormally high demand resulting from windstorms and the Rule itself, as follows:

Purchase orders for the generators were sent in November of 2017, in effort to comply with the prior Emergency Power Rule, *i.e.* Rule 58-AER17-1, F.A.C. The requested design completion for that order was January 15, 2018.

In March 2018, the Department promulgated Rule 58A-5.036, F.A.C., which resulted in redesign change orders in April 2018. In relation to these change orders, the process of meeting with engineers, discussing, and deciding on various options for the ALF took significant time to develop and ultimately obtain approval, given the scope of the projects involved.¹ Specifically, the redesign process took from April 26, 2018 to September 12, 2018.

The generator and emergency plan was submitted to AHCA on September 13, 2018, but took a while to be approved by AHCA. The generator itself was ordered on November 6, 2018, in anticipation of AHCA approval, for delivery on March 25, 2019. It is worth noting that the generator and other equipment deliveries have been delayed so that the normal 8 to 10 week delivery timeframes have been replaced with 16 to 20 week timeframes. **In this case, generator delivery has now been delayed until August 5, 2019.**

It is anticipated that it will take until September 1, 2019, to come into full compliance. This is a very significant project, with estimated total cost to provide emergency generator capacity (approximately 1,200 kW) to power **F.S. 119.071(3)(a)2.b.**

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

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

at

approximately \$1,500,000.00.

¹ The contractor hired, WSI Construction and Design, has taken on 20 unplanned generator projects (in addition to its customary workload) without allowance for addition resources, to be administered by a staff of nine.

11. Based on consultation with one or more experts, Petitioner has taken the following steps toward full compliance with the Emergency Power Rule: 1) H2 Engineering completed a comprehensive schematic report complete with one-line drawings detailing existing systems²; 2) obtained completed design documents from its consultant engineer; 3) submitted the design and construction documents for approval; 4) obtained approval; 5) ordered the generator; 6) obtained bids for final revised documents; and 7) completed contractor permitting and construction.

12. To complete the project and come into rule compliance Petitioner will: 1) take delivery of the generator (scheduled for August 5, 2019); 2) complete generator installation and commissioning (estimated completion by September 1, 2019); 3) revise existing policies for Post Disaster and Sheltering in Place protocols; and 4) train staff on revised protocols.

13. The facility has made arrangements that provide the residents with an area or areas to congregate that meets the safe indoor air temperature requirements of paragraph (1)(a) of the Emergency Power Rule, for a minimum of ninety-six (96) hours.

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

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

At the present time there are written policies to help reduce temperatures in our health center and assisted living to maintain temperatures below the State mandated maximum.

² This work was started as a 2017 Goal **F.S. 119.071(3)(a)2.b.**

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

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

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

Frequent rounds and logs are used to document the residents' wellbeing, temperatures, and hydration levels. Environmental temperatures are monitored 24-hours per day to assess any heat risk to residents.

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

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

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

14. The facility needs an amendment and extension to its prior variance to allow additional time for full compliance. Substantial hardship will result if time for compliance is not extended. This includes the physical disruption and financial hardship for the facility. Noncompliance risks: substantial per diem fines that further reduce compliance capability; loss of the facility's goodwill with residents, potential residents, and staff; and possible license revocation. This would irreparably injure the facility itself, as well as its residents and their families, if the facility is threatened with penalties or loss of its license, forcing unnecessary discharge or relocation of residents.

15. Principles of fairness support this relief to maintain fair competition when some facilities will be unable to comply as promptly as others.

16. For the reasons stated above, Petitioner will suffer immediate adverse effects unless the variance is issued expeditiously.

17. A variance serves the purpose of the underlying statutes by enabling the facility to continue to perform essential services for residents without threat of disruption or termination, while implementing the requirements of the Emergency Power Rule and working to come into full compliance.

18. The additional time requested for the variance is 90 days, or until September 1, 2019. This extension of variance will be temporary. However, this request is without prejudice to seeking an additional extension of variance if the planned compliance time becomes impossible or impractical due to unforeseen circumstances.

19. Petitioner also requests that time for compliance with the Emergency Power Rule be tolled while this petition for amendment and extension of variance is reviewed and resolved.

20. Petitioner is not aware of any disputed fact issues, and believes this verified petition can be decided promptly on its face, without adversary proceedings.

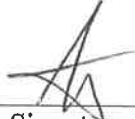
21. Due to the very short time for compliance imposed by the Emergency Power Rule, an emergency amendment and extension is needed to avoid noncompliance with said Rule, which would constitute an emergency for the facility, its residents and their families, causing immediate adverse effects, including the threat of penalties, loss of goodwill, and resulting irreparable injury.

WHEREFORE, Petitioner requests that DOEA take jurisdiction, and determine that the situation presents an emergency for which amendment and extension of the variance is proper;

stay enforcement of the Emergency Power Rule provisions pending resolution of this Petition either as an emergency amendment to variance, or if necessary as a standard variance; promptly review and approve the amendment and extension thereby granting an emergency variance, or standard variance from Emergency Rule 58A-5.036(4)(b), F.A.C.; and allowing Petitioner until September 1, 2019, to complete compliance with the requirements of said Rule or to provide an updated implementation plan for approval to extend the variances; and grant such further relief as may be proper.

VERIFICATION

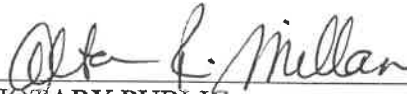
Before me, the undersigned authority, appeared Henry Keith, as Executive Director, who being duly sworn, deposes and states upon his/her oath that the foregoing fact allegations are true and correct.



Affiant Signature

Printed Name of Affiant Henry T. Keith

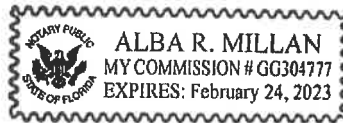
Sworn to and Subscribed before me, this 3 day of April, 2019, at
(City) Orlando, (County) Orange, Florida.



NOTARY PUBLIC

State of Florida at Large

My commission expires: Feb. 24, 2023



Respectfully submitted this 5th day of April, 2019.

NELSON MULLINS BROAD AND CASSEL

By: s/John F. Loar

LEONARD M. COLLINS, ESQ.

Florida Bar No. 423210

JOHN F. LOAR, ESQ.

Florida Bar No. 110386

Nelson Mullins Broad and Cassel

215 S. Monroe Street, Suite 400 (32301)

P. O. Drawer 11300

Tallahassee, Florida 32302

Tel 850-681-6810; Fax 850-681-9792

leonard.collins@nelsonmullins.com

john.loar@nelsonmullins.com

susan.huss@nelsonmullins.com

kathryn.dilworth@nelsonmullins.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Verified Petition To Amend And Extend Prior Variance Granted To Emergency Power Rule 58A-5.036(4)(b), F.A.C. has been hand-delivered to the Agency Clerk, Francis Carbone, Office of the General Counsel, Florida Department of Elder Affairs, 4040 Esplanade Way, Ste. 315, Tallahassee, FL 32399-7000; and a true and correct copy has been served by E-Mail on the parties listed below, this 5th day of April, 2019.

Joint Administrative Procedures
Committee
680 Pepper Bldg.
111 W. Madison Street
Tallahassee, FL 32399
joint.admin.procedures@leg.state.fl.us

s/John F. Loar

Attorney