

IN THE DEPARTMENT OF ELDER AFFAIRS
STATE OF FLORIDA

In re Petition for Emergency Variance relating to
Palm Shores Retirement Community Inc.,
d/b/a Westminster Palms

Case No. _____
License No. AL 5338

VERIFIED PETITION FOR EMERGENCY VARIANCE
FROM EMERGENCY RULE 58AER17-1, F.A.C.

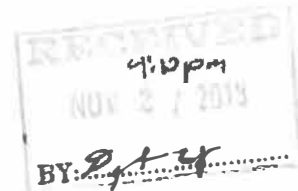
Petitioner, Palm Shores Retirement Community Inc., d/b/a Westminster Palms, requests that the Department of Elder Affairs (“DOEA” or “Department”) amend and extend the prior variance granted to Petitioner of Emergency Rule 58AER17-1, the predecessor to Rule 58A-5.036, F.A.C. (“Emergency Power Rule”), under Fla. Stat. § 120.542 and Rules 28-104.004 and 104.005, F.A.C., and approve additional time of 120 days for compliance by Petitioner with subsection 4(b) of the Emergency Power Rule. Petitioner shows:

1. Palm Shores Retirement Community Inc., (hereafter Petitioner or the facility), is a Florida Corporation with its principal place of business in Pinellas 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. 5338). Petitioner has 60 approved beds. Resident quarters and common areas that residents occupy have an area totaling 35,745 square feet.

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

4. On October 16, 2017, Petitioner submitted a Verified Petition for Emergency Variance from Emergency Rule 58AER17-1, F.A.C. Said petition was granted on November 28, 2017. A copy of the granted variance is attached as Exhibit “A.”



5. On March 26, 2018, DOEA adopted Rule 58A-5.036, F.A.C., entitled Emergency Environmental Control for Assisted Living Facilities (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 through May 1, 2019, will ensure completion prior to the 2019 hurricane season, beginning June 1, 2019, so that the spirit of the rule, *i.e.* emergency power in the event of major power outage caused by a hurricane, is not impeded.

9. Petitioner has an existing approved emergency plan for residents in case of a power outage, which is briefly summarized as follows:

During a power outage, §119.071(3)(a)2.b F.S.

§119.071(3)(a)2.b F.S. Also fans that connect to power by use of a generator are used to cool the temperature inside the facility. Frequent rounds are made to assess residents’ wellbeing, temperatures and hydration. Environmental temperatures are monitored 24-hours per day to

assess any heat risk to residents. The facility maintains an adequate supply of ice, water, juices, and electrolyte beverages for residents. Also, spot coolers are utilized during 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:

The facility requested and was provided a proposal for a feasibility study from Stephen Hutchinson of MPS Engineering, to provide Air Conditioning §119.071(3)(a)2.b F.S.

§119.071(3)(a)2.b F.S. The preferred option for providing Air Conditioning is to connect the §119.071(3)(a)2.b F.S.

§119.071(3)(a)2.b F.S.

§119.071(3)(a)2.b F.S. According to MPS, there is sufficient capacity on the generator to do so, as long as we §119.071(3)(a)2.b F.S.

§119.071(3)(a)2.b F.S. The older 150KW generator is a required "Level 1", since it was originally an AHCA reviewed project back in 2003 (this is a joint ALF/SNF facility).

In March 2018, the Department promulgated Rule 58A-5.036, which resulted in redesign change orders in April of 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, project redesign took from April 26, 2018 to July 18, 2018.

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.

The generator was ordered on September 20, 2018 for delivery on February 6, 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.

Provided is a time line to come into full compliance with the Emergency Power Rule. It is anticipated that it will take until May 1, 2018, to come into full compliance. The project implementation schedule is attached hereto as Exhibit B. This is a very significant project, with estimated total cost to provide Emergency Generator Capacity at \$311,911.

11. Based on consultation with one or more experts, Petitioner has taken the following steps toward full compliance with the Emergency Power Rule: 1) obtained completed design documents from its consultant Engineer; 2) submitted the design and construction documents to AHCA and local emergency agency for approval; 3) obtained approval from AHCA and local agencies; 4) ordered the generator; 5) obtained bids for final revised documents; 6) began contractor permitting and construction (began October 4, 2018). Attached as Exhibit "C" are confirmations from such experts.

12. To complete the project and come into rule compliance Petitioner will: 1) complete contractor permitting and construction (estimated December 26, 2018); 2) take delivery of the generator (scheduled February 6, 2019); 3) generator installation, completion, and commissioning (estimated February 13, 2019); 4) revise existing policies for Post Disaster and Sheltering in Place protocols; and 5) train staff on revised protocols.

13. The facility has made arrangements that provides 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.

§119.071(3)(a)2.b F.S.

Also fans

that connect to power by use of a generator are used to cool the temperature inside the facility. Additional fans will be purchased in order to provide additional cooling for residents. Frequent rounds and logs are used to document residents' wellbeing, temperatures and hydration. Environmental temperatures are monitored 24-hours per day to assess any heat risk to residents. The facility maintains an adequate supply of ice, water, juices, and electrolyte beverages for residents.

§119.071(3)(a)2.b F.S.

14. Petitioner has taken the following steps to notify residents and their legal guardians or health care surrogates that it has applied for a variance from the Emergency Rule:

By November 19, 2018, the facility will have mailed notice to every resident, legal guardian and/or health care surrogate that the facility has applied for a variance from the Emergency Rule from DOEA.

15. The facility needs an amendment and extension to its prior variance to allow additional time for 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.

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

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

18. 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 before the beginning of hurricane season, and thus not impeding the goal of the Emergency Power Rule to limit the multitude of dangerous situations that may come about as a result of a loss of power caused by a hurricane.

19. The additional time requested for the variance is 120 days, or until May 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.

20. 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.

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

22. 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 May 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 Senior VP

Sworn to and Subscribed before me, this 26th day of November, 2018, at
(City) Orlando, (County) Orange, Florida.



NOTARY PUBLIC
State of Florida at Large
My commission expires: March 6, 2022
Printed Name of Notary Public Marcia L. Johnson



Marcia L. Johnson
Notary Public, State of Florida
My Comm. Expires Mar. 6, 2022
Commission No. GG 179726

Respectfully submitted this 27th day of November, 2018.

NELSON MULLINS BROAD AND CASSEL

By 

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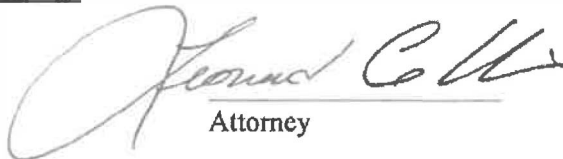
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Counsel for Petitioner

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) 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 27th day of November, 2018.

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Attorney

