

**STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS**

**IN RE: PELICAN MARSH SUBTENANT,
LLC d/b/a ASTON GARDENS AT
PELICAN MARSH'S 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.**

Pelican Marsh Subtenant, LLC d/b/a Aston Gardens at Pelican Marsh (“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 1, 2019, for full implementation of the Rule, and to stay any imposition of fines throughout the extension period provided by the temporary variance.

1. Petitioner operates a 120-bed assisted living facility, License No. 10175, located at 4750 Aston Gardens Way, Naples, FL 34109, 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. For purposes of this proceeding, the address and telephone number of Petitioner for all communications concerning this matter are that of undersigned counsel.

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

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

6. This Emergency Petition is filed pursuant to section 120.542 Florida Statutes and

Chapter 28-104.004, F.A.C.

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

8. 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.

9. Petitioner filed a notice of extension on May 24, 2018. *See* “Extension Notification” attached hereto as Exhibit A and incorporated by reference.

10. On June 8, 2018, the Agency for Healthcare Administration (“AHCA”) granted the extension request, providing notice that the first quarterly report would be due within 90 days of said date.

11. On August 30, 2018, Petitioner filed its first quarterly report as required. *See* Exhibit B attached hereto and incorporated by reference.

12. Petitioner has made good faith efforts to timely implement the plan and fully expected to complete the plan by January 1, 2019, however due to circumstances beyond its control, Petitioner will be unable to fully implement the plan by the January 1, 2019, deadline. This creates a substantial hardship for Petitioner in that the DOEA and/or the AHCA could impose various penalties for noncompliance.

13. 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.

14. In a good faith effort to meet the required January 1, 2019, deadline, Petitioner has completed the following towards plan implementation and to ensure that the purpose of the Rule is met in the interim:

- a. Made arrangements to comply with the Rule during the extension period to ensure resident’s comfort and clinical needs, including maintaining a temperature which does not exceed 81 degrees.

- b. **F.S. 119.071(3)(a)2.b.**
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- c. 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.
- d. Engaged MPS Engineering, Inc. (“MPS”) to develop a plan for the installation of a generator and fuel tank. MPS submitted a completed site plan to the Petitioner on March 28, 2018. A copy of the site plan is attached to Exhibit A.
- e. 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.
- f. On May 7, 2018, Petitioner contracted with Quinco Services, Inc. (“Quinco”) for the installation of the generator and fuel tank. A copy of the Petitioner’s contract with Quinco is attached to Exhibit A.
- g. The completed designs were timely submitted to Collier County on April 27, 2018, and a work permit was issued by the Collier County so the installation of the generator and fuel tank could commence.
- h. The fuel tank has been installed and tested, and the generator has been installed but has not yet undergone full testing and passed the final inspections.

15. The Petitioner will be unable to fully implement the plan by January 1, 2019, for the following reasons:

- a. Due to the increase in demand for Quinco’s services, Quinco has been delayed in fulfilling its job duties to Petitioner. *See* status letter from December 7, 2018,

from Quinco attached hereto as Exhibit C and incorporated by reference.

- b. The fuel tank did not pass its initial inspection, but Quinco has scheduled the fuel tank to be retested the week of December 10, 2018.
- c. Quinco anticipates and that the load bank testing will be scheduled as soon as the EPA registration is completed and after the fuel tank is filled. Once the tank is full, then the generator can be tested. Final AHCA inspection is typically completed three to four weeks after the generator is tested. *See Exhibit C.*

16. 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.*

17. 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 Section 429.41(1)(b), F.S.*

18. 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. 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 generator is completed.

19. 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 January 1, 2019, deadline for full implementation.

20. 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 community 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.

21. 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 Quinco running behind on its installations and an unexpected inspection failure. 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.

22. Petitioner will implement the Rule, however will not be able to do so by January 1, 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.

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

24. 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.

25. Petitioner expects to be in full compliance with the Rule in early 2019, however in an abundance of caution is requesting a temporary variance until June 1, 2019, to ensure that it meets all requirements of the Rule.

26. 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 1, 2019, for full implementation of the Rule, and to stay imposition of fines throughout the extension period provided by the temporary variance.

Respectfully submitted this 14th day of December 2018.

/s/ Ryan Wierenga
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813-444-2007
Attorney for Petitioner

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> this 14th day of December 2018.

/s/ Ryan Wierenga
RYAN WIERENGA