

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT  
STATE OF FLORIDA

MAGNOLIA RETIREMENT HOME, INC.,

Appellant,

v.

CASE NO.: 1D19-1963

AHCA NO.: 2018008393, 2018010207,  
2018010211, 2018010213,  
2018010216, 2018013918,  
18-816-PH, 18-822PH

STATE OF FLORIDA, AGENCY FOR  
HEALTH CARE ADMINISTRATION,

Appellee.

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**RESPONSE TO AMENDED EMERGENCY MOTION TO STAY**

Pursuant to Florida Rules of Appellate Procedure 9.190(e), 9.300, and 9.310, Appellee State of Florida, Agency for Health Care Administration (“AHCA” or “the Agency”), hereby responds to Appellant Magnolia Retirement Home, Inc.’s (“Magnolia”) Amended Emergency Motion to Stay Final Order Pending Appeal and for a Temporary Stay of the Final Order While AHCA Prepares and Files Its Response (“Motion to Stay”), and in opposition, states as follows:

**LEGAL AND FACTUAL BACKGROUND**

**A. Summary of the Law Governing ALFs.**

***1. ALFs and Residents, Generally.***

An “ALF” is “any building or buildings, section or distinct part of a building, private home, boarding home, home for the aged, or other residential facility, whether operated for profit or not, which undertakes through its ownership or

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management to provide housing, meals, and one or more personal services[, including ‘direct physical assistance with or supervision of the activities of daily living and the self-administration of medication and other similar services[,.]’] for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.” § 429.02(5), (17), Fla. Stat.

The laws governing the licensure and regulation of ALFs are administered and enforced by AHCA, and are located at chapters 120, 408, part II, and 429, part I, Florida Statutes, and chapters 58A-5 and 59A-35, Florida Administrative Code, §§ 408.803(1), et seq., 429.01(2), et seq., Fla. Stat.; Fla. Admin. Code R. 58A-5.0161(3). These laws are intended to promote the welfare of and protect vulnerable ALF residents, many of whom include elderly persons and adults with disabilities. § 429.01(2), Fla. Stat.

## ***2. ALF Licensure and Relicensure.***

Under Florida law, an ALF license “is a public trust and a privilege and is not an entitlement ...” § 429.01(3), Fla. Stat. To operate, an ALF must apply for and obtain a standard ALF operating license from AHCA. §§ 408.804(1), (2), 408.806, 408.808(1), 429.07(1), 429.11(1), Fla. Stat.; Fla. Admin. Code R. 58A-5.014(1). A license may only be issued “when the applicant is in compliance with all statutory requirement and agency rules,” meets minimum licensure requirements, background screening requirements, and provides satisfactory proof of its ability to operate and conduct the facility in accordance with the law.

§§ 408.806(5), (7), 408.808(1), 408.809-408.811, 429.07(1), 429.11, 429.14(1)(f), (1)(h), 429.17, 429.174, Fla. Stat. A license expires by operation of law two years from the date of issue. § 408.808(1), Fla. Stat.

To seek licensure renewal, an ALF must file a timely renewal application and fee with AHCA. § 408.806(2)(a), Fla. Stat. Once the application is deemed complete, AHCA must conduct an unannounced biennial licensure survey of the facility to determine if it is compliant with the law. § 408.811(1)(b), Fla. Stat.; Fla. Admin. Code R. 58A-5.0161(3). If violations are found, the procedures below apply. § 408.811(4), (5), Fla. Stat. The act of filing the application extends the validity period of the existing license until AHCA grants or denies the renewal application. Id.

AHCA may deny an application for a new license or licensure renewal for any reason prescribed by law, including failure to meet the minimum requirements for licensure and background screening requirements and past violations of the law governing ALFs. See §§ 408.806(5), (7), 408.808(1), 408.809-408.811, 408.815, 429.07(1), 429.11, 429.14, 429.17, 429.174, Fla. Stat. If AHCA denies licensure renewal, it may extend the existing license for up to 30 days to allow for the safe and orderly discharge of residents. § 408.815(6), Fla. Stat.

### ***3. Procedures that Apply when an ALF Violates the Law.***

In addition to the biennial licensure surveys noted above, AHCA may conduct unannounced on-site surveys and complaint investigations to ensure an ALF

complies with the law. § 408.811(1)-(3), Fla. Stat.; Fla. Admin. Code R. 58A-5.033(1), 58A-5.0161(3), 59A-35.120. Afterwards, AHCA must provide the ALF with a report or “statement of deficiencies” containing its findings and listing any violations of law or “deficiencies” identified. § 408.811(4), Fla. Stat.; Fla. Admin. Code R. 58A-5.033(3), 59A-35.120. If violations are identified, the ALF must correct the violations within 30 days or such other period identified by AHCA (except Class I violations must be corrected within 24 hours). § 408.811(4), (5), Fla. Stat.; Fla. Admin. Code R. 58A-5.033(3)(a)3.-4., (3)(b), (3)(c), 59A-35.120(1)(a). AHCA may conduct follow-up surveys to verify that correction has occurred. § 408.811, Fla. Stat.; Fla. Admin. Code R. 58A-5.033(1)(a)7.

AHCA may also charge any Class I, II, or Unclassified violations, any uncorrected Class III and IV violations, and any background screening violations by administrative complaint, and may seek penalties ranging from fines to license suspension or revocation. §§ 408.811, 408.813-408.815, 429.14, 429.15, 429.19, Fla. Stat.; Fla. Admin. Code R. 58A-5.033(3)(a)3.-5., (5).

#### ***4. Classes of Violations and Available Sanctions.***

Violations are classed according to their nature and gravity of potential effect on clients (i.e. persons receiving ALF services), as follows:

(2)(a) Class “I” violations are those conditions or occurrences related to the operation and maintenance of a provider or to the care of

clients which the agency determines present an imminent threat to the clients of the provider or a substantial probability that death or serious physical harm would result therefrom. ...

(b) Class “II” violations are those conditions or occurrences related to the operation and maintenance of a provider or to the care of clients which the agency determines directly threaten the physical or emotional health, safety or security of the clients, other than class I violations. ...

(c) Class “III” violations are those conditions or occurrences related to the operation and maintenance of a provider or to the care of clients which the agency determines indirectly or potentially threaten the physical or emotional health, safety or security of clients, other than class I or class II violations. ...

(d) Class “IV” violations are those conditions or occurrences related to the operation and maintenance of a provider or to the required reports, forms, or documents that do not have the potential of negatively affecting clients. These violations are of a type that the agency determines do not threaten the health, safety, or security of clients. ...

§ 408.813(2)(a)-(d), Fla. Stat. See §§ 408.803(6) (defining “clients”), 429.19(2) (adopting § 408.813’s classes), Fla. Stat. Additionally, “unclassified” violations include: “(a) Violating any term or condition of a license. (b) Violating any provision of [chapter 408, part II], authorizing statutes, or applicable rules. (c) Exceeding licensed capacity. [and] (d) Providing services beyond the scope of the license. ...” § 408.813(3)(a)-(d), Fla. Stat.

Violations by ALFs carry mandatory fines, as set forth at section 429.19, Florida Statutes. § 429.19(2)-(5), Fla. Stat. Some violations are also grounds for license revocation and/or denial. See §§ 408.808(1), 408.810, 408.812, 408.815,

408.831, 429.11, 429.14, 429.17, 429.19, Fla. Stat.

**B. Facts of this Case.**

Magnolia is a 57-bed ALF with limited mental health specialty services, located at 149 Magnolia Avenue, Sebring, Florida, 33870, license number AL4947. (App.<sup>1</sup> A 5; App. G 74, 78). It is subject to AHCA's licensing and regulatory authority, pursuant to chapters 408, Part II, 429, Part I, 58A-5, and 59A-35.

On October 24, 2017, AHCA surveyors conducted a complaint investigation/survey at Magnolia's facility and identified: two (2) Class III deficiencies related to resident care, rights, facility procedures, and staffing standards; and three (3) Unclassified deficiencies based on the failure to maintain or comply with Level II criminal background screening requirements. (App. B 6-26).

On January 4, 2018, AHCA surveyors conducted a follow-up survey of Magnolia's facility and found the deficiencies identified during the October 24, 2017 compliant investigation/survey had been corrected. (App. C 27).

On April 17, 2018, AHCA conducted a second initial complaint survey at Magnolia's facility and identified three (3) Class III deficiencies related to resident care, resident rights, facility procedures, training, nutrition, food service,

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<sup>1</sup> This Response includes an Appendix. The Appendix to this Response is referenced as "App.," followed by any appropriate Appendix letter and page numbers.

and dietary standards. (App. D 28-30). Specifically, AHCA's surveyors found the following violations: (1) mold and cockroaches in and around the facility and a hole in the exit door to the facility; (2) that the facility's administrator had failed to ensure that its food service manager remained up-to-date on training for nutrition and food services; and (3) also that facility menus were not reviewed annually by a licensed nutritionist/dietician. (App. D 28-30).

On May 8, 2018, AHCA's surveyors conducted a third initial complaint investigation/survey of Magnolia's facility and identified one Class III violation related to staffing standards and one Class II violation related to physical plant conditions and hazards to a safe living environment. (App. E 31-39). As to the Class III violation, AHCA's surveyors found that staff did not meet the minimum hours of direct care for residents. (App. E 31-35). As to the Class II violation, many rooms had been damaged by Hurricane Irma or were inaccessible: there were leaks, stains, smells, mold, bags of garbage, no hot water in some resident rooms, hanging electrical cords, holes in walls and ceilings, and other items in need of repair. In addition, the courtyard to the facility had piles of building material, old furniture, and broken light coverings that were accessible to residents, thus presenting a safety hazard. Also, Magnolia had failed to receive a satisfactory result during an inspection from the local Health Department. (App. E 35-39).

On June 27, 2018, AHCA conducted a fourth initial complaint

investigation/survey, as well as follow-up to the April 17, 2018 and May 8, 2018 complaint investigations/surveys, and identified: three (3) new Class III deficiencies related to medication storage and disposal, staff in-service training, and emergency plan approval; one (1) new Unclassified deficiency related to background screening requirements; two (2) uncorrected Class II deficiencies related to resident rights, facility procedures, physical plant conditions, and hazards to a safe living environment; and two (2) uncorrected Class III deficiencies related to dietary standards and staffing standards. (App. F 40-73).

On July 27, 2018, AHCA received Magnolia's application for the renewal of its ALF license. (App. G 74-84).

On August 13, 2018, AHCA sent Magnolia a letter notifying it that the license renewal application was incomplete, listing the omitted information (including documentation showing the facility had received a satisfactory fire safety inspection and also a satisfactory group home sanitation inspection within the previous 365 days conducted by the county Health Department, and also documentation showing that the facility had a surety bond, as required by section 408.806(3)(a)-(3)(b), Florida Statutes), and requiring it to submit the omitted required information within 21 days. (App. H 85-87).

On August 20, 2018, AHCA's surveyors conducted a combined standard biennial relicensure survey (with limited mental health) of Magnolia's facility, a second follow up to the May 8, 2018 complaint investigation/survey, and a first

follow-up to the June 27, 2018 complaint investigation/survey. (App. I 88-110). AHCA's surveyors identified: four (4) new Class III deficiencies related to staffing standards, dietary standards, and training requirements for limited mental health and do not resuscitate orders; and four (4) uncorrected Class III deficiencies for staffing standards, physical plant conditions, and hazards to a safe living environment, staff in-service training, and emergency plan approval. (App. I 88-110).

On August 29, 2018, AHCA filed an Administrative Complaint ("AC") against Magnolia for the deficiencies found in the surveys and sought administrative fines and fees. (App. J 111-42). The AC notified Magnolia of its right to request an administrative hearing under chapter 120, Florida Statutes, within 21 days of receipt, and included a "check the box" Election of Rights form with instructions for its completion. (App. J 141-42).

On September 25, 2018, AHCA issued a Notice of Intent to Deny Renewal Application ("NOID") notifying Magnolia that it intended to deny the license renewal application based on the failure to provide the documents requested in the August 13, 2018 omissions letter and also on the deficiencies found during AHCA's surveys. (App. K 143-47). The NOID notified Magnolia of its right to request an administrative hearing under chapter 120, Florida Statutes, within 21 days of receipt, and included a "check the box" Election of Rights form with instructions for its completion. (App. K 145-47).

On or about October 12, 2018, Magnolia completed and returned the Election of Rights form for the AC, having selected:

**OPTION TWO (2) [X] I admit to the allegations of fact contained in the Administrative Complaint, but wish to be heard at an informal proceeding** (pursuant to Section 120.57(2), Florida Statutes) where I may submit testimony and written evidence to the Agency to show that the proposed administrative action is too severe or that the fine should be reduced.

(App. L 148-50).

On October 16, 2018, AHCA's surveyors conducted a follow-up to the August 20, 2018 biennial licensure survey and also a follow-up to previous complaints, and identified two (2) uncorrected Class III deficiencies related to emergency plan approval and training in limited mental health. (App. M 151-56).

On October 17, 2018, Magnolia completed and returned the Election of Rights form for the NOID, having selected:

**OPTION TWO (2) [X] I admit to the allegations of fact contained in the Notice of Intent . . . or other proposed action by AHCA, but I wish to be heard at an informal proceeding** (pursuant to Section 120.57(2), Florida Statutes) where I may submit testimony and written evidence to the Agency to show that the proposed administrative action is too severe or that the fine should be reduced.

(App. N 157-58).

On October 17-18, 2018, the AC and NOID cases were referred to an AHCA Hearing Officer for an informal hearing, pursuant to section 120.57(1) and Magnolia's completed Election of Rights forms. (App. O 159-60; App. P 161-62).

On December 3, 2018, a Notice of Telephone Hearing and Order of Prehearing Instructions was rendered. (App. Q 163-65).

On December 19, 2018, AHCA's surveyors conducted a second follow-up to the August 20, 2018 biennial survey, and a third follow-up to the April 17, 2018, May 8, 2018, and June 27, 2018 complaint investigations/surveys. (App. R 166-74). AHCA's surveyors identified three (3) uncorrected Class III deficiencies related to staffing standards, physical plant conditions, hazards to a safe living environment, and emergency plan approval. (App. R 166-74).

On January 3, 2019, AHCA and Magnolia filed a Joint Response to the informal Hearing Officer's December 3, 2018 Order. (App. S 175-283). In the Joint Response, the Parties stipulated as to the issues, material facts, applicable law, and exhibits. (App. S 175-283). The Parties also explained their respective positions, with AHCA noting that it would present argument and testimony only to the extent necessary to rebut any mitigating evidence presented by Magnolia. (App. S 175-283). On January 31, 2019, an informal telephonic hearing was held to address both the AC and the NOID. (App. T 284). The parties presented witness testimony and documentary evidence for the Hearing Officer's consideration. (App. S 204-83; App. T 284-85). The hearing was recorded but has not been transcribed; nor has Magnolia sought to have it transmitted to this Court for consideration.

On March 13, 2019, the Hearing Officer rendered a Recommended Order. (App. T 284-89). Therein, the Hearing Officer explained that in requesting an informal hearing, Magnolia had admitted “all material allegations of fact” in the AC and the NOID but had not presented sufficient evidence to warrant mitigation of the sanctions sought by AHCA. (App. T 285, 288). Regarding the evidence presented by Magnolia in mitigation, the Hearing Officer found:

5. Respondent’s owner, Manuel Domisiw, testified that the majority of deficiencies at issue, as cited in the administrative complaint and Notice of Intent, were caused by Hurricane Irma. Respondent introduced Exhibit “A”, a document produced by the Federal Emergency Management Agency, form DR-4337, that recites the declaration of a major disaster on September 10, 2017 as a result of the hurricane, and the general effects and damages resulting therefrom. Mr. Domisiw further testified that one third of Respondent’s facility’s roof was “lifted” and damaged by wind during the storm.

6. The gist of Mr. Domisiw’s testimony, in general, was that most or all deficiencies resulted from the damaged roof, compounded by a significant delay in repairing the roof, due to market conditions that resulted in an allegedly inflated initial repair estimate of \$96,127.00, and that the other damaged areas of the facility could not be repaired until the roof was repaired. He also testified that soon thereafter, he was eventually able to engage a different roofing contractor to repair the roof at a cost of \$13,760.00. The initial estimate was received on June 13, 2018, more than nine months after the hurricane damaged the roof, and the second estimate of \$13,760[.]00 was dated June 27, 2018. The roof repair was completed on or about September 27, 2018, more than one year after the roof was damaged.

7. Of significance, Mr. Domisiw also testified that the Respondent had no wind damage insurance on the facility. One might reasonably conclude that, had the wind damage been insured, the inflated costs associated with the tight market for repairs, would have been absorbed by the insurance carrier as an implied provision of the insurance contract requiring them to act, and possibly been moderated by a contract between the insurer and one or more roofers

to repair many properties, and without the delay that Respondent experienced waiting for a “reasonable” roofing contractor to become available. The lack of insurance coverage in a geographic area that historically experiences hurricane damage, suggests that the delay, and the continuing deficiencies resulting therefrom, were caused in part by Respondent’s economy, a risk that Respondent chose to take, for economic benefit. There is no testimony or record evidence to suggest otherwise.

8. Meanwhile, as the property remained unrepaired, the Agency was required to discharge its delegated responsibility to ensure that residents of such licensed facilities, including Respondent’s, received the level of care required by Florida law to be provided by licensees to residents, and that the required care was delivered in conditions that complied with legal requirements for such facilities. While the Agency may exercise some modicum of patience and reasonable forbearance under such circumstances as are presented by the occurrence of a hurricane causing major damage, it may not, however, abdicate its responsibility to protect the health, safety, and welfare of the residents entrusted to licensees, as its first and foremost obligation.

9. Testimony, and the occurrence of multiple surveys that were conducted by the Agency, suggest that the facility remained open continuously after it was damaged, and that residents continued to reside there. There was no testimony to indicate that residents, or their payor sources, did not continue to pay all rents when due, and the Agency continued to conduct periodic surveys, following up on earlier surveys that found deficiencies, and finding uncorrected deficiencies, many of which compromising the health, safety, and welfare of the residents. See generally, the allegations set forth in the administrative complaint and Notice of Intent.

10. By knowingly failing to purchase wind damage insurance, Respondent positioned itself to be susceptible to the prolonged delays in repairing the roof that ultimately resulted in the many, varied, and continuing deficiencies identified by the Agency during the several surveys. Yet Respondent ostensibly continued to collect full rents and enjoy the savings afforded by not paying substantial premiums for wind damage insurance. The scenario does not suggest that equity be brought to bear on behalf of Respondent.

11. In addition, many of the cited deficiencies cited [sic] are not logically connected in any manner to the hurricane damage, notably background screening violations, staffing violations, and dietary violations.

12. In light of the foregoing, Respondent has not demonstrated mitigation of the sanctions imposed by the administrative complaint and Notice of Intent.

13. The allegations of the Agency's administrative complaint to impose the fines set forth therein, and Notice of Intent to deny renewal of the Respondent's license to operate an assisted living facility, are sustained by the admitted facts, and the sanctions imposed are appropriate.

(App. T 286-88). The Hearing Officer recommended that AHCA enter a Final Order imposing the fines and fees set forth in the AC and also denying Magnolia's license renewal application, based on the unresolved omissions from its application and on the deficiencies found during AHCA's many surveys of the facility. (App. T 288).

On March 21, 2019, Magnolia filed an "Objection to Recommended Order or Motion for Reconsideration," which the Hearing Officer denied on the same day. (App. U 348-52; App. V 353-54).

On April 29, 2019, AHCA rendered a Final Order that adopted the Hearing Officer's findings of fact and conclusions of law, and denied Magnolia's application for the renewal of its ALF license. (App. W 355-67). The Final Order expressly extended the expiration of Magnolia's license "for 30 days for the sole purpose of allowing the safe and orderly discharge of clients," pursuant to section 408.815(6), Florida Statutes. (App. W 356).

On May 22, 2019, Magnolia filed, with AHCA, a Motion to Stay Final Order or Alternatively to Vacate and Enter a New Final Order." (App. X 368-70).

On May 23, 2019, AHCA filed its Response in opposition to the Motion, and on May 24, 2019, the Motion was denied. (App. Y 371-92; App. Z 393-94).

On May 29, 2019, Magnolia filed three documents related to AHCA's April 29, 2019 Final Order. First, Magnolia filed, with AHCA, a Motion for Rehearing or Reconsider of the April 29, 2019 Final Order. (App. AA 395-466). Second, Magnolia filed its appeal of the Final Order to this Court, and third, Magnolia filed its Emergency Motion to Stay. (App. BB 467-81; App. CC 482-554).

On its own motion, this Court rendered an Order temporarily staying the Final Order and ordering Magnolia to file a Supplemental Appendix containing the Motion to Stay filed with AHCA and the May 24, 2019, Order Denying Stay. (App. DD 554).

On May 30, 2019, Magnolia filed its Supplemental Appendix. (App. EE 555-88). Magnolia also filed a Motion for Leave to File an Amended Emergency Motion to Stay and an Amended Emergency Motion to Stay. (App. FF 589-601; App. GG 602-11).

On May 31, 2019, this Court rendered an Order granting in part Magnolia's Motion for Leave to File an Amended Emergency Motion to Stay but denying its request for a temporary stay. (App. HH 612). This Court ordered AHCA to respond to Magnolia's Amended Emergency Motion to Stay by 5:00 pm on Wednesday, June 5, 2019. (App. HH 612).

AHCA hereby responds to this Court's May 31, 2019 Order and in opposition to Magnolia's Amended Emergency Motion to Stay, states as follows.

### **Argument**

#### **A. Summary of the Law Governing Stays.**

"The purpose of an appellate stay is to maintain the status quo in the lower tribunal while an appeal proceeds." QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc., 94 So. 3d 541, 555 (Fla. 2012).

*Stays of final orders, generally.* A person who files a notice of administrative appeal or petition for review with a district court of appeal may file a motion to stay the order to be reviewed with "either with the lower tribunal or, for good cause shown, with the court in which the notice or petition has been filed." Fla. R. App. P. 9.190(e)(2)(A). Neither the filing of a notice of appeal nor the filing of the motion to stay operates as an automatic stay. § 120.68(3), Fla. Stat.; Fla. R. App. P. 9.190(e)(1), (2)(A). A lower tribunal or district court of appeal may condition any stay granted upon appropriate terms. Fla. R. App. P. 9.190(e)(2)(A), 9.310.

*Stay Factors.* The "[f]actors which are considered ... in deciding whether to grant a stay include the moving party's likelihood of success on the merits, and the likelihood of [irreparable] harm should a stay not be granted." Perez v. Perez, 769 So. 2d 389, 391 n.4 (Fla. 3d DCA 1999). Accord Mitchell v. State, 911 So. 2d 1211, 1219 (Fla. 2005) (employing the same "principal considerations" in

deciding whether to vacate a stay and specifying that the harm must be both likely and irreparable). Where the requested stay will enjoin an agency action, the court should also consider whether the moving party has demonstrated: (1) an irreparable harm, or likelihood of irreparable harm, if the injunction is not granted; (2) a clear legal right to the requested relief; (3) unavailability of an adequate remedy at law; and (4) whether the public interest will be served. See Weekley v. Pace Assembly Ministries, Inc., 671 So. 2d 220, 220 (Fla. 1st DCA 1996); see also State, Ag. for Health Care Admin. v. Cont'l Car Servs., Inc., 650 So. 2d 173, 175 (Fla. 2d DCA 1995).

**B. Magnolia's Motion to Stay Should Be Denied Because It Is Legally Insufficient.**

As explained further below, Magnolia has failed to demonstrate the factors required by law for a stay that has the effect of enjoining Agency action. As such, its Motion to Stay should be denied.

***1. Magnolia does not have a clear legal right to a stay.***

Pursuant to the express language of section 429.01(3), a license to operate an ALF in Florida is “a public trust and a privilege and is not an entitlement” and this principle “should guide the trier of fact or trier of law at any administrative proceeding or court action initiated by [AHCA] to enforce [chapter 429, part I].” To receive a license – whether upon initial application or renewal – the Legislature has expressly required an applicant for licensure to meet minimum

licensure requirements; if these requirements are not met, AHCA will not grant the license. §§ 408.806(5), (7), 408.808(1), 408.809, 408.810, 408.811, 429.11, 429.14(1)(f), (1)(h), 429.17, 429.174, Fla. Stat. Additionally, the Legislature has delegated to AHCA a measure of discretion to determine the fitness of licensure applicants, including the discretion to deny an ALF license to an applicant with a history of past deficiencies. §§ 408.810, 408.815(1), (5), 429.01(2), (3), 429.14, 429.17(2), Fla. Stat. And, this is especially true in a case such as this where Magnolia submitted a licensure renewal application, and had at best, the “hope” that its license would be renewed. Terrell Oil Co. v. Dep’t of Transp., 541 So. 2d 713 (Fla. 1st DCA 1989); Silver Show, Inc. v. Dep’t of Bus. & Prof’l Reg., 763 So. 2d 348 (Fla. 4th DCA 1998); Beach Club Adult Center, LLC (“Beach Club”) v. Ag. for Health Care Admin., 2018 WL 3151252 (Fla. 1st DCA June 28, 2018).

Together, these statutes and cases clearly establish that Magnolia has no legal expectation or right to obtain relicensure where, as here: (a) AHCA’s surveyors found numerous deficiencies at the facility during the surveys and revisits, such that minimum requirements of law for licensure were not met; and (b) AHCA had statutory discretion to deny Magnolia’s licensure renewal application based on a demonstrated lack of fitness. §§ 408.810, 408.815(1), (5), 429.01(2), (3), 429.14, 429.17(2), Fla. Stat.

***2. Magnolia is unlikely to succeed on the merits of its appeal.***

Magnolia is unlikely to succeed on the merits of its appeal – one of the

essential factors discussed in the Perez case. Indeed, Magnolia has no reasonable chance of success on the merits.

Florida law is clear that “[w]hen a party waives the right to challenge the factual allegations of an administrative complaint, either by requesting an informal hearing pursuant to section 120.57(2), Florida Statutes, or by failing to respond to the complaint at all, the facts of the complaint are deemed to be admitted.” Nicks v. Dep’t of Bus. & Prof’l Reg., 957 So. 2d 65, 67 n.1 (Fla. 5th DCA 2007) (citing Fla. Admin. Code R. 28-106.111(2) & (4); § 120.569(2)(c), Fla. Stat.; Autoworld of America Corp. v Dep’t of Highway Safety, 754 So. 2d 76, 77 (Fla. 3d DCA 2000) (recognizing that when the facts alleged in the administrative complaint are not disputed “[t]his leaves only conclusions of law to be drawn as to whether the admitted facts constitute a violation of the statutes as charged and penalties to be imposed”); Hime v. Fla. Real Estate Comm’n, 61 So. 2d 182, 183 (Fla. 1952)).

Here, section 429.14 expressly authorizes AHCA to deny a license to a licensee for: (1)(f) “Failure to comply with background screening standards of this part, s. 408.809, or chapter 435”; (1)(h) “Failure of ... the licensee during relicensure ... to meet the minimum license requirements of [chapter 429, part I], or related rules, at the time of license application or renewal”; and (1)(k) “Any act constituting a ground upon which application for a license may be denied.” Id. Similarly, section 408.815 authorizes AHCA to deny a license for: (1)(c) “[a]

violation of this part, authorizing statute, or applicable rules” and (1)(d) “[a] demonstrated pattern of deficient performance.” Also, section 408.806(3)(b) requires AHCA to deem a licensure renewal application as “incomplete” when there are unresolved omissions within 21 days after AHCA’s request; an incomplete application is “withdrawn from further consideration” and denied. §§ 408.806(3)(b), 429.27(2), Fla. Stat.; Fla. Admin. Code R. 58A-5.021(3), 58A-5.016(5). Magnolia stipulated that these statutory sections were applicable in the Joint Response to Initial Order. (App. S 178-87, 196-99).

By requesting an informal administrative hearing and via the Joint Response to Initial Order, Magnolia admitted that, over several months and multiple complaint investigations/surveys and follow-up surveys, it: failed to correct widespread hurricane damage, including mold, garbage, stains, debris, holes, water damage, and other threats to physical or emotional health, safety, or welfare (a Class II violation); failed to correct deficiencies related to staffing standards, training requirements, dietary standards, and criminal background screening (all uncorrected Class III violations subject to sections 408.809, 408.815, and 429.14, Florida Statutes); and failed to timely provide the documents that AHCA requested in its omissions notice. (App. L 148-50; App. N 157-58; App. S 175-78, 193-96; App. T 285).

Thus, Magnolia agreed that AHCA had grounds to deny its licensure renewal application, but argued that should consider evidence of mitigation.

(App. L 148-50; App. N 157-58; App. S 175-78, 193-96; App. T 285). While AHCA is certainly permitted to consider mitigation at an informal hearing, it is not required to mitigate the denial of a license. See §§ 408.815(1), 429.14(1)(f), (1)(h), (1)(k), Fla. Stat. In this case, the informal Hearing Officer found the evidence of mitigation presented by Magnolia was unpersuasive. (App. T 288).

Specifically, the Hearing Officer considered that:

- Magnolia lacked wind damage insurance coverage in a geographic area that historically experiences hurricanes;
- Magnolia's delays and continuing deficiencies were a risk that Magnolia chose to take for its economic benefit;
- Magnolia remained open continuously after it was damaged, and residents continued to reside there even though the damage compromised their health, safety, and welfare;
- There was no testimony to indicate that residents, or their payor sources, did not continue to pay all rents to Magnolia when due;
- Magnolia knew or should have known that in failing to purchase the necessary insurance, it would be susceptible to prolonged delays in repairing the roof that ultimately resulted in the deficiencies identified by the Agency during its surveys;
- Magnolia ostensibly continued to collect full rents and enjoy the savings afforded by not paying substantial premiums for insurance; and
- Magnolia's other deficiencies were not connected to hurricane damage (background screening violations, staffing standards, training requirements, and dietary violations), and Magnolia could still be cited for them.

(App. T 286-88).

For these reasons, Magnolia should not prevail on the merits of its appeal.

### ***3. Public policy does not support a stay.***

Similarly, there are strong public policy reasons for denying a stay because conditions at the facility present a current danger to the health, safety, and welfare

of residents and the public.

ALF residents are a vulnerable population, often consisting of elderly and disabled adults with significant mental and/or physical disabilities. § 429.01(2), Fla. Stat. Since this group is at a substantial risk of harm and abuse, AHCA has a duty to protect their health, safety, and welfare. Id. Indeed, the Legislature has expressly stated in statute that an ALF license is “a public trust and a privilege” and “not an entitlement.” § 429.01(3), Fla. Stat. And here, Florida’s ALF law does not permit AHCA to grant licenses to facilities that fail to complete satisfactory surveys, fail to satisfy the minimum requirements of law for licensure, and fail to correct survey violations and/or actively demonstrate deficient performance. §§ 408.815(1)(c), (1)d), 429.14(1)(f), (1)(h), (1)(k), Fla. Stat.; Supra Legal and Factual Background at A.1.-A.4.

Although Magnolia argues that the community has “rallied around” its attempts to stay open, the most recent monitoring survey of the facility has found that Magnolia is still in an unsafe condition. (App. II 613-17). Contra Motion to Stay at ¶ 24. Namely, the roof still leaks, and the interior of the facility is in disrepair. (App. II 613-17). While Magnolia has provided anecdotal evidence (social media posts, photographs, letters, and articles) to show support for the facility, this information is irrelevant to the issue of whether committed the violations that formed the basis for the AC and the NOID. (App. J 111-42; App. K 143-47). And, even if this information was relevant, Magnolia has not

demonstrated that physical conditions at the facility are now safe. (App. II 613-17). Contra Motion to Stay at ¶ 24 and Magnolia’s Appendix.

As previously explained, ALFs are subject to AHCA’s licensing and regulatory authority, pursuant to chapters 408, Part II, 429, Part I, 58A-5, and 59A-35; Supra Legal and Factual Background at A and B. Section 429.14 expressly authorizes AHCA to deny a license and/or impose administrative fines for: (1)(f) “Failure to comply with background screening standards of this part, s. 408.809, or chapter 435”; (1)(h) “Failure of ... the licensee during relicensure ... to meet the minimum license requirements of [chapter 429, part I], or related rules, at the time of license application or renewal”; and (1)(k) “Any act constituting a ground upon which application for a license may be denied.” Id. Further, section 408.815 authorizes AHCA to deny a license for: (1)(c) “[a] violation of this part, authorizing statute, or applicable rules” and (1)(d) “[a] demonstrated pattern of deficient performance.” Id.

Here, Magnolia not only failed to meet the minimum requirements of law for ALF licensure but also committed repeated violations related to staffing standards, training, dietary standards, background screening, and emergency plan approval. §§ 408.809(1)(e), (2), 408.815(1)(c), (1)d, 429.075(1), 429.14(1)(f), (1)(h), (1)(k), 429.174, 435.06, Fla. Stat.; Fla. Admin. Code 58A-5.019(3), 58A-0191(9), (11), 58A-5.020(2), 58A-5.026(2).

And, Magnolia’s deficiencies are harmful to the public interest because

ALF residents are entitled to appropriate levels of care and protection under the Resident Bill of Rights prescribed by section 429.28, Florida Statutes. This statute provides that every resident “shall have the right to: [(1)](a) Live in a safe and decent living environment, free from abuse and neglect[;]” and [(1)](j) Access to adequate and appropriate health care consistent with established and recognized standards in the community.” Id.

For these reasons, public policy does not support a stay. Additionally, for these reasons, conditions at the facility constitute a probable danger to residents’ health, safety, and welfare, and to the health, safety, and welfare of the public at large. Thus, this Court should deny the request for stay.

**C. Alternatively, Any Stay Should Include Conditions.**

Alternatively, should this Court determine that a stay is appropriate, AHCA requests this Court impose/recognize the following conditions:

a) Magnolia will not admit any new clients to its ALF while this appeal remains pending; and

b) AHCA shall retain regulatory authority over Magnolia, pursuant to chapters 408, Part II, and 429, Part III, Florida Statutes, and chapter 58A-6 and 59A-35, Florida Administrative Code, while this appeal remains pending.

These conditions may be imposed pursuant to section 120.68(3), and rule 9.190(e)(3), and are necessary to protect the health, safety and welfare of the residents, persons who may become residents, and of the State.

WHEREFORE, AHCA respectfully requests this Honorable Court deny the Motion to Stay.

Alternatively, AHCA requests this Court impose the following conditions (also described above) on any stay that it may grant:

a) Magnolia will not admit any new clients to its ALF while this appeal remains pending; and

b) AHCA shall retain regulatory authority over Magnolia, pursuant to chapters 408, Part II, and 429, Part III, Florida Statutes, and chapter 59A-6 and 59A-35, Florida Administrative Code, while this appeal remains pending.

### **CONCLUSION**

For all of the above-stated reasons, AHCA respectfully requests that this Court deny Magnolia's Amended Emergency Motion to Stay.

Respectfully submitted by,

*/s/ Nicholas A. Merlin*

NICHOLAS A. MERLIN

Senior Attorney

Florida Bar No. 0029236

Agency for Health Care

Administration

2727 Mahan Drive, MS#3

Tallahassee, Florida 32308

Tel. (850) 412-3667

Fax (850) 922-6484

**Primary E-mail:**

Nicholas.Merlin@ahca.myflorida.com

**Secondary E-mails:**

Tracy.George@ahca.myflorida.com

Catherine.Belmont@ahca.myflorida.com

**CERTIFICATE OF SERVICE**

I CERTIFY that the foregoing document has been furnished by Electronic Mail to counsel for Appellant, Dwight O. Slater, Esquire, at [dwright@cohnslater.com](mailto:dwright@cohnslater.com), Cohn Slater, P.A., 336 E. College Avenue, Suite 300, Tallahassee, Florida 32301, on this 5th day of June, 2019.

*/s Nicholas A. Merlin*  
NICHOLAS A. MERLIN

**CERTIFICATE OF COMPLIANCE**

I CERTIFY that the foregoing document complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l).

*/s Nicholas A. Merlin*  
NICHOLAS A. MERLIN