

**STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD**

IN RE:)
)
PROPOSED RENOVATION PROJECT FOR) **GMCB-013-16CON**
THE PINES AT RUTLAND CENTER FOR)
NURSING AND REHABILITATION, RUTLAND, VT)

RESPONSES TO THIRD SET OF INFORMATION REQUESTS
DATED JANUARY 18, 2017

The Applicants respond to the Green Mountain Care Board’s second set of information requests as follows.

Request No. 1

Please explain how the proposed renovation project complies with recent federal regulations found at 42 CFR §§ 483.90(a)(7), 483.90(e), and 483.90(f). In the alternative, please explain why the proposed renovations are exempt from these new regulations.

Background

This Request references the January 6, 2017 letter from the Long Term Care Ombudsman Project (“LTCOP”). In that letter, the LTCOP raises the following points:

“the existing four-bed bedrooms in The Pines at Rutland Center will not be renovated in accordance with recent regulations. In the 11/10/2016 Project Narrative, the applicant proposes to modify the “four existing 4-bed bedrooms (2 on each floor) by constructing full height partitions that will split each bedroom in two in order to afford a bit more resident privacy. The proposed configuration will create two semi-private zones within each of the existing 4-bed bedroom spaces.”

During a recent visit to the facility, Ombudsmen observed that partitions put into place a few years ago to divide the 4-bed bedrooms on the second floor are not full height partitions. In addition, all four residents on the second floor still have to share a bathroom. However, recent regulations preclude the proposed renovations from being the same as what was put into place a few years ago.

Those new Federal Nursing Home Regulations, effective November 28, 2016, include the following requirements:

[42 CFR §483.90 (e)]

(1) Bedrooms must-

(i) Accommodate no more than four residents. For facilities that receive approval of construction or reconstruction plans by State and local authorities or are newly certified after November 28, 2016, bedrooms must accommodate no more than two residents.

(ii) Measure at least 80 square feet per resident in multiple resident bedrooms, and at least 100 square feet in single resident rooms;

(iii) Have direct access to an exit corridor;

(iv) Be designed or equipped to assure full visual privacy for each resident; [and]

(v) In facilities initially certified after March 31, 1992, except in private rooms, each bed must have ceiling suspended curtains, which extend around the bed to provide total visual privacy in combination with adjacent walls and curtains.

In addition, 42 CFR §483.90(a)(7) requires that every sleeping room have an outside window or outside door. Finally, regarding bathroom facilities, 42 CFR §483.90(f) requires:

Each resident room must be equipped with or located near toilet and bathing facilities. For facilities that receive approval of construction from State and local authorities or are newly certified after November 28, 2016, each residential room must have its own bathroom equipped with at least a commode and sink.

Response:

42 CFR § 483.90(a)(7), Outside Windows

The facility must be designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel and the public.

(a) Life safety from fire.

* * *

(7) Buildings must have an outside window or outside door in every sleeping room, and for any building constructed after July 5, 2016 the sill height must not exceed 36 inches above the floor. Windows in atrium walls are considered outside windows for the purposes of this requirement.

42 C.F.R. § 483.90.

Each sleeping room will have an outside window. As such, the proposed reconstruction project complies with Section 483.90(a)(7)'s requirement that the building "must have an outside window or outside door in every sleeping room."

42 CFR § 483.90(e), Resident Rooms

(e) Resident rooms. Resident rooms must be designed and equipped for adequate nursing care, comfort, and privacy of residents.

(1) Bedrooms must—

(i) Accommodate no more than four residents. For facilities that receive approval of construction or reconstruction plans by State and local authorities or are newly certified after November 28, 2016, bedrooms must accommodate no more than two residents.

Section 483.90(e)(3) allows a facility to seek a variance from the room requirement through the facility's survey agency.

Submitted herewith is an April 27, 2017 letter from Pamela M. Cota, RN, Licensing Chief for the Vermont Division of Licensing and Protection granting the requested state and federal variances pertaining to the number of residents per room.

42 CFR § 483.90(f), Bathroom Facilities

(f) Bathroom facilities. Each resident room must be equipped with or located near toilet and bathing facilities. For facilities that receive approval of construction from State and local authorities or are newly certified after November 28, 2016, each resident room must have its own bathroom equipped with at least a commode and sink.

This provision is inapplicable, as it applies to approval of construction or new certification after November 28, 2016, but this project involves neither construction nor new certification. This is a renovation project. When proposed, this regulation applied to renovated, or newly constructed or certified after the effective date of the regulation. 81 Fed. Reg. 68818 (Oct. 4, 2016). However, in response to commenters, they removed its application to renovations. "We have considered commenters concerns about cost and the lack of available space to add additional bathrooms deterring upgrades to existing facilities and have revised this requirement to apply only to facilities that receive approval of construction from State and local authorities or are newly certified after the effective date of this rule[November 28, 2016]." 81 Fed. Reg. 68818 (Oct. 4, 2016).

Dated this 27th day of April, 2017.



Marvin Ostreicher
Managing Member of Rutland Crossings LLC

Division of Licensing and Protection

103 South Main Street

Waterbury VT 05671-2306

<http://www.dlp.vermont.gov>

Survey and Certification Voice/TTY (802) 241-0480

Survey and Certification Fax (802) 241-0343

Survey and Certification Reporting Line: (888) 700-5330

To Report Adult Abuse: (800) 564-1612

April 27, 2017

Shireen Hart, Esq.
Primmer, Piper, Eggleston & Cramer, P.C.
150 South Champlain Street
P.O. Box 1489
Burlington VT 05402

Re: The Pines at Rutland Variance Requests Decision

Dear Shireen:

The Department of Disabilities, Aging and Independent Living (Department) has reviewed the information that you submitted on February 7, 2017, February 14, 2017 and March 23, 2017 in support of your client's request for variances from certain state and federal regulations for the proposed renovation project at The Pines at Rutland Center for Nursing and Rehabilitation (The Pines).

Variance regarding Centers for Medicare and Medicaid Services 42 C.F.R. §483.90(e)

As you know, 42 C.F.R. §483.90(e)(3), the relevant federal variance provision, authorizes the Department's Survey and Certification Unit to "permit variations in requirements specified in paragraphs (e)[sic](1)(i) and (ii) of this section relating to rooms in individual cases when the facility demonstrated in writing that the variations (i) are in accordance with the special needs of the residents; and (ii) will not adversely affect residents' health and safety."

Because the proposed renovation would be underway after November 28, 2016, 42 C.F.R. §483.90(e)(1)(i) requires that the 4-person bedrooms at The Pines "accommodate no more than two residents." In the Department's letter to you, dated March 20, 2017, you were informed that, based upon the information you had already provided, your client had satisfied 42 C.F.R. §483.90(e)(3)(ii). I requested, however, that you more fully address 42 C.F.R. §483.90(e)(3)(i) regarding the special needs of the affected residents. In your March 23rd response, you stated "there currently are no residents at The Pines in the 4-person rooms with 'special needs' as that terms is used in 42 C.F.R. §483.25(k)(injection, parenteral and enteral fluids, colostomy, ureterostomy, or ileostomy care, tracheostomy care, tracheal suctioning, respiratory care, foot care, prostheses.)"¹ In addition, you

¹ Our attorney reviewed 42 C.F.R. §483.25(k) and advised that the term "special needs" is not used in that section, although

provided assurances, on behalf of your client, that “the affected residents in the 4-person bedrooms are long-stay residents whose special needs, attendant to a long stay [will be] across the board improved...” by the increased privacy resulting from the proposed renovation. In the absence of the “special needs” described in 42 C.F.R. §483.25, it is my impression that your statement asserts that the proposed renovation would in fact accommodate a “special need” of the residents in the 4-person bedrooms because privacy is a “special need” of long-term care residents. You also provide an assurance that the proposed renovation will afford the residents in the 4-person bedrooms increased privacy as part of their residential experience at The Pines. I agree with your assertion and appreciate the assurance. Based upon your statements regarding the privacy needs of long term care residents, coupled with the information you previously provided to the Department in support of this variance request, and your previous representations that if the variance is not granted to allow the proposed renovation to proceed as planned, there will be no modernization to the 4-person bedrooms at issue, **S&C will permit a variation from 42 C.F.R. §483.90(e)(3) and grant your client’s variance request for the proposed renovation project.**

Variance from Vermont’s “Licensing and Operating Rules for Nursing Homes”

At the state level, variances regarding nursing homes are provided for in Rules 1.5 and 8.4(d) of Vermont’s *Licensing and Operating Rules for Nursing Homes*. Rule 1.5(a) specifies that the Department may grant a variance from **any** provision of these Regulations. To do so, there must be a showing that:

- (1) strict compliance would impose substantial hardship on the licensee;
- (2) the licensee will otherwise meet the goal of the rule; and
- (3) a variance will not result in less protections of the health, safety and welfare of the residents.

Your client has requested a variance from Rule 8.4(b). The Department’s March 20th letter informed you that the information submitted to date sufficiently demonstrated your client would “otherwise meet the goal” of Rule 8.4, and that a determination has been made that a variance will not result in less protections of the health, safety and welfare of the affected residents. In short, Rule 1.5(a), subsections (2) and (3) have been satisfied. The outstanding issue relative to Rule 1.5 is subsection (a)(1) regarding strict compliance with Rule 8.4(b). That is to say, your client must demonstrate that strict compliance would impose a substantial hardship on them. Rule 8.4(b)(1) requires that bedrooms accommodate no more than two residents, unless they meet the exception provided for in Rule 8.4(d). In your March 23rd letter, you conveyed that your client “cannot proceed” with a renovation plan that would result in a reduction of 8 beds, require conversion of the 4-person bedrooms into semi-private bedrooms, or involve removing walls and reconfiguring the space. Based on you and your client’s previous communications with me, it is my understanding, not my suggestion as you indicated in your March 23rd correspondence, that your client’s inability to proceed with such significant renovations is a business decision based on anticipated costs. From the information you have provided, I am concluding that such anticipated costs constitute a “substantial hardship” from your client’s perspective. The criteria in Rule 1.5(a)(1) is met.

As indicated in the Department’s March 20th letter, Rule 8.4(d) mirrors the federal requirements.

the requirements governing the quality of care for residents’ with the specific types of special needs you have identified is addressed in that provision.

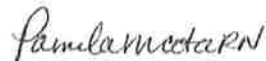
Therefore, to satisfy Rule 8.4(d), in addition to satisfying the criteria in Rule 1.5(a)(1) and (2), there must be a showing that the proposed renovations “(1) are in accordance with the special needs of the residents” and “(2) will not adversely affect residents’ health and safety.” Based on the Department’s assessment (in the Federal rules section above) of your assertion and assurance regarding the privacy needs of long term care residents, Rule 8.4(d)(1) is satisfied. Rule 1.5(a)(3) and Rule 8.4(d)(2) essentially require the same showing, and, therefore, are satisfied based on the information, including the floor plans, you previously provided.

In the Department’s March 20th letter, you were notified that Rule 1.5(d) requires your client to contact the appropriate departments in state government to determine if variances regarding fire safety and/or building construction are necessary before proceeding further. Your March 23rd correspondence confirms that the bedrooms at issue, currently and after the proposed renovation, otherwise comply with the applicable federal requirements, including, but not limited to, square footage per resident, direct access to an exit corridor, full visual privacy for each resident, ceiling suspended curtains, at least one exterior window and a floor at or above grade. Your letter also stated that you contacted Patrick Banks, Assistant State Fire Marshal, at the Rutland Region for the State of Vermont Division of Fire Safety and you were informed that no variance is required from that division as to fire safety to proceed with creating semi-private zones within the existing 4-person bedrooms. Following your request for confirmation that a variance is also not necessary regarding state building code, I spoke with Patrick Banks and learned that your client also does not need a variance from state building code to proceed with the proposed renovation.

Based on the information you have submitted to the Department, your client has demonstrated that the bedrooms at issue otherwise comply with the state requirements, the requested variation would not adversely affect residents' health and safety, and the variations would provide a more private setting to meet the long term care needs of the residents in these rooms. You have also demonstrated that the proposed renovation will otherwise meet the goal of Rule 8.4, strict compliance with Rule 8.4 would impose substantial hardship on your client, and a variance would not result in less protections of the health, safety and welfare of the affected residents. Based on the foregoing, and because your client has made it clear that if the requested variance is not granted, the proposed renovations will not proceed as planned, and there would be no modernization to the bedrooms at issue, an outcome which would certainly not benefit the residents, **S&C is granting the requested variance to Rule 8.4(b)(1) for the proposed renovation project.**

Please don't hesitate to contact me with any questions.

Sincerely,



Pamela M. Cota, RN
Licensing Chief

**STATE OF VERMONT
GREEN MOUNTAIN CARE BOARD**

IN RE:)
)
PROPOSED RENOVATION PROJECT FOR) **GMCB-013-16CON**
THE PINES AT RUTLAND CENTER FOR)
NURSING AND REHABILITATION, RUTLAND, VT)

VERIFICATION UNDER OATH

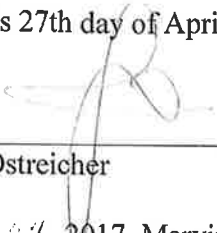
Marvin Ostreicher, being duly sworn, states on oath as follows:

1. My name is Marvin Ostreicher. I am the managing member of Rutland Crossings LLC (the "Applicant"). I have reviewed the *Responses to Third Set of Information Requests Dated January 18, 2017* (the "Submission").
2. Based on my personal knowledge and after diligent inquiry, I attest that the information contained in the Submission is true, accurate and complete, does not contain any untrue statement of a material fact, and does not omit to state a material fact.
3. My personal knowledge of the truth, accuracy and completeness of the information contained in the Submission is based upon either my actual knowledge of the subject information or upon information reasonably believed by me to be true and reliable and provided to me by the individuals identified below in paragraph 4. Each of these individuals has also certified that the information they have provided is true, accurate and complete, does not contain any untrue statement of a material fact and does not omit to state a material fact.
4. The following individuals have provided information or documents to me in connection with the Submission and each individual has certified, based either upon his or her actual knowledge of the subject information or, where specifically identified in such certification, based on information reasonably believed by the individual to be reliable, that the information or documents provided are true, accurate and complete, do not contain any untrue statement of a material fact, and do not omit to state a material fact:

David Ostreicher, CFO, National HealthCare Associates
John Russell, Construction Manager, National Health Care Associates
Carmelo Ferla, R.A., NCARB, LEED AP, Senior Associate, MBH
ARCHITECTURE, LLC

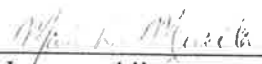
5. In the event that the information contained in the Submission becomes untrue, inaccurate or incomplete in any material respect, I acknowledge my obligation to notify the Green Mountain Care Board and to supplement the Submission as soon as I know, or reasonably should know, that the information or document has become untrue, inaccurate or incomplete in any material respect.

Dated this 27th day of April, 2017.



Marvin Ostreicher

On April 27, 2017, Marvin Ostreicher appeared before me and swore to the truth, accuracy and completeness of the foregoing.



Notary public

My commission expires: 5/10/18

MARIE T. MUELLER
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MU6221801
Qualified In Nassau County
My Commission Expires 05-10-2018