

**PETITION FOR TEMPORARY WAIVER/VARIANCE OF CERTAIN REQUIREMENTS OF
Rule 58A-5.036 Florida Administrative Code**

TO: VIA EMAIL (ALFEMP@elderaffairs.org) AND FEDEX
Florida Department of Elder Affairs
4040 Esplanade Way
Tallahassee, FL 32399-7000

COPY TO: VIA EMAIL (assistedliving@ahca.myflorida.com) AND FEDEX
Agency for Healthcare Administration
Bureau of Health Facility Regulation
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Tallahassee, FL 32308

VIA FEDEX
Joint Administrative Procedures Committee
Room 680, Pepper Building
111 W. Madison Street
Tallahassee, FL 32399-1400

PETITIONER: SHP IV HARBOUR ISLAND, LLC (ALF: AL11297)
1101 Plantation Island Drive South
St. Augustine, Florida 32080

Pursuant to Section 120.542 Florida Statutes (2018), Petitioner, SHP IV HARBOUR ISLAND, LLC, a Delaware limited liability company, by and through its undersigned attorneys hereby respectfully requests a temporary waiver and/or variance of certain requirements of Rule 58A-5.036 Fla. Admin. Code and in support thereof would show as follows:

RULE FROM WHICH RELIEF IS SOUGHT

Rule 58A-5.036 Fla. Admin. Code: Emergency Environmental Control for Assisted Living Facilities (the "Rule").

CITATION OF THE APPLICABLE PORTION OF THE RULE

58A-5.036 Emergency Environmental Control for Assisted Living Facilities.

(1) DETAILED EMERGENCY ENVIRONMENTAL CONTROL PLAN. Each assisted living facility shall prepare a detailed plan ("plan") to serve as a supplement to its Comprehensive Emergency Management Plan, to address emergency environmental control in the event of the loss of primary electrical power in that assisted living facility which includes the following information:

(a) The acquisition of a sufficient alternate power source such as a generator(s), maintained at the assisted living facility, to ensure that current licensees of assisted living facilities will be equipped to ensure ambient air temperatures will be maintained at or below 81 degrees Fahrenheit for a minimum of ninety-six (96) hours in the event of the loss of primary electrical power. {text omitted}

(b) The acquisition of sufficient fuel, and safe maintenance of that fuel at the facility, to ensure that in the event of the loss of primary electrical power there is sufficient fuel available for the alternate power source to maintain ambient temperatures at or below 81 degrees Fahrenheit for a minimum of ninety-six (96)

hours after the loss of primary electrical power during a declared state of emergency. The plan must include information regarding fuel source and fuel storage.

1. Facilities must store minimum amounts of fuel onsite as follows: {text omitted} b. A facility with a licensed capacity of 17 or more beds must store 72 hours of fuel onsite.

{text omitted}

(c) The acquisition of services necessary to maintain, and test the equipment and its functions to ensure the safe and sufficient operation of the alternate power source maintained at the assisted living facility.

(d) The acquisition and maintenance of a carbon monoxide alarm.

{text omitted}

(4) IMPLEMENTATION OF THE PLAN.

(a) Each assisted living facility licensed prior to the effective date of this rule shall, no later than June 1, 2018, have implemented the plan required under this rule.

(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.

(c) During the extension period, an assisted living facility must make arrangements pending full implementation of its plan that provides the residents with an area or areas to congregate that meets the safe indoor air temperature requirements of paragraph (1)(a) for a minimum of ninety-six (96) hours. {text omitted}

CITATION TO THE STATUTE THE RULE IS IMPLEMENTING

The referenced Rule implements the following provisions of Chapters 429, Florida Statutes (2017):

Section 429.19, Florida Statutes

- Provides authority to impose administrative fines for violations.
- Does not address power plans or generator requirements.

Section 429.28, Florida Statutes

- Resident bill of rights-provides rights of residents, including, but not limited to, the right to live in a safe and decent living environment, to be treated with consideration, and to receive at least 45 days' notice of relocation unless certain emergency situations arise.
- Does not address power plans or generator requirements.

Section 429.41, Florida Statutes

- Department is required to adopt rules, policies, and procedures in consultation with the Agency for Health Care Administration, Department of Children and Families, and the Department of Health to provide standards for safe and sanitary facilities and the highest quality of resident care. These must include:

-The preparation and annual update of a comprehensive emergency management plan. Such standards must be included in the rules adopted by [DEA] after consultation with the Division of Emergency Management.

-At a minimum, the rules must provide for plan components that address emergency evacuation transportation; adequate sheltering arrangements; postdisaster activities, including provision of emergency power, food, and water; postdisaster transportation; supplies; staffing; emergency equipment; individual identification of residents and transfer of records; communication with families; and responses to family inquiries.

-The comprehensive emergency management plan is subject to review and approval by the local emergency management agency. During its review, the local emergency management agency shall ensure that the following agencies, at a minimum, are given the opportunity to review the plan: the Department of Elder Affairs, the Department of Health, the Agency for Health Care Administration, and the Division of Emergency Management. Also, appropriate volunteer organizations must be given the opportunity to review the plan. The local emergency management agency shall complete its review within 60 days and either approve the plan or advise the facility of necessary revisions.

-In addition, ALFs must abide by the State Fire Marshal's uniform fire safety standards for ALFs, established pursuant to Section 633.206, Florida Statutes. §429.41(1), Fla. Stat.; *see also* Fla. Admin. Code 69A-40. ALFs must also abide by the National Fire Protection Association codes in Section 429.41, Florida Statutes.

BACKGROUND FACTS

Petitioner owns and operates an independent and assisted living facility located in St. Augustine, St. Johns County (the "Community"). The Community contains independent apartments and 46 licensed assisted living beds.

The Community is located on a barrier island near St. Augustine, Florida. Since the Community is located in a low lying area, in virtually all hurricane events it is under a mandatory evacuation order. Thus it does not have emergency generator power installed. **F.S. 119.071(3)(a)2.b.**

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

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

[Attachment 7]

PETITIONER'S ACTIONS IN FURTHERANCE OF COMPLIANCE WITH THE RULE

In response to Hurricane Irma and the Rule, Petitioner has met with representatives of the Community's ownership, and management company as well as with the Community's resident services director, maintenance director, and executive director to determine compliance with the Rule. Petitioner has sought guidance from architectural, electrical and mechanical consultants, to discuss engineering and mechanical solutions to compliance issues with the requirements of the Rule. Petitioner has determined that the Community is not in compliance with the Rule and that a new emergency generator system and fuel tank(s) serving the same are required in order for the Community to be in compliance with the Rule.

Petitioner promptly contacted Zabatt Power Systems and Sweetwater Restoration, Inc. for information concerning the power generation needs and fuel consumption specifications for installation of a new generator system. **[Attachments 1, 2, 3]**

The Petitioner has revised its emergency preparedness plan as required by the Rule to incorporate procedures concerning (a) monitoring and documenting temperatures in resident apartments at any time the Community is without electrical 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. Based upon the Department's adoption of the Rule, the Petitioner has submitted its revised Emergency Environmental Control Plan to the Department and the local emergency management agency for approval and the same has been approved [**Attachment 9**].

Petitioner has also developed and implemented written policies and procedures to ensure that it can effectively and immediately activate, operate and maintain the alternate power source once installed and any fuel required for the operation of the alternate power source.

Petitioner has notified each resident of the Community or (as applicable) their legal guardian in writing that Petitioner has applied for a temporary waiver of the requirements of the Rule.

Petitioner has been working diligently since 2017 to have its location evaluated by engineers, contractors and other experts to determine the most appropriate alternative power sources and maximum onsite fuel storage options in order to ensure compliance with the Rule. In October 2017, Petitioner filed for an extension of time until June 1, 2018 to implement the Emergency Environmental Control Plan required under the Rule.

Thereafter, in May 2018, Petitioner notified the Agency for Health Care Administration that it would utilize an extension of time up to January 1, 2019 (the "Automatic Extension") to comply with the Rule, citing delays caused by necessary construction, delivery of ordered equipment, zoning or other regulatory approval processes, said Automatic Extension is reflected on ACHA's site as being granted May 16, 2018. While Petitioner never received confirmation of the same by direct communication, attached to this petition is a print out from AHCA's website showing that the Automatic Extension was, in fact, granted to Petitioner. [**Attachment 5**]

As required by the Rule, Petitioner filed Quarterly Report(s) with the Agency for Health Care Administration, reporting on the status of its implementation of its Emergency Environmental Control Plan, and citing ongoing delays caused by necessary construction, delivery of ordered equipment, zoning or other regulatory approval processes. Attached are copies of the Quarterly Progress reports filed by Petitioner. [**Attachment 6**]

Petitioner received and accepted final proposals for equipment necessary to comply with the Rule and ordered the required equipment on or about April 30, 2018. [**Attachment 11**]. Petitioner recently received the enclosed notice and timeline from the supplier indicating that all or material portions of the ordered equipment would not be available from the manufacturer in time to install it on or before January 1, 2019 as a result of the current level of demand for large generators and generously sized propane tanks. [**Attachment 11**]

Based on information available at the time of the filing of this Petition, and due to delays beyond its control, Petitioner will not be able to fully implement its revised Emergency Environmental Control Plan by January 1, 2019, and requests a waiver under Section (4)(b) of the Rule, extending that deadline until June 1, 2019. Thus, it appears that compliance with the Rule is possible, but that it is not possible within the time frame required by the Rule, even with the previously granted extension through January 1, 2019.

While waiting on the required equipment to be delivered, Petitioner commenced seeking approvals for the installation of the system. Fortunately, the Community is a large parcel with ample open space, providing significant flexibility in generator and tank placement. Of course, the placement and design are impacted

by ground conditions, including utility line locations and building design specifications. An update as to the status of permits and approvals is attached hereto. [Attachment Error! Reference source not found.12]

TYPE OF ACTION REQUESTED

Petitioner requests a temporary waiver of the Rule 58A-5.036 deadline of January 1, 2019, and an extension of time until June 1, 2019 to allow Petitioner to complete implementation of its revised Emergency Environmental Control Plan.

Petitioner's request is predicated on the fact that, despite Petitioner's good faith efforts, there have been delays beyond its control, caused by necessary construction, delivery of ordered equipment, zoning or other regulatory approval processes.

FACTS JUSTIFYING A TEMPORARY WAIVER OF THE RULE

The Legislature, as part of the Florida Administrative Procedure Act ("APA"), has adopted Section 120.542, Florida Statutes, which provides for rule waivers and states: Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. . . . Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. §120.542(1), Fla. Stat. (2017). As defined in the APA, "waivers" are a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. §120.52(22), Fla. Stat. (2017)

Section 120.542(2), Florida Statutes, requires agencies to grant waivers of rules when two conditions have been met, i.e., when the person subject to the rule demonstrates:

- (a) That the purpose of the underlying statute will be or has been achieved by other means; and
- (b) when application of a rule would create a substantial hardship or would violate principles of fairness.

A "substantial hardship" is defined in Section 120.542(2), Florida Statutes, as a demonstrated economic, technological, legal, or other type of hardship to the person requesting the waiver. The APA also provides that "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.

As demonstrated below, Petitioner satisfies all of these conditions.

Purpose Achieved By Other Means

The legislative purpose of enacting the provisions of Chapter 429 is to ensure that assisted living facilities are maintained and operated in a manner that provides safe, adequate, and appropriate care, treatment, and health of persons in such facilities. *See* § 429.01(2), Fla. Stat. (2017). The Legislature mandates assisted living facilities to have in place emergency and contingency disaster plans. Accordingly, Petitioner already has a written comprehensive emergency management plan that details the procedures it is to implement in the event of disaster. As required by law, Petitioner's emergency management plan (already approved by local emergency management authorities) includes comprehensive analysis of potential hazards as well as the requirement for establishment of policies, procedures, responsibilities, and actions that the facility will take before, during, and after any storm, including, at a minimum, direction and control, notification, evacuation, re-entry, and sheltering in place. Rule 58A-5.026, Florida Admin. Code (Emergency Management). Facilities must review their emergency management plans annually and submit to the local

emergency agency for review and any substantive changes are subject to approval. Rule 58A-5.026(2)(c), Fla. Admin. Code. Moreover, approval of an ALF's emergency management plan by local emergency management officials evidences that the plan meets all the criteria and conditions established in the rule. Rule 58A-5.026(2)(e), Fla. Admin. Code.

Thus, we submit that Petitioner's current Comprehensive Emergency Management Plan ("CEMP"), ensures that the purpose of Section 429.41, Florida Statutes, will be or has been achieved by Petitioner by other means. More specifically, the initiation, development, and maintenance of the current CEMP have been accomplished in consultation with the local county emergency management agency. Rule 58A-5.026, Fla. Admin. Code. **Attachment 8**. In addition Petitioner has enacted policies and procedures concerning evacuation of the facility and emergency operations in order to protect residents against extreme temperatures during a power outage. **Attachments 8 and 13**

Substantial Hardship

In addition, Petitioner submits that strict enforcement of the Rule on the schedule established in the Rule would serve to impose upon Petitioner a substantial hardship from a logistical perspective, as although compliance with the Rule is from all indications possible, it is the timing of the compliance requirement which establishes a substantial hardship upon Petitioner sufficient to support the requested delayed compliance given that it is the unavailability of sufficiently sized generator equipment and fuel tanks which make Petitioner's compliance impossible at this time.

Violation of Principles of Fairness

In support of this request for a temporary waiver of the Rule, Petitioner further submits that strict enforcement of the Rule on the schedule established in the Rule violates principles of fairness. While Petitioner understands that Section 120.542 Florida Statutes prescribes that "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, Petitioner submits that due to the sweeping nature of the Rule's enactment, the literal enforcement of the timetable in the Rule is "unfair" to a number of senior facility operators in the State of Florida. That this "unfairness" is shared by others similarly situated does not make the literal enforcement of the Rule any more fair to Petitioner.

Summary

Given Petitioner's need for a large generator system and sizeable fuel tanks serving the same, Petitioner cannot reasonably comply with the timing requirements of the Rule even though Petitioner timely commenced (and diligently prosecuted) actions in an effort to comply. Given (a) the policies and procedures in place to monitor ambient temperatures in resident rooms during a power outage and (b) the cooler temperatures for the duration of the requested additional extension, there is little to no additional risk to residents between January 1, 2019 and the requested June 1, 2019 extension expiration.

CONCLUSION

Petitioner concedes that in the face of recent events, government has a legitimate interest in regulating the ability of senior living facilities to safeguard residents in the face of natural disaster. Petitioner is committed to complying with the requirements of the Rule. Unfortunately, the timing of the Rule's sweeping implementation has resulted in statewide competition for generators, tanks, and professional design and installation talent at a time when there is already increased demand for generators and tanks (as the result of 2016 and 2017 storms). All of which makes Petitioner's ability to comply with the Rule within the time specified in the Rule impossible.

Petitioner further submits that the likelihood of a hurricane making US landfall (anywhere in the US) between January 1st and May 31st of any given year is nearly zero. According to NOAA since 1851 only four (4) hurricanes have "hit" the State of Florida (anywhere in the state) between January 1st and May 31st in the entire 165 year period on record. [Attachment 4] Since Petitioner is requesting only a short additional delay of compliance with the Rule for a period of time when hurricane-related power loss is extremely unlikely (and when outdoor temperatures are significantly cooler), and when there is virtually no risk to residents of harm resulting from Petitioner's requested delay in compliance with the Rule. In contrast, in the absence of a temporary waiver and without any reasonable means of expediting the acquisition of equipment already on order for months, Petitioner cannot timely comply with the Rule on or before January 1, 2019.

ATTACHED SUPPORTING DOCUMENTATION

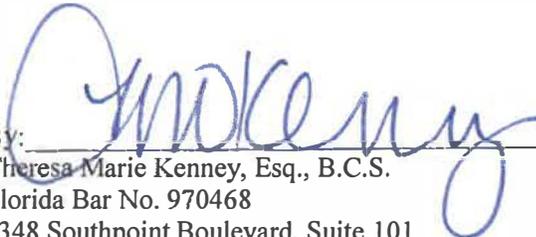
1. Quote 42244 dated October 4, 2017 from Zabatt for specifications
2. Second Quote from TAW Power Systems Group for generator only
3. Proposal dated October 13, 2017 from Sweetwater for installation and timeline
4. NOAA Hurricanes by Month 1851-2015
5. AHCA Printout Showing Automatic Extension
6. Quarterly Updates
7. Copies of Mutual Aid Agreements
8. Copy of Comprehensive Emergency Management Plan
9. Evidence of approval of CEMP by St. Johns County Emergency Management
10. Copies of contracts for generator and fuel tank design, procurement, and installation.
11. Notice Concerning Timing of Availability
12. Permit and Approvals Update from Sweetwater Restoration dated November 15, 2018, including copies of Permit Applications for installation of the generator and fuel tanks
13. Copies of Policies and Procedures developed and implemented by Petitioner in accordance with Rule 58A-5.036(5)

[The remainder of this page was intentionally left blank]

WHEREFORE, Petitioner respectfully requests an extension of time through June 1, 2019 for Petitioner's compliance with the requirements of Rule 58A-5.036 Fla. Admin. Code regarding the installation of required emergency power generation equipment and fuel sources therefor.

RESPECTFULLY SUBMITTED this 29th day of November 2018.

DUSS, KENNEY, SAFER, HAMPTON & JOOS, P.A.

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