

**STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS**

**IN RE: ARHC BTFMYL01 TRS LLC
D/B/A BARRINGTON TERRACE-FT MYERS**

DOEA Case No.

**EMERGENCY PETITION FOR TEMPORARY
WAIVER OF/ VARIANCE FROM OF RULE 58A-5.036**

ARHC BTFMYFL01 TRS LLC d/b/a Barrington Terrace-FT Myers (hereinafter “Petitioner” or “Barrington Terrace”) by and through its undersigned representative, hereby petitions the Florida Department of Elder Affairs (DOEA) for a **Temporary Emergency Waiver/Variance** of *Rule 58A-5.036, F.A.C.*, pursuant to *Section 120.542, Florida Statutes, Rule 28-10.004, Florida Administrative Code*; and *Rule 58A-5.036, F.A.C.*

BACKGROUND

1. Petitioner operates a one hundred and thirty-five (135) bed assisted living facility licensed under *Chapter 429, Part II, Florida Statutes* located at 9731 Commerce Center Court in Fort Myers, Florida 33908.
2. The Agency/Department affected by this petition is the Florida Department of Elder Affairs, 4040 Esplanade Way, Tallahassee, Florida 32399.
3. Barrington Terrace has cared for one of Florida’s most vulnerable population for a just almost six years at this location. However, like all Arbor Company communities, they share the collectiveness of the entire family of communities and the wealth of knowledge that it brings to caring for seniors their determination to provide the best resident experience.
4. Barrington Terrace offers exceptional independent living, assisted living and dementia care

services and is committed to ensuring each resident's needs are cared for on a personable, engaging and dignified level.

5. Barrington Terrace provides both assisted living and memory care in its community; and provides Florida's older adults a vibrant and interactive experience.
6. The residents of Barrington Terrace live in a safe, caring and supportive environment while maintaining their dignity, independence, and purpose.
7. The residents at Barrington Terrace suffer from various conditions and illnesses. However, there are some residents that are truly independent and chose to live a less complicated life at their community.
8. Barrington Terrace believes a critical component of meeting the needs of its resident revolves around the hiring and training of highly trained staff; and the monitoring of resident admissions to the facilities. Barrington Terrace does not provide housing to persons that are bedbound or require services that may question appropriateness of placement.

**Barrington Terrace Seeks A
Temporary Waiver/Variance of Rule 58A-5.036**

9. The Florida Department Elder Affairs adopted Rule 58A-5.036 on March 26, 2018 which requires full compliance not later than January 1, 2019 unless a variance or waiver is granted.
10. Based on the estimates and time lines Barrington Terrace received the need for a variance is detrimental. The outcome for Barrington Terrace if the variance is not granted will result in fines, sanctions, possible closure and the removal of residents that have been entrusted in their care. The deadline created by the Rule creates a hardship for Barrington Terrace to come into

compliance.

11. Barrington Terrace believes that this is not an emergency or an instance of Petitioner's own making, but one that is based on various factors such as the acquisition of the generator, time lines for installation, and the need to work through the constraints of vendors, contractors and the local municipality.
12. Barrington Terrace submits that it has attempted to comply with the Rule since implementation of the Emergency Rule 58AER17-1 that was adopted in September 2017.
13. Barrington Terrace ordered a 300 KW replacement generator from TAW Power Systems, but to meet compliance, Barrington Terrace has continued to work with local zoning and contractors to get the permitting done for the new standby generator to be installed.
14. Barrington Terrace request a variance from Rule 58A-5.036, *F.A.C.* The rule was adopted by the Florida Department of Elder Affairs to implement §429.41 and 429.19, *F.S.*, and it provides in pertinent part:

§429.28(1), F.S.

...(1) No resident of a facility shall be deprived of any civil or legal rights, benefits, or privileges guaranteed by law, the Constitution of the State of Florida, or the Constitution of the United States as a resident of a facility. Every resident of a facility shall have the right to:

- (a) Live in a safe and decent living environment, free from abuse and neglect.

§429.41(1), F.S.

...The agency, in consultation with the department, may adopt rules to administer the requirements of part II of chapter 408, *F.S.* In order to provide safe and sanitary facilities and the highest quality of resident care accommodating the needs and preferences of residents, the department, in consultation with the agency, the Department of Children and Family Services, and the Department of Health, shall adopt rules, policies, and procedures to administer this part, which must include reasonable and fair minimum standards in relation to:

- (a) The requirements for and maintenance of facilities, not in conflict with chapter 553, relating to plumbing, heating, cooling, lighting, ventilation, living space, and other

housing conditions, which will ensure the health, safety, and comfort of residents suitable to the size of the structure.

CREATION OF A SUBSTANTIAL HARDSHIP AS TO PETITIONER

15. *Section 120.542(2), F.S.*, provides that 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. *See, Section, 120.542(2), F.S.* 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. As discussed below, the application of *Rule 58A-5, F.A.C.* creates a substantial hardship for Barrington Terrace.
16. Furthermore, the Florida legislature has directed the Department of Elder Affairs to take many factors into account when making rules to ensure assisted living facilities should not be regulated as a medical or nursing facility. *See, 429.01(2), F.S.*
17. Barrington Terrace provides services and care to residents in a modern assisted living facility with individual apartments with which makes the acquisition of a generator more expensive and adds to the technological requirements because each and every apartment has the ability to control its own temperature.

18. Barrington Terrace is committed to moving this process as quick as possible, but can only rely on the contractors, engineers, and the local municipality.
19. Barrington Terrace has developed a timeframe for the installation of the generator required by Rule and it is expected that it will have the generator installed by not later than May 2019.
20. Barrington Terrace does have additional approvals that will be needed by the local municipality having jurisdiction of permitting.
21. Barrington Terrace submits the literal application of the Rule will thus create a substantial hardship, more specifically related to the technological aspects required for the installation of a 300 KW standby generator. Barrington Terrace would also argue that there exists a legal impediment that will delay the installation based on administrative requirements, mainly city and county ordinances that must be adhered to prior to installation.
22. Barrington Terrace is legally unable to move forward without the cooperation of the city, county and the experts that can assist with compliance. Barrington Terrace submits that they do not have the staff or expertise to fulfill the project without the assistance of highly trained individuals to which they have contracted. Accordingly, the waiver/variance should be granted.

**THE UNDERLYING PURPOSE OF SECTIONS 429.19 and 429.41,
FLORIDA STATUTES WILL BE ACHIEVED**

23. The Departments authority and law implemented as noted in Rule 58A-5.036, F.A.C. include Sections 429.19, F.S. and 429.41, F.S.
24. Section 429.19 provides that In addition to the requirements of part II of chapter 408, the agency shall impose an administrative fine in the manner provided in chapter 120 for the violation of any provision of this part, part II of chapter 408, and applicable rules by an assisted

living facility, for the actions of any person subject to level 2 background screening under s. 408.809, for the actions of any facility employee, or for an intentional or negligent act seriously affecting the health, safety, or welfare of a resident of the facility.

25. Each violation of this part and adopted rules shall be classified according to the nature of the violation and the gravity of its probable effect on facility residents. The agency shall indicate the classification on the written notice of the violation as follows:

- a. Class “I” violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class I violation in an amount not less than \$5,000 and not exceeding \$10,000 for each violation.
- b. Class “II” violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class II violation in an amount not less than \$1,000 and not exceeding \$5,000 for each violation.
- c. Class “III” violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class III violation in an amount not less than \$500 and not exceeding \$1,000 for each violation.
- d. Class “IV” violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class IV violation in an amount not less than \$100 and not exceeding \$200 for each violation.
- e. Regardless of the class of violation cited, instead of the fine amounts listed in paragraphs (a)-(d), the agency shall impose an administrative fine of \$500 if a facility is found not to be in compliance with the background screening requirements as provided in s. 408.809.

26. Section 429.19, F.S. provides for the sanctioning of assisted living facilities. More specifically, it provides the following:

For purposes of this section, in determining if a penalty is to be imposed and in fixing the amount of the fine, the agency shall consider the following factors:

- (a) The gravity of the violation, including the probability that death or serious physical or emotional harm to a resident will result or has resulted, the severity of the action or potential harm, and the extent to which the provisions of the applicable laws or rules were violated.

- (b) Actions taken by the owner or administrator to correct violations.
- (c) Any previous violations.
- (d) The financial benefit to the facility of committing or continuing the violation.
- (e) The licensed capacity of the facility.

27. *Section 429.41, F.S.* was enacted to provide safe and sanitary facilities and the highest quality of resident care accommodating the needs and preferences of residents. *See, Section 429.41(1), F.S.* Furthermore, it can be also derived that the Florida Legislature also desired rules that would address cooling, lighting, ventilation, living space, and other housing conditions, which will ensure the health, safety, and comfort of residents suitable to the size of the structure. *See, Section 429.41(1), F.S.*

28. *Section 429.41, F.S.* further provides that a Comprehensive Emergency Management Plan must be submitted for review and approval to the local emergency management agency. The statute also provides for standards must be included in the rules adopted by the department 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; post-disaster activities, including provision of emergency power, food, and water; post-disaster 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 Elderly 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. See Section 429.41(1) (b), F.S.

29. Petitioner has complied with this requirement and a copy of the plan approval has been attached.

30. *Section 429.28, F.S.* was enacted to that residents had rights that should be afforded to all residents. Among many of those the right of residents of assisted living facilities to have a safe and decent living environment, free from abuse and neglect. *See, Section 429.28(1), F.S.*

31. A variance/waiver of the Rule will not impair the purpose of the statute, which is to provide for the safety of residents before, during, and after an emergency.

32. Barrington Terrace has been providing the care and services to residents through Florida's last two hurricanes. Petitioner continues to make care and services to its residents a priority.

33. Barrington Terrace currently has a 200 KW Generator to provide a cooled space for the seniors that reside at the facility until its new generator is installed. **F.S. 119.071(3)(a)2.b.**

[REDACTED] The current generator **F.S. 119.071(3)(a)2.b.**

34. Barrington Terrace will continue to follow the legislative requirements for the Comprehensive Emergency Management Plan, adhere to the local emergency management officials as it pertains to added safety requirements.

35. It must be noted that Barrington Terrace is not seeking a variance or waiver from providing exceptional care and services to its residents, but rather from the technological, legal and governmental hardships it is facing based on the attempts to comply with the Rule.

36. Barrington Terrace submits the following exhibits to its petition that provides evidence of ongoing attempted compliance:

- (a) Barrington Terrace's quarterly reports attached hereto as Exhibit "A"
- (b) Barrington Terrace's Emergency Power Plan Approval Letter attached hereto as Exhibit "B"
- (c) Barrington Terrace's CEMP approval letter attached hereto as Exhibit "C"
- (d) Barrington Terrace's generator order form attached hereto as Exhibit "D"

TYPE OF WAIVER/VARIANCE SOUGHT

37. Barrington Terrace seeks a Temporary Emergency Waiver from/Variance of *Rule 58A-5.036, F.A.C.*

DEPARTMENT ACTION REQUESTED

For the foregoing reasons, Petitioner, Barrington Terrace requests that the Department of Elder Affairs grant its Petition for a Temporary Waiver of /Variance from Emergency Rule 58A-5.036, F.A.C. for not less than May 31, 2019 [five (5) months] to obtain permitting, final plans, delivery, and installation of the generator. The Undersigned has requested both a Waiver from Rule 58A-5.036, F.A.C. and a Variance from Rule 58A-5.036, F.A.C. for the purpose of seeking additional time in order to comply fully with the Department's Rule. If the Department deems that the amount of time requested is not acceptable, we would request a time the Department believes to be reasonable under the circumstances. Should this request not be granted, Barrington Terrace faces fines, sanctions, possible closure and the removal of residents that have been entrusted in their care.

Respectfully Submitted this 2nd day of January 2019.

Shaddrick A. Haston

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Petition for Waiver has been provided to Francis Carbone, Agency Clerk, Florida Department of Elder Affairs, 4040 Esplanade Way Tallahassee, Florida 32399 via email to: agencyclerk@elderaffairs.org and U.S. Mail, to the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, Florida 32399-1300 this 2nd day of January 2019.

Shaddrick A. Haston