

STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS

IN RE: BISHOP GRADY VILLAS, INC.
PETITION FOR EMERGENCY TEMPORARY
VARIANCE OF FROM RULE 58A-5.036,
FLORIDA ADMINISTRATIVE CODE

**PETITION FOR EMERGENCY TEMPORARY VARIANCE FROM RULE 58A-5.036,
FLORIDA ADMINISTRATIVE CODE, EMERGENCY ENVIRONMENTAL CONTROL
FOR ASSISTED LIVING FACILITIES**

Petitioner, Bishop Grady Villas, Inc., through its undersigned counsel, files with the Florida Department of Elder Affairs (“Department”) this Petition for Emergency Temporary Variance pursuant to Section 120.542, Florida Statutes, and Florida Administrative Code Rules 28-104.002 and 28-104.004:

1. The Petitioner’s name is Bishop Grady Villas, Inc. (“Petitioner”). Petitioner is a forty-eight (48) bed licensed assisted living facility serving individuals with developmental and intellectual disabilities. Petitioner’s address, e-mail address, telephone number, facsimile number and license number are set forth below.

Address: 401 Bishop Grady Court
St. Cloud, Florida 34769
Attention: Kevin C. Johnson, Executive Director
Telephone Number: 407-892-6078
Fax Number: 407-892-3081
E-mail: kjohnson@bishopgradyvillas.org
License No.: 10398

2. The name, address, e-mail address, telephone number and facsimile number of Petitioner’s counsel are listed below the signature. Petitioner respectfully requests that correspondence relating to this matter be directed to the undersigned.

3. Petitioner seeks an emergency temporary variance from Sections 3 and 4 of Rule 59A-5.036, Florida Administrative Code (“Rule”).

4. The Rule is implementing Sections 429.19 and 429.41, Florida Statutes.

5. The applicable portions of the Rule are set forth below.

(3) APPROVED PLANS.

(a) Each assisted living facility must maintain a copy of its approved plan in a manner that makes the plan readily available at the licensee's physical address for review by a legally authorized entity. If the plan is maintained in an electronic format, assisted living facility staff must be readily available to access and produce the plan. For purposes of this section, “readily available” means the ability to immediately produce the plan, either in electronic or paper format, upon request.

(b) Within two (2) business days of the approval of the plan from the local emergency management agency, the assisted living facility shall submit in writing proof of the approval to the Agency for Health Care Administration.

(c) The assisted living facility shall submit a consumer-friendly summary of the emergency power plan to the Agency. The Agency shall post the summary and notice of the approval and implementation of the assisted living facility emergency power plans on its website within ten (10) business days of the plan's approval by the local emergency management agency and update within ten (10) business days of implementation.

(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.

6. The Rule requires an assisted living facility to provide the local emergency management agency a detailed written plan (the “Plan”) as a supplement to the assisted living facility’s comprehensive emergency management plan, detailing the acquisition of generator(s) and the acquisition and safe maintenance of sufficient fuel for the generators to ensure that the

generators can function in emergency situations so that temperatures in an assisted living facility are maintained at a level providing for the safety of residents, no later than June 1, 2018 (the “Implementation Deadline”).

7. Pursuant to Section 4 of the Rule, the Department allowed an extension of the Implementation Deadline until January 1, 2019 (the “Initial Extension Deadline”) for providers to implement the Plan.

8. Pursuant to Section 4 of the Rule, providers may request a variance from the Rule if the provider can show in its quarterly progress reports that unavoidable delays caused by regulatory approval processes will occur beyond the Initial Extension Deadline.

9. Petitioner requests that an emergency temporary variance from the Rule be granted to change the Implementation Deadline to June 30, 2019, effectively extending the Initial Extension Deadline for 180 days, for the reasons set forth below.

BACKGROUND FACTS

10. Petitioner filed a Comprehensive Emergency Management Plan (“CEMP”) with the Osceola County Board of County Commissioners Office of Emergency Management (the “Local Agency”) on February 15, 2017. The CEMP was approved by the Local Agency on April 15, 2017. A copy of the CEMP and the Local Agency’s approval letter are attached hereto as Exhibits “A” and “B”, respectively.

11. On November 9, 2017, the Petitioner submitted an update to Petitioner’s CEMP to the Local Agency, which included an Emergency Power Plan (“EPP”). A copy of the EPP and the Local Agency’s receipt of the same are attached hereto as Exhibits “C” and “D”, respectively.

12. On May 31, 2018, Petitioner submitted a notification of extension of the Implementation Date to the Agency for Healthcare Administration (“AHCA”), in compliance with the Rule. A copy of the Petitioner’s extension notification and AHCA’s receipt of the same are attached hereto as Exhibits “E” and “F”, respectively.

13. On August 31, 2018 and November 30, 2018, Petitioner submitted quarterly progress reports to AHCA, as required by the Rule. A copy of Petitioner’s August 31, 2018 quarterly progress report is attached hereto as Exhibit “G” and a copy of Petitioner’s November 30, 2018 quarterly progress report is attached hereto as Exhibit “H”.

14. As of December 18, 2018, the EPP had still not been approved by the Local Agency. Petitioners became concerned that the Initial Extension Deadline was quickly approaching and the EPP had not been approved. Out of an abundance of caution, Petitioner submitted a more comprehensive, amended Emergency Power Plan to the Local Agency on December 18, 2018 (the “Amended EPP”). A copy of the Amended EPP and the Local Agency’s receipt of the Amended EPP are attached hereto as Exhibits “I” and “J”, respectively.

15. Petitioner has made several attempts to follow up with the Local Agency regarding review of the Amended EPP, including making an in-person visit to the Local Agency. Petitioner was originally informed by the Local Agency that the Amended EPP would be reviewed before the end of the year. The Petitioner was subsequently informed by the Local Agency that the Amended EPP would likely be reviewed prior to December 21, 2018. However, as of the date of this Petition, the Local Agency has yet to review the Amended EPP.

16. The Amended EPP fully complies with the requirements of the Rule. Petitioner has taken various steps to ensure that Petitioner has an adequate plan in place that meets the requirements of the Rule, including purchasing and installing a compliant generator, ensuring

adequate fuel is onsite and working with various contractors to obtain compliance with the Rule in a timely manner. In accordance with the Amended EPP, the Petitioner has a portable generator that is fully installed as of the date of this Petition. The Petitioner also has [REDACTED] of fuel onsite, which is enough fuel for the portable generator to run for ninety-six (96) hours. As specified in the Amended EPP, the generator will be used to cool [REDACTED] to a temperature at or below 81 degrees for a period of at least ninety-six (96) hours. [REDACTED]

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

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

17. As of the date of this Petition, Petitioner has taken all steps necessary to fully comply with the Rule, including, but not limited to, establishing policies and procedures in accordance with the Rule. A copy of Petitioner's policies and procedures are attached hereto as Exhibit "K". Petitioner has fully implemented the Amended EPP, except for the Amended EPP has not been approved by the Local Agency.

18. Therefore, as of the date of this Petition, Petitioner is in full compliance with the Rule, except that the Amended EPP has not been approved by the Local Agency.

ACTION REQUESTED

19. Petitioner requests that this Petition for an Emergency Temporary Variance be granted to change the Implementation Deadline to June 30, 2019, effectively extending the Initial Extension Deadline for 180 days, to give the Local Agency time to review and approve the Amended EPP. While the Petitioner has fully implemented the Amended EPP, Petitioner cannot be fully compliant with the Rule until the Amended EPP has been approved by the Local Agency. Petitioner is not aware of how much longer it will take for the Local Agency to review the Amended EPP, however, Petitioner is hopeful that 180 days will be a sufficient time frame for the Local Agency to review and approve the Amended EPP.

20. This Petition is emergent because the Initial Extension Deadline is quickly approaching. Petitioner will suffer an immediate adverse effect if the variance is not issued expeditiously, because failure to comply with the Rule by the Initial Extension Deadline may result in substantial fines, as well as possible revocation of Petitioner's assisted living facility license.

21. Section 120.542(2), Florida Statutes, states that variances shall be granted when: (1) the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means; and (2) when application of the rule would create a substantial hardship or would violate principles of fairness. As discussed below, the purpose of the underlying statutes will be achieved by other means and application of the Rule to Petitioner would result in substantial hardship to Petitioner and violate principles of fairness, pursuant to Section 120.542(2), Florida Statutes. As such, this Petition should be granted.

**THE PURPOSE OF THE UNDERLYING STATUTE WILL BE OR HAS BEEN
ACHIEVED BY OTHER MEANS**

22. The underlying statutes implemented by the Rule are sections 429.41 and 429.19, Florida Statutes. Both sections are part of the Assisted Living Facilities Act. The purpose of the Assisted Living Facilities Act is to provide for the health, safety and welfare of residents of assisted living facilities. *See Fla. Stat. § 429.01.* Additionally, Section 429.41 provides for the preparation and annual update of a comprehensive emergency management plan which addresses, among other things, emergency evacuation transportation and adequate sheltering arrangements. Section 429.19 establishes fines and penalties in the event the requirements of the Assisted Living Facilities Act are not met.

23. Petitioner has achieved the purpose of the underlying statutes, (to provide for the health, safety and residents of the Petitioner), by other means. As set forth above, Petitioner has

already submitted to the Local Agency and received approval of a CEMP, which addresses, among other things, emergency evacuation transportation and adequate sheltering arrangements. Additionally, Petitioner has submitted the Amended EPP to the Local Agency that meets the requirements of the Rule. However, Petitioner is still awaiting approval of the Amended EPP by the Local Agency. In the meantime, Petitioner has an approved CEMP in place.

24. Additionally, as of the date of this Petition, the Petitioner has fully implemented the Amended EPP, except for the Amended EPP has not been approved by the Local Agency. In accordance with the Amended EPP, Petitioner has installed a portable generator and has adequate fuel onsite to provide for ninety-six (96) hours of cooling, in the event of a power failure.

25. The Petitioner can ensure the health, safety and welfare of Petitioner's residents through the current, approved CEMP and the Amended EPP. Therefore, the CEMP and Amended EPP will achieve the purpose of the underlying statutes. As such, this Petition should be granted.

APPLICATION OF THE RULE TO PETITIONER WILL VIOLATE THE PRINCIPLES OF FAIRNESS

26. Section 120.542(2), Florida Statutes, states that variances shall be granted when application of a rule would violate principles of fairness. Principles of fairness are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. *See Fla. Stat. § 120.542(2)*. As set forth above, Petitioner has taken many steps to comply with the Rule, including the submission of the EPP to the Local Agency on November 9, 2017, submission of the Amended EPP to the Local Agency on December 12, 2018, and submission of an extension notification and quarterly progress reports to AHCA. As of the date of this Petition, Petitioner is

in full compliance with the Rule, except the Amended EPP has not been approved by the Local Agency. Petitioner was not able to foresee that the Local Agency would be unable to approve the EPP or the Amended EPP prior to the Initial Extension Deadline. Petitioner cannot fully comply with the Rule until the Local Agency approves the Amended EPP, and approval of the Amended EPP is out of Petitioner's control. Application of the Rule to Petitioner will affect Petitioner in a manner significantly different from the way it affects other similarly situated persons, who are subject to the Rule, who did not encounter such delays in the regulatory approval process. Therefore, application of the Rule to Petitioner would violate the principles of fairness.

**APPLICATION OF THE RULE TO PETITIONER WOULD CREATE A
SUBSTANTIAL HARDSHIP**

27. Section 120.542(2), Florida Statutes states that variances shall be granted when application of the rule would create a substantial hardship. A "substantial hardship" means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance. *See Fla. Stat. § 120.542(2)*. Application of the Rule to Petitioner would create demonstrated legal and economic hardships for Petitioner.

28. Petitioner has taken various steps to achieve full compliance with the Rule, as set forth above. As of the date of this Petition, Petitioner is in full compliance with the Rule, except for the approval of the Amended EPP by the Local Agency. Petitioner cannot fully comply with the Rule until the Local Agency approves the Amended EPP, and approval of the Amended EPP by the Local Agency is out of Petitioner's control. A delay in approval of the Amended EPP by the Local Agency constitutes a delay in the regulatory approval process. As such, application of the Rule to Petitioner would create a legal hardship to Petitioner.

29. Until Petitioner's Amended EPP is approved by the Local Agency, application of the Rule to Petitioner will potentially subject Petitioner to numerous fines which would

constitute an economic hardship to Petitioner. Petitioner cannot be certain how soon the Local Agency will approve the Amended EPP and how many days the Petitioner will be out of compliance with the Rule, due to the Local Agency's delay in approving the Amended EPP. As such, application of the Rule to Petitioner could result in the imposition of fines to Petitioner and would create an economic hardship to Petitioner.

30. Application of the Rule to Petitioner would create both legal and economic hardships for Petitioner. Both legal hardships and economic hardships are considered substantial hardships. Therefore, application of the Rule to Petitioner would create not one, but two, substantial hardships, and this Petition should be granted.


CONCLUSION

31. The purpose of the underlying statutes will be achieved through Petitioner's CEMP and Amended EPP. The principles of fairness would be violated by requiring that Petitioner comply with the requirements of the Rule, due to the fact that as of the date of this Petition, Petitioner is in full compliance with the Rule, with the exception of having the Amended EPP approved by the Local Agency. Further, it will be a substantial hardship for Petitioner to fully comply with the Emergency Rule by the Initial Extension Deadline, due to the inability of the Local Agency to approve Petitioner's Amended EPP by the Initial Extension Deadline, which will result in a legal and economic hardship for Petitioner.

32. Therefore, Petitioner respectfully requests that this Petition for Emergency Temporary Variance extending the Implementation Deadline to June 30, 2019 be granted. Approval of this variance will allow the Local Agency time to approve the Amended EPP.

WHEREFORE, Petitioner requests that the Department grant this Emergency Petition for Temporary Variance in accordance with the proposal set forth herein.

Respectfully submitted this 29th day of December, 2018.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Petition for Emergency Temporary Variance has been provided to the Florida Department of Elder Affairs, by submission through its website, <http://elderaffairs-apps.state.fl.us/alf-waivers/>, and via overnight mail to Francis Carbone, General Counsel, Florida Department of Elder Affairs, 4040 Esplanade Way, Tallahassee, Florida 32399-7000; and a true copy has been furnished via overnight mail, to the Joint Administrative Procedures Committee, Room 680 Pepper Building, 111 West Madison Street, Tallahassee, Florida 32399-1400, on this 29th day of December, 2018.



JESSICA CAPTAIN NOVICK, ESQ.