

STATE OF FLORIDA  
DEPARTMENT OF ELDER AFFAIRS

In re: Emergency Petition for Waiver from  
Rule 58A-5.036 filed by Cresthaven East,  
LLC

DOEA CASE No.: 2018-

EMERGENCY PETITION FOR TEMPORARY WAIVER FROM RULE 58A-5.036

Petitioner, Cresthaven East, LLC, by and through its undersigned counsel, and in accordance with section 120.542, Florida Statutes, and Florida Administrative Code Rules 28-104.002, 28-104.004, and 58A-5.036, files this Emergency Petition for Temporary Waiver from Rule 58A-5.036 and states:

**I. Parties**

Petitioner:

Cresthaven East, LLC  
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Agencies:

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**II. Applicable Rule Citation (Rule 58A-5.036; Emergency Environmental Control for ALFs)**

The pertinent rule in this matter is Florida Administrative Code Rule 58A-5.036, which sets for criteria for the Emergency Environmental Control Plans required of all Florida ALFs, as well as procedures for the submission, approval, and implementation of plans. The purpose of the plans is "to address emergency environmental control in the event of the loss of primary electrical power." Fla. Admin. Code R. 58A-5.036(1).

The specific provision at issue is sub-rule 58A-5.036(4)(b), which imposes a January 1, 2019, deadline for full implementation of plans for ALFs that took the initial extension provided for in the rule. Sub-rule 58A-5.036(4)(b) provides, in part:

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.

The rule also permits an ALF to request a waiver of the January 2019 deadline under section 120.542, Florida Statutes, if it “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.” Fla. Admin. Code R. 58A-5.036(4)(b).

### **III. Statute Implemented (Section 429.41, Fla. Stat.)**

Rule 58A-5.036 implements section 429.41, Florida Statutes. Section 429.41 delegates to the Department the authority to promulgate rules that establish minimum standards for the provision of “safe and sanitary facilities and the highest quality of resident care accommodating the needs and preferences of residents.” § 429.41(1), Fla. Stat. This includes adopting rules concerning the “maintenance of facilities ... , relating to plumbing, heating, cooling, lighting, ventilation, living space, and other housing conditions, which will ensure the health, safety, and comfort of residents.” § 429.41(1)(a), Fla. Stat.

### **IV. Factual Background**

Cresthaven ALF. Petitioner owns and operates an independent and assisted living community called Cresthaven East in West Palm Beach, Florida. Its 308-bed facility is home to more than 240 residents—a large proportion of whom are disabled U.S. military veterans. In fact, Cresthaven serves one of the largest veteran populations of any ALF in this state; and it does so without regard to their ability to pay. Even its President is a Vietnam War-era veteran. Cresthaven truly is “the home of the brave.”

Cresthaven provides a wide range of services to its residents in a variety of living options, including a 44-bed Memory Care Unit where residents suffering from dementia can participate in structured. Cresthaven also offers a host of amenities and services so its residents can enjoy the independent and active lifestyles they desire, while receiving the personalized attention and care they deserve.

Cresthaven has served the Palm Beach community for over 16 years under its current owner; however, its President, a registered nurse himself, has served the community from Cresthaven for over 20 years. In that time, Cresthaven has done an excellent job protecting its residents before, during, and after hurricanes with first-rate licensed nursing care and on-hand health monitoring. As one of the few ALFs in the state with RNs at the top of its management (including at the President and the Administrator level), as well as a team of Licensed Practical Nurses, Cresthaven has the capability and the capacity to provide unmatched care during storm season. Beyond keeping its residents comfortable and nourished, Cresthaven's staff provides around-the-clock care—monitoring temperatures and hydration levels and assisting with medication administration.

Immediate Action. In late September 2017, during the aftermath of Hurricane Irma, Cresthaven's President, Administrator, and Maintenance Director immediately began to take steps to comply with newly announced emergency rules. The building (originally designed and built to be an independent (not assisted) living facility back in 1978), was equipped with a natural gas generator sufficient to supply emergency power to life-saving and life-sustaining equipment. But, by itself, it would not be able to handle the additional load of the cooling systems required under the new rule. So, Cresthaven set out to upgrade its facility by adding a second generator.

Within a couple weeks, Cresthaven had already engaged an engineering firm called Covenant Electrical Engineering to design an emergency generator system that would power the air conditioning system, lights, and other loads for a large portion of the facility. It also conferred with multiple emergency generator contractors, including EmPower Generators. EmPower conducted a thorough site visit on November 2, 2017, and, over the course of several conversations, provided Covenant with its input regarding design options. (Appx. A).

Unavoidable Delay #1. Unfortunately, Covenant proved to be overwhelmed by the sheer number of long-term care facilities in need of engineering services and failed to timely produce the contracted-for plans for the new generator. Accordingly, in April 2018, after weeks of unanswered e-mails and calls, Cresthaven terminated its agreement with Covenant and engaged another firm called MAG Engineering, Inc. (Appx. B).

By this time, it was clear that Cresthaven would not be able to fully implement its plan by the June 1, 2018 deadline; so, it made arrangements to provide its residents with an area to congregate that met the safe, indoor air temperature requirements of rule 58A-5.036. It contracted with MAG to handle the designs. MAG submitted its proposal on April 18, 2018, Cresthaven made its initial payment a few days later, and MAG began work on the project. (Appx. C & D). Soon thereafter, Cresthaven requested an extension from the AHCA to January 1, 2019, in accordance with rule 58A-5.036(4)(b). AHCA acknowledged receipt and granted the extension on April 24, 2018. (Appx. E).

Cresthaven contracted with Green Electric to perform the electrical work for MAG's design, including rewiring a large auditorium/meeting room to draw emergency power from the existing generator, installing receptacles for new lighting and medical equipment, as well as higher-capacity receptacles to handle multiple air conditioning units. Green also agreed to provide load calculations and sketches for Palm Beach County permit approval. (Appx. F). Ultimately, Cresthaven spent more than \$20,000 (approximately \$6,500 for MAG's designs; \$13,400 for Green's installation; and \$3,060 for air conditioning units and fans) to create the temporary contingency cooling space as a stopgap during the extension period. (Appx. D, F, G).

Cresthaven timely filed its first quarterly report on July 24, 2018. (Appx. H). In the report, it updated AHCA on its progress with the temporary cooling space. Specifically, it advised that it had obtained the necessary permits for the work and had purchased the air conditioning units and fans. It also advised that MAG had begun design work on Cresthaven's original plan to install a second emergency generator that would power air conditioning units, lights, and other loads for a larger portion of the facility, and that it would begin to seek bids as soon as the plans were done. (Appx. H).

Unavoidable Delay #2. In mid- to late-September 2018, MAG completed its second set of designs and Cresthaven immediately began seeking bids. (Appx. I). Unfortunately, the bidding process revealed a delay-causing logistical problem in MAG's plans: installation of the new generator as designed would require the use of a flatbed truck and a crane, which would have endangered underground utilities. In short, the planned location for the new generator was no longer viable. (Appx. I).

As a result, MAG had to identify another location for the generator—**F.S. 119.071(3)(a)2.b**, yet far enough from the facility to not run afoul of building codes. (Appx. I). In many ways, this unfortunate development forced MAG having to start from square one. Indeed, in addition to further coordination with the power company to obtain accurate fault current data, the local gas company had to visit the property multiple times to help devise a plan to connect the new generator to the natural gas service line.

Unavoidable Delay #3. It also became apparent during this period that the age of the facility posed its own unique set of problems. The electrical room was just large enough for existing machinery; new and necessary equipment would not fit. The older construction also meant tighter clearances for the installation of new electrical equipment and conduits inside the building. Compounding these problems was the fact that various electrical components were no longer produced, and finding compatible parts was virtually impossible. Cresthaven detailed these issues and delays in its second quarterly report to AHCA on October 18, 2018. (Appx. J).

Unavoidable Delay #4. Another delay-causing problem emerged about a month later. Because the plan called for the existing generator and the new generator to work in

tandem to provide emergency power, MAG advised that the County would require more precise data on the electrical demands of the existing generator before approving plans that purported to accurately calculate the required size of the new generator. Specifically, MAG advised Cresthaven to find a company that could conduct a 30-day demand load study of the existing generator—a task made all the more challenging by the age of the unit. Still, there was no other option: MAG could not complete its revised plans without this data; and, even if it could, the County would not approve them. (Appx. B).

Final Stretch. Fortunately, the demand load study is done and MAG completed its revised plans this week. (Appx. K). Cresthaven is currently in the process of collecting bids for the work, and expects to execute a contract by the end of next week. MAG estimates that the construction and installation will take approximately sixteen (16) weeks to complete. (Appx. B). Thus, Cresthaven needs 120 days to fully implement its emergency cooling plan.

## **V. Temporary Action Requested**

Cresthaven requests a temporary waiver of the January 2019 deadline for the full implementation of its plan. Specifically, Cresthaven requires a 120-day extension to May 1, 2019, to complete the construction and installation of the new generator.

## **VI. Emergency Nature of Request**

The implementation deadline is fewer than two weeks away. If Cresthaven is not granted a waiver before January 1, 2019, it would be exposed to all the sanctions authorized under chapter 429, part I, Florida Statutes, or chapter 408, part II, Florida Statutes, including, license revocation, license suspension, and the imposition of administrative fines. The standard waiver timeframes are too long to serve any practical purpose.

## **VII. Facts Justifying a Waiver**

The Legislature enacted the variance and waiver provisions of the APA to provide for a procedure in which agencies may relieve licensees of the sometimes unreasonable, unfair, and unintended results of the strict application of regulations. § 120.542(1), Fla. Stat. Agencies must grant a variance or waiver when the licensee “subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means” and “when application of a rule would create a substantial hardship or would violate principles of fairness.” § 120.542(2), Fla. Stat. “‘Substantial hardship’ means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver,” and “‘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.” § 120.542(2), Fla. Stat.

Additionally, rule 58A-5.036(4)(b) expressly provides for the waiver of the January 2019 deadline if the ALF “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.” Fla. Admin. Code R. 58A-5.036(4)(b). Cresthaven’s circumstances satisfy these criteria.

Purpose Achieved. The purpose of the underlying statute, section 429.41, is to provide for “safe and sanitary facilities and the highest quality of resident care accommodating the needs and preferences of residents,” in part through the promulgation of regulations relating to “plumbing, heating, cooling, lighting, ventilation, living space, and other housing conditions, which will ensure the health, safety, and comfort of residents.” § 1429.41(1) & (1)(a), Fla. Stat.

Cresthaven has achieved this purpose by other means. It has an approved Emergency Management Plan in place—which accounts for all hazards and ensures that Cresthaven and its staff are ready and able to provide care for its residents before, during and after a storm. Cresthaven employs one of the most highly qualified staffs of any ALF in the state; and it has procedures for providing around-the-clock care for before, during, and after storms. Furthermore, it invested upwards of \$20,000 to install air conditioning units, fans, and power outlets that run on its existing generator to ensure that its residents have a safely cooled and adequately equipped space in the event of a prolonged power outage. As such, Cresthaven contends that it has achieved the purpose of section 429.41 by several other means.

Substantial Hardship. Strict application of rule 58A-5.036(4)(b) would create a substantial hardship for Cresthaven. In fact, not only would requiring Cresthaven to meet the January 2019 deadline create a substantial hardship, doing so would create an impossibility. Indeed, even if Cresthaven broke ground on the new generator today, construction and installation still would not be complete for 16 weeks.

Strict application of rule 58A-5.036(4)(b) would also create a substantial hardship for Cresthaven if AHCA decided to impose any of the sanctions available to it, including license revocation, license suspension, and the imposition of administrative fines, based on the missed deadline. Potential effects on Cresthaven’s residents would only increase any hardship.

Principles of Fairness. Principles of fairness would also be violated by strict application because rule 58A-5.036(4)(b) affects Cresthaven more than other ALFs due to the unique challenges presented by the age of the facility and the location of its utilities. It is difficult to overstate the effect these issues had on Cresthaven’s timely implementation of its plan; e.g., multiple electricians tried—unsuccessfully—to configure new circuitry and components in the undersized electrical room; and the location of underground utilities effectively killed the first set of plans, only to yield an entirely different set of problems with the second.

Unavoidable Delays. Lastly, Cresthaven 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 January 1, 2019. Cresthaven's quarterly progress reports show that necessary construction, zoning, and other regulatory processes caused unavoidable delays. For example:

- The need to use a flatbed truck and a crane killed the original plans for the installation of the new generator due to potential damage to underground utilities;
- Identifying another location for the new generator caused further delays because building code (and practical) restrictions on where it could be placed;
- Multiple visits from the local gas utility company were required to explore methods of connecting a gas line to the generator at its new location;
- The necessity of additional coordination with the power company to obtain accurate fault current data; and
- A late-discovered electrical demand issue requiring a 30-day study of the existing generator.

Moreover, Cresthaven could not avoid the delays caused by the added layer of complication attributable to the age of the building, like the difficult, if not impossible, task of obtaining electrical components that are compatible with the facility's existing equipment.

## **VIII. Conclusion**

Strict application of rule 58A-5.036 would create a substantial hardship (read: utter impossibility). It would also violate principles of fairness because, despite its early start, Cresthaven finds itself in this position thanks to the unfortunate location of underground utilities and the less-than-spacious nature 1970s construction. Cresthaven only needs 120 days to implement its emergency cooling plan. This represents a temporary waiver from rule 58A-5036—one that is necessary because of delays not caused by Cresthaven. For the foregoing reasons, Cresthaven respectfully asks the Department to grant its Emergency Petition for Temporary Waiver from Rule 58A-5.036.

Respectfully submitted,

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