

**STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS**

**IN RE: MIAMI-DADE COUNTY ALF
D/B/A/ HELEN M. SAWYER PLAZA ALF**

**EMERGENCY PETITION FOR TEMPORARY
VARIANCE FROM RULE 58A-5.036,F.A.C.**

Miami-Dade County d/b/a Helen M. Sawyer Plaza ALF (hereinafter "Petitioner") hereby petitions the Florida Department of Elder Affairs (DOEA) for a Temporary Emergency Variance of Rule 58A-5.036, F.A.C., pursuant to Section 120.542, Florida Statutes, Rule 28-104.004, Florida Administrative Code; and Rule 58A-5.036, F.A.C.

1. Petitioner is a 101-bed based assisted living facility ("ALF") License No. 9359, located at 1150 NW 11 Street Road Miami, FL 33136 and is licensed pursuant to Chapter's 429, Part I and 408 Part II, Florida Statutes and Chapter 58A-5, Florida Administrative Code.
2. The Agency affected by this petition is the Florida Department of Elder Affairs, 4040 Esplanade Way, Tallahassee, Florida 32399.
3. Rule 58A-5.036 is implementing 429.19 and 429.41, Florida Statutes.
4. This Emergency Petition is filed pursuant to section 120.542 Florida Statutes and Chapter 28-104.004, F.A.C.
5. The Florida Department of Elder Affairs adopted Rule 58A-5.036 on March 26, 2018 which requires full compliance no later than January 1, 2019.
6. Petitioner requests an emergency temporary variance from the provision in Rule 58A-5.036 which sets a deadline for implementing the environmental control project.
7. Based on construction estimates and timelines received by Petitioner, the need for a variance is vital. If Petitioner is not granted a temporary variance, it will result in fines, sanctions, facility closure, and removal of residents whose care we are responsible for. The January 1, 2019 deadline created by Rule 58A-5.036 creates a hardship for our facility.
8. Petitioner has made good faith efforts to timely implement the plan. However, due to circumstances beyond its control, Petitioner will be unable to implement the plan by the January 1, 2019 deadline. This creates a hardship for Petitioner in that the DOEA and/or the Agency for Health Care Administration may impose various penalties for noncompliance.
9. Petitioner submitted an Extension Notification on April 25, 2018. **(See Exhibit "A" attached hereto and incorporated by reference).**

10. On July 2, 2018, the Agency for Health Care Administration (“AHCA”) issued a Notice of Apparent Violation of Rule 58A-5.036 (“Notice”). **(See Exhibit “B” attached hereto and incorporated by reference).**
11. On July 10, 2018, Petitioner sent its Response to the Notice via email with proof that Petitioner had previously submitted an extension notification and also provided documentation that was requested in response to the submission of the extension notification, and therefore was not in violation of Rule 58A-5.036. **(See Exhibit “C” attached hereto and incorporated by reference).**
12. Section 120.542(2), Florida Statutes, provides that variances and 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. 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. See § 120.542(2), F.S. As discussed below, the application of Rule 58A-5.036, F.A.C. creates a substantial hardship on the Petitioner.
13. 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.
14. Petitioner provides care at a lower reimbursement rate than private pay facilities of similar size due to reimbursements being comprised primarily of Florida's Medicaid program. The funds necessary to purchase a generator of sufficient size requires significant financing which Petitioner has been able to secure.
15. Contractor hired by Petitioner has developed a timeframe for the installation of the generator required by Rule 58A-5.036 and expects that it will have the generator installed by December 2019.
16. Petitioner is unable to complete generator installation without cooperation from the city, the county, and professionals who can provide expertise in order to assist with compliance. Petitioner submits that they do not have the staff nor expertise to fulfill the project without the assistance of highly trained individuals which they have contracted. Accordingly, the variance should be granted.
17. Specifically, the Petitioner has completed the following towards plan implementation:
 - a) Determined the appropriate method of meeting residents’ comfort and clinical needs, which include maintaining an ambient temperature which does not exceed 81 degrees Fahrenheit.
 - b) Retained the services of CSA Group, a project delivery and program management company, to design a generator implementation plan for various Miami-Dade Public Housing sites which includes Miami-Dade County ALF.
 - c) Petitioner’s contractor will proceed with designing a scope of project requiring significant electrical and construction modifications by way of a permitted plan of design, allowing for the installation of infrastructure that can host the use of a generator of sufficient power supply capacity when needed.

- d) The contractor has visited the property with electrical subcontractors and is currently preparing scope of work, assessment, and design for the generator installation project which includes a new infrastructure foundation to be constructed which would allow for installation of a permanent generator.

18. Petitioner will be unable to implement the plan by January 1, 2019, for the following reasons:

- a) As a government-funded entity, Petitioner is required to adhere to specific Procurement and Bid Processes for the acquisition of a generator which have hindered compliance.
- b) Petitioner must obtain approval from U.S. Department of Housing and Urban Development; a requirement when additional debts are placed on the property.
- c) Petitioner's contractor must design a scope of project that requires significant electrical and construction modifications by way of a permitted plan of design, which allows for the installation of infrastructure that can host the use of a generator of sufficient power supply capacity when needed. The design will include a new infrastructure foundation that will allow for installation of a permanent generator.

19. The granting of a variance at this time is not unreasonable.

20. If the emergency variance is not granted, Petitioner will suffer an immediate adverse effect.

21. Petitioner may be subject to revocation of license, fines, or sanctions. Any fines imposed will reduce the capability of the Petitioner to comply with Rule 58A-5.036. Furthermore, the possibility of license revocation for noncompliance would irreparably injure the Petitioner, as well as its residents and their families.

22. Principles of fairness are violated in this instance although the Petitioner is not the only ALF affected by the rule. The significant differences in how the rule affects the Petitioner versus other ALFs is exhibited by the fact that the Petitioner must adhere to specific government procurement and bid processes while it attempts to comply with Rule 58A-5.036. The Petitioner has hired a contractor to complete design plans that will allow for a financially feasible option for the Petitioner to comply with the rule and implement the plan.

23. Petitioner submits that the literal application of the rule will thus create a substantial hardship for Petitioner and it violates principles of fairness. Additionally, the Petitioner will suffer an immediate adverse effect unless the variance is granted. Accordingly, the variance should be granted.

24. Section 429.19, Florida Statutes, was enacted to provide for imposition of administrative fines for violations of Chapter 429 Part I, Florida Statutes. See § 429.19 (1) FS.

25. Section 429.41, F.S. was enacted to provide reasonable and consistent quality of resident care and quality of life, and to ensure a safe and sanitary residential environment accommodating the needs and preferences of residents. See Section 429.41(1), F.S. Furthermore, this section ensures the preparation and annual update of a comprehensive emergency management plan that provides for emergency power. See § 429.41(1)(b), F.S. The statute also provides for standards that 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, water, post-disaster transportation, supplies, staffing, emergency equipment, individual identification of residents, 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. 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.
26. Petitioner has complied with this requirement and a copy of the plan approval letter has been attached.
27. Rule 58A-5.036 Section 4(c) requires assisted living facilities to make arrangements pending full implementation of its plan that provide residents with an area or areas to congregate that meet a safe indoor air temperature of 81 degrees Fahrenheit or less for a minimum of ninety six hours.
28. A variance from the rule will not impair the purpose of the statutes, which is to require that assisted living facilities provide for the safety, care, and comfort of its residents on a regular basis, as well as during emergencies.
29. Petitioner's Facility Emergency Power Plan was reviewed and approved by Miami-Dade County's Office of Emergency Management on May 29, 2018 and therefore has been found to be compliant with the underlying purpose of the statutes. **(See Exhibit "D", attached hereto and incorporated by reference).**
30. Petitioner's Comprehensive Emergency Management Plan (CEMP) was reviewed and approved by Miami Dade County's Office of Emergency Management on July 5, 2018 and therefore has been found to be compliant with the underlying purpose of the statutes. **(See Exhibit "E", attached hereto and incorporated by reference).**
31. Petitioner will continue to follow the legislative requirements for the Comprehensive Emergency Management Plan and adhere to local emergency management officials as it pertains to added safety requirements.
32. **F.S. 119.071(3)(a)2.b.**
33. During a power outage, staff will make rounds to check on the safety and well-being of all residents. Staff on duty will perform the following:
- a) Notify the power company of the loss of electrical service by calling Florida Power & Light: 1-800-468-8243. Staff will not assume power outage has already been reported.
 - b) Ensure that existing standby generator powered on when power was lost.

- c) Staff will monitor ambient temperature in common areas, hallways, and apartments.
- d) Staff will check all breaker panels and reset if necessary.
- e) Staff will regularly patrol the building in 20 minute intervals for wellness checks and to determine the need for assistance by residents.

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

- 34. It must be noted that Petitioner is not seeking a variance from implementation of the rule, but rather from the substantial legal, technological, and governmental hardships and immediate adverse effect it is facing based on the deadline within which the rule requires implementation. It would be fundamentally fair to grant the Petitioner the time it requires to implement this project.
- 35. Petitioner fully intends on implementing Rule 58A-5.036. However, it will not be able to do so by January 1, 2019. A variance serves the purpose of the underlying statutes by enabling the Petitioner to continue to perform essential services for residents without the threat of disruption or termination, while implementing the requirements of the rule.
- 36. The facts herein demonstrate a substantial hardship to the Petitioner and principles of fundamental fairness justify the granting of the variance for the Petitioner.
- 37. The deadline for implementation under Petitioner's approved extension is January 1, 2019. Under 120.542, F.S., except for emergency variances or waivers, the agency has up to 30 days to review a petition and submit a request for additional information if necessary. Within 30 days after receipt of such additional information, the agency shall review such information, and may request information to clarify the additional information if necessary. Ultimately, the agency shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition. A petition not granted or denied within 90 days after receipt of a completed petition is deemed approved. In an abundance of caution, the Petitioner has titled this an Emergency Petition.
- 38. The Petitioner will suffer an immediate adverse effect unless the variance is granted since the agency may choose to impose sanctions or fines for noncompliance with Rule 58A-5.036.
- 39. For the foregoing reasons, Petitioner, Miami-Dade County ALF, requests that the Department of Elder Affairs approve its Emergency Petition for a Temporary Variance from Emergency Rule 58A- 5.036, F.A.C., allowing Petitioner until December 31, 2019 for full implementation of the rule and to stay imposition of fines throughout the requested extension period provided by the variance. If the Department deems that the amount of time requested is not acceptable, Petitioner requests a time the Department believes to be reasonable under the circumstances. Should this request not be granted, Petitioner faces fines, sanctions, possible closure, and the removal of residents that have been entrusted in our care. Additionally, Petitioner requests that they not be prohibited from seeking an additional extension if implementation of the rule is unavoidably delayed through no fault of Petitioner.

Respectfully submitted this 28th day of December 2018.



Martin Sandino, Administrator
Miami-Dade County ALF License #AL9359
1150 NW 11 Street Road, Miami, FL 33136

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Emergency Petition for Variance has been provided to the Agency Clerk, Office of the General Counsel of the Florida Department of Elderly Affairs, at agencyclerk@elderaffairs.org and via fax to 850.414.2006.

Martin Sandino, Administrator
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Miami, FL 33136