

**STATE OF FLORIDA  
DEPARTMENT OF ELDER AFFAIRS**

**IN RE:**

**ELYSIAN GARDENS, LLC D/B/A  
ABSOLUTE CARE ASSISTED LIVING  
FACILITY'S PETITION FOR WAIVER  
OR VARIANCE FROM RULE 58A-5.036  
OF FLORIDA ADMINISTRATIVE CODE.**

**DOEA CASE NO.:**

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

COMES NOW, ELYSIAN GARDENS, LLC D/B/A ABSOLUTE CARE ASSISTED LIVING FACILITY ("Petitioner"), by and through the undersigned counsel, and pursuant to Section 120.524 of Florida Statutes and Rules 28-104.004 and 58A-5.036 of Florida Administrative Code, hereby Petitions the Florida Department of Elder Affairs ("DOEA") for a temporary waiver or variance from Rule 58A-5.036 of Florida Administrative Code. In support, Petitioner states as follows:

**I.  
BACKGROUND**

1. Petitioner operates a fourteen (14) bed assisted living facility ("ALF") located at 3621 N.W. 90th Terrace, Sunrise Florida 33351.
2. Petitioner is licensed by Agency for Health Care Administration ("AHCA").
3. The Agency affected by this Petition is the Florida Department of Elder Affairs ("DOEA") located at 4040 Esplanade Way, Tallahassee Florida 32399.
4. Petitioner's ALF is the residence of senior citizens who need assistance with the activities of everyday life, but Petitioner does not provide housing to seniors who are bedbound or who require substantial assistance with activities of daily living.
5. Petitioner files this Emergency Petition for Temporary Waiver or Variance from Rule 58A-5.036 pursuant to Section 120.542 of the Florida Statutes and Chapter 28-104.004 of the Florida Administrative Code.

**II.**

**RULE 58A-5.036 WAS ADOPTED TO IMPLEMENT § 429.41 AND § 429.19**

6. DOEA adopted Rule 58A-5.036 of the Florida Administrative Code on March 26, 2018, for purposes of implementing the rules under Section(s) 429.41 and 429.19 of Florida Statutes, which were enacted to ensure quality of care, safe and sanitary environments, and the accommodations of the needs of ALF residents. See Fla. Stat. §§ 429.41, 429.19.

7. Section 429.41(1) of Florida Statutes provides, in relevant part, the following:

The agency, in consultation with the department, may adopt rules to administer the requirements of part II of chapter 408. 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 Families, 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.

Fla. Stat. § 429.41(1), (a); Fla. Admin. Code. r. 58A-5.036, (2018).

8. Rule 58A-5.036 of the Florida Administrative Code sets forth the deadline for licensees of ALFs to implement an environmental control plan, which includes among other things, the acquisition of alternative power sources 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. Fla. Admin. Code. r. 58A-5.036(a), (2018).

9. Rule 58A-5.036 provides, in relevant part:

(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.

Fla. Admin. Code. r. 58A-5.036(4), (a)–(b), (2018).

10. Petitioner submitted and Extension Notification to AHCA notifying it of Petitioner's intent to utilize the extension permitted by Subsection (4)(b) of Rule 58A-5.036 when Petitioner anticipated the inability to have fully implemented the Emergency Environmental Control Plan prior to the June 1, 2018 deadline.

11. AHCA subsequently granted Petitioner's request for an extension.

12. Thereafter Petitioner submitted its ALF Extension Quarterly Report to the AHCA and provided an update as to its progress toward full compliance. (A copy of the ALF Extension Quarterly Report is attached hereto as Exhibit "A.").

13. Petitioner advised AHCA in its Quarterly Report that it was still in the process of implementing the emergency environmental control plan. AHCA granted Petitioner an additional extension to January 1, 2019, to be fully compliant with Rule 58A-5.036. (A copy of the email correspondence noting that the AHCA granted Petitioner an addition extension is attached hereto as Exhibit "B.").

14. Petitioner must be in full compliance with Rule 58A-5.036 not later than January 1, 2019, unless the Department grants a waiver or variance from the rule. Petitioner is currently in compliance with 58A-5.036(4)(c) and asserts that unavoidable delays beyond Petitioner's control caused by necessary construction, delivery of ordered equipment, zoning or other regulatory approval processes will occur beyond the initial extension date. Consequently, Petitioner seeks a waiver or variance from the Rule's January 1, deadline.

**III.**  
**PETIONER WILL SUFFER SUBSTANTIAL HARDSHIP**  
**IN THE ABSENCE OF A WAIVER OR VARIANCE FROM THE RULE**

15. Petitioner files the instant Emergency Petition for Temporary Waiver or Variance from Rule 58A-5.036 pursuant to Section 120.542 of Florida Statutes and Chapter 28-104.004 of the Florida Administrative Code.

16. Section 120.542(2) of Florida Statutes provides, in relevant part:

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.

Fla. Stat. §120.542 (2).

17. During the extension period, Petitioner has made continuous and diligent efforts towards compliance with Rule 58A-5.036 by its acquisition, and attempted installation, of a sufficient alternative alternate power source in compliance with Rule 58A-5.036.<sup>1</sup> See Fla. Admin. Code. r. 58A-5.036(a), (2018).

18. Petitioner has taken the following action in furtherance of compliance:

- a. Petitioner has entered into a contract with Generator Supercenter of Broward County for the purchase and complete installation of a 22kW Generac Generator with a Transfer Switch and will incur a total cost of

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<sup>1</sup> It should also be noted that on April 19, 2018, the City of Sunrise issued Petitioner a violation of City Ordinance Section 6-100, (Ord. No. 627, § 2, 12-12-17). Similar to the state-wide standards referenced herein and imposed by AHCA, the ordinance requires all ALFs within the City of Sunrise to install and maintain a permanent emergency power source that would provide electricity for the entire facility. But the City’s requirements are greater and more expansive than state-wide requirements imposed by AHCA. Petitioner has spent substantial time and resources challenging the ordinance on that bases and others, including hiring legal counsel to represent it in that matter. Challenging the City’s ordinance has also contributed to the delay of Petitioner’s efforts to become fully compliant with state-wide requirements imposed by AHCA and referenced herein. Petitioner is still awaiting a ruling in that matter, but should DOEA require more information regarding this matter, Petitioner is prepared to provide the same at the request of DOEA.

\$18,065.57. (A copy of the Quote prepared by Generator Supercenter of Broward County is attached hereto as Exhibit "C.")

- b. Petitioner has paid a total of \$9,303.77 towards the total balance of \$18,065.57. (A copy of the Invoice prepared by Generator Supercenter of Broward County is attached hereto as Exhibit "D.").
- c. Petitioner intends to pay the remaining balance upon completion of the installation of the Generator.
- d. Petitioner has had Generator Supercenter of Broward County's Project Manager perform a survey of the property performed for purposes of installing the purchased 22kW Generac Generator with a Transfer Switch. (A copy of the correspondence from Generator Supercenter of Broward County confirming the same is attached hereto as Exhibit "E.").
- e. Petitioner has requested that the Engineering Department of Generator Supercenter of Broward County prepare a permitting package to be submitted to the city for approval prior to installation of the purchased 22kW Generac Generator with a Transfer Switch. See Exhibit "E."

19. As set forth above, Petitioner has made good-faith efforts to become fully compliant with Rule 58A-5.036, but the following unavoidable delays beyond its control prevent Petitioner's timely compliance:

- a. Generator Supercenter of Broward County's Project Manager is still in the process of preparing the permitting package for the installation of 22kW Generac Generator with a Transfer Switch. (A copy of the correspondence from Generator Super Center of Broward County confirm the same is attached hereto as Exhibit "F").
- b. As of December 21, 2019, Generator Supercenter of Broward County has not yet submitted the permitting package to the city. See Exhibit "F."
- c. Petitioner cannot move forward with installation of the 22kW Generac Generator and Transfer Switch without city approval the proper permitting.

20. Given the existence of the above-referenced circumstances, over which Petitioner has no control, and documentation previously produced to AHCA during the

extension period, Petitioner has shown that the delays to date are necessary and unavoidable due to necessary construction, delivery of ordered equipment, zoning or other regulatory approval processes will occur beyond January 1, 2019. See Fla. Admin. Code. r. 58A-5.036(4), (a)–(b), (2018).

21. Legally, the Petitioner may not move forward with the installation of its generator without the proper permitting and approval by the city.

22. The application of Rule 58A-5.036—specifically the deadline by which Petitioner must be in full compliance—creates substantial hardship and violates principals of fairness as applied to Petitioner and granting Petitioner’s request for a variance from the rule will not impair the purpose of the statute. See §120.542(2); §§ 429.41, 429.19.

23. As evidenced by Petitioner’s actions to date towards full compliance, Petitioner is committed to full compliance with the rule as soon as possible. Petitioner, in reality, does not seek a waiver from the rule; more precisely, Petitioner seeks a waiver or variance from the deadline it imposes. Petitioner will suffer substantial hardship in the absence of such and a violation of principles of fairness will occur upon literal application of the rule to Petitioner.

24. Without question, the accumulation of fines or the imposition of sanctions will create a substantial hardship, and in the process, impede Petitioner’s ability to reach full compliance. Being subject to fines and sanctions will also jeopardize the financial investments Petitioner made in furtherance of its commitment to reach full compliance, which dutifully exceeds the sum of \$10,000.00 dollars. See Fla. Stat. §120.542 (defining hardship that is substantial as “demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver”). A license revocation would cause immediate and irreparable injury to Petitioner by foreclosing its ability to operate, which in-turn would cause harm to its residents and their families.

25. Although Petitioner is not the only ALF affected by the deadline for implementing the Rule, Petitioner’s resident capacity of fourteen (14) pales in comparison to the size of other similarly situated ALFs whose resources, undoubtedly, far-exceed that of Petitioner and would facilitate a faster transition to full compliance. See Fla. Stat. §120.542 (2) (explaining that a violation of principles of fairness occurs where “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”).

**IV.**  
**GRANTING THE VARIANCE WILL NOT IMPAIR OR**  
**FRUSTRATE THE PURPOSE OF SECTION(S) 429.41 AND 429.19**

26. Granting Petitioner’s Emergency Petition for Temporary Variance from Rule 58A-5.036 will not impair or frustrate the purpose of Section(s) 429.41 and 429.19 of Florida Statutes, which were enacted to ensure quality of care, safe and sanitary environments, and to accommodate the needs of ALF residents on a regular basis and in the event of an emergency. See Fla. Stat. §§ 429.41, 429.19

27. Petitioner’s Comprehensive Emergency Management Plan accomplishes the purpose of Section(s) 429.41 and 429.19 of Florida Statutes by ensuring quality care on a regular basis and in the event of an emergency. (A copy of Petitioners Comprehensive Emergency Management Plan is attached hereto as Exhibit “G.”).

28. Petitioner’s Comprehensive Emergency Management Plan includes provisions for emergency power, evacuation procedures, transportation, alternative shelter, food and water, the preservation of medications and life-saving medical equipment, and training protocols for its employees to ensure smooth the execution of the same.<sup>2</sup>

29. Petitioner’s Emergency Power Plan also accomplishes the purpose of Section(s) 429.41 and 429.19 of Florida Statutes by setting forth the procedures for the immediate restoration of power in the event it is lost in an emergency. (A copy of Petitioners Supplemental Emergency Power Plan is attached hereto as Exhibit “H”).

30. Petitioner’s Emergency Power Plan sets forth the following emergency procedures in the event that power to its ALF is lost:

**Procedures During the Loss of Power**

VII. If power is lost to the building, staff will make rounds on all residents to ensure they have a light source and check on the safety of all residence. Staff on duty will perform the following.

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<sup>2</sup> The mutual aid agreements and contracts between Petitioner and its host facilities/vendors that are attached as exhibits to Petitioner’s Comprehensive Emergency Management Plan are copies of the agreements. Petitioner is prepared to provide the executed originals at the request of DOEA.

a. Notify the power company of the loss of electrical service by calling FPL emergency outage contact number 800.468.8243. Staff will not assume it has already been reported.

b. Staff will check all breaker panels and reset if necessary.

c. Staff will contact the Executive Director. Additional staff may be called in to assist if roads permit and are open.

d. F.S. 119.071(3)(a)2.b.  
[Redacted]

e. If the temperature is not an issue, staff should regularly patrol the building every 20 minutes for wellness checks, determine the needs for assistance for residence, the smell of smoke or evidence of fire.

f. If power remains off for a significant length of time and temperatures exceed 80° in the common area of the building designated for resident calling in a power outage, staff must engage the generator if it does not engage automatically. Only trained staff or the maintenance director on call may engage the generator.

g. F.S. 119.071(3)(a)2.b.  
[Redacted]

31. As evidenced by the detailed procedures and provisions set forth in Petitioner’s written Comprehensive Emergency Management Plan and Supplemental Emergency Power Plan, Petitioner has demonstrated that granting the instant Emergency Petition for Waiver or Variance from Rule 58A-5.036 will not impair or frustrate the purpose of Section(s) 429.41 and 429.19 of Florida Statutes.

**V.  
PETITIONER’S REQUEST FOR RELIEF**

Rule 58A-5.036 requires full compliance by January 1, 2019 in the absence of the issuance of a waiver or variance. Pursuant to Section 120.542 Florida statutes DOEA thirty (30) days after receipt of a waiver or variance petition to request additional information if necessary, except where the petition is an emergency. Given, the proximity of the compliance deadline with the date of submission of the instant Petition, the undersigned requests that this Petition be deemed an emergency petition within the

scope within Subsection (7) of Section 120.542. Furthermore, for the reasons stated above, Petitioner respectfully requests that DOEA grant Petitioner's Emergency Petition for Waiver or Variance from Rule 58A-5.036. Petitioner anticipates being in full compliance with Rule 58A-5.036 by March 1, 2019, based on assurances made by Generator Supercenter of Broward County, with whom Petitioner has a contract for the purchase and installation of a 22kW Generac Generator with a Transfer Switch. Finally, Petitioner requests that it be permitted to request future extensions upon demonstrating the need for the same was caused by unavoidable delays beyond Petitioner's Control.

On this 24th day of December 2018:

Respectfully submitted,

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#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served to Francis Carbone, Agency Clerk, Office of the General Counsel, Florida Department of Elder Affairs, via electronic mail to [agencyclerk@elderaffairs.org](mailto:agencyclerk@elderaffairs.org); and a true and correct copy of the foregoing was furnished U.S. Certified Mail to the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, Florida 32399-1300 on this 24th day of December 2018.

By: /s Rashad A. Green  
RASHAD A. GREEN, ESQ.

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