

STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS

IN RE: APOLLO GARDENS RETIREMENT
RESIDENCE INC. EMERGENCY PETITION
FOR VARIANCE FROM RULE 58A-5.036
FLORIDA ADMINISTRATIVE CODE

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

Apollo Gardens Retirement Residence Inc. ("Petitioner") hereby petition
the

Florida Department of Elder Affairs ("DOEA") for an emergency variance from
Rule 58A-5.036, F.A.C.

1. Petitioner is the operator of a 57 -bed assisted living facility ("ALF"), license number AL7341, located at 2718 Johnson St., Hollywood (Broward County), Florida, that is licensed pursuant to Chapters 429, Part I, and 408, Part II, Florida Statutes, and Chapter 58A-5 , Florida Administrative Code. Petitioner is an assisted living facility. The facility administrator is Grace Ueberlauer and the facility manager is Andrew Kulnick.
2. The Agency affected by this petition is the Florida Department of Elder Affairs, 4040 Esplanade Way , Tallahassee Florida 32399 , (850) 414 -20 96 .
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. Petitioner requests an emergency temporary variance from the provision in Rules 58A-5.036, F.A.C. which sets out a completion deadline for implementing the environmental control project.
6. Rule 58A-5.036 provides as follows:

(4) IMPLEMENTATION OF THE PLAN. (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.

7. The Extension Notification was submitted on May 24, 2018. (See Exhibit A attached hereto and incorporated by reference.)
8. On May 24th, 2018, the Petitioner was granted an extension as provided in the rule. . (See Exhibit B attached hereto and incorporated by reference.)
9. Petitioner filed its first quarterly report on August 24, 2018 as required. (See Exhibit C attached hereto and incorporated by reference.)
10. The Petitioner's next quarterly report is due by November 24, 2018.
11. Petitioner has made good faith efforts to timely implement the plan, however due to circumstances beyond its control, the 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 could impose various penalties for noncompliance.
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 Petitioner.

13. Specifically the Petitioner has completed the following towards plan implementations:

- a. Determined the appropriate method of meeting the residents' comfort and clinical needs, including maintaining a temperature which does not exceed 81 degrees.
- b. Petitioner has signed a contract on April 25th, 2018 with a generator installation company (Don Hillman Generators). (See Exhibit D attached hereto and incorporated by reference.)
- c. Don Hillman Generators filed for permit with the City of Hollywood on September 27, 2018 (See Exhibit E attached hereto and incorporated by reference.). Portions of the permit have been approved however several parts are awaiting changes, clarifications, etc.

14. Due to the high demand for generator installations, This imposes a hardship on petitioner as petitioner is not able to make these changes and/or clarifications and is relying solely on the services of the contracted generator installation company. Unfortunately due to high demand Don Hillman Generators is working at a slower pace although contacted weekly by petitioner for status updates.

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

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

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

18. The literal application of the rule will thus create a substantial hardship for Petitioner. Additionally, the Petitioner will suffer an immediate adverse effect unless the variance is granted. Accordingly, the variance should be granted.

19. 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) F.S.

20. Rule 58A-5.036 Section 4(c) requires for the assisted living facility to make arrangements pending full implementation of its plan that provides the

residents with an area or areas to congregate that meets the safe indoor air temperature of 81 degrees for a minimum of ninety six hours.

21. 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.

22. The Emergency Environmental Control Plan (EECP) was approved by Broward county on June 8th, 2018 approving the space and square footage to be used as a cooled area. A portable generator will be available at the assisted living facility at all times pending installation of the standby generator. 96 hours of fuel will be delivered to the facility upon the state declaration of a state of emergency **F.S. 119.071(3)(a)2.b.**

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

F.S. 119.071(3)(a)2.b. Staff will remain with residents during a prolonged outage and the temperature will be monitored hourly. If power is lost to the building, staff will make rounds to ensure residents have a light source and to check on the safety of all residents. Staff on duty will do the following:

1. Notify the power company of the loss of electrical services by calling Florida Power & Light (800) 468-8243. Staff will NOT assume it has been reported.

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

111. Staff will contact the manager. Additional staff may be called in to assist.

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

v. If temperature is not an issue, staff will regularly patrol the building every 20 minutes for wellness checks, to determine the needs of residents and to check for the evidence of smoke or a fire.

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

24. Petitioner will implement the rule, however 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.

25. The facts herein demonstrate a substantial hardship to Petitioner and justify the granting of the variance for Petitioner. There has been a plethora of generator projects begun and implemented under both the ALF and nursing home rules and resources are stretched causing the generator installation companies to work slower than typical. Facility was notified that upon full permit approval a generator will at that time be ordered and will be available within 3-4 weeks.

26. It must be noted that Petitioner is not seeking a variance from implementation of the rule, but rather from the substantial hardship 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.

27. The deadline for implementation under the approved extension is January 1, 2019. Under 120.542, F.S., the Agency has up to 30 days to review the 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 has up to 90 days within which to grant or deny this Petition. Although the request for additional information may not be made by the Agency, in an abundance of caution, the undersigned has titled this an Emergency Petition.

28. The Petitioner will suffer an immediate adverse effect unless the variance is granted before January 1, 2019 since the Agency may choose to impose sanctions or fines for noncompliance with the rule.


29. For the foregoing reasons, Petitioner requests that the DOEA grant its Emergency Petition for Variance from Rule 58A-5.036, F.A.C. allowing Petitioner until July 1, 2019 for full implementation of the rule, and to stay imposition of fines throughout the extension period provided by the variance. 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 7th day of November 2018.

Grace Ueberlauer, Administrator
Apollo Gardens Retirement Residence
2718 Johnson St. Hollywood, Fl 33020
ALF# 7341

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 Elder Affairs, at agencyclerk@elderaffairs.org.



Grace Ueberlauer