STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS

IN RE: Coastal Living LLC dba Banana River Villas ALF  December 18, 2018

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

Petitioner, BANANA RIVER VILLAS ALF, pursuant to Section 120.542, Florida Statutes, and Rule 28-104, Florida Administrative Code, hereby requests and emergency petition for a variance from Rule 58A-5.036, Florida Administrative Code, because strict application of this rule will create a substantial hardship and will violate principles of fairness. Furthermore, the Petitioner will suffer immediate adverse effect if the variance or waiver is not issue more expeditiously than the statutory time frame. In support, Petitioner states:

Background Facts:

1. Petitioner is Alan Spears, Owner of BANANA RIVER VILLAS ALF, Lic # 11441, located at 1275 N Banana River Drive, Merritt Island Florida 32952. Telephone 321-454-9528, Fax 321-454-9528.

2. Banana River Villas ALF is an assisted living facility licensed for 6 residents.

3. The property is one story facility comprised of five bedrooms, in which, The facility also contains a Dining Room/Kitchen, a TV room, a family room and a small reading area/library.

An Emergency Petition is Necessary


2. Rule 58A-5.036 provide that failure to comply with the Rule may lead to the Agency for Health Care Administration revoking the facility's license, as well as resulting in a fine or sanction.

3. The Petitioner's variance or waiver must be granted prior to January 1, 2019 to avoid costly fines and to avoid the threat of losing its license.

4. Thus, the Petitioner will suffer an immediate adverse effect if the variance or waiver is not issued more expeditiously than the statutory time frames provided in Section 120.542 and Chapter 28-104, Florida Administrative Code.
The Rule

1. Rule 58A-5.036 provides that:

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.

Type of Action Required

1. BANANA RIVER VILLAS ALF is requesting a variance from the restrictions imposed by Rule 58A-5.036 that would require compliance by January 1, 2019.

2. On April 25, 2018, Banana River Villas Emergency Environmental Control Plan was submitted to the Brevard Co. Emergency Management for approval/denial. As of December 18, 2018, we have not received an approval nor a denial of our EECP.

3. Specific circumstances beyond the facilities control that have prevented full implementation of the detailed: Failure to receive an approval/denial of our EECP from the Brevard Co. Emergency Management.

4. What arrangements have been made to pending full implementation of the detailed plan to ensure that residents of the ALF will not exposed to temperatures above 81 degrees in the event of a power failure or loss of AC due to loss of power:

All equipment is in place to comply with the Emergency Rule. Banana River Villas' Emergency Environment Control Plan was submitted to the Brevard Co. Emergency Management on 25 April 2018. As of 17 Dec 2018, we have not received an approval nor a denial on our EECP. We have a 12,000-watt, dual fuel portable generator (we are located on Merritt Island, and subject to evacuation), that can cool the square footage required by the Emergency Rule F.S. 119.071(3)(a)2.b. by a central air conditioner unit. To fuel the generator, we have F.S. 119.071(3)(a)2.b. tanks that is more fuel required by the rule prior to any declared emergency. When an emergency is declared, "F.S. 119.071(3)(a)2.b. of gasoline will be obtained to meet and exceed the 96-hour fuel requirement.

5. A delineation of the steps remaining for full implementation of the detailed plan and the ALF’s estimate of the time needed to fully implement Rule 58A-5.036: Once the facilities EECP is approved by the Brevard Co. Emergency Management, AHCA will be notified along with the Fire Dept for their inspection.
6. All steps taken by the ALF provided to the residents and family members or legal guardians that the ALF has applied for a variance or waiver from Emergency Rule 58AER17-1 and the steps the ALF is taking to comply with the Emergency Rule:
The family members of the residents were sent or given a letter indicating the facility was under an emergency order from the Governor to install a generator and appropriate fuel source for 96 hours as a backup due to a loss of power.

7. As explained above, the strict application of the terms of the rule will constitute an unnecessary hardship if applied to the Petitioner for which the variance is sought.

The Requested Variance Will Serve the Purpose of the Underlying Statute

1. As set forth in the Rule, the purpose of the emergency rule was to establish a process for certain assisted living facilities to obtain sufficient equipment and resources to ensure that the ambient temperature of the assisted living facilities will be maintained at 81 degrees or less within the facility for a minimum of ninety-six (96) hours in the event of the loss of electrical power.

2. The approval of this variance will not substantially interfere with the purpose of the rule because Petitioner has a portable generator and required minimum fuel on hand to cool the designated areas within the facility.

3. The approval will not be injurious to the public health, safety, morals and general welfare of the community because Petitioner already has the necessary equipment to cool the designated areas within the facility.

Conclusion

BANANA RIVER VILLAS ALF requests that the Department grant a Variance to Rule 58A-5.036, to permit enough time for the Brevard Co Emergency Management to approve the facility EECP and to satisfy other AHCA and Fire Dept inspections.

As owner of Banana River Villas, I understand the important policy behind Rule 58A-5.036 and intends to fully implement the requirements under the rule. Furthermore, I understand the conditions on the variance may be required to ensure that the relief being provided is the minimum necessary to alleviate the circumstances for which the variance is requested.

Alan Spears
Owner, Banana River Villas ALF
1275 N Banana River Drive Merritt Island, Florida 32952
Phone: 321-454-9528; Fax: 321-454-9528