

**STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS**

**IN RE: HEATHER HAVEN, INC.
D/B/A HEATHER HAVEN II**

DOEA Case No.

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

Heather Haven, Inc., d/b/a Heather Haven II (hereinafter “Petitioner” or “Heather Haven II”) by and through its undersigned representative, hereby petitions the Florida Department of Elder Affairs (DOEA) for a **Temporary Emergency Waiver/Variance** of *Rule 58A-5.036, F.A.C.*, pursuant to *Section 120.542, Florida Statutes, Rule 28-10.004, Florida Administrative Code*; and *Rule 58A-5.036, F.A.C.*

BACKGROUND

1. Petitioner operates a nineteen (21) bed assisted living facilities licensed under *Chapter 429, Part II, Florida Statutes* located at 220 Scotland St in Dunedin, Florida 34698.
2. The Agency/Department affected by this petition is the Florida Department of Elder Affairs, 4040 Esplanade Way, Tallahassee, Florida 32399.
3. Heather Haven II has cared for one of Florida’s most vulnerable population as an assisted living facility for over nineteen (12) years.
4. Heather Haven II provides an affordable home with assisted living services allowing older adults to live in a safe, caring and supportive environment while maintaining their dignity, independence, and purpose.

5. The residents at Heather Haven II suffer from various conditions, illnesses, diseases, and many suffer from mental health issues. A critical component of meeting the needs of those residents is the hiring and training of qualified staff; and the monitoring of resident admissions to the facilities. HEATHER HAVIN II does not provide housing to persons that are bedbound or require tremendous amounts of assistance with the daily living.

**HEATHER HAVEN II Seeks A
Temporary Waiver/Variance of Rule 58A-5.036**

6. The Florida Department Elder Affairs adopted Rule 58A-5.036 on March 26, 2018 which requires full compliance not later than January 1, 2019 unless a variance or waiver is granted.
7. Based on the estimates and time lines HEATHER HAVIN II received the need for a variance is detrimental. The outcome for HEATHER HAVIN II if the variance is not granted will result in fines, sanctions, possible closure and the removal of residents that have been entrusted in their care. The deadline created by the Rule creates a hardship for HEATHER HAVIN II to come into compliance.
8. Heather Haven II believes that this is not an emergency or an instance of Petitioner's own making, but one that is based on various factors such as the acquisition of the generator, time lines for installation, and the need to work through the constraints of the local municipality.
9. Heather Haven II submits that it has attempted to comply with the Rule since implementation of the Emergency Rule in 58AER17-1 that was adopted in September 2017.
10. Heather Haven II currently has an installed standby generator that has been properly permitted by Pinellas County. However, the City of Dunedin is required to run the gas lines from the street so that the generator can be hooked to gas.

11. Heather Haven II has requested that gas lines be installed and has paid for those lines to be installed at both Heather Haven II and Heater Haven, which are both in Dunedin, Florida.

12. Heather Haven request a variance from Rule 58A-5.036, F.A.C. The rule was adopted by the Florida Department of Elder Affairs to implement §429.41 and 429.19, F.S., and it provides in pertinent part:

§429.28(1), F.S.

...(1) No resident of a facility shall be deprived of any civil or legal rights, benefits, or privileges guaranteed by law, the Constitution of the State of Florida, or the Constitution of the United States as a resident of a facility. Every resident of a facility shall have the right to:

(a) Live in a safe and decent living environment, free from abuse and neglect.

§429.41(1), F.S.

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

CREATION OF A SUBSTANTIAL HARDSHIP AS TO PETITIONER

13. Section 120.542(2), F.S., provides that 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. *See, Section, 120.542(2),*

F.S. 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. As discussed below, the application of *Rule 58A-5, F.A.C.* creates a substantial hardship Heather Haven.

14. Furthermore, 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.*
15. Heather Haven II provides services and care to residents in an older structure. Easements and zoning approval were not a problem. However, the installation of the gas required to run the generators require the city to provide the gas to the facility.
16. Heather Haven II provides care at a lower reimbursement rate than private pay facilities of the same size due to their reimbursement being provided predominately by Florida's Medicaid program.
17. Heather Haven II has developed a timeframe for the installation of the generator required by Rule and was able to meet its installation timeline for the generator. It is expected that it will have the gas line located at the facility not later than March 2019. Although, it could be as early as next week provided the City of Dunedin is able to do so.
18. Heather Haven II submits the literal application of the Rule will thus create a substantial hardship, more specifically related to the technological aspects required its standby generator to operate. Heather Haven II would also argue that there exists a legal impediment that will delay the installation based on the requirements of the city that it install the gas lines from the

City's gas to the property.

19. Heather Haven II is legally unable to move forward without the cooperation of the city to assist with compliance. Heather Haven II submits that they do not have the staff or expertise to fulfill the project without the assistance of highly trained individuals to which they have contracted or that of the City of Dunedin. Accordingly, the waiver/variance should be granted.

**THE UNDERLYING PURPOSE OF SECTIONS 429.19 and 429.41,
FLORIDA STATUTES WILL BE ACHIEVED**

20. The Departments authority and law implemented as noted in Rule 58A-5.036, F.A.C. include Sections 429.19, F.S. and 429.41, F.S.
21. Section 429.19 provides that In addition to the requirements of part II of chapter 408, the agency shall impose an administrative fine in the manner provided in chapter 120 for the violation of any provision of this part, part II of chapter 408, and applicable rules by an assisted living facility, for the actions of any person subject to level 2 background screening under s. 408.809, for the actions of any facility employee, or for an intentional or negligent act seriously affecting the health, safety, or welfare of a resident of the facility.
22. Each violation of this part and adopted rules shall be classified according to the nature of the violation and the gravity of its probable effect on facility residents. The agency shall indicate the classification on the written notice of the violation as follows:
 - a. Class "I" violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class I violation in an amount not less than \$5,000 and not exceeding \$10,000 for each violation.
 - b. Class "II" violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class II violation in an amount not less than \$1,000 and not exceeding \$5,000 for each violation.

- c. Class “III” violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class III violation in an amount not less than \$500 and not exceeding \$1,000 for each violation.
- d. Class “IV” violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class IV violation in an amount not less than \$100 and not exceeding \$200 for each violation.
- e. Regardless of the class of violation cited, instead of the fine amounts listed in paragraphs (a)-(d), the agency shall impose an administrative fine of \$500 if a facility is found not to be in compliance with the background screening requirements as provided in s. 408.809.

23. Section 429.19, F.S. provides for the sanctioning of assisted living facilities. More specifically, it provides the following:

For purposes of this section, in determining if a penalty is to be imposed and in fixing the amount of the fine, the agency shall consider the following factors:

- (a) The gravity of the violation, including the probability that death or serious physical or emotional harm to a resident will result or has resulted, the severity of the action or potential harm, and the extent to which the provisions of the applicable laws or rules were violated.
- (b) Actions taken by the owner or administrator to correct violations.
- (c) Any previous violations.
- (d) The financial benefit to the facility of committing or continuing the violation.
- (e) The licensed capacity of the facility.

24. *Section 429.41, F.S.* was enacted to provide safe and sanitary facilities and the highest quality of resident care accommodating the needs and preferences of residents. *See, Section 429.41(1), F.S.* Furthermore, it can be also derived that the Florida Legislature also desired rules that would address 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. *See, Section 429.41(1), F.S.*

25. *Section 429.41, F.S.* further provides that a Comprehensive Emergency Management Plan must

be submitted for review and approval to the local emergency management agency. The statute also provides for standards 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, and water; post-disaster transportation; supplies; staffing; emergency equipment; individual identification of residents and 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. Also, appropriate volunteer organizations must be given the opportunity to review the plan. 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 has been attached.

27. *Section 429.28, F.S.* was enacted to that residents had rights that should be afforded to all residents. Among many of those the right of residents of assisted living facilities to have a safe and decent living environment, free from abuse and neglect. *See, Section 429.28(1), F.S.*

28. A variance/waiver of the Rule will not impair the purpose of the statute, which is to provide for the safety of residents before, during, and after an emergency.

29. Heather Haven II has been providing the care and services to residents through several storms,

to include hurricanes. They have continued to make care and services to its residents a priority.

30. Heather Haven II currently has a portable generator that **F.S. 119.071(3)(a)2.b.**
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

31. Heather Haven II will continue to follow the legislative requirements for the Comprehensive Emergency Management Plan, adhere to the local emergency management officials as it pertains to added safety requirements.

32. It must be noted that Heather Haven II is not seeking a variance or waiver from providing exceptional and safe care to its residents, but rather from the technological, legal and governmental hardships it is facing based on the attempts to comply with the Rule.

33. Heather Haven II submits the following exhibits to its petition that provides evidence of ongoing attempted compliance:

- (a) Heather Haven II’s quarterly reports attached hereto as Exhibit “A”
- (b) Heather Haven II’s Extension approval attached hereto as Exhibit “B”
- (c) Heather Haven II’s Emergency Power Plan Approval attached hereto as Exhibit “C”
- (d) Heather Haven II’s Comprehensive Emergency Management Plan and agreements attached hereto as Exhibit “D”
- (e) Heather Haven II’s receipts for generators and payments to the City of Dunedin attached hereto as Exhibit “E”
- (f) Heather Haven II’s Zoning approvals/ Notice of Commencement of Work attached hereto as Exhibit “F”

- (g) Heather Haven II's Policy and Procedure attached hereto as Exhibit "G"
- (h) Photos of standby generators attached hereto as Exhibit "H"

TYPE OF WAIVER/VARIANCE SOUGHT

34. Heather Haven II seeks a Temporary Emergency Waiver from/Variance of *Rule 58A-5.036, F.A.C.*

DEPARTMENT ACTION REQUESTED

For the foregoing reasons, Petitioner, Heather Haven II requests that the Department of Elder Affairs grant its Petition for a Temporary Waiver of /Variance from Emergency Rule 58A-5.036, F.A.C. for not less than March 31, 2019 [three (3) months] to obtain gas piping to the facility to power its standby generator. The Undersigned has requested both a Waiver from Rule 58A-5.036, F.A.C. and a Variance from Rule 58A-5.036, F.A.C. for the purpose of seeking additional time in order to comply fully with the Department's Rule. If the Department deems that the amount of time requested is not acceptable, we would request a time the Department believes to be reasonable under the circumstances. Should this request not be granted, Heather Haven II faces fines, sanctions, possible closure and the removal of residents that have been entrusted in its care.

Respectfully Submitted this 28th day of December 2018.

Shaddrick A. Haston
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Petition for Waiver has been provided to Francis Carbone, Agency Clerk, Florida Department of Elder Affairs, 4040 Esplanade Way Tallahassee, Florida 32399 via email to: agencyclerk@elderaffairs.org and U.S. Mail, to the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, Florida 32399-1300 this 28th day of December 2018.

Shaddrick A. Haston

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