

**STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS**

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

Memory Lane Cottage at Tampa Palms, LLC d/b/a Memory Lane Cottage at Tampa Palms (“Petitioner”) hereby petitions the Florida Department of Elder Affairs (“DOEA”) for an emergency variance from Rule 58A-5.036, F.A.C.

1. Petitioner is a 20-bed assisted living facility (“ALF”), License No. 12675, located at 5175 Cypress Preserve Drive, Tampa, Hillsborough County, Florida 33647, that is licensed pursuant to Chapters 429, Part I, and 408, Part II, Florida Statutes, and Chapter 58A-5, Florida Administrative Code. The facility administrator is Rhonda Travland. For purposes of this proceeding, the address and telephone number of Petitioner for all communications concerning this matter are that of the Petitioner’s Managing Member, Memory Lane Cottage, LLC.

2. The Agency affected by this petition is the Florida Department of Elder Affairs, 4040 Esplanade Way, Tallahassee Florida 32399, (850) 414-2096.

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 Rule 58A-5.036, F.A.C. (“the Rule”) 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. Petitioner previously submitted an extension request on May 18, 2018 (the “Extension”). The Extension was approved May 21, 2018 and has been in place since that date. (See Exhibit A for the Extension approval.)

8. Petitioner timely filed required quarterly updates with AHCA on both August 15, 2018 and November 15, 2018 providing the status of the generator implementation. (See Exhibits B and C, respectively, for the two quarterly reports timely submitted and accepted by AHCA.)

9. 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.

10. 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 and violates principles of fairness.

11. Specifically, the Petitioner has completed the following towards plan implementation:

- a. Determined the appropriate method of meeting the residents' comfort and clinical needs, including maintaining a temperature which does not exceed 81 degrees.
- b. During April 2018 after the Rule was passed, Petitioner purchased the generator for implementation.
- c. During April 2018, Petitioner also retained the services of a contractor to implement the generator, attaching it to the existing transfer switch that was incorporated in the original 2015 building and design.
- d. Prior to receipt of the generator, the contractor implemented the slab on which the generator would be situated, and from which it would be connected to the transfer switch.
- e. In early June, the contractor submitted for a local building permit to the City of Tampa to connect the generator to transfer switch.
- f. The generator was delivered on or about June 23, 2018, upon which it was placed and secured to the slab in its permanent location.
- g. The generator is in place and ready to be activated upon connection to the natural gas line and connection to the manual transfer switch.
- h. Local city officials approved all components of the permit application with the exception of the connection to the manual transfer switch; local authorities have requested an automatic transfer switch as opposed to the existing manual transfer switch, which was previously permitted and approved by the City of Tampa.

Purchasing and installing an automatic transfer switch is financial hardship as well as apparently not required by code or rule.

- i. Petitioner's Approved Emergency Management Plan dated January 8, 2018 allows for a manual transfer switch as does Rule 58A-5.036. (Exhibit D provides this approval and plan)
- j. Nothing is Codified within the City of Tampa or Hillsborough County requiring an automatic transfer switch.
- k. Petitioner enlisted the assistance of Hillsborough County Emergency Operations Center and Hillsborough County officials to provide guidance and assistance. In October, Petitioner was directed to file an appeal with the Hillsborough County Electrical Review Board to review the situation with the objective of having the Electrical Review Board confirm a manual transfer switch is allowed by code, Rule and all other authorities having jurisdiction.
- l. Petitioner timely filed a petition with Hillsborough County Electrical Review Board, which meets quarterly. The next meeting is December 20, 2018 at which Petitioner's matter will be heard. Notice of the hearing is provided as Attachment E.
- m. Petitioner anticipates a positive result which would allow Petitioner to finish the generator installation during January 2019. In the event Petitioner receives a negative result, it would take longer to implement the costly alternative.

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

- a. The Hillsborough County Electrical Review Board meeting to approve the existing transfer switch will be held December 20, 2018. If existing transfer switch is approved, then the installation may be completed during January 2019.
 - b. If existing transfer switch is not approved, Petitioner will need to take bids to acquire and install an automatic transfer switch. This may take some time to establish a new financially feasible project, if required.
13. The granting of a variance at this time is not unreasonable.
 14. If the emergency variance is not granted, Petitioner will suffer an immediate adverse effect.
 15. 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.
 16. 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 City of Tampa has made an arbitrary and capricious requirement that is not Codified after Petitioner purchased the generator and contracted for its installation, has a manual transfer switch and an approved plan to use that switch. Per the County's direction, an appeal is underway and is anticipated to be favorably resolved by the end of December 2018.
 17. 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.

18. 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.

19. 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.

20. 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. This purpose is accomplished by setting requirements that must be met by each emergency management plan, including provision of emergency power, as well as penalties for violations of those requirements.

21. 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.

22. The facts herein demonstrate a substantial hardship to Petitioner and principles of fundamental fairness justify the granting of the variance for Petitioner; they are further caused by an authority having jurisdiction attempting to implement a process which is not Codified, and is therefore under appeal.

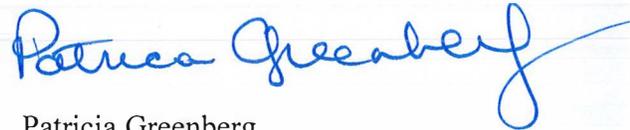
23. It must be noted that Petitioner is not seeking a variance from implementation of the rule, but rather from the substantial hardship and immediate adverse effect it is facing based on the deadline within which the rule requires implementation. It would be fundamentally fair to grant the Petitioner the time it requires to implement this project.

24. 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.

25. 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.

26. 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 June 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 December 2018.



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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, by submission through its website at: <http://elderaffairs.org/doea/rulemaking.php> and a true copy furnished by Federal Express, to the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400 this 7th day of December 2018.

/s/ Patricia Greenberg
PATRICIA GREENBERG