

**STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS**

**IN RE: DAISY FUNDORA
& ASSOCIATES, INC.,
D/B/A OUR DREAM A.L.F.
FROM RULE 58A-5.036**

DOEA Case No.:

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

Petitioner, DAISY FUNDORA & ASSOCIATES, INC. D/B/A OUR DREAM A.L.F., by and through undersigned counsel, hereby submits this **emergency petition** with the Florida Department of Elder Affairs (“DOEA”) for a **temporary variance** from Rule 58A-5.036 (the “Rule”), pursuant to Section 120.542 of the Florida Statutes and Rules 28-104 of the Florida Administrative Code.

THE PARTIES

1. Petitioner operates a forty-two (42) bed assisted living facility licensed under *Chapter 429, Part II, Florida Statutes* located at 1640 Palm Avenue Hialeah, Florida, 33010.
2. The agency affected by this petition is the Florida Department of Elder Affairs, located at 4040 Esplanade Way, Tallahassee, Florida 32399.
3. Petitioner has been in operation for twenty-nine and a half years serving residents with mental illnesses.

**OUR DREAM ALF SEEKS TEMPORARY
VARIANCE OF RULE 58A-5.036**

4. Petitioner requests a temporary variance from Emergency Rule 58A-5.036, which was adopted by the Florida Department of Elder Affairs to implement §429.19, §429.28, and §429.41, of the Florida Statutes.

**RULE 58A-5.036 CREATES
A SUBSTANTIAL HARDSHIP**

5. Section 120.542(2), F.S., states, “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.”
6. Furthermore, the Florida Legislature has directed DOEA to take a variety of factors into account when promulgating rules in order to ensure assisted living facilities are not treated as a medical or nursing home facility. *See, 429.01(2), F.S.*
7. The Petitioner provides, serves, and caters to a much smaller resident population than other, larger facilities in the State of Florida.
8. The Petitioner also provides care at a lower reimbursement rate than private pay facilities of the same size due to their reimbursement being provided predominately by Medicaid recipients.

9. Despite this, Petitioner has taken substantial steps to come into compliance with the Rule at significant cost. Among other things, the Petitioner has hired an electrician, purchased new permanent on-site generators through said contractor, drawn and redrawn plans for installation of said generators on more than two occasions, retained undersigned counsel for repeated legal representation, and paid substantial fees to the City of Hialeah to secure permits for the installation of the new generators.
10. The process to come into compliance has also taken significantly more time for Petitioner than for many other operators.
11. As far back as October 11, 2017, Petitioner learned in a meeting with city officials that there was no existing ordinance providing for a uniform and expeditious system of approval for the permits necessary to install the new on-site generators and therefore each relevant department, **five in all**, would have to approve the installation of the generator separately and in processes that may take as long **twenty-one days per department**. The City of Hialeah also stated to Petitioner no “fast track” process would be applied to A.L.F.s applying for permits to comply with the Rule despite its strict timeframe.
12. This problem was compounded when the City of Hialeah City Council considered an ordinance to add additional requirements to the mandates of the Rules. (*See Exhibit A*). Until said ordinance was approved or denied by the City Council, the Building Department stated it would not process any permits. The proposed ordinance passed its first reading and later died during its second reading at the Council’s regular meeting held on April 24, 2018. (*See Exhibit B*).
13. Shortly after, the Petitioner experienced a logistical hardship in preparing the premises for the installation of the on-site generators. Florida City Gas, **F.S. 119.071(3)(a)2.b.**

F.S. 119.071(3)(a)2.b. which was intended to power the new generators, had not configured said line to provide service to Petitioner's property. (See Exhibit C). Although this work was eventually performed, it represented another obstacle to compliance with the Rule.

14. Other obstacles continue to this day. Petitioner was informed earlier this month by the City of Hialeah that the planned placement of the new generators would violate the City's setback requirements. Only in the last few days was Petitioner informed that it could install the new generators **F.S. 119.071(3)(a)2.b.** —although this requires the preparation and submission of new plans representing another legal and logistical setback for Petitioner and additional costs to prepare said plans.

15. Finally, if Petitioner is not in compliance with the Rule by January 1st, then it will be subjected to fines of **\$1,000.00 per day.**

16. In this way, the Petitioner has suffered from economic, legal, and logistical hardship necessitating this Emergency Petition and well within the requirements for granting a temporary variance.

17. Therefore, a literal application of the Rule will create a substantial hardship on Petitioner and violate principles of fairness because the challenges presented by Petitioner's property in the process of complying are unique to them and a temporary variance should and must be granted in accordance with Section 120.542(2) of the Florida Statutes so that Petitioner can fully comply.

**THE UNDERLYING PURPOSE OF
SECTION 429.41, FLORIDA STATUTES WILL BE ACHIEVED**

18. 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. Furthermore, it can be also inferred that the Florida Legislature desired regulatory rules that 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.*
19. A temporary variance from the Rule will not impair the purpose of the statute, which is to provide for the safety of residents by requiring a space within an assisted living community to be cooled at a temperature of 80 degrees or below for the residents entrusted within the care of residents of assisted living facilities.
20. Petitioner already has two Generac 6500W generators and a Generac 5500W generator with the required fuel supplies to power ventilation equipment § 119.071(3)(a)2.b in the event of a power outage while it continues to seek full implementation of the Detailed Plan called for in the Rule. (*See Exhibit D*).
21. Further, Petitioner, as stated above, has already begun the process of complying with the Rule and is only inhibited from complying by the deadline by the bureaucracy of city government and the unique challenges posed by the dimensions and layout of its property. For example, Petitioner's electrical contractor—Voltage Electric—has already acquired the generators that will bring it into compliance with the Rule. (*See Exhibit E*).
22. Petitioner seeks this temporary variance not to escape its obligations under the Rule or its residents, but rather to allow it more time to comply given the complex legal, financial, and logistical situation that exists and has been described above and to avoid the penalties it may face if found not to be in compliance with the Rule.

23. Petitioner's Comprehensive Emergency Plan has also been approved by the Miami-Dade Office of Emergency Management and it has also developed a backup to said plan. (See Exhibit F).
24. Therefore, the underlying purpose of the Statute—and the Rule—will still be achieved and the granting of the temporary variance allows the Petitioner to fully carry out such purpose.

ADDITIONAL REQUIREMENTS

25. Petitioner also states that this is an emergency situation because the time for compliance set under the Rule is January 1st, which is **less than a few days away**. Petitioner may be subjected to fines of **\$1,000.00 a day** if it does not receive this temporary variance even though it has and continues to make every effort to comply with the Rule.
26. In addition, Petitioner incorporates into this section paragraphs 5 – 16 as facts demonstrating the cause of the emergency situation.
27. For the foregoing reasons, Petitioner will suffer an immediate adverse effect unless the variance is granted.
28. Further, the residents will be notified of this Petition by posting a letter in the common area visible to all residents and notify their respective families of the Petition.

RELIEF SOUGHT

29. Petitioner seeks a temporary variance from the requirements of Rule 58A-5.036 for one year or for not less than one hundred eighty (180) days in order to finish preparing and submitting new plans as described above to the City of Hialeah, obtain all the required permits, and install the generator.

*In Re: Daisy Fundora &
Associates, Inc. d/b/a Our Dream
A.L.F., From Rule 58A-5.036*

Dated: December 28, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of this Petition for Temporary Variance has been provided to the Agency Clerk of the Florida Department of Elder Affairs located at 4040 Esplanade Way, Tallahassee, Florida 32399 via facsimile at (850) 414-2126 this 28th day of December 2018 and via U.S. Mail to the Joint Administrative Procedures Committee, Room 680, Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400.