

**STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS**

**IN RE: TITUSVILLE HOUSING
AUTHORITY d/b/a TITUSVILLE
TOWERS ALF'S EMERGENCY PETITION
FOR VARIANCE FROM RULE 58A-5.036
FLORIDA ADMINISTRATIVE CODE**

DOEA Case No.

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

Titusville Housing Authority d/b/a Titusville Towers ALF ("Petitioner") by and through its undersigned counsel, hereby petitions 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 138-bed assisted living facility ("ALF"), license number AL10346, located at 405 Indian River Avenue, Titusville (Brevard 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 a Section 8 and Public Housing Agency that provides assisted living to low income individuals. The facility administrator is Robert Lambert and the facility manager is Beth Ann Walker. For purposes of this proceeding, the address and telephone number of Petitioner for all communications concerning this matter are that of undersigned counsel.

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 s 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 June 1, 2018. (See Exhibit A attached hereto and incorporated by reference.)

8. On June 6, 2016, 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 27, 2018 as required. (See Exhibit C attached hereto and incorporated by reference.)

10. The Petitioner's next quarterly report is due before November 25, 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 and violates principles of fairness.

13. Petitioner is a government agency that provides assisted living to low income individuals.

14. As a government agency, Petitioner spends federal funds and is required to adhere to competitive public procurement procedures in order to spend those funds.

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

- a. I Determined the appropriate method of meeting the residents’ comfort and clinical needs, including maintaining a temperature which does not exceed 81 degrees.
- b. I Contracted with DDC Engineering, Inc. to design the generator.
- c. I Obtained detailed plans from DDC Engineering, Inc. for the generator and the remodeling required to house the generator. (See Exhibit D attached hereto and incorporated by reference.)
- d. I Developed a bid package as required for a government agency. (See Exhibit E attached hereto and incorporated by reference.)
- e. I Opened the competitive bid process on October 23, 2018.

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

- a. pThe Petitioner received only one bid in response to its request and that bid was in excess of \$100,000 more than the original projected cost for the project. (See Exhibit F attached hereto and incorporated by reference.)
- b. pIt is unknown why the Petitioner only received one bid, however due the ongoing recovery efforts from Hurricane Florence and Hurricane Michael, contractors and materials are in short supply.
- c. pDue to federal regulations the bid cannot be accepted as it is beyond that which can be approved.
- d. pThe Petitioner is looking into other options for implementing the plan such as:
 - i. Bidding the project piecemeal rather than as a whole;
 - ii. searching for another government contract where they may be able to procure a generator through an existing bid and piggyback the existing bid to obtain a generator;
 - iii. searching for ALF reserve funds that may be available or re-routed for spending; and
 - iv. searching for grant money.
- e. pThe recovery efforts from both Hurricane Florence and Hurricane Michael have taken all available resources from the Brevard County area and it is unknown when the contractors will be available to begin new projects.
- f. pIf the Petitioner has to re-bid the project by dividing up the project into individual bids, each section will have to go through the government purchasing process of

preparing a bid package, advertising for competitive bids, tabulating bids at a public meeting, achieving the Brevard County Board of Commissioner's approval to award the bid, licensing and permitting by Brevard County agencies, and finally installation of the generator and supporting equipment.

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

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

19. 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.

20. 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 Petitioner is a government agency and is required to go through a specific competitive bidding and procurement process before it can accept and enter into a contract for the building and installation of the generator and required equipment to implement the plan. The Petitioner has completed design plans for the building and installation of the generator, however through no fault of its own, the Petitioner cannot find an acceptable bidder for the project. The availability of qualified specialists to build and install the equipment and the availability of the equipment have been scarce because of both Hurricane Florence and Hurricane Michael. Additionally, because the Petitioner is a government agency, they do not have the flexible spending that a private owner of an ALF has, and must go through a specific process before it can spend any money.

21. The literal application of the rule will thus create a substantial hardship for n 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.

22. 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.

23. 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.

24. 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.

25. The Facility Emergency Management Plan was reviewed and approved by Brevard County Emergency Management on August 9, 2018 and therefore has been found to be compliant with the underlying purpose of the statutes. (See Exhibit C, Page 4, attached hereto and incorporated by reference.)

26. Petitioner's Emergency Management Plan provides for evacuation of its residents to alternate facilities in the event that a mandatory evacuation is ordered.

27. The Facility Emergency Power Plan was reviewed and approved by Brevard y County Emergency Management on August 9, 2018. (See Exhibit C, Page 3, attached hereto and incorporated by reference.)

28. Facility Emergency Power Plan provides as follows in the event of a power outage:

a. y **Cooling Area** - F.S. 119.071(3)(a)2.b. [REDACTED] which is a total of 7,858 square feet. Titusville Towers is licensed for 137 residents. With staff, we estimate the area will house about 145-150 people during a power emergency.

F.S. 119.071(3)(a)2.b. [REDACTED]

[REDACTED] Cots will be stored onsite and set up in cooled area for residents. Staff will remain with residents during a prolonged outage and the temperature will be monitored hourly.

b. **Emergency Power & Fuel** - The new generator will be fixed F.S. 119.071(3)(a)2.b. [REDACTED] It will be a 250 KW natural gas unit F.S. 119.071(3)(a)2.b. [REDACTED]. In a power outage the generator will engage automatically. F.S. 119.071(3)(a)2.b. [REDACTED]

[REDACTED]. It is inspected weekly by staff and quarterly by C Sonka All Tech Services, LLC. The HVAC is inspected monthly by staff and repairs are conducted as needed by HM2 Mechanical & Specialty Contractors. Titusville Towers has an account with Watkins Oil Company located in Titusville and a gas account with Florida City Gas. The minimum 96-hour fuel capacity will be met by connecting the to the existing natural gas service utility. The inspection schedule for the new generator will follow the schedule of the current generator.

c. 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:

i. 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.

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

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

iv. F.S. 119.071(3)(a)2.b. [REDACTED]
[REDACTED]

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.

vi. F.S. 119.071(3)(a)2.b. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

vii. If F.S. 119.071(3)(a)2.b. [REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED]

29. 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.

30. The facts herein demonstrate a substantial hardship to Petitioner and principles of fundamental fairness 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 already stretched resources are now close to extinct due to Hurricane Florence and Hurricane Michael.

31. 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.

32. 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.

33. 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.

34. 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.

/s/ Geoffrey D. Smith
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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, at agencyclerk@elderaffairs.org; 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 November 2018.

/s/ Geoffrey D. Smith
GEOFFREY D. SMITH