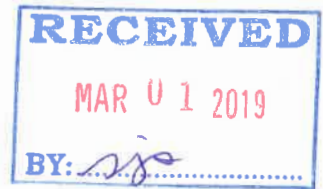


STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS



S-H THIRTY FIVE OPCO PORT ST LUCIE, LLC
DBA ATRIA PORT ST LUCIE,

Petitioner,
vs.

DOEA Case No.: 2019-

STATE OF FLORIDA,
DEPARTMENT OF ELDER AFFAIRS,

Respondent.

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

Petitioner S-H THIRTY FIVE OPCO PORT ST LUCIE, LLC DBA ATRIA PORT ST LUCIE ("Petitioner") files this Petition for Emergency Variance from or a Waiver of the time frame for implementation of the Detailed Emergency Environmental Control Plan ("Plan") required by Rule 58A-5.036(1), F.A.C. Petitioner was already granted a conditional variance through April 1, 2019, and seeks an additional sixty (60) days, or until May 31, 2019, to fully implement its Plan and states in support:

1. Petitioner operates a 120-bed assisted living facility ("ALF") located at 9825 S. U.S. Highway 1, Port St. Lucie, Florida 34952, under Florida license number 9628.
2. For purposes of these proceedings, Petitioner's address is that of undersigned counsel, Martin R. Dix and Thomas A. Range, Akerman LLP, 106 East College Ave., Suite 1200, Tallahassee, Florida 32301, martin.dix@akerman.com and tom.range@akerman.com, telephone number 850-224-9634.

The Applicable Rule or Portion of the Rule.

3. Below is the applicable portion of the rule from which Petitioner seeks an emergency variance or waiver (emphasis added):

(4) IMPLEMENTATION OF THE PLAN.

(a) Each assisted living facility licensed prior to the effective date of this rule shall, no later than June 1, 2018, have implemented the plan required under this rule.

(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.

(c) During the extension period, an assisted living facility must make arrangements pending full implementation of its plan that provides the residents with an area or areas to congregate that meets the safe indoor air temperature requirements of paragraph (1)(a), for a minimum of ninety-six (96) hours.

1. An assisted living facility not located in an evacuation zone must either have an alternative power source onsite or have a contract in place for delivery of an alternative power source and fuel when requested. Within twenty-four (24) hours of the issuance of a state of emergency for an event that may impact primary power delivery for the area of the assisted living facility, it must have the alternative power source and no less than ninety-six (96) hours of fuel stored onsite.

4. The Rule requires that each ALF implement the Plan by June 1, 2018.
5. There is an extension process in the Rule that allows an ALF to request an extension of time to fully implement its Plan through January 1, 2019.
6. Petitioner applied to AHCA for this extension, which was granted, thus allowing Petitioner until January 1, 2019, to implement its Plan.
7. On or about September 28, 2018, Petitioner filed a Petition for Variance from or Waiver of Rule 58A-5.036, F.A.C., requesting a waiver of the time frames for implementing the Plan through April 1, 2019.
8. By Final Order dated December 26, 2018, Respondent granted Petitioner a conditional temporary variance to these requirements through April 1, 2019.

9. Petitioner has met all of the conditions imposed in the Final Order.

Citation to the Statute the Rule is Implementing.

10. Rule 58A-5.036, F.A.C., was promulgated to implement Sections 429.19 and 429.41, Florida Statutes, which generally provide that ALF residents have the right to live in a safe and decent living environment and that they are ensured a reasonable and consistent quality of care, quality of life, and safe and sanitary facilities. Section 429.41, Florida Statutes, specifically requires that: "the rules must provide for plan components that address emergency evacuation transportation; adequate sheltering arrangements; postdisaster activities, including provision of emergency power, food, and water; postdisaster transport..." (emphasis added).

Type of Action Requested.

11. Petitioner requests an emergency variance or waiver of the requirement in Rule 58A-5.036(4)(a), F.A.C., that the Plan be implemented no later than January 1, 2019, as extended to April 1, 2019, by Final Order of the Department and asks that it be allowed until May 31, 2019, to implement the Plan. As of the date of filing this Petition, Petitioner anticipates that its Plan should be fully implemented by the April 1, 2019, deadline, but it is requesting this variance or waiver in an abundance of caution. If unforeseen construction, permitting, or other issues arise before April 1, 2019, Petitioner would not have sufficient time to seek a variance or waiver at that point because it typically takes at least 90 days to obtain a non-emergency variance or waiver. § 120.542(8), Fla. Stat.

Petitioner's Showing of Substantial Hardship and that Meeting the Rule would Violate Principles of Fairness.

12. Petitioner relies on and incorporates by reference the statements made in its Petition for Variance or a Waiver to Rule 58A-5.036, F.A.C., as its showing of substantial hardship.

13. Additionally, it took over a month to obtain its local building permit and so Petitioner was delayed in the construction of the project and this delay was outside Petitioner's control. Exhibit 1 is the February 25, 2019, letter from Project Manager Aaron Tomlinson of Gerelco verifying that the building permit was received.

14. After obtaining the building approval, there were delays in the assembly of the generator and the generator was not complete until late January 2019. This delay was outside Petitioner's control.

15. There were further delays caused by the local utility company taking additional time to **F.S. 119.071(3)(a)2.b.** This delay was outside Petitioner's control.

16. The main electrical switch gear has to be assembled off-site and Petitioner has been advised that this equipment will be shipped to Petitioner on February 28, 2019. The delay in receiving this equipment is outside of Petitioner's control.

17. Petitioner has begun construction on the concrete pad that will support the equipment (see Exhibit 2 showing the timeline for the construction and installation of the equipment).

18. Petitioner's timeline shows that the equipment should be fully installed and can be operational within the current April 1, 2019, conditional variance date.

19. However if, due to unforeseen circumstances such as weather, equipment delays, building permit inspection delays, etc., the equipment is not fully installed by the April 1, 2019, conditional variance date, Petitioner could be found in violation.

20. Petitioner is seeking the emergency variance or waiver in an abundance of caution and hopes that its use will not be necessary and believes that all equipment will be fully installed well before the requested emergency variance date of May 31, 2019.

The Dates and Duration of the Emergency Variance or Waiver.

21. Accordingly, Petitioner is requesting a variance or waiver to allow an additional 60 days past the April 1, 2019, conditional variance period or until May 31, 2019, in which to implement the Plan for acquiring and installing the equipment.

Why the Emergency Variance or Waiver will meet the Underlying Purpose of the Statute and Rule.

22. Section 120.542, Florida Statutes (2018), authorizes agencies to grant emergency variances to provide relief for persons subject to regulation upon a showing "that the purpose of the underlying statute will be . . . achieved by other means" and "when application of a rule would create a substantial hardship." § 120.542(2).

23. In relevant part, the stated purpose of section 429.41 is to require ALFs to make provision for emergency power. The Rule's stated purpose is to make sure that power outages do not cause ambient temperatures in the ALFs to be kept at above 81 degrees Fahrenheit. The Florida hurricane season runs from June 1 through November 30 of each year. During the period that NOAA has kept statistics, for the 164-year period from 1851-2015, only five hurricanes have hit anywhere in the United States during the months of November through May. All five of these hurricanes occurred in the month of November, so the total number of hurricanes over this 164-year period is zero for December through May. Thus, granting a variance or waiver until May 31, 2019, creates little risk for increased temperatures caused by hurricane created power outages.

24. Additionally, as required by the Rule, Petitioner has had an extensive plan providing for a temporary generator and fuel during the June 1-January 1, 2019, extension period. Petitioner will have similar measures in place through the end of the requested emergency variance (May 31, 2019), and the emergency variance or waiver requested in this Petition will continue to

satisfy the statute's and Rule's underlying purpose, i.e., the maintenance of suitable temperatures in the event of the loss of primary electrical power.

25. Granting Petitioner's emergency variance or waiver will still ensure that the required Plan is carefully crafted and completely implemented. It will also ensure that a safe generator and fuel supply are in place and functioning well before of the 2019 hurricane season and will be available for use in the event of any other power outage.

WHEREFORE, Petitioner respectfully requests that the DOEA grant its Petition for an emergency variance from or waiver of the Plan implementation deadline in Rule 58A-5.036, F.A.C., as extended by the conditional variance, and allow it an additional 60 days until May 31, 2019, to implement its Plan to obtain and install a sufficient generator, fuel, and services to comply with the Rule.

Respectfully submitted this 1st day of March 2019.

/s/ Martin R. Dix
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been sent via hand delivery to the Agency Clerk, Office of the General Counsel, Florida Department of Elder Affairs, 4040 Esplanade Way, Ste. 315, Tallahassee, Florida 32399-7000, and via Federal

Express to the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, FL 32399-1400, on March 1, 2019.

/s/ Martin R. Dix
Martin R. Dix