

December 7, 2018



**VIA FACSIMILE: (850) 414-2126**

**VIA: REGULAR US MAIL**

Francis Carbone, Agency Clerk  
Department of Elder Affairs  
4040 Esplanade Way, Ste. 315  
Tallahassee, FL 32399-7000

Joint Administrative Procedures Committee  
Room 680, Pepper Building  
111 W. Madison Street  
Tallahassee, FL 32399-1400

**Emergency Petition for Waiver of Rule 58A-5.036  
(Emergency Environmental Control for Assisted Living Facilities)**

**1. Petitioner Information.**

**Solaris Senior Living of North Naples LLC**  
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**2. Applicable Rule.** The applicable rule for this emergency petition is **58A-5.036** (the "**Rule**"), more specifically, 58A-5.036(4)(a)-(b) included below.

**(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.

**3. Statutes Implemented By The Rule: F.S. 429.19, 429.41**

**4. Action Requested.** Petitioner intends to fully comply with the Rule. However, for the reasons detailed in this emergency petition, Petitioner requests a waiver from the Rule's June 1, 2018 implementation requirement (following the expiration of the extension period on January 1, 2019).

**5. Facts Demonstrating Substantial Hardship.** A variance or waiver is permissible under F.S. 120.542 “when application of a rule would create substantial hardship”, which it defines as “a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.”

The petitioner has been diligently working towards the agency’s desired emergency power capabilities even prior to the Rule’s finalization. When the Rule was finalized in March 2018, it required that each licensed facility have implemented the required emergency power plan by June 1, 2018. But the Rule also allowed for an extension until January 1, 2019 for any facility that could show “delays caused by necessary construction, delivery of ordered equipment, zoning or other regulatory approval processes” and could demonstrate implementation of the temporary emergency cooling arrangements stated in the Rule.

The petitioner timely requested and was granted an extension by the agency. Since that time, the petitioner has continued to maintain the the temporary emergency cooling arrangements required by the Rule, and continued to apprise the agency of its progress on a monthly basis as it pushes towards full implementation and compliance. However, despite its continued effort and diligence, as demonstrated by the timeline attached to this emergency petition, the petitioner continues to experience “delays caused by necessary construction, delivery of ordered equipment, zoning or other regulatory approval processes.”

Specifically, delays caused by the delivery of ordered equipment. To wit, the petitioner’s original plan was denied by the agency, and the petitioner did not receive agency approval of its revised plan until November 9, 2018. In the interim, the petitioner attempted to schedule installation work as soon as it could, however, without the benefit of knowing whether or not its plan is approved made scheduling difficult. The new generator is scheduled for delivery on January 14, 2019, just after the expiration of the extension period. As evidence of such delays, petitioner has attached the generator purchase order evidencing the lengthy lead time for the customized work, as well as communicaiton from the vendor informing the petitioner of the delayed delivery. As such, the petitioner does not foresee being able to be fully compliant with the Rule by January 1, 2019 (the end of the extension period). Therefore, the immediate application of the Rule’s implementation deadline would result in substantial hardship to the petitioner.

However, the petitioner wishes to stress and reaffirm that at all times during the extension period, and for the remainder of the time until full implementation, the petitioner is compliant with the most import aspect of the Rule, namely, arragements to ensure that residents can be housed in an area that can be maintained to not exceed 81 degrees Faranheit for a minium of 96 hours, as required by the Rule.

**6. Why the Waiver Serves the Underlying Statutes.** The waiver requested in this emergency petition will serve the purpose of the statutes cited in Section 3 of this emergency petition as follows:

- F.S. 429.19. This section allows the agency to impose penalties for failure to comply with applicable rules. The waiver requested by petitioner will allow the petitioner additional time in which to pursue compliance without being subject to the crippling penalties – which can include loss of licensure.
- F.S. 429.41. Section 429.41 requires the agency to adopt rules addressing emergency

power. This statutory requirements was satisfied with the Rule's adoption. However, F.S. 429.41 is also clear that the overall goal of such rules is to ensure reasonable, consistent care and enhanced quality of life for the residents of assisted living facilities. By enforcing the June 1, 2018 implementation deadline against petitioner at the end of the January 1, 2019 extension deadline, petitioner will possibly incur the penalties stated in Section 6 of the Rule, any of which could prohibit the petitioner from providing its residents with the care desired by F.S. 429.41.

**7. Duration of Waiver.** The waiver requested herein is temporary. Petitioner requests a waiver duration until June 1, 2019.

**PETITIONER**

SOLARIS SENIOR LIVING OF NORTH NAPLES LLC

By: *Jennifer Iavarone*  
Jennifer Iavarone, as its President