

STATE OF FLORIDA  
IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT

FL ARGENTUM, INC.,

Petitioner,

v.

Case No. \_\_\_\_\_  
Emergency Rule No. 58AER17-1

FLORIDA DEPARTMENT OF  
ELDER AFFAIRS,

Respondent.

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**PETITION FOR REVIEW OF EMERGENCY RULE**

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Pursuant to sections 120.54(4) and 120.68(9), Florida Statutes, FL Argentum, Inc. ("FL Argentum" or "Petitioner"), petitions this court for review of emergency rule 58AER17-1 ("Emergency Rule") published by the Respondent, Florida Department of Elder Affairs ("DOEA"). DOEA's stated reasons for finding an immediate danger to the public health, safety or welfare, and in adopting the Emergency Rule, is insufficient to justify emergency rulemaking pursuant to section 120.54(4)(a), Florida Statutes, and Petitioner requests an order quashing the Emergency Rule.

RECEIVED, 10/2/2017 6:37 PM, Jon S. Wheeler, First District Court of Appeal

## **JURISDICTION**

The Court has jurisdiction to review emergency rules pursuant to sections 120.54(4)(a)3, and 120.68(9), Florida Statutes. *See Hartman-Tyner, Inc. v. Div. of Pari-Mutuel Wagering, Dep't of Bus. & Prof'l Regulation*, 923 So. 2d 559, 562 (Fla. 1st DCA 2006)(citing *Fla. Health Care Ass'n Agency for Health Care Admin.*, 734 So. 2d 1052, 1053 (Fla. 1st DCA 1998)).

## **EMERGENCY RULE 58AER17-1**

This Petition seeks review of DOEA's Emergency Rule 58AER17-1, entitled "Procedures Regarding Emergency Environmental Control for Assisted Living Facilities" ("the Emergency Rule"). *See* Appendix Tab "A."

The Emergency Rule was adopted on September 16, 2017, following the deaths of a number of residents at a Hollywood Hills nursing home, located in Broward County, Florida. The nursing home apparently failed to evacuate residents when conditions became unsafe due to rising temperatures during a power outage. The circumstances surrounding these deaths and the nursing home's culpability is under investigation.

Nevertheless, in apparent response to the tragedies at the Hollywood Hills nursing home, Governor Scott issued a press release announcing that, at his direction, the Agency for Health Care Administration (AHCA) and DOEA, would be issuing emergency rules applicable to all nursing homes and assisted living

facilities in Florida. These emergency rules would require all such facilities to install generators with sufficient power to maintain an indoor ambient temperature of at or below 80 degrees, and with enough fuel to power the generator for 96 hours, *within 60 days*.

No public workshops or hearings were conducted by DOEA regarding the Emergency Rule prior to the publication, which first appeared in a press release on Saturday, September 16, 2017. *See* <http://elderaffairs.state.fl.us/index.php>.

Petitioner and its members received official notice of the Emergency Rule on Monday, September 18, 2017, when DOEA published its Notice of Emergency Rule in the Florida Administrative Register. *See* 43 *Fla. Admin. Reg.*, No. 180, pp. 4002-4005 (Sept. 18, 2017). A copy of DOEA's Notice is in the Appendix at Tab "A."

**A. DOEA's Statement of Basis for Emergency Rule 58AER17-1**

By way of justification for the Emergency Rule, DOEA provided the following explanation in its Notice:

**SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE:** The State has experienced extreme shortages of electrical power that have jeopardized, and continue to jeopardize, the health, safety and welfare of residents in Florida's assisted living facilities. According to the United States Census Bureau, Florida has the largest percentage of residents age 65 and older in the nation. According to the Centers for Disease Control and Prevention, people age 65 and are more prone to heat-related health problems. An incompetent response by a nursing

facility to a loss of air conditioning after Hurricane Irma resulted in the tragic loss of eight senior citizens at the Rehabilitation Center at Hollywood Hills. Thousands of frail seniors reside in assisted living facilities in Florida. Ensuring assisted living facilities maintain sufficient resources to provide alternative power sources during emergency situations mitigates the concerns related to the health, safety and welfare of residents in those assisted living facilities that experience loss of electrical power. This emergency rule establishes a process by which assisted living facilities shall obtain sufficient equipment and resources to ensure that the ambient temperature of assisted living facilities will be maintained at or below 80 degrees Fahrenheit within the facilities for a minimum of ninety- six (96) hours in the event of the loss of electrical power. Prompt implementation of this rule is necessary to ensure continuity of care and to ensure the health, safety and welfare of residents of Florida's assisted living facilities.

*See* Appendix at Tab A.

AHCA's explanation of the emergency that necessitated the publication of Rule 59AER17-1 is nearly identical to the DOEA's statement made in support of Rule 58ER 17-1, except that it applies to nursing homes rather than assisted living facilities. *See* 43 Fla. Adm. Reg. No. 180, p. 4004 (Sept. 18, 2017).

#### **B. Existing Rules Governing Operational Standards for Assisted Living Facilities**

DOEA has promulgated rules regarding the construction standards and operational requirements for assisted living facilities. *See* Fla. Admin. Code Rule 58A-5.023, "Physical Plant Standards." By rule, assisted living facilities are already required to maintain an emergency management plan, including emergency power plans, pursuant to Rule 58A-5.026, Florida Administrative

Code. DOEA promulgated its existing rules pursuant to non-emergency rulemaking requirements set forth in section 120.54, Florida Statutes, and obtained public input through rule development workshops, public hearings and review by the Joint Administrative Procedure Committee of the Florida Legislature.

### **C. Emergency Rule 58AER17-1**

There are currently 3,104 assisted living facilities in Florida.<sup>1</sup> The Emergency Rule requires all assisted living facilities in Florida to provide a detailed, written plan for the acquisition of sufficient generators to ensure ambient temperatures of at or below 80 degrees for 96 hours in the event of a power loss. *See* Ex. A, Rule 58AER17-1(1)(a). That plan must be submitted to DOEA and local emergency management agencies for *review and approval* of the plan for emergency environmental control within 45 days of the Rule's effective date, thus creating a deadline of October 31, 2017. The Emergency Rule also requires all assisted living facilities to acquire and maintain sufficient fuel on-site to power the generators. *See id.*, Rule 58AER17-1(1)(b). Even assuming the detailed written plan for the design and acquisition of the generators could be submitted for review within this short time period, it is virtually impossible to believe that DOEA would

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<sup>1</sup> <http://www.floridahealthfinder.gov/facilitylocator/FacilitySearch.aspx>.

be able to review and approve these thousands of applications, and then allow the facilities sufficient time to contract for the generators and to obtain local building permits once approved.

The Emergency Rule requires assisted living facilities to *implement* the required plan within 60 days of the Rule's effective date, creating a deadline of November 15, 2017, for all assisted living facilities to obtain all necessary regulatory approvals, purchase and have installed adequate generators and fuel supply tanks.

The generators and fuel tanks for a majority of mid-size to large assisted living facilities must be specially designed by engineers and architects to meet all applicable building, zoning and other safety requirements. Thus, for a majority of assisted living facilities, complying with the requirements of the Emergency Rule is a massive undertaking, and cannot be accomplished within the time designated in the Emergency Rule. This is not a situation where an off-the-shelf generator can be purchased from a home supply store. Instead these generators must be designed, built and installed - which cannot occur within the timeframe set forth in the Emergency Rule.

The penalties for failing to comply with the Emergency Rule are severe. If an assisted living facility is unable to obtain and install generators and a fuel supply

in the time required by the Emergency Rule, AHCA may revoke the facility's license. *See id.*, Rule 58AER17-1(9). The Emergency Rule also requires AHCA to impose fines of \$1,000 per day for failure to comply. *See id.*, Rule 58AER17-1(10).

### **STANDING**

Petitioner has standing to bring this action. FL Argentum is an association representing companies that operate professionally managed assisted living facilities, and industry partners that serve assisted living facilities in the State of Florida. It represents over 400 professionally-managed assisted living, memory care and independent living communities in Florida, including the largest assisted living providers in the State.

In filing this Petition, FL Argentum is chiefly concerned with the arbitrary and unreasonable deadline set by DOEA, which may cause the process to be rushed, potentially creating dangerous environments instead of advancing safety. FL Argentum and its members are fully committed to creating safe environments for their residents, especially during a natural disaster or other emergency situation. This includes requiring every assisted living community to have a generator for emergency power. However, the process needed to implement safe solutions is technical and complicated from an engineering perspective.

The planning, procurement, permitting and installation of the appropriate type, size and caliber of generators and fuel storage tanks needed to satisfy the Emergency Rule requirements is a process that under the best of circumstances could be expected to take five to eight months. Considering that the entire state's population of nursing homes and assisted living facilities will be trying to complete the same process simultaneously, this will undoubtedly complicate and delay the timeline.

Even if the appropriate generators could be installed within the timeframe, the acquisition and storage of the appropriate amount of fuel presents a myriad of resident safety and other challenges. Storage systems for fuel to power generators also presents resident safety concerns that must be addressed. This tragic event occurred during a massive hurricane, the results of which have been devastating in many areas. A snap decision directing an emergency rule that cannot possibly be complied with in such a short period of time, while laudable, should not be allowed. Indeed, its desired effect could have the opposite result. FL Argentum and its members remain committed to supporting the Governor's intentions, but it must be done in a safe and effective manner. The current Emergency Rule requirements both jeopardize the safety and security of residents and mandate an arbitrary deadline that is unnecessary given that there is no emergency situation.

## ARGUMENT

DOEA's specific reasons for finding an immediate danger to the public health, safety or welfare, upon which the Emergency Rule is based, is insufficient to justify emergency rulemaking pursuant to section 120.54(4)(a), Florida Statutes.

Section 120.54(4), Florida Statutes provides as follows:

(4) EMERGENCY RULES.—

(A) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger. The agency may adopt a rule by any procedure which is fair under the circumstances if:

(1) The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.

(2) The agency takes only that action necessary to protect the public interest under the emergency procedure.

(3) The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one or a part of one county, including the full text of the rules, shall be published in the first available issue of the Florida Administrative Register and provided to the committee along with any material incorporated by reference in the rules. The agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

§ 120.54(4)(a), Fla. Stat. (2017).

Review of emergency orders is generally limited to the face of the emergency order when the agency conducts no section 120.57 proceedings prior to issuing the order, like here. *See Commercial Consultants Corp. v. Dep't of Bus. Regulation, Div. of Florida Land Sales & Condominiums*, 363 So. 2d 1162, 1163-64 (Fla. 1st DCA 1978). The stated reasons for the emergency should be gleaned from the information provided at the time of promulgation. *See Florida Health Care Ass'n v. Agency for Health Care Admin.*, 734 So. 2d 1052, 1053. (Fla. 1st DCA 1998); *Times Pub. Co. v. Florida Dept. of Corr.*, 375 So. 2d 307 (Fla. 1st DCA 1979).

To be sufficient to support an emergency rule, an agency's stated reasons for the emergency must be factually explicit and persuasive. *See Florida Health Care Ass'n* at 1053-1054 (citing *Florida Home Builders Assoc. v. Division of Labor, Bureau of Apprenticeship, Florida Dep't of Commerce*, 355 So. 2d 1245, 1246 (Fla. 1st DCA 1978)). Emergency rules must be narrowly tailored to address the specific emergency described in the agency's stated reasons for emergency. *See Times Pub. Co.* at 310. The proposed Emergency Rule is neither. "In emergency rulemaking, especially that emergency rulemaking which effectively cancels rule policy previously adopted after open public debate, Section 120.54(1), an agency is confined to

measures which are demonstrably necessary to alleviate the emergency described in its justification statement. Section 120.54(9)(a)2 authorizes emergency rulemaking, provided that, "The agency takes only that action necessary to protect the public interest under the emergency procedure." *Id.* at 310.

DOEA's bases for declaring an emergency for all assisted living facilities in Florida are: (1) that Florida has a large number of elderly residents; (2) that elderly residents are more prone to heat-related health problems; (3) that a single nursing home incompetently responded to a loss of power resulting in a tragic loss of life; (4) that thousands of elderly citizens reside in assisted living facilities and nursing homes; and (5) that the rule's requirements will mitigate health concerns in the event that an assisted living facility or nursing home loses power.

DOEA made no finding that other nursing homes or assisted living facilities are incapable of maintaining a temperature at 80 degrees or lower or otherwise are incapable of caring for their residents. DOEA in fact made no factual findings related to any other healthcare facilities at all. Nor were there any factual findings related to areas of Florida untouched by Hurricane Irma.

Florida has maintained a large population of elderly for many years, and thousands of those residents have resided safely in assisted living facilities. Only the recent events at a single nursing home in Broward County are cited as the basis for declaring an immediate threat to the public's health and safety in all parts of Florida. DOEA has not made any findings that indicate that the actions taken at that nursing home, which has been described as an "incompetent response by a nursing facility to a loss of air conditioning after Hurricane Irma," are present in any assisted living facility in Florida.

Though DOEA's stated reasons for emergency identify only one non-compliant nursing home in one county of Florida and do not even address an assisted living facility, the Emergency Rule nevertheless imposes requirements on all assisted living facilities in all counties of Florida. The Emergency Rule therefore violates the requirement that an emergency rule take "only that action necessary to protect the public interest under the emergency procedure." § 120.54(4)(a)2; *see also Times Pub. Co.* at 310. In short, the DOEA's proposed remedy is not narrowly tailored to alleviate the emergency described in its justification statement as required by section 120.54(4)(a)2, Florida Statutes, and *Times Pub. Co.* DOEA's stated reasons for emergency are therefore insufficient to support the Emergency Rule.

Hurricane Irma made landfall in Florida on September 11, 2017, and has since subsided. Hurricane Irma no longer presents an emergency. Additionally, the hurricane season in Florida ends on November 30, 2017. The next hurricane season will not begin until June 1, 2018. The Emergency Rule requires compliance no later than November 15, 2017, two weeks before the end of hurricane season. Thus, the Emergency Rule cannot plausibly be intended to address an emergency created by the current hurricane season in Florida, as the hurricane season will have ended in a matter of days after the compliance date set forth in the Emergency Rule. Ample time is available before the next hurricane season begins to conduct non-emergency rulemaking and concurrent workshops and public hearings to gather pertinent facts and public input.

### **RELIEF SOUGHT**

FL Argentum requests that the Court quash the Emergency Rule.

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing document complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

Respectfully Submitted,

*/s/Amy W. Schrader*

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### **CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on October 2, 2017, the foregoing was electronically filed with:

Clerk of the Court  
First District Court of Appeal  
2000 Drayton Drive  
Tallahassee, FL 32399-0950

And that a copy was delivered by electronic mail to the following:

Frances Carbone, Agency Clerk  
Office of General Counsel  
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*/s/ Amy W. Schrader*  
Amy W. Schrader

STATE OF FLORIDA  
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Emergency Rule No. 58AER17-1

FLORIDA DEPARTMENT OF  
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**APPENDIX TO PETITIONER'S PETITION FOR REVIEW  
OF EMERGENCY RULE**

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INDEX TO APPENDIX

**Document**

**Tab No.**

*Notice of Emergency Rule, Federal Aging Program  
58AER17-1, Procedures Regarding Emergency  
Environmental Control for Assisted Living Facilities, 43  
Fla. Admin. Reg., No. 180, pp.4002-4003 (Sept. 18,  
2017).....* A

Respectfully Submitted,

*/s/Amy W. Schrader*

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Frances Carbone, Agency Clerk  
Office of General Counsel  
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*/s/ Amy W. Schrader*  
Amy W. Schrader

# **Exhibit “A”**

**DEPARTMENT OF ELDER AFFAIRS**

**Federal Aging Programs**

**RULE NO.: RULE TITLE:**

58AER17-1: Procedures Regarding Emergency  
Environmental Control for Assisted Living  
Facilities

**SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE:** The State has experienced extreme shortages of electrical power that have jeopardized, and continue to jeopardize, the health, safety and welfare of residents in Florida's assisted living facilities. According to the United States Census Bureau, Florida has the largest percentage of residents age 65 and older in the nation. According to the Centers for Disease Control and Prevention, people age 65 years or older are more prone to heat-related health problems. An incompetent response by a nursing facility to a loss of air conditioning after Hurricane Irma resulted in the tragic loss of eight senior citizens at the Rehabilitation Center at Hollywood Hills. Thousands of frail seniors reside in assisted living facilities in Florida. Ensuring assisted living facilities maintain sufficient resources to provide alternative power sources during emergency situations mitigates the concerns related to the health, safety and welfare of residents in those assisted living facilities that experience loss of electrical power. This emergency rule establishes a process by which assisted living facilities shall obtain sufficient equipment and resources to ensure that the ambient temperature of assisted living facilities will be maintained at or below 80 degrees Fahrenheit within the facilities for a minimum of ninety-six (96) hours in the event of the loss of electrical power. Prompt implementation of this rule is necessary to ensure continuity of care and to ensure the health, safety and welfare of residents of Florida's assisted living facilities.

REASON FOR CONCLUDING THAT THE PROCEDURE IS FAIR UNDER THE CIRCUMSTANCES: The procedure used to adopt this emergency rule is fair as the State of Florida is under a declaration of emergency due to the massive destruction caused by Hurricane Irma, and it is essential to ensure as soon as possible that temperatures in assisted living facilities are maintained at a level providing for the safety of the residents residing therein; provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution; and takes only that action necessary to protect the public interest under the emergency procedure.

SUMMARY: This emergency rule establishes a process for the Department of Elder Affairs to ensure that licensees of assisted living facilities develop and implement plans that ensure ambient temperatures will be maintained at or below 80 degrees Fahrenheit or less for a minimum of ninety-six (96) hours in the event of the loss of electrical power to an assisted living facility. THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS: Jeanne Curtin, Senior Attorney, Department of Elder Affairs, Office of the General Counsel, curtinj@elderaffairs.org, (850)414-2096, 4040 Esplanade Way, Tallahassee, FL 32399-7000.

THE FULL TEXT OF THE EMERGENCY RULE IS:

(1) Assisted living facilities shall, within forty-five (45) days of the effective date of this emergency rule provide, in writing, to the Department of Elder Affairs at ALFEMP@elderaffairs.org and to the local emergency management agency for review and approval, a detailed plan which includes the following criteria:

(a) The acquisition of a sufficient generator or sufficient generators to ensure that current licensees of assisted living facilities will be equipped to ensure ambient temperatures will be maintained at or below 80 degrees Fahrenheit for a minimum of ninety-six (96) hours in the event of the loss of electrical power.

(b) The acquisition and safe maintenance of sufficient fuel to ensure that in the event of the loss of electrical power the generators will maintain ambient temperatures at or below 80 degrees Fahrenheit for a minimum of ninety-six (96) hours after the loss of electrical power.

(c) The acquisition of services necessary to install, maintain, and test the equipment and its functions to ensure the safe and sufficient operation of the generator system installed in the assisted living facility.

(2) Each assisted living facility shall, within sixty (60) days of the effective date of this rule, have implemented the plan required under this rule.

(3) If the facility's initial submission of the plan is denied, then the local emergency management agency shall report the

denial to the Florida Division of Emergency Management and the facility within forty-eight (48) hours of the date of the denial.

(4) Within ten (10) business days of the date of the local county emergency management agency's notice of denial, the facility shall resubmit their plan.

(5) The county shall post all approved facility emergency management plans to their website within ten (10) days of the plan's approval.

(6) Within forty-eight (48) hours of the approval of the plan from local emergency management agency, the facility shall submit in writing proof of approval to the Agency for Health Care Administration and the Department of Elder Affairs.

(7) The State Fire Marshall shall conduct inspections to ensure compliance with this rule within fifteen (15) days of installation.

(8) Each assisted living facility shall develop and implement written policies and procedures to ensure that the facility can effectively and immediately activate, operate and maintain the generators and alternate fuel required for the operation of the generators.

(9) The Agency for Health Care Administration may revoke the assisted living facility's license for failure to comply with this rule.

(10) In addition to other remedies provided by law, violation of this rule shall result in a fine or sanction as provided in Section 429.19, F.S. of \$1,000 per day. Rulemaking Authority 429.41, FS. Law Implemented 429.19, 429.28, 429.41, FS. History - New 9-16-17.

THIS RULE TAKES EFFECT UPON BEING FILED WITH THE DEPARTMENT OF STATE UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE.

EFFECTIVE DATE: 9/16/2017