STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ARGENTUM,

Petitioner,

v. Case No. _____

DEPARTMENT OF ELDER AFFAIRS,

Respondent.
_____/

PETITION TO CHALLENGE EMERGENCY RULE 58AER17-1

Petitioner, Florida Argentum, ("FL Argentum") pursuant to sections 120.54(4), 120.56(1) and (5), Florida Statutes, files this petition requesting a formal administrative proceeding and seeking a final order determining that emergency rule 58AER17-1, "Procedures Regarding Emergency Environmental Control for Assisted Living Facilities," ("the Emergency Rule") adopted by the Department of Elder Affairs ("DOEA") constitutes an invalid exercise of delegated legislative authority and that DOEA has failed to demonstrate that an emergency rule is necessary under the circumstances stated in its Notice of Emergency Rule and in support thereof alleges:

I. PARTIES AND BACKGROUND

1. Petitioner, FL Argentum is an association representing companies that operate professionally managed senior living communities and industry partners that serve senior living operators in the State of Florida. FL Argentum represents over 400 professionally-managed assisted living, memory care and independent living communities in Florida, including the largest assisted living providers in the State. For purposes of this proceeding, FL Argentum's address shall be that of undersigned counsel.

2. Respondent, DOEA is one of the state agencies charged with implementing the

Assisted Living Facilities Act ("the Act") under Part I of Chapter 429, Florida Statutes. DOEA's address is: 4040 Esplanade Way, Tallahassee, Florida 32399-7000.

3. DOEA is charged by sections 429.24, 429.255, 429.256, 429.275, 429.41, and 429.52, Florida Statutes, to adopt rules administering the Act, and thus is the proper respondent in this proceeding.

4. The Emergency Rule was adopted following the deaths of a number of residents at the 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, however, the nursing home's culpability for these deaths is still under investigation.

5. 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 issue emergency rules applicable to all nursing homes and assisted living facilities within the State of Florida, which would require these facilities to install, within 60 days, generators with sufficient power to maintain an indoor ambient temperature of at least 80 degrees and with enough fuel to power the generator for 96 hours.

6. DOEA did not conduct any public workshops or hearings regarding the Emergency Rule prior to the publication and first announced the Emergency Rule in a press release on Saturday, September 16, 2017. *See* http://elderaffairs.state.fl.us/index.php.

7. FL Argentum 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 attached as Exhibit "A."[1]

[1] The Agency for Health Care Administration simultaneously published Emergency Rule 59AER17-1 imposing nearly the

8. 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 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.

See Ex. A.

9. 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 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 within 45 days of the Rule's effective date, 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).

10. 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

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same requirements on nursing homes for acquisition of a generator and a 96-hour supply of fuel, however, FL Argentum is only challenging Emergency Rule 58AER-17 in this proceeding given that its members consist of Assisted Living Facilities and associated industries.

have installed adequate generators and fuel supply tanks.

11. 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 in terms of time, and cannot simply be accomplished by utilizing an off-the-shelf generator from a home supply store.

12. 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, the Agency for Health Care Administration may revoke its license. *See id.,* Rule 58AER17-1(9). The Emergency Rule also requires the Agency to impose fines of $1,000 per day for failure to comply. *See id.,* Rule 58AER17-1(10).

13. Subsequent to receiving a number of inquiries from representatives of assisted living facilities regarding difficulties in compliance with the Emergency Rule, DOEA posted a "Questions and Answers" document on its website, dated September 21, 2017. A copy of the Questions and Answers document is attached as Exhibit "B."

14. 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.

15. 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.

16. 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. FL Argentum and its members remain committed to supporting the Governor's intentions, however, additional clarity and an expanded timeline are necessary to safely and effectively carry out his directive. 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.

II. STATEMENT OF FACTS WHICH SHOW THAT THE EMERGENCY RULE CONSTITUTES AN INVALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY

A. DOEA's Rulemaking Authority Under the Assisted Living Facilities Act

17. DOEA currently regulates 3,104 licensed assisted living facilities ("ALFs") in the State of Florida and has statutory authority in conjunction with the Agency for Health Care Administration, the Department of Children and Families, and the Department of Health to implement the Assisted Living Facilities Act under Part I of Chapter 429, Florida Statutes.

18. DOEA has cited sections 429.19, 429.28 and 429.41, Florida Statutes, as its authority for adoption of the Emergency Rule. These sections state in pertinent part:

- § 429.19 Violations; imposition of administrative fines; grounds:

  (1) In addition to the requirements of part II of chapter 408, the agency shall impose an administrative fine in the manner provided in chapter 120 for the violation of any provision of this part, part II of chapter 408, and applicable rules by an assisted living facility. . .

- § 429.28 Resident bill of rights:

  (3)(a) . . . The agency shall adopt rules for uniform standards and criteria that will be used to determine compliance with facility standards and compliance with residents' rights.

- § 429.41 Rules establishing standards:

  (1) It is the intent of the Legislature that rules published and enforced pursuant to this section shall include criteria by which a reasonable and consistent quality of resident care and quality of life may be ensured and the results of such resident care may be demonstrated. Such rules shall also ensure a safe and sanitary environment that is residential and noninstitutional in design or nature. . . . The agency in consultation with the department, may adopt rules to administer the requirements of part II of chapter 408. In order to provide safe and sanitary facilities and the highest quality of resident care accommodating the needs and preferences of residents, the department, in consultation with the agency, the Department of Children and Families, and the Department of Health, shall adopt rules, policies, and procedures to administer this part, which must include reasonable and fair minimum standards in relation to:

  (a) The requirements for and maintenance of facilities, not in conflict with chapter 553, relating to plumbing, heating, 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.

  * * *

  (b) The preparation and annual update of a comprehensive emergency management plan. Such standards must be included in the rules adopted by the department after consultation with the Division of Emergency Management. At a minimum, 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 transportation; supplies; staffing; emergency equipment; individual identification of residents and transfer of records; communication with families; and responses to family inquiries. The comprehensive emergency management plan is subject to review and approval by the local emergency management agency. During its review, the local emergency management agency shall ensure that the following agencies, at a minimum, are given the opportunity to review the plan: the Department of Elderly Affairs, the Department of Health, the Agency for Health Care Administration, and the Division of Emergency Management. Also, appropriate volunteer organizations must be given the opportunity to review the plan. The local emergency management agency shall complete its review within 60 days and either approve the plan or advise the facility of necessary revisions.

  * * *

  (g) The enforcement of the resident bill of rights specified in s. 429.28.

* * *

(2) In adopting any rules pursuant to this part, the department, in conjunction with the agency, shall make distinct standards for facilities based upon facility size; the types of care provided; the physical and mental capabilities and needs of residents; the type, frequency, and amount of services and care offered; and the staffing characteristics of the facility. . . . Except for uniform firesafety standards, the department shall adopt by rule separate and distinct standards for facilities with 16 or fewer beds and for facilities with 17 or more beds. The standards for facilities with 16 or fewer beds must be appropriate for a noninstitutional residential environment; however, the structure may not be more than two stories in height and all persons who cannot exit the facility unassisted in an emergency must reside on the first floor. . . .

* * *

(3) The department shall submit a copy of the proposed rules to the Speaker of the House of Representatives, the President of the Senate, and appropriate committees of substance for review and comment prior to the promulgation thereof. . . .

(Emphasis added.)

19. Section 120.54(4), generally authorizes the adoption of emergency rules under specified circumstances, and states in pertinent part:

(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.

(Emphasis added.)

20. Notwithstanding DOEA's authority to bypass certain procedural rulemaking requirements otherwise applicable under section 120.54, in the event an emergency rule is justified, DOEA's authority to adopt rules is still limited to that authority statutorily delegated to it by the Legislature. Thus, any emergency rule that exceeds DOEA's delegated legislative authority is subject to invalidation in response to a meritorious challenge.

21. Pursuant to section 120.52(8), Florida Statutes, an "invalid exercise of delegated legislative authority" is defined as "action that goes beyond the powers, functions, and duties delegated by the Legislature." An existing rule, including an emergency rule, is an invalid exercise of delegated legislative authority if any of the following circumstances applies:

> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

§ 120.52(8), Fla. Stat. (2017).

22. The Emergency Rule violates sections 120.52(8)(a), (b), (c), (d), (e) and (f), Florida Statutes, and therefore constitutes an invalid exercise of delegated legislative authority as detailed herein.

B. DOEA Materially Failed to Comply with Emergency Rulemaking Procedures under Section 120.54(4) as Set Forth in Statute, Exceeded its Grant of Rulemaking Authority and Contravened the Specific Provisions of Law Implemented

23. Pursuant to section 429.41, Florida Statutes, DOEA is directed to consult with AHCA, the Department of Children and Families, and the Department of Health prior to adopting rules regarding the maintenance of ALFs, including requirements for "heating, 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." § 429.41(1)(a), Fla. Stat. (2017).

24. Standards for comprehensive emergency management plans are required to be adopted by rule after consultation with the Division of Emergency Management. §429.41(1)(b), Fla. Stat. (2017).

25. Further, prior to adoption of any rules under the rulemaking authority set forth in section 429.41, DOEA is required to submit a copy of the proposed rules to "the Speaker of the House of Representatives, the President of the Senate, and appropriate committees of substance for review and comment prior to the promulgation thereof." § 429.41(3), Fla. Stat. (2017).

26. Upon information and belief, DOEA failed to consult with the required agencies and likewise failed to submit the Emergency Rule to the appropriate legislative officials prior to adoption. This is a material failure to follow substantive rulemaking requirements that should result in invalidation of the Emergency Rule.

27. While section 120.54(4), Florida Statutes, provides a waiver of some procedural requirements under the Administrative Procedure Act applicable to adoption of rules in an emergency situation, it does not purport to waive rulemaking requirements imposed by the Legislature under substantive statutes. Specifically, section 120.54(4)(a)1, requires that the

procedure an agency utilizes to adopt an emergency rule must provide "at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution."

28. Here, section 429.41 provides procedural protections that are meant to ensure that rules adopted by DOEA to regulate ALFs are first vetted with other appropriate agencies, such as the Department of Health and the Division of Emergency Management, that have substantive knowledge regarding these areas of regulation before standards are adopted and imposed upon ALFs.

29. The rationale for this vetting requirement is made especially clear in the case of this Emergency Rule given that DOEA's failure to consult with other agencies, that would have had substantive knowledge of the feasibility of installing generators and fuel tanks for every ALF in the state under an extremely compressed timeframe, has resulted in a completely unworkable rule.

30. The Legislature imposed these vetting requirements for a very good reason and did not give DOEA authority to bypass these preconditions to adopting rules--even one labeled as an "emergency" rule. DOEA on its own simply does not have the specialized knowledge in the areas regulated under the Emergency Rule, and its failure to follow rulemaking requirements set forth by the Legislature should result in invalidation of the Emergency Rule.

31. In addition to its failure to consult with other agencies and Legislative offices prior to adoption, the Emergency Rule further contravenes the requirement in section 429.41(2), that separate standards must be adopted for facilities with 16 beds or less as compared with those for 17 beds or more. The Legislature recognized that rules governing ALFs should not be a "one size fits all" determination and that standards should be individualized to specific size and type facilities. The Emergency Rule's failure to distinguish between small and larger facilities and those with different types of resident populations should result in invalidation.

32. Finally, the Emergency Rule seeks to impose penalties that are not otherwise authorized by statute. Specifically, section 429.19 sets forth authorization for AHCA to impose fines on ALFs under certain conditions where there has been a rule violation. The statute provides that the agency may assess a fine within a particular range given the severity of the infraction, and that the agency must consider aggravating and mitigating factors in determining the gravity of the violation, and hence the amount of the fine.

33. Here, the Emergency Rule imposes a strict $1,000 per day fine for noncompliance and provides that AHCA may revoke a facility's license as an additional penalty. This penalty scheme is not authorized by any of the statutes cited by DOEA as authority for the Emergency Rule, and therefore the Emergency Rule constitutes an invalid exercise of delegated legislative authority.

C. The Emergency Rule is Impermissibly Vague and Fails to Establish Adequate Standards for Agency Decisions

34. The Emergency Rule is impermissibly vague as evidenced by DOEA's issuance of the Questions and Answers document on September 21, 2017, which facially acknowledges that the Emergency Rule is unclear in several aspects and cannot stand on its own. *See* Ex. B.

35. FL Argentum has further identified several items that are inherently unclear in the Emergency Rule, leaving ALFs to speculate as to how they should comply. Some of the most obvious items which are overly vague and require clarification include the following:

- It is unclear under the Emergency Rule as to which locations within a building must be maintained at an ambient temperature of 80 degrees. This is an extremely important factor in an ALF determining the size of the generator and fuel tank it must acquire to be in compliance.
- It is unclear whether DOEA will require local governments to issue permits or waive zoning requirements for installation of large fuel tanks where they

otherwise may not be authorized by law to be installed.

- It is unclear whether DOEA's selection of 80 degrees as the ambient temperature requirement is meant to supersede temperature requirements for ALFs as set forth in the Florida Building Code (FBC). Specifically, the FBC, Chapter 4, Section 464.2, provides that inside temperatures must be maintained between 81 and 85 degrees based on whether it is night or day and whether the outside temperature is above or below 90 degrees. Therefore, DOEA's rationale for selecting 80 degrees is not clear given conflict with the FBC, and ALFs are left with uncertainty as to which standards apply.

36. Due to the inherent vagueness of the Emergency Rule, it should be invalidated as exceeding DOEA's delegated legislative authority.

D. The Emergency Rule is Arbitrary and Capricious

37. DOEA's Emergency Rule is also invalid because DOEA has exceeded its statutory authority by imposing requirements that were adopted without adequate research or investigation by DOEA as to their reasonableness.

38. Pursuant to section 120.52(8)(e), Florida Statutes, "A rule is arbitrary and capricious if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational." §120.52(8)(e), Fla. Stat. (2017); *see also Agrico Chemical Co. v. Dept. of Environ. Reg.,* 365 So. 2d 759, 763 (Fla. 1st DCA 1979).

39. Despite the fact that not one resident of an assisted living facility was lost in the wake of Hurricane Irma, despite a widespread loss of power, DOEA has arbitrarily determined that it must impose additional requirements on ALFs beyond what is already required under their approved emergency management plans. Current emergency management plans, which have been reviewed and approved by the Division of Emergency Management, already include

measures necessary to prevent jeopardizing the life safety of all residents in an ALF. *See* § 429.41(1)(b), Fla. Stat. (2017) and Rule 58A5.026(1)(b), F.A.C.

40. While FL Argentum and its members fully agree with taking all necessary steps to protect their residents, after significant research and investigation they have determined that compliance with the Emergency Rule in the timeframe allowed is not possible. The only reasonable conclusion is that DOEA failed to perform its own research and investigation into the feasibility of ALFs complying with the Emergency Rule prior to adoption.

41. Specifically, FL Argentum's research and investigation revealed the following unworkable problems that make DOEA's 45 and 60-day timeframes for compliance with the Emergency Rule arbitrary and capricious:

- 60 days is insufficient time to complete the planning, purchasing and installation processes needed for the acquisition of emergency generator power and fuel storage capacity as required by the Emergency Rule. This timeframe is especially inappropriate given that DOEA and AHCA have mandated that all ALFs and nursing homes statewide comply with the same generator and fuel storage requirements. With over 3,000 ALFs alone, there are simply not enough existing generators with the required capacity to timely fulfill this demand. Moreover, other states and countries impacted by the recent hurricanes have increased demand for generators and related parts and labor. FL Argentum's research indicates that the normal time for planning and installation of a commercial generator is between five to eight months. This timeframe, however, does not account for the fact that all facilities statewide will be simultaneously competing for limited resources to achieve installation of a compliant generator.
- Placement of a fuel tank with sufficient capacity to operate a commercial

generator for 96 hours implicates compliance with state and federal safety standards. Many facilities would need to install large underground storage tanks, which would require engagement of engineering and fire safety experts along with the need for permitting. The Emergency Rule does not purport to waive any permitting or zoning requirements to allow ALFs the ability to comply with a 60-day installation requirement even if they are able to secure a custom-designed fuel tank within that timeframe.

Further, the Emergency Rule arbitrarily forecloses the use of natural gas, which is clean energy that can be delivered through buried pipelines, instead of storing fuel in a storage tank. Many ALFs already have generators installed that utilize natural gas, however, the Emergency Rule makes no accommodation for use of these existing fuel sources to meet the Rule requirements. DOEA, further has provided no support for its apparent position that natural gas pipelines are a less reliable source of fuel than storage tanks.

- Upon information and belief, DOEA lacks sufficient staff to review and approve thousands of emergency management plans within the timeframe allotted. Further, local divisions of emergency management have 60 days per statute to review proposed emergency management plans submitted by ALFs. *See* § 429.41(b), Fla. Stat. (2017). DOEA has not purported to change this statutory timeframe for review, thereby making compliance by ALFs with the Emergency Rule impossible.

42. Given that many of the requirements in the Emergency Rule are completely unworkable due to the extremely short timeframes provided by DOEA, the Emergency Rule should be deemed arbitrary and capricious, and subject to invalidation.

E. The Emergency Rule Improperly Imposes Regulatory Costs that Could Be Reduced by the Adoption of Less Costly Alternatives that Substantially Achieve DOEA's Objectives

43. There is no indication that DOEA has considered any less costly alternative than requiring installation of commercial generators with large fuel tanks to ensure access to power in the event of another natural disaster.

44. Currently, many facilities located within zones prone to flooding during hurricanes have approved emergency plans that require evacuation and therefore make the need for 96 hours of generator power unnecessary. Despite this fact, there is no exception for facilities that have an evacuation plan versus a plan to shelter in place long-term.

45. Further, it is unclear what safety objectives DOEA is attempting to achieve beyond those objectives which are already achieved under existing emergency management plans, which have been reviewed and approved by the Division of Emergency Management. These plans already provide for maintenance of emergency life-sustaining systems, where needed. The approved plans provide necessary safety measures to protect residents in assisted living facilities, the majority of which are not bed-ridden as those residents of a nursing home may be. Thus, given the differing physical abilities of residents in assisted living facilities versus those in a nursing home setting, there is much less concern that assisted living facility residents would be unable to evacuate a facility should power not be quickly restored.

46. Therefore, for the above-stated reasons the Emergency Rule should be deemed an invalid exercise of delegated legislative authority.

III. STANDING OF PETITIONER

47. Petitioner, FL Argentum, is adversely affected by the Emergency Rule given that DOEA regulates Petitioner's members that operate assisted living facilities. FL Argentum has been authorized to file this Petition on behalf of its members, a substantial number of which would be adversely affected should the Emergency Rule be enforced by DOEA.

48. The Petitioner has retained the services of the undersigned counsel to represent it in this proceeding, and has agreed to pay reasonable costs and attorneys' fees.

IV. DISPUTED ISSUES OF MATERIAL FACT

50. Disputed issues of material fact include, but are not limited to:

(a) Whether assisted living facilities in Florida can obtain and install new generators and fuel tanks within 60 days;

(b) Whether assisted living facilities in Florida are permitted to store fuel reserves on-site, as required by the Emergency Rule;

(c) Whether DOEA has adequate resources to review and approve emergency plans from all assisted living facilities in Florida within the timeframes required by the Emergency Rule;

(d) Whether DOEA lacks a documented, immediate threat to public health, safety or welfare required to justify the use of emergency rules;

(e) Whether local emergency management agencies have the resources necessary to review revised emergency plans from every assisted living facility in the State of Florida within the time required by the Emergency Rule;

(f) Whether the State Fire Marshal is able to complete required inspections of all assisted living facilities within the time required by the Emergency Rule;

(g) Whether the Emergency Rule takes only the action necessary to protect the public interest under the emergency procedure;

(h) Whether DOEA published an adequate statement of facts and reasons for finding an immediate danger to public health safety and welfare;

(i) Whether DOEA failed to follow rulemaking requirements required by section 429.41, Florida Statutes, in adopting the Emergency Rule;

(j) Whether the Emergency Rule is impermissibly vague;

(k) Whether the Emergency Rule is arbitrary and capricious;

(l) Whether the Emergency Rule improperly imposes regulatory costs that could be reduced by the adoption of less costly alternatives that substantially achieve DOEA's objectives;

(m) Whether DOEA exceeded its legislatively delegated rulemaking authority in adopting the Emergency Rule; and

(n) Whether the Emergency Rule enlarges, modifies, or contravenes specific provisions of law.

VI. REQUEST FOR RELIEF

WHEREFORE, Petitioner requests:

A. That a formal hearing be conducted in accordance with Sections 120.54(4), 120.56(1) and 120.56(5), Florida Statutes;

B. That Emergency Rule 58AER17-1 be determined to be an invalid exercise of delegated legislative authority and that DOEA lacks a documented, immediate threat to public health, safety or welfare required to justify the use of emergency rules.

Dated this 29th date of September, 2017.

/s/ Amy W. Schrader
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Attorney for Petitioner, Florida Argentum

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing was delivered by electronic mail to:

Frances Carbone, Agency Clerk
Office of the General Counsel
Department of Elder Affairs
4040 Esplanade Way, Suite 315
Tallahassee, Florida 32399-7000
carbonef@elderaffairs.org

and

Stefan R. Grow, General Counsel
Office of General Counsel
Department of Elder Affairs
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Tallahassee, Florida 32399-7000
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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

Exhibit "B"

Department of
ELDER AFFAIRS
STATE OF FLORIDA

Rick Scott
Governor

Jeffrey S. Bragg
Secretary

NURSING HOME RULE 59AER17-1 – ASSISTED LIVING FACILITY RULE 58AER17-1
QUESTIONS AND ANSWERS - SEPTEMBER 21, 2017

Question 1: Is any action required if a facility already meets the requirements of the rule?

Answer: Many facilities have already taken steps to protect their residents and are in compliance with this rule. Such facilities must submit their plan in accordance with the rule to confirm compliance and will be acknowledged for their proactive implementation.

Question 2: Does the requirement to maintain temperatures in subsection (1) apply to the entire licensed facility including all resident rooms and common areas?

Answer: The required temperatures must be maintained in an area of sufficient size to maintain all residents comfortably at all times and that is appropriate for the health, safety and welfare of all residents. This may include areas that are less than the entire licensed facility if the facility's emergency management plan includes relocating residents to portions of the building where temperatures will be maintained as required by the rule. This information must be included in the plan required by subsection (1).

Question 3: Will a contract or agreement to bring in a generator and/or fuel when needed comply with the requirement of subsection (1)?

Answer: No. The rule requires the generator be installed and maintained at the facility, and sufficient fuel must be safely maintained at the facility to ensure temperatures for 96 hours. A contract to bring in a generator when needed does not comply with the rule. A contract to bring in fuel to support temperatures beyond the initial 96 hours would be appropriate as part of the CEMP, however the initial 96 hours must be supported by a fuel source available at the facility at all times. The rule is intended to enable nursing homes and assisted living facilities to be self-sufficient in maintaining resident safety. During times of emergency, delivery of a generator or fuel can be unreliable and will not provide necessary protections for vulnerable residents.

Question 4: Will a mobile generator meet the requirements of the rule?

Answer: The rule does not restrict the type of generator required, but it must be installed and maintained at the facility. The emergency generator, fuel supply, and distribution equipment must be protected from debris impact as required by the Florida Building Code.

Question 5: Can natural gas be used as a fuel source?

Answer: The rule does not dictate the type of fuel permitted. Only sources of fuel that are stored onsite will be considered reliable, however a piped fuel source may serve as an additional resource. The plan that must be submitted for review should include fuel information.

Question 6: Does the rule waive other permitting or approval requirements elsewhere in law?

Answer: The rule does not waive any other permitting or requirements. Nursing homes must continue to seek approval from all other state and local authorities including the Agency's Office of Plans and Construction. Assisted living facilities must continue to seek approval from all other state and local authorities.

Question 7: Does the rule provide for an extension of time if requested?

Answer: No. The rule does not provide for an extension of time.

Question 8: If a facility's CEMP is to evacuate if a power outage or other emergency does not enable the maintenance of required temperatures, is this plan a permissible alternative to meeting the generator and temperature requirements of this rule?

Answer: No. Emergency evacuation plans are vital in many instances. However, the rule does not provide evacuation as an alternative means for compliance with this rule.