STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA ASSOCIATION OF HOMES AND SERVICES FOR THE AGING, INC., d/b/a LEADINGAGE FLORIDA,

Petitioner,

vs. Case No. 17-5388RE

AGENCY FOR HEALTH CARE ADMINISTRATION, AND DEPARTMENT OF ELDER AFFAIRS,

Respondents.
_____/

FLORIDA ASSISTED LIVING ASSOCIATION, INC., A FLORIDA NOT FOR PROFIT CORPORATION,

Petitioner,

vs. Case No. 17-5409RE

FLORIDA DEPARTMENT OF ELDER AFFAIRS,

Respondent.
_____/

FLORIDA ARGENTUM,

Petitioner,

vs. Case No. 17-5445RE

DEPARTMENT OF ELDER AFFAIRS,

Respondent.
_____/

FINAL ORDER

Pursuant to notice, a final hearing was held in this case on October 12 through 13, 2017, in Tallahassee, Florida, before

Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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STATEMENT OF THE ISSUES

Whether Florida Administrative Code Emergency Rules 58AER17-1 and 59AER17-1 (collectively referred to as "the

Emergency Rules") are invalid exercises of delegated legislative authority and whether an immediate danger justified issuance of the Emergency Rules.

PRELIMINARY STATEMENT

On September 26, 2017, the Florida Association of Homes and Services for the Aging, Inc., d/b/a LeadingAge Florida ("LeadingAge Florida") filed a Petition alleging that: (a) the Emergency Rules are invalid exercises of delegated legislative authority; and that (b) there is no immediate threat to the public health, safety, or welfare.

On September 27, 2017, the Florida Assisted Living Association, Inc., ("the FALA") filed a Petition raising the same grounds as LeadingAge's Petition. However, the FALA's Petition only challenged Emergency Rule 58AER17-1.

On September 29, 2017, Florida Argentum filed a Petition contesting the validity of Emergency Rule 58AER17-1. Florida Argentum's Petition raised the same grounds as the other two Petitions.[1/]

After holding a pre-hearing telephonic conference on September 29, 2017, the undersigned consolidated these three cases and scheduled the final hearing to occur on October 12 and 13, 2017.

On October 10, 2017, the undersigned issued an Order Regarding Presentation of Evidence and Testimony. The Order stated the following:

> During the final hearing scheduled for October 12 and 13, 2017, the parties will present their evidence and testimony in the following order:
>
> 1. Respondents shall proceed first with evidence and testimony regarding their compliance with section 120.54(4), Florida Statutes, while promulgating rules 58AER17-1 and 59AER17-1, including evidence demonstrating the existence of the "immediate danger" that supports the adoption of rules 58AER17-1 and 59AER17-1.
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> 2. Petitioners may then present evidence and testimony regarding Respondents' compliance with section 120.54(4), while promulgating rules 58AER17-1 and 59AER17-1. Petitioners shall also present their case in chief pertaining to whether rules 58AER17-1 and 59AER17-1 are invalid exercises of delegated legislative authority.
>
> 3. Respondents may then present any rebuttal regarding their compliance with section 120.54(4), while promulgating rules 58AER17-1 and 59AER17-1. Respondents shall also present their case in chief in support of the validity of rules 58AER17-1 and 59AER17-1.
>
> 4. Petitioners may then present any rebuttal as to whether rules 58AER17-1 and 59AER17-1 are invalid exercises of delegated legislative authority.

The final hearing was commenced as scheduled on October 12, 2017.

The Agency for Health Care Administration ("AHCA") and the Department of Elder Affairs ("DOEA")[2/] presented the testimony of Molly McKinstry, AHCA's Deputy Secretary for the Division of Health Quality Assurance, and Catherine Anne Avery, DOEA's Bureau Chief for Elder Rights.

The Agencies' Exhibits 5, 8, 9, 10, and 11 were accepted into evidence without objection.

The Agencies' Exhibit 6 was a composite exhibit consisting of a 22-page PowerPoint presentation followed by 585 Bates-stamped pages. Over objection, the undersigned accepted the PowerPoint presentation into evidence. As for the Bates-stamped pages, the undersigned granted an objection and excluded the following pages from consideration: 359 through 362, 367 through 370, 379 through 384, 389, 390, and 568 through 584.

The Agencies' Exhibit 7 was also a composite exhibit, and the undersigned accepted Bates-stamped pages 592 through 593 and 598 into evidence.

The Agencies' Exhibits 14 and 15 (Emergency Rules 58AER17-2 and 59AER17-2)(described herein as "the Emergency Variance Rules") were accepted into evidence over objection.

The Agencies' Exhibits 22 and 23 were the depositions of Casia Sinco and Scott Waltz, and those Exhibits were accepted into evidence over objection.

LeadingAge Florida called James R. "Skip" Gregory, Michael Dodane, and Steve Bahmer as witnesses. The undersigned accepted Mr. Gregory and Mr. Dodane as expert witnesses.

The undersigned accepted the following exhibits from LeadingAge Florida into evidence without objection: 1, 3 through 5, and 9 through 24. LeadingAge's Exhibit 8 was accepted into evidence over a relevance objection.

The FALA called Shaddrick A. Haston, Esquire, as a witness, and Mr. Haston was accepted as an expert witness.

The FALA offered the following exhibits that were accepted into evidence without objection: 3 through 8, 10, and 17. Exhibits 6 and 7 were admitted for specific reasons as described by FALA's counsel during the final hearing. Exhibit 9 was accepted for demonstrative purposes only.

The following exhibits from the FALA were accepted over objection: 2, 14, and 25.

Florida Argentum presented the testimony of Gwen Thibault and Bryan Richardson.

The following exhibits from Florida Argentum were accepted into evidence without objection: 2 through 11, and 14.

The following exhibits from Florida Argentum were accepted into evidence over hearsay objections: 12 and 13.

The following exhibits from Florida Argentum were accepted into evidence over hearsay objections but no findings were based on them: 15 and 16.

The final hearing was completed on October 13, 2017, and the transcript was filed on October 17, 2017. Because of the accelerated time frame associated with challenges to emergency rules, the undersigned required proposed final orders to be filed by noon on October 20, 2017.

All of the parties timely filed proposed final orders, and those proposed final orders were considered in the preparation of this Final Order.

FINDINGS OF FACT

The following findings of fact are based on the testimony presented at the final hearing, exhibits accepted into evidence, admitted facts set forth in the pre-hearing stipulation, and matters subject to official recognition.

The Parties

1. LeadingAge Florida is a trade association whose membership includes 75 nursing homes and 79 assisted living facilities ("ALFs"). LeadingAge Florida's services include the provision of legislative and regulatory advocacy on behalf of its members.

2. FALA is a professional organization whose membership includes 592 ALFs. FALA's advocates on its members' behalf before the legislative and executive branches.

3. Florida Argentum has 367 members and represents companies that operate professionally managed senior living communities, including independent living, assisted living, and memory care communities, as well as allied companies that serve senior living operators in the State of Florida.

4. AHCA is the state agency in Florida responsible for licensing nursing homes and ALFs. AHCA's staff inspects nursing homes and ALFs in order to ensure compliance with the statutes and rules governing those facilities.

5. AHCA promulgates the rules governing nursing homes.

6. DOEA is one of the state agencies charged with implementing the Assisted Living Facilities Act under Part I of Chapter 429, Florida Statutes (2017).[3/] DOEA consults with AHCA in order to promulgate the rules governing ALFs.

Pertinent Statutes and Rules Governing Nursing Homes and ALFs

7. Nursing homes and ALFs are subject to statutes and existing rules pertaining to emergency management plans and emergency power.

8. Section 400.23(2)(g), Florida Statutes, requires AHCA, in consultation with DOEA and the Department of Health, to adopt rules that include reasonable and fair criteria for "[t]he

preparation and annual update of a comprehensive emergency management plan" by a nursing home.

9. "At a minimum, the rules must provide for plan components that address emergency evacuation transportation; adequate sheltering arrangements; postdisaster activities, including emergency power, food, and water . . . ." (emphasis added).

10. Florida Administrative Code Rule 59A-4.134(12)(h) requires nursing homes to have generators.[4/]

11. Rule 59A-4.122(1)(e) requires nursing homes to maintain "[c]omfortable and safe room temperature levels in accordance with 42 CFR, Section 483.15(h)(6), which is effective October 1, 2014 . . . ." The version of 42 C.F.R. § 483.15 cited by the rule mandates that "[f]acilities initially certified after October 1, 1990 must maintain a temperature range of 71-81 °F." No exceptions are mentioned.

12. Section 429.41(1)(b) requires DOEA in consultation with AHCA, the Department of Children and Families, and the Department of Health, to adopt rules that include reasonable and fair minimum standards for "[t]he preparation and annual update of a comprehensive emergency management plan" by an ALF.

13. "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. . . ." § 429.41(1)(b), Fla. Stat. (emphasis added).

14. ALFs are not specifically required to have generators.

15. Florida Administrative Code Rule 65G-2.007(8)(a) mandates that indoor temperatures at ALFs "shall be maintained within a range of 68 degrees to 80 degrees, as appropriate for the climate." No exceptions are mentioned.

Hurricane Irma and Its Aftermath

16. On September 6, 2017, Hurricane Irma was projected to strike Southeast Florida, and nursing homes and ALFs in that area initiated evacuation plans.

17. By September 8, 2017, Hurricane Irma's direction had shifted, and projections indicated that Southwest Florida was in the storm's path. Nursing homes and ALFs in that area also initiated evacuation plans.

18. There were numerous situations during the pre-storm evacuation process in which patients could not be successfully evacuated to the originally planned destinations because those destinations were already filled with evacuees. In many instances, alternative arrangements had to be made in the midst of the emergency conditions and, often, the alternative shelters were not equipped to provide an appropriate level of care and/or did not have generators or the ability to house the patients for extended periods of time.

19. By September 9, 2017, the scope of Hurricane Irma's threat came into sharp focus. Projections had Hurricane Irma moving north over the entire Florida peninsula and affecting the vast majority of the State.

20. On September 9, 2017, the Division of Emergency Management estimated that 6.5 million Floridians had been ordered to evacuate.

21. By September 11, 2017, 6.7 million homes and businesses had lost power. More than 30,000 restoration personnel were activated in order to restore power as quickly as possible. That was the largest power restoration undertaking in history for a single state.

22. Many nursing homes and ALFs were without power for more than 72 hours after the storm and had a difficult time maintaining their indoor temperatures at the required levels.

23. Even facilities that had generators experienced difficulty due to a shortage of fuel during Hurricane Irma's aftermath or because of a lack of generator capacity to power their air conditioning.

24. Residents at some nursing homes and ALFs suffered from overheating, and they were transferred to hospitals because temperatures within the facilities had become excessively warm.

25. Temperatures in some facilities became so high that AHCA ordered them to be evacuated.

26. By September 15, 2017, power had been restored to more than 75 percent of the homes and businesses that had lost power.

27. In the days after Hurricane Irma, AHCA and DOEA concluded that nursing homes and ALFs needed to be more self-sufficient. That would reduce the need for evacuations and the need for nursing homes and ALFs to seek emergency assistance if electricity could not be promptly restored following a hurricane.

The Tragedy at Hollywood Hills Nursing Home

28. In the aftermath of Hurricane Irma, a tragedy occurred at the Rehabilitation Center of Hollywood Hills, LLC ("Hollywood Hills"), a nursing home located in Hollywood Hills, Florida.

29. Hollywood Hills was licensed to provide care to 152 residents.

30. After conducting a survey of Hollywood Hills on September 13, 2017, AHCA imposed an immediate moratorium[5/] on additional admissions to Hollywood Hills.[6/]

31. Following imposition of the moratorium, AHCA gathered additional facts and issued an Emergency Suspension Order[7/] on September 20, 2017, that immediately suspended Hollywood Hills' license to operate a nursing home in Florida.

32. AHCA's Emergency Suspension Order set forth the following findings:

a. On September 10, 2017, [Hollywood Hills] became aware that its air conditioning equipment had ceased to operate effectively.

b. In addition to contacting the local electrical power provider, [Hollywood Hills] situated eight (8) portable air coolers somewhere in the facility and equipped the halls with fans.

c. Between 1:30 AM and 5:00 AM on September 13, 2017, several residents suffered respiratory or cardiac distress. At least eight (8) of those residents ultimately expired.

d. Emergency personnel and law enforcement responding to these multiple emergency medical events directed [Hollywood Hills], as a result of the heat in the building, to evacuate the second floor of [Hollywood Hills].

e. [Hollywood Hills] ultimately evacuated the entire building.

f. Due to the active state of emergency of Hurricane Irma, the Florida Emergency Operations Center was actively staffed to assist with critical incidents. Additional emergency resources through several state and local government agencies were also available. This includes potential assistance with a timely evacuation, which [Hollywood Hills] never requested.

g. [AHCA] officials have reviewed records pertaining to the operational status of Memorial Regional Hospital, the hospital located directly across the street from [Hollywood Hills], and have confirmed that at all times relevant to this matter, the hospital was open, air-conditioned, and available to receive patients.

33. The Emergency Suspension Order also found that:

> As a result of [Hollywood Hill's] failure to care for and protect its residents, at least eight (8) residents have died. The deceased residents arrived at the large air-conditioned hospital across the street with core body temperatures of, for example, [109.9] degrees Fahrenheit; [108.5] degrees Fahrenheit; [107] degrees Fahrenheit; and [108.3] degrees Fahrenheit – too far gone and far too late to be saved.

The Emergency Rules

34. On Saturday, September 16, 2017, AHCA approved the adoption of Emergency Rule 59AER17-1. Emergency Rule 59AER17-1 was filed with the Department of State on September 18, 2017.

35. Emergency Rule 59AER17-1 is entitled "Nursing Home Emergency Power Plan" and states that it "establishes a process for [AHCA] to ensure that licensees of nursing homes develop and implement plans that ensure ambient temperatures will be maintained at 80 degrees or less for a minimum of ninety-six (96) hours in the event of the loss of electrical power to a health care facility."

36. The full text of Emergency Rule 59AER17-1 provides that:

> 59AER17-1 Nursing Home Emergency Power Plan
>
> (1) Procedures Regarding Emergency Environmental Control for Nursing Homes. Nursing homes shall, within forty-five (45) days of the effective date of this emergency rule, provide in writing, to the Agency for Health Care Administration 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 nursing homes will be equipped to ensure ambient temperatures will be maintained at 80 degrees or less for a period of 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 an emergency situation the generators can function to maintain ambient temperatures at 80 degrees or less for a period of a minimum of ninety-six (96) hours in the event of 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 nursing home.

(2) Each nursing home 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 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 the local emergency management agency, the facility shall submit in writing proof of approval to the Agency for Health Care Administration.

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

(8) Each nursing home 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 nursing home'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 of $1,000 per day.

(11) The facility shall implement policies and procedures to ensure that the health care facility can effectively and immediately activate and maintain the generators and alternate fuel required for the operation of the generators.

37. Emergency Rule 59AER17-1 purportedly took effect on Saturday, September 16, 2017.

38. In sum, Emergency Rule 59AER17-1 imposes the following requirements: (a) development of a plan regarding emergency environmental control within 45 days (i.e., October 31, 2017);

(b) acquisition of a generator within 60 days (i.e., November 15, 2017); and (c) acquisition of enough fuel by November 15, 2017, to power the aforementioned generator for 96 hours

39. On September 18, 2017, DOEA filed Emergency Rule 58AER17-1 with the Department of State.

40. Emergency Rule 58AER17-1 is entitled "Procedures Regarding Emergency Environmental Control for [ALFs]" and states that it "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."

41. Emergency Rule 58AER17-1 imposed the same requirements on ALFs that were imposed on nursing homes by Emergency Rule 59AER17-1.

42. Emergency Rule 58AER17-1 purportedly took effect on Saturday, September 16, 2017.

43. With regard to the specific reasons why there exists an "immediate danger to the public health, safety or welfare," the Emergency Rules state the following:

> 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 nursing homes. 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 nursing homes in Florida. Ensuring that nursing homes 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 nursing homes that experience loss of electrical power. This emergency rule establishes a process for certain nursing homes to obtain sufficient equipment and resources to ensure that the ambient temperature of the nursing homes will be maintained at 80 degrees or less 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 nursing homes.

44. As for why the method employed by AHCA and DOEA to address the situation described above was fair under the circumstances, the Emergency Rules explain that:

> 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 nursing homes 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 the action necessary to protect the public interest under the emergency procedure.

Prior Evaluation of Whether Facilities Could Comply with the November 15, 2017, Deadline

45. AHCA did not consult with the nursing home or ALF industries before adopting Emergency Rule 59AER17-1. DOEA did not consult with the ALF industry prior to adopting Emergency Rule 58AER17-1.

46. Before adoption of Emergency Rule 59AER17-1, AHCA did not investigate whether the requirements imposed by the Emergency Rules were a workable solution that could address the alleged emergency described in the preamble to the Emergency Rules.

47. Before adoption of Emergency Rule 58AER17-1, DOEA did not consider whether it was realistic to expect that ALFs could comply with the Emergency Rules' requirements by November 15, 2017. In addition, DOEA had not: (a) formulated or procured any estimates regarding the cost of compliance; (b) become aware of the process and timeframe for planning, permitting, procuring, and installing a commercial generator; (c) consulted with any generator suppliers to ascertain whether this increased need for generators could be satisfied by November 15, 2017;

(d) consulted with electrical engineers as to whether 60 days was a reasonable amount of time for compliance; and had not

(e) consulted fuel tank suppliers to ascertain if the fuel tanks necessary to comply with Emergency Rule 58AER17-1 could be procured by November 15, 2017.

The Installation Process for Commercial Generators and Fuel Tanks

48. There are several steps that must be taken in order to safely and legally install generators.

49. For existing nursing homes, installing a generator that complies with Emergency Rule 59AER17-1 requires three distinct phases: design, approval, and installation.

50. The design phase requires that a nursing home hire an electrical engineer. Negotiating a contract with an electrical engineer is a one-to-two week process.

51. Once hired, the electrical engineer will have to visit the site, examine existing electrical distribution systems, and discuss and confirm with the operators their expectations for the HVAC system when the generator is activated. The initial site visit requires three to four days to collect all of the facts needed for the design.

52. After the initial site visit, the electrical engineer must create final diagrams and construction drawings that will ultimately be reviewed by AHCA and the local jurisdiction. The

electrical engineer must engage the client frequently as the design is being drawn to ensure that expectations are being met. Finally, once the drawings are close to completion, the electrical engineer will take a final walkthrough of the facility in order to complete the final design that will be submitted for regulatory review.

53. An expeditious design phase would take 60 days to complete.

54. After a new power delivery system has been designed and drawn, the plans are submitted to AHCA and to the local jurisdiction concurrently for review. The plans must contain breaker coordination studies, ground fault studies, and power demand studies.

55. AHCA must complete its review of the design plans within 60 days. There is no provision in the Emergency Rules regarding the time within which necessary local governmental approvals must be completed.

56. After AHCA and the local jurisdiction complete their review, they provide comments to the electrical engineer. If the comments conflict, then the engineer must negotiate a solution between AHCA and the local jurisdiction.

57. After completion of the approval phase, a nursing home can begin the process of ordering and installing the generator. Usually a nursing home will not order the generator and

equipment necessary for installation until the design plans have been approved by AHCA and the local jurisdiction.

58. While a nursing home could order a generator at an earlier time, that is problematic given that the final plan approved by AHCA may require a different generator than the one initially ordered.

59. Following placement of a generator order, delivery usually takes 12 to 16 weeks because generators suitable for a large facility must be custom made rather than pulled "off the shelf."

60. After the generator has been delivered, installation can take weeks.

61. With the exception of the smallest of ALFs, ALFs subject to Emergency Rule 58AER17-1 must go through a similar design and approval process and cannot comply by purchasing an "off the shelf" generator from a local home improvement store.

62. Instead, the majority of ALFs (just like nursing homes) will need a generator built according to plans and specifications prepared by an electrical engineer and ordered months ahead of installation.

63. Electrical engineer Michael Dodane provided persuasive expert testimony regarding the timeline required for nursing homes and ALFs to comply with the Emergency Rules. Mr. Dodane credibly testified that it is physically impossible for a

facility to have a new generator installed within the 60-day timeline set forth in the Emergency Rules.

64. Mr. James R. "Skip" Gregory, a former Chief of AHCA's Office of Plans and Construction also credibly and persuasively testified that it is impossible for a generator to be installed within the 60-day timeframe set forth in the Emergency Rules.

Uncertainty About Compliance with the Emergency Rules

65. During the evening of September 18, 2017, LeadingAge Florida participated in a conference call with AHCA. LeadingAge Florida believed the call would present an opportunity to have questions answered so that LeadingAge could provide information to its members. At the time of the call, there was a great deal of uncertainty about how to comply with the Emergency Rules.

66. AHCA was unable to answer any questions during the call. AHCA treated the call as an opportunity to gather questions and assured the callers that AHCA would provide answers at a later time.

67. On September 21, 2017, the Agencies published eight questions and answers pertaining to compliance with the Emergency Rules. The most noteworthy questions and answers were the following:

> Question: 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: 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 [comprehensive emergency management plan], 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: Will a mobile generator meet the requirement 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: 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: 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. [ALFs] must continue to seek approval from all other state and local authorities.

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

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

Question: If a facility's [comprehensive emergency management plan] 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.

68. On September 22, 2017, the Florida Health Care Association ("the FHCA") held an open summit in Tallahassee for discussion about the Emergency Rules and how nursing homes and ALFs could comply. Attendees included facility operators, personnel from the Agencies, and industry experts and suppliers with expertise regarding generator installation at health care facilities.

69. At the summit, expert panelists opined that 60 days was an insufficient amount to time to comply with the Emergency Rules.

70. In addition, the Agencies were notified that generator manufacturers would not be able to fill orders quickly enough for every nursing home and ALF needing a new generator to comply with the Emergency Rules.

71. Justin Senior, AHCA's Secretary, spoke at the summit and indicated that the November 15, 2017, deadline established by the Emergency Rules would not be extended. However, Secretary Senior invited nursing homes and ALFs to utilize the statutory waiver process[8/] if they could not comply with the Emergency Rules.

72. Following the summit, the Agencies published more questions and answers on October 2, 2017, pertaining to whether nursing homes and ALFs could obtain a waiver and/or variance from the Emergency Rules' requirements.

73. Another set of questions and answers published on October 2, 2017, pertained to the requirements set forth in the Emergency Rules. One noteworthy question concerned the use of spot coolers:

> Question: The rule does not state that the generator(s) needs to run HVAC systems to cool. Are spot coolers considered in the rule?
>
> Answer: The rule does not specify the method of cooling required to allow flexibility for each provider to determine the most appropriate equipment to meet their facility needs. These details should be specified in the plan submitted for review and approval.

74. The Agencies published another set of questions and answers on October 10, 2017. The more noteworthy questions and answers included the following:

> Question: There is no defined review timeline for local emergency management review of plans; however facilities are expected to have generators implemented within 60 days. If all plans [are] received on [the] 45th day – there is very little time for review/comment, particularly if permits are required [and] if it is expected that reviews will be completed within the 60 days implementation period. Is it expected that the plan reviews and approvals [will] be completed prior to implementation?
>
> Answer: The rule describes plan reviews and approvals prior to implementation.
>
> Question: Who determines the technical specifications for the emergency power requirements, such as load requirements?

What agency/organization established these technical standards?

Answer: The rules establish the criteria for compliance. The plans must include any analysis and documentation necessary to demonstrate compliance with the criteria. The solution must be compliance with applicable building and life safety codes. Some facilities will utilize the services of a professional engineer who will determine technical requirements. If an engineer is not utilized, publicly available tools may assist with determining needs. Generator sizing calculators are commonly available online to help determine an appropriate solution for small facilities.

Question: Are there expectations for fuel burn rates/projections to be in the plan?

Answer: The plans should address the fuel needs required to maintain the 96 hours of temperature control as required in the rule.

Question: Local code/zoning provisions may not allow for fuel storage on site – there may be other on-site safety considerations.

Answer: Plans should include details of fuel storage information. Review of plans should consider safety issues prior to approval.

Question: Under the rules, local emergency management agencies report denials to Florida DEM but approvals to AHCA/DOEA. Wouldn't AHCA/DOEA want information on denials? To whom will these notices be directed at the respective agencies?

Answer: Notification to AHCA and DOEA would be helpful. Please use the following email addresses for notifications . . . .

75. On October 10, 2017, the Agencies published revisions to two answers initially issued on September 21, 2017. With regard to whether a mobile generator could be utilized to satisfy the Emergency Rules' requirements, the Agencies revised their answer to state the following:

> Answer: The rule does not restrict the type of generator required, but it must be installed and maintained at the facility. If the emergency generator used to meet the temperature requirements in the rule also supplies power for life safety and critical equipment, a level 1 generator must be used and the fuel supply and distribution equipment must be protected from debris impact as required by the Florida Building Code.

76. As for whether natural gas can be used as a fuel source, the Agencies now stated that "[p]iped natural gas is an allowable fuel source under the rule. The plan submitted for review should include fuel information."

77. Despite the publication of the questions and answers discussed above, there are still unanswered questions regarding compliance with the Emergency Rules.

78. For example, the Emergency Rules are silent on how much of a nursing home or ALF's physical space must be air conditioned. One of the Questions and Answers published by the Agencies provided that only part of a facility needed to be air conditioned, but there was no specification as to which part. No square footage or other clear guidance was provided.

Instead, the Answer merely stated that enough space had to be provided to keep residents "comfortable."

79. The Emergency Rules provided no guidance on where the air conditioning should be provided in a nursing home or ALF.

80. The Emergency Rules do not give sufficient specificity about electrical load requirements. The Emergency Rules require that a generator power air conditioning for 96 hours, but they do not specify what type of load the generator must power. The current building code requires 72 hours of connected load, but engineers can design generators for 96 hours of connected load, 96 hours of demand load, or 96 hours of nameplate rating load, each requiring different amounts of fuel. Regardless of load, the 96 hour requirement would cause a need for more fuel storage than currently required under the building code.

81. Another unanswered question concerns permissible types of fuel. The Emergency Rules would allow gasoline as a fuel source. However, gasoline is generally considered to be a poor fuel source for powering emergency generators because gasoline is highly flammable and only remains usable for six months unless stabilizers are added.

The Emergency Waiver Rules

82. On October 12, 2017, each of the Agencies published an emergency rule describing how facilities could apply for a waiver and/or variance from the Emergency Rules' requirements.

The variance rule pertaining to nursing homes appeared in the Florida Administrative Register as follows:

> 59AER17-2: Variances from Nursing Home Emergency Power Plan Rule
>
> SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE: The specific reasons are as set forth in the Notice of Emergency Rule, published in the Florida Administrative Register on Monday, September 18, 2017, Volume 43, No. 180, pp. 4003-4005. As a result of the vulnerabilities and risks to the elderly population residing in Florida nursing homes that was evidenced by the impacts of Hurricane Irma, the Agency has promulgated Rule 59AER17-1 Nursing Home Emergency Power Plan to set forth the requirements for each nursing home to develop a plan to ensure the safety and health of residents in the event of the loss of electrical power. In the aftermath of the devastation left by Hurricane Irma, including the loss of life at a licensed nursing home facility due to an incompetent emergency response coupled with the loss of power to cooling systems, and facing the threat of two more potential hurricanes on a similar track toward Florida, the Agency took immediate steps to require nursing home facilities to develop and implement plans to ensure that each facility would be able to maintain temperatures at an appropriate level for a minimum of 96 hours in the event of the loss of electrical power. The experience of Hurricane Irma revealed that additional protections for the elderly were needed beyond reliance on evacuation plans, transfer agreements for evacuation of patients to other facilities, or third-party suppliers of emergency power in times of emergency, and staffing issues arise when facilities are without air conditioning, potentially immediately endangering the health, safety and welfare of the residents.

Accordingly, the Emergency Rule was promulgated to direct licensed nursing homes to implement Emergency Power Plans for a minimum of 96 hours to protect patients and residents during the immediate aftermath of a major power outage and infrastructure disruption, not just during a hurricane.

This Supplement does not repeal or modify the requirements of the Emergency Power Plan Rule. Instead, this supplement to Emergency Rule is adopted to provide guidance and direction on the submission of variance requests under current Florida law. Nursing homes must focus their efforts on ensuring their patients and residents will be protected during the immediate 96 hours following a community-wide disruption of operation of environmental controls.

REASON FOR CONCLUDING THAT THE PROCEDURE IS FAIR UNDER THE CIRCUMSTANCES: To facilitate the expeditious implementation of the Emergency Rule requirements, this Supplement to Emergency Power Plan Rule regarding the variance process already available under existing law is adopted to provide guidance and direction to the nursing homes that for reasons outside their control are unable to fully implement an Emergency Power Plan within the sixty (60) days specified in the Emergency Rule. This Supplement does not repeal or modify the requirements of the Emergency Power Plan Rule. This Supplement will enable the Agency to accurately track the steps taken by nursing homes around the state to address the important goal of ensuring that all nursing homes have the ability to protect the safety of the residents in times of emergency. The Supplement provides at least the procedural protections given by other statutes, the Florida Constitution, or the United States Constitution; and takes only that action necessary to clarify the requirements and to protect the public interest under the emergency procedure.

SUMMARY: This Supplement to Emergency Rule sets forth the criteria and information that should be provided by nursing homes seeking an emergency variance on the grounds that, for reasons outside their control, full implementation of the Emergency Power Plan is not feasible within the sixty (60) day timeframe required by the Emergency Rule.

This Supplement does not repeal or modify the requirements of the Emergency Power Plan Rule. The Agency will consider the reasonable efforts undertaken by a nursing home to provide the protections contemplated by the Emergency Rule. Administrative action or sanctions for non-compliance with the Emergency Rule will be evaluated based upon the information submitted by the nursing home in conjunction with any variance request under existing law (see § 120.542, Florida Statutes) along with such additional information as may be available to the Agency.

THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS: Kimberly Stewart, Agency for Health Care Administration, Division of Health Quality Assurance, Bureau of Health Facility Regulation, 2727 Mahan Drive, MS# 28A, Tallahassee, FL 32308 or at BHFR@ahca.myflorida.com.

THE FULL TEXT OF THE EMERGENCY RULE IS:

Rule 59AER17-2, Variances from Nursing Home Emergency Power Plan Rule.

(1) Rule 59AER17-1, Nursing Home Emergency Power Plan, calls for implementation of a plan within sixty (60) days (the "Sixty-Day Period") of its effective date. Variances from Rule 59AER17-1, Nursing Home Emergency Power Plan, may be granted by the Agency pursuant to section 120.542, Florida Statutes and Rule 28-104.004-104.005. To facilitate the timely consideration of requests for variances or waivers, in

addition to the requirements of Section 120.542, Fla. Stat. and Chapter 28-104, F.A.C., a nursing home seeking a variance from any of the requirements of Rule 59AER 17-1 may provide a sworn affidavit from the Administrator of the nursing home that addresses the following:

(a) steps the nursing home has taken to implement the detailed plan required by Rule 59AER17-1 (the "Detailed Plan") within the Sixty-Day Period;

(b) specific circumstances beyond the control of the nursing home that have prevented full implementation of the Detailed Plan within the Sixty-Day Period;

(c) arrangements the nursing home has made pending full implementation of the Detailed Plan to ensure that residents and patients of the nursing home will not be exposed to ambient temperatures above 80 degrees Fahrenheit in the event of power failure or loss of air conditioning due to loss of electrical power;

(d) a delineation of the steps remaining for full implementation of the Detailed Plan and the nursing home's estimate of the time needed to fully implement the Detailed Plan called for by the Emergency Power Plan Rule; and,

(e) all steps taken by the nursing home to provide notice to each resident or patient and, if applicable, to the resident's or patient's legal guardian or health care surrogate that the nursing home has applied for a variance or waiver from Emergency Rule 59AER17-1 and the steps that the nursing home is taking to comply with the Emergency Rule.

(2) The nursing home's request for a variance shall be posted on the Agency's website.

> (3) Once notice has been provided as required in this Rule and the information related to the nursing home's request has been posted on the Agency's website, the Agency will consider the request for variance and the accompanying proof. If the Agency determines from the petition and any accompanying proof offered by the nursing home:
>
> (a) that the nursing home has made all feasible efforts to implement the Detailed Plan within the Sixty-Day Period;
>
> (b) circumstances beyond the control of the nursing home have made full and timely implementation impossible; and
>
> (c) that satisfactory arrangements have been made to ensure the residents and patients will not be exposed to ambient temperature above 80 degrees Fahrenheit in the event the nursing home is without electric power, the Agency will grant a variance of the Sixty-Day Time Period for implementation of the Detailed Plan under the 'principles of fairness' standard in §120.542 for a period no longer than 180 days as to the nursing home, subject to such conditions the Agency determines are appropriate under the circumstances.
>
> (4) The Agency will not assess a fine during the period of the variance if the agency grants a variance under Florida law.

83. The variance rule pertaining to ALFs was virtually identical to the variance rule for nursing homes, and both variance rules (collectively referred to as "the Emergency Variance Rules") took effect upon their filing with the Department of State on October 12, 2017.

The Existence of an "Emergency" and Whether Nursing Homes and ALFs Can Comply by November 15, 2017

84. AHCA and DOEA relied on the same statements in order to justify the Emergency Rules. However, the greater weight of the evidence demonstrates that despite the tragic but singular events at Hollywood Hills, there is not "an immediate danger to the public health, safety or welfare" to constitute an emergency.

85. One justification for the Emergency Rules was that, "According to the United States Census Bureau, Florida has the largest percentage of residents age 65 and older in the nation." AHCA admitted that Florida has had a high percentage of residents age 65 and older for decades. The presence of elderly populations in Florida is not an emergency situation.

86. Another justification for the Emergency Rules was that, "According to the Centers for Disease Control and Prevention, people age 65 years or older are more prone to heat-related health problems." AHCA admitted that this situation was not new or emergent. The effects of prolonged heat exposure on the elderly have been known for years.

87. Another justification for the Emergency Rules was that, "Thousands of frail seniors reside assisted living facilities [and nursing homes] in Florida." Again, AHCA admitted that thousands of frail seniors have resided safely in

nursing homes and ALFs for decades. This is not an emergent situation that might justify the Emergency Rules.

88. In order to justify the Emergency Rules, AHCA and DOEA also cited "an incompetent response" by one nursing home in Hollywood Hills, Florida, that resulted in the deaths of several residents.

89. AHCA took appropriate and swift action by immediately suspending Hollywood Hill's license to operate a nursing home.

90. There was no evidence at the final hearing indicating that the tragic situation at Hollywood Hills was representative of the situation at any other facilities. The fact that there were no similar incidents at any of the multitude of other nursing homes and ALFs affected by Hurricane Irma suggests that it was not.

91. The Agencies' position that an emergency exists is undermined by: (a) the fact that the Secretary of AHCA invited facilities to consider applying for a variance almost immediately after adoption of the Emergency Rules; and by (b) the Agencies' adoption of the Emergency Variance Rules. If Floridians are truly in immediate danger, then whether the protections of the Emergency Rules affect a particular nursing home or ALF differently than they affect another nursing home or ALF (the "principles of fairness" standard referred to in the Emergency Variance Rules) should not matter.

92. The Agencies' justification for adopting the Emergency Rules is further undermined by the fact that there are only 15 days between November 15, 2017 (the date when the Emergency Rules go into effect) and November 30, 2017 (the last day of the 2017 hurricane season). As a result, the Emergency Rules will only be in effect for the final two weeks of the 2017 hurricane season, and the requirements of the Emergency Rules will not be realized until well after the end of the 2017 hurricane season.

93. Furthermore, Hurricane Irma was a unique storm in that it impacted the vast majority of the State due to its sheer size and the course it took directly northward through the Florida peninsula.

94. While Florida's emergency response personnel performed admirably, they and the resources they utilized were severely taxed due to the amount of the State impacted by Hurricane Irma.

95. Fortunately, the evidence presented at the hearing indicates it is meteorologically unlikely that another storm like Hurricane Irma will strike Florida this late in the 2017 hurricane season.

96. While not cited in the preamble as a justification for the Emergency Rules, Molly McKinstry,[9/] AHCA's agency representative, testified about how facilities need to be more self-sufficient during natural disasters such as Hurricane Irma. In other words, facilities should be able to take care of their

residents on-site if disaster strikes and emergency response personnel are unable to quickly restore public services.

97. None of the Petitioners argued that requiring nursing homes and ALFs to be more self-sufficient was not a good idea or that they had already achieved an adequate amount of self-sufficiency.

98. However, even if one were to conclude that a lack of self-sufficiency for nursing homes and ALFs requires prompt action, the greater weight of the evidence demonstrates that it is not an "emergency" that can be resolved by November 15, 2017.

99. As demonstrated from the findings of fact above, the greater weight of the evidence demonstrates that it is impossible for the vast majority of nursing homes and ALFs currently noncompliant with the Emergency Rules to achieve compliance by November 15, 2017.

CONCLUSIONS OF LAW

100. DOAH has jurisdiction of the subject matter and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

101. Section 120.56(1)(a) provides that "any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on

the ground that the rule is an invalid exercise of delegated legislative authority."

Standing

102. Associations have standing to bring a rule challenge when:

> a substantial number of [the association]'s members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be the type appropriate for a trade association to receive on behalf of its members.

Fla. Home Builders Ass'n v. Dep't of Labor and Emp. Sec., 412 So. 2d 351, 353-54 (Fla. 1982); see also NAACP, Inc. v. Bd. of Regents, 863 So. 2d 294, 298 (Fla. 2003).

103. The testimony presented during the final hearing is sufficient to demonstrate that a substantial number of each Petitioner's membership would be substantially affected by the Emergency Rules in a manner and degree sufficient to confer administrative standing in this case. See, e.g., Abbott Labs. v. Mylan Pharms., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009); Dep't of Prof'l Reg., Bd. of Dentistry v. Fla. Dental Hygienist Ass'n, 612 So. 2d 646, 651 (Fla. 1st DCA 1993); see also Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., 688 So. 2d 404, 407 (Fla. 1st DCA 1997)(recognizing that "a less demanding standard applies in a rule challenge proceeding than in an

action at law, and that the standard differs from the 'substantial interest' standard of a licensure proceeding."); Coalition of Mental Health Prof'ls v. Dep't of Prof'l Reg. 546 So. 2d 27, 28 (Fla. 1st DCA 1989)(stating that "[t]he fact that appellant's members will be regulated by the proposed rules is alone sufficient to establish that their substantial interests will be affected and there is no need for further factual elaboration of how each member will be personally affected.").

Did the Agencies Satisfy the Requirements of Section 120.54(4), Florida Statutes?

104. Emergency rulemaking pursuant to section 120.54(4) is much different than the normal rulemaking process set forth in section 120.54(1), (2), and (3). In describing the distinction between the degree of public input between "regular" rulemaking and emergency rulemaking, the Florida Supreme Court has held that:

> When adopting rules, the agencies must specifically conform to the rulemaking procedure enacted by the Legislature as the Florida Administrative Procedure Act in chapter 120, Florida Statutes. First, the agency must provide preliminary notice of the development of the proposed rule in the *Florida Administrative Weekly.* See § 120.54(2), Fla. Stat. (2010). Second, upon approval of the agency head, the agency must give a more thorough notice of the intended action in the *Florida Law Weekly*, and this notice must be published at least 28 days prior to the intended action.

> See § 120.54(3)(a), Fla. Stat. (2010). The agency must file a copy of the proposed rule with the Administrative Procedures Committee as well. See §§ 120.54(3)(a)4; 120.52(4), Fla. Stat. (2010). Third, under certain circumstances and upon the request of any affected person, the agency must provide such persons the opportunity to present evidence and make arguments on all issues under consideration. See § 120.54(3)(c), Fla. Stat. (2010). If all of the statutory requirements are met, the rule is officially "adopted" upon filing with the Secretary of State, and the rule becomes effective twenty days after this filing. See § 120.54(3)(e)6, Fla. Stat. (2010). However, if an agency finds that "an immediate danger to the public health, safety, or welfare requires emergency action," it may adopt "any rule necessitated by the immediate danger"—i.e., an emergency rule. See § 120.54(4), Fla. Stat. (2010). Otherwise, the agency must comply with the normal procedures for rulemaking. See Fla. Health Care Ass'n v. Agency for Health Care Admin., 734 So. 2d 1052, 1053-54 (Fla. 1st DCA 1998).

Whiley v. Scott, 79 So. 3d 702, 711-12 (Fla. 2011).

105. Section 120.54(4), Florida Statutes, sets forth the law governing emergency rules and provides that:

> (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.[10/]

106. In evaluating the Emergency Rules at issue in the instant case, the first question is whether the Agencies have demonstrated that there is "an immediate danger to the public health, safety, or welfare." In conducting this analysis, the undersigned considers the case law governing emergency orders to be instructive.

107. Obviously, an emergency exists when lives are in danger. See Tauber v. Bd. of Osteopathic Med. Exam'rs, 362 So. 2d 90, 93 (Fla. 4th DCA 1978)(stating that "[w]e can conceive of no greater emergency of immediate necessity than that which endangers the preservation of human life.").

108. However, the case law emphasizes the need to demonstrate that the public is in "immediate" danger. See Witmer v. Dep't of Bus. & Prof'l Reg., 631 So. 2d 338, 341 (Fla. 4th DCA 1994)(noting that "[t]he factual allegations contained in the emergency order must sufficiently identify particularized facts which demonstrate an immediate danger to the public."); Commercial Consultants Corp. v. Dep't of Bus. Reg., 363 So. 2d 1162, 1165 (Fla. 1st DCA 1978)(noting that "the agency's statement of reasons for acting must be factually explicit and persuasive concerning the existence of a genuine emergency.").

109. "General conclusory predictions of harm are not sufficient to support the issuance of an emergency suspension order." Bio-Med Plus v. Dep't of Health, 915 So. 2d 669 (Fla. 1st DCA 2005).

110. With regard to the instant case, the Agencies failed to demonstrate by a preponderance of the evidence that the need to increase the self-sufficiency of nursing homes and ALFs is an "emergency" within the meaning of section 120.54(4).

111. Furthermore, the greater weight of the evidence demonstrates that remedies for the described "emergency" cannot be implemented by the November 15, 2017, deadline imposed by the Emergency Rules.

Do the Emergency Rules Amount to an Invalid Exercise of Delegated Legislative Authority?

112. In addition to arguing that there is no "emergency" within the meaning of section 120.54(4), Petitioners also argue that the Emergency Rules amount to invalid exercises of delegated legislative authority.

113. Section 120.52(8) provides that a rule is an invalid exercise of delegated legislative authority if it "goes beyond the powers, functions, and duties delegated by the Legislature."

114. Section 120.52(8) continues by enumerating six different circumstances in which a rule amounts to an invalid exercise of delegated legislative authority, four of which will be addressed below.[11/]

Are the Emergency Rules Arbitrary or Capricious?

115. Section 120.52(8)(e) provides that a rule is an invalid exercise of delegated legislative authority if it is "arbitrary or capricious." As stated in section 120.52(8)(e), "[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 . . . ."

116. "An arbitrary decision is one not supported by facts or logic, or despotic." Bd. of Trs. of Int. Imp. Trust Fund v. Levy, 656 So. 2d 1359, 1362 (Fla. 1st DCA 1995)(quoting Agrico Chem. Co. v. Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st

DCA 1978)). "A capricious action is one which is taken without thought or reason or irrationally." Id. A determination is not arbitrary or capricious if it is justifiable "under any analysis that a reasonable person would use to reach a decision of similar importance." Dravo Basic Materials Co., Inc. v. Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

117. Petitioners have demonstrated by a preponderance of the evidence that the Emergency Rules are arbitrary and capricious. As discussed in the Findings of Fact above, the Agencies did not assess whether it was reasonable (or even possible) for nursing homes and ALFs to comply with the Emergency Rules by November 15, 2017.

118. Expert witnesses credibly testified that compliance with the November 15, 2017, deadline is impossible. To whatever extent that there was any testimony or evidence to the contrary, that testimony or evidence was unpersuasive.

119. To whatever extent that the Emergency Variance Rules are at issue in this proceeding, they do not cure the invalidity of the Emergency Rules.

120. By adopting the Emergency Variance Rules, the Agencies appear to be implicitly acknowledging that complying with the Emergency Rules by the November 15, 2017, deadline is impossible for at least a substantial number of nursing homes and ALFs.

121. Moreover, the Emergency Variance Rules do not guarantee that a nursing home or ALF will receive a variance if it satisfies certain conditions. Provision of variances is subject to the Agencies' complete discretion. There is nothing to prevent the Agencies from treating similarly situated nursing homes and ALFs differently when deciding on variance applications. In other words, the Emergency Variance Rules establish an additional opportunity for the Agencies to act arbitrarily and capriciously.

Do the Emergency Rules Vest Unbridled Discretion in the Agencies?

122. Section 120.52(8)(d) provides that a rule is an invalid exercise of delegated legislative authority if it "fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency."

123. With regard to what would fall under the scope of section 120.52(8)(d), the First District Court of Appeal has stated that "[a]n administrative rule which creates discretion not articulated in the statute it implements must specify the basis on which the discretion is to be exercised." Cortes v. Bd. of Appeals, 655 So. 2d 132, 138 (Fla. 1st DCA 1995).

124. However, "Florida courts have previously recognized that executive agencies may exercise some discretion without breaching their authority." Fla. East Coast Indus. v. Dep't of

Cmty. Aff., 677 So. 2d 357, 361 (Fla. 1st DCA 1996). "The exercise of some authority, discretion, or judgment may be incident or necessary to the performance of administrative or ministerial duties . . . ." Id. (quoting Fla. State Bd. of Architecture v. Wasserman, 377 So. 2d 653, 656 (Fla. 1979)).

125. For instance, a situation may be so complex that it would be impossible to create a rule that could address every possible contingency. See generally Ameraquatic, Inc. v. Dep't of Nat. Res., 651 So. 2d 114, 119 (Fla. 1st DCA 1995)(noting "[t]he record contains competent substantial evidence to support the hearing officer's conclusion that the assignment of specific weight to each criterion, as suggested by appellants, would be impractical.").

126. As discussed above in the Findings of Fact, the Emergency Rules failed to address numerous questions pertinent to a nursing home or ALF's compliance.

127. Even after publication of several Questions and Answers, important questions regarding compliance with the Emergency Rules remain unanswered.

128. Given that noncompliance with the Emergency Rules "shall" result in licensure revocation and daily fines of $1,000, the Emergency Rules fail to establish adequate standards to govern AHCA and DOEA's decisions.

129. Moreover, even if the undersigned considered the Emergency Rules in pari materia with the Emergency Variance Rules, the invalidity of the Emergency Rules would not be cured. There are no discernable standards governing the Agencies' decisions as to which applicants will receive variances. As a result, inadequate standards and unbridled discretion remain.

Are the Emergency Rules Supported by Rulemaking Authority and Do They Contravene Any Laws They Purport to Implement?

130. Section 120.52(8)(b) provides that a rule is invalid if "[t]he agency has exceeded its grant of rulemaking authority."

131. Moreover, the "flush left" paragraph of section 120.52(8) explains that,

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or

> interpreting the specific powers and duties conferred by the enabling statute.

§ 120.52(8), Fla. Stat.

132. The extensively cited cases of Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000); and Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001), recognize that the flush left paragraph of section 120.52(8) was intended to restrict and narrow the scope of agency rulemaking. As established in Day Cruise, 794 So. 2d at 700:

> It is now clear, agencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class or powers or duties the Legislature has conferred on the agency.

133. Nonetheless, "[i]t follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough." Save the Manatee Club, 773 So. 2d at 600. See also United Faculty of Fla. v. Fla. St. Bd. of Educ., 157 So. 3d 514, 517-18 (Fla. 1st DCA 2015)(stating that "it is not necessary under Save the Manatee Club and its progeny for

the statutes to delineate every aspect of tenure that the Board is authorized to address by rule; instead, all that is necessary is for the statutes to specifically authorize the Board to adopt rules for college faculty contracts and tenure, which the statutes clearly do.").

134. In addition to being supported by rulemaking authority, a rule must be consistent with any laws it purports to implement. See § 120.52(8)(c)(providing that a rule is invalid if it "enlarges, modifies, or contravenes the specific provisions of law implemented . . . .").

135. Emergency Rule 59AER17-1 cites sections 400.23, 408.819, and 408.821(4), Florida Statutes, as rulemaking authority. Emergency Rule 59AER17-1 also cites the aforementioned statutes as the laws being implemented.

136. Section 400.23(2)(a) provides in pertinent part that

> (2) Pursuant to the intention of the Legislature, the agency, in consultation with the Department of Health and the Department of Elderly Affairs, shall adopt and enforce rules to implement this part and part II of chapter 408, which shall include reasonable and fair criteria in relation to:
>
> (a) The location of the facility and housing conditions that will ensure the health, safety, and comfort of residents, including an adequate call system.

137. Because maintenance of a certain temperature can be considered a housing condition that affects the health, safety,

and comfort of residents, section 400.23(2)(a) provides AHCA with the authority to adopt Emergency Rule 59AER17-1.

138. However, Emergency Rule 59AER17-1 contravenes section 400.23(8), which provides that:

> (8) The agency shall adopt rules pursuant to this part and part II of chapter 408 to provide that, when the criteria established under subsection (2) are not met, such deficiencies shall be classified according to the nature and the scope of the deficiency. The scope shall be cited as isolated, patterned, or widespread. An isolated deficiency is a deficiency affecting one or a very limited number of residents, or involving one or a very limited number of staff, or a situation that occurred only occasionally or in a very limited number of locations. A patterned deficiency is a deficiency where more than a very limited number of residents are affected, or more than a very limited number of staff are involved, or the situation has occurred in several locations, or the same resident or residents have been affected by repeated occurrences of the same deficient practice but the effect of the deficient practice is not found to be pervasive throughout the facility. A widespread deficiency is a deficiency in which the problems causing the deficiency are pervasive in the facility or represent systemic failure that has affected or has the potential to affect a large portion of the facility's residents. The agency shall indicate the classification on the face of the notice of deficiencies as follows:
>
> (a) A class I deficiency is a deficiency that the agency determines presents a situation in which immediate corrective action is necessary because the facility's noncompliance has caused, or is likely to cause, serious injury, harm, impairment, or

death to a resident receiving care in a facility. The condition or practice constituting a class I violation shall be abated or eliminated immediately, unless a fixed period of time, as determined by the agency, is required for correction. A class I deficiency is subject to a civil penalty of $10,000 for an isolated deficiency, $12,500 for a patterned deficiency, and $15,000 for a widespread deficiency. The fine amount shall be doubled for each deficiency if the facility was previously cited for one or more class I or class II deficiencies during the last licensure inspection or any inspection or complaint investigation since the last licensure inspection. A fine must be levied notwithstanding the correction of the deficiency.

(b) A class II deficiency is a deficiency that the agency determines has compromised the resident's ability to maintain or reach his or her highest practicable physical, mental, and psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services. A class II deficiency is subject to a civil penalty of $2,500 for an isolated deficiency, $5,000 for a patterned deficiency, and $7,500 for a widespread deficiency. The fine amount shall be doubled for each deficiency if the facility was previously cited for one or more class I or class II deficiencies during the last licensure inspection or any inspection or complaint investigation since the last licensure inspection. A fine shall be levied notwithstanding the correction of the deficiency.

(c) A class III deficiency is a deficiency that the agency determines will result in no more than minimal physical, mental, or psychosocial discomfort to the resident or has the potential to compromise the

> resident's ability to maintain or reach his or her highest practical physical, mental, or psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services. A class III deficiency is subject to a civil penalty of $1,000 for an isolated deficiency, $2,000 for a patterned deficiency, and $3,000 for a widespread deficiency. The fine amount shall be doubled for each deficiency if the facility was previously cited for one or more class I or class II deficiencies during the last licensure inspection or any inspection or complaint investigation since the last licensure inspection. A citation for a class III deficiency must specify the time within which the deficiency is required to be corrected. If a class III deficiency is corrected within the time specified, a civil penalty may not be imposed.
>
> (d) A class IV deficiency is a deficiency that the agency determines has the potential for causing no more than a minor negative impact on the resident. If the class IV deficiency is isolated, no plan of correction is required.

139. Under section 408.23(8), if a nursing home were to violate criteria pertaining to the health, safety, and comfort of residents, then the deficiency in question must be classified according to the nature and scope of the deficiency.

140. While a violation of Emergency Rule 59AER17-1 would presumably be a class I violation requiring immediate corrective action due to the possibility of serious harm, Emergency Rule 59AER17-1 provides for daily fines of $1,000 rather than

$10,000 for an isolated deficiency, $12,500 for a patterned deficiency, and $15,000 for a widespread deficiency.

141. Because Emergency Rule 59AER17-1 makes no effort to classify noncompliance thereof in a manner consistent with section 400.23(8), Emergency Rule 59AER17-1 contravenes one of the statutes it purports to implement.

142. Emergency Rule 58AER17-1 has the same problem. Even if section 429.41 authorizes Emergency Rule 58AER17-1 as asserted by DOEA, the rule violates one of the statutes that it purports to implement.

143. Specifically, Emergency Rule 58AER17-1 cites section 429.19 as a law being implemented. However, that statute provides in pertinent part that

> (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, for the actions of any person subject to level 2 background screening under s. 408.809, for the actions of any facility employee, or for an intentional or negligent act seriously affecting the health, safety, or welfare of a resident of the facility.
>
> (2) Each violation of this part and adopted rules shall be classified according to the nature of the violation and the gravity of its probable effect on facility residents. The agency shall indicate the classification on the written notice of the violation as follows:

> (a) Class "I" violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class I violation in an amount not less than $5,000 and not exceeding $10,000 for each violation.
>
> (b) Class "II" violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class II violation in an amount not less than $1,000 and not exceeding $5,000 for each violation.
>
> (c) Class "III" violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class III violation in an amount not less than $500 and not exceeding $1,000 for each violation.
>
> (d) Class "IV" violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class IV violation in an amount not less than $100 and not exceeding $200 for each violation.
>
> (e) Regardless of the class of violation cited, instead of the fine amounts listed in paragraphs (a)-(d), the agency shall impose an administrative fine of $500 if a facility is found not to be in compliance with the background screening requirements as provided in s. 408.809.

144. Because Emergency Rule 58AER17-1 makes no effort to classify noncompliance thereof in a manner consistent with section 429.19, Emergency Rule 58AER17-1 contravenes one of the statutes it purports to implement.

ORDER[12/]

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Emergency Rules 58AER17-1 and 59AER17-1 of the Florida Administrative Code are invalid exercises of delegated legislative authority as defined in section 120.52(8), Florida Statutes;

2. Jurisdiction is reserved for the undersigned to consider motions for fees and costs pursuant to section 120.595(3), Florida Statutes. Because such motions have already been filed, the Agency for Health Care Administration and the Department of Elder Affairs shall have 10 days from issuance of this Final Order to file responses to the aforementioned motions.

DONE AND ORDERED this 27th day of October, 2017, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of October, 2017.

ENDNOTES

[1/] LeadingAge Florida, the FALA, and Florida Argentum will be collectively referred to as "Petitioners."

[2/] AHCA and DOEA will be collectively referred to as "the Agencies."

[3/] Unless stated otherwise, all statutory references will be to the 2017 version of the Florida Statutes.

[4/] Every nursing home built since 1982 has been required to have a generator. Since 2004, the Florida Building Code has required all newly constructed nursing homes to have a level-one generator. A level-one generator must power three different areas: the life safety branch; the critical branch; and the equipment branch. The life safety branch refers to needs critical to fire safety such as lights for exit signs, egress lighting, nurse call systems, medical gas alarms, and locking devices. It also powers nurse call systems. The critical branch pertains to needs associated with machines, such as ventilators, that furnish life support to residents who cannot go more than 10 seconds without such support. Air conditioning is on the equipment branch. The Florida Building Code does not consider it to be a critical function because one will not die immediately without air conditioning.

The generator required by the Florida Building Code must be programmed to shed off nonessential loads (such as air conditioning) if it begins to lose power. So, if a facility chooses to power air conditioning with its generator and the generator begins to lose power, then it will stop powering the air conditioning because that is a nonessential function. Items on the life safety branch will be the last ones to lose power as a generator fails.

If the level-one generator is not programmed to power air conditioning, then new nursing homes must have an optional standby generator that can power noncritical functions such as air conditioning. Thus, it is not optional to have this second generator, but a nursing home does get to choose when to activate it in order to power noncritical needs.

Mr. Gregory estimated that approximately 20 licensed nursing homes in Florida were built prior to 1982 and, as such, are under no requirement to have any generator.

[5/] The Agencies raised a relevance objection in response to FALA moving the Moratorium Order into evidence. That objection is overruled.

[6/] Section 408.814(1), Florida Statutes, provides that AHCA "may impose an immediate moratorium or emergency suspension as defined in s. 120.60 on any provider if the agency determines that any condition related to the provider or licensee presents a threat to the health, safety, or welfare of a client."

[7/] AHCA's Emergency Suspension Order was not offered as an exhibit during the final hearing. However, the Emergency Suspension Order is posted on the internet at https://ahca.myflorida.com/Executive/Communications/Press_Releases/pdf/RCHH2017010728.pdf.

The undersigned takes official recognition of the Emergency Suspension Order because it is posted on a government-run website. See U.S. v. Garcia, 855 F.3d 615, 622 (4th Cir. 2017) (holding that "[t]he district court acted well within its discretion when it took judicial notice of the facts contained on the government website.").

[8/] Section 120.542, Florida Statutes, sets forth a process by which regulated entities can obtain a waiver or variance from requirements imposed by a rule.

[9/] Ms. McKinstry and Catherine Avery, DOEA's agency representatives, are dedicated public servants who have genuine and deep concern for the residents of nursing homes and ALFs. The testimony and evidence presented during the final hearing demonstrated that they and other personnel at the Agencies have gone to great lengths to do what they can to assist nursing homes and ALFs with achieving compliance with the Emergency Rules. Nothing in this Final Order should be construed as criticism of the many fine public servants working at the Agencies.

[10/] Section 120.54(4)(a)3. provides that "[t]he agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable." It was argued during the final hearing by the Agencies' counsel that Petitioners have an opportunity to argue to an appellate court that the findings in

the Emergency Rules do not amount to an immediate danger to the public health, safety, and welfare. Therefore, the agencies' counsel argued that Petitioners could not make the same argument by challenging the facts underlying the findings during the final hearing before DOAH.

Petitioners have an opportunity before an appellate court to argue that the allegations used by the Agencies in support of the Emergency Rules do not amount to a genuine emergency. In doing so, the appellate court must accept the allegations as being true. Before DOAH, Petitioners are able to present evidence and testimony to refute the veracity of the allegations. This point can be illustrated by reference to emergency orders. Section 120.60(6) sets forth the law governing emergency orders and empowers agencies to suspend a license prior to affording a licensee due process. See 120.60(6), Fla. Stat. (providing that "[i]f the agency finds that [an] immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license, the agency may take such action by any procedure that is fair under the circumstances . . . ."). As is the case with emergency rules, an agency must state "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." § 120.60(6)(c), Fla. Stat. In addition and virtually identical to the requirement in section 120.54(4)(a)3., "[t]he agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable." § 120.60(6)(c), Fla. Stat.

Accordingly, challenges to emergency rules and emergency orders travel on two tracks. On one track, a challenger to an emergency action can argue to an appellate court that an agency's allegations (even if accepted as true) do not amount to an emergency. The challenger's argument must be so limited because an appellate court is not a fact-finding tribunal and thus not equipped to hear testimony and weigh evidence. See Anderson v. Dep't of Health & Rehab. Serv., 482 So. 2d 491, 495 (Fla. 1st DCA 1986)(noting that because the emergency suspension order "was issued without a hearing and supporting evidentiary record, we are required by chapter 120 to review the facial sufficiency of the order without the benefit of a record establishing the facts underlying agency action and elucidating agency policies."); Commercial Consultants Corp. v. Dep't of Bus. Reg., 363 So. 2d 1162, 1164 (Fla. 1st DCA 1978)(noting that because "the [d]ivision conducted no

[s]ection 120.57(1) or (2) proceedings before entering its order, we must review the order without the benefit of a record establishing the facts underlying agency action and elucidating agency policies."); Witmer v. Dep't of Bus. & Prof'l Reg., 631 So. 2d 338, 343 (Fla. 4th DCA 1994)(stating that "the demonstration of immediate harm must be made within the four corners of the order," and holding "in this case neither the order nor the incorporated complaint contain this allegation."); Anonymous Bank v. Dep't of Banking & Fin., 512 So. 2d 1112, 1113 (Fla. 3d DCA 1987)(noting "[t]he bank elected to seek review in this district court, which review, of necessity, must accept the factual basis underlying the cease and desist order for purposes of consideration of the emergency that warranted the issuance of the order.").

Challengers to emergency orders have an opportunity to refute the allegations supporting the emergency action at DOAH, which is a fact-finding tribunal and thus equipped to hear testimony and weigh evidence. If that were not the case, a party challenging an agency's emergency action would have no opportunity to refute the allegations supporting the emergency action. See Pinacoteca Corp. v. Dep't of Bus. Reg., 580 So. 2d 881, 882 (Fla. 4th DCA 1991)(denying a petition for review, but noting the denial "does not, however, affect any subsequent administrative proceedings under section 120.57(1), Florida Statutes (1989), at which proceedings petitioner may introduce evidence to contradict the findings in the emergency order."); Field v. Dep't of Health, 902 So. 2d 893 (Fla. 1st DCA 2005)(noting that "[s]ection 120.60(6)(c) requires, in cases of summary suspension, that the [d]epartment promptly institute a formal suspension or revocation proceeding pursuant to sections 120.569 and 120.57, Florida Statutes (1999)."); Ampuero v. Dep't of Prof'l Reg., 410 So. 2d 213, 214 (Fla. 3d DCA 1982)(quashing an emergency order and stating "[w]hen the state undertook to temporarily restrict the petitioner's privilege to practice medicine it had an affirmative duty to grant a post-suspension hearing and one that would be concluded without appreciable delay.").

The aforementioned procedure has been further explained as follows:

> In the course of assessing whether an emergency order states particularized facts showing an immediate danger to the public welfare, an appellate court's review is restricted to the facts alleged in the

> emergency order. In other words, the "record" associated with a petition for review is limited to the emergency order itself and any attachments thereto.
>
> An appellate court must accept the allegations in an emergency order as true, and a licensee is not supposed to dispute the facts alleged therein. Instead, a licensee must raise factual disputes during the formal administrative hearing to which he or she is entitled.
>
> For example, in Broyles, M.D. v. Dep't of Health, 776 So. 2d 340, 341 (Fla. 1st DCA 2001), the court noted that Dr. Broyles' arguments "primarily contest the factual matters set out in the [d]epartment's order" rather than advancing "any substantial argument that the order, on its face, fails to comply with section 120.60(6)." In affirming the emergency suspension order, the court noted the department was required by law to "promptly institute a formal suspension or revocation proceeding pursuant to sections 120.569 and 120.57, Florida Statutes (1999). It is in these formal proceedings that licensees, such as Dr. Broyles, may dispute the factual matters relied upon by the [d]epartment."

Gar Chisenhall, Writing and Challenging Emergency Orders, Part II, 87 Fla. B.J., May 2013 at 42.

[11/] Petitioners argued that the Agencies failed to follow the applicable rulemaking procedures. See §120.52(8)(a)(providing that a rule is invalid if "[t]he agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter."). Because consideration of that argument is not dispositive, the undersigned has elected not to address it herein. Petitioners did not argue that the Emergency Rules are invalid under section 120.52(8)(f). The aforementioned statute provides that a rule is invalid if it "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."

[12/] Nothing herein should be construed as a determination that AHCA and DOEA lack the authority to utilize the normal rulemaking process set forth in section 120.54(1), (2), and (3) to implement measures to ensure that residents of nursing homes and ALFs are protected. In fact, AHCA and DOEA have initiated that process, and all relevant stakeholders will have an opportunity to provide input on the best means of achieving that goal. Because there was no argument from Petitioners that increasing the self-sufficiency of nursing homes and ALFs is a poor policy, the undersigned is optimistic that a reasonable compromise will be achieved in the near future. Indeed, rather than taking issue with the requirement to have a generator in place to maintain temperatures at a comfortable level, it appeared to the undersigned that the Petitioners' challenge to the Emergency Rules was almost entirely motivated by the difficulty associated with achieving compliance by the November 15, 2017, deadline.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.