10-5

Secretary of State
Certificate and Order for Filing

TEMPORARY ADMINISTRATIVE RULES

A Statement of Need and Justification accompanies this form..

I certify that the attached copies* are true, full and correct copies of the TEMPORARY Rule(s) adopted on [upon filing] by the
Date prior to or same as filing date

Department of Human Services, Seniors and People with Disabilities Division 411

Agency and Division | Administrative Rules Chapter Number

Christina Hartman | 500 Summer Street NE, E-10, Salem, OR 97301-1074 | (503) 945-6398

Rules Coordinator | Address | Telephone

SPD 24-2010 (T)

to become effective [upon filing] through [April 2, 2011].
Date upon filing or later — A maximum of 180 days including the effective date.

RULE CAPTION

RCF/ALF Requirements for New Construction or Initial Licensure

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

List each rule number separately, 000-000-0000.
Secure approval of new rule numbers (Adopted rules) with the Administrative Rules Unit prior to filing

ADOPT:

AMEND:
411-054-0005, 411-054-0012

SUSPEND:

FILED
OCT 05 2010
ARCHIVES DIVISION
SECRETARY OF STATE

Stat. Auth.: ORS 410.070 & 443.450

Other Auth.: Appellate Court Opinion A142248

Stats. Implemented: ORS 443.420

RULE SUMMARY

The Department of Human Services (DHS), Seniors and People with Disabilities Division (SPD) is temporarily amending OAR 411-054-0005 (Definitions) and OAR 411-054-0012 (Requirements for New Construction or Initial Licensure) relating to residential care (RCF) and assisted living facilities (ALF) to meet the intent of the legislature as the language in OAR 411-054-0012 was found to exceed the authority that the legislature delegated to DHS.

Catherine A Cooper 10/4/10 Catherine A. Cooper
Signature | Date | Printed Name

*With this original and Statement of Need, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules.

ARC 940-2005

Secretary of State

STATEMENT OF NEED AND JUSTIFICATION

A Certificate and Order for Filing Temporary Administrative Rules accompanies this form.

Department of Human Services, Seniors and People with Disabilities Division 411

Agency and Division | Administrative Rules Chapter Number

In the Matter of: The temporary amendment of OAR 411-054-0005 and OAR 411-054-0012 relating to RCF/ALF.

Rule Caption: (Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.)
RCF/ALF Requirements for New Construction or Initial Licensure

Statutory Authority: ORS 410.070 & 443.450

Other Authority: Appellate Court Opinion A142248

Stats. Implemented: ORS 443.420

Need for the Temporary Rule(s):
Appellate Court Opinion A142248 found OAR 411-054-0012 to be invalid because it exceeds the authority that the legislature delegated to DHS.

SPD needs to temporarily amend OAR 411-054-0005 and OAR 411-054-0012 to meet the legislative intent.

Documents Relied Upon, and where they are available:
Appellate Court Opinion
Available at: http://www.publications.ojd.state.or.us/A142248.htm

Justification of Temporary Rule(s):
Failure to act promptly will result in serious prejudice to SPD and the general public. The rules need to be amended promptly so that OAR 411-054-0012 is valid and meets legislative intent. If not amended, the current rules as written will remain invalid and initial licensing and change of ownership licensing for RCFs and ALFs would not be valid.

Catherine A Cooper 10/4/10 Catherine A. Cooper

Signature | Date | Printed Name

DEPARTMENT OF HUMAN SERVICES
SENIORS AND PEOPLE WITH DISABILITIES DIVISION
OREGON ADMINISTRATIVE RULES

CHAPTER 411
DIVISION 54

RESIDENTIAL CARE AND ASSISTED LIVING FACILITIES

411-054-0005
Definitions

For the purpose of these rules, the following definitions apply:

(1) "Abuse" means abuse as defined in OAR 411-020-0002 (Adult Protective Services).

(2) "Activities of Daily Living (ADL)" mean those personal functional activities required by an individual for continued well being, health, and safety. Activities consist of eating, dressing/grooming, bathing/personal hygiene, mobility (ambulation and transfer), elimination (toileting, bowel, and bladder management), and cognition/behavior.

(3) "Administrator" means the person who is designated by the licensee that is responsible for the daily operation and maintenance of the facility.

(4) "Advance Directive" means a document that contains a health care instruction or a power of attorney for health care.

(5) "Applicant" means the person, persons, or entity, required to complete a facility application for license. Applicant includes a sole proprietor, each partner in a partnership, and each member in a limited liability company, corporation, or entity that owns the residential care or assisted living facility business. Applicant also includes the sole proprietor, each partner in a partnership, and each member in a limited liability company, corporation, or entity that operates the assisted living or residential care facility on behalf of the facility business owner.

(6) "Area Agency on Aging (AAA)" as defined in ORS 410.040 means the Department designated agency charged with the responsibility to provide a comprehensive and coordinated system of services to seniors or individuals with disabilities in a planning and service area. For the purpose of these rules, the term Area Agency on Aging is inclusive of both Type A and B Area Agencies on Aging that contract with the Department to perform specific activities in relation to residential care and assisted living facilities including:

(a) Conducting inspections and investigations regarding protective service, abuse, and neglect;

(b) Monitoring; and

(c) Making recommendations to the Division regarding facility license approval, denial, revocation, suspension, non-renewal, and civil penalties.

(7) "Assistant Director" means the assistant director of the Division, or that individual's designee.

(8) "Assisted Living Facility (ALF)" means a building, complex, or distinct part thereof, consisting of fully, self-contained, individual living units where six or more seniors and adult individuals with disabilities may reside in homelike surroundings. The assisted living facility offers and coordinates a range of supportive services available on a 24-hour basis to meet the activities of daily living, health, and social needs of the residents as described in these rules. A program approach is used to promote resident self-direction and participation in decisions that emphasize choice, dignity, privacy, individuality, and independence.

(9) "Caregiver" means a facility employee who is trained in accordance with OAR 411-054-0070 to provide personal care services to residents. The employee may be either a direct care staff or universal worker as defined in this rule.
(10) "Change of Condition – Short Term" means a change in the resident's health or functioning that is expected to resolve or be reversed with minimal intervention or is an established, predictable, cyclical pattern associated with a previously diagnosed condition.
(11) "Change of Condition – Significant" means a major deviation from the most recent evaluation that may affect multiple areas of functioning or health that is not expected to be short term and imposes significant risk to the resident. Examples of significant change of condition include but are not limited to:
(a) Broken bones;
(b) Stroke, heart attack, or other acute illness or condition onset;
(c) Unmanaged high blood sugar levels;
(d) Uncontrolled pain;
(e) Fast decline in activities of daily living;
(f) Significant unplanned weight loss;
(g) Pattern of refusing to eat;
(h) Level of consciousness change; and
(i) Pressure ulcers (stage 2 or greater).
(12) "Choice" means a resident has viable options that enable the resident to exercise greater control over his or her life. Choice is supported by the provision of sufficient private and common space within the facility that allows residents to select where and how to spend time and receive personal assistance.
(13) "Condition" means a provision attached to a new or existing license that limits or restricts the scope of the license or imposes additional requirements on the licensee.
(14) "Department" means the Department of Human Services (DHS).
(15) "Dignity" means providing support in such a way as to validate the self-worth of the individual. Creating an environment that allows personal assistance to be provided in privacy, supports dignity as does delivering services in a manner that shows courtesy and respect.
(16) "Direct Care Staff" means a facility employee whose primary responsibility is to provide personal care services to residents. These personal care services may include:
(a) Medication administration;
(b) Resident-focused activities;
(c) Assistance with activities of daily living;
(d) Supervision and support of residents; and
(e) Serving meals, but not meal preparation.
(17) "Directly Supervised" means that a qualified staff member maintains visual contact with the supervised person.
(18) "Disaster" means a sudden emergency occurrence beyond the control of the licensee, whether natural, technological, or manmade that renders the licensee unable to operate the facility or the facility is uninhabitable.
(19) "Disclosure" means the written information the facility is required to provide to consumers to enhance the understanding of facility costs, services, and operations.
(20) "Division" means the Department of Human Services, Seniors and People with Disabilities Division (SPD).

(21) "Entity" means an individual, a trust, an estate, a partnership, a corporation, or a state or governmental unit, including associations, joint stock companies, and insurance companies, a state, or a political subdivision, or instrumentality including a municipal corporation.
(22) "Exception" means a written variance granted by the Division from a regulation or provision of these rules.
(23) "Facility" means the residential care or assisted living facility licensee and the operations, policies, procedures, and employees of the residential care or assisted living facility.
(24) "FPS" means the Facilities Planning and Safety Program within the Department's Public Health Division.
(25) "Homelike Environment" means a living environment that creates an atmosphere supportive of the resident's preferred lifestyle. Homelike environment is also supported by the use of residential building materials and furnishings.
(26) "Incident of Ownership" means an ownership interest, an indirect ownership interest, or a combination of direct and indirect ownership interest.
(27) "Independence" means supporting resident capabilities and facilitating the use of those abilities. Creating barrier free structures and careful use of assistive devices supports independence.
(28) "Indirect Ownership Interest" means an ownership interest in an entity that has an ownership interest in another entity. Indirect ownership interest includes an ownership interest in an entity that has an indirect ownership interest in another entity.
(29) "Individuality" means recognizing variability in residents' needs and preferences and having flexibility to organize services in response to different needs and preferences.
(30) "Licensed Nurse" means an Oregon licensed practical or registered nurse.
(31) "Licensee" means the entity that owns the residential care or assisted living facility business, and to whom an assisted living or residential care facility license has been issued.
(32) "Managed Risk" means a process by which a resident's high-risk behavior or choices are reviewed with the resident. Alternatives to and consequences of the behavior or choices are explained to the resident and the resident's decision to modify behavior or accept the consequences is documented.
(33) "Management" or "Operator" means possessing the right to exercise operational or management control over, or directly or indirectly conduct, the day-to-day operation of a facility.
(34) "Modified Special Diet" means a diet ordered by a physician or other licensed health care professional that may be required to treat a medical condition (e.g., heart disease or diabetes).
(a) Modified special diets include but are not limited to:
(A) Small frequent meals;
(B) No added salt;
(C) Reduced or no added sugar; and
(D) Simple textural modifications.
(b) Medically complex diets are not included.
(35) "New Construction" means:
(a) A new building;
(b) An existing building or part of a building that is not currently licensed;
(c) A major alteration to an existing building; or
(d) Additions, conversions, renovations, or remodeling of existing buildings.
(36) "Nursing Care" means the practice of nursing as governed by ORS chapter 678 and OAR chapter 851, division 047.

(37) "Owner" means a person with an ownership interest.
(38) "Ownership Interest" means the possession of equity in the capital, the stock, or the profits of an entity.
(39) "Personal Incidental Funds (PIF)" means the monthly amount allowed each Medicaid resident for personal incidental needs. For purposes of this definition, personal incidental funds include monthly payments, as allowed, and previously accumulated resident savings.
(40) "Privacy" means a specific area or time over which the resident maintains a large degree of control. Privacy is supported with services that are delivered with respect for the resident's civil rights.
(41) "P.R.N." means those medications and treatments that have been ordered by a qualified practitioner to be administered as needed.
(42) "Psychoactive Medications" mean medications used to alter mood, level of anxiety, behavior, or cognitive processes. Psychoactive medications include antidepressants, anti-psychotics, sedatives, hypnotics, and anti-anxiety medications.
(43) "Resident" means any person who is receiving room, board, care, and services on a 24-hour basis in a residential care or assisted living facility for compensation.
(44) "Residential Care Facility (RCF)" means a building, complex, or distinct part thereof, consisting of shared or individual living units in a homelike surrounding where six or more seniors and adult individuals with disabilities may reside. The residential care facility offers and coordinates a range of supportive services available on a 24-hour basis to meet the activities of daily living, health, and social needs of the residents as described in these rules. A program approach is used to promote resident self-direction and participation in decisions that emphasize choice, dignity, individuality, and independence.
(45) "Restraint" means any physical device that the resident cannot manipulate that is used to restrict movement or normal access to the resident's body.
(46) "Retaliation" means to threaten or intimidate, or take an action that is detrimental to a person (e.g., harassment, abuse, coercion, etc.)
(47) "Service Plan" means a written, individualized plan for services developed by a service planning team and the resident, or the resident's legal representative, that reflects the resident's capabilities, choices, and if applicable, measurable goals, and managed risk issues. The service plan defines the division of responsibility in the implementation of the services.
(48) "Service Planning Team" means two or more individuals, as set forth in OAR 411-054-0036 that assist the resident in determining what services and care are needed, preferred, and may be provided to the resident.
(49) "Services" means supervision or assistance provided in support of a resident's needs, preferences, and comfort, including health care and activities of daily living, that help develop, increase, maintain, or maximize the resident's level of independent, psychosocial, and physical functioning.
(50) "Subject Individual" means any person 16 years of age or older on whom the Department may conduct a criminal records check and from whom the Department may require fingerprints for the purpose of conducting a national criminal records check.
(a) For the purpose of these rules, subject individual includes:
(A) All applicants, licensees, and operators of a residential care or assisted living facility;
(B) All persons employed or that are receiving training in an assisted living or residential care facility;
(C) Volunteers, if allowed unsupervised access to residents.

(b) For the purpose of these rules, subject individual does not apply to;
(A) Residents and visitors of residents; or
(B) Persons employed by a private business that provides services to residents and is not regulated by the Department.
(51) "Supportive Device" means a device that may have restraining qualities that supports and improves a resident's physical functioning.
(52) "These Rules" mean the rules in OAR chapter 411, division 054.
(53) "Underserved" means services are significantly unavailable within the service area in a comparable setting for:
(a) The general public; or
(b) A specific population, for example, residents with dementia or traumatic brain injury.
(54) "Unit" means an individual living space constructed as a completely private apartment, including living and sleeping space, kitchen area, bathroom, and adequate storage areas.
(55) "Universal Worker" means a facility employee whose assignments include other tasks (e.g., housekeeping, laundry, food service, etc.) in addition to providing direct resident services. Universal worker does not include administrators, clerical or administrative staff, building maintenance staff, or licensed nurses who provide services as specified in OAR 411-054-0034.
Stat. Auth.: ORS 410.070 & 443.450
Stats. Implemented: ORS 443.400 to 443.455 & 443.991

411-054-0012
Requirements for New Construction or Initial Licensure
(1) An applicant requesting approval of a potential license for new construction or licensing of an existing building that is not operating as a licensed RCF or ALF, must request a meeting with the Division before submitting a letter of intent as described in section (3) of this rule.
(2) Prior to beginning new construction of a building, or purchase of an existing building with intent to request a license, the applicant must provide the following information for consideration by the Division for a potential license:
(a) Demonstrate a past history, if any, of substantial compliance with all applicable state and local laws, rules, codes, ordinances, and permit requirements in Oregon, and the ability to deliver quality services to citizens of Oregon; and
(b) Provide a letter of intent as set forth in section (3) of this rule. The letter of intent must include a statement of whether the applicant is willing to provide care and services for an underserved population and identify the underserved population the applicant is willing to serve. The letter of intent must also indicate whether the applicant is willing to provide services through the state medical assistance program.
(3) LETTER OF INTENT. Prior to application for a building permit, a prospective applicant, with intent to build or operate a facility, must submit to the Division a letter of intent that includes the following:
(a) Identification of potential applicant;
(b) Identification of the city and street address of the intended facility;
(c) Intended facility type (e.g., RCF, ALF, memory care), the intended number of units, and maximum resident capacity;
(d) Description of any underserved population the applicant is requesting to service;
(e) Indication of whether the applicant is willing to provide services through the state medical assistance program;

(f) Identification of operations within Oregon or within other states that provide a history of the applicant's ability to serve the intended population; and
(g) An independent market analysis completed by a third party professional that meets the requirements of section (4) of this rule.
(4) MARKET ANALYSIS. The applicant must submit a current market analysis to the Division for review and consideration prior to application for a building permit. A market analysis is not required for change of owner applicants of existing licensed buildings. The market analysis must show the need for the services offered by the license applicant and must include:
(a) Description of the intended population to be served, including special needs population as applicable;
(b) A current demographic overview of the area to be served;
(c) A description of the area and regional economy and the effect on the market for the project;
(d) Identification of the number of persons in the area to be served who are potential residents;
(e) Description of available amenities (e.g., transportation, hospital, shopping center, traffic conditions, etc.);
(f) Description of the extent, types, and availability of existing and proposed RCFs and ALFs located in the area to be served, as defined in ORS 443.400 to 443.455; and
(g) The rate of occupancy, including waiting lists, for existing and recently completed developments competing for the same market segment.
(5) The Division shall issue a written decision of a potential license within 60 days of receiving all required information from the applicant.
(a) If the applicant is dissatisfied with the decision of the Division, the applicant may request a contested case hearing in writing within 14 calendar days from the date of the decision.
(b) The contested case hearing shall be in accordance with ORS chapter 183.
(6) The Division shall consider the applicant's stated intentions and compliance with the requirements of this rule and all structural and other licensing requirements as stated in these rules prior to issuing a license.
(7) BUILDING PLANS. After the letter of intent has been submitted to the Division, one set of building plans and specifications must be submitted to FPS and must comply with OAR chapter 333, division 675.
(a) Building plans must be submitted to FPS:
(A) Prior to beginning construction of any new building;
(B) Prior to beginning construction of any addition to an existing building;
(C) Prior to beginning any remodeling, modification, or conversion of an existing building that requires a building permit; or
(D) Subsequent to application for an initial license of a facility not previously licensed under this rule.
(b) Plans must comply with the Oregon Structural Specialty Code and Oregon Fire Code as required for the occupancy classification and construction type.
(c) Plans must be drawn to a scale of one-fourth inch or one-eighth inch to the foot, and must specify the date when construction, modification, or conversion is expected to be completed.
(d) Construction containing 4,000 square feet or more must be prepared by, and bear the stamp of, an Oregon licensed architect or engineer.
(8) SIXTY-DAYS PRIOR. At least 60 days prior to anticipated licensure the applicant must submit to the Division:
(a) A completed application form with the required fee;

(b) A copy of the facility's written rental agreements;
(c) Disclosure information; and
(d) Facility policies and procedures, ensuring that the facility's administrative, personnel, and resident care operations are conducted in compliance with these rules.
(9) THIRTY-DAYS PRIOR. Thirty days prior to anticipated licensure the applicant must submit:
(a) To the Division, a completed and signed Administrator Reference Sheet that reflects the qualifications and training of the individual designated as facility administrator and a criminal records request; and
(b) To FPS, a completed and signed Project Substantial Completion Notice that attests substantial completion of the building project and requests that an onsite licensing inspection be scheduled.
(10) TWO-DAYS PRIOR. At least two working days prior to the scheduled onsite licensing inspection of the facility the applicant must submit to the Division and FPS, a completed and signed Project Completion/Inspection Checklist that confirms that the building project is complete and fully in compliance with these rules.
(a) The scheduled, onsite licensing inspection may not be conducted until the Project Completion/Inspection Checklist has been received by both FPS and the Division.
(b) The onsite licensing inspection may be rescheduled at the Division's convenience if the scheduled, onsite licensing inspection reveals that the building is not in compliance with these rules as attested to on the Project Completion/Inspection Checklist.
(11) CERTIFICATE OF OCCUPANCY. The applicant must submit to the Division and FPS, a copy of the Certificate of Occupancy issued by the Building Codes Agency having jurisdiction that indicates the intended occupancy classification and construction type.
(12) CONFIRMATION OF LICENSURE. The applicant, prior to admitting any resident into the facility, must receive a written confirmation of licensure issued by the Division.
Stat. Auth.: ORS 410.070 & 443.450
Stats. Implemented: ORS 443.400 to 443.455 & 443.991