STATE OF FLORIDA
DEPARTMENT OF ELDER AFFAIRS

SNH SE BARRINGTON BOYNTON
TENANT LLC d/b/a BARRINGTON
TERRACE OF BOYNTON BEACH,

Petitioner,

v. CASE NO. ___________________

STATE OF FLORIDA,
DEPARTMENT OF ELDER AFFAIRS,

Respondent.

/__________________________/

EMERGENCY PETITION FOR VARIANCE FROM
RULE 58A-5.036, FLORIDA ADMINISTRATIVE CODE

Pursuant to Section 120.542, Florida Statutes, and Rules 28-104.002 and 28-104.004, Florida Administrative Code, Petitioner (also referred to as “facility”), respectfully requests an emergency variance of Rule 58A-5.036, Florida Administrative Code. In support of this request, Petitioner states:

Identification of Petitioner

1. The name, address, telephone number and fax number of the Petitioner's counsel are:

   Thomas W. Caufman
   Quintairos, Prieto, Wood and Boyer, P.A.
   1410 N. Westshore Boulevard #200
   Tampa, FL 33607
   Phone 813-286-8818
   Fax: 813-286-8818

2. Petitioner is a 125 bed licensed assisted living facility located at 1425 Congress Avenue, Boynton Beach, Florida 33426.

Identification of the Agency
3. The name and address of the agency affected by this Petition is:

Department of Elder Affairs  
4040 Esplanade Way, Ste. 315  
Tallahassee, Florida 32399-7000  
850.414.2000

Variance History of Petitioner

4. Petitioner on September 28, 2018 filed a Petition and supporting documents (including the AECOM “detailed plan” for compliance with the Rule with attachments including an operation plan, site plans, generator sizing calculations, fuel tank calculations, generator and tank location drawings, engineering and electrical diagrams, proof of local Emergency Power Plan Approval, updates to the Agency for Health Care Administration (AHCA), F.S. 119.071(3)(a)2.b., the facility evacuation plan and the comprehensive facility emergency plan) with the Department of Elder Affairs (“Department”) seeking either a permanent waiver or temporary variance from Rule 58A-5.036, Florida Administrative Code. At the request of the Department the Petitioner on December 5, 2018 and December 18, 2018 submitted supplemental documentation and information. Pursuant to a Final Order issued on December 28, 2018 in case Number DOE-2018-1556 the Department denied the Petitioner’s request for permanent waiver but granted a conditional temporary variance to April 4, 2019 to implement the Rule. Petitioner on March 22, 2019 filed an Emergency Petition for Variance because despite its diligent efforts to achieve compliance it was unable meet the April 4, 2019 deadline. Pursuant to a Final Order issued on April 4, 2019 in case Number DOE-2019-3226 the Department granted a conditional temporary variance to July 5, 2019 to implement the Rule.

5. The Petitioner hereby incorporates and adopts the Petition and all supplemental materials filed in Case number DOE-2018-1556 except for the overall request for a permanent
waiver from the Rule and the anticipated construction completion date of March 4, 2019 outlined in paragraph #21. The Petitioner also hereby incorporates and adopts the Petition and all supplemental materials filed in Case number DOEA-2019-3226 except for the anticipated construction completion date of June 1, 2019 outlined in paragraph #6.

6. Due to circumstances beyond the control of the Petitioner a new implementation date of July 31, 2019 is requested. Generator sets with custom tanks have extended lead times due to the extreme high volume of orders for tanks and enclosures resulting from the need for all Florida assisted living facilities and nursing homes to comply with Rules 58A-5.036 and 59A-4.1265, Florida Administrative Code, at the same time. There are limited manufacturers that can build these specialized tanks and enclosures to comply with the Florida rules.

7. New since the Petitioner’s prior Petitions in DOEA-2018-1556 and DOEA-2019-3226 were drafted or submitted is that the Petitioner received comments from plans and construction personnel at the Agency for Health Care Administration (AHCA) and responded to those comments in January 2019. The F.S. 119.071(3)(a)2.b. was installed an operable in March 2019. The generator, fuel tank and enclosure were delivered in April 2019. Petitioner is completing installation and obtaining final approvals from all government bodies with jurisdiction. While it is possible the Petitioner may achieve compliance by July 5, 2109 as mandated by the pending Final Order, in an abundance of caution the Petitioner seeks an additional variance through July 31, 2019 to complete installation and obtain necessary approvals.

8. The measures to ensure resident comfort and safety during an extended power outage that were outlined in the DOEA-2018-1556 and DOEA-2019-3226 Petitions and attachments that are adopted and incorporated by reference, and remain in place including that the Petitioner’s
9. Based upon the Department’s adoption of the subject Rule and the above referenced
Final Orders in DOEA-2018-1556 and DOEA-201903226, the Petitioner must be in compliance
with the Rule by July 5, 2019. This required Petitioner to have the plan approved by the
Department, secure all other regulatory approvals, purchase new (or modify existing) generators,
construct and install the generators, ensure it has fuel capacity to support the generator and
develop written policies and procedures to ensure that the facility can effectively and
immediately activate, operate and maintain the generators. The extremely high demand and
limited supply of qualified manufacturers makes compliance with the Rule by July 5, 2019 highly
unlikely if not impossible. Securing required permits and securing delivery of custom built
generators, tanks, switches and related equipment is beyond the control of the Petitioner and the
April 4, 2019 is impossible to meet despite Petitioner’s best efforts to achieve compliance since
the Department adopted the Rule. If Petitioner fails to comply with the Rule, it is subject to
fines, suspension of its license and revocation of its license thereby creating an emergency
circumstance for the Petitioner.

WHEREFORE, Petitioner respectfully requests the entry of a final order granting a
temporary conditional variance from Rule 58A-5.036, Florida Administrative Code, as set forth
herein.
Respectfully submitted this 27th day of May, 2019.

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been provided via electronic transmission to: the Agency Clerk, Florida Department of Elder Affairs; via Federal Express to: Secretary Jeffrey Bragg, Florida Department of Elder Affairs, 4040 Esplanade Way, Ste. 315, Tallahassee, Florida 32399-7000; and the Joint Administrative Procedures Committee, Room 680, Pepper Building, 111 W. Madison Street, Tallahassee, Florida, 32399-1400 all on this 27th day of May, 2019.

QUINTAIROS, PRIETO, WOOD & BOYER, P.A.

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