STATE OF FLORIDA  
DEPARTMENT OF ELDER AFFAIRS

FS TENANT POOL TRUST  
d/b/a FOUNTAINVIEW,

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 a variance from 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 102 bed licensed assisted living facility located at 111 Executive Center Drive, West Palm Beach, Florida 33401.
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

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. The Department on October 24, 2018 requested additional information that the Petitioner provided. Pursuant to a Final Order issued on December 21, 2018 in case Number DOEA-2018-0738 the Department denied the Petitioner’s request for permanent waiver but granted a conditional temporary variance to July 1, 2019 to implement the Rule.

5. The Petitioner hereby incorporates and adopts the Petition and all supplemental materials filed in Case number DOEA-2018-0738 except for the overall request for a permanent waiver from the Rule and the anticipated construction completion date of April 8, 2019 outlined in paragraph #21.

6. Due to circumstances beyond the control of the Petitioner a new implementation date
of November 1, 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 Petition in DOEA-2018-0738 was drafted or submitted is that a purchase order for the generator, tank, enclosure and as approved was released to the vendor December 6, 2018. The City of West Palm Beach approved permitting in February 2019. Construction commenced in March 2019 and is largely completed. The Petitioner’s vendor informed that the generator, fuel tank, enclosure and are expected to be delivered on September 2, 2019. Thereafter, it will take 4 to 6 weeks to complete installation and obtain final approvals from all government bodies with jurisdiction.

8. In addition to all of the measures to ensure resident comfort and safety during an extended power outage that were outlined in the DOEA-2018-0738 Petition that is adopted and incorporated by reference, and remain in place, the Petitioner’s See attached contract.

9. Based upon the Department’s adoption of the subject Rule and the above referenced Final Order in DOEA-2018-0738, the Petitioner must be in compliance with the Rule by July 1,
2019. This required Petitioner to have the plan approved by the Department, secure all other regulatory approvals, purchase a new generator, 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. Obtaining the necessary regulatory approvals and obtaining the proper generator, fuel tank, enclosure and to gain compliance with the Rule by July 1, 2019 is not possible given the extremely high demand and limited supply of qualified manufacturers. Securing required permits and securing delivery of custom built generators, tanks, switches and related equipment is beyond the control of the Petitioner and the July 1, 2019 deadline is impossible to meet despite Petitioner’s best efforts 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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Attorneys for Petitioner

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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