

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

KINNERET, INC.

Petitioner

FHFC CASE NO.: 2016-003VW

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent

ORDER GRANTING WAIVER OF RULE 67-48.0075(2)

THIS CAUSE came on for consideration and final action before the Board of Directors of the Florida Housing Finance Corporation on January 29, 2016, pursuant to a Petition for Waiver ("Petition"). Florida Housing Finance Corporation ("Florida Housing") received the Petition on January 14, 2016, from Kinneret, Inc. ("the Petitioner"). Notice of the Petition was published on January 15, 2016, in Volume 42, Number 10, of the Florida Administrative Register. Florida Housing received no comments regarding the Petition. After careful review of the record and being otherwise fully advised in the premises, the Board of Directors (the "Board") of Florida Housing hereby finds:

1. The Board has jurisdiction over the subject matter of this case and the parties hereto.

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

 /DPTL: 1-29-16

2. Petitioner was selected to receive financing from the Multifamily Energy Retrofit Program (MERP) under RFA 2015-115 to assist in the retrofit of an existing development serving elderly tenants in Orlando, Florida. Petitioner's Application Number was 2016-209M (the "Application"). Rule 67-48.0075(2), Fla. Admin. Code, clarifies how Florida Housing defines the term "non-profit." It provides:

(2) For purposes of this rule chapter, in accordance with Section 42 of the IRC, a for-profit entity wholly owned by one or more qualified non-profit organizations will constitute a Non-Profit entity. The purpose of the Non-Profit must be, in part, to foster low-income housing and such purpose must be reflected in the Articles of Incorporation of the Non-Profit entity. A Non-Profit entity shall own an interest in the Development, either directly or indirectly; shall not be affiliated with or controlled by a for-profit Corporation; and shall materially participate in the development and operation of the Development throughout the total affordability period as stated in the Land Use Restriction Agreement and the Extended Use Agreement.

3. Similarly, the Application for RFA 2015-115 defined the term "non-profit" to require that "the purpose of the Non-Profit must be, in part, to foster low-income housing and such purpose must be reflected in the Articles of Incorporation." Under the terms of the RFA, non-profit applicants qualify for up to 15 percent of the MERP award to be forgiven, whereas for-profit applicants qualify for up to 10 percent of the MERP award to be forgiven.

4. Petitioner is a non-profit corporation, but its Articles of Incorporation do not specifically reflect that the purpose of the corporation is to foster low-income housing. For this reason, Florida Housing determined that Petitioner did not qualify for the 15 percent forgiveness provision. This determination did not impact Florida Housing's recommendation to award up to the full amount of the requested funding to Petitioner.

5. Petitioner timely filed an administrative challenge to the determination that it did not qualify for the 15 percent forgiveness provision. This challenge did not allege that any of the recommended awards, either to itself or other applicants, were flawed. During the settlement negotiations regarding this challenge, it was discovered that in 2008 Florida Housing had issued an application for funding under the Elderly Housing Community Loan ("EHCL") Program. That application specifically required each applicant to demonstrate that it qualified as a non-profit entity and to attach "the articles of incorporation demonstrating that one of the purposes of the Non-Profit entity is to foster low-income housing."

6. Petitioner submitted an application in 2008 for the EHCL Program, and attached a copy of its Articles of Incorporation to that application. These are the same Articles of Incorporation that were attached to its application under RFA 2015-115, and in fact appear to have been unchanged since 1967. Both applications were for the same applicant and the same development. In its scoring of the EHCL

applications, Florida Housing determined that Petitioner did qualify as a non-profit entity.

7. Rather than litigate the question of whether Petitioner had met the requirements of the rule and the terms of RFA 2015-115, Petition seeks a waiver of the rule and the terms, alleging that failure to grant the waiver would violate principles of fairness, as well as creating a substantial hardship for Petitioner. Petitioner argues that it had been led by Florida Housing to believe that its Articles of Incorporation adequately demonstrated the purpose of the non-profit entity, and that while it could have amended its Articles to more specifically state that its purpose was to foster low-income housing, it reasonably believed that this was not necessary.

8. This order does not constitute a determination of whether Florida Housing's scoring of Petitioner's application for RFA 2015-115 was correct or not, nor does it constitute a determination that the scoring of the 2008 EHCL application was in error. The fact that the scoring for these two applications was different forms the basis for the unfairness argument. When this order is issued, Petitioner will withdraw its administrative challenge to RFA 2015-115 and the question will not be litigated. Granting this waiver will also have no impact on the other successful applicants under RFA 2015-115, all of whom were recommended for funding. This

specifically includes the two other applicants that qualified as non-profit entities, both of whom will continue to be eligible for the 15% forgiveness provision.

9. The Board finds that granting the waiver would neither affect the scoring of Petitioner's application nor allow Petitioner to gain an unfair advantage over other applicants. The Board further finds that granting the waiver would have no detrimental impact on Florida Housing or any of its programs.

10. Section 120.542(2), Florida Statutes provides in pertinent part:

Variations and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.

11. Petitioner has demonstrated that the waiver is needed because of circumstances beyond its control, and that it would be unfair not to grant the waiver. Petitioner has also demonstrated that the purpose of the underlying statute, which is to "encourage development of low-income housing in the state" (§420.5099, Fla. Stat.), would still be achieved if the waiver is granted.

12. The Board finds that strict application of the above Rules under these circumstances would violate principles of fairness, and that granting this request furthers Florida Housing's statutory mandate to provide safe, sanitary and affordable housing to the citizens of Florida.

IT IS THEREFORE ORDERED:

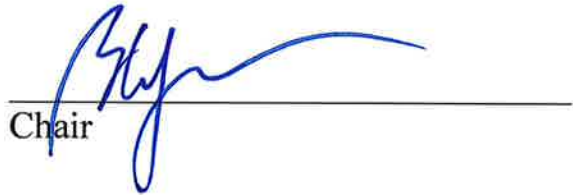
Petitioner's request for a waiver of Rule 67-48.0075(2), Fla. Admin. Code, and the similar provision in RFA 2015-115, is hereby **GRANTED**. Solely for purposes of RFA 2015-115, Petitioner will be considered a non-profit entity eligible for the 15% loan forgiveness provision.

DONE and ORDERED this 29th day of January, 2016.

Florida Housing Finance Corporation

By:

Chair



Copies furnished to:

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Joint Administrative Procedures Committee
Attention: Ms. Yvonne Wood
120 Holland Building
Tallahassee, Florida 32399-1300

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTIONS 120.542(8), 120.569, AND 120.57, FLORIDA STATUTES. SUCH PROCEEDINGS ARE COMMENCED PURSUANT TO CHAPTER 67-52, FLORIDA ADMINISTRATIVE CODE, BY FILING AN ORIGINAL AND ONE (1) COPY OF A PETITION WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329.