

STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION

VILLA CAPRI ASSOCIATES, LTD.,

Petitioner,

vs.

FHFC Case No. 2008-058UC  
Application No. 2008-266BS

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

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**RECOMMENDED ORDER**

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal hearing in the captioned proceeding on August 27, 2008 in Tallahassee, Florida.

**APPEARANCES**

For Petitioner:

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For Respondent:

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## **STATEMENT OF THE ISSUE**

There are no disputed issues of material fact. The issue for determination in this proceeding is whether Petitioner's application met threshold requirements with regard to the availability of infrastructure, specifically electricity, as of the application deadline date.

## **PRELIMINARY STATEMENT**

At the commencement of the informal hearing, the parties submitted a Joint Stipulation of Facts and Exhibits. The Joint Stipulation basically describes the application process and the circumstances regarding the scoring of Petitioner's application. It was marked and received as Joint Exhibit 1, is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order. Joint Exhibits 2 through 6 were received into evidence.

The Petitioner offered into evidence Petitioner's Exhibits 1 and 2. Petitioner's Exhibit 1 contains exhibits from Petitioner's application and was received into evidence over Respondent's objection. Petitioner's Exhibit 2 contains exhibits from and scorings of other applicants in the same cycle, and Respondent's objection to that exhibit was sustained.

The parties timely filed Proposed Recommended Orders subsequent to the hearing, and those have been fully considered by the undersigned.

## FINDINGS OF FACT

Based upon the undisputed facts and documents received into evidence at the hearing, the following relevant facts are found:

1. Along with other applicants, Petitioner, VILLA CAPRI ASSOCIATES, LTD., submitted an application for financing in the 2008 Universal Cycle, seeking MMRB funds, a SAIL loan and an allocation of non-competitive housing credits to help finance the construction of a 160-unit Garden Apartment complex in Miami, Florida.

2. Part III.C.3 of the Universal Application Instructions required that applicants provide evidence of infrastructure availability on or before the application deadline. This requirement is deemed a threshold item. According to the Instructions, applicants are permitted to submit a Verification of Availability of Infrastructure form included within the Application Package or a letter from the entity providing the service verifying availability of the infrastructure for the proposed development. Such verifications are to be provided behind designated tabs in the application. Tab 28 is to contain evidence of availability of electricity; Tab 29 is to contain evidence of availability of water; Tab 30 is to contain evidence of availability of sewer, package treatment or septic tank; and Tab 31 is to contain evidence of availability of roads.

3. The Application Instructions specifically provide that, “whether provided by the Application Deadline or by the date that signifies the end of the cure period,” each form or letter “confirming infrastructure availability must demonstrate availability on or before the Application Deadline.”

4. The parties have stipulated that the Application Deadline was April 7, 2008.

5. Throughout its application, Petitioner identified the address of its proposed development as “14500 SW 280<sup>th</sup> Street, Miami, Florida 33032.”

6. In its initially filed application, Petitioner provided, behind Tab 28, a letter from Florida Power & Light Company, dated January 23, 2008, stating that “as of January 18, 2008, FPL has sufficient capacity to provide single phase electric service to the above captioned property.” The captioned property was identified in that letter as “Villa Capri, 14500 SW 280<sup>th</sup> St., Homestead, FL 33032.” (Joint Exhibit 2)

7. In its preliminary scoring, Respondent Florida Housing awarded Petitioner’s application 66 points out of a possible 66 points, and 7.5 points of 7.5 possible tie-breaker points for geographic proximity to certain services and facilities. However, Florida Housing determined that Petitioner failed the threshold requirement regarding availability of electricity because the letter dated January 23, 2008 from Florida Power and Light “contains

conflicting information. Although the letter refers to the correct Development Name and street address, it refers to the city as Homestead rather than Miami.” (Joint Exhibit 3)

4. Although there appeared to be some confusion as to whether the correct address of the proposed project located at 14500 SW 280<sup>th</sup> Street lies within Miami or Homestead, Florida, Petitioner elected to file a cure in response to its scoring regarding the availability of electricity. Petitioner submitted a “revised Exhibit 28,” which was a letter dated May 30, 2008 from Florida Power & Light Company. This letter references the project at “14500 SW 280<sup>th</sup> Street, Miami, Fl 33032,” and confirms that “**at the present time**, FPL has sufficient capacity to provide electric service to the above captioned property.” (Emphasis Supplied) (Joint Exhibit 4)

5. Rules 67-21-003 and 67-48.004, Florida Administrative Code, both of which govern this proceeding, set forth the application and selection process for developments. Subsection 6 of both rules allow applicants to “cure” their application after initial scoring by submitting “additional documentation, revised pages and such other information as the applicant deems appropriate” to address the issues raised in preliminary scoring. Those rules further provide that:

A new form, page or exhibit provided to the Corporation during this period shall be considered a replacement of that form, page

or exhibit if such form, page or exhibit was previously submitted in the Applicant's Application. Pages of the Application that are not revised or otherwise changed may not be resubmitted, except that documents executed by third parties must be submitted in their entirety, including all attachments and exhibits referenced therein, even if only a portion of the original document was revised.

Rules 67-21-003(6) and 67-48.004(6), Florida Administrative Code.

5. Other portions of Petitioner's application demonstrated that water, sewer and roads were available to the project site as of the application deadline, and that the proposed project site qualifies as urban infill development and is located in an area that is already developed. (Petitioner's Exhibit 1)

6. In its final scoring of Petitioner's application, Florida Housing determined that Petitioner failed to meet the threshold requirement regarding the availability of electricity because

As a cure for Item IT, the Applicant provided a May 30, 2008 letter from FPL which states that electric service is available to the site ". . . at the present time . . ." The cure is deficient because the letter does not specifically state that the service was available to the site on or before the Application Deadline (April 7, 2008) as required by the 2008 Universal Application Instructions.

### **CONCLUSIONS OF LAW**

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapters 67-21 and 67-48, Florida Administrative Code, the Informal

Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. Because Florida Housing determined that Petitioner was ineligible for funding due to failure to meet the threshold requirement of demonstrating the availability of electricity, the Petitioner's substantial interests are affected by Florida Housing's proposed agency action. Accordingly, Petitioner has standing to bring this proceeding.

The issue for determination in this proceeding is whether Petitioner properly demonstrated that electricity was available for its proposed project as of April 7, 2008, the application deadline, as required by Respondent's rules.

It is Petitioner's position that its application adequately demonstrated the availability of electricity for its proposed development project. To support this position, Petitioner states that the "cure" letter dated May 30, 2008 submitted by Florida Power and Light, referencing the Miami address, was intended only to reply to the preliminary scoring issue raised by Florida Housing; to wit: the replacement of "Homestead" with "Miami," so as to be consistent with the remainder of Petitioner's application. Petitioner urges that the "cure" letter did not change the fact that electric infrastructure was in place as of the application deadline, and that such letter in no way "shut off" the power that was already servicing the site. Petitioner argues that the

“cure” letter is not inconsistent with the initial FPL letter, with the exception of the revised location.

Petitioner’s position is attractive and, more than likely, reflects the reality that electricity was available to the proposed development site as of January 18, 2008, long before the application deadline, as stated in the letter initially submitted from FPL. However, to accept that argument would be to totally disregard the adopted rules which govern this proceeding. Respondent’s rules expressly address “cure” materials and the manner in which they must be submitted and considered.

Two provisions within Rules 67-21.003(6) and 67-48.004(6), Florida Administrative Code, require the rejection of Petitioner’s arguments. First, those rules, which read identically, mandate that a new form, page or exhibit submitted as a cure is considered a “replacement” of that same form, page or exhibit previously submitted. The May 30, 2008 letter from FPL was a page or exhibit submitted by Petitioner to “cure” the threshold issue raised in preliminary scoring and it replaced the prior January 23, 2008 letter submitted with Petitioner’s original application. In other words, the prior letter ceased to exist once the “cure” letter was submitted. While this result may seem harsh, and close to putting form over substance, that is what the rules require. There is no ambiguity in the rule which states that the cure

documents replace the original documents. As pointed out by counsel for Florida Housing, the “replacement” rule ensures certainty in the scoring process by delineating the precise documents that should be the focus of the scoring. Petitioner elected to avail itself of the opportunity to cure a deficiency in response to Florida Housing’s preliminary scoring of its application, and is bound by the rules governing cure documentation.

Petitioner’s position would require Respondent to review its cure letter from FPL in conjunction with the earlier FPL letter submitted with its original application to reach the conclusion that electricity has been available for its site since January 18, 2008. This would not only be contrary to the “replacement” rule, it would require Florida Housing to speculate as to whether the Homestead and the Miami addresses, while bearing the same street numbers, were indeed the exact same location.

Petitioner’s argument that Florida Housing should not have ignored its initial submission regarding the availability of electricity is also in contravention of another portion of Rules 67-21.003(6) and 67-48.006(6), Florida Administrative Code. Those rules require that

Pages of the Application that are not revised or otherwise changed may not be resubmitted, except that documents executed by third parties must be submitted in their entirety, including all attachments and exhibits referenced therein, **even if only a portion of the original document was revised.**

Thus, in order for the initial FPL letter of January 23, 2008 to be considered by Florida Housing, it would have had to be referenced and attached to the later FPL letter submitted as a cure.

Finally, Petitioner urges that other portions of its application, such as its exhibits relating to urban in-fill development (Application Exhibit 21), water and sewer availability (Applications Exhibits 28 and 29) and environmental safety (Application Exhibit 33), adequately demonstrate that electricity was available to its proposed development as of the application deadline. If this argument were accepted, the Respondent's Application Instructions and Application Forms, both of which are adopted as rules (Rules 67-21.003(1)(a) and 67-48.004(1)(a), Florida Administrative Code) would be rendered a nullity.

The Instructions and Forms require that evidence of the availability of electricity be set forth behind a specific tab labeled "Exhibit 28." The availability of other forms of infrastructure are to be demonstrated in other exhibit numbers. Indeed, Petitioner itself, in submitting its cure documentation regarding electricity, described its "cure" as "a revised Exhibit 28, Evidence of Availability of Electricity." Respondent's rules do not permit electrical infrastructure to be demonstrated circumstantially or by inference. Instead, the Instructions explicitly require and provide for the

means and methods (including the designated exhibit number) of demonstrating the availability of electricity as of the application deadline. The Instructions require that “[v]erification of the availability of **each** type of infrastructure on or before the Application Deadline must be provided,” and that “**each**” letter confirming infrastructure availability must demonstrate availability on or before the Application Deadline.” (Application Instructions, Part III.C.3) Other portions of the application and specific exhibit numbers are included for their own particular purposes which are unrelated to electrical infrastructure. Moreover, those other exhibits included within Petitioner’s Exhibit 1 do not specifically and conclusively demonstrate that electricity was available to Petitioner’s proposed development as of April 7, 2008, the application deadline.

While the result reached herein may seem harsh in light of the probable reality that electricity was available to Petitioner’s proposed development as of the application deadline, any other result would require speculation on the part of Florida Housing and a complete disregard and violation of Respondent’s adopted rules, by which all applicants, as well as Florida Housing itself, are bound. As agreed by both parties, the demand for MMRB and SAIL funding far exceeds that which is available under those programs, and qualified affordable housing developments must compete for

that funding. To assess the relative merits of proposed developments, Florida Housing has established a competitive and detailed application process. Just as Florida Housing is bound in its scoring of applications by the rules governing that process, applicants are likewise bound.

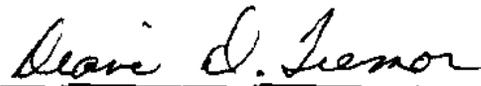
Here, the rules required that the availability of electricity be demonstrated as of the application deadline and on a specified Exhibit Number 28. Petitioner elected to submit a cure of its initial documentation which showed an inconsistency of the development address with the rest of Petitioner's application. In doing so, Petitioner "replaced" the initial document. The latter May 30, 2008 "cure" document, standing by itself (as it must) and stating that electricity was available "at the present time", did not demonstrate that electricity was available to the project site as of the application deadline. Accordingly, Petitioner failed to satisfy the threshold requirement set forth in Part III.C.3 of the Application Instructions. Rules 67-21.003(13)(b) and 67-48.004(13)(b), Florida Administrative Code, require that Florida Housing reject an application if the applicant fails to achieve the threshold requirements as defined in the Application Instructions. Accordingly, Florida Housing properly rejected Petitioner's application for funding on that ground. See Brownsville Manor Apartments

v. Florida Housing Finance Corporation, FHFC Case No. 2004-029-UC  
(October 14, 2004).

**RECOMMENDATION**

Based upon the Findings of Fact and Conclusions of Law stated above, it is RECOMMENDED that Florida Housing's final scoring of Petitioner's application be upheld, and that Petitioner's application be rejected for failure to establish the threshold requirement that electricity be available to the project site as of the application deadline.

Respectfully submitted this 8th day of September, 2008.



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## NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

In accordance with Rules 67-21.0035(3) and 67-48.005(3), Florida Administrative Code, all parties have the right to submit written arguments in response to a Recommended Order for consideration by the Board. Any written argument should be typed, double-spaced with margins no less than one (1) inch, in either Times New Roman 14-point or Courier New 12-point font, and may not exceed five (5) pages, excluding the caption and certificate of service. Written arguments must be filed with Florida Housing Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, no later than 5:00 p.m. on September 15, 2008. Submission by facsimile will not be accepted. Failure to timely file a written argument shall constitute a waiver of the right to have a written argument considered by the Board. Parties will not be permitted to make oral presentations to the Board in response to Recommended Orders.

*H. Sp. 1  
Rev. 2.*

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

VILLA CAPRI ASSOCIATES, LTD.,  
a Florida limited partnership

Petitioner,

v.

FHFC CASE NO.: 2008-058UC  
Application No. 2008-266BS

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

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**JOINT STIPULATION OF FACTS AND EXHIBITS**

Petitioner, Villa Capri Associates, Ltd., ("Villa Capri") and Respondent, Florida Housing Finance Corporation, ("Florida Housing") by and through undersigned counsel, submit this stipulation for purposes of expediting the informal hearing scheduled for 10:00 am, August 27, 2008, in Tallahassee, Florida, and agree to the following findings of fact and to the admission of the exhibits described below:

**STIPULATED FACTS**

1. Villa Capri is a Florida limited partnership with its address at 2121 Ponce de Leon Blvd., PH, Coral Gables, Florida 33134, and is in the business of providing affordable rental housing units.

2. Florida Housing is a public corporation, organized to provide and promote the public welfare by administering the governmental function of financing and refinancing housing and related facilities in the State of Florida. (Section 420.504, Fla. Stat.; Rule Chapter 67-48, Fla. Admin. Code).

3. Florida Housing administers various affordable housing programs including the following relevant to these proceedings:

(a) The Multifamily Mortgage Revenue Bonds (MMRB) Program pursuant to Section 420.509, Fla. Stat., and Rule Chapter 67-21, Fla. Admin. Code; and

(b) the State Apartment Incentive Loan (SAIL) Program pursuant to Sections 420.507(22) and 420.5087, Fla. Stat., and Rule Chapter 67-48, Fla. Admin. Code.

4. The 2008 Universal Cycle Application, through which affordable housing developers apply for funding under various affordable housing programs administered by Florida Housing, including the MMRB Program and the SAIL Program, is adopted as the Universal Application Package or UA1016 (Rev. 3-08) by Rules 67-21.003(1)(a) and 67-48.004(1)(a), Fla. Admin. Code, respectively, and consists of Parts I through V and instructions.

5. Because the demand for MMRB and SAIL funding exceeds that which is available under the MMRB Program and the SAIL Program, respectively, qualified affordable housing developments must compete for this funding. To assess the relative merits of proposed developments, Florida Housing has established a competitive application process known as the Universal Cycle pursuant to Rule Chapters 67-21 and 67-48, Fla. Admin. Code, respectively. Specifically, Florida Housing's application process for the 2008 Universal Cycle, as set forth in Rules 67-21.002-.0035 and 67-48.001-.005, Fla. Admin. Code, involves the following:

- a. the publication and adoption by rule of an application package;
- b. the completion and submission of applications by developers;
- c. Florida Housing's preliminary scoring of applications;

- d. an initial round of administrative challenges in which an applicant may take issue with Florida Housing's scoring of another application by filing a Notice of Possible Scoring Error ("NOPSE");
- e. Florida Housing's consideration of the NOPSEs submitted, with notice (NOPSE scoring summary) to applicants of any resulting change in their preliminary scores;
- f. an opportunity for the applicant to submit additional materials to Florida Housing to "cure" any items for which the applicant was deemed to have failed to satisfy threshold or received less than the maximum score;
- g. a second round of administrative challenges whereby an applicant may raise scoring issues arising from another applicant's cure materials by filing a Notice of Alleged Deficiency ("NOAD");
- h. Florida Housing's consideration of the NOADs submitted, with notice (final scoring summary) to applicants of any resulting change in their scores;
- i. an opportunity for applicants to challenge, via informal or formal administrative proceedings, Florida Housing's evaluation of any item for which the applicant was deemed to have failed to satisfy threshold or received less than the maximum score; and
- j. final ranking scores, ranking of applications, and allocation of MMRB and SAIL (or other) funding to successful applicants as well as those who successfully appeal through the adoption of final orders.

6. Villa Capri and others timely submitted applications for financing in Florida Housing's 2008 Universal Cycle. Villa Capri, pursuant to Application #2008-266BS (the "Application"), applied for MMRB funds in the amount of \$12,000,000, a SAIL loan in the amount of \$3,700,000, and an allocation of non-competitive housing credits in the amount of \$837,806 to help finance the construction of a 160-unit Garden Apartment complex in Miami, Florida, named Villa Capri Apartments.

7. Pursuant to Part III.C.3. of the Universal Application Instructions, as a threshold item, Villa Capri and the other applicants in the 2008 Universal Cycle were required to provide evidence demonstrating that certain types of infrastructure (electricity, water, sewer and roads) were available for their proposed developments on or before the Application Deadline (the Application Deadline for the 2008 Universal Application Cycle was April 7, 2008).

8. Villa Capri received notice of Florida Housing's initial (preliminary) scoring of its Application by scoring summary dated as of May 7, 2008, at which time Florida Housing awarded Villa Capri a preliminary score of 66 points out of a possible 66 points, and 7.5 points of 7.5 possible "tie breaker" points (awarded for geographic proximity to certain services and facilities). Florida Housing also concluded that Villa Capri failed the threshold requirement regarding availability of electricity for the following reason:

The Applicant provided a letter from FPL as evidence of the availability of electricity; however, the letter contains conflicting information. Although the letter refers to the correct Development Name and street address, it refers to the city as Homestead rather than Miami.

(Exhibits J-2 and J-3)

9. Villa Capri timely submitted cure materials to Florida Housing in response to the threshold failure. The cure documentation consists of a 2008 Cure Summary Form, a 2008 Cure Form, and a letter from FPL to Ms. Mara Mades dated May 30, 2008.

(Exhibit J-4)

10. NOADs were filed by three (3) competing applicants, each contending that the cure letter submitted by Villa Capri was deficient because it failed to demonstrate the availability of electricity as of the Application Deadline. (Exhibit J-5)

11. Florida Housing issued its final scoring summary dated as of July 16, 2008, determining that Villa Capri failed the threshold requirement regarding evidence of availability of electricity noting that:

As a cure for Item 1T, the Applicant provided a May 30, 2008 letter from FPL which states that electric service is available to the site "...at the present time..." The cure is deficient because the letter does not specifically state that the service was available to the site on or before the Application Deadline (April 7, 2008) as required by the 2008 Universal Application Instructions.

(Exhibit J-6)

12. Along with the final scoring summary Florida Housing provided Villa Capri a Notice of Rights, informing Villa Capri that it could contest Florida Housing's actions by requesting a hearing.

13. Villa Capri timely filed its Petition for Review contesting Florida Housing's scoring of its Application together with an Election of Rights in which it elected an informal hearing.

14. The parties request the Honorable Hearing Officer take official recognition (judicial notice) of Rule Chapters 67-21 and 67-48, Fla. Admin. Code, as well as the incorporated Universal Application Package or UA1016 (Rev. 3-08).

#### **EXHIBITS**

The parties offer the following joint exhibits into evidence and stipulate to their authenticity, admissibility and relevance in the instant proceedings, except as noted below:

Exhibit J-1: This Joint Stipulation of Facts and Exhibits.

Exhibit J-2: Florida Power & Light letter dated January 23, 2008, submitted as Application Exhibit 28 with Villa Capri's original Application #2008-266BS.

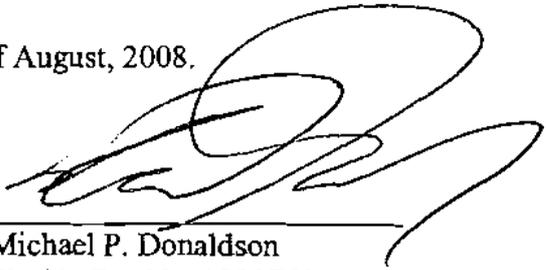
Exhibit J-3: Preliminary Scoring Summary for Application #2008-266BS (Villa Capri) dated May 7, 2008.

Exhibit J-4: Cure materials submitted by Villa Capri regarding Item 1T from Exhibit J-3 comprised of a 2008 Cure Summary Form, a 2008 Cure Form, and a letter from FPL dated May 30, 2008.

Exhibit J-5: NOADs submitted by Application Nos. 2008-260BS, 2008-112C, and 2008-176BS contesting the sufficiency of the cure materials submitted by Villa Capri.

Exhibit J-6: Final Scoring Summary for Application #2008-266BS (Villa Capri) dated July 16, 2008.

Respectfully submitted this 27 day of August, 2008.

By: 

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