

**BEFORE THE STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

VILLA CAPRI ASSOCIATES, LTD.,

Petitioner,

vs.

FHFC No. 2008-058UC

Application No. 2008-266BS

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

---

**NOTICE OF FILING PROPOSED RECOMMENDED ORDER**

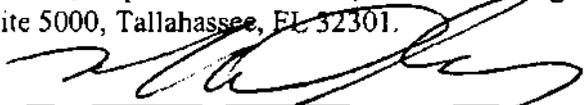
Petitioner, VILLA CAPRI ASSOCIATES, LTD., pursuant to Florida Administrative Code Rule 28-106.215, hereby gives notice of having filed its Proposed Recommended Order in the above-styled proceeding on the 12<sup>th</sup> day of March, 2010.

Respectfully submitted,

  
\_\_\_\_\_  
Michael P. Donaldson  
FL Bar No. 0802761  
CARLTON FIELDS, P.A.  
P.O. Drawer 190  
215 S. Monroe St., Suite 500  
Tallahassee, FL 32302  
Telephone: (850) 224-1585  
Facsimile: (850) 222-0398  
Counsel for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished this 12<sup>th</sup> day of March, 2010 to Wellington Meffert, Esq. General Counsel, Florida Housing Finance Corporation, 227 N. Bronough St., Suite 5000, Tallahassee, FL 32301.

  
\_\_\_\_\_  
MICHAEL P. DONALDSON

**BEFORE THE STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

VILLA CAPRI ASSOCIATES, LTD.,

Petitioner,

vs.

FHFC No. 2008-058UC

Application No.2008-266BS

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

---

**RECOMMENDED ORDER**

Pursuant to Notice, on February 23, 2010, an informal hearing was held in this matter in Tallahassee, Florida, before the Florida Housing Finance Corporation ("Florida Housing") appointed Hearing Officer Diane D. Tremor.

**APPEARANCES**

For Petitioner,  
Villa Capri  
Associates, Ltd.:

Michael P. Donaldson, Esq.  
Carlton Fields, P.A.  
P.O. Drawer 190  
Tallahassee, FL 32301

For Respondent  
Florida Housing:

Wellington Meffert, Esq.  
General Counsel  
Florida Housing Finance Corporation  
227 N. Bronough St., Suite 5000  
Tallahassee, FL 32301-1329

## **STATEMENT OF THE ISSUES**

There were no disputed issues of material fact in this proceeding; accordingly, it was conducted as an informal hearing. Two issues are presented for resolution. The first issue is whether the Applicant correctly identified its development location in its initial Application. The second issue is whether the cure materials submitted by Villa Capri were necessary. A corresponding consideration is whether the *Eclipse* case is controlling.

## **PRELIMINARY STATEMENT**

At the informal hearing, the parties stipulated to the admission into evidence of the Record on Appeal in the case of *Villa Capri Associates, Ltd. vs. Florida Housing Finance Corporation*, DCA Case No. 1D08-5235. The opinion and mandate of the First District Court of Appeal and the parties' briefs in that case were also offered and accepted. Petitioner additionally offered two exhibits, which were both admitted. Those exhibits were consistent with the exhibits allowed by Florida Housing in *Eclipse*.

This action is a continuation of a proceeding, initiated on May 27, 2008, when Villa Capri timely challenged Florida Housing's scoring of its 2008 Universal Cycle Application. Villa Capri challenged Florida Housing's threshold scoring determination regarding the failure to provide documentation to demonstrate the availability of electric infrastructure to the proposed development site as of the application deadline.

On August 22, 2008, an informal hearing was conducted, during which Villa Capri argued that it had satisfactorily demonstrated the availability of infrastructure. On September 8, 2008, the assigned Informal Hearing Officer entered a Recommended

Order finding that Villa Capri's argument was attractive and, more than likely reflected the reality that electricity was available to the proposed development site long before the application deadline. The Informal Hearing Officer, however, ultimately concluded that to accept Villa Capri's position would be to totally disregard the adopted rules which govern the proceeding and neither she nor Florida Housing could do that despite the harsh result. This conclusion was based on the purported fact that Florida Housing never deviates from its rules. In support, the Informal Hearing Officer cited to the case of *Brownsville Manor Apartments v. Florida Housing Finance Corporation*, FHFC Case No. 2004-029-UC (Oct. 14, 2004).

Villa Capri later determined, however, that Florida Housing had in fact deviated from its rules before in almost an identical circumstance. *Eclipse West Associates, Ltd. v. Florida Housing Finance Corporation*, FHFC Case No. 2006-078-RLP. Neither the Informal Hearing Officer nor Villa Capri were aware of the decision at the time the Informal Hearing Officer's initial Recommended Order was entered because it was not indexed or made publicly available.

On September 26, 2008, Florida Housing adopted the Findings of Fact and Conclusions of Law as set forth in the Recommended Order, and on October 24, 2008, Villa Capri timely appealed that Final Order. Among other things, Villa Capri argued that by not properly indexing and publishing the *Eclipse* Final Order, Florida Housing impeded the fairness of the proceeding, particularly since the Informal Hearing Officer's

Recommended Order was grounded on the fact that Florida Housing did not ever deviate from its rules.

On November 30, 2009, the First District reversed Florida Housing's final order and remanded the case back to Florida Housing to assess the applicability of *Eclipse*. In accordance with the Court's mandate, Villa Capri provided an Amended Petition which closely mirrored the petition filed in the *Eclipse* case. On February 19, 2010, Florida Housing moved to strike the Amended Petition. On February 22, 2010, Villa Capri filed its Response to the Motion. At hearing, the undersigned allowed the amendment based on the language of the Villa Capri opinion. The parties agreed to file Proposed Recommended Order on March 12, 2010.

### **FINDINGS OF FACT**

Based upon the undisputed facts and exhibits received into evidence and oral argument presented at the hearing, the following relevant facts are found:

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, Florida Statutes ("F.S."); Rule Chapter 67-48, Florida Administrative Code ("FAC").

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, F.S., and Rule Chapter 67-21, FAC; and
- (b) The State Apartment Incentive Loan (SAIL) Program pursuant to Sections 420.507(22) and 420.5087, F.S., and Rule Chapter 67-48, FAC.

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), FAC, 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, qualified affordable housing developments must compete for this funding.

6. 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, FAC. 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, FAC, 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 adaption

of final orders.

7. 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.

8. Pursuant to Part III.C.3. of the Universal Application Instructions, 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). Villa Capri accordingly provided such information. As to the provision of electric infrastructure, Villa Capri submitted a letter from Florida Power and Light ("FPL") which stated that electricity existed at the site since at least January 18, 2008.

9. Villa Capri received notice of Florida Housing's initial (preliminary) scoring of its Application by a scoring summary dated 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, however, further concluded

that Villo Capri failed the threshold requirement regarding availability of electricity, stating:

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.

10. Villa Capri timely submitted cure materials to Florida Housing in response to the threshold failure. The cure documentation consists of a revised and updated letter from FPL dated May 30, 2008.

11. Florida Housing issued its final scoring summary on July 16, 2008, determining that Villo Capri failed the threshold requirement regarding evidence of availability of electricity, stating:

As a cure for Item 11, 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**

12. Pursuant to sections 120.569 and 120.57, Florida Statutes, the Hearing Officer has jurisdiction over the parties and the subject matter of this proceeding.

13. Villa Capri's substantial interests are affected by Florida Housing's action. Accordingly, Villa Capri has standing to bring this challenge.

14. The issue in this case is whether, under *Eclipse*, Villa Capri submitted documentation in its Application and cure materials sufficient to satisfy the threshold requirements for SAIL and MMRB funding. Specifically the central issue in this case, as well as in *Eclipse*, focuses on whether the applicant has shown that infrastructure existed on or before the Application Deadline.

15. The Universal Application [2008] at Part III.C.3., asked for information concerning the availability of infrastructure, including electricity. The purpose of this section is to ascertain whether the necessary infrastructure is in place that will allow the development to proceed in a timely fashion.

16. In compliance with the Application requirements, Villa Capri provided in its initial application a letter from Florida Power and Light ("FPL") that made clear that sufficient electrical capacity existed for the Villa Capri development as of January 18, 2008. Similarly, Villa Capri submitted evidence of the availability of other infrastructure, including water and sewer and roads.

17. Villa Capri also submitted documentation which verified that the proposed project was an urban infill development located in an urban service area. Likewise, the Verification of Environmental Safety – Phase I Environmental Site Assessment indicates the presence of existing buildings on the property. Additionally, letters provided by Miami-Dade County, indicated that water and sewer are available to the proposed project site. In conjunction with the initial FPL letter, these additional exhibits make clear that the required infrastructure was in place as of the application deadline.

18. In reviewing the initial FPL letter, Florida Housing did not question the availability of electricity to the site as of the Application deadline; rather, it simply raised an issue concerning the address for the development site referenced in the FPL letter. Florida Housing opined that to be consistent with how the address was listed in other places in the Application, the letter should have reflected Miami as the location of the project, not Homestead.

19. Villa Capri thereafter provided as a cure a revised letter from FPL dated May 30, 2008. The revised FPL letter changed the address location of the property as requested by Florida Housing to Miami.

20. Florida Housing nonetheless concluded that Villa Capri still failed threshold because it had not satisfied the electricity infrastructure requirements. The cure letter which was dated May 30, 2008, indicated that electricity was in place "at the present time." Florida Housing thus rejected the application solely because the FPL revised letter included a date subsequent to the Application Deadline of April 7, 2008.

21. As explained earlier, this issue was the subject of appeal in light of the fact that *Eclipse* was not properly published. It must now be determined if the actions taken by Florida Housing in *Eclipse* are applicable here.

22. Florida Housing's decision is not consistent with *Eclipse*. In *Eclipse*, just like here, an address inconsistency was discovered during the review and scoring process. The *Eclipse* applicant, attempted to cure the address issue by submitting several new documents, including a new FPL letter. Just like here, the revised FPL letter stated that

electricity was available at the site as of the date on the letter, which was well after the application deadline. Like here, Florida Housing determined that the applicant failed threshold solely based on the FPL letter.

23. Specifically, in *Eclipse*, the applicant submitted an application for funding designating the address and location of its proposed project as “[a] portion of property located at the SE corner of NW Flagler Drive and NW 4<sup>th</sup> Street, Ft. Lauderdale, FL 33301.” This address was used consistently throughout the application.

24. A NOPSE, however, pointed out, based on numerous exhibits that no Flagler “Drive” existed in Ft. Lauderdale. Florida Housing reviewed the issues raised in the NOPSE and based on the discrepancy in the address, concluded that *Eclipse* failed to meet threshold.

25. The *Eclipse* applicant then filed cure documents in response to Florida Housing’s preliminary score. Florida Housing, however, concluded that the *Eclipse* applicant’s cure was deficient because it did not demonstrate the availability of electricity as of the application deadline.

26. The applicant petitioned for review of that decision and requested an informal hearing. Prior to that scheduled hearing, Florida Housing and *Eclipse* resolved their dispute. Based on information provided by the *Eclipse* applicant, Florida Housing agreed that “various units of local government referred to the street as Flagler Drive, Flagler Avenue and simply Flagler.” A Joint Recommended Order was subsequently adopted by the Florida Housing Board of Directors and provided that the particular

section of Flagler cited by Eclipse had been recognized by municipal authorities both as Flagler Drive and Flagler Avenue. As such, **"there was no necessity for the Cure documents to be filed, thus issues related to the date of the Florida Power and Light letter verifying availability of electric service to the site are moot."**

27. Because the address inconsistency was a mere technicality and the location of the project had never changed, Florida Housing did not apply its cure rule and accepted the original application documentation. Florida Housing accepted the factual reality that the project location had always been the same and that electricity was available as of the application deadline - - "Drive" and "Avenue" were both accurate. Florida Housing reasoned that resolving the *Eclipse* case was consistent with prior cases where a scoring action had been undone because of the effects of Florida Housing's actions. *In re: Allapatah Gardens*, FHFC Case No. 2002-013 (Final Order July 18, 2002). That same reasoning should apply here.

28. Just like in *Eclipse*, Villa Capri responded to a scoring decision made by Florida Housing as to the valid address for the development. While Florida Housing alleges that factually in *Eclipse* the address was consistent throughout the application, whereas here, the apparent inconsistency existed in the initial application, this distinction does not change the result that both applicants attempted to "cure" an issue involving the address for the development site and that the address contained in the initial application were both correct. The cure is why both applications failed threshold.

29. Similarly, Florida Housing suggests that the error was discovered during preliminary scoring and not as a result of a NOPSE, as was the case in *Eclipse*. Because of this distinction, Florida Housing argues that *Eclipse* should not control. Again, this distinction ignores the fact that in both cases, regardless of when the mistake was discovered, each applicant of their own accord submitted corresponding cure documents, which resulted in rejection. Moreover, while Florida Housing staff may have not discovered the address issue in *Eclipse*, they must have reviewed and agreed with the issues raised by the NOPSE.

30. Here, while Florida Housing found that Homestead in the original FPL letter was inconsistent with other parts of the Application, in reality either Homestead or Miami is acceptable for purposes of identifying the location of the project. This conclusion is confirmed if the address of the proposed project – 14500 S.W. 280 St., 33032, -- is inputted into either Google Maps, Yahoo Maps, or Mapquest using either Miami or Homestead as the referenced City. The resulting map illustrates the same location which is the development location for the proposed Villa Capri project.

31. This result is also confirmed by the entities who wrote the letters. For example, the letters from Miami-Dade County indicate that the property is in Miami, or Miami-Dade. Florida Housing did not have an issue with this apparent inconsistency. FPL, in its original letter indicated that the project was in Homestead. The cure letter from FPL indicated that Miami was also appropriate. This was not a situation where the applicant prepared forms including an address that was then signed by the entity. To the

contrary, confirmations were prepared and executed by those entities themselves and included an appropriate address.

32. Accordingly, just as in *Eclipse*, Villa Capri should be permitted to provide documentation and evidence that the reference to Homestead and Miami were both correct. Thus no cure was required.

33. As in *Eclipse*, the Villa Capri Project Location had not changed, and the actual address and zip code of the project never changed. Indeed, Florida Housing disputed this. Instead, Villa Capri's application was denied on a hyper-technical application of its rules.

34. Florida Housing argues that *Eclipse* is not controlling because it involved a different program, with different rules and instructions. That is a distinction without a difference. The rules and instructions applying to the provision of infrastructure are virtually identical, and both require that documentation of infrastructure availability must be provided as of the application date. In each program this was a threshold issue which could be cured.

35. Florida Housing also points to *Nautilus Development Partners, LLLP v. Florida Housing Finance Corporation*, FHFC case No. 2006-0230C (Final Order, 2006) as support for the proposition that the RRLP rules that governed in *Eclipse* are not applicable to a Universal Cycle proceeding. But, a review of that Recommended Order reveals that it was how the RRLP rules were being used that was problematic. The challenger in *Nautilus* attempted to use the RRLP rules even though they were not identical

to the Universal Cycle rules. Quite to the contrary, here, the application provisions are identical.

36. Florida Housing also has cited *Brownsville Manor Apartments v. Florida Housing*, FHFC Case No. 2004-029UC (Final Order October 14, 2004), in support for its position. In *Brownsville*, the application was rejected for failing to provide documentation that demonstrated the availability of infrastructure. But the actual documents at issue were submitted *for the first time* as cures. In other words, there were no responsive documents submitted as of the application deadline to indicate the availability of infrastructure. Thus, the applicant in *Brownsville* did not and could not question a scoring issue made by Florida Housing as to the initial document submission. The cure was not the result of a questionable scoring decision as is the case here

37. By contrast, in the instant case *Villa Capri* submitted infrastructure evidence with its initial application which clearly demonstrated that electric infrastructure was available. Accordingly, *Brownsville* is not controlling here.

38. Florida Housing also cites to several other cases which it alleges supports its decision here. However, none of those cases involved a purportedly inconsistent address that was contended to be correct. In fact, in most of the cases, the petitioner had not even provided any information in the original application. See, e.g., *Marian Manor, Inc. v. Fla. Housing Fin. Corp.*, FHFC Case No. 2006-019UC (Final Order, July 31, 2006) (petitioner failed to provide required information in original application and cure material was insufficient; no issue that the information in original application was correct);

*Catholic Charities Housing, Inc. v. Fla. Housing Fin. Corp.*, FHFC Case No. 2004-019UC (Final Order Oct. 14, 2004) (no issue regarding inconsistent address); *Bonita Cove, LLC v. Florida Housing Finance Corporation*, FHFC Case No. 2008-056UC (Final Order, Sept. 26, 2008) (no purported inconsistency in original application; applicant submitted infrastructure letters with incorrect dates at the cure stage for the first time).

39. Florida Housing cites *Fountain Terrace Apartments Limited Partnership v. Florida Housing Finance Corporation*. FHFC Case no. 2008-1020C, for the proposition that the final order in *Eclipse* is not controlling because it was not the subject of an evidentiary or informal administrative hearing, nor does it reflect a substantive review of the facts and law by the hearing officer or the agency head. That is incorrect.

40. In *Fountain Terrace*, Florida Housing set up a two-part challenge procedure which allows applicants to challenge their own Application. Then, after final rankings are issued, Applicants may file "after the fact challenges" which allow them to challenge other applications. A Final Order resulting from a challenge of one's own application is final only as to that particular application. The Final Order may, however, be revisited during that same cycle year and the results changed by an applicant challenging the scoring decision made in the Final Order in an after-the-fact challenge. While the initial scoring decision does not change, the after-the-fact challenge and the informal hearing officer's consideration is not controlled by any precedent established by the initial "Final Order". No after-the-fact procedural issue existed in *Eclipse*.

41. That order is a "Final Order" as that term is defined by section 120.52, Florida Statutes, and is not subject to the limitations of *Fountain Terrace*. Additionally, even though the *Eclipse* proceeding did not include a full blown informal hearing to consider the agency action, that agency action was nonetheless reviewed, considered, and adopted by the Florida Housing Board of Directors as the final agency action. It is this action that serves as the precedent upon which parties should be able to rely. In fact, even if a hearing had been held, formal or otherwise, the Board of Directors could have disagreed with any resulting Recommended Order.

42. This case is just like *Eclipse*. Thus, in accordance with *Eclipse*, no cure was required by Villa Capri. Villa Capri has satisfied the application requirements and the necessary infrastructure is in place and was in place as of the Application Deadline. To hold otherwise would, in essence, elevate form over substance, which Florida Housing chose not to do in *Eclipse*. Accordingly, Villa Capri has met threshold.

### **RECOMMENDATION**

Based on the forgoing, it is recommended that Florida Housing enter an Order which finds that Villa Capri's Universal Application Response has met threshold.

---

Diane D. Tremor  
Informal Hearing Officer  
Rose, Sundstrom & Bentley  
2548 Blairstone Pines Drive  
P.O. Box 1567  
Tallahassee, FL 32302-1567  
Fax Filing [850] 877-6555