

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

IN THE MATTER OF:

VILLA CAPRI ASSOCIATES, LTD.,  
Petitioner,

v.

FHFC CASE NO.: 2008-058UC

FLORIDA HOUSING FINANCE  
CORPORATION,  
Respondent.

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**RESPONDENT'S PROPOSED RECOMMENDED ORDER ON REMAND**

The Respondent Florida Housing Finance Corporation ("Florida Housing"), files its Proposed Recommended Order on Remand, and says:

**Appearances**

For Petitioner:

Michael P. Donaldson  
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Tallahassee, FL 32302-0190

For Respondent:

Wellington Meffert, General Counsel  
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FILED WITH THE CLERK OF THE FLORIDA  
HOUSING FINANCE CORPORATION

*Della M. Harrell* DATE: 3/12/2010

## **JOINT EXHIBITS**

The following exhibits were admitted into evidence:

1. Record on Appeal, Villa Capri Associates, Ltd., v. Florida Housing Finance Corporation,
2. Mandate and Opinion of the First District Court of Appeal
3. Initial Brief, Answer Brief, and Reply Brief

## **PETITIONER'S EXHIBITS**

1. Google Earth Satellite Photo of Miami-Homestead Area March 5, 2009
2. Google Map of 14500 SW 280<sup>th</sup> St., Miami, FL 33032 and 14500 SW 280<sup>th</sup> St., Homestead, FL 33032; MapQuest Map of 14500 SW 280<sup>th</sup> St., Homestead, FL 33032-8308; and Yahoo Map of 14500 SW 280<sup>th</sup> St., Homestead, FL 33032-8308

## **WITNESSES**

For Petitioner:

Leonard Wolfe

For Respondent:

None.

## **PRELIMINARY STATEMENT**

The issue in this case is whether Florida Housing properly evaluated and scored Petitioner's application, more specifically, whether Florida Housing correctly found that Villa Capri failed to adequately provide verification that electric infrastructure was available to the project site on or before the application deadline, as required by Florida Housing's rules.

### **Statement of the Case**

This proceeding is conducted pursuant to the opinion and mandate of the First District Court of Appeal (the "Court"), in Villa Capri Associates, Ltd., v. Florida Housing Finance Corporation, 23 So.3d 795 (Fla. 1<sup>st</sup> DCA 2009). The District Court of Appeal specifically held that by failing to publish the Final Order in Eclipse West Associates, Ltd. v. Florida Housing Finance Corporation, FHFC Case No. 2006-078RRLP (March 13, 2007) on the Florida Housing website in the same location as all its other final orders, Florida Housing had deprived Villa Capri of the use of that case in its argument in the hearing below. To remedy this error, the Court provided, "Accordingly, we remand for Florida Housing to submit the instant case to a hearing officer to conduct a hearing to assess the applicability of Eclipse to this case." Villa Capri Associates Ltd., 23 So. 3d at 798.

Pursuant to the remand and after notice, an informal hearing was held in this matter before Hearing Officer Diane D. Tremor on February 23, 2010, in Tallahassee, Florida.

Previously, an informal hearing was held before Hearing Officer Tremor on August 27, 2008. That hearing resulted in the issuance of a Recommended Order on September 8, 2008, finding that Florida Housing had scored Villa Capri's application as required by its rules, and recommending that Villa Capri's petition be dismissed. On October 13, 2008, Florida Housing issued a Final Order adopting the findings of fact, conclusions of law, and the recommendation of the Recommended Order. Petitioner then filed an appeal of the Final Order.

On February 10, 2010, Petitioner filed an "Amended Petition for Review" (the "Amended Petition"), which was accepted at hearing on February 23, 2010.

### **Findings of Fact**

1. Florida Housing adopts the Findings of Fact contained in the Recommended Order dated September 8, 2009, and incorporates those Findings of Fact as though fully set forth in this Proposed Recommended Order, and adds additional Findings of Fact as set forth below.

2. Eclipse West Associates, Ltd. v. Florida Housing Finance Corporation, FHFC Case No. 2006-078RRLP (Final Order March 13, 2007), addressed an application for funding through the 2006 Rental Recovery Loan Program ("RRLP"), a disaster recovery program established to assist areas impacted by the storms of 2004-2005. Ch. 2006-69, s. 31, Laws of Fla. The RRLP

application and selection process was similar in many respects to the SAIL program, but was implemented by R. 67ER06-27, Fla. Admin. Code..

3. The issue in Eclipse was whether the address provided for the development site in its RRLP application was an address that actually existed, not whether the address given on a verification of electric infrastructure availability was inconsistent with the project address shown throughout its application. The Eclipse application consistently and without exception referred to the development site as “a portion of the property located at the corner of NW Flagler Drive and NW 4<sup>th</sup> Street, Ft. Lauderdale, Florida 33301<sup>1</sup>,” throughout its application. (Jt. Exh. 1 at 76)

4. A NOPSE filed on the Eclipse application (Jt. Exh. 1 at 76) by Petitioner’s principal, Mara Makes, claimed that “NW Flagler Drive is not the name of a street in Ft. Lauderdale, FL.” (Jt. Exh 3 – Amended Answer Brief - at 109) Florida Housing, using a computer program, “DeLorme Street Atlas USA 2006,” accepted the contention of Ms. Makes’ NOPSE, that the stated address of the Eclipse project site did not exist, and rejected the Eclipse application. (Jt. Exh. 1 at 80, 99-102)

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<sup>1</sup> As the Eclipse project site was not developed, the USPS had not assigned a street address.

5. The DeLorme Street Atlas program was adopted in the RRLP Application Instructions only for purpose of determining the project's proximity to certain services or amenities for tie-breaker scoring. (Jt. Exh. 1 at 141)

6. As part of its cure, the Eclipse applicant filed a letter from Florida Power & Light which, as did the letter in the instant case, failed to verify electric service was available at the site on or before the application deadline. (Jt. Exh. 1 at 78)

7. The Eclipse applicant filed its petition challenging Florida Housing's scoring determination. A notice of hearing was provided to all RRLP applicants. (Jt. Exh. 1 at 87-93)

8. In preparation for the Eclipse hearing, Florida Housing discovered that various units of local government referred to the street as "Flagler Drive," "Flagler Avenue," and simply "Flagler." (Jt. Exh. 1 at 80-82) Further, Florida Housing determined that it had not adopted the DeLorme Street Map 2008 software for the purpose of determining correct street names, and did not require applicants to use that program to verify street names in applications. (Jt. Exh. 1 at 80) Florida Housing and the applicant filed a Joint Proposed Recommended Order with the Hearing Officer at the noticed hearing, correcting Florida Housing's erroneous acceptance of Ms. Mades' NOPSE.

9. Eclipse had filed the defective cure letter in response to Florida Housing's erroneous acceptance of the NOPSE. Florida Housing's Final Order reversed its error, accepted the NW Flagler Drive address, and returned Eclipse to *status quo ante*, which mooted the need for a cure letter intended to correct the address. (R 1 at 83)

### **Conclusions of Law**

1. Florida Housing adopts the Conclusions of Law contained in the Recommended Order dated September 8, 2008, and incorporates those Conclusions of Law as though fully set forth in this Proposed Recommended Order, and adds additional Conclusions of Law as set forth below.

2. The issue for determination remains whether, in scoring Villa Capri's 2008 Universal Cycle Application, Florida Housing properly applied its rules to the documents filed by Villa Capri: more specifically whether Florida Housing correctly required Petitioner to resolve the inconsistency created by its letter verifying availability of electric infrastructure (Application Exhibit 28) to an address in Homestead, Florida, when all other references in its application showed the project as being in Miami, Florida; and whether Florida Housing correctly read the "cure" letter, showing service to a Miami address as a complete replacement for the initial letter. This review on remand is to determine whether consideration of Eclipse West Associates, Ltd. v. Florida Housing Finance Corporation, FHFC

Case No. 2006-078RRLP (March 13, 2007), compels a change in the previous Recommendation of the Hearing Officer filed on September 8, 2008.

3. Villa Capri has argued that because *Eclipse* involved an “address inconsistency,” (Jt. Exh. 1 at 32) that the *Eclipse* case “involved facts almost identical,” and is “exactly on point,” to the instant case, (1B at 11), that had Petitioner been able to argue *Eclipse* at hearing, Florida Housing would have ignored its rules and case law and excused the threshold failure in Appellant’s Universal Cycle application.

4. Florida Housing disqualified Villa Capri’s application for funding based on an even-handed, implementation of its own rules, consistent with its precedent cases. Florida Housing’s decision was consistent with the plain language of its rules, and consistent with prior cases. E.g., Catholic Charities Housing, Inc., v. Florida Housing Finance Corporation, FHFC Case No. 2004-019UC (Final Order October 14, 2004) (Defective infrastructure verification form submitted as cure did not verify availability to site on or before application deadline; Florida Housing could not ignore the cure document to find required information elsewhere in the application.)

5. Villa Capri’s application included a verification of electric infrastructure availability that identified the project site as being in Homestead, while otherwise throughout its application, Villa Capri represented that the project

was in Miami. This inconsistency created doubt as to just what city FP&L was providing service. The only evidence in the record belies Appellant's statement that "either place was technically accurate . . . ." The United States Postal Service, which assigns street addresses and zip codes, provides that this address is in Homestead<sup>2</sup> (R\_ at \_\_).

6. The Universal Cycle application rules, because the competition for funding is extremely intense, are demanding in their nature and strictly applied. Florida Housing staff cannot attempt to reconcile inconsistent information, and is not permitted to "fill in the blanks," for an applicant. R. 67-48.004(1)(b), Fla. Admin. Code. *Marian Manor, Inc., v. Florida Housing Finance Corporation*, FHFC Case No. 2006-019UC (Final Order July 31, 2006). As the IHO noted, to have done as Appellant suggested in this case would have required Florida Housing to totally disregard its own rules. (Jt. Exh. 1 at 185) Thus, Florida Housing was not free to speculate whether the city or the zip code in the original Florida Power & Light letter was correct, or whether the FP&L letter of January 18, 2008, referred to Appellant's project at all. Villa Capri's error was more than a "technical discrepancy."

7. Villa Capri states that the Eclipse case ". . . involved facts almost identical to this case . . . ." It is the "almost," that is the rock upon which

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<sup>2</sup> The USPS provides several alternative city designations for this address and zip code. Miami is not among the alternatives. To have been "technically accurate," Appellant would have had to change all other documents in the

Petitioner's argument founders. Far from being "identical," the two cases have in common only that the address of the proposed project was an issue for litigation. In the instant case, the application exhibit 28, verifying availability of electrical infrastructure, created an inconsistency which an applicant was required under the rules to reconcile. R. 67-48.004(1)(a), Fla. Admin. Code. Appellant's cure, while reconciling the inconsistent city (Homestead) shown in the January 18<sup>th</sup> letter's address, failed to demonstrate that electric infrastructure was available to the site on or before the application deadline, thus failing to satisfy the threshold requirement.

8. Eclipse is clearly distinguishable from this case. In Eclipse, the issue raised was whether the project address existed at all; here the initial issue was whether the address given verified electric infrastructure availability to the Villa Capri project. Villa Capri's second letter apparently cured the question of inconsistent addresses, but did not confirm availability of electrical infrastructure to the project site on or before the application deadline.

9. In Eclipse, Florida Housing used a computer program for a purpose which it was not adopted by rule to reject Eclipse's application and require Eclipse to file a cure letter. Florida Housing corrected its own error when it settled the case, which included returning matters to the *status quo ante*. This required Florida

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application to reflect Homestead.

Housing to disregard Eclipse's cure letter, which but for Florida Housing's error, it would not have filed.

10. In Eclipse, the applicant consistently referred to the location of its project throughout its RRLP application as "a portion of the property located at the corner of NW Flagler Drive and NW 4<sup>th</sup> Street, Ft. Lauderdale, Florida 33301<sup>3</sup>." The NOPSE filed by Ms. Mades argued that "NW Flagler Drive is not the name of a street in Ft. Lauderdale, FL. Florida Housing misapplied its own rules when it relied on the "DeLorme Street Atlas USA 2006" software program to make its decision to accept Ms. Mades' NOPSE and to reject the Eclipse application, because the street name used by Eclipse to describe the address of its project was not recognized by that software. While Florida Housing's RRLP instructions (adopted by and incorporated into its rules prescribed the use of the Street Atlas software for certain, limited purposes R. 67-48.004, nothing in the RRLP rules required applicants to identify projects using street names found in that software (or any other specific source of street name information). In large part, the final order in Eclipse evidences Florida Housing's efforts to rectify its admitted misuse of the Street Atlas software in scoring and rejecting the Eclipse application in the first instance.

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<sup>3</sup> As the proposed Eclipse project site was not developed, the Post Office had not assigned a street number.

11. The difference in triggering events in the two cases determined the differing outcomes in what are represented as similar factual circumstances. In Eclipse, the event that triggered the proceeding was Florida Housing's error in accepting the NOPSE that stated that the Eclipse project address was nonexistent. In Villa Capri, the triggering event was Florida Housing's correctly noting that electric service was verified for a different city than the address given for the Villa Capri project throughout its application. In each case, it was incumbent on the party committing an error to rectify that error. For Florida Housing in Eclipse, that meant returning the applicant to its status as though Florida Housing had not erred, which meant that no cure materials should have been required. For Villa Capri, that meant curing the inconsistent addresses. That the cure itself created yet another problem was not reason for Florida Housing to return Villa Capri to status quo ante.

12. "This Court will not depart from the contemporaneous construction of a statute by an agency charged with its enforcement unless the construction is 'clearly unauthorized or erroneous;'" Level 3 Communications, Inc. v Jacobs, 841 So.2d 447, 450 (Fla. 2003), quoting P.W. Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988). "An agency's interpretation of a statute it is charged with enforcing, is entitled to great deference." Level 3 Communications, Inc. v Jacobs, 841 So.2d at 450. Appellant incorrectly argues that Florida Housing's interpretation is "clearly

contradictory to the plain and unambiguous language of the statute,” so there is no reason to deprive the agency of such deference. The interpretation will be upheld if the agency’s construction falls within the permissible range of interpretations. Colbert v. Department of Health, 890 So.2d 1165 (Fla. 1<sup>st</sup> DCA 2004). Even if somehow problematic, an agency’s interpretation of a statute it is charged with enforcing is entitled to great deference. Morris v. Division of Retirement, 696 So.2d 830 (Fla. 1<sup>st</sup> DCA 1997). And, a reviewing court must defer to any statutory interpretation by an administrative agency which is within the range of the possible and reasonable. Natelson v. Department of Insurance, 454 So.2d 31 (Fla. 1<sup>st</sup> DCA 1984).

13. The burden is on an applicant seeking funding to demonstrate entitlement. Department of Banking and Finance v. Osborne Stern and Company, 670 So.2d 932 (Fla. 1996). Under the rules applicable here, applicants must provide information that is both correct and internally consistent. R. 67-21.003(X) and 67-48.004(X), Fla. Admin. Code.

14. Petitioner’s argument that infrastructure availability could be gleaned from other parts of the application was also properly rejected, as such arguments have been consistently rejected by Florida Housing through the history of the Universal Application Cycle. Plaza La Isabela, LLC, v. Florida Housing Finance Corporation, FHFC Case No. 2006-022UC (Final Order July 31, 2006)

(“Respondent may not assist Petitioner by referring to other exhibits to ascertain that pertinent information.”); Marian Manor, Inc., v. Florida Housing Finance Corporation, FHFC Case No. 2006-019UC (Final Order July 31, 2006); Catholic Charities Housing Inc. v. Florida Housing Finance Corporation, FHFC case No. 2004-019-UC (Final Order October 14, 2004); and continued to do so in the 2008 Universal Cycle, Bonita Cove, LLC, v. Florida Housing Finance Corporation, FHFC Case No. 2008-056UC (Final Order September 26, 2008). Florida Housing would have improperly changed its interpretation of its own rule if it had looked to other parts of the application to reconcile the inconsistent address in Villa Capri’s Exhibit 28.

15. It is clear from the plain language of the Universal Cycle rules,

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. R. 67-21.003(6) and 67-48.004(6), *Fla. Admin. Code*.

16. The IHO properly found that the original FP&L letter regarding availability of electric infrastructure was completely replaced by the letter submitted as Appellant’s cure. This is clear and unambiguous, and the IHO could not have reasonably concluded otherwise.

17. Florida Housing has consistently rejected applications which do not clearly establish availability of the required elements of infrastructure on the

project site not later than the application deadline. City View Apartments at Hughes Square v. Florida Housing Finance Corporation, FHFC case No. 2004-028-UC (Final Order October 14, 2004) (Verification form “failed to reference whether electricity was available to the development site prior to the Application Deadline of March 31, 2004.”); Brownsville Manor Apartments v. Florida Housing Finance Corporation, FHFC case No. 2004-029-UC (Final Order October 14, 2004) (Verification forms failed to demonstrate availability of sewer, water infrastructure to the development site prior to the Application Deadline, additionally, the local government verification form reflected a different address from the project address as stated elsewhere in the application.); in Catholic Charities Housing Inc. v. Florida Housing Finance Corporation, FHFC case No. 2004-019-UC (Final Order October 14, 2004), where as in the instant case, the cure materials filed to establish availability of (sewer capacity) infrastructure to the site as of the Universal Cycle Application Deadline, because the form supplied as a cure contained a later date; and Bonita Cove LLC, v. Florida Housing Finance Corporation, FHFC Case No. 2008-56UC (Final Order September 26, 2008).

18. The Hearing Officer’s acknowledgment of Villa Capri’s argument as “attractive” and that “the result herein may seem harsh,” also reflected prior cases. As the Hearing Officer noted in Villas on the Green, Ltd., v. Florida Housing Finance Corporation, FHFC Case No. 2002-0017 (Final Order October

10, 2002), “[A]lthough the result may seem harsh under these specific circumstances, the Respondent is bound to follow its rules with regard to the application process, just as applicants are bound by such rules.”)

19. Regardless whether the facts in Eclipse are similar or dissimilar when compared to the instant case, the decision in Eclipse is not precedent to the instant case, as a matter of law. Florida Housing’s Board has articulated its view of the precedential value of prior cases where a Final Order resulted from an agreement between the parties. In Fountain Terrace Apartments Limited Partnership v. Florida Housing Finance Corporation, FHFC Case No. 2008-102UC (Final Order July 24, 2009), the Board adopted the Hearing Officer’s Conclusion of Law (Recommended Order, p. 13) which states:

While the Final Order in the Winter Haven<sup>4</sup> case resulted in an interpretation of the . . . rule . . . which is different than the interpretation reached in this Recommended Order, the Winter Haven decision did not follow 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.

20. Just as in Winter Haven, the Board’s order in Eclipse was the result of the parties’ submitting a Joint Proposed Recommended Order reflecting a settlement of the issues. And in both the Joint PRO was then simply incorporated into an Order and forwarded to the Board by the Hearing Officer.

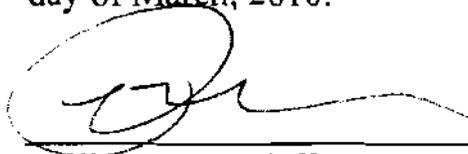
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<sup>4</sup> Winter Haven Gardens, Ltd., v. Florida Housing Finance Corporation, FHFC Case No. 2008-057UC (Final Order September 26, 2008)

21. Florida Housing's decision in Eclipse West Associates, Ltd. v. Florida Housing Finance Corporation , FHFC Case No. 2006-078RRLP (Final Order March 13, 2007) does not affect or change the recommendation previously filed in this case on September 8, 2009, for the reasons stated above.

WHEREFORE, the Respondent, Florida Housing Finance Corporation, for the reasons set forth above, requests that this Honorable Hearing Officer find that the Eclipse case does not affect the outcome of the instant case, and issue an order recommending that Villa Capri's Petition be DISMISSED.

Respectfully Submitted this 12<sup>th</sup> day of March, 2010.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Mail and by U. S. Mail to Michael P. Donaldson, Esq., Carlton Fields, PA, P. O. Drawer 190, Tallahassee, FL, 32302, and by Electronic Mail and by Hand Delivery to Diane Tremor, Hearing Officer, Rose Sundstrom & Bentley, 2548 Blairstone Pines Drive, Tallahassee, FL 32301, this 12<sup>th</sup> day of March, 2010.

A handwritten signature in black ink, appearing to read 'W. Meffert, II', written over a horizontal line.

Wellington H. Meffert, II  
General Counsel