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.
_____/

FINAL ORDER ON REMAND

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on April 30, 2010. After review of the record hearing argument of counsel, and being fully advised in this matter, the Board finds and orders as follows:

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.

This matter is considered pursuant to the opinion and mandate of the First District Court of Appeal (the "Court"), in Villa Capri Associates, Ltd., v. Florida

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Della M Harrell /DATE: 5/4/2010

Housing Finance Corporation, 23 So.3d 795 (Fla. 1st 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. On March 23, 2010, the Hearing Officer filed a Recommended Order, a copy of which is attached as Exhibit "A."

Written Argument

On March 26, 2010, Villa Capri filed its "Written Argument," in response to the Recommended Order, arguing that the Hearing Officer erred in her conclusion that the cases were factually distinguishable due to the difference in "triggering events," in the two cases. A copy of the Written Argument is attached as exhibit "B." Villa Capri, having previously argued on appeal that the cases were "almost identical," argued that the cases are "identical factually and legally," because both

cases involved, at some point, a letter that failed to verify that electric service was available on or before the application deadline.

In Eclipse, Florida Housing's scoring error—accepting the NOPSE's contention, based on a mapping program not approved by rule for that purpose, began a series of events that culminated in Florida Housing admitting its error and correcting same by placing the Eclipse Applicant in the same position as before the error; as though its cure had never been filed. In Villa Capri, the Applicant created an inconsistency when its electric service verification letter bore an address in a different city from every other part of its application. The letter offered as a cure for that issue created yet another problem—that while the address issue was resolved, the letter failed to demonstrate that electric service was available to the project site on or before the application deadline.

Villa Capri's Written Argument is rejected.

Findings of Fact

1. Florida Housing adopts the Findings of Fact contained in the Recommended Order dated March 23, 2010, and incorporates those Findings of Fact as though fully set forth in this Order.

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 Order.

2. 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 in the Recommended Order.

ORDER

In accordance with the foregoing, it is hereby **ORDERED:**

1. The findings of fact of the Recommended Order dated March 23, 2010, are adopted as Florida Housing's findings of fact and incorporated by reference as though fully set forth in this Order.

2. The conclusions of law of the Recommended Order dated March 23, 2010, are adopted as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Order.

3. Villa Capri's Written Argument in opposition to the Recommended Order is rejected.

IT IS HEREBY ORDERED that:

Villa Capri's Petition is hereby DISMISSED.

DONE and ORDERED this **30th** day of April, 2010.

FLORIDA HOUSING FINANCE ORPORATION

By: _____
Chair

Copies to:

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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.
_____/

RECOMMENDED ORDER

Pursuant to notice, Sections 120.569 and 120.57(2), Florida Statutes, and the opinion of the District Court of Appeal, First District, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal hearing in the captioned proceeding on February 23, 2010, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Michael P. Donaldson, Esq.
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Exhibit A

STATEMENT OF THE ISSUE

The prime 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. In resolving this issue, the District Court of Appeal, First District, has directed an assessment of the applicability of a prior final order of the Florida Housing Finance Corporation to the facts of this case.

PRELIMINARY STATEMENT

Petitioner, VILLA CAPRI ASSOCIATES, LTD., submitted an application for financing in the 2008 Universal Cycle. In final scoring, its application was rejected by Respondent, FLORIDA HOUSING FINANCE CORPORATION, for failure to meet a threshold requirement regarding the availability of electricity. Villa Capri requested an informal hearing, which was conducted on August 22, 2008. The undersigned Hearing Officer entered a Recommended Order on September 8, 2008, concluding that Florida Housing properly rejected Villa Capri's application. That Recommended Order is attached to this Recommended Order as Exhibit A. On September 26, 2008, Florida Housing entered its Final Order adopting and incorporating by reference the Findings of Fact and Conclusions of Law contained within the Recommended Order, and ordering that Villa Capri's

application be rejected for failure to establish the threshold requirement that electricity be available to the project site as of the application deadline.

Villa Capri appealed the Final Order, contending that Florida Housing had reached a different decision in a similar case (Eclipse West Associates, Ltd. v. Florida Housing Finance Corp., Case No. 2006-078RRLP (March 13, 2007)) and that, by not properly indexing and publishing the Final Order in the Eclipse case, the fairness of the proceeding was impaired. The District Court of Appeal agreed, reversed the Final Order and remanded this matter for submission "to a hearing officer to conduct a hearing to assess the applicability of Eclipse to this case." Villa Capri Associates, Ltd. v. Florida Housing Finance Corp., 23 So.3d 795 (Fla. 1st DCA 2009). The District Court's opinion is attached hereto as Exhibit B.

Pursuant to this remand, an informal hearing was held on February 23, 2010. Received into evidence at the hearing were Joint Exhibits 1 through 3 and Petitioner's Exhibits 1 and 2. On March 12, 2020, the parties timely filed their separate Proposed Recommended Orders, and those submittals 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 as to the Villa Capri and Eclipse applications, scorings and administrative proceedings are found:

The Villa Capri Application, Scoring and Administrative Process

1. The facts surrounding Villa Capri's 2008 application and its scoring are fully set forth in the Findings of Fact of the September 8, 2008 Recommended Order, which is attached hereto as Exhibit A. Those Findings of Fact are adopted and incorporated herein and are repeated and/or summarized herein only for the purpose of providing the analysis of the applicability of the Final Order in Eclipse West Associates, Ltd. v. Florida Housing Finance Corporation, FHFC Case No. 2006-078RRLP (March 13, 2007) (hereinafter Eclipse) to the facts of this case, as directed by the District Court of Appeal.

2. At the remand hearing, Villa Capri proffered into evidence Petitioner's Exhibits 1 and 2. Petitioner's Exhibit 1 is a Google Earth Satellite Photograph and Petitioner's Exhibit 2 is a composite comprised of internet Google, Mapquest and Yahoo maps. These documents and sources are not adopted or referenced in the rules which govern Florida Housing's

application and scoring process, nor were they included within Villa Capri's initial application or its cure documentation submitted thereafter. The hearing was an informal hearing, with neither party claiming disputed issues of material fact.

3. Throughout its initially filed application, with one exception, Petitioner identified the address of its proposed development as "14500 SW 280th Street, *Miami*, Florida 33032." (Emphasis supplied) The one exception was an exhibit containing a letter from Florida Power & Light Company ("FP&L") stating that prior to the date of Villa Capri's application, FP&L had 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 280th St., *Homestead*, FL 33032." (Emphasis supplied)

4. In its preliminary scoring, Florida Housing determined that Petitioner failed the threshold requirement regarding availability of electricity because the FP&L 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."

5. Petitioner filed a cure in response to its scoring regarding the availability of electricity by submitting a "revised Exhibit 28," which was a

letter dated May 30, 2008 from FP&L. This letter referenced the project at "14500 SW 280th Street, *Miami*, Fl 33032," which address was consistent with the remainder of the application, and stated that "**at the present time**, FPL has sufficient capacity to provide electric service to the above captioned property." (Emphasis Supplied)

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 the FP&L letter did not specifically state that electric service was available to the site on or before the application deadline as required by Florida Housing's rules governing the application process.

7. Villa Capri timely petitioned for an informal hearing, which was conducted by the undersigned Hearing Officer. While the parties entered into a Joint Stipulation of Facts describing the application process and the circumstances regarding the scoring of Petitioner's application, there were no stipulations of law regarding the scoring of Petitioner's application. Subsequent to the hearing, a Recommended Order and Final Order were entered rejecting Villa Capri's application for failure to establish the threshold requirement that electricity be available to the project site as of the date of the application deadline.

The Eclipse Application, Scoring and Administrative Process

8. Eclipse submitted an application for funding from the 2006 Rental Recovery Loan Program. With regard to the issues for resolution in this proceeding, Florida Housing's rules governing the Eclipse application and the Villa Capri application were the same.

9. Throughout its entire original application, Eclipse designated the address and location of its proposed project as "at the SE corner of NW Flagler Drive and NW 4th Street, Ft. Lauderdale, Florida 33301." The exhibit from FP&L verifying the availability of electric service as of the application deadline referenced that same address.

10. In initial scoring, Florida Housing determined that Eclipse's application failed to meet threshold regarding numerous requirements because information provided by a NOPSE (comments from another applicant) called into question the accuracy of the address of the development site. In each instance, Florida Housing concluded that

> While Street Atlas USA 2006, published by DeLorme, recognizes Flagler Drive, N. Flagler Drive, and NW Flager Avenue, it does not recognize NW Flagler Drive as a valid street name.

11. As a result of initial scoring, Eclipse filed cure documents changing the project address throughout its application by referencing "NW Flagler Avenue," as opposed to "NW Flagler Drive." This necessitated the

filing of a number of revised exhibits as cures, including the exhibit verifying the availability of electricity. That exhibit consisted of a new letter from FP&L verifying the availability of electricity to the NW Flagler Avenue address as of the date of that letter, a date subsequent to the application deadline. In final scoring, Florida Housing determined that Eclipse's application failed to achieve threshold with regard to the availability of electricity as of the application deadline date.

12. Eclipse petitioned for an informal administrative hearing regarding the rejection of its application, and an informal hearing was scheduled to be conducted before this undersigned Hearing Officer on December 1, 2006. Prior to the scheduled hearing, Eclipse and Florida Housing reached an agreement, announced that fact at the commencement of the scheduled hearing and stated their intent to file a Joint Proposed Recommended Order. Accordingly, no hearing was held. The Joint Proposed Recommended Order, filed with the undersigned on February 19, 2007, resolved the issues by concluding, in part, that Florida Housing's rules do not require applicants to identify projects using street names found in DeLorme's Street Atlas software, that various local governmental authorities recognize the address listed in Eclipse's initial application and that, therefore, there was no necessity for the cure documents to have been filed.

Accordingly, the parties stipulated that the issue concerning the FP&L letter submitted as a cure was moot, and that Eclipse's application as initially submitted should be scored as having satisfied all threshold requirements.

13. As noted above, the parties reached agreement on the issues prior to the informal administrative hearing, and no hearing was held. After submission of the parties' Joint Proposed Recommended Order, the undersigned entered an "Order" stating that there was no need for additional Findings of Fact and/or Conclusions of Law and that none were made. The Joint Proposed Recommended Order, along with its exhibits, were returned to the Florida Housing Finance Corporation for entry of a Final Order by the undersigned's "Order" dated March 2, 2007. By Final Order filed on March 19, 2007, Florida Housing determined that the address utilized in Eclipse's *initial* application satisfied the rules, that the issue concerning the cure FP&L letter was moot, and that Eclipse's application should be scored as having satisfied all threshold requirements. The parties' Joint Proposed Recommended Order (without exhibits), the undersigned's "Order," and Florida Housing's Final Order are attached hereto as Exhibit C. It should be noted that Florida Housing's Final Order in the Eclipse case erroneously states that "an informal hearing was held," that the Hearing Officer issued a "Recommended Order," and that the Hearing Officer recommended certain

findings and conclusions.[1] In reality, the undersigned Hearing Officer specifically made no Findings of Fact, Conclusions of Law or Recommendation. The matter was submitted to the Board of Directors of Florida Housing based upon a stipulated agreement of the parties as to the facts, the law and a recommendation in the form of a "Joint Proposed Recommended Order."

CONCLUSIONS OF LAW

Due to the fact that the Final Order in the Eclipse case was not published or indexed, the appellate court concluded that the fairness of the proceedings was impaired. The Court stated:

> Had the Appellant known of the decision in Eclipse prior to the hearing, it could have raised the same legal arguments which were successful in Eclipse. Appellant should be allowed to rely on Florida Housing precedent in presenting its case to Florida Housing.

Villa Capri Associates, Ltd. v. Florida Housing Finance Corp., 23 So.3d 795 (Fla. 1st DCA 2009). Accordingly, this cause was remanded for a hearing to assess the applicability of Eclipse to this case.

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[1] This mistake was no doubt the source of the appellate court's error in referencing the findings and conclusions of the "Hearing Officer" in the Eclipse case. In fact, no hearing was held, no findings, conclusions or recommendation were made by the Hearing Officer, and the findings of fact, conclusions of law and Final Order resulted from a joint stipulation by the parties.

In its Proposed Recommended Order, Villa Capri frames the issues for this remand proceeding to be whether Villa Capri correctly identified its development location in its initial application and whether the cure materials submitted by Villa Capri were unnecessary. As more fully explained below, the undersigned disagrees that these are the issues for determination upon remand. While those were the issues in the Eclipse case, they are not the issues here. The cure material submitted in Villa Capri was occasioned by Florida Housing's determination that the addresses set forth throughout its initial application and in the initial FP&L letter affirming the availability of electric service were inconsistent and in conflict, and *not* that one of the two inconsistent addresses was correct or incorrect.

The instant case and the Eclipse case have one commonality; to wit: the FP&L letter submitted as a cure to document the availability of electricity to the proposed development site failed to demonstrate such availability on or before the application deadline date. There, the similarity between the two cases ends.

Of prime distinction between the factual circumstances in Villa Capri and in Eclipse is the triggering event which led to the cure letters from FP&L. The triggering event in Eclipse was Florida Housing's erroneous determination that Eclipse had provided a **faulty**, nonexistent address, albeit

consistent, throughout its initial application. That mistake was occasioned by its wrongful reliance upon a source not adopted by rule for the purpose of determining correct street names. The triggering event in Villa Capri was that Villa Capri provided an address with respect to its verification of the availability of electricity which was **inconsistent** with the address provided throughout the remainder of its application. Accordingly, it could not be determined from the initial application that electricity was available to the site described by Villa Capri as its proposed development site.

The determination of a faulty address in Eclipse was erroneous, and the cure letter was filed by Eclipse due to Florida Housing's error. The determination of a facial inconsistency in Villa Capri was correct, and Villa Capri was required to resolve that inconsistency through cure documentation.

In Eclipse, the applicant filed cure documentation changing the proper address used in its initial application to another address (which, apparently, was equally proper) in response to Florida Housing's erroneous initial scoring. However, Florida Housing conceded its error prior to a requested administrative hearing and determined that, in fact, the address initially provided by Eclipse was correct and no cure documentation was necessary. Accordingly, it disregarded the cure letter from FP&L stating that electricity

was available as of the date of that letter, and accepted the initial letter from FP&L showing availability as of the date of the application deadline.

In Villa Capri, Florida Housing was not in error in finding an inconsistency in the initial application because there was, in fact, an inconsistent address with regard to the exhibit verifying the availability of electricity, and a cure was necessary to resolve that inconsistency. The fact that the cure itself, while reconciling the previous address inconsistency, created yet another problem regarding the time at which electrical service was available to the site did not mean that no cure documentation was necessary to resolve the inconsistency of addresses provided by the applicant. Unlike Eclipse, Florida Housing made no determination that either the Miami address or the Homestead address was correct or incorrect; it simply noted that the Homestead address conflicted with the Miami address provided throughout Villa Capri's application.

In its Proposed Recommended Order, Villa Capri again argues that other portions of its application demonstrated that infrastructure, such as water, sewer and roads, were available as of the application deadline and, therefore, the FP&L cure letter should be read only insofar as it changes the address to conform with the address stated throughout the remainder of the application and not with regard to the date of the availability of electric

service. Not only does this argument disregard the fact that the availability of other infrastructure services were referenced with regard to the Miami address stated in the application, these same arguments were made and rejected in the undersigned's initial Recommended Order in this case and are not pertinent to the facts or rationale utilized in the Eclipse case. [2] Eclipse did not allow the use of one application exhibit to supply the missing or deficient information contained in another exhibit. Nor does Eclipse deviate from Florida Housing's rule that a cure document replaces the document cured. Eclipse did not mix and match cure documentation with the initially submitted application or with other exhibits contained within the application. The Eclipse case simply held that the FP&L cure document was not necessary because Florida Housing erroneously determined that Eclipse's initial application contained a faulty address. Eclipse does not establish a precedent affecting the outcome of this case.

There is one further distinction between the Eclipse case and the instant case. While both applications were denied because of the FP&L cure letters and both applicants petitioned for an informal hearing regarding that denial, no hearing was held in Eclipse. Instead, prior to the conduct of a hearing requested by Eclipse, Florida Housing determined it had erred in

[2] It does not appear that these arguments were raised or discussed on appeal.

rejecting the address provided throughout Eclipse's original application. Neither Florida Housing's initial scoring nor its conceded position that the original address provided was sufficient were subject to an evidentiary or informal administrative hearing or a substantive review of the facts and law by either a hearing officer or the agency head. Accordingly, even if the factual situation in Eclipse were identical to those in the instant matter, which is not the case, the degree of precedential value of a Final Order resulting solely from a settlement or agreement between the parties may be less than a Final Order resulting from the administrative hearing process. See Fountain Terrace Apartments Limited Partnership v. Florida Housing Finance Corp., FHFC Case No. 2008-102UC (Final Order, July 24, 2009).

In summary, a review of the facts and law of the Eclipse case leads to the conclusion that the two cases are not factually or legally similar and do not compel a result different than that reached in the initial Final Order rendered in this case. Had Villa Capri been aware of the nonpublished and unindexed Final Order in Eclipse, it could not have raised the factual or legal argument that was deemed successful in Eclipse. In Eclipse, the address used throughout its application was not only correct, it was consistent. Being correct, there was no need for cure documentation showing infrastructure availability. That was apparent from the initial application. In

contrast, there was a discrepancy in Villa Capri's initial application between the identification of the city in which the project was located, as claimed throughout the application, and the city in which FP&L verified the availability of electric service as of the date of the application. In Villa Capri, Florida Housing did not rely upon any non-rule policy to determine that there was a facial inconsistency in addresses. Accordingly, a cure was necessary to resolve that inconsistency. The cure provided resolved the inconsistency in identification of the project site, but failed to demonstrate that service was available as of the application deadline date in accordance with the rules which govern the application and scoring process. Florida Housing properly determined that Villa Capri's application failed to meet threshold requirements.

RECOMMENDED ORDER

Based upon the findings of fact and conclusions of law recited herein, it is recommended that a Final Order be entered holding that the Final Order in the case of Eclipse West Associates, Ltd. v. Florida Housing Finance Corp., (Case No. 2006-078RRLP (March 13, 2007), is factually and legally distinguishable from the instant case and does not affect the outcome of the Final Order entered on September 26, 2008.

Respectfully submitted this 23rd day of March, 2010.

Diane D. Tremor

DIANE D. TREMOR
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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

VILLA CAPRI ASSOCIATES, LTD,

Petitioner,

v.

FHFC CASE NO.: 2008-058UC
APPLICATION NO. 2008-266BS FLORIDA

HOUSING FINANCE CORPORATION,

Respondent.
_____/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on September 26, 2008. On or before , Villa Capri Associates, Ltd., ("Petitioner") submitted its 2008 Universal Cycle Application ("Application") to Florida Housing Finance Corporation ("Florida Housing") to compete for funding/allocation from the MMRB and SAIL Programs and an allocation of non-competitive housing credits. Petitioner timely filed its Petition for Review, pursuant to Sections 120.569 and 120.57(2), Florida Statutes, (the "Petition") challenging Florida Housing's scoring on parts of the Application. Florida Housing reviewed the Petition pursuant to Section 120.569(2)(c), Florida Statutes, and determined that the Petition did not raise disputed issues of material fact. An informal hearing was held in this case on August 27, 2008, in Tallahassee, Florida, before Florida

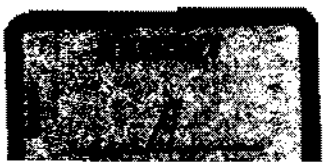

EXHIBIT
A

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
DATE 9-26-08

Exhibit A

Housing's designated Hearing Officer, Diane Tremor. Petitioner and Respondent timely filed Proposed Recommended Orders.

After consideration of the evidence, arguments, testimony presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer recommended Florida Housing enter a Final Order finding that Florida Housing's final scoring of Petitioner's application be upheld, and that Petitioner's application be rejected for failure to establish threshold requirement that electricity be available to the project site as of the application deadline.

RULING ON THE RECOMMENDED ORDER

The findings and conclusions of the Recommended Order are supported by competent substantial evidence.

ORDER

In accordance with the foregoing, it is hereby **ORDERED**:

1. The findings of fact of the Recommended Order are adopted as Florida Housing's findings of fact and incorporated by reference as though fully set forth in this Order.

2. The conclusions of law of the Recommended Order are adopted as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Order.

Accordingly, it is found and ordered that Florida Housing's final scoring of Petitioner's application be upheld, and that Petitioner's application be rejected for failure to establish threshold requirement that electricity be available to the project site as of the application deadline.

IT IS HEREBY ORDERED that Petitioner's Application be rejected for failure to establish threshold requirement that electricity be available to the project site as of the application deadline.

DONE and ORDERED this 26th day of September, 2008.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chairperson

Copies to:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

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.
_____/

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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Exhibit A

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 280th 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 280th 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 280th 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 280th 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 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.

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

Exhibit A

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

Exhibit A

"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 Petitiouer'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.

Diane D. Tremor

DIANE D. TREMOR
Hearing Officer for Florida
Housing Finance Corporation
Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
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Exhibit A

Copies furnished to:

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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.

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.
_____/

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).

ATTACHMENT "A"

Exhibit A

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 reeeived 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 "Applicatiou"), 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 respouse 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 A

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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By: _____

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Exhibit A

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

VILLA CAPRI ASSOCIATES, LTD.,

Appellant,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Appellee.

CASE NO. 1D08-5235

_____/

Opinion filed November 30, 2009.

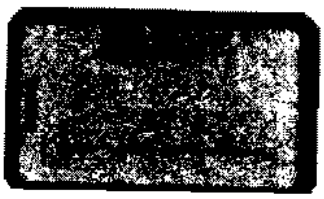
An appeal from an order of the Florida Housing Finance Corporation.

Michael P. Donaldson and Christine Davis Graves, of Carlton Fields, P.A., Tallahassee, for Appellant.

Wellington H. Meffert, II, General Counsel and Robert J. Pierce, Assistant General Counsel, Tallahassee, for Appellee.

BROWNING, JR., EDWIN B., SENIOR JUDGE.

Appellant seeks review of an order from the Florida Housing Finance Corporation (Florida Housing) which rejected Appellant's application for funding



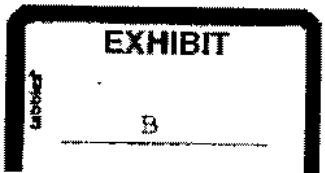


Exhibit A

to build affordable housing. Appellant argues that Florida Housing impaired the fairness of the proceeding below by failing to index an order in a previous case and post it to the public. Appellant contends that the previous decision was relevant and could have changed the outcome of the case had Appellant and the hearing officer had benefit of the decision. We agree and reverse on this issue.

Florida Housing administers various affordable housing programs, including Multifamily Mortgage Revenue Bonds (MMRB) and State Apartment Incentive Loan (SAIL). Because the demand for funding exceeds that which is available, 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 Florida Administrative Code Chapters 67-21 and 67-48.

Appellant provides affordable rental housing units and applied to Florida Housing for funding in 2008. Appellant sought $12,000,000 in MMRB funds and $3,700,000 in SAIL funds to help finance the construction of a 160-unit apartment complex in South Florida named Villa Capri Apartments. Appellant submitted a timely application, identifying the development as located in Miami; the application deadline was April 7, 2008.

On May 7, 2008, Florida Housing awarded Appellant a preliminary score of 66 points out of 66 possible points and 7.5 points out of 7.5 possible "tie-breaker"

points (awarded for proximity to certain services and facilities). Florida Housing, however, concluded that Appellant 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.

Appellant submitted timely cure materials to Florida Housing in response to the threshold failure. The cure documentation contained a letter from FPL dated May 30, 2008, which reflected a Miami address and stated that electricity was available to the site "at the present time." Florida Housing determined that the cure was deficient because the letter did not specifically state that the service was available to the site on or before the application deadline as required.

Appellant petitioned for an informal hearing. The issue for the hearing was whether Appellant's application met threshold requirements with respect to the availability of electrical infrastructure as of the application deadline date. Appellant argued at the hearing that the cure letter from FPL was not inconsistent with the original letter demonstrating an electrical infrastructure. The cure letter only addressed a location change to be consistent with the application. Appellant stated that neither the address in the cure letter nor the address in the application was incorrect; the project was located in an unincorporated portion of Miami-Dade

County, approximately the same distance from Homestead as Miami. Florida Housing, however, contended that the cure letter replaced the original letter concerning verification of infrastructure. Thus, the cure letter was the only operative document for that purpose and did not demonstrate that electricity was available on or before the application deadline because it stated "at the present time."

The informal hearing officer stated that there was confusion as to whether the correct address of the project was Miami or Homestead. The hearing officer stated that Appellant's position was "attractive" and, more than likely, reflected that electricity was in fact available before the deadline as stated in the initial letter. However, to accept the argument would be to disregard the adopted rules which governed the proceeding, Florida Rules of Administrative Procedure 67-21.003(6) and 67-48.006(6). By operation of the rules, Appellant's cure letter replaced the initial document, and Appellant did not demonstrate that electricity was available as of the application deadline. Rules 67-21.003(13)(b) and 67-48.004(13)(b) required that Florida Housing reject an application if the applicant fails to achieve the threshold requirements. Therefore, the hearing officer held that Florida Housing properly rejected Appellant's application for funding. Florida Housing adopted the findings of fact and conclusions of law set forth in the Recommended Order.

On appeal, Appellant contends that Florida Housing interpreted the cure rule differently in Eclipse West Associates, Ltd. v. Florida Housing Finance Corp., Case No. 2006-078RRLP (March 13, 2007). Because Florida Housing did not properly index this decision and make it available to the public electronically, the administrative process was impaired.

In Eclipse, Florida Housing held that Eclipse satisfactorily demonstrated that the application address satisfied the requirement of the 2006 Rental Recovery Loan Program application. Eclipse's original application designated the project address as "located at the SE corner of NW Flagler Drive and NW 4th Street, Ft. Lauderdale." Florida Housing initially determined that Eclipse failed to meet the threshold requirement regarding the address of the site because the stated address was incorrect and inaccurate. NW Flagler Drive was not a valid street in Ft. Lauderdale; it was properly identified as Flagler Avenue.

Eclipse filed a cure document identifying the project by reference to "NW Flagler Avenue." In order to complete the cure, Eclipse had to submit a verification form from FPL confirming the availability of electricity for the project. The FPL letter confirmed electricity as of the date of the letter. FPL had previously provided a letter verifying electricity prior to the application date. Florida Housing denied the application as failing to show infrastructure availability as of the application deadline.

The hearing officer found that Florida Housing's rules did not require applicants to identify projects using street names found in any specific source of street name information. The rules also did not specify which name or version of a name was required in identifying an address. The hearing officer noted that the street on which the project was located was recognized by local government officials as either Flagler Avenue or Flagler Drive. The hearing officer concluded that the address provided in the application was acceptable. Therefore, there was no necessity for the cure documents to be filed. The issues relating to the FPL letter were moot. Florida Housing adopted the hearing officer's findings and conclusions.

Section 120.53(1)(a), Florida Statutes (2008), provides that each agency shall maintain all final orders. The agency may provide these orders by a subject-matter index or by a searchable electronic database. § 120.53(1)(a)2., Fla. Stat. (2008); see also Fla. Admin. Code R. 67-52.003 (requiring Florida Housing clerk to maintain all final orders and a subject matter index on such orders). Final orders must be indexed or listed within 120 days after the order is rendered. §120.53(1)(b), Fla. Stat. (2008). Florida Housing does not dispute that the Eclipse order was not properly listed or indexed as required by statute.

We hold that Florida Housing's failure to list or index the Eclipse order properly was an error in procedure which impaired the fairness of the proceedings

below. See Graham Contracting, Inc. v. Dep't of Gen. Servs., 363 So. 2d 810 (Fla. 1st DCA 1978) (stating that agency's failure to maintain subject-matter index of its orders deprives general public, agency, and this court of the continuity and rationality such a resource would provide). Parties in an administrative proceeding have a right to locate precedent and have it apply as well as the right to know the factual basis and policy reasons for agency action. Amos v. Dep't of Health and Rehabilitative Servs., 444 So. 2d 43 (Fla. 1st DCA 1983). Had the Appellant known of the decision in Eclipse prior to the hearing, it could have raised the same legal arguments which were successful in Eclipse. Appellant should be allowed to rely on Florida Housing precedent in presenting its case to Florida Housing. An agency's failure to follow its own precedent which contains similar facts is "contrary to established administrative principles and sound public policy." Brookwood-Walton County Convalescent Ctr. v. Agency for Health Care Admin., 845 So. 2d 223, 229 (Fla. 2003). 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.

REVERSED and REMANDED for further proceedings.

VAN NORTWICK and PADOVANO, JJ., CONCUR.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ECLIPSE WEST ASSOCIATES, LTD.,

Petitioner,

v.

FHFC CASE NO.: 2006-078RRLP
APPLICATION NO. 2006-362CHR

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on March 16, 2007. On or before August 3, 2006, Eclipse West Associates, Ltd., ("Petitioner") submitted its 2006 Rental Recovery Loan Application ("Application") to Florida Housing Finance Corporation ("Florida Housing") to compete for funding/allocation from the Rental Recovery Loan Program. Petitioner timely filed its Petition for Informal Administrative Proceeding, pursuant to Sections 120.569 and 120.57(2), Florida Statutes, (the "Petition") challenging Florida Housing's scoring on parts of the Application. Florida Housing reviewed the Petition pursuant to Section 120.569(2)(c), Florida Statutes, and determined that the Petition did not raise disputed issues of material fact. An informal hearing was held in this case on December 1, 2006, in Tallahassee, Florida, before Florida Housing's designated Hearing Officer, Diane Tremor. Petitioner and Respondent timely filed a Joint Proposed Recommended Order.

Petitioner and Respondent timely filed a Joint Proposed Recommended Order. The Hearing Officer issued a Recommended Order. A true and correct copy of the Recommended

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
DATE 3-19-07

Exhibit A

Order is attached hereto as "Exhibit A." The Hearing Officer recommended Florida Housing enter a Final Order finding that:

1. Petitioner has satisfactorily demonstrated that the Eclipse West Application's address of its proposed development site as being located "at the SE corner of NW Flagler Drive and NW 4th Street, Ft. Lauderdale, FL 33301," satisfied the requirement of Part III., Section A., Subsection 2.a., of the 2006 Rental Recovery Loan Program Application.

2. The issue concerning the FP&L letter submitted as a cure is thus moot; no cure was required.

3. Petitioner's Application should be scored as having satisfied all threshold requirements.

RULING ON THE RECOMMENDED ORDER

The findings and conclusions of the Recommended Order are supported by competent substantial evidence.

ORDER

In accordance with the foregoing, it is hereby **ORDERED:**

1. The Findings of Fact of the Recommended Order are adopted as Florida Housing's Findings of Fact and incorporated by reference as though fully set forth in this Order.

2. The Conclusions of Law of the Recommended Order are adopted as Florida Housing's Conclusions of Law and incorporated by reference as though fully set forth in this Order.

3. Accordingly, it is found and ordered that Petition has satisfactorily demonstrated that the Eclipse West Application's address of its proposed development site as being located "at the SE corner of NW Flagler Drive and NW 4th Street, Ft. Lauderdale, FL 33301," satisfied the

Exhibit A

requirement of Part III., Section A., Subsection 2.a., of the 2006 Rental Recovery Loan Program Application.

4. The issue concerning the FP&L letter submitted as a cure is thus moot.

5. Petitioner's Application should be scored as having satisfied all threshold requirements.

IT IS HEREBY ORDERED that Petitioner's Application should be scored as having satisfied all threshold requirements.

DONE and ORDERED this 16th day of March, 2007.

FLORIDA HOUSING FINANCE CORPORATION

By: Lynn M. Hall
Chair

FLORIDA HOUSING FINANCE CORPORATION Tallahassee Florida

Exhibit A

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Vicki Robinson
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Florida Housing Finance Corporation
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Tallahassee, FL 32301

Michael G. Maida
Rutledge, Ecenia Et Al.
PO BOX 551
Tallahassee, Fl 32302

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

Exhibit A

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ECLIPSE WEST ASSOCIATES, LTD.
(PROJECT NAME: ECLIPSE),

Petitioner,

FHFC Case No.: 2006-0078RRLP
Application No.: 2006-362 CHR

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, an informal hearing was scheduled before the undersigned Hearing Officer on December 1, 2006. Prior to the hearing, the parties reached an agreement resolving the sole issues in dispute, and stated their intent to file with the Hearing Officer a Joint Proposed Recommended Order. The Joint Proposed Recommended Order, along with exhibits, was filed with the undersigned on February 19, 2007, and is attached hereto as Exhibit A. In essence, the parties agreed that the original application submitted by Petitioner, ECLIPSE WEST ASSOCIATES, LTD., correctly identified the address and development location of its proposed project, thus rendering moot cure documentation regarding the address, and that Petitioner's application should be scored as having satisfied all threshold requirements.

Exhibit A

Based upon this agreement and the Joint Proposed Recommended Order and Joint Exhibits, there is no need for additional Findings of Fact and/or Conclusions of Law. Accordingly, no Findings of Fact or Conclusions of Law are made herein. The parties jointly executed Joint Proposed Recommended Order, along with Joint Exhibits 1 through 22, is attached as Exhibit A, and this proceeding is returned to the Florida Housing Finance Corporation for entry of a Final Order.

Respectfully submitted and entered this 2nd day of March, 2007.

Diane D. Tremor

DIANE D. TREMOR
Hearing Officer for Florida Housing
Finance Corporation
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Copies furnished to:

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NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

In accordance with Rule 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. 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 March 9, 2007. 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.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ECLIPSE WEST ASSOCIATES, LTD.
(PROJECT NAME: ECLIPSE)

Petitioner,

vs.

FHFC Case No.: 2006-0078RRLP
Application No.: 2006-362 CHR

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

JOINT PROPOSED RECOMMENDED ORDER

The parties, ECLIPSE WEST ASSOCIATES, LTD. ("Eclipse"), and FLORIDA HOUSING FINANCE CORPORATION ("Florida Housing"), stipulate and agree to the following facts and conclusions of law in the above-entitled matter.

APPEARANCES

For Petitioner, Eclipse West Associates, Ltd.

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JOINT EXHIBITS

The following exhibits were admitted into evidence:

1. Affidavit of Sherry M. Green
2. RRLP Ranking Scenario
3. Letter from Reliance-Theatre Place Associates, Ltd.
4. 67ER06-27(3), F.A.C., Application and Selection Procedures for Developments
5. Eclipse Final Scoring Summary
6. Eclipse address as identified on page 15 of the 2006 RRLP Original Application
7. Rule 67ER05-9(2), F.A.C.
8. Part III, Item A.2.a of the 2006 RRLP Application
9. Exhibits 19, 22, 25-28 and 32-36 to the Original Application
10. Emergency Services map and DeLorme map
11. City's aerial photography maps
12. Photograph of street sign, "Flagler Ave."
13. Photograph of gated or feneed alleyway between two rows of buildings with no street sign
14. Pages 13-18 of the RRLP Application Instructions
15. City of Fort Lauderdale Record Land Survey
16. City of Fort Lauderdale utility services document
17. City of Fort Lauderdale's Planning and Zoning Department's maps
18. Broward County Property Appraiser's Folio Information
19. Page 15 of the Application filed as part of Eclipse's Cure material
20. "Original" and "Cure" Surveyor Certifications

Exhibit A

21. FP&L letter dated July 26, 2006 (submitted with original Application)

22. FP&L letter dated September 11, 2006 (submitted with Cure material)

WITNESSES

For Petitioner:

None.

For Respondent:

Vicki Robinson, Deputy Development Officer

PRELIMINARY STATEMENT

Petitioner applied for funding during the 2006 Rental Recovery Loan Program ("RRLP"), seeking a rental recovery loan and an allocation of Low Income Housing Tax Credits ("Housing Credits"). Petitioner was notified by Florida Housing Finance Corporation ("Florida Housing") of its final scores on or about October 17, 2006. On November 13, 2006, Petitioner timely filed a Petition for an Informal Administrative Hearing under Sections 120.569 and 120.57(2), Florida Statutes, disputing the Florida Housing's final scoring of its 2006 Rental Recovery Loan Program Application for the proposed Eclipse West Apartments. After review of the Petition, Florida Housing granted Petitioner an informal hearing in this matter. Notice of the informal hearing was served on all RRLP applicants. Petitioner sought a determination that the Eclipse West Application's address of its proposed development site as being located "at the SE corner of NW Flagler Drive and NW 4th Street, Ft. Lauderdale Florida 33301," satisfied the requirement of Part III., Section A., Subsection 2.a., of the 2006 Rental Recovery Loan Program Application. The Parties are agreed that Petitioner has done so.

Exhibit A

STATEMENT OF THE ISSUE

Two issues were presented for resolution in this proceeding. The first issue is whether Eclipse's original application material correctly identified the Address and Development Location of its proposed project. As the first issue is answered in the affirmative, the second issue with respect to whether Eclipse's cure material satisfies the application's requirements is moot.

GENERAL

1. Florida Housing is a public corporation organized pursuant to Section 420.504, Fla. Stat., to provide and promote the public welfare by administering the governmental function of financing and refinancing affordable housing and related facilities in Florida. Florida Housing is governed by a Board of Directors (the "Board"), appointed by the Governor with the Secretary of the Department of Community Affairs sitting ex-officio. Florida Housing is an agency as defined in Section 120.52, Fla. Stat., and, therefore, is subject to the provisions of Chapter 120, Fla. Stat.

2. Florida Housing administers the Rental Recovery Loan Program ("RRLP"), as provided in Chapter 2006-69, § 31, Laws of Florida. The RRLP program facilitates the allocation of RRLP Loans to competing applicants. RRLP funds are allocated through a competitive application process in accordance with Rule 67ER06-27, F.A.C. The applications are competitively ranked and compete for a limited amount of funds and credits during a given cycle. An award to an applicant under the RRLP program can, under certain circumstances, include an allocation of Housing Credits. Allocation of Housing Credits is further governed by the 2006 Qualified Allocation Plan ("QAP"), the Application Instructions, and Rule 67ER06-27, F.A.C., which collectively set forth the selection criteria and Florida Housing's preferences for

Exhibit A

developments which will receive Housing Credits. Furthermore, the Applications are ranked and selected in accordance with criteria established in the Application Instructions.

3. Eclipse submitted an Application seeking a loan through the RRLP Program and an allocation of Housing Credits from the 2006 RRLP Cycle. Eclipse's application was assigned Application Scoring No. 2006-362CHR.

THE PARTIES

4. All other applicants for 2006 RRLP funding have been provided with notice of this proceeding. (J. Exh. 1) None of the other applicants chose to intervene or participate in the hearing.

5. The only other application directly affected by the decision in this proceeding is Theatre Place, RRLP Application number 2006-363HCR. (J. Exh. 2) The developer of both Theater and Eclipse West is Reliance Housing Foundation, Inc., 805 East Broward Avenue, Suite 200, Ft. Lauderdale, Florida 33301. (J. Exh. 2)

6. Reliance Housing Foundation recognizes, and waives objection to, the effect of a decision in this case which would result in Eclipse West being funded while removing Theatre from funding. (J. Exh. 3)

THE SCORING PROCESS

7. Rule 67ER06-27, F.A.C., is entitled "Application and Selection Procedures for Developments." This rule prescribes a multistage process under which Florida Housing scores the applications submitted in the RRLP Cycle.

8. Pursuant to Rule 67ER06-27(3), F.A.C., applications are evaluated and preliminarily scored by Florida Housing using factors specified in the RRLP Application Package and rules governing the RRLP Program, following which the scores are transmitted to

Exhibit A

all applicants. Rule 67ER06-27(4), F.A.C., provides a mechanism through which an applicant may challenge the preliminary score of another applicant through a written submission to the Corporation. Such a submission is referred to as a Notice of Possible Scoring Error or "NOPSE." Once a NOPSE is filed, the Corporation reviews the challenge and transmits to each affected Applicant the NOPSE as well as the Corporation's position with respect to the challenge. See, Rule 67ER06-27(5), F.A.C.

9. Under Rule 67ER06-27(6), F.A.C., an applicant is allowed to cure alleged deficiencies in its application raised as a result of the preliminary scoring or the Corporation's position regarding a NOPSE. In curing an alleged deficiency, an applicant is permitted to submit "additional documentation, revised pages and such other information as the Applicant deems appropriate to address the issues . . . " raised by the preliminary scoring or NOPSE. Additional information submitted under this provision is referred to as a "Cure."

10. Pursuant to Rule 67ER06-27(7), F.A.C., challengers can submit to the Corporation a Notice of Alleged Deficiency ("NOAD") contesting a Cure filed by an applicant. A NOAD is "limited only to the issues created by document revisions, additions or both by the Applicant submitting the Application pursuant to subsection (6) [of the Rule]."

11. Following receipt and review by Florida Housing of the documentation contained in the NOPSEs, the Cures and the NOADs for the 2006 RRLP Cycle, Florida Housing prepared "Final Scores and Notice of Rights" for all applicants dated October 20, 2006. (J. Exh. 5)

12. Rule 67ER06-28, F.A.C., establishes a procedure through which an applicant may challenge the review and scoring of its own application through an informal proceeding conducted by Florida Housing. In addition, each applicant may petition the Corporation for a formal hearing if the appeal involves disputed issues of material fact.

ECLIPSE'S ORIGINAL APPLICATION MATERIAL

13. The original Eclipse project application (the "Original Application") designated the address and location of its proposed project as: "A portion of property located at the SE corner of NW Flagler Drive and NW 4th Street, Ft. Lauderdale, Florida 33301." (J. Exh. 6).

14. Pursuant to Rule 67ER05-9(2), F.A.C., where the U.S. Postal Service has not yet assigned an address, the rule permits identification by "street name and closest designated intersection":

> "Address" means the address assigned by the United States Postal Service and must include address number, street name, city, state and zip code. If address has not yet been assigned, include, at a minimum, street name and closest designated intersection, city, state and zip code.

. (J. Exh.. 7)

15. The 2006 RRLP Application (RRLP 1016), which was promulgated as a rule, also requires applicants to provide the "Address" of the development (Part III, Item A.2.a), thus incorporating the definition found in Rule 67ER05-9(2). (J. Exh. 8)

16. A number of forms included in the Application similarly require the applicant to identify the Development Location, stating "At a minimum, provide the address assigned by the United States Postal Service, including the address number, street name and city, or if the address has not yet been assigned, provide the street name, closest designated intersection and city." (J. Exh. 9)

17. The Eclipse project has not yet been built. It has not been assigned an address by the United States Postal Service.

18. Following preliminary scoring, a challenger filed a NOPSE that stated as follows:

Exhibit A

> At Part III.A.2.a. of the Application, the Applicant states the Address of the Development Site as "a portion of property located at the SE corner of NW Flagler Drive and NW 4th Street, Ft. Lauderdale, Florida 33301." This address is also repeated on all exhibit forms requiring Development Location. The stated address is incorrect and inaccurate. NW Flagler Drive is not the name of a street in Fort Lauderdale, FL. The Applicant likely meant NW Flagler Avenue. Attached to this Statement is a portion of the official Fort Lauderdale Emergency Services map which shows the name of the street as NW Flagler Avenue. In addition, the DeLorme Street Atlas software does not recognize NW Flagler Drive as a valid street name. Because the Development Site Address is inaccurate and inconsistent with the Program Rule, the Application and any exhibit bearing the wrong address must be rejected.

19. In response to the NOPSE, Florida Housing concluded that the Original Application failed to meet threshold requirements regarding the address of the Development site because "information provided by a NOPSE calls into question the accuracy of the Address of the Development site...." Florida Housing also concluded that the Original Application failed to meet threshold requirements regarding certain other matters because "the Development Location appears to be incorrect" on various documents included in the Application and Eclipse thus was not entitled to maximum scores or proximity tie-breaker points. (J. Exh. 5)

ECLIPSE'S CURE MATERIAL

20. Eclipse filed Cure documents in response to the Florida Housing's position that the Original Application failed to meet threshold requirements regarding the Address and Development Location. Eclipse's Cure documents identified the project by reference to "NW Flagler Avenue." (J. Exh. 19)

21. The physical location of the project did not change. The longitude and latitude of the project did not change. (J. Exh. 20)

Exhibit A

22. Under the applicable rules, there was no point of entry for Eclipse to challenge Florida Housing's determination prior to filing Cure materials.

23. In order to complete the Cure, Eclipse had to obtain a number of revised exhibits, including but not limited to Exhibit 24, Verification of Availability of Infrastructure – Electricity, from Florida Power & Light Company ("FP&L"). FP&L is the sole provider of electricity within the City of Ft. Lauderdale. (J. Exh. 22)

24. In connection with the Original Application, FP&L refused to execute the Verification Form provided in the Application Package or to confirm availability of electricity for any date other than the date upon which it executed the verification letter. Instead, FP&L provided a letter verifying availability of electricity on the date of the letter, as permitted by the application instructions. (J. Exh. 21)

25. In connection with the Cure, FP&L, refused to execute the Verification Form provided in the Application Package or to confirm availability of electricity for any date other than the date upon which it executed the verification letter. Instead, FP&L provided a letter verifying availability of electricity on the date of the Cure letter. (J. Exh. 22)

26. For the Original Application, FP&L provided a letter dated July 26, 2006, verifying availability of electricity to the project site as of that date, which, as required by the applicable rule, was prior to the application date. (J. Exh. 21) In connection with the Cure, FP&L, in conformance with its policy, again refused to execute a Cure Verification Form and instead provided a Cure letter dated September 11, 2006, verifying availability of electricity to the project site as of the date of that letter. (J. Exh. 22)

27. After submission of the Cure material, a competitor filed a NOAD alleging that the letter from FP&L submitted with the Cure was deficient because it did not demonstrate

Exhibit A

infrastructure availability as of the application deadline. Florida Housing agreed with this challenge and scored the Eclipse's Application as failing to achieve threshold. (J. Exh. 5)

CONNSIDERATION OF ADDITIONAL MATERIAL

28. The NOPSE that challenged the Original Application address and alleged that both the City of Fort Lauderdale's Emergency Services map and the DeLorme Street Atlas program demonstrated that the Address and Development Location used by Eclipse were "incorrect and inaccurate." However, further review of the two maps shows that the City's Emergency Services map is inconsistent with the DeLorme map. (J. Exh. 10)

29. Both the DeLorme map and the Emergency Services map identify a street as "NW Flagler Avenue", but they place them in different locations. The DeLorme map shows a "NW Flagler Avenue" directly next to and to the east of railroad tracks, which begins at NW 6th Street and continues south for four blocks. The Emergency Services map, on the other hand, shows no road in this location, but instead identifies as "NW Flagler Ave." a one-block roadway that begins at NW 5th Street and ends at NW 4th Street. (J. Exh. 10)

30. The City's aerial photography maps reveal that the four-block street shown on the DeLorme map is immediately adjacent to the railroad tracks, while the one-block roadway is physically separated from the railroad tracks by a row of buildings. (J. Exh. 11) Physical inspection of the four-block street reveals a street sign bearing the name "Flagler Ave." (J. Exh. 12) Physical inspection of the one-block roadway reveals what appears to be a gated or fenced alleyway between two rows of buildings, with no street sign. (J. Exh. 13)

31. The City of Fort Lauderdale's GIS Property Information Reporter identifies the one-block roadway as "NW Flagler Ave." as do several other City maps. (J. Exh. 18)

Exhibit A

32. In making its determination that the Original Application failed to meet threshold requirements, Florida Housing relied solely on a software product called "Street Atlas USA 2006," published by DeLorme, stating that although the program "recognizes Flagler Drive, N. Flagler Drive, and NW Flagler Avenue, it does not recognize NW Flagler Drive as a valid street name."

33. Florida Housing's rules do not require applicants to identify projects using street names found in DeLorme's Street Atlas software (or any other specific source of street name information).

34. The only prescribed use of Delorme's Street Atlas program by Florida Housing's rules is found on pages 13-18 of the Application Instructions, which permit the agency to use the program for the purpose of determining a Development's proximity to eligible services and other developments in connection with the award of tie-breaker points. (J. Exh. 14)

35. Florida Housing's rules do not specify which name or version of a name must be used when identifying an Address or Development Location, nor do they specify any process an Applicant or Florida Housing may or must use to determine which name or version of a name Florida Housing will consider to be "correct."

36. Neither the Rule nor the Application Package specifies that an applicant must identify the Address or Development Location using the exact street designation found in the Delorme Street Atlas software program.

37. Various municipal authorities recognize and identify this particular section of Flagler as "NW Flagler Drive," "NW Flagler Avenue", "Flagler Drive" or even simply "Flagler."

38. The street in question is a short section of Flagler that intersects with and crosses NW 4th Street, parallel and immediately to the east of railroad tracks. Various governmental

authorities in Broward County and the City of Ft. Lauderdale, identify this section of Flagler as "NW Flagler Drive". The Broward County Administrator, the City of Ft. Lauderdale Commission Planning and Zoning Director, and the City of Ft. Lauderdale Engineering Design Manager, all acting in their official capacities, identified the Development Location using the designation "NW Flagler Drive" and verified the availability of required services to that specific location, thus demonstrating that each entity officially recognizes and accepts the name "NW Flagler Drive" to identify the street adjacent to the proposed Eclipse project. (J. Exh. 19)

39. During the site plan approval process, the City referred to the subject property's location as "Northwest Flagler Drive," "Flagler Drive," and "Flagler," and relied upon documents that similarly identified the property, including but not limited to the City of Fort Lauderdale Record Land Survey, which references this street as both "N.W. Flagler Drive" and "Flagler Avenue." (J. Exh. 15)

40. The City of Fort Lauderdale utilizes the service address of "312 NW Flagler Dr." for provision of utility services to a parcel of land that forms a portion of the property upon which the Eclipse project will be built. (J. Exh. 16)

41. The City of Fort Lauderdale's Planning and Zoning Department's maps refer to this section of the street simply as "Flagler Avenue," and the street is labeled "Flagler Ave." on a street sign at its intersection with NW 4th Street. (J. Exh. 17)

42. The Broward County Property Appraiser recognizes and identifies this same street as both "Flagler Drive" and "NW Flagler Avenue," documenting a "Site Address" on "Flagler Dr." for certain parcels of land on this section of the street, but also providing a map that locates the same parcels on "NW Flagler Ave." The Broward County Property Appraiser's official web site provides Folio Information that identifies (among other things) the property tax ID number,

Exhibit A

property owner, legal description, property assessment values, sales history and tax information for four parcels of land with designated Site Addresses of 400 Flagler Dr., 410 Flagler Dr., 430 Flagler Dr., and 440 Flagler Dr. Each page also shows a physical map of the area on which the specific parcel of land is identified. On the map, each of the four parcels with a "Flagler Dr." Site Address is located on a street identified as "NW Flagler Ave." (J. Exh. 18)

43. As shown by their execution of revised certifications, the Broward County Administrator, City of Ft. Lauderdale Commission Planning and Zoning Director, and City of Ft. Lauderdale Engineering Design Manager also recognize and accept the name "NW Flagler Ave." to identify the Address and Development Location of the Eclipse project as well as "NW Flagler Drive."

44. At its intersection with NW 4th Street, the street on which the Eclipse West project is located is recognized by local government officials as either Flagler Avenue or Flagler Drive.

CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat. and Rule 67-48.005, Fla. Admin. Code, the Hearing Officer has jurisdiction over the parties to this proceeding.

2. Pursuant to Sec. 420.507(22)(f), Fla. Stat., Florida Housing is authorized to institute a competitive application process, and has done so in accordance with R. 67ER-27, Fla. Admin. Code.

3. Florida Housing's application form and instructions are adopted as Form RRLP1016. Rule 67ER06-27(1)(a), Fla. Admin. Code.

4. The Petitioner submitted an application for the 2005 Universal Application Cycle to Florida Housing in which it sought an allocation of tax credits under the Low-Income housing Tax Credit (HC) program in the 2005 Universal Cycle.

5. Sufficient notice of this proceeding has been provided to all parties potentially having standing to intervene in this matter, so as to allow such parties the opportunity to appear herein.

6. As the use of either "Flagler Drive" or "Flagler Avenue" is acceptable to the responsible local governments, and there was never any question concerning the physical location of the proposed development site, the Rental Recovery Loan Program Application provision requiring the address of the development site, as defined in R. 67ER06-26(2), Fla. Admin. Code, was met by describing the property as being, "A portion of the property located at the SE corner of NW Flagler Drive and NW 4th Street, Ft. Lauderdale Florida 33301."

7. As the address of the proposed development provided in the application and exhibits was acceptable, and the physical location of the development site was not at issue, 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.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, the parties recommend the Hearing Officer enter a Recommended Order finding that:

1. Petitioner has satisfactorily demonstrated that the Eclipse West Application's address of its proposed development site as being located "at the SE corner of NW Flagler Drive and NW 4th Street, Ft. Lauderdale Florida 33301," satisfied the requirement of Part III., Section A., Subsection 2.a., of the 2006 Rental Recovery Loan Program Application.

2. The issue concerning the FP&L letter submitted as a cure is thus moot.

3. Petitioner's Application should be scored as having satisfied all threshold requirements.

Exhibit A

Respectfully submitted this 16th day of February, 2007,

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Exhibit A

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 March 29, 2010. 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.

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.
_____/

WRITTEN ARGUMENT

Petitioner, Villa Capri Associates, Ltd. ("Villa Capri") hereby submits to the Florida Housing Finance Corporation Board of Directors ("Board") its written argument in response to the designated Hearing Officer's Recommended Order ("Recommended Order") dated March 23, 2010. In the Recommended Order, the Hearing Officer recommends that a Final Order be entered determining that the case of *Eclipse West Associates, Ltd. v. Florida Housing Finance Corp.*, (Case No. 2006-078 RRLP, March 13, 2007) is factually and legally distinguishable from the instant case and does not affect the outcome of the Final Order entered on September 26, 2008. (Initial Final Order).

In that Initial Final Order, the same informal Hearing Officer recommended that a Final Order be entered finding that Villa Capri failed threshold because it failed to provide the necessary documents to show that electricity was available to the development site on or before the application deadline. The Hearing Officer concluded

Exhibit B

that Villa Capri's argument was "attractive" and more than likely reflected that electricity was in fact available before the application deadline. However, the Hearing Officer went on to conclude that to accept Villa Capri's argument would be to disregard the adopted rules which governed the proceeding. If the current recommendation is accepted, Florida Housing will not only be disregarding its own rules, but its prior agency actions as well. Villa Capri requests that the Board reverse the Hearing Officer's Recommended Order because it is erroneous and inconsistent with Florida Housing's own rules. In support of this request, Villa Capri provides as follows:

(1) The Hearing Officer concludes that the *Eclipse* case is factually distinct from the instant case, because the "triggering" events are different in each case. The triggering event is what led to the scoring decision, and ultimately why a cure was submitted by each applicant. In reaching this conclusion, the Hearing Officer is concluding that cases should be treated differently simply because the reason a cure was submitted was different.

(2) But, it is not the "triggering" event that is the issue here; rather it is the fact that each applicant by their own choice made the decision to cure a scoring issue. As Florida Housing argued in the initial Villa Capri informal hearing: "An applicant who elects to avail itself of the opportunity to cure a deficiency in response to Florida Housing's scoring of its application, subjects its application not only to the obvious

benefits that process affords but to the consequences which flow from that process as well."[1]

(3) The Hearing Officer concluded that no error occurred in *Eclipse*. But there was, in fact, a discrepancy, as Eclipse itself concluded when it chose to submit a cure, which included the problematic FPL letter.

(4) While the *Eclipse* applicant subsequently challenged the original scoring decision as being erroneous, it nonetheless provided a cure concerning the address issue. As Florida Housing also argued in the initial Villa Capri proceeding, the fortunes of the applicant "must rise or fall based solely on its cure. To hold otherwise ignores the cure rule itself". The same logic and rationale applies here. But by drawing the distinction in the "triggering" event, the Hearing Officer ignored the fact that in each case the applicant made the choice to submit a cure and must live with that choice. The factual distinction drawn by the Hearing Officer is unavailing in that in reality both applicants submitted a cure which proved to be the basis for the rejection.

(5) The Hearing Officer also concluded as a matter of law that *Fountain Terrace Apartments Limited Partnership v. Florida Housing Finance Corporation*. (FHFC Case No. 2008-1020C) controls here. Based on this case, the Hearing Officer held 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

[1] Excerpt from Proposed Recommended Order submitted in initial Villa Capri informal hearing by Florida Housing

the facts and law by the Hearing Officer or the agency head. This conclusion is legally incorrect. To the contrary, the *Eclipse* order like any other Final Order, evidences an agency policy that must be consistently applied. How the agency policy was developed is not dispositive of the weight to be given that policy.

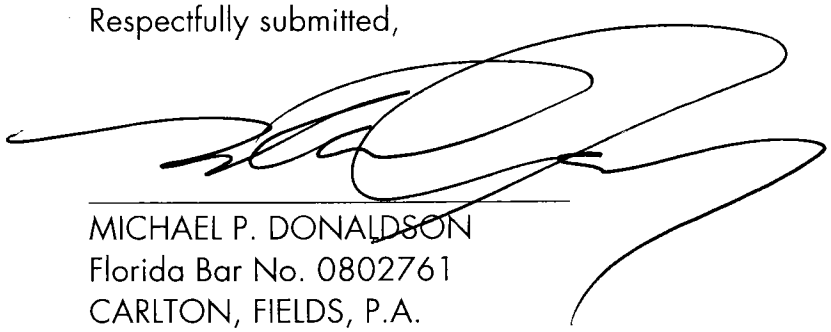
(6) Additionally, the same procedural issues that existed and addressed in *Fountain Terrace* do not exist with *Eclipse*. In *Fountain Terrace*, Florida Housing set up a two-part challenge procedure which allows applicants to challenge their own Application. Then, after final rankings are issued, Applicants 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*.

(7) Stated simply, the *Eclipse* 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 agency policy 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. It must be assumed, therefore, that the Board knew exactly what it was adopting when it entered the *Eclipse* final order contrary to the Hearing Officer's suggestion otherwise.

(8) Contrary to the Hearing Officer's Recommended Order, *Eclipse* is identical factually and legally to this case. In *Eclipse,* Florida Housing did not reject an application for a purely technical scoring issue involving the address of the development site. The same result should occur here.

Respectfully submitted,



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