STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HTG MIAMI 4, LLC,

Petitioner,

v.

FHFC Case No.: 2012-023UC
Application No.: 2011-094C

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 June 8, 2012. The matter for consideration before this Board is a recommended order pursuant to Section 120.57(2), Florida Statutes, and Rule 67-48.005(2), F.A.C. After a review of the record and otherwise being fully advised in these proceedings, this Board finds:

On or before December 6, 2011, HTG Miami 4, LLC, ("Petitioner"), submitted its 2011 Universal Cycle Application ("Application") to Florida Housing Finance Corporation ("Florida Housing") seeking an allocation of competitive "9%" Tax Credits under the federal Low Income Housing Tax Credit program to fund the project known as La Margarita. Petitioner timely

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Della M Harrell /DATE. 6/8/12

filed its "Petition for Review," (the "Petition") challenging Florida Housing's scoring on its Application No. 2011-094C. The parties stipulated to the facts at issue. In lieu of an informal hearing, Petitioner elected to make a written submission; it chose to rely on its Petition. Florida Housing filed a Proposed Recommended Order on May 14, 2012. Florida Housing Finance Corporation's appointed Hearing Officer Diane D. Tremor, reviewed the written submissions and filed a Recommended Order on May 23, 2012. A true and correct copy of the Recommended Order[1] is attached hereto as "Exhibit A."

To achieve threshold, an applicant in the 2011 Universal Cycle must demonstrate that the proposed development is consistent with local zoning and land use requirements pursuant to the requirements set out in Part III.C.4.a. of the Application Instructions. Petitioner failed to completely and accurately complete the form Exhibit 32, "Local Government Verification That Development Is Consistent With Zoning And Land Use Regulations," when it failed to include the "Name of the City/County," having zoning approval authority on Exhibit 32, in its original submission and its cure.

The Recommended Order recommends that Florida Housing enter a Final Order finding that:

[1] The Recommended Order caption refers to Application No. 2011-205C. The Application number is 2011-094C.

Petitioner's Application failed to meet the threshold requirement for verification of zoning, thus was entitled to no tie-breaker points for Zoning.

RULING ON THE RECOMMENDED ORDER

The Board finds that the findings of fact and the conclusions of law of the Recommended Order are supported by competent substantial evidence.

ORDER

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.

IT IS HEREBY **ORDERED** Petitioner's Application No. 2011-094C failed to meet the threshold requirement for Zoning, and was entitled to no Ability to Proceed tie-breaker points for Zoning. The Petition is DISMISSED.

DONE and ORDERED this *8th* day of June, 2012.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

Wellington H. Meffert II
General Counsel
Florida Housing Finance Corporation
337 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Matthew Rieger, Esq.
Matthew Rieger, PA
3225 Aviation Avenue, Suite 602
Coconut Grove, Florida 33133

Diane Tremor, Hearing Officer
Sundstrom Friedman & Fumero LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301

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

HTG MIAMI 4, LLC,

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vs.

FHFC Case No. 2012-023UC
Application No. 2011-205C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

_____/

RECOMMENDED ORDER

This proceeding was conducted pursuant to Sections 120.569 and 120.57(2), Florida Statutes, by duly designated Hearing Officer, Diane D. Tremor. In lieu of attending an informal hearing in Tallahassee, Florida, Petitioner elected to submit a written statement and further elected to rely on its previously filed Petition for Review as its written statement.

APPEARANCES

For Petitioner:

Matthew Rieger
Matthew Rieger, PA
3225 Aviation Avenue, Suite 602
Coconut Grove, Florida 33133

For Respondent:

Wellington H. Meffert II
General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Ste. 5000
Tallahassee, FL 32301-1329

STATEMENT OF THE ISSUES

There are no disputed issues of material fact. The issue for determination in this proceeding is whether Petitioner's application met threshold requirements regarding local zoning and land use.

PRELIMINARY STATEMENT

The parties have stipulated to the admission into evidence of Joint Exhibits 1 through 6. Joint Exhibit 1 is a Joint Stipulation of Facts and Exhibits. That document basically describes the application process and the circumstances regarding the scoring of Petitioner's application with regard to the issues in dispute. The Joint Stipulation of Facts and Exhibits (Joint Exhibit 1) is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order.

Petitioner has elected to rely on its Petition for Review as its written statement and argument in this case. Respondent Florida Housing Finance Corporation submitted a Proposed Recommended Order. Both documents have been fully considered by the undersigned.

FINDINGS OF FACT

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

1. The Petitioner, HTG Miami 4, LLC, submitted Application Number 2011-094C in Florida Housing's 2011 Universal Cycle seeking $2,561,000 in annual federal tax credits to help finance the development of a 100-unit apartment complex in Miami, Miami-Dade County, Florida, known as La Margarita. (Joint Exhibit 1)

2. Part III.C.4.a of the 2011 Universal Application Instructions requires an applicant, as a threshold matter, to provide evidence of appropriate zoning for its proposed development site. To achieve that threshold, applicants are required to provide the applicable Local Government verification form, properly completed and executed, behind a tab labeled "Exhibit 32." The verification form must demonstrate that the proposed development site is appropriately zoned and consistent with local land use regulations regarding density and intended use or that the development is legally non-conforming. (Instructions, pages 59 and 60) The Instructions also permit applicants to receive one tie-breaker point for passing threshold requirements for Zoning in their initial application submittal, and ½ point if an applicant cures a defect found in its initial submittal. (Instructions, pages 55 – 56)

3. In response to this requirement, Petitioner submitted, as Exhibit 32 of its initial application, a form entitled "Local Government Verification that Development is Consistent with Zoning and Land Use Regulations." In the blanks

provided, Petitioner supplied the name of the development, the development location as "3535, 3521, 3517, 3505 NW 17 Avenue, Miami, Fl," the number of units and the zoning designation for the development site. The Certification at the bottom of the form has a space for the identification of the "City/County" which has vested the signatory of the Certification with the authority to verify the land use regulations and the zoning designation specified on the form. That space was left blank on Petitioner's Exhibit 32. The Certification is signed by Barnaby L. Min, Zoning Administrator. (Joint Exhibit 2)

4. In its preliminary scoring of Petitioner's application, Florida Housing determined that Petitioner failed to meet threshold requirements with regard to Zoning because the Certification portion of the "Local Government Verification that Development is Consistent with Zoning and Land Use Regulations" form provided in the application was not complete, in that the "City/County" space was left blank. Petitioner received no tie-breaker points for Zoning. (Joint Exhibit 3)

5. In response to this preliminary scoring, Petitioner submitted a Cure. The Cure did not attach a revised Exhibit 32. Instead, the Cure provided an explanation, urging that the fact that "Miami" was not filled in on the Certification portion of the form in its original submission does not negate the fact that all essential information on the form was correctly filled out and signed by the appropriate local official. Petitioner further argued that by providing the

development location, it could be determined that the Zoning Administrator was indicating appropriate zoning for the correct site in "Miami." Also, as a part of its Cure, Petitioner pointed out that another competing applicant in the current cycle received full tie-breaker points for Zoning, even though its Exhibit 32 left blank the space provided on the upper portion of the form to indicate "the number of units (not buildings) allowed for this development site (if restricted)". (Joint Exhibit 4)

6. In its final scoring of Petitioner's application, Florida Housing concluded that Petitioner failed to meet threshold requirements for Zoning for the same reason. (Joint Exhibit 5)

CONCLUSIONS OF LAW

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Informal Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. Because Florida Housing determined that Petitioner was ineligible for funding due to failure to meet a threshold requirement and failed to receive a tie-breaker point for Zoning, Petitioner's substantial interests are affected by Florida Housing's proposed agency action.

The issue for determination in this proceeding is whether Petitioner met threshold requirements regarding Zoning. More specifically, the issue is whether

Petitioner's failure to fill in the blank space on the Certification portion of the required form which identifies the city or county vesting authority in the person who signed the form constitutes a failure to meet threshold and an inability to receive tie-breaker points for Zoning.

Petitioner argues that by indicating the Development Location on its Exhibit 32 as "3535, 3521, 3517, 3505 NW 17 Avenue, Miami, Fl," Florida Housing could clearly see that the Zoning Administrator who signed the Certification was indicating appropriate zoning for the correct site in "Miami." Petitioner contends that the duplication and reiteration of the city of "Miami" on the Certification portion of the form is not an integral or material part of the form.

Petitioner's argument in this regard ignores the obvious intent and purpose of the form required and attached as Exhibit 32. The form is entitled "Local Government **Verification** that Development is Consistent with Zoning and Land use Regulations." (Emphasis supplied) The obvious purpose of the Certification on the form is to demonstrate that the person signing the form has been vested, by the pertinent City or County, with the authority to make such verifications of consistency with local land use regulations and the zoning designation provided. The location of the development is only one item required on the form in order to allow a verification of consistency. That verification can only be properly made if the person providing it has been vested with authority to make such a

determination of consistency. Petitioner's application failed to provide required information regarding the vesting of such authority, and Petitioner failed to cure this deficiency when given the opportunity to do so.

The Universal Application Package or UA1016 (Rev. 2-11), which includes the application forms and the Application Instructions, is adopted by rule. See Rule 67-48.004(1)(a), Florida Administrative Code. Just as applicants are bound by the rules governing the application and selection procedures for developments, so too is Florida Housing, the agency charged with the responsibility and authority for administering Florida's affordable housing programs.

The Universal Application Instructions provide, in pertinent part:

> Each page and applicable exhibit of the Application must be accurately completed, and Applicants must provide all requested information. Failure to provide the requested information and documentation shall result in failure to meet threshold for threshold items, failure to achieve maximum points for point items, rejection of the Application for rejection items, or a combination of the foregoing.

(Instructions, page 2) In addition, Florida Housing's rules require that all applications be complete (Rule 67-48.004(1)(b)) and that failure to submit an application completed in accordance with the Application Instructions will result in the failure to meet threshold or a score less than the maximum available (Rule 67-48.004(2)).

The Application and Application Instructions clearly required Petitioner to provide a "properly completed and executed" Local Government Verification That

Development Is Consistent With Zoning And Land Use Regulations form behind a tab labeled Exhibit 32. Petitioner failed to submit such a properly completed and executed form in its initial application, was notified of this deficiency, and failed to cure the deficiency. As such, Petitioner failed to meet the threshold with regard to Zoning and it follows that Petitioner was entitled to no tie-breaker points in that category.

As a final argument, Petitioner urges that it was treated inconsistently with another applicant (Application No. 2011-182C) in the same application cycle. According to Exhibit E of Petitioner's Petition for Review, that applicant left blank the space provided on the same form for "the number of units (not buildings) allowed for this development site (if restricted)," but completed all spaces in the Certification portion of the form submitted as Exhibit 32. That Applicant received the full one tie-breaker point for Zoning in preliminary scoring.

Petitioner's argument in this regard is unavailing for several reasons. First, there is nothing in this record to indicate that Applicant Number 2011-182C was required to fill in the space, as the space is only required to be completed if the development site is restricted. Second, the completed Certification portion on that same form would indicate that the person who signed the form had sufficient information to verify the consistency of the development with zoning and land use regulations. And third, the preliminary scoring of Application Number 2011-182C

with regard to Zoning has not been tested in litigation, and has little precedential value. See *Fountain Terrace Apartments Limited Partnership* v. *Florida Housing Finance Corporation,* FHFC Case No. 2008-102UC (Final Order July 24, 2009). There is simply nothing in the record of this proceeding indicating that Florida Housing has ignored the failure to fill in the blanks provided on the Certification portion of Exhibit 32.

Here, Petitioner did not comply with the Application Instructions or the requirements on the form to be attached as Exhibit 32. Florida Housing properly determined that Petitioner failed to meet threshold requirements with regard to Zoning in its initial application submittal and failed to cure that deficiency in its Cure documentation. It follows that Petitioner failed to meet the requirements for tie-breaker points for its Exhibit 32.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law stated herein, it is RECOMMENDED that a Final Order be entered concluding that Petitioner's application failed to meet the threshold requirement regarding Zoning, and was entitled to no tie-breaker points for Zoning.

Respectfully submitted this 23rd day of May, 2012.

Diane D. Tremor

DIANE D. TREMOR
Hearing Officer for Florida Housing
Finance Corporation

Sundstrom, Freidman & Fumero, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301
(850) 877-6555

Copies furnished to:

Matthew Rieger
Matthew Rieger, PA
3225 Aviation Avenue, Suite 602
Coconut Grove, Florida 33133

Wellington H. Meffert II
General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Ste. 5000
Tallahassee, FL 32301-1329

NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

In accordance with Rule 67-48.005(3), Florida Administrative Code, Applicants 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. five (5) calendar days from the date of issuance of the Recommended Order. 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.

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JOINT STIPULATION OF FACTS AND EXHIBITS

Petitioner, HTG MIAMI 4, LLC, ("Petitioner"), and Respondent, FLORIDA HOUSING FINANCE CORPORATION ("Florida Housing"), by and through undersigned counsel, submit this stipulation in connection with the above styled informal proceedings and agree to the findings of fact and to the admission of the exhibits described below.

THE PARTIES

1. Petitioner is a Florida limited liability company with its address at 3225 Aviation Avenue, Suite 602, Miami, Florida 33133, and is in the business of providing affordable rental housing units. Petitioner is an "Applicant," within the meaning of R. 67-48.002(9), Fla. Admin. Code, whose substantial interests are affected by Florida Housing's action described below.

2. Florida Housing is a public corporation, with its address at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32310, organized to provide and

EXHIBIT
tabbies
JOINT 1

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, F.S.

BACKGROUND

3. Florida Housing administers various affordable housing programs including the following:

(a) Housing Credit (HC) Program pursuant to Section 42 of the Internal Revenue Code and Section 420.5099, F.S., under which Florida Housing is designated as the Housing Credit agency for the state of Florida within the meaning of Section 42(h)(7)(A) of the Internal Revenue Code, and Rule Chapter 67-48, F.A.C.; and

(b) HOME Investments Partnerships (HOME) Program pursuant to Section 420.5089, F.S., and Rule Chapter 67-48, F.A.C.

4. The 2011 Universal Cycle Application, through which affordable housing developers apply for funding under the above-described affordable housing programs administered by Florida Housing, together with Instructions and Forms, comprise the Universal Application Package or UA1016 (Rev. 2-11) adopted and incorporated by Rule 67-48.004(1)(a), F.A.C.

5. Because the demand for HC and HOME funding exceeds that which is available under the HC Program and HOME 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 Chapter 67-48, F.A.C. Specifically, Florida Housing's application process for the 2011 Universal Cycle, as set forth in Rule 67-48.001-.005, F.A.C., involves the following:

a. the publication and adoption by rule of a "Universal Application Package," which applicants use to apply for funding under the HC and HOME Programs administered by Florida Housing;

b. the completion and submission of applications by developers;

c. Florida Housing's preliminary scoring of applications (preliminary scoring summary);

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, by informal or formal administrative proceedings, Florida Housing's evaluation of any item in their own application for which the applicant was deemed to have failed to satisfy threshold or received less than the maximum score;[1]

j. final scores, ranking of applications, and award of funding to successful applicants, including those who successfully appeal the adverse scoring of their application; and

k. an opportunity for applicants to challenge, by informal or formal administrative proceedings, Florida Housing's final scoring and ranking of competing applications where such scoring and ranking

[1] This proceeding is the subject of such a challenge.

resulted in a denial of Florida Housing funding to the challenging applicant.

PETITIONER'S APPLICATION AND SCORING ISSUES

6. The Petitioner timely submitted its application for financing in Florida Housing's 2011 Universal Cycle. The Petitioner, pursuant to Application No.: 2011-094C applied for $2,561,000 in annual federal tax credits[2] to help finance the development of its project, a 100-unit apartment complex in Miami, Miami-Dade County, Florida, known as La Margarita.

7. To achieve threshold, an applicant in the 2011 Universal Cycle must demonstrate that the proposed development is consistent with local zoning and land use requirements pursuant to the requirements set out in Part III.C.4.a. of the Application Instructions. The required documentation evidencing such consistency must be provided at Exhibit 32 to the applicant's application.

8. Petitioner's original application included at Exhibit 32 a "Local Government Verification That Development Is Consistent With Zoning And Land Use Regulations," executed by Barnaby L. Min. ***(Exhibit J-2)***

[2] The United States Congress has created a program, governed by Section 42 of the IRC, by which federal income tax credits are allotted annually to each state on a per capita basis to help facilitate private development of affordable low-income housing for families. These tax credits entitle the holder to a dollar-for-dollar reduction in the holder's federal tax liability, which can be taken for up to ten years if the project continues to satisfy IRC requirements. The tax credits allocated annually to each state are awarded by state "housing credit agencies" to single-purpose applicant entities created by real estate developers to construct and operate specific multi-family housing projects. The applicant entity then sells this ten-year stream of tax credits, typically to a syndicator, with the sale proceeds generating much of the funding necessary for development and construction of the project. The equity produced by this sale of tax credits in turn reduces the amount of long-term debt required for the project, making it possible to operate the project at below-market-rate rents that are affordable to low-income and very-low-income tenants. Pursuant to section 420.5099, F.S., Florida Housing is the designated "housing credit agency" for the state of Florida and administers Florida's tax credit program under its Housing Credit (HC) Program. Through the HC Program, Florida Housing allocates Florida's annual fixed pool of federal tax credits to developers of affordable housing under its annual Universal Cycle application process.

9. Florida Housing identified the following deficiency relevant to these proceedings in its preliminary scoring summary of the Petitioner's application dated 1/19/2012 *(Exhibit J-3)*:

> **The Certification portion of the Local Government Verification that Development is Consistent with Zoning and Land Use Regulations Form provided in the Application is not complete. The space for "city or county" is blank.**

10. The Petitioner timely submitted a cure in response to this scoring deficiency consisting of a statement that La Margarita's form contained all necessary information, along with copies of scoring materials (NOPSE's Numbered 539 & 327) regarding another application in the current cycle, Application No. 2011-182C (Sapodilla Place), as an example of an application that received full credit for the item despite missing information on the form. ***(Exhibit J-4)***

11. Florida Housing scored the Petitioner's application and issued its final scoring summary dated 3/27/2012 ***(Exhibit J-5)*** in which it concluded that the Petitioner failed threshold:

> **The Certification portion of the Local Government Verification that Development is Consistent with Zoning and Land Use Regulations Form provided in the Application is not complete. The space for "city or county" is blank.**

12. As a result of the failure noted in the scoring summary, Florida Housing found that the Petitioner's application failed to achieve threshold, and thus was disqualified from further participation in the Universal Cycle.

PETITIONER'S ELECTION TO SUBMIT WRITTEN STATEMENT IN LIEU OF ATTENDING HEARING; TIME FOR SUBMITTING WRITTEN STATEMENT AND RESPONSE

13. The Petitioner timely filed its Petition contesting Florida Housing's scoring of its application regarding the threshold failure. Petitioner, in its Election of Rights, elected an informal proceeding, and in lieu of attending an informal hearing to be held in Tallahassee, elected to submit a written statement and documentary evidence. ***(Exhibit J-6)*** Petitioner and Florida Housing stipulate and agree that Florida Housing's designated hearing officer may issue a recommended order in this matter based on the following procedure: In lieu of a hearing, Petitioner shall submit a written statement and Florida Housing shall submit a written response to the written statement. Petitioner's written statement shall be submitted to Florida Housing's designated hearing officer and a copy of same served on Respondent, no later than close of business on May 10, 2012. Petitioner has elected to rely on its Petition as its written statement. Respondent shall submit its written response to the Petitioner's written statement within five (5) business days following service of Petitioner's written statement.

OFFICIAL RECOGNITION OF RULES

14. The parties request the Honorable Hearing Officer take official recognition (judicial notice) of Rule Chapter 67-48, Fla. Admin. Code, as well as the incorporated Universal Application Package or UA1016 (Rev. 2-11) which includes the forms and instructions.

15. The parties stipulate, subject to arguments on the grounds of relevance, to the official recognition of any Final Orders of the Florida Housing Finance Corporation and to any Rules promulgated by the Florida Housing Finance Corporation, including

past and present versions of the Universal Cycle Application, Instructions, and any forms and exhibits attached thereto or incorporated by reference therein.

EXHIBITS

16. 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: Exhibit 32 - "Local Government Verification That Development Is Consistent With Zoning And Land Use Regulations,"

Exhibit J-3: Preliminary scoring summary of Petitioner's application dated 1/19/2012.

Exhibit J-4: Petitioner's Cure, Tracking Number 624

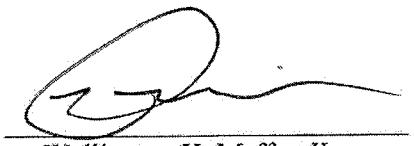
Exhibit J-5: Final scoring summary of Petitioner's application dated 3/27/2012.

Exhibit J-6: Petitioner's Election of Rights.

Respectfully submitted this 9TH day of May, 2012.

By: _____

Matthew Rieger, Esq.
Florida Bar No. 0520251
Matthew Rieger, PA
3225 Aviation Avenue, Suite 602
Coconut Grove, Florida 33133
Telephone: (305) 537-4684
matthew@matthewrieger.com
Attorney for Petitioner
HTG Miami 4, LLC

By: 

Wellington H. Meffert II
Florida Bar No. 0765554
General Counsel
Florida Housing Finance
Corporation
227 North Bronough Street
Suite 5000
Tallahassee, Florida 32301-1329
Telephone: (850) 488-4197
Facsimile: (850) 414-6548
Wellington.meffert@floridahousing.org
Attorney for Respondent