

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS

Agenda Item #:

3A-6

AGENDA ITEM SUMMARY

Meeting Date: October 6, 2009 [x] Consent [] Regular
[] Workshop [] Public Hearing
Department: County Administration
Submitted By: County Administration
Submitted For: Economic Development Office

I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to:

- A) Approve a Section 108 Loan Program Agreement between Palm Beach County (PBC) and Oxygen Development, LLC in the amount of three million dollars (\$3,000,000), contingent upon the approval of the U.S. Department of Housing & Urban Development (HUD);
- B) Approve the increase of the working capital loan term from ten (10) years to fifteen (15) years; and
- C) Authorize the County Administrator to sign all loan documents associated with this item.

Summary: On September 2, 2009, the Section 108 Loan Review Committee, made up of representatives from the Economic Development Office, Housing & Community Development, and the Office of Financial Management & Budget, recommended providing a \$3,000,000 HUD Section 108 loan for Oxygen Development LLC (the "Company") through the Palm Beach County Section 108 Loan Program. The Company, a manufacturer of color cosmetics, skin care, hair care and over-the-counter drug-type products will invest an estimated \$26,110,000, which includes \$22,480,000 from the Recovery Zone Facility Bond (approved by the Board of County Commissioners on September 1, 2009, Document R2009-1443), \$630,000 from owner's equity and \$3,000,000 from the HUD Section 108 loan. The Company will use the Section 108 funds for working capital. The interest rate on the Sec. 108 loan will be the 3-month London Inter Bank Offered Rate (LIBOR) at the time of closing (as of 09/21/09, LIBOR was 0.289 %) plus one percent (1%), for a term of fifteen (15) years. The project includes the construction of a new manufacturing/global headquarter facility on a site located at 1525 S. Congress Avenue in Palm Springs, which is owned by the Company's real estate affiliate Oxygen Holdings LLC. The Company will create 400 new full time equivalent jobs in Palm Beach County within five years of which 51% will be offered to persons with low to moderate income. **These are Federal funds that require no local match. All documents are subject to such modifications required for consistency with the loan commitment, compliance with HUD's criteria, and to protect the County's interest.** District 2 (DW)

Background and Policy Issues: On March 12, 2002 (Agenda Item # 6D-1), the Board of County Commissioners (BCC) approved policies for the development and administration of a revolving loan program funded by HUD under the CDBG Section 108 Loan Guarantee Program. On June 18, 2002 (Documents R-2002-0989 and R-2002-0990), the BCC approved the first amendment to the Palm Beach County Five-year Consolidated Plan to incorporate the Section 108 Loan Guarantee Program and the application for 108 funds for \$15,000,000. HUD approved the County's application for funding on September 26, 2002. The BCC has approved four amendments to the Palm Beach County Section 108 Loan Program Criteria as follows: the first amendment on January 28, 2003 (Agenda Item No. 5C-1), the second amendment on May 15, 2007 (Agenda Item No. 5A-2), the third amendment on December 2, 2008 (Agenda Item No. 6A-1), and the fourth amendment on May 5, 2009 (Document R-2009-0725).

Attachments:

Section 108 Loan Program Agreement

Recommended by: Sharon Jones 9/24/09
Economic Development Director Date
Approved by: Sharon Jones 9/24/09
Senior Assistant County Administrator Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2009	2010	2011	2012	2013
Capital Expenditures	_____	_____	_____	_____	_____
Expenditure	_____	3,000,000	_____	_____	_____
Operating Cost	_____	_____	_____	_____	_____
External Revenue	_____	(3,000,000)	_____	_____	_____
Program Income (PBC)	_____	_____	_____	_____	_____
In-Kind Match (PBC)	_____	_____	_____	_____	_____
NET FISCAL IMPACT	\$0 - 0 0	_____	_____	_____	_____
# ADDITIONAL FTE POSITIONS (Cumulative)	_____	_____	_____	_____	_____

Is Item Included In Current budget? Yes No

Budget Account Numbers:

Fund 1540 Dept. 764 Unit 2002 Object 8201 (Section 108 Loan)

B. Recommended Sources of Funds/Summary of Fiscal Impact:

C. Departmental Fiscal Review: *Harry [Signature]* 9/17/09

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Dev. and Control Comments:

* No Fiscal Impact, funds are used by Section 108 loan fund

Neil [Signature] 9/18/09
 9/18/09 OFMB 9/18/09 9/18/09

June J. Jacoby 9/22/09

Contract Dev. and Control

This Section 108 Loan Program Agreement will be executed at the closing with other documents.

B. Legal Sufficiency:

[Signature] 9/22/09
 Assistant County Attorney

C. Other Department Review:

 Department Director

This summary is not to be used as a basis for payment.

**SECTION 108 LOAN PROGRAM AGREEMENT
BETWEEN
PALM BEACH COUNTY
AND
OXYGEN DEVELOPMENT, LLC**

THIS AGREEMENT is made as of the ____ day of _____, 2009 by and between Palm Beach County, Florida, a political subdivision of the State of Florida, by and through its Board of County Commissioners, herein referred to as COUNTY, and Oxygen Development, LLC [] an individual, [] a partnership, [X] a limited liability company, [] a corporation authorized to do business in the State of Florida, hereinafter referred to as COMPANY, whose physical address is 1441 West Newport Center Drive, Deerfield Beach, FL 33442 and whose Federal I.D. number is 010715094.

WITNESSETH:

WHEREAS, the COUNTY is administering various Section 108 Loan Programs (its "108 Loan Program") under the Rules and Regulations of the U.S. Department of Housing and Urban Development (hereinafter referred to as "HUD"); and

WHEREAS, the COUNTY and the COMPANY are required to follow such Rules and Regulations of HUD and the national purpose of the program which is to eliminate slums or blight or provide job opportunities to persons of low and moderate income or provide for an urgent need as defined by HUD; and

WHEREAS, the COUNTY has determined that the Section 108 loan is an eligible loan to the COMPANY under CFR 570.203 (b) and 570.703(i);

WHEREAS, COUNTY intends to grant financing in the amount of three million dollars (\$3,000,000) to COMPANY subject to the terms and conditions outlined in the loan commitment dated _____ as well as those certain loan documents which include, the Loan Agreement, Section 108 Promissory Notes, Collateral Mortgage and Security Agreement, Guaranty Agreement, and any and all other documents and/or agreements evidencing, securing or relating to the loan.

NOW, THEREFORE, in consideration of the promises and mutual covenants hereinafter contained, the parties agree as follows:

1. Anti-Piracy Provisions

The COMPANY hereby certifies that it is in compliance with Section 105H of U.S.C. 5305 and 24 CFR 570.210 and 570.482 and 507.506 in that the Section 108 Loan will not cause the COMPANY to locate a facility, plant or operation, including the expansion of a business that will result in the loss of jobs from one Labor Market Area to another.

2. Benefit to Persons of Low and Moderate Income

The COMPANY has agreed to enter into a First Source Agreement with Workforce Alliance to meet the goal of hiring 51% of its new employees from the low and moderate income workforce.

3. Job Creation

In compliance with 24 CFR 570.209(b)(1) the COMPANY agrees to make a good faith effort to create in Palm Beach County one new full time equivalent (FTE) job per \$7,500 of HUD assistance within five (5) years, totaling 400 new FTE jobs. Year 1 shall begin as of the date of closing of the Section 108 Loan.

A new FTE job shall be a position that requires employment for a minimum of 40 hours per week or 2,080 hours annually. A FTE job may include permanent, salaried part-time employees whose hours total 2,080 hours annually.

4. Job Audit

The COMPANY shall report its compliance with the job creation requirement by submitting an Annual Report certified by the Payroll Officer or Lead Accountant as shown in Exhibit A of the Agreement attached hereto and made a part hereof. The Annual Report shall be submitted to the COUNTY (attn: Palm Beach County Economic Development Office). COMPANY will be informed by the COUNTY when the COUNTY has made the determination that there are deficiencies with the audit and/or invoice documentation. Under these circumstances, the audit and invoice documentation cannot be processed pending COMPANY resolving the identified deficiencies. Upon receipt by the COUNTY from COMPANY of the appropriate audited and/or invoiced documentation, processing of the audit and invoices may proceed. Further, the COMPANY shall permit the COUNTY to investigate its books and records and interview employees to insure compliance with this provision. When the COMPANY has achieved its job goals, it shall have satisfied this requirement.

5. Inspection

Upon ten (10) business days notice and at any time during normal business hours and as often as the COUNTY deems necessary, there shall be made available by COMPANY to the COUNTY for examination, all its records with respect to all matters covered by this Agreement. The COUNTY reserves the right to require copies of such records and/or to conduct an inspection of COMPANY'S records regarding performance measures at any time for any period covered by this Agreement.

GENERAL CONDITIONS

1. Employee: Bona Fide

COMPANY warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for COMPANY to solicit or secure this Agreement and that it has not paid or agreed to pay any person, company, corporation, individual, or firm, other than a bona fide employee working solely for COMPANY, any fee, commission, percentage, gift, or any other consideration contingent upon or resulting from the award or making of this Agreement.

2. Non-discrimination

COMPANY agrees that no person shall on the grounds of race, color, disability, national origin, religion, age, familial status, sex or sexual orientation, gender identity or expression, be excluded from the benefits of, or be subjected to discrimination under, any activity carried out by the performance of this Agreement.

3. Worker's Compensation & Employer's Liability

COMPANY shall agree to maintain Worker's Compensation Insurance & Employers Liability in accordance with Florida Statute Chapter 440.

4. Convicted Vendor List; Debarment

(a) As provided in F.S. 287.132-133, by entering into this Agreement or performing any work in furtherance hereof, COMPANY certifies that neither COMPANY, its affiliates nor its principals who will perform hereunder have been placed on the Convicted Vendor List maintained by the State of Florida Department of Management Services within thirty-six (36)

months immediately preceding the date of execution of this Agreement by the COUNTY. This notice is required by F.S. 287.133(3)(a).

Florida Department of Management Services, Division of Purchasing
4050 Esplanade Way, Tallahassee, FL 32399-0950
(850) 488-8440
http://dms.myflorida.com/dms/purchasing/convicted_suspended_discriminatory_vendor_lists/convicted_vendor_list

(b) By entering into this Agreement or performing any work in furtherance hereof, COMPANY certifies that neither COMPANY, its affiliates nor its principals who will perform hereunder is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency, as such terms are defined in Executive Order 12549, nor is any such action pending or proposed.

5. Successors & Assigns

The COUNTY and COMPANY each binds itself and its partners, successors, executors, administrators and assigns to the other party and to the partners, successors, executors, administrators and assigns of such other party, in respect to all covenants of this Agreement. Except as above, neither the COUNTY nor COMPANY shall assign, sublet, convey or transfer its interest in this Agreement without the prior written consent of the other. Nothing herein shall be construed as creating any personal liability on the part of any officer or agent of the COUNTY, nor shall it be construed as giving any rights or benefits hereunder to anyone other than the COUNTY and COMPANY.

6. Material Change of Circumstances

COMPANY shall immediately notify the COUNTY of any material change of circumstances of COMPANY'S business operations in Palm Beach County. For the purposes hereof, material change of circumstance shall include, but not be limited to, the failure of COMPANY to diligently and actively pursue fulfillment of the terms hereof, the sale or transfer of COMPANY'S assets for the benefit of creditors, the suspension, closing or cessation of operation of COMPANY, voluntary or involuntary bankruptcy or an assignment for the benefit of COMPANY'S creditors. In the event of a material change of circumstances, the COUNTY shall have the right to terminate this Agreement, whereupon the COUNTY shall have no further obligation to COMPANY under this Agreement.

7. Entire Agreement Between Parties

The COUNTY and COMPANY agree that this Agreement and all attachments hereto, including but not limited to the Loan Documents and any BEDI Grant, sets forth the entire agreement between the parties, and that there are no promises or understandings other than those stated herein. None of the provisions, terms and conditions contained in this Agreement may be added to, modified, superseded or otherwise altered, except by written instrument executed by the parties hereto.

8. Invalid or Unenforceable Terms

If any term or provision of this Agreement, or the application thereof to any person or circumstances shall, to any extent, be held invalid or unenforceable, the remainder of this Agreement, or the application of such terms or provision, to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected, and every other term and provision of this Agreement shall be deemed valid and enforceable to the extent permitted by law.

9. Remedies

In the event of a Default by the COMPANY, the COUNTY shall consult with HUD as to the appropriate remedy, including acceleration of the principal balance due under the Section 108 loan, including defeasance provisions if applicable. The COMPANY recognizes the authority of HUD in this matter.

10. Law and Remedy

This Agreement shall be governed by the laws of the State of Florida and the laws of the United States and the Rules and Regulations of HUD. Any and all legal action necessary to enforce the Agreement shall be held in Palm Beach County or such jurisdiction as is established by HUD. No remedy herein conferred upon any party is intended to be exclusive of any other remedy, and each and every such remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing at law or in equity or by statute or otherwise. No single or partial exercise by any party of any right, power, or remedy hereunder shall preclude any other or further exercise thereof.

11. Indemnification and Hold Harmless

The COMPANY agrees to protect, defend, reimburse, indemnify and hold the COUNTY and HUD, its agents, its employees and elected officers and each of them, free and harmless at all times from and against any and all claims, liability, expenses, losses, costs, fines and damages, including attorney's fees, and causes of action of every kind and character against and from the COUNTY and HUD, which arise out of this Agreement. COMPANY recognizes the broad nature of this indemnification and hold harmless clause, and voluntarily makes this covenant and expressly acknowledges the receipt of good and valuable consideration provided by the COUNTY in support of this clause in accordance with the laws of the State of Florida. This Paragraph shall survive the termination of the Agreement.

12. Assignability

It is recognized by the COUNTY and the COMPANY that this Agreement is part of the closing documents of a Section 108 Loan and the loan documents and this Agreement are held in trust for the benefit of HUD, and HUD has the final discretion as to its enforcement.

13. Amendment; No Waiver

This Agreement may not be amended or the terms or provisions hereof waived unless such amendment or waiver is in writing and signed by the parties. No delay or failure by the COUNTY to exercise any right, power, or remedy shall constitute a waiver thereof by the COUNTY, and no single or partial exercise by the COUNTY of any right, power, or remedy shall preclude other or further exercise thereof or any exercise of any other rights, powers, or remedies.

14. Counterparts

This Agreement may be executed in any number of counterparts, all of which together shall constitute one agreement.

15. Further Actions

The COMPANY shall execute and deliver such documents and instruments, and shall take such other actions as the COUNTY deems necessary to more fully carry out the terms of this Agreement.

16. Notice

All notices required in this Agreement shall be sent by certified mail, return receipt requested, and if sent to the COUNTY shall be mailed to:

Kevin Johns, Director
Palm Beach County Economic Development Office
P.O. Box 1989
West Palm Beach, Florida 33402-1989

With a copy to:

Dawn Wynn, Assistant County Attorney
Palm Beach County Attorney's Office
301 N. Olive Ave, 6th Floor
West Palm Beach, FL 33401

And if sent to the COMPANY shall be mailed to:

Philippe Cohen, General Manager
1441 West Newport Center Drive
Deerfield Beach, FL 33442

(REMAINDER OF THIS PAGE LEFT BLANK INTENTIONALLY)

IN WITNESS WHEREOF, the Board of County Commissioners of Palm Beach County, Florida has made and executed this Agreement on behalf of COUNTY, and COMPANY has hereunto set its hand the day and year above written.

WITNESS FOR PALM BEACH COUNTY:

Signature _____

Name (type or print) _____

Title _____

APPROVED AS TO TERMS AND CONDITIONS:

By: _____

Director, Economic Development _____

WITNESS FOR COMPANY:

Signature _____

Name (type or print) _____

Title _____

PALM BEACH COUNTY, FLORIDA BY ITS BOARD OF COUNTY COMMISSIONERS:

By: _____

Robert Weisman, County Administrator _____

APPROVED AS TO FORM AND LEGAL SUFFICIENCY:

By: _____

Senior Assistant County Attorney _____

COMPANY:
Oxygen Development, LLC

Signature _____

Name (type or print) _____

Title _____

COMPANY SEAL
(Seal must be identical to COMPANY name. If seal is unavailable, COMPANY must draw seal. If not applicable, write N/A.)

