

ADD ON

Agenda Item #: 5F.2

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS

AGENDA ITEM SUMMARY

Meeting Date: July 19, 2011 Consent Regular
 Workshop Public Hearing

Department: County Administration
Submitted By: Office of Economic Development

I. EXECUTIVE BRIEF

Motion and Title: Staff recommends motion to:

A) **adopt** a Resolution by the Board of County Commissioners of Palm Beach County, Florida, authorizing the submittal of a New Markets Tax Credit (NMTC) Program Application with Palm Beach County (PBC) as the Controlling Entity in the amount of \$30,000,000 to the United States Department of the Treasury (Treasury) Community Development Financial Institutions (CDFI) Fund; authorizing PBC to enter into a Controlling Entity Agreement with CIDC-Palm Beach County Community Development Entity, LLC (CDE); authorizing the acceptance of the funds awarded in order to spur new or increased investments in established businesses in Palm Beach County and rural counties surrounding Lake Okeechobee; authorizing the Economic Development Office (EDO) to establish and manage the NMTC Loan Program to finance business projects; and authorizing the County Administrator or his designee to execute the Loan Application documents to implement the NMTC Loan Program and issue debt obligations pursuant thereto; and

B) **approve** Controlling Entity Agreement with CIDC-Palm Beach County Community Development Entity, LLC designating PBC as Controlling Entity in order to manage the CDE.

Summary: This Application will request an allocation of Federal funds totaling \$30,000,000 to stimulate private investment capital that, in turn, will facilitate economic and community development in low-income communities and create jobs in Palm Beach County and rural counties surrounding Lake Okeechobee. The NMTC Program draws investment capital by permitting individual and corporate investors to receive a tax credit totaling 39% against their Federal income tax in exchange for making equity investments in specialized financial institutions called Community Development Entities. Palm Beach County will receive 80% of all investment capital and the rural counties will receive 20%. The Application requires that every applicant designate a Controlling Entity. The Controlling Entity Agreement with CDE, the Applicant, will designate Palm Beach County as Controlling Entity and non-member Manager, providing Management Control and Management Voting Control over the CDE. The CDE will provide financing from the pool of investment funds in the form of loans to qualified businesses within Palm Beach County and surrounding rural counties. EDO will receive an annual allocation of revenue to offset administrative costs over a seven (7) year period. The loan recipient will be responsible for paying the debt of the loan. **No County funds will be pledged to complete any project funded by the NMTC Program. These are Federal funds that do not require a match.** Countywide (DW)

Background and Policy Issues: The NMTC Program, enacted by Congress as part of the Community Renewal Tax Relief Act of 2000, is incorporated as section 45D of the Internal Revenue Code and is funded by the United States Treasury under the Community Development Fund NMTC Program and provides tax incentives over a period of seven (7) years to induce private sector market-driven investments in businesses and real estate developments located in economically distressed communities across the nation. The Treasury CDFI announced the availability of up to \$3.5 Billion of NMTC authorized by section 733 of the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010. Substantially all of the taxpayer's investment must be used by these entities to make investments in low-income communities. The tax credit is claimed over a period of seven (7) years and the investment cannot be redeemed before the end of the seven-year (7) period. The EDO will manage the NMTC Loan Program which may be used to leverage the County's existing loan resources under the Section 108 Loan Program and the Revolving Energy Loan Fund.

Attachments:

1. Resolution
2. Controlling Entity Agreement with CIDC-Palm Beach County Community Development Entity, LLC.

Recommended by: [Signature] 7-13-2011
 Economic Development Director Date

Approved by: [Signature] 7/15/2011
 Assistant County Administrator Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2011	2012	2013	2014	2015
Capital Expenditures	_____	_____	_____	_____	_____
Expenditure	_____	_____	_____	_____	_____
Operating Cost	\$ _____	\$ _____	\$ _____	_____	_____
External Revenue	(\$ _____)	(\$ _____)	(\$ _____)	_____	_____
Program Income (PBC)	_____	_____	_____	_____	_____
In-Kind Match (PBC)	_____	_____	_____	_____	_____
NET FISCAL IMPACT	*See Below	_____	_____	_____	_____
# ADDITIONAL FTE POSITIONS (Cumulative)	_____	_____	_____	_____	_____

Is Item Included In Current Budget? Yes _____ No _____

Fund Dept. Unit Object

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

*Source of funding will be U.S. Department of the Treasury CDFI Funds - NMTCC. The budget will be amended to recognize the \$30,000,000 in Federal funds should it be awarded.

C. Departmental Fiscal Review:

[Handwritten Signature]

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Administration Comments:

[Handwritten Signature] 7/14/2011
 OFMB
 WS 7-14-11
 SW 7/14/11
 7/14/11

[Handwritten Signature] 7/14/11
 Contract Development and Control

B. Legal Sufficiency:

[Handwritten Signature] 7/14/11
 Sr. Assistant County Attorney
 Contract not executed.

This Contract complies with our contract review requirements.

At the time of our review, the contract was not executed.

C. Other Department Review:

 Department Director

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

RESOLUTION NO. R-2011-

Resolution by the Board of County Commissioners of Palm Beach County, Florida, authorizing the submittal of a New Markets Tax Credit (NMTC) Program Application with Palm Beach County (PBC) as the Controlling Entity in the amount of \$30,000,000 to the United States Department of the Treasury (Treasury) Community Development Financial Institutions (CDFI) Fund; authorizing PBC to enter into a Controlling Entity Agreement with CIDC-Palm Beach County Community Development Entity, LLC (CDE); authorizing the acceptance of the funds awarded in order to spur new or increased investments in established businesses in Palm Beach County and rural counties surrounding Lake Okeechobee; authorizing the Economic Development Office (EDO) to establish and manage the NMTC Loan Program to finance business projects; and authorizing the County Administrator or his designee to execute the Loan Application documents to implement the NMTC Loan Program and issue debt obligations pursuant thereto.

WHEREAS, the United States Department of the Treasury Community Development Financial Institutions Fund accepts applications under its New Markets Tax Credit Program from Community Development Entities or CDE's to establish a pool of funds to be used for businesses and community development projects; and

WHEREAS, CIDC-Palm Beach County Community Development Entity, LLC has been designated, Palm Beach County's CDE, thereby establishing it as the Applicant; and

WHEREAS, the Application requires that every Applicant for NMTC Allocation must designate a Controlling Entity and such Controlling Entity Representative is required to affirm, through submission of a signature page, that it is indeed the Controlling Entity of the Applicant and supports the Applicant's Allocation Application; and

WHEREAS, the Applicant desires that Palm Beach County EDO be designated as the CDE's Controlling Entity and non-member Manager, providing Management Control and Management Voting Control over the CDE; and

WHEREAS, the purpose of the NMTC Program under IRC §45D of the Internal Revenue Code is to create jobs and provide material improvement in the lives of residents of low-income communities by permitting individual and corporate taxpayers to receive a credit against federal income taxes for making Qualified Equity Investments (QEI's) in qualified community development entities; and

WHEREAS, if selected for an allocation, Palm Beach County must enter into an Allocation Agreement with the CDFI Fund which sets forth terms and conditions of the NMTC Allocation which may include the targeted population, the approved uses of funds, the approved service area(s) in which the proceeds of QEI's will be used, reporting requirements and CDE certification requirements throughout the term of the Allocation Agreement etc.; and

WHEREAS, in Section 290.045, Florida Statutes, the Florida Legislature declared that the use of public funds towards the achievement of enhancing and expanding economic activity in the counties of the State by attracting and retaining business enterprises conducive to economic promotion, enhancing and preserving purchasing power and employment opportunities for State residents, and improving the welfare and competitive position of the State constitutes a public purpose; and

WHEREAS, the Board of County Commissioners of Palm Beach County, Florida believes that it is appropriate to utilize the United States Treasury Community Development Financial Institution's NMTC Investment capital to provide gap financing to established businesses, and has determined that the use of public funds to assist in implementing the NMTC Loan Program constitutes a public purpose as described in Section 290.0411 and Section 125.045 of the Florida Statutes.

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF PALM BEACH COUNTY, FLORIDA, THAT:

Section I. The foregoing recitals are true and correct and are expressly incorporated herein by reference and made a part hereof.

Section II. The EDO is authorized to submit to the United States Department of the Treasury Community Development Financial Institutions Fund a NMTC Program Application for \$30,000,000 to administer and lend to businesses located in low income communities in Palm Beach County and surrounding rural counties and to establish and manage a NMTC Loan Program.

Section III. The EDO is authorized to enter into an Agreement with CIDC-Palm Beach County Community Development Entity, LLC as its Controlling Entity.

Section IV. The County Administrator or his designee is authorized to execute all loan documents related to this New Markets Tax Credit Loan Program Allocation Application in order to implement the NMTC Loan Program and issue debt obligations pursuant thereto and to provide additional information as may be required.

The foregoing Resolution was offered by Commissioner _____ who moved its adoption. The motion was seconded by Commissioner _____ and, being put to a vote, the vote was as follows:

- COMMISSIONER KAREN T. MARCUS, CHAIR _____
- COMMISSIONER SHELLEY VANA, VICE CHAIR _____
- COMMISSIONER PAULETTE BURDICK _____
- COMMISSIONER STEVEN L. ABRAMS _____
- COMMISSIONER BURT AARONSON _____
- COMMISSIONER JESS R. SANTAMARIA _____
- COMMISSIONER PRISCILLA A. TAYLOR _____

The Chair thereupon declared the Resolution duly passed and adopted this ____ day of _____, 2011.

APPROVED AS TO FORM AND LEGAL SUFFICIENCY

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

SHARON R. BOCK, CLERK & COMPTROLLER

By: _____
County Attorney

By: _____
Deputy Clerk

AGREEMENT

THIS AGREEMENT, made and entered into as of this ____ day of July, 2011, is by and between CIDC-PALM BEACH COUNTY COMMUNITY DEVELOPMENT ENTITY, LLC, a Florida limited liability company ("CDE") and PALM BEACH COUNTY, a political subdivision of the State of Florida, by and through its Board of County Commissioners (COUNTY).

RECITALS:

WHEREAS, CDE is a qualified community development entity as certified by the Community Development Financial Institution Fund ("CDFI").

WHEREAS, CDE (as applicant) intends to file an application for new markets tax credit ("NMTC") authority pursuant to Notice of Allocation Availability ("NOAA") for the CY 2011 allocation round of the NMTC Program (the "Application"); and

WHEREAS, the Application requires that every applicant for NMTC authority must designate a Controlling Entity; and

WHEREAS, CDE desires that COUNTY be designated as the CDE's Controlling Entity. For this purpose, the term "Controlling Entity" means an entity which controls (as such term is hereinafter defined) the CDE applicant; and

WHEREAS, COUNTY is willing to be so designated as CDE's Controlling Entity on the terms of this Agreement.

NOW, THEREFORE, it is agreed as follows:

1. Controlling Entity Designation.

For purposes of this Agreement, and as specified in the Application, the term "control" means either:

(a) Control or power to vote more than 50% of the equity interests in the CDE, either directly or indirectly or acting through one or more other persons ("Voting Control"); or

(b) Control in any manner over the election of a majority of the Governing Board and Advisory Board of the CDE ("Board Control"); or

(c) Power to influence, directly or indirectly, a controlling influence over the management policies or investment decisions of the CDE ("Management Control").

2. CDE hereby designates COUNTY as its Controlling Entity, and COUNTY hereby accepts such designation. To evidence such designation, the Operating Agreement of the CDE shall designate COUNTY as its non-member Manager, providing to COUNTY as Manager Voting Control and Management Control. As Manager, COUNTY will have Board Control over any governing board and/or advisory board as may be appointed by the CDE.

3. Indemnification. CDE shall protect, defend, reimburse, indemnify and hold COUNTY, its agents, employees and elected officers harmless from and against all claims, liability, expense, loss, cost, damages or causes of action of every kind or character, including attorney's fees and costs, whether at trial or appellate levels or otherwise, arising during and as a result of their performance of the terms of this Agreement or due to the acts or omissions of CDE.

4. Insurance.

(a) CDE shall ensure that in connection with each transaction it undertakes under the NMTC Program that each borrower of funds loaned by the CDE or project developers otherwise benefitting from CDE's allocation of NMTCs to a business or project (herein a "Borrower") shall maintain, at such Borrower's sole cost and expense the insurance coverages and limits (including endorsements), as described herein. Each such policy shall provide the CDE and COUNTY with at least

ten (10) day prior notice of any cancellation, non-renewal or material change to the insurance coverages. The requirements contained herein, as well as COUNTY'S review or acceptance of insurance maintained by such Borrowers are not intended to and shall not in any manner limit or qualify the liabilities and obligations assumed by CDE under the Agreement.

(1) Commercial General Liability. Commercial General Liability at a limit of liability not less than **\$500,000** Each Occurrence. Coverage shall not contain any endorsement excluding Contractual Liability or Cross Liability unless granted in writing by COUNTY's Risk Management Department. Each of CDE's Borrowers shall provide this coverage on a primary basis.

(2) Business Automobile Liability. Business Automobile Liability at a limit of liability not less than **\$500,000** Each Accident for all owned, non-owned and hired automobiles. In the event a CDE Borrower does not own any automobiles, the Business Auto Liability requirement shall be amended allowing such Borrower to agree to maintain only Hired and Non-Owned Auto Liability. This amended requirement may be satisfied by way of endorsement to the Commercial General Liability, or separate Business Auto coverage form. Each of CDE's Borrowers shall provide this coverage on a primary basis.

(3) Worker's Compensation Insurance & Employers Liability. Worker's Compensation and Employers Liability in accordance with Florida Statute Chapter 440. Each of CDE's Borrowers shall provide this coverage on a primary basis.

(b) Professional Liability. Upon CDE's receipt of an award of NMTC allocation under the Application (an "Award"), CDE shall maintain Professional Liability or equivalent Errors and Omissions Liability at a limit of liability not less than **\$1,000,000** Each Claim. When a self-insured retention (SIR) or deductible exceeds **\$10,000**, COUNTY reserves the right, but not the obligation, to review and request a copy of CDE'S most recent annual report or audited financial statement. For policies written on a "Claims-Made" basis, CDE shall maintain a Retroactive Date prior to or equal to the effective date of this Agreement. The Certificate of Insurance providing evidence of the purchase of this coverage shall clearly indicate whether coverage is provided on an "occurrence" or "claims - made" form. If coverage is provided on a "claims - made" form the Certificate of Insurance must also clearly indicate the "retroactive date" of coverage. In the event the policy is canceled, non-renewed, switched to an Occurrence Form, retroactive date advanced, or any other event triggering the right to purchase a Supplement Extended Reporting Period (SERP) during the life of this Agreement, CDE shall purchase a SERP with a minimum reporting period not less than 3 years. CDE shall provide this coverage on a primary basis.

(c) Additional Insured. All insurance required hereunder shall endorse the COUNTY as an Additional Insured with a CG 2026 Additional Insured - Designated Person or Organization endorsement, or its equivalent, to the Commercial General Liability. The Additional Insured endorsement:

(1) respecting policies to be provided by Borrower shall read "Palm Beach County Board of County Commissioners, a Political Subdivision of the State of Florida, its Officers, Employees and Agents, Successors and/or Assigns" and "CIDC-Palm Beach County Community Development Entity, LLC its Officers, Employees and Agents, Successors and/or Assigns". The Borrower shall provide the Additional Insured endorsements coverage on a primary basis; and

(2) respecting the professional liability policy to be provided by CDE shall read "Palm Beach County Board of County Commissioners, a Political Subdivision of the State of Florida, its Officers, Employees and Agents. The CDE shall provide the Additional Insured endorsements coverage on a primary basis.

(d) Waiver of Subrogation. CDE hereby waives, and shall cause its

Borrowers to waive, any and all rights of Subrogation against the COUNTY, its officers, employees and agents for each required policy. When required by the insurer, or should a policy condition not permit an insured to enter into a pre-loss agreement to waive subrogation without an endorsement to the policy, then CDE shall agree to notify the insurer and request the policy be endorsed with a Waiver of Transfer of rights of Recovery Against Others, or its equivalent. This Waiver of Subrogation requirement shall not apply to any policy, which specifically prohibits such an endorsement, or which voids coverage should CDE enter into such an agreement on a pre-loss basis.

(e) Certificate(s) of Insurance. Each Borrower at its CDE transaction closing, and CDE upon receipt of an Award, shall deliver to the COUNTY'S representative as identified in Article 26, a Certificate(s) of Insurance evidencing that all types and amounts of insurance coverages required by this Agreement have been obtained and are in full force and effect. Such Certificate(s) of Insurance shall include a minimum ten (10) day endeavor to notify due to cancellation or non-renewal of coverage. The certificate of insurance shall be issued to the COUNTY, and on behalf of the CDE if from a Borrower, at:

Palm Beach County
c/o Economic Development Office
301 North Olive Avenue, 10th Floor
West Palm Beach, Florida 33401

(f) Umbrella or Excess Liability. If necessary, a Borrower may satisfy the minimum limits required above for either Commercial General Liability, Business Auto Liability, and Employer's Liability coverage under Umbrella or Excess Liability. The Umbrella or Excess Liability shall have an Aggregate limit not less than the highest "Each Occurrence" limit for either Commercial General Liability, Business Auto Liability, or Employer's Liability. The COUNTY and CDE shall be specifically endorsed as an "Additional Insured" on the Umbrella or Excess Liability, unless the Certificate of Insurance notes the Umbrella or Excess Liability provides coverage on a "Follow-Form" basis.

(g) Right to Review. COUNTY, by and through its Risk Management Department, in cooperation with the contracting/monitoring department, reserves the right to review, modify, reject or accept any required policies of insurance, including limits, coverages, or endorsements, herein from time to time throughout the term of this Agreement. COUNTY reserves the right, but not the obligation, to review and reject any insurer providing coverage because of its poor financial condition or failure to operate legally.

5. Miscellaneous Provisions.

(a) Any and all notices given hereunder shall be furnished in writing, and either hand delivered or sent by certified mail, return receipt requested to:

Sherry Howard, Director
Economic Development Office
301 North Olive Avenue – 10th Floor
West Palm Beach, Florida 33401

with a copy to:

Palm Beach County Attorney's Office
301 North Olive Avenue – Suite 601
West Palm Beach, Florida 33401

and if sent to CDE:

(b) This Agreement represents the entire agreement between the parties and supersedes any oral or written agreements heretofore entered into by the parties.

(c) This Agreement shall be governed in all respects by the laws of the State of Florida.

(d) This Agreement is binding upon and inures to the benefit of the parties, their respective successors, assigns and legal representatives.

(e) This Agreement may not be assigned by either party without the prior written consent of the other party.

6. Remedies. This Agreement shall be governed by the laws of the State of Florida. Any legal action necessary to enforce the Agreement will be held in Palm Beach County. 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, 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.

7. Conflict of Interest. The CDE represents that it presently has no interest and shall acquire no interest, either direct or indirect, which would conflict in any manner with the performance of services required hereunder, as provided for in Chapter 112, Part III, Florida Statutes, and the Palm Beach County Code of Ethics. The CDE further represents that no person having any such conflict of interest shall be employed for said performance of services.

The CDE shall promptly notify the COUNTY's representative, in writing, by certified mail, of all potential conflicts of interest of any prospective business association, interest or other circumstance which may influence or appear to influence the CDE'S judgment or quality of services being provided hereunder. Such written notification shall identify the prospective business association, interest or circumstance, the nature of work that the CDE may undertake and request an opinion of the COUNTY as to whether the association, interest or circumstance would, in the opinion of the COUNTY, constitute a conflict of interest if entered into by the CDE. The COUNTY agrees to notify the CDE of its opinion by certified mail within thirty (30) days of receipt of notification by the CDE. If, in the opinion of the COUNTY, the prospective business association, interest or circumstance would not constitute a conflict of interest by the CDE, the COUNTY shall so state in the notification and the CDE shall, at its option, enter into said association, interest or circumstance and it shall be deemed not in conflict of interest with respect to services provided to the COUNTY by the CDE under the terms of this Agreement.

8. Arrears. The CDE shall not pledge the COUNTY'S credit or make it a guarantor of payment or surety for any contract, debt, obligation, judgment, lien, or any form of indebtedness. The CDE further warrants and represents that it has no obligation or indebtedness that would impair its ability to fulfill the terms of this Contract.

9. Independent Contractor Relationship. The CDE is, and shall be, in the performance of all work services and activities under this Contract, an Independent Contractor, and not an employee, agent, or servant of the COUNTY. All persons engaged in any of the work or services performed pursuant to this Agreement shall at all times, and in all places, be subject to the CDE'S sole direction, supervision, and control. The CDE shall exercise control over the means and manner in which it and its employees perform the work, and in all respects the CDE'S relationship and the relationship of its employees to the COUNTY shall be that of an Independent Contractor and not as employees or agents of the COUNTY.

The CDE does not have the power or authority to bind the COUNTY in any promise, agreement or representation.

10. Access and Audits. The CDE shall maintain adequate records to justify all

charges, expenses, and costs incurred in estimating and performing the work for at least three (3) years after completion or termination of this Agreement. The COUNTY shall have access to such books, records, and documents as required in this section for the purpose of inspection or audit during normal business hours, at the CDE'S place of business.

Palm Beach County has established the Office of the Inspector General in Palm Beach COUNTY Code, Section 2-421 - 2-440, as may be amended. The Inspector General's authority includes but is not limited to the power to review past, present and proposed County contracts, transactions, accounts and records, to require the production of records, and to audit, investigate, monitor, and inspect the activities of the CDE, its officers, agents, employees, and lobbyists in order to ensure compliance with contract requirements and detect corruption and fraud.

Failure to cooperate with the Inspector General or interfering with or impeding any investigation shall be in violation of Palm Beach County Code, Section 2-421 - 2-440, and punished pursuant to Section 125.69, Florida Statutes, in the same manner as a second degree misdemeanor.

11. Authority to Practice. The CDE hereby represents and warrants that it has and will continue to maintain all licenses and approvals required to conduct its business, and that it will at all times conduct its business activities in a reputable manner. Proof of such licenses and approvals shall be submitted to the COUNTY's representative upon request.

12. Severability. 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.

13. Regulations; Licensing Requirements. The CDE shall comply with all laws, ordinances and regulations applicable to the services contemplated herein, to include those applicable to conflict of interest and collusion. CDE is presumed to be familiar with all federal, state and local laws, ordinances, codes and regulations that may in any way affect the services offered.

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 the COUNTY and CDE has hereunto set its hand the day and year above written.

ATTEST:
SHARON R. BOCK
CLERK AND COMPTROLLER

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS

By: _____
Deputy Clerk

By: _____
Chair

WITNESS:

CIDC – Palm Beach County Community
Development Entity, LLC

Signature

Name: William Loewenstein
Title: Member

Name (type or print)

Signature

Signature

Typed Name

Name (type or print)

Title

APPROVED AS TO FORM
AND LEGAL SUFFICIENCY

(corp. seal)

By: _____
County Attorney

APPROVED AS TO TERMS
AND CONDITIONS

By: 
Department Director