

4D-3

Agenda Item #:

2:15 pm

PALM BEACH COUNTY
BOARD OF COUNTY COMMISSIONERS
AGENDA ITEM SUMMARY

Meeting Date: December 6, 2011 [] Consent [X] Regular
[] Ordinance [] Public Hearing

Department: Facilities Development & Operations

I. EXECUTIVE BRIEF

Motion and Title: Staff requests Board direction on the conclusion of contract negotiations for the sale and development of the Wedge Property located within the Transit Oriented Development District in downtown West Palm Beach.

Summary: On October 18, 2011, County Staff provided the Board with a brief update on the status of negotiations and the likely schedule for conclusion to the negotiations. Since that time, Staff has reached conclusion on all but five (5) items on which it requires direction. The five (5) items are: 1) minimum guaranteed development; 2) contract milestones and timing; 3) return of the deposit, 4) exposure for damages, and 5) traffic circulation plan. In addition, the Property Review Committee (PRC) met for an introduction to the disposition and to provide recommendations on the appraisal process and assumptions. - Staff has issued an Invitation to Bid for appraisal services with an expedited schedule. The appraisal work product is due to the County the second week in February and it is anticipated that the contract could be presented to the Board for final consideration along with a recommendation from the PRC on April 3, 2012. The Board's direction on the five issues will allow Staff to conclude the contract negotiations and give the appraiser's the final information required to complete their appraisal. (FDO) Countywide (HJF)

Background and Policy Issues: In early 2010, an RFP for the development of Transit Oriented Development project to be on the Wedge Property. The RFP was structured to be conducted in two phases; 1) pre-qualifications and general project scope, and 2) detailed project scope and supporting documentation. Only one response was received. Because the developer, Transit Village LLC (TV), was determined to be qualified by the Selection Committee and submitted a proposal that was responsive to the RFP requirements, the Board directed that Staff commence negotiations with TV rather than completing Phase 2 of the RFP process. However, because much of the information that would have been submitted in Phase 2 of the RFP process and have been vetted through the continuation of the competitive process was not submitted by TV; negotiations have been protracted as Staff attempted to secure the information that would have otherwise been provided in Phase 2 of the RFP process and to develop appropriate contract terms to not only address the County's real estate interest but provide protections to the operation of the existing Intermodal Transit Facility. At this time, all but five (5) contract issues have been resolved and Staff requires Board direction to conclude negotiations.

Attachments:

1. Summary of Contract Issues Requiring Direction to Conclude Contract Negotiations
2. Summary of Contract Issues Recently Resolved But Contract Modifications to Reflect Same Have Yet To Be Incorporated.

Recommended By: Annex Wolf 11/28/11
Department Director Date

Approved By: [Signature] 12/1/11
County Administrator Date

II. FISCAL IMPACT ANALYSIS

A. Five Year Summary of Fiscal Impact:

Fiscal Years	2012	2013	2014	2015	2016
Capital Expenditures	_____	_____	_____	_____	_____
Operating Costs	_____	_____	_____	_____	_____
External Revenues	_____	_____	_____	_____	_____
Program Income (County)	_____	_____	_____	_____	_____
In-Kind Match (County)	_____	_____	_____	_____	_____
NET FISCAL IMPACT	<u>_____</u> * See below	<u>_____</u>	<u>_____</u>	<u>_____</u>	<u>_____</u>
# ADDITIONAL FTE POSITIONS (Cumulative)	_____	_____	_____	_____	_____
Is Item Included in Current Budget:	Yes	_____	No	_____	
Budget Account No:	Fund _____	Dept _____	Unit _____	Object _____	
		Program _____			

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

* There is no fiscal impact associated with this item. The decisions/direction received from the Board as a result of this item may result in a financial impact. The total financial impact and risk of the contract will be itemized and disclosed in the future item where the Board is considering approval.

C. Departmental Fiscal Review: _____

III. REVIEW COMMENTS

A. OFMB Fiscal and/or Contract Development Comments:

<p>_____ 11/28/11 OFMB</p>	<p>_____ 11/30/11 Contract Development and Control</p>
<p>11/29/11</p>	

B. Legal Sufficiency:

_____ 12/1/11
Assistant County Attorney

C. Other Department Review: _____

Department Director

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

Attachment 1
Transit Oriented Development – Wedge Property
Issues List as of November 10, 2011
Presentation on December 6, 2011

ISSUES WHERE STAFF DESIRES DIRECTION TO CONCLUDE CONTRACT NEGOTIATIONS

1. Minimum Guaranteed Development

Issue: The development that the Developer (Transit Village, LLC or TV) is obligated to do by this contract is; 1) physical site and driveway modifications to the existing ITC to allow for the future development, 2) 290 structured parking spaces to replace the 160 existing surface spaces, 3) a structural “envelop” enclosing the existing intermodal facility, 4) improvements to local roadways/intersections, and 5) the construction of liner buildings of not less than 50,000 square feet which may include 20 affordable housing units. Collectively this is referred to as the First Phase.

The contract states that the Purchaser intends that ultimately the site will be developed to include; 1) civic uses, 2) up to 600,000 sf of commercial/office, 3) up to 400 hotel rooms, 4) up to an additional 120 residential units, and up to 100,000 sf of amenity retail.

While it is reasonably arguable that the developer would not make the significant investment required to accomplish the First Phase without being ready to proceed with at least a significant portion of the overall development allowed and intended, the contract itself does not guarantee a level of development which will produce the purported transit ridership and economic benefits which have been represented to occur.

2. Contract Milestones and Timing

Issue: The contract provides nine (9) years for Transit Village, LLC (TV) to commence construction on the First Phase and there is no milestone for completion of the First Phase.

The contract identifies certain milestones which must be met starting with the approval of this contract. They are as follows.

- Obtain FTA and NEPA approval by end of Year 2.
- Submit application for site plan approval for minimum development by end of Year 3.
- Obtain all government approvals, excluding building permits by end of Year 4.
- Obtain building permits and complete the closing by end of Year 8.
- Commence construction of First Phase Improvements one year after closing or by end of Year 9; whichever is first.

In addition, the contract provides for a day for day extension to the milestones for County review beyond 20 days for each required or voluntary submittal.

Staff believes that the time frames beyond the first milestone are protracted and could be accomplished concurrently thereby decreasing the overall duration, notwithstanding the complexity of the development including planning for future vertical construction. TV has represented that it is their desire to proceed with future phases concurrent with the First Phase. Staff believes that the milestones are protracted to give TV additional flexibility to time the start of construction to the market as well as avoid termination of its rights in the event that the milestones are not met.

Staff also believes that the day for day extension to the milestones beyond 20 days for each submittal is not warranted as the contract:

- provides for sufficient time built into each milestone for regulatory agency reviews that are substantially longer than those being granted to the County for its reviews which are limited solely to compliance with the contract terms;*
- provides for a detailed review and resubmit process and time frames for mandatory submittals on design and pre-construction activities;*
- provides for a process by which the developer can fund the services of a FDO Project Manager to be more involved in the pre-construction process to reduce the amount of time required for the review and plan his/her County work around known submittal dates and durations; and*
- requires that County to review voluntary submittals in the same time frames as mandatory reviews which, as a practical matter, would allow TV to have sole control over extensions.*

3. Return of the Deposit

Issue: The contract provides for the \$100,000 contract deposit to be returned for any reason other than their default, if the contract is terminated prior to closing.

Typically a contract deposit would be refunded, at least in part, if the contract was terminated by default of the seller or for unforeseen conditions. The contract goes beyond that requiring return of the deposit in the event that approvals are not received, or basically for any non-TV reason prior to closing.

While it is true that TV will be expending a considerable amount of money pre-closing (much more than in a typical development), the County will also be incurring considerable pre-closing expenses far in excess of \$100,000 and should recover at least part of its expenses in the event of a termination that was of no fault by the County.

4. Exposure for Damages

Issue: The contract states, in the event of a County default (failure or refusal to perform any term covenant, or condition of the contract) and after a cure period, TV may 1) terminate the contract if prior to closing, or 2) seek specific performance. If TV seeks specific performance and is unable to obtain performance, then TV shall have the right to terminate and pursue damages. Notwithstanding the foregoing, in the event of a willful breach by the County, TV has the right to pursue damages.

While this is typically reasonable that the County be responsible for damages caused by its own actions in a transaction, Staff does not believe that there is sufficient benefit to the County for it to have any exposure to damages particularly post closing. Further, at this time there is no way to identify that financial exposure, so contractually committing to same is legally problematic unless capped.

5. Traffic Circulation Plan

Issue: Staff's review of traffic impacts generated by the full development contemplated under this contract indicates that the operation of the Intermodal Facility will not be adversely impacted provided that TV funds an estimated \$1,000,000 in contractually required improvements to surrounding roadways/intersections. The Traffic Circulation Plan that will document the assumptions to provide for enforcement into the future is in the process of being drafted.

Engineering believes that these improvements are not eligible for Road Impact Fee credits and would like this documented in the contract. TV disagrees with this position and wants the contract to be silent on the issue, allowing TV to seek a determination through the normal process and subject to whatever protocols are in place at that time.

It should be noted that the contract contains a contractual requirement of the County to acquire right of way at an estimated cost of \$100,000 for TV's construction of a turn lane on Australian Avenue. This will require the County to budget the acquisition amount from ad valorem sources concurrent with the execution of the contract. The right of way acquisition cost is eligible for funding from Road Impact Fees and the estimated impact fees from the project build-out would be sufficient to cover the cost of the right of way acquisition. At such time that Road Impact Fees are collected, the Board can either reimburse or switch the funding source from ad valorem.

Attachment 2

ISSUES RECENTLY RESOLVED BUT CONTRACT MODIFICATIONS TO REFLECT SAME HAVE YET TO BE INCORPORATED

- 1. Land Acquisition Grant Repayment.** Language indicating that TV acknowledges the grant requirements and takes full responsibility for complying with those requirements; including repayment of the grant if triggered by the Federal Transit Authority, Florida Department of Transportation, and/or the City of West Palm Beach; each of whom is a funding partner of the County. In the event that repayment is required, TV will have the option to terminate the contract, or repay the grant.
- 2. First Phase Guarantees.** The bonding requirements for the First Phase are as follows; a) a 255.05 bond for 100% of the value of the required improvements, and b) a payment and performance bond for 100% of the value of the remainder of the First Phase Improvements. The Developer's obligation and 100% guaranty of completion for the First Phase will be backed by a letter of credit or a surety in the entire amount of the First Phase. If TV's developer obligation is met via a letter of credit, the contract will allow for that obligation to be reduced by an amount equal to 80% of the value of materials and work in place. At the end of the one year warranty period, the remaining 20% will be returned to TV. TV will be permitted to modify the form of financial assurance for the developer guarantee mid project. Both the First Phase completion bonds and developer's guaranty will be provided either; 1) within a year of closing or 2) at the start of construction, whichever is first, or the property will automatically revert. The automatic reversion date can be modified by mutual agreement of the County and TV.

The reduction in the developer obligation will be made after certification by TV, field observation by the county Project Manager and the formula contained in the contract. No risk assessment will be performed by the County prior to the reduction which may (or may not) be a cause for the actual completion value exceeding the amount of money remaining in the third party guarantee in the event that TV defaults.

- 3. Latter Phase Financial Requirements.** For future phases, the County will be named as additional insured. On each future phase, there will be a 100% developer guarantee but it will only be backed by a \$1,000,000 third party guarantee in the form of a letter of credit or surety. The County will have the right to field observe TV's future phases to ensure compliance with the Construction Plan for Latter Phases and other terms of the contract.

This third party guarantee is not sufficient to complete construction or even to demolish in-place future phase improvements; but will act as an incentive for TV to complete each phase started or forfeit the guarantee.

- 4. Latter Phase Non-Financial Requirements.** Language will be added throughout the document where appropriate to ensure consistency with the concept that all requirements of the contract

(except financial assurances) which apply to First Phase will apply to latter phases, unless released from those requirements in the approved Construction Plan.

5. **Assignment and Vertical Subdivision.** The contract acknowledges that TV is permitted to create a special purpose entity in which control remains with Purchaser to hold title to, develop, and operate the Property and that TV may assign any and all rights it possesses to the special purpose entity. TV may also be permitted to admit or remove members or transfer ownership between its members as long as Michael Masanoff remains a manager of the entity. Any other change in ownership prior to closing shall require the County's approval. With a language modification to address what happens in the event of a death prior to closing, this is satisfactory language prior to closing.

Post closing, TV claims it will need the ability to transfer ownership of portions of the development and/or phases (vertical subdivision) in order to construct, market and sell the project. The contract will require all future owners to be subject to the requirements of the contract, particularly compliance with; 1) the latter phase construction plan, and 2) traffic circulation plan. However, compliance enforcement (and potentially property management) will become the responsibility of the County unless a strong property, condominium association or equivalent mechanism is established and funded and with the authority to enforce compliance and take action against those not in compliance. Language is being added to the contract to address the need for a recorded declaration of covenants (or equivalent instrument) to be agreed upon by TV and the County prior to any transfer of rights.

6. **Other.** Clean-up changes to the document will need to be made to accommodate the direction received and for internal consistency with the added language discussed above.