



Cover Memorandum/Staff Report

File #: 18-0862 CRA

Agenda Date: 7/15/2021

Item #: 8B.

TO: CRA Board of Commissioners
FROM: Sanaz Alempour, Esq., CRA Outside Legal Counsel
THROUGH: Renée A. Jadusingh, Esq., Executive Director
DATE: July 15, 2021

POSSIBLE ACTION REGARDING THE CRA'S RIGHT TO TERMINATE THE PURCHASE AND SALE AGREEMENT WITH BH3 MANAGEMENT, LLC

Recommended Action:

Board consideration and possible action regarding termination of the Purchase and Sale Agreement with BH3 Management, LLC in light of the Closing not taking place on or before the July 10, 2021 Termination Date.

Background:

On April 22, 2019, the Delray Beach Community Redevelopment Agency ("the CRA") and BH3 Management, LLC ("BH3") entered into a Purchase and Sale Agreement ("Agreement") for the SW 600-800 blocks West Atlantic Avenue Properties. Pursuant to the Agreement, the Effective Date of the agreement is April 22, 2019.

On August 13, 2019, the CRA and BH3 entered into the First Amendment to the Agreement extending the commencement date for the workforce housing units being restricted to eligible tenants. At the request of BH3, on November 19, 2019, the CRA and BH3 entered into a Second Amendment to the Agreement in order to extend the Application Date by which BH3 had to submit for all government approvals from two hundred ten (210) calendar days to two hundred seventy (270) calendar days. The CRA and BH3 entered into the Third Amendment to the Agreement in order to allow the CRA to enter a new commercial lease with Emmanuel Jackson Sr. Project, Inc.

On May 11, 2020, BH3's Legal Counsel sent a letter to the CRA, placing the CRA on notice of BH3's intent to seek Force Majeure related extensions to the Approval Date in the Agreement due to COVID-19.

On November 25, 2020, BH3 notified the CRA of a design change and sought extension of the Approval Date, and to address project phasing and removal of the financing contingency.

At the January 26, 2021 CRA Board Meeting, the CRA Board declared BH3 in default of the Agreement for failure to meet the required Approval Date and through its counsel, issued its Default Notice on January 28, 2021.

On or around February 8, 2021, BH3 sent the CRA a letter intending to seek an extension of the Approval Date in the Agreement based on the Florida Governor's Declarations of Emergency and Section 252.363, F.S.

On or around February 12, 2021, BH3's legal counsel submitted a written request for a three hundred eighty-three (383) calendar day extension of the Approval Date and subsequent dates in the Agreement as a result of a Force Majeure related to the COVID-19 global pandemic.

On February 23, 2021, the CRA Board considered BH3's Force Majeure letter and approved a ninety (90) calendar day extension of certain deadlines in the Agreement. The extension was memorialized on March 1, 2021, in the Fourth Amendment to the Agreement ("Fourth Amendment"). The ninety (90) day extension for Force Majeure commenced on March 1, 2021 and expired on June 1, 2021.

The Fourth Amendment correspondingly extended the Permit Date, the Closing Date, and the Termination Date as set forth in the Agreement for ninety (90) calendar days. The Fourth Amendment specifically stated that Termination Date, as defined in paragraph 1.21 of the Agreement due to the ninety (90) calendar day extension due to Force Majeure, was eight hundred ten (810) calendar days subsequent to the Effective Date. Accordingly, the Fourth Amendment extended the Termination Date to July 10, 2021.

Section 9 of the Agreement provides the CRA the right to terminate the Agreement, in the event the CRA is not default in the event the closing does not occur solely because of BH3's failure to close after the Permit Date but in any event no later than the Termination Date. Termination pursuant to Section 9 of the Agreement, requires the CRA to return the Earnest Money plus interest earned to BH3, and provides the CRA and BH3 shall be released from any and all liability to one another.

On March 5, 2021, BH3 filed a lawsuit against the CRA seeking declaratory and injunctive relief. BH3 also filed an emergency motion to stay deadlines in the AGREEMENT, or in the alternative, for injunctive relief for temporary injunction. After a court hearing on the matter on May 10, 2021, the judge denied BH3's emergency motion to stay the deadlines in the AGREEMENT, or in the alternative, for injunctive relief for temporary injunction and rendered an order on May 17, 2021. BH3 has appealed the May 17, 2021 order, and on June 1, 2021, BH3 filed an amended complaint seeking monetary damages for breach of contract, breach of the covenant of good faith and fair dealing, and declaratory relief as to the exclusive remedy provision in the AGREEMENT.

On May 17, 2021, BH3 through its counsel sent the CRA a correspondence claiming the CRA is in default of the AGREEMENT and demanding that the CRA take no action to terminate the AGREEMENT should BH3 not timely cure its default.

On June 10, 2021, the Board voted to withdraw its January 28, 2021 Notice of Default to BH3. On June 25, 2021, the CRA through its counsel, provided BH3 its Withdrawal of the January 28, 2021 Default Notice.

The Closing did not occur on or before the July 10, 2021 Termination Date, therefore, the CRA has the right to terminate the Agreement pursuant to Section 9 of the Agreement and return the Earnest Money plus interest earned to BH3.

At this time, CRA Staff is seeking Board consideration and possible action regarding its right to terminate the Agreement pursuant to Sections 1.21 and 9 of the Agreement and subsequent amendments.

Attachment(s): Exhibit A: Fourth Amendment to the Purchase and Sale Agreement