

# ***BEMIDJI ECONOMIC DEVELOPMENT AUTHORITY***

## ***Special Meeting Agenda*** Monday, April 15, 2013

**City Hall  
Conference Room  
7:00 P.M.  
(Following Council Meeting)**



1. CALL TO ORDER
  
2. DISCUSSION – Wayzata Bemidji Hospitality Associates, LLC
  
3. ADJOURN



City Attorney's Office

# MEMORANDUM

TO: BEDA President, Members and Executive Director  
FROM: Alan Felix, City Attorney  
DATE: April 11, 2013  
RE: Purchase Agreement Status - BEDA Land Sale to Wayzata

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At the BEDA meeting on Monday evening April 14<sup>th</sup>, there will be the opportunity to discuss the status of the Purchase Agreement between the BEDA and Wayzata Hospitality for the Lot located just west of the Sanford Center, and, in particular, the failure to timely close on the sale. BEDA members should recall that back in January of this year the BEDA gave Wayzata 90 days within which to complete their project financing efforts and proceed to close on the property.

In addition to the apparent difficulty in finally wrapping up bank financing for the Hotel Project, that inability to conclude the bank financing element of the deal has in turn held up the timely completion of final negotiation and execution of a Development Agreement between, among others, the BEDA and Wayzata. That Development Agreement was to be executed by **April 1, 2012**, or such later date as may be approved by the BEDA, unless the BEDA reasonably determined that the Hotel Developer was not proceeding in good faith and due diligence to negotiate and enter into the Development Agreement (**See, Paragraph 2. of the Purchase Agreement dated March 15, 2012**).

A full year has now gone by and of late it is being hinted that the BEDA, perhaps, may be asked to reconsider or renegotiate a term or terms of the existing Purchase Agreement as a condition of closing on the property,

As your Legal Counsel, I strongly advise against such a decision and/or intended action by the BEDA. Furthermore, the result(s) of such intended action, if seriously considered by the BEDA, may constitute a substantial change in the terms of the sale, thereby triggering an amendment of the Purchase Agreement and, in turn, require a new public hearing under Minnesota Statutes Section 469,105, Subdivision 2.

As an aside, the City Council has yet to finally act on the \$400,000 revolving loan fund request submitted by Wayzata. The reason for that not happening is, similarly, the lack of completion of the bank financing elements. Final consideration and approval of the revolving fund loan request entails the holding of yet another public hearing as the loan constitutes a business subsidy under State law and the City's own Business Subsidy Policy.

As concerns the revolving fund loan, it is my observation that the security being offered to back that loan is simply the “strength” of corporate and personal guarantees of Bay Ridge Properties, Tripp Snyder, Pam Snyder, and Lee Faundant. There is no primary creditor position in any of the collateral (property and improvements) only a shared subordinate creditor’s position, there’s no letter of credit at a bank to draw upon if loan repayments are missed, there’s only the resources and credit history of the guarantors. Consequently, any notion of amending the terms of the purchase agreement, most importantly the financial terms, should be approached with caution if the result is additional public dollars being put at risk to compensate for the shortcomings in the bank financing effort.

I will not be in attendance at Monday night’s meeting, but I would leave you with the general observation and guidance that no action can be taken by the BEDA respecting the revolving fund loan Monday night, as approval of that loan is the responsibility of the City Council. Moreover, the City Council itself cannot take action until the required business subsidy public hearing has been properly noticed and conducted under Minnesota Statutes and our own Business Subsidy Policy.

At the same time, BEDA response to any request that may be offered Monday night in terms of a proposed modification or renegotiation of the existing terms of the Purchase Agreement, should be, if at all, by action which requests a formal proposal from Wayzata and the preparation of a draft amendment containing the desired terms or terminology. Depending on the substantiality of such proposed revised terms, if ultimately agreed to by the BEDA, approval of such amendment might need to be considered after a BEDA public hearing resulting in new Findings and Decision by the BEDA.

On the other hand, if Wayzata comes forward with final financing terms in hand and says it’s ready to proceed to closing, the discussions and negotiations leading to a Development Agreement need to be completed ASAP, and, as mentioned above, City staff should be directed to notice the public hearing required to consider and approve the revolving loan request/business subsidy.

Lastly, should Monday’s discussion lead to consideration of termination of the Purchase Agreement, be advised that any step to initiate termination should proceed first by preparation of formal written notice of such intention delivered to Wayzata. I would also advise that any proposed termination notice provide, at a minimum, a 30 to 60 day notice period along with a date specific for termination, within which time period Wayzata obviously has the opportunity to complete the purchase conditions and close on the sale of the property.

**Hundred Two and No/100 Dollars (\$656,202.00)** paid in cash or by certified check payable to BEDA on or about **April 1, 2012** (the "**Date of Closing**") or such other date as the parties may agree.

The earnest money and all interest thereon shall be applied against the purchase price and closing costs at Closing. Furthermore, the earnest money deposit shall be non-refundable to Hotel Developer, except that pursuant to Paragraph 3 herein, should the BEDA either fail to approve the sale, or as a result of the public hearing thereafter impose additional conditions not otherwise stated herein that Hotel Developer will not agree to, Hotel Developer may elect to terminate this Purchase Agreement and have the escrowed earnest money returned to it. Moreover, in the event Hotel Developer should satisfactorily perform all actions and obligations required under this Purchase Agreement, once executed, and such performance satisfaction is adjudged adequate by the BEDA, but the BEDA nonetheless fails to close on the sale of the Subject Property, Hotel Developer may elect to terminate this Purchase Agreement and have the escrowed earnest money and any interest earned thereon returned to it.

2. **Development Agreement for Concourse** As a condition to the sale of the Subject Property to Hotel Developer, the BEDA and City of Bemidji shall enter into a Development Agreement with Hotel Developer for construction by Hotel Developer, at its sole cost and expense, of an enclosed concourse between the hotel to be constructed on the Subject Property and the Sanford Center presently constructed on the Event Center Property. Terms and conditions of the concourse Development Agreement shall be negotiated and agreed to subsequent to the execution of this Purchase Agreement; however, negotiation and execution of the Development Agreement shall be a condition of the BEDA's sale and conveyance of the Subject Property to Hotel Developer as described in Paragraph 3 herein. Should the Development Agreement not be executed by and between BEDA and the Hotel Developer by April 1, 2012, or such later date as may be approved by BEDA, if BEDA reasonably determines that the Hotel Developer is not proceeding in good faith and with due diligence to negotiate and enter into the Development Agreement, this agreement shall be terminated and cancelled, and all Earnest Money and any interest earned thereon shall be retained by BEDA.

3. **Sale Conditioned on BEDA Approval and City Approval.** The sale of the Subject Property is conditioned upon the BEDA's approval in accordance with the requirements of Minnesota Statutes Sections 469.090 to 469.108, including being subject to the results of a public hearing pursuant to Minnesota Statutes Section 469.105. Within 30 days of such hearing, the BEDA shall make written findings and decision whether sale of the Subject Property is advisable. The sale is further conditioned upon there being no taxpayer appeal of the BEDA's decision within 20 days after the decision is entered. Terms and conditions of the proposed land sale (this Purchase Agreement) shall be available for review by the public prior to the hearing. Furthermore, the sale described herein may be conditioned upon the BEDA's review and approval of written plans and specifications for the hotel and connecting concourse construction, which review and approval shall be based upon the recommendation(s) of the BEDA's Design and Review Committee (the "DRC") (the BEDA may require preparation of said plans and specifications prior to the hearing).

Additionally, as provided in Paragraph 2. above, the BEDA's sale and conveyance of the Subject Property is further conditioned upon the successful negotiation and execution of a Development Agreement between Hotel Developer, the BEDA and the City of Bemidji for construction of an enclosed concourse connecting the proposed hotel to the Sanford Center.