

City of Scottsbluff, Nebraska

Monday, August 7, 2017

Regular Meeting

Item Reports5

Council to consider an Economic Development Assistance Agreement with Flyover Brewery and authorize the City Manager to execute the agreement as the Economic Development Program Administrator.

Staff Contact: Nathan Johnson, City Manager

ECONOMIC DEVELOPMENT ASSISTANCE AGREEMENT

This Agreement is made on August __, 2017, between the City of Scottsbluff, Nebraska (the “City”) and BDS3C, L.L.C. (the “Applicant”).

Recitals:

a. The City has adopted an Economic Development Plan pursuant to the Nebraska Local Option Municipal Economic Development Act (the “Plan”). Pursuant to the Plan, the City has implemented an Economic Development Program (the “Program”).

b. The Applicant has made application for assistance from the Program (the “Application”);

c. The Administrator of the Program (the “Administrator”) and the City Economic Development Application Review Committee (the “Committee”) have reviewed the Application and recommended to the City Council (the “Council”) that a loan (the “Loan”) be made to the Applicant from the City of Scottsbluff Economic Development Fund (the “Fund”) as provided for in this Agreement. The City Council has approved the Committee’s recommendation.

d. The parties now desire to enter into this Agreement for the purpose of setting out the terms and conditions of the Loan.

Agreement:

1. Purpose of Loan:

The Applicant is establishing a craft brewpub in downtown Scottsbluff doing business as “Flyover Brewing Company” (the “Business”). The proceeds of the Loan will be used primarily for the purchase of brewing equipment to be used in the Business.

2. Amount of Loan:

The Loan shall be in the amount of \$515,000 and shall be disbursed from the City’s Economic Development Fund (the “Fund”) to the Applicant as provided for below. The Loan shall be represented by a promissory note (the “Note”) to be signed at the Loan Closing in the form of the attached “Exhibit A”. The Note shall carry interest from January 1, 2018 (the “Note Interest Date”), at which time it shall carry interest at the Applicable Federal Mid-Term rate for the month of the Loan Closing and shall be repaid over 108 equal monthly payments of principal and interest with the first payment due on July 1, 2018, with each additional payment due on the first day of each subsequent month until the Note is paid in full.

3. **Loan Disbursement and Loan Closing:**

As soon as the Applicant has satisfied the conditions to the Loan Closing, the amount of the Loan shall be scheduled as a claim at the next Council meeting for which the matter may be reasonably scheduled. Disbursement of the Loan proceeds shall be made within 10 business after the Council has approved a claim for the Loan. The disbursement of the Loan proceeds shall constitute the "Loan Closing".

4. **Job Credits:**

As long as the Applicant is not in default of the Note, this Agreement, or any other document entered into pursuant to this Agreement, for the first 5 Years, the Applicant shall be eligible for credit against the balance due under the Note for Job Credits earned during a Year. The Applicant shall advise the City in writing as to the date (which shall correspond with the first day of a calendar quarter) that it desires for the effective date for Job Credit calculation purposes (the "Job Credit Effective Date"); provided, however, the Job Credit Effective Date shall be no later than July 1, 2018. A "Year" shall mean the 12-month beginning on the Job Credit Effective Date, and each annual anniversary of that date. "Annual Job Credits" shall be calculated as follows:

a. The Applicant is eligible to receive a "Base Annual Job Credit" during a Year equal to the FTE's for a Year multiplied by \$1000.

b. If at the end of a Year, (1) the Annual Report (as provided for below) indicates that the Applicant has any FTE's that have average earnings for the Year of at least (i) \$14 per hour in the case of hourly employees, or (ii) \$29,120 in the case of salaried employees, and (2) such employees are eligible for the Applicant's fringe benefit plan, then the Applicant may earn additional job credits (the "Additional Annual Credits") as calculated on a per employee basis based on the following table:

<u>Additional Credit</u>	<u>Hourly Rate (Based on 2080 hours)</u>	<u>Annual Salary</u>
\$200	\$14.00 to \$17.99	\$29,120 to \$37,439
\$400	\$18.00 to \$21.99	\$37,440 to \$45,759
\$600	\$22.00 to \$25.99	\$45,760 to \$54,079
\$800	\$26.00 to \$29.99	\$54,080 to \$62,399
\$1,000	\$30.00 and above	\$62,400 and above

In calculating the hourly rate or salary rate for purposes of the above table, the Applicant is entitled to add the hourly equivalent or annual cost of the following fringe benefits provided to

the applicable employee by the Applicant: 401k Plan, profit sharing or equivalent retirement benefits, health insurance, and life and disability insurance.

c. For purposes of this Agreement, Annual Job Credit shall mean the total of the Base Annual Job Credits and the Additional Annual Credit.

d. The amount of the Annual Job Credit may not exceed \$25,000 per Year (the "Maximum Annual Credit"). If the Applicant earns credits in excess of the Maximum Annual Credit in any one Year, the excess credits may be carried back to one or more prior Years where the Maximum Annual Credit was not earned, as long as the Maximum Annual Credit is not exceeded for any one Year. Excess credits may not be carried forward.

In order to receive Annual Job Credits, the Applicant must file an Annual Report as provided for below. Annual Job Credits shall be applied against the principal balance of the Note as prepayments, which prepayments shall not alter the amount of the monthly payment due under the Note. If at any time, the Annual Job Credits exceed the balance of the Note, then the City shall refund the excess to the Applicant.

5. Employee Definitions:

a. "Full Time Employee" shall mean a bona fide employee of the Applicant who (1) is classified by the Applicant as full time; (2) subject to normal and reasonable waiting periods, is eligible for the employer's normal fringe benefit package; and (3) is primarily employed to work in the Applicant's brewing operation and/or in the wholesale distribution of products produced by the Applicant at the Business.

b. "Eligible Full Time Employee" shall mean a Full Time Employee who: (1) primarily works within the City, and (2) resides within 60 miles of the corporate limits of the City; provided, however any Full Time Employee who does not reside within 60 miles of the corporate limits of the City at the time that the Full Time Employee is hired, shall nevertheless be considered an Eligible Full Time Employee if the Full Time Employee moves to a residence within the required geographic area within 6 months of the hiring of the Eligible Full Time Employee.

c. "Full Time Equivalent" Employees (the "FTE's") shall be the number arrived at by dividing the total hours paid by the Applicant to their Eligible Full Time Employees during a Year divided by 2080 hours, and then rounded down to the nearest tenth; provided, however, the maximum hours paid that can be counted for any one Eligible Full Time Employee shall not exceed 40 hours per week. Salaried employees shall be presumed to have been paid on the basis of 40 hours per week.

6. Representations and Warranties of the Applicant:

The Applicant represents and warrants the following, all of which shall survive the Closing:

a. The Applicant is a limited liability company organized, existing, and in good standing under the laws of Nebraska. The Applicant has full power and authority to enter into this Agreement and carry out the transactions contemplated by this Agreement. The Applicant's execution, delivery and performance of this Agreement have been authorized by all necessary action on the part of the Applicant. This Agreement, and each agreement and instrument delivered by the Applicant pursuant to it, is the legal and binding obligation of the Applicant, enforceable against the Applicant in accordance with its terms.

b. No representation or warranty made by the Applicant in this Agreement contains or will contain any untrue statement of any material fact, or omits or will fail to state any material fact known to the Applicant that are required to make the statements not misleading.

c. The execution and performance of this Agreement will not violate any provision of law, or conflict with or result in any breach of any of the terms or conditions of, or constitute a default under any indenture, mortgage, agreement or other instrument to which the Applicant is a party or by which they are bound.

All representations and warranties made by the Applicant shall survive the Loan Closing.

7. Representations and Warranties of the City:

The City represents and warrants the following, all of which shall survive the Loan Closing:

a. The City is a municipal corporation organized and existing under the laws of Nebraska, and has full power and authority to enter into this Agreement and carry out the transactions contemplated by this Agreement. The City's execution, delivery and performance of this Agreement has been authorized by all necessary action on the part of the City. This Agreement, and each agreement and instrument delivered by the City pursuant to it, is the legal and binding obligation of the City, enforceable against the City in accordance with its terms.

b. No representation or warranty made by the City in this Agreement contains or will contain any untrue statement of any material fact, or omits or will fail to state any material fact known to the City that is required to make the statements not misleading.

8. Certification of the Applicant:

The Applicant certifies to the City that it has not filed nor does it intend to file an application with the Department of Revenue to receive tax incentives under the Nebraska Advantage Act for the Business.

9. Conditions to Loan Closing:

The City's obligation to proceed with the Loan Closing is subject to the Applicant's fulfillment of each of the following conditions at or prior to the Loan Closing:

- a. All representations and warranties of the Applicant shall be true as of the Loan Closing.
- b. The Applicant shall have delivered to the City:
 - (1) Evidence of Good Standing of the Applicant from the Nebraska Secretary of State.
 - (2) A copy of the current and correct Certificate of Organization and Operating Agreement of the Applicant certified by the members (the "Members") to be correct;
 - (3) Certified resolutions of the Members authorizing this Agreement and providing for signature authority.
- c. In order to secure the Loan and the Repayment, the Applicant shall have delivered to the City the following:
 - (1) a security agreement (the "Security Agreement") covering the Applicant's assets which shall be second in priority to the Applicant's primary lender. The Security Agreement shall be in the form of the attached "Exhibit B".
 - (2) a deed of trust (the "Deed of Trust") covering the Applicant's real estate which shall be second in priority to an existing lien. The Deed of Trust shall be in the form of the attached "Exhibit C".
 - (3) a guaranty (the "Guaranty") of the Members. The Guaranty shall be in the form of the attached "Exhibit D".
- d. The Applicant shall in all material respects have performed its obligations, agreements, and covenants contained in this Agreement to be performed by them, on, or before the Loan Closing.
- e. There shall have been no material adverse change in the operation or financial status of the Applicant and the Loan Closing shall constitute the Applicant's representations that there has been no such material adverse change.
- f. In requesting the disbursement of the Loan, the Applicant is considered to have represented that the above conditions have been satisfied and are continuing to be satisfied.

10. Annual Reports:

If the Applicant desires to claim Job Credits, the Applicant shall annually, within 60 days of the end of each Year, provide to the Administrator a report in form and substance acceptable to the Administrator which calculates the Annual Job Credit for the Year (the "Annual Report"). The Administrator shall have the right at any time to (i) require that the Annual Reports be reviewed at the Applicant's expense by a Certified Public Accountant reasonably acceptable to the Administrator, or (ii) hire, at the Administrator's own expense, an independent Certified Public Accountant or other Business or financial expert, to review the books and records of the Applicant pertaining to the Annual Report and any other terms and conditions as provided for in this Agreement. If after a review or audit of the Applicant's records it is discovered that the Annual Job Credit claimed on the Annual Job Credit Report exceeds 10% of the Annual Job Credit as determined by the Administrator, then the Administrator may require the Applicant to reimburse the Fund for the actual cost of the audit.

11. Default:

The Applicant shall be in default in this Agreement and the Note if any of the following happen:

- a. Failure to comply with any of the terms of this Agreement, the Note, the Security Agreement or the Guaranty to include an assignment not permitted under this Agreement.
- b. Any warranty, representation or statement made or given to the City by the Applicant proves to have been false in any material respect when made or given.
- c. Dissolution or liquidation of any of the Applicant, the termination of existence, insolvency, business failure, appointment of a receiver, assignment for the benefit of creditors, or bankruptcy of the Applicant.
- d. The Applicant ceases to conduct its Business or moves its Business outside of the City.

12. Assignability:

The Administrator may assign his interest in this Agreement to any successor administrator designated by the City Council. The Applicant may not assign or transfer its interest in this Agreement without the consent of the Administrator. Assignment shall include a transfer of ownership of the Applicant which results in the Members owning less than 51% of the ownership interests of the Applicant.

13. Confidentiality:

It is agreed that this Agreement and its terms are public record and are not confidential. However, the City agrees to take reasonable steps to insure that any financial and proprietary

information provided in connection with this Agreement by the Applicant shall remain confidential and shall not be revealed or disclosed to outside sources unless the information is public knowledge, is independently developed, or is required to be disclosed by law or legal process.

14. Notices:

Any notices or other communications between the parties shall be personally delivered, sent by certified or registered mail, return receipt requested, by Federal Express or similar service that records delivery, to the addresses set out below, or to such other address as a party may designate, from time to time, by written notice to the other. A notice shall be deemed effective upon receipt.

a. If to the City:

City of Scottsbluff
2525 Circle Drive
Scottsbluff, NE 69361
Attention: City Manager

b. If to the Applicant:

BDS3C, L.L.C.
2745 Club House Drive
Gering, NE 69341
Attention: Andrea Margheim

15. Miscellaneous:

a. This Agreement constitutes the entire agreement of the parties with respect to its subject matter, and may only be modified by a writing signed by both of the parties.

b. The City's waiver of any one default shall not be a waiver of the same or any other default in the future. In addition, the City's failure to exercise any right given to it by this Agreement shall not be a waiver of any later exercise of that right.

c. The provisions of this Agreement are severable and if any provision is held to be invalid, the remainder of the Agreement shall remain in effect.

d. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but which together shall constitute a single instrument.

e. This Agreement shall be governed by the laws of Nebraska.

f. This Agreement shall be binding on the successors and assigns of the parties.

**Signature Page to Economic Development Assistance Agreement between
the City of Scottsbluff, Nebraska and BDS3C, L.L.C.**

City of Scottsbluff, Nebraska

BDS3C, L.L.C.

By: _____
Economic Development
Program Administrator

By: _____
Title: _____