

# **City of Scottsbluff, Nebraska**

**Monday, August 21, 2017**

**Regular Meeting**

## **Item Reports1**

**Council to consider an Economic Development Assistance Agreement with M R Housing 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 Millennium Resilient International, Inc. (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 Assistance:**

The Applicant has started a business which is or will be engaged in (i) the manufacturing of building components for domestic and international sales, and (ii) local development and construction of work force affordable housing (the “Business”). The proceeds of the Loan will be used for the purchase of equipment to be identified by the Applicant (the “Equipment”). The initial location of the Business is 3500 North 10<sup>th</sup> Street, Gering, Nebraska.

#### **2. Amount of Assistance:**

The Loan shall be in the maximum amount of \$310,000 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 terms of the Note are as follows:

a. The Note shall carry interest from January 1, 2018 (the “Note Interest Date”) at the Applicable Federal Mid-Term rate for the month of the Loan Closing. Interest shall be charged only on the principal balance outstanding.

b. Interest payments shall be made on a quarterly basis, with the interest for each quarter due on the first day of a calendar quarter. The first interest payment shall be due on April 1, 2018.

c. Principal payments may be required if the Annual Job Credit for a year does not equal at least 10% of the Maximum Annual Credit; in which case, a principal payment shall be payable in an amount equal to the difference between the Maximum Annual Credit and the actual Annual Job Credit for the year. Any such principal payment shall be due on or before April 1 of the Year following the Year for which the Job Credits were deficient. If not sooner paid, the entire remaining balance of the Note shall be payable on or before March 31, 2023.

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

The Applicant shall have the right to request disbursements of the Note as it purchases the Equipment. All draw requests shall be requested in writing and shall be accompanied by a list of the Equipment being purchased along with the price. The first disbursement shall be considered the "Loan Closing". As long as the Applicant has satisfied the conditions to the Loan Closing, the amount of a disbursement 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 days after the Council has approved a claim for the Loan. The last date for requesting a disbursement shall be one year from 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, the Applicant shall receive a credit against the balance due under the Note for Job Credits earned during a Year. A "Year" shall mean the 12-month period ending on each December 31, with the first Year beginning January 1, 2018. "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 \$62,000 per Year (the “Maximum Annual Credit”); provided, however, if the full amount of the Note has not been disbursed to the Applicant, then the Maximum Annual Credit shall be equal to 20% of the total amount disbursed to the Applicant. 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.

d. 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.

## **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; and (2) subject to normal and reasonable waiting periods, is eligible for the employer’s normal fringe benefit package.

b. “Eligible Full Time Employee” shall mean a Full Time Employee who: (1) primarily works within Scotts Bluff County, Nebraska, and (2) resides within 60 miles of the City; provided, however any Full Time Employee who does not reside within 60 miles 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 corporation organized, existing, and in good standing under the laws of Delaware and is authorized to do business in 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 an application with the Department of Revenue to receive tax incentives under the Nebraska Advantage Act for the Business. In the event that the Applicant files such an application, it shall advise the City in writing, and the City shall have the option to review the status of the Loan, to include determining that the Note is due and payable if the Applicant is awarded incentives under the Nebraska Advantage Act.

## **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 Articles of Incorporation and Bylaws certified by an officer of the Applicant to be correct;
  - (3) Certified resolutions of the Directors of the Applicant 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 Equipment. The Security Agreement shall be in the form of the attached "Exhibit B".
  - (2) a guaranty (the "Guaranty") of Amy Westphal, Mark Westphal and Rod Russell. The Guaranty shall be in the form of the attached "Exhibit C".
- 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:**

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 or the Security Agreement, 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 the Business outside of Scotts Bluff County.

#### **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  
Fax: (308) 632-2916  
Attention: City Manager

b. If to the Applicant:

Millennium Resilient International, Inc.  
3500 North 10<sup>th</sup> Street  
PO Box 567  
Scottsbluff, NE 69361  
Attention: Amy Westphal, President

**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 follow]*

**Signature Page to Economic Development Assistance Agreement between  
the City of Scottsbluff, Nebraska and Millennium Resilient International, Inc.**

City of Scottsbluff, Nebraska

Millennium Resilient International, Inc.

By: \_\_\_\_\_  
Economic Development  
Program Administrator

By: \_\_\_\_\_  
Amy Westphal, President

**City of Scottsbluff**  
**Economic Development Application Review Committee**  
**July 7, 2017**

A meeting of the Economic Development Application Review Committee was held on July 7, 2017, at 8:00 a.m. at City Hall, 2525 Circle Drive, Scottsbluff, NE.

The meeting was convened at 8:00 a.m. Present were Committee Members, Jim Trumbull, Lee Glenn and Marla Marx. In attendance on behalf of the City were Program Administrator, Nathan Johnson, Deputy City Attorney, Rick Ediger, and City Finance Director, Liz Hilyard.

Chairman Trumbull called the meeting to order and stated that a copy of the Nebraska Open Meetings Act is located on the South wall of the Council Chamber. There were no changes in the Agenda, nor were there any citizens with business not scheduled on the Agenda.

It was moved by Marx and seconded by Glenn that the Minutes of the May 12, 2017 Committee Meeting be approved. Voting yes: Trumbull, Glenn, and Marx. Voting no: None.

The next order of business concerned a review of an Application for Assistance from Flyover Brewing Company. This Application was first presented to the Committee on October 28, 2016. However, at the time, due to the significant retail proponent of the proposed business, it was determined that the Applicant was not a Qualifying Business. In addition, the Nebraska liquor laws would not allow for separation of the manufacturing (brewing) component of the business. The City's Economic Development Plan has recently been amended to allow for assistance to a Qualifying Business engaged in retail trade if the principal source of income is from retail sales of products manufactured on the premises. Present on behalf of the Applicant were Joe and Andrea Margheim. They made a presentation to include updated financial projections and a reduction in the expected cost of the project. They project five full-time employees involved in the brewing side of the business. Lee Glenn reminded the Committee that he had a conflict of interest. No action was taken until a further meeting when more Committee Members could attend.

The next order of business concerned an Application for Assistance from Millennium Resilient, Inc. Present on behalf of the Applicant were Rod Russell and Mark Westphal. Amy Westphal appeared at 9:06 a.m. Deputy City Attorney Ediger indicated that his firm had a conflict of interest in this matter and would not be providing legal advice in this matter. Millennium Resilient has leased space at 3500 N. 10<sup>th</sup>, Gering, Nebraska. The business will be involved in the manufacturing of pre-cast concrete building forms for domestic and international sales and franchise or licensing of building methods. In addition, the company will be involved with local development of building of work-force affordable housing utilizing their unique building methods. The business currently has 5 full-time employees, with an expectation of 31 full-time employees by the end of 2017. The wage range is from \$12/hour to \$60,000/year. Following discussion, it was moved by Marx and seconded by Glenn that the Committee recommend to the City Council that a Loan be made in the amount of \$310,000 to Millennium Resilient, Inc. Interest only shall be payable on the

Loan at the applicable midterm federal rate for the month of the Closing, with principal due and payable after five years. At the end of each year, the Applicant shall submit a Job Credit Report, and a credit against the Loan can be earned as per the Job Credit Schedule established by the Committee in 2014. Security shall be the Applicant's equipment (subject to any bank line of credit loan), as well as personal Guaranties from Rod Russell and Mark & Amy Westphal.

Discussion was had on the Job Credit Rate. Deputy City Attorney Ediger indicated that the following Job Credit History since the inception of the City's Economic Development Plan:

1/1/1996:	\$400 per FTE
8/1/1996:	\$500 per FTE
1/1/2004:	\$1,000 per FTE

It has been 13½ years since the amount earned for the Job Credits per FTE has been increased. City Manager Johnson indicated that Starr Lehl had been hired as the City's Economic Development Director starting July 31. It was the consensus of those Committee Members present that the rate per FTE needs to be adjusted higher, but that this should be part of a policy discussion after Starr has started her position. She will also be asked to research what is a competitive rate.

The meeting was then adjourned at 9:30 a.m.

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Nathan Johnson, Program Administrator