

City of Scottsbluff, Nebraska

Monday, April 2, 2018

Regular Meeting

Item Reports3

Council to approve the Economic Assistance Grant for the Candy Barn Express, LLC.

Staff Contact: Starr Lehl, Economic Development Director

City of Scottsbluff
Economic Development Application Review Committee
March 9, 2018

A meeting of the Economic Development Application Review Committee was held on March 9, 2018, 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, Dennis Hadden, Marla Marx, and alternate Jeanne McKerrigan. Since there are less than 5 Committee Members, McKerrigan participated in all matters. In attendance on behalf of the City were Program Administrator, Nathan Johnson, Deputy City Attorney, Rick Ediger, and City Economic Development Director, Starr Lehl.

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. The Chair announced there would be a revision in the order of the items on the Agenda. Item Nos. 6, 7 and 8 would be reversed. There were no other changes in the Agenda, nor were there any citizens with business not scheduled on the Agenda.

It was moved by Marx and seconded by McKerrigan that the Minutes of the February 8, 2018 Committee Meeting be approved. Voting yes: Trumbull, Hadden, Marx, and McKerrigan. Voting no: None.

A revised Application for Assistance was submitted by American Doorstop Productions, LLC. Present on behalf of the Applicant was Jody Lamp. Jody had previously made an application and presentation on behalf of Lamp Public Relations and Marketing for funding for a documentary film. However, at the time of the prior presentation, the City had not yet considered adding film production to the Economic Development Assistance Plan. The City Council will have a third reading on the Ordinance to add film production to its Economic Development Assistance Plan on March 19. In addition, in order to comply with the requirements of the proposed revisions to the City's Program, the owners of Lamp Public Relations and Marketing have formed a new company which will be engaged in film production only. The request is for a \$25,000 grant. Following discussion it was moved by Hadden and seconded by Marx that assuming that the City Council adds film production to the City's Economic Development Program, then the Committee recommends a commitment of up to \$25,000 for the Applicant's project. Reimbursement will be made for expenditures as shown on the Application and may include prior eligible expenses so that the Applicant has funding to complete the project. In addition, the Applicant can submit requests for reimbursement as expenses are incurred. Voting yes: Trumbull, Hadden, Marx, and McKerrigan. Voting no: None.

Next was a presentation by Candy Barn Express, LLC. Present on behalf of the Applicant was Patrick Maag. Ediger indicated that his office had a conflict of interest in this matter, as one of his partners had formed the Applicant LLC. The Applicant is requesting \$50,000 in order to expand its business of wholesale candy packaging and distribution. The Applicant is moving to a new warehouse

with an FDA compliant packaging facility. The Applicant indicated that the planned expansion is already in process. However, if City funding is awarded, expansion of the business into other products will be accelerated. Currently, the business has one full-time employee. The Applicant will also contract with the Office of Human Development to provide additional workers. This presents an unusual situation as most of the employment growth for the Applicant will be through contracted employees. Also, there is some question as to whether the projected number of jobs, even considering the contracted employees, would support a grant of the amount requested. Following questions and discussion, it was moved by Marx and seconded by Hadden that the Committee recommend that a low-interest loan be made to the Applicant in the amount of \$50,000. The loan shall be amortized over five equal annual payments with interest at the Midterm Applicable Federal Rate in effect at the time the loan is closed. At the end of each year, the Applicant can submit a Job Credit Report (to include the number of hours contracted with the Office of Human Development). A credit against the loan can be earned based on the number of actual employees, plus the contracted hours, divided by 2,080 hours, to determine the number of FTE's. Once the Job Credit is determined, the difference between the payment amount and the credit shall then be paid to the City. No more than an amount equal to the annual payment may be earned. The security shall be a personal Guarantee of Patrick Maag and a Security Agreement in the assets of the business. The Applicant can determine the start date, which shall be no later than January 1, 2019. Voting yes: Trumbull, Hadden, Marx, and McKerrigan. Voting no: None.

The request from Walther Investments to subordinate the City's Deed of Trust was next on the agenda. However, Walther has not been able to provide all of the information requested by City staff as of this time. As a result, this matter will be deferred to a future meeting.

The meeting was then adjourned at 9:15 a.m.

Nathan Johnson, Program Administrator

ECONOMIC DEVELOPMENT ASSISTANCE AGREEMENT

This Agreement is made on April ____, 2018, between the City of Scottsbluff, Nebraska (the “City”) and Candy Barn Express, LLC (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 relocating and expanding its business of processing, storage, transport and distribution of candy and snack items located at 1012 West 36th Street, #5, Scottsbluff (the “Business”). The proceeds of the Loan will be used in connection with this relocation and expansion.

2. Terms of Loan:

The Loan shall be in the amount of \$50,000 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 (as provided for below) in the form of the attached “Exhibit A”. The Note shall carry interest from the Loan Closing at the Applicable Federal Mid-Term rate for the month of the Loan Closing. The Note shall be repaid over 5 equal annual amortized payments of principal and interest (each, an “Annual Payment”).

3. Loan Closing:

As soon as the Applicant has satisfied the conditions to Closing (as provided for below), the amount of the Loan shall be scheduled as a claim at the next Council meeting for which the claim may be reasonably scheduled. The "Loan Closing" shall then occur within 10 business days after the Council meeting where the claim is approved.

4. Job Credits and Time of Annual Payment:

The Applicant may earn Job Credits (as provided for below). In connection with the calculation of the Job Credits:

a. 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 to be 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 January 1, 2019.

b. 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 be eligible for credit against the balance due under the Note for Job Credits earned during a Year for 5 Years. A "Year" shall mean the 12-month period ending on the last day of the calendar quarter following the Job Credit Effective Date.

c. The Applicant is eligible to receive a "Base Annual Job Credit" during a Year equal to the FTE's for a Year multiplied by \$2,000.

d. In order to receive Annual Job Credits, the Applicant must file an Annual Report as provided for below. Upon receipt of an Annual Report, the City will make a preliminary review based on the Annual Job Credits claimed. The City shall notify the Applicant as to the difference between the Annual Payment and the Annual Job Credit. The difference shall be paid to the City within 30 days of the due date of the Annual Report. The Annual Job Credit may not in any event exceed the Annual Payment.

5. Employee Definitions:

a. "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. From time to time, the Applicant contracts with the Office of Human Development ("OHD") for services provided by disabled individuals employed by OHD. With respect to employees of OHD or similar organizations which employ disabled individuals, Employee shall also include (i) such individuals to the extent of the number of hours paid by the Applicant, and (ii) in the event that any such individuals are then directly employed by the Applicant, those individuals shall also be included to the extent of the number of hours paid by the Applicant.

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

d. "Full Time Equivalent" Employees (the "FTE's") shall be the number arrived at by dividing the total hours paid by the Applicant for its Eligible 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 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. 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 balance of the Loan 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 Certificate of Organization and Operating Agreement of the Applicant certified by the member (the "Member") to be correct;

(3) Certified resolutions of the Member of the Applicant authorizing this Agreement and providing for signature authority.

c. In order to secure the Loan, the Applicant shall have delivered to the City the following:

(1) The "Guaranty" of Patrick Maag. The Guaranty shall be in the form of the attached "Exhibit B".

(2) A “Security Agreement” covering the Applicant’s assets. The Security Agreement 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:

If the Applicant desires to claim Job Credits, the Applicant shall annually, within 30 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. In the event that the City determines that the Applicant has claimed Annual Job Credits in excess of those actually earned, then the City may demand that the Applicant immediately repay any excess Annual Job Credits applied against an Annual Payment. Failure to make such a repayment within 10 days of the demand shall be considered a default under this Agreement and the Note.

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 Guaranty, 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 its Business outside of the zoning jurisdiction of the City.

12. Early Termination:

a. The Applicant shall have the right at any time to terminate their participation in the Program by notifying the Administrator in writing of its desire to do so.

b. The Administrator shall have the right to terminate the Applicant's participation in the Program if the Applicant is in default of any of the terms and conditions of this Agreement, which default is not cured within 30 days of written notice by the Administrator.

c. In the event of a termination as described in this paragraph, (i) the balance of the Loan shall be immediately due and payable and the interest rate under the Note shall convert to a default rate of 7% per annum. This amount shall then be immediately due and payable to the Fund, and interest shall accrue at the rate of 7% per annum on any amounts not immediately paid.

13. 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.

14. 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.

15. 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:

Candy Barn Express, LLC
1012 36th Street #3
Scottsbluff, NE 69361
Attention: Patrick Maag

16. 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 Candy Barn Express, LLC**

City of Scottsbluff, Nebraska

Candy Barn Express, LLC

By: _____
Economic Development
Program Administrator

By: _____
Patrick Maag, Sole Member