

City of Scottsbluff, Nebraska

Tuesday, January 21, 2020

Regular Meeting

Item Reports1

Council to discuss and consider action on an Economic Development Assistance Agreement for Gardner Technologies, LLC.

Staff Contact: Starr Lehl, Economic Development Director

ECONOMIC DEVELOPMENT ASSISTANCE AGREEMENT

This Agreement is made on January 21, 2020, between the City of Scottsbluff, Nebraska (the “City”) and Gardner Technologies, 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 loans (the “Loans”) 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 a Nebraska limited liability company doing business in a multi-state area. The Applicant is a telecommunications business providing low voltage phone and telecommunications installation and repair, and PC repair and support. The Applicant is located in Scottsbluff, Nebraska and operates out of leased premises (the “Business”). The proceeds of the Loans will be used primarily working capital of the Business.

2. Amount and Description of Loans:

Two Loans in the aggregate amount of \$40,000 have been recommended and approved, described as follows:

a. The first loan shall be \$20,000 (the “Non-Contingent Loan”) and shall be disbursed from the City’s Economic Development Fund (the “Fund”) to the Applicant as soon as possible for Closing, as provided for below. The Non-Contingent Loan shall be used by the Applicant for working capital purposes. The Non-Contingent Loan shall be represented by the Non-Contingent Promissory Note (the “Non-Contingent Note”), to be signed at the Non-Contingent Loan Closing. The Non-Contingent Note shall carry interest from the date of Closing at the Annual Applicable Federal Mid-Term rate for the month of Closing, and all

principal and interest shall be repayable in one balloon payment on or before March 1, 2021. Proceeds of the “Contingent Loan” (as defined below) may be used to repay some or all of the Non-Contingent Loan. The form of the Non-Contingent Note is attached.

b. The second loan shall be \$20,000 (the “Contingent Loan”) and shall be (1) disbursed from the Fund to the Applicant, (2) contingent upon the Applicant obtaining and showing proof of Apple Authorized Service Professional Certification (the “Certification”) and upon the Applicant not being in default of the Non-Contingent Note, and (3) scheduled as a claim on the next reasonably available Council meeting after showing proof of Certification and disbursed within 10 business days after the Council has approved the claim for the Contingent Loan. The Contingent Loan shall be represented by the Contingent Promissory Note (the “Contingent Note”) to be signed at the Contingent Loan Closing. The Note shall not carry or accrue interest until Default, at which time it shall accrue interest at 7% per annum. The Applicant may earn job credits against the amount due under the Contingent Note as set forth below. The form of the Contingent Note is attached.

3. Loan Disbursement and Loan Closing:

As soon as the Applicant has satisfied the conditions to the Loan Closing under paragraph 10 below, the Non-Contingent Loan shall be scheduled as a claim at the next Council meeting for which the matter may be reasonably scheduled. Disbursement of the Non-Contingent Loan proceeds shall be made within 10 business days after the Council has approved a claim for the Loan. Disbursement of the Contingent Loan proceeds shall be made as set forth above. The disbursement of proceeds for each Loan shall constitute the “Loan Closing” for each, respectively.

4. FTE Credit Definitions:

a. As long as the Applicant is not in default of the Agreement or any other document entered into pursuant to this Agreement, the Applicant shall be eligible for credit against the balance due under the Contingent Note for Job Credits earned during a Year, beginning on the “Effective Date.” The Effective Date shall be the first day of the first calendar quarter after the Contingent Loan Closing.

b. The “Term” of this Agreement for Annual Job Credit calculation purposes shall begin on the Effective Date and shall continue for 5 Years from the Effective Date (the “Term”).

c. A “Year” shall mean the 12-month period ending as of the day prior to each annual anniversary of the Effective Date.

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 in Scotts Bluff County, 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 by the Applicant, 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 total of (i) the number of Eligible Full Time Employees which are paid based on a salary, plus (ii) with respect to hourly Eligible Full Time Employees, the number arrived at by dividing the total hours paid by the Applicant to its hourly 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 hourly Eligible Full Time Employee shall not exceed 2080 hours.

6. Job Credits:

Job Credits” shall be calculated as follows:

a. The Applicant shall receive an “Annual Job Credit” during the Term equal to the FTE’s multiplied by \$1,000.

b. The amount of the Annual Job Credit may not exceed \$5,000 per Year (the “Maximum Annual Credit”). It is anticipated that the Applicant will earn \$4,000 per Year in Annual Job Credits.

c. In the event that 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.

7. 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.

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

8. 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.

9. Conditions to Loan Closing:

In addition to any conditions for the Conditional Loan above, the City's obligation to proceed with either Loan Closing is subject to the Applicant's fulfillment of each of the following conditions at or prior to each 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 of the Applicant, certified by the President of the Applicant to be correct;

(3) Certified Resolution of the Members of the Applicant, authorizing this Agreement and providing for signature authority.

c. In order to secure the Loans and the repayment, the Applicant shall have delivered to the City a Security Agreement covering the Applicant's personal property of the Business. The form of the Security Agreement is attached.

d. In order to induce the Loans and secure repayment, the Applicant shall have delivered an unconditional Guaranty of Jerry Gardner. The form of the Guaranty is attached.

e. 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 either Loan Closing.

f. There shall have been no material adverse change in the operation or financial status of the Applicant and either Loan Closing shall constitute the Applicant's representations that there has been no such material adverse change.

g. In requesting the disbursement of the Loans, 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 or Asphalt Plant 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 or Annual Asphalt Plant Job Credits 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 or Annual Asphalt Plant Job Credits claimed on the Annual Report exceeds 10% of the Annual Job Credit or Annual Asphalt Plant Job Credits 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, either Note, or the Security 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, or 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 principal location of Business (as defined above) or moves its principal location of Business (as defined above) outside of Scotts Bluff County, Nebraska.
- e. Upon default, the Note shall accrue interest at the default rate of 7% per annum.

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 membership interest of the Applicant which results in the Jerry Gardner owning than 51% of the membership 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:

a. 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.

- b. If to the City:
City of Scottsbluff
2525 Circle Drive
Scottsbluff, NE 69361
Attention: City Manager
- c. If to the Applicant:

Gardner Technologies, LLC.

1414 E. 20th St, Suite #4.
Scottsbluff, NE 69361
Attention: Jerry Gardner

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 Gardner Technologies, LLC

City of Scottsbluff, Nebraska

Gardner Technologies, LLC.

By: _____
Economic Development
Program Administrator

By: _____
Jerry Gardner, President/Member