

City of Scottsbluff, Nebraska

Tuesday, January 21, 2020

Regular Meeting

Item Reports2

Council to discuss and consider action on an Economic Development Assistance Agreement for Western Farms, 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 the Western Farms, LLC., a Nebraska limited liability company (the “Applicant”).

Recitals:

- a. The City has adopted an Economic Development Program (the “Program”) pursuant to the Nebraska Local Option Municipal Economic Development Act;
- b. The Applicant has made application for assistance from the Program, as amended (the “Application”);
- c. The Administrator of the Program (the “Administrator”) and the City Economic Development Program Application Review Committee (the “Committee”) have reviewed the Application and recommended to the City Council (the “Council”) that a loan totaling \$500,000 (the “Loan”) be made to the Applicant from the City’s Economic Development Fund (the “Fund”), as provided for in this Agreement. The City Council has accepted the recommendations.
- d. The parties now desire to enter into this Agreement for the purpose of setting out the terms and conditions of the Loans.

Agreement:

1. Purpose of the Loans:

The Applicant is a start-up business located in Scottsbluff, Scotts Bluff County, Nebraska, engaging in the business of hemp seed production and hemp processing (the “Business”). The proceeds of the Loan will be used for construction and expansion of the hemp seed production greenhouse of the Business, as well as working capital related thereto, which construction and expansion is necessary begin business and enter the market for hemp seed production and sales.

2. Description of the Loan:

The City agrees to provide the Loan to the Applicant. The Loan principal (the “Principal”) up to but not exceeding \$500,000 shall be disbursed to the Applicant according to each “Draw Request” (as defined below) made by the Applicant under paragraph 3 below. The Loan shall be represented by a promissory note (the “Note”) to be signed at Closing in the form of “Exhibit A.” All Principal paid in each Draw Request shall not accrue interest until July 1, 2020 (the “Term Date”). On the Term Date: (i) all Principal shall then be amortized over three (3) annual payments, the first being due on June 1, 2021, accruing interest at the applicable federal mid-term rate in effect on the Term Date (the “Interest Rate”). Job Credits (as defined below) may be earned during the term of the Loan, retroactive to January 1, 2020 (the “Job Credit Effective Date”). Each annual amortized payment shall receive Job Credits earned, if any, from the previous Year before payment is made. A sample amortization schedule, anticipating Job Credits that may be earned each Year as set forth in the Application, a sample interest rate of 2.25%, and Draw Request up to \$500,000, is

attached to the Exhibit “A” Note for reference. A more accurate and working amortization schedule shall be created by the City on the Term Date.

3. Closing and Disbursement:

After the Applicant has met all of the conditions to Closing (as provided for below), the maximum Principal amount of \$500,000 shall be disbursed from the City’s Economic Development Fund (the “Fund”) to the Applicant as follows:

a. The Applicant shall submit all requests for the disbursement of Principal to the Administrator on or before the “Term Date” for the purpose of paying for construction and expansion of the hemp seed production greenhouse and working capital related thereto (each, a “Draw Request”). Each Draw Request shall include (i) a certification by the Applicant the amount of Principal requested, (ii) unless for working capital, itemized invoices for expenses of work and materials previously performed or purchased or to be immediately performed or purchased, and (iii) the requested date of disbursement from the City.

b. Upon receipt of a Draw Request, the Administrator shall review the Draw Request and the documentation for the Draw Request and shall within three business days inform the Applicant of any discrepancy, deficiencies, or questions regarding the Draw Request and its documentation. Once the Administrator approves a Draw Request, the Draw Request shall be scheduled for disbursement by the City as a claim on the next available Council meeting. Disbursement of such approved claim shall occur within five business days after approval.

c. Provided that the cumulative amount of Draw Requests does not exceed the Principal amount of \$500,000 and that all Draw Requests are submitted for disbursement before the Term Date, the Applicant may make Draw Requests at its discretion on one or more occasions. The parties understand the amount of the Loan will not pay in full the amounts anticipated for construction and expansion of the seed production greenhouse, so the Applicant is responsible for scheduling and timing all funding sources, including the Draw Requests under the Loan, as desired in its discretion.

4. Job Credit Effective Date and Term:

The Applicant may earn “Job Credits” to be applied against the balance of the Loan during the three Years following the Job Credit Effective Date. In connection with the calculation of the Job Credits:

a. The effective beginning date for Job Credit calculation purposes shall be the Job Credit Effective Date.

b. The term for earning Job Credits shall begin as of the Job Credit Effective Date and shall expire three (3) Years after the Job Credit Effective Date (the “Job Credit Term”), ending December 31, 2022.

c. A “Year” shall mean a 12-month period beginning January 1, 2020 and ending as of the day prior to each annual anniversary of the Job Credit Effective Date.

5. Employee Definitions:

a. “Full Time Employee” shall mean a bona fide employee of the Applicant who (1) is classified as full time; and (2) subject to normal and reasonable waiting periods, is eligible for the employer’s normal fringe benefit package. The normal fringe benefit package must, at the least, be made available to all employees of the Applicant classified as full time.

b. In addition, a Full Time Employee shall (1) work primarily in Scotts Bluff County, Nebraska, and (2) reside within 50 miles of the corporate limits of the City; provided, however any Full Time Employee who does not reside within fifty (50) miles of the corporate limits of the City at the time the of hire by the Applicant may move to a residence within the required geographic area within six (6) months of the hiring.

c. “Full Time Equivalent” Employees (the “FTE’s”) shall mean the sum of the number arrived at by dividing the total hours of all Full Time Employees paid by the Applicant during a given Year by 2,080 hours, and then rounding down to the nearest tenth; provided, however, the maximum hours paid that can be counted for any one Full Time Employee shall not exceed 2,080 hours. Salaried employees meeting the definition of a Full Time Employee shall be presumed to have been paid for 2,080 hours.

6. Job Credits:

Job Credits shall be calculated as follows:

a. Within sixty (60) days following of the anniversaries of each Job Credit Effective Date, the Applicant shall receive an “Annual Job Credit” for the previous Year of the Job Credit Term equal to the FTE’s of the Applicant, multiplied by \$2,000. It is anticipated that seventeen (17) FTE’s may be created by the Applicant during the first Year of the Job Credit Term and that (30) FTE’s may be created by the Applicant during the second and third Year of the Job Credit Term. If the Applicant fails to provide an Annual Report when required by this Agreement, the full amortized payment of the Loan shall be due the following June 1 without application of the Job Credits.

b. The amount of the Annual Job Credit for all FTE’s may not exceed \$75,000 per Year (the “Maximum Annual Credit”). During the entire Job Credit Term all FTE’s created by the Applicant and Annual Job Credits of the Applicant may not be greater than \$225,000 in the aggregate.

7. Loan Repayment:

a. The Principal of the Loan shall carry at the Interest Rate (as defined above), beginning on the Term Date. The Loan shall be paid in three (3) equal annual payments of principal and interest, with the first payment due on June 1, 2021 and each subsequent payment due on June 1 of each year thereafter (the “Annual Payment Date”). The Loan shall carry interest at the Default Interest Rate upon default.

b. Within sixty (60) days following each of the three anniversaries of the Job Credit Effective Date, the total of the cumulative Annual Job Credits earned for the previous Year of the Job Credit Term will be subtracted from the payment due the following June 1, retroactively effective to the anniversary of the Job Credit Effective Date. The Annual Job Credits shall be applied first to accrued interest of the Loan and then to Principal. Thereafter, after application of each Annual Job Credit, if any, the Applicant shall pay the difference between the Annual Job Credit and the annual amortized payment.

c. A sample amortization schedule, anticipating Job Credits that may be earned each Year as set forth in the Application, a sample interest rate of 2.25%, and Draw Requests of \$500,000, is attached to the Note for reference. An accurate and working amortization schedule shall be created by the City on the Term Date.

8. Ownership of Property, Financing Arrangements and Collateral:

a. In order to secure the obligations of the Applicant under this Agreement, the City is requiring the following security:

(1) A Security Agreement (the “Security Agreement”) to be given by the Applicant and Western Farms Seed, LLC covering all Business assets of the Applicant and Western Farms Seed, LLC. The Security Agreement shall be in the form of the attached “Exhibit B”. The Security Agreement shall provide for a first-priority security interest on all Business assets described in the Security Agreement.

(2) A deed of trust, (the “Deed of Trust”) to be given by Western Farms, LLC, covering the real estate asset on which the Business is located. The Deed of Trust shall be in the form of the attached “Exhibit C”. The lien of the Deed of Trust shall be junior only to a lien under a deed of trust executed by the applicant to Brendan J. Rice, trustee, for the benefit of HVS, LLC, as beneficiary.

(3) An unconditional guaranty of Arthur Hoehn, Edward Hoehn, Mark Johnson, Michael Hoehn, Patrick Hoehn, and Western Farms Seed, LLC, jointly and severally (the “Guaranty”), guaranteeing the obligations of this Agreement, the Note, the Security Agreement, and the Deed of Trust. The Deed of Trust shall be in the form of the attached “Exhibit D”.

9. 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 the Application for 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 Applicants a party or by which they are bound.

d. At all times, the Applicant shall operate in compliance with all federal or state hemp production, cultivation, processing, and sale statutes, laws, rules, and regulations, and shall carry all required hemp permits and licenses for its Business operation.

e. The Applicant shall execute a “Certification Regarding Nebraska Advantage Act,” attached to this Agreement as Exhibit E, and the Applicant represents and warrants that it is not currently an applicant or participant of the Nebraska Advantage Act.

10. Representations and Warranties of the City:

The City represents and warrants the following, all of which shall survive the 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.

11. Conditions to Closing:

In addition to conditions set forth above, the City’s obligation to provide any funding or approve any Draw Requests is absolutely conditional upon each of the following conditions:

a. The Applicant providing documents sufficient to show a licensed processing operation under or in conjunction with an approved license pursuant to the 2014 Farm Bill, the 2018 Farm Bill, or the Nebraska Hemp Act; provided, however, that as soon as reasonably practical the Applicant shall apply for and receive an annual license from the Nebraska Department of Agriculture under the Nebraska Hemp Act.

b. All representations and warranties of the Applicant shall be true as of the Closing and remain true after Closing.

c. The Applicant shall each 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 an officer of the Applicant to be correct;

(3) Certified corporate action of the Applicant authorizing this Agreement and providing for signature authority for all accompanying documents.

d. In order to secure the Loan and perform the warranties of this Agreement, the Applicant and its shareholders shall have delivered to the City the Security Agreement, the Deed of Trust, the Guaranty, and the Certification Regarding Nebraska Advantage Act.

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 before, and after the Closing.

f. There shall have been no material adverse change in the operation or financial status of the Applicant. At the time of Closing, the Closing shall constitute the Applicant's representation that there has been no such material adverse change.

g. Upon accepting funds under each Draw Request of the Loan, the Applicant is considered to have represented that the above conditions have been satisfied and are continuing to be satisfied.

12. Annual Reports

For the first three (3) Years following each anniversary of the Job Credit Effective Date, the Applicant shall annually, within 60 days after 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 that previous 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.

13. 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 or if the Applicant sells, transfers, or conveys a majority of its assets, including real estate and personal property. A "default" may, however, be cured within 30 days of written notice by the Administrator before termination occurs.

c. In the event of a termination as described in this paragraph 13, the total of the Annual Job Credits for FTE's as of the end of the Year immediately preceding the termination will be subtracted from the amount of the Loan, if that calculation has not previously been made. The balance of the Loans shall then be immediately due and payable and the interest rate under the Note shall be the Default Interest Rate. This amount shall then be immediately due and payable to the Fund, and interest shall accrue at the Default Interest Rate on any amounts not immediately paid. Provided, however, if the Applicant sells, transfers, or conveys a majority of its assets to a single buyer or to related buyers, including real estate and personal property, the buyer or transferee may apply for assistance from the Program in the form of assuming the remaining terms, conditions, and amounts of the Loans, and if such assumption is approved by the City, under the terms of conditions of such approval, the default arising from the sale, transfer, or conveyance shall be considered cured at that time, provided that interest shall have continued to accrue at the Default Interest Rate until the effective date of the City's approval.

14. Default:

The Applicant shall be in default if any of the following happen:

a. Failure to comply with any of the terms of this 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 the Applicant, the termination of its 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 on a normal and regular basis at the site of the Business.

e. Failure to make payments due under the Note on the Annual Payment Date.

f. Breach of any provisions, warranty, or agreement in the Security Agreement, the Deed of Trust, the Guaranty, or the Certification Regarding Nebraska Advantage Act.

g. Loss of a license as described in paragraph 11.a above.

h. The Applicant intentionally or materially misstates the Annual Job Credit on an Annual Report. A material misstatement shall be considered to have occurred if the Annual Job Credit claimed on the Annual Report exceeds 10% of actual Annual Job Credit as reasonably determined by the Administrator.

i. The “Default Interest Rate” as that term is used in this Agreement and any accompanying documents shall be 7% per annum.

15. 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 or conveyance of a majority of the Applicant’s assets, including real estate and personal property.

16. 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 ensure 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.

17. 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, or by facsimile transmission combined with any of the above methods of notice, 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
2121 Circle Drive
Scottsbluff, NE 69361
Attention: City Manager

b. If to the Applicant:

Western Farms, LLC.
3109 Avenue B
Scottsbluff, NE 69361
Attention: Patrick Hoehn

18. 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 FOLLOWS]

City of Scottsbluff, Nebraska

Western Farms, LLC

By: _____
Economic Development
Program Director

By: _____
Patrick Hoehn, President