

# **City of Scottsbluff, Nebraska**

**Friday, August 7, 2020**

**Regular Meeting**

## **Item Amend1**

**Review and Consider EDA Agreement with Bluffs Physical Therapy/Hydro Zen.**

**Staff Contact: Starr Lehl**

## **ECONOMIC DEVELOPMENT ASSISTANCE AGREEMENT**

This Agreement is made on August \_\_\_\_, 2020, between the City of Scottsbluff, Nebraska (the “City”), Bluffs Physical Therapy, LLC (the “Bluffs PT”), and Hydrozen, LLC (“Hydrozen”).

### **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. Bluffs PT has made application for assistance from the Program (the “2018 Application”) and has entered into an Economic Development Assistance Agreement dated May 11, 2018 (the “Bluffs PT Agreement”), under which Bluffs PT received a loan and grant from the City.

c. Bluffs PT and Hydrozen have made a subsequent 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 grant (the “Grant”) and a loan (the “Loan”) be made to Bluffs PT and Hydrozen, respectively, 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 Grant and the Loan.

### **Agreement:**

#### **1. Purpose of Assistance:**

Bluffs PT and Hydrozen are expanding a physical therapy clinic in Scottsbluff (the “Clinic”), to include a sensory deprivation therapy center. The proceeds of the Grant and the Loan shall be used to make improvements to the Clinic space rented by Bluffs PT and Hydrozen, including the purchase of equipment and tenant improvements.

#### **2. Amount of Grant and Loan:**

The Grant and the Loan shall be disbursed from the Fund at the Closing (as provided for below) as follows:

a. The Grant shall be in the amount of \$93,795.82, awardable to Bluffs PT, represented by a promissory note (the “Grant Note”) to be signed at the Closing in the form of the attached “Exhibit A”, and allocated as follows (the “Grant Amount”). The Grant Note shall not carry interest unless a default occurs, at which time the Default Rate (defined below) shall apply.

i. The current outstanding amount of the loan under Bluffs PT Agreement (\$24,985.82) shall be refinanced as part of the Grant Amount in this Agreement;

ii. The current outstanding amount of the grant under Bluffs PT Agreement (\$12,000) shall be refinanced as part of the Grant Amount in this Agreement;

iii. An additional \$57,000 shall be awarded to Bluffs PT as party of the Grant Amount in this Agreement.

b. The Loan shall be in the amount of \$30,000 (the “Loan Amount”), awardable to Hydrozen and represented by a promissory note (the “Loan Note”) to be signed at the Closing in the form of the attached “Exhibit B”. The Loan Note carry interest from September 1, 2020 (the “Loan Note Interest Date”) until paid in full, at which time the Note shall carry interest at the Applicable Federal Mid-Term rate for the month of the Closing and shall be repaid over 5 equal annual payments of principal and interest. The first payment shall be due on July 1, 2021, with each additional payment due on the same day of each subsequent Year until the Note is paid in full.

### **3. Closing:**

As soon as Bluffs PT and Hydrozen have satisfied the conditions to Closing (as provided for below), the Grant Amount and the Loan Amount shall be scheduled as a claim at a City Council meeting. The “Closing” shall then occur within 10 business days after the Council meeting where the claim is approved.

### **4. Possible Grant Repayment:**

The Grant Amount shall be subject to repayment (the “Repayment”) to the City if Bluffs PT does not fully earn the Job Credits (as provided for below). In connection with the calculation of the Job Credits:

a. The effective date of this Agreement for Job Credit calculation purposes shall be July 1, 2020 (the “Job Credit Effective Date”).

b. The term of this Agreement for Job Credit calculation purposes shall begin on the Job Credit Effective Date and shall continue for 5 years from the Job Credit 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 Job Credit Effective Date.

## **5. Employee Definitions:**

a. “Full Time Employee” shall mean a bona fide employee of Bluffs PT who (1) is classified by Bluffs PT 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, include a health insurance plan which provides for employee coverage substantially paid for by Bluffs PT.

b. “Eligible Full Time Employee” shall mean a Full Time Employee who: (1) primarily works in 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 by Bluffs PT, 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 Bluffs PT 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. Bluffs PT shall receive a “Base Annual Job Credit” during the Term equal to the FTE’s multiplied by \$2000.

b. If at the end of a Year, (1) the Annual Report (as provided for below) indicates that Bluffs PT 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 Bluffs PT’s fringe benefit plan, then Bluffs PT 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>
\$400	\$14.00 to \$17.99	\$29,120 to \$37,439

\$800	\$18.00 to \$21.99	\$37,440 to \$45,759
\$1,200	\$22.00 to \$25.99	\$45,760 to \$54,079
\$1,600	\$26.00 to \$29.99	\$54,080 to \$62,399
\$2,000	\$30.00 and above	\$62,400 and above

In calculating the hourly rate or salary rate for purposes of the above table, Bluffs PT is entitled to add the hourly equivalent or annual cost of the following fringe benefits provided to the applicable employee by Bluffs PT: 401k Plan, profit sharing, pension or equivalent retirement benefits, health insurance, and life and disability insurance.

c. The amount of the Annual Job Credit may not exceed \$20,000 per Year (the “Maximum Annual Credit”). If, during any Year, Bluffs PT does not earn greater than \$15,000 in Annual Credits, Bluffs PT shall repay to the City the difference between the Annual Credit earned and \$15,000 within 30 days’ demand of the City. The failure of Bluffs PT to make such payment shall be considered a default.

d. In the event that Bluffs PT 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 Bluffs PT and Hydrozen:**

Bluffs PT and Hydrozen represent and warrant the following, all of which shall survive the Closing:

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

b. No representation or warranty made by Bluffs PT and Hydrozen 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 Bluffs PT and Hydrozen 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 Bluffs PT or Hydrozen are a party or by which they are bound.

d. Both Bluffs PT and Hydrozen derive their principal sources of revenue from the sales of services in interstate commerce.

e. All representations and warranties made by Bluffs PT and Hydrozen shall survive the Closing.

## **8. 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.

## **9. Certification of Bluffs PT and Hydrozen:**

Bluffs PT and Hydrozen certify to the City that they have not filed nor do they intend to file an application with the Department of Revenue to receive tax incentives under the Nebraska Advantage Act for the Business, or its successor legislation or program. In the event that either Bluffs PT and Hydrozen files such an application, it shall advise the City in writing, and the City shall have the option to review the status of the assistance, to include determining that the balance of the Grant Amount or Loan Amount is due and payable if Bluffs PT or Hydrozen is awarded incentives under the Nebraska Advantage Act, or its successor legislation or program

## **10. Conditions to Closing:**

The City's obligation to proceed with the Closing is subject to Bluffs PT and Hydrozen's fulfillment of each of the following conditions at or prior to the Closing:

a. All representations and warranties of Bluffs PT and Hydrozen shall be true as of the Closing.

b. Bluffs PT and Hydrozen shall have delivered to the City:

(1) Evidence of Good Standing of Bluffs PT and Hydrozen from the Nebraska Secretary of State.

(2) A copy of the current and correct Certificate of Organization and Operating Agreement Bluffs PT and Hydrozen. certified by the members (the “Members”) to be correct;

(3) Certified resolutions of the Members of each entity authorizing this Agreement and providing for signature authority.

c. In order to secure the Assistance and the repayment, Bluffs PT and Hydrozen shall have delivered to the City the following:

(1) A guaranty (the “Guaranty”) of the Michael Morevec and Lisa Moravec. The Guaranty shall be in the form of the attached “Exhibit C”.

(2) A Security Agreement covering Bluffs PT and Hydrozen’s equipment, inventory, accounts, and general intangibles. The Security Agreement shall be in the form of the attached “Exhibit D”.

d. Bluffs PT and Hydrozen shall in all material respects have performed their obligations, agreements, and covenants contained in this Agreement to be performed by them, on, or before the Closing.

e. There shall have been no material adverse change in the operation or financial status of Bluffs PT or Hydrozen and the Closing shall constitute Bluffs PT and Hydrozen’s representations that there has been no such material adverse change.

f. In requesting the disbursement of the assistance, Bluffs PT and Hydrozen are considered to have represented that the above conditions have been satisfied and are continuing to be satisfied.

## **11. Annual Reports:**

In order to obtain Job Credits, Bluffs PT 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 Bluffs PT’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 Practice or financial expert, to review the books and records of Bluffs PT pertaining to the Annual Report and any other terms and conditions as provided for in this Agreement. If after a review or audit of Bluffs PT’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 Bluffs PT to reimburse the Fund for the actual cost of the audit.

**12. Default:**

Bluffs PT and Hydrozen 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 Grant Note, the Loan 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 Bluffs PT or Hydrozen proves to have been false in any material respect when made or given.
- c. Dissolution or liquidation of any of Bluffs PT or Hydrozen, the termination of existence, insolvency, business failure, appointment of a receiver, assignment for the benefit of creditors, or bankruptcy of Bluffs PT or Hydrozen.
- d. Bluffs PT or Hydrozen ceases to conduct the business or moves the business outside of the City.

**13. Assignability:**

The Administrator may assign his interest in this Agreement to any successor administrator designated by the City Council. Neither Bluffs PT or Hydrozen may not assign or transfer its interest in this Agreement without the consent of the Administrator. Assignment shall include a transfer of ownership of Bluffs PT or Hydrozen which results in the Members owning less than 51% of the ownership interests of Bluffs PT or Hydrozen.

**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 Bluffs PT and Hydrozen 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 Bluffs PT or Hydrozen:

Bluffs Physical Therapy, LLC, or  
Hydrozen, LLC  
3510 Avenue B  
Scottsbluff, NE 69361  
Attention: Michael Moravec

**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, Bluffs Physical Therapy, LLC, and Hydrozen, LLC**

City of Scottsbluff, Nebraska

Bluffs Physical Therapy, LLC

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

By: \_\_\_\_\_  
Michael Moravec, Member

Hydrozen, LLC

By: \_\_\_\_\_  
Michael Moravec, Member