

City of Scottsbluff, Nebraska

Monday, November 1, 2021

Regular Meeting

Item Reports1

Council to discuss and consider action on Economic Development Assistance Agreement for BDS3C, LLC d/b/a Flyover Brewing Company.

Staff Contact: Starr Lehl, Economic Development Director

ECONOMIC DEVELOPMENT ASSISTANCE AGREEMENT

This Agreement is made on November 1, 2021, between the City of Scottsbluff, Nebraska (the “City”) and BDS3C, L.L.C. (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”), reviewed by the Committee (as defined below) in September of 2021.

c. The Applicant has received assistance from the Program pursuant to a previous application and Economic Development Assistance Agreement dated August 29, 2017 (the “2017 Agreement”). The 2017 Agreement was amended by the Amendment to the EDA Agreement dated May 21, 2018 (the “First Amendment”) and the second Amendment to the EDA Agreement dated April 1, 2020 (the “Second Amendment”). It is intended that this Agreement will act as a novation, refinance, and replacement of and will supersede all terms and conditions of the 2017 Agreement, the First Amendment, and the Second Amendment.

d. 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 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.

e. 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 Grant:

The Applicant’s business known as “Flyover Brewery” is continuing the expansion of its business with an expanded seating, dining, and manufacturing and distribution area in Scottsbluff, Nebraska (the “Business”). The Grant and the Loan is to be used to fund to capital asset purchase of the new manufacturing and distributing expansion, and the initial operating capital costs of the expansion, job creation, and capital asset purchase.

2. Amount of Grant and Loan:

The following amounts shall be payable to the Applicant from the City of Scottsbluff Economic Development Fund (the “Fund”) at the Closing (as provided for below).

a. The Grant shall be in the amount of \$250,000 (the “Grant Amount”) representing the investment by the Applicant into the expanded manufacturing and distribution business, the support the Applicant provides to the community, and the addition to the community’s economy by the Business. The Grant shall in the form of a promissory note (the “Forgivable Note”) which may be repaid according to the terms of this Agreement, to be signed at Closing.

b. The Loan shall be in the amount of \$300,000 shall be represented by a promissory note (the “Non-Forgivable Note”) to be signed at the Closing. The Non-Forgivable Note shall be effective April 1, 2022, and shall carry interest at the rate of 1.08% from April 1, 2022 (the “Note Interest Date”). Subject to paragraph 2.c below, the total sum payable to the City by the Applicant under the 2017 Agreement, the First Amendment, and the Second Amendment under the Amended and Restated Note dated March 1, 2020 immediately after the current payment on April 1, 2022 (the “Current Sum”) shall be refinanced with the \$300,000 loan, and the total sum of both shall be made payable under new Amended and Restated Note over 120 equal monthly payments of principal and interest, with the first payment being due May 1, 2022. Each subsequent payment shall be due on the first of each month thereafter, until the new Amended and Restated Note is paid in full.

c. Before refinancing the \$300,000 with the Current Sum, an amount of \$75,000 shall be separated from the Current Sum and treated as a jobs-based grant subject to the terms and conditions for earning job credits below (the “Jobs-Based Grant”). The balance of the Jobs-Based Grant shall not earn interest, and shall be repaid according to the terms and conditions of FTE Credits below. The Jobs-Based Grant shall be represented by the “Jobs Credit Note”, to be signed at Closing.

d. Until refinance under paragraph 2.b above, the additional amount provided under this Agreement (\$550,000) shall not carry interest, and the Applicant shall continue to perform under the terms and obligations of the Amended and Restated Note dated March 1, 2020, including any job credits earned thereto under the 2017 Agreement, the First Amendment, and the Second Amendment.

3. Closing:

The Grant Amount and the Loan Amount shall be scheduled as a claim at the next Council meeting following the signing of this Agreement. The “Closing” shall occur following the satisfaction of all conditions to Closing as provided for below, but no earlier than 5 business days after the Council meeting where the claim is approved.

4. Possible Grant Repayment:

The Grant Amount, Forgivable Note, Jobs-Based Grant, and Jobs Credit Note shall be subject to repayment as follows;

a. The Applicant shall earn \$50,000 in credit for every Year (as defined below) the Business remains open and operating in the City, with the first Year beginning January 1, 2022. If the Business closes during any Year, the Business shall receive a prorated amount of credit for the length of the Year in which the Business was open, but if the Business remains open for five Years, the full amount of the Grant Amount and the Forgivable Note shall be deemed repaid. Any balance remaining on the Grant Amount after the Term shall be repaid to the Fund within 90 days of the end of the Term and any amount not paid within this time period shall then carry interest at the rate of 7% per annum until paid.

b. The Jobs-Based Grant and Jobs Credit Note shall be repaid and earn credits under the terms of paragraphs 5 and 6 below.

c. The “Effective Date” of this Agreement for Job Credit and Grant Amount calculation purposes shall be January 1, 2022 (the “Effective Date”).

d. The term of this Agreement shall begin on the Effective Date and shall continue for 10 years from the Effective Date (the “Term”).

e. 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; (2) subject to normal and reasonable waiting periods, is eligible for the employer’s normal fringe benefit package; and (3) is primarily employed to work in the Applicant’s brewing operation and/or in the wholesale distribution of products produced by the Applicant at the Business. For purposes of this Agreement, one or more of the owners of the Applicant that act as the regular manager and receives pay, a regular draw, or guaranteed payment from the Applicant (or is taxed on undistributed earnings) shall be considered “employed to work in the Applicant’s brewing operation” and shall be eligible to be a “Full Time Employee.”

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, and (3) received as pay, except for owners of Applicant, at least 110% of the applicable minimum wage, or if salaried, at least the applicable exempt amount; 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; and further provided that the value of benefits provided to employees may be used by the Applicant in determining amounts paid.

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 or any owner defined in paragraph 5.a above, 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 2,080 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 2,080 hours.

d. “Eligible FTE’s” shall mean the FTE’s calculated for a Year.

6. Job Credits:

a. The Applicant shall receive an “Annual Job Credit” during the Term equal to the Eligible FTE’s multiplied by \$2,000.

b. At the end of each Year of the Term, the total of the cumulative Annual Job Credits will be subtracted from the Jobs-Based Grant amount owed on the Jobs-Based Note. Any balance remaining on the Jobs-Based Note after the Term shall be repaid to the Fund within 90 days of the end of the Term (the “Repayment”), and any amount not paid within this time period shall then carry interest at the rate of 7% per annum until paid. If there is no balance, then the Applicant shall be considered as having satisfied its obligations under the Jobs-Based Grant, the Jobs-Based Note, and this Agreement and no repayment shall be due.

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 and existing 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 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 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, or its program or legislative successor, 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 Assistance, to include determining that the unearned portion of the Assistance is due and payable if the Applicant is awarded incentives under the Nebraska Advantage Act, or its program or legislative successor.

10. Conditions to Closing:

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

a. All representations and warranties of the Applicant shall be true as of the Closing.

b. The Applicant shall have delivered to the City:

(1) A Certificate or Letter of Good Standing 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 secretary of the Applicant to be correct; and

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

(4) A W-9 of the Applicant, certifying the tax ID number of the Applicant.

c. In order to secure repayment and performance of this obligations of this Agreement, the Applicant shall have delivered to the City the following:

(1) An updated guaranty (the “Guaranty”) of the owners of the Applicant taking into account the terms and conditions of this Agreement.

(2) A Deed of Trust (the “Deed of Trust”) covering the real estate where the Business is expanding. The Deed of Trust shall be subordinate to a prior deed of trust in favor of Platte Valley Bank recorded against the real estate.

(3) A binding lending commitment from Platte Valley Bank in the amount of \$600,000 for the purposes of the Business expansion.

d. The Applicant shall in all material respects have performed its obligations, agreements, and covenants contained in this Agreement to be performed by it, on, or before the Closing.

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

11. 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 (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.

12. Early Termination:

a. The Applicant shall have the right at any time to terminate its 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, the total of the Annual Job Credits as of the end of the Year immediately preceding the termination will be subtracted from the Jobs-Based Grant amount. This amount shall then be immediately due and payable to the Fund. Interest shall accrue at the rate of 7% per annum on any amounts not immediately paid.

13. 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 or any other agreement entered into connection with 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 existence, insolvency, business failure, appointment of a receiver, assignment for the benefit of creditors, or bankruptcy of the Applicant.

d. The Applicant ceases to operate a branch of the Business in Scottsbluff, Nebraska.

e. 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 25% of Annual Job Credit as reasonably determined by the Administrator.

f. Transfer of sale of a majority of the membership interest of the Applicant by Andrea Margheim, Joe Margheim and Peter Meyer, which results all three collectively owning less than 51% of the ownership interests in the Applicant.

14. 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 their interest in this Agreement without the consent of the Administrator. Assignment shall include a transfer of ownership which results in Andrea Margheim, Joe Margheim and Peter Meyer collectively owning less than 51% of the ownership interests in the Applicant.

15. 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.

16. Notices:

a. Any notices or other communications between the parties shall be personally delivered, sent by regular first-class mail, 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.

b. If to the City:

City of Scottsbluff
2525 Circle Drive
Scottsbluff, NE 69361
Fax: (308) 632-2916
Attention: City Manager

c. If to the Applicant:

BDS3C, L.L.C.
Flyover Brewing Company.
1824 Broadway
Scottsbluff, NE 69361
Attn: Andrea Margheim

17. 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]

[SIGNATURE PAGE]

City of Scottsbluff, Nebraska

BDS3C, L.L.C.

By: _____
Economic Development
Program Administrator

By: _____
Andrea Marghein,
Member