

City of Scottsbluff, Nebraska

Monday, August 15, 2022

Regular Meeting

Item Reports1

Council to discuss and consider action on the Economic Development Assistance Agreement with Fusion Ranch, Inc. and authorize the Economic Development Program Administrator to sign the Agreement.

Staff Contact: Starr Lehl, Economic Development Director

ECONOMIC DEVELOPMENT ASSISTANCE AGREEMENT

This Agreement is made on August 15, 2022, between the City of Scottsbluff, Nebraska (the “City”) and Fusion Ranch, Inc. (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 July of 2022.

c. The Applicant (as KYS Foods, Inc.) has received assistance from the Program pursuant to a previous application and Economic Development Assistance Agreements dated October 6, 2011 (the “2011 Agreement”), as amended. It is intended that the 2011 Agreement will continue in full force and effect, that this Agreement and the 2011 Agreement shall operate and stand independent of each other (except as set forth herein), and that this Agreement shall not act a novation, refinance, or replacement of the 2011 Agreement or any amendments thereto.

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 “Fusion Ranch” is expanding its business In Scotts Bluff County, Nebraska, located at 250521 Skyport Drive, Scottsbluff, NE 69361 (the “Business”). The expansion includes need for capital upgrades to the Applicant’s existing facilities which will result in future job creation. The Grant and the Loan is to be used to fund to capital upgrades of the future job expansion and creation.

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 \$300,000 (the “Grant Amount”) representing the addition of 10 employees. The Grant shall be 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 in the form of the attached Exhibit A.

b. The Loan shall be in the amount of \$200,000 shall be represented by a promissory note (the “Non-Forgivable Note”) to be signed at the Closing in the form of the attached Exhibit B. The Non-Forgivable Note shall carry interest from October 1, 2022 (the “Note Interest Date”) at the Applicable Federal Mid-Term rate for the month of October 2022, and shall be repaid over 120 equal monthly payments of principal and interest, the first payment being due November 1, 2022. Each subsequent payment shall be due on the first of each month thereafter, until the Non-Forgivable Note is paid in full.

3. Closing:

The Grant Amount and the Loan Amount shall be scheduled as a claim at a Council meeting determined by the City following the signing of this Agreement. The “Closing” shall occur following claim approval and 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 and Forgivable Note shall be subject to repayment to the City if the Applicant does not fully earn the Job Credits (as provided for below). The Applicant may earn Job Credits, to be applied against the balance of the Forgivable Note during the Term of this Agreement. In connection with the calculation of the Job Credits:

a. The “Effective Date” of this Agreement for Job Credit calculation purposes shall be October 1, 2022 (the “Effective Date”).

b. The term of this Agreement shall begin on the Effective Date and shall continue for 10 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 Applicant’s normal fringe benefit package. This normal fringe benefit package must, at the least, include a health insurance plan which provides for at least 75% of the premium for employee’s coverage to be paid by the Applicant.

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 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 2080 hours.

d. “Eligible FTE’s” shall mean the FTE’s calculated for a Year less 45 (allowing for a portion of the existing employees of the Applicant).

6. Job Credits:

As long as the Applicant is not in default of this Agreement, the 2011 Agreement, or any document executed pursuant to this Agreement or the 2011 Agreement, the Applicant shall be eligible for credit against the balance due under the Forgivable Note for Job Credits earned during a Year. A “Year” shall mean the 12-month period ending on each September 30, with the first Year beginning October 1, 2022. “Annual Job Credits” shall be calculated as follows:

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

b. If at the end of a Year, (1) the Annual Report (as provided for below) indicates that the Applicant has any Eligible 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 the Applicant’s fringe benefit plan, then the Applicant 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 Pay</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, the Applicant is entitled to add the hourly equivalent or annual cost of the following fringe benefits provided to the applicable employee by the Applicant: 401k Plan, profit sharing, pension or equivalent retirement benefits, health insurance, and life and disability insurance.

c. For purposes of this Agreement, Annual Job Credit shall mean the total of the Base Annual Job Credits and the Additional Annual Credit.

d. The Grant shall earn Annual Job Credits for ten (10) Years, beginning October 1, 2022. After the tenth (10th) Year of earning Annual Job Credits, the balance due on the Forgivable Note, if any, shall be repaid by the Applicant to the Fund.

7. Grant Repayment:

At the end of each Year of the Term, the total of the cumulative Annual Job Credits will be subtracted from the Grant Amount owed on the Forgivable Note. Any balance at the end of 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 Grant, the Forgivable Note, and this Agreement and no repayment shall be due.

8. 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 corporation 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.

9. 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.

10. Certification of the Applicant:

The Applicant certifies to the City that it has not filed an application with the State of Nebraska, the Nebraska Department of Revenue, or the Nebraska Department of Economic Development to receive sales tax incentives that would affect the City's sales tax receivable. 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 sales tax incentives.

11. 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 Articles of Organization and Bylaws of the Applicant certified by the secretary of the Applicant to be correct; and

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

c. In order to secure the Repayment, the Forgivable Note and the Non-Forgivable Note, the Applicant shall have delivered to the City the following:

(1) An guaranty (the “Guaranty”) of KaiYen Mai, guarantying the obligations of this Agreement and any document executed pursuant to this Agreement;

(2) A Deed of Trust (the “Deed of Trust”) on the real estate of the Business, securing the payment and performance of this Agreement and any document executed pursuant to this Agreement;

(3) A Security Agreement (the “Deed of Trust”) on personal property assets of the Business, securing the payment and performance of this Agreement and any document executed pursuant to this Agreement, including the Automated Vertical Packaging Machine purchased pursuant to this Agreement;

(4) Original, executed copies of the Forgivable Note and the Non-Forgivable Note.

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.

12. 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.

13. 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 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.

d. If FTE's for any Year is less than 20, then the Administrator may terminate this Agreement and demand payment in full of all amounts then due under the Forgivable Note or Non-Forgivable Note. Any amount not paid within this time period shall then carry interest at the rate of 7% per annum until paid.

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 and the 2011 Agreement, or any other agreement entered into connection with this Agreement and the 2011 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 the Business or reports FTE's for any Year less than 20.

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 10% 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 KaiYen Mai, which results in KaiYen Mai owning less than 51% of the ownership interests in the Applicant.

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 their interest in this Agreement without the consent of the Administrator. Assignment shall include a transfer of ownership which results in KaiYen Mai owning less than 51% of the ownership interests in the Applicant.

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 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.

17. 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:

Fusion Ranch, Inc.
250521 Skyport Drive
Scottsbluff, NE 69361
Attn: KaiYen Mai

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]

[SIGNATURE PAGE]

City of Scottsbluff, Nebraska

Fusion Ranch, Inc.

By: _____
Economic Development
Program Administrator

By: _____
Kai Yen Mai,
Shareholder, Director, President

CITY OF SCOTTSBLUFF
ECONOMIC DEVELOPMENT APPLICATION REVIEW COMMITTEE
July 25, 2022

A meeting of the Economic Development Application Review Committee was held on July 25, 2022 at 10:30 a.m. at City Hall, 2525 Circle Drive, Scottsbluff, Nebraska.

Present at 10:30 were Committee members Hod Kosman, Dave Schaff, and Marla Marx. Also present were Adam Hoelsing, Deputy City Attorney, Starr Lehl, City Economic Development Director, Sharaya Toof, Small Business Outreach/Public Relations Coordinator for the City, and the assistance manager for Fusion Ranch, Inc.

The meeting was called to order by Vice-Chairman Schaff at 10:30 a.m.

Vice-Chairman Schaff then announced a copy of Nebraska Open Meetings Act was posted on the back wall of the meeting room.

It was moved by Member Marx and seconded by Member Kosman to approve the Minutes of the July 14, 2022 Application Review Committee Meeting. Voting yes: Marx, Schaff, and Kosman. Voting no: None.

The next item on the agenda was a presentation by Fusion Ranch, Inc. as an applicant for assistance from the Program. The applicant produces jerky, ham, Asian meat snacks in Scotts Bluff County, Nebraska, and the applicant employs 45 employees. As part of its operation, the Applicant manufactures and sources its own branded products, as well as products for other private label retailers. The Applicant desires to expand production through the purchase of two automated vertical packing machines, and the Applicant is requesting assistance for the purchase of the second packing machine in the amount of \$826,802.00. The Applicant states that an additional 10 employees will be employed over the next five years to meet the increased production, and the Applicant believes that the market for orders and retailers is available to meet the Applicant's desired production expansion. Additionally, the Applicant desires to introduce a fava bean product to grow sales, and the Applicant anticipates that sales will double in the next few years.

The Committee asked whether the equipment for the purchase was available, and the Applicant stated that the equipment can be ordered with a delivery period of seven to eight months. The Committee asked whether the Applicant will expand square footage of its facility, and the Applicant will not do so at the moment but is planning with an engineer/architect for expansion in the near future to meet the increased production demands. Upon questioning, the Applicant has not seen a large issue with supply chain of raw material or finished inventory and the Applicant has not seen a large issue with available workforce to expand, as workforce retention has been the greater problem.

After presentation from the Applicant, it was moved by Committee Member Marx and seconded by Committee Member Kosman for the Committee to enter closed session for the purpose of protecting the public interest of discussing the Applicant's financial documents and

tax returns and keeping the Applicant's financial information confidential. Voting yes: Marx, Schaff, and Kosman. Voting no: None.. Closed session was entered at 11:03 A.M.

The Committee exited closed session at 11:15 A.M. After entering open session, the Committee discussed its desires for recommended assistance, and discussed a job creation component that could qualify for only \$300,000 as a forgivable loan over 10 years. After discussion, it was moved by member Kosman and seconded by Member Marx to offer the following assistance to the Applicant:

\$300,000 as a forgivable loan with a job credit component, and \$200,000 as a loan, repayable with monthly payments over ten years. The \$300,000 grant would have a job credit effective dated October 1, 2022, and the Applicant would receive \$2,000 per fulltime employment position per year, for all employees over the base 45 full-time employees at the current time, plus additional credit for higher paid employees. The assistance would be secured by a deed of trust, a security agreement, and supported by a guaranty of the Applicant's owner. Voting in favor: Schaff, Marx, and Kosman. Voting no: None.

Thereafter, the Committee reviewed materials regarding adding retail the Program, and the Committee believes the material is ready for review by the Citizen Advisory Review Committee. The Meeting was adjourned at approximately 11:30 A.M.

Starr Lehl, Economic Development Director