

**CITY OF LA VISTA  
MAYOR AND CITY COUNCIL REPORT  
MAY 5, 2009 AGENDA**

<b>Subject:</b>	<b>Type:</b>	<b>Submitted By:</b>
APPLICATION FOR CDBG FUNDING — AMERICAN MARKING CORPORATION	◆ RESOLUTION ORDINANCE RECEIVE/FILE	ANN BIRCH COMMUNITY DEVELOPMENT DIRECTOR

**SYNOPSIS**

A public hearing has been scheduled and a resolution prepared for Council to consider an application from American Marking Corporation for CDBG Recovered Program Income Reuse Funds and to authorize the transfer of funds to Sarpy County for this project.

**FISCAL IMPACT**

Expenditure of approximately \$30,000 in CDBG Recovered Program Income funds.

**RECOMMENDATION**

Approval.

**BACKGROUND**

In October 2008 the City received a building permit application for construction of a new building for American Marking Corporation to be located at 13240 Chandler Road in the Centech Business Park. Since that time the company has been working with Sarpy County EDC and MAPA on an application for CDBG Recovered Program Income Reuse Funds. Because the site they have purchased is in Sarpy County and in order to simplify the loan documents, if the project is approved, the administration of the loan will be handled by the County.

American Marking Corporation was founded 24 years ago and is currently located at 127<sup>th</sup> & Q Streets. Their primary product is lawn flags for utility locations, etc. however they also produce hard hats and other safety equipment. Their anticipated investment is \$1.5 million in the building and several production machines at \$275,000 each. They are projecting hiring 10 new employees in the first year and growing to 20 in five years with \$4 million total investment. The wages are \$12 to \$13 per hour plus fringe benefits.

American Marking Corporation is requesting approximately \$30,000 in CDBG Reuse Funds from the City of La Vista CDBG Reuse Program. The funds will be transferred to the Sarpy County Board of Commissioners who will use the funds to provide the company with a performance-based forgivable loan, which is conditioned on the company satisfying minimum job creation and investment requirements. In

addition to the CDBG funds, the applicant will finance the remainder of the project with corporate equity and a loan from the company's bank.

The request is for a \$50,000 loan for working capital (\$20,000 County and \$30,000 City, less the cost of the legal ad), with twelve months to create 10 jobs that must be maintained for 24 months, with at least 51% of the jobs held or made available to LMI persons.

The City of La Vista has a balance of approximately \$30,000 in the CDBG reuse account, and Sarpy County has a balance of approximately \$550,000. Based on these balances, the City and County are able to fund the full amount of the request. The City's balance, and a portion of the County's balance, would have to be repaid to the State by the end of June 2009 if the funds have not been committed to a project.

The City and County requested that Metropolitan Area Planning Agency (MAPA) review the application and submit a recommendation to the application review committee. This committee is comprised of the Executive Board of the Sarpy County Economic Development Corporation as designated in La Vista's Reuse Plan. The application review committee met with MAPA to discuss the application on April 29<sup>th</sup> and unanimously recommended approval of the request.

Additionally, the City and County have requested that MAPA perform the loan servicing and monitoring of the job creation requirements, which is also provided for in La Vista's Reuse Plan. MAPA's cost for providing these services will not exceed \$1,500. This fee will also be paid from the reuse funds, making the total amount of the funding \$51,500 from the City and County.

A resolution has been prepared which approves the funding for the project and authorizes the transfer of funds to Sarpy County. Toby Churchill, Executive Director of Sarpy County EDC, and Jake Hansen, Community Development Manager with MAPA will be present at the Council meeting to answer any questions.

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RESOLUTION NO. \_\_\_\_\_

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF LA VISTA, NEBRASKA AUTHORIZING THE TRANSFER OF APPROXIMATELY \$30,000 IN CDBG RECOVERED PROGRAM INCOME REUSE FUNDS FROM THE CITY OF LA VISTA, NEBRASKA, TO SARPY COUNTY, NEBRASKA, TO BE USED SOLELY FOR THE AMERICAN MARKING CORPORATION APPLICATION FOR CDBG FUNDING.

WHEREAS, American Marking Corporation has submitted an application to Sarpy County and the City of La Vista for \$50,000 in CDBG Recovered Program Income funds; and

WHEREAS, the City of La Vista adopted an amended CDBG Recovered Program Income – Reuse Plan for Economic Development on May 6, 2008, for such purpose; and

WHEREAS, according to the Reuse Plan the application was submitted to the review committee which consists of the executive board of the Sarpy County Economic Development Corporation (SCEDC); and

WHEREAS, the SCEDC executive board reviewed the application and program requirements and has unanimously voted to recommend approval of the request; and

WHEREAS, the City of La Vista has approximately \$30,000 in the CDBG Reuse Funds account and will conditionally committed funds for this project based upon the creation of 10 new FTE positions.

NOW, THEREFORE, BE IT RESOLVED, that the Mayor and City Council of La Vista, Nebraska, do hereby authorize the transfer of approximately \$30,000 in CDBG Recovered Program Income funds from the City of La Vista to Sarpy County to be used solely for American Marking Corporation upon successful execution of a Memorandum of Understanding with Sarpy County and other contract documents necessary to approve the expenditure of CDBG Recovered Program Income Reuse funds.

PASSED AND APPROVED THIS 5<sup>TH</sup> DAY OF MAY, 2009.

CITY OF LA VISTA

\_\_\_\_\_  
Douglas Kindig, Mayor

ATTEST:

\_\_\_\_\_  
Pamela A. Buethe, CMC  
City Clerk

## MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("MOU") is entered into among Sarpy County, Nebraska ("County") and American Marking Corporation ("Business"); upon the date of signature by all parties.

### RECITALS

#### PART I: IDENTIFICATION OF PARTIES.

**Business:** The benefited business —American Marking Corporation

**County:** Sarpy County, Nebraska

**Administrator:** MAPA, Jake Hansen, 2222 Cuming Street, Omaha, NE 68102.

**DED/Department:** Nebraska Department of Economic Development, P.O. Box 94666, Lincoln, Nebraska 68509-4666

**Guarantors:** Jeanne Moderow, President, American Marking Corporation

#### PART II: PROJECT SUMMARY DESCRIPTION.

The Loan will be made with a principal amount of \$50,000. The project involves a CDBG Reuse loan of \$50,000 from the County to the Business. The loan is associated with the Business' proposed facility near LaVista, Nebraska. CDBG funding will require the Business to satisfy various job requirements as set forth in §5.01 below.

### AGREEMENT:

Premised on the *Recitals* above, and in consideration of the mutual promises and understandings of the parties set forth below, the parties agree as follows:

#### PART III: DEFINITIONS; FEDERAL FUNDING SOURCES and GOVERNING FEDERAL LAW CITED; AND INCORPORATION OF RECITALS.

**§3.01** *Full-Time Equivalent Position (FTE):* An FTE position represents a culmination of 2,080 work hours per annum per position by a person in a permanent position of employment with Business at its facility to be located near LaVista, Nebraska.

**§3.02** *Low-to-Moderate Income Person (LMI):* LMI persons are defined as members of a family (single-person or multi-person) where the family has an income equal to or less than the most recent HUD-established income limits for the family residence location. These income limits may be found generally via the HUD national website. The specific webpage address (subject to change by HUD) at the time of this writing is:

→<http://www.huduser.org/datasets/il.html>←

**§3.03** Specifics about how an employment position is considered to be "*held by*" or "*made available to*" an LMI person, and other related definitional matters, may be found in the HUD CDBG regulations in 24 C.F.R. Part 570.

**§3.04** The Department has been designated by the United States Department of Housing and Urban Development ("HUD") to administer; and HUD has awarded the Department funds for; the Community Development Block Grant ("CDBG") program. This is the source for funding by the Department for the project which is the subject matter of this MOU.

**§3.05** Based on the provisions of this MOU, the Business has submitted, or will submit, and the County conditionally approves, the Business's application for funding for the project which will undertake community development activities authorized under the Housing and Community Development Act of 1974, as amended, and as authorized under the federal regulations governing CDBG at 24 C.F.R. Part 570.

**§3.06** All provisions of the *RECITALS* above are incorporated as agreed provisions of the MOU.

#### **PART IV: ADDITIONAL TERMS AND CONDITIONS OF THE CDBG FUNDING.**

##### **§4.01 CDBG Re-Use Loan Amounts.**

The amount of CDBG funds to be loaned from the County to the Business will not exceed \$50,000. The exact terms of the loan are outlined in Section 4.03 of this MOU.

##### **§4.02 Sources and Uses of Funds.**

<b>USES OF FUNDS</b>	<b>Business Equity</b>	<b>Bank Loan</b>	<b>County CDBG Reuse Funds</b>	<b>TOTALS</b>
Working Capital	\$20,000	\$50,000	\$50,000	\$120,000
Audit and Administration	\$0	\$0	\$1,500	\$1,500
<b>TOTALS</b>	<b>\$20,000</b>	<b>\$50,000</b>	<b>\$51,500</b>	<b>\$121,500</b>

The Sources and Uses of Funds table above reflects:

- The anticipated total costs of the CDBG-assisted project.
- The CDBG-assisted activities being funded.
- The sources and amounts of other matching funds required for each activity.
- The maximum authorized CDBG funds for each CDBG-assisted activity.
- The ratio (derived by computation, not expressly shown) of CDBG funds to other matching funds for each CDBG-assisted activity, which ratio is a further limitation upon the maximum authorized CDBG funds which may be paid for each activity. The ratio is invoked as a limitation if the actual total costs of the activity are less than anticipated.

[An example illustrates this point: If the anticipated cost of an activity such as the acquisition of equipment was \$100,000, with \$40,000 to be from CDBG funds as the source, and \$60,000 to be from the benefited business as the source—but the actual cost of the machinery turned out to be \$90,000—then the 40% ratio limits CDBG funding to \$36,000, rather than the \$40,000 originally anticipated.]

- The proportionality (derived by computation, not expressly shown) of funding from all funding sources, for each activity and for the project in total. Disbursement of CDBG funds will be made only on a pro rata basis with all other funding sources, for each activity and for the project in total. CDBG funds will not be the first funds invested in the project—but rather—CDBG funds will flow into the project in proportion to all other funding sources.
- The timing (of CDBG funds flowing into the project on a pro rata basis) is that CDBG funding is reimbursement funding. Reimbursement after-the-fact of the expense having been incurred is what will be done. This timing may well result in the benefited business having to temporarily carry the costs which are then later reimbursed through CDBG funding.

[An example illustrates this point: If the actual cost of an activity such as the acquisition of equipment was \$100,000, with \$40,000 to be from CDBG funds as the source, and \$60,000 to be from the benefited business as the source—then the benefited business would have to first pay the entire \$100,000 cost of acquisition, and then seek reimbursement of \$40,000 from CDBG funding.]

#### **§4.03 CDBG Loan Terms.**

The \$50,000 to be loaned to the Business is for the purpose(s) set forth in **PART II** above, and will be loaned by the County to the Business using CDBG Reuse funds under the following terms:

- (a) The promissory note evidencing the loan to the Business will be drawn in favor of the County, and any payments required are to be made by the Business to the County.
- (b) Collateral requirements, if any, or loan guarantee requirements, if any, are specified in §4.04 below.
- (c) The total loan is to be structured as a performance-based loan which bears no interest (0% interest) and is forgivable upon the meeting of certain conditions by the Business with respect to job creation, job retention, job maintenance, and LMI benefit. If the requisite conditions for forgiveness are not met, the principal is repayable in full by the Business (bearing no interest) upon appropriate notice from the County, and under factual circumstances supporting such conclusion by the County.
- (d) The maturity date of the loan shall be thirty-six months from the date of execution of the loan agreement by the Business and the County.

These favorable CDBG loan terms are conditioned upon the Business' agreements concerning job creation, job retention, job maintenance, and jobs benefiting LMI persons, all as specified in other portions of this MOU.

#### **§4.04 Collateral/Guarantees.**

The \$50,000 CDBG loan will be secured by a security agreement deed of trust granted to the County on equipment owned by the Guarantors.

The \$50,000 CDBG loan will be personally guaranteed by Jeanne Moderow.

#### **§4.05 Reporting Requirements.**

- (a) Employment Reporting. The Business will have each employee for which LMI status is relevant (normally this includes employees for created jobs, and employees for retained jobs, but not employees forming the measuring baseline of present employment by the Business), complete the Department's Employee Certification Form (such form to be provided to the Business by the County). Such form requests information from the employee concerning the employee's income status, race, gender, and handicap status. The information from such forms, and other pertinent employment data reasonably required by the County, will be provided by the Business, at least semi-annually. Such information is for use by the County and the Department in assembling and reporting LMI and other employment data to meet HUD requirements for the CDBG program.
- (b) Financial Reporting. The Business will provide to the Administrator or to the County, in a timely manner, the Business' financial statements, including balance sheets and income statements, in such form as may be reasonably required by the County or by the Department, following the close of the Business' fiscal year. This obligation will continue so long as there remains outstanding any balance of the CDBG loan, unless waived by the Department.

#### **§4.06 Due on Sale.**

Repayment of the entire amount of any outstanding balance of the CDBG funded obligation of the Business may be declared (by the County) immediately due and payable upon any material change in the ownership control of the principal assets of the Business, or of the Business itself, including mergers and/or consolidations with other persons or entities. This provision exists to protect the interests of the County and the Department in seeing to it that the obligations of the Business as set forth in this MOU are completely fulfilled, as they must be to comply with HUD CDBG statutes and regulations permitting CDBG funds to be used for financial assistance to the Business in the first place.

#### **§4.07 Maintain Location of Project.**

Until all the requirements of this MOU are satisfied including the repayment of the loan, the Business agrees to keep its facility near LaVista, Nebraska and in Sarpy County.

Repayment of the entire amount of any outstanding balance of the CDBG funded obligation of the Business may be declared (by the County) immediately due and payable upon a failure to adhere to this requirement.

## **PART V: JOB CREATION, JOB RETENTION, AND JOB MAINTENANCE REQUIREMENTS.**

### **§5.01 Job Creation, Job Retention, and Job Maintenance Requirements.**

The Business must:

- (a) create at least 10, new, permanent jobs (on an FTE basis), in the Business' facility near LaVista, Nebraska over and above the agreed baseline of employment at the company's existing facility, which agreed baseline is 12 FTEs for purposes of this MOU:
  - (1) within 12 months of the date of conditional loan approval from the County.
  - (2) meeting the requirement that 51% or more of all jobs (on an FTE basis) created as a result of the CDBG-assisted project must be held by (or if not actually "held by", then the Business must meet the required regulatory standards so as to be considered to have made the jobs "available to") low-to-moderate income (LMI) persons.
- (b) maintain the minimum required created 10 FTE jobs, [and maintain all additional jobs created as a result of the CDBG-assisted project,] for 24 months measured from the date of hire for each respective job.
- (c) maintain the 12 FTE positions which represent the agreed baseline of employment for 36 months measured from the date of loan approval from the County.
- (d) retain 10, permanent jobs (on an FTE basis), in the Business' facility near LaVista, Nebraska:
  - (3) for 36 months from the date of loan approval from the County.
  - (4) meeting the requirement that 51% or more of those jobs (on an FTE basis) must be held by (or if not actually "held by", then the Business must meet the required regulatory standards so as to be considered to have made the jobs "available to") low-to-moderate income (LMI) persons.
- (e) pay all employees of the Business a minimum hourly rate of \$9.00 per hour, and provide all employees with an appropriate package of employee benefits.

Only permanent employees (not temporary employees); and only employee positions to be located at the Business' facility near LaVista, Nebraska; will be credited in assessing whether the job creation, job retention, and job maintenance requirements have been satisfied.

### **§5.02 Proration of Any Repayment Obligation Arising from Failure by the Business to Meet the Job Requirements of §5.01.**

If the Business fails to meet the job requirements set forth in §5.01, the default remedy specified at §6.02 will be mitigated by allowing, in some instances, proration of the principal amount of the repayment obligation as follows:



- (a) CDBG statutes and regulations require CDBG-assisted projects to meet the national objective of principally benefiting low-to-moderate income (LMI) persons. These statutes and regulations require that at least 51% of the created/retained jobs benefit LMI persons. If Business fails to meet the national objective by not having at least 51% of the created/retained jobs benefiting LMI persons, then full repayment of the CDBG funding is required, and no proration is allowed.
- (b) If the national objective (51% LMI benefit) is met, but the job creation/retention requirement (6 jobs in this instance) is not achieved, then a pro rata portion of the CDBG funds will be required to be repaid, equivalent to the ratio of→jobs not created, divided by the number of jobs required to be created.
- (c) If the national objective (51% LMI benefit) is met, but the jobs are not maintained for the required job maintenance period (24 months in this instance), then a pro rata portion of the CDBG funds will be required to be repaid, equivalent to the ratio of→the required maintenance period in months, less the number of months the jobs were maintained, divided by the required maintenance period in months.
- (d) If the national objective (51% LMI benefit) is met, but there is a failure as to both the job creation/retention requirement and the job maintenance period, then a pro rata portion of the CDBG funds will be required to be repaid, equivalent to→using the number of jobs required to be created, multiplied by the number of months the jobs were to be maintained, resulting in a computational factor of "required job-months"—then using the number of jobs actually created multiplied by the number of months the jobs were actually maintained, resulting in a computational factor of "achieved job-months"—and then subtracting the "achieved job-months" factor from the "required job-months" factor to calculate a "failed job-months" factor—and then establishing the ratio of:

$$\frac{\text{"failed job-months"}}{\text{"required job-months"}}$$

with such ratio (with "failed job-months" as the numerator, and "required job-months" as the denominator), being the required pro rata portion of CDBG funds to be repaid.

An example to illustrate application of this requirement is:

CDBG assistance total	= \$250,000
# of jobs to be created	= 20
# of months the jobs were to be maintained	= 24
# of jobs actually created	= 15
# of months the jobs were actually maintained	= 16
20 x 24	= 480 "required job-months"
15 x 16	= 240 "achieved job-months"
480 – 240	= 240 "failed job-months"

240 "failed job-months"	
-----	= .50
480 "required job-months"	

\$250,000 x .50 = \$125,000 to be repaid.

## **PART VI: OTHER TERMS AND CONDITIONS OF THIS MOU.**

### **§6.01 Events of Default.**

In addition to other events or fact settings where debt acceleration or other remedies may be specified elsewhere in this MOU, the following are (but are not exclusively the only) events of default, each of which triggers the general default remedy set forth in §6.03 (or the remedies specified elsewhere in this MOU associated with such event or fact setting):

- (a) Failure by Business to fully satisfy the Job Creation, Job Retention, and Job Maintenance Requirements set forth in §5.01.
- (b) A breach of the Maintain Location of Project provisions in §4.07.
- (c) Bankruptcy or insolvency of the Business.
- (d) Failure by Business to provide, in a timely manner, reports and other administrative documentation identified in this MOU.
- (e) Any other failure by the Business to substantially comply with the terms and conditions of this MOU.
- (f) If the Business, or its officers or employees, engage in:
  - 1) material misrepresentation concerning CDBG funds; or,
  - 2) unauthorized use or theft of CDBG funds.
- (g) Failure to make scheduled loan payments.

### **§6.02 General Default Remedy (applicable to events of default where remedies for specific events or fact settings are not specified elsewhere in this MOU).**

If an event of default occurs, then CDBG funding will be disallowed, and immediate repayment to the County of the entire amount of any outstanding balance of the CDBG funded obligation of the Business will be required, together with interest computed at 7% per annum (simple interest), from the date(s) CDBG funds were advanced to the Business by the County.

### **§6.03 Loan Documentation Responsibility.**

The Business shall have the duty to prepare any necessary loan documentation instruments (e.g., a promissory note reflecting the CDBG loan obligation of the Business in favor of the County), including (if applicable) any necessary security instruments or guarantees, associated with the CDBG loan. If others, such as an attorney representing the County, prepare such documentation at the request of the Business, then payment for such attorney's services shall be borne by the Business. None of the costs of loan documentation for the CDBG portion of this project, including

any attorney's fees for loan documentation preparation or review, will be the responsibility of the County unless voluntarily undertaken by the County.

**§6.04 Severability, Binding Effect, Counterparts, and Governing Law.**

If any provision of this MOU or its application to any person or circumstance is held invalid by any court of competent jurisdiction, such invalidity will not affect other provisions of this MOU.

This MOU will be binding upon, and will insure to the benefit of, the successors, assigns, and legal representatives of the parties.

This MOU may be signed in any number of counterparts, each of which will be an original, but all of which taken together will constitute one agreement.

This MOU will be governed by; construed according to the laws and regulations of; and subject to the jurisdiction of; the State of Nebraska.

**§6.05 No Legal Actions.**

The Business warrants there are no legal actions, suits, or other proceedings, pending or threatened, before any court or administrative agency, which, if determined adversely to the Business, would have a material adverse effect on the financial condition of the Business nor on the ability of the Business to complete the project which is the subject of this MOU.

**§6.06 Authorization of Representative Signing for the Benefited Business.**

The Business, by and through the officer or other representative accepting this MOU by signing below on behalf of the Business, has entered into this MOU with the full knowledge and authorization of the Business, under proper procedures prescribed by the articles of incorporation, bylaws, and other organizing documents applicable to the governance of Business.

**§6.07 This MOU is NOT a Notice of Approval of the Project.**

Project funding approval by the County is neither expressed nor implied by the County's execution of this MOU, and project costs should not be incurred based solely upon this MOU. Additional approval steps beyond the MOU are required before a project receives a Notice of Approval, including satisfying other steps of the application and approval process at the County.

**§6.08 Conditions Precedent to Drawdown of CDBG Funds.**

Certain conditions must be satisfied before any requests for funds (so-called "drawdowns") by the Business would be paid by the Grantee, in the event a Notice of Approval for this project is ultimately issued by the Grantee. The conditions are emphasized here so that all parties to this MOU will be aware of, and can appropriately plan for, the requirements for drawdowns, should the project be approved.

- (a) The requirements set forth in §4.02, *Sources and Uses of Funds*, must be strictly observed. These requirements include CDBG-activity maximum payments; the injection of matching funds; and CDBG funds payments being limited and governed by the ratio, proportionality, and reimbursement timing requirements detailed in §4.02.
- (b) Documentation, in such form as the County may prescribe, showing disbursement by other project funding sources for qualified expenditures, will be required by the County.
- (c) Compliance with the environmental review process pertaining to the project, established by the National Environmental Policy Act of 1969 (NEPA), and other provisions of federal law as specified in 24 C.F.R. Part 58 which further the purposes of NEPA, is required.
- (d) Proper execution, by the Business, of this MOU is required **no later than June 30, 2009.** Proper execution, by the Business, of all other required documents pursuant to Section 6.07 of this MOU is required by December 31, 2009.

#### **ACCEPTANCE PROVISIONS.**

The parties acknowledge they have read and understand this MOU and agree to its provisions, and that it will be effective on the date when all parties have signed.

<b>County— Sarpy County</b>	<b>Business— American Marking Corporation</b>
By: _____ (Signature of Chief Elected Official)	By: _____ (Signature of Authorized Officer)
_____ (Typed or Printed Name/Title)	_____ (Typed or Printed Name/Title)
_____ (Date)	_____ (Date)