



Interoffice Memorandum

Date January 11, 2022

TO: Mayor Jerry L. Demings
-AND-
County Commissioners

FROM: Joseph C. Kunkel, P.E., Director, Public Works Department

CONTACT PERSON: Raymond L.A. Williams, P.E., Manager
Public Works Engineering Division

PHONE NUMBER: (407) 836-7909

SUBJ: **Mitigation Credits Purchase Agreement for Kennedy Boulevard from Forest City to Wymore Road by and between Wekiva Mitigation Bank, L.L.C. and Orange County**

The Kennedy Road project consists of widening the existing 2-lane roadway to a 4-lane roadway from Forest City Road to Wymore Road. The project impacts Class I wetland areas which require mitigation in the amount of 2.71 forested fresh water federal mitigation credits.

The Orange County Comprehensive Plan Conservation Element, Section 1.4.6 states "Off-Site Mitigation for wetland impacts will be considered only when the mitigation site is located within Orange County. This applies to all Class I wetland areas, wetland and upland preservation, enhancement and creation of wetlands. *All impacts associated with Orange County Capital Improvement Projects must be mitigated for within Orange County.* The Board of County Commissioners may approve out of County mitigation area on a case by case basis; this includes mitigation banks, which benefit the County resources."

The County is therefore proposing to purchase mitigation credits from the Wekiva Mitigation Bank, which is located outside of Orange County. Several options for mitigation within Orange County such as land acquisition, preservation and enhancement were investigated but were determined not to be feasible. The Bank is located within the hydrologic basin and therefore meets the Comprehensive Plan.

The Public Works Engineering Division and the County Attorney's Office have reviewed these agreements and find their terms acceptable.

Action Requested: Approval and execution of Mitigation Credits Purchase Agreement (Kennedy Boulevard - From Forest City to Wymore Road) by and between Wekiva Mitigation Bank, L.L.C. and Orange County. District 2.

JCK/RLAW/JC/ilc

Attachments

MITIGATION CREDITS PURCHASE AGREEMENT
(Kennedy Boulevard – From Forest City to Wymore Road)

THIS MITIGATION CREDITS PURCHASE AGREEMENT (the “**Agreement**”) is by and between **Wekiva River Mitigation Bank, L.L.C.**, a Florida limited liability company, whose mailing address is P.O. Box 540285 Orlando, Florida 32854 (“**Seller**”), and **Orange County**, a charter county and political subdivision of the State of Florida (“**County**”), whose mailing address is P.O. Box 1393, Orlando, Florida 32802-1393 (Seller and County are sometimes collectively referred to in this Agreement as the “**Parties**”).

W I T N E S S E T H:

WHEREAS, County is permitting a project known as “Kennedy Boulevard – From Forest City (SR 434) to Wymore Road” located in Orange County, Florida (the “**Project**”); and

WHEREAS, as part of the Project, the County has obtained a Permit from the St Johns River Water Management District (the “**SJRWMD**”) under **ERP Permit No. 107365-2** and **Florida Department of Environmental Protection (FDEP) Permit Application No. ST404_398570-001-SFI** (the “**Permits**”); and

WHEREAS, the Permits require the County to purchase mitigation credits to offset wetland impacts associated with the Project; and

WHEREAS, pursuant to Florida Department of Environmental Protection (hereinafter “**FDEP**”) Permit No. 0234803-001 and U.S. Army Corps of Engineers (hereinafter “**USACOE**”) Permit No. SAJ-2002-07490, Seller may sell mitigation credits from the Wekiva River Mitigation Bank to third parties to offset certain wetland impacts; and

WHEREAS, County wishes to purchase **Two and Seventy-One Hundredths (2.71) State & Federal Uniform Mitigation Assessment Method (UMAM) Forested Freshwater** mitigation credits (the “**Credits**”) from the Wekiva River Mitigation Bank to offset wetland impacts associated with the Project on the terms and conditions set forth below.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants, representations, warranties, and agreements contained herein, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, County and Seller covenant and agree as follows:

1. **SALE AND PURCHASE OF CREDITS.** Subject to the terms and conditions hereof, Seller agrees to sell, transfer and convey the Credits to County, and County agrees to purchase the Credits from Seller.

DKB

2. PURCHASE PRICE AND PAYMENT.

A. The purchase price ("Purchase Price") for the Credits is Two Hundred Ninety-Eight Thousand One Hundred Dollars US (\$298,100.00). The Purchase Price is based on the unit price of \$110,000.00 per State & Federal UMAM credit.

B. Seller agrees to reserve and sell to the County, and County agrees to purchase from Seller, the Credits required and approved by the SJRWMD and FDEP for the Permits for the Project. The Purchase Price shall be paid by County to Seller by check or cashier's check delivered to Mitigation Marketing, LLC at the address set forth for Mitigation Marketing, LLC in Paragraph 6 below.

C. Buyer's State (SJRWMD Permit No. 107365-2) and Federal (FDEP Permit No. ST404_398570-001-SF1) have both been issued authorizing the wetland impacts. Therefore, the Purchase Price amount of \$298,100.00 should be paid in full following the Effective Date (defined in 6. P. below) of this Agreement.

3. REPRESENTATIONS AND WARRANTIES OF COUNTY AND SELLER.

A. Seller represents, warrants, and guarantees that the Credits are available for purchase by County in accordance with the terms of this Agreement.

B. Seller represents and warrants that the Credits are free and clear of all mortgages, liens, or any other security interest.

C. As of the date hereof and as of the Closing, Seller represents and warrants that it has full power to enter into, and perform the terms of this Agreement and that execution, delivery and performance of this Agreement by Seller has been duly authorized by all requisite action, and that the provisions of this Agreement applicable to Seller constitute legal and binding obligations enforceable in accordance with their terms.

D. Upon the approval of this Agreement by the Orange County Board of County Commissioners and execution of this Agreement by the Orange County Mayor on behalf of the Orange County Board of County Commissioners, County represents and warrants that execution, delivery and performance of this Agreement by County has been duly authorized by all requisite action, and that the provisions of this Agreement applicable to County constitute legal and binding obligations enforceable in accordance with their terms.

E. All the representations and warranties made by Seller and County shall be true and correct on and as of the Closing as though made on and as of that date. Seller and County shall have performed all obligations and complied with all covenants required to be performed or to be complied with by each party under this Agreement prior to or as of the Closing.

4. DEBIT OF CREDITS AND TRANSFER. Upon notification to Seller of the debit/transfer of the Credits by the FDEP and USACE, the Credits shall be transferred to County together with document(s) evidencing such transfer of Credits. The Parties hereby agree that

evidence of the Credits being transferred shall be the receipt by Seller from the FDEP and USACE of the Minor Permit Modification to FDEP Environmental Resource Permit No. 0234803-001 and USACE ledger evidencing the debit of Credits. Once transfer of all Credits has been completed, it is acknowledged that Seller's payment is fully earned.

5. **FAILURE TO CLOSE.** If, for any reason, the Credits have not been conveyed to the County due to breach by Seller, the County shall provide written notice of the breach to Seller. Seller shall have twenty (20) days after receipt of the notice to cure the breach, and if not cured, the County shall have the option of terminating the Agreement in accordance with Paragraph 6.

6. **MISCELLANEOUS.**

A. **Termination.** If the County terminates the Agreement due to breach by Seller, a determination by SJRWMD/USACE that mitigation is not required, or that the purchase of Credits from Seller would not satisfy the mitigation requirements associated with the Permit, the Purchase Price shall be refunded to the County within ten (10) days of receipt of the notice of termination. If County otherwise terminates the Agreement, Seller shall retain ten percent of the Purchase Price and shall refund the remaining ninety percent of the Purchase Price within ten (10) days of receipt of the notice of termination. This Agreement may be terminated by Seller in the event County has failed to submit payment of funds in accordance with the terms herein by providing fifteen (15) days prior written notice to County.

B. **Entire Agreement.** This Agreement, including Exhibits and other writings referenced herein, or delivered pursuant hereto which form a part hereof, contains the entire understanding of the parties hereto in respect of the subject matter hereof.

C. **Amendments and Waivers.** This Agreement may not be amended, modified, altered, or changed in any respect whatsoever, except by a further agreement in writing duly executed by each and all of the Parties. No failure by the County or Seller to insist upon the strict performance of any covenant, duty, agreement or condition of this Agreement or to exercise any right or remedy upon a breach thereof shall constitute a waiver of any such breach or of such any other covenant, agreement, term or condition. Any party hereto, by notice, may but shall be under no obligation to, waive any of its rights or any conditions to its obligations hereunder, or any duty, obligation or covenants of any other party hereto. No waiver shall affect or alter this Agreement, but each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other then existing or subsequent breach thereof.

D. **Calculation of Time.** Time periods of 5 days or less shall be computed without including Saturdays, Sundays, or national legal holidays, and any time period existing on a Saturday, Sunday or national legal holiday shall be extended until 5:00 p.m. on the next business day.

E. **Further Actions.** Each Party shall each take all such additional actions and execute and deliver such additional documents and instruments as may be required in order to fully effectuate all actions contemplated in this Agreement.

F. Choice of Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Florida. The Parties hereto hereby irrevocably (i) agrees that any suit, action or other legal proceeding against any of them arising with respect to this Agreement shall be brought in the state courts of Orange County, Florida, in the 9th Judicial Circuit; and (ii) waives any and all objections any of them might otherwise now or hereafter have to the laying of the venue of any such suit, action or proceeding in any of the courts referred to in this Section hereof or to service of any writ, summons or other legal process in accordance with applicable law.

G. Time. Time is of the essence of this Agreement.

H. Enforceability. If any provision of this Agreement shall be declared to be invalid or unenforceable, the remaining provisions of this Agreement shall continue in full force and effect.

I. Persons Bound. This Agreement shall be binding upon and inure to the benefit of the successors and assigns of the respective parties.

J. Counterparts. This Agreement may be executed in any number of counterparts, any one and all of which shall constitute the agreement of the Parties and shall be deemed one original instrument.

K. "As Is" – "Where Is". Except as otherwise specifically stated in this Agreement, Seller hereby specifically disclaims any warranty, guaranty, or representation, oral or written, past, present or future, of, as to, or concerning the Credits.

L. Notices. All notices required by this Agreement shall be in writing and shall be sent by certified or registered mail or hand delivered to the addresses set out below.

As to Seller: Wekiva River Mitigation Bank, LLC
Attn: Alex Preisser
P.O. Box 540285 *USPS*
Orlando, Florida 32854
1091 W Morse Blvd, Suite 101 *Physical*
Winter Park, Florida 32789
407-481-0677 phone
alex@mitigationmarketing.com

As to County: Attn: Mr. Kenneth Leeming
Orange County Public Works Department - Engineering
4200 S. John Young Pkwy
Orlando, FL 32839-9205
Email: Jennifer.Cummings@ocfl.net

With a Copy to: Orange County, Florida

P.O. Box 1393
Orlando, Florida 32802-1393
Attn: Orange County Administrator
E-mail: countyadmin@ocfl.net

Any notice or demand so given, delivered or made by United States mail shall be deemed so given, delivered or made on the third business day after the same is deposited in the United States Mail, registered or certified letter, addressed as above provided, with postage thereon fully prepaid. Notices shall be deemed delivered and given when delivered by hand, upon receipt. The County and Seller may from time to time notify the other of changes with respect to whom and where notice should be sent by sending notification of such changes pursuant to this paragraph.

M. No Joint Venture or Partnership or Agency Relationship. Seller does not have any ownership interest in the County's business relationships or operations and the County does not have any interest in Seller's business relationships or operations. The relationship between Seller and the County is not in any manner whatsoever a joint venture or partnership and neither Party shall be the agent of the other for any purpose, unless specifically granted in writing after execution hereof. Neither Party shall hold itself out as an agent, partner, or joint venture partner with the other.

N. Credit Reservation Letter. Seller will issue to County a Reservation Letter for the Credits within 5 days after the Effective Date.

O. Cumulative Impact Analysis. N/A

P. Effective Date. This Agreement is effective on the date on which the last of the Parties signs this Agreement ("**Effective Date**").

Q. Entire Agreement. This Agreement contains the entire understanding between the Parties and the Parties agree that no representation was made by or on behalf of the other which is not contained in this Agreement, and that in entering into this Agreement neither relied upon any representation not especially herein contained.

R. Limitation of Remedies. The Parties expressly agree that the consideration, in part, for each of them entering into this Agreement is the willingness of the other to limit the remedies for all actions arising out of or in connection with this Agreement. Upon any failure by any party hereto to perform its obligations under this Agreement, each party shall be limited strictly to only the following remedies:

1. Action for specific performance or injunction;
2. Action for declaratory judgment regarding the rights and obligations of the County and/or the Seller;
3. Any combination of the foregoing.

The Parties expressly waive their respective rights to sue for damages of any type for breach of or default under this Agreement by any party hereto. The Parties will bear the cost of their own attorney's fees for any action arising out of or in connection with this Agreement.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed by their duly authorized representatives on the dates set forth below.

SELLER:

**WEKIVA RIVER MITIGATION BANK, L.L.C., a
Florida limited liability company**

Alexis M. Preissner
WITNESS SIGNATURE

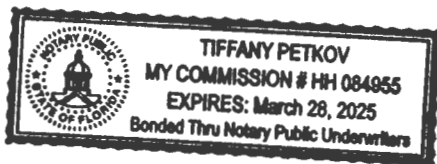
BY: *Dennis K Benbow*
DENNIS K BENBOW
MANAGING MEMBER

Alexis M. Preissner
WITNESS NAME

12-10-21
DATE

STATE OF FLORIDA
COUNTY OF *Orange*

The following instrument was acknowledged before me by means of ☒ physical presence or ☐ online notarization, this *10th* day of *December*, 2021, by Dennis Benbow, as Authorized Agent of Wekiva River Mitigation Bank, L.L.C., a Florida limited liability company, who is personally known to me or who as produced _____, as identification.



Tiffany Petkov
Notary Public, State of Florida At Large

Tiffany Petkov
Notary Printed Name or Stamp

My Commission Expires: *March 28, 2025*

BUYER:

ORANGE COUNTY, FLORIDA

By: Board of County Commissioners

By: _____

Jerry L. Demings
Orange County Mayor

Date: _____

ATTEST: Phil Diamond, CPA, County Comptroller
As Clerk of the Board of County Commissioners

By: _____
Deputy Clerk

Printed Name: _____

Project Name: Kennedy Boulevard – From Forest City (SR 434) to Wymore Blvd.