




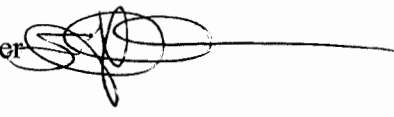
Interoffice Memorandum

CAPITAL PROJECTS ITEM 1

**DATE:** March 24, 2017

**TO:** Mayor Teresa Jacobs  
and the  
Board of County Commissioners

**THROUGH:** Anne Kulikowski, Acting Director   
Administrative Services Department

**FROM:** Sara Flynn-Kramer, Manager   
Capital Projects Division

**CONTACT PERSON:** Sara Flynn-Kramer, Manager

**DIVISION:** Capital Projects  
Phone: 407-836-0048

**SUBJECT:** Mitigation Credit Purchase Agreement by and between the Southport Mitigation Bank, LLC and Orange County.

The Deputy Jonathan "Scott" Pine Community Park project is a 19.5 acre site. The project will have a multi-purpose field and the off-site football stadium for West Orange Relief High School per the Orange County, Florida and The School Board of Orange County, Florida Agreement Regarding West Orange County Relief High School Stadium approved at the May 24, 2016 BCC Meeting. The project impacts Class I wetland areas, which require 2.09 mitigation credits.

The Orange County Comprehensive Plan Conservation Element, Section 1.4.6 states "All attempts should be made to mitigate wetland or surface water impacts within the County. Off-site mitigation or out of County mitigation for all Classes of wetlands (i.e. I, II, and III) will be considered only when, 1) the mitigation site deemed as appropriate (i.e. functional equal or like for like) mitigation to offset any direct or secondary impacts and, 2) is located within the same hydrologic basin as the impact or 3) the applicant can demonstrate that mitigation area will have spillover benefits to the basin where the impact is to occur. *This includes Orange County Capital Improvement Projects.* The Board of County Commissioners may approve out of County mitigation areas on a case by case basis; this includes mitigation banks, which benefit the County's wetland resources."

The County is proposing to purchase mitigation credits from the Southport Mitigation Bank. The Bank is located outside of Orange County. Other alternatives 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 requirements.

The Capital Projects Division, Public Works Engineering Division and County Attorney's Office have reviewed the agreement and find the terms acceptable.

**Action Requested: Approval and execution of Mitigation Credit Purchase Agreement by and between Southport Mitigation Bank, LLC and Orange County. District 1.**

JC/

Attachments

APR 11 2017

**MITIGATION CREDIT PURCHASE AND ESCROW AGREEMENT**

**THIS MITIGATION CREDIT PURCHASE AND ESCROW AGREEMENT** (hereinafter "Agreement") is made this \_\_\_\_ day of **APR 11, 2017**, by and between **Southport Mitigation Bank, LLC** (hereinafter "Seller"), whose mailing address is Post Office Box 540285 Orlando, Florida 32854 and **Orange County**, a charter county and political subdivision of the State of Florida, (hereinafter the "County") whose mailing address is P.O. Box 1393, Orlando, Florida 32802-1393 (hereinafter the Seller and the County are sometimes collectively referred to as the "Parties").

**WITNESSETH:**

**WHEREAS**, Seller maintains an ecological restoration project located in Osceola County, Florida (hereinafter referred to as the "Mitigation Property"); and

**WHEREAS**, the Mitigation Property is permitted as a mitigation bank (Mitigation Bank) with freshwater forested and herbaceous mitigation credits (hereinafter "Credits") available for transfer and sale under South Florida Water Management District (hereinafter "SFWMD") Permit No. 49-00002-M and the U.S. Army Corps of Engineers (hereinafter "ACOE") Permit No. SAJ-2009-01047; and

**WHEREAS**, as part of the environmental permitting process involving the SFWMD and ACOE, the Parties anticipate that the County's permits from the referenced respective governmental agencies will be conditioned upon purchase of Credits as compensatory mitigation; and

**WHEREAS**, Seller agrees to reserve and sell and the County agrees to purchase Credits available from the Mitigation Property on the terms and conditions below to be used to offset wetland impacts associated with the proposed development of project known as **Deputy Jonathan "Scott" Pine Community Park** (hereinafter the "Project") as authorized under SFWMD Permit No. **160914-17** and ACOE Permit No. **SAJ 2016-2893** (hereinafter SFWMD Permit No. **160914-17** and ACOE Permit No. **SAJ 2016-2893** are sometimes referred to collectively as the "Permits"); and

**WHEREAS**, the County, after consultation with its advisors, has estimated the number of Credits to be purchased by the County to be **0.47 Forested state and federal Uniform Mitigation Assessment Method** (hereinafter "UMAM") **credits and 1.22 Herbaceous state and federal UMAM credits**; and

**WHEREAS**, Seller warrants and guarantees that a minimum of 0.48 Forested State and Federal and 1.25 Herbaceous State and Federal Credits and 0.33 Forested Federal and 0.03 Herbaceous Federal Credits are available for purchase by County in accordance with the terms of this Agreement; and

**WHEREAS**, Seller requires as part of this Agreement for the County to remit this Agreement via Mitigation Marketing, LLC , in order to allow Seller to submit a minor permit modification (hereinafter "Minor Permit Modification") for a debit of UMAM Credits from the SFWMD and ACOE so that the aforesaid respective Credits can be transferred to the County.

**NOW, THEREFORE**, in consideration of the premises and of the mutual covenants hereinafter contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereto, each intending to be legally bound, do hereby warrant and agree as follows:

1. **Terms of Purchase.** The estimated purchase price (hereinafter "Estimated Purchase Price") of the Credits is Three Hundred Three Thousand Fifty dollars U.S. (\$303,050.00). The Estimated Purchase price is based on the unit price of one hundred and forty-five thousand dollars (\$145,000.00) per UMAM credit. The total purchase price (hereinafter "Total Purchase Price") will be adjusted up or down from the Estimated Purchase Price by multiplying the actual number of UMAM credits required by SFWMD and/or USACOE for the Project by the unit price of \$145,000.00. The Total Purchase Price shall be paid by check, wired federal funds or cashier's check. The Total Purchase Price shall not exceed 333,355.00 (the "Not-to-Exceed Price").

Seller agrees to reserve and sell to the County the Credits required and approved by the SFWMD and ACOE for the Permits for the Project. The County shall pay to Seller via Mitigation Marketing, LLC, within ninety (90) days of the last of the two Permits being issued the funds in the amount of the Total Purchase Price. .

The Buyer shall only be required to purchase the actual number of UMAM Credits required and approved by SFWMD and/or USACOE for the Project and nothing herein shall require the County to purchase more UMAM credits than required by the Permits. If the Total Purchase Price exceeds the Not-to-Exceed Price, then this Agreement must be amended to authorize payment of the Total Purchase Price. If the Parties cannot agree to amend the Agreement within ninety days of the last of the two Permits being issued, then this

Agreement shall automatically terminate, and neither Party shall have any liability to the other Party for the termination of the Agreement, and neither Party shall have any further obligation to the other Party under the terms of this Agreement.

2. **Covenants of Seller.** Seller covenants and agrees that it shall comply with all conditions and continuing requirements set forth in Seller's permits from the SFWMD and ACOE for the Mitigation Property. Responsibility for compliance with the Seller's permits as to mitigation on the Mitigation Property shall solely be the responsibility of Seller. The provisions of this paragraph 2 shall survive this Agreement and the transfer of the Credits to the County.

3. **Debit of Credits and Transfer.** Upon notification of the debit of the Credits by the SFWMD and ACOE, the same 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 SFWMD of the Minor Permit Modification to its Environmental Resources Permit (hereinafter "ERP") and/or ledger evidencing the debit of Credits and the withdrawal and transfer letter from ACOE. Once transfer of all Credits has been completed, it is acknowledged that Seller's payment is fully earned.

4. **Final Permit.** The Parties acknowledge that the Permits shall be deemed final only upon the following conditions:

A. The SFWMD's proposed agency action or final agency action was properly noticed in a newspaper of general circulation; and the SFWMD's intended agency action or final agency action was not challenged under the Florida Administrative Procedures Act, Chapter 120, Florida Statutes; or

B. The SFWMD's proposed agency action or final agency action was properly noticed in a newspaper of general circulation; and County's Permit was issued by the SFWMD upon the conclusion of any formal administrative hearing and subsequent judicial appeals; and

C. The ACOE-issued permit is final and all administrative and judicial appeals have been exhausted, or the timeframe to challenge the ACOE-issued Permit expired without an appeal being initiated.

5. **Breach of Seller.** 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 7.

6. **Successors and Assigns.** This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Parties hereto.

7. **Termination.** This Agreement may be terminated by the County at any time before the Permits are issued (deemed final) by providing fifteen (15) days prior written notice to Seller without any liability to Seller. If after issuance of the Permits the County terminates the Agreement due to breach by Seller, a determination by either the SFWMD or the ACOE that mitigation is not required, or that the purchase of Credits from Seller would not satisfy the mitigation requirements associated with the Permits, the Total 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 after issuance of the Permits, Seller shall retain ten percent of the Total Purchase Price and shall refund the remaining ninety percent of the Total 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. **This Agreement shall automatically terminate if the Permits are not issued on or before the second anniversary of the Effective Date without either Party having any liability to the other Party.**

8. **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:

- A. Action for specific performance or injunction;
- B. Action for declaratory judgment regarding the rights and obligations of the County and/or the Seller;
- C. 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.

9. **Applicable Law and Venue.** 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.

10. **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. Notices shall be deemed delivered and given when mailed, if mailed, or when delivered by hand, upon receipt.

As to Seller: Southport Ranch Mitigation Bank, LLC  
P.O. Box 540285  
Orlando, Florida 32854

With a copy to: Mitigation Marketing, LLC  
Attn: Alex Preisser  
P.O. Box 540285 *USPS*  
Orlando, Florida 32854  
[alex@mitigationmarketing.com](mailto:alex@mitigationmarketing.com)  
(407) 481-0677 (office)  
(407) 718-1780 (mobile)

As to County: Orange County  
Attn: Mr. Roan Waterbury  
PM Orange Co Capital Project Division  
400 E. South Street  
Orlando, Florida 32801  
[Roan.Waterbury@ocfl.net](mailto:Roan.Waterbury@ocfl.net)

With a copy to: Orange County, Florida  
P.O. Box 1393  
Orlando, Florida, 32802-1393  
Attn.: Orange County Administrator  
Facsimile: (407) 836-7399  
E-mail: [countyadmin@ocfl.net](mailto: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. All Parties agree that any notice may be faxed to any of the above Parties or their attorneys. 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.

11. **Further Assurances.** 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.

12. **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.

13. **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.

14. **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. Each Party shall defend and indemnify the other against any claim of liability arising out of an asserted agency relationship, partnership or joint venture partnership by the other contrary to the express provisions of this paragraph. Nothing contained in this paragraph, or in any other provision of this Agreement shall constitute a waiver of the County's sovereign immunity or the provisions of Section 768.28, Florida Statutes.

15. **Interpretation.** This Agreement shall be interpreted as drafted by the Parties equally and no rule of strict construction shall be applied against either party.

16. **Captions; Genders.** Captions used in this Agreement are for convenience of reference only and shall not affect the construction of any provision of this Agreement. Whenever used, the singular shall include the plural, the plural shall include the singular, and gender shall include all genders.

17. **Partial Invalidity.** In case any term of this Agreement shall be held to be invalid, illegal or unenforceable, in whole or in part, neither the validity of the remaining part of such term or the validity of any other term of this Agreement shall in any way be affected thereby.

18. **Calculation of Time.** Time periods of five (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.

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



20. **Typewritten or Handwritten Provisions.** Handwritten provisions and/or typewritten provisions inserted in this Agreement, which are initialed by both Parties, shall control over the printed provisions in conflict therewith.

21. **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.

22. **Time is of the Essence.** Time is of the essence under the terms of this Agreement.

**SIGNATURE PAGES FOR MITIGATION CREDIT PURCHASE AND ESCROW  
AGREEMENT ON FOLLOWING PAGES**

**SIGNATURE PAGES FOR MITIGATION CREDIT PURCHASE AND ESCROW  
AGREEMENT**

**IN WITNESS WHEREOF**, the Parties hereto have duly executed this Agreement, to become effective in accordance with the terms of this Agreement.

Signed, sealed and delivered in the presence of:

**SELLER:**

**SOUTHPORT RANCH MITIGATION BANK,  
LLC**

Tiffany Petkov  
WITNESS SIGNATURE

BY: Dennis K. Benbow  
DENNIS K. BENBOW,  
MANAGING MEMBER

Tiffany Petkov  
WITNESS NAME

3-28-17  
DATE

STATE OF FLORIDA  
COUNTY OF \_\_\_\_\_

The following instrument was acknowledged before me this 28 day of MARCH, 2017, by Dennis K. Benbow, as Manager of Southport Ranch Mitigation Bank, LLC, who is personally known to me or who as produced License, as identification.

ORANGE COUNTY OR, FL

Notary Public, State of Florida At Large

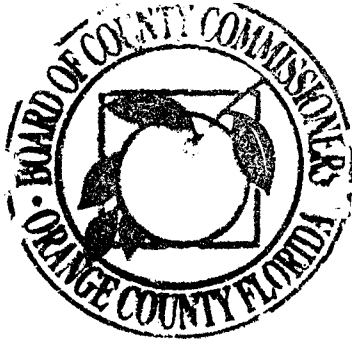
MILKA DIAKOVA

Notary Printed Name or Stamp



**MILKA DIAKOVA**  
MY COMMISSION # FF 035596  
EXPIRES: July 27, 2017  
Bonded Thru Budget Notary Services

My Commission Expires: July 27/2017



**ORANGE COUNTY, FLORIDA**  
By: Board of County Commissioners

By: *Teresa Jacobs*  
Teresa Jacobs  
County Mayor

Date: 4.11.17

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

By: *Katell Smith*  
Deputy Clerk

Project Name:

**Deputy Jonathan "Scott" Pine Community Park**

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