

MITIGATION CREDIT RESERVATION AND PURCHASE AGREEMENT

City of Olathe, Kansas: South Keeler Street & South Keeler Terrace

This MITIGATION CREDIT RESERVATION AND PURCHASE AGREEMENT (“Agreement”) is made and entered into this ____ day of _____, 2021, by and between Swallow Tail, L.L.C. (“Seller”) and the City of Olathe, Kansas (“Purchaser”). Each of Seller and Purchaser is referred as a “Party” and, collectively, as the “Parties.”

WITNESSETH:

WHEREAS Purchaser has applied to the U.S. Army Corps of Engineers (“USACOE”) for a permit under Section 404 of the Clean Water Act (the “Section 404 Permit”), to allow impacts to regulated surface waters (“Project”) in Johnson County, Kansas. The Project Number assigned by the USACOE is NWK-2019-00979 and the USACOE regulatory project manager is Richard Chong.

WHEREAS, in connection with granting the Section 404 Permit, the USACOE has determined that Purchaser shall be required to create compensatory mitigation due to these proposed impacts resulting from the development of the Project.

WHEREAS, the USACOE has stated in the Section 404 Permit that they concluded that the Project will result in impacts to impacts to streams translating to 2,123.56 stream debits.

WHEREAS, as a condition to the issuance of a permit from the USACOE, Purchaser is required to compensate for said impacts, and elects to do so through the

purchase of compensatory mitigation from Swallow Tail, L.L.C. for assignment to the Kansas River and Missouri River Umbrella Mitigation Bank ("Mitigation Bank"). Seller retains the right to use a different Mitigation Bank to satisfy some or all of the Purchaser's compensatory mitigation requirements as long as there is no material effect on the Purchaser and as long as the USACOE does not object to the change. A change in Mitigation Banks will not alter the Purchase Price nor any other provision of this Agreement.

WHEREAS, Purchaser desires to satisfy all 2,123.56 of its required stream debits through the purchase of the corresponding number of credits at the Mitigation Bank from Seller.

NOW, THEREFORE, for and in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby mutually acknowledged, it is agreed by the Parties as follows:

- 1) RECITALS: The recitals are hereby incorporated by this reference.
- 2) COMPENSATION: Purchaser shall, subject to the terms and conditions hereinafter provided, pay to the Seller the sum of **One Hundred Six Thousand One Hundred Seventy-Eight DOLLARS (\$106,178)** ("Purchase Price") for 2,123.56 stream credits at the Mitigation Bank. The Purchase Price is derived from the unit cost of Fifty (\$50) DOLLARS per stream credit. The Purchase Price is to be paid in the manner following:

- a.) VALIDITY PERIOD: The Purchase Price (\$106,178) is valid until January 15, 2022. If the Purchase Price is not paid in full to Seller by such date, the

agreement terminates and the parties shall have no further obligations to each other.

- b.) PAYMENT: Please send payment to Seller at:

Attn: Dan Drake
Swallow Tail, L.L.C.
6240 West 135th Street, Suite 100
Overland Park, KS 66223

- 3) SELLERS WARRANTY: In consideration of the Purchase Price:

- a) Seller affirms that it has sufficient credits today at the Mitigation Bank to satisfy the credits required by Purchaser.
- b) Seller agrees to Reserve and Assign such credits to Purchaser.
- c) Seller represents that the credits purchased pursuant to this Agreement do not expire and last in perpetuity, and such credits satisfy the requirements dictated by the USACOE in the Section 404 Permit.
- d) The parties understand and agree that Purchaser shall have no obligation to perform any responsibility or incur any liability associated with the creation, development, maintenance and/or management of the Mitigation Bank.
- e) Seller shall defend, indemnify and hold harmless the Purchaser for Seller's compliance, and for Seller's failure to comply, and with all Seller's obligations under this Agreement.
- f) Seller shall comply with all applicable law in the performance of this Agreement.

4) NOTICES: Any notices required or permitted hereunder shall be sufficiently given if delivered by overnight courier, by United States mail, return receipt requested, or by facsimile to the Parties hereto as follows:

If to Seller: Shane Staten
Swallow Tail, L.L.C.
13610 Barrett Office Drive, Suite 112
St. Louis, MO 63021

If to Purchaser: City of Olathe, Kansas
P.O. Box 768
Olathe, KS 66051
Attn: Scott Ward

Any notice given pursuant hereto by overnight courier shall be effective as of delivery; any notice given pursuant hereto by United States mail, return receipt requested, shall be effective as of the third business day following its posting and any notice given pursuant hereto by facsimile shall be effective as of receipt of confirmation by the sending party.

5) PRIOR AGREEMENTS: This Agreement shall supersede any and all prior understandings and agreements between the Parties hereto, whether written or oral, with respect to the subject matter hereof and may be amended only by a written instrument executed by or on behalf of both Seller and Purchaser.

6) APPLICABLE LAW: Purchaser shall be contractually bound to this Agreement, which shall be governed by the laws of the state of Kansas and subject to the requirements of any applicable federal law or regulation. Changes in federal, state or local laws, however, which might have otherwise impacted this Agreement shall not be enforced retroactively after execution of this Agreement.

7) ATTORNEY'S FEES: In the event any action, suit, or other proceeding at law or in equity is brought to enforce the covenants and agreements contained in this Agreement or to obtain monetary damages for breach thereof, and such action results in an award of judgment for monetary damages, or the granting of any equitable relief in favor of any party hereto, all expenses, including reasonable attorney's fees, of the successful party in such action, suit, or other proceeding shall, upon demand of such party, be paid by the other party.

8) COUNTERPARTS: This Agreement may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall be deemed one and the same instrument. Furthermore, this Agreement may be executed and delivered by email transmission. The Parties intend that email signatures shall constitute original signatures and that an emailed copy or counterpart of this Agreement containing the signature (original or facsimile) of a Party shall be and is binding upon that Party.

9) SUCCESSORS AND ASSIGNS: This Agreement shall be binding upon the parties and the Purchaser's and Seller's successors and assigns. It is the intention of the parties hereto that this Agreement shall bind all successive owners of any interest in the property subject to this Agreement.

10) CONTRACT ACCEPTANCE: This Agreement is null and void if not executed and delivered to Seller by December 31, 2021.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed on the day and year first above written.


PURCHASER:

City of Olathe, Kansas

By: _____
Mayor

SELLER:

Swallow Tail, L.L.C.

By:  _____
James D. Drake, Managing Member