

SULTAN CITY COUNCIL AGENDA ITEM COVER SHEET

ITEM NO: A-3

DATE: November 11, 2008

SUBJECT: Wetland Mitigation Credit Purchase Agreement

CONTACT PERSON: Deborah Knight, City Administrator

ISSUE:

The issue before the City Council is to authorize the Mayor to sign the Wetland Mitigation Credit Purchase Agreement and obligate the remaining balance from the LID-97 fund (approximately \$100,000) and approximately \$54,800 from the CR Sewer Fund to satisfy the City's obligation to mitigate for damage associated with the LID-97 sewer extension project.

STAFF RECOMMENDATION:

Authorize the Mayor to sign the Wetland Mitigation Credit Purchase Agreement to satisfy the City's obligation to mitigate for damage associated with the LID-97 sewer extension project.

SUMMARY:

On August 22, 2008, the City transmitted a wetland mitigation plan (Plan) to Kristina Tong at the Army Corps of Engineers. The Plan addresses impacts to wetlands adjacent to Wagley's Creek which were disturbed during the construction of a sewer extension (LID-97) adjacent to the creek between Sultan Basin Road and Rice Road.

The Mitigation Plan was required in order to address the compliance action brought by the Army Corps of Engineers against the City in 2000.

The City proposed two mitigation measures in the Plan:

1. Purchase mitigation bank credits equivalent to 1.29 acres of wetland at the Snohomish Basin Mitigation Bank owned by Habitat Bank LLC.
2. Enhance 1.26 acres of degraded riparian wetland, wetland buffer and riparian buffer on-site within the LID project area.

Authorizing the Mayor to sign the Wetland Mitigation Credit Purchase Agreement will complete the City's obligation under the first mitigation measure. Staff will return to Council in January with a proposal to enhance the degraded riparian wetland and implement the second mitigation measure.

DISCUSSION:

The City Council reviewed the Executive Summary of the Mitigation Plan at its September 11, 2008 meeting. Staff presented the Plan and recommendation to use a combination of wetland bank credits and on-site mitigation to address the Army Corps of Engineers (Corps) compliance action.

The Council questioned whether the Corps was familiar with the mitigation site and the re-vegetation of the area since the project was completed.

The City is in a difficult position. The Army Corps of Engineers expects the City of Sultan to address the impacts to wetland and riparian buffers resulting from LID-97. The City originally planned to work with adjacent property owners to develop created wetlands. Unfortunately, the relationship between the City and adjacent property owners deteriorated after the sewer extension project was completed.

The City doesn't have much leeway in meeting the Corps' requirements. A combination of on-site and purchasing wetland credits is deemed the most prudent course of action to achieve the required mitigation.

Purchasing Wetland Credits

Purchasing credits through the Bank is necessary due to the difficulties in finding an appropriate site for wetland creation and a willing landowner.

Normally, the cost of a wetland credit is \$160,000.00/credit. Habitat Bank has charged \$120,000.00 per credit for the purchase of more than one credit by a public entity. Since the Plan calls for purchasing 1.29 credits the cost to the City would be \$154,800.00.

City staff propose using the remaining balance in the LID-97 fund and the CR Sewer Fund to purchase the credits. The LID-97 fund will have a balance of approximately \$100,000 after the consultant fees for preparing the Plan are expensed. The remaining balance (approximately \$54,800) will be expensed from the CR Sewer Fund. These expenses are included in the 2009 Capital Budget. The funds would not be released until after January 1, 2009.

Once the City has signed the contract and issue a check, Habitat Bank will send official notification to the agencies that the credits have been transferred to the City's permit number.

BACKGROUND:

During construction of LID-97, permitted wetland impacts were exceeded from .54 acre to 1.82 acres. The unanticipated impacts resulted from discharge of slurry through level spreaders during dewatering construction phase of Wagley's Creek.

The City was contacted by Ms. Kristina Tong of the Army Corps of Engineers on December 7, 2006 requesting that the City submit as built drawings of the mitigation plan. The City responded by hiring Graham-Bunting Associates (GBA) to prepare a mitigation plan that was achievable. GBA contacted Ms. Tong and agreed that the current existing conditions needed to be documented as a starting point for the preparation of a mitigation plan.

Existing recovery conditions and prior to construction conditions have been recorded in a table by GBA during the fall of 2007 and is attached to the Bank Use Plan.

Based upon these recovery conditions, the Corps determined the City must mitigate for the wetland impacts as originally proposed with the exception of a .14 acre enhancement credit to be reduced from the original amount of proposed enhancement acreage.

The amount of mitigation the Corps has requested is 1.29 acres of created wetlands and 1.26 acres of enhanced riparian wetland and buffer areas.

Created Wetlands

At the recommendation of Graham-Bunting Associates, the City proposed a bank use plan to satisfy the 1.29 acres of wetland creation requirement through the purchase of wetland "credits" from the Snohomish County Basin Mitigation Bank (Bank) located south of Monroe. The City of Sultan is located in the service area of the Bank.

On-site Mitigation

The 1.26 acres of enhanced wetland and riparian areas will be accomplished on-site. The proposed on-site area will enhance wetland buffers and riparian buffers on the Hammer PUD adjacent to Wagley Creek. The City will need to negotiate access easements to improve the site area. The objectives of the on-site mitigation is to:

1. Remove invasive species including reed canary grass and blackberries
2. Install native shrubs and trees
3. Improve water quality functions through shading
4. Enhance wildlife habitat
5. Administer a maintenance and monitoring program to ensure success

The City has contacted the Snohomish Conservation District to discuss potential partnerships to implement the on-site mitigation and long-term maintenance and

monitoring. City staff are proposing to use native plants, volunteer groups such as Salmon Keepers and Earth Corps to keep the cost of on-site mitigation at a minimum.

FISCAL IMPACT:

There will be approximately \$100,000 remaining in the LID project fund. These are funds designated for mitigation following the project construction. The project fund is currently paying for the consulting work that is underway and will be used to pay for the wetland credits and on-site mitigation.

The City will need to use its capital project fund to make up any difference between costs and available funding in the LID project fund.

ALTERNATIVES:

1. Authorize the Mayor to sign the Wetland Mitigation Credit and Purchase Agreement.

This action implies the City Council ready is to address the impacts to wetland and riparian buffers resulting from LID-97 and resolve its continued violation of the permit issued by the Army Corps of Engineers for the project.

2. Authorize the Mayor to sign the Wetland Mitigation Credit and Purchase Agreement and direct staff to areas of concern.

This action would allow the Council to identify and resolve any questions or concerns before authorizing the Mayor to sign the Purchase Agreement.

3. Do not authorize the Mayor to sign the Wetland Mitigation Credit and Purchase Agreement and direct staff to areas of concern.

This action would delay the City's compliance requirements. The City has been in violation of the Corps permit since 2002. The 2008 Bank Use and On-site Mitigation Plan was prepared by the City's consultant, Graham-Bunting Associates and approved by the Army Corps of Engineers (Attachment B). A delay in implementing the proposed plan could result in further mitigation requirements.

RECOMMENDED ACTION:

Authorize the Mayor to sign the Wetland Mitigation Credit Purchase Agreement to satisfy the City's obligation to mitigate for damage associated with the LID-97 sewer extension project.

ATTACHMENTS:

A - Wetland Mitigation Credit Purchase Agreement

B – Army Corps of Engineer Comment letter – September 26, 2008

C - Executive Summary *City of Sultan LID 97-1 Wetland Mitigation Plan (July 18, 2008)*

**WETLAND MITIGATION CREDIT PURCHASE AGREEMENT
SNOHOMISH BASIN MITIGATION BANK**

This Wetland Mitigation Credit Purchase Agreement (“Agreement”) is made by and between HABITAT BANK, LLC, a Washington limited liability company (“Bank Sponsor”), and The City of Sultan, a Washington municipality (“Buyer”) (collectively “Parties”).

1. RECITALS

- 1.1. With approval and authorization from the Washington State Department of Ecology (“Ecology”), U.S. Army Corps of Engineers (“Corps”), Environmental Protection Agency (“EPA”), Washington State Department of Natural Resources (“DNR”), and Snohomish County (“County”) (collectively the “Permitting Authorities”), Bank Sponsor has established a wetland mitigation bank known as the “Snohomish Basin Mitigation Bank” (“SBMB”).
- 1.2. The SBMB is established to operate within a portion the State of Washington’s Water Resource Inventory Area Number 7 (“WRIA No. 7”), which portion constitutes the SBMB’s “Service Area.”
- 1.3. The purpose of the SBMB is to provide off-site mitigation for unavoidable impacts to wetlands associated with certain development activity within the Service Area.
- 1.4. Bank Sponsor is authorized by the Permitting Authorities to operate the SBMB and to obtain, hold, sell, and transfer wetland mitigation credits, said credits being units of trade representing the increase in ecological value of a site, as measured by acreage, functions, and/or values (“Mitigation Credits”).
- 1.5. Buyer contemplates undertaking a development activity within the Service Area (“Project”), which will require permits and/or approvals (“Permit(s)”) from regulatory agencies and which development activity may cause unavoidable impacts to wetlands and may require mitigation. Buyer is solely responsible for determining whether such mitigation can be satisfied by its acquisition of Mitigation Credits.
- 1.6. Buyer wishes to purchase from Bank Sponsor and Bank Sponsor wishes to sell to Buyer one or more Mitigation Credits from the SBMB for the Project on the terms and conditions contained in this Agreement.

2. AGREEMENT

NOW THEREFORE, in consideration of the mutual covenants and conditions and promises contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, Bank Sponsor and Buyer agree as follows:

2.1. *Purchase/Sale of Mitigation Credits*

- 2.1.1. **Purchase/Sale.** Bank Sponsor hereby sells to Buyer and Buyer hereby buys from Bank Sponsor one point two nine (1.29) Mitigation Credits upon all of the terms, covenants, and conditions set forth in this Agreement (“Project Mitigation Credits”).
- 2.1.2. **Purchase Price.** The purchase price for the Project Mitigation Credits shall be one hundred fifty four thousand eight hundred and 00/100 Dollars (U.S. \$154,800.00) (“Purchase Price”).
- 2.1.3. **Payment.** Buyer agrees to pay the Purchase Price to Bank Sponsor as otherwise provided in this Agreement.

2.2. *Buyer’s Obligations/Limitation on Transfer of Mitigation Credits/Project Information.*

- 2.2.1. **Mitigation Credits for Project.** Buyer shall be solely responsible for determining whether the Mitigation Credits may be used for the Project and the Permit(s). Bank Sponsor provides no representation or warranty as to the utility or applicability of the Mitigation Credits to the Project or Permit(s). Buyer acknowledges and agrees that Bank Sponsor shall sell the Project Mitigation Credits specifically for the Permit(s) identified in Section 2.2.2 below and that, as of Closing, said credits shall not be transferable.
- 2.2.2. **Project.** The Project, Permit(s), and related information is as follows:
- 2.2.2.1. Buyer’s name, address, & telephone number: City of Sultan, 319 Main Street, Suite 200, Sultan WA 98294-1199
- 2.2.2.2. Permitting Agency(ies) name(s), address(es), telephone number(s): US Army Corps of Engineers, PO Box 3755, Seattle WA 98124-3755
- 2.2.2.3. Permit(s) Number(s): 1999-00025 US Army Corps of Engineers Memorandum for Record 26 September 2008
- 2.2.2.4. Project Name & Location: City of Sultan LID 97-1, Sultan WA
- 2.2.2.5. Brief Description of Impact(s) to be Compensated for by the Project Mitigation Credits: Impacts occurred to 1.82 acres of wetlands during construction from the discharge of slurry during dewatering.
- 2.2.3. **Disclosure.** Buyer acknowledges and agrees that Bank Sponsor may, as part of the process for transferring the Project Mitigation Credits, disclose the information provided under Section 2.2.2 above to the permitting agency(ies) described in Section 2.2.2, the Snohomish County Auditor, and the Permitting Authorities.

2.3. *Title/Risk of Loss*

2.3.1. **Conveyance.** At Closing, Bank Sponsor shall convey to Buyer the Project Mitigation Credits, free of liens, encumbrances, restrictions, rights, and conditions, except as expressly provided for herein. Conveyance shall be in the form of a letter from the Bank Sponsor to the Buyer and Permitting Authorities notifying them that credits have been transferred by the bank to the Buyer for the permits and projects detailed in Section 2.2.2

2.3.2. **Risk of Loss.** Bank Sponsor shall bear the risk of loss of the Project Mitigation Credits prior to Closing.

2.4. *Representations and Warranties*

Bank Sponsor represents and warrants to Buyer that:

2.4.1. Bank Sponsor is authorized by the Permitting Authorities to operate the SBMB and to obtain, hold, sell, and transfer Mitigation Credits; and

2.4.2. Bank Sponsor owns the Project Mitigation Credits and has the right to sell said credits to Buyer.

2.5. *Closing*

2.5.1. **Closing and Closing Date.** The closing of the purchase and sale of the Project Mitigation Credits (“Closing”) shall occur when the Bank Sponsor receives a cashiers check for the purchase amount, under the terms of this Agreement within ten (10) days after the effective date of this Agreement (“Closing Date”).

2.5.2. **Limits on Closing Date.** The Closing Date shall not be modified without the written approval of Bank Sponsor and Buyer.

2.6. *Notice*

2.6.1. Except as may be otherwise expressly provided for herein, all notices required or permitted to be given under this Agreement shall be in writing and shall be delivered or sent: (a) in person; (b) by U.S. Mail, postage prepaid and certified with return receipt requested; or (c) by nationally recognized overnight delivery service, prepaid, and addressed as set forth below. Either party may change its address by notifying the other party in writing of the change of address. Notice shall be deemed delivered immediately, if delivered in person, or within two days if sent by any other means set forth in this Section 2.6.

2.6.2. If to Bank Sponsor: Habitat Bank, LLC
15600 NE 173rd St.

Woodinville, WA 98072

2.6.3. If to Buyer: As provided in Section 2.2.2 above.

2.7. *Miscellaneous*

2.7.1. **Effective date.** The effective date of this Agreement shall be the earliest date by which both Bank Sponsor and Buyer have executed this Agreement.

2.7.2. **Assignment.** Buyer's rights under this Agreement shall not be assigned or apportioned, either voluntarily or by operation of law, without the prior written consent of Bank Sponsor, which shall be in Bank Sponsor's reasonable discretion. Subject to the foregoing limitation, this Agreement shall inure to the benefit of and be binding upon the Parties' respective successors and assigns.

2.7.3. **Entire Agreement.** This Agreement constitutes the entire agreement and understanding between the Parties with respect to the purchase and sale of the Project Mitigation Credits, and supersedes and replaces any prior agreements and understandings, whether oral or written, between them with respect to said matters.

2.7.4. **Confidentiality.**

2.7.4.1. The existence of this Agreement and the number of Project Mitigation Credits may be disclosed to the permitting agency(ies) described in Section 2.2.2 above and the Permitting Authorities.

2.7.5. **Time.** Time is of the essence of this Agreement.

2.7.6. **Governing Law.** This Agreement shall be construed and interpreted in accordance with the laws of the State of Washington.

2.7.7. **Amendment.** No change or modification of this Agreement shall be valid unless the same is in writing and signed by the Parties. No waiver of any of the provisions of this Agreement shall be valid unless in writing and signed by the party against whom it is sought to be enforced.

2.7.8. **Captions.** The captions of this Agreement have no effect upon its interpretation and are for convenience and ease of reference only.

2.7.9. **Severability.** The unenforceability, invalidity, or illegality of any provision hereof shall not render any other provision unenforceable, invalid, or illegal.

2.7.10. **Computation of Time.** If any date set forth in this Agreement for the delivery of any document or the happening of any event should, under the terms hereof, fall on a weekend or holiday, then such date shall be automatically extended to the next succeeding weekday that is not a holiday.

2.7.11. **Attorneys' Fees.** In the event either party to this Agreement finds it necessary to bring an action at law or other proceeding against the other party to enforce any of the terms, covenants, or conditions of this Agreement or any instrument executed pursuant to this Agreement, or by reason of any breach or default under this Agreement, the prevailing party in any such action or proceeding (and any appeal thereof) shall be paid all costs and reasonable attorneys' fees by the other party. This provision shall survive Closing and shall not be merged into the Bill of Sale.

2.7.12. **Acts Beyond Party's Control.** Neither party to this Agreement shall be in default or violation as to any obligation created hereby and no condition precedent or subsequent shall be deemed to fail to occur if such party is prevented from fulfilling such obligation by, or such condition fails to occur due to, forces beyond such party's reasonable control, including without limitation, destruction or impairment of facilities resulting from breakdown not resulting from lack of ordinary care and maintenance, flood, earthquake, slide, storm, lightning, fire, epidemic, war, riot, civil disturbance, sabotage, proceeding by court or public authority, or act or failure to act by court, public authority, or third party, which forces by exercise of due diligence and foresight such party could not reasonably have expected to avoid.

2.7.13. **No Joint Venture.** It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership, joint venture, or other arrangement between Buyer and Bank Sponsor. No term or provision of this Agreement is intended to be, or shall be, for the benefit of any person, firm, organization, or corporation not a party to this Agreement, and no such other person, firm, organization, or corporation shall have any right or cause of action hereunder.

2.7.14. **Counterparts/Faxes.** This Agreement may be executed in one or more counterparts with like effect as if all signatures appeared on one copy. Facsimile transmission of any signed original document (other than the Bill of Sale), and retransmission of any signed facsimile transmission shall be the same as delivery of an original. At the request of either party or the Escrow Agent, the Parties shall confirm facsimile transmitted signatures by signing an original document.

The Parties have executed this Agreement as of the dates set forth below.

HABITAT BANK, LLC, Bank Sponsor

By _____
_____ Date
[print name and title]

City of Sultan, Buyer

By _____
_____ Date
Mayor Carolyn Eslick