

AGREEMENT FOR DESIGN, ESTABLISHMENT, DEVELOPMENT, OPERATION, AND MANAGEMENT OF WETLAND MITIGATION BANK

THIS AGREEMENT (“Agreement”) is entered into between the City of Redmond, a Washington city (the “City”) and ~~Habitat-Bank Keller Farm Mitigation Partners~~, LLC, a Washington limited liability company (“~~Habitat-Bank KFMP~~”), for the purposes hereafter mentioned.

RECITALS

A. The City is the owner of that certain real property located in King County, Washington, commonly known as the Keller Farm Property and legally described on Exhibit A attached to this Agreement and incorporated herein by this reference as if set forth in full. THE Keller Farm Property is graphically depicted on Exhibit B attached to this Agreement and incorporated herein by this reference as if set forth in full.

B. In early October 2014, the City issued a request for proposals (“RFP”) for a Bank Sponsor to establish, develop, operate and maintain a Certified Wetland Mitigation Bank (the “Bank”) on the Keller Farm Property. The selection process closed on October 23, 2014 and a committee thereafter recommended to the Redmond City Council that ~~Habitat-Bank~~~~KFMP~~ be awarded a contract to develop, operate, and maintain the Bank according to ~~Habitat-Bank’s~~~~KFMP’s~~ proposal dated October 21, 2014 and the terms of the RFP. On December 2, 2014, the Redmond City Council awarded the contract to ~~the Habitat-Bank~~~~KFMP~~ and authorized the City’s Mayor to negotiate and sign the contract on behalf of the City.

C. The parties now desire to set forth their negotiated and agreed upon terms in writing and to provide for the design, establishment, development, operation, and management of the Certified Wetland Mitigation Bank as provided for herein.

AGREEMENT

IN CONSIDERATION OF and subject to all terms and conditions of this Agreement, the City and ~~Habitat-Bank- KFMP~~ agree as follows:

1. **Scope of Work.** ~~Habitat-Bank~~~~KFMP~~ agrees to proposed, develop, establish, construct, operate, and maintain a Certified Wetland Mitigation Bank meeting the requirements of Chapter 173-700 of the Washington Administrative Code (“WAC”) on the Keller Farm Property. Specifically, ~~Habitat-Bank~~~~KFMP~~ will perform the following tasks at ~~Habitat Bank’s~~~~KFMP’s~~ sole cost and expense:

A. ~~Habitat-Bank~~~~KFMP~~ will establish and implement a plan to maintain and manage the Keller Farm Property to keep invasive species under control from the date of this Agreement through site development and beyond. This plan shall include a schedule for mowing frequency and timing (time of year) as well as an approach for targeted invasive weed control for poison hemlock and knotweed.

B. ~~Habitat Bank~~KFMP will prepare and submit all necessary documentation in order to obtain approval of the Washington State Department Ecology for operation of the Keller Farm Property as a Certified Wetland Mitigation Bank, including, but not limited to, the prospectus referred to in WAC 173-700-201 through WAC 173-700-212; the draft instrument referred to in WAC 173-700-221 through WAC 173-700-225, and the final instrument referred to in WAC 173-700-230 through WAC 173-700-231. ~~Habitat Bank~~KFMP will prepare or obtain all technical and financial studies, plans, designs, and other documentation necessary to support the prospectus, draft instrument, and final instrument. The City will review and approve all documentation prior to submittal to the Department of Ecology.

C ~~Habitat Bank~~KFMP will propose establish, develop, construct, operate, and maintain the Certified Wetland Mitigation Bank upon approval by the Department of Ecology and US Army Corps of Engineers, including obtaining any and all federal, state, and local permits, providing any and all financial assurances required by regulatory agencies, providing any and all monitoring services and monitoring reports, marketing the credits associated with the bank, selling the credits, maintaining the credit ledger and submitting required reports regarding sales, and any and all other task necessary to administer the credit system. The Mitigation Bank shall be operated in accord with the approved final instrument and all requirements of Chapter 173-700 WAC. The design and construction of the Mitigation Bank shall include the daylighting of Perrigo Creek through the site and the connection of Perrigo Creek with Bear Creek. Coordination will be necessary with any future development of Bear Creek Design District 1 (BCCD1) since a portion of Perrigo Creek lies within this zone, which is outside of the wetland mitigation bank area, and requirements of this zone also include the daylighting of Perrigo Creek. If the mitigation bank project occurs in advance of any future development application for BCCD1, the mitigation bank project, with the City's input, shall determine the point at which Perrigo Creek will align onto BCCD1. The design and construction shall also include provisions for a thirty (30) foot wide corridor to accommodate the City's future development of the missing links for the Bear-Evans Creek Greenway and Trail System, and a sixty (60) foot wide corridor along the east side of Avondale Road to accommodate future roadway, stormwater management, and trail improvements. Both of these corridors shall be exclusive of any buffers required by the MBRT.

3. Right to Use Keller Farm Property - Acceptance. The City will retain fee title to the Keller Farm Property throughout the term of this Agreement. The City grants ~~Habitat Bank~~KFMP the exclusive right to use, possess, establish, develop, construct, operate, and maintain a Certified Wetland Mitigation Bank on the Keller Farm Property. The City will make the Keller Farm Property available to ~~Habitat Bank~~KFMP for this purpose and will not take any actions with respect to the Keller Farm Property that would preclude the use of the Property for this purpose. The City agrees to impose any necessary conservation easement or other restriction on the Keller Farm Property required in order to get approval for the Certified Wetland Mitigation Bank and to execute any and all necessary documents to do so. ~~Habitat Bank~~KFMP accepts the Keller Farm Property in its present condition, AS IS, WHERE IS, WITH ALL FAULTS and without any representations or guarantees whatsoever from the City.

4. Schedule - Term of Agreement. This Agreement shall take effect and be in full force upon execution of this Agreement by both parties. This Agreement shall continue in effect

thereafter ~~until (a) that date which is ten years after construction of the Certified Wetland Mitigation Bank is completed, i.e., that date on which the ten year operational life of the Certified Wetland Mitigation Bank is completed, or (b) twelve years from the date this agreement is executed by both parties, whichever is sooner~~ throughout the duration of the Operational Life of the Bank as defined in the MBI. The tasks required by this Agreement are listed on the schedule attached to this Agreement as Exhibit C and shall be accomplished according to the timeline set forth therein, provided, that it is understood that the schedule represents an estimated timeline and that the exact delivery dates for each milestone shall be mutually negotiated and is dependent upon the support and timely responses from the regulatory agencies reviewing the mitigation bank proposal. This Agreement may be extended by the City for up to two additional two-year terms by the City providing notice to ~~Habitat Bank~~ KFMP at least 30 calendar days prior to the expiration of the initial term or the first extended term. If the term of this Agreement is extended, all terms and conditions of this Agreement shall remain in full force and effect. An extension shall be accomplished through a separate contract with reference to the original contract. The Mayor or his or her designee is authorized to exercise this extension option.

5. Compensation of ~~Habitat Bank~~ KFMP. ~~Habitat Bank~~ KFMP will not be compensated directly by the City for the services performed by ~~Habitat Bank~~ KFMP under this Agreement. Instead, ~~Habitat Bank's~~ KFMP's sole compensation will come from the sale of credits from the Certified Wetland Mitigation Bank upon release of those credits by the Department of Ecology. ~~Habitat~~ KFMP will pay the City twenty percent (20%) of the gross revenue received from each credit sale, derived from the Keller Farm Property until the City is fully reimbursed for the City's \$2,520,000.00 purchase price for the Keller Farm Property. Thereafter, the City will receive ten percent (10%) of the gross revenue from each credit sale ~~for the remaining term of this Agreement or until all credits are sold, whichever occurs sooner~~ throughout the duration of the Operational Life of the Bank as defined in the MBI. If additional properties are included in the Certified Wetland Mitigation Bank, the City will receive reimbursement for each sale that is prorated according to the percentage of credits in the Bank generated by the Keller Farm Property. Payment is due upon closing of each credit sale.

6. Financial Assurances - Endowments. As provided in Section 1 above, ~~Habitat Bank~~ KFMP shall be responsible for providing all financial assurances required by the regulatory agencies in connection with the development, construction, operation, and maintenance of the Certified Wetland Mitigation Bank. In keeping with this requirement, ~~Habitat Bank~~ KFMP will provide and fund an endowment for an agreed-upon third party to hold a conservation easement and inspect the site on an annual basis in perpetuity to confirm that the terms of the conservation easement referred to in Section 3 are being met. In addition, ~~Habitat Bank~~ KFMP will provide and fund a long-term stewardship endowment which will be turned over to the City or to an agreed-upon third party at the end of the operational life of the Certified Wetland Mitigation Bank, i.e., after all credits have been sold and the initial ten year monitoring period is concluded, in order to fund site maintenance in perpetuity.

7. Ownership of Documents. All permits, studies, instruments, plans, designs, and other documentation prepared for the Keller Farm Property shall be jointly owned by the City and ~~Habitat Bank~~ KFMP for the duration of this Agreement and thereafter owned exclusively by

the City. Both parties shall have the right to use and re-use such documents as each party deems appropriate, provided, that use on any property other than the Keller Farm Property shall be at the sole risk of the party using the same.

8. **Independent Contractor.** ~~Habitat Bank~~KFMP is an independent contractor for the performance of services under this agreement.

9. **Indemnity.** ~~Habitat Bank~~KFMP agrees to hold harmless, indemnify and defend the City, its officers, agents, and employees, from and against any and all claims, losses, or liability, for injuries, sickness or death of persons, including employees of ~~Habitat Bank~~KFMP, or damage to property, arising out of any willful misconduct or negligent act, error, or omission of ~~Habitat Bank~~KFMP, its officers, agents, subcontractors or employees, in connection with the services required by this agreement, provided, however, that:

A. ~~Habitat Bank's~~KFMP's obligations to indemnify, defend and hold harmless shall not extend to injuries, sickness, death or damage caused by or resulting from the sole willful misconduct or sole negligence of the City, its officers, agents or employees; and

B. ~~Habitat Bank's~~KFMP's obligations to indemnify, defend and hold harmless for injuries, sickness, death or damage caused by or resulting from the concurrent negligence or willful misconduct of ~~Habitat Bank~~KFMP and the City, or of ~~Habitat Bank~~KFMP and a third party other than an officer, agent, subcontractor or employee of ~~Habitat Bank~~KFMP, shall apply only to the extent of the negligence or willful misconduct of ~~Habitat Bank~~KFMP.

10. **Insurance.** ~~Habitat Bank~~KFMP shall provide the following minimum insurance coverage:

A. Worker's compensation and employer's liability insurance as required by the State of Washington;

B. General public liability and property damage insurance in an amount not less than five million dollars (\$5,000,000) per occurrence for bodily injury, including death, and for property damage; and

C. Automobile liability insurance in an amount not less than five million dollars (\$5,000,000) per occurrence for bodily injury, including death, and for property damage.

The amounts listed above are the minimum deemed necessary by the City to protect the City's interests in this matter. The City has made no recommendation to the ~~Habitat Bank~~KFMP as to the insurance necessary to protect ~~Habitat Bank's~~KFMP's interests and any decision by ~~Habitat Bank~~KFMP to carry or not carry insurance amounts in excess of the above is solely that of ~~Habitat Bank~~KFMP.

All insurance shall be obtained from an insurance company authorized to do business in the State of Washington. Excepting the professional liability insurance, the City will be named on all insurance as an additional insured. ~~Habitat Bank~~KFMP shall submit a certificate of

insurance to the City evidencing the coverage specified above, together with an additional insured endorsement naming the City, within fifteen (15) days of the execution of this agreement. The additional insured endorsement shall provide that to the extent of ~~Habitat Bank's~~KFMP's negligence, ~~Habitat Bank's~~KFMP's insurance shall be primary and non-contributing as to the City, and any other insurance maintained by the City shall be excess and not contributing insurance with respect to ~~Habitat Bank's~~KFMP's insurance. The certificates of insurance shall cover the work specified in or performed under this agreement. No cancellation, reduction or modification of the foregoing policies shall be effective without thirty (30) days prior written notice to the City.

11. Records. ~~Habitat Bank~~KFMP shall keep all records related to the Certified Wetland Mitigation Bank that are required by WAC 173-700, or that required by any regulatory agency approving or monitoring the Certified Wetland Mitigation Bank, and shall retain the same for a period of three years following the end of the operational life of the Bank, i.e., for a period of three years following the last credit sale. ~~Habitat Bank~~KFMP shall permit any authorized representative of the City, any authorized representative of any regulatory agency approving or monitoring the Bank, and any person authorized by the City for audit purposes, to inspect such records at all reasonable times during regular business hours of ~~Habitat Bank~~KFMP. Upon request, ~~Habitat Bank~~KFMP will provide the City with reproducible copies of any such records without cost.

12. Notices. All notices required to be given by any party to the other under this Agreement shall be in writing and shall be given in person or by mail to the addresses set forth below:

To the City:

City of Redmond

Attn: Planning Director

15670 NE 85th Street

P.O. Box 97010

Mail Stop 4SPL

Redmond, WA 98073-9710

To ~~Habitat Bank~~KFMP:

~~Habitat Bank, LLC~~Keller Farm Mitigation Partners, LLC

Attn: Victor Woodward

~~P.O. Box 354801 E 1st St., Suite B-107~~

~~Kirkland, WA 98083~~Cle Elum, WA 98922

Or such other addresses as the parties may provide to each other from time to time. If delivered in person, notice shall be deemed given upon delivery. If delivered by mail, notice shall be deemed given three (3) days after the date the same is deposited in the United States mail, postage prepaid, addressed as provided in this Section.

13. Project Administrator. The Redmond Planning and Development Director or his or her designee will be the Project Administrator for the City. The Project Administrator shall be responsible for coordinating the work of the City with that of ~~Habitat Bank~~KFMP, for providing any necessary information for and direction to ~~Habitat Bank~~KFMP in order to ensure that it meets the requirements of this Agreement, and for reviewing, monitoring and approving all items requiring City review, monitoring, and approval under this agreement.

14. **Disputes.** Any dispute concerning the obligations of the parties not disposed of by agreement between ~~Habitat Bank~~KFMP and the City shall be referred for resolution to a mutually acceptable mediator. The parties shall each be responsible for one-half of the mediator's fees and costs.

15. **Termination.** Either party may terminate this Agreement for a material breach or default in the performance of its terms by the other party. Termination shall become effective thirty (30) days after the non-breaching or non-defaulting party provides written notice of termination to the breaching or defaulting party, provided, that termination shall not become effective and this Agreement shall continue in full force and effect if the breaching or defaulting party cures the breach or default within the thirty (30) day notice period. If the breach or default cannot reasonably be cured within thirty (30) days, termination shall not become effective and this Agreement shall continue as long as the breaching or defaulting party commences cure within the thirty (30) day period and diligently pursues the cure to completion.

16. **Non-Discrimination.** ~~Habitat Bank~~KFMP agrees not to discriminate against any customer, credit purchaser, employee or applicant for employment, subcontractor, supplier or materialman, because of race, color, creed, religion, national origin, marital status, sex, age or handicap, except for a bona fide occupational qualification. ~~Habitat Bank~~KFMP understands that if it violates this provision, this agreement may be terminated by the City and that the ~~Habitat Bank~~KFMP may be barred from performing any services for the City now or in the future.

17. **Compliance and Governing Law.** ~~Habitat Bank~~KFMP shall at all times comply with all applicable federal, state, and local laws, rules, ordinances, and regulations. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

18. **Subcontracting or Assignment.** ~~Habitat Bank~~KFMP may not assign or subcontract any portion of ~~Habitat Bank's~~KFMP's obligations under this agreement without the express written consent of the City, provided, that the use of those consultants and sub-consultants described in ~~Habitat Bank's~~KFMP's Response to the City's Request for Proposals dated October 23, 2014 is hereby approved. ~~Habitat's~~KFMP's proposal has been accepted by the City based on the key personnel identified in the Response for ~~Habitat~~KFMP and its subcontractors and consultants. ~~Habitat~~KFMP may change consultants or key personnel only with the express written consent of the City, which consent shall not be unreasonably withheld.

19. **Non-Waiver.** Approval of any of ~~Habitat Bank's~~KFMP's work or services by the City shall not constitute a waiver by the City of any remedies of any type it may have against ~~Habitat Bank~~KFMP for any breach of the agreement by ~~Habitat Bank~~KFMP, or for failure of ~~Habitat Bank~~KFMP to perform work required of it under this Agreement. Waiver of any right or entitlement under this agreement by the City shall not constitute waiver of any other right or entitlement.

20. **Litigation.** In the event that either party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this agreement, the parties agree that such actions shall be initiated in the Superior Court of the State of Washington, in and for King County. The parties agree that all questions shall be resolved by application of Washington law and that parties to such actions shall have the right of appeal from such decisions of the Superior Court in accordance with the law of the State of Washington. ~~Habitat Bank~~KFMP hereby consents to the personal jurisdiction of the Superior Court of the State of Washington, in and for King County. The prevailing party in any such litigation shall be entitled to recover its costs, including reasonable attorney's fees, in addition to any other award

21. **Taxes.** ~~Habitat Bank~~KFMP will be solely responsible for the payment of any and all applicable taxes related to the services provided under this agreement and if such taxes are required to be passed through to the City by law, the same shall be duly itemized on any billings submitted to the City by ~~Habitat Bank~~KFMP.

22. **City Business License.** ~~Habitat~~KFMP and its consultants have obtained, or agree to obtain, business licenses from the City prior to commencing to perform any services under this Agreement. ~~Habitat Bank~~KFMP and its consultants will maintain their business licenses in good standing throughout the term of this Agreement.

23. **Entire Agreement.** This agreement represents the entire integrated agreement between the City and ~~Habitat Bank~~KFMP, superseding all prior negotiations, representations or agreements, written or oral. The terms of this Agreement also supersede any contrary provisions of any of the Exhibits attached hereto and where any conflict between the terms of this Agreement and the Exhibits exists, the terms of this Agreement control. This agreement may be modified, amended, or added to, only by written instrument properly signed by both parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first above written.

~~HABITAT BANK, LLC~~
~~KELLER FARM MITIGATION PARTNERS, LLC~~

CITY OF REDMOND

Victor Woodward, Member/Manager
Dated: _____

Mayor ~~John Marchione~~ Angela Birney
Dated: _____

ATTEST:

City Clerk ~~Michelle M. Hart~~Cheryl
Xanthos, MMC

APPROVED AS TO FORM:

City Attorney James E. Haney