

MEMORANDUM

To: Finance, Executive and Legislative Subcommittee

Re: Heron Haven Purchase Agreement and Funds Transfer

Date: May 5, 2011

From: Jim Becic

There are two recommendations on this agenda item to consider:

Recommendation Item #1 The Heron Haven site, located immediately north of 114th – 118th and West Maple Road is a naturally occurring oxbow wetland within the Papillion Creek watershed adjacent to the Big Papio Creek. The site was acquired and a Master Plan developed approximately 18 years ago by the Papio-Missouri River Natural Resources District (NRD) and is managed and operated by the non-profit, Friends of Heron Haven as an environmental and education site.

The approximately 10 acre area is bordered by residential and commercial land and has historically experienced drainage, sedimentation and concrete fill over the years prior to the NRD's acquisition. Naturally occurring springs keep the wetlands supplied with a plentiful water supply but the historic concrete fill and sedimentation has degraded the wetlands with cattails and reed canary grass dominating the site. The restoration project for Heron Haven planned by the U.S. Army Corps of Engineers (COE) under their Section 206 authority, for which the NRD is the local non-federal sponsor, is designed to address these and other problems and reestablish a quality and viable wetland for many decades into the future.

As local sponsor, the NRD is required to provide the necessary right of way for the project. A Public Hearing for the acquisition of real property for the project was held by the NRD on December 9, 2010, ostensibly for the potential acquisition of a single, 3.34 acre tract of land in the middle of the project that is owned by an Iowa company - 11402 Evans Omaha LLC (Exhibit "A"). Once the public hearing was completed, an appraisal of the site was finalized and a Purchase Agreement offering the appraised amount was presented to the owners. Attached is a copy of the signed Purchase Agreement for the appraised amount of \$35,100.00. If approved by the Board, the sale closing will be scheduled and the purchased project land rights will be secured to allow the initiation of this restoration project.

- **Management recommends that the Finance, Executive and Legislative Subcommittee recommend to the Board that the General Manager be authorized to fully execute the proposed Purchase Agreement with 11402 Evans Omaha LLC to acquire 3.34 acres for the Heron Haven Wetland Restoration Project for the appraised amount of \$35,100.00.**

Recommendation Item #2 The other approval needed by the Board regarding the Heron Haven restoration is to pay the COE the remaining balance of the District's 35% local share of the estimated total project cost. That remaining balance is \$304, 325.50. (Attached April, 2011 Correspondence from the COE to John Winkler.)

Funding for this restoration project was not included in the NRD's FY 2011 budget since the likelihood of securing federal funding appeared to be minimal for the Section 206 program nationwide and there was little chance that the NRD's request would receive support.

In November, 2010 the COE informed the District that they recently received federal funds for the Design and Implementation of the Heron Haven Section 206 Wetland Restoration project. This federal funding support notification was an unexpected yet welcome surprise. As specified in the COE correspondence, the total project cost was estimated at \$1,594,535 with an NRD contribution (35% Cost Share) of \$558,087 (\$97,860 estimated real estate value and \$460,227 cash). To keep on schedule for a construction start in FY 2011 (federal fiscal year), the NRD needed to send the COE \$155,902.50 as our initial cash contribution by January 1, 2011. This expenditure was authorized by the Board in December, 2010.

The currently requested \$304,325.50 would fulfill the NRD's financial commitments to the COE. It should allow the COE an ample period to review the final design plans, avoid end of their fiscal year delays and to schedule and award the construction contracts needed to complete the project with the fewest possible contracting complications. Also, if this payment is approved and completed in the District's FY-2011, it would assure a timely completion of the project and the District would not need to budget these funds in FY 2012.

- **Management recommends that the Finance, Executive and Legislative Subcommittee recommend to the Board that the General Manager be authorized to make payment in the amount of \$304,325.50 to the U.S. Army Corps of Engineers, Omaha District for the Heron Haven Wetland Restoration Project.**

EXHIBIT "A"

HERON HAVEN CITY OF OMAHA DOUGLAS COUNTY NE



T 15 N, R 12 E
5th Principal Meridian



- Easements
- Highways
- Creeks & Streams
- Sections

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Real Estate CERWORTHES	
Prepared By: Jesse Clifton	
Prepared Date: April 19, 2010	
Reviewed By:	US Army Corps of Engineers Omaha District
File Location: C:\jessclifton_Haven\Project\Final\HeronHaven.mxd	

ID	OWNER	ACRES	REMARKS
1	11402 Evans Omaha Lic	3.34	Fee Simple
2	Greenhall Investments Lic	1.97	Temporary Construction Easement
3	Papio Missouri River Natural	4.51	Channel Improvement Easement
4	Papio Missouri River Natural	5.97	Channel Improvement Easement
5	City Of Omaha	1.68	Channel Improvement Easement
6	Papio Missouri River Natural	1.38	Temporary Construction Easement
7	DELETED		
8	Nebraska Department of Roads	0.66	Temporary Construction Easement



PURCHASE AGREEMENT
PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT
HERON HAVEN PROJECT
TRACT 1
11402 EVANS OMAHA LLC

THIS PURCHASE AGREEMENT ("THIS PURCHASE AGREEMENT") is made by and between or among: **11402 EVANS OMAHA LLC**, an Iowa Limited Liability Company existing under and by virtue of the laws of the State of Iowa (hereinafter referred to as "**SELLER**"), on the one hand, and the **PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT** (hereinafter referred to as "**PURCHASER**") on the other hand.

In return for payment by **PURCHASER** to **SELLER** of **THIRTY-FIVE THOUSAND ONE HUNDRED DOLLARS (\$35,100.00)** (hereinafter referred to as the "**PURCHASE PRICE**"), **SELLER** agrees to convey and grant to **PURCHASER** Lot 1, Lake Forest Estates, a subdivision as surveyed, platted and recorded, in the City of Omaha, County of Douglas, State of Nebraska ("the **SALE PROPERTY**"), consisting of 3.34 acres, more or less, subject to the following:

1. **Payment.** The **PURCHASE PRICE** shall be paid by **PURCHASER** to **SELLER** by **PURCHASER'S** bank draft at the closing of this transaction ("the **CLOSING**").

2. **The Closing.** The **CLOSING** shall occur at the office of **PURCHASER** at 8901 S. 154th Street, Omaha, NE 68138, at 10:00 o'clock, A.M. DST, on May 2, 2011, or on such other date and/or at such other time or place as may be agreed upon in writing by **PURCHASER** and **SELLER**. At the **CLOSING**, **SELLER** shall execute and deliver to **PURCHASER** a special warranty deed conveying to the **PURCHASER** the insurable, marketable fee-simple title to the **SALE PROPERTY**, free and clear of all liens, encumbrances, limitations, covenants, reservations, conditions, restrictions and easements, except easements of record, a 50' foot wide sanitary sewer easement shown on the City of Omaha utility map, and/or as otherwise

contemplated by or permitted in accordance with THIS PURCHASE AGREEMENT. Such conveyance shall also convey to PURCHASER, its successors, assigns or nominees, any and all interest of SELLER in any existing easements or licenses that benefit the SALE PROPERTY.

3. **Title Insurance Commitment.** Within ten (10) days after execution of THIS PURCHASE AGREEMENT, SELLER shall deliver to PURCHASER a commitment ("the COMMITMENT") from a duly authorized title insurance company for a policy of title insurance to be issued at the CLOSING. The COMMITMENT shall be irrevocable for a period of six (6) months and shall commit the insurer to insure the title to the SALE PROPERTY in the condition required herein for the benefit of PURCHASER, and its assigns or nominees, for the amount of the PURCHASE PRICE. The COMMITMENT shall exclude all standard exceptions to coverage shown on its Schedule B.

4. **Objections to Title.** After delivery of the COMMITMENT, PURCHASER may notify SELLER of any conditions disclosed in the COMMITMENT that are objectionable to PURCHASER. Following such notice SELLER shall promptly and diligently undertake such steps as are reasonably necessary to cure, satisfy, or remove such conditions. In the event SELLER shall fail to correct, satisfy or resolve any such condition to the reasonable satisfaction of PURCHASER within thirty (30) days from the date of PURCHASER'S delivery of written objections to SELLER, PURCHASER (as its sole and exclusive remedy) shall have the right to terminate THIS PURCHASE AGREEMENT.

5. **New Liens or Conditions.** As long as THIS PURCHASE AGREEMENT is in effect SELLER shall not transfer, convey, lease or otherwise dispose of any right, title or interest in the SALE PROPERTY except subject to the terms of THIS PURCHASE AGREEMENT or with written consent of PURCHASER. SELLER further agrees not to consent to or allow any new lien, encumbrance, condition reservation, easement, lease, restriction or covenant against the SALE PROPERTY, other than the lien for current real estate taxes due but not yet delinquent.

6. **Right of Entry.** Prior to the CLOSING, PURCHASER, and its duly authorized agents, shall have the right to enter the SALE PROPERTY in order to make,

at PURCHASER'S expense, all surveys, measurements, soil tests, environmental studies and other tests as PURCHASER shall deem necessary. PURCHASER agrees to repair any resulting damage to the SALE PROPERTY and to indemnify, hold harmless and defend SELLER from any and all claims by third persons of any nature whatsoever arising from PURCHASER'S exercise of such right of entry hereunder, including all actions, suits, proceedings, demands, assessments, costs, expenses and attorney fees.

7. **Leases and Other Interests.** At the CLOSING, no portion of the SALE PROPERTY will be subject to any agreement, right of first refusal, lease or other undisclosed or unrecorded interest, right or restriction. SELLER certifies that there will have been no labor performed, and no materials furnished to the SALE PROPERTY, by any person or entity, who has not been paid in full, for at least one hundred twenty (120) days prior to the CLOSING. SELLER hereby agrees to indemnify and hold PURCHASER harmless from and against any such claims.

8. **Hazardous Materials.** SELLER represents and warrants that SELLER has not used, generated, stored or disposed of, above, in, on, under or upon the SALE PROPERTY, any "hazardous materials" as hereinafter defined, and that SELLER has no actual knowledge that there are any hazardous materials above, in, on, under or upon the SALE PROPERTY. The term "hazardous materials" means any material or substance which is listed in the United States Department of Transportation Hazardous Materials' Table (49 CFR 172.101) as of the date of THIS PURCHASE AGREEMENT that is or has been kept, used or disposed of in or on the SALE PROPERTY in a manner and/or in quantities which do not comply with applicable laws and regulations pertaining to said materials or substances. Further, SELLER and PURCHASER agree that they will not use, generate, store or dispose, or permit the use, generation, storage or disposal, of any hazardous materials as hereinabove described over, in, on, under or upon the SALE PROPERTY at any time prior to the CLOSING.

9. **Tests.** Not later than five (5) days after execution of THIS PURCHASE AGREEMENT, SELLER agrees to provide to PURCHASER all soil tests, engineering reports, wetland studies and other similar drawings and technical information relating

to the SALE PROPERTY that SELLER has in his, her or its possession, at no additional cost to PURCHASER.

10. **Conditions Precedent.** The obligation of PURCHASER to consummate the transactions contemplated herein is expressly subject to satisfaction as determined by PURCHASER, in its absolute discretion, of the conditions listed below.

a) **Title.** THIS PURCHASE AGREEMENT is contingent upon condition of title to the SALE PROPERTY being established in accordance with THIS PURCHASE AGREEMENT, subject only to exceptions waived or agreed to by PURCHASER.

b) **Warranties.** THIS PURCHASE AGREEMENT is contingent upon all warranties and representations of SELLER hereunder being true and correct in all material respects as of the date hereof and as of the CLOSING date.

11. **Closing Costs and Apportionments.**

a) **Real Estate Taxes.** All consolidated real estate taxes that become delinquent in the calendar year in which the CLOSING takes place shall be treated as though all are current taxes, and such current taxes shall be prorated between PURCHASER and SELLER as of the date of the CLOSING on the basis of a 365-day calendar year. All prior years' taxes, interest and other charges related thereto, if any, shall be paid by SELLER.

b) **Greenbelt recapture.** PURCHASER shall indemnify and hold SELLER harmless from and against any greenbelt property tax recapture resulting from PURCHASER'S purchase of the SALE PROPERTY.

c) **Special Assessments.** SELLER agrees that it shall pay and/or be responsible for all special assessments, preliminary or final, including any deficiency assessments or such assessments deferred for any reason, including agricultural deferrals, which affect the SALE PROPERTY as of the date of the CLOSING, with all such payments being made at the time of the CLOSING, or by way of escrow or bond as determined by PURCHASER which would allow for payment at the time of final assessment. In the event that special assessments for

installation of public improvements have not been levied as of the CLOSING, there shall be escrowed from the CLOSING an amount equal to the estimated amount of such special assessments. In the event the actual special assessments are greater than the estimates, SELLER shall be responsible for the difference; and, in the event that the estimated special assessments are more than the actual assessments, the balance shall be returned to SELLER.

d) **Recording Fees.** PURCHASER shall be responsible for payment of recording fees for the deed of conveyance.

e) **Title Insurance.** PURCHASER shall be responsible for the costs of the title insurance required by THIS PURCHASE AGREEMENT, for the costs of any endorsement premiums for endorsements requested by PURCHASER, and for the fee charged by the CLOSING company or agent selected by PURCHASER to assist with the CLOSING.

f) **SELLER'S Expenses of Sale.** After the CLOSING PURCHASER agrees to reimburse Seller within 45 days of SELLER'S written demand, accompanied by invoices, for the first \$1,500 of SELLER'S legal fees, mortgage release fees and other expenses of this transaction.

12. **Other Documents.** SELLER agrees to execute and deliver at the CLOSING such other documents and assurances on forms as may be reasonably required by PURCHASER to affirm the title of the SALE PROPERTY, and to verify to PURCHASER'S satisfaction, the conditions of THIS PURCHASE AGREEMENT, including, without limitation, an affidavit of possession, a lien and special assessment affidavit and indemnity, and a special warranty deed.

13. **Payment in full.** The PURCHASE PRICE shall constitute payment in full for the SALE PROPERTY and for any and all damages and diminishment in the value of SELLER'S remainder or other severance damages that may be sustained by SELLER by reason of any severance of the SALE PROPERTY from other property of SELLER.

14. **Waiver.** SELLER waives compliance by PURCHASER with the notice and other provisions of the Uniform Procedure for Acquiring Private Property for Public Use (Neb. Rev. Stat. Secs. 25-2501, *et seq.*)

15. **Broker and Attorney Fees.** SELLER and PURCHASER each represent to the other that they have not engaged a real estate agent or broker in this transaction. Any party engaging such an agent or broker agrees to indemnify and hold the other party harmless from and against any such fees or commissions due to such agent or broker, including reasonable attorney fees and court costs, should any such expense arise in this transaction. Either party engaging an attorney in connection with this transaction agrees to indemnify and hold the other party harmless from and against the fees for the services of such attorney or any court costs or other expenses incurred in connection therewith, except as otherwise provided herein.

16. **Remedies of the Parties.** If either PURCHASER or SELLER defaults in the performance of any provision of THIS PURCHASE AGREEMENT, the other party shall be entitled to any and all remedies available at law or in equity.

17. **Prior Agreements.** THIS PURCHASE AGREEMENT evidences the entire agreement of the parties, replaces any and all prior written or oral representations, offers, letters of intent or agreements made by the parties, and shall be binding upon the parties hereto, their successors and assigns. THIS PURCHASE AGREEMENT may not be changed or altered in any way, except by a written instrument signed by both parties; provided, however, PURCHASER shall have the right to assign THIS PURCHASE AGREEMENT to another governmental entity. No oral representations of any kind shall be binding upon either party unless fully set forth herein or in such a written instrument.

18. **Survival of Warranties.** Any warranties, covenants and representations herein made shall survive the execution of THIS PURCHASE AGREEMENT and any other documents, including the Warranty Deed given by SELLER to PURCHASER to consummate this transaction, and THIS PURCHASE AGREEMENT shall not be merged into any such documents.

19. **Construction.** THIS PURCHASE AGREEMENT shall be construed in accordance with the laws of the State of Nebraska. Wherever possible, each provision of THIS PURCHASE AGREEMENT shall be interpreted in such manner as to be effective and valid. If any provision of THIS PURCHASE AGREEMENT shall be determined to be invalid or unenforceable, such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating or otherwise affecting the remaining provisions of THIS PURCHASE AGREEMENT. Time is of the essence of THIS PURCHASE AGREEMENT. The captions contained in THIS PURCHASE AGREEMENT are for convenience only and are not intended to limit or define the scope or effect of any provision of THIS PURCHASE AGREEMENT.

20. **Authority.** Except as may otherwise be provided in THIS PURCHASE AGREEMENT, whenever pursuant to THIS PURCHASE AGREEMENT the approval of PURCHASER is called for, the authority for any such approval shall be presumed if such approval is granted or endorsed in writing by PURCHASER'S General Manager.

21. **Eminent Domain.** Neither THIS PURCHASE AGREEMENT, nor termination of THIS PURCHASE AGREEMENT by SELLER or PURCHASER pursuant to any provision of THIS PURCHASE AGREEMENT, shall be deemed to estop PURCHASER from instituting an action in eminent domain to acquire the SALE PROPERTY or any portion thereof.

22. **Non-waiver.** No delay or failure by either party to exercise any right under THIS PURCHASE AGREEMENT, and no partial or single exercise of that right, shall constitute a waiver of that or any other right unless otherwise expressly provided herein. A valid waiver by either party shall not be deemed to extend the amount of time available to perform any other act required under THIS PURCHASE AGREEMENT.

23. **Further Agreements.** Each party will, whenever and as often as the other may reasonably request, execute, acknowledge and deliver or cause to be executed, acknowledged and delivered any and all such further conveyances, assignments and other instruments and documents as may be necessary, expedient or proper in order to complete any and all conveyances, transfers, and assignments herein provided, and will do any and all other acts and execute, acknowledge and deliver any other documents so

reasonably requested in order to carry out the intent and purposes of THIS PURCHASE AGREEMENT.

24. **Effective date** THIS PURCHASE AGREEMENT shall be effective upon its complete execution by both PURCHASER and SELLER.

25. **Recordation.** At PURCHASER'S election a Notice of Interest may be recorded with the Register of Deeds of Douglas County, Nebraska.

26. **Notices.** All notices, demands, writings, supplements, or other documents which are required or permitted by the terms of THIS PURCHASE AGREEMENT to be given to any party shall be delivered in person, or shall be deposited in the United States Mail, postage prepaid, return receipt requested, addressed as set forth below, and shall be effective on the date of such deposit (if mailed) or the date of such delivery (if hand-delivered), as the case may be:


To SELLER: 11402 Evans Omaha LLC
c/o BH Management Services, Inc.
400 Locust Street, Suite 790
Des Moines, IA 50309

To PURCHASER: John Winkler, General Manager
Jim Becic, Project Manager
Papio-Missouri River Natural Resources District
8901 S. 154th Street
Omaha, NE 68138

Paul F. Peters, Attorney at Law
640 Omaha Tower
2120 South 72nd Street
Omaha, NE 68124

THIS PURCHASE AGREEMENT is executed by SELLER on this 20th day of APRIL, 2011.

11402 Evans Omaha LLC

By 

On behalf of 11402 Evans Omaha Manager, Inc.,
Manager

THIS PURCHASE AGREEMENT is executed by PURCHASER on this _____ day
of _____, 2011.

**PAPIO-MISSOURI RIVER NATURAL
RESOURCES DISTRICT**

By _____
JOHN WINKLER, General Manager

STATE OF Iowa)
COUNTY OF Polk) ss.
)

The foregoing instrument was acknowledged before me this 20th day of
APRIL, 2011, by Nicholas H. Roby, officer of the,
Manager of 11402 EVANS OMAHA LLC.



SHARON SULLIVAN
Notary Public

STATE OF NEBRASKA)
COUNTY OF SARPY) ss.
)

The foregoing instrument was acknowledged before me this _____ day of
_____, 2011, by JOHN WINKLER, General Manager of the
PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT, for and on behalf of the
district.

Notary Public



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CORPS OF ENGINEERS, OMAHA DISTRICT
1616 CAPITOL AVENUE
OMAHA NE 68102-4901

APR 25 2011

Planning, Programs, and Project Management

Mr. John Winkler, General Manager
Papio-Missouri River Natural Resources District
8901 South 154th Street, Suite A
Omaha, Nebraska 68138

Dear Mr. Winkler:

As you know, we have executed the Project Partnership Agreement with the Papio-Missouri River Natural Resources District and moved into the Design and Implementation Phase of the Heron Haven Wetland Restoration Project. Total project costs are \$1,594,535 and cost-sharing for the project is 65 percent federal and 35 percent non-federal. The total cost of the Feasibility Phase was \$507,000 and the estimated federal share of the Design and Implementation Phase of this project is \$529,448, bringing the total federal funding share for this project to \$1,036,448 (65% of \$1,594,535).

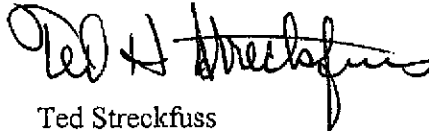
The non-federal share for this project is \$558,087 (35% of \$1,594,535). Of that, the estimated real estate value to the Papio-Missouri River Natural Resources District for the project is \$97,860. The remaining amount of \$460,227 is needed in cash to finalize the Design and Implementation Phase and close out the project. We received a check from you in December 2010 for the amount of \$155,902.50 leaving the remaining non-Federal share owed \$304,325.50. Originally we requested the remaining \$304,325.50 by July 25th, 2011, but since we are nearly complete with the bid package for the project we are requesting these funds as soon as possible. This will reduce the potential for contracting delays and schedule impacts during the final months of our fiscal year. We greatly appreciate your assistance with this but understand these funds were not originally in your Fiscal Year 2011 budget.

We are requesting that you please provide a check in the amount of \$304,325.50 payable to "U.S. Army Corps of Engineers, Omaha District" with a note on the check "for deposit to the Heron Haven Section 206 Project" to the following address:

U.S. Army Corps of Engineers, Omaha District
Attention: CENWO-PM-P (Nancy Pfeffer)
1616 Capitol Avenue
Omaha, Nebraska 68102

If you have any questions, please contact Mr. Jeff Greenwald at (402) 995-2698 or via e-mail to Jeffrey.R.Greenwald@usace.army.mil.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Streckfuss". The signature is written in a cursive style with a large initial "T" and a long, sweeping underline.

Ted Streckfuss
Deputy District Engineer