

Maureen Puddicombe

From: Suzanne Frick
Sent: Monday, March 22, 2021 1:26 PM
To: Neil Morrow; Jen Cosgrove; Mattie Mead; Tim Carter; brenda@williams-partners.com
Cc: Maureen Puddicombe; Jen Zung
Subject: Letters from Sandra Swan and Geoffrey Rusack and Attorney
Attachments: Letter Request to Rusack.pdf; Letter Request to Swan.pdf; Letter from Mr. Rusack.pdf; Letter from Rusack Attorney.pdf; Letter from Sandra Swan.pdf

Commissioners,

Attached please find the following information for your consideration for the March 23rd meeting:

- Email from me requesting a letter from Mr. Rusack and email from me to Ms. Swan asking for a response. A request was made by Mr. Rusack's attorney to extend the response deadline to March 17th which was granted.
- Response letter from Mr. Rusack and letter from his attorney.
- Response letter from Ms. Swan.

Please call me if you have any questions.

Suzanne

SUZANNE FRICK | CITY OF KETCHUM

PLANNING AND BUILDING | KURA DIRECTOR
P.O. Box 2315 | 480 East Ave. N. | Ketchum, ID 83340
o: 208.727.5086 | m: 208.721.2765
sfrick@ketchumidaho.org | www.ketchumidaho.org

From: [Suzanne Frick](#)
To: ["Geoff Rusack"](#)
Subject: Letter Request
Date: Wednesday, March 10, 2021 11:46:43 AM

Mr. Rusack—

You are identified as the owner of 411 Northwood Way, the property upstream of 401 Northwood Way owned by the Swans.

I am requesting a written letter outlining the conditions/requirements you are requesting in order to allow the work to occur on your property that is associated with the Swan's approved Stream Alternation/Bank Stabilization Permit P18-131.

The goal is to identify your requirements in writing and then I will share them with the Swans and obtain their response. The Planning and Zoning Commission is trying to determine the facts on why the approved project cannot move forward and if there is a path to complete the approved work. Both responses will be shared with the Planning and Zoning Commission at their next meeting on March 23rd.

I would appreciate you providing me a letter by Monday March 15th.

Thank you and please let me know if you have any questions.

Regards,
Suzanne

SUZANNE FRICK | CITY OF KETCHUM

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GEOFFREY CLAFLIN RUSACK

411 Northwood Way
Ketchum, Idaho

Planning & Zoning Commission
City of Ketchum
c/o Suzanne Frick
P.O. Box 2315
Ketchum, Idaho 83340
sfrick@ketchumidaho.org

March 17, 2021

Via Email Only

Re: Revised Swan River Restoration Project
Stream Alteration Permit (P17-134)

Dear Commissioners:

This letter is in response to your March 9th meeting request that we provide a letter setting forth what we would like in exchange for agreeing to the Swans conducting work on our property to mitigate flood risks on their property.

Let me start, though, by stating how incredibly difficult it was for my wife, Alison, and me to watch and listen to that meeting. Sadly, I was given 3 minutes of non-video time to present our side of the story, while my neighbors, Sandra and Bob Swan, could visually appear sitting together before you and not only present their case but also have the final word. We felt that, in their presentation, I was unfairly portrayed as uncaring and uncompromising, including Sandra reading you all a somewhat simple response I made to an email request from her about getting the remediation work done as a birthday present for Bob, implying that I was brushing off her property issues. What she didn't tell you is that, following that brief email discussion, and as I confirmed in my saved emails, we actually spoke and wrote numerous times soon thereafter over the project. We also discussed family, golf and more. Even our friends were friendly and helpful to the Swans, with our guests' teenage sons going next door to assist with placing sandbags when we were out of town and the river was particularly high. In fact, throughout the flooding and over the last few years, there were and have been countless, courteous emails between Sandra and me over

this difficult subject; yet she chose to read you only one – where I asked what day Bob’s birthday was!

Further, the Swans made it sound as though the sole reason for the long delay in this project was due to us-- failing to mention all the time that had to be spent getting the required approvals from various governmental agencies. The Swans are not the only ones who have spent a tremendous amount of time, energy, and money on this project; It has taken a lot of effort and expert consultants for us to evaluate the Swans’ plans, as well as to negotiate with them, and the process has been very frustrating for all of us. We are dismayed not only to find ourselves in this difficult position, but also that the City Staff and now the Commissioners are there as well. Even more unfair and upsetting is that the Swans have made it seem like it is our fault, when it was actually they who ended the negotiations.

Please know that Alison and I have been coming to the Sun Valley/Ketchum area for over 40 years now. Not only do we have numerous friends in the community and do business here, but my sister and her family have been living in Ketchum for over 20 years and are an integral part of the Wood River Valley. Two of our sons have been ski instructors for the Sun Valley Company (and one also taught skiing for Higher Ground), waiters at Cornerstone and salesclerks at the Board Bin. Alison and I have personally given to numerous local non-profits, including the Sun Valley Center for the Arts, St. Thomas Playhouse, Higher Ground, Big Wood Backcountry Trail and more. We are also very conservation oriented and are and have been intimately involved with numerous conservation groups, including serving on multiple boards and being elected as board chairs.

I mention all of this because, as I said in my brief comments at the hearing, we care about the community, our neighbors and the Big Wood River. Our intent in this entire matter has always been to be fair and willing to discuss and ultimately reach an agreement with the Swans. Sadly, despite our efforts to come to an amicable resolution with the Swans, they have made things so difficult that we often have a hard time even thinking of coming back to visit our property.

We must also say that, ever since the Swans first came to us about their needing to do work on our property to protect theirs, we were up front about what was important to us – and have not changed our priorities at all. First, we pointed out to them that we wanted to be good neighbors and noted that we would likely be dealing with other neighborly matters as time went on – so we wanted to do this right! Second, we told them that, for the sake of our family’s interest in and love for this beautiful property, we could not accept anything that would damage it. Third, we told the Swans that we’d like to have our view corridor of Baldy and the river preserved. I confirmed these items (and others) in a September 4, 2018 email I sent to Sandra and multiple other times over the next few years, as her application was processed. Each time, she readily agreed to those terms. In fact, at one point when we were together, Sandra went so far as to say that she had plenty of vegetation and saw no need to ever plant trees in the area I was concerned about. We are happy to share those emails where she referenced and agreed to the view corridor with you.

The Swans’ permitted remediation work includes the positioning of heavy earth moving equipment on our property, trenching and installation of 1 ½ significantly sized permanent wood barb(s) into our land that would jut out into the water to protect the Swan’s property, the installation of a temporary dam halfway up our riverbank in order for the Swans to do their river floor work, planting of trees on our riverbank (which would obstruct our river view) and an agreement that our riverbank landscaping would have to be reviewed yearly (for five years) by a state official. Also, unknown to us for a very long time, was that the Swans’ work would result in increased river flow velocity, which would cause erosion to both our river floor and bank. It should be noted that the work that was originally permitted for them to do on our property was not our idea, but theirs. They asked to be allowed to do it and offered to pay for most of it—this was and is not a case of our refusing to do work that should be done on our land. In fact, it was freely acknowledged by numerous people at the hearing, including the various engineers, that the best solution for their property was to do the work on our property as part of the overall project.

Further to this, presently we are not concerned about the stability of our southern riverbank, but we do have some concerns over the far north. We submitted an application to address that northern area, which is still under review by the City. As is very clear to me now, both the Swans’ original plans and their amended application will create increased river velocity. Of course, if their

amended application was to be approved, our southern riverbank and river floor would face imminent harm. At least the Swans' initial application addressed the bank erosion concern – unfortunately, though, it did not address the damage to our river floor that would be caused by the increased velocity. The Swans were unwilling to amend their application to address that issue, forcing us to put it in our application. Now, via their amended application before you, they are attempting to avoid any responsibility for damage their work will do to our land.

So, why is granting us a view corridor, memorialized in writing, a fair exchange? The answer is because, unlike their work on our property, this request is not damaging theirs. Further, insuring this view corridor provides us with the peace of mind - via a private contractual agreement – that we will be able to continue to enjoy the beauty of the river and Bald Mountain.

The view of the Big Wood and Baldy is seen by looking over a floodplain and riparian zone that is on the Swans' property and is relatively small. It is in this area, where there is very little vegetation and no tall trees, that we asked the Swans for this view protection. (Based on it being in a floodplain, and burdened by a platted scenic easement, any possible building there would be heavily restricted.) Again, over, and over, including in writing, the Swans agreed to our request and, in fact, seemed to have no concern about it. Further, I had Sandra over to our property and showed her the exact borderlines of the land I was thinking of, and she said it looked absolutely fine. Following that, we had a surveyor come out and specify the coordinates.

Ultimately, we will accept the terms of the written draft 'Agreement' document that the Swans prepared and presented to me on June 23, 2020 (attached) with the following additions:

1. The view corridor should be that area that Sandra agreed to in person, while looking at it from our back yard, as described by the surveyors.
2. Only licensed and properly insured contractors (naming us as co-insured) will be used for the work on our property.
3. The Swans' remediation work will occur simultaneously with the upriver remediation work in our pending application with the city and all work will be conducted by the same contractors.

In essence, we are accepting all that the Swans previously proposed to us and requesting very little. Needless to say, we hope we can work things out. Nature threw us a curveball, which we as good neighbors need to deal with by working together in coming up with stable, viable and holistic solution, while preserving our ability to enjoy the beauty that led us all to this land in the first place.

Sincerely,

A handwritten signature in black ink, appearing to read "Geoff Rusack". The signature is fluid and cursive, with the first name "Geoff" written in a larger, more prominent script than the last name "Rusack".

Geoffrey Claffin Rusack

cc: Alison Wrigley Rusack
Ed Lawson
Katie Franklin
Nick Kraus

w/ attachment

FLOOD PROTECTION AGREEMENT

THIS AGREEMENT is made and entered into this ___ day of _____, 2020, by and between ROBERT SWAN and SANDRA SWAN, as trustees of the SWAN FAMILY TRUST AGREEMENT, Dated December 19, 2006, hereinafter referred to as “Swan”, and MARSUPIAL PROPERTIES, LLC, a Delaware limited liability company, hereinafter referred to as “Marsupial”.

RECITALS

- A. Swan is the owner of Lots 11 and 12 of Chateau of Northwood Subdivision, Blaine County, Idaho, according to the official plat thereof, recorded June 27, 1996, as Instrument No. 391749, records of Blaine County, Idaho, hereinafter referred to as the “Swan Parcel”.
- B. Marsupial is the owner of Lot 1 of the Lot Line shift: Lots 1 and 2, resubdivision of Lot 2 of Northwood PUD Subdivision, amended July, 1985, according to the official plat thereof, recorded as Instrument No. 264427, records of Blaine County, Idaho, hereinafter referred to as the “Marsupial Parcel”.
- C. Both the Swan Parcel and the Marsupial Parcel are bisected by the east bank of the Big Wood River, (“River”) and all portions of both Parcels located west, or waterward, of the east bank comprise a portion of the bed of the River.
- D. During the River’s flood event during the Spring of 2017, the east bank of the River located adjacent to both the Swan Parcel and the Marsupial Parcel was breeched and damaged, and the flood waters then proceeded across, and caused extensive damage to, the established Floodplain and twenty-five foot wide Riparian Zone on the Swan Parcel.
- E. In an effort to repair damages caused to both the Swan Parcel and to a portion of the Marsupial Parcel by the 2017 River flood event and to prevent similar occurrences in the future, Swan retained Brockway Engineering, PLLC, to develop the “Swan Property Restoration Plan”, a copy of which is attached hereto as Exhibit “A” (“Restoration Plan”), which sets forth in detail the following list of improvements to the River system to be installed and constructed on the Swan Parcel and on portions of the Marsupial Parcel:
 - i. On the Swan Parcel, the proposed improvements include channel regrading, including gravel removal and stabilization of the east bank of the River, together with revegetation of the established Riparian Zone along with reclamation and revegetation of the established Floodplain.

- ii. On the Marsupial Parcel, the proposed improvements, herein referred to as the “Marsupial Project”, shall be completed as detailed in Exhibit “B” attached hereto (“Channel Modifications and Bank Stabilization Work on Marsupial Parcel”)
- F. Other portions of the Riverbank and Floodplain areas fronting the Marsupial Parcel are also in need of stabilization and restoration work due to the Big Wood River flood event of 2017, and Marsupial is in the process of applying to the Army Corps of Engineers, the Idaho Department of Water Resources and the City of Ketchum for the required permits to allow the work to be completed. (“Marsupial Restoration Plan”)
- G. Swan has secured all required approvals and permits for the Restoration Plan from U.S. Army Corps of Engineers, the Idaho Department of Water Resources and the City of Ketchum, and the parties hereto desire to herein set forth the terms and conditions upon which they will participate in its implementation, construction and maintenance.

AGREEMENT

NOW, THEREFORE, in accordance with the terms and conditions hereof, the parties agree as follows:

1. The parties hereto both consent to, and approve, construction and completion of the entire Restoration Plan.
2. Marsupial hereby agrees to the construction and completion of the Marsupial Project by Swan, subject to the following terms and conditions, which Swan hereby accepts and agrees to abide by:
 - a. Construction of the Marsupial Project shall be exclusively undertaken and completed by contractors and material suppliers selected and retained by Swan, and all costs incurred therefore shall be the responsibility of Swan, subject to reimbursement from Marsupial as set for hereinbelow.
 - b. All construction related work on the Marsupial Project shall be conducted under the supervision of Brockway Engineering, PLLC., and shall be consistent with the plans and specifications detailed in the Restoration Plan.
 - c. Brockway Engineering, PLLC and the contractors and material suppliers retained by Swan to construct and complete the Marsupial Project shall be entitled to reasonable access to the Marsupial Parcel for those purposes.
 - d. All construction work on the Marsupial Project shall, to the extent practicable, be completed from the bed of the River, rather than landward

of the east bank on the lawn and landscaped areas of the Marsupial Parcel. Should any areas on the Marsupial Parcel be damaged during construction this shall be repaired and restored by the construction team to the reasonable satisfaction of Marsupial.

- e. Construction shall commence as soon as conditions in the River permit, on a specific date mutually agreed upon by the parties, but in no event later than October 1, 2020, and shall be diligently pursued to completion in an expeditious manner, estimated not to exceed six weeks after commencement date.
 - f. Marsupial agrees to reimburse Swan for fifty percent (50 %) of all labor and material costs incurred by Swan, for the installation and completion of the rip rap, log barb, and riverbank vegetation portions of the Marsupial Project. All other costs for completing the Marsupial Project shall be borne by Swan.
3. In consideration of Marsupial consenting to, and participating in, the construction, installation and completion of the Restoration Plan, Swan agrees to indemnify, and hold harmless Marsupial Properties, LLC and its members, including, but not necessarily limited to, Alision Rusack and Geoffrey Rusack, harmless from any and all claims or causes of action brought by third parties alleging liability for injury or damage to any person or property arising from, or in any way connected with, the design, implementation, construction or maintenance of the Restoration Project or any portion or component thereof, including the Marsupial Project.
4. To protect existing views from the Marsupial Parcel Swan agrees, for itself and all succeeding owners of the Swan Parcel as follows:
- a. Not to allow any vegetation located upon or within the east bank of the River or the adjacent twenty-five foot wide Riparian Zone on the Swan Parcel to exceed five feet in height.
 - b. Within the area of the Swan Parcel designated as floodplain under applicable Ketchum City Ordinances, no shrubs or trees shall be planted or maintained with the exception of those required by the terms of the approved and permitted Swan Property Restoration Plan, and shall not allow any of such vegetation to exceed heights required by said Restoration Plan or as may be reasonably necessary to sustain it.

It is further agreed that in the event Swan fails or refuses to maintain such vegetation density and height limitations, Marsupial, and any succeeding owner of the Marsupial Parcel, shall be entitled to enter upon the Swan Parcel to trim any

such vegetation accordingly, or to seek a court order of specific performance compelling the owner of the Swan Parcel to adhere to this requirement.

5. To the extent it will not impede or delay the completion of the Marsupial Project, Swan shall support and cooperate with any efforts undertaken by Marsupial to obtain required permits and entitlements for the construction of additional bank stabilization improvements on the Marsupial Parcel.
6. In the event Marsupial decides to remove from the Marsupial Parcel any existing mature cottonwood trees along the east bank of the River prior the completion of the bank stabilization work on the Marsupial Parcel, which will facilitate such removal by allowing it to be completed during the period when the riverbed will be the driest, Swan agrees to grant Marsupial and its contractors reasonable access at designated locations across the Swan Parcel for tree removal equipment, and agrees further, if requested to do so by Marsupial, to incorporate portions of any removed cottonwood trees, to the extent practical, in the bank stabilization component of the Restoration Plan. Any such tree removal is not included in the Marsupial Plan and shall be undertaken and managed by Marsupial at its sole cost and expense.
7. Swan agrees not to oppose in any manner any applications now or hereafter filed with the Army Corps of Engineers, the Idaho Department of Water Resources or the City of Ketchum for permits authorizing completion of the Marsupial Restoration Plan, and, upon request from Marsupial will provide written letters supporting approval of the plan to any or all of said regulatory entities.
8. The Provision of this Agreement shall run with the land, and shall bind and benefit the current owners of the Marsupial Parcel and the Swan Parcel, and any succeeding owners thereof. This agreement may be recorded in the records of Blaine County by either party hereto.

IN WITNESSES WHEREOF, the parties have executed this Agreement on the day and year first written above.

SWAN FAMILY TRUST AGREEMENT
Dated December 19, 2006

MARSUPIAL PROPERTIES, LLC

Robert Swan, Trustee

By: _____
Its: _____

Sandra Swan, Trustee

STATE OF IDAHO)
)
 ss.
County of _____)

On this ____ day of _____, 2020, before me, a Notary Public for said County and State, personally appeared **Robert Swan**, known or identified to me, to be the person whose name is subscribed to the within instrument as Trustee of the **Swan Family Trust Agreement, Dated December 19, 2006**, and acknowledged to me that he executed the same as such Trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at _____

STATE OF IDAHO)
)
 ss.
County of _____)

On this ____ day of _____, 2020, before me, a Notary Public for said County and State, personally appeared **Sandra Swan**, known or identified to me, to be the person whose name is subscribed to the within instrument as Trustee of the **Swan Family Trust Agreement, Dated December 19, 2006**, and acknowledged to me that she executed the same as such Trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at _____

STATE OF _____)
)
 ss.
County of _____)

On this ____ day of _____, 2020, before me, a Notary Public for said County and State, personally appeared _____, known or identified to me, to be the authorized agent and signer of **Marsupial Properties, LLC**, and the person who executed the foregoing instrument on behalf of said limited liability company, and acknowledged to me that such limited liability company executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC
Residing at _____

March 17, 2021

Via Email Only

Planning & Zoning Commission
City of Ketchum
c/o Suzanne Frick
P.O. Box 2315
Ketchum, ID 83340
sfrick@ketchumidaho.org

Re: Revised Swan River Restoration Project Stream Alteration Permit (P17-134)
Our File No. 12135-001

Dear Commissioners:

This letter is intended as a follow up to the March 9, 2021 Planning and Zoning Commission ("Commission") meeting regarding the Revised Swan River Restoration Project and as a response to Suzanne Frick's request for a letter outlining my clients', Geoff and Alison Rusack (the "Rusacks") requested conditions and/or requirements for the work on their property (the "Rusack Property") relating to Robert and Sandra Swans' (the "Swans") contingently approved Stream Alteration/Bank Stabilization Permit P18-131.

The Rusacks are submitting a letter contemporaneously that focuses on the request, but we wanted to take this opportunity to address the concerns that were raised during the March 9 meeting. First and foremost, we are baffled that certain members of the Commission would even consider voting against the clear recommendation in the staff report, which unequivocally recommends that the Commission follow the law and deny the proposed amendment for the following reasons: (1) it does not create a stable situation or permanent solution because it will increase velocity which can cause erosion of unstable banks; and (2) the rock sill will promote bed erosion and downcutting on the Rusack Property but without the previously proposed bank protection on the Rusack Property.

Despite the undisputed scientific evidence that the proposed amendment will not create a stable situation or a permanent solution, most of the Commission's deliberation focused on the self-serving story told by the Swans that the Rusacks have been unreasonable in their negotiations with the Swans. In fact, the focus of the

Commission's deliberation (and its forthcoming decision) must be that the Swans' proposed amendment simply does not meet the City's standards of evaluation under 17.88.050(E)14. For this reason, the Swans' proposed amendment is fatally flawed and must be denied.

Rather than denying the Swans' proposed amendment, however, some members of the Commission seemed to favor placing the burden on the Rusacks to solve the problem that the Swans have created for themselves. I would encourage the Commissioners to go back and read my March 4, 2021 letter, which better explains the history of this matter and the events that led to this current situation. Essentially though, the Swans' decision to unilaterally terminate negotiations with the Rusacks and submit their proposed amendment to the Commission rather than to consummate the agreement to grant the Rusacks the view corridor (that had been discussed and agreed upon for years) is what has placed the Commission in this dispute amongst neighbors.

Interestingly, a large portion of the Commission's deliberation on March 9 seemed to focus on the idea of equity – that it would be equitable to approve the Swans' proposed amendment because of the purported protection it would provide to the downstream neighbors without any thought given to the adverse impact on the Rusack Property. These comments seemed to be largely based on the public comments from owners in the Red Fox development ("Red Fox") which raised some significant questions regarding the validity of this argument grounded in "equity."

After discussions with Brittany Skelton and our engineer, Nick Kraus, it is clear that the impact on Red Fox would be the same whether the work pursuant to the original Swan permit or the proposed amendment to the permit gets done. What is not clear, however, is how any of this work protects the Red Fox property as was off-stated at the March 9 hearing and/or why the Red Fox owners cannot provide their own flood protection and would rather sacrifice the Rusack Property. The Rusacks are amenable to helping the Swans and the Red Fox neighbors via allowing work on the Rusack Property provided it does not adversely impact their existing view corridor over an existing scenic easement, floodplain and riparian zone.

The water flow adjacent to Red Fox is identified as an overflow ditch on the Chateaux of Northwood plat recorded in the Records of Blaine County, Idaho as Instrument Number 391749 ("Chateaux Plat") and not actually considered a channel of the Big Wood River. If anything, it appears that Red Fox gets an aesthetic benefit from the Swans' work as it will get a steady flow of water through that area, but we are at a loss as to what sort of protection would be provided to Red Fox as a result of this work.

Another focus of the deliberations was that the Rusacks are not “entitled” to the view corridor that they are requesting. The Swans also alleged that the Rusacks requested that the Swans alter their deed to increase the Rusacks property value. This allegation is simply not true. The preservation of the view corridor is not intended to be an alteration to the Swans’ deed. The Rusacks requested a restrictive covenant only to preserve their existing view corridor.

For a number of years, the Swans were amenable to a restrictive covenant as evidenced by the Flood Protection Agreement (“Agreement”) drafted by their attorney, a copy of which is attached as Exhibit A. The Agreement included a provision “to protect existing views” from the Rusack Property and a provision that the Agreement shall “run with the land.” Agreement, ¶¶ 4, 8. Inclusions of these provisions shows that the Swans were agreeable to granting the Rusacks the requested view corridor as recently as of June 2020 when they presented the Agreement for consideration by the Rusacks.

Moreover, Plat Note No. 1 of the Chateaux Plat (the Plat the Swans’ property is subject to) already provides that a “25-foot scenic easement shall exist along the east bank of the Big Wood River” that disallows the “construction of any fence, deck or other structure within said easement.” Also, a majority of the view corridor that is being sought by the Rusacks is contained within the floodplain and/or the riparian zone – both areas in which the Swans have restrictions on building pursuant to City code. Quite literally, the view corridor boils down to the permitted maximum height of the vegetation that, for the most part, would already be in a floodplain area, riparian zone, and/or a scenic easement area.

In view of the foregoing, the question should not be, “why aren’t the Rusacks willing to take the work on themselves?” as posited by at least one of the Commissioners. In any event, the answer to this question is simply that the work on the Rusack Property would not be required *but for* the work proposed on the Swans’ property. The question should be, “why are the Swans so resistant to granting the Rusacks the view corridor that they had previously agreed to for years?” Again, especially given that the area of concern already has restrictions on building from the Chateaux Plat and from the City code.

Hopefully it will become clear from a review of the Rusacks’ letter and this letter that the Rusacks are being reasonable in their requests. The Swans’ decision to end private party contract negotiations and pursue the amendment (that unquestionably damages the Rusack Property) is what has created the current situation.

In conclusion, there is uniform agreement that the best project for the Big Wood River, the Swans, the Rusacks, and Red Fox is the permit that has already been

City of Ketchum
Planning & Zoning Commission
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contingently approved. If the Swans can stand by the agreement drafted by the Swans' attorney with limited additions as outlined in my client's letter, it will result in the best and most holistic solution. The fact of the matter, however, remains that the proposed amendment does not comply with the City's code and must be denied.

Please let me know if you have any additional questions.

Sincerely,

LAWSON LASKI CLARK, PLLC



Edward A. Lawson

cc: Client
Nick Kraus [nick@quadrant.cc]

FLOOD PROTECTION AGREEMENT

THIS AGREEMENT is made and entered into this ___ day of _____, 2020, by and between ROBERT SWAN and SANDRA SWAN, as trustees of the SWAN FAMILY TRUST AGREEMENT, Dated December 19, 2006, hereinafter referred to as “Swan”, and MARSUPIAL PROPERTIES, LLC, a Delaware limited liability company, hereinafter referred to as “Marsupial”.

RECITALS

- A. Swan is the owner of Lots 11 and 12 of Chateau of Northwood Subdivision, Blaine County, Idaho, according to the official plat thereof, recorded June 27, 1996, as Instrument No. 391749, records of Blaine County, Idaho, hereinafter referred to as the “Swan Parcel”.
- B. Marsupial is the owner of Lot 1 of the Lot Line shift: Lots 1 and 2, resubdivision of Lot 2 of Northwood PUD Subdivision, amended July, 1985, according to the official plat thereof, recorded as Instrument No. 264427, records of Blaine County, Idaho, hereinafter referred to as the “Marsupial Parcel”.
- C. Both the Swan Parcel and the Marsupial Parcel are bisected by the east bank of the Big Wood River, (“River”) and all portions of both Parcels located west, or waterward, of the east bank comprise a portion of the bed of the River.
- D. During the River’s flood event during the Spring of 2017, the east bank of the River located adjacent to both the Swan Parcel and the Marsupial Parcel was breeched and damaged, and the flood waters then proceeded across, and caused extensive damage to, the established Floodplain and twenty-five foot wide Riparian Zone on the Swan Parcel.
- E. In an effort to repair damages caused to both the Swan Parcel and to a portion of the Marsupial Parcel by the 2017 River flood event and to prevent similar occurrences in the future, Swan retained Brockway Engineering, PLLC, to develop the “Swan Property Restoration Plan”, a copy of which is attached hereto as Exhibit “A” (“Restoration Plan”), which sets forth in detail the following list of improvements to the River system to be installed and constructed on the Swan Parcel and on portions of the Marsupial Parcel:
 - i. On the Swan Parcel, the proposed improvements include channel regrading, including gravel removal and stabilization of the east bank of the River, together with revegetation of the established Riparian Zone along with reclamation and revegetation of the established Floodplain.

- ii. On the Marsupial Parcel, the proposed improvements, herein referred to as the “Marsupial Project”, shall be completed as detailed in Exhibit “B” attached hereto (“Channel Modifications and Bank Stabilization Work on Marsupial Parcel”)
- F. Other portions of the Riverbank and Floodplain areas fronting the Marsupial Parcel are also in need of stabilization and restoration work due to the Big Wood River flood event of 2017, and Marsupial is in the process of applying to the Army Corps of Engineers, the Idaho Department of Water Resources and the City of Ketchum for the required permits to allow the work to be completed. (“Marsupial Restoration Plan”)
- G. Swan has secured all required approvals and permits for the Restoration Plan from U.S. Army Corps of Engineers, the Idaho Department of Water Resources and the City of Ketchum, and the parties hereto desire to herein set forth the terms and conditions upon which they will participate in its implementation, construction and maintenance.

AGREEMENT

NOW, THEREFORE, in accordance with the terms and conditions hereof, the parties agree as follows:

1. The parties hereto both consent to, and approve, construction and completion of the entire Restoration Plan.
2. Marsupial hereby agrees to the construction and completion of the Marsupial Project by Swan, subject to the following terms and conditions, which Swan hereby accepts and agrees to abide by:
 - a. Construction of the Marsupial Project shall be exclusively undertaken and completed by contractors and material suppliers selected and retained by Swan, and all costs incurred therefore shall be the responsibility of Swan, subject to reimbursement from Marsupial as set for hereinbelow.
 - b. All construction related work on the Marsupial Project shall be conducted under the supervision of Brockway Engineering, PLLC., and shall be consistent with the plans and specifications detailed in the Restoration Plan.
 - c. Brockway Engineering, PLLC and the contractors and material suppliers retained by Swan to construct and complete the Marsupial Project shall be entitled to reasonable access to the Marsupial Parcel for those purposes.
 - d. All construction work on the Marsupial Project shall, to the extent practicable, be completed from the bed of the River, rather than landward

of the east bank on the lawn and landscaped areas of the Marsupial Parcel. Should any areas on the Marsupial Parcel be damaged during construction this shall be repaired and restored by the construction team to the reasonable satisfaction of Marsupial.

- e. Construction shall commence as soon as conditions in the River permit, on a specific date mutually agreed upon by the parties, but in no event later than October 1, 2020, and shall be diligently pursued to completion in an expeditious manner, estimated not to exceed six weeks after commencement date.
 - f. Marsupial agrees to reimburse Swan for fifty percent (50 %) of all labor and material costs incurred by Swan, for the installation and completion of the rip rap, log barb, and riverbank vegetation portions of the Marsupial Project. All other costs for completing the Marsupial Project shall be borne by Swan.
3. In consideration of Marsupial consenting to, and participating in, the construction, installation and completion of the Restoration Plan, Swan agrees to indemnify, and hold harmless Marsupial Properties, LLC and its members, including, but not necessarily limited to, Alision Rusack and Geoffrey Rusack, harmless from any and all claims or causes of action brought by third parties alleging liability for injury or damage to any person or property arising from, or in any way connected with, the design, implementation, construction or maintenance of the Restoration Project or any portion or component thereof, including the Marsupial Project.
4. To protect existing views from the Marsupial Parcel Swan agrees, for itself and all succeeding owners of the Swan Parcel as follows:
- a. Not to allow any vegetation located upon or within the east bank of the River or the adjacent twenty-five foot wide Riparian Zone on the Swan Parcel to exceed five feet in height.
 - b. Within the area of the Swan Parcel designated as floodplain under applicable Ketchum City Ordinances, no shrubs or trees shall be planted or maintained with the exception of those required by the terms of the approved and permitted Swan Property Restoration Plan, and shall not allow any of such vegetation to exceed heights required by said Restoration Plan or as may be reasonably necessary to sustain it.

It is further agreed that in the event Swan fails or refuses to maintain such vegetation density and height limitations, Marsupial, and any succeeding owner of the Marsupial Parcel, shall be entitled to enter upon the Swan Parcel to trim any

such vegetation accordingly, or to seek a court order of specific performance compelling the owner of the Swan Parcel to adhere to this requirement.

5. To the extent it will not impede or delay the completion of the Marsupial Project, Swan shall support and cooperate with any efforts undertaken by Marsupial to obtain required permits and entitlements for the construction of additional bank stabilization improvements on the Marsupial Parcel.
6. In the event Marsupial decides to remove from the Marsupial Parcel any existing mature cottonwood trees along the east bank of the River prior the completion of the bank stabilization work on the Marsupial Parcel, which will facilitate such removal by allowing it to be completed during the period when the riverbed will be the driest, Swan agrees to grant Marsupial and its contractors reasonable access at designated locations across the Swan Parcel for tree removal equipment, and agrees further, if requested to do so by Marsupial, to incorporate portions of any removed cottonwood trees, to the extent practical, in the bank stabilization component of the Restoration Plan. Any such tree removal is not included in the Marsupial Plan and shall be undertaken and managed by Marsupial at its sole cost and expense.
7. Swan agrees not to oppose in any manner any applications now or hereafter filed with the Army Corps of Engineers, the Idaho Department of Water Resources or the City of Ketchum for permits authorizing completion of the Marsupial Restoration Plan, and, upon request from Marsupial will provide written letters supporting approval of the plan to any or all of said regulatory entities.
8. The Provision of this Agreement shall run with the land, and shall bind and benefit the current owners of the Marsupial Parcel and the Swan Parcel, and any succeeding owners thereof. This agreement may be recorded in the records of Blaine County by either party hereto.

IN WITNESSES WHEREOF, the parties have executed this Agreement on the day and year first written above.

SWAN FAMILY TRUST AGREEMENT
Dated December 19, 2006

MARSUPIAL PROPERTIES, LLC

Robert Swan, Trustee

By: _____
Its: _____

Sandra Swan, Trustee

STATE OF IDAHO)
)
 ss.
County of _____)

On this ____ day of _____, 2020, before me, a Notary Public for said County and State, personally appeared **Robert Swan**, known or identified to me, to be the person whose name is subscribed to the within instrument as Trustee of the **Swan Family Trust Agreement, Dated December 19, 2006**, and acknowledged to me that he executed the same as such Trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at _____

STATE OF IDAHO)
)
 ss.
County of _____)

On this ____ day of _____, 2020, before me, a Notary Public for said County and State, personally appeared **Sandra Swan**, known or identified to me, to be the person whose name is subscribed to the within instrument as Trustee of the **Swan Family Trust Agreement, Dated December 19, 2006**, and acknowledged to me that she executed the same as such Trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR IDAHO
Residing at _____

STATE OF _____)
)
 ss.
County of _____)

On this ____ day of _____, 2020, before me, a Notary Public for said County and State, personally appeared _____, known or identified to me, to be the authorized agent and signer of **Marsupial Properties, LLC**, and the person who executed the foregoing instrument on behalf of said limited liability company, and acknowledged to me that such limited liability company executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

NOTARY PUBLIC
Residing at _____

From: [Suzanne Frick](#)
To: "[Sandra Swan](#)"; [Evan Robertson \(erobertson@rsidaholaw.com\)](mailto:erobertson@rsidaholaw.com); "charles.g.brockway@brockwayeng.com"
Subject: Response To Rusack Letter
Date: Wednesday, March 17, 2021 8:25:36 PM
Attachments: [Rusack Letter to City PZ w Attachment.pdf](#)
[Planning Zoning Commission Letter from EAL with Exhibit A.pdf](#)

Greetings—

Attached, please find the response from the Mr. Rusack concerning their requirements in order for the original stream alternation permit P18-131 to proceed.

I ask that you provide me with a response to their request by end of day Monday March 22 or sooner. Your response, and the Rusack's letters, will be provided to the Planning and Zoning Commission for Tuesday.

Thank you,
Suzanne

SUZANNE FRICK | CITY OF KETCHUM

PLANNING AND BUILDING | KURA DIRECTOR

P.O. Box 2315 | 480 East Ave. N. | Ketchum, ID 83340

o: 208.727.5086 | m: 208.721.2765

sfrick@ketchumidaho.org | www.ketchumidaho.org

Planning & Zoning Commission
City of Ketchum
% Suzanne Frick
sfrick@ketchumidaho.org

March 21st, 2021

Via Email Only

Re: Swan Response to Rusack's Letter

Dear Commissioners,

From the very start of this process we have strived to work with ALL parties to mitigate risks, alleviate concerns and comply with all written laws and ordinances. Despite our best efforts, our neighbors are clearly trying to take advantage of our misfortune to garner benefits unrelated to our permitted work. We consider this to be wholly unacceptable, not to mention it has placed us all in this very uncomfortable position of having to work around the Rusack's demands, rather than the law and common sense.

To put it very simply, our original offer still stands - we will pay to mitigate all known risks and will agree that unless otherwise required in our permit, no vegetation associated with our permitted work will impede the Rusack's view for as long as we own the property. We will not grant them view corridor rights across our property for eternity, nor will we tie our two permits together. We have amended our permits in an attempt to detach ourselves from the constraints the Rusack's are imposing, not increase them. Furthermore, the suggestion that the version of the legal agreement they presented was both written and agreed to by us is utterly false. The document was coauthored by both our attorneys and was never agreed to by either party. It was simply yet another attempt to get the Rusack's constantly changing demands down in writing.

We find it very disconcerting that the Rusack's feel they deserve something in return for allowing us to reclaim some of their most valuable land and reinforce their unstable and unprotected bank, while trying to protect our property. Both of his hired engineers recommended he protect his entire bank, and both Mr. Rusack and his current engineer admitted these actions would make the Rusack's far better off than they are today. Furthermore, we are asking nothing more of the Rusack's than they are asking of their upstreams neighbors or are seeking permission to do to their own property. Our permit does not require staging ANY heavy equipment on his land yet his permitted work would. He is

requesting a temporary diversion dam be placed in front of his neighbors, and his permit includes log barbs, vegetation and bank reinforcement on both his and his neighbors property. Why are these things acceptable to him on his own permit but not ours, especially when we have made it clear our permitted work will NOT impede his view? Similarly, if the Rusack's are so concerned with erosion why won't they agree to our work or amend their own permit?

In summary, we have always been, and remain more than willing to mitigate all risks, but we are not willing to endure more delays or decrease our property value for the sole benefit of increasing the value of the Rusack's, by granting them something no homeowner in Ketchum is entitled to by law. Despite more than 3 years of trying to reach an agreement with the Rusack's, we are willing to make one more attempt to reach a mutually acceptable agreement prior to the next meeting, if they are willing to drop their request for view corridor rights.

Sincerely,

 + 

Bob & Sandra Swan