



# City of Norman, OK

Municipal Building  
Council Chambers  
201 West Gray  
Norman, OK 73069

## Master

**File Number: K-1617-139**

**File ID:** K-1617-139

**Type:** Contract

**Status:** Non-Consent Items

**Version:** 1

**Reference:** 31

**In Control:** City Council

**Department:** Legal Department

**Cost:** \$200,000.00

**File Created:** 06/21/2017

**File Name:** 10 Mile Flat Drainage Structure Contract

**Final Action:**

**Title:** CONTRACT K-1617-139: A PARTICIPATION AGREEMENT BY AND BETWEEN THE CITY OF NORMAN, OKLAHOMA, ARBUCKLE PROPERTIES, INC.; STEVEN RICH; AND BELLAROSE, L.L.C., FOR THE FUNDING AND CONSTRUCTION OF THE WEST MAIN STREET DRAINAGE STRUCTURE AND SPAN BRIDGE AND BUDGET APPROPRIATION FROM THE CAPITAL FUND BALANCE IN THE AMOUNT OF \$200,000 FOR THE CITY'S SHARE OF THE PROJECT.

**Notes:** ACTION NEEDED: Motion to approve or reject Contract K-1617-139 with Arbuckle Properties, Inc., BellaRose, LLC and Steven Rich in the amount of \$200,000; and if approved, authorize the execution thereof and appropriate \$200,000 from the Capital Fund Balance (050-0000-253.20-00) to Project DR0066, West Main Street Drainage Structure-South Bridge, Construction (050-9717-431.61-01).

ACTION TAKEN: \_\_\_\_\_

**Agenda Date:** 06/27/2017

**Agenda Number:** 31

**Attachments:** Participation Agreement, Exhibit A - Project Map, Exhibit B - Drainage Analysis, Exhibit B - Roadway Plans, Exhibit C - Cost Estimate

**Project Manager:** Leah Messner, Assistant City Attorney

**Entered by:** sencinias@normanok.gov

**Effective Date:**

### History of Legislative File

Ver- sion:	Acting Body:	Date:	Action:	Sent To:	Due Date:	Return Date:	Result:
---------------	--------------	-------	---------	----------	-----------	-----------------	---------

### Text of Legislative File K-1617-139

Body

**BACKGROUND:** In 1988 the City of Norman initiated litigation concerning the area west of 48th at West Main Street in the area known as Ten Mile Flat Creek. This litigation was the result of the property owner conducting earth work in the form of a levy on West Main Street which ultimately caused an impoundment of storm water from the Ten Mile Flat Creek. The City of Norman instituted legal action in January of 1988 in Cleveland County District Court, Case No. CJ-1988-58, alleging that the earth work conducted by the property owner on West Main Street west of 48th Avenue constituted a public nuisance. The City requested that the Court find that there was a public nuisance and that the property owner be required to abate the alleged nuisance.

In February of 1989 the Court determined that the earth work was a public nuisance and the City was granted an injunction prohibiting the property owner to perform any additional work on the property. The property owner appealed that finding and a hearing on the abatement issue was ordered. In February of 1990 an abatement order was entered requiring the property owner, i.e. Frederick Spitz, to abate the nuisance.

The Order provides that the property owner is to remove the Main Street extension fill materials; there shall be installed ten 72" pipes for Main Street extension for the Ten Mile Flat Creek Waterway to carry 2500 cu.ft. per second; the City will provide five 10" pipes for this purpose; to continue the Ten Mile Flat Creek Waterway south of Main Street and southeasterly to the South Canadian River; the owner may construct a low water crossing south of Main Street across the waterway; allow some fill of the flood plain subject to FEMA and Corp of Engineers' permits; and construct Brookhaven Creek Waterway. The abatement Order further provided that Spitz was to maintain the Ten Mile Flat Creek Waterway during his ownership of the property, the City would be allowed to inspect the work for compliance with the Court Order, and the City be allowed to approve the water way plans and accept the applicable drainage easements.

The Order further provided in paragraph 20:

In no event shall the plaintiff (City), by consenting to the entry of this judgment, order and decree, be held liable or responsible for implementing the solution set forth in paragraphs 1-19 above.

An appeal of the February of 1990 Order to the Court of Appeals resulted in the Opinion that the District Court Order was too vague and the matter was remanded to District Court to specify remedial actions. In February of 1992 the District Court Abatement Order of February of 1990 was readopted. In April of 1993, the property owner, Frederick Spitz, filed bankruptcy. Subsequently, the property was acquired by Robert Moore and Arbuckle Properties.

Subsequent to the bankruptcy filing and the acquisition of the property by new property owners, in December of 1994 the District Court modified the abatement Order wherein Arbuckle, Moore, and the City of Norman agreed to:

Lower Main Street road bed for Ten Mile Flat Overflow Channel (100 year storm - 10,000 CFS); install ten 72" pipes for channel directed to South Canadian River to cover lower flows; and relieve flooding at confluence at Brookhaven and Ten Mile Flat Creek

The Order also included the following:

Paragraph 9: "Property Owners . . . grant the right of ingress and egress over, across, and onto their property to themselves and others for the purposes of implementing and maintaining of said nuisance abatement solution. However, no portion of the costs of maintaining of the road, low water crossing, the metal pipes, for the relocated Ten Mile Flat Creek shall be paid or borne by Robert W. Moore, Arbuckle Properties, Inc., or their successors in interest."

Paragraph 10: "Property Owners Arbuckle Properties, Inc. requests and is granted as an additional modification that they be allowed to maintain, with Robert W. Moore's approval, the roadway and low water crossing for access with application of gravel or other suitable material. . ."

Paragraph 13: "The Court notes that the City's engineers have reviewed the proposed modified abatement solution and it is believed the proposal, when fully implemented, will abate the nuisance that is the subject of this lawsuit, i.e. the impoundment of water caused by the elevation of the Main Street road bed . . . ."

The City complied with this Order by providing the tinhorns as required by the Order. The structure was inspected by the City and the proposed solution was adequate for the property owners until a flood in August of 2007. This flood washed out the corrugated metal pipes rendering the roadway impassable for access to the property owners. The property owners allege the structure washed out as a result of lack of maintenance by the City upstream and downstream of the structure. Beginning in the fall of 2007, the property owners have

been in contact with the City requesting the City correct the problem. Their complaint is that as a result of the structure being washed out that they do not have access to the property.

Over the years since the 2007 flood, the City and the property owners have considered various solutions for this issue. Some of those solutions have included re-installation of the Court-ordered tin horns; construction of a span bridge; construction of a low water crossing; and improvement of 60th Avenue to provide alternative access. All of these options have been discarded due to either ineffectiveness or cost.

More recently, the parties have reopened the discussion of the construction of a span bridge at this crossing location. This solution is appealing to the City's Department of Public Works because they advise that reinstallation of the Court-ordered tin horns ("corrugated metal pipes" or "CMPs") is not an effective solution to the drainage issues in this area because of high maintenance costs to monitor and remedy tree limbs or other debris which may collect upstream of the CMPs. The span bridge solution is also appealing to the effected property owners, currently Arbuckle Properties, Inc., Steven Rich, and BellaRose, LLC, as it provides an opportunity to construct an improved crossing for their vehicles and farm equipment.

**DISCUSSION:** As an initial matter, the proposed Agreement is subject to the approval of the Cleveland County District Court through modification of the Court's Orders in *City of Norman v. Spitz*, Cleveland County District Court Case No. CJ-1988-58.

The scope of the proposed project includes the cleaning of Ten Mile Flat Creek channel both up and downstream from the location of the crossing. Bank stabilization will also be required and will include establishing and fortifying the banks of the stream at the crossing location to provide defined unrestricted flow of storm water drainage. A free span bridge will also be constructed from bank to bank at a minimum of twenty feet in width. A motorized gate will also be installed on Main Street to the east of the crossing location and to the west of the existing cul-de-sac. The gate will limit access to the private road and bridge.

The project is proposed to be constructed by the City of Norman via a contractor chosen through the statutory competitive bidding process. For that reason, there are several conditions that must be met prior to letting the project out to bid. All regulatory approvals must be received prior to initiation of bidding and construction of the Project. The regulatory approvals include, but are not limited to, compliance with City standards for construction projects and approval of the Project by the City of Norman Floodplain Permit Committee.

The Project is estimated to cost \$500,000. This cost estimate includes up and downstream cleaning; bank stabilization; bridge construction; and installation of the motorized gate. The City of Norman agrees to provide such up and downstream channel cleaning, clearing and bank stabilization as is required to adequately provide for the flow of storm water from the Ten Mile Flats at the Crossing Location and to provide funding in the amount of \$200,000. Arbuckle Properties, Inc. agrees to provide funding in the amount of \$50,000. BellaRose, LLC agrees to provide funding in the amount of \$75,000, and these funds will be used to construct the gate with the balance applied to other project costs. Steven Rich intends to submit a competitive bid to the City for the construction of the project and absorb his cost share through contribution of labor, overhead, and would be profit to accomplish the project if he is the successful bidder. Any funds not used for the project will be returned to the City, Arbuckle Properties, Inc., and BellaRose, LLC on a pro-rata basis.

As a public construction project, the successful bidder will be required to submit a Statutory Bond, a Performance Bond, and a one-year Maintenance Bond in an amount equal to the amount bid by the successful bidder. However, since Mr. Rich is planning on contributing to the Project "in kind" if he is the successful bidder, a pre-bid Bond amount equal to the engineer's estimate will be required as a method to assure the project will be completed if Mr. Rich is not the successful bidder. The City will be allowed to inspect the construction progress of the project on a daily basis. In addition, as a cooperative project between the parties, the parties agree to jointly support an application for a floodplain permit from the City of Norman Floodplain Permit Committee, with the City waiving the Floodplain permit fee in this instance.

Once the project is completed, Arbuckle Properties, Inc. and BellaRose, LLC will each grant a private roadway easement across their respective properties to Steven Rich to allow him to access his property. Once those easements are granted, the Rich property will be eligible to apply for City building permits. The Arbuckle property will also be eligible for building permits at the completion of the project. The portion of Main Street

west of the motorized gate will be classified by the City as a private road. The property owners will also grant any necessary easements to the City of Norman for maintenance of the drainage ways.

As to maintenance, the selected contractor will submit a maintenance bond. The bond will be for a one year term beginning at the date of the City's final acceptance of the project. Upon expiration of the maintenance bond, the City will accept maintenance responsibility for the drainage channels and the drainage way abutments, and the property owners, and any successors, shall accept the maintenance responsibility for the private bridge. The private bridge includes the bridge structure placed on the drainage way abutments; support structures for the bridge; and the roadway surface of the bridge.

The City's cost share in this Participation Agreement is \$200,000. Although this share will be appropriated with approval of the contract to be used toward the Project as outlined in the Participation Agreement, there are several contingencies that will need to be met for the Project to proceed. Those contingencies include appropriate regulatory approvals, receipt of contributions from the other Participating Parties, completion of engineering plans and specifications that are in a suitable format to submit the Project for competitive bid, including an engineer's estimate of Project cost; receipt of pre-bid bonds in the amount of the engineer's estimate, among others.

Council has discussed this issue over the years in several Executive Sessions, the most recent one being held on June 13, 2017. As noted, this matter concerns potential litigation in C-88-58 to amend the previously ordered abatement solution to conform to the proposed agreement which will provide a more efficient means to handle low flow drainage from the Ten Mile Flat, preserve the overflow channel to better manage the 100 year storm event at that location, and allow the property owner to place a private span bridge structure to provide access to their properties west of the crossing location.

**RECOMMENDATION:** The litigation and issues surrounding this Ten Mile Flat Drainage way have been ongoing for almost twenty years. The proposed agreement is the culmination of those years of negotiation, and it represents a path forward toward resolution of the litigation. The Participation Agreement represents a cooperative approach between the City and affected property owners to address a storm water issue that enhances storm water efficiency at this location and also addresses an access issue for these property owners. For that reason, Staff recommends approval of the Participation Agreement for the Funding and Construction of the West Main Street Drainage Structure and Span Bridge, Contract K-1617-139, and appropriation of \$200,000 from the capital fund balance (050-0000-253.20-00) to account number 050-9717-431.61-01, #DR0066 which represents the City's share of this Project.