

**FIRST AMENDMENT TO THE PARTICIPATION AGREEMENT
FOR THE
MISTY LAKE DAM REPAIR PROJECT**

This FIRST AMENDMENT TO THE PARTICIPATION AGREEMENT FOR THE MISTY LAKE DAM REPAIR PROJECT (the “Amendment”) is made on or as of the ____ day of _____, 2021, by and between THE CITY OF NORMAN, an Oklahoma Municipal Corporation (the “City”); NORMAN MUNICIPAL AUTHORITY, an Oklahoma Public Trust (“NMA”); SUMMIT LAKES PROPERTY OWNERS ASSOCIATION (“Summit Lakes POA”); SUMMIT LAKES VILLAS PROPERTY OWNERS ASSOCIATION (“Summit Villas POA”), and SUMMIT LAKES, L.L.C., as an Oklahoma limited liability company (“Developer”) which are collectively herein referred to as “Parties.”

WITNESSETH:

WHEREAS, Parties entered into a PARTICIPATION AGREEMENT FOR THE MISTY LAKE DAM REPAIR PROJECT on the 27th day of June 2017, (the “**Agreement**”) in order to make repairs to the Summit Lakes Addition storm water drainage system, which is part of a subdivision in the City of Norman located between 24th Avenue SE and 36th Avenue SE and south of Alameda Street known as Summit Lakes Addition, and Summit Lakes Villas Addition;

WHEREAS, the Summit Lakes Addition storm water drainage system is recognized as important to adequately address storm water retention and runoff concerns that could impact citizens of Norman who live in Summit Lakes Addition, as well as other citizens of Norman who may be impacted by a failure of the Misty Lake dam which is classified by the OWRB as a high hazard dam; and

WHEREAS, the parties wish to amend the following paragraphs in the Agreement so as to address the holding of funds associated with the project and as to timing of when and how to allow the NMA to proceed with putting the completed engineering plans out for request of contractor qualifications or bids to make the improvements.

NOW, THEREFORE, in consideration of the premises and mutual covenants and agreements herein contained, and for other good and valuable consideration, the receipt of which are hereby acknowledged, the parties hereby agree to the Amendment as follows:

SECTION 1.2(g) shall be added in its entirety, as follows:

(g) Any assessments that are subject to private financing may be remitted by the City directly to a Lender, at the subject POA’s direction. Any assessments that are not subject to financing shall be tendered directly to the POA in the manner directed by the POA. The number of assessments pursuant to this Agreement, and the amounts thereof, may be modified at the direction of the subject POA, based upon the terms of the assessment approved by that POA. Any applicable financing interest may be collected by the City, at the direction of the subject POA.

SECTIONS 1.3(c) and (d) are hereby amended in their entirety to state as follows:

- (c) For the purposes of all matters concerning the Summit Lakes dam and related improvements, as such matters pertain to the issues that gave rise to the Agreement, Developer shall allow each of the sixty two (62) lots that were final platted in Section 11 to be subject to the proposed assessment amount in Exhibit B of the Agreement of \$808.67 per lot. Of note, the Agreement was executed at a time when 69 lots were preliminarily planned for Section 11. However, through final design and platting, only 62 lots were final platted. Therefore, additionally, in a gesture of good faith to assist the project to completion, but without any obligation to do so pursuant to the original Agreement, subject to the terms herein, Developer voluntarily undertakes an obligation herein to contribute the difference of \$5,660.73 to the Section 11 advance assessments amount.¹
- (d) The Developer hereby agrees, through Developer's sole discretion, to tender to the NMA, pursuant to Section 1.4(a), an advance amount of \$808.67 for each of the 62 final platted Section 11 lots, plus the additional voluntary contribution of \$5,660.73, for a total of \$55,798.27, three (3) days prior to the City Council's consideration of a contract for selection, acceptance, award, and Mayoral execution of a Construction Manager at Risk ("CMAR") to proceed with bids addressing the entirety of the repairs and improvements as put forth in the engineered plans and specifications as were prepared by Cardinal Engineering pursuant to the Agreement.² In the event that such contributions are tendered to the NMA, but the City Council thereafter does not accept and award the contract, then all such funds shall be immediately returned to the Developer. The Developer's advance payment of 62 Section 11 lot assessments, and the additional contribution of \$5,660.73, shall be conditional and contingent upon each of the following provisions:
- (1) Prior to the City proceeding to CMAR selection, Developer shall have confirmed in writing that it obtained private a financing commitment for the advance payments and additional voluntary

¹ As per the original Agreement, any Section 11 assessments were not to be paid to the POA's Lender until each applicable Section 11 lot had been sold, and only upon such occasion that such sale had closed to an unaffiliated third party bona fide buyer and end user/occupant of the lot (not the builder).

² It is noted per the Agreement that the Section 11 lots were not to be assessed until the closing to a bona fide third party, non-builder, purchaser for occupancy as a resident, and that no interest payment and no assessment payment were to become due or obligated upon any Section 11 lot unless and until such lot had closed upon those terms. None of the Lots in Section 11 have been sold as such and therefore, the \$808.67 per 62 final platted lots is not owed at this time under the original Agreement, and has thus been included as a voluntarily-undertaken obligation of the Developer.

contribution on terms and conditions acceptable to Developer in Developer's sole and absolute discretion; and

(2) Except only as provided in Section 1.4 or any payment required by the terms of the original Agreement, Developer shall not be required to contribute any further amounts for any repairs, improvements, remedies, damages, maintenance, rehabilitation, or restoration costs or expenses as related to the Summit Lakes dam.

Developer shall take full responsibility for collection of any reimbursements attributable to Developer resulting from Developer's voluntary advance payments of the assessments of the Section 11 lots as agreed to in this Amendment, and shall, according to Developer's sole and absolute discretion, opt to pursue any measures necessary to collect any reimbursements attributable to each Section 11 lot at the time of sale of each lot. Developer may, at Developer's sole and absolute discretion, obtain private financing to fund the advance assessments agreed to herein attributable to Section 11 lots. However, no provision of this Agreement shall be construed to place any responsibility on any other Party to collect, reimburse or assess the construction proceeds attributable to Section 11, nor place any responsibility upon the City to remit any funds to Developer's lender for any assessments attributable to Section 11 lots.

SECTION 1.4(a) is hereby amended in its entirety to state as follows:

(a) Upon closing of private financing, and three (3) days prior to City Council's consideration of a CMAR contract for acceptance, award, and Mayoral execution addressing the entirety of the repairs and improvements as put forth in the engineered plans and specifications as were prepared by Cardinal Engineering pursuant to the Agreement, the funding from the POA's in the aggregate amount of **FOUR HUNDRED NINETY-ONE THOUSAND SIX HUNDRED SEVENTY ONE AND 73/100 DOLLARS (\$491,671.73)** and the Developer's funding and advance assessments of Section 11 lots pursuant to Section 1.3(d) in the aggregate amount of **FIFTY-FIVE THOUSAND SEVEN HUNDRED NINETY-EIGHT AND 27/100 DOLLARS (\$55,798.27)** shall be paid over to the NMA and shall be placed in a separate NMA bank account at a third party financial institution, with such account to be specifically designated for the Misty Lake Dam Repair Project. The amounts so paid to the NMA are for convenience sometimes hereinafter referred to as the "original Tendered Amounts." In the event that such original Tendered Amounts are paid to the NMA, but the City Council thereafter does not accept and award the subject CMAR contract or GMP amendment, then all such original Tendered Amounts shall be immediately returned to the respective payors thereof. In the event that the CMAR presents a GMP contract amendment amount in excess of the original Tendered Amounts, the parties shall endeavor in good faith to come to a solution or accommodation that allows the project to move

forward, including but not limited to (i) adjustments to the project scope that accomplish the project goal of structure repair as provided in 1.4(c)(2) below, and (ii) an increase in the Tendered Amounts of as much as ten percent (10%) of each party's share of the original Tendered Amounts, the agreement for which accommodations shall not be unreasonably withheld. The NMA agrees to provide copies of bank statements from such account to the Parties monthly, or from time to time upon reasonable request. All cash contributions not provided through private financing, or previously paid, shall also be paid to the NMA three (3) days prior to the award and execution of a contract to a contractor(s) to proceed with the repairs. The NMA and City shall provide each of the private Parties with copies of all construction drawings and specifications, and the awarded contract.

SECTION 1.4(c)(2) is hereby amended as follows:

(3) The parties acknowledge and agree that Change Orders to the CMAR contract and/or executed GMP Amendment, shall:

- Be presented to the Developer, Summit Lakes POA and Summit Lake Villas POA for consideration in a writing including the following information :

(a) the specific change in the CMAR contract and/or GMP Amendment including, without limitation, and as applicable (i) modifications of the description, amount, or timing of the work to be performed, (ii) modifications of the manner in which the work will be performed, (iii) modifications of the description, specifications , or amount, of the materials to be supplied or utilized, and (iv) provisions for additional goods or services; (b) the GMP established in the GMP Amendment, and (c) the adjustment, if any, to the time allowed by the CMAR contract for the CMAR to fulfill its obligations under the CMAR contract; **and**

- Be responded to in writing by or on behalf of each of the Developer, Summit Lakes POA, Summit Lake Villas POA within ten (10) business days of each party's receipt of notice of the requested Change Order. A failure to respond within ten (10) days will constitute approval by that party. A party may pose questions or request additional information, which shall be provided in five (5) business days, after which the parties shall have five (5) business days to provide a final response to the change order request. The parties' agreement to Change Orders approved by the OWRB, funded by the

City, and solely beneficial to the NMA, shall not be unreasonably withheld.

Upon the unanimous written prior approval of a proposed Change Order by Developer, Summit Lakes POA, Summit Lake Villas POA, and NMA, all additional proceeds not voluntarily funded by the NMA and attributable pro rata to Developer, Summit Lakes POA, Summit Lake Villas POA shall be paid over to NMA three (3) days prior to the City Council's consideration of, acceptance, award, and Mayoral execution of the Change Order. For purposes of this Agreement, "pro rata" shall mean that the total amount owed for any Change Order(s) divided by the total number of 670 lots and applied as an equal assessment to each such lot as follows: (a) Summit Lakes is responsible for the share attributable to 542 lots; (b) Summit Lake Villas is responsible for the share attributable to 66 lots; and (c) the Developer is responsible for the share attributable to 62 lots.

In the event that the sum of:

- (a) the original Tendered Amounts and all prior increases thereof made pursuant to the provisions of Section 1.4(a)

plus

- (b) the amount of the proposed Change Order's adjustment to the guaranteed maximum price as fixed by the original GMP Amendment to the CMAR contract is equal to or less than 110% of the original Tendered Amounts, then and in that event written approval of the proposed Change Order shall not be unreasonably withheld by any party to this Agreement.

Anything in this Agreement to the contrary notwithstanding, there is no agreement by Developer, Summit Lakes POA, or Summit Lake Villas POA to consent to, approve or bear any cumulative financial obligations by reason of this Agreement that add up to more than 110% of their respective original Tendered Amounts, and nothing in this Agreement shall be interpreted or construed to impose any such cumulative financial obligation.

SECTION 1.8(f) shall be hereby added following 1.8(e), stating as follows:

- (f) To the extent the provisions of the First Amendment to this Participation Agreement have been approved by all Parties and fully executed, including in counterparts, thereby, any actions performed by the Parties' pursuant thereto shall constitute an acknowledgement and affirmation of the Parties' agreement that all conditions precedent hereunder have been met to each Party's satisfaction and that no Party is currently aware of any breach of this Agreement by any other Party.

SECTION 2.1 shall be hereby amended to state as follows:

SECTION 2.1 COMPETITIVE BIDDING ACT. To the extent required by law, any and all contracts or portions thereof made pursuant to this Agreement shall be made in compliance with the Oklahoma Public Competitive Bidding Act of 1974, 61 O.S. §101, *et seq.*, as amended, including but not limited to any applicable bonding requirements. The Parties hereby agree that the Project shall be bid as a Construction Manager at Risk ("CMAR") project, pursuant to the municipal authority outlined in state law and, in particular, 61 O.S. §61-220, and further as follows.

- (a) Upon approval of this amendment, an RFP in a form acceptable to all Parties shall be issued. A panel including one representative from each of Summit Lakes POA, Summit Lake Villas POA, and Summit Lakes, L.L.C. shall review and select a CMAR. These representatives must be a delegate identified with authority to participate in selection of a CMAR without further board approval of any of these Parties. At least one representative of the City and NMA will participate on the panel.
- (b) The selected CMAR shall be retained and compensated by the City according to the CMAR contract, and any GMP contract amendment, from the funds delivered to the City per Section 1.4(a) and 1.4(c)(3) herein.

This Amendment may be executed in several counterparts, and all such executed counterparts shall constitute the same agreement. It shall be necessary to account for only one such counterpart in proving this Amendment. Except as specifically amended by this Amendment, the Agreement remains in full force and effect in accordance with its terms.

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IN WITNESS WHEREOF, the City, the Authority, the POAs, and the Developer, as Parties to this Amendment, have caused this Amendment to be duly executed and delivered as of the date first above written.

THE CITY OF NORMAN, OKLAHOMA

By: _____
Name: Breea Clark
Title: Mayor

By: _____
Name: Brenda Hall
Title: City Clerk
(SEAL)

NORMAN MUNICIPAL AUTHORITY

By: _____
Name: Breea Clark
Title: Chairman

By: _____
Name: Brenda Hall
Title: Secretary
(SEAL)

Approved as to form and legality this 7 day of January, 2021.

Christy Luckala
Office of the City Attorney/ General Counsel

SUMMIT LAKES POA

SUMMIT VILLAS POA

By: Lewis C. Goidell

By: _____

Name: Lewis C. Goidell

Name: _____

Title: President

Title: President

SUMMIT LAKES, L.L.C.

By: _____

Name: by Evan Nixon as President of and on behalf of Cies Properties, Inc.,
as Manager and on behalf of Summit Lakes, L.L.C.,
and not in any individual or personal capacity

Title: Manager

SUMMIT LAKES POA

SUMMIT VILLAS POA

By: _____

By: Michelle Evans

Name: _____

Name: Michelle Evans

Title: President

Title: President

SUMMIT LAKES, L.L.C.

By: _____

Name: by Evan Nixon as President of and on behalf of Cies Properties, Inc.,
as Manager and on behalf of Summit Lakes, L.L.C.,
and not in any individual or personal capacity

Title: Manager

SUMMIT LAKES POA

SUMMIT VILLAS POA

By: _____

By: _____

Name: _____

Name: _____

Title: President

Title: President

SUMMIT LAKES, L.L.C.

By: 

Name: by Evan Nixon as President of and on behalf of Cies Properties, Inc.,
as Manager and on behalf of Summit Lakes, L.L.C.,
and not in any individual or personal capacity

Title: Manager