

PARTICIPATION AGREEMENT
for the
FUNDING AND CONSTRUCTION OF THE
WEST MAIN STREET DRAINAGE STRUCTURE AND SPAN BRIDGE

This Participation Agreement for the funding and construction of the west main street drainage structure and span bridge ("Agreement"), made and entered into on this _____ day of _____, 2017, the Effective Date, is by and between Arbuckle Properties, Inc. ("Arbuckle"), BellaRose LLC, Steven Rich (collectively "Property Owners"), and the City of Norman, Oklahoma, a Municipal Corporation, ("City").

WHEREAS, the City is a charter municipality vested with the power to enter into contracts, and the Property Owners are individuals and a corporate body, each with the authority to contract; and

WHEREAS, the City initiated litigation in Cleveland County District Court case, *City of Norman v. Fredrick J. Spitz*, CJ-1988-58 against Mr. Spitz, a predecessor in interest to Arbuckle, due to the impoundment of water at 10 Mile Flat Creek west of 48th Ave and north of a roadway privately constructed by Mr. Spitz that extending west of Main Street (the "Impoundment Location"); and

WHEREAS, the Court, in *City of Norman v. Spitz*, by Order dated December 6, 1994, ordered installation of ten (10) 72" corrugated metal pipes ("CMPs") by Arbuckle previously designated by the Court for installation in its February 22, 1990 Order to convey low flows ("Crossing Location") and construction of a low water crossing immediately east of the CMPs by Robert W. Moore to relieve the impoundment of water and to provide some relief for the flow of stormwater from the Ten Mile Flats at the Impoundment Location during certain rainstorm events having an .01 Annual Exceedance Probability (AEP) commonly referred to as the 100 year flood; and

WHEREAS, Arbuckle and the City worked cooperatively to implement the December 6, 1994, Court Order with the City providing the required CMPs and Arbuckle providing installation of the CMPs and attending earth work to accomplish the same; and

WHEREAS, the Court ordered that no portion of the costs of maintenance of the road, low water crossing, the CMPs, or the relocated Ten Mile Flat Creek shall be paid or borne by Robert W. Moore, Arbuckle Properties, Inc. or their successors in interest but was silent as to who was actually responsible, although the City is responsible for maintenance of its drainage ways; and

WHEREAS, the successors in interest to Arbuckle Properties, Inc. and Robert W. Moore contend that the responsibility for maintenance (including replacement) of the low water crossing and the CMPs and maintenance of the relocated Ten Mile Flat Creek was to be borne the City and the City disputes the contention that the Court's Order addressing relief from impoundment

of water in the 10 Mile Flat drainage basin imposed additional maintenance obligations on the City, as Plaintiff in the litigation, to maintain CMPs at the Crossing Location for the low flow channel that were ordered to be installed by Arbuckle Properties, Inc. (the "Dispute"); and

WHEREAS, in 2007, a major flooding event caused the wash out of CMPs and private roadway located on West Main Street at 10 Mile Flat Creek; and

WHEREAS, as a result of the wash out, property owners west of the former CMPs Crossing Location find it is necessary to re-establish vehicular access to properties located to the west of the Crossing Location; and

WHEREAS, the City of Norman desires to settle the Dispute and improve stream flow of the 10 Mile Flat drainage area at the Crossing Location and believes construction of a new free span bridge structure as outlined in the Agreement below, as opposed to the previously existing CMPs, will provide more efficient stream flow at the Crossing Location than was previously provided through the CMPs; and

WHEREAS, the Property Owners collectively desire to re-establish vehicular access to their respective properties via West Main Street across the relocated 10 Mile Flat Creek and they desire to work together with the City of Norman for the construction of the free span bridge structure as outlined in the Agreement below; and

WHEREAS, the Parties have proposed to enter into this Agreement to jointly fund stormwater and access improvements at the Crossing Location such that the City will provide funding as outlined in the Agreement below for stormwater, stream flow, and channel improvements and the Property Owners will provide funding as outlined in the Agreement below for the construction of the span bridge; and

WHEREAS, this Agreement is subject to approval of the Cleveland County District Court through the modification of the Court's Orders in City of Norman v. Spitz, Cleveland County District Court Case No. CJ-1988-58; and

NOW, THEREFORE, IN CONSIDERATION of One Dollar (\$1.00) and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, to effectuate the purposes stated above, and the mutual covenants and agreements contained herein, the parties agree as follows:

I. SCOPE OF PROJECT

1. The Project includes cleaning of the 10 Mile Creek channel both up and down stream from the Crossing Location.

2. Bank stabilization will also be required. This will include establishing and fortifying the banks of the stream at the Crossing Location to provide defined unrestricted flow of storm water drainage at the Crossing Location.
3. A free span bridge will also be constructed at the Crossing Location. It will be constructed from bank to bank and will be a minimum of twenty (20) feet in width.
4. A motorized gate will also be installed to the east of the Crossing Location and to the west of the west curb line of the cul-de-sac south of the mini-storage facility. Installation of the gate will provide private road access along the section line to those property owners west of the gate.
5. A map, marked Exhibit A, is attached to this Agreement and details the location of the above items, sometimes collectively referred to herein as the "Improvements".
6. Construction drawings and engineering plans for the Improvements, dated May 19, 2017, prepared by Professional Engineer H. Lester Seiger are attached to this Agreement and marked as Exhibit B.
7. The City, through the competitive bidding process, will select a contractor to complete the proposed work as a public construction project.
8. The selected contractor shall maintain a temporary access across the Crossing Location for the duration of the construction process, which construction process shall be completed in accordance with the timeline specified in the bid documents.

II. CONDITIONS PRECEDENT TO PROJECT

1. As the project is proposed to be administered and completed as a public construction contract, all regulatory approvals must be received prior to initiation of bidding and construction of the Project.
2. 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.
 - a. In order to meet City standards, the following items must be accepted by the City as satisfactory: construction plans sealed by a registered professional engineer; an registered professional engineer's sealed estimate of project costs including a list of bid items, unit quantities and prices, contingency costs, and construction engineering fees; a certification of appropriateness and material strength calculations for any beams proposed to be used in the Project; a timeline for construction; and any other special provisions for items of work within the Project that are not included in the City's standard bid specifications.

These items will be submitted by Professional Engineer H. Lester Seiger, the engineer of record for the Project, within thirty (30) days from the effective date of this Agreement. If not received within the thirty (30) days, the conditions precedent will not be satisfied, and the City reserves the right to reevaluate its continued participation under the terms of the Agreement.

- b. A complete Floodplain Permit Application from the licensed professional engineer of record for the Project must be submitted to the City of Norman. The application must include identification of compensatory storage if fill is proposed to be placed in the floodplain as part of the Project.
3. In addition to the regulatory approvals, the property owners agree to submit their project contributions to the City prior to initiation of bidding and construction of the Project. Arbuckle agrees to submit \$50,000 to the City and BellaRose agrees to submit \$75,000 to the City, and these funds will be held in a separate Capital account for construction of the Project. Steven Rich agrees to submit a valid, irrevocable bond or letter of credit to the City of Norman in the amount of the engineer's estimate for completion of the Project.

III. ESTIMATED PROJECT COST and FINANCIAL PARTICIPATION OF PARTIES

1. The Engineer's Estimate of project costs remains to be finalized. That cost estimate will include: up and downstream cleaning; bank stabilization; bridge construction; and installation of the motorized gate at the location depicted on Exhibit A. However, a partial cost estimate is attached to the Agreement and marked as Exhibit C.
2. 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 stormwater from the Ten Mile Flats at the Crossing Location and to provide funding in the amount of \$200,000.00. Arbuckle agrees to provide funding in the amount of \$50,000.00. BellaRose LLC agrees to provide funding in the amount of \$75,000.00.
3. The Parties recognize that Steven Rich intends to submit a competitive bid to the City for the construction of the Improvements and absorb his cost share through contribution of labor, overhead, and would be profit to accomplish the Project. If Steven Rich is awarded the bid and enters into the contract for the construction of the Improvements, Steven Rich agrees to fund the balance of the Project costs. If Steven Rich is not the low bidder on the Project, his bond or letter of credit will be used to satisfy the outstanding balance between the \$325,000 cash contributions and the bid price. All parties agree and recognize that all State Laws and City Ordinances regarding competitive bidding will be followed.
4. The City agrees to appropriate \$200,000.00 for this Project following approval of this Agreement by all the parties. Floyd and Bird shall pay their contributions over to the City prior to bidding of the Project. Once collected and appropriated, funds for the Project will be held by the City and disbursed to the successful bidder as the Project progresses in accordance with the bid documents.

5. Funds contributed by BellaRose LLC shall be used to assure the purchase, construction, or installation of the motorized gate with the balance being applied to other Project costs.
6. Any funds not used for this Project will be returned to the City, Arbuckle, and BellaRose LLC on a pro-rata basis. If there are excess materials, those materials will be sold and the proceeds distributed between the City, Arbuckle, and BellaRose LLC on a pro-rata basis.

IV. PROJECT CONSTRUCTION

1. The parties recognize that the Project has been engineered by a professional engineer, and that the plans bear the seal of a professional engineer licensed to do business in the State of Oklahoma.
2. The Project will be considered a public construction contract, competitively bid under the Oklahoma Competitive Bidding Act, and administered by the City of Norman.
3. As a public construction contract, 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 either the estimated project cost or the amount bid by the successful bidder, whichever is greater. In addition, the City will be allowed to inspect the construction of the Project on a daily basis.
4. The parties agree that all required regulatory approvals will be obtained by the appropriate parties prior to bidding the Project. Based on the submittal by Professional Engineer H. Lester Seiger indicating improved storm water flow with installation of a span bridge over the low flow drainage channel as opposed to the CMPs required in the original Court Order, along with no disturbance to the Ten Mile Flat overflow low water crossing immediately east of the low flow area, the parties agree to jointly support an application for a Floodplain Permit from the City Floodplain Permit Committee for this Project. Recognizing the cooperative nature of the Project with the City's participation in funding floodplain and floodway improvements, the \$100 filing fee to be accompanied with the Flood Plain Permit Application will be waived.
5. It is acknowledged that the Army Corps of Engineers did not require a Section 404 Permit when the CMPs were installed in 1995. However, the City agrees to contact the Army Corp of Engineers regarding the necessity, if any, of a Section 404 Permit for the current Project. Should a 404 Permit be required, then the Property Owners and the City will jointly pursue the necessary 404 Permit.

V. USES OF PROPERTY TO THE WEST OF THE LOCATION

1. As to the Rich property, once the Project is satisfactorily completed, Arbuckle will each grant a private roadway easement across the northern border of its property and BellaRose LLC will each grant a private roadway easement across the southern border of

its property within the section line right-of-way to Mr. Steven Rich to allow Mr. Rich to access his property. Having provided access to a public roadway through the recording of such private roadway easements, Mr. Rich and his successors in interest will then be allowed to apply for a residential building permit.

2. As to the Arbuckle property, with the satisfactory completion of the Project, Arbuckle, and its successors in interest will be eligible to apply for residential building permits.
3. Once the Project is completed, the City of Norman will classify the roadway on the extension of Main Street west of 48th Avenue as a private road except for the portion from the west curb line of 48th Avenue extending west to the west curb line of the cul-de-sac south of the mini-storage facility (approximately 451 feet).
4. Any necessary easements shall be granted by the Property Owners where necessary for City maintenance of drainage ways.

VI. MAINTENANCE

1. When the City competitively bids the Project, the chosen contractor will submit a maintenance bond. That bond will be for a one year term beginning at the date of the City's final acceptance of the Project.
2. The City accepts the maintenance responsibility for the drainage channels and the drainage way abutments upon expiration of the maintenance bond.
3. The Property Owners, except BellaRose LLC, accept the maintenance responsibility for the private bridge upon expiration of the maintenance bond. The private bridge shall include the bridge structure placed on the drainage way abutments, support structures for the bridge, if any, so marked or identified on the construction drawings annexed hereto and that are not part of the drainage way abutments, and the roadway surface of the bridge. This maintenance responsibility shall transfer to any successors or assigns of the Property Owners, except BellaRose LLC. A sign shall be located on the eastern side of the bridge that states "private bridge – no City maintenance."

VII. TERM

1. This Agreement shall begin on the Effective Date and continue until the Project is completed and all necessary easements have been granted by the Property Owners.

VIII. TERMINATION AND ASSIGNMENT

1. This Agreement may be terminated by either City or the Property Owners at its sole option and without prejudice by giving thirty (30) days written notice of termination to the other Party prior to awarding the public construction contract by the City. Once the construction contract is awarded, neither the City nor the Property Owners may terminate the Agreement without cause. If a Party to this Agreement willfully or negligently fails to

fulfill in a timely and proper manner, or otherwise violate any of the covenants, agreements or stipulations material to this Agreement, another party has the right to terminate the Agreement by giving written notice to the defaulting party of its intent to terminate specifying the grounds for termination. The defaulting party shall have thirty (30) days after receipt of the notice to cure the default. If it is not cured then, this Agreement shall terminate. Despite termination of the Agreement, the City will not return any funds to BellaRose LLC or Arbuckle that are properly owed to the City's contractor.

2. No party shall assign, transfer, or sub-contract any of its rights, burdens, duties, or obligations under this Agreement without the prior written permission of the other Parties to this Agreement.

IX. DISPUTE RESOLUTION AND VENUE

1. In the event the Parties are unable to resolve a dispute arising under this Agreement, then the final decision specific to that dispute will be submitted for resolution to the City Manager and the Property Owners. In the event the City Manager and the Property Owners are unable to resolve any such dispute, then the matter will be submitted within thirty (30) days to a third party mediator. In the event the mediation is unsuccessful in resolving any such dispute, then each party has the option to file suit.
2. All obligations of the parties to this Agreement shall be performed in Cleveland County, Oklahoma. The laws of the State of Oklahoma shall govern the interpretation, validity, performance, and enforcement of this Agreement and the exclusive venue for any legal proceedings involving this Agreement shall be Cleveland County, Oklahoma.

X. NOTICES

1. Any notice to be given by any Party to BellaRose LLC hereunder shall be deemed to be properly served if deposited in the United States mail, postage prepaid, addressed to: BellaRose LLC, 700 Cabella Court, Norman, Oklahoma, 73071.
2. Any notice to be given by any Party to Arbuckle hereunder shall be deemed to be properly served if deposited in the United States mail, postage prepaid, addressed to: Arbuckle Properties, Inc., c/o Glenn Floyd, 118 West Main Street, Norman, Oklahoma, 73069, with a copy to William R. Dill, Attorney at Law, 401 West Main Street, Suite 380, Norman, Oklahoma 73069
3. Any notice to be given by any Party to Steven Rich hereunder shall be deemed to be properly served if deposited in the United States mail, postage prepaid, addressed to: Steven Rich, 5800 W. Main Street, Norman, Oklahoma, 73069.
4. Any notice to be given hereunder by any Party to City shall be deemed to be properly served if the same be deposited in the United States mail, postage prepaid addressed to: City Manager Steve Lewis, P. O. Box 370, Norman, Oklahoma, 73070 with a copy to the Office of the City Attorney, P. O. Box 370, Norman, Oklahoma, 73070.

XI. SEVERABILITY

1. If any provisions of this Agreement, or the application of such provision, shall be rendered or declared invalid by a court of competent jurisdiction, or by reason of its requiring any steps, actions, or results, the remaining parts or portions of this Agreement shall remain in full force and effect.

XII. HOLD HARMLESS CLAUSE

1. To the extent allowed by law, the Property Owners hereby agree to waive all claims against, release, and hold harmless City and all of its officials, officers, agents, employees, in both their public and private capacities, for any and all liability, claims, suits, demands, losses, damages, attorneys' fees, including all expenses of litigation or settlement, or causes of action which may arise by reason of injury or death of any person or for loss of, damage to, or loss of use of any property arising out of or in connection with this Agreement.
2. To the extent allowed by law, City does hereby agree to waive all claims against, release, and hold harmless the Property Owners for any and all liability, claims, suits, demands, losses, damages, attorneys' fees, including all expenses of litigation or settlement, or causes of action which may arise by reason of injury or death of any person or for loss of, damage to, or loss of use of any property arising out of or in connection with this Agreement. If Steven Rich is selected as the general contractor for the Project through the competitive bidding process, this paragraph shall not apply to him in his capacity as general contractor.
3. It is the intention of both Parties that this mutual hold harmless clause shall be interpreted to mean that each party shall only be responsible for the actions of each party's own employees, officials, officers, and agents. The Parties agree that the City has not waived its sovereign immunity by entering into and performing its obligations under this Agreement.

XIII. ENTIRE AGREEMENT

1. This Agreement shall be binding upon the parties hereto, their successors and assigns, and constitutes the entire Agreement between the parties. No other Agreements, oral or written, pertaining to the performance of this Agreement exists between the parties. This Agreement can be modified only by an Agreement in writing, signed by both of the parties.

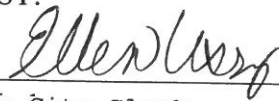
Executed this 27th day of June, 2017.

CITY OF NORMAN, OKLAHOMA

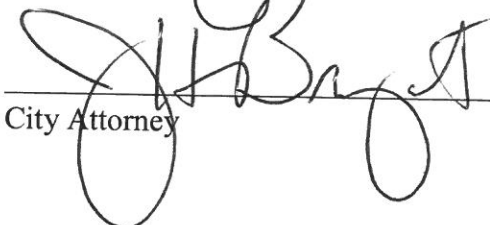
By  Mayor



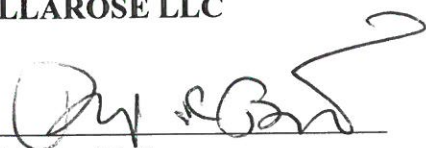
ATTEST:


Deputy City Clerk

Approved as to form and legality this 27th day of June, 2017.


City Attorney

BELLAROSE LLC


 BellaRose LLC

REPRESENTATIVE ACKNOWLEDGEMENT

STATE OF OKLAHOMA, COUNTY OF CLEVELAND, SS:

Before me, the undersigned, a Notary Public in and for said County and State, on this 23rd day of June, 2017, personally appeared Philip Bird, to me known to be the identical person(s) who executed the foregoing Agreement and acknowledged to me that he executed the same as a free and voluntary act and deed for the uses and purposes therein set forth.

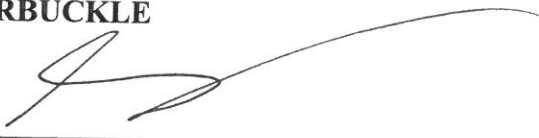
WITNESS my hand and seal the day and year last above written.

My Commission Expires: 12/20/20

Notary Public:



ARBUCKLE



Glenn Floyd - Title

REPRESENTATIVE ACKNOWLEDGEMENT

STATE OF OKLAHOMA, COUNTY OF CLEVELAND, SS:

Before me, the undersigned, a Notary Public in and for said County and State, on this 26th day of June, 2017, personally appeared Glenn Floyd, to me known to be the identical person(s) who executed the foregoing Agreement and acknowledged to me that he executed the same as a free and voluntary act and deed for the uses and purposes therein set forth.

WITNESS my hand and seal the day and year last above written.

My Commission Expires



Notary Public:

D. Floyd

STEVEN RICH



Steven Rich

REPRESENTATIVE ACKNOWLEDGEMENT

STATE OF OKLAHOMA, COUNTY OF CLEVELAND, SS:

Before me, the undersigned, a Notary Public in and for said County and State, on this 26th day of June, 2018, personally appeared Steven Rich, to me known to be the identical person(s) who executed the foregoing Agreement and acknowledged to me that Mr. Rich executed the same as a free and voluntary act and deed for the uses and purposes therein set forth.

WITNESS my hand and seal the day and year last above written.

My Commission Expires: 02/14/2018 Notary Public: Lisa Morgan