

**PARTICIPATION AGREEMENT
FOR THE
MISTY LAKE DAM REPAIR PROJECT**

This PARTICIPATION AGREEMENT FOR THE MISTY LAKE DAM REPAIR PROJECT (the “Agreement”) is made on or as of the ____ day of June, 2017, 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, the Developer has Preliminary Platted 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; and

WHEREAS, over the years Summit Lakes Addition has developed with ten (10) final plats that includes 542 platted lots with another 69 lots planned for Section 11 of Summit Lakes Addition and 66 platted lots in Summit Lakes Villas Addition; and

WHEREAS, there are seven lakes within the Summit Lakes Addition that function as a storm water drainage system: Misty Lake, Heron Lake, Drake Lake, Hidden Lake, Willow Lake, StarCrest Lake, and Secret Lake. Part of Misty Lake is also contained within the Summit Lakes Villas Addition. All such improvements and amenities are currently owned, managed, maintained, and controlled by one or both Summit Lakes POA and Summit Villas POA; and

WHEREAS, on or about March 16, 2011 the Summit Lakes POA was notified by the Oklahoma Water Resource Board (“OWRB”) that the dam associated with Misty Lake was being reclassified as a “high hazard” dam due to the potential downstream impacts on Alameda Street and nearby homes in event of a failure of the dam; and

WHEREAS, on March 20, 2015, the OWRB issued an Emergency Order and set an administrative hearing on April 14, 2015 due to the dangerous condition of the dam; and

WHEREAS, subsequent to that hearing, the OWRB issued a Consent Order on July 8, 2015 requiring the Summit Lakes POA to lower the lake level three feet below the emergency spillway and maintain that level until the dam was repaired; and

WHEREAS, the Consent Order also required the Summit Lakes POA to prepare and submit engineering plans and to make repairs as specified in the engineering plans; and

WHEREAS, the engineering plans have been completed and the cost of necessary repairs is estimated to be within the range of \$595,000 to \$700,000; and

WHEREAS, the Summit Lakes POA is unable to fund these repairs and has reached out to the Summit Villas POA, the Developer, the City, and NMA for assistance; and

WHEREAS, the Summit Lakes POA has contacted a private financial institution regarding providing financing to accomplish the Misty Lake dam repairs that would bring the Misty Lake dam up to a standard approved by the OWRB; and

WHEREAS, the Summit Villas POA has offered to participate through a pro rata lot assessment at the same rate per lot as the Summit Lakes Addition lots are assessed; and

WHEREAS, the Developer, in agreed settlement in return for release and waiver of liability as related to the Misty Lake Dam as set out below, has offered to contribute cash toward the Misty Lake Dam Repair Project as well as bring the Section 11 lots to the addition via final plat to assist in spreading the repair costs over a greater number of lots; and

WHEREAS, the NMA is willing to assist in collection of assessments to property owners through its regular utility billing processes and remit the same to the Lender providing the financing to the POAs; and

WHEREAS, City Stormwater Master Plan recommends public and private participation in order to ensure that necessary maintenance to key stormwater infrastructure occurs, especially in cases where property owners associations are unable to perform such functions; and

WHEREAS, City of Norman is responsible for both of the two other high hazard dams located in the City of Norman by virtue of ownership (Hall Park) or lease obligation (Sutton Lake); and

WHEREAS, repair and maintenance of 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, assistance from NMA to the POAs to adequately address the Summit Lakes and Summit Villas drainage systems is necessary to protect the health, safety, and welfare of its citizens and is in the best interest of the City of Norman; and

WHEREAS, the City is willing to accept permanent ownership and maintenance of the Misty Lake Dam following completion of the Misty Lake Dam Repair Project

upon certification that the dam repairs have been made in accordance with sound engineering practices.

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, and as reflected in the attached exhibits, the parties hereby agree as follows:

I. OBLIGATIONS RELATED TO THE DAM REPAIR PROJECT

SECTION 1.1. IMPROVEMENTS TO BE COMPLETED. Engineering plans have been completed by Cardinal Engineering detailing the scope of required repairs in order to bring the Misty Lake dam into compliance with OWRB regulations and in accordance with sound engineering practices such that the City will accept. Those plans are attached as Exhibit A.

- (a) The cost of necessary repairs is estimated to be \$700,000. However, this previous engineering estimate was based on a phased approach for completion of the required repairs. Engineering consultants have advised that constructing improvements as one project would likely result in substantial cost savings in mobilization and bonding costs with a revised estimate of \$595,000.
- (b) In an effort to realize project savings, POAs and Developer agree to jointly fund the engineering costs necessary to revise the plans, attached as Exhibit A, to allow an option to let the project as a single bid package, to insure the project will meet City of Norman standards and specifications, including geotechnical investigation, submitting documents and obtaining permitting through OWRB, producing bid package documents, reviewing bids, and providing recommendations for contract award.
- (c) The current estimated cost for scope of work described in Section (b) above is \$42,000.00. In addition, materials costs to be incurred for Phase I are estimated to be \$27,530.00. The POAs and the Developer agree to evenly divide the Section (b) costs and the Phase I material costs. Accordingly the POAs will fund \$34,765.00. The Developer will fund \$34,765.00. These payments will be due to the NMA within seven business days following execution of this agreement. Once paid, the NMA will contract with Cardinal Engineering to deliver the documents specified in Section (b) above to prepare for public bidding of the project. These initial engineering costs may be included in the project's private financing costs that will allow reimbursement of these costs to the POAs and the Developer at the time of closing of the loan needed to provide project funding.

- (d) City will administer the improvement project as a Public Construction project through the Oklahoma Competitive Bidding Act, including appropriate bonding which may include, if available, a five (5) year maintenance bond in an amount up to the cost of the Project that may be activated if the Summit Lake Dam repairs do not perform as anticipated due to construction defects. The City will not let the improvement project until the POAs, in accordance with their respective covenants, approve the transfer of ownership of Misty Lake Dam to the City and approve an assessment in an amount not to exceed the smaller of \$547,470 or the revised engineering estimate less the agreed upon Developer's contributions, and execute an appropriate release and waiver as set out in Section 1.7 related to the Misty Lake Dam.
- (e) City will contract with a competent engineering firm, preferably Cardinal Engineering, to oversee the construction process to include daily reporting and certification that the Summit Lake Dam repair project is constructed as designed. The construction observation and documentation cost will be borne by the City.

SECTION 1.2. POA ASSESSMENTS AND COLLECTION. Both Additions, Summit Lakes and Summit Villas, are governed by a Declaration of Covenants filed October 21, 1997 and August 5, 1999 respectively. Those covenants created Property Owners Associations. The Property Owners Associations own the common areas in their respective additions and are responsible for maintenance, repair, and improvements to the common areas.

- (a) Subject to the cap set out in 1.1d above, the costs to bring the stormwater drainage system and the Misty Lake dam up to the standard required by the OWRB will be assessed through the POAs.
- (b) The POAs will seek approval of the property owners, in accordance with the procedures outlined in their respective covenants, for an assessment to be paid over a ten (10) year period of an amount not to exceed the estimated cost of the repairs.
- (c) The amount of the assessments shall be reduced by the amount contributed by the Developer in accordance with Section 1.3.
- (d) NMA/City will collect assessments levied against platted lots with City of Norman utility accounts through utility bills on a monthly basis with a \$1.00/month administrative charge.
- (e) The Summit Lakes POA, and Summit Lake Villas POA shall have up to ten years from the date of completion of the repairs to repay the funds to the Lender. Early repayment will be allowed to avoid finance charges.

- (f) The structure for assessment calculation on each lot owner in each POA is as shown on attached Exhibit B.

SECTION 1.3. DEVELOPER CONTRIBUTION. In return for a release and waiver as more fully set out in Section 1.7, the Developer will contribute a portion of the project costs as follows:

- (a) The Developer agrees to contribute towards engineering costs and estimated materials costs incurred for Phase I as more specifically set out in Section 1.1(c) in an amount not to exceed \$34,765.00.
- (b) In addition, the Developer agrees to contribute a \$20,000 cash payment toward the construction costs.
- (c) Developer will allow all lots of Section 11 (up to 69 planned additional lots) to be assessed at the same rate as other Summit Lakes Addition's developed lots as calculated in the manner set forth in Exhibit B. Assessments per lot will be paid to the POA's Lender at the time of lot sale, if and when such sale closes to an unaffiliated third party bona fide buyer and end user/occupant of the lot (not the builder), following approval of the assessments by the POAs.
- (d) The Developer may, in its sole discretion, pay for the Section 11 assessments in advance to the POA's Lender. Early repayment will be allowed to avoid finance charges on future Section 11 assessments. However, subject to terms offered by the Lender, no interest payment and no assessment payment shall become due or obligated upon any Section 11 lot unless and until such lot is final platted through a recorded plat at the Cleveland County Clerk, AND such lot has been sold and closed upon to an unaffiliated third party bona fide buyer for occupancy as a residence, and thus is not the builder that has bought a lot to construct a house upon and then sell to the intended resident. Assessments on Developer's lots that were financed shall be paid in accordance with the Lender's requirements even if those lots have not been platted or sold to third party purchasers, which time period for platting, building, and sale to occupant shall not exceed ten (10) years from the date of such financing. In the event that a builder purchases a Section 11 lot, but then does not build upon the lot within the ten year time period, then the assessment shall become due and payable at the end of the ten year period.
- (e) If the Developer chooses to final plat additional sections beyond Section 11, the City shall allow the Developer to drain into the Summit Lakes drainage basin, subject to City subdivision ordinances and design engineering guidelines as in effect at such time of final platting. The POAs agree to support and not protest or object to the Developer

continuing to final plat sections beyond Section 11. Except as set out in Section 1.4 below, the parties agree that no other or additional assessments as regarding this agreement or the Summit Lakes dam project and repairs shall be owed by any other lots in any additional sections or additions beyond Section 11.

- (f) Developer's contributions and agreement herein are conditional and contingent upon the City approving this Agreement, and upon the POA's voting in approval of this Agreement and the release and waiver terms set out in Section 1.7d herein.

SECTION 1.4. PROJECT FINANCING. Funding for the repairs will be provided through a private financing arrangement established by the POAs and the Developer with a private Lender.

- (a) Upon closing of private financing, proceeds shall be paid over to the NMA to be placed in a separate Capital Fund project account specifically for the Misty Lake Dam Repair Project. All other cash contributions not provided through private financing, or previously paid, shall be paid to the NMA prior to letting the project out to bid.
- (b) Upon final completion of the project improvements, the actual costs of the project shall be verified by the NMA Project Engineer charged with construction oversight and administration.
- (c) Once the costs have been verified:
 - (1) Any remaining excess funding shall be returned to the POAs or Developer as the case may be, to the extent provided by each, on a pro-rata per lot assessed basis for reduction in assessment amounts, payment against outstanding project loans, or reimbursement of project costs, as appropriate.
 - (2) Should bids for the project exceed the engineer's estimate, then the parties may agree upon adjustments to the project scope that accomplish the project goal of structure repair without diminishing the structural integrity of the project. If adjustments to the project scope cannot be agreed upon, then the parties shall attempt to agree on supplemental funding sources to allow the project to be constructed as originally designed. If the parties are unable to agree on supplemental funding sources then the bid to construct the project will not be awarded and funding previously provided to the Authority to construct this project, less engineering costs, shall be returned to the Lender or the contributing party as appropriate.

SECTION 1.5. TRANSFER OF PROPERTY. The Summit Lakes and Summit Villas POAs agree to transfer drainage easements and access easements relative to the Common Areas Owned by POAs to the City of Norman without cost to the City. Executed drainage easements and access easements relative to the Common Areas as described in this section shall be delivered to the City upon receipt of appropriate written confirmation that assessments have been approved by the POA, and the Agreement has been ratified. The drainage and access easements shall be for Misty Lake Dam maintenance and repair purposes, and shall not include a right of general public access to the dam or lake for recreational or other purposes.

SECTION 1.6. MAINTENANCE OF COMMON AREAS. Once the Misty Lake dam and drainage facilities have been completed, and verified to be constructed according to the engineering design, the City agrees to accept permanent and complete ownership and maintenance responsibilities for the entire Misty Lake dam and the drainage facilities marked on the attached Exhibit C. These maintenance responsibilities include dam safety inspections; preparing annual reports to OWRB relative to high hazard dam structure; and tree removal or such repairs necessary to maintain the structural integrity of the dam.

Summit Lakes POA and Summit Villas POA shall retain all responsibility for mowing, sidewalks, litter control, and all improvements not identified on Exhibit C.

SECTION 1.7. MUTUAL RELEASE & WAIVER OF CLAIMS.

- (a) Release & Waiver of Claims by City – Upon completion and acceptance by the City of the Misty Lake Dam repair project as outlined in this Participation Agreement, to the extent allowed by law, the City of Norman, and the Norman Municipal Authority, covenants and agrees to release, waive and forever discharge the Developer, and Developer’s officers, directors, employees, representatives, agents, contractors, subcontractors, consultants, affiliates, successors and assigns, and the POAs of any and all claims the City had or may have had regarding the Misty Lake Dam, including but not limited to the design, planning, construction, management, engineering, development, permitting, platting, seeping, leaking, or failure of function, as may be related to the Misty Lake Dam. This covenant and agreement shall not extend to claims the City or the Norman Municipal Authority may have arising after completion and acceptance of the Misty Lake Dam repair project that relate to the City or the Norman Municipal Authority’s efforts to assist the POAs in the collection of assessments to individual lots as requested by the POAs or Lender.
- (b) Release & Waiver of Claims by POAs – As a condition precedent to letting the Misty Lake Dam repair work out for public competitive bidding, and as a condition precedent to the any Party being obligated or bound to this Agreement, the City shall be provided a separate instrument of agreement executed by the Developer, and the POAs that evidences an agreement regarding obligations as to areas of mutual concerns regarding defense,

waiver, release, dismissal, discharge, and relinquishment of all claims, demands, actions, and liabilities that may be or could be asserted against each or all of them jointly or severally in relation to Misty Lake Dam.

- (c) **Costs & Attorney's fees, and no admission of liability.** Each party shall be responsible for their own attorney fees and costs as related to this Agreement. The parties agree that this Agreement is not an admission of guilt or liability on the part of any party under any federal, state or local law, whether statutory or common law. Liability for any and all claims is expressly denied by all parties to this Agreement.

SECTION 1.8 CONDITIONS PRECEDENT. The obligation of Summit Lakes POA and Summit Villas POA, to assess lot owners and/or to fund any amount in excess of the amount of \$34,750.00 provided in Section 1.1.c above, and all obligations of the Developer as expressed in this Agreement, are subject to the satisfaction of the following conditions precedent:

- (a) The prior approval of transfer of ownership of the Misty Lake Dam to the City of Norman by the members of Summit Lakes POA and Summit Villas POA as required by the governing documents of the POAs.
- (b) The prior approval by the members of Summit Lakes POA and Summit Villas POA as required by the governing documents of the POAs of a special assessment in an amount not to exceed the smaller of \$547,470 or the revised engineering estimate less the agreed upon Developer's contributions, .
- (c) Summit Lakes POA and Summit Villas POA shall have obtained commitment letters acceptable to POAs in form and substance from one or more banks (the "Debt Commitment Letter(s)"), pursuant to which the lender parties thereto have committed to lend the amounts set forth therein but not less than \$491,672 for the purpose of funding the transactions contemplated by this Agreement (the "Debt Financing").
- (d) Developer shall have obtained commitment letters acceptable to Developer in form and substance from one or more banks (the "Debt Commitment Letter(s)"), pursuant to which the lender parties thereto have committed to lend the amounts set forth therein but not less than \$55,798 for the purpose of funding the transactions contemplated by this Agreement (the "Debt Financing").
- (e) Developer and POAs will have complied with Section 1.7(b) set out above and provided a fully executed separate instrument of agreement between the parties as referenced therein.

ARTICLE II. GENERAL PROVISIONS

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.

SECTION 2.2 APPLICABLE LAW, SEVERABILITY AND ENTIRE AGREEMENT. This Agreement shall be governed by and construed in accordance with the laws of the State of Oklahoma governing agreements made and fully performed in Oklahoma. If any provisions of this Agreement or the application thereof to any persons or circumstances shall, to any extent, be invalid or unenforceable, then the remainder of this Agreement or the application of such provision, or portion thereof, and each provision of this Agreement, shall be valid and enforceable to the fullest extent permitted by law.

SECTION 2.3 THIRD PARTIES. Except as expressly provided otherwise in this Agreement, the provisions of this Agreement are for the exclusive benefit of the Parties hereto and not for the benefit of any other persons, as third-party beneficiaries or otherwise, and this Agreement shall not be deemed to have conferred any rights express or implied, upon any other person.

SECTION 2.4 NO PARTNERSHIP CREATED OR JOINT VENTURE CREATED. This Agreement specifically does not create any partnership or joint venture between the Parties hereto, or render any party liable for any of the debts or obligations of any other party.

SECTION 2.5 TIME IS OF THE ESSENCE. The Parties understand and agree that time is of the essence with regard to all the terms and provisions of this Agreement.

SECTION 2.6 FORMALITIES AND AUTHORITY. The Parties hereto represent and warrant that they are validly existing and lawful entities with the power and authorization to execute and perform this Agreement. The headings set forth in this Agreement are for convenience and reference only, and in no way define or limit the scope or content of this Agreement or in any way affect its provisions.

SECTION 2.7 NOTICES AND DEMANDS. Any notice, demand, or other communication under this Agreement shall be sufficiently given or delivered when it is deposited in the United States mail, registered or certified mail, postage prepaid, return receipt requested, or delivered personally to:

City: The City of Norman
P.O. Box 370
Norman, OK 73070
Attn: City Manager
With Copy to: City Attorney

Authority: Norman Municipal Authority
P.O. Box 370
Norman, OK 73070
Attn: General Manager
With Copy to: General Counsel

Summit Lakes POA:
Attn : Jeff Puckett
3260 Marshall Avenue
Norman, OK 73072

with a copy to:

William R. Dill
Attorney at Law
401 W. Main St.; Suite 380
Norman, OK 73069

Summit Villas POA: Attn: Larry Dunham, President
228 Blvd Du Lac
Norman, OK 73071

Developer: Summit Lakes, L.L.C.
1203 Brookhaven Blvd
Norman OK 73072
Attn: Evan Nixon

With Copy to:

Rieger Law Group PLLC
136 Thompson Drive
Norman, OK 73069
Attn: Sean Paul Rieger

or to such other address, within the United States, with respect to a party as that party may from time to time designate in writing and forward to the others as provided in this Section. A copy of any notice, demand or other communication under this Agreement given by a party under this Agreement to any other party under this Section shall be given to each other party to this Agreement.

SECTION 2.8 BINDING EFFECT. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective legal representatives, successors and assigns.

SECTION 2.9 MODIFICATIONS. This Agreement cannot be changed orally, and no executory agreement shall be effective to waive, change, modify or discharge it in whole or in part unless such executory agreement is in writing and is signed by the parties against whom enforcement of any waiver, change, modification or discharge is sought.

SECTION 2.10 UNAVOIDABLE DELAYS. The time for performance of any term, covenant, condition, or provision of this Agreement shall be extended by any period of unavoidable delays. In this Agreement, “unavoidable delay” means a delay beyond the reasonable control of the party obligated to perform the applicable term, covenant, condition or provision under this Agreement and shall include, without limiting the generality of the foregoing, delays attributable to acts of God, any other party to this Agreement (for example, a delay in transfer of possession), strikes, labor disputes, governmental restrictions, court injunctions, riot, civil commotion, acts of public enemy and casualty, but shall not include delays attributable to financial difficulties of such party.

SECTION 2.11 FURTHER ASSURANCES. Each party agrees that it will, without further consideration, execute and deliver such other documents and take such other action, whether prior or subsequent to closing, as may be reasonably requested by the other party to consummate more effectively the purposes or subject matter of this Agreement.

SECTION 2.12 COUNTERPARTS. This Agreement 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 Agreement.

[Remainder of Page Left Blank Intentionally]

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

THE CITY OF NORMAN, OKLAHOMA

By: _____
Name: Lynne Miller
Title: Mayor

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

NORMAN MUNICIPAL AUTHORITY

By: _____
Name: Lynne Miller
Title: Chairman

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

Approved as to form and legality this ____ day of _____, 2017.

City Attorney/ General Counsel

SUMMIT LAKES POA

SUMMIT VILLAS POA

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

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

EXHIBIT A
CURRENT ENGINEERING PLANS

EXHIBIT B
ASSESSMENT CALCULATION STRUCTURE

EXHIBIT C
LEGAL DESCRIPTIONS, MAPS, and DRAWINGS