

**COMBINED SECOND AMENDED PARTICIPATION AGREEMENT
FOR THE
MISTY LAKE DAM REPAIR PROJECT
AND
MEMORANDUM OF UNDERSTANDING FOR FUTURE AGREEMENTS**

This SECOND AMENDED PARTICIPATION AGREEMENT FOR THE MISTY LAKE DAM REPAIR PROJECT AND MEMORANDUM OF UNDERSTANDING FOR FUTURE AGREEMENTS (the “Agreement” or “Amend. 2 and MOU” herein) is made on or as of the ____ day of _____, 2024, 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 LAKE VILLAS PROPERTY OWNERS ASSOCIATION (“Summit Lake 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 62 lots platted in 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 Lake Villas Addition. All such improvements and amenities are currently owned, managed, maintained, and controlled by one or both Summit Lakes POA and Summit Lake 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, following issuance of the Board's Emergency Order and Consent Order, the lake level at Misty Lake Dam was lowered and has been maintained at a minimum of three feet below the top of the emergency spillway; 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, engineering plans were submitted, and an EAP Level I was implemented as set out in the aforementioned orders. The submitted engineering plans, which were accepted and approved by the Board, included a subsurface drain system designed to address seepage from the dam; and

WHEREAS, upon completion of the engineering plans, the cost of necessary repairs was originally estimated to be within the range of \$595,000 to \$700,000; and

WHEREAS, the Parties entered into a Participation Agreement (“**Contract K-1617-137**”), on June 27, 2017, whereby the POAs and Developer intended to secure financing and to be repaid with private pro-rata POA lot assessments collected by the City through utility billing as set forth therein, in order to bring the Misty Lake dam up to the standard set forth in the engineering plans approved and accepted by the OWRB and whereby the City was to administer the improvement project as a Public Construction project through the Oklahoma Competitive Bidding Act; and

WHEREAS, the Participation Agreement provided that City would not let the improvement project until the POAs, in accordance with their respective covenants, approved the transfer of ownership of Misty Lake Dam to the City and approved 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

WHEREAS, the POAs, in accordance with their respective covenants, approved the transfer of ownership of Misty Lake Dam to the City and approved the assessments in the required amounts; and

WHEREAS, thereafter the POAs secured necessary funding for the project and the Parties entered into a First Amendment to the Participation Agreement (“**Contract K-1617-137 Amend. 1**”), which altered and supplemented terms regarding the delivery of the funds to the City for bid, addressed matters of potential project overages, and specified that the City would pursue the project with a Construction Manager at Risk (“CMaR”) through a selection process involving all Parties; and

WHEREAS, the City put out Request for Qualifications (“RFQ”) 2021-11 on July 1, 2021, and ultimately retained Downey Contracting, L.L.C. as CMaR in compliance with the selection process outlined in Contract K-1617-137 Amend. 1; and

WHEREAS, pursuant to Contract K-1617-137 and Downey's CMAr Contract with the City, Contract K-2122-67 ("**Downey Contract**"), Downey publicly bid the Misty Lake Dam Repair project on December 9, 2021 and received bids which, when combined with Downey's CMAr costs, was estimated to create a total construction budget in excess of \$1,000,000.00, which was well beyond the Parties budget expectations for the Project; and

WHEREAS, the Parties have determined that, due to unanticipated market conditions and other circumstances beyond their expectation or control, that the Participation, the Project cannot proceed as the CMAr project addressed in Amendment 1 and the parties have since been considering alternative options for construction; and

WHEREAS, one such option considered for proceeding would be to amend this Participation Agreement to permit the project to proceed as a private construction project, subject to certain controls by the City, in order to best fulfill the original purpose of K-1617-137 and K-1617-137 Amend. 1. The parties have expended considerable efforts to pursuing this option, at the private parties' urging; and

WHEREAS, the OWRB has recently informed the parties of an opportunity for federal matching funding of 65% of total project costs were the City to apply for and be awarded a High Hazard Potential Dam Grant ("HHPD Grant"), and take the project forward as a publicly-bid contract; and

WHEREAS, the Summit Lakes POA, Summit Lake Villas POA and the Developer have requested that the City and NMA pursue the HHPD Grant, and a resolution is being presented to City Council contemporaneously with this Amend. 2 and MOU to allow the City to do so; 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 continues to be 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 OWRB has entered an updated Consent Order, No. OK12578, on September 19, 2023 (“2023 OWRB Consent Order,” attached as **EXHIBIT A**), which recognizes and is consistent with the parties’ plans and agreements herein; and, at its October 17, 2023, the OWRB renewed its approval of the construction plans for the Misty Lake Dam, as attached hereto as **EXHIBIT B** (the “Approved Construction Plans”); and

WHEREAS, the City remains obligated 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 industry standards as provided in the Approved Construction Plans and any changes thereto hereafter approved by the parties as set forth further herein; and

WHEREAS, transfer of ownership to the City shall be accomplished through means of first completing a lot line adjustment to create a lot to be conveyed to the City, and then conveyance through a deed to the City of said lot, the precise details of which will be presented in a future Amendment to this Agreement, based on this Amend. 2 and MOU.

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 enter into this Amend. 2 and MOU, and agree as follows:

I. CONTINUED OBLIGATIONS RELATED TO THE DAM REPAIR PROJECT

SECTION 1.1. FUNDS FROM PRIVATE PARTIES. To date, the City acknowledges that it is in possession of funds delivered by the private parties totaling SIX HUNDRED THREE THOUSAND FOUR HUNDRED SEVENTY EIGHT AND 95/100 DOLLARS (\$603,478.95). Summit Lakes POA, Summit Lake Villas POA, and the Developer acknowledge that, from these funds, payment to Downey was owed and paid in the amount of TEN THOUSAND DOLLARS (\$10,000.00) for CMAR services already provided by Downey pursuant to the Downey Contract, leaving a total remaining in the City’s possession FIVE HUNDRED NINETY-THREE THOUSAND FOUR HUNDRED SEVENTY-EIGHT AND 95/100 DOLLARS (\$593,478.95).

SECTION 1.2 USE OF FUNDS FOR HHPD GRANT CONSTRUCTION. In the event that the Project is ultimately awarded HHPD Grant funds, which the City and NMA accept and enter into any required cooperative agreements with OWRB relating to the utilization of same, the POAs and Developer hereby pledge and commit all funds then in the City’s possession (less however amounts sufficient to pay the costs of the project for work or materials required by the Approved Construction Plans which are not eligible for reimbursement under the terms of the grant, if any) to use in providing the 35% local match for construction of the Project. The Parties hereby acknowledge and agree to a need to enter into further agreements, consistent with this Participation Agreement, all amendments and MOUs, upon acceptance of any such HHPD Grant Funds and/or the City entering into any such agreement with OWRB. Any such future agreements will address responsibility for unforeseen Project cost overages not covered by HHPD Grant funds or the funds described in Section 1.1 herein.

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In the event that only part of the funds in the City's possession are needed to complete construction with the HHPD Grant, any surplus funds will be returned to the POAs and Developer pursuant to further agreement of the parties and in a manner consistent with this Participation Agreement, all amendments and MOUs.

SECTION 1.3 RETURN OF FUNDS FOR PRIVATE CONSTRUCTION. In the event that the Parties do not ultimately utilize HHPD Grant funds to construct the Project per Section 1.2 above, the City agrees to release these funds at the direction of each party, including to an identified designee, pursuant to a further agreement of the parties, in amounts set forth as follows:

(a) **Summit Lakes POA:** FOUR HUNDRED FORTY-FOUR THOUSAND FIFTY-THREE AND 37/100 DOLLARS (\$444,053.37), based upon the following:

- i. Return of its \$438,299.47 pro-rata construction cost contribution (*see herein* Section 1.1(a));
- ii. Return of \$2,204.74 from funds left over for engineering work performed by Parkhill (*see herein* Section 1.1(b)); and
- iii. Return of its \$6,882.50 Phase I material cost contribution (*see herein* Section 1.1(c)); and
- iv. Payment by Summit Lakes POA of \$3,333.34 toward the total owed by the City to Downey for CMAR services already provided.

(c) **Summit Lake Villas POA:** FIFTY-NINE THOUSAND ONE HUNDRED TWENTY-SIX AND 17/100 DOLLARS (\$59,126.17), based upon the following:

- i. Return of its \$53,372.26 pro-rata construction cost contribution (*see herein* Section 1.1(a));
- ii. Return of \$2,204.74 from funds left over for engineering work performed by Parkhill (*see herein* Section 1.1(b)); and
- iii. Return of its \$6,882.50 Phase I material cost contribution (*see herein* Section 1.1(c)); and
- iv. Payment by Summit Lake Villas POA of \$3,333.33 toward the total owed by the City to Downey for CMAR services already provided.

(d) **Developer:** NINETY THOUSAND TWO HUNDRED NINETY-NINE AND 41/100 DOLLARS (\$90,299.41), based upon the following:

- i. Return of its \$55,798.27 pro-rata construction cost contribution (*see herein* Section 1.1(a));

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- ii. Return of \$4,069.47 from funds left over for engineering work performed by Parkhill (*see herein* Section 1.1(b));
- iii. Return of its \$13,765.00 Phase I material cost contribution (*see herein* Section 1.1(c));
- iv. Return of its \$20,000.00 lump sum contribution (*see herein* Section 1.1(d) herein); and
- v. Payment by Developer of \$3,333.33 toward the total owed by the City to Downey for CMAR services already provided.

SECTION 1.4. RESERVED

SECTION 1.5. TRANSFERS TO THE CITY OF NORMAN; LOT LINE ADJUSTMENT; MAINTENANCE OF COMMON AREAS.

(a) **Transfer of Property.** The Summit Lakes POA and Summit Lake Villas POA agree to transfer and convey to the City of Norman (subject to the covenants, restrictions, reservations and exceptions currently under discussion and to be finalized by later agreement of the Parties), fee title ownership of the property, (identification of which is currently under discussion and which shall be described in a future agreement of the Parties (**“Transferred Property”**), along with any drainage easements and access easements over and across any portion of common areas remaining in the ownership of either POA as reasonably necessary to carry out the intent of this Agreement and sufficient to ensure that the NMA/City can properly access, repair and maintain the Transferred Property, and which are currently under discussion and shall also be finalized in by future agreement of the Parties (the **“Easements”**). The NMA/City shall pay no monetary consideration for the Transferred Property or the Easements. The NMA/City’s acceptance of the Transferred Property shall be subject to and more fully set forth in a future agreement of the parties, including specified Conditions Precedent, and language address the applicability of any existing POA covenants, rules or agreements; provided however that the future agreement and instruments implementing the future agreement will: (i) not include a right of general public access to the dam or lake for recreational or other purposes, (ii) provide that Summit Lakes POA and Summit Villas POA shall retain responsibility for general maintenance of the Transferred Property such as mowing, sidewalk maintenance, and litter control, and (iii) reserve to the POAs on behalf of their respective residents perpetual rights, easements and license to continue to go upon, traverse, and enjoy the Summit Lake Dam for recreational purposes which do not materially interfere with the performance of the City of Norman’s duties and obligations to maintain the dam, as may later be further defined.

(b) **Lot Line Adjustment by POAs.** To facilitate the transfer of title to the Transferred Property to the City of Norman as aforesaid, the POAs agree to make application according to applicable laws, codes and regulations of the City of Norman, for a lot line adjustment facilitating transfer of the Transferred Property. The POAs shall obtain the survey and legal descriptions as necessary to facilitate lot line adjustment and the transfer of ownership to

the City. This Lot Line Adjustment process shall be subject to and more fully set forth in a future agreement of the parties

(c) **City Responsibility for Maintenance of Misty Lake Dam.** The POAs shall be responsible to ensure that the transfers described herein will be sufficient, for the POA's purposes, to allow OWRB to recognize the City of Norman as the actual owner responsible for the safety and maintenance of the Misty Lake Dam for all purposes. The City of Norman agrees that concurrently with the transfer of the Transferred Property to the City of Norman, the City of Norman will execute and deliver to OWRB such notices of change of ownership and other related documents as are required or reasonably necessary, expedient or proper for OWRB to recognize the City as the actual owner of the Misty Lake Dam and to carry out the intent of this Agreement. These processes shall be subject to and more fully set forth in a future agreement of the parties.

SECTION 1.6. MUTUAL RELEASE & WAIVER OF CLAIMS.

(a) Mutual Release & Waiver of Claims by POAs and Developer.

(i) The City has been 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. Further, the POAs shall fully indemnify and defend the City and Norman Municipal Authority against any and all claims arising from the collection of those assessments referenced in Sections. 1.3 and 1.4 above.

(ii) Upon completion and acceptance by the City of the Misty Lake Dam repair project as ultimately outlined in the parties' future final agreements, and excepting claims based upon workmanship in carrying out the Dam Improvements, and to the extent permitted by applicable law, the City, NMA, the POAs and Developer (each a "Releasor") severally covenant and agree to release, waive and forever discharge the each other party to this Agreement, and their respective officers, directors, employees, representatives, successors and assigns from any and all claims the Releasor had or may have had against any other party to this Agreement regarding the Misty Lake Dam, including but not limited to the design, planning, construction oversight, engineering, development, permitting, platting, seeping, leaking, maintenance, repair or failure of function, as may be related to the Misty Lake Dam. This covenant and agreement shall not extend to claims the POAs 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 fulfill the terms of this Agreement. Further, with respect to any claims based upon workmanship in carrying out the Dam Improvements, the POAs shall cooperate with the City in pursuing any such claims and hereby assigns the proceeds of any successful claims to the City and/or NMA, as applicable, for use in remedying any damage to the Transferred Property, including the Dam Improvements.

(b) **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.

(c) To the extent the provisions of the Second 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.

ARTICLE II. GENERAL PROVISIONS

SECTION 2.1 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: Lew Goidell
109 Summit Bend
Norman, OK 73071

With a copy to:

William R. Dill
Attorney at Law
401 W. Main St. Ste. 444
Norman, OK 73069

Summit Lake Villas POA:

Attn: Larry Dunham
228 Boulevard 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

SECTION 2.2 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. This paragraph applies to the further agreements of the Parties referenced throughout this Amend. 2 and MOU.

SECTION 2.3 NATURE OF AGREEMENT. This Amend. 2 and MOU amendments and supplements the Parties' Participation Agreement, and all previous Amendments, only insofar as set forth herein. Until such time as the Parties otherwise and further agreement, terms not amended herein shall remain in force and be construed, insofar as is possible, consistently with the terms of this Amend. 2 and MOU.

SECTION 2.4 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.

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

THE CITY OF NORMAN, OKLAHOMA

By: _____
Name: Larry Heikkila
Title: Mayor

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

NORMAN MUNICIPAL AUTHORITY

By: _____
Name: Larry Heikkila
Title: Chairman

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

Approved as to form and legality this 22 day of March, 2024.


City Attorney/ General Counsel

SUMMIT LAKES POA

By: Lewis C. Goideell
Name: Lewis C. Goideell
Title: President

SUMMIT LAKE VILLAS POA

By: Larry Dunham
Name: LARRY DUNHAM
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

EXHIBIT A
2023 OWRB CONSENT ORDER

EXHIBIT B
CURRENT ENGINEERING PLANS