

APPENDIX G

PRIVATE DETENTION FACILITY MAINTENANCE AGREEMENT AND EASEMENT

This PRIVATE DETENTION FACILITY MAINTENANCE AGREEMENT (Agreement) by and between THE CITY OF CATOOSA, OKLAHOMA (CITY) and _____, an Oklahoma Corporation (“Developer”) and _____ PROPERTYOWNERS ASSOCIATION (“Propertyowners Association” or “Association”), an Oklahoma non-profit corporation. The above may occasionally be referred to herein singularly as “Party” and collectively as “Parties”.

RECITALS

1. **WHEREAS**, the Developer is the owner of certain real estate (describe/name the Property or Subdivision Plat) in the CITY, which Property is legally described as follows:
2. **WHEREAS**, the Developer desires to develop or plat a subdivision on the Property to be known as or described as _____; and
3. **WHEREAS**, the development of this Subdivision Plat or development will increase the volume of water runoff from the property, and, therefore, it is in the interest of public health, safety and welfare for the CITY to condition approval of this subdivision or development on the Developer’s promise to construct storm water drainage and detention facilities in the Subdivision Plat or Development as required by CITY regulations; and
4. **WHEREAS**, Section 4.9 of the CITY Subdivision Regulations, as periodically amended, requires a developer to construct adequate storm water drainage and detention facilities in subdivisions or developments; and
5. **WHEREAS**, the CITY has not assumed control of the Subdivision or Development storm water detention facility; and
6. **WHEREAS**, storm water detention facilities are an effective means of controlling storm water runoff; and
7. **WHEREAS**, the Developer and the Association are required to construct a detention facility as the means for providing adequate storm water drainage and runoff control in the Subdivision or Development; and
8. **WHEREAS**, the Association shall be charged in the Subdivision’s or Development’s Covenants with the duty of maintaining all common areas and common structures, including the detention facility; and

9. **WHEREAS**, the lack of proper cleaning, maintenance and repair could reduce the capacity and efficiency of said facility and otherwise threaten the public health, safety and welfare; and
10. **WHEREAS**, the CITY, in order to so protect the public health, safety and welfare, requires the means to recover its cost incurred in the event the CITY must clean, maintain and/or repair said private detention facility in an effort to protect the public health, safety and welfare; and
11. **WHEREAS**, the CITY conditions its approval of this Subdivision Plat or Development on the Developer's and the Association's agreement to so construct this detention facility, and conditions approval on the Association's agreement to reimburse the CITY in the event the burden falls upon the CITY to so clean, maintain and/or repair the detention facility; and
12. **WHEREAS**, the CITY, in order to secure performance of the promises contained herein, conditions approval of this Subdivision Plat or Development upon the Developer's grant herein of a perpetual access over a portion of the Subdivision Plat or Development for the purpose of allowing the CITY to periodically access, inspect, and, when so necessary, to clean, maintain and/or repair the detention facility; and
13. **WHEREAS**, given that the Association could potentially avoid liability hereunder by dissolving and reforming as a different entity, and given the difficulties inherent in collecting an unsecured promise, the CITY, in order to secure performance of the promises contained herein, condition approval of this Subdivision Plat or Development upon the Developer's creation, by and through this Agreement, of a covenant running with the land upon each and every lot in the Subdivision or Development.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual Promises contained herein, the sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Incorporation of Recitals: The Parties incorporate the Recitals above into this Agreement.
2. Covenants Running with the Land and Pro Rata Liability upon Individual Lot Owners: The Developer and Propertyowners' Association agree that this entire Agreement and the performance thereof shall become a covenant running with the land, which land is legally described in Paragraph One (1) of the Recitals set forth above, and that this entire Agreement and the performance thereof shall be binding upon themselves, their respective successors and assigns, including individual lot owners within the Subdivision or Development.

However, any liability imposed under this Agreement against an individual lot owner shall not be joint and several with the Developer and the Association, but shall be pro rated on a per-lot basis as determined by the following formula and illustration:

Each individual lot owner(s) shall be liable for no more than the total monetary amount of liability multiplied by a fraction in which the numerator is the number of lots in the Subdivision Plat or Development owned by a particular lot owner, and the denominator is the total number of lots in the Subdivision Plat or Development. As to any lot(s) owned by more than one person or entity, the liability among co-owners shall be joint and several for the pro rata obligation of that lot. The application of this Paragraph is best illustrated by the following example. Assume the following parameters: total liability is \$10,000; total number of lots is 100; Lot 1 is owned by persons A and B; person B also owns Lot 2. Liability is as follows: the Developer, \$10,000; the Association, \$10,000; Lot 1 is \$100, joint and several as to A and B, Lot 2 is \$100 owned solely by B. Thus person A's total liability is \$100 and person B's is \$200. Applying the principle that the CITY cannot collect more than it is owed, and assuming that the CITY cannot collect anything from the Developer and the Association, if the CITY collected the \$200 from B, then it could not collect the \$100 from A. Likewise, if the CITY collected the \$100 from A, then it could only collect \$100 from B.

3. Construction: The Developer and the Propertyowners' Association agree that they shall construct on (Tract _____ or Lot: _____, Block _____ or Reserve _____) as indicated on the final plat of the Subdivision or such other officially approved plans and as described below a private storm water detention facility (for multiple detention facilities, insert the following here: consisting of _____ () detention ponds, one on each tract [or lot]) ("detention facility"). The Developer and the Propertyowners' Association shall not commence construction of the detention facility until the CITY ENGINEER has approved in writing the plans and specifications for the detention facility. Failure to obtain such approval shall be material breach of this Agreement, and shall entitle the CITY to pursue any remedies available to it at law or in equity to enforce the same. Construction of the detention facility shall be completed prior to filing of the final plat. Rough grading of the detention facility must be completed and inspected and approved by the CITY ENGINEER prior to commencing road construction.

In the event construction is not so completed, then the CITY may exercise its discretion (as secured by performance bonds or other such surety) to complete the project, and shall have the right to seek reimbursement from the Developer and the Propertyowners' Association and their respective successors and assigns, for its actual costs and expenses incurred in the process of completing construction.

The term actual costs and expenses shall be liberally construed in favor of the CITY, and shall include, but shall not be limited to, labor costs, tool and equipment costs, supply costs, and engineering and design costs, regardless of whether the CITY uses its own personnel, tools, equipment and supplies, etc. to correct the matter. In the event the CITY initiates any litigation or engages the services of legal counsel in order to enforce the provisions arising herein, the CITY shall be entitled to its damages and costs, including reasonable attorney fees, regardless of whether the CITY contracts with outside legal counsel or utilizes in-house legal counsel for the same. The scope of liability therefor of the Developer, the Association, and the individual lot owners shall be as set forth in Paragraph 2 above.

4. Maintenance: The Developer and the Association agree for themselves, their respective successors and assigns, including individual lot owners within the Subdivision Plat or Development, that they will regularly and routinely inspect, clean and maintain the detention facility, and otherwise keep the same in good repair, all at their own cost and expense. No trees or shrubs that will impair the structural integrity of the detention facility shall be planted or allowed to grow on the detention facility.
5. Creation of Easement: The Developer and the Association hereby grant the CITY a non-exclusive perpetual easement upon the entire Tract(s) [or Lot(s)] described above. The purpose of the easement is to allow the CITY to access, inspect, clean, repair and maintain the detention facility; however, the creation of the easement does not expressly or implicitly impose on the CITY a duty to so inspect, clean, repair or maintain the detention facility.
6. City's Rights and Obligations: Any time the CITY determines, in the sole exercise of its discretion, that the detention facility is not properly cleaned, maintained and/or otherwise kept in good repair, the CITY shall give reasonable notice to the Developer, the Association and their respective successors and assigns, including the individual lot owners within the Subdivision Plat or Development, that the detention facility needs to be cleaned, maintain and/or otherwise repaired. The notice shall provide a reasonable time to correct the problem(s). Should the responsible parties fail to correct the specified problem(s), the CITY may enter upon the Property to so correct the specified problem(s). Notice shall be effective to the above by the CITY'S deposit of the same into the regular United States mail, postage pre-paid. However, this Agreement does not expressly impose on the CITY a duty to so inspect, clean, repair or maintain the detention facility.
7. Reimbursement of CITY'S Costs/Covenant Running with the Land: The Developer and the Association agree and covenant, for themselves, their respective successors and assigns, including individual lot owners within the Subdivision Plat or Development, that they will reimburse the CITY for its costs and expenses incurred in the process of cleaning, maintaining, and/or repairing the detention facility. However, the obligation and liability of the Developer hereunder shall only continue until such time as the Developer

transfers the entire management and operation of the Association to the individual lot owners within the Subdivision Plat or Development. Notwithstanding the previous sentence, the Association and the individual lot owners within the Subdivision or Development shall always remain obligated and liable hereunder, and as per the provisions of Paragraph 2 above.

8. Contingencies of Subdivision Plat or Development Approval: The Developer's and the Association's execution and compliance with this Agreement are a condition of Subdivision Plat or Development approval. Additional conditions of this Agreement include, but are not limited to, the following:

a. Conveyance of Tract(s) _____ from the Developer to the Association (which will include a reservation of easement in favor of the CITY for purposes of accessing, inspecting, cleaning, maintaining and repairing the detention facility), and recording of the Deed for the same; and

If not a conveyance of a fee interest but merely creating and conveying an easement on the affected lot(s) or property so described above, then substitute the following alternative Paragraph "a" and include "b" – "d":

a. Conveyance of easements on (Lot(s) _____, Block _____ OR Property described above) from the Developer to the Association and to the CITY for the purposes of accessing, inspecting, cleaning, maintaining and repairing the detention facility, and recording of appropriate conveyance documents for the same; and

b. The CITY'S receipt of a copy of the Articles of Incorporation for the Association, as filed with the Oklahoma Secretary of State; a copy of the Bylaws of the Association; a copy of the organizational minutes or other appropriate documents of the Association, properly executed and attested, establishing that the Association has adopted this Agreement as an obligation of the Association; and

c. A copy of the recorded (Book and Page) Covenants of the Subdivision Plat or Development establishing: that the Association is obligated to inspect, clean, maintain and repair the detention facility; that the Association has adopted this Agreement as an obligation of the Association; and that a funding mechanism is in place whereby individual lot owners within the Subdivision Plat or Development pay a regular fee to the Association for, among other matters, the inspection, cleaning, maintenance and repair of the detention facility.

d. A copy of recorded (Book and Page) the Covenants of the Subdivision Plat or Development establishing that this Agreement is incorporated into the Covenants, and that such Agreement touches and concerns every lot in the Subdivision Plat or Development.

The CITY shall have the right, in the sole exercise of its discretion, to approve or disapprove any documentation submitted to it under the above conditions.

9. The CITY'S rejection of any documentation submitted hereunder shall mean that the appropriate condition of this Agreement has not been fulfilled.
10. Distribution to Lot or Property Purchasers: Upon the initial sale, or any and all subsequent sales of any lot(s) within the Subdivision Plat or Development prior to closing on such sale, the Developer shall give a copy of this Agreement to the potential Buyer. Upon sale to said Buyer, the Buyer shall acknowledge receipt in writing of this agreement.
11. Agreement Monitored by Planning Department: Any and all actions and decisions to be made hereunder by the CITY shall be made by the CITY ENGINEER. Accordingly, any and all documents, submissions, plan approval, inspections, etc. shall be submitted to and shall be made of record by the CITY ENGINEER.
12. Indemnification and Hold Harmless: To the extent authorized by law, the Developer and the Association agree, for themselves, their respective successors and assigns, including the individual lot owners in the Subdivision Plat or Development, that they will indemnify, defend and hold harmless the CITY from any and all loss, costs, damage, injury, liability, claim, lien, demand, action and causes of action whatsoever, whether at law or in equity, arising from or related to their respective intentional or negligent acts, errors or omissions or that of its agents, officers, servants, employees, invitees and licenses in the construction, operation, inspection, cleaning, solid or hazardous wastes as defined by State and/or Federal environmental laws and maintenance and repair of the detention facility, and such obligation arising under this Paragraph shall be joint and several. Nothing in this Paragraph shall be deemed to waive or otherwise limit the defense available to the CITY as provided by law. However, the obligation and liability of the Developer hereunder shall only continue until such time as the Developer transfers the entire management and operation of the Association to the Propertyowners Association and/or individual lot owners within the Subdivision Plat or Development.
13. Severability: In the event any Court of competent jurisdiction declares any part of this Agreement to be unenforceable, such declarations shall not affect the enforceability of the remaining parts of this Agreement.
14. Third Parties: This Agreement does not and shall not be deemed to confer upon or grant to any third party any right to claim damages or to bring any lawsuit, action or other proceeding against either the CITY, the Developer or the Association, their respective successors and assigns, including any individual lot owners within the Subdivision Plat or Development, because of

any breach hereof or because of any terms, covenants, agreements or conditions contained herein.

15. Solid or Hazardous Wastes: Should any refuse from the detention facility be suspected or identified as solid waste and/or hazardous waste, the Developer and the Association shall take all necessary and proper steps to identify and classify the waste and properly dispose of it in accordance with applicable State and/or Federal environmental laws and regulations. The CITY shall not be responsible or liable for identifying, characterizing, cleaning up or disposing of such solid and/or hazardous waste. Notwithstanding the previous sentence, should any refuse cleaned up and disposed of by the CITY be determined to be solid and/or hazardous waste, the Developer and the Association, but not the CITY, shall be responsible and liable as the owner, generator, and/or transporter of said solid and/or hazardous waste.

16. Applicable Law and Venue: The laws, rules and regulations of the State of Oklahoma and CITY shall be applicable in the enforcement, interpretation and execution of this Agreement, except that Federal law may be applicable regarding solid or hazardous wastes. Venue shall be in the _____ County District Court.

IN WITNESS WHEREOF, the Parties affix their signatures below.

Executed this _____ day of _____, _____,

by: _____
[DEVELOPER'S NAME]:

By: _____

_____, President
(Insert Name)

The forgoing instrument was acknowledged before me this _____ day of _____, _____, by _____,

President, _____.

Witness my hand and official seal.

My commission expires _____.

Notary Public

Executed this _____ day of _____, _____ by:

_____ **PROPERTYOWNERS' ASSOCIATION,** an
Oklahoma nonprofit corporation.

By: _____

_____, President
(Insert Name)

The forgoing instrument was acknowledged before me this _____ day of

_____, _____, by _____,

President, _____.

Witness my hand and official seal.

My commission expires _____.

Notary Public

Executed this _____ day of _____, _____.

CITY COUNCIL OF CATOOSA, OKLAHOMA

By: _____

_____, Mayor
(Insert Name)

The forgoing instrument was acknowledged before me this _____ day of

_____, _____, by _____
Mayor of the City of Catoosa, Oklahoma

ATTESTED to by _____, City Clerk
(Insert Name)

Witness my hand and official seal.

My Commission expires _____.

Notary Public

APPROVED as to Content and Form:

City Attorney

Date