

**INDEMNITY AGREEMENT FOR APPLICATION FOR HIGHWAY OCCUPANCY PERMIT  
CONCERNING SUBSURFACE STORMWATER FACILITIES**

**THIS AGREEMENT** is made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between

\_\_\_\_\_, a \_\_\_\_\_, having a mailing  
address of \_\_\_\_\_ (the "Developer").

A N D

**SUMMIT TOWNSHIP**, a township of the second class, situate in Erie  
County, Pennsylvania, having the address of 1230 Townhall Road W – Suite  
100, Erie, PA 16509 - 5080 ("Township").

**BACKGROUND**

- A. Developer is the holder of contracts to purchase or develop certain parcels of property situate along State Route \_\_\_\_ in Summit Township, Erie County, Pennsylvania, on which it has proposed to develop a \_\_\_\_\_ to be known as \_\_\_\_\_ (collectively, the "Property").
- B. The Developer has submitted a Development plan for the Township's approval.
- C. Developer has or will submit to the Pennsylvania Department of Transportation ("PennDOT") an application for a highway occupancy permit ("HOP"), as required by Pennsylvania law and the Township's ordinances.
- D. Developer's application for the HOP proposed the \_\_\_\_\_  
\_\_\_\_\_ to connect with the Developer's subsurface stormwater drainage facilities for the site, as shown within the construction plans of the HOP Plan marked "Exhibit A," attached hereto and made a part hereof.
- E. The pipe or the inlet and piping associated with it directs subsurface stormwater from the Developer's Property into or under the highway's right of way or drainage facilities within it.
- F. The subsurface stormwater drainage facilities to be installed under the HOP include only the new facilities to be installed by Developer within the right of way of State Route \_\_\_\_\_.

G. The Township has received Developer's land development plan application for the development, which requires Developer's acquisition of the required HOP, prior to approval of land development plan.

H. Developer has complied with all stated requirements for issuance of an HOP for the development except PennDOT issued a "strike-off" letter stating a "policy" of requiring the municipality to join as permit applicant where drainage facilities within the highway right of way would be utilized to receive subsurface stormwater flows from the development.

I. Developer's HOP application provides for the conveyance of subsurface stormwater flows from the development site into subsurface stormwater drainage facilities within the highway right of way, PennDOT has advised Developer that the fact of its constructing the subsurface stormwater drainage facilities are viewed by PennDOT as requiring joinder of the Township as co-applicant of the HOP.

J. This same PennDOT policy directs that any HOP issued concerning subsurface stormwater drainage facilities will contend that PennDOT is not responsible for maintenance of storm drainage facilities and that the municipality within which a permit applicant proposes to develop must join as "co-permittee" as to a HOP, PennDOT suggesting that municipalities be protected from liabilities under its new "policy" by requiring indemnification agreements and financial security from the developers to ensure the developers' payment of costs for inspections, maintenance, repair, replacement and/or reconstruction of such subsurface stormwater management facilities.

K. The Township believes that there is no basis, in the State Highway Law, any other law of Pennsylvania or under the facts of Developer's application, for PennDOT's attempt to divest itself of responsibility for implementation and maintenance of stormwater drainage facilities within its highways' right of way, and that PennDOT's new administrative "policy" contradicts the plain language of 67 Pa. Code § 441.3 governing application for highway occupancy permits.

L. The Township has advised Developer of its fundamental disagreement with PennDOT's new administrative "policy" and of its refusal to assume liabilities as to costs that should be borne by PennDOT or, failing that, those developing land and requesting issuance of a HOP.

M. The Developer has advised the Township that it does not wish to revise its HOP permit application and that it believes the Township's agreement to join as co-applicant on the HOP for this development is necessary to avoid the collapse of the development that would create jobs and enhance the tax revenues of the school district, Erie County and the Township.

N. The Township, solely to avoid loss of the development and the economic benefits it can provide the community, has agreed to join as co-applicant on Developer's HOP application in regard to the subsurface stormwater drainage facilities only. The Township is not a co-applicant for any other Proposed Work on HOP Application No. \_\_\_ and Permit No. \_\_\_, subject to the terms and conditions of this Agreement.

O. Developer and Township desire, through this Agreement, to allocate the rights and responsibilities between each other for the repair, replacement and reconstruction cost of the subsurface stormwater drainage facilities to be constructed should PennDOT issue the applied for HOP for the Property and to provide for the Developer's indemnification of the Township for any and all liability related to the matters set forth in this Agreement.

**NOW THEREFORE**, in consideration of the mutual covenants and agreements contained herein and intending to be legally bound thereby, the parties hereto agree as follows:

The foregoing recitals are incorporated herein and made a part hereof.

## **ARTICLE I**

### **PLANNING, DESIGN, CONSTRUCTION AND MAINTENANCE RESPONSIBILITIES**

**1.01.** Developer and its engineering firm have represented to the Township that portions of the stormwater drainage facilities described in Exhibit A, will direct flows of stormwater from the Property into, subsurface stormwater facilities within the State Route \_\_\_ right of way.

**1.02.** Developer shall be solely responsible, at its own cost and expense, for the design of the subsurface stormwater drainage facilities and the preparation and submission of the application to PennDOT for the associated HOP for the Property.

**1.03.** Developer shall ensure that any design of such subsurface stormwater drainage facilities shall comply with all applicable building and other codes, industry standards, PennDot's rules and regulations and laws.

**1.04.** The Township, or its retained engineering firm responsible for reviews, inspections and certifications as to stormwater management regulations, shall have the right to review, approve or deny the proposed design of the subsurface stormwater drainage facilities and to the proposed application for the associated HOP for the Property before submission to PennDOT. Developer shall pay all costs of the Township's review of the designs and application.

**1.05.** The Township's joinder as co-applicant for the HOP is expressly conditioned upon such application's including a Highway Occupancy Permit Condition Statement to be provided by the Township, stating that the Township's joinder is under protest and is made solely to protect against loss of this development in view of PennDOT's actions as set forth in Background, above.

**1.06.** Upon receipt of the HOP and commencement of construction of \_\_\_\_\_, Developer shall construct or cause to be constructed the subsurface stormwater drainage facilities in accordance with any and all approvals required and received from the Township, PennDot and otherwise in accordance with all applicable building codes, laws, ordinances and regulations.

**1.07.** Developer, at its own cost and expense, shall be solely responsible for regularly inspecting, maintaining and, as may be necessary, reconstructing, repairing or replacing the installed subsurface stormwater drainage facilities as necessary or when the Township or PennDOT determines that maintenance or replacement is necessary in their reasonable discretion.

**1.08.** Developer shall indemnify, defend and hold harmless the Township and its officials, employees, professional advisors, agents, servants, workmen and contractors from and against all suits, claims, actions, damages, losses and expenses of any nature, including, but not limited to, attorneys' fees, and all suits, claims, actions, workers' compensation claims, damages, losses and expenses brought by any third parties, and/or employees of Developer or contractors and subcontractors of Developer, and for all costs or liability to which the Township may be held responsible, and for any injury or alleged injury to the person or property of another resulting from negligence or carelessness arising out of or resulting from the design, construction, inspection or failure to inspect, operation and/or failure of the subsurface stormwater drainage facilities that are the subject of the associated HOP for the Property and for all costs associated with the design, construction, inspection, maintenance, repair, reconstruction and/or operation of said facilities.

## **ARTICLE II - SECURITY FOR PERFORMANCE**

**2.01.** At the sole discretion of the Township, Developer shall be required to provide security to ensure its construction, inspection, maintenance, repair, reconstruction and indemnity obligations concerning the subsurface stormwater drainage facilities in the form of (a) a deposit of funds into an Escrow Account maintained by the Township or (b) the tender to the Township of a letter of credit issued by a bank chartered by the Federal Government or the Commonwealth of Pennsylvania.

**2.02. Escrow Account.** (Check if this section is applicable: )

A. Developer shall deposit into an escrow account for the sole benefit of the Township, with the Township as escrow agent, the initial sum of \_\_\_\_\_ and \_\_\_\_/100 Dollars (\$ \_\_\_\_\_), said monies to be held in the Township's name alone as escrowee in an interest-bearing account segregated from and not commingled with its general fund (but it may be part of a shared escrow fund entitled Stormwater Maintenance Escrow Account if so determined by the Township). Said deposit shall be paid over to the Township prior to release by the Township of the approved development plan for recording. Said account shall be held and administered by the Township for the purposes set forth below.

B. The Stormwater Maintenance Escrow Account shall be used to reimburse the Township for any and all expenses, fees and charges incurred by the Township for the inspection, maintenance, repair, replacement and/or reconstruction of the subsurface stormwater drainage facilities that are described in the Background section of this Agreement. The Township shall be entitled to use, at its election, the funds in said escrow to pay for costs of such work, materials and/or supplies or for costs and fees associated therewith only after the Township has notified Developer in writing of the need to perform inspection, maintenance, repair, replacement or reconstruction of one or more of the subsurface stormwater drainage facilities and/or to reimburse the Township for costs or fees otherwise incurred by it. The Developer shall have fifteen (15) days after the date of such notice in which to begin work on such measures (or, if applicable, to reimburse for costs, fees, expenses or awards incurred by the Township) or otherwise provide the Township with a response that is deemed adequate by the Township before the Township uses funds from the Account.

C. The balance of Developer's Stormwater Maintenance Escrow Account at no time shall be in an amount less than 90 percent of the original amount, or \$\_\_\_\_\_ (the Minimum Balance). In the event that the balance in said Account should fall below this Minimum Balance, the Township shall require that the Developer deposit into the Account, within fifteen (15) days after the date of Township's notice, the difference between the Account's then current balance and the original escrow deposit amount set forth in Section 2.02(A).

D. In accordance with the procedure set forth as to security for ensuring construction of required improvements as set forth in the Township's Developer's Agreement, the Township may on a periodic basis review the Escrow Account and require a reasonable increase in the Escrow Account deposit amount paid by the Developer, after taking into account all relevant factors, including inflation, estimated inspection, maintenance, repair, replacement and reconstruction costs, any material alteration of the property

serviced by the subsurface stormwater drainage facilities and the performance and/or condition of the facilities.

E. As Developer's obligations under this Agreement are perpetual, funds shall remain at all times in the Escrow Account for the intended and stated purposes.

**2.03. Letter of Credit.** (Check if this section is applicable: )

A. Developer shall cause to be issued by a bank chartered by the Federal Government or the Commonwealth of Pennsylvania a letter of credit naming the Township as beneficiary and Developer as obligated party, in the initial sum of \_\_\_\_\_ and \_\_/100 Dollars (\$ \_\_\_\_\_), certifying that Developer will design, construct, inspect and maintain (including repair, replacement and/or reconstruction as necessary) the subsurface stormwater drainage facilities that are described in the Background section of this Agreement.

B. The Letter of Credit shall be used to reimburse the Township for any and all expenses, fees and charges incurred by the Township for the inspection, maintenance, repair, replacement and/or reconstruction of the subsurface stormwater drainage facilities that are described in the Background section of this Agreement. The Township shall be entitled to exercise its rights against the Letter of Credit, at its election, to pay for costs of such work, materials and/or supplies or for costs and fees associated therewith only after the Township has notified Developer in writing of the need to perform inspection, maintenance, repair, replacement or reconstruction of one or more of the subsurface stormwater drainage facilities and/or to reimburse the Township for costs or fees otherwise incurred by it. The Developer shall have fifteen (15) days after the date of such notice in which to begin work on such measures (or, if applicable, to reimburse for costs, fees, expenses or awards incurred by the Township) or otherwise provide the Township with a response that is deemed adequate by the Township before the Township uses funds from the Letter of Credit.

C. The balance of Developer's Letter of Credit at no time shall be in an amount less than 90 percent of the original amount, or \$ \_\_\_\_\_ (the Minimum Balance). In the event that the balance in said Letter of Credit should fall below this Minimum Balance, the Township shall require that the Developer increase the amount of the Letter of Credit, within fifteen (15) days after the date of Township's notice, the difference between the Letter of Credit's then current balance and the original Letter of Credit amount set forth in Section 2.03(A).

D. In accordance with the procedure set forth as to security for ensuring construction of required improvements as set forth in the Township's Subdivision & Land Development Ordinance (Section 303 as may in the future be amended), the Township may on a periodic basis review the Letter of Credit amount and require a reasonable increase in the security amount, after taking into account all relevant factors, including inflation, estimated inspection, maintenance, repair, replacement and reconstruction costs, any material alteration of the property serviced by the subsurface stormwater drainage facilities and the performance and/or condition of the facilities.

E. As Developer's obligations under this Agreement are perpetual, funds shall remain at all times in the Letter of Credit for the intended and stated purposes.

F. Said Letter of Credit shall comply with all requirements in the Township's Developer's Agreement, with respect to the content, requirements and administration of Letters of Credit, these including but not being limited to automatic extension without demand.

G. If Developer does not renew or increase the amount of the Letter of Credit then Developer shall create an Escrow Account consistent with section 2.02 herein.

### **ARTICLE III - DEFAULT; REMEDIES**

**3.01.** The Township shall bear or incur no financial obligation, liability, risk or exposure, of any kind or nature, by virtue of joining, under protest, as applicant on Developer's HOP application to preserve



Developer's project. Developer shall be responsible for all actions, payments and other matters required to comply with obligations under the HOP as issued, regulations governing such HOP and/or facilities Developer constructs and under this Agreement. This Section is not intended to obligate the Developer to bear expense as to any dispute between the Township and PennDOT as to the "policy" said to require involvement by municipalities in HOP applications.

**3.02.** In the event Developer shall neglect, fail or refuse to inspect, maintain, repair, reconstruct or replace the installed subsurface stormwater drainage facilities as necessary or when the Township or PennDOT determines in their reasonable discretion that inspection, maintenance, repair, reconstruction or replacement is necessary, then the Township may correct said deficiencies and Developer shall be required to reimburse the Township for all reasonable costs of said corrections, including administration, attorney and engineering fees, together with any additional payment authorized by law.

**3.03.** In the event of any breach by Developer of its obligations under the HOP as issued or under this Agreement, the Township shall be entitled to exercise all remedies available under Pennsylvania law, including but not limited to actions at law or in equity. Such remedies may be exercised from time to time as elected by the Township.

**3.04.** In the event of any breach by Developer of its obligations under the HOP as issued or under this Agreement, the Developer, in addition to all other relief, shall be liable for paying over to the Township all attorneys' and professional fees, costs and litigation expenses incurred by it in securing performance or in defending matters for which Developer is to indemnify the Township.

**3.05.** Interest on sums due to the Township by Developer and unpaid after the date due shall bear interest at six percent per annum.

**3.06.** The above provisions do not limit availability or exercise of remedies by the Township, which shall have the right to exercise from time to time all remedies available at law or in equity, including but not limited to actions for specific performance and/or injunctive relief.

**ARTICLE IV - GENERAL PROVISIONS**

**4.01.** This Agreement shall be binding upon and inure to the benefit of the parties and also the successors and assigns of the Developer and the Township.

**4.02.** Any notice to be given hereunder shall be deemed given when personally delivered to the party to receive such notice, or when mailed postage prepaid, by registered or certified mail at the following addresses:

Summit Township:	Summit Township Supervisors 1230 Townhall Road W – Suite 100 Erie, PA 16509 - 5080
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[DEVELOPER]	[DEVELOPER ADDRESS]
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**4.03.** Developer's obligations under this Agreement shall be deemed incorporated within its Developer's Agreement with the Township and a requirement of the Township's development plan approval. Breach of this Agreement shall, in addition to other remedies provided for default, constitute a violation of said Developer's Agreement and plan approval.

**4.04.** In the event PennDOT should abandon its insistence that the Township be co-permittee or agrees to transfer the HOP to Developer, then this Agreement shall terminate and funds then held by Township shall be refunded to the Developer.

**4.05.** This Agreement shall be interpreted according to the laws of the Commonwealth of Pennsylvania. Disputes and actions arising out of this Agreement shall be subject to jurisdictions in the Courts of Erie County, Pennsylvania or the Western District of Pennsylvania.

4.06. This Agreement may be amended, modified or supplemented only by a writing signed by all of the parties to this Agreement.

4.07. This Agreement represents the entire understanding of the parties with respect to the subject matter of this Agreement and supersedes all prior agreements, contracts, negotiations, understandings and other arrangements between the parties.

4.08. Developer shall promptly notify the Township of any material changes in ownership of the Property or any portion of the Property and provide any information about that change in ownership that is reasonably required by the Township.

4.09. The covenants and agreements set forth in this Agreement shall run with the land.

4.010. This Agreement shall be recorded at the Developer's expense in the office of the Erie County Recorder of Deeds as evidence of the existence of this Agreement and of the obligations of the parties concerning the Property.

**IN WITNESS WHEREOF**, the parties have hereunto set their hands and seals or caused this Agreement to be executed and acknowledged by their duly authorized officers, effective as of the date of the earlier acknowledgment.

[DEVELOPER]

BY: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

SUMMIT TOWNSHIP

BY: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**ACKNOWLEDGMENTS**

COMMONWEALTH OF PENNSYLVANIA :  
 : SS.  
COUNTY OF \_\_\_\_\_ :

On this, the \_\_\_ day of \_\_\_\_\_, 20\_\_\_, before me, a Notary Public in and for said Commonwealth and County, the undersigned officer, personally appeared \_\_\_\_\_, \_\_\_\_\_ of [DEVELOPER], known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same for the purposes therein contained, being duly authorized to do so.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public

COMMONWEALTH OF PENNSYLVANIA :  
 : SS.  
COUNTY OF ERIE :

On this, the\_\_ day of \_\_\_\_\_, 20\_\_\_, before me, a Notary Public in and for said Commonwealth and County, the undersigned officer, personally appeared \_\_\_\_\_, Chair of the Board of Supervisors of the **SUMMIT TOWNSHIP**, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged that he executed the same for the purposes therein contained, being duly authorized to do so.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

\_\_\_\_\_  
Notary Public