



# City of Grand Island

Thursday, September 11, 2008  
Special Meeting

## Item I5

**#2008-258 - Consideration of Escrow Agreement with Wells Fargo  
Brokerage Services, LLC**

Staff Contact: Jeff Pederson

## ESCROW AGREEMENT

THIS ESCROW AGREEMENT, made and entered into as of \_\_\_\_\_, 2008, by and between WELLS FARGO BROKERAGE SERVICES, LLC, Public Finance Department, 608 Second Avenue South – 10<sup>th</sup> Floor, MAC: N9303-105, Minneapolis, MN 55479, as escrow agent (Escrow Agent), and the City of Grand Island, Nebraska, a political subdivision of the State of Nebraska (Lessee):

WITNESSETH THAT, in the joint and mutual exercise of their powers, and in consideration of the mutual covenants herein contained, the parties hereto recite and agree as follows:

### Section 1. Recitals; Definitions.

1.1 Wells Fargo Brokerage Services, LLC, and Lessee have entered into a License and Easement dated \_\_\_\_\_, 2008 (the License and Easement), under which Lessee has granted certain rights to real property described therein (the Land) to Wells Fargo Brokerage Services, LLC for a term as expressed therein.

1.2 Wells Fargo Brokerage Services, LLC (Lessor) and Lessee have entered into a Lease-Purchase Agreement dated as of the date hereof (the Lease), whereby certain improvements (the Improvements) are to be constructed upon the Land, and Lessor has agreed to sublease and/or lease the Land and the Improvements to Lessee, and Lessee has agreed to sublease and/or lease the Land and the Improvements (collectively the Project) from Lessor, in the manner and on the terms set forth in the Lease.

1.3 This Agreement is not intended to alter or change in any way the rights and obligations of Lessor and Lessee under the Lease and the License and Easement, but is entirely supplemental thereto.

1.4 The terms capitalized in this Agreement but not defined herein shall have the meanings given to them in the Lease.

1.5 Under the Lease, there is required to be deposited with Escrow Agent the amount of \$ \_\_\_\_\_, which amount shall be credited to the Project Acquisition Fund established in Section 2 hereof and used to pay costs of the Project.

1.6 Under the Lease, Lessee will cause to be designed, constructed and installed the Improvements on the Land. The Project costs are estimated to comprise the types and amounts of costs set forth in the attached Exhibit A, and the Project costs are to be paid from moneys on hand in the Project Acquisition Fund, in accordance with the Lease and this Agreement.

1.7 Lessee desires to employ Escrow Agent to receive, hold, invest and disburse the moneys to be held hereunder as described in Section 1.5 and to perform the other specified functions; all as hereinafter provided.

1.8 Escrow Agent shall not be obligated to assume or perform any obligation of Lessor or Lessee under the Lease or the Ground Lease by reason of anything contained in this Agreement.

1.9 Each of the parties has authority to enter into this Agreement, and has taken all actions necessary to authorize the execution of this Agreement by the officers whose signatures are affixed hereto.

## Section 2. Project Acquisition Fund.

2.1 Escrow Agent shall establish a special escrow fund designated as the "Project Acquisition Fund" (the Project Acquisition Fund), shall keep such Project Acquisition Fund separate and apart from all other funds and moneys held by it, and shall administer such Fund as provided in this Section and Section 3 hereof.

2.2 There shall be credited to the Project Acquisition Fund the amount specified in Section 1.5 hereof. Escrow Agent shall use the moneys in the Project Acquisition Fund to pay Project costs (other than any Project costs paid directly by the Lessee), upon receipt of a request for payment in the form attached hereto as Exhibit B (Payment Request Form), executed by Lessee fully completed and with all supporting documents described therein attached thereto and compliance with the requirements of Section 2.5 hereof. Upon receipt of a Payment Request Form with respect to any component of the Project, an amount equal to the Project costs as shown therein shall be paid directly to the person or entity entitled to payment as specified therein.

2.3 Escrow Agent shall only be responsible for the safekeeping and investment of the moneys held in the Project Acquisition Fund, and the disbursement thereof in accordance with this Section, and shall not be responsible for the authenticity or accuracy of such certifications or documents, the application of amounts paid pursuant to such certifications by the persons or entities to which they are paid, or the sufficiency of the moneys credited to the Project Acquisition Fund to make the payments of Project costs herein required.

2.4 Any moneys credited to the Project Acquisition Fund representing interest earned on the amounts originally deposited therein shall be transferred to Lessee upon the written request of Lessee and used to pay the Rental Payments next owing under the Lease. No such transfer shall be requested if the amount remaining in the Project Acquisition Fund after such transfer will not be sufficient to pay all remaining Project costs. Any portion of the original deposit remaining in the Project Acquisition Fund after payment of all Project costs may be expended on any capital expense directly related to the Project as directed by Lessee, upon receipt by Escrow Agent of an opinion of an attorney or firm of attorneys nationally recognized as bond counsel to the effect that the planned expenditure will not cause the interest component of the Rental Payments to become includable in gross income for federal income tax purposes or may be used to pay the principal portion of Rental Payments coming due under the Lease. In any event, any moneys remaining on hand in the Project Acquisition Fund which have not been so used within three years of the date of execution of this Agreement shall be applied to pay the principal portion of the Rental Payments as they next become due.

2.5 Upon request by Lessor, no amounts shall be disbursed from the Project Acquisition Account unless or until there has been provided to Lessor:

- (a) the contract between Lessor and the Project architect, together with the plans and specifications for the Improvements, prepared by the Project architect, and an assignment of such contract for the benefit of Lessor;
- (b) a fixed price or guaranteed maximum price contract for the construction and installation of the Improvements, and an assignment of such contract for the benefit of Lessor;
- (c) a sworn construction cost statement from the contractor; and
- (d) evidence that the contractor has obtained builder's risk, liability and workers compensation insurance reasonably satisfactory to Lessor and has provided payment and performance bonds with respect to the Project naming Lessor as a dual obligee.

### Section 3. Moneys in Funds; Investment.

3.1 The moneys and investments held by Escrow Agent under this Agreement are irrevocably held in trust for the benefit of Lessee and Lessor, and such moneys, together with any income or interest earned thereon, shall be expended only as provided in this Agreement and shall not be subject to levy or attachment or lien by or for the benefit of any creditor of either Lessee or Lessor.

3.2 Moneys held by Escrow Agent hereunder shall be invested and reinvested by Escrow Agent upon written order or telephonic order confirmed immediately thereafter in writing of Lessee only in Qualified Investments (as defined below) and in accordance with investment instructions given to Escrow Agent by Lessee. Escrow Agent shall be entitled to rely on such order of Lessee that an investment is a Qualified Investment. Such investments shall be registered in the name of Escrow Agent and held by Escrow Agent. With the approval of Lessee, Escrow Agent may purchase or sell to itself or any affiliate, as principal or agent, investments authorized by this Section. Such investments and reinvestments shall be valued at the lower of cost or fair market value and shall be made giving full consideration for the time at which funds are required to be available.

Qualified Investments shall include any obligation which is authorized by law as an eligible investment for funds of Lessee.

3.3 Escrow Agent shall, without further direction from Lessee, sell such investments as and when required to make any payment from the Fund for which such investments are held. Any income received on such investments shall be credited to the respective Fund for which it is held.

3.4 Upon request, Escrow Agent shall furnish to Lessee an accounting of all investments. Escrow Agent shall not be responsible or liable for any loss suffered in connection with any investment of moneys made by it in accordance with this Section.

Section 4. Escrow Agent's Authority; Indemnification.

4.1 Escrow Agent may act in reliance upon any writing or instrument or signature which it, in good faith, believes to be genuine, may assume the validity and accuracy of any statement or assertion contained in such a writing or instrument, and may assume that any person purporting to give any writing, notice, advice or instructions in connection with the provisions hereof has been duly authorized to do so. Escrow Agent shall not be liable in any manner for the sufficiency or correctness as to form, manner and execution, or validity of any instrument deposited with it, nor as to the identity, authority or right of any person executing the same; and its duties hereunder shall be limited to those specifically provided herein.

4.2 Unless Escrow Agent is guilty of [gross] negligence with regard to its duties hereunder, Lessee hereby agrees to indemnify Escrow Agent and hold it harmless from any and all claims, liabilities, losses, actions, suits or proceedings at law or in equity, or any other expense, fees or charges of any character or nature, which it may incur or with which it may be threatened by reason of its acting as Escrow Agent under this Agreement; and in connection therewith, to indemnify Escrow Agent against any and all expenses, including reasonable attorneys' fees and the cost of defending any action, suit or proceeding or resisting any claim. Escrow Agent shall be vested with a lien on all funds and accounts deposited hereunder, for indemnification, for reasonable attorneys' fees, court costs, for any suit, interpleader or otherwise, or any other expense, fees or charges of any character or nature, which may be incurred by Escrow Agent by reason of disputes arising between Lessee and Lessor as to the correct interpretation of the Lease, the Ground Lease, the License and Easement or this Agreement and instructions given to Escrow Agent hereunder, or otherwise, with the right of Escrow Agent, regardless of the instructions aforesaid, to hold the said funds and accounts until and unless said additional expenses, fees and charges shall be fully paid.

4.3 If the parties shall be in disagreement about the interpretation of the Lease, the Ground Lease or this Agreement, or about the rights and obligations, or the propriety of any action contemplated by Escrow Agent hereunder, Escrow Agent may, but shall not be required to, file an appropriate civil action to resolve the disagreement. Escrow Agent shall be indemnified by Lessee for all costs, including reasonable attorneys' fees, in connection with such civil action, and shall be fully protected in suspending all or part of its activities under this Agreement until a final judgment in such action is received.

4.4 Escrow Agent may consult with counsel of its own choice and shall have full and complete authorization and protection with the opinion of such counsel. Escrow Agent shall otherwise not be liable for any mistakes of facts or errors of judgment, or for any acts or omissions of any kind unless caused by its [gross] negligence or willful misconduct.

4.5 Escrow Agent in its sole discretion may engage an agent to perform any of the obligations of Escrow Agent hereunder, provided that Escrow Agent shall remain primarily liable for performance of all obligations imposed upon it by this Agreement.

Section 5. Default and Nonappropriation; Notice; Exercise of Rights and Agreement.

5.1 If an Event of Default occurs under the Lease, or if Lessee fails to appropriate moneys to pay the Rental Payments in any subsequent Fiscal Year of Lessee, any amounts remaining in the Project Acquisition Fund shall be paid to Lessor upon Lessor's written request therefor.

5.2 Escrow Agent shall have no obligation to determine whether an Event of Default has occurred under the Lease, to determine whether the Lease has been terminated pursuant to Section 6.4 thereof, to take any action to collect any Rental Payment not paid when due, or to exercise on behalf of Lessor or any assignee of Lessor their rights under the Lease and the Ground Lease.

Section 6. Escrow Agent's Compensation. Upon execution of this Agreement, Escrow Agent shall be entitled to payment from Lessee in the amount of \$\_\_\_\_\_. Lessee shall thereafter be responsible for and pay all fees, charges and expenses of Escrow Agent. Such compensation does not include compensation for actions taken by Escrow Agent subsequent to a default by Lessee under the Lease or termination of the Lease under the terms thereof, which shall be paid by Lessor or any assignee of Lessor unless determined to be recoverable from Lessee.

Section 7. Change of Escrow Agent.

7.1 Lessor shall have the right to substitute a state or national banking association, authorized to do business in the State of Nebraska and qualified as a depository of public funds, to act as Escrow Agent under this Agreement. Such substitution shall not be deemed to affect the rights or obligations of the parties. Upon any such substitution, Escrow Agent agrees to assign to such substitute Escrow Agent its rights under this Agreement.

7.2 Escrow Agent or any successor may at any time resign by giving mailed notice to Lessee and Lessor of its intention to resign and of the proposed date of resignation, which shall be a date not less than 30 days after such notice is deposited in the United States mail with postage fully prepaid, unless an earlier resignation date and the appointment of a successor Escrow Agent shall have been or are approved by Lessor. The resignation shall not be effective until the appointment of a successor institution to act as Escrow Agent.

Section 8. Administrative Provisions.

8.1 Escrow Agent shall keep complete and accurate records of all moneys received and disbursed under this Agreement, which shall be available for inspection by Lessee or Lessor, or the agent of either of them, at any time during regular business hours.

8.2 All written notices to be given under this Agreement shall be given by mail to the party entitled thereto at its address set forth in the first paragraph hereof, or at such address as the party may provide to the other parties hereto in writing from time to time. Any such notice shall be deemed to have been received 48 hours after deposit in the United States mail in registered form, with postage fully prepaid.

8.3 This Agreement shall be construed and governed in accordance with the laws of the State of Nebraska.

8.4 Any provision of this Agreement found to be prohibited by law shall be ineffective only to the extent to such prohibition, and shall not invalidate the remainder of this Agreement.

8.5 This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns. Specifically, as used herein the term "Lessor" as used herein means any person or entity to whom Lessor has assigned its right to receive Rental Payments under the Lease and any payments due to Lessor hereunder.

8.6 This Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same Agreement.

8.7 This Agreement shall terminate upon disbursement by Escrow Agent of all moneys held by it hereunder.

8.8 Upon execution of this Agreement, Lessee shall execute and deliver to Lessor a certificate with respect to the tax status of the interest component of the Rental Payments in form and substance satisfactory to the Lessee's counsel providing an opinion and to the Lessor.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first written above.

WELLS FARGO BROKERAGE SERVICES, LLC,  
Escrow Agent

By \_\_\_\_\_  
Its \_\_\_\_\_



CITY OF GRAND ISLAND,  
Lessee

By \_\_\_\_\_  
Its \_\_\_\_\_

ATTEST:

By \_\_\_\_\_  
Its \_\_\_\_\_

**EXHIBIT A**

**ESTIMATED PROJECT COSTS**

**EXHIBIT B**

**Payment Request Form**

Wells Fargo Brokerage Services, LLP, Escrow Agent under an Escrow Agreement dated as of \_\_\_\_\_, 2008, by and among the said Escrow Agent, and \_\_\_\_\_ (Lessee), is hereby requested to pay, from the Project Acquisition Fund held under said Escrow Agreement, to the persons, firms or corporations designated below as payee, the amount set forth opposite each such person's, firm's or corporation's name, in payment of the Project costs of the component of the Project described on the attached page(s) designated opposite such Payee's name and account.

The undersigned hereby certifies that: (a) attached hereto is a duplicate original or certified copy of the following documents relating to the services described in the attached pages: (1) if this is the last Payment Request Form submitted for construction costs, a Certificate of Completion in form satisfactory to Escrow Agent; (2) an invoice; (3) lien waivers duly executed by the Contractor, or any subcontractor; (4) if this is the first Payment Request Form submitted for construction costs, evidence of all performance bonds and insurance required by the Escrow Agreement; and (5) all documents required by the Construction Contract, a sworn construction cost statement from the Contractor, all lien waivers required by the title insurance company issuing the policy with respect to the Project and a disbursement endorsement from such title insurance company with respect to any draw to pay construction costs, and (b) that the amount requested for payment is for Project costs previously paid or incurred, is now due and owing, and has not been included in any earlier Payment Request Form.

Dated: \_\_\_\_\_, 20\_\_.

CITY OF GRAND ISLAND, NEBRASKA,  
Lessee

By \_\_\_\_\_  
Its \_\_\_\_\_

APPROVED:

\_\_\_\_\_  
Project Architect

By \_\_\_\_\_  
Its \_\_\_\_\_  
Date \_\_\_\_\_

RESOLUTION 2008-258

WHEREAS, the Nebraska State Unicameral passed Legislative Bill 1116 which allows for the relocation of the Nebraska State Fair from Lincoln, Lancaster County, to Grand Island, Hall County, on property known as Fonner Park; and

WHEREAS, the City Council, for the City of Grand Island, in consideration of LB 1116 has considered the impact of the State Fair upon the City of Grand Island; and

WHEREAS, the City of Grand Island wishes to assist in the efforts to relocate the Nebraska State Fair by constructing a building, which building will be financed through a Lease Purchase Agreement with Wells Fargo Bank, N.A.;

WHEREAS, the Lease Purchase Agreement is allowed by Nebraska State Law for the purposes of constructing a public building; and

WHEREAS, the Lease Purchase Agreement includes the requirement for an Escrow Agreement.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF GRAND ISLAND, NEBRASKA, that the Mayor is hereby authorized to, on behalf of the City, execute the Escrow Agreement and related documents.

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Adopted by the City Council of the City of Grand Island, Nebraska, September 11, 2008.

\_\_\_\_\_  
Margaret Hornady, Mayor

Attest:

\_\_\_\_\_  
RaNae Edwards, City Clerk

Approved as to Form    ☐ \_\_\_\_\_  
September 11, 2008    ☐ City Attorney