

**City of Oak Harbor
City Council Agenda Bill**

Bill No. C/A 6.p
Date: July 7, 2015
Subject: Wells Fargo Possession and Use Agreement

FROM: Nikki Esparza, City Attorney

INITIALED AS APPROVED FOR SUBMITTAL TO THE COUNCIL BY:

- Scott Dudley, Mayor
- Larry Cort, City Administrator
- Doug Merriman, Finance Director
- Nikki Esparza, City Attorney, as to form

RECOMMENDED ACTION

Motion to authorize the Mayor to execute the Possession and Use Agreement with Wells Fargo in substantially the form which has been provided in the council agenda materials with any revisions being subject to the review and approval of the City Attorney.

BACKGROUND / SUMMARY INFORMATION

The City is in the process of negotiating with Wells Fargo for temporary parking and permanent subsurface use of the southernmost 88 feet of parking lot located at Wells Fargo's 361 SE Pioneer Way location. The Wells Fargo property is adjacent to the City's property (formerly known as the Whidbey Island Bank property) that will be the site of the new waste water treatment facility. The City needs 88 feet to temporarily provide parking for the Daily Grind and construction crew and 25 feet of subsurface to permanently house tiebacks.

Wells Fargo has indicated theoretical willingness to agree to a Possession and Use Agreement that would be conditioned on the City installing a fence between the easement area Wells Fargo's ingress/egress lanes. This Agreement would provide the City with possession and control over the 88 feet temporarily while the negotiations for a permanent solution continue or condemnation proceedings are initiated.

The City hired Jim Dodge with Valbridge Property Advisers to conduct an appraisal on the subject 88 feet. The appraised value of the temporary parking and access is \$15,500 per year or \$1,291.67 per month. The appraised value of the tieback and temporary construction easement is \$14,000. The appraisal has been provided to Wells Fargo's legal counsel. The Possession and Use Agreement provides that the City will compensate Wells Fargo for the appraised values, pending completion of negotiation or condemnation.

The shallow excavation work authorized under GMP #3 will begin the week of July 6, 2015. It would be beneficial to the Daily Grind to have alternate parking upon commencement of shallow excavation.

LEGAL AUTHORITY

RCW 35A.11.010 provides that code cities may lease or acquire real property.

FISCAL IMPACT

This item has a fiscal impact of \$15,500 per year for the temporary access and parking easement, plus a flat \$14,000 for the permanent tieback easement.

PREVIOUS COUNCIL / BOARD / CITIZEN INPUT

ATTACHMENTS

1. [Possession and Use Agreement](#)

After Recording Return to:

City Clerk
City of Oak Harbor
865 S.E. Barrington Drive
Oak Harbor, WA 98277

POSSESSION AND USE AGREEMENT

Grantor: WELLS FARGO BANK, N.A.
Grantee: CITY OF OAK HARBOR
Property: Ptn Reserve B, Ely's Addition, V2, p. 27, Add'l on P. 5-6
Island County, WA
Tax Account No.: Ptn of S6565-00-00B17-0 ID 252176
In the matter of: CITY OF OAK HARBOR
Wastewater Treatment Plant

THIS AGREEMENT is made and entered into by and between the CITY OF OAK HARBOR, a municipal corporation of the State of Washington, hereinafter referred to as the "City," and WELLS FARGO BANK, N.A., a national banking association, (successor-in-interest by merger to First Interstate Bank of Washington, N.A., and Olympic Bank) who acquired title as Everett Trust and Savings Bank, a Washington corporation, hereinafter referred to as "Owner ":

WITNESSETH:

WHEREAS, the City affirms that the Owner's real estate described herein is required by the City for immediate project construction; and

WHEREAS, the City affirms that any delay in its construction program is contrary to the public interest; and

WHEREAS, the City has made a firm and continuing offer to pay the amount of FOURTEEN THOUSAND AND NO/100THS DOLLARS (\$14,000.00) for the

purchase of the tieback easement and temporary construction easement affecting property situated in the Island County, Washington, more fully described in **EXHIBIT A** attached hereto and incorporated herein by this reference; and

WHEREAS, the City has made a firm and continuing offer to pay the amount of FIFTEEN THOUSAND FIVE HUNDRED AND NO/100THS DOLLARS (\$15,500.00) per year, which breaks down to \$1,291.67 per month, for the temporary parking and access easement affecting property situated in the Island County, Washington, more fully described in **EXHIBIT B** attached hereto and incorporated herein by this reference; and

WHEREAS, the Owner requires time to evaluate said firm offer and/or to resolve any questions concerning just compensation; NOW, THEREFORE,

IT IS AGREED THAT:

1. The property and rights described in **EXHIBITS A and B** are necessary for public use of the City of Oak Harbor, State of Washington.
2. Owner represents and warrants that Owner is the real party in interest and the legal owner of the Property and is entitled to receive the offered compensation.
3. The City will issue payment to the Owner in the amount of \$14,000.00 for the **EXHIBIT A** temporary construction and permanent tieback easement, subject only to deduction of the value of interests of others, such as mortgage, judgment and lien holders, and subject to deduction of unpaid current year's real estate taxes, which will be paid by City directly to the Island County Treasurer. In addition the City will issue payment to the Owner of \$1,291.67 per month, in advance, for each month of use of the **EXHIBIT B** temporary parking and access easement. The Owner has not agreed to the firm offer amount. So the final payment may be determined in condemnation proceedings or by other settlement. The sums paid pursuant to this Possession and Use Agreement to Owner, and/or to others with an interest in the Property, and/or paid to the Island County Treasurer for real estate taxes assessed against the Property, shall be credited against the award to Owner in any condemnation proceeding or other settlement for acquisition of the Property.
4. Upon resolution of the above-mentioned matters, the Owner will convey to the City the **EXHIBIT A and B** property rights, free and clear of all encumbrances, taxes and assessments, by execution of the appropriate legal instruments.

5. Upon acceptance of this agreement by the City and payment of the firm offer amount, Owner grants immediate possession and use of the above-described property to the City and its employees, agents, contractors and representatives, for the purpose of commencing construction and performing all tasks necessary for completion of the above-referenced project.
6. Within 30 days after commencement of City's use of the parking easement area, the City shall erect a sight-obscuring fence not less than 5 feet in height along the entire northerly boundary of the parking easement area, which fence shall block access from the bank's remaining property to the parking easement area.
7. It is understood and agreed that Owner hereby tenders delivery of this agreement to City, and that the terms and obligations hereof shall not become binding upon City unless and until accepted and approved hereon in writing by the City of Oak Harbor.
8. Upon acceptance by the City, this agreement shall be binding upon the parties hereto, their heirs, successors and assigns. The City is authorized to record this Possession and Use Agreement in the records of the Island County Auditor.
9. If it becomes necessary for the City to institute condemnation proceedings, the Owner hereby stipulates to, and has no objection to, the City's forthwith entering an Order Adjudicating Public Use as provided in RCW 8.12.090.
10. This Possession and Use Agreement is equivalent to a stipulation to an Order of Immediate Possession and Use as provided by RCW 8.25.070(3), and Owner hereby stipulates and agrees that it may be filed as such in any condemnation proceeding instituted by the City with respect to the Property. It is expressly understood by both parties to this agreement that by signing this agreement, the Owner is deemed to have met the requirements of RCW 8.25.070(3) concerning responding to a written request for possession and use, and that the date of City's acceptance of this Possession and Use Agreement is the agreed date of valuation.
11. The Owner and City each agree to indemnify, hold harmless and defend the other from any and all claims, liability, damages, costs, expenses and judgments arising from the negligence or intentional misconduct of themselves, their respective officers, employees, agents, or contractors on the above-described property occurring prior to closing of the sale of the Property.

12. This agreement contains all of the agreements of the parties with respect to any matter covered or mentioned in this agreement. The Owner has been advised of Owner's right to secure review of this agreement by Owner's own legal counsel and has not relied upon the City for any advice concerning this agreement. No provision of this agreement may be amended or modified except in writing signed by all parties. Any provision of this agreement which is declared invalid or illegal shall in no way affect or invalidate any other provision. Individuals signing on behalf of a principal represent and warrant that they have the authority to bind their principals. The venue for any dispute related to this agreement shall be Island County, Washington. Failure of the City to declare any breach or default immediately upon the occurrence thereof, or delay in taking any action in connection therewith, shall not waive such breach or default. Time is of the essence of this agreement and each and all of its provisions in which performance is a factor.

DATED this _____ day of _____, 2015.

WELLS FARGO BANK, N.A.

By _____
_____ (print name)
_____ (title)

ACCEPTED AND APPROVED

this _____ day of _____, 2015:

CITY OF OAK HARBOR

By _____
SCOTT DUDLEY, Mayor

STATE OF _____)
)ss.
COUNTY OF _____)

I certify that I know or have satisfactory evidence that _____ is the person who appeared before me, and said person acknowledged that _____ signed this instrument, on oath stated that _____ was authorized to execute the instrument and acknowledged it as the _____ of WELLS FARGO BANK, N.A. to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED this ____ day of _____, 2015.

(Legibly print name of notary)
NOTARY PUBLIC in and for the State of
Washington, residing at _____
My commission expires _____

EXHIBIT A
PERMANENT TIEBACK AND TEMPORARY CONSTRUCTION EASEMENT

1. Easement Area Description:

The entire subsurface area of the South 25 feet of the following-described property:

That portion of Reserve "B" of Ely's Addition to the Town of Oak Harbor, according to the plat thereof recorded in Vol. 2 of Plats, page 27, records of Island County, Washington, described as follows:

Beginning at the intersection of the South line of West Pioneer Way and the West line of 70th Southwest Street;

Thence South 16°35' East 243.56 feet along said West line of 70th Southwest Street;

Thence South 78°50' West 222.29 feet parallel with the South line of West Pioneer Way;

Thence North 11°10' West 242.47 feet to said South line of West Pioneer Way;

Thence North 78°50' East 200.00 feet along said South line to the Point of Beginning.

Situate in Island County, Washington.

2. Temporary Construction Easement: A temporary underground construction easement for the purpose of installation, monitoring, adjustment and maintenance of wall support members and devices, including, but not limited to, tiebacks, anchors, cables and soil nails, hereinafter collectively referred to as the "tiebacks," together with the right to enter the Easement Area with such equipment and materials as may be required for said purposes. The surface of the Easement Area will not be impacted. This temporary construction easement will commence on the date this easement is taken, and shall terminate upon completion and final approval of City's construction project and restoration of Grantor's property, or on December 31, 2021, whichever occurs sooner.
3. Permanent Installation Easement: A perpetual easement and right to permanently keep in place and maintain within the Easement Area the tiebacks and other underground equipment installed in the Easement Area in connection with construction of the City's wastewater treatment plant, and the right at any time to monitor, tension, re-tension and de-tension, adjust, maintain, destroy, cut through or leave such abandoned tiebacks in place, at City's discretion.

EXHIBIT B
TEMPORARY PARKING AND ACCESS EASEMENT

1. Easement Area Description:

The South 88.40 feet of the following-described property:

That portion of Reserve "B" of Ely's Addition to the Town of Oak Harbor, according to the plat thereof recorded in Vol. 2 of Plats, page 27, records of Island County, Washington, described as follows:

Beginning at the intersection of the South line of West Pioneer Way and the West line of 70th Southwest Street;
Thence South 16°35' East 243.56 feet along said West line of 70th Southwest Street;
Thence South 78°50' West 222.29 feet parallel with the South line of West Pioneer Way;
Thence North 11°10' West 242.47 feet to said South line of West Pioneer Way;
Thence North 78°50' East 200.00 feet along said South line to the Point of Beginning.

Situate in Island County, Washington.

2. Temporary Parking Easement: An exclusive easement and right for the City, its employees, contractors, agents, permittees and licensees and the public, to park vehicles in the Easement Area, subject to sole regulation by the City, including, but not limited to, the right, but not the obligation, to limit public parking to patrons, owners and employees of the business located at Suite 102, 321 SE Pioneer Way, Oak Harbor, Washington.
3. Temporary Access: A temporary access easement to the business located on City-owned property commonly known as Suite 102, 321 SE Pioneer Way, Oak Harbor, Washington, including the right of ingress and egress by the public and the owners, employees, invitees and licensees of the business, and the right to make deliveries to and from the business.
4. Maintenance: The City shall have the sole right to maintain the Easement Area. City shall have the right to stripe the parking area as it deems suitable and to control traffic patterns and movements within the parking area.
5. Ingress and Egress: The City and its employees, contractors, agents, permittees,

licensees and invitees, shall have the right of ingress to and egress from and on the Easement Area for the purposes stated herein, and for purposes of preconstruction surveying, engineering and similar activities, and activities associated with the tiebacks being installed in the construction of the wastewater treatment plant.

6. Term: The term of this easement shall run from the date of taking of this easement until completion and final approval of construction of the City wastewater treatment plant immediately south of the easement area and construction the parking area to serve the treatment plant has been completed, but in no event later than December 31, 2021.